UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Kristine L. Svinicki, Chairman
Jeff Baran
Stephen G. Burns
Annie Caputo
David A. Wright

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| In the Matter of<br><br>POWERTECH (USA), INC.<br><br>(Dewey-Burdock<br>*In Situ* Uranium Recovery Facility) | Docket No. 40-9075-MLA |

**CLI-19-01**

**MEMORANDUM AND ORDER**

We have received the views of the parties to this proceeding regarding how the agency should respond to the remand from the U.S. Court of Appeals for the District of Columbia Circuit in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018). For the reasons explained below, we leave the license previously issued to Powertech (USA), Inc. (Powertech) in place for now, consistent with the court's choice of remedy. We also order Powertech to notify the Atomic Safety and Licensing Board (Board) and the parties 60 days in advance of conducting any activities at the site under its NRC license should this adjudication still be pending at that time. This notification will allow the Board to take any necessary action regarding Powertech's license before such activities at the site would commence.

## I. BACKGROUND

At the time the Board issued its Partial Initial Decision in this proceeding, the NRC Staff had already issued a license to Powertech for an *in situ* uranium recovery facility in Custer and Fall River Counties, South Dakota. The Staff took this action, consistent with NRC regulations, after completing its review of Powertech's application—a review that included a full safety

review and the issuance of a draft site-specific environmental impact statement for public comment, a final site-specific environmental impact statement, and a record of decision.[1] In its Partial Initial Decision, the Board found that the Staff had not sufficiently considered the potential impacts of the proposed facility on Oglala Sioux Tribe (Tribe) cultural resources under the National Environmental Policy Act (NEPA).[2]

The Board, despite identifying this NEPA-analysis deficiency (and one other related deficiency, under a different statute),[3] chose not to suspend Powertech's license, but it did retain jurisdiction to ensure the deficiency would be properly addressed.[4] On appeal, we left undisturbed both the Board's finding and its remedy.[5]

The Tribe petitioned for review of the Commission's order in the D.C. Circuit and challenged, *inter alia*, the Commission's decision not to order immediate vacatur of Powertech's license in light of the Board's findings. Of relevance here, the D.C. Circuit held that it was inconsistent with NEPA for the NRC to allow Powertech's "project to continue in a manner that

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[1] *See* LBP-15-16, 81 NRC 618, 630-32 (2015); CLI-16-20, 84 NRC 219, 223-24 (2016). Under 10 C.F.R. §§ 2.1202(a) and 2.340(e)(2)(ii), for certain types of applications, the NRC Staff may "issue its approval or denial" of an application before the Presiding Officer has issued an Initial Decision. Applications for uranium recovery facilities are one such type of application.

[2] LBP-15-16, 81 NRC at 653-55; *see also* CLI-16-20, 84 NRC at 243-44.

[3] The Tribe and the Consolidated Intervenors also originally prevailed on the merits before the Board on a related contention (Contention 1B) regarding the Staff's consultations with the Tribe under the National Historic Preservation Act (NHPA). *See* CLI-16-20, 84 NRC at 244. The Board has since granted summary disposition on that contention in favor of the Staff and found that additional efforts subsequent to the initial ruling cured the NHPA deficiency. LBP-17-9, 86 NRC 167, 188-90 (2017).

[4] LBP-15-16, 81 NRC at 658; *see also* CLI-16-20, 84 NRC at 244 ("[T]he Board . . . retained jurisdiction over the proceeding pending the Staff's curing of the deficiencies in the FSEIS and consultation with the Tribe."); *id.* at 244 n.151 ("The Board noted that it could have suspended Powertech's license, and it attributed its decision to leave the license in place to the Tribe's incomplete participation in the consultation process.").

