

July 29, 2014

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))	

NRC STAFF'S RESPONSE TO PREHEARING MOTIONS

I. Introduction

On July 22, 2014, the Oglala Sioux Tribe, the Consolidated Intervenors, and Powertech moved for the Board to exclude certain testimony and exhibits from the hearing. The Tribe argues that the Board's review of the Staff's Final Supplemental Environmental Impact Statement (FSEIS) must be limited to the FSEIS itself and that the Board should exclude testimony going beyond the analysis in the FSEIS. The Consolidated Intervenors argue that the Board should exclude certain testimony for which Powertech's witnesses are allegedly not qualified to testify. Powertech argues that the Board should exclude certain testimony of both the Tribe and the Consolidated Intervenors for a number of reasons. Below, the Staff responds to each motion. The Staff also responds to another motion the Tribe filed on July 22, 2014, in which they seek to cross-examine three of Powertech's witnesses concerning the company's recent acquisition of certain data.

II. The Board Should Deny the Tribe's Motion in Limine

The Tribe argues that certain portions of the testimony from the Staff and Powertech go beyond the analysis in the FSEIS. Motion at 1. The Tribe claims that, in deciding whether the

Staff complied with the National Environmental Policy Act (NEPA), the Board must limit its review to the analysis and information contained in the FSEIS itself. Motion at 2–4.

The testimony challenged by the Tribe should remain in the hearing. The Staff and Powertech submitted this testimony consistent with the Board's Scheduling Order, which directed the parties to submit testimony addressing the admitted contentions. Order (Providing Case Management Information) (June 2, 2014) at 2. The Staff and Powertech also submitted this testimony consistent with NRC regulations and Commission precedent, which unequivocally state that parties may offer evidence in proceedings involving issues arising under NEPA.

The Tribe's motion hinges on its argument that the administrative record rule applies in NRC hearings. Under the administrative record rule, a court reviewing a final agency decision generally defines the administrative record as the record that was before the agency at the time it made its decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, (1971). The cases the Tribe cites on pages 2 and 3 of its motion all involve attempts by federal agencies to supplement the administrative record before federal district courts or courts of appeals. In these cases the courts applied the administrative record rule to exclude certain evidence on which the agencies sought to rely before the federal courts. *E.g.*, *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996). The Tribe argues that in this case the Board should similarly limit the testimony submitted by the Staff and Powertech.

The Tribe fails to show that the administrative record rule applies in this hearing. This rule does not apply because the administrative record is still being developed, and there is not yet a final agency decision subject to federal court review. Although the Staff issued Powertech a license, the NRC, as an agency, has not decided whether the Staff's licensing decision will stand; that is the very purpose of this hearing before the Board. In an NRC hearing, the parties may submit evidence within the scope of the environmental contentions:

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(a)(2). Referring to this regulation, the Tribe argues that the Staff's and Powertech's testimony is outside the scope NEPA because it was "not incorporated in the FSEIS." Motion at 4. But the Tribe's argument holds only if the Board accepts the premise that the administrative record rule applies in an NRC hearing. It does not, and there is no basis for finding the Staff's and Powertech's testimony outside the scope of the admitted contentions.¹

While the Tribe refers to 10 C.F.R. § 51.104(a)(2), it overlooks NRC precedent undermining the basis for its motion. The Powertech hearing is not the first NRC hearing in which the parties submitted testimony on the adequacy of a Staff-issued EIS or environmental assessment (EA). In no prior case has the Commission found that such testimony improperly supplements the EIS or EA.² To the contrary, the Commission and Board routinely rely on testimony from the parties when ruling on NEPA-related contentions.³ As the Commission has explained, to the extent its environmental findings or the Board's findings differ from those in the EIS or EA, the document is deemed modified by the decision. *Hydro Resources, Inc.* (P.O. Box

¹ The Staff's and Powertech's testimony are quite clearly "within the scope of NEPA," because they respond to arguments the Tribe and the Consolidated Intervenors themselves raised under NEPA when challenging the FSEIS.

² In *Pa'ina Hawaii, LLC* (Material License Application), the Intervenor likewise argued that the Staff's and the Applicant's submittal of testimony amounted to *post hoc* rationalizations that improperly supplemented the Staff's NEPA document. The Board denied the Intervenor's motion. *Pa'ina Hawaii, LLC, Order* (Ruling on Intervenor's Motion to Strike Testimony, Releasing Previously Reserved Hearing Dates, and Directing Parties to Submit Scheduling Information for Hearing) (December 4, 2008) (unpublished) at 2.

