UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	)	Date: August 26, 2010
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

RESPONSE TO NRC STAFF'S MOTION FOR CLARIFICATION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Powertech (USA) Uranium Corporation (hereinafter "Powertech" or the "Applicant") hereby submits this Response to United States Nuclear Regulatory Commission Staff (NRC Staff) Motion for Clarification of the Atomic Safety and Licensing Board's (Licensing Board) Order (LBP-10-16) regarding Powertech's license application to construct and operate a proposed in situ leach uranium recovery (ISR) project in Custer and Johnson counties in the State of South Dakota (hereinafter the "Dewey Burdock ISR project"). As will be discussed below, Powertech fully supports NRC Staff's Motion with additional points of emphasis and respectfully requests that the Presiding Officer provide the clarification requested on the contentions discussed in such Motion.

II. ARGUMENT

As a general proposition, Powertech fully supports the positions stated by NRC Staff and agrees that the fair and efficient conduct of a Subpart L hearing depends on appropriate focusing of the issues to be litigated. In order for Powertech to participate effectively in the oral hearing

process, it is imperative that the scope of the issues to be litigated is clearly and concisely defined. In addition to its support of NRC Staff's Motion, and while Powertech explicitly notes that it is not appealing LBP-10-16 to the Commission nor is it asking the Licensing Board to reconsider its decision, Powertech offers the following points of concern:

1. The Licensing Board frequently refers to Powertech's proposed ISR licensing action as "mining" and is referenced at numerous places in the June, 2010 oral argument transcript. *See e.g.,* June 8-9, 2010 Oral Argument Transcript at p. 13-14. Powertech respectfully requests that the Licensing Board take notice of the fact that the subsurface, as well as the surface, activity at an ISR site have been interpreted by the Commission to be "milling." It is important to make this distinction between "mining" and "milling," as the Atomic Energy Act of 1954, as amended (AEA), does not grant NRC jurisdiction over "mining" operations and, thus, if Powertech's proposed ISR licensing action is considered to be "mining," this hearing process would not be occurring. Additionally, Powertech also suggests that the Licensing Board's brief description of the ISR process in LBP-10-16 at Pages 7-8 does not appear to reflect numerous important facts related to ISR projects including the subsurface conditions that create ISR-amenable uranium deposits, the resulting mandatory aquifer exemption for the proposed recovery zone because the water in that zone can never be a public source of drinking water, the many process controls reflected in license conditions, and the post-recovery requirements for restoration of groundwater in the recovery zone to minimize or eliminate the potential for post-restoration migration of recovery fluids. Powertech is concerned that the Licensing Board may not understand the facts of the ISR process. For example, LBP-10-16 states that monitor wells are designed to detect any "uranium" or "uranium leaks" wherein actuality the constituents chosen for upper control limits

(UCLs) are chosen for their heightened mobility to serve as an "early warning" of a potential excursion long before uranium, radium or any heavy metals would ever reach the monitor wells.

2. LBP-10-16 cites the recent litigation involving Hydro Resources, Inc. and its ISR project in the State of New Mexico with respect to the determination of standing in this proceeding. As stated by Powertech at the June, 2010 oral argument, the primary standard for determining standing in a proceeding such as the instant case is whether the proposed water source alleged to be contaminated by Powertech's proposed ISR project is "reasonably contiguous" to the proposed ISR project area. The Licensing Board's decision on standing in this proceeding suggests that the "reasonably contiguous" component of the *Hydro Resources* standing test means that any person, no matter where they are located in the United States, drawing water from the same regional aquifer in which uranium recovery will take place would have standing for a hearing, regardless of how far from the proposed ISR site they are located or how large the aquifer is. Powertech understands that the threshold for standing is relatively low, but "reasonably contiguous" must be applied realistically.

3. On Page 25 of LBP-10-16, the Licensing Board offers its opinion regarding the Oglala Sioux Tribe's (Tribe) allegations about the lack of Tribal consultation for historic and cultural resources within the proposed Dewey-Burdock license area. After reviewing the statements made in the first full paragraph of Page 25, Powertech is concerned that the language offered by the Licensing Board appears to presume that the lack of consultation has resulted in tangible impacts to Tribal historic and/or cultural resources. The language in question (i.e., "there *are* cultural resources on the Powertech site that have not been properly identified…" and without Tribal consultation "culturally significant resources *will go unidentified and unprotected*") almost appears to prejudge the contention. *See* LBP-10-16 slip op at 25 (emphasis added).

