



POWERTECH (USA) INC.

May 24, 2018

Powertech (USA) Inc.
5575 DTC Parkway, Suite 140
Greenwood Village, CO 80111-3012

Maureen Wylie
Chief Financial Officer ("CFO")
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Ms. Wylie:

Powertech (USA) Inc. ("Powertech") would like to dispute charges totaling \$10,257.00 within invoice LFB-18-3369 dated April 26, 2018, as provided for under 10 CFR § 15.31 and request a full waiver of these charges. The charges incurred by the Environmental Review Branch ("ERB") relate to license SUA -1600 and are being billed as a result of decisions made by the Atomic Safety Licensing Board ("ASLB") in LBP-15-16 and LBP-17-09 and what Powertech considers to be an overly burdensome solution to alleged deficiencies identified by the ASLB in said decisions. These charges are disputed on the basis described within this letter and Powertech requests that the accounting office and CFO investigate this matter. Further, Powertech requests the full waiver of all future charges expected to be incurred by the Nuclear Regulatory Commission ("NRC") Staff to perform work as stated in their March 16, 2018 letter (ML 18075A500) *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, South Dakota* (the "Approach"). NRC Staff estimated additional billable hours and charges over the next 12-18 months to be approximately \$661,300 in order to complete this process. Powertech does not believe it should be responsible for the costs incurred by the NRC Staff and its contractors to complete this process due to the previous and repeated failed efforts of the NRC Staff to complete National Environmental Policy Act ("NEPA") review responsibilities listed below using an Approach that strongly resembles a National Historic Preservation Act ("NHPA") Section 106 Tribal Consultation process, which the ASLB already has determined was adequately completed.

Further, as Powertech has requested a fee waiver, Powertech also requests that the NRC suspend collection of any fees while the review takes place in accordance with 10 CFR § 15.53.



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Powertech requests that the CFO review findings from the ASLB and NRC Commission, which identify NRC Staff failing to satisfy requirements under NEPA, which will give a better perspective of the foundation upon which Powertech's requests herein rest. Thus, in order to satisfy NEPA, additional significant costs will be incurred to repeat activities (for example, additional site surveys), when Powertech, the licensee, already has incurred significant costs to facilitate this process historically.

Overall, Powertech has already incurred approximately US\$10 million in expenditures over eleven (11) years directly related to NRC licensing, including consultant costs, and including an initial survey for seven (7) Tribes who willingly committed to participate in an open site survey that expended approximately US\$115 thousand for Tribal reimbursement alone. This total does not include Powertech's litigation costs and internal staff costs during this time period. NRC has invoiced Powertech for approximately US\$3.8 million for the licensing process for the Dewey-Burdock project. While the cost of consultation with Native American Tribes, or specifically the Lakota Tribes are not readily separable from other licensing activities, this activity was undoubtedly the largest part of the licensing effort. Of the US\$3.8 million invoiced by NRC pertaining to the licensing process, approximately US\$2.6 million was invoiced by ERB, which encompassed the activities involved in preparation of the final environmental impact statement ("FSEIS") and consultation with Native American Tribes and represents, by far, the largest portion billed by NRC.

Powertech respectfully requests that, due to the extreme burden placed on the licensee as a result of the repeated failed past efforts and the Approach going forward proffered by NRC Staff to satisfy NEPA, all costs associated with the Approach to satisfy NEPA, including invoice LFB-18-3369 should be borne by NRC, Further points of support include:

- 1.) Powertech is entirely dependent on NRC Staff to satisfy their responsibilities under NEPA and is powerless to take action to resolve otherwise. That said, Powertech has supported NRC Staff requests to facilitate all licensing initiatives, including providing site access on multiple occasions.
- 2.) Powertech believes it has already paid an excessive licensing cost for the Dewey-Burdock project, much greater than other comparable uranium in-situ recovery licensing actions, even despite the presence of a Generic Environmental Impact Statement specifically tailored to ISR facilities so that site-specific SEISs may be prepared using its analyses.
- 3.) Dewey-Burdock has been subject to several years of delay caused by NRC Staff deficiencies, as noted in the ASLB orders, to resolve these matters.
- 4.) NRC has repeatedly been unsuccessful with efforts, now being undertaken for a third time, to satisfy requirements.



