

December 2, 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 NEW CONTENTIONS**

I. Introduction

The Nuclear Regulatory Commission (NRC) Staff responds to the Oglala Sioux Tribe's motion to admit two new contentions.¹ The Tribe's first contention challenges the Staff's analysis of borehole data that Powertech disclosed to the parties on September 13, 2014. The second contention relates to a Preliminary Assessment that the U.S. Environmental Protection Agency (EPA) recently released for the abandoned Darrow/Freezeout/Triangle mine area, which is partially within the Dewey-Burdock site.

The Board should reject the Tribe's contentions because they fail to present a genuine issue of law or fact warranting Board review. In particular, the Tribe fails to show there is a genuine issue as to whether there is new and significant information affecting the conclusions in the Final Supplemental Environmental Impact Statement (FSEIS) that the Staff prepared for the Dewey-Burdock Project. In addition, the Tribe's arguments contain factual errors that, when corrected, remove the support for its contentions.

¹ Motion for Leave to File New or Amended Contention on Behalf of the Oglala Sioux Tribe (November 7, 2014).

II. Legal Standards

A. New or Amended Contentions

A contention cannot be admitted in an NRC hearing unless it meets the criteria in 10

C.F.R. § 2.309(f)(1). This subpart requires that each contention:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ;
- (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

Although contentions must typically be filed at the same time a petitioner submits its hearing request, a person may later file new or amended contentions ("late-filed contentions") based on subsequently released documents, such as the NRC Staff's draft or final EIS. 10

C.F.R. § 2.309(f)(2). Such a contention cannot be admitted, however, unless it meets the following additional requirements in 10 C.F.R. § 2.309(c)(2):

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The intervenor has the burden of demonstrating that any contention meets the standards in 10 C.F.R. § 2.309. *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

B. Standards Governing the Staff's Environmental Review

When preparing an EIS, the Staff must take a "hard look" at the environmental impacts of the proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350

(1989). Under this standard, the Staff must provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]" *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974). The hard look standard does not, however, require that the Staff discuss every impact of the proposed action; for example, the Staff need not discuss impacts that are remote and highly speculative. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980).

After the Staff has issued an EIS, it may receive new information that is relevant to the proposed action. The Staff's receipt of new information does not, however, necessarily require that it supplement the EIS. Rather, 10 C.F.R. § 51.92 specifies when the Staff must prepare an EIS supplement:

(a) If the proposed action has not been taken, the NRC staff will prepare a supplement to a final environmental impact statement for which a notice of availability has been published in the Federal Register as provided in § 51.118, if:

- (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
- (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

This regulation closely follows 40 C.F.R. § 1502.9, "Draft, final, and supplemental statements," a regulation issued by the Council on Environmental Quality (CEQ). One difference is that, while 10 C.F.R. § 51.92 states that it applies only "[i]f the proposed action has not been taken," the CEQ's regulation does not contain similar language. In practice, however, the NRC has applied the test in § 51.92(a)(2) in determining whether the Staff needs to supplement an EIS, regardless of whether the NRC has taken the proposed action, such as granting a license. See, e.g., *Hydro Resources, Inc.* (P.O. Box 777 Crownpoint, New Mexico 87313), LBP-04-23, 60 NRC 441 (2004), *aff'd*, CLI-04-39, 60 NRC 657, 661 (2004) (applying § 51.92(a) in rejecting the Intervenor's May 2004 motion to require the Staff to supplement the EIS, even though the Staff had issued the applicant a license in January 1998).

For new information to be sufficiently significant to require an EIS supplement, the information "must paint a *seriously* different picture of the environmental landscape." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 533 n.53 (2012) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (emphasis in original)). The new information must, moreover, point to impacts that affect "the quality of the human environment in a significant manner or to a significant extent not already considered." *Hydro Resources*, LBP-04-23, 60 NRC at 448 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989)). Furthermore, while the Staff may need to supplement an EIS where new information identifies a "previously unknown" environmental concern, it need not do so where the new information "amounts to mere additional evidence supporting one side or the other of a disputed environmental effect." *Vogtle*, CLI-12-11, 75 NRC at 533 n.53. When filing a contention arguing that the Staff needs to supplement an EIS, the Intervenor has the burden of showing there is a genuine issue regarding the applicability of 10 C.F.R. § 51.92. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-39, 60 NRC 657, 659 (2004).

