

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	October 19, 2018
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**OGLALA SIOUX TRIBE’S RESPONSE TO  
THE PARTIES’ VIEWS REGARDING  
THE COMMISSION’S AUGUST 30, 2018 ORDER**

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On September 24, 2018, NRC Staff, Powertech (USA) Inc. (“Powertech”), the Oglala Sioux Tribe (“Tribe”), and Consolidated Intervenors submitted their respective positions on the Commission’s August 30, 2018 Order inviting the parties in this proceeding to provide their views on how the agency should respond to the United States Court of Appeals for the District of Columbia’s ruling in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018). The Tribe hereby provides its response to the positions taken by NRC Staff and Powertech, both of which advocate for maintenance of the status quo, despite the established significant NEPA violations and the suspension of NRC Staff efforts to remedy those violations.

**Response to NRC Staff Position**

NRC Staff takes the general position that the Commission should wait to take any action on the remand until the Atomic Safety and Licensing Board (“Board”) makes a ruling on the pending motions for summary disposition. NRC Staff Response at 3. Should the Board’s resolution of the pending motions not result in the termination of the adjudication, NRC Staff

concedes that “suspending the effectiveness of, or otherwise conditioning, the license may well be an appropriate remedy, pending the ultimate resolution of Contention 1.” NRC Staff Response at 3. In conducting its analysis of whether to set aside, suspend, or impose conditions on the license, NRC Staff urges the Commission to apply the factors set forth in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993) and employed in *Pub. Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016). NRC Staff Response at 3-4. These are the same basic tests that the Tribe referenced in its Response. Tribe Response at 2.

However, NRC Staff does not address its burden to demonstrate that the license should not be set aside in light of the confirmed significant pre-licensing NEPA violations. The *Oglala Sioux Tribe* court made clear that the Commission “must explain why it permitted the project to go forward despite its own determination that the Staff had failed to comply with NEPA. As we have explained, the Commission has failed to offer a justification that is consistent with its statutory responsibility.” 896 F.3d at 537. The Tribe asserts that in the absence of evidence in the record as to any disruption resulting from suspension or rescission of the license pending NEPA review, the statutory remedy established by the Administrative Procedure Act (“APA”) should prevail: “the reviewing court shall ... hold unlawful and set aside agency action ... found to be ... not in accordance with law ....” 896 F.3d at 536 *quoting* 5 U.S.C. § 706(2)(A).

Based on the current record, setting aside the license is the proper remedy at this time. Such relief not only adheres to the statutory command of the APA, but also of NEPA. As explained in the Tribe’s Response to the Commission’s August 30, 2018 Order, setting aside the license allows the NRC Staff to consider various alternatives, mitigation measures, and potential license conditions based on a clean slate, informed by a lawful NEPA analysis. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1<sup>st</sup> Cir. 1989). (“[T]he harm at stake is a harm to the environment, but

the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.”); *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014) (“NEPA’s goals of deliberative, non-arbitrary decision-making would seem best served by the agencies approaching these actions with a clean slate.”).

Alternatively, if the Commission makes the determination not to set aside the license in its entirety, it may only do so based on a sufficient explanation supported by the record. In such case, the Commission should, at minimum, follow the *Hopper* example cited by NRC Staff, where the court did not vacate the license, but did expressly “vacate the impact statement and require the [federal agency] to supplement it with adequate [NEPA reviews] before [the project] may begin construction.” 827 F.3d at 1084. Setting aside the NEPA analysis and requiring further NRC Staff licensing action based on an adequate NEPA analysis before construction is consistent with the *Oglala Sioux Tribe* court’s remand order. 896 F.3d at 538 citing *Pub. Utils. Comm’n v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding that NEPA did not preclude FERC from issuing an approval that was “expressly not to be effective until [an] environmental hearing was completed”).