³ Other recent hearings in which the Staff and the Applicant/Licensee submitted testimony on environmental contentions include *Levy County, Calvert Cliffs*, and *South Texas*. Board decisions referring to this testimony can be found at *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-13-04, 77 NRC 107, 220 (2013); *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-12-17 76 NRC 71, 76, 125 (2012); *Nuclear Innovation North America* (South Texas Project Units 3 and 4), LBP-12-05, 75 NRC 227, 242, 254 (2012). For materials licensing hearings, some fairly recent examples include *Pa'ina, Diablo Canyon* and *Nuclear Fuel Services*. *Pa'ina Hawaii, LLC* (Material License Application, CLI-10-18, 72 NRC 56, 72–73 (2010); *Pacific Gas and Electric* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 & n.87 (2008); *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), LBP-05-8, 61 NRC 202, 217 (2005).

15910, Rio Rancho, New Mexico 87174), CLI-01-4, 53 NRC 31, 53 (2001).⁴ The Commission's position has, moreover, been upheld on appeal.⁵

The Tribe argues that the out-of-scope nature of the Staff's and Powertech's testimony is best illustrated by the testimony on cultural resources. Motion at 4. Based on the citations to testimony that the Tribe provides, it appears the Tribe is arguing that the Staff violated NEPA by using a Programmatic Agreement to address certain impacts to cultural resources. The Tribe raised this claim in both its contentions and Initial Statement of Position, and the Staff addressed this claim in its Initial and Rebuttal Statements of Position.⁶ As the Staff explained, it complied with NEPA because it finalized the Programmatic Agreement before issuing the Record of Decision for the Dewey-Burdock Project—in other words, while its NEPA process remained open. The Tribe fails to show any violation of NEPA.

In brief, the Tribe's motion conflicts with NRC regulations, Commission precedent, and circuit court precedent. The Board should therefore deny the Tribe's motion.

III. The Board Should Deny the Tribe's Motion for Cross-Examination

The Tribe seeks to cross-examine three Powertech witnesses concerning Powertech's recent acquisition of historical drill logs and maps prepared by the Tennessee Valley Authority (TVA). The Tribe argues that it should be allowed to cross-examine Powertech's witnesses because "it appears that Powertech may have taken steps to structure its acquisition of 'additional quality data' to deny review [of the data] by its witnesses, the parties, and [the

⁴ See also *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site) CLI-07-27, 66 NRC 215, 230 n.79 (2007) ("If the Commission . . . reaches conclusions different from those of the presiding officer with respect to . . . matters [involving the adequacy of the FEIS], the final [FEIS] will be deemed modified to that extent[.]").

⁵ See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705 (1985) ("Amendment of the FE[I]S by the adjudicatory hearing record and subsequent Licensing Board decision is entirely proper under NRC regulations and court precedent"), *review denied*, CLI-86-5, 23 NRC 125 (1986), *aff'd in part and denied in part on other grounds*, *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3rd Cir. 1989). See also *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (applying similar reasoning to uphold a Licensing Board decision amending an FEIS).

⁶ Staff's Initial Statement of Position at 16, 21–22, 47; Staff's Rebuttal Statement of Position at 5, 22.

Board].” Motion at 3. According to the Tribe, “this brings into question the veracity of Powertech witnesses’ conclusions regarding the voluminous and technical information presented by these proceedings.” *Id.*

The Board is conducting this hearing under the rules in 10 C.F.R. Subpart L, “Simplified Hearing Procedures for NRC Adjudications.” Under Subpart L, the Board “shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision.” 10 C.F.R. § 2.1204(b)(3). When the Commission adopted the procedures in Subpart L, it explained that “the presiding officer will permit cross-examination only in the rare circumstance where the presiding officer finds in the course of the hearing that his or her questioning of witnesses will not produce an adequate record for decision, and that cross-examination by the parties is the only reasonable action to ensure the development of an adequate record.” *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2196 (January 14, 2004).

