

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))	July 2, 2015

**OGLALA SIOUX TRIBE'S REPLY IN SUPPORT OF PETITION FOR REVIEW
OF LPB-15-16 AND DECISIONS FINDING TRIBAL CONTENTIONS INADMISSIBLE**

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Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Reply on its Petition for Review.

A. Contentions Regarding Lack of Analysis of 11e2 Byproduct Waste Disposal

NRC Staff and Powertech argue that the Board properly rejected the Tribe’s contention regarding the lack of analysis of the impacts of 11e2 Byproduct waste disposal by asserting that certain portions of 10 C.F.R. Part 40, Appendix A do not apply to ISL mines. NRC Staff Resp. at 4; Powertech Resp. at 7. These arguments parrot the Board’s ruling rejecting this contention, improperly ignoring the Tribe’s reliance on Appendix A Criterion 2, which unequivocally applies to ISL mines. By ignoring the Tribe’s argument, NRC Staff and Powertech confirm the need for Commission review of the Board’s error in ruling that the Tribe’s contention lacked a basis in law.

NRC Staff’s and Powertech’s responses confirm that the DSEIS and FSEIS did not analyze the site-specific impacts of disposal of 11e2 Byproduct wastes created by the licensed activity. NRC Staff and Powertech rely on references to disposal in the Generic Environmental Impact Statement, but Staff readily concedes that “the Staff did not discuss these disposal sites at length in the GEIS” relying instead on analysis of convention mill waste disposal prepared in 1979 and 1980, over 30 years before the Dewey-Burdock proposal was even submitted. NRC Staff Resp. at 5 n.8. These outdated documents do not contain the site-specific impact review of the current proposal, as required by NEPA. *See New York v. NRC*, 681 F.3d 471 (2012). NRC Staff’s internally contradictory arguments demonstrate the merits of the issue, and reinforce the Tribe’s request for Commission review of the admissibility ruling. Powertech similarly concedes that “a specific disposal” plan was not provided in the NEPA documents, instead relying only on a generic plan to store the waste on site and transport the waste, but no analysis of disposal. Powertech Resp. at 8.

NRC Staff and Powertech wrongly assert the Board properly found the Tribe’s contention untimely. As described in the Tribe’s Petition, the contention was plead at the earliest possible time (upon the application), but the *Board found its NEPA-based arguments too early* because the

applicant is not bound by NEPA. *See* LBP-10-16 at 78. This ruling was in error on the law and should be reviewed.

Lastly, neither NRC Staff nor Powertech meaningfully rebut the Tribe's argument that the Board's ruling is inconsistent with NUREG-1569. NRC Staff disavows its own guidance requiring a site-specific disposal plan, instead relying on a novel interpretation that a license condition requiring post-licensing development of a disposal plan can satisfy NEPA. The Commission should review the waste disposal ruling that ignores NUREG guidance in favor of the NEPA-violating practice of using license conditions to avoid NEPA analysis. Powertech asserts that a disposal plan exists (Powertech Resp. at 7 *citing* Ex. APP-040-C at 90-91), but the cited reference merely calls for the company to provide a disposal plan in the future, and lacks analysis of off-site disposal impacts.

B. Contention Regarding Scoping

NRC Staff concedes that the Tribe's arguments that NRC Staff violated NEPA in failing to conduct scoping have been confirmed by NRC's Office of Inspector General (OIG). NRC Staff Resp. 8. Instead of addressing the contention admissibility standards, however, both NRC Staff and Powertech argue the merits as to why they believe scoping was not required. This OIG report and these premature merits arguments confirm the need for Commission review of this important issue.

NRC Staff and Powertech wrongfully conflate the concepts of "tiering" and "scoping" and neglect to recognize the critical role scoping plays in achieving NEPA's mandate that environmental impacts be considered "at the earliest possible time" to ensure meaningful review. 40 C.F.R. § 1501.2. NRC Staff and Powertech allegations that the Tribe had other opportunities for input do not resolve the admitted omission of NEPA scoping for this project. Nowhere does NRC Staff or Powertech attempt to address the specific benefits identified by the Tribe associated with scoping that are not achievable with post-NEPA document participation (*see* OST Petition at 8 *citing* 40 C.F.R. § 51.29(a)(1)-(5)), or recognize that a GEIS, by its nature, does not address site-specific issues with a definite proposal. Powertech's argument that the Tribe's appeal is untimely is

without basis, as the OIG audit simply confirms the precise legal analysis relied on by the Tribe in stating the contention at the outset, and is not an independent basis for the contention. Where there is no dispute that the scoping process was omitted, and the Tribe's legal analysis is echoed by the OIG audit, the Commission should review the Board's legally-flawed decision to exclude the Tribe's scoping contention.

C. Contention Regarding Additional Borehole Data

NRC Staff and Powertech argue that the Board was correct to reject the Tribe's contention regarding new borehole data based on allegations that NRC Staff "did not conduct a 'random spot check' of these borehole logs." NRC Staff Resp. at 11; Powertech Resp. at 11. However, NRC Staff testimony contained in the record states unequivocally that "[w]e conducted a spot check and analysis of randomly selected digital and paper drill hole logs...." Exhibit NRC-158 at 8. NRC Staff's blatant contradiction and refutation of "random spot check" methodology confirms that the Commission should grant review.

