

December 19, 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 BOARD'S DECEMBER 10, 2014 ORDER**

**I. Introduction**

The Nuclear Regulatory Commission (NRC) Staff responds to the Board's December 10, 2014 order.<sup>1</sup> In that order, the Board directed the parties to file legal memoranda addressing whether the exhibits the Oglala Sioux Tribe filed on November 21, 2014 should be accorded nonpublic status. The Board admitted the Oglala Sioux Tribe's exhibits as nonpublic until it resolves this issue.

The exhibits in question, Exhibits OST-029 through OST-041, relate to well log data that Powertech disclosed to the parties on September 13, 2014. Exhibit OST-029 is supplemental testimony from Dr. Hannan LaGarry addressing the well log data. Exhibits OST-030 and OST-041 are the headers of geophysical logs included in the data set Powertech disclosed to the parties. Exhibits OST-031 through OST-040 are drillers' notes from the same data set. Except for Exhibit OST-029, Dr. LaGarry's testimony, these exhibits are currently covered by the protective order in this hearing, as modified by the Board on September 12, 2014.<sup>2</sup>

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<sup>1</sup> Order (Admitting Additional Exhibits, Closing the Record on Contention 3 and Setting Briefing Dates) (December 10, 2014).

<sup>2</sup> Order (Granting Joint Motion to Amend Protective Order) (September 12, 2014) at 3. In its motion to admit Exhibits OST-029 through OST-041, the Oglala Sioux Tribe stated that it believes its exhibits should be

## II. Applicable Law

NRC regulations govern when information submitted by a licensee may be withheld from public disclosure. The regulation most relevant here is 10 C.F.R. § 2.390. This regulation incorporates the statutory exemptions from disclosure specified in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552. Among the information that may be exempt from disclosure is information protected by FOIA Exemption 4 or Exemption 9. Exemption 4 concerns “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 10 C.F.R. § 2.390(a)(4). Exemption 9 pertains to “geological and geophysical information and data, including maps, concerning wells.” 10 C.F.R. § 2.390(a)(9).

To determine whether information is protected by Exemption 4, the NRC considers the following factors:

- (i) Whether the information has been held in confidence by its owner;
- (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
- (iii) Whether the information was transmitted to and received by the Commission in confidence;
- (iv) Whether the information is available in public sources;
- (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

10 C.F.R. § 2.390(b)(4).

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posted publicly in the NRC’s Agencywide Documents Access Management System (ADAMS). Motion at 2. The Tribe also stated, however, that it was filing the exhibits “under seal to allow Powertech and/or NRC Staff the opportunity to file a motion seeking protected status. . . . To the extent no such protections are sought, the Tribe requests the testimony and exhibits be posted in the NRC ADAMS public database.” Motion at 3. Although the Tribe believes its exhibits should be disclosed publicly, Exhibits OST-030 through OST-041 are unquestionably covered by the Board’s protective order, because they directly reproduce documents described in the order. Order at 3. Accordingly, rather than attempting to place the burden on Powertech and the Staff to “file a motion seeking protected status” for these documents, the Tribe should have filed a motion to modify the Board’s protective order to *exclude* Exhibits OST-030 through OST-041.

While the NRC does not have similarly detailed criteria for applying Exemption 9, there is some legislative and judicial guidance in this area. In one federal district court case, the court suggested that Exemption 9 covers information not only about wells, but exploratory findings *related to wells*, such as information from drill holes. *Black Hills Alliance v. U.S. Forest Serv.*, 603 F. Supp. 117, 122 (D.S.D. 1984) (citing House Report showing the exemption was developed based in part on the concern that “disclosure of seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration”) (legislative citation omitted). The court in *Black Hills Alliance* also held, however, that Exemption 9 does not extend to generalized well data, such as the number, locations, and depths of proposed drill holes. The court found that such geological exploration information “falls short of the technical and scientific information envisioned by Congress.” *Id.* On the other hand, as summarized in the Department of Justice’s FOIA Guide, other court decisions suggest that the exemption may be somewhat broader: “A survey of all of the Exemption 9 cases decided to date suggests that its present boundaries are defined neither by the type of well nor the type of information. In fact, what is clear from the Exemption 9 decisions thus far is that courts have applied it to all types of wells and to various information about these wells.” *Freedom of Information Act Guide* (May 2004) (available at <http://www.justice.gov/oip/foia-guide-2004-edition-exemption-9>) (footnotes omitted).

### **III. Powertech’s August 2014 Affidavits**

Powertech has submitted two affidavits addressing the well log data that it disclosed under the Board’s protective order. In an August 12, 2014 affidavit, Richard Clement, Powertech’s President and Chief Executive Officer, stated that Powertech should not be required to disclose its well log data to the public:

The second issue is the confidential nature of the additional data. Powertech has paid money for the data acquired to date and therefore it is an asset held by the company. It is data that can be sold again (has value) and therefore is worth protecting through a confidentiality agreement.