Consultation is an ongoing process which NRC Staff specifically stated is commencing and the results of such consultation will be forthcoming as part of NRC Staff's environmental review. Thus, Powertech respectfully requests that the Licensing Board clarify its position on this issue with respect to its language on Page 25 of LBP-10-16, so that all parties can better understand the scope of this issue in light of the Commission-approved "phased" approach to historic and cultural resource consultation standard to which NRC Staff will be held with respect to such consultation.

4. An argument that was discussed at length during the June, 2010 oral argument was Powertech's interpretation of NRC Staff's regulation at 10 C.F.R. § 40.32(e) and Chapters 2 and 5 of NUREG-1569 regarding the types of construction and data gathering activities required and permitted at a proposed ISR site prior to the issuance of an NRC license. Specifically, the Licensing Board states that "Powertech argues that the pertinent regulation, 10 C.F.R. § 40.32(e), *does not require* detailed groundwater baseline information at this stage of the licensing process."[1] Powertech respectfully disagrees with this characterization of Part 40.32(e) and its argument on this issue.

The critical issue here is what constitutes "complete baseline data" for ISR facilities in the context of 10 C.F.R. Part 40, Appendix A, Criterion 7 with the regulatory restrictions articulated by Part 40.32(e) on pre-licensing site construction of complete well-fields (i.e., well-field injection and extraction wells and a complete monitor well network). As indicated multiple times during the June, 2010 oral argument, Powertech referred to the "phased" approach to ISR projects embodied in the NRC licensing process as specifically set forth in Chapters 2 (*Site*

[1] LBP-10-16 slip op at 63.

Characterization) and 5 (*Operations*) of NUREG-1569.[2] While twelve months of pre-operational data are required for groundwater both within the recovery zone and without, the level of detail is in no way comparable to the level of detail in data necessary for the licensee to efficiently develop its well-fields and monitor well network and for NRC Staff to establish UCLs for excursion monitoring purposes and to determine appropriate baseline constituents of concern for restoration purposes. Thus, Powertech's point was not that "complete baseline data" is not necessary; but rather that pre-license issuance baseline data collection requirements are significantly different than such requirements post-license issuance as reflected in Chapter 2 versus Chapter 5 of NUREG-1569 and, as reflected in NRC Staff's interpretation of Part 40.32(e) that forbids the installation of a complete well-field, including monitor well networks, required to collect the level of data necessary for site operations as reflected in Chapter 5 of NUREG-1569. Therefore, Powertech respectfully suggests that the Licensing Board take notice of the distinctions noted above with respect to Part 40.32(e) and pre-license versus post-license data gathering requirements.

5. In keeping with the discussion in Paragraph 4 above, starting on Pages 198 through 201 of the June, 2010 oral argument transcript, questions were raised regarding a petitioner's ability to challenge an ISR licensee's submission of appropriate water quality parameters, including UCLs, post-license issuance. While this item does not appear to be within the scope of any of

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[2] For example, Powertech's Response to the Tribe's hearing request references Chapter 2 of NUREG-1569 as it pertains to ISR facilities and the information available in a license application due to the aforementioned "phased" implementation process: NUREG-1569 specifically notes that:

> "[r]eviewers should keep in mind that the development and initial licensing of an *in situ* leach facility is *not based on comprehensive information….reviewers should not expect that information needed to fully describe each aspect of all the operations will be available in the initial application*."

See Powertech's Response to Tribe's Request for a Hearing at 23 *quoting* NUREG-1569 at 2-1 & 2-2.

the admitted contentions, Powertech believes that the Licensing Board should take notice of the recent decision in the *Hydro Resources, Inc.* litigation that holds that a petitioner's AEA Section 189 hearing rights are not violated by NRC Staff's approach to the ISR licensing process, including the approval of UCLs and other water quality parameters post-license issuance.[3]

III. CONCLUSION

Based on the information above, Powertech fully supports NRC Staff's Motion for Clarification and respectfully requests that the Licensing Board provide additional clarification on and take notice of the additional items noted above.

Respectfully Submitted,

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

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[3] *See Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-01, 2006 WL 1704518 (January 11, 2006).