

**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
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	Date: December 2, 2014
	)	
_____	)	

**POWERTECH (USA), INC. RESPONSE TO THE OGLALA SIOUX TRIBE MOTION FOR LEAVE TO SUBMIT NEW OR AMENDED CONTENTIONS**

On November 7, 2014, the Oglala Sioux Tribe (Tribe) submitted a Motion for Leave to File New or Amended Contentions to seek leave of the Atomic Safety and Licensing Board (hereinafter the “Licensing Board”) to admit two (2) new contentions based on the disclosure of two sets of data and/or documents: (1) disclosed borehole log data for the Dewey-Burdock *in situ* leach uranium recovery (ISR) Project (hereinafter the “Dewey-Burdock ISR Project”) and (2) a United States Environmental Protection Agency (EPA) Preliminary Assessment of the Darrow/Freezeout/Triangle Mine site pursuant to the Comprehensive Environmental Remediation Compensation and Liability Act (CERCLA) (hereinafter the “Preliminary Assessment”). In response to this Motion, Powertech (USA), Inc. (Powertech) hereby submits this Response in Opposition to the Tribe’s Motion and opposes admission of its proffered two new contentions for the reasons set forth below.

**I. PROCEDURAL HISTORY**

From August 19-21, 2014, the Licensing Board held an evidentiary hearing in Rapid City, South Dakota to hear argument and testimony regarding seven (7) admitted contentions in

this proceeding. In addition to hearing this argument and testimony, the Licensing Board also heard oral argument on procedural motions regarding the applicability of mandatory disclosure requirements under 10 CFR § 2.336 to borehole log data possessed by Powertech prior to submission of its United States Nuclear Regulatory Commission (NRC) combined source and 11e.(2) byproduct materials license application and additional borehole data acquired prior to or after the evidentiary hearing.

On September 8, 2014, the Licensing Board held that Powertech should disclose these borehole logs to both Consolidated Intervenors (CI) and the Tribe for review and for potential submission of supplemental testimony under Contention 3. Pursuant to a protective order amendment approved by the Licensing Board on September 12, 2014, CI and the Tribe were given access to paper borehole log data at Powertech's Edgemont office and were shipped DVD copies of all electronic logs acquired by Powertech for disclosure on September 12, 2014.

On October 9, 2014, the Tribe and CI submitted a motion requesting an extension of time within which to file supplemental testimony until January 9, 2015, on Powertech's disclosures dated September 12, 2014. Powertech opposed this motion and NRC Staff opposed this motion in part by stating that an extension of up to three (3) weeks would be acceptable. On October 22, 2014, the Licensing Board granted CI and the Tribe an additional thirty (30) days or until November 21, 2014, to submit additional testimony/exhibits on Contention 3. Thus, the deadline to submit additional testimony/exhibits on Contention 3 related to the borehole log data was extended thirty-eight (38) days from the original due date of October 14, 2014.

On October 14, 2014, NRC Staff submitted a Motion to Admit Testimony and Exhibits regarding Powertech's borehole log data disclosures. In that Motion, NRC Staff specifically notes that:

“Powertech’s recent disclosures largely support, and in no way contradict, the Staff’s findings in the FSEIS. These disclosures fail to support the Intervenor’s contentions, and they serve only to confirm that when preparing the FSEIS the Staff complied with the National Environmental Policy Act.”

NRC Staff Motion at 2.

The same day, the Tribe filed a Motion to Admit Additional Exhibits but did not file any additional supplemental testimony. The Tribe’s Motion consisted of a three (3) page document with claims that the submitted supplemental exhibits support specific points offered previously. The Tribe’s Motion also did not offer any supplemental argument or testimony showing why the disclosed data should result in modification of NRC’s record of decision (ROD) for the Project. On October 24, 2014, Powertech and NRC Staff submitted responses to the Tribe’s Motion to admit additional exhibits. On the same date, Powertech submitted a response to NRC Staff’s supplemental testimony and exhibits and concurred with NRC Staff’s conclusions regarding further evaluation of the borehole log data disclosures. Neither the Tribe nor CI filed a response to NRC Staff’s supplemental testimony and exhibits by the October 24, 2014, deadline.