Further, the Commission should review the Board's ruling that failed to apply the contention-pleading standards and instead rejected this contention by improperly ruling on the merits. NRC Staff and Powertech confirm that the Board shoe-horned a merits determination into the admissibility ruling by inappropriately determining at the pleading stage, and without the benefit of any hearing process, that the new borehole data "did not 'paint a seriously different picture of the environmental landscape.'" NRC Staff Resp. at 10 (*citing* LPB-15-16 at 108); Powertech Resp. at 10-11. The Tribe deserved the opportunity to make a full record to demonstrate the "seriously different picture" and not have this issue resolved on arguments limited by contention pleading. Admissibility was confirmed by admitted evidence the Tribe provided in the form of testimony submitted by Dr. Hannan LaGarry. (Exhibit OST-029)(ML14325A866). The Commission should review whether the Tribe met its contention-pleading burden with detailed evidence of significant problems associated with the geologic setting. Exhibit OST-029 at 2.

D. Contention Regarding EPA Preliminary Assessment

NRC Staff and Powertech simply repeat the error of the Board as detailed in the Tribe's Petition. NRC Staff asserts that "the FSEIS refers to the same key information contained in the EPA's Preliminary Assessment regarding potential contamination pathways." NRC Staff Resp. at 12 (*citing* LBP-15-16 at 109); Powertech Resp. at 12. However, the EPA identified a new contamination pathway with implications for pollution containment at the site that is not addressed in the application, any NRC materials, or the FSEIS. See OST Petition at 10-11. NRC Staff and Powertech rely on improper merits arguments that the Tribe was required to prove at the contention stage the ultimate issue that preparation of a supplemental NEPA document was required.

E. Relief Granted the Tribe in Prevailing on Contentions 1A and 1B

NRC Staff and Powertech challenge the Tribe's argument that a license may not issue until compliance with NEPA and the NHPA has been demonstrated. NRC Resp. at 14; Powertech Resp. at 14. However, they ignore the unambiguous mandates of the NHPA and NEPA that require compliance before agency action. 16 U.S.C. § 470(f)(NHPA); 42 U.S.C. § 4332(2)(C)(NEPA). NRC Staff fails to recognize the applicability of *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012), inappropriately relying instead on cases addressing the heightened standard for a preliminary injunction. Powertech argues that the Tribe is precluded from making a remedy argument because it did not seek a stay. Powertech Resp. at 15. This ignores the fact that the Tribe has already prevailed on this issue on the merits and the only question remaining is relief – and the Tribe is not required to meet the heightened stay standard, which Powertech admits is futile given their lack of authorization from other state and federal agencies.

F. Contention 2: Determination of Baseline Groundwater Quality

NRC Staff and Powertech fail to address the Tribe's argument that the ASLB misapplied the *Hydro Resources, Inc.* and *Strata* results to render ineffective both 10 C.F.R. § 51.45(b) and 10 C.F.R. Part 40, Appendix A, Criterion 5. Given the obvious confusion, the Commission should

undertake review of this important and novel issue to clarify the relationship between Criteria 5 and 7, whether deferral of admittedly necessary groundwater data until after licensing can comply with NEPA, and whether Regulatory Guide 4.14 is properly relied upon by NRC Staff for ISL projects.

G. Contention 3: Hydrogeological Information

NRC Staff asserts that instead of conducting an analysis of the potential impacts of groundwater contamination through historic boreholes, it suffices under NEPA for Staff to simply rely on a “legally enforceable” license condition that the applicant must “attempt” to locate and plug these problem boreholes. This is wrong, as NEPA requires that a “hard look” analysis be presented in the relevant environmental document, before agency action, and to the fullest extent possible. 42 U.S.C. § 4332. Similarly, NRC Staff fails to rebut the Tribe’s argument that the Commission should review the Board’s decision that NEPA “hard look” review of the impacts of faults and fractures was not required, despite the Board’s finding that Staff failed to account for the faults and fractures that exist in the area. Powertech wrongly asserts that the Staff did conduct the required borehole analysis, but cites to the FSEIS section which only includes the same empty assertion that “the applicant commits to properly plugging” abandoned holes, but with no analysis as to the potential impacts of these holes. Powertech Resp. at 20 (*citing* Exs. NRC-151 and NRC-008-A-2).

H. Contention 6: Mitigation Measures

NRC Staff and Powertech continue to rely on the Programmatic Agreement (PA) as a substitute for NEPA review of mitigation measures and cultural resources impacts. Nowhere, however, does either NRC Staff or Powertech address or rebut the Tribe’s primary argument that an agency cannot rely on future, as-of-yet-undeveloped, mitigation plans such as those presented in the PA. NRC Staff admits that the Board’s ruling on Contention 1A, that cultural mitigation was not adequately reviewed, conflicts with its ruling on Contention 6 in favor of NRC Staff and Powertech. Yet, NRC Staff, like the Board, fails to address in any detail the specific gaps in mitigation analyses identified by the Tribe. The Commission should review this ruling to ensure a proper adjudication.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 2nd day of July, 2015

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in Support of Petition for Review in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 2nd day of July 2015, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____
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