[5] CLI-16-20, 84 NRC at 245-51.

puts at risk the values NEPA protects simply because no intervenor can show irreparable harm," once the NRC had identified, during the adjudicatory hearing process, "a significant deficiency" in the NRC's NEPA compliance.[6]

The court did not, however, vacate Powertech's license. Instead, the court remanded the case to the Commission "for further proceedings consistent with [the court's] opinion," basing its choice of remedy on the court's remand-without-vacatur doctrine under *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993).[7] In analyzing the pertinent facts under *Allied-Signal*, the court explained that it had "not been given any reason to expect that the agency will be unable to correct [the Board-identified NEPA] deficiencies," and it also cited Powertech's reliance on NRC's "ruling and settled practice" permitting the license to remain in place and Powertech's representations regarding financial harm that would befall it should action be taken against its license.[8] Further, and "[m]ore important," the court referenced Powertech's representation "that a South Dakota permitting requirement independently bars it from moving forward with construction on the site until the NRC completes its compliance with NEPA."[9] Based on the latter consideration, the court concluded that "it appears that the Tribe will not suffer harm—irreparable or otherwise—from a disposition that leaves the license in effect *for now*."[10]

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[6] 896 F.3d at 538. Based on the Board's summary disposition ruling on Contention 1B, the court in *Oglala Sioux Tribe* limited its holding to Contention 1A. 896 F.3d at 527 n.4. The court also declined to decide the remainder of the issues the Tribe raised in its review petition and found that it lacked jurisdiction to review those issues because "the Commission's order did not end the agency proceeding as to all issues." *Id.* at 527.

[7] *Id.* at 538-39.

[8] *Id.* at 538.

[9] *Id.*

[10] *Id.*

In response to this remand from the court, the Commission issued an order inviting the parties to provide their views on how the agency should proceed.[11] The order specifically requested that "[t]he parties should address, at a minimum, the question of what legal standard the NRC should use" when considering the status of Powertech's license, "to ensure consistency with the court's opinion going forward."[12] The parties have provided their views in response to that order, and the Tribe, Powertech, and the Consolidated Intervenors have also filed responses to those initial filings.[13]

The Tribe relies on 5 U.S.C. § 706, which generally provides the standard for judicial review of agency action, and related federal court precedent to argue that, unless an analysis undertaken pursuant to *Allied-Signal* warrants rebutting the presumption of vacatur, the Commission should vacate Powertech's license based on the finding of a NEPA violation.[14] That *Allied-Signal* analysis, the Tribe asserts, would look to "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[15] The Tribe argues that the record in this proceeding does not currently support any remedy other than vacating the

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[11] Order of the Secretary (Aug. 30, 2018) (unpublished).

[12] *Id.* at 1.

[13] *Oglala Sioux Tribe's Response to the Commission's August 30, 2018 Order* (Sep. 24, 2018) (Tribe's Views); *Powertech (USA), Inc's Response to Commission Inquiry on Legal Standards* (Sept. 24, 2018) (Powertech's Views); *NRC Staff's Response to Order Dated August 30, 2018* (Sep. 24, 2018) (Staff's Views); *Consolidated Intervenors' Views on Agency Response to U.S. Court of Appeals (D.C. Cir) Remand* (Sep. 24, 2018) (Consolidated Intervenors' Views); *Oglala Sioux Tribe's Response to the Parties' Views Regarding the Commission's August 30, 2018 Order* (Oct. 19, 2018) (Tribe's Responsive Views); *Powertech (USA), Inc's Response to Pleadings on Legal Standards* (Oct. 19, 2018) (Powertech's Responsive Views); *Consolidated Intervenors Response to Powertech & NRC Staff Views* (Oct. 19, 2018) (Consolidated Intervenors' Responsive Views).

[14] Tribe's Views at 2-4.

