LBP-10-16

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

In the Matter of	Docket No. 40-9075-MLA
POWERTECH (USA), INC.	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	August 5, 2010

MEMORANDUM AND ORDER
(Ruling on Petitions to Intervene and Requests for Hearing)

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I. Introduction

Before this Board are two petitions to intervene and requests for a hearing. The first petition was filed by six individuals and two organizations sharing common counsel (Consolidated Petitioners),[1] and the second was filed by the Oglala Sioux Tribe (Oglala Sioux or Tribe).[2] These petitions to intervene and requests for hearing challenge an application submitted by Powertech (USA), Inc. (Powertech) requesting a license to construct and to operate a proposed in-situ leach uranium recovery (ISL) facility in Custer and Fall River Counties, South Dakota.[3] This facility is to be known as the Dewey-Burdock ISL facility.

Notice of the Powertech license application (Application) was published in the Federal Register on January 5, 2010.[4] That publication provided interested parties notice of the Application and the opportunity to request a hearing.

In this Memorandum and Order, we find that three individuals and the two organizations among the Consolidated Petitioners have demonstrated they have standing to participate in this proceeding, and one of their contentions as pled and three of their contentions as modified by the Board are admissible. Three other members of the Consolidated Petitioners have not demonstrated standing and are not admitted. We also find that the Oglala Sioux Tribe has shown it has standing to participate in this proceeding and three of its contentions as pled and one as modified by the Board are admissible.

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[1] Consolidated Request for Hearing and Petition for Leave to Intervene (Mar. 8, 2010) (ADAMS Accession No. ML100680010) (Petition). David Frankel, Esq., filed the Petition on his own behalf and on behalf of the following persons and organizations: Theodore P. Ebert, Gary Heckenlaible, Susan Henderson, Dayton Hyde, Lilias C. Jones Jarding, the Clean Water Alliance, and Aligning for Responsible Mining. Id. at 1.

[2] Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010) (ADAMS Accession No. ML100960645) (Tribe Petition).

[3] Powertech (USA) Inc.'s Submission of an Application for a Nuclear Regulatory Commission Uranium Recovery License for its Proposed Dewey-Burdock In-Situ Leach Uranium Recovery Facility in the State of South Dakota (Feb. 25, 2009) (ADAMS Accession No. ML091030707).

[4] Notice of Opportunity for Hearing, License Application Request of Powertech (USA), Inc. Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, SD, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation, 75 Fed. Reg. 467 (Jan. 5, 2010).

Based on these findings, we grant the hearing requests of the Consolidated Petitioners and the Oglala Sioux Tribe and admit them as parties in this proceeding.

II. Background

Powertech originally submitted an application on February 25, 2009 for a combined source[5] and 11e.(2) byproduct material license[6] to construct and operate the proposed Dewey-Burdock ISL facility in the Black Hills region of South Dakota on February 25, 2009.[7] By letter dated June 19, 2009, Powertech withdrew the application in order to revise the application to provide additional NRC Staff-requested information on hydrology/site characterization, waste disposal, location of extraction operations, protection of water resources, and operational issues. Powertech re-submitted its Dewey-Burdock license application on August 10, 2009 with additional data and information requested by the NRC Staff.[8] The NRC Staff accepted Powertech's Application for docketing on October 2, 2009,[9] and subsequently published a January 5, 2010 notice of opportunity to request a hearing on the Application, along with instructions on how to gain access to sensitive unclassified non-safeguards information (SUNSI) associated with the Application.[10]

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[5] The Atomic Energy Act of 1954, as amended, defines "source material" at Section 11(z). 42 U.S.C. § 2014. See also 10 C.F.R. § 40.4.
[6] The Atomic Energy Act of 1954, as amended, defines "byproduct material" at Section 11(e)(2). 42 U.S.C. § 2014. See also 10 C.F.R. §§ 30.4 and 40.4.
[7] See supra note 3.
[8] Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009 (Aug. 10, 2009) (ADAMS Accession No. ML092870155).
[9] Results of Acceptance Review, Powertech (USA), Inc.'s Proposed Dewey-Burdock Facility, Fall River and Custer Counties, South Dakota (Oct. 2, 2009) (ADAMS Accession No. ML092610201).
[10] See 75 Fed. Reg. at 467.

On January 15, 2010, Consolidated Petitioners submitted a request for access to SUNSI material,[11] which was reviewed and denied by the NRC Staff.[12] Consolidated Petitioners then joined a motion filed by the Oglala Sioux for a ninety-day extension of time to file its hearing request, which was opposed by both Powertech and the NRC Staff, and was subsequently denied by the Commission on March 5, 2010.[13] On March 8, 2010, Consolidated Petitioners filed their Request for Hearing and Petition for Leave to Intervene,[14] and this Licensing Board was established on March 12, 2010.[15] After requesting and being granted an extension of time by this Licensing Board,[16] Powertech and the NRC Staff filed their answers to the Consolidated Petition on April 12, 2010,[17] and Consolidated Petitioners filed their reply to the Powertech and NRC Staff answers on April 22, 2010.[18]

The Oglala Sioux requested access to SUNSI in this case on January 15, 2010, and was granted access by the NRC Staff on January 25, 2010.[19] As a result, a Protective Order granting access to the requested information was issued by the Chief Administrative Judge of

