

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 OPPOSITION TO APPLICATIONS FOR A STAY

Introduction

The NRC Staff responds to the applications for a stay that the Consolidated Intervenor and the Oglala Sioux Tribe (collectively, the Intervenor) filed on April 8, 2014. The Intervenor ask the Board to stay the effectiveness of the NRC license that the Staff issued to Powertech (USA) Inc. on April 8, 2014 for its proposed Dewey-Burdock Project.¹ The Board should deny the applications because the Intervenor do not meet the regulatory standard for a stay.

Legal Standard

The party applying for a stay must show that the Board should grant its application.² The legal standard the Board uses to determine whether an applicant meets its burden is in 10 C.F.R. § 2.1213(d). The Board uses the following factors to evaluate a stay application:

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.

No one factor is dispositive.³ The most important factor, however, is whether the moving party shows it will be irreparably harmed if a stay is not granted.⁴ A movant that fails to show irreparable

¹ Dewey-Burdock Source Materials License (ADAMS Accession No. ML14043A392) (April 8, 2014).

² *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 795 (1981).

³ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002).

harm must show overwhelmingly that it is likely to succeed on the merits.⁵ Furthermore, if the movant for a stay fails to meet its burden on the first two factors, the Board need not give lengthy consideration to balancing the other two factors.⁶

Discussion

The Intervenor fail to show the Board should grant a stay. Most significantly, the Intervenor fail to show they will be irreparably harmed if the Board denies their stay applications. The Intervenor also fail to make a strong showing they will prevail on the merits of the arguments underlying their stay applications. In addition, the Intervenor do not fully address the potential harm to Powertech if the Board grants a stay, nor do they establish that a stay is in the public interest.

I. The Intervenor Fail To Show They Will Be Irreparably Harmed If A Stay Is Not Granted

The Intervenor argue that construction of the Dewey-Burdock Project will damage resources that are culturally significant to American Indians. In support of their arguments, the Intervenor attach affidavits from tribal representatives and tribal members describing harm that could result from construction activities.⁷

The Intervenor fail to show that cultural resources will be harmed unless the Board grants a stay. The Staff has prepared a Programmatic Agreement for the Dewey-Burdock Project.⁸ The parties to the Programmatic Agreement include Powertech, the Bureau of Land Management (BLM), the South Dakota State Historic Preservation Office (SHPO), and the Advisory Council on

⁴ *Hydro Resources, Inc.* (2929 Coors Blvd. Suite 101 Albuquerque, New Mexico 87120) LBP-98-05, 47 NRC 119, 120 (1998); *White Mesa*, LBP-02-9, 55 NRC at 232.

⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399–400 (2008).

⁶ *Sequoyah Fuels Corporation and General Atomics* (Gore, Okla. site), CLI-94-9, 40 NRC 1, 8 (1994).

⁷ Attachments 1 and 2 to Tribe's Application; Attachments 1–6 to Consolidated Intervenor's Application.

⁸ The documents associated with the Programmatic Agreement can be found at ADAMS Accession Nos. ML14066A347, ML14066A350, ML14098A464, ML14098A155, ML14098A107, ML14098A102, and ML14098A110.

Historic Preservation (ACHP).⁹ The purpose of the Programmatic Agreement is to avoid the very harm described by the Intervenor. The Programmatic Agreement includes a plan for avoiding impacts to sites that are eligible or potentially eligible for inclusion on the National Register of Historic Places. The Programmatic Agreement also includes a plan for avoiding impacts to sites that are currently unidentified, but which Powertech may encounter during construction of the Dewey-Burdock Project. In addition to the Programmatic Agreement, the Staff has included a condition in Powertech's NRC license requiring that Powertech comply not only with the Programmatic Agreement, but with the National Historic Preservation Act and the Archaeological Resources Protection Act.¹⁰ The Intervenor fails to explain why the Programmatic Agreement and the conditions in Powertech's license are insufficient to protect cultural resources.