[15] *Id.* at 2 (quoting *Allied-Signal*, 988 F.2d at 151).

license, and it therefore recommends principally that the Commission vacate the license now.[16] The Tribe also argues in the alternative that "should the Commission consider leaving the license in effect, any such decision should be preceded by briefing and an opportunity for the parties (through the ASLB or otherwise) to establish competent evidence on all [*Allied-Signal*] considerations, especially Powertech and NRC Staff's burden to demonstrate disruptive effect."[17] The Consolidated Intervenors expressly adopt the Tribe's views and reiterate their support for 5 U.S.C. § 706 and *Allied-Signal* as supplying the appropriate legal standard.[18] The Staff similarly supports relying on *Allied-Signal* and also cites to *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016), another case in which the D.C. Circuit remanded without vacating the underlying agency action, though in that case the court did require the agency to supplement the relevant EIS before the project moved forward.[19]

Powertech presents an alternative view, arguing that the Commission should apply the stay standard set forth at 10 C.F.R. § 2.1213(d).[20] That standard considers: (1) irreparable injury to the stay requestor; (2) the likelihood of the stay requestor prevailing on the merits in the adjudication; (3) the harm a stay would inflict on the other participants in the adjudication; and

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[16] *Id.* at 2-4.

[17] *Id.* at 4.

[18] Consolidated Intervenors' Views at 1-2.

[19] Staff's Views at 3-4; 827 F.3d at 1084. Elaborating on its recommendation, the Staff suggests that the proper analysis could "consider and weigh, among other factors, the significance of the remaining NEPA deficiency, the prospects for its timely resolution, the potential disruptive consequences to the parties (including consequences to Powertech in light of its representations both about economic harm and its inability to move forward with licensed activities until the contention is resolved), the nature of the cultural-resource protections that the license imposes on Powertech, and the public interest." Staff's Views at 3-4.

[20] Powertech's Views at 4-8.

(4) the public interest.[21] Powertech also references the "no harm, no foul" rationale utilized in another recent D.C. Circuit *in situ* uranium recovery licensing case—involving the Strata Ross facility—and describes that case as "provid[ing] a good substantive comparison" to this one.[22]

The Tribe asserts in its responsive filing that the Staff bears the burden of demonstrating that a remedy other than vacatur is warranted.[23] The Tribe also argues that the D.C. Circuit's *Oglala Sioux Tribe* decision already considered and rejected the applicability of Powertech's recommendations to the instant case.[24] Lastly, the Tribe supports the Staff's reference to the D.C. Circuit's *Hopper* decision, and it also cites an earlier D.C. Circuit decision—*Public Utilities Commission v. FERC*, 900 F.2d 269 (D.C. Cir. 1990)—in which the court upheld an agency's issuance of a conditional approval before completing a hearing on environmental issues, based on the agency not allowing that conditional approval to take effect until completion of the environmental hearing.[25]

## II. DISCUSSION

Our analysis of how to proceed on remand in light of the parties' views necessarily begins with the D.C. Circuit's opinion in *Oglala Sioux Tribe*. In its opinion, the D.C. Circuit provided only limited direction as to how the NRC should determine proper remedies if NEPA

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[21] *Id.* at 4; 10 C.F.R. § 2.1213(d).

[22] Powertech's Views at 7-8 (discussing *Nat'l Res. Def. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (*NRDC*)). Both Powertech and the Staff also argued that the Commission should await the outcome of motions for summary disposition of Contention 1A that, at the time of their filings, were still pending before the Board. They reasoned that the Board could potentially grant summary disposition in response to the motions and terminate the proceedings, thereby mooting the question of interim action on Powertech's license. *Id.* at 8; Staff's Views at 2-3. The Board, however, has since ruled on those motions and denied all requests for summary disposition. LBP-18-05, 88 NRC __ (Oct. 30, 2018) (slip op.).

[23] Tribe's Responsive Views at 2.

[24] *Id.* at 3-6.

