

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

In the Matter of

POWERTECH (USA), INC.,
(Dewey-Burdock In Situ Uranium
Recovery Facility)

Docket No. 40-0975-MLA
ASLBP No. 10-899-02-MLA-BD01

January 29, 2015

CONSOLIDATED INTERVENOR'S REPLY TO POST-HEARING BRIEFS

ADOPTION OF TRIBE BRIEF AND FUTURE CONTENTIONS

The Consolidated Intervenors hereby adopt the Tribe Reply and associated filings. Consolidated Intervenors also note that the Board has not yet ruled on certain new contentions filed by the Tribe. To the extent any new contentions are admitted by the Board, the Consolidated Intervenors hereby adopt those contentions in accordance with 10 C.F.R. § 2.309(f)(3). The Consolidated Intervenors also reiterate their adoption of all the admitted contentions in this case under the guidance laid out by the Commission in *Crow Butte Resources*, CLI-09-09 (2009) at 9-11 discussing its holding in *Yankee Rowe* CLI-96-1 regarding the nexus between “injury and relief” to illustrate that,

[I]f denying a license amendment would alleviate a petitioner’s potential injury, *Yankee Rowe* would allow that petitioner to prosecute any admissible contention that could result in the denial of the license amendment, regardless of whether the contention was directly related to that petitioners’ articulated ‘injury.’

Id. at 11. Consolidated Intervenors understand that the Tribe shall act as the representative with respect to any new contentions admitted.

APPLICATION OF NEPA STANDARDS

NRC Staff misapprehends the purpose behind the preparation of an Environmental Impact Statement (“EIS”) under NEPA. An EIS demonstrates to the public, that the agency has taken a hard look, grounded in detailed, objective science prior to the agency taking action. It is not some obligatory checklist of bare minimums cut and pasted from documents that have worked in the past.

An example of the kind of reasoning endemic to the entire FSEIS involves the unanimous agreement among all parties, that the Fuson Shale layer is “leaky” at the project site, nicely summarized by the Tribe in its Post-Hearing Brief on pages 48-50. Applicant assures, and the Staff accepts, that at some point in the future, it will easily identify, and readily repair, the leaky condition of the so-called “confining layer.” Of course this will be long after the record has closed and the opportunity for public participation and oversight is over, thereby frustrating the very purpose of NEPA.

The same is true of the Staff’s misapplication of “mitigation” standards in the NEPA context.

CEQ defines “mitigation” as a way to avoid, minimize, rectify or compensate for the impact of a potentially harmful action. 40 C.F.R. § 1508.20 a-e. *See Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 827, 828 (9th Cir. 2008) (“A court must be able to review, in advance, how specific measures will bring projects into compliance with environmental standards.”).

In order to be effective, a mitigation measure must be supported by analytical data demonstrating why it will “constitute an adequate buffer against the negative impacts that

may result from the authorized activity.” *Nat’l Parks and Conservation Ass’n v. Babbitt*, 241 F.3d 722, 734 (9th Cir., 2001) (“The Parks Service proposes to increase the risk of harm to the environment and then perform its studies.... This approach has the process exactly backwards.”).

When an agency action will have unavoidable environmental consequences, take production aquifer contamination for instance, the mitigation measures must constitute that adequate buffer against negative impacts. Mitigation measures that were once theoretical, but in practice have repeatedly failed, take aquifer remediation for example, cannot be the cornerstone of a complete mitigation discussion.

REJECTION OF “REASONABLE ASSURANCE” STANDARD PROPOSED BY POWERTECH AND APPLICABLE LEGAL STANDARDS UNDER AEA

In addition to the requirements of NEPA and NHPA (and related NRC Regulations), the license may not be issued unless it complies with the Atomic Energy Act of 1954, as amended (the “AEA”) (and related NRC Regulations). Powertech, but notably not the NRC Staff, seeks to convince the Board to adopt a much more lenient standard for its findings than currently exists under the AEA and corresponding regulations at Section 40.32.