In the attachments to their stay applications, the Intervenor does not identify specific harms that will result if the Board denies their applications. The Intervenor states that American Indian burial sites may be present in the Dewey-Burdock area. The South Dakota Department of Environmental and Natural Resources, however, found no evidence of burial sites in the Dewey-Burdock area.¹¹ The Intervenor also alleges harm to other cultural resources, but they do not provide enough information for the Board to determine that these resources would both be threatened by construction of the Dewey-Burdock Project *and* left unprotected by the Programmatic Agreement. Where measures such as a Programmatic Agreement are in place to protect resources, those measures must be taken into account when considering whether the moving party will be irreparably harmed without a stay.¹² Because the Intervenor does not explain

⁹ In signing the Programmatic Agreement, the ACHP stated that "[b]y carrying out the terms of the PA, the Nuclear Regulatory Commission will fulfill its responsibilities under Section 106 of the NHPA and the regulations of ACHP."

¹⁰ License Condition 9.8.

¹¹ <http://denr.sd.gov/powertech/PTSUFindingsofFact.pdf> at ¶ 20.

¹² *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 169 (1st Cir. 2003) (finding no irreparable injury in part because "archaeologists are monitoring work and will continue to do so, and a protocol guides steps to be taken in the event that significant historic materials come to light").

why the Programmatic Agreement is inadequate to protect cultural resources, their arguments lack the specificity required for the Board to grant a stay.¹³

II. The Intervenor's Do Not Show Make a Strong Showing That They Are Likely to Succeed on the Merits of Their Contentions

The Intervenor's base their stay requests on arguments within admitted Contentions 1 and 6. In Contention 1A, the Intervenor's allege that the Staff failed to assess impacts to cultural resources as required under NEPA and the NHPA. In Contention 1B, they allege that the Staff failed to consult with interested tribes as required under the NHPA. In Contention 6, the Oglala Sioux Tribe argues that the FSEIS is deficient because the Staff does not explain how various mitigation measures would be effective in reducing impacts to cultural and other resources.

In admitting Contentions 1 and 6, the Board did not reach the merits of the Intervenor's' claims. Rather, the Board found that, based on the information available at the time, the Intervenor's had identified issues that should be considered further in an evidentiary hearing. To support their stay applications, the Intervenor's must do more than reiterate arguments raised in their contentions—the Intervenor's must make a strong showing they are likely to prevail on their contentions in the hearing. In fact, because the Intervenor's do not show they will be irreparably harmed if a stay is not granted, they must show that success on the merits is a “virtual certainty.”¹⁴ The Intervenor's fail to do so here.

A. The Intervenor's Do Not Make a Strong Showing that the Staff Failed to Consult as Required under the NHPA

The Intervenor's argue that the Staff failed to consult with tribes as required under the NHPA. They argue that, as a result, the Staff's identification of cultural resources and its assessment of impacts to such resources is flawed under both the NHPA and NEPA. In particular, the Intervenor's argue that field surveys of the Dewey-Burdock site that the Staff

¹³ See *Iowa Utilities Board v. Fed. Communications Commission*, 109 F.3d 418, 425 (8th Cir. 1996) (“[A] party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.”); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 748 n.20 (1985) (holding that mere speculation about an accident does not constitute the imminent, irreparable injury required for issuing a stay).

¹⁴ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008).

facilitated were inadequate because not all tribes participated in the surveys and because the Staff did not work with the tribes to decide upon an appropriate survey methodology.

Under the NHPA, the Staff had to make a “reasonable and good faith effort” to identify historic properties that might be affected by the Dewey-Burdock Project.¹⁵ The Intervenor fails to make a strong showing that the Staff has not done so here. The Staff has been consulting with interested tribes and other parties since 2010, and it has made substantial efforts to identify cultural resources at the Dewey-Burdock site.¹⁶ As part of these efforts, the Staff facilitated tribal surveys of the site in April and May 2013. The Staff provided its analysis of the survey results to the consulting tribes for comment,¹⁷ and it took the tribes’ comments into account when preparing the PA for the Dewey-Burdock Project. In signing the PA, the ACHP acknowledged the Staff’s efforts in consulting with tribes regarding the Dewey-Burdock Project.¹⁸ In sum, the Intervenor fails to make a strong showing that they will succeed on the merits of their argument that the Staff failed to consult as required under the NHPA.

