

EPA REGION 8 RESPONSE TO PETITIONER'S MOTION TO  
AMEND PETITION FOR REVIEW

## Attachment 1



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 8**

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**EPA Region 8**

**Underground Injection Control (UIC) Program**

**Response to Public Comments**

**Class III Area Permit No. SD31231-00000, Aquifer Exemption Decision**

**And**

**Class V Area Permit No. SD52173-00000**

**Issued to:**

**Powertech (USA) Inc.**

**P.O. Box 448**

**Edgemont, South Dakota 57735**

**Final Permit issuance: November 24, 2020**

## National Historic Preservation Act Comments

EPA sought comment on NHPA issues through the UIC program's public involvement procedures, which allow for public notice and comment on the draft UIC permit and its supporting record. See 36 C.F.R. §§ 800.2(d), 800.3(e); 40 CFR § 124.10. Specifically, EPA invited public comment on the identification of traditional cultural properties within the area of potential effects (APE) on the potential adverse effects of the proposed project, and on measures to avoid, minimize, or mitigate potential adverse effects on historic properties, including those of traditional religious and cultural importance, pursuant to 36 CFR § 800.2(d) and § 800.6(a)(4).

**263. The Agency received a number of comments related to compliance with the NHPA. Among them were general comments on the types of impacts and protected resources; specific comments about properties potentially covered by the NHPA; and comments characterizing the EPA's NHPA obligations and the Agency's fulfillment of them. The EPA also received comments on the NRC's NHPA compliance process, and on the EPA's potential reliance on the NRC's efforts.**

Response #263:

The approach to NHPA compliance that EPA has decided to follow in this matter makes a consolidated response to these comments appropriate.

### *Agency Public Involvement Responsibilities Under the NHPA*

Under the applicable implementing regulations, federal agency compliance with section 106 of the NHPA includes providing for appropriate public involvement. This involvement may occur, as it did here, through the public involvement procedures of another program that the federal agency is implementing. 36 C.F.R. §§ 800.2(d). The agency must "seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking." *Id.*<sup>11</sup>

### *Lead Agency Designation*

The Dewey-Burdock Project is an undertaking, as defined at 36 C.F.R. § 800.16(y), in that it is a project requiring federal permits, licenses, and approvals, including EPA UIC permits and aquifer exemption as well as the NRC license. In the case of an undertaking involving actions by one or more federal agencies, such as the Dewey-Burdock project, the ACHP's regulations provide that some or all of the agencies involved "may designate a lead federal agency," whose section 106 compliance fulfills the collective section 106 responsibilities of the other federal agencies. 36 C.F.R. § 800.2(a)(2). In this matter, involved federal agencies may designate the NRC as the lead agency, and may rely on the NRC's NHPA

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<sup>11</sup> See also Section 106 Regulations Section-by-Section Questions and Answers, Advisory Council on Historic Preservation (ACHP), <https://www.achp.gov/digital-library-section-106-landing/section-106-regulations-section-section-questions-and-answers> (agency must give the public the opportunity "to examine the results of the agency's effort to identify historic properties, evaluate their significance, and assess the undertaking's effects upon them," and "to express their views on resolving adverse effects") (accessed October 5, 2020).

compliance in accordance with stipulation 7 of the Programmatic Agreement (PA) developed by the NRC and other parties:

**Coordination with Other Federal Reviews:**

Any federal agency that will provide approvals or assistance for the undertaking as presently proposed may comply with its Section 106 responsibilities for the undertaking by agreeing to the terms of this PA in writing and sending copies of such written agreement to all the signatories and consulting parties of this PA. Such agreement to the terms of this PA will not necessitate an amendment to the PA.

Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Recovery Project Located in Custer and Fall River Counties, South Dakota (<https://www.nrc.gov/docs/ML1406/ML14066A347.pdf>). The PA was developed “to take into account the effects of the [Dewey-Burdock Project] undertaking on historic properties.” PA at 4.

*Previous EPA Statements Regarding NHPA Compliance*

EPA’s anticipated approach to compliance with section 106 was discussed in the Draft Compliance and Review Document for the Proposed Dewey-Burdock In-Situ Uranium Recovery Project (August 2019), which was included as a part of the docket for the draft EPA Underground Injection Control permits for the facility. In the draft Compliance and Review Document, EPA documented several determinations relevant to compliance with section 106:

- EPA’s federal UIC permitting for the Project is a federal undertaking. 36 CFR §§ 800.3, 800.16(y).
- This undertaking has the potential to cause effects on historic properties. 36 CFR § 800.3(a).
- The Site is in South Dakota, and is not on tribal lands as defined at 36 CFR § 800.16(x).
- The Area of Potential Effect (APE) consists of 3,887 acres within the 10,580-acre Dewey-Burdock Project Area described in Section 2.1 of the Fact Sheet for the UIC draft Class III Area Permit.

The draft Compliance and Review Document also noted that EPA was coordinating its NHPA review efforts with other required federal reviews, consistent with 36 CFR § 800.3(b), and summarized EPA’s efforts to that point to consult with the South Dakota State Historic Preservation Office (SHPO), 38 federally recognized tribes, the NRC, and the BLM.

EPA further stated in the draft Compliance and Review Document that the agency was considering whether to rely on the NRC’s section 106 review and consultation, which could be accomplished by adopting the NRC PA, or whether to complete a separate section 106 process.

