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.,	)	ASLBP No. 10-898-02-MLA-BD01
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	August 17, 2018
	)	

OGLALA SIOUX TRIBE'S MOTION FOR SUMMARY DISPOSITION

Pursuant to 10 C.F.R. § 2.1205 and the Board's Order of July 19, 2018, the Oglala Sioux Tribe ("Tribe") hereby submits this Motion for Summary Disposition ("Motion"). The Tribe conferred with the parties pursuant to 10 C.F.R. § 2.323(b) and reports that NRC Staff and Powertech oppose the Motion, while Consolidated Intervenors support the Motion.

Standard of Review

This matter is being heard pursuant to Subpart L, which contains a summary disposition provision that incorporates the standards set out in Subpart G. 10 C.F.R § 2.1205(c). Both provisions require "a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." *Id.* § 2.1205(c). The operative summary disposition rule provision states, in relevant part:

> The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.710(d)(2). As a practical matter, this standard establishes a two-part test: first, the Board must determine if any material facts remain genuinely in dispute; and second, if no such disputes remain, the Board must determine if the movant's legal position is correct. *Id.*

Argument

The issues presented in this Motion involve "[t]he National Environmental Policy Act of 1969 ('NEPA'), 42 U.S.C. § 4321 et seq., [which] requires federal agencies such as the Commission to examine and report on the environmental consequences of their actions." *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). The D.C. Circuit, which regularly reviews decisions of the Commission, has "long held that NEPA requires that 'environmental issues be considered at every important stage in the decision making process concerning a particular action.'" *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012) *citing Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118, 146 U.S. App. D.C. 33 (D.C. Cir. 1971).

With respect to the issues in this case, as summarized by the U.S. Circuit Court for the D.C. Circuit:

> The Atomic Safety and Licensing Board ruled that, to "fulfill the agency's NEPA . . . responsibilities to protect and preserve cultural, religious, and historical sites important to the Native American tribal cultures in the Powertech project area, the NRC Staff must conduct a study or survey of tribal cultural resources before granting a license." ASLB Initial Decision, 81 N.R.C. at 653 (J.A. 452). As discussed in Part I above, the Board found that "the [EIS] in this proceeding does not contain" such an analysis. *Id.* at 655 (J.A. 454). Moreover, "[b]ecause the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the [EIS] does not include mitigation measures sufficient to protect this Native American tribe's cultural, historical, and religious sites that may be affected by the Powertech project." *Id.* "Accordingly," the Board concluded, "NEPA's hard look requirement has not been satisfied." *Id.*
>
> The Board did not find just a technical violation of NEPA. Rather, it found that "the inadequate discussion of potential impacts to Sioux cultural, historical, or religious sites in the [EIS] or Record of Decision is a *significant deficiency* in the NRC Staff's NEPA review." *Id.* at 658 (emphasis added) (J.A. 457). And the Commission did not disagree. Refusing to "second guess the Board's fact-finding," the Commission declined to set aside the Board's order and denied the Staff's petition for review with respect to the Tribe's NEPA contention. NRC Order, 84 N.R.C. at 248 (J.A. 272-73).

Oglala Sioux Tribe v. NRC, ____ F.3d____, (D.C. Cir., July 20, 2018)(slip op. at 18)(emphasis in original). The D.C. Circuit also specifically addressed the need for an on-the-ground cultural resources survey of the proposed mine site to inform a lawful NEPA analysis:

> The Tribe is concerned that mining, as well as the construction and other land disturbances that precede mining, will damage those resources. *See* Trina Lone Hill Decl. ¶¶ 5, 28. The purpose of an EIS is, in part, to determine whether the land contains such resources and where they are located, so that damage to them can be avoided or mitigated. If the project is permitted to go forward without the necessary land survey, such damage may well be done.

Id. at slip op. 23 (emphasis added). The D.C. Circuit referenced *Pub. Empls. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016) as directly analogous to the Contention 1A NEPA deficiencies that flow from the lack of cultural resources survey. The Court likened the lack of a sea floor survey in that case dealing with an ocean wind turbine project to this case, affirming that the federal courts would not "excuse the [agency] from its NEPA obligation to gather data about the seafloor" before issuing a lease for a wind turbine project because "[w]ithout adequate geological surveys, the [agency] cannot ensure that the seafloor [will be] able to support wind turbines" (internal quotation marks omitted). *Id*. at slip op. at 27.