On October 30, 2014, the Tribe submitted a motion to the Licensing Board requesting leave to submit a reply brief to Powertech’s and NRC Staff’s responses to the Tribe’s October 14, 2014, motion to submit additional exhibits. The focus of the Tribe’s motion was a request for leave to file a reply to Powertech’s and NRC Staff’s arguments on the admissibility of proposed Tribe Exhibits OST-025 and OST-026 pertaining to an EPA Preliminary Assessment. Further, on November 1, 2014, the Tribe submitted a reply to Powertech’s and NRC Staff’s responses without leave of the Licensing Board. On November 13, 2014, the Licensing Board denied the Tribe’s October 30, 2014, motion for leave to file a reply to Powertech’s and NRC Staff’s October 24, 2014, responses to the Tribe’s motion to admit additional exhibits. At the

same time, the Licensing Board admitted Exhibits OST-025 and OST-026 into evidence for Contention 3.

On November 7, 2014, the Tribe filed a motion requesting admission of two (2) new contentions based on NRC Staff's review of the disclosed borehole log data and the aforementioned EPA Preliminary Assessment. The Tribe claims that these two contentions should be admitted, because they satisfy the Commission's Rules of Practice for new or amended contentions filed after the submission of a hearing request. By this Response, Powertech respectfully requests that the Licensing Board deny the Tribe's Motion to admit two new contentions and that it close the record on Contention 3 after submission of responses by Powertech and NRC Staff to the Tribe's November 21, 2014, Motion to Admit Additional Testimony and Exhibits regarding the borehole log data.

## **II. STATEMENT OF LAW**

Typically, NRC 10 CFR Part 2 regulations at Part 2.309(f)(1) delineate requirements for admissible contentions. However, a petitioner may file new or amended contentions based on documents admitted to the administrative record after submission of an applicant's license/license amendment/license renewal application or documents such as an FSEIS. *See* 10 CFR § 2.309(f)(2). NRC's standards for admitting new or amended contentions based upon documents such as the identified data and documents in the Tribe's instant Motion are found at 10 CFR Part 2.309(f)(2) which, in turn, refers back to 10 CFR Part 2.309(c)(1)(i-iii) standards for admission.

Part 2.309(c) entitled *Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions* states that a request to admit new or amended contentions must satisfy three specific requirements: "(1) the

information upon which the filing is based was not previously available; (2) the information upon which the filing is based is materially different from information previously available; and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information.” 10 CFR § 2.309(c)(1)(i-iii) (2013). Each of these requirements must be satisfied for a new or amended contention to be admitted. Further, it has been determined that, notwithstanding that an intervenor’s contentions are based on NRC Staff’s FSEIS, the intervenor still bears the responsibility of demonstrating that the contentions merit admission. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000). The intervenors carry the burden of showing that any late-filed contentions are admissible. *See Amergen Energy Company, LLC*, (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 260-61 (2009). A Licensing Board should not need to sift through the administrative docket to determine if information is new and how it is materially different from information previously available. *Cf Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 46 (2001) (“The Commission should not be expected to sift unaided through large swaths of earlier briefs filed before the Presiding Officer in order to piece together and discern the intervenors’ particular concerns or the grounds for their claims.”).

An intervenor’s time to submit contentions tolls when the information upon which a contention is based first becomes available and not later when NRC Staff issues its DSEIS. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Facility), LBP-00-27, 52 NRC 216 (2000). An intervenor must submit a new contention “in a timely fashion based on the availability of the subsequent information.” 10 CFR § 2.309(c)(1)(iii). Generally, a “good cause” finding based on “new information” can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. *See Yankee Atomic Electric Co.*

(Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996). The finding of good cause for the late filing of contentions is related to the total previous unavailability of information. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), LBP-83-39, 18 NRC 67, 69 (1983). A contention based on an FSEIS which contains no new information relevant to the contention, lacks good cause for filing. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982). A submitted document, while perhaps incomplete, may be enough to require that a contention related to it be filed promptly. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), LBP-83-39, 18 NRC at 69 (1983).

