

June 22, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

**NRC STAFF'S RESPONSE TO POWERTECH'S
PETITION FOR REVIEW OF LBP-15-16**

I. Introduction

The NRC Staff responds to Powertech's petition for Commission review of the Atomic Safety and Licensing Board's Partial Initial Decision.¹ Powertech asks the Commission to review the Board's rulings on Contentions 1A and 1B. In these contentions the Board found that, when evaluating how the Dewey-Burdock Project may affect American Indian cultural resources, the Staff did not comply fully with the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (NEPA), and the National Historic Preservation Act, 16 U.S.C. §§ 470–470x6 (NHPA). Powertech also asks the Commission to review a condition that the Board added to Powertech's license requiring it to address boreholes in the Dewey-Burdock area.

The Commission should review the Board's rulings on Contentions 1A and 1B, for the reasons stated in Powertech's petition and in the Staff's own petition for review.² The Commission should also review the condition that the Board added to Powertech's license. Although the Board did not err by adding a license condition related to boreholes, as written the

¹ *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC __ (April 30, 2015) (slip op.).

² NRC Staff's Petition for Review of LBP-15-16 (ADAMS Accession No. ML15146A499) (May 26, 2015).

condition potentially conflicts with existing requirements in Powertech's license. Accordingly, while the Commission need not disturb the Board's decision to add a license condition, it should revise the condition to better align the condition with the existing requirements in Powertech's license.

II. Legal Standard

The Commission may review a partial initial decision and, where appropriate, reverse the Board's rulings on contested issues. In deciding whether to review the Board's decision, the Commission considers whether:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) [there is] Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. §2.341(b)(4).

III. Discussion

A. Contentions 1A and 1B

The Board addressed two admitted contentions related to historic and cultural resources. In Contention 1A, the Oglala Sioux Tribe and the Consolidated Intervenors argued that the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock Project failed to comply with NEPA and the NHPA because it inadequately considered how the Dewey-Burdock Project may affect American Indian historic and cultural resources. In Contention 1B, the Oglala Sioux Tribe argued that during its NHPA review the Staff failed to consult adequately with American Indian tribes.

i. The Board's Decision

For Contention 1A, the Board found that the Staff complied with the NHPA when identifying historic properties in the Dewey-Burdock area. LBP-15-16, 81 NRC at ___ (slip op. at 38). In particular, the Board found that the Staff made a reasonable and good faith effort to identify such properties, using a number of approved methodologies endorsed by ACHP regulations. *Id.* The Board also found, however, that the Staff failed to take the “hard look” at tribal cultural, religious, and historic resources required by NEPA. The Board found the Staff did not do so because “the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued” and because the FSEIS does not include mitigation measures to protect such sites. *Id.* (slip op. at 40).

For Contention 1B, the Board acknowledged that when reviewing the Dewey-Burdock application the Staff consulted with numerous American Indian tribes. *Id.* The Board also acknowledged that the Staff sent numerous consultation letters to the Oglala Sioux Tribe and held several face-to-face meetings to which the Tribe was invited. *Id.* (slip op. at 41). The Board found, however, that these efforts did not satisfy the NHPA because the Staff did not hold an individual consultation meeting with the Oglala Sioux Tribe, and also because the Oglala Sioux Tribe and certain other tribes did not participate in the field surveys of the Dewey-Burdock site held in April and May 2013. *Id.* (slip op. at 42–43).

Although the Board found that the Staff failed to meet NEPA's hard look standard and the NHPA's consultation requirements, it also stated that it “will retain jurisdiction of this case pending the NRC Staff's curing of the deficiencies in Contentions 1A and 1B.” *Id.* (slip op. at 44). The Board stated that the Staff can resolve these deficiencies by promptly initiating government-to-government consultation with the Oglala Sioux Tribe. *Id.* (slip op. at 44, 112, 114). In addition to retaining jurisdiction over Contentions 1A and 1B, the Board directed the Staff to submit monthly reports, beginning June 1, 2015, addressing its progress in resolving the issues that the Board identified. *Id.* (slip op. at 114).

ii. The Commission Should Review the Board's Rulings on Contentions 1A and 1B

Powertech argues that the Commission should review the Board's finding on the NEPA component of Contention 1A, its finding on Contention 1B, and its decision to retain jurisdiction over both contentions until the Staff takes further action consistent with its findings.³ The Staff agrees on all counts. As Powertech correctly states, the Board's decision to retain jurisdiction over Contentions 1A and 1B pending further Staff action is inconsistent with NRC rules defining the scope of the Board's authority.⁴ Powertech also correctly argues that the Board's finding on Contention 1A is contrary to Commission and federal court precedent defining NEPA's hard look standard.⁵ In addition, Powertech correctly states that the Board's NHPA finding on Contention 1A conflicts with its NHPA finding on the same contention.⁶ Based on Powertech's arguments and the Staff's arguments in its own petition for review, the Commission should take review of this case, reverse the Board's finding on the NEPA component of Contention 1A, and reverse its finding on Contention 1B.