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- 5.) Powertech cannot proceed with development and operation of the Dewey-Burdock project as the currently unresolved matter affects other pending permits which have been awaiting a resolution for several years. Powertech has documented this fact in the administrative record before the ASLB;
- 6.) Powertech has been burdened by four (4) years of continuous legal costs, which began in 2014, to support the licensing action and ongoing ASLB process and these legal costs continue at this time.

The ASLB's most recent decision on October 10, 2017 (LBP-17-09), found that for a second time data within in the Dewey-Burdock NEPA documents developed by NRC Staff was insufficient and that the NRC Staff needs to perform additional efforts to consult with Native American tribes to gather missing information pertaining to historic, cultural and religious sites. This decision is already part of a process that has taken over eight years of effort by the NRC Staff starting as far back as December, 2009. Agencies such as the US Bureau of Land Management ("BLM"), U.S. Environmental Protection Agency ("EPA") and the State of South Dakota Department of Natural Resources ("DENR") are waiting for these NEPA matters to be resolved before proceeding with their licensing initiatives. Powertech has been unnecessarily and unfairly burdened by the unreasonable duration of the efforts of NRC Staff to complete its efforts in this regard and this has placed a severe financial burden upon the licensee well beyond the charges disputed herein.

The 2017 ASLB decision represents its second major decision in litigation proceedings that occurred following the April, 2014 issuance of license SUA-1600 for the Dewey-Burdock project. In summary, the April 30, 2015, ASLB decision, LBP-15-16, originally found that the NRC Staff efforts were inadequate in regard to consultation efforts under the NHPA and identification of historical, cultural, and religious site under NEPA. Approximately two and a half years were then spent by the NRC Staff to attempt completion of consultation and resolve the deficiencies until the NRC Staff filed for summary disposition on August 3, 2017. The ASLB ruled that the NHPA deficiency had been resolved via summary disposition; however, the NEPA deficiency remained unsolved; thus, the NRC Staff developed the Approach to resolve the remaining deficiencies for identification of historic, cultural, and religious sites under the auspices of NEPA. Further, Powertech has an appeal of the alleged ASLB-identified NEPA deficiency before the Commission.

Powertech would like to direct the CFO and accounting office to the following public documents, which may be found on the NRC Agency-wide Document Access and Management System ("ADAMS") under the corresponding ascension numbers provided. To begin with the most recent decision, LBP-17-09 (ML 17292B298), the ASLB found a number of failures by the



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NRC Staff conducting a second round of attempts to consult with the Oglala Sioux Tribe and identify historical, cultural, and religious sites. Some important excerpts are as follows:

Pages 1-2

“On April 30, 2015, this Licensing Board issued a Partial Initial Decision addressing seven contentions raised by the Oglala Sioux Tribe and the Consolidated Intervenors concerning the Source Materials License issued to Powertech (USA), Inc., (Powertech) to construct and operate an in situ uranium recovery (ISR) facility. The Board ruled in favor of the NRC Staff and Powertech on all contentions save for Contentions 1A and 1B, on which the Board found for the Oglala Sioux Tribe and Consolidated Intervenors. Regarding Contention 1B, the Board determined that the NRC Staff had not complied with the National Historic Preservation Act (NHPA) because meaningful government-to-government consultations between the Oglala Sioux Tribe and the NRC Staff had not taken place. As to Contention 1A, the Board concluded that the NRC Staff had not satisfied its National Environmental Policy Act (NEPA) responsibility because the Final Supplemental Environmental Impact Statement (FSEIS) did not adequately address Sioux tribal cultural, religious, and historic resources. The Board stated that these deficiencies could be remedied if the NRC Staff initiated government-to-government consultations with the Oglala Sioux Tribe and took the steps necessary to ensure that an adequate analysis of tribal cultural resources was included in the FSEIS and the Record of Decision in this case. The NRC Staff now moves for summary disposition on both contentions. We grant the motion as to Contention 1B, concluding that over the past two years the combination of multiple attempts at direct correspondence, a May 19, 2016 face-to-face meeting, and a January 31, 2017 teleconference between the Oglala Sioux Tribe and the NRC Staff satisfies, at a bare minimum, the NHPA’s requirement that the NRC Staff consult with the Oglala Sioux Tribe. However, we deny the NRC Staff’s motion as to Contention 1A, concluding that the NRC Staff has failed to establish that there are no material facts in dispute relative to the NRC Staff’s NEPA burden to adequately address the impact of the Dewey-Burdock project on tribal cultural resources. More specifically, the NRC Staff has failed to demonstrate that there is no material factual dispute regarding the reasonableness of its method for assessing impacts from the Dewey-Burdock project on Sioux tribal cultural resources.”