An intervenor must also offer a contention that is not based on an incomplete or inaccurate reading of an FSEIS. *Cf 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 the Safety Analysis Report). An intervenor also cannot proffer an admissible contention that merely alleges deficiencies in an FSEIS; but rather, it must identify the specific analysis in the document and explain how it is incorrect. *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) (“An expert opinion that merely states a conclusion (*e.g.*, the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate[.]”).

With respect to NEPA’s “hard look” requirement, an FSEIS should represent a “hard look” at potential impacts by NRC Staff. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). But, this “hard look” standard does not require an assessment of every conceivable potential environmental impact in an FSEIS. *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9<sup>th</sup> Cir. 2004) (*citing NoGWEN*

*Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9<sup>th</sup> Cir. 1988)). The “hard look” requirement requires only that NRC Staff provide “[a] reasonable, thorough discussion of the significant aspects of the probable environmental consequences.” *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974).

With respect to supplementing an environmental impact statement-level document, such as an FSEIS, the party offering the new contention has the burden of presenting information sufficient to show that there is a genuine issue regarding whether NRC Staff should supplement such document. *See* 10 CFR § 51.92; *see also In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-04-33, 60 NRC 581, 659 (2004). In order to trigger the requirement for supplementation, the party offering the contention must explain why the new information presents a significantly different picture of the environmental landscape. *See In the Matter of Southern Nuclear Operating Co.* (Vogle Electric Generating Plant, Units 3 and 4), 75 NRC 523, 533 n. 53 (April 16, 2012). NRC Staff does not need to supplement an EIS where some new information “amounts to mere additional evidence supporting one side or the other of a disputed environmental effect.” *Vogle*, CLI-12-11, 75 NRC at 533 n.53. The test for supplementation under Part 51.92 represents how NRC Staff conducts its NEPA “hard look” analysis after the Part 51 environmental review documents (e.g., FSEIS) is issued. *See In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), 60 NRC 441, 448 (October 22, 2004).

### **III. ARGUMENT**

For the reasons set forth below, Powertech respectfully requests that the Licensing Board deny the Tribe’s November 7, 2014, Motion requesting admission of the two (2) aforementioned new contentions. As a general matter, the Tribe’s Motion is not timely based on the timing of

Powertech's disclosure of the borehole log data. The Licensing Board's November 2, 2010, Scheduling Order at page 5 specifically states that parties have thirty (30) days from the disclosure of previously unavailable information to file for new or amended contentions. This practice typically has been followed by CI and the Tribe throughout this proceeding with respect to newly available documents such as the draft (DSEIS) and final (FSEIS) SEISs, as evidenced by pleadings requesting new or amended contentions on both documents. However, in the instant case, The Tribe submitted this request to admit new contentions based on borehole log data that was disclosed more than thirty (30) days prior to the submission of the Tribe's Motion.

Pursuant to the Licensing Board's September 8, 2014, Order and the execution of the current protective order in this proceeding, Powertech made the borehole log data available in paper form on September 12, 2014, and shipped DVD versions of electronic borehole log data to CI and the Tribe on the same day. Thirty (30) days after disclosure of this data, the aforementioned November 2, 2010, Licensing Board Scheduling Order requires that any motion for admission of new or amended contentions should have been filed on October 14, 2014. Neither CI nor the Tribe attempted to justify their late filing in the instant Motion, except to state that it was the first time Intervenors had been informed of an alleged "spot check" review of the disclosed borehole log data by NRC Staff. *See* Tribe Motion at 4. However, as has been stated on numerous occasions by the Licensing Board and the Tribe, evaluation of the admission of contentions is not based on the merits of the contention, but rather the satisfaction of Part 2.309(f) requirements. *See e.g., Powertech (USA), Inc. (Dewey-Burdock ISR Project), LBP-10-16 (August 5, 2010).* The Tribe offers no legal precedent to justify admission of new contentions after the deadline prescribed in the November 2, 2010, Scheduling Order, nor did the Tribe ask

for leave to do so in an untimely fashion. Thus, the Licensing Board should reject the Tribe's proffered new contentions as untimely.