To the extent the Intervenor is arguing that methodological flaws in the tribal surveys of the Dewey-Burdock site invalidate the Staff’s assessment of cultural resources under NEPA or its identification of such resources under the NHPA, the Intervenor likewise fails to make a strong showing of success on the merits of their claims. Although the Intervenor claims that the tribal surveys lacked a methodology, this is incorrect. The Staff arranged for individual tribal surveys so that each of the tribes with whom it was consulting could survey the Dewey-Burdock site using the methodology best suited to identifying properties significant to the tribe. The Staff did so in response to tribal input on this very issue.¹⁹ The Intervenor fails to show that this survey approach was inadequate under the NHPA.

¹⁵ 36 C.F.R. § 800.4(b)(1).

¹⁶ See Dewey-Burdock ISR Project Summary of Tribal Outreach (ADAMS Accession No. ML14099A010) (April 8, 2014) (summarizing Staff’s consultation efforts).

¹⁷ ADAMS Accession Nos. ML13357A234, ML13357A234, ML13343A155, and ML13354B948.

¹⁸ ADAMS Accession No. ML14099A025 at 1.

¹⁹ See, e.g., ADAMS Accession No. ML13026A005 (November 5, 2012) at 2 (“It is self-evident that each tribe will have expertise in recognizing its own sacred sites. *The Oglala Sioux Tribe strongly objects to the use of*

B. The Intervenor Do Not Make a Strong Showing that the Staff Failed to Consider Impacts to Cultural Resources in its NEPA Analysis

The Intervenor argues that the Staff violated NEPA because it issued the FSEIS before finalizing the Programmatic Agreement for the Dewey-Burdock Project. According to the Intervenor, the Staff therefore failed to consider mitigation measures for cultural resources during its NEPA review.

The Intervenor does not make a strong showing that they are likely to succeed on the merits of their claims. The Staff concluded its NEPA review not with the FSEIS, but with its Record of Decision.²⁰ The Staff did not issue its Record of Decision until April 8, 2014, after it finalized the Programmatic Agreement for the Dewey-Burdock Project. In fact, the Staff did not issue its Record of Decision until then precisely because it needed to take into account the Programmatic Agreement, including the mitigation measures specified in the Programmatic Agreement, before reaching a licensing decision. Although the Intervenor cites federal court decisions holding that an agency cannot defer its consideration of mitigation measures until after the NEPA process is complete, these cases are inapposite. In this case the Staff finalized the Programmatic Agreement while its NEPA process remained open, and the Staff considered mitigation measures for cultural resources in its NEPA review.

The Intervenor also argues that the Staff erred by not fully disclosing the mitigation measures for cultural resources in a NEPA document. But the Intervenor fails to explain why the Staff had to make the Programmatic Agreement part of the FSEIS. In fact, an agency is not required to merge the two documents. The only requirement is that the Programmatic Agreement inform the agency's NEPA review.²¹ The Staff met that requirement, because it did not conclude its NEPA review until it finalized the Programmatic Agreement.

persons without any expertise in Sioux TCP to identify Sioux TCP.") (emphasis in original). The Staff received similar input from a number of other tribes. *E.g.*, ADAMS Accession Nos. ML13036A104 (November 6, 2012) at 1, ¶ 1; and ML13036A110 (October 31, 2012) at 2, ¶ 2.

²⁰ Dewey-Burdock Record of Decision (ADAMS Accession No. ML14066A466) (April 8, 2014).

²¹ 36 C.F.R. § 800.4(b)(2).