III. Discussion

A. The Board Should Reject the Tribe's New Contention Related to Borehole Data

The Tribe argues that the Staff failed to take a hard look at the borehole data Powertech disclosed on September 13, 2014. The Tribe further argues that, in order to take a hard look at these data, the Staff must prepare a supplement to the Dewey-Burdock FSEIS. The Tribe, however, fails to acknowledge the specific legal standard applying to the new information; that is, whether the information meets the threshold in 10 C.F.R. § 51.92. By ignoring this standard, the Tribe fails to raise a genuine legal issue, as required by 10 C.F.R. § 2.309(f)(1)(vi), and it does not present an admissible contention.

It is the Tribe that has the burden of explaining why the new information it identifies—the Staff’s testimony regarding the well log data—requires supplementing the FSEIS. *Hydro Resources*, CLI-04-39, 60 NRC at 659. In other words, the Tribe must explain how the Staff’s testimony “paint[s] a seriously different picture of the environmental landscape.” *Vogtle*, 75 NRC at 534. The Tribe is unable to do that, because it focuses solely on alleged flaws in the Staff’s analysis of the well log data. Motion at 2, 3, 6–10. These arguments do nothing to explain why the Board should admit a contention under the “new and significant information” standard in 10 C.F.R. § 51.92. It is only the underlying information that the Staff reviewed—Powertech’s new well log data—that could conceivably support such a contention.

Had the Tribe sought to base its new contention on Powertech’s well log data, however, its contention would be impermissibly late. Powertech disclosed the new well log data on September 13, 2014, and under the Board’s scheduling order the Tribe had until October 13, 2014 to submit a new contention based on those data.² The Tribe failed to do so, and it did not seek an extension of time to submit a contention.³ For that reason, a motion to admit a new contention based on the well log data itself would have to be rejected as untimely. 10 C.F.R. § 2.309(c)(iii).

The Board should also reject the Tribe’s new contention because it greatly mischaracterizes the Staff’s review of Powertech’s well log data. These mischaracterizations are relevant, because the Tribe relies on them to argue that there is a genuine issue concerning whether the Staff adequately reviewed the new data. Most significantly, the Tribe erroneously claims that the Staff conducted a “random ‘spot check’” of Powertech’s well log data. Motion at

² See Board Order (Supplementing Initial Scheduling Order) (November 2, 2010) at 5 (giving Intervenors 30 days to submit new or amended contentions that are not based on the Draft SEIS, FSEIS, or Safety Evaluation Report).

³ Instead, the Tribe obtained an extension of time to submit testimony on the well log data. The Tribe submitted testimony on the well log data on November 21, 2014. In that testimony the Tribe makes essentially the same arguments it raises in its current contention challenging the Staff’s testimony on Powertech’s well log data. Because the Tribe’s existing Contention 3 is apparently broad enough to encompass testimony mirroring its new contention, it is unclear how the Tribe’s current contention can be considered either a new contention or an amendment of its existing contention.

7. As the Staff previously explained in its testimony, when preparing the FSEIS it closely reviewed the structure and isopach maps Powertech presented in its Technical Report, which were constructed using information from over 1,800 well logs. Ex. NRC-158 at A6. The Staff then used its prior review, along with the claims regarding faults, fractures, and sinkholes made by the Intervenor's experts, as a starting point to conduct a focused review of the well log data Powertech disclosed on September 13, 2014. Ex. NRC-158 at A7 and A8. By failing to account for the Staff's complete review, the Tribe is unable to present a genuine issue for the Board's consideration. See, e.g., *Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2)*, CLI-89-3, 29 NRC 234, 241 (1989) (holding that a Board will reject a contention that is based solely on an erroneous factual underpinning that has essentially been repudiated by the source of the document). Cf. also *Georgia Institute of Technology, (Georgia Tech Research Reactor)*, LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on a mistaken reading of an NRC Staff document).

