

**UNITED STATES OF AMERICA  
BEFORE THE NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	
	)	Docket No. 40-0975-MLA
POWERTECH (USA), INC.	)	ASLBP No. 10-898-02-MLA-BD01
	)	
(Dewey-Burdock	)	December 31, 2017
In Situ Leach Facility)	)	

**CONSOLIDATED INTERVENORS OPPOSITION TO  
APPLICANT REQUEST TO TAKE JUDICIAL NOTICE**

Pursuant to 10 CFR 2.337(f), Consolidated Intervenors<sup>1</sup> hereby file this Opposition to Request to Take Judicial Notice filed by Powertech (USA), Inc. (“Powertech”) on December 11, 2017 (“Request”). During the December 12 telephone call, counsel for Consolidated Intervenors agreed to file this by December 29, 2017<sup>2</sup> but due to unexpected year-end workload, he was unable to do so and this filing was delayed until December 31, 2017. Consolidated Intervenors submit that due to the holiday, there is no prejudice or inconvenience to any party or the Board by the filing of this pleading two days later than agreed and Consolidated Intervenors respectfully request that this pleading be accepted.

**APPLICABLE STANDARDS**

10 CFR 2.337(f)(1) provides that:

(f) Official notice. (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with

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<sup>1</sup> Susan Henderson, Dayton Hyde and Aligning for Responsible Mining.

<sup>2</sup> Hearing Transcript at 1257.

sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and concisely set forth the information relied upon to controvert the fact.

Section 2.337(f)(1) provides that the Board may take official notice of any fact of which a federal court may take judicial notice or any technical or scientific fact within the knowledge of the Commission. A federal court may take judicial notice under Federal Rules of Evidence Section 201.

Section 201(b) provides that:

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Accordingly, unless it is a technical or scientific fact within the knowledge of the Commission, any fact proposed by Powertech for official notice may not be officially noticed if such fact is subject to reasonable dispute, or is not generally known with the Board's jurisdiction, or if such fact cannot be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.

## DISCUSSION

Powertech's counsel mentioned that, in response to the Board's factual question, Powertech would file information for official notice of the status of the EPA UIC Permit, Bureau of Land Management, and South Dakota Department of Environment and Natural Resources (DENR) hearing status on the state permits. See Transcript at 1181; 1182-1183; 1186-1187; 1223. Instead of submitting three such facts, Powertech submitted 10 pages of argumentation that is outside the processes of this proceeding and should be stricken.

In the spirit of contributing towards a constructive dialogue per Judge Froelich's encouragement,<sup>3</sup> Consolidated Intervenors consent to the taking of official notice of the parts of the Request consisting of the following ("Consented to Facts"):

1. SD DENR BME Order dated November 5, 2013 (at pp. 12-15 of the Request);
2. Bureau of Land Management letter dated April 7, 2011 (at p.16 of the Request);
3. SD DENR Water Board Order granting Powertech's motion to continue dated November 25, 2013 (at p17-21 of the Request);
4. Undated Bureau of Land Management letter (at p.22 of the Request).

Consolidated Intervenors note that the DENR BME Order dated November 5, 2013 states that both the NRC and the EPA processes must be completed before DENR BME will recommence. Consolidated Intervenors also note that the DENR Water Board Order dated November 25, 2013 was in response to and granting Powertech's own motion in that proceeding.

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<sup>3</sup> Hearing Transcript at 1259.

Consolidated Intervenors object to the taking of official notice of the “Summary of Notes” dated December 17, 2014 as not being in conformance with FRE 201(b)(2) because they are not official minutes, the identity of the preparer is unknown and, therefore, they are not capable of being accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Consolidated Intervenors object to the taking of official notice of any information in the following described parts of the Request: Pages 2-10: Page 2, first full paragraph, second sentence commencing with “Given that...” and ending with page 10, carryover sentence ending with “other permits and/or authorizations.”

All of the information in page 2-10 of the Request that Consolidated Intervenors object to, as described above, fails to meet the applicable standards for taking official notice under 2.337(f). Such information is argumentative and greatly exceeds what was suggested by Powertech’s counsel in the telephone conference. None of such information constitutes a technical or scientific fact that is within the knowledge of the Commission. Likewise, none of such information is of a kind that may be judicially noticed by a federal court under FRE 201(b). Accordingly, all of such information should be stricken and none of such information should be officially noticed.

Consolidated Intervenors submit that Powertech could contribute to a constructive dialogue per Judge Froelich’s encouragement if it minimized its attempts to push the boundaries: if it offers to submit facts, then it should offer just the facts, without argumentation, background, and surmises.

## CONCLUSION

The Request should be denied except as it pertains to the two DENR orders and the two Bureau of Land Management letters described above as the Consented to Facts.

Dated this 31st day of December, 2017.

Respectfully submitted,

      *signed electronically via EIE*      

David C. Frankel  
Counsel for Consolidated Intervenors  
Greenspoon Marder LLP  
202 Providence Mine Road, Suite 107  
Nevada City, CA 95959  
Tel: 530-470-8509  
E-mail: [David.Frankel@gmlaw.com](mailto:David.Frankel@gmlaw.com)

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Bruce Ellison  
Counsel for Consolidated Intervenors  
P.O. Box 2508  
Rapid City, SD 57709  
Tel: 605-348-9458  
Email: [belli4law@aol.com](mailto:belli4law@aol.com)

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Thomas J. Ballanco  
Counsel for Consolidated Intervenors  
P.O. Box 585  
Douglas City, CA 96024  
(650) 296-9782  
E-mail: [HarmonicEngineering@gmail.com](mailto:HarmonicEngineering@gmail.com)

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the foregoing were served upon the Electronic Information Exchange (the NRC's E-Filing System), and served by email to Travis Stills and Thomas Ballanco, in the above-captioned proceeding.

Dated: December 31, 2017.

*Signed (electronically) by David C. Frankel*

David Frankel  
Counsel for Consolidated Intervenors  
Greenspoon Marder LLP  
202 Providence Mine Road, Suite 107  
Nevada City, CA 95959  
Tel: 530-470-8509  
E-mail: [David.Frankel@gmlaw.com](mailto:David.Frankel@gmlaw.com)