

November 4, 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 FOR LEAVE TO SUBMIT REPLY BRIEF**

The NRC Staff responds to the Oglala Sioux Tribe's motion for leave to submit a reply brief. The Tribe seeks to reply to the Staff's and Powertech's responses to its October 14, 2014 motion to submit additional exhibits. In particular, the Tribe seeks to reply to the Staff's and Powertech's arguments regarding the admissibility of two documents from the U.S. Environmental Protection Agency (EPA). These documents, which the Tribe seeks to introduce as Exhibits OST-025 and OST-026, relate to a Preliminary Assessment of the Darrow/Freezeout/Triangle mine area, which is partially within the Dewey-Burdock site.

The Staff opposed the Tribe's motion to add the EPA documents as exhibits. The Staff opposed the motion because the Tribe failed to explain how the EPA documents are relevant to the admitted contentions. Staff Response at 2. The Staff also submitted testimony addressing the EPA documents and explaining that these documents do not call into question the Staff's analysis in the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock Project. Ex. NRC-174.

In its current motion, the Tribe acknowledges that a party does not have a right to reply to another party's answer to its motion. 10 C.F.R. § 2.323(c). The Board may, however, grant a party the right to file a reply brief "in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks

leave to reply.” *Id.* The Tribe argues here that it could not reasonably have anticipated that the Staff and Powertech would object to admission of the EPA documents on grounds of relevance, or that the Staff would submit testimony on these documents. Motion at 2.

The Board should reject the Tribe’s arguments. The parties have been arguing about the relevance of documents for the past two-and-a-half months.<sup>1</sup> Thus, the Tribe could hardly be surprised that either the Staff or Powertech would object to new evidence on this basis. Furthermore, relevance is a foundational requirement for admitting evidence in a hearing. 10 C.F.R. § 2.337(a). Accordingly, the Tribe should not have been surprised when the Staff and Powertech cited this very requirement when objecting to the Tribe’s motion to admit the EPA documents as exhibits.

Equally unavailing is the Tribe’s argument that, during the hearing, the “Board admitted hundreds of exhibits based on a stated lack of objection from each party.” Reply Brief at 2. The Staff did not object to those exhibits because, in either their testimony or statements of position, the other parties explained how the exhibits related to the admitted contentions. By contrast, in its October 14, 2014 motion, the Tribe failed to similarly connect the EPA documents to its contentions.

Nonetheless, the Staff takes no position on the Tribe’s motion to file a reply brief. The Staff takes no position on this issue because the Tribe apparently did not receive the Preliminary Assessment until October 14, 2014, the same day it filed its motion to admit the two EPA documents into evidence. Motion at 2. Although the Tribe joined its motion to admit the EPA documents with its motion to admit other documents into evidence,<sup>2</sup> the Tribe arguably

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<sup>1</sup> These arguments concerned well logs that Powertech recently acquired, Powertech’s draft Avian Management Plan, Powertech’s Avian Take Permit Application, and a July 2014 letter from the U.S. Bureau of Land Management (BLM) concerning Powertech’s Plan of Operations for the Dewey-Burdock Project.

<sup>2</sup> October 14, 2014 was the deadline for the parties to submit testimony and additional exhibits on the well log data, Take Permit Application, and BLM Letter. Post-Hearing Order (September 8, 2014) at 13, 19.

could have separated the two motions, allowing itself additional time to explain how the EPA documents are relevant to its admitted contentions.<sup>3</sup> While separating the two motions would not have given the Tribe the right to reply to the other parties' answers, this approach could have allowed the Tribe to present its arguments in more detail, as it seeks to do now.

Setting aside the Tribe's motion to file a reply brief, and turning to the reply brief itself, the Tribe still fails to show that the EPA documents are relevant to any admitted contention. The Tribe cites the Preliminary Assessment to argue that "additional sampling and data collection is warranted to determine the extent of, and hydrogeologic pathways for, existing and future contamination." Reply Brief at 5 (citing Preliminary Assessment at 30). On pages 30–31, the Preliminary Assessment states:

### **Conclusions**

Additional surface soil sampling within the Site appears warranted to better characterize and define source areas. Additional data could be used to quantify source materials within the area of the Site, and volumes of waste piles should be measured more accurately. Additional sampling of surface water and sediment also appears warranted to determine if releases from the Site are impacting downstream sensitive environments (i.e., wetlands and possible fish habitat).

The additional sampling and data collection mentioned here pertain to soil, surface water, and sediment. None of these issues, however, forms the basis for an admitted contention. In particular, Contentions 2 and 3 pertain to *groundwater* quality and confinement, not surface water quality and confinement.<sup>4</sup> Accordingly, the Tribe again fails to show the Preliminary Assessment is relevant to its admitted contentions.

The Tribe does not otherwise support its argument that the EPA documents are relevant to the admitted contentions. To the contrary, the Tribe states that it "will provide the substantive arguments [regarding the EPA documents] at the appropriate time, Powertech and NRC Staff

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<sup>3</sup> See 10 C.F.R. § 2.323(a)(2) ("All motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.").

<sup>4</sup> Memorandum and Order (Ruling on Proposed Contentions Related to the Final Supplemental Environmental Impact Statement) (April 28, 2014) at 12, 14.

can counter, and the Board is free to give what weight it will to those arguments at that time.” Reply Brief at 5. The Tribe appears to be suggesting that, should the Board admit the EPA documents into evidence, the Tribe will address these documents in its proposed findings of fact. In a Subpart L hearing, however, a party is supposed to use position statements and testimony, not its proposed findings of fact, to initially explain how the evidence supports its case. 10 C.F.R. § 2.1207(a)(1), (a)(2). Furthermore, in a Subpart L hearing there is no right to respond to another party’s proposed findings of fact. 10 C.F.R. § 2.1209.<sup>5</sup> Allowing the Tribe to provide its substantive arguments on the EPA documents for the first time in its findings of fact would therefore be inconsistent with the NRC’s rules for Subpart L hearings, and it would deny the Staff and Powertech the opportunity to respond to the Tribe’s new arguments. The Board should reject this approach.

In conclusion, the Staff takes no position on the Tribe’s motion for leave to submit a reply brief. Even if the Board considers the Tribe’s reply brief, however, it should find that the Tribe fails to show how the EPA documents are relevant to any of the admitted contentions. The Board should also reject the Tribe’s offer to make substantive arguments regarding the EPA documents at some future time. Instead, the Board should rule that any such arguments would be untimely, because the Tribe should have included them in support of its motion to admit the documents as exhibits.

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 4<sup>th</sup> day of November 2014

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<sup>5</sup> In this case, the Board set a date for reply legal briefs, but not a date for reply findings of fact. Post-Hearing Order (September 8, 2014) at 20.

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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 for Leave to Submit Reply Brief via the NRC's Electronic Information Exchange (EIE) on November 4, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on November 4, 2014.

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

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