

June 22, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

| | | |
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| 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 CONSOLIDATED INTERVENORS'
PETITION FOR REVIEW OF LBP-15-16**

I. Introduction

The NRC Staff responds to the Consolidated Intervenor's petition for Commission review of the Atomic Safety and Licensing Board's Partial Initial Decision.¹ The Consolidated Intervenor asks the Commission to review various issues related to Contentions 1A and 1B, both of which involve cultural resources; and Contention 3, which relates to hydrogeological confinement. The Consolidated Intervenor also asks the Commission to review the Board's decision to reject a portion of Contention D in which they challenged the organization and clarity of Powertech's application.² In addition, the Consolidated Intervenor seeks review of the Board's ruling in LBP 10-16 denying the petitions to intervene from Gary Heckenlaible, Liliias Jarding, and Theodore Ebert.³

¹ *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC __ (April 30, 2015) (slip op.).

² *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 386-89, 444 (2010). Although the Board admitted part of Contention D, it rejected the proposed basis that Powertech's application violated 10 C.F.R. § 40.9. The Board later merged Contention D with the Oglala Sioux Tribe's Contention 2. Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LBP-13-09 at 34-39, 88, 94 (2013).

³ *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 386-89, 444 (2010).

For Contentions 1A and 1B, the Staff agrees that the Commission should review the Board's rulings, for reasons stated in the Staff's own petition for review.⁴ The Commission should also decline review of the other issues identified by the Consolidated Intervenors, however, because they fail to identify any legal or factual error in the Board's rulings.

II. Legal Standard

The Commission may review a partial initial decision and, where appropriate, reverse the Board's contention admissibility or merits determinations. In deciding whether to review the Board's decision, the Commission considers whether:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) [there is] Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. §2.341(b)(4).

NRC precedent further addresses the manner in which the Commission may review the Board's contention admissibility and merits determinations. For contention admissibility determinations, the Commission accords substantial deference to the Board's rulings. *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006). More specifically, the Commission defers to the Board's contention admissibility rulings unless the appeal points to an "error of law or abuse of discretion." *Crow Butte Resources Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009). A party petitioning for review of the Board's rulings on contention admissibility must, in other words, do more than simply restate its contention and cite additional support for the contention.

⁴ NRC Staff's Petition for Review of LBP-15-16 (ADAMS Accession No. ML15146A499) (May 26, 2015).

Shieldalloy Metallurgical Corp. (Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503–05 (2007).

The Commission also accords substantial deference to the Board's rulings on the merits of admitted contentions. Where the Board's decision rests on carefully made factual findings, the Commission typically will not disturb the decision. *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 45 (2001). The Commission standard of "clear error" for overturning Board factual findings is high, particularly with respect to intricate factual findings based on expert witness testimony. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26–27 (2003). In particular, the fact that the Board accorded greater weight to one party's evidence to another's is not a basis for overturning the Board's decision. *David Geisen*, CLI-10-23, 72 NRC 210, 241 (Aug. 27, 2010).

III. Discussion

A. Ruling on Standing for Petitioners Gary Heckenlaible, Liliias C. Jones Jarding, and Theodore P. Ebert

The Consolidated Intervenors argue that the Board improperly denied standing for Gary Heckenlaible, Liliias Jarding, and Theodore Ebert by finding they failed to demonstrate a plausible contaminant pathway by which they could be harmed. Specifically, the Consolidated Intervenors argue the Board erred in denying standing to the petitioners because, as residents of Rapid City and Hot Springs, South Dakota, they could potentially consume groundwater from an aquifer affected by the Dewey-Burdock Project. Petition at 2.