The Intervenor further argue that the Staff did not provide an opportunity for comments on mitigation measures related to cultural resources. In fact, the Staff sought to involve the parties in developing these very measures. The Staff sent multiple draft versions of the Programmatic Agreement to the consulting tribes and the other consulting parties for comment. The Staff also held several teleconferences to discuss mitigation measures and other issues related to the Programmatic Agreement. In addition, in the DSEIS the Staff discussed mitigation measures that might limit impacts to cultural resources, providing the tribes and other interested persons an early opportunity to identify measures that might be incorporated in a Programmatic Agreement.

C. The Tribe Does Not Make a Strong Showing that the Staff Failed to Consider the Effectiveness of Mitigation Measures

The Oglala Sioux Tribe argues that the Staff did not adequately consider mitigation measures in its NEPA review because it failed to address whether the measures it identified would be effective in reducing impacts not only to cultural resources, but to other resources as well.²² The Tribe does not, however, make a strong showing that it will succeed on the merits of this argument in the hearing.

Under NEPA precedent, an agency considers the effectiveness of mitigation measures by describing how those measures will reduce environmental impacts in a resource area.²³ “The discussion of effectiveness of mitigation measures does not need to be highly detailed.”²⁴ For example, one court recently found that BLM considered the effectiveness of mitigation measures through the following type of analysis:²⁵

- AR 60864 (“Overall, impacts [to air quality], however, would be reduced as the public would have access to fewer miles of unpaved roads and a number of roads would be closed and rehabilitated, decreasing the potential for fugitive dust throughout the Monuments.”)

²² Tribe’s Application for Stay at 6.

²³ *Wilderness Soc’y v. United States BLM*, 822 F. Supp. 2d 933, 943–944 (D. Ariz. 2011) (affirmed by *Wilderness Soc’y v. BLM*, 526 Fed. Appx. 790, 2013 (9th Cir. 2013)).

²⁴ *Moapa Band of Paiutes v. United States BLM*, 2011 WL 4738120 (D. Nev. Oct. 6, 2011).

²⁵ *Wilderness Soc’y*, 822 F. Supp. 2d at 943–944. The bullets above are representative examples cited by the court.

- AR 60869 ("The application of specific mitigation measures identified in activity level planning and NEPA level review would reduce or prevent impacts to water quality.")
- AR 60883 ("Restoration and vegetation treatment projects aimed at improving vegetation health and cover would reduce erosion potential and increase soil productivity.")

The Staff included this same type of analysis in the Dewey-Burdock FSEIS and Programmatic Agreement. For example:²⁶

- [Page 4-216] "In SEIS Section 4.7.1.1, NRC staff concluded that implementation of mitigation measures will result in fugitive dust emission levels that will not destabilize the air quality of the local area nor change the current attainment status of the air quality surrounding the proposed site areas. However, despite the use of controls, short-term and intermediate fugitive dust emissions are possible when vehicles travel on unpaved roads."
- [Page 4-101] "However, NRC staff considers such chronic direct wildlife exposure to undiluted wastewater unlikely because the applicant's proposed wastewater controls (e.g., pond design, leak detection and mitigation, pressure monitoring) and SDDENR permitting requirements will limit direct contact that aquatic life and terrestrial wildlife have with wastewater solutions."
- [Page 4-10] "Impacts of surface land disturbance will be minimized by mitigation measures, including concurrently reclaiming and revegetating surface disturbed areas, limiting construction of new access roads, and restricting vehicular traffic in wellfields and land application areas."
- [Page 4-183] "[M]itigation measures, such as limiting construction of new access and secondary roads, will minimize surface disturbance (Powertech, 2009a) during this option and will limit potential impacts to historic and cultural resources."
- Stipulations 5 and 6 of the Programmatic Agreement and Appendix B of the Agreement explain how measures contained in treatment plans will avoid, minimize, or mitigate adverse effects on historic properties

Accordingly, contrary to the Tribe's arguments, the Staff analyzed the effectiveness of mitigation measures. The Staff's review cannot be compared to agency reviews that have been found deficient because "[n]othing whatsoever is said about whether the anticipated harms could be avoid by any of the listed mitigation measures."²⁷ Nor can the Staff's review be compared to cases

²⁶ The Staff discusses the effectiveness of mitigation on numerous other pages of the FSEIS, including pages 4-8, 4-46, 4-76, 4-193, 4-216.