[25] *See* 900 F.2d at 282; *see also Oglala Sioux Tribe*, 896 F.3d at 538 (citing that decision).

deficiencies are found in post-license-issuance adjudications. Of particular importance here, given the legal-standard recommendations of the Tribe, the Consolidated Intervenors, and the Staff, we observe that the court expressly declined to decide whether the NRC may itself lawfully fashion remedies for NEPA violations based on an analysis of equitable factors in accordance with *Allied-Signal*.[26] This was the case even though the court *itself* relied expressly on *Allied-Signal* in reaching its own decision to remand the case to the NRC without vacating Powertech's license. Consequently, although we see parallels between the question a court faces when it considers remanding without vacatur and the question we face here, *Oglala Sioux Tribe* did not resolve whether, as a general matter, it would be permissible for the NRC to model its own legal analysis in this context after *Allied-Signal*. As discussed below, we need not resolve the question here to proceed in accordance with the remand.

As to Powertech's recommendation to apply the stay standard at 10 C.F.R. § 2.1213(d), we agree with the Tribe that *Oglala Sioux Tribe* plainly precludes us from adopting that recommendation.[27] The court described the scope of its ruling against the NRC as follows: "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."[28] In light of the clear import of the court's opinion, we decline to employ a standard that, like 10 C.F.R. § 2.1213(d), turns on the existence of irreparable injury.

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[26] *See* 896 F.3d at 536 (stating that "the agency fails to identify any statute that authorizes it not to comply with NEPA on equitable grounds" but declining, after determining that the NRC had not yet performed an analysis akin to a D.C. Circuit remand-without-vacatur analysis, to decide "whether the absence of statutory authority is sufficient to reject the analogy to judicial remand-without-vacatur").

[27] *See id.* at 538; 10 C.F.R. § 2.1213(d)(1) (requiring the presiding officer to consider "[w]hether the [stay] requestor will be irreparably injured unless a stay is granted").

[28] *Oglala Sioux Tribe*, 896 F.3d at 538.

We also agree with the Tribe that the D.C. Circuit's "no harm, no foul" rationale in *NRDC* (involving the Strata Ross facility) cannot govern our analysis here. In that case, the D.C. Circuit declined to impose a remedy for an NRC-identified NEPA-compliance deficiency on the ground that the NRC had already corrected the deficiency itself through the adjudicatory hearing process.[29] Here, in contrast, the NEPA deficiency has not been corrected, and the Board has recently determined that summary disposition of the outstanding NEPA contention is not warranted.[30] Moreover, the D.C. Circuit in *Oglala Sioux Tribe* expressly cited its prior holding in *NRDC*, but it then held the Powertech scenario to be distinguishable.[31] Therefore, we decline to treat the facts before us regarding Powertech as analogous to the facts that supported the D.C. Circuit's decision in *NRDC*.

Although providing some specific direction on what the NRC must not do, the *Oglala Sioux Tribe* opinion does not expressly set forth what the NRC *should* do, whether on remand in this case or generally for future cases. We have, however, identified certain principles in the court's opinion that we believe should guide our path forward. First, the court identified Powertech's near-term inability to move ahead with the project due to the absence of another required permit as the key factor supporting the court's decision to leave Powertech's license in place "for now."[32] The court's reasoning there squared with the court's earlier description of the "problem" posed by the NRC action under review.[33] The court also described its holding as a

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[29] 879 F.3d at 1211-12.

[30] LBP-18-05, 88 NRC __ (slip op. at 45).

[31] 896 F.3d at 534 n.10 (citing *NRDC*, 879 F.3d at 1211-12) ("This circuit has also sometimes regarded deviations from NEPA as harmless when an agency subsequently completed a comprehensive environmental review before the matter reached our court. . . . In this case, however, the agency has not yet completed a valid review.").

[32] *Id.* at 538 (emphasis omitted).

[33] *See id.* at 533 ("[T]he nature of the agency action in this case puts the problem in high relief. . . . The Tribe is concerned that mining, as well as the construction and other land

restriction on the NRC "permit[ting] a project to continue in a manner that puts at risk the values NEPA protects," and it clarified immediately thereafter that the court was not holding that the NRC's identification of a NEPA deficiency during a post-license-issuance hearing process necessarily requires that the NRC vacate the license.[34] Specifically, the court declined to hold that the NRC could never, after finding a NEPA deficiency in a post-license-issuance adjudication, permissibly leave a license in place based on a harmless error finding or based on "protective conditions the Commission might impose . . . during an administrative remand intended to cure a NEPA deficiency."[35] Thus, of particular concern to the court in this case was the potential that the license might actually be used to the detriment of resources before the NRC has remedied the Board-identified NEPA deficiency.

