UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

POWERTECH (USA), INC.,
(Dewey-Burdock In Situ Uranium
Recovery Facility)

Docket No. 40-0975-MLA
ASLBP No. 10-898-02-MLA-BD01

May 26, 2015

CONSOLIDATED INTERVENORS' PETITION FOR REVIEW OF LBP 15-16

Pursuant to 10 CFR 2.1212 and 10 CFR 2.341, Consolidated Intervenors[1] hereby seek review of the Atomic Safety and Licensing Board's (ASLB or Board) Partial Initial Decision in LBP 15-16, and an earlier ruling in LBP 10-16 concerning standing, concerning the Powertech/Dewey-Burdock ISL[2] mining project. As some of the Consolidated Intervenors are enrolled members of the Oglala Sioux Tribe, the Consolidated Intervenors also adopt all the assertions and arguments of the Oglala Sioux Tribe in their Petition for Review of LBP 15-16 filed on this date.

Pursuant to 10 CFR 2.341(b)(2), Consolidated Intervenors submit:

(i) A concise summary of the decision or action of which review is sought:

A. LBP 15-16 is the partial initial decision of the Board in the Powertech/Dewey-Burdock source materials licensing proceeding. Consolidated Intervenors as well as the Oglala Sioux Tribe timely filed petitions to intervene,

[1] Susan Henderson, Dayton Hyde and Aligning for Responsible Mining ("ARM").
[2] "Powertech Uranium, Corp." no longer exists and is now called "Azarga Uranium, Corp." however for consistency this brief shall continue to use "Powertech/Dewey-Burdock" to indicate the Licensee.

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demonstrated standing, and had admitted contentions on the Application as well as on the DSEIS which migrated to the FSEIS per the Board's rulings. The Board did not completely decide the matter and failed to issue an initial decision as to Contentions 1A & 1B which relate to the rights of Oglala Sioux Tribe tribal members to consultation and to protection of traditional cultural resources (TCPs). In its ruling in LBP-15-16, the Board improperly withheld an initial decision and refused to rule on Contentions 1A & 1B thereby depriving the Tribe and tribal members from an opportunity to appeal the Board's decision. In LBP 15-16, the Board also ruled against Consolidated Intervenors after improperly shifting the burden of proof to Consolidated Intervenors, erroneously weighing the evidence, and/or setting new and erroneous standards under NRC Regulations to the prejudice of Consolidated Intervenors.[3]

B. In its first ruling on this matter in LBP 10-16, the Board ruled that certain petitioners did not have standing because they failed to demonstrate a plausible contaminant pathway by which they could be harmed. That ruling failed to consider that one or more of the admitted contentions related to consumption of groundwater and that as residents of Rapid City, SD, such petitioners had standing on the consumption of groundwater contention and erred by refusing standing to these petitioners.[4]

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[3] LBP 15-16 at 37 ruling against Contention D based on a newly created standard that Applications must be 'incomprehensible' and 'useless to the public' in order to be deficient under Section 40.9; LBP 15-16 at 44 ruling that the Tribe (and by extension, tribal members) should be punished for acting 'unreasonably'; LBP 15-16 at 69-70 shifting the burden of proof and creating a new 'compelling' standard; LBP 15-16 at 71 accepting a witness' unsubstantiated opinion not tied to this licensed area site geology as a basis for ruling against Consolidated Intervenors concerning faults, fractures, boreholes as undermining adequacy of containment of mining fluids; and LBP 15-16 at 115 retaining jurisdiction over Contentions 1A & 1B and refusing to issue an appealable initial decision as to Contentions 1A & 1B.

[4] LBP 10-16 at 19.

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(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised:

It was unknown what the Board would rule until LBP 15-16 was issued. All matters of fact or law raised in this Petition for Review were raised previously before the Board except those raised for the first time by the Board itself when it issued LBP 15-16.