### **Response to Powertech Position**

Powertech’s Response does not provide an analysis based on the *Oglala Sioux Tribe* court’s holdings, instead focusing on the Commission’s regulations at 10 C.F.R. § 2.1213 governing a stay of the effectiveness of a license. However, the stay regulations have no application. The question the Commission presented is the proper relief that should be granted where an initial decision (10 C.F.R. § 2.1210) and final decision of the Commission (10 C.F.R. §

2.344) confirmed fully adjudicated NEPA violations. 896 F.2d at 536 (“[t]he seriousness of the NEPA deficiencies is particularly clear here. . .”). The *Oglala Sioux Tribe* court explicitly precluded the use of a standard based on a requirement to show irreparable harm.

Powertech’s characterization of the D.C. Circuit’s ruling could not be more inaccurate. Powertech focuses on the Commission’s stay regulations at 10 C.F.R. § 2.1213, which require a demonstration of irreparable harm as a predicate to any stay of the effectiveness of a license. Powertech contends that “in this case, certain stay factors are considered to be more important, the most important of which is irreparable injury.” Powertech Response at 4. Without citation, Powertech argues that no action on the license should be taken “in light of the D.C. Circuit’s opinion directing the Commission to consider whether there is a showing of irreparable harm and, if unable to be made, the procedural NEPA defect can fall under a ‘no harm, no foul’ scenario.” Powertech Response at 5. The opinion contains no such provision.

Indeed, a central holding of the *Oglala Sioux Tribe* ruling was 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.” 896 F.3d at 538. This holding precludes the Commission from continuing to rely on an irreparable harm standard in this matter, where, as here, a significant NEPA deficiency has been established. *See* 896 F.3d at 525 (“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.”). As such, Powertech’s reliance on the 10 C.F.R. § 2.1213

“irreparable harm” standard is misplaced relies on a mischaracterization of the D.C. Circuit Court opinion.

Similarly, Powertech’s discussion of the 10 C.F.R. § 2.1213 “likelihood of success on the merits” standard is flawed. Powertech contends that in order for the Commission to take any action at this point rendering the license ineffective, the Tribe must “show that [the ultimate] reversal of NRC Staff’s licensing decision is a virtual certainty.” Powertech Response at 5. Powertech misstates the test. In order to achieve a stay under 10 C.F.R. §2.1213, the party seeking a stay must show that its legal arguments are likely to succeed during an adjudicatory hearing or subsequent Commission appeal – not that there are no possible ways for NRC Staff to remedy that deficiency once it is established. *See Cleveland Electric Illuminating Company, et al.* (Perry Nuclear Power Plant, Units 1 and 2), 22 N.R.C. 743 (1985) (demonstrating that the test for stay applies prior to Board review or Commission appeal, not after both the Board and Commission have made merits rulings in that party’s favor). In this case, because both the Board and the Commission have issued rulings on the merits in the Tribe’s favor on Contention 1A, there can be no dispute that the Tribe’s NEPA arguments related to the lack of an adequate cultural resources impact analysis are likely to succeed – as they already have.

In its Response, Powertech also inappropriately attempts to reargue its case on the merits regarding whether the original license review and analysis complied with NEPA. Powertech Response at 6-7. Powertech asserts that the existing license conditions and the Programmatic Agreement provide all of the required analysis and protection for cultural resources. *Id.* This is the same argument recently rejected by the Commission in the context of Powertech’s appeal of the Board’s decision in LBP-17-9. Upon review, the Commission specifically held that “[T]o the

extent Powertech argues that the FSEIS was already sufficient before the 2014 evidentiary hearing, it is a challenge to the Board's findings in LBP-15-16 and essentially a late-filed motion for reconsideration of CLI-16-20. We previously found that these arguments did not establish 'clear error' by the Board. Powertech does not provide a compelling reason to revisit those issues at this time." CLI-18-07 at 11. The Commission should similarly disregard those arguments here.