Second, the court's choice of remedy suggests to us that vacating Powertech's license will continue to remain inappropriate unless there is some material change in the circumstances the court considered under its *Allied-Signal* analysis. While the court declined to specify whether the NRC may consider equitable factors in the first instance when determining a remedy for a NEPA deficiency, we view our task here as implementing the court's remedy—which was expressly based on equitable considerations—rather than performing our own equitable analysis *de novo.*

Lastly, the court determined that the NRC "placing the burden on the Tribe to show harm" in order to obtain vacatur of the license was "especially inappropriate" here, "because the

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disturbances that precede mining, will damage those resources. 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." (citation omitted)).

[34] *Id.* at 538.

[35] *Id.*

inadequate EIS may well make doing so impossible."[36] Accordingly, whatever approach we adopt on remand must not require, as a prerequisite to NRC action regarding Powertech's license, that the Tribe identify specific risks to cultural resources before the NRC has met its own legal burden under NEPA to identify such risks.

Applying the principles discussed above in light of the parties' filings, we find the proper course to be to preserve the court's choice of remedy by continuing to leave the license in place for now, while imposing a protective measure to prevent harm to the Tribe's cultural resources while the identified NEPA deficiency is remedied. Based on the parties' statements of views, the key facts supporting the court's choice of remedy do not appear to have changed substantially since the court decided *Oglala Sioux Tribe*, which counsels, in our view, for continuing the court's remedy for the time being. Powertech continues to represent that action taken against its license would cause Powertech financial harm and that it cannot, in any event, make use of its NRC license yet, given the absence of necessary permits from the U.S. Environmental Protection Agency (EPA) and the State of South Dakota.[37] According to Powertech, South Dakota "awaits action by both NRC and EPA to continue its large-scale mine permit and water rights administrative proceedings, which were stayed pending these two outcomes."[38] The Tribe disputes Powertech's assertions regarding the potential financial consequences of the NRC altering the status of the license.[39] But the Tribe does not take specific issue with what the court viewed—and we view—as the more important point: that

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[36] *Id.* at 534-35.

[37] Powertech's Views at 7-8; Powertech's Responsive Views at 2-5; *see also* Staff's Views at 2 ("The license is not currently (and to date, has never been) in use."). Powertech also added, in its Responsive Views, that a necessary Bureau of Land Management approval for the project is still outstanding. Powertech's Responsive Views at 3-4.

[38] Powertech's Views at 7.

[39] Tribe's Views at 2-4.

leaving the license in place for now poses no harm to the Tribe because Powertech is not yet in a position to use its NRC license.[40] Until Powertech can lawfully use its NRC license, the risk of harm occurring to any Tribal cultural resources that is traceable to the identified NEPA deficiency will remain hypothetical. And it may never mature into a non-hypothetical risk, if Powertech is correct that South Dakota's permitting process is stayed pending the outcome of the NRC adjudicatory proceeding. Continuing to leave Powertech's license in place for now thus appears to us to be the approach most consistent with the court's opinion.

We must also account for the possibility that these circumstances could change. The court's determination that Powertech's project cannot currently move forward because South Dakota is waiting for the NRC's NEPA proceedings to conclude was based on representations made by Powertech's counsel. We consider it fair and appropriate to hold Powertech to these representations. In addition, the burden naturally should rest with Powertech to notify the NRC and the parties if there are material new developments. And to safeguard the NRC's interest in faithfully and fully complying with NEPA and the court's ruling, this notice must occur before Powertech engages in any activity at the Dewey-Burdock site under its NRC license that could potentially put Tribal resources at risk.[41]

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[40] *See generally* Tribe's Views; Tribe's Responsive Views. Relatedly, we note that Powertech's NRC license itself prohibits operations at any production area at the site until Powertech has "obtain[ed] all necessary permits, licenses, and approvals from the appropriate regulatory authorities." Ex. NRC-12 at 12 (Standard Condition 12.1).

