

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

In the Matter of

POWERTECH (USA), INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

February 08, 2018

ORDER

(Requesting Information for Fourth Telephonic Conference Call)

On January 24, 2018, the Licensing Board held its third conference call with the parties to this proceeding since the issuance of LBP-17-09¹ to discuss the NRC Staff's efforts to resolve Contention 1A.² Contention 1A is the sole remaining contention in this case, and pertains to the NRC Staff's National Environmental Policy Act (NEPA) responsibility to adequately address Sioux tribal cultural, religious, and historic resources in the Final Supplemental Environmental Impact Statement (FSEIS).³ In LBP-15-16, the Board previously found with respect to Contention 1A 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

¹ See LBP-17-09, 86 NRC __ (Oct. 19, 2017).

² Tr. at 1260–310.

³ See LBP-17-09, 86 NRC at __ (slip op. at 1–2).

tribal cultural resources before granting a license,”⁴ and that the FSEIS was deficient in this regard because the FSEIS did not “contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes.”⁵ In CLI-16-20, the Commission affirmed this Board decision on Contention 1A, concluding that the Board did not commit “clear error” in its factual determination that the NRC Staff’s consideration of Oglala Sioux Tribe and other Native American cultural resources failed to satisfy NEPA’s hard look standard.⁶ Thus, the Commission affirmed that a deficiency exists in the FSEIS. Thereafter, in LBP-17-09, the Board denied the NRC Staff’s motion for summary disposition on Contention 1A, concluding that the FSEIS deficiencies remained because (1) the NRC Staff had yet to conduct a study or survey of the missing tribal cultural resources; and (2) there remained a factual dispute on whether the NRC Staff’s method of assessing the missing tribal cultural resources was reasonable.⁷

On December 6, 2017, the NRC Staff proposed in letters to the parties a newly developed approach to provide the information needed for the tribal cultural resources analysis missing in the FSEIS.⁸ Six weeks later, on January 19, 2018, the parties provided written responses to the NRC Staff’s proposal.⁹ The Board held a conference call on January 24,

⁴ LBP-15-16, 81 NRC 618, 653 (2015), aff’d, CLI-16-20, 84 NRC 219 (2016).

⁵ Id. at 655.

⁶ CLI-16-20, 84 NRC at 247–48.

⁷ See LBP-17-09, 86 NRC at ___ (slip op. at 31).

⁸ See, e.g., Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards & Environmental Review, NRC Office of Nuclear Material Safety & Safeguards (ERB/FCSE/NMSS), to Trina Lone Hill, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Dec. 6, 2017) (ADAMS Accession No. ML17340B365) [hereinafter December 6 Proposal].

⁹ Letter from Trina Lone Hill, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe, to Cinthya I. Román, Chief, ERB/FCSE/NMSS (Jan. 19, 2018) (ADAMS Accession No.

2018 that was the first opportunity to discuss the parties' formal responses to the NRC Staff's December 6 proposal to resolve Contention 1A.

During the conference call, the Oglala Sioux Tribe and Consolidated Intervenor expressed general approval of the proposal, counsel for the Oglala Sioux Tribe specifically stating that "should the [S]taff propose to move forward as proposed, we would participate,"¹⁰ and that the Tribe was committed to "soliciting . . . input and helping to coordinate and arrange the NRC [S]taff's engagement with . . . other tribes."¹¹ However, Powertech indicated that it was "unequivocal[ly]" rejecting the NRC Staff's proposal as it currently stands.¹² Nonetheless, the parties agreed to have a conference call among counsel on February 1, 2018 to determine if there was an approach to resolving Contention 1A upon which all parties could agree,¹³ and that the parties would submit a joint Status Report summarizing the teleconference to the Board.¹⁴ The parties provided the Status Report to the Board on February 6, 2018.¹⁵

The Status Report states Powertech's position that "the approach proposed by NRC Staff in December 2017 to resolve Contention 1A [is] cost-prohibitive" and indicates that counsel for Powertech "would need to discuss with the client as to whether the [licensee] could support any site survey proposal" and "whether there were any components of the NRC Staff-proposed

ML18019B267); Letter from John Mays, Chief Operating Officer, Powertech (USA) Inc., to Cinthya I. Román, Chief, ERB/FCSE/NMSS (Jan. 19, 2018) (ADAMS Accession No. ML18019B268); Email from David Frankel, Counsel, Consolidated Intervenor, to Emily Monteith, NRC Staff Counsel (Jan. 19, 2018) (ADAMS Accession No. ML18024A812).

