

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
POWERTECH (USA) INC.,	)	Docket No. 40-9075-LR
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	December 17, 2024
Facility)	)	

**ORGANIZATIONAL PETITIONERS' SUPPLEMENTAL BRIEF**  
**IN SUPPORT OF PETITION TO INTERVENE**

Pursuant to the Board’s request made at the close of the December 3, 2024 oral argument in this matter for additional information related to 1) the National Environmental Policy Act (NEPA) requirement that an agency consider cumulative impacts from reasonably foreseeable future actions, and 2) the allowable scope of contentions for a source materials license renewal, Petitioners Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective hereby submit this response.

**Reasonably Foreseeable Actions**

NEPA regulations define “Effects or Impacts” which must be reviewed under the statute to include “Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from actions with individually minor but collectively significant effects taking place over a period of time.” 40 C.F.R. § 1508.1(i)(3).

In interpreting this language, federal courts have held that, with respect to reasonably foreseeable mining projects:

[A]nalysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment . . . . Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.

*Te-Moak Tribe of W. Shoshone v. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting NEPA review for mineral exploration operation that failed to include detailed analysis of impacts from nearby contemplated mining operations).

“Effects are reasonably foreseeable if they are sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.” *EarthReports Inc. v. Federal Energy Regulatory Commission*, 828 F.3d 949, 955 (D.C. Circuit 2016).

In an EPA NEPA guidance document, EPA noted:

[P]rojects **need not be finalized before they are reasonably foreseeable**. “NEPA requires that an EIS engage in reasonable forecasting. Because speculation is . . . implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.” *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003). As the [EPA] also has noted, “reasonably foreseeable future actions need to be considered even if they are not specific proposals.

Environmental Protection Agency, *Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents*, Office of Federal Activities, May 1999, at 12–13 (emphasis added) (available at: <https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf>)

A cumulative impact analysis must provide a “useful analysis” that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1066 (9th Cir. 2002); *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review

of environmental impacts. *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1306-07 (9th Cir. 2003). Thus, the fact that relevant permitting agencies have yet to complete their review of reasonably foreseeable actions does not mean that the impacts from those actions can be ignored. If that was true, then a federal agency would never have to review the cumulative impacts of “proposed” projects since it is possible that every project under agency review could change somewhat.

Such a short-sighted view of NEPA has been consistently rejected by the federal courts.

NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) (“Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry,’” quoting *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C.Cir.1973)).

*Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1072 (9th Cir. 2002).

Even projects that have not reached the formal proposal stage (which is not the case here, since Resolution has already submitted its Main Mine proposal to the USFS) are considered “reasonably foreseeable” and must be reviewed in this EA or EIS.

**[P]rojects need not be finalized before they are reasonably foreseeable.** “NEPA requires that an EIS engage in reasonable forecasting. Because speculation is ... implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.” *Selkirk*, 336 F.3d at 962 (internal quotation marks and citation omitted). As the Environmental Protection Agency (EPA) also has noted, “**reasonably foreseeable future actions need to be considered even if they are not specific proposals.**” EPA, Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents, Office of Federal Activities, 12–13 (May 1999), available at <http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf>.

*Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9<sup>th</sup> Cir. 2011)(emphasis added). Additionally, the federal courts have routinely required the agencies to review the impacts from future, not-yet-proposed mineral activity when preparing EAs or EISs for

mineral leasing projects.

[the agency] finally argues that at this stage, the exact scope and extent of drilling that will involve fracking is unknown, so NEPA analysis, if any, should be conducted when there is a site-specific proposal. But “the basic thrust” of NEPA is to require that agencies consider the range of possible environmental effects before resources are committed and the effects are fully known. “Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”

*Center for Biological Diversity v. Bureau of Land Management*, 937 F.Supp.2d 1140, 1157 (N.D. Cal. 2013) citing *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir.1975) and *Northern Plains*, 668 F.3d at 1079. *See also*, *Connor v. Burford*, 848 F.2d 1441 (9<sup>th</sup> Cir. 1988)(future impacts of drilling must be analyzed when preparing NEPA document for oil and gas lease); *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1209-09 (D. Colo. 2011)(impacts from future, as-yet-un-proposed mining must be considered when preparing NEPA document for leasing decision); *Colo. Wild, Inc. v. United States Forest Serv.*, 523 F. Supp. 2d 1213, 1225-26 (D. Colo. 2007) (granting preliminary injunction based on lack of NEPA analysis for reasonably foreseeable cumulative impacts based on the “nature of these related actions and their significant potential impact on the environment” without resolving the “label attached to these actions”).