[41] We recognize that not all activities Powertech might undertake at the site would necessarily require an NRC license. *See* LBP Order (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600) (May 20, 2014), at 7 (unpublished) (ML14140A470) (Board's Stay Denial Order) ("At oral argument, counsel for Powertech stated, without contradiction, that the ground disturbing work contemplated for the next few months could be accomplished without the NRC license."). Powertech is, however, still bound by its NRC license so long as that license remains in effect, including the license's requirement to comply with the Programmatic Agreement entered into under the NHPA. *See* Ex. NRC-12 at 5-6 (License Condition 9.8 addressing "Cultural Resources"); *see also* CLI-16-20, 84 NRC at 260 (referencing the Programmatic Agreement's protections for cultural resources discovered during project activities).

Accordingly, we order Powertech to notify the Board and the parties no later than 60 days prior to performing any activities at the Dewey-Burdock site that would require an NRC license, unless this adjudicatory proceeding is no longer pending at the time. Upon receipt of such a notice, the Board is directed to proceed expeditiously in soliciting the parties' views and considering, in light of the proceeding's status and consistent with this order, whether the Board must take action regarding Powertech's NRC license to preserve the environmental status quo.[42]

Finally, we observe that our decision in this matter is tied to the particular facts before us. Certainly, we consider it a key element of our task on remand to monitor the facts the court identified, under *Allied-Signal*, as supporting its decision not to vacate Powertech's license so that we can take prompt action consistent with the court's opinion if those facts materially change. Yet, we do not address today the question, left expressly open by the court, of whether, or under what circumstances, an NRC presiding officer should perform an *Allied-Signal*-style equitable analysis in the first instance upon finding a significant NEPA deficiency.[43] We also are not questioning today—and the court expressly did not opine upon—the propriety of relying on a harmless error standard in different circumstances.[44] This order also does not revisit the remedial approach employed in the Strata Ross proceeding, under a different factual

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[42] Because the outstanding NEPA contention may be resolved before Powertech obtains all other necessary permits to proceed with the project—meaning that the eventuality requiring Powertech to provide notice may never come to pass—we decline to order the addition of an express new condition to Powertech's license. Nonetheless, Powertech's license already states that it is "subject to all applicable rules, regulations, and *orders* of the Nuclear Regulatory Commission now or hereafter in effect," Ex. NRC-12 at 1 (emphasis added), which would include the order we issue today.

[43] *See Oglala Sioux Tribe*, 896 F.3d at 536.

[44] *See id.* at 538 ("[W]e do not decide that there is no version of a harmless error rule that the Commission may apply."); CLI-16-20, 84 NRC at 235-37 (finding harmless error in connection with Tribe's contention challenging lack of site-specific scoping, where Tribe received comparable notice and participation opportunities via other means).

scenario, that the D.C. Circuit upheld in *NRDC.* In sum, we do not attempt here to set forth a comprehensive formula for addressing any future circumstances in which significant NEPA deficiencies are found through our hearing process after staff issuance of a license under 10 C.F.R. § 2.1202(a).[45] Nonetheless, we expect that the principles discussed in this order, and in the court's *Oglala Sioux Tribe* opinion, will help to frame and inform consideration of any future questions regarding remedy that may arise in those limited categories of NRC hearings for which post-license-issuance hearings are permissible under § 2.1202(a).