The D.C. Circuit also used the case to demonstrate the necessary remedy for such a case as this, "requiring the agency 'to supplement [the impact statement] with adequate geological surveys before [the project] may begin construction.'" *Id.* at slip op. 34 *(quoting Pub. Empls. for Env. Responsibility*, 827 F.3d at 1084. Although the license was not set aside, the D.C. Circuit commanded that NRC conduct its activities consistent with the Court's findings and legal interpretations, which require NEPA "hard look" at impacts, alternatives, and mitigation measures in a public NEPA process *before* a license is issued. *Id*. at slip op. 2, 9-10. The lack of any supplementation of the FSEIS obliges the Board to set aside the license based on the NRC Staff's announcement that it will not prepare any further NEPA documentation and Powertech's

statements in Board Conference Calls that Powertech considers NEPA compliance an undue expense.

Consistent with the D.C. Circuit Court's ruling, this Board concluded:

> the Board finds and concludes that the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources. Without additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement has not been satisfied, and potentially necessary mitigation measures have not been established. The NRC Staff did not give this issue its required hard look in the FSEIS, and therefore the Record of Decision is incomplete.

Partial Initial Decision (LBP-15-16) at 40 (emphasis added).

The Commission has also recently confirmed the holding in LBP-15-16:

> In LBP-15-16, the Board found with respect to Contention 1A that:
>
> > the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources. Without additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement has not been satisfied[.]
>
> [citing LBP-15-16, 81 NRC at 655].
>
> * * *
>
> Rather, the Board explained that consultation was necessary to achieve the *end* of meeting NEPA's "hard look" requirement; it did not suggest that the mere act of consultation would in and of itself be sufficient.

Memorandum and Order, CLI-18-07 (July 24, 2018), slip op. at 9-10.

In part due to Powertech's opposition to the cost of NEPA compliance, NRC Staff has not conducted any surveys to catalogue Native American (particularly Lakota) cultural, historic and religious resources, and no NEPA analyses of the impacts to cultural, historic and religious resources from the project, or mitigation measures, have been completed. This is contrary to NEPA – and without these NEPA analyses, there is no set of facts that can excuse this legal

violation. The Tribe submits that so long as the license remains in effect, NRC Staff and Powertech will continue to spend resources on this litigation instead of spending those resources on NEPA compliance. Indeed, the NRC Staff (and counsel's) litigation expenditures as compared to the expenditures on Contention 1A compliance pose a relevant inquiry.

In abandoning its March 2018 survey proposal and NEPA compliance schedule, NRC Staff points to two documents as a basis for its argument that it has now satisfied NEPA: 1) a "Compilation and Evaluation of Existing Information for the National Environmental Policy Act Review of Lakota Historic, Cultural, And Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project" dated June 2018 (ML 18159A192); and 2) a "Summary of Tribal Cultural Heritage Resources Data Acquired in June 2018 at the Dewey-Burdock In Situ Uranium Recovery Project" dated July 2018 (ML 18211A580). Neither of these documents have been subjected to the "hard look" procedures required for NEPA compliance. Putting aside the factual question of the scientific value of documents prepared over a short period by a federal contractor and two students without demonstrated knowledge of Sioux (particularly Lakota) culture (the Tribe believes they lack any additional scientific value), neither of these documents contain any new information related to a cataloguing of Native American cultural, historical, or religious resources on the site, as required by this Board's Order in LPB-15-16. Indeed, regarding the survey document, it merely attempts to re-hash the survey already found inadequate for NEPA purposes.

In any case, the lack of a NEPA-compliant analysis is confirmed by the indisputable fact that NRC Staff abandoned its proposal to prepare a supplement to the Final Supplemental Environmental Impact Statement (FSEIS) and has provided no public involvement or opportunity for comments or input on either of these NRC Staff documents in context of NEPA's

"hard look" mandate. The continued reliance on previous NEPA analysis found deficient by the Board, Commission, and D.C. Circuit is in direct contrast to the proposal set forth by NRC Staff in March 2018, which specifically contemplated procedure for "Supplementing the Final SEIS" with any additional information, including formal public involvement. *See* March 16, 2018 letter from Cinthya I. Romàn, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, Office of Nuclear Material Safety and Safeguards to Trina Lone Hill, Oglala Sioux Tribal Historic Preservation Officer (ML 18075A499). The March 16 letter stated:

> Supplementing the Final SEIS
>
> The NRC staff's supplemental analysis to the FSEIS for the Dewey-Burdock ISR project, Supplement 4 to NUREG-1910, will describe potential impacts to sites of historic, cultural, or religious significance to the Lakota Sioux Tribes using the information gathered through the field survey, meetings with Tribal Leaders, oral history interviews with Tribal Elders, and any other information provided by the Tribes. The NRC staff anticipates publishing a draft of the supplemental analysis for a 45-day public comment period by mid-February 2019. The NRC staff anticipates that after reviewing and considering comments, it will publish the final analysis by May 2019.

March 16, 2018 letter at 5.

The analysis of impacts – including analysis and disclosure of the shortcomings of the assumptions relied upon by the agency – must be found in the NEPA document itself, not in supplemental documentation, nor even buried somewhere in the administrative record. As the Ninth Circuit noted in *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998): "We do not find adequate support for the Forest Service's decision in its argument that the 3,000 page administrative record contains supporting data. The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found."