This argument is further strengthened by the fact that NRC Staff expert witnesses have concluded that the review of this borehole log data further supports the conclusions reached in the Safety Evaluation Report (SER) and the FSEIS. This testimony demonstrates that there is no materially different information upon which to substantiate a new contention based on the borehole log data, because none of the ROD decision documents is being altered to either support or contest the issuance of Powertech's NRC license or any of the license conditions therein. Had NRC Staff chosen to supplement or amend any aspects of the ROD or its decision documents, then the Tribe likely could show the availability of new or materially different information. However, in the instant case, NRC Staff has not changed any aspect of the ROD and, thus, the Tribe cannot argue that there is new or materially different information available in NRC Staff's supplemental testimony.

Further, as stated above, the Tribe attempts to argue that the alleged "spot check" methodology performed by NRC Staff during its review of the disclosed borehole log data served as new or materially information because "[t]he proffer was the first time NRC Staff had revealed that its analysis relied on a random "spot check"...." Tribe Motion at 4. This is untrue as Powertech submitted an appropriate set of borehole logs to support its cross-sections and to adequately characterize the environment for NRC Staff's environmental review. NRC Staff's review of this representative set of borehole logs and additional logs submitted pursuant to NRC Staff's requests for additional information (RAI) in Powertech possession during the licensing process demonstrates that it based its final licensing conclusions on a representative set of borehole logs and not the entirety of available borehole logs. Since the Commission's

environmental review regulations only require a characterization of the affected environment and not a *complete* review of all available data, the fact that NRC Staff reviewed representative logs to confirm its final licensing conclusions is not new or materially different information. Thus, the Tribe has failed to proffer these contentions in a timely fashion, as the instant Motion was filed after the due date of October 14, 2014.

**A. THE TRIBE’S MOTION TO ADMIT A NEW CONTENTION BASED ON ADDITIONAL BOREHOLE LOG DATA SHOULD BE DENIED**

Should the Licensing Board determine that the Tribe’s proffered new contentions have been timely offered, the Tribe’s proffered new contention based on the disclosure of borehole log data should not be admitted to this proceeding. First and foremost, the Tribe’s Motion and the arguments levied therein on this borehole log data do not rise to the level of a new contention. As stated by the Licensing Board, the disclosure of Powertech’s borehole log data is relevant to Contention 3. *See* September 8, 2014, Post-Hearing Order at 10. The Tribe has expressly acknowledged this fact by supplying supplemental testimony and exhibits in its November 21, 2014 Motion attempting to demonstrate how these logs support its arguments under Contention 3. Thus, the Tribe has acknowledged that its review of the borehole logs fits squarely within the parameters of an already admitted contention (Contention 3), and it is not necessary to admit a new contention based on information that has already been deemed relevant to Contention 3. This argument is no different from the arguments offered by the Tribe within the parameters of the current Contention 3. Given that the Tribe has been offered more than ample time to review these borehole logs and to submit supplemental testimony within the scope of Contention 3, admission of this new contention will serve no purpose other than to unnecessarily delay the completion of this proceeding.

The Tribe rests its argument regarding new or materially different information on NRC Staff's alleged "spot check" of Powertech's additional disclosed borehole log data. As stated above, this type of review of representative borehole logs is not new or materially different information, as this review methodology has been practiced by NRC Staff since the submission of Powertech's license application and throughout its review thereof culminating in the issuance of Powertech's NRC license. Indeed, given the requirements under 10 CFR Part 51 and NUREGs 1569 and 1748 to adequately characterize the affected environment, this type of review is proper to satisfy such requirements. This type of review is consistent with the long-understood legal maxim cited previously that, when faced with uncertainty, NEPA only requires "reasonable forecasting." In short, NEPA allows agencies "to select their own methodology as long as that methodology is reasonable."<sup>1</sup> Additionally, it is well-understood that NEPA allows agencies the flexibility to determine how much data is enough to make a determination on final agency action such as the issuance of Powertech's NRC license. *Louisiana Energy Servs, L.P.*, CLI-98-3, 47 NRC at 103. This methodology was reasonable to support issuance of the license application and, accordingly, is reasonable for review of the additional borehole log data. This does not rise to the level of new and significant or materially different information.