*EPA Final NHPA Section 106 Compliance Determination*

After considering public comments and other available information in the record, EPA has determined that relying on the NRC’s section 106 review and consultation will appropriately address EPA’s NHPA compliance obligations for this project. Having a single agency serve as the lead, with input from other

agencies as appropriate, promotes efficiency in government. According to the ACHP, “[s]ignificant advantages to designating a single lead federal agency for Section 106 review can include increased efficiency in coordinating and communicating with consulting parties, less duplicative analyses and paperwork, and more clarity and consistency in reaching findings and determinations.” Frequently Asked Questions About Lead Federal Agencies in Section 106 Review, available at <https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies> (accessed Oct. 6, 2020). Further, EPA has concluded that completing a separate, parallel NHPA compliance effort would not meaningfully alter the protection of historic properties in connection with this undertaking. Accordingly, EPA has signed the PA and provided that signature to the other parties in accordance with PA stipulation 7. (See EPA November 13, 2020 Letter to the Advisory Council on Historic Preservation in the administrative record.)

Appendix B of the PA includes information on archaeological and tribal field surveys, and describes cultural resources identified within and adjacent to the boundary of the 10,580-acre project site. More than 300 cultural resources were identified based on this evaluation. Under the PA, Powertech is also required to protect all unevaluated properties until a determination is made as to their eligibility for inclusion on the National Register of Historic Places, and additional investigations are required if changes in the project design could affect any unevaluated properties. PA at 5 (stipulation 3.a., 3.b.). The PA also includes provisions for halting ground-disturbing work and evaluating any previously unknown cultural resources discovered during implementation of the project. PA at 10 (stipulation 9).

As a signatory to the PA, EPA will have certain specified ongoing roles and responsibilities, including:

- Reviewing draft treatment plans and revised draft treatment plans for addressing adverse effects on historic properties.
- Review and comment on Powertech’s draft Monitoring Plan for monitoring during the project to ensure that PA requirements are met.
- Review and comment on annual Monitoring Plan reports.
- Participate in calls discussing PA implementation.
- Participate in dispute resolution if that is invoked.
- Review, comment, and agree on amendments to PA.

Participating in these ways will help ensure that the PA functions effectively to protect historic properties. In addition, EPA will support the NRC in its role as lead agency as appropriate by providing information and recommendations in connection with areas of the project where EPA has knowledge or expertise.

#### *EPA Responses to NHPA Issues Raised in Comments*

As a general matter, EPA’s responsibilities under section 106 are being addressed in accordance with the Programmatic Agreement, which was developed by the NRC and other signatory agencies, and which EPA has now signed. EPA’s signature on the PA is sufficient to establish the Agency’s compliance with the NHPA. See PA at 10 (stipulation 7); 36 C.F.R. §§ 800.2(a)(2), 800.14(B). Accordingly, EPA has no further NHPA compliance obligations in connection with the Dewey-Burdock project, although as noted we will participate in accordance with our role as a signatory to the PA. Also, consistent with the NRC’s

role as lead agency, and with our role as a signatory to the PA, EPA will forward to the NRC all comments relevant to the identification of historic properties or to impacts upon them.

EPA's decision to rely on NRC as the lead federal agency for NHPA compliance is a matter committed to agency discretion by the relevant regulations. See 36 C.F.R. § 800.2(a)(2) ("If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency."). And comments directed to the sufficiency of the NRC's section 106 compliance process are beyond the scope of this action. We note, however, that – contrary to the assertions of some commenters – the NRC's NHPA process has been upheld in response to administrative petitions, while the D.C. Circuit declined to consider the petitioners' challenge to the NHPA process. See *In re Powertech USA, Inc.*, 86 N.R.C. 167 (Oct. 19, 2017), *pet. for rev. denied*, 88 NRC 1 (2018) (granting summary disposition of administrative challenge on NHPA grounds); see also *In re Powertech (USA) Inc.*, 90 N.R.C. 287, 287 (Dec. 12, 2019), *pet. for rev. pending* (finding in favor of NRC staff on "sole remaining contention," related to National Environmental Policy Act (NEPA)); *In re Powertech USA, Inc.*, Memorandum and Order, NRC Docket No. 40-9075-MLA (Oct. 8, 2020) (finding that renewed challenges concerning NHPA were brought impermissibly late, and that NRC staff had satisfied NEPA responsibilities; affirming ASLB's December 12, 2019 decision); *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 527 n.4 (D.C. Cir. 2018) (noting that NHPA issues were not before the court). The NRC's administrative review process is complete. EPA has concluded that the interests of efficiency in government and historic and cultural resource protection are best served by designating NRC as the lead agency in accordance with the provisions of the PA.

#### **National Environmental Policy Act**

**264. EPA received comments regarding EPA's compliance with the National Environmental Policy Act (NEPA) and EPA's compliance with NEPA's implementing regulations. EPA also received comments regarding statutory and regulatory exemptions for EPA compliance with NEPA. In addition, EPA received comments regarding the applicability of the doctrine of NEPA functional equivalency to EPA, the legal basis for the NEPA functional equivalence doctrine, and EPA's compliance with the NEPA functional equivalence doctrine. EPA also received comments regarding the Nuclear Regulatory Commission (NRC)'s NEPA analysis.**

Response #264:

EPA Compliance with NEPA and the NEPA Functional Equivalence Doctrine

EPA determined that its action on Powertech's applications for Class III and Class V Underground Injection Control (UIC) permits and the aquifer exemption pursuant to SDWA is exempt from NEPA consistent with EPA's longstanding view, as well as the U.S. Court of Appeals for the 8<sup>th</sup> Circuit's decision in *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8<sup>th</sup> Cir. 1991) and other relevant NEPA case law. EPA did not need to conduct a formal NEPA analysis prior to making its SDWA decisions on Powertech's applications for the UIC permits and aquifer exemption. October 23, 2020 Memo from Sarah Bahrman, Chief, Drinking Water Branch, EPA Region 8 to the File.