The Board ruled on the standing of these three individuals after fully considering the expected groundwater flow throughout the southwestern Black Hills area generally and the Dewey-Burdock area specifically. LBP-10-16 at 16-20. The Board rejected the standing of the three petitioners for several reasons. First, the Board concluded that due to the distance between the Dewey-Burdock Project and the petitioners' residences, the petitioners did not allege a plausible pathway by which their drinking water could be impacted by the Project. The

Board noted that Petitioners Jarding and Heckenlaible live more than 70 miles away from the Dewey-Burdock site, while Petitioner Ebert lives more than 30 miles away. LBP-10-16 at 19. Second, the Board found that the petitioners use municipal water supplies that draw on aquifers other than the Inyan Kara Aquifer, the aquifer in which Powertech will conduct operations. The Madison and Minnelusa Aquifers, from which the Petitioners draw water, are 2000 feet below the Inyan Kara Aquifer and separated from this aquifer by the Morrison Formation and other confining layers. LBP-10-16 at 18. Finally, the Board considered that the residences of the three petitioners in Rapid City and Hot Springs are northeast of Dewey-Burdock site, while groundwater in the Dewey-Burdock area flows southwest. *Id.* at 18.

The Commission should decline review of the Board's ruling denying standing to the three petitioners. The Board correctly rejected the petitioner's arguments of a potential injury due to groundwater contamination or consumption. The Commission ordinarily defers to Licensing Board standing determination, and it should do so in this proceeding. *See Atlas Corp.* (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997) (upholding the Presiding Officer's refusal to grant standing for petitioner's failure to specify its proximity-based standing claims). Furthermore, a Licensing Board typically has considerable discretion in ruling on standing, and the Commission's standard for review of these rulings is abuse of discretion. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27 (2004). Here, the Consolidated Intervenors fail to show that the Board abused its discretion in denying standing to Petitioners Heckenlaible, Jarding, and Ebert.

B. Contentions 1A and 1B (Cultural Resources)

1. The Board Erred in Retaining Jurisdiction over Contentions 1A and 1B

The Consolidated Intervenors argue that the Board erred by retaining jurisdiction over Contentions 1A and 1B and not rendering an appealable initial decision on those contentions.

Petition at 3, 7. In fact, the Staff petitioned for review on these very same bases.⁵ As the Consolidated Intervenor correctly state, the Board's decision to retain jurisdiction over Contentions 1A and 1B pending further Staff action is inconsistent with NRC rules defining the scope of the Board's authority and contrary to Commission precedent. Petition at 3, 7.

2. The Board Correctly Found No Basis for Suspending Powertech's License

The Consolidated Intervenor argues that, based on its findings under Contentions 1A and 1B, the Board should have suspended Powertech's NRC license. Petition at 3. The Consolidated Intervenor fails to show that there is a substantial question regarding the Board's actions. In fact, the Board invited the Consolidated Intervenor to file a motion to stay the effectiveness of Powertech's license based on any perceived harm to cultural, historic, or religious sites. LBP-15-16 at 44–45. The Consolidated Intervenor did not, however, file a motion within the 10 days allotted by the Board. Nor do the Consolidated Intervenor identify any case law suggesting that the Board was required to suspend Powertech's license.

3. The Trust Doctrine Created No Additional Obligations for the Staff during Consultation with Indian Tribes

The Consolidated Intervenor argues that the Staff failed to fulfill the trust responsibility owed by federal agencies to the Oglala Sioux Tribe and tribal members. Petition at 3, 6. The Consolidated Intervenor does not, however, cite to any law, treaty, executive order, court decision, or guidance document stating that the federal government's trust responsibility to tribes required the Staff to take particular action when consulting on the Dewey-Burdock Project.⁶ In fact, the case law clarifies that the Staff had no specific responsibilities when

⁵ NRC Staff's Petition for Review of LBP-15-16 (ADAMS Accession No. ML15146A499) (May 26, 2015).

⁶ *Cf. Navajo Tribe of Indians v United States*, 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).

reviewing the Dewey-Burdock application, other than to comply with applicable law.⁷ Where the Consolidated Intervenor provide no connection between their asserted rights and their demands, the Commission should not grant the demands.