Powertech advocates for the adoption of this new, lesser standard based on some dicta in one of the Hydro Resources decisions at CLI-06-01 (see Powertech Post-Hearing Filing at Section 4.7; page 18 thereof), “[t]he legal standard used by the Commission in Hydro Resources, Inc. to evaluate license issuance is “reasonable assurance” citing CLI-

06-01.¹ Notwithstanding such advocacy, the correct legal standard for source materials licenses like the one at issue in this case is stated in the AEA (42 U.S.C. § 2099) and the Regulations, as follows:

The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.

This is not to be confused with the ‘reasonable assurance’ standard for production and utilization facilities under 42 U.S.C. § 2235 which is absolutely inapplicable in this case because we have a clear section on point concerning source materials licenses which makes no mention of the proffered ‘reasonable assurance’ standard.

The applicable standard under the AEA for source materials is that the issuance of the license would not be inimical to the common defense and security, and would not be inimical to the health and safety of the public. These are much higher standards than Powertech would like to be applied in this case but they are mandated by statute. The NRC Staff has not advocated for this new ‘reasonable assurance’ standard in its filing.

NRC Regulations at 10 C.F.R. § 40.32(d) echo the statutory requirements set forth in 42 U.S.C. § 2099:

(d) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public

Consolidated Intervenors note that this is in addition to the satisfaction of the NEPA and NHPA requirements which must be complied with before a license may be

¹ At pages 18, 23 and 151 of Powertech’s January 9, 2015 filing.

issued pursuant to 10 C.F.R. § 40.32(e). Consolidated Intervenors note that Section 40.32(d) contains no reference to Powertech's proffered 'reasonable assurance' standard.

A careful reading of CLI-06-01 reveals the actual holding of the decision on page 2 thereof as follows:

"As we have said earlier in this proceeding, where a "Presiding Officer has reviewed [an] extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed." While we certainly have discretion to undertake a de novo factual review, we "generally do not exercise that authority where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact." We carefully have considered the intervenors' challenges to LBP-05-17. We find, however, that the intervenors have not identified any "clearly erroneous" factual finding or significant legal error, or any other reason warranting plenary review." CLI-06-01 (NRC January 11, 2006) at 2 (internal citations omitted). (Emphasis added.)

Thus, the holding is that the Commission will apply a 'clearly erroneous' standard to the Board's decision, whatever it is, and that the intervenors in the HydroResources failed to identify any 'clearly erroneous' factual or legal error. Later, in explaining its holding, the Commission states the following in dicta (and this part Powertech relies on to advocate for the lesser 'reasonable assurance' standard):

"But here the basic findings on groundwater protection necessary for a licensing decision have been made. The Presiding Officer in LBP-05-17 found reasonable assurance that groundwater at the Section 17, Unit 1, and Crownpoint sites will be adequately protected. He reviewed extensive data submitted by HRI and the NRC staff, including preliminary pump test data, and data from HRI's exploration drill holes and geophysical logs, as well as intervenor arguments challenging that data. Based upon information in the record, he concluded that the Westwater Aquifer is confined at the Section 17, Unit 1 and Crownpoint sites, and that drinking water supplies will be adequately protected." Id. at 4 (footnotes omitted.)

Consolidated Intervenors assert that the foregoing dicta suggests that in the HydroResources case, there were demonstrations of evidence in the record consisting of data showing confinement of the Westwater Aquifer at issue in that case. In this case

there have been demonstrations of evidence in the record of faults, fractures and other ‘leaky’ aquifers that undermine a conclusion that the aquifers to be mined by Powertech are confined. Despite this obvious distinction, Powertech argues that the dicta in CLI-06-01 should *bind* this Board to a lesser standard of ‘reasonable assurance’ of ‘adequate containment’.

A careful reading of CLI-06-01 belies this argument because in the dicta the Commission states that the Presiding Officer’s finding of reasonable assurance in that case was that the groundwater would be adequately protected and that finding itself was based on the Presiding Officer’s conclusion of confinement of the Westwater Aquifer. If the Presiding Officer had not found the Westwater Aquifer to be confined, there could not have been a finding of ‘reasonable assurance of groundwater protection.’ Here, in this case, the Board could and should find that the aquifer to be mined is not adequately confined but rather is ‘leaky.’ Therefore, due to the lack of confinement, the Board could and should find that there is no assurance of groundwater protection and that the issuance of the license would be inimical to the health and safety of the public in violation of Section 40.32(d).