B. The New License Condition

i. Background

During the hearing the Board received evidence on boreholes in the Dewey-Burdock area. There are approximately 4,000 boreholes that resulted from exploratory drilling in the Dewey-Burdock area, with most of this activity occurring in the 1970s and 1980s.⁷ Witnesses for all parties agreed that improperly abandoned boreholes could provide pathways for wellfield

³ Petition at 6–22.

⁴ Petition at 5–6.

⁵ Petition at 17–22.

⁶ Petition at 9.

⁷ Ex. NRC-008-A-1 at 192.

solutions to migrate away from the production zones at the Dewey-Burdock Project, potentially affecting groundwater supplies.⁸

The Staff was, however, fully aware of this issue during its technical review of the Dewey-Burdock application. As a result, the Staff obtained the following commitments from Powertech concerning boreholes:

Powertech commits to properly plugging and abandoning or mitigating any of the following should they pose the potential to impact the control and containment of well field solutions within the project area:

- 1) Historical wells and exploration holes
- 2) Holes drilled by Powertech for the purposes of delineation and exploration
- 3) Any wells failing mechanical integrity testing (MIT) including those installed by Powertech and those installed before Powertech

Powertech will attempt to locate with best professional practices any presently unknown boreholes or wells in the vicinity of every potential well field. Historical records will be used to determine the presence of previous boreholes and wells. Pump testing conducted as part of routine well field hydrogeologic package development will use an array of monitor wells designed to detect and locate any unknown boreholes or wells.⁹

Although the Staff did not include these commitments as a specific condition in Powertech's NRC license, the Staff nonetheless ensured Powertech's commitments would be legally enforceable. Under License Condition 9.2, Powertech "shall conduct operations in accordance with the commitments, representations, and statements contained in the license application."¹⁰ Because Powertech's commitments to locate, properly plug, and abandon boreholes are part of its license application, Powertech must fulfill these commitments in order to comply with the terms of its NRC license. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

⁸ See, e.g., NRC Staff's Initial Testimony (Ex. NRC-001) at A3.5(5) (page 46) ("The Staff recognizes that there are potential hydrogeologic conditions at the Dewey-Burdock site that may result in the migration of contaminants, such as leakage through the Fuson Shale or to the ground surface through improperly plugged exploratory boreholes (see FSEIS Section 3.5.3).").

⁹ Ex. APP-016-B at 31 (page 55 of .pdf document).

¹⁰ Ex. NRC-012 at 1.

Installation), CLI-01-09, 53 NRC 232, 235–236 (2001) (holding that not all licensee commitments must be converted into express license conditions to make them enforceable).

ii. The Board's Decision

In its decision, the Board correctly noted that Powertech's license does not include a specific license condition addressing historic boreholes. LBP-15-16, 81 NRC __ (slip op. at 73). For that reason, the Board amended Powertech's license to include the following condition:

Prior to conducting tests for a wellfield data package, the licensee will attempt to locate and properly abandon all historic drill holes located within the perimeter well ring for the wellfield. The licensee will document, and provide to the NRC, such efforts to identify and properly abandon all drill holes in the wellfield data package.

Id. Because the Board added a specific condition to Powertech's license, Powertech's existing commitments related to boreholes are superseded by the license condition, to the extent they differ from the condition.¹¹

iii. Powertech's Arguments

Powertech argues that the Board erred by adding the license condition related to boreholes.¹² Powertech argues the license condition is unnecessary because the commitments in its license application, together with License Condition 9.2, already require it to address boreholes. Powertech also argues that by adding the license condition the Board ruled on a subject that was not properly before it in the hearing. According to Powertech, while the parties in the hearing litigated whether improperly plugged or abandoned boreholes could affect the containment of wellfield solutions, they did not litigate whether Powertech needed to properly abandon *all* boreholes before operating in a particular wellfield.¹³ Finally, Powertech argues

¹¹ See Ex. NRC-012 at 1 (License Condition 9.2) ("The approved application and supplements are, hereby, incorporated by reference, *except where superseded by specific conditions in this license.*") (emphasis added).