The Tribe’s motion does not present the type of “rare circumstance” where cross-examination is needed to develop the record. In its application dated August 2009, Powertech explained that it intended to obtain additional TVA data before it began placing wellfield injection and extraction wells.⁷ In Contention 2 of its hearing request dated April 2010, the Tribe argued

⁷ Dewey-Burdock, Supplement to the Uranium Recovery License Application (August 31, 2009) (ADAMS Accession No. ML092870155) at 2-5:

All regional maps used in this submission and the original submittal, are based on data from over 1000 electric logs that Powertech was able to secure from the Tennessee Valley Authority (TVA) data base.

The additional structure maps, isopachs and cross sections present in detail, the geology within the two initial production well field areas. These supplemental exhibits demonstrate the current availability of electric log and mapped data that Powertech has in its possession for interpreting the first planned well fields. However, as stated in the operations discussion, the company plans to add significantly to the database through conducting delineation drilling before emplacement of the well field injection and extraction wells, including the appropriate monitoring wells at the 400 ft perimeter as well as any shallow or deeper monitor wells as dictated by the detailed drilling program. Further discussion of well field planning and monitor well spacing is included in this supplemental submission.

that Powertech needed to provide these data with its application in order to adequately define baseline groundwater quality.⁸ Thus, whether or not Powertech needed to provide additional TVA data with its application has been a long-running dispute in this hearing. This issue is currently part of Contention 2, which concerns whether Powertech provided, and the Staff considered, sufficient data to assess baseline groundwater quality in the Dewey-Burdock area.

The Tribe's motion for cross-examination does not, in fact, appear to be directed toward this issue or any other issue in Contention 2.⁹ Rather, the Tribe appears to seek cross-examination so that it can potentially show that Powertech violated unspecified requirements by "deny[ing] review by its witnesses, the parties, and this tribunal" of relevant information. Motion at 3. While the NRC's regulation at 10 C.F.R. § 40.9(a) requires an applicant like Powertech to ensure the information it submits is complete and accurate in all material respects, any claim that Powertech violated this regulation is outside the scope of Contention 2.

The Board should also disallow cross-examination because it is unlikely to shed light on even those out-of-scope issues the Tribe seeks to illuminate. The Tribe claims that Powertech may have improperly structured its acquisition of additional data. Motion at 3. The Tribe does not allege, however, that any of the three Powertech witnesses it seeks to cross-examine had a role in acquiring the additional data. In other words, the Tribe has not offered any specific reasons for questioning the veracity, credibility, or recollection of these witnesses. Instead, the Tribe suggests that it would use cross-examination as a means of impeaching the credibility of unnamed Powertech executives who have not submitted testimony in this hearing. Nothing in the regulatory history to 10 C.F.R. § 2.1204 suggests that cross-examination may be used for this purpose. 69 Fed. Reg. at 2182–2196.

⁸ Tribe's Hearing Request (Exh. OST-010) at 19 (citing ¶¶ 22–23 of Dr. Moran's Initial Declaration).

⁹ Nor does the Tribe connect its request for cross-examination to any other contention. Because the only issues involved in this hearing are those framed by the admitted contentions, the Tribe's failure to draw a connection between cross-examination and the issues legitimately in controversy before the Board should weigh heavily against granting its motion.

In arguing for cross-examination, the Tribe also refers to the “voluminous and technical information presented by these proceedings.” Motion at 3. This alone, however, does not warrant cross-examination. See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-12-18, 76 NRC 371, 375 (2012) (“If large records and complexity justified cross-examination, such questioning would be commonplace at many, if not most, Subpart L hearings. That was not the intent of Subpart L., which was designed to shift most questioning of witnesses from parties to the Board itself.”).

In conclusion, the Board should deny the Tribe’s motion for cross-examination of three Powertech witnesses.¹⁰

IV. The Board Should Deny the Consolidated Intervenors’ Motion in Limine

The Consolidated Intervenors argue that the Board should strike numerous portions of the testimony from Powertech witnesses Dr. Lynne Sebastian and Errol Lawrence. Motion at 5–7. According to the Consolidated Intervenors, the testimony should be stricken because Dr. Sebastian and Mr. Lawrence provide legal opinions or conclusions falling outside their areas of expertise. Motion at 5. The Consolidated Intervenors argue that Powertech’s testimony is inadmissible under both the Federal Rules of Evidence and the NRC’s rule at 10 C.F.R. § 2.337(a).