In conclusion, the Tribe fails to show that the new information it identifies—the Staff's testimony regarding its review of Powertech's newly disclosed well log data—"paint[s] a seriously different picture of the environmental landscape." *Vogtle*, 75 NRC at 534. The Tribe does not even make this argument, claiming only that the Staff failed to take a "hard look" at the new data. Because the Tribe fails to argue under the specifically applicable legal standard, it is unable to identify a genuine issue in dispute, and the Board must reject the Tribe's contention under 2.309(f)(1)(vi).

B. The Board Should Reject the Tribe's New Contention Related to the EPA's Preliminary Assessment

In its second new contention, the Tribe argues that the Staff failed to take a hard look at certain issues raised in a Preliminary Assessment that the EPA recently released for the abandoned Darrow/Freezeout/Triangle mine area, which is partially within the Dewey-Burdock site. Motion at 11–15. The Tribe argues that the EPA has concluded there needs to be

remediation of the area under the Comprehensive Environmental Remediation Compensation and Liability Act (CERCLA). Motion at 2, 3, 6, 14. According to the Tribe, this CERCLA remediation is a reasonably foreseeable future action that the Staff should have considered in the FSEIS. Motion at 11–13.

As with its first new contention, the Tribe again overlooks the applicable legal standard. Because the EPA documents are from September 2014, eight months after the Staff released the Dewey-Burdock FSEIS, the issue is not simply whether the Staff took a “hard look” at the issues mentioned in the EPA’s Preliminary Assessment. Rather, the issue is whether the Preliminary Assessment “paint[s] a *seriously* different picture of the environmental landscape” than that presented in the FSEIS or identifies a “previously unknown” environmental concern. *Vogtle*, 75 NRC at 533 n.53. The Tribe fails to show the Preliminary Assessment falls into either category.

First, contrary to the Tribe’s statements on pages 2, 3, 6, and 14 of its motion, the EPA has *not* concluded that there needs to be remediation of the Darrow/Freezeout/Triangle area. Nor has the EPA concluded, as the Tribe states on pages 3, 5, 11, and 14 of its motion, that sampling in this area indicates an observed release to groundwater from the abandoned uranium mines. Rather, the EPA has concluded only that it will conduct additional sampling to determine whether radionuclides found in groundwater can be linked to the abandoned mines. Ex. OST-025 at 2, Ex. OST-026 at 29–31. The EPA plans to conduct a Site Investigation in 2015 to better characterize the abandoned mine area, and at that time it will collect additional water and soil samples. Only then will it decide whether CERCLA remediation is necessary. Ex. OST-025 at 1.

Second, even assuming the EPA had concluded that there needs to be remediation of the Darrow/Freezeout/Triangle area, the Tribe fails to explain why the EPA’s conclusion would paint a different picture of environmental impacts than that presented in the FSEIS. In fact, the Tribe does not even refer to the FSEIS sections addressing the issues mentioned in the

Preliminary Assessment. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002) (holding that an intervenor must read all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing view).

By overlooking the Staff's analysis in the FSEIS, the Tribe fails to present a genuine issue for the Board's review, as required by 10 C.F.R. § 2.309(f)(1)(vi). More specifically, the Tribe fails to identify a "previously unknown" environmental concern warranting an EIS supplement. *Vogtle*, 75 NRC at 534. As the Staff previously explained, the FSEIS addresses the same environmental concerns that are discussed in the EPA's Preliminary Assessment. Ex. NRC-174 at A10. In particular, both the FSEIS and the Preliminary Assessment report that: (1) surface soils near the abandoned uranium mines contain levels of radionuclides above health-based standards; (2) surface and water samples obtained taken from the mine pits and nearby streams contain radionuclides; (3) air samples collected at the uranium mines have elevated levels of radionuclides; and (4) groundwater samples contain levels of radionuclides that exceed drinking water standards. *Id.* at A11. Furthermore, in the Preliminary Assessment the EPA acknowledges that the Staff evaluated these issues in the FSEIS, and the EPA refers to the Staff's conclusions throughout the Preliminary Assessment. *E.g.*, Ex. OST-026 at 11, 13, 29, 30.⁴