In *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 718-19 (10<sup>th</sup> Cir. 2009), the Tenth Circuit determined that future mineral activity was “reasonably foreseeable” due to the fact that “considerable exploration has already occurred on parcels adjacent to the [challenged] parcel,” a developable mineral deposit “is known to exist beneath these parcels,” and the company “has concrete plans to build” a mineral project on these lands. All of these conditions are present here – as acknowledged by Powertech in the attachments included in the Petition to Intervene. *See* Map included on page 3 in the applicant’s November 2018 press release

(attached as Exhibit 12 to Petition) showing detailed configuration of increased well fields in the northeast and northwest portions of the project area compared to the map from the 2014 NRC Final Supplemental Environmental Impact Statement (attached as Exhibit 13 to Petition); Azarga/Powertech December 4, 2019 press release (attached as Exhibit 14 to Petition) announcing increased uranium ore it proposes mine from the property. These documents demonstrate the type of detailed and concrete plans for additional ore production at the Dewey-Burdock site that constitute material and sufficiently new information and demonstrate that such increased production is “reasonably foreseeable” under NEPA.

In addition, as demonstrated in the Petition, the applicant is moving forward with additional satellite mine projects that will use the Dewey-Burdock facility as a central processing facility. *See* NI 43-101 Technical Report Preliminary Economic Assessment Dewey-Burdock Uranium ISR Project South Dakota, USA (December 2020 PEA) at p. 141 (pdf) (attached as Exhibit 15 to Petition to Intervene); NI 43-101 Technical Report Preliminary Economic Assessment Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (August 2021 PEA) at p. 82 (attached as Exhibit 16 to Petition to Intervene). These documents demonstrate the applicant’s concrete plans to process uranium ore from satellite mines, including the Dewey-Terrace and Gas Hills mines at the Dewey-Burdock facility, as discussed in the Petition to Intervene at 23-25.

Since the filing of the Petition, the company has filed additional formal documents, including a Management’s Discussion and Analysis (MDA) submitted to the U.S. Securities and Exchange Commission on November 14, 2024, which confirms that the company is moving forward with

The Company has commenced the initial permitting work to advance the Gas Hills Uranium Project (Gas Hills) as an ISR uranium recovery operation located in central Wyoming, approximately 60 miles west of Casper, WY. As part of the initial data collection for project permitting, **the Company initiated core drilling during the three months ended September 30, 2024.** Gas Hills has a current resource and robust economics as described in a 2021 PEA. It is ideally located in the historic Gas Hills Uranium Mining District, a brownfield area of extensive previous mining. The Company has Dewey-Burdock and Gas Hills as its mid-term production assets within the planned production pipeline.

Page 4 (emphasis added) (attached hereto as Attachment 1). The same document (at p. 3) states that “During the three months ended September 30, 2024, the Company conducted resource development drilling on its Dewey Terrace project area. The Dewey Terrace project is located across the Wyoming-South Dakota border from western extent of the Dewey Burdock ISR Uranium Project.” Notably, this MDA was certified as accurate and complete by the applicant’s Chief Executive Officer

([sec.gov/Archives/edgar/data/1500881/000121390024097787/ea022055201ex99-3\\_encore.htm](https://sec.gov/Archives/edgar/data/1500881/000121390024097787/ea022055201ex99-3_encore.htm)).<sup>1</sup>

These documents from the applicant that were attached to the Petition to Intervene, independently and combined with the more recent certified statements from the applicant’s leadership, constitute material and sufficiently material new information confirming that the satellite mine projects are in process and “reasonably foreseeable” under the NEPA legal standards discussed herein.

Lastly, although the Board did not mandate that the parties address the matter, there is still a significant issue with respect to the uranium processing capacity of the Dewey-Burdock facility. The Applicant presented at trial that the processing capacity was one million tons per year. The license renewal application seeks a twenty-year renewal, equating to a maximum of 20 million tons total at current capacity. There is no guarantee that these resources will come exclusively from the Dewey-Burdock site.