Although the Federal Rules of Evidence do not apply directly in NRC proceedings, the Board may look to these rules for guidance. *Southern Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 365 n.32 (1983). Under Federal Rule 702, a witness qualifies as an expert if he or she has “scientific, technical, or other specialized

¹⁰ If the Board grants the Tribe’s motion, it should emphasize that cross-examination is limited to the issues identified in the motion, and that it will be permitted only if the Board itself is unable to obtain sufficient information to rule on the admitted contentions. See *Indian Point*, CLI-12-18, 76 NRC at 374 (declining to grant review of Board order permitting cross-examination, but only because the Chief Judge’s “comments at the teleconference reflect an intent to allow only limited, supplemental questions, not an ‘unfettered’ opportunity to pose extensive, unfocused, or immaterial questions.”). Furthermore, the Board should assure the other parties that, should the need arise, their counsel will likewise be provided “a full and fair opportunity to request cross-examination” at the hearing. *Id.* at 375.

knowledge [that] will assist the trier of fact to understand the evidence or determine a fact in issue.” *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982). Furthermore, under the NRC’s rule at 10 C.F.R. § 2.337(a), the Board should admit evidence as long as it is “relevant, material, and reliable . . . [and] not unduly repetitious.”

The Consolidated Intervenors fail to show that the Board should strike the testimony in question. In her testimony, Dr. Sebastian explains the process by which a federal agency gathers information required by the National Historic Preservation Act (NHPA). Mr. Lawrence, on the other hand, explains how Powertech gathered data necessary to meet NRC regulations. The resumes of both Dr. Sebastian (Exh. APP-002) and Mr. Lawrence (Exh. APP-038) show that they have extensive experience related to the subjects of their testimony. In fact, each witness has experience in legal proceedings raising issues similar to those on which he or she is now testifying. Although the Consolidated Intervenors argue that Dr. Sebastian and Mr. Lawrence fail to connect their testimony to their experience,¹¹ the connection between each witness’s experience and testimony appears reasonably clear from their resumes and from the background information they provide in their testimony. Exh. APP-001 at A.1 and A.2; Exh. APP-037 at A.1 through A.5.

In any event, the portions of Dr. Sebastian’s and Mr. Lawrence’s testimony to which the Consolidated Intervenors object are not the focus of either witness’s testimony. Rather, these portions contain certain conclusions Dr. Sebastian and Mr. Lawrence draw based on specific information they provide in other portions of their testimony. Their testimony in these areas is similar to that of Dr. Robert Moran, upon whose testimony the Consolidated Intervenors rely. See Moran Rebuttal Testimony (Exh. OST-018) at 2–4 (concluding that the Staff committed various NEPA violations due to allegedly inadequate information in the FSEIS). While the Consolidated Intervenors are correct to the extent they argue that it is the Board, rather than

¹¹ Motion at 6.

any witness, which ultimately draws the legal conclusions of consequence in this hearing, that does not mean a witness's testimony must be stricken each time he draws a conclusion regarding the merits of the contention on which he is testifying. Because the Board itself is the decisionmaker in an NRC hearing, it can ensure that such testimony carries weight only to the extent it is supported by other evidence in the record.

In sum, the testimony of Dr. Sebastian and Mr. Lawrence meets the NRC's standards for admissible evidence, and the Board should reject the Consolidated Intervenors' motion to strike the identified portions of their testimony.

V. The Board Should Grant Substantial Parts of Powertech's Motion in Limine

In its motion Powertech seeks to exclude certain testimony or exhibits of either the Consolidated Intervenors or Oglala Sioux Tribe. Powertech's arguments generally align with the Staff's arguments in its motion in limine dated July 22, 2014. Below, the Staff states its position on Powertech's specific requests.

1. Powertech's Motion to Exclude Argument on Technical/Safety Analyses and Conclusions in the Staff's Safety Evaluation Report

Powertech argues that certain testimony submitted by the Tribe and the Consolidated Intervenors improperly challenges the Staff's Safety Evaluation Report (SER) for the Dewey-Burdock Project. Motion at 5–6. Powertech correctly states that it is the FSEIS, not the SER, that is at issue in this hearing. See Order (Denying Motions for Summary Disposition) (June 2, 2014) (“In any event, the admitted contentions challenge the adequacy of hydrological information in the Staff environmental documents.”). Accordingly, the Board should exclude the testimony and exhibits, or parts thereof, challenged in Powertech's motion as outside the scope of the admitted contentions.