Further, Powertech mis-states the applicable standard at Section 5.21 (p. 23 thereof) when it states:

5.21. NRC Staff’s AEA-based regulatory standard for issuance of an ISR operating license is a demonstration that there is “reasonable assurance” that issuance of said license will result in adequate protection of public health and safety and will not be inimical to the common defense or security. *See* 10 CFR § 40.32(c) & (d).

Powertech argues that the regulatory standard is a ‘reasonable assurance’ that the issuance will result in adequate protection of public health and safety and will not be inimical to the common defense or security, citing 10 C.F.R. § 40.32(c) & (d). This is

puzzling because neither of these two sections 40.32(c) or 40.32(d) mentions the ‘reasonable assurance’ standard.

Section 40.32(c) states that Powertech’s proposed equipment, facilities and procedures must be adequate to protect health and minimize danger to life or property. No mention there. Section 40.32(d) states that the issuance of the license will not be inimical to the common defense and security or to the health and safety of the public. No mention there. Powertech is completely fabricating this standard of ‘reasonable assurance’, attempting to graft the standards for production and utilization combined licenses under 42 U.S.C. § 2235 onto the limbs of this case. But to do so they would have the Board ignore the applicable standard for source materials licenses under the AEA at 42 U.S.C. § 2099 and this would be outside the Board’s authority.

CONCLUSION

In the interest of brevity and linguistic economy through these proceedings, the “Consolidated Intervenors” have become an entity unto themselves, like the international corporation that is the Applicant, and the regulatory agency embodied by the Staff. In Closing, it is appropriate to revisit the organizational and individual Intervenors who have thus consolidated.

Aligning for Responsible Mining

Aligning for Responsible Mining (ARM) is an Oglala Sioux Tribe nonprofit unincorporated association formed on June 25, 2007 to: (a) cause the International Precautionary Principle to be applied to all mining activities, (b) train people in the

technical aspects of testing, monitoring and reporting of the impacts of mining activities, and (c) prevent abusive mining (which it defines as mining that does not demonstrate that it can be undertaken without causing irreversible harm to the water, environment, or food supply and that will not cause any substantial adverse health impacts to populations of people, animals, fish, birds, plants and other wildlife).

ARM's membership has swelled over the course of this proceeding, as more and more concerned citizens sought to participate in the process but found the daunting regulatory framework involved in intervention to be excruciating for a layperson to navigate. While acutely aware of this ongoing difficulty, all of the Consolidated Intervenors wish to acknowledge the numerous extraordinary steps taken by this Board, its administrative staff, and, on a number of occasions, by individual members of the Staff to simplify and explain the process for the public and for their counsel. Still the lingering challenges to understanding and actually participating in the licensing process demonstrate that even when individuals within an agency have the best intentions, the agency's goals, in this instance—open and accessible procedures—may yet prove elusive.

ARM takes steps to make the regulatory process more accessible to more people and it functions as a clearinghouse for the dissemination of information to the interested public. Many ARM members are enrolled in the Oglala Sioux Tribe and have thus been afforded two perspectives on this process.

Susan Henderson

When Marie Curie was busy winning her first Nobel Prize for research on the “radiation phenomena,” Susan Henderson’s family was already well established on their 8,000-acre ranch outside of Edgemont, SD. The Henderson family homestead has used, maintained and developed its local water resources for more than a century. Such local water resources, in the form of springs and various wells are in the Inyan Kara and Madison aquifers and are downstream and down gradient from the licensed Dewey Burdock site.