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“We conclude that these points—specifically, the Oglala Sioux Tribe’s challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff’s proposed terms for an open-



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site survey to assess the identified deficiencies in this FSEIS.”

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a. Errors in Consultation Process to Date

“In addition to our findings on the NRC Staff’s Motion for Summary Disposition, we are mindful that there are cross-allegations in the pleadings that the NRC Staff and Oglala Sioux Tribe generally conducted themselves poorly in their communications.....We outline these communications issues below.”

“i. Failure to Include Counsel

Over the past two years, there were several periods during which very little communication occurred between the NRC Staff and the Oglala Sioux Tribe. The NRC Staff has alleged that it made multiple attempts to contact the Oglala Sioux Tribe without receiving any response during the periods from September 24, 2015 to November 30, 2015, and during August 2016 and December 2016. However, it appears that during that time the NRC Staff did not include the Oglala Sioux Tribe’s counsel in these attempted communications, and instead contacted Oglala Sioux Tribal staff directly.

In an effort to show that the Oglala Sioux Tribe did not avail itself of its opportunity to participate in the consultation process, the NRC Staff has pointed out that during the period of September 2015 to November 2015 the NRC Staff “attempted unsuccessfully to reach the Tribe’s THPO by telephone and email to coordinate dates for the government-to-government meetings.” Yet, having failed to receive any response from the THPO, the NRC Staff did not contact the Oglala Sioux Tribe’s counsel until two months of silence had passed.”

“There is no evidence the NRC Staff attempted to contact the Oglala Sioux Tribe’s counsel, even after the Tribe’s counsel had requested to be included in such communications. The NRC Staff also claims, that beginning on November 23, 2016 and continuing throughout December 2016, it sent emails and made several calls to the Oglala Sioux Tribe’s THPO—though, again, without communicating through the Tribe’s counsel, to arrange a teleconference, but received no response. After a month of virtual silence, the NRC Staff finally sent an email that included the Tribe’s counsel.”

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“ii. Slow Response Times by Both Parties

The record before us also suggests that neither the NRC Staff nor the Oglala Sioux Tribe could be considered highly responsive, as the consultation process has unfolded over the



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past two years. No one party is singularly to blame; both the Oglala Sioux Tribe and the NRC Staff have been slow to meet to resolve Contentions 1A and 1B. Along with the aforementioned periods during which there was no contact for weeks or months at a time, the “regular” correspondence exchange between the parties proceeded slowly and actual meetings took an overly long time to schedule.”

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iii. Mandatory Disclosure Failures

“Pursuant to 10 C.F.R. § 2.336(d), all parties bear an ongoing obligation to disclose any documents relevant to admitted contentions, which—following our issuance of the Partial Initial Decision—included Contentions 1A and 1B. The Oglala Sioux Tribe has argued that the NRC Staff failed to comply with these requirements by withholding documents relating to communications between the NRC Staff and Powertech.”