In addition to overlooking the findings in the FSEIS, the Tribe ignores the Staff's environmental conclusions. In Section 5.5.2 of the FSEIS, the Staff states:

The NRC staff have determined that the cumulative impact on groundwater resources within the water resources study area resulting from past, present, and reasonably foreseeable future actions is MODERATE.

⁴ Furthermore, as the Tribe acknowledges on page 4 of its motion, to prepare its Preliminary Assessment the EPA relied on the data Powertech submitted with its application for an NRC license; in other words, the EPA considered the same data the Staff considered when preparing the FSEIS.

Ex. NRC-008-A-2 at 602. The Tribe does not address this conclusion, nor does it claim that the Preliminary Assessment suggests the cumulative impacts on groundwater resources at in the Dewey-Burdock area may be large, as opposed to the Staff's "moderate" finding. The Tribe therefore fails to explain how the Preliminary Assessment "paint[s] a seriously different picture of the environmental landscape" than that presented in the FSEIS or suggests there may be impacts affecting "the quality of the human environment in a significant manner or to a significant extent not already considered" in the FSEIS. *Hydro Resources*, LBP-04-23, 60 NRC at 448. Accordingly, the Tribe again fails to raise a genuine issue of law or fact, and the Board must reject its contention. *Vogtle*, 75 NRC at 533 n.53; 10 C.F.R. § 2.309(f)(1)(vi).

Finally, the Tribe incorrectly states that the Staff did not consider the possibility of CERCLA cleanup actions at the Dewey-Burdock site. Motion at 14. The Staff mentions this very possibility in Section 5.5.1 of the FSEIS:

There are no operating ISR facilities located within 80 km [50 mi] of the proposed site, which is the cumulative impacts surface water study area. Several abandoned open pits and overburden waste piles associated with past surface mining activities are located in the Burdock portion of the site (see SEIS Figure 3.2-3). Radiation surveys reveal that soils near old surface mines have higher than background radiation levels (see SEIS Section 3.12.1). Runoff from snowmelt and heavy rains may leach and transport contaminants from the waste piles associated with these mines to surface waters and wetlands in the Beaver Creek and Pass Creek watersheds (Powertech, 2009c). Water within the Beaver Creek watershed and Pass Creek watershed flows south into the Cheyenne River. The Cheyenne River empties into the Angostura Reservoir east of the proposed Dewey-Burdock ISR Project site. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, has been used to clean up uncontrolled or abandoned legacy uranium mines in western Colorado and eastern Utah. EPA is authorized to implement Superfund. Superfund site identification, monitoring, and response activities in South Dakota would be coordinated through SDDENR.

NRC-008-A-2 at 596. Accordingly, the Staff was aware of the possibility of CERCLA remediation involving the Darrow/Freezeout/Triangle area when conducting its NEPA review, and it informed the public of that possibility through the FSEIS.

In sum, the Tribe fails to show that the Preliminary Assessment is significant new information requiring the Staff to supplement the FSEIS. The Tribe therefore fails to raise a

genuine issue of law or fact, and the Board should reject its contention. 10 C.F.R.

§ 2.309(f)(1)(vi).

IV. Conclusion

The Board should deny the Tribe's motion to admit two new contentions.

Respectfully submitted,

/Signed (electronically) by/

Michael J. Clark

Michael J. Clark

Counsel for the NRC Staff

/Signed (electronically) by/

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Counsel for the NRC Staff

Dated at Rockville, Maryland
this 2nd day of December 2014

December 2, 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 New or Amended Contentions” via the NRC’s Electronic Information Exchange (EIE) on December 2, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on December 2, 2014.

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

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