Affidavit at 4, ¶ 9. After the Board ordered Powertech to disclose the well log data to the parties, Powertech submitted a second affidavit. In his August 26, 2014 affidavit, John Mays, Powertech's Chief Operating Officer, specifically addressed the criteria for withholding Powertech's well log data under FOIA Exemption 4. Affidavit at 3–4, ¶ 11. In particular, Mr. Mays explained how Powertech might be economically harmed if it were ordered to publicly disclose the well log data. Affidavit at 4, ¶ 11.vii–11.x.

In their affidavits, both Mr. Clement and Mr. Mays focused on whether the electric logs or geophysical data Powertech acquired should be disclosed publicly. *E.g.*, Clement Affidavit at 3–4, ¶¶ 4, 6–8; Mays Affidavit at 2, ¶ 8. They did not specifically address the drillers' notes included within Powertech's well log data. At the time, however, Mr. Clement and Mr. Mays were responding to the Intervenor's arguments that Powertech's *electric logs* are relevant to Contention 3. See Mays Affidavit at 2, ¶ 7 ("The intervenors have stated that the data are relevant to accurately assess the potential for uncontrolled groundwater migration since they contain electric logs not previously evaluated by the NRC"). In other words, Mr. Clement and Mr. Mays likely did not mention drillers' notes in their affidavits simply because, until Dr. LaGarry's recent testimony (Ex. OST-029), the Intervenor had not argued that drillers' notes were relevant to the issues in Contention 3.

#### **IV. Discussion**

##### **A. Exhibits OST-030 and OST-041 Appear To Be Covered by Both Exemption 4 and Exemption 9**

Exhibits OST-030 and OST-041 are the headers of two electric or geophysical logs included in Powertech's data set. In his affidavit, Mr. Mays states why Powertech believes these types of logs should remain non-public. Affidavit at 4, ¶ 11. Mr. Mays' statement tracks 10 C.F.R. § 2.390(b)(4), which lists the criteria the NRC must consider when a licensee requests that the NRC Staff withhold information from public disclosure as proprietary or confidential information. Accordingly, based on Mr. Mays' affidavit, the NRC would appear to have a valid basis for withholding Exhibits OST-030 and OST-041 from public disclosure under FOIA Exemption 4.

FOIA Exemption 9 also appears to provide a basis for withholding Exhibits OST-030 and OST-041 from public disclosure. These exhibits both contain geophysical data, thus falling squarely within the exemption, which applies to “geological and geophysical information and data, including maps, concerning wells.” 10 C.F.R. § 2.390(a)(9). These exhibits do not merely include generalized well data, such as the number and location of drill holes, but contain technical information and exploratory findings. This would appear to bring the exhibits within the scope of Exemption 9. *Black Hills Alliance*, 603 F. Supp. at 122.

**B. The Staff Is Unable to Determine whether Exhibits OST-031 through OST-040 Are Covered by Exemption 4**

Exhibits OST-031 through OST-040 are drillers' notes from Powertech's set of well log data. As stated above, in their August 2014 affidavits neither Mr. Clement nor Mr. Mays specifically addressed whether drillers' notes should be protected from public disclosure. Because the Intervenor had to that point called primarily for the disclosure of electric/geophysical logs, Mr. Clement and Mr. Mays addressed those logs in their affidavits. The NRC Staff thus has not heard Powertech's arguments on whether the drillers' notes, standing alone, should be withheld from public disclosure under Exemption 4. In particular, the Staff has not heard from Powertech regarding the competitive harm, if any, that might result from public disclosure of the drillers' notes. The Staff therefore takes no position at this time on whether Exhibits OST-031 through OST-040 are covered by Exemption 4.

**C. Exemption 9 May Provide a Basis for Withholding the Information in Exhibits OST-031 through OST-040**

As the Staff explained in its testimony of December 9, 2014, drillers' notes differ from geophysical logs in several important ways. NRC Staff's Answering Testimony (Ex. NRC-175) at A.6–A.8. Whereas geophysical logs are produced by taking measurements with calibrated instruments, drillers' notes reflect the observations of the drillers themselves, who may not even be geologists. *Id.* at A.7. The quality of these notes therefore varies depending on the particular driller's knowledge of the local subsurface geology, the quality of the cuttings, and the driller's

experience in interpretation. *Id.* For these and other reasons, drill cuttings cannot be relied upon to evaluate stratigraphic and structural features that might be present at the location being drilled. *Id.* It is therefore unclear whether the drillers' notes submitted as Exhibits OST-031 through OST-040 can be considered the type of "technical and scientific information" that the court in *Black Hills Alliance* found to be covered by Exemption 9. 603 F. Supp. at 122.