## III. CONCLUSION

For the foregoing reasons, we leave Powertech's license in place for now, but we order Powertech to notify the Board and the parties no less than 60 days prior to commencing any activities at the Dewey-Burdock site under its NRC license, if the adjudicatory proceeding regarding Contention 1A remains pending at the time, so that the Board may consider expeditiously whether action is necessary to ensure full compliance with NEPA.

IT IS SO ORDERED.

For the Commission

**NRC Seal**

***/RA/***

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 31st day of January, 2019.

[45] Further, while *Oglala Sioux Tribe* and this order plainly restrict the use of the 10 C.F.R. § 2.1213(a) stay standard where a significant NEPA deficiency has already been found through our hearing process, neither we nor the court in *Oglala Sioux Tribe* has deemed that standard, or its associated burdens, inapplicable to the scenario for which it *is* traditionally used—i.e., for requests to stay a staff action taken under 10 C.F.R. § 2.1202(a) that are filed *before* the presiding officer has decided the pertinent contention(s) on the merits. *See, e.g.,* Board's Stay Denial Order (denying Tribe's request to stay Powertech's license after license issuance but before the Board decided Contentions 1A and 1B on the merits).

**Commissioner Baran, Dissenting**

As the Commission has observed many times, NEPA is a procedural statute.[1] It establishes a process to ensure that, when an agency makes a decision that could affect the environment, that decision is informed by a thorough evaluation of the expected environmental impacts. A basic premise of the statute is that informed decisionmaking will help protect the environment by forcing agencies to consider the consequences of potential actions as well as alternatives that could be less environmentally damaging. That commonsense approach simply does not work if the agency decision precedes the environmental review. Thus, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[2] When the Commission allows a Board to correct an inadequate NEPA document through augmentation *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

In two recent cases, the D.C. Circuit made it clear that it does not approve of the Commission's current practice of allowing for the augmentation of an inadequate NEPA environmental review after the decision to issue a license has already been made. In *NRDC v. NRC*, the Court examined this practice. While the Court of Appeals found that there was no concrete harm in that particular case, the Court stated:

> We do not mean to imply the procedure the Board followed was ideal or even desirable. Certainly it would be preferable for the FEIS to contain all relevant information and the record of decision to be complete and adequate before the license is issued.[3]

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[1] *See e.g., Entergy Nuclear Operations., Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 (2011).

[2] *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

[3] *NRDC v. NRC*, 879 F.3d 1202, 1212 (D.C. Cir. 2018).

The second case is the one before us now on remand. In *Oglala Sioux Tribe*, the Court of Appeals went even further than it had in *NRDC v. NRC* in broadly criticizing the agency's practice. The Court explained:

> The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm.[4]

The Court added:

> The agency's decision in this case and its apparent practice are contrary to NEPA. The statute's requirement that a detailed environmental impact statement be made for a "proposed" action make clear that agencies must take the required hard look *before* taking that action.[5]

The Court of Appeals held 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."[6] It then remanded the case to the Commission to decide whether to leave Powertech's license in place. In order to allow the Commission time to make that decision, the Court weighed the equitable factors and opted to leave "the license in effect *for now*."[7]

The Commission's decision states that our task is "implementing the court's remedy … rather than performing our own equitable analysis *de novo*."[8] I disagree. Performing a *de novo* review of whether to vacate, suspend, modify, or leave in place Powertech's license is precisely our role on remand. Though the Court did not immediately vacate the Commission's prior ruling

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[4] *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 523 (D.C. Cir. 2018).

[5] *Id.* at 532.

[6] *Id.* at 538.

[7] *Id.*

[8] Memorandum and Order at 9.

that the license should remain in effect, the Commission can and should further consider the appropriate remedy for the agency's violation of NEPA in this case. That is the very purpose of the remand.

In my view, we should not make a determination about the appropriate remedy based solely on the representations of the parties. Unlike the Court of Appeals, we are in a position to hold an evidentiary hearing, at which the parties could provide evidence of the real-world consequences of each of the potential remedies. The development of a factual record would enable the Commission to weigh the equities at stake and make a fact-based decision about whether to leave the license in place prior to the NRC Staff's completion of an adequate NEPA analysis.