Next, Powertech urges the Commission to adopt the so-called "no harm, no foul" approach from the D.C. Circuit's holding in *NRDC, et al. v. NRC*, 879 F.3d 1202 (2018) dealing with the Strata Energy in-situ leach uranium mine. Powertech argues that the *NRDC* case provides guidance and can "be applied to licenses issued despite allegations of potential NEPA defects." Powertech Response at 7. Unlike in *NRDC*, however, in the instant case there are not "allegations of potential NEPA defects" but rather adjudicated findings of a "significant deficiency" in the NRC Staff's NEPA review. *See* 896 F.3d at 525. As such, the *NRDC* case is of scant value to the present analysis. Indeed, the *Oglala Sioux Tribe* court specifically referenced the *NRDC* case's approach urged by Powertech and unambiguously rejected that case as inapplicable where, as here, significant NEPA deficiencies have been established. 896 F.3d at 534 N.10. Powertech's misguided attempts to minimize the NEPA deficiency in the present case as simply "procedural" and thereby somehow less meaningful was also specifically rejected by the *Oglala Sioux Tribe* court. 896 F.3d at 534 ("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 the Act to provide.").

Last, Powertech urges the Commission to refrain from any action until the Board rules on the pending motions for summary disposition based on potential mootness concerns.

The Tribe asserts that NEPA caselaw cited previously by the Tribe demonstrates the fallacy of this approach to allow a decision to remain in effect despite an admittedly flawed agency NEPA analysis. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1<sup>st</sup> Cir. 1989). (“[T]he harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.”); *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014) (“NEPA’s goals of deliberative, non-arbitrary decision-making would seem best served by the agencies approaching these actions with a clean slate.”).

### **Conforming NRC Practice with NEPA Mandates**

As discussed in the Tribe’s original Response, the *Oglala Sioux Tribe* court did not just address the flaw in the Commission’s “irreparable harm” test for a stay in the context of the instant case, but also ruled on the illegitimacy of “an NRC practice that permits NEPA-deficient licenses to remain in place unless an intervenor can show irreparable harm.” 896 F.3d at 537. Neither Response addressed steps required to bring NRC’s practices into compliance with NEPA. 896 F.3d at 529 (“Congress has directed that, to protect those values, ‘all agencies of the Federal Government’ must prepare an environmental impact statement that satisfies NEPA before taking an action like granting Powertech’s license.”) *citing* 42 U.S.C. § 4332(2)(C); *see also* 10 C.F.R. § 51.20(b)(8)

The systemic failure to comply with NEPA mandates cannot be “mooted” through a ruling by the Board on the pending summary disposition motions. Rather, the Commission must take steps to remedy the offending practice, regardless of the outcome of the present case.

## Conclusion

In summary, the Commission should not wait to take steps to ensure the integrity of the NEPA analysis in this case. The Commission should apply the standard APA remedy and set aside the FSEIS and the license until the serious NEPA violations confirmed in the Board's initial decision in LBP-15-16 and upheld by Commission in CLI-16-20 are resolved. Only in this way can the Commission provide NRC Staff the benefit of the required NEPA analysis before taking final action on the license. Short of that, the Commission should at a minimum immediately suspend the effectiveness of the license and FSEIS pending resolution of the outstanding Contention 1A. Last, the Commission should begin rulemaking proceedings to address the systemic flaw identified by the *Oglala Sioux Tribe* court of applying an irreparable harm standard to stays of licenses where NEPA violations have been established.

Respectfully submitted this 19<sup>th</sup> day of October, 2018.

/s/ Jeffrey C. Parsons  
Jeffrey C. Parsons  
Western Mining Action Project  
P.O. Box 349  
Lyons, CO 80540  
303-823-5732  
Fax 303-823-5732  
[wmap@igc.org](mailto:wmap@igc.org)

Travis E. Stills  
Energy and Conservation Law  
Managing Attorney  
Energy Minerals Law Center  
1911 Main Avenue, Suite 238  
Durango, Colorado 81301  
[stills@frontier.net](mailto:stills@frontier.net)  
phone:(970)375-9231  
fax: (970)382-0316

Counsel for Oglala Sioux Tribe



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Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE TO THE PARTIES' VIEWS REGARDING THE COMMISSION'S AUGUST 30, 2018 ORDER in the above-captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 19<sup>th</sup> day of October 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