

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))	February 28, 2020

**OGLALA SIOUX TRIBE'S REPLY TO POWERTECH'S ANSWER IN OPPOSITION
TO PETITION FOR REVIEW OF LBP-19-10, LBP-17-09, AND BOARD RULING ON
MOTION TO STRIKE**

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Pursuant to 10 C.F.R. §§ 2.1212 and 2.341, Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Reply to Powertech’s Answer in Opposition to the Tribe’s Petition for Review (“Powertech”). Powertech filed its Answer on February 18, 2020.

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I. Powertech's Narrative Does Not Support the Board's Ruling

Powertech, often ignoring the record altogether, weaves a false narrative that blames the Tribe for NRC Staff's failure to carry out the cultural resources duties imposed by federal law. Powertech at 12-13. Yet, Powertech concedes that NRC Staff established a hard cap of \$10,000 for the Tribe to develop and conduct the pedestrian cultural resources survey despite that uncontroverted evidence that such an effort would undoubtedly require substantially more to complete even a survey of the limited Areas of Potential Effect – to say nothing of the expense to conduct and interpret the contemplated oral interviews. See Petition at 8-9 citing LBP-19-10 at 46, n. 231 (Board conceding inadequate funding for survey approach).

Powertech also asserts that the Board ruling in LBP-19-10 is reasonable because of the potential costs associated with the Tribe's June 2018 discussion draft methodology and because NRC Staff "spent over four (4) years working with the Tribe to complete a site survey after the Partial Initial Decision...." Powertech at 13. However, Powertech ignores that the Tribe prepared the June 2018 discussion draft because NRC Staff showed up in South Dakota that month without any credible methodology. See Petition at 12 citing NRC Staff testimony regarding NRC Staff's June 2018 preparations (8/29/2019 Transcript at 1958, lines 16-22. ("It very much lacked a scientific methodology.)). There is no evidence, other than the lack of a methodology, of any other reason for the Tribe to offer its discussion draft. Powertech, like the Board, created an unsupported narrative to blame the Tribe that is contrary to the evidence. Moreover, the Board's narrative, if accepted, deters Tribes and others from substantively negotiating with NRC Staff.

The record flatly contradicts Powertech's endorsement of the Board's view that NRC Staff spent four (4) years working with the Tribe to develop a cultural resource survey methodology. Instead, the first and only time that NRC Staff produced anything that could have been deemed a *draft* survey methodology was on February 15, 2019 – a mere week before the

meeting in Pine Ridge on February 22, 2019. See Petition at 13. Following this meeting, each of the Tribes committed to work with NRC Staff and its contractor toward a final methodology. Id. Instead, NRC Staff unilaterally abandoned the effort with no further substantive discussions on its Draft Methodology. Id. Thus, the evidence confirms NRC Staff did not spend four (4) years working on a methodology. The record contains a draft methodology that was considered for a matter of days in February 2019, and then unilaterally abandoned by NRC Staff after the Tribes' expressed a commitment and readiness to help work through the draft.

In short, the lack of admittedly necessary financial resources for the survey and the failure of NRC Staff to produce a credible draft methodology until February 2019 confirms the Board committed error by finding the NRC Staff complied with NEPA procedures and duties.

II. Powertech Demonstrates the Board's Misapplication of NEPA

Powertech, like the Board, fashions an erroneous NEPA legal standard by repeatedly asserting that so long as NRC Staff makes "reasonable efforts" to obtain existing and available information, that information then becomes "unavailable" and NEPA's hard look mandate is satisfied. Powertech at 7-9. The statutory mandate that requires all federal agencies comply with NEPA "to the fullest extent possible" cannot be avoided or rewritten in these proceedings. 42 U.S.C. § 4332(2)(C).

Powertech asserts nonexistent "substantive" conflicts to supplant CEQ's determination that NEPA requires adherence to the explicit procedural requirements of 40 C.F.R. § 1502.22 when availability of information is at issue. Powertech at 9. Powertech asserts NRC is not bound by "substantive" requirements of NEPA or CEQ regulations, contradicting the blackletter holdings that "NEPA imposes only procedural requirements." Winter [v. Nat. Res. Def. Council], 555 U.S. [7] at 23, 129 S.Ct. 365. Powertech, like the Board, identifies no conflict with a substantive mandate, and if NEPA violations are "forgiven because they are merely procedural,

there will be nothing left to the protections that Congress intended the Act to provide.” Oglala Sioux Tribe v. NRC, 896 F.2d 520, 435 (D.C. Cir. 2018). Powertech, like the Board, provides a prohibited legal basis to ignore the 40 C.F.R. § 1502.22 procedures, including public notice and comment on a NEPA document, to determine whether the information is “unavailable.”