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[11] Email Request from David Cory Frankel, Legal Director for Aligning for Responsible Mining, et al. for Access to Sensitive Unclassified Non-safeguards Information (SUNSI) (Jan. 15, 2010) (ADAMS Accession No. ML100192098).
[12] NRC Staff Response to David Frankel Denying Request for Access to SUNSI Information (Jan. 25, 2010) (ADAMS Accession No. ML100252219).
[13] Order of the Secretary (Mar. 5, 2010) (unpublished) (ADAMS Accession No. ML100640426).
[14] See supra note 1.
[15] Establishment of Atomic Safety and Licensing Board (Mar. 12, 2010) (unpublished); see also Powertech (USA), Inc.; Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 13,141 (Mar. 18, 2010).
[16] See Joint Motion for Extension of Time for Late-Filed Contentions and to Respond to Request for Hearing (Mar. 31, 2010) (ADAMS Accession No. ML100900058); Licensing Board Order (Granting Motion for Extension of Time) (Apr. 1, 2010) (unpublished) (ADAMS Accession No. ML100910251). This Order also granted Consolidated Petitioners additional time to file new or amended contentions based on information recently released by the Staff. Id. at 2.
[17] Applicant Powertech (USA) Uranium Corporation's Response to Consolidated Petitioners' Request for a Hearing/Petition for Intervention (Apr. 12, 2010) (ADAMS Accession No. ML101020722) (Powertech Answer to Petition); NRC Staff Response to Hearing Request of Consolidated Petitioners (Apr. 12, 2010) (ADAMS Accession No. ML101020723) (Staff Answer to Petition).
[18] Petitioners' Consolidated Reply to Applicant and NRC Staff Answers to Hearing Request/Petition to Intervene (Apr. 19, 2010) (ADAMS Accession No. ML101100001) (Reply).
[19] See NRC Staff Response to Grace Dugan Granting Access to SUNSI Information (ADAMS Accession No. ML100210203) (Jan. 25, 2010).

the Licensing Board Panel on March 5, 2010.[20] The Protective Order stated that the Oglala Sioux was to file its Hearing Request within twenty-five days of receiving the SUNSI material from the NRC Staff.[21] The Oglala Sioux timely filed its Hearing Request and Petition for Leave to Intervene on April 6, 2010.[22] Powertech and the NRC Staff timely filed answers to the Oglala Sioux Petition on May 3, 2010,[23] and the Oglala Sioux filed its reply to the Powertech and NRC Staff answers on May 14, 2010.[24]

On April 30, 2010, Consolidated Petitioners filed a new contention (designated Contention K by the Board), which they state is based on SUNSI material provided to Consolidated Petitioners' expert on April 1, 2010.[25] Answers to Contention K were timely filed by the NRC Staff and Powertech on May 21, 2010, and May 23, 2010, respectively.[26] The Consolidated Petitioners, however, did not file a reply to the Powertech and NRC Staff answers.[27]

The Board held an oral argument on standing and contention admissibility in Custer, South Dakota on June 8 and 9, 2010.

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[20] Licensing Board Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)), (Mar. 5, 2010) (unpublished) (ADAMS Accession No. ML100640405) (Protective Order).
[21] Id. at 4.
[22] See supra note 2.
[23] Applicant Powertech (USA) Inc.'s Response to Petitioner Oglala Sioux Tribe's Request for a Hearing/Petition for Intervention (May 3, 2010) (ADAMS Accession No. ML101230722) (Powertech Answer to Tribe); NRC Staff's Response to Oglala Sioux Tribe's Hearing Request (May 3, 2010) (ADAMS Accession No. ML101230726) (Staff Answer to Tribe).
[24] Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (May 14, 2010) (ADAMS Accession No. ML101340870) (Tribe Reply).
[25] Petitioners' Request for Leave to File a New Contention Based on SUNSI Material (Apr. 30, 2010) (ADAMS Accession No. ML101200675) (New Contention).
[26] NRC Staff's Response to Consolidated Petitioners' Contention filed April 30, 2010 (May 21, 2010) (ADAMS Accession No. ML1014105410) (Staff Answer to New Contention); Applicant Powertech (USA) Uranium Corporation's Response to Consolidated Petitioners' Request for Leave to File a New Contention Based on SUNSI Material (May 23, 2010) (ADAMS Accession No. ML1014300009) (Powertech Answer to New Contention).
[27] Tr. at 381.

III. The ISL Process

With this procedural backdrop established, we note by way of explanation the technical background to this proceeding. As described in Powertech's Application, an in situ leach facility, also known as an in situ recovery (ISR) facility, is designed to remove underground (subsurface) uranium without physical mining.[28] An aqueous solution, called a lixiviant, is injected into the naturally existing underground water (groundwater) through an injection well, which dissolves the uranium in the lixiviant. The lixiviant solution consists of oxygen, carbon dioxide, and water. The uranium-containing or pregnant lixiviant is then pumped back to the surface from a production well, where the uranium is removed from the lixiviant by a process called ion exchange. The uranium-free lixiviant is then reinjected back into the ground to dissolve more uranