



POWERTECH (USA) INC.

March 30, 2018

John Mays
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Cinthya I. Román - Cuevas, Chief
Environmental Review Branch
Division of Fuel Cycle Safety, Safeguards, and Environmental Review
Office of Nuclear Material Safety and Safeguards

RE: U.S. NUCLEAR REGULATORY COMMISSION'S APPROACH TO IDENTIFY
HISTORIC, CULTURAL, AND RELIGIOUS SITES AT THE DEWEY-BURDOCK
IN SITU URANIUM RECOVERY PROJECT IN FALL RIVER AND CUSTER COUNTIES
(DOCKET NUMBER: 40-9075): Response to March 16, Letter

Dear Ms. Roman-Cuevas:

Thank you for your letter dated March 16, 2018 regarding your approach to identify historic, cultural, and religious sites at the Dewey-Burdock Project. As requested, please see Powertech (USA), Inc.'s (hereinafter "Powertech") response.

Powertech would like to emphasize that efforts to collect the data in question has taken approximately eight (8) years to date and numerous opportunities have been given to the consulted parties to gather data on historic, cultural and religious sites. As noted in Powertech's January 19, 2018 response, two (2) previous attempts have been made to satisfy the National Environmental Policy Act ("NEPA") and the associated Contention 1A in this proceeding: 1) the initial licensing action completed in 2014, which involved approximately five years of Native American Tribal consultation efforts and 2) an attempt at consultation following the Atomic Safety and Licensing Board's (hereinafter the "Board") Partial Initial Decision in April, 2015. Powertech previously funded site survey opportunities for Native American Tribes in 2013 and, in 2017, Powertech agreed to make the Dewey-Burdock site available for the Oglala Sioux Tribe (hereinafter the "Tribe") in accordance with the NRC Staff's request. The current site survey approach has been under active consideration since December, 2017 and represents a third attempt by NRC Staff to perform a site survey for historic, cultural, and religious sites at the Dewey-Burdock Project.

Powertech has already incurred approximately US\$10 million in expenditures over eleven (11) years directly related to NRC licensing, including NRC contractor and private consultant costs,



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and an initial site survey for seven (7) Native American Tribes that included approximately US\$115,000 of Tribal reimbursements. This total does not include Powertech's litigation costs and staffing costs during this time period. The NRC has invoiced Powertech approximately US\$3.8 million for the Dewey-Burdock licensing process. While the cost of consultation with Native American Tribes is not readily separable from other licensing activities, this activity was undoubtedly one of, if not the largest part of the NRC licensing effort. Of the US\$3.8 million invoiced by the NRC pertaining to the licensing process, approximately US\$2.6 million was invoiced by the Environmental Review Branch, which encompasses the activities involved in preparation of the FSEIS and consultation with Native American Tribes and represents the largest portion billed by the NRC.

NRC estimated costs in its December, 2017 site survey proposal, which envisioned five (5) Native American Tribes participating, to total US\$792,300 (*See* ML18017B322); however, this estimate did not include all costs for which Powertech would be responsible for when executing the site survey proposal. When considering these additional costs, Powertech estimated that the total cost to its business to support the December 2017 site-survey proposal would be \$1,962,300 (*See* ML18019B268). Further, the scope of this proposal and estimate only included five (5) Native American Tribes; however, the latest approach now includes seven (7) Native American Tribes. Therefore, it is reasonable to assume that the estimated costs for the current approach would increase further, undoubtedly above US\$2 million.

The estimated cost for the NRC staff approach to resolve this one contention is approaching the cost of the entire original FSEIS, which addresses a much broader array of issues concerning all items related to the environmental impact of the project. Still, even if such costs are incurred and data collection is completed, the sufficiency of NRC Staff efforts to resolve the alleged NEPA and FSEIS deficiencies must still be approved by the ASLB and can also be subject to further challenge in the course of this proceeding. In other words, if Powertech were to agree to this approach, the company could spend significant financial and managerial resources and the outstanding deficiencies potentially could remain unresolved. There is no guarantee that Powertech supporting this process will result in Contention 1A being resolved, and that even if resolved, it will not be further challenged.