In any event, the Tribe's argument for admission of this new contention based on the "hard look" standard under NEPA is without merit. Rather than arguing the "hard look" standard, the Tribe should be discussing the 10 CFR § 51.92 standard for "new and significant" information. Under Part 51.92(a)(2), the requirements for a supplement to an environmental impact statement or, in this case, an FSEIS is that "[t]here are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its

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<sup>1</sup> See *The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (finding that an EIS need not be based on the "best scientific methodology available").

impacts.” 10 CFR § 51.92(a)(2). As stated above, the borehole log data are not new or significant information that would give rise to admission of a new contention or to otherwise cast doubt on the expert testimony offered by NRC Staff, as it is encompassed squarely within the parameter of Contention 3. Thus, the Tribe has failed to show that any supplement to the FSEIS is required.

Finally, when inviting NRC Staff to determine whether the borehole log data reinforces what they already reviewed in the FSEIS, the Licensing Board summarized the circumstances as follows:

“On the other hand, if the data...merely reinforces what’s already been reviewed or reviewed by the Staff and I guess the company, well then I’ll hear from them that...upon further additional review, there’s nothing that will come in.”

*See* Tr. at 1321-1322.

Based on this invitation, NRC Staff’s motion and supplemental testimony followed the Licensing Board’s request appropriately. As shown in their submission, NRC Staff confirmed the use of a variety of methods (e.g., spot checking drill hole locations to verify that position information in the license application is accurate, spot checking digitized and paper drill hole logs to evaluate whether structure and isopach maps of the Fuson Shale in the license application are accurate, and evaluating closely spaced drill hole logs in selected portions of the Dewey-Burdock ISR Project site based on the Tribe’s and CI’s expressed concerns to evaluate whether there is evidence of faults, fractures or breccia pipes) to determine that its SER and FSEIS findings did not require amendment or supplementation pursuant to 10 CFR § 51.92. Should the Tribe have deemed it appropriate to argue the merits of NRC Staff’s supplemental testimony, then it could have offered answering testimony and/or exhibits ten (10) days after the date of NRC Staff’s submission. Indeed, based on a lack of response on this matter, it appears again that the Tribe is

attempting to file additional supplemental testimony on these data at a much later date by the artifact of admission of a new contention. Therefore, the Licensing Board should deny the Tribe's Motion to admit the proffered new contention on Powertech's borehole log data.

**B. THE TRIBE'S MOTION TO ADMIT A NEW CONTENTION BASED ON EPA'S PRELIMINARY ASSESSMENT SHOULD BE DENIED**

The Tribe's Motion also attempts to admit a new contention based on the aforementioned EPA Preliminary Assessment and claims that its substance constitutes grounds for a new contention. As stated previously, the Tribe must demonstrate that the data or information giving rise to a newly admitted contention on the Preliminary Assessment represents materially different information from that available at the time the new information was made available. Initially, the Preliminary Assessment itself specifically states that it relies on data and information provided by Powertech in its license application. *See* Tribe Exhibit OST-026 at 8. These data and information already have been subject to several sets of written and oral testimony and legal argument over the past five (5) months and cannot be considered to be "new" within the scope of the Commission's Rules of Practice for new contentions.<sup>2</sup>

EPA analyses and conclusions rendered in this Preliminary Assessment also cannot be considered to be "significant" under the standard for supplementing an environmental impact statement under 10 CFR § 51.92(a)(2). While the Preliminary Assessment is considered to be a "final" document for purposes of publication to the public, it is nothing more than a "preliminary" assessment of the potential for further investigation into possible CERCLA regulation. The conclusions in this report are likely to evolve and change over time given that its final conclusion specifically indicates that further investigation is warranted. As discussed by

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<sup>2</sup> To the extent that the Tribe alleges that the Preliminary Assessment is new information with respect to the substance of already admitted contentions, such allegations should be dismissed as the Tribe has failed to satisfy the 10 CFR § 2.326 standards for re-opening the record on such contentions.

the Commission in *Louisiana Power & Light Co.*, a draft document does not provide particularly useful support for a motion to re-open the record, as it is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. *See* ALAB-812, 22 NRC 5, 43 n.47 (1985). Given that this Preliminary Assessment is an initial step towards an actual CERCLA investigation and not an actual proposal to list this site on the National Priorities List (NPL), which potentially could be the subject of a final yet complicated future analysis and conclusion of a CERCLA investigation, it is more likely than not that any conclusions regarding conditions at or near the Dewey-Burdock ISR Project site will evolve and change over time. Therefore, the Preliminary Assessment should not be considered to be “significant” under 10 CFR § 51.92(a)(2).