2. Powertech's Motion to Exclude Testimony and Argument on Contention 14

Powertech argues that the Board should exclude all evidence and argument on Contention 14, a contention which the Board recently dismissed. Order (Granting Request to

Withdraw and Motion to Dismiss Contentions 14A and 14B) (July 15, 2014). Although the Staff agrees that the Board should not accept evidence or hear further argument on Contention 14, the Staff believes that the Board's July 15, 2014 Order sufficiently addresses this issue. In other words, while the Staff does not oppose Powertech's motion on this issue, the Staff believes the Board does not have to act on the motion to obtain the result Powertech seeks.

3. Powertech's Motion to Exclude All Evidence and Preclude Argument from the Consolidated Intervenors on Contentions 4, 6, and 9

Powertech argues that the Board should exclude the Consolidated Intervenors' prefiled testimony and exhibits on Contentions 4, 6, and 9. Motion at 6–8. The Staff supports Powertech's position. As Powertech notes, these are the Tribe's contentions, and the Consolidated Intervenors have not sought to co-sponsor or adopt these contentions. Excluding the Consolidated Intervenors' evidence on these contentions is consistent with the Commission precedent that the Staff cited in its own motion. *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 626 (2004); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 869 n.17 (1974), *aff'd in pertinent part*, CLI-75-1, 1 NRC 1 (1975); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 (1985).

At the same time, the Staff does not support Powertech's motion to the extent it seeks to exclude legal arguments that the Consolidated Intervenors have submitted on Contentions 4, 6, and 9. While under NRC precedent an intervenor may not submit affirmative evidence—testimony and exhibits—on another intervenor's contention, NRC case law does not necessarily prohibit intervenors from submitting legal argument on contentions other than their own. *Prairie Island*, ALAB-244, 8 AEC at 869 n.17; *LES*, CLI-04-35, 60 NRC at 626.

4. Powertech's Motion to Exclude Exhibits INT-002 and INT-005

Powertech argues that the Board should exclude an October 2009 Report from Dr. Richard Abitz (Exh. INT-002), along with Dr. Abitz's resume (Exh. INT-005). Motion at 8. The

Staff supports this part of Powertech's motion. As Powertech notes, the Consolidated Intervenor failed to submit prefiled testimony from Dr. Abitz. They also failed to include an affidavit supporting either Dr. Abitz's resume or his October 2009 Report. Both of these documents—prefiled testimony and a supporting affidavit—were required by the Board's case management order. Order (Providing Case Management Information) (June 2, 2014) at 2.

5. Powertech's Motion to Exclude Exhibits INT-008, INT-010, INT-011, INT-012, and INT-014

Powertech moves for the Board to exclude the testimony offered by the Consolidated Intervenor in Exhibits INT-008 (Testimony of Dr. Donald Kelley), INT-010 (Testimony of Peggy Detmers), INT-011 (Testimony of Marvin Kammerer), INT-012 (Testimony of Dayton Hyde), and INT-014 (Testimony of Lindsay McLean). Motion at 9–13. The Staff supports this part of Powertech's motion, for substantially the same reasons the Staff provided on pages 4–5 and 9–11 of its own motion in limine. As Powertech notes, the testimony of these witnesses is outside the scope of the admitted contentions, and the Consolidated Intervenor fails to show that the witnesses have expertise relevant to the admitted contentions. In addition, the testimony is not supported by affidavits.

6. Powertech's Motion to Exclude Portions of Exhibit INT-020

Powertech argues that the Board should strike the rebuttal testimony from Dr. LaGarry (Exh. INT-020) to the extent it addresses "periodic releases of water from storage ponds." Motion at 13–14. Powertech argues that Dr. LaGarry's testimony goes beyond the scope of Powertech's direct testimony, which did not address storage ponds. Powertech also argues that the language to which Dr. LaGarry refers was in fact deleted from its application. The Staff agrees that the Board should exclude this portion of Dr. LaGarry's testimony from evidence. In addition to the reasons provided by Powertech, Dr. LaGarry's testimony on storage ponds appears unrelated to the subject of any admitted contention. Thus, the Board should exclude this testimony as irrelevant to the issues before it. 10 C.F.R. § 2.337(a).

Powertech also argues that the Board should strike a hyperlink Dr. LaGarry includes on page 4 of his rebuttal testimony because the Consolidated Intervenors did not submit the contents of the hyperlink as evidence. While the Staff agrees that the Board should not allow the Consolidated Intervenors to belatedly introduce evidence they failed to submit with their rebuttal testimony, the Staff does not see any compelling reason for the Board to strike the hyperlink in Dr. LaGarry's testimony.