(iii) A concise statement why in the petitioner's view the decision or action is erroneous:

A. Failure to Issue Appealable Ruling on Contentions 1A & 1B and failing to suspend Powertech's Source Materials License despite finding that NRC Staff failed to comply with NEPA requirements regarding cultural, historic and religious resources. LBP 15-16 at 44.

B. Misconstruing the trust responsibility owed by federal agencies to the Tribe and Tribal Members by presuming that the Tribe will act 'Unreasonably' and further violating the federal trust responsibility by failing to revoke Powertech's Source Materials License despite finding that meaningful consultation with the Oglala Sioux Tribe has not taken place prior to issuance of the license. Id. at 44 fn 236.

C. Setting the Lowest Possible Standard for Section 40.9 'Accuracy' and 'Completeness' in Source Materials License Applications: Consolidated Intervenors had advocated for a materiality standard to be imposed under Section 40.9 similar to that imposed in federal securities laws, namely that that Application should contain all information that a reasonably prudent member of the public would consider important in evaluating whether to intervene in a licensing proceeding. Instead the Board ruled that in order for an Application to fail Section 40.9, it must be 'incomprehensible' and 'useless to the public.' LBP 15-16 at 37. Such decision undermines the entire purpose of having

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an Application if the standard is so low that it will pass muster if it is barely comprehensible and a hair better than 'useless.'

D. Shifting the Burden of Proof to Consolidated Intervenors and Setting a High 'Compelling' Evidentiary Standard in Lieu of the 'Preponderance' Standard: On pages 69-71 of LBP 15-16, the Board finds that Consolidated Intervenors had to bear a high burden to show that there was 'compelling' evidence of natural connectivity by fractures and faults, when the Board concluded that any leakage was the result of unplugged boreholes. However, the Consolidated Intervenors did not bear the burden of proof which is supposed to be borne by Powertech and NRC Staff. It was their burden to demonstrate by a preponderance of the evidence that there was no natural connectivity. Shifting the burden to Consolidated Intervenors and imposing the very high burden to show 'compelling' evidence of natural connectivity and lack of adequate confinement was erroneous and reversible error.

E. Accepting Applicant's Witness' Demuth's Unsubstantiated Testimony: This is further described below.

(iv) A concise statement why Commission review should be exercised:

The Commission should exercise its review powers because the Board made a finding of material fact that is clearly erroneous, a necessary legal conclusion is without governing precedent or is a departure from and/or contrary to established law, a substantial and important question of law, policy, or discretion has been raised, the conduct of the proceeding involved a prejudicial procedural error; and other considerations require the Commission to exercise its review powers in the public interest.

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Pursuant to 10 CFR 2.341(b)(4), Consolidated Intervenors submit that the petition for review should be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous: At page 69-71 of LBP 15-16, the Board found that the leakage was caused by unplugged boreholes and had nothing to do with the fractures, faults and other geologic features of the project area despite evidence presented by Consolidated Intervenors and the Tribe to the contrary.

At pages 71 of LBP 15-16, the Board erred when it accepted the testimony of Powertech Witness Demuth who noted without specifics that ISL mines have operated 'successfully' (whatever that means) in areas where faults cut the ore body and that the presence of 'small scale features in the orebody is not a 'deal killer.'" Id. The Board should have understood Mr. Demuth was speaking from the perspective of the mining industry not a government regulator who is responsible for the public health & safety. While mining companies and their experts like Mr. Demuth are required to answer to the bottom line without regard for public health and safety risks (except to the extent such risks mature into balance sheet liabilities), the Board is responsible under the AEA for protecting public health and safety and so what would not be a 'deal killer' for the mining industry could be a deal killer if faults and fractures result in the migration of mining fluids. It was the NRC Staff's and Powertech's burden to carry and they failed to carry that burden based on Mr. Demuth's testimony. Therefore the Board's finding, 'that even though small faults and joints may be present in the project area, their presence does not support Intervenors' assertions that such faults produced significant offsets, much less that such faults and joints provide pathways for groundwater to migrate between

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aquifers" was not supported by the testimony and was clearly erroneous. Since several of the admitted contentions hinge on whether the faults and fractures in the licensed area are contaminant pathways, this finding of fact was material to the Board's rulings on several contentions.