The Tribe also argues that NRC should have involved EPA as a “cooperating agency” in the development of the FSEIS. The Tribe also alleges that “NRC did not invite EPA to provide its expert analysis of the mine contamination within the project area as part of the NRC-led NEPA process.” Tribe Motion at 4. As stated in previous pleadings and testimony, EPA was consistently involved in the development of the DSEIS and the finalization of the FSEIS, as well as offering public comments on the DSEIS and final concurrence on the FSEIS after its issuance. *See e.g.*, NRC Staff Exhibit NRC-174 at 6.<sup>3</sup> This argument also ignores the fundamental fact that the Commission, which has delegated review and approval authority for the issuance of Atomic Energy Act (AEA) licenses for source material recovery, is the expert agency for the regulation of AEA materials such as source material and is tasked with express implementation and enforcement authority under the Uranium Mill Tailings Radiation Control Act of 1978

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<sup>3</sup> “We would further note that the EPA submitted public comments on the Draft SEIS for the Dewey-Burdock Project (see Ex. NRC-008-B-2, Appendix E, comment document 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 abandoned uranium mines.”

(UMTRCA) of EPA's *generally applicable standards* for the regulation of 11e.(2) byproduct material. Inherent in this expert authority is the evaluation of potential impacts from areas within and outside of a proposed project site. This is evidenced by several references in the FSEIS (NRC Staff Exhibit NRC-008) to projects or other areas of review outside a proposed license boundary for cumulative impacts (i.e., FSEIS Section 5 entitled *Cumulative Impacts* (NRC Staff Exhibit NRC-008-A-2 at 263-328)). Indeed, NRC Staff's review of Powertech's license application assessed the areas evaluated by NRC Staff in its review, and this is further substantiated by the fact that the Preliminary Assessment is based on information in Powertech's NRC license application. Thus, the Tribe's claims regarding EPA's involvement in the development of the FSEIS and that it should have been involved in NRC Staff's evaluation of the areas assessed in the Preliminary Assessment are without merit.

Finally, the Tribe bases its argument on the fact that NRC Staff failed to assess potential cumulative impacts associated with the potential NPL listing of the Darrow/Freezeout/Triangle Uranium Mine site under CERCLA. The listing of a site on the NPL is a regulatory action that puts remediation of a particular site under the jurisdiction of EPA under Superfund. However, despite this potential regulatory classification, it does not change the environmental characteristics of these land areas, which were assessed in NRC Staff's review of the Powertech license application. Further, cumulative impact analyses are designed to assess potential cumulative impacts from past, ongoing, and *reasonably foreseeable future* actions. *See* NRC Staff Exhibit NRC-008-A-2 at 263. Listing of this site on the NPL cannot now be classified as a reasonably foreseeable future action, as the conclusion of the Preliminary Assessment is that further investigation is required and not that listing on the NPL is likely. Thus, the admission of this contention based on speculative cumulative impacts is without merit.

**IV. CONCLUSION**

For the reasons discussed above, Powertech respectfully requests that the Licensing Board deny the Tribe's Motion to admit its two (2) proffered new contentions.

Respectfully submitted,

**/Signed (electronically) by/ Christopher S. Pugsley**

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Dated: December 2, 2014

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
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	)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	)	
	)	Date: December 2, 2014
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(Dewey-Burdock In Situ Uranium Recovery	)	
Facility)	)	
_____	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **“POWERTECH (USA), INC. RESPONSE TO OGLALA SIOUX TRIBE MOTION FOR LEAVE TO SUBMIT NEW OR AMENDED CONTENTIONS”** in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 2nd day of December 2014, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in  
accord with 10 C.F.R. § 2.304(d)/  
Christopher S. Pugsley, Esq.**

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Dated: December 2, 2014