Therefore, I respectfully dissent from the Commission's decision. Instead of making a decision about whether to leave Powertech's license in place without the benefit of a full factual record, I believe the Commission should find that a focused evidentiary hearing is necessary.

The Commission's decision also should address the broader question of how the agency will ensure that it is complying with NEPA in cases where the adjudicatory process occurs after the issuance of a license. The Court of Appeals decisions are a strong signal that the Commission must act to bring the agency's doctrine and practice into compliance with NEPA. The Staff's practice has been to issue materials licenses before the completion of contested hearings on environmental matters. Our regulations governing materials licenses provide:

> 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 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 . . . .[9]

The Staff has read this provision to require it to issue a license once it completes its safety review and issues a final NEPA environmental analysis. This interpretation of the

[9] 10 C.F.R. § 2.1202(a).

regulation has been paired with a Commission adjudicatory doctrine that permits the NEPA environmental analysis to be augmented by adjudicatory decisions occurring *after* issuance of a materials license. By allowing the significant deficiencies of NEPA analyses to be corrected by adjudicatory proceedings *after* a license has already been issued, the Commission has put NRC on course to repeatedly and predictably violate a core requirement of NEPA.

We have a responsibility to avoid this result. There are at least two ways to address this problematic interaction between our regulation and our augmentation doctrine: we could initiate a rulemaking to change the regulation or refine the adjudicatory doctrine. This case is not the appropriate venue for a decision about whether to initiate a rulemaking, but it is the proper vehicle for revising the augmentation doctrine. We should take this opportunity to change the Commission's current practice of allowing for the augmentation and correction of a significantly inadequate NEPA environmental review after the decision to issue a license has already been made. The Commission should hold that the Board cannot correct any significant deficiencies of a NEPA environmental review through the hearing process after a licensing action has already been taken in reliance on the deficient NEPA analysis.[10]

[10] This approach would not require completing the hearing before making a licensing decision, and it would not change Commission jurisprudence allowing for augmentation of the environmental record *before* a licensing action is taken. Rather, if a licensing decision is based on an environmental review that the Board or Commission later finds to be significantly deficient, then after-the-fact augmentation of the environmental review with the hearing record would not available as an option to correct the deficiency.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| POWERTECH (USA) INC. | ) | Docket No. 40-9075-MLA |
| (Dewey-Burdock In Situ Recovery Facility) | ) | |
| | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-19-01)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
william.froehlich@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
paul.bollwerk@nrc.gov

Taylor Mayhall, Law Clerk
Taylor.Mayhall@nrc.gov

Joseph D. McManus, Law Clerk
Joseph.McManus@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16B33
Washington, DC 20555-0001
OCAA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16B33
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Emily Monteith, Esq.
emily.monteith@nrc.gov
Lorraine Baer, Esq.
Lorraine.Baer@nrc.gov
Carrie Safford, Esq.
Carrie.Safford@nrc.gov
Krupskaya T. Castellon, Paralegal
Krupskaya.Castellon@nrc.gov
OGC Mail Center:
RidsOgcMailCenter.Resource@nrc.gov

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher S. Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Consultant to Applicant (Powertech)
WWC Engineering
1849 Terra Ave.
Sheridan, WY 82801
Jack Fritz
jfritz@wwcengineering.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy & Conservation Law
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.*
stills@frontier.net

Counsel for Consolidated Intervenors
David C. Frankel, Esq.
1430 Haines Ave., #108-372
Rapid City, SD 57701
E-mail: arm.legal@gmail.com

Counsel for Consolidated Intervenors
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.*
belli4law@aol.com
Roxanne Andre, Paralegal*
roxanneandre@yahoo.com

Counsel for Consolidated Intervenors
(Dayton Hyde)
Thomas J. Ballanco, Esq.*
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering@gmail.com

[Original signed by Clara Sola ]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of January, 2019



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