The Consolidated Intervenor also argue that the staff failed to fulfill the NRC's trust responsibility because it did not consult with tribes on a government-to-government basis. The Consolidated Intervenor do not, however, cite any authority to support their claim that the Staff failed to consult on a government-to-government basis. They do not, for example, allege that the Staff consulted with unauthorized tribal representatives, nor do they allege that the Staff failed to correspond with tribal leaders on significant issues within the scope of the NHPA.⁸

In sum, the Consolidated Intervenor do not show that the federal trust responsibility presents an issue warranting Commission review under 10 C.F.R. § 2.341(b)(4).

C. Contention D (Rejection of Basis Concerning the Organization and Clarity of Powertech's Application)

The Consolidated Intervenor challenge the rejection of one of the bases for admitted Contention D. Petition at 2 at n.3, 3–4, 7. They argue that the Board improperly rejected their claim that Powertech's application was so deficient as to be inaccurate and incomplete under 10 C.F.R. § 40.9. *Id.* at 3–4. The Consolidated Intervenor argue that Board rejected their proposed standard—that an application contain all the “information that a reasonably prudent

⁷ See *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (“We recognize that there is a ‘distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes].’ That alone, however, does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations.”). See also *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (“[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty.”); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (holding that “unless there is a specific duty that has been placed on the government with respect to Indians, [the government’s general trust obligation] is discharged by [the government’s] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”).

⁸ As reflected in Exhibits NRC-015 and NRC-008-A-1 at 76–84, the Staff sent numerous letters to the president of each consulting tribe regarding NHPA-related issues. See also Ex. NRC-018-B at 13–14, 22. The Staff also held an NHPA consultation meeting in South Dakota specifically for tribal leaders. Ex. NRC-143.

member of the public would consider important”⁹—and adopted the standard that an application must be “incomprehensible” and “useless to the public” to be rejected. *Id.* at 2, 3–4.

Contrary to the Consolidated Intervenors’ argument, the Board did not “adopt a standard” requiring that an application be incomprehensible or useless in order for an intervenor to raise an admissible contention. Rather, the Board simply rejected the Consolidated Intervenors’ particular claims that Powertech’s application could be described in this manner. In any event, the Board had ample reason to reject the Consolidated Intervenors’ argument that, in order to comply with 10 C.F.R. § 40.9, an application must contain all “information that a reasonably prudent member of the public would consider important.” As the Commission has explained, 10 C.F.R. § 40.9 and similarly worded regulations focus on whether information would be considered by an NRC Staff reviewer, not a member of the general public. See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 486, 491 (1976) (explaining that information is material if it “has a natural tendency or capability to influence a reasonable agency expert”). In other words, an application does not violate 10 C.F.R. § 40.9 simply because a member of the public would benefit from additional information, or because the application contains erroneous information that could be confusing to a member of the public.

In conclusion, the Consolidated Intervenors fail to show there is a substantial question regarding the Board’s decision to reject their claims under 10 C.F.R. § 40.9.

D. The Board Did Not Shift the Burden of Proof to the Intervenors

The Consolidated Intervenors claim that in LBP-15-16 at 69–70 the Board shifted the burden of proof to the Intervenors on the issue of whether the Dewey-Burdock site contains geological features, such as faults and fractures, which could affect the containment of wellfield

⁹ The Intervenors first presented this interpretation of 10 C.F.R. § 40.9 as bases in support of Contentions D and I. See Consolidated Request for Hearing and Petition for Leave to Intervene (ADAMS Accession No. ML100680010) (March 8, 2010) at 30, 36, 52.

solutions. Petition at 2 n.3, 4, 6, 7. The Consolidated Intervenor further claim that the Board created a new “compelling evidence” standard, in place of the typical preponderance of the evidence standard, which the Board required the Intervenor to meet. *Id.*

There is no merit to the Consolidated Intervenor’s arguments. During the hearing the Board considered extensive evidence on whether features such as faults, fractures, breccia pipes, sinkholes, and abandoned boreholes could provide pathways for contaminant migration.¹⁰ After reviewing the evidence, the Board reasonably concluded that there are no major faults in the Dewey-Burdock area and that, even if there are small faults, this will not affect the containment of ISR solutions. LBP-15-16 at 71. The Board also found that, taking into account the conditions in Powertech’s license, the other the Consolidated Intervenor identified do not provide plausible pathways for contaminant migration.