Susan Henderson has seen uranium booms come and go in the Edgemont, SD area. What lingers long after the mining outfits have gone bust is the contamination. All the previous uranium mining in Edgemont was thought to be safe at the time. Having heard the promises and assurances of nuclear industry and nuclear agency before, Susan Henderson wants to see the science for herself. NEPA exists for people like Susan Henderson to be involved in the meaningful decisions that are bound to directly affect her. She wants to see for herself that the Staff’s actions are grounded in hard, objective science, as she will suffer the effects of those actions regardless.

Dayton Hyde

In *The Pastures of Beyond: An Old Cowboy Looks Back at the Old West*, his anecdotal autobiographical memoir, Dayton Hyde, allots three paragraphs to discuss his landing at Normandy on D-Day and fighting in Patton’s Third Army from the Battle of the Bulge through to the end of World War II. Such is the stoic characteristic of a man who epitomizes what Tom Brokaw coined, “The Greatest Generation.”

As a teenager, Dayton Hyde escaped his bleak, Depression-era Michigan surroundings by being shipped off to his uncle's cattle ranch in Oregon. There, amongst the old tough ranch hands, he became one of America's last true cowboys. Dayton Hyde's first decade in the ranching industry was powered almost exclusively by horse and oxen. In the course of his duties, he rode several hundred miles a week on horseback, making his home on the range. In those days, when a cowboy was in need of a horse, he went out and caught one from the wild herds that populated the western country. It was in those early years, alone on the prairies, that Dayton Hyde forged his lifelong bond with wild horses.

After a successful career as a cattle rancher, author and naturalist, Dayton Hyde decided to dedicate the remainder of his life to the wild horses who had given him so much. After a lengthy search throughout the West, Dayton Hyde finally settled on the present location of the Black Hills Wild Horse Sanctuary. Some of the first horses to find sanctuary there, were taken from rangelands in Nevada that had become contaminated when above ground nuclear testing proved to not be as safe as was once thought.

Additionally, after witnessing first hand, the degradation of grazing lands across the West under state and federal management, Dayton Hyde founded the nonprofit Institute for Range and the American Mustang ("IRAM") to demonstrate that biological diversity and ecological well being could coexist on the prairie alongside economic viability. IRAM administers and maintains the land designated as the Black Hills Wild Horse Sanctuary under a conservation easement that ensures the creatures have a home in perpetuity. A home that is six hours downstream from the licensed Dewey-Burdock facility.

Dayton Hyde's property is not just another ranch. It is a pristine prairie ecosystem that is home to the largest wild horse herd under private management in the country. It is also an archeological treasure trove, home to tens of thousands of petroglyphs and the source of thousands of artifacts dating as far back as the mammoth hunting peoples that once roamed the valleys of the Black Hills. The Wild Horse Sanctuary is also a traditional ceremonial ground for several Lakota tiiospaye (extended family groups) who conduct some of their most sacred ceremonies above its dramatic canyons.

For more than thirty-five years, Dayton Hyde has worked to develop a lasting, sustainable sanctuary for these wild horses that will continue to perpetuate as long as U.S. property law continues to govern the region. And, given the well-known Lakota traditional beliefs, it is looking pretty good for the horses even after this long running crime against humanity is finally put to rest, and the Lakota are returned to the Black Hills.

Dayton Hyde acknowledges the Board's limited scope in these proceedings, yet he is a man prone to interact with the land under these kinds of timeframes. He thinks in terms of lasting impact, legacy and perpetuity. The Staff is not even speaking his same language. Dayton Hyde has already accounted for the safety and security of subsequent generations in his land planning. He has put far more time, effort and detail into his planning for his land, downstream from the project site, than the Staff has put into the FSEIS.

It is these Intervenor, consolidated by these proceedings, who ask the Board to find that the FSEIS fails to fulfill the requirements under NEPA and to revoke the license issued thereunder.

Date: January 29, 2015

Respectfully Submitted,

/s/

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POWERTECH (USA) INC.,)
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(Dewey-Burdock In Situ Uranium Recovery)
Facility))

Docket No. 40-9075-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “CONSOLIDATED INTERVENORS’ REPLY TO POST-HEARING BRIEFS” in the captioned proceeding were served via email per the Board’s order in this matter, on the 29th day of January, 2015, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/

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