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<sup>1</sup> In other proceedings, the ASLB has allowed a Petition to be supplemented after filing. *In the Matter of N. States Power Co. (Formerly Nuclear Mgmt. Co., LLC) (Prairie Island Nuclear Generating Plant, Units 1 & 2)*, 68 N.R.C. 905, 912 (Dec. 5, 2008). *See also In the Matter of Louisiana Energy Servs., L.P. (Nat’l Enrichment Facility)*, 62 N.R.C. 523, 523 (Oct. 19, 2005) (Commission affirming that “the Board can request supplemental evidence from the parties” for contention admissibility purposes).

## **Scope of Contentions for a Source Materials License Renewal**

Recent NRC precedent demonstrates that the contention pleading standards for new source material license applications under 10 C.F.R. § 2.309 are the same standards that apply for contention pleading for source material license renewals. *In the Matter of Crow Butte Res., Inc. (in Situ Leach Facility, Crawford, Nebraska)*, 68 N.R.C. 691, 716 (Nov. 21, 2008) affirmed in part, reversed in part, Nuclear Reg. Rep. (CCH) ¶ 31589 (N.R.C. May 18, 2009).

However, the Atomic Safety and Licensing Board has held that:

Much like the situation in a reactor operating license proceeding in which issues litigated in the earlier construction permit proceeding cannot be revisited absent changed circumstances, a license renewal proceeding cannot be used to relitigate issues from the initial licensing proceeding absent some material change in circumstances affecting the original determinations or some differentiation of the other sites from the one already litigated.

*In the Matter of Hydro Res.*, 58 N.R.C. 408, 416 (Nov. 26, 2003) citing *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-785, 20 NRC 848, 870-71 (1984).<sup>2</sup>

Importantly, the Board in *Hydro Resources* made clear that its decision there was based on “the unique circumstances of this license renewal proceeding” (58 N.R.C. at 418) which involved “a license renewal proceeding, occurring prior to the conclusion of the adjudication of the original license, with the renewal application based on the same underlying support as that for the original license without any changed circumstances. Thus this ruling is based solely on the unique factual circumstances presented — a situation that is unlikely to occur again.” 58 N.R.C. at 411.

Other important distinctions exist. For example, the premise for the *Hydro Resources* determination on renewal license contentions was from a Nuclear Power Plant case in *Philadelphia Electric Co.* Unlike

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<sup>2</sup> The Commission alternatively describes the test as requiring “a showing of sufficiently changed circumstances” since the original license was issued. *In the Matter of Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2)*, 20 N.R.C. 848, 1984 WL 49858 at \*6 (Sept. 26, 1984).

source material license renewals, nuclear power plant renewals are subject to a specialized body of regulations, including regulatory authority that specifically delineates between those matters that may be raised as contentions in an original licensing proceeding and those that may be raised in a renewal licensing proceeding. *See* 10 C.F.R. Part 51, Subpt. A, App. B - Environmental Effect of Renewing the Operating License of a Nuclear Power Plant. To counsel's knowledge, no such regulation exists for source material license renewals. The absence of the such a regulation, when the agency clearly knows how to impose one, demonstrates that the same restrictions on renewal licensing for nuclear power plant contentions are not intended to apply outside that subject matter. In any case, the broad purposes of NEPA, as discussed in the Petition to Intervene, counsel against such restrictions, lest the agency issue licenses without fulfilling the statutory mandates and purposes of NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (agencies must comply with NEPA "to the fullest extent possible").

In this case, as demonstrated in the Petition to Intervene and as discussed at oral argument, the consolidated intervenors' contentions are premised on several changed circumstances that provide a basis for admissible contentions for the Dewey-Burdock license renewal. Among these changes are the demonstrated ability of the Oglala Sioux Tribe, NRC Staff, and an applicant to agree on a cultural resources survey protocol, the demonstrated reasonable foreseeability of the additional uranium production wellfields withing the Dewey-Burdock permit area and the processing of uranium from satellite mines at the Dewey-Burdock central processing unit, the new Fall River County ordinance presumptively prohibiting the operation as a nuisance, the new Executive Order on Indigenous Traditional Ecological Knowledge (Nov. 15. 2021), and the stale data on several aspects, including groundwater regimes and flow at the site, cultural resource inventory and impacts due to potential erosion at the site, and endangered species surveys, among others discussed in the Petition.

Respectfully Submitted,

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Dated at Lyons, Colorado  
this 17th Day of December, 2024

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORGANIZATIONAL PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION TO INTERVENE in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 17th day of December, 2024, 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 \_\_\_\_\_

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