¹² Petition at 22–25.

¹³ Petition at 23–24.

that, under the standard procedures to which it committed in its application, it will use the results of pumping tests it conducts when developing wellfield hydrogeologic packages to identify improperly plugged or abandoned boreholes.¹⁴ Powertech argues that the license condition imposed by the Board unreasonably forecloses this approach, because it requires that Powertech plug and abandon boreholes “prior to conducting tests for a wellfield data package.”¹⁵

iv. The Commission Should Review the Board’s Decision to Add a License Condition Related to Boreholes

The Staff agrees that the Board’s decision to add a license condition raises a substantial question of law or policy warranting Commission review under 10 C.F.R. § 2.341(b)(4)(iii).¹⁶ As Powertech states in its petition, the Board’s license condition departs from Powertech’s existing commitments because it requires Powertech to properly abandon “all historic drill holes located within the perimeter well ring for the wellfield,” rather than just those boreholes that could potentially affect the control and containment of wellfield solutions.¹⁷ The license condition also potentially conflicts with other commitments that are captured by Powertech’s license. For example, the license condition arguably overrides Powertech’s existing commitment to use aquifer pumping tests as a means of identifying boreholes.¹⁸ The license condition could also create uncertainty over whether Powertech must fulfill its commitment to use best professional

¹⁴ Petition at 24.

¹⁵ Petition at 24–25.

¹⁶ The Staff does not agree with Powertech’s argument that by adding the license condition the Board ruled on a subject that was not properly before it in the hearing. Petition at 23–24. Although the Oglala Sioux Tribe and the Consolidated Intervenors focused their arguments on boreholes that might affect the containment of wellfield solutions, their arguments could reasonably be construed as claiming that, in order to ensure adequate containment, Powertech must properly abandon all boreholes within the perimeter of each wellfield.

¹⁷ Petition at 23 (citing Ex. APP-016-B at 31 (page 55 of .pdf document)).

¹⁸ Ex. APP-016-B at 31 (page 55 of .pdf document).

practices and historical records to locate boreholes and wells, or its commitment to use an array of monitor wells during aquifer pumping tests to detect boreholes and wells.¹⁹

At the same time, the license condition is potentially more protective of public health and safety than Powertech's existing commitments. The license condition would require Powertech to locate and properly abandon boreholes *before* it conducts tests for a wellfield data package. LBP-15-16, 81 NRC __ (slip op. at 73). Accordingly, when Powertech conducts the tests that are part of preparing a wellfield data package, the tests would verify whether the boreholes were properly abandoned. This requirement is potentially more protective of health and safety than Powertech's existing commitments, which do not expressly require that Powertech conduct confirmatory tests.

In conclusion, the Staff agrees that the Commission should review the condition that the Board added to Powertech's license. The Staff does not object to the Board's finding that Powertech's license would benefit from a specific condition addressing boreholes. Nor does the Staff object to language in the license condition requiring that Powertech conduct testing to demonstrate it has properly plugged boreholes that could potentially affect the control and containment of wellfield solutions. To avoid conflicts with Powertech's existing commitments, however, the license condition should track the relevant language in Powertech's application as closely as possible. Due to the potential complexity of drafting a license condition that reconciles Powertech's existing commitments with the language added by the Board, the Staff respectfully suggests that, if the Commission grants review on this issue, it consider inviting briefs under 10 C.F.R. § 2.341(c)(2).

IV. Conclusion

The Commission should grant Powertech's petition for review, reverse the Board's finding on the NEPA component of Contention 1A, and reverse its finding on Contention 1B.

¹⁹ *Id.*

The Commission should also review the condition the Board added to Powertech's license and revise the condition so that it aligns with Powertech's commitments in its application.

Respectfully submitted,

/Signed (electronically) by/
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/Signed (electronically) by/
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Dated at Rockville, Maryland
this 22nd day of June 2015

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the "NRC Staff's Response to Powertech's Petition for Review of LBP-15-16" via the NRC's Electronic Information Exchange (EIE) on June 22, 2015. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on June 22, 2015 .

***/Signed (electronically) by/
Patricia A. Jehle***

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