

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark Barnett

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

June 1, 2010

ORDER

(Providing Details for Oral Argument)

Oral argument will be heard on standing and contention admissibility issues presented in the hearing requests filed on March 8, 2010 by several individuals and organizations sharing common counsel (Consolidated Petitioners),¹ and on April 6, 2010 by the Oglala Sioux Tribe (Tribe).² This proceeding arises from an application filed by Powertech USA, Inc. requesting a license to construct and operate a proposed in-situ leach uranium recovery (ISR) facility in Custer and Fall River Counties, South Dakota.

The participants are advised of the following information regarding the scheduling and conduct of the oral argument:

Date: June 8 and 9, 2010

Time: 9:00 AM MDT – 5:00 PM MDT

Location: Custer City Hall, Council Chambers
622 Crook Street
Custer, SD 57730

¹ Consolidated Request for Hearing and Petition for Leave to Intervene (Mar. 8, 2010) (Petition).

² Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010).

The format of oral argument will proceed as set forth in our May 17, 2010 Order.³ Generally, the Board asks that the Parties refrain from simply rehashing the content of their pleadings. Rather, the Board wishes to further explore with the Parties the positions they took in their written submissions. The oral argument is not an opportunity to bring forth new evidence which should have been included in the pleadings. It is an opportunity for counsel to clarify what was stated in the pleadings and to provide the Board with arguments on applicable legal precedent to be applied. The oral argument will serve principally to assist the Board in the discharge of its decisional responsibilities regarding whether the petitioners have demonstrated that they have standing and the admissibility of the proffered contentions.

The Board has identified several issues it wishes to discuss at oral argument. Counsel should arrive fully prepared to discuss each topic that is a matter of concern to his or her client(s). While the following list does not purport to include all issues that may arise, it should help to guide the Parties in their preparation.

Standing

1. Parties should be prepared to discuss whether the petitioners have met their burden to show a “specific and plausible means” by which the Powertech proposal may harm him or her. Consolidated Petitioners should be prepared to cite to their pleadings to show the Board where the “specific and plausible means” are addressed.

2. Applicant should be prepared to describe the geographic footprint of this project and the location of the wells to be drilled. Consolidated Petitioners will be asked to calculate the distances from the wells to be drilled and the project boundaries to their respective properties or residences.

3. The Board seeks clarification as to the relative locations of the wells and aquifers (and formations within the aquifers) and their purported connections and interrelationships.

³ Licensing Board Order (Setting Oral Argument) (May 17, 2010) at 2 (unpublished).

4. To establish organizational standing under 10 C.F.R. § 2.309(d)(1), an organization must demonstrate (1) that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and (2) that the injury is within the zone of interests protected by NEPA or the AEA. Do the Consolidated Petitioners seek organizational standing? Have the Consolidated Petitioners shown these two elements with regard to the Clean Water Alliance and Aligning for Responsible Mining?

5. An organization asserting "representational" standing must (1) demonstrate that the interest of at least one of its members will be harmed, (2) demonstrate that the member would have standing in his or her own right, (3) identify that member by name and address, and (4) demonstrate that the organization is authorized to request a hearing on behalf of that member.⁴ Have the Consolidated Petitioners shown these elements with regard to the Clean Water Alliance and Aligning for Responsible Mining?

6. The Consolidated Petition states that Powertech will be drawing water from the Madison aquifer.⁵ Many of the individual Consolidated Petitioners (Theodore Ebert, David Frankel, Gary Heckenlaible, Susan Henderson and Liliias C. Jones Jarding) claim they draw water from the Madison Aquifer. How will these individuals be harmed by Powertech's use of water from the Madison aquifer?

7. The Consolidated Petition states that Powertech will be mining uranium from the Inyan Kara aquifer. One individual, Dayton Hyde, claims he draws water from the Inyan Kara aquifer.⁶ How will Mr. Hyde be harmed by Powertech's mining of the Inyan Kara aquifer? Where in the Consolidated Petition or in the Declarations does he show the "specific and plausible means" by which he will be harmed?

⁴ See GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 194 (2000); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

⁵ See Petition at 18.

⁶ See id. at 26.

8. How does the decision in Hydro Resources, Inc.⁷ inform the standing of the Consolidated Petitioners?

Consolidated Petitioners' Contentions

1. Consolidated Petitioners should be prepared to cite to the Board where in their Petition or Reply each of the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi) have been addressed for each proposed contention.

2. Contention H: Can Consolidated Petitioners point to specific local studies that the Applicant should have used in their Application?

Tribe's Contentions

1. Contention 1: The Commission held in its Crow Butte Resources, Inc.⁸ decision that an identical contention was inadmissible because it was not ripe. As that decision would appear to be binding precedent in this case, can the Tribe articulate a means as to how this Board could admit this contention? Do the Staff and the Applicant agree that this contention may be premature and that the Tribe would have the right to file this contention at a later date, after the EIS is issued in this case?

General

1. Powertech claims in their answer to many contentions that 10 C.F.R. § 51.45 does not impose adequacy requirements on an applicant. Is it Powertech's argument that a petitioner can never challenge the adequacy of a statement made by an applicant in their filed application?

⁷ LBP-98-9, 47 NRC 261 (1998), rev'd on other grounds, CLI-98-16, 48 NRC 119 (1998).

⁸ CLI-09-09, 69 NRC __ (slip op.) (May 18, 2009).

2. All parties should be prepared to address how the Commission's decision in Crow Butte Resources, Inc.⁹ should inform the Board's decision regarding the standing of Consolidated Petitioners and the Oglala Sioux Tribe, as well as the admissibility of Consolidated Petitioners' Contention A and the Tribe's Contentions 1 and 5.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹⁰

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 1, 2010

⁹ Id.

¹⁰ Copies of this order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Consolidated Petitioners; (2) the NRC Staff; (3) the Oglala Sioux Tribe; and (4) Powertech USA, Inc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)
Source Materials License Application))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **ORDER (Providing Details for Oral Argument)** dated June 1, 2010, have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
wjf1@nrc.gov

Richard F. Cole
Administrative Judge
richard.cole@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

Anthony C. Eitrem, Esq., Chief Counsel
ace1@nrc.gov
Megan Wright, Law Clerk
megan.wright@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
OCA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Catherine Scott, Esq.
clm@nrc.gov
Michael Clark, Esq.
mjc1@nrc.gov
Brett Klukan, Esq.
brett.klukan@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov

OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

ORDER (Providing Details for Oral Argument)

Counsel for the Applicant
Thompson & Simmons, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher Pugsley, Esq.
cpugsley@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Counsel for the Oglala Sioux Tribe
Gonzales Law Firm
522 7th Street, Suite 202
Rapid City, SD 57701
Grace Dugan, Esq.
dugan@wavecom.net

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy Minerals Law Center
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for multiple petitioners -

Organizations:
Aligning for Responsible Mining
Clean Water Alliance

Individuals:
Theodore P. Ebert
Gary Heckenlaible
Susan Henderson
Dayton Hyde
Lilias Jones Jarding

David Frankel, Esq., Legal Director
Aligning for Responsible Mining
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.
belli4law@aol.com
Roxanne Andre, Paralegal
roxanneandre@yahoo.com

Thomas J. Ballanco, Esq.
Attorney for Dayton Hyde
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering1@mac.com

[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of June 2010.