

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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))

Oglala Sioux Tribe’s Motion to Strike

In accordance with 10 C.F.R. § 2.319(d-e) and this Board’s Order of June 2, 2014, Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Motion to Strike. Counsel for the Tribe conferred with the parties with respect to this Motion and states that both NRC Staff and Powertech oppose this Motion.

INTRODUCTION AND SUMMARY

In this proceeding, the Tribe has presented contentions admitted for hearing challenging the NRC Staff’s compliance with the National Environmental Policy Act (NEPA). These contentions include Contentions 1A, 2 (environmental portion), 3 (environmental portion), 4, 6, and 9. In the pre-hearing submittals regarding these NEPA-based contentions, Powertech and NRC Staff have filed Opening Statements and Testimony and Answering Statements and Testimony that purport to support the analysis presented in the Final Supplemental Environmental Impact Statement (FSEIS) for the proposed Dewey-Burdock mine proposal. However, portions of the testimony and argument submitted by both NRC Staff and Powertech go beyond the analysis contained in the FSEIS, and include additional analysis and information in support of the FSEIS that are not found within the FSEIS itself, or documents referenced or discussed in the FSEIS.

As explained below, under NEPA and relevant caselaw, a final NEPA document may not be supplemented or rehabilitated by information, testimony, or other evidence not included in the FSEIS itself. As a result, this testimony and argument is beyond the scope of NEPA and should be excluded from this proceeding.

ARGUMENT

NRC Staff's and Powertech's attempts to rehabilitate the NRC Staff's FSEIS through *post-hoc* written testimony of witnesses should be struck by this Board. NEPA regulations and caselaw make clear that information provided after a NEPA document is finalized and outside of the NEPA process cannot be used to fix problems with the NEPA process itself.

The courts have repeatedly confirmed that NEPA procedures mandate that environmental impact reviews, mitigation measures, and other requirements of NEPA be completed in a NEPA document and finalized and publicly circulated for public comment at the time of the publication of, or in, the Final SEIS. Otherwise, the public has no ability to review these critical components within the context of the NEPA process, only after it is completed. Village of False Pass v. Watt, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff'd sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) ("The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement."); Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997) ("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot 'bring into compliance with NEPA an EIS that by itself is

inadequate.’ . . . Because of the importance of NEPA’s procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency’s actual decision was informed and well-reasoned.”) (citations omitted); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir.1980) (even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot “bring into compliance with NEPA an EIS that by itself is inadequate.”); 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.”); South Fork Band Council v. BLM, 588 F.3d 718, 726 (9th Cir. 2009)(“A non-NEPA document -- let alone one prepared and adopted by a state government -- cannot satisfy a federal agency’s obligations under NEPA.”).

Further, federal caselaw confirms that an administrative adjudicatory hearing is not a NEPA process capable of supplementing, amending, or rehabilitating a NEPA process that is otherwise insufficient. *See* Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds*, Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). This is consistent with NEPA regulations that specify what is an “environmental document” for purposes of satisfying NEPA, which includes only those documents specified in 40 C.F.R. § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent). 40 C.F.R. § 1508.10.

NRC regulations make some reference to testimony regarding a NEPA document, particularly a FSEIS, at 10 C.F.R. § 51.104. That regulation states, in relevant part:

(2) Any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the

provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing.

10 C.F.R. § 51.104. This language specifically restricts any testimony to that which is “within the scope of NEPA.” As discussed above and confirmed by extensive caselaw, documents, testimony, or other information not incorporated into the FSEIS is not “within the scope of NEPA.” *See also* 72 Fed.Reg.57416, 57435 (Oct. 9, 2007)(confirming that under 10 C.F.R. § 51.104, “a party may only take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart which are within the scope of that party’s admitted contention.”). In short, NEPA compliance must be adjudicated by the Board based on the scope of information presented to the public in the environmental documents produced in the NEPA process, and the *post hoc* testimony of the project proponents and NRC Staff falls outside the scope of the NEPA process.

In this case, several of Powertech’s witnesses provided testimony that falls outside the scope of the NEPA documents at issue in this case. Most prevalent is with respect to the FSEIS cultural resources impact review (Contention 1A), examples include: Ex. NRC-001 at A1.3, A1.6, A1.8, A1.12; Ex. APP-003 at A.3, A.4, A.6, A.7, A.8, A.9, A.10, A.11, A.12, A.13, A.15, A.16, A.17, A.18, A.19, A.20; APP-005; APP-010 at A.3, A.4, A.6; APP-064 at A.1, A.2, A.3, A.4, A.5, A.6. With respect to mitigation measures (Contention 6), examples include: APP-053 at A.9, A.12, A.13; APP-070 at A.1 (second and third paragraphs), A.2 (portions unsupported by FSEIS), A.3 (portions unsupported by FSEIS). With regard to Contention 2 and 3, the issues are somewhat blurred, because these contentions potentially involve both safety and environmental (NEPA) components.

Thus, the Tribe asserts based on the foregoing legal analysis that NRC Staff and Powertech should be not be permitted to rely on any testimony, exhibits, or argument based on

material not included in the FSEIS for Contentions 1A, 2, 3, 4, 6, or 9. The Tribe reserves the right to object at the hearing to testimony or argument that falls outside the scope of NEPA.

CONCLUSION

For the foregoing reasons, the Board should strike testimony submitted by NRC Staff and Powertech that purport to supplement or provide information not contained in the FSEIS, along with any argument presented by NRC Staff or Powertech relying on such testimony.

Respectfully Submitted,

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Attorneys for Oglala Sioux Tribe

Dated at Lyons, Colorado
this 22nd day of July, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Strike in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 22nd day of July 2014, 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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