¹⁰ Tr. at 1273.

¹¹ Tr. at 1274.

¹² Tr. at 1292.

¹³ Tr. at 1276–77, 1282, 1306.

¹⁴ Tr. at 1307.

¹⁵ Notice of Summary Report of Counsel Conference Call (Feb. 6, 2018) [hereinafter Status Report].

framework that would be acceptable . . . or any components that the licensee believes would need to be eliminated.”¹⁶ The Oglala Sioux Tribe agreed to provide “a list of the other Tribes that it contemplated being part of any survey approach.”¹⁷ The Oglala Sioux Tribe also reaffirmed its belief that a “physical site survey remains a fundamental requirement for resolution” of Contention 1A and that while a literature review could play a role in the NEPA impacts analysis, such a review “cannot substitute” for such a survey.¹⁸

While the continued willingness of the parties to engage with each other regarding the NRC Staff’s proposal is commendable, the Board is troubled that Powertech has not yet provided the NRC Staff with answers on what components of the NRC Staff’s proposal it would accept and what components it would not, and, likewise, that the Oglala Sioux Tribe has yet to prepare a list of other Tribes it contemplates being a part of a survey—let alone reached out to those Tribes to determine if they are willing to participate. It was the Board’s understanding that Powertech and the Oglala Sioux Tribe, based on statements made by counsel at the January 24, 2018 teleconference, would have this information to discuss with the NRC Staff during the February 1, 2018 conference call among counsel.¹⁹ This stands in contrast to the actions by the

¹⁶ Id., unnumbered attach. at unnumbered p. 1.

¹⁷ Id.

¹⁸ Id.

¹⁹ During the January 24, 2018 teleconference, counsel for Powertech stated that it would answer “in short order,” and discuss with the other counsel during the February 1, 2018 teleconference whether it was unequivocally opposed to any site survey, or only unequivocally opposed to any site survey that included Tribes other than the Oglala Sioux Tribe. See Tr. at 1296. Yet, in the Status Report Powertech counsel stated that he “would need to discuss with the client as to whether the [licensee] could support any site survey proposal in the framework proposed by NRC Staff.” Status Report, unnumbered attach. at unnumbered p. 1. Likewise, the December 2017 proposal asked the Oglala Sioux Tribe for assistance with identifying Tribes that should be involved, December 6 Proposal at 4, and, during the January 24 teleconference, NRC Staff counsel again asked for that information. Tr. at 1298. Yet, in the Status Report counsel for the Oglala Sioux Tribe stated that it had yet to complete such a list. Status Report, unnumbered attach. at unnumbered p. 1.

NRC Staff. After the Board denied its motion for summary disposition,²⁰ the NRC Staff moved quickly and constructively to craft a new proposal and timeline to resolve the concerns raised by the intervenors and address the Board's determinations regarding the NEPA deficiency remaining in the FSEIS as identified in Contention 1A.

Given the weather and other scheduling limitations recognized in the NRC Staff's proposal, it is incumbent upon Powertech and the intervenors to move expeditiously in response to the NRC Staff's substantial efforts. The NRC Staff's proposal was provided to the parties in early December, but, after two months, Powertech's and the intervenors' counsel still appear unable to answer basic questions regarding their clients' positions on key elements of the NRC Staff's suggested plan.²¹ The Status Report states that Powertech and the Oglala Sioux Tribe are committed to furnishing answers to the NRC Staff's questions within seven days of the February 1, 2018 call,²² and the Board requests that these responses be docketed with the Board by February 15, 2018.