The D.C. Circuit rejected NRC's unique approach to NEPA, confirming that NRC Staff must comply with NEPA's procedural requirements before taking action. *Oglala Sioux Tribe v. NRC*, ___ F.3d___, slip op. at 26 ("If even 'significant' deficiencies in NEPA reviews are forgiven because they are merely procedural, there will be nothing left to the protections that Congress intended [NEPA] to provide."). Repairing NEPA violations within the confines of NRC's contention-based administrative litigation similarly eviscerates NEPA's twin purposes. "[I]t is not an adequate alternative . . . to merely include scientific information in the administrative record. NEPA requires that the EIS itself 'make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.'" *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002). *See also* 40 C.F.R. § 1502.24; *Save the Yaak Committee v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988) (biological assessment was not functional equivalent of NEPA analysis and also came too late).

In *League of Wilderness Defenders v. Forsgren*, the Ninth Circuit noted:

> the Forest Service relies upon post-EA submissions and declarations to the court, as well as assurances that its experts were aware of plaintiffs' concerns and considered them, in arguing that there are no uncertainties or unknown risks surrounding the Hash Rock proposal. This is insufficient under NEPA.

184 F. Supp. 2d 1058, 1069 (D. Or. 2002). *See also, League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (study relied upon by BLM was not in AR at the time of final NEPA document; "A federal agency's defense of its positions must be found in its EA"); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980)(NEPA does not contemplate that documents "contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate").

The NRC Staff's approach here is strikingly similar to other situations where the federal courts have invalidated attempts by a federal agency to use post-EIS analyses to confirm or

otherwise ratify previously identified gaps in a NEPA analysis. For instance, in *Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095 (9th Cir. 2016), the Court rejected the Bureau of Land Management's attempt to fix gaps in an air quality NEPA analysis by conducting a "double-check" post-EIS review of air quality. The Court ruled that:

> [A] post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS. *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003). The public never had an opportunity to comment on the 'double-check' analysis, frustrating NEPA's goal of allowing the public the opportunity to "play a role in … the decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351.

Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095, 1104 (9th Cir. 2016).

Further, the federal courts have specifically held that analyses submitted during an adjudicatory hearing process also cannot remedy a NEPA violation:

> The preparation of an EIS also entails similar public and interagency participation. [. . .] This cross-pollinization of views could not occur within the enclosed environs of a courtroom.

Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds, Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Lastly, the new documents do not address or discuss mitigation measures that could avoid impacts to cultural resources, as required by NEPA and this Board's ruling in LPB-15-16. Indeed, given the lack of any cataloguing of Native American (particularly Lakota) cultural, historic, and religious resources, there is no feasible way for the agency to review, analyze, or implement any potentially necessary mitigation. In contrast, NEPA requires that mitigation measures be fully reviewed in the FEIS. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without

such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989). NEPA requires that documents: "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R.§§1502.14(f), and "include discussion of . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." §1502.16(h). "An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *South Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). The NRC Staff failed to provide the required mitigation analysis during a NEPA public review process (including the required effectiveness analysis) for the cultural, historic, and religious resources.

Although NRC Staff's basis for abandoning its attempts to comply with NEPA will likely be addressed on Response to its Motion for Summary disposition, the lack of any NEPA analysis – or even FSEIS supplementation – confirms that the Board may grant the Tribe's Motion as a matter of law. As demonstrated, reliance on post-NEPA documents that are not part of a NEPA analysis has been repeatedly rejected by federal courts. During the conference calls, NRC Staff and Powertech asserted they were not willing to spend the money required to achieve NEPA compliance. The Board should take NRC Staff and Powertech at their word, rule yet again that Tribe is entitled to relief on Contention 1A.

Lastly, the D.C. Circuit Court of Appeals recently invalidated the NRC practice of requiring a demonstration of harm (let alone irreparable harm) in the face of continued NEPA violations. *Oglala Sioux Tribe v. NRC,* ____ F.3d. _____ (D.C. Cir., July 20, 2018) at 32 ("To be clear, today we hold only that, once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values

NEPA protects simply because no intervenor can show irreparable harm."). As a result, given the ongoing serious deficiencies in the FSEIS, the Tribe again requests that the Board vacate the license and remand the matter to NRC Staff to comply with NEPA. In the alternative, given the long-term lack of NEPA compliance, the Board should vacate the license, enter a final decision in the Tribe's favor on Contention 1A, and dismiss Powertech's license application.

Respectfully Submitted this 17th day of August 2018.

/s/ Jeffrey C. Parsons

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Summary Disposition in the above-captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 17th day of August 2018, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by_____

Jeffrey C. Parsons
Western Mining Action Project