On the other hand, the drillers' notes are exploratory in nature, and they provide data about the geologic characteristics of specific drill holes, not merely generalized data. As the court in *Black Hills Alliance* noted, Congress enacted Exemption 9 in response to concern that the "disclosure of seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration"). *Id.* Furthermore, the case law concerning Exemption 9, although admittedly sparse, suggests that other courts may interpret the exemption more broadly than the court in *Black Hills Alliance*, so that it covers even non-technical information concerning wells. See <http://www.justice.gov/oip/foia-guide-2004-edition-exemption-9> ("In fact, what is clear from the Exemption 9 decisions thus far is that courts have applied it to all types of wells and to various information about these wells.").

In sum, there may be a legal basis for withholding Exhibits OST-031 through OST-040 under Exemption 9. The Staff acknowledges, however, that the case law concerning this exemption is neither well developed nor focused on the precise issue raised by drillers' notes.

**D. Exhibit OST-029 Does Not Appear To Be Covered by Either Exemption 4 or Exemption 9**

Exhibit OST-029 is Dr. LaGarry's testimony addressing Powertech's well log data. In his testimony Dr. LaGarry offers his opinion on certain information in Exhibits OST-030 through OST-041. Although Dr. LaGarry refers to the geophysical data and drillers' remarks in these exhibits, he does so generally. For example, although Dr. LaGarry paraphrases certain drillers' remarks, he does not provide the specific locations of the drill holes to which the remarks refer. Nor does Dr. LaGarry divulge specific geophysical data, such as resistivity readings. At most, Dr.

LaGarry's testimony appears to provide only generalized information concerning drill holes. The Staff finds nothing in the August 2014 affidavits from Mr. Clement or Mr. Mays suggesting that disclosure of this type of information would cause Powertech competitive harm or that this information meets the other requirements for withholding under FOIA Exemption 4. Nor do Dr. LaGarry's generalized statements appear to qualify for withholding under FOIA Exemption 9. *Black Hills Alliance*, 603 F. Supp. at 122. Therefore, Dr. LaGarry's testimony (Ex. OST-029) should be made publicly available.

**E. The Tribe Has Not Shown that Powertech or the Staff Waived Any Otherwise Applicable Exemption**

In its motion to admit Dr. LaGarry's testimony (Ex. OST-029) and Exhibits OST-030 through OST-041, the Tribe states:

The testimony and exhibits are offered to address inadequacies and omissions in NRC Staff and Powertech analyses and conclusions that are based on borehole logs and information Powertech provided in its application and which are already included in the hearing record.

Motion at 2. The Tribe appears to be suggesting that its testimony and exhibits should be made publicly available because they merely duplicate information that is already in the public hearing record. If that is the Tribe's argument, it fails to support its argument by citing the information already in the record and showing why the exhibits it now seeks to introduce duplicate that information. The Tribe also fails to explain why, if the information is already in the record, it did not simply submit the publicly available versions of its exhibits as evidence.

To the extent the Tribe is instead arguing that Powertech's geophysical logs and drillers' notes should be made publicly available because the boreholes to which they refer have been identified publicly, the Tribe overlooks the distinction drawn by *Black Hills Alliance*. There, the court distinguished between generalized well data, such as the number and locations of proposed drill holes, and the "technical and scientific information envisioned by Congress" as falling within Exemption 9. 603 F. Supp. at 122. In other words, there is no inconsistency between Powertech disclosing generalized borehole data in its application and seeking to maintain as confidential the

technical data and exploratory findings taken from those boreholes. To the contrary, according to *Black Hills Alliance*, this would be the proper approach to invoking Exemption 9.

**V. Conclusion**

The Board should clarify that Exhibits OST-030 and OST-041 remain covered by the Board's protective order and by the non-disclosure agreements the parties' representatives have signed in this proceeding. The Board should also clarify that Exhibit OST-029 does *not* fall under the Board's protective order. While there appears to be a potential basis for keeping Exhibits OST-031 through OST-040 covered under the protective order, the Board may need to seek additional information to determine whether FOIA Exemption 4 or Exemption 9 applies to these exhibits.

Respectfully submitted,

*/Signed (electronically) by/  
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*/Signed (electronically) by/  
Patricia A. Jehle  
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Dated at Rockville, Maryland  
this 19<sup>th</sup> day of December 2014

December 19, 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 Board Order of December 10, 2014” via the NRC’s Electronic Information Exchange (EIE) on December 19, 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 19, 2014.

***/Signed (electronically) by/  
Michael J. Clark***

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