Lastly, during the January 24, 2018 teleconference, the Board noted that after it received the Status Report it would "issue an order either scheduling another telephone status conference or other procedures going forward."²³ The Board anticipates holding the fourth teleconference between Tuesday, February 20 and Friday, February 23, 2018, and requests that one representative of the collective parties contact Board law clerk Sarah Ladin, at sarah.ladin@nrc.gov, no later than February 12, 2018, and provide dates and times (Eastern Time) of availability for such a session during the week of February 20, 2018. Although the Board anticipates discussing the responses docketed by the parties on February 15, 2018

²⁰ LBP-17-09, 86 NRC at ___ (slip op. at 31).

²¹ Status Report, unnumbered attach. at unnumbered p. 1.

²² Id.

²³ Tr. at 1307.

during the February teleconference, we also highly encourage the parties to contact one another to further discuss the docketed responses before the Board's February teleconference.

The Board further requests that by February 15, 2018 the NRC Staff submit to the Board documentation of the NRC's billings to Powertech from April 30, 2015,²⁴ to the present.²⁵ These billings should include, and distinguish between, any of Powertech's bills for general costs under the materials program, and any fees billable to Powertech for the resolution of Contentions 1A and 1B.²⁶ Having this cost estimate from the NRC Staff will provide the parties further clarity on

²⁴ This is the date the Board issued LBP-15-16 determining that a NEPA deficiency existed in the FSEIS for Powertech's license, thereby putting all parties on notice that action had to be taken to rectify the FSEIS's inadequacies.

²⁵ If NRC Staff considers this information sensitive, it should submit these documents non-publically via the agency's E-Filing system. While there is a Protective Order in place that governs this proceeding, Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010) (unpublished), if the NRC Staff believes that the Protective Order does not cover the information, in consultation with the other parties, the NRC Staff should submit a proposed amendment to the Protective Order by February 13, 2018, so the Board can act to ensure a timely submission of the financial information may still be made by February 15, 2018.

²⁶ For instance, we now know that had the NRC Staff implemented its original April 2017 proposal for addressing Contention 1A, fees billable to Powertech for resolving this contention would have been approximately \$619,200, according to the NRC Staff's estimate. See NRC Staff Response to January 9, 2018 Order (Scheduling Third Telephonic Conference Call) (Jan. 17, 2018) attach. 1 at 1. The requested figures should provide a baseline for determining fees actually billed to Powertech for general costs under the materials program and for fees billed to Powertech to resolve Contentions 1A and 1B after the Board's decision in LBP-15-16.

the expenses thus far incurred by Powertech in the resolution of Contentions 1A and 1B, which should facilitate further discussions of costs in resolving Contention 1A.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 08, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| 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 **ORDER (Requesting Information for Fourth Telephonic Conference Call)** 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

Margaret J. Bupp, Esq., Chief Counsel
margaret.bupp@nrc.gov

Nicole Simmons, Law Clerk
Nicole.Simmons@nrc.gov

Sarah B. Ladin, Law Clerk
Sarah.Ladin@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16B33
Washington, DC 20555-0001
OCA 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
Mary Spencer, Esq.
mary.spencer@nrc.gov
Susan Vrahoretis, Esq.
Susan.Vrahoretis@nrc.gov
Emily Monteith, Esq.
emily.monteith@nrc.gov
Sabrina Allen, Paralegal
sabrina.allen@nrc.gov
David Cylkowski
David.Cylkowski@nrc.gov
OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

ORDER (Requesting Information for Fourth Telephonic Conference Call)

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 Intervenor
Greenspoon Marder, LLP
202 Providence Mine Road, Suite 107
Nevada City, CA 95959
David C. Frankel, Esq.
E-mail: arm.legal@gmail.com

Counsel for Consolidated Intervenor
(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 Intervenor
(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 8th day of February, 2018