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law:

A. There is no legal precedent for an administrative board of a federal agency such as the Board to forego the federal trust responsibility owed to sovereign nations such as the Oglala Sioux Tribe and its tribal members by diluting the required consultation and setting preconditions regarding perceived 'unreasonableness' by the Tribe in the government-to-government consultation process.

B. There is no legal precedent for shifting the burden of proof to Consolidated Intervenors and imposing a higher 'compelling' standard in lieu of the 'preponderance' standard.

(iii) A substantial and important question of law, policy, or discretion has been raised:

A. The Board acknowledged that meaningful consultation with the Oglala Sioux Tribe and its tribal members has not taken place. Such consultation is a necessary part of a NEPA FSEIS, which is itself a prerequisite to the issuance by NRC Staff of a Source Materials License. The Board bends applicable legal and regulatory requirements past the breaking point by finding clear deficiency in the NEPA process and yet refusing to reverse the regulatory action already taken based on the deficient NEPA document.

B. This factor is also implicated by the retention of jurisdiction over Contentions 1A & 1B and refusing to issue an appealable decision on those Contentions

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at this time.

(iv) The conduct of the proceeding involved a prejudicial procedural error:

A. The Board's retention of jurisdiction over Contentions 1A & 1B and refusal to render an appealable initial decision on those Contentions was prejudicial procedural error and should be immediately reversed by the Commission.

B. The Board's creation of new standards for accuracy and completeness under Section 40.9 and the creation of a new 'compelling' standard in lieu of the 'preponderance' standard as well as shifting the burden of proof to Consolidated Intervenors and the Tribe are prejudicial procedural error.

(v) Any other consideration which the Commission may deem to be in the public interest:

A. The public has a strong interest in seeing the NRC engage in proper and legally valid government to government consultations with indian tribes such as the Oglala Sioux Tribe and in the license being revoked until the consultation and protection of traditional cultural properties (TCPs) has been accomplished.

B. The public has a strong interest in the standard for accuracy and completeness of source material license applications being higher than that set by the Board ('incomprehensible' 'useless to the public').

C. The public has a strong interest in the NRC Staff and Applicant/Licensee as proponents of the license bearing the burdens of proof and that the burdens of proof being borne by members of the public not be overwhelmingly difficult such as the 'compelling' standard imposed by the Board on Consolidated Intervenors.

D. The public has a strong interest in being granted standing based on large

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scale consumptive use of water even if they are residents in a city that has a municipal water supply.

E. The NRC Staff routinely engages in the practice of issuing licenses immediately, usually within a week, of releasing final NEPA documents, even in cases where an ASLBP action has already been commenced. This practice violates both the spirit and legal foundation behind NEPA, that mandates consideration of environmental factors "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) *See also*, *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989); *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9th Cir. 1988); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083-1084 (9th Cir. 2011) ("NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward."). NRC Staff's practice demonstrates the low regard with which the agency seems to hold its NEPA obligations. The Board's findings and incomplete order in LBP 15-16 further demonstrates that the NRC appears to view NEPA as an inconvenience requiring only token compliance.

CONCLUSION

Based on the foregoing, Consolidated Intervenors request that the Commission accept this Petition for Review, review this matter and issue an order revoking the license that has been issued to Powertech (now Azarga). In furtherance thereof, should the Commission grant this Petition for Review, Consolidated Intervenors submit that the complexity of the legal and policy issues raised in this Petition require a briefing schedule

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that allows all parties to brief, answer and reply to all issues raised in this Petition that are accepted for review.

Dated this 26th day of May, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "CONSOLIDATED INTERVENORS' PETITION FOR REVIEW" in the captioned proceeding were served via email per the Board's order in this matter, on the 26th day of May, 2015, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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