7. Powertech's Motion to Exclude Portions of Exhibits OST -001, OST-005, and INT-023

Powertech argues that the Board should exclude all portions of Dr. Moran's initial testimony (Exh. OST-001) relating to surface water quality. The Staff supports this part of Powertech's motion. Contentions 2 and 3 relate to groundwater quality and groundwater impacts. *Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, LBP-10-16, 72 NRC 361, 423–426 (2010).¹² Therefore, Dr. Moran's testimony on surface water quality is outside the scope of the contentions.

Powertech also moves to exclude a number of slides from Exhibit OST-005, which is a PowerPoint presentation intended to accompany Dr. Moran's testimony. Motion at 13–14.¹³ The Staff does not support this part of Powertech's motion. Although it is perhaps not immediately obvious how certain slides relate to Dr. Moran's testimony, during the oral portion of the hearing Dr. Moran may be able to draw a connection between the slides and his testimony on Contentions 2–4.

¹² The Board's rulings on the FSEIS-related contentions make clear that Contentions 2 and 3 relate to groundwater, not surface water. See Memorandum and Order (Ruling on Proposed Contentions Related to the Final Supplemental Environmental Impact Statement), LBP-14-5 (April 28, 2014) at 12 ("The migration tenet applies and this issue migrates from a criticism of baseline groundwater determinations in the Powertech ER to a criticism of baseline groundwater determinations in the NRC Staff's FSEIS.") and 14 ("To the extent the Intervenors have concerns with the adequacy of the hydrogeologic analysis necessary to show adequate confinement and potential impacts to groundwater, this is already an issue set for hearing.").

¹³ Powertech cites Exhibit OST-018, but it appears it is referring to Exhibit OST-005.

Finally, Powertech moves to exclude Exhibit INT-023 from the hearing, a document the Consolidated Intervenors refer to at page 3 of their Rebuttal Statement of Position. Motion at 14. The Staff supports this part of Powertech's motion. As Powertech notes, the Consolidated Intervenors failed to submit this document as an exhibit.

8. Powertech's Motion to Exclude Exhibit INT-007

Powertech seeks to exclude Susan Henderson's testimony from the hearing. Motion at 14. Powertech argues that the Consolidated Intervenors have not shown Ms. Henderson has expert credentials that qualify her to testify on any of the admitted contentions. Powertech also argues that Ms. Henderson's testimony fails to address the FSEIS specifically and lacks supporting references. While the Staff generally agrees that the Board should exclude Ms. Henderson's testimony, the Staff also believes Ms. Henderson's testimony may be admissible to the extent she discusses possible contamination from the Black Hills Army Depot. As the Staff explains in its motion in limine, Ms. Henderson's experience as former Chair of the Restoration Advisory Board for the Black Hills Army Depot might qualify her to testify on the extent of contamination from that site, an issue that is arguably within the scope of Contention 2.¹⁴

VI. Conclusion

The Board should deny the Tribe's and the Consolidated Intervenors' motions in limine. The Board should also deny the Tribe's motion for cross-examination. The Board should grant

¹⁴ The extent of contamination from the Black Hills Army Depot is not directly at issue in this hearing. Potentially within the scope of Contention 2, however, is whether the Staff's analysis of baseline water quality is flawed because it fails to take into account contamination from the Black Hills Army Depot. Although in her prefiled testimony Ms. Henderson does not offer specific information on this issue, the Staff is not opposing her limited testimony in this area so that, if given the opportunity by the Board, during the oral portion of the hearing she will be able to present any relevant information she does have.

substantial portions of Powertech's motion in limine, while denying the limited portions identified above.

Respectfully submitted,

*/Signed (electronically) by/
Michael J. Clark
Michael J. Clark
Counsel for the NRC Staff*

*/Signed (electronically) by/
Patricia A. Jehle
Patricia A. Jehle
Counsel for the NRC Staff*

Dated at Rockville, Maryland
This 29th day of July 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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POWERTECH (USA) INC)	Docket No. 40-9075-MLA
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)	
(Dewey-Burdock In Situ Uranium Recovery)	Date: July 29, 2014
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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 Staff's Response to Prehearing Motions via the NRC's Electronic Information Exchange (EIE) on July 29, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its Response by electronic mail, also on July 29, 2014.

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

Patricia A. Jehle
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-8366
Patricia.Jehle@nrc.gov