Powertech further believes that the NRC Staff and ASLB should also take note of Commissioner (now Chairman) Svinicki's dissent in CLI-16-20. This dissent specifically states that "when considered under the correct legal standards, the evidentiary record supports resolving Contentions 1A and 1B in favor of the Staff." CLI-16-20 at 96-97. More specifically, Commissioner Svinicki rightly stated that "the Board examined whether the FSEIS 'adequately catalogues' the 'cultural, historical, and religious sites of the Oglala Sioux Tribe.'" *Id.* at 97. The dissent also correctly concludes that:



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"[t]his approach is facially inconsistent with our precedent, Federal case law, and the CEQ regulations, which recognize that in some instances information relevant to an EIS will not be reasonably available and direct the agency to proceed in accord with NEPA's rule of reason in the face of such lacunae." CLI-16-20 at 99-100.

With all that said, although Powertech is not convinced that this current approach (a third attempt at a site survey) provides a reasonable guarantee of a successful, cost-effective, and timely resolution of Contention 1A, in the spirit of good faith, Powertech COULD agree to this site-survey approach¹ IF:

- 1.) The ASLB establishes enforceable timelines and repercussions for missed timelines and these are enforced against parties who fail to adhere to these timelines.
- 2.) The ASLB provide confirmation that contention 1A will be satisfied through this process.
- 3.) The ASLB provide confirmation, that, should any Native American Tribe(s) participating in data collection choose not to participate in the NRC Staff approach, such lack of participation constitutes termination of their involvement in the remainder of this process and will not prevent the resolution of Contention 1A in favor of the NRC Staff and Powertech.

Powertech, in the interest of all of its stakeholders, needs reasonable assurance that the NRC Staff approach will result in the outstanding contention being resolved in favor of the NRC Staff and Powertech before agreeing to allocate significant capital to this process.

Further, Powertech COULD agree to this site survey approach² IF, NRC staff and contractor costs are not passed onto Powertech. Powertech has incurred substantial expenditures supporting past NRC Staff initiatives that have failed to resolve this outstanding Contention, and Powertech requests that the NRC Staff accept responsibility for this and be responsible for their own costs moving forward. Lastly, and an additional point that should be considered in this matter, Powertech believes that the current NRC Staff approach to resolve Contention 1A is now more cost-prohibitive than previous proposals and Powertech believes that it has presented an alternative proposal that enables the resolution of the FSEIS deficiencies identified by the ASLB and is not cost prohibitive, unlike the NRC Staff approach. Given that the Board has noted in a previous decision that the "cost-prohibitive" nature of any proposal or approach is a factor be considered, Powertech respectfully requests that NRC Staff and the ASLB assess this factor.

¹ This includes Powertech providing support of all seven bullet points listed on page 3-4 of NRC Staff March, 2018 Approach

² As previous stated, this includes Powertech providing support for all seven bullet points listed on page 3-4 of NRC Staff March, 2018 Approach



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Assuming that the ASLB and the NRC Staff support the above requests, Powertech may be able to agree to the reimbursement rates offered in the April, 2017 proposal for all Native American Tribes that choose to participate in the NRC Staff approach. However, the honoraria would only be payable on successful completion of all activities pertaining to the NRC Staff approach, in accordance with the timeline developed by the NRC Staff, and participating Native American Tribes agreeing not to seek an evidentiary hearing on the final product through a revised Contention 1A or appeal any decision of the Board on the resolution of contention 1A in favor of the NRC Staff and Powertech to any competent body, including, but not limited to, the NRC Commission.

Powertech understands that on March 16, 2018, a similar letter was provided to the Oglala Sioux Tribe and representatives of other Lakota Sioux Tribes; however, to the best of Powertech's knowledge, NRC Staff have not had further discussions with the Native American Tribes included in the NRC staff approach and is currently awaiting a response from the Tribe on its approach. Given the potential for additional input from the participating Native American Tribes, it is not clear if the current approach, timeline, or estimated costs may be subject to change, therefore many of Powertech's concerns raised in its January 19, 2018 response to the NRC Staff have not been addressed by NRC Staff.

Powertech has also provided an alternative proposal to resolve the FSEIS deficiencies that would satisfy requirements under NEPA and is not cost prohibitive. This alternative falls within the requirements of NEPA regulations and the direction provided by ASLB order LBP-17-09, yet NRC Staff has provided no meaningful feedback on this proposal. Powertech remains ready to fund such an approach to resolve Contention 1A.

Sincerely,

John Mays
Chief Operating Officer

CC: Blake Steele, President and CEO
John Tappert, NRC, Diana Diaz Toro, NRC, David Cylkowski, NRC,
Kellee Jamerson, NRC, Bill Von Till, NRC
U.S. Senator, Mike Rounds, South Dakota (R)
U.S. Senator, John Thune, South Dakota (R)
U.S. Representative, Kristi Noem, South Dakota (R)