Further, Powertech echoes the Board’s erroneous conclusion that the final NEPA document may be supplemented through the adjudicatory process regardless of the magnitude of the flaws. Powertech at 19. Both misapply the holding in NRDC v. NRC, 879 F.3d 1202 (D.C. Cir. 2018). The D.C. Circuit did not confirm NRC’s novel practice of supplementing NEPA documents through the adjudicatory process. Rather, the Court warned that issues surrounding the undermining NEPA’s procedural mandate by supplementing a NEPA document through the adjudicatory process “are not idle concerns” (879 F.3d at 1210) and the Commission’s practice in this regard is neither “ideal or even desirable.” Id. at 1212. The Court upheld the license only because a remand would be “utterly pointless” as the required analyses were already completed and part of the evidentiary record. Id. Here, the cultural resources impact and mitigation analyses have not been conducted and the public has never had a chance to comment on NRC Staff’s purported 40 C.F.R. § 1502.22 compliance nor the Board’s new Programmatic Agreement amendment.

Powertech also ignores the extensive rulings of the federal courts establishing that federal agencies cannot simply rely on a quasi-adjudicatory hearing record to fulfill the public participation and analysis requirements of NEPA. Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”). See also Petition at 3 n. 1.

Instead, Powertech cites to unrelated federal court rulings that do not support the Board’s ruling. Powertech at 19 n.15. For example, Citizens for Safe Power v. NRC, 524 F.2d 1291

(D.C. Cir. 1975) only condoned the addition into the record of a radiological stipulation between the parties while specifically acknowledging that the underlying NEPA document contained a compliant analysis of the radiological impacts. Thus, like in NRDC v. NRC, the Court found no benefit to any additional public involvement on unique facts of that case. Indeed, the nuclear plant at issue had already been constructed and authorized to operate at 75% capacity for eighteen months. The contested license was for a subsequent forty-year term at full production capacity. In contrast, here, no ground disturbance has occurred and the record demonstrates the availability of substantial information on cultural resources that the public could provide (see Petition at 15-16 referencing additional available information).

Ecology Action v. AEC, 492 F.2d 998 (2nd Cir. 1974) is also inapposite, as it dealt with a jurisdictional issue of whether an appeal could be had over an interlocutory order of the Commission. Id. at 1000. The underlying NEPA issue was one of extreme remoteness of a particular accident that the Court found “the likelihood of which has been estimated to be not more than one in 10 million during a year's operation.” Id. at 999. In contrast, the impacts to Lakota cultural resources in this case are guaranteed. Powertech at 20-21.

III. Powertech Confirms the Inappropriate Role Undertaken by the Board

Powertech confirms that the Board unlawfully inserted itself into the process in such a way as to prejudice the Tribe and unreasonably narrow the negotiations. Powertech concedes that “NRC Staff is free to select any approach it deems appropriate to meet the requirements of [NEPA and NHPA].” Powertech at 21. However, Powertech confirms the uncontroverted evidence that NRC Staff disregard the Tribe’s attempts to ensure sufficient resources and time to conduct the necessary cultural resources because the agency was operating under “the Board’s directive that the March 2018 Approach was not subject to negotiation.” Powertech at 5.

Powertech’s admissions confirm that the Board exceeded its adjudicatory role, and by

engaging in the negotiations, gave NRC Staff a basis to foreclose meaningful discussion of a credible survey methodology. Powertech openly concedes that this matter should not have been decided, as was done by the Board, based on “a ‘he said/she said’ regarding who negotiated in good faith and who maintained negotiating positions.” Powertech at 12. The Tribe agrees.

IV. The Programmatic Agreement Amendment Does Not Remedy the NEPA or NHPA Violations

Powertech argues that the amendment to the Programmatic Agreement (PA) inserted by the Board in LBP-19-10 works to remedy any NEPA or NHPA violations. Powertech at 17-18. However, as Powertech concedes, the PA is creature of the NHPA and thus by its terms applies any protections it may provide only to cultural resources that rise to the level of eligibility for the National Register of Historic Places. See Petition at 17-18. Powertech also concedes, however, that the new PA condition was “incorporated as a mitigation measure into the FSEIS.” Powertech at 18. Thus, Powertech and the Board unlawfully ignored NEPA’s mandate, discussed *supra*, that such changes to an FSEIS must be subject to public notice and comment.

The PA amendment confirms that attempts to segregate the overlapping NEPA and NHPA complicate, and perhaps prevent, NRC Staff from complying with these overlapping duties to address significant cultural resources impacted by the Powertech proposal. The Board’s addition of mitigation measures without public and Tribal involvement violate NEPA and the NHPA. Specifically, the NHPA regulations explicitly require consultation with and involvement by the Tribe in the development or modification of measures intended to mitigate or avoid impacts to Tribal cultural resources. 36 C.F.R. § 800.6(a), (b).

The Board’s insertion of new mitigation measures without any effort to involve the Tribe, public, or other Tribes violates NEPA and the NHPA and is grounds for this Commission to review and reverse the Board’s rulings in both LBP-19-10 and LBP-17-09.

The Petition for Review is properly granted.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 28th day of February, 2020

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to Powertech Answer to Petition for Review in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 28th day of February 2020, 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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