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iv. Failure to Move from Negotiating Position

“Throughout the consultation process, both the NRC Staff and the Oglala Sioux Tribe have appeared unwilling and/or unable to step away from their original negotiating position and move toward compromise.”

“Yet, despite both parties’ apparent continued inflexibility, the NRC Staff also “expressed interest in receiving information about the survey methodology/approach,” and the Oglala Sioux Tribe “committed to provide the NRC staff with information about a tribal survey approach. However, further negotiations on an acceptable methodology by both parties never transpired. Thus, despite both parties expressed interest in finding a mutually acceptable method for conducting the tribal cultural resource survey, on April 14, 2017, the NRC Staff sent the Oglala Sioux Tribe its final proposal that once again stated the NRC Staff would provide an opportunity to participate in the same open-site survey approach offered to the tribes in the original licensing review. In its May 31, 2017 response, the Oglala Sioux Tribe showed greater flexibility by identifying specific elements the Tribe believed were necessary for an adequate survey, and did so without referencing the Makoche Wowapi approach. At that point, however, the NRC Staff rejected any further negotiation regarding a cultural resources survey and instead filed its motion for summary disposition.”

The ASLB provided a solution/reprimand for these communication failures starting on page 46..

“The Board anticipates that going forward the parties will be more timely and responsive



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in their communications. Effective and productive discourse demands as much. For successful negotiation and consultation and to create a strong working relationship, regular dialogue must develop through frequent exchanges. Both the NRC Staff and the Oglala Sioux Tribe and their counsel need to improve their response times as consultation continues under the Programmatic Agreement. It should not take a year to schedule a meeting, and the Board should not have to order a teleconference to bring the parties together. Likewise, failing to copy counsel created at least four months' worth of communication delay over the past two years."

These communication failures clearly lay blame with NRC Staff and provide a clear indication of NRC Staff's overall failure to assess historic, cultural, and religious sites. Further, this was not the first time the ASLB found NRC Staff efforts to be insufficient. In 2015, the ASLB original decision on the matter, the "Partial Initial Decision" LBP-15-16, pointed to NRC Staff failures over a period of more than five (5) years during review of the license application, which included publishing the draft environmental impact statement ("DSEIS") for public comment and cumulated in publishing the FSEIS, which addresses these comments. This process will now have to be repeated due to the oversight of the NRC Staff. From the ASLB's Partial Initial Decision (ML15120A299):

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"As the proponent of the agency action, an applicant generally has the burden of proof in a licensing proceeding. The statutory obligation of complying with NEPA, however, rests with the NRC. Consequently, when NEPA contentions are involved, the burden shifts to the NRC Staff."

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"The Commission's regulations at 10 C.F.R. § 51.71(b) require the NRC Staff to include in an EIS "an analysis of significant problems and objections raised by . . . any affected Indian tribes and by other interested persons." For a variety of reasons, the FSEIS in this proceeding does 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. The field surveys conducted in 2013 by members of seven tribes and the three sets of findings submitted do not satisfy this requirement. Because the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the FSEIS does not include mitigation measures sufficient to protect this Native American tribe's cultural, historical, and religious sites that may be affected by the Powertech project."



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“Accordingly, as to Contention 1A, the Board finds and concludes that the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources. Without additional analysis as to how the Powertech project may affect the Sioux Tribes’ cultural, historical, and religious connections with the area. NEPA’s hard look requirement has not been satisfied, and potentially necessary mitigation measures have not been established. The NRC Staff did not give this issue its required hard look in the FSEIS, and therefore the Record of Decision is incomplete.”

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“The NRC Staff is at least partly at fault for the failed consultation process. For the past five years the Oglala Sioux Tribe has raised its concerns with the consultation process, and yet the NRC Staff has not held a single consultation session, on a government-to-government basis, solely with members of the Oglala Sioux Tribe.”

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“Though numerous letters were sent to the Oglala Sioux Tribe, as detailed above, quantity does not necessarily equate with meaningful or reasonable consultation, and doesn’t in itself show the NHPA-required consultation occurred.”