²⁷ *South Fork Band Council of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

in which the measures identified by the agency were, by its own admission, not actually mitigation measures.²⁸

D. The Intervenor's Remaining Arguments Do Not Show a Strong Likelihood of Success on the Merits of the Contentions

The Intervenor's make two other arguments that are at least potentially relevant to the merits of Contentions 1 and 6. First, they argue that the NRC has a special duty to tribes and individual tribal members that would be violated if the Board declines to grant a stay. The Intervenor's do not, however, cite to a specific treaty, law, or executive order binding on the NRC that guarantees these rights. The Intervenor's also argue that the NRC has a trust obligation to tribes that requires it to provide a hearing on the merits of the contentions before a NRC materials license may take effect. The Intervenor's fail to show, however, that this trust obligation applies in an NRC hearing or warrants granting a stay.²⁹ Where the Intervenor's provide no connection between their asserted rights and their stay requests, the Board cannot grant the stay requests.³⁰

The Intervenor's further argue that the Staff issued Powertech's license prematurely because not all documents associated with the license were immediately available to the public. This is not an argument in favor of granting a stay, but an argument for granting an extension of time in which to seek a stay. In any event, assuming the Intervenor's were unable to locate documents associated with Powertech's license, they could have contacted the Staff or Staff counsel, who would have provided the documents to them.

III. The Remaining Factors Do Not Support Granting a Stay

Because the Intervenor's do not show a stay should be granted under the first two factors of the NRC's test, the Board need not dwell long on the third and fourth factors—whether other parties would be harmed by a stay and where the public interest lies. In any event, these factors do not strongly support granting a stay.

²⁸ *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998).

²⁹ *Cf. Navajo Tribe of Indians v United States*, 224 Ct. Cl. 171, 624 F.2d 980, 987 (1980) (where the Federal Government controls or supervises tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties).

³⁰ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-08, 45 NRC 367, 374–376 (1997).

The Intervenor argue that Powertech will not be irreparably harmed if the Board grants a stay. But the inquiry under the NRC's test is not whether another party will be *irreparably* harmed, but whether it will be harmed at all. Under NRC precedent, a Board may consider economic harm to a licensee in deciding whether staying the effectiveness of the license would harm other parties.³¹

The Intervenor also argue that Powertech will not be harmed by a stay because it has stated that it does not intend to begin construction until 2015, when the hearing before the Board will likely be over. This argument, of course, undermines the Intervenor's claim that they will be irreparably harmed if a stay is not granted. In any event, the potential harm to Powertech is a relevant factor for the Board to consider.

Under the fourth part of the NRC's test for evaluating a stay request, the Board must consider where the public interest lies. Historic properties at the Dewey-Burdock site are currently protected by the Programmatic Agreement for the Dewey-Burdock Project and by conditions in Powertech's license. Under these circumstances, the Intervenor fail to show that the Board must grant a stay to protect the public interest.

Conclusion

The Board should deny the Intervenor's applications to stay the effectiveness of Powertech's license.

Respectfully submitted,

/Signed (electronically) by/ Michael J. Clark
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/Signed (electronically) by/ Patricia A. Jehle
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Dated at Rockville, Maryland
this 24th day of April 2014

³¹ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 180 (1985).

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(Dewey-Burdock In Situ Uranium Recovery)	Date: April 24, 2014
Facility))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that copies of the "NRC STAFF'S OPPOSITION TO APPLICATIONS FOR A STAY" have been served via the NRC's Electronic Information Exchange (EIE) or, for those participants exempted from filing through the EIE, by electronic mail, on this 24th day of April, 2014.

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

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