The Board, in other words, did not shift the burden of proof to the Consolidated Intervenor. Rather, it simply found that the evidence as a whole supported the conclusions in the Staff’s Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock Project. In matters where the Board weighs complex and disputed evidence, the Commission typically defers to the decision of the trier of fact.¹¹ Accordingly, the Consolidated Intervenor fail to show there is any issue requiring Commission review.

E. Contention 3 (Hydrogeological Confinement)

The Consolidated Intervenor claim that the Board erred by finding that any leakage in between aquifers at the Dewey-Burdock site is caused by unplugged boreholes, rather than natural connectivity. Petition at 5. During the hearing, however, the Board considered evidence from all parties concerning faults, fractures, joints, and the potential for groundwater to migrate

¹⁰ See LBP-15-16 at 69-73 (summarizing evidence on these issues).

¹¹ Where the Board’s decision for the most part rests on its own carefully rendered factual findings, the Commission has repeatedly declined to second-guess plausible Board decisions. See, e.g., *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 45 (2001); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001); *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 2 (2006).

between aquifers.¹² The Board did not ignore the evidence presented by the Consolidated Intervenor— it simply concluded the evidence did not support their position. For example, the Board concluded that “[t]he fence diagrams based on logs from closely spaced drill holes that transect the purported faults identified by Dr. Moran *provide particularly convincing evidence for a lack of significant faulting* in that part of the project area.” LBP-15-16 at 71 (emphasis added).¹³

The Board also found that, “even though small faults and joints may be present in the project area, their presence does not support Intervenor’s assertions that such faults produced significant offsets, much less that such faults and joints provide pathways for groundwater to migrate between aquifers.” LBP-15-16 at 71. In addition, the Board considered testimony from witnesses for Powertech and the Staff, who explained that the very existence of artesian conditions in the ore zone aquifers means that they are largely confined, and that in the absence of significant natural pathways, such as faults and breccia pipes, the most plausible explanation for groundwater movement was unplugged boreholes. LBP-15-16 at 74–75.

The Board also carefully weighed the testimony of the Consolidated Intervenor’s expert witnesses. In their petition, however, the Consolidated Intervenor overlook the Board’s conclusions regarding this testimony. For example, the Board found that the “Intervenor offered little evidence relating specifically to these stratigraphic units” underlying the Dewey-Burdock site. LPB-15-16 at 69 & n.365 (*citing* Moran Testimony, Ex. OST-001 at 27). The Board also found that the Intervenor “offered very little evidence to support their claim that the Graneros Group and Morrison Formation were not effective aquitards[.]” *Id.* at 70. Furthermore, the Board noted that Dr. LaGarry, another of the Intervenor’s experts, “. . . alleged

¹² See, e.g., Exs. NRC-151 at A3.10; NRC-175 at A16, A17, A18, A23 A24 (Staff testimony on related issues).

¹³ Dr. Moran testified as an expert witness for both the Consolidated Intervenor and the Oglala Sioux Tribe.

the groundwater velocity in the ore zone was 35.5 meters per day. The Board was unable to find any support for Dr. LaGarry's claim. Accordingly, we concur with [Powertech witness] Mr. Demuth's analysis that Dr. LaGarry's groundwater velocity estimates are not supported by the record." *Id.* at 70.

The Consolidated Intervenors further argue that the Board erred in accepting the testimony of Hal DeMuth, a Powertech expert witness, regarding faults and fractures in the Dewey-Burdock area. The Consolidated Intervenors argue that Mr. DeMuth was "speaking from the perspective of the mining industry" and that his claims regarding faults and fractures are unsubstantiated. Petition at 5. Mr. DeMuth was not, however, the only expert witness to testify on faults and fractures. The Board also heard testimony on these issues from Robert Moran and Hannan LaGarry, expert witnesses for the Consolidated Intervenors and the Oglala Sioux Tribe; Thomas Lancaster, James Prikryl, Paul Bertetti, and Ronald McGinnis, expert witnesses for the Staff; and Errol Lawrence and Frank Lichnovsky, experts for Powertech. In sum, the Board did not rely solely on Mr. DeMuth's testimony when concluding that faults and fractures, to the extent they exist in the Dewey-Burdock area, will not provide pathways for wellfield solutions to migrate away from the production zones. LBP-15-16 at 71. Moreover, while the Board accepted Mr. DeMuth's testimony that in-situ uranium recovery (ISR) projects have operated successfully in areas where small faults are present, the Consolidated Intervenors fail to show any error on the Board's part in doing so. *See Hydro Resources*, CLI-01-4, 53 NRC at 45 (explaining that the Commission's standard of "clear error" for overturning a Board's factual findings is high, particularly with respect to intricate factual findings based on expert witness testimony and credibility determinations).¹⁴

¹⁴ *See also Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998) ("Although the Commission has the authority to reject or modify a licensing board's factual findings, it will not do so lightly. The Commission in this instance is not inclined to second-guess the Board's complex findings" on the credibility of the evidence and expert witnesses."); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1211 (1984), *rev'd in part on other grounds*, CLI-85-2,

To summarize, the Consolidated Intervenors have not shown any error in the Board's ruling on Contention 3.

F. The Consolidated Intervenors Do Not Show Any Error Related to the Timing of the Staff's License Issuance

The Consolidated Intervenors challenge the Staff's practice of issuing licenses almost immediately, and typically within a week, of releasing final NEPA documents. Petition at 8. They do not, however, identify any Board ruling with which they disagree. As a result, the Commission should reject the Consolidated Intervenors' arguments for failing to meet 10 C.F.R. § 2.341(b)(2)(ii) and (iii) (requiring that a petitioner explains where the matters it raises were raised previously and explain why the presiding officer's decision is erroneous).

In any event, the Consolidated Intervenors overlook that issuing a license promptly is not merely staff "practice," but a requirement once the Staff's completes its reviews for certain types of license applications:

During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter which is the subject of the hearing and as authorized by law, *the NRC staff is expected to promptly issue its approval or denial of the application, or take other appropriate action on the underlying regulatory matter for which a hearing was provided.*

10 C.F.R. § 2.1202(a) (emphasis added). In other words, the Consolidated Intervenors are challenging an NRC regulation, which is not permitted in an adjudicatory proceeding without prior leave of the presiding officer and Commission. 10 C.F.R. § 2.235(a), (d). See *also Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility) CLI-13-1, 77 NRC 1, 9-10 & n.35 (2013) ("Challenges to the rule itself are more appropriately lodged through a request for rulemaking. To the extent such challenges are presented in an adjudication, they also contravene our rule prohibiting collateral attacks on regulations."). Accordingly, the Consolidated Intervenors do not identify any issue requiring Commission review.

21 NRC 282 (1985) (explaining that the value of testimony by a witness at NRC proceedings is not undermined merely by the fact that the witness is a hired consultant of a licensee).

IV. Conclusion

Except for the Board's decision to retain jurisdiction over Contentions 1A and 1B, the Consolidated Intervenors do not identify any legal or factual error in the Board's decision warranting review under 10 C.F.R. §2.341(b)(4).

Respectfully submitted,

*Signed (electronically) by/
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*/Signed (electronically) by/
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Dated at Rockville, Maryland
this 22nd day of June 2015

June 22, 2015

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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 Consolidated Intervenor’s Petition for Review of LBP-15-16” via the NRC’s Electronic Information Exchange (EIE) on June 22, 2015. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on June 22, 2015.

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

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