“Meaningful consultation between the NRC Staff and the Oglala Sioux Tribe may still be undertaken to identify and mitigate any potential harm to Sioux cultural, historical or religious sites, even though the Programmatic Agreement has been finalized. We therefore conclude that additional consultation between the NRC Staff and the Oglala Sioux Tribe is necessary. This additional consultation is required in order to 1) to satisfy the hard look at impacts required by NEPA and to supplement the FSEIS, if necessary, and 2) to satisfy the consultation requirements of the NHPA. The NRC Staff can remedy this deficiency in the Record of Decision in this proceeding by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe that may be impacted by the Powertech Dewey-Burdock project. This would then allow the adoption of mitigation measures, as necessary. The FSEIS and Record of Decision in this case must be supplemented, if necessary, to include any cultural, historic or religious sites identified and to discuss any mitigation measures necessary to avoid any adverse effects.”



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All of these statements reflect the deficiencies in the work product of NRC Staff and 1) clearly identify that the statutory obligation of complying with NEPA rests with NRC Staff and 2) the lack of compliance with NEPA by NRC Staff has been unduly burdensome to Powertech as noted above. These items further support Powertech's request that all costs associated with the Approach to satisfy NEPA, including invoice LFB-18-3369 should be borne by the NRC. This is now the third attempt NRC Staff has made to resolve the NEPA deficiency and Powertech expects the NRC to hold itself accountable for its lack of performance in this matter.

In 2015, Powertech and the NRC Staff filed a petition for review to the NRC Commission of the partial initial decision (ML 15146A493, ML 15146A499). The ASLB decision was ultimately upheld by the NRC Commission with respect to the NHPA and NEPA contentions.

The NRC Staff provided a cost estimate for the proposed Approach to satisfy the ASLB order pertaining to historical, cultural, and religious sites (ML 18017B322). These efforts include, but are not limited to, hiring a contractor to support the process, publishing a second draft SEIS, addressing public comments and drafting a second final SEIS. The NRC Staff estimated costs totaling \$792,300, of which approximately \$661,000 is attributable to NRC Staff time and contractor costs. As noted above, Powertech is requesting a full waiver of these costs. Further, it is important to note that NRC Staff's estimated costs of \$792,300 failed to include a number of Powertech specific costs. Powertech reviewed the NRC estimates and filed with the ASLB, as requested, its own cost estimates to implement the Approach (ML18019B268), which totaled approximately \$1,962,300, inclusive of sustaining costs, field labor and other expenses. The quantum of these costs clearly indicates the financial burden that has been placed on Powertech as a result of NRC Staff oversights.

In addition to the financial burden associated with the estimated costs of the Approach, the unresolved NEPA deficiencies, as a result of NRC Staff's oversights, have significantly delayed development of the Dewey-Burdock project, further amplifying that financial burden. As noted above, other permitting initiatives have been put on hold pending resolution of this issue. Details of these delays include files submitted to the ASLB on December 11, 2017 (ML 17345B130) and a letter from BLM included in Powertech's cost estimate (ML 18019B268). Documentation provided includes clear statements that several agencies including the BLM, EPA, and South Dakota DENR have been and continue to wait for resolution of the NEPA deficiency before proceeding to final approvals that would allow operation of the Dewey-Burdock project. For example, in 2013, South Dakota DENR commenced hearings on permits that were recommended for approval by DENR Staff. These hearings were subsequently placed in abeyance pending resolution of the NRC license. Such a resolution is still pending five years later. The actions, or lack thereof, of the NRC Staff continue to have a detrimental effect to the business of Powertech.



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Powertech respectfully requests that all costs associated with the Approach to satisfy NEPA, including invoice LFB-18-3369, be waived and that all future costs incurred are not billed to Powertech and are instead borne by the NRC. Powertech strongly believes that the NRC should be held accountable for their previous oversights, which have been documented herein, and that Powertech should not continue to bare the financial burden of the NRC Staff's oversights.

Sincerely,

John Mays
Chief Operating Officer