

October 24, 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 OGLALA SIOUX TRIBE'S  
MOTION TO ADMIT ADDITIONAL EXHIBITS**

The Nuclear Regulatory Commission Staff responds to the Oglala Sioux Tribe's motion to admit additional exhibits.<sup>1</sup> The Tribe moves for the Board to admit well log data and three documents that Powertech disclosed to the parties on September 14, 2014. Although the Tribe was unable to submit the well log data as an exhibit, the Tribe submitted the other documents as Exhibits OST-022, OST-023, and OST-024. In addition, the Tribe moved for the Board to admit two documents from the U.S. Environmental Protection Agency (EPA). The first document, marked as Exhibit OST-025, is a two-page announcement stating that the EPA has completed a Preliminary Assessment of the Darrow/Freezeout/Triangle abandoned uranium mines, which are partially within the Dewey-Burdock site. The second document, marked as Exhibit OST-026, is a Preliminary Assessment of the Darrow/Freezeout/Triangle site prepared for the EPA by a contractor (Ex. OST-026). Both documents were issued in September 2014.

The Staff does not oppose the Tribe's motion to admit into evidence the well log data and the documents marked as Exhibits OST-022, OST-023, and OST-024. The Board has

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<sup>1</sup> Oglala Sioux Tribe Motion to Admit Additional Exhibits (October 14, 2014). The Staff's response is consistent with the Board's post-hearing order, in which the Board gave all parties 10 days to submit answers and responsive testimony addressing the other parties' motions to admit additional testimony or exhibits. Post-Hearing Order (September 8, 2014) at 19.

previously found that these documents are relevant to certain admitted contentions, and the Tribe has explained why it believes the documents support its position on those contentions.

The Board should not, however, admit into evidence Exhibit OST-025 or OST-026. Although the Tribe argues that these documents “confirm[ ] data gaps in the materials used by Powertech and NRC Staff,”<sup>2</sup> the Tribe fails to show these documents are relevant to the admitted contentions. The EPA arranged for a Preliminary Assessment of the Darrow/Freezout/Triangle area to help decide whether it must further investigate the area under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Any “data gaps” identified in the Preliminary Assessment relate to CERCLA, and the Tribe fails to explain why such gaps show any deficiency in the Staff’s analysis under the National Environmental Policy Act (NEPA). As the proponent of a motion, the Tribe has the burden of showing why the Board should admit Exhibits OST-025 and OST-026 into evidence.<sup>3</sup> Here, the Tribe fails to provide testimony, or even argument, explaining how the EPA’s findings under CERCLA advance the Tribe’s NEPA-related claims. Accordingly, the Board should reject Exhibits OST-025 and OST-026.

In any event, Exhibits OST-025 and OST-026 do not call into question the Staff’s findings in the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock Project. In the attached testimony, the Staff explains that the EPA arranged for the Preliminary Assessment to determine its responsibilities under CERCLA, not to assess whether the NRC needed additional information to comply with NEPA (Ex. NRC-174 at A6, A7, A9). In fact, the EPA makes clear that the Preliminary Assessment “is separate from decisions about the ISR Project or its underground injection control permits.” Ex. OST-025 at 2. Furthermore,

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<sup>2</sup> Motion at 3.

<sup>3</sup> *Cf. USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 457 (2006) (“It is not the Board’s responsibility to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; Boards may not infer unarticulated bases for contentions.”)

as the Staff also explains in its attached testimony, the EPA submitted comments on the Draft SEIS for the Dewey-Burdock Project (Ex. NRC-008-B-2, Appendix E, comment number 049). None of the EPA's comments questioned the adequacy of the environmental data presented in the SEIS or raised concerns about potential contamination associated with the Darrow/Freezeout/Triangle area (Ex. NRC-174 at A12).

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 24<sup>th</sup> day of October 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 “NRC Staff’s Response to Oglala Sioux Tribe’s Motion to Admit Additional Exhibits” and the “NRC Staff’s Revised Exhibit List” via the NRC’s Electronic Information Exchange (EIE) on October 24, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of these documents by electronic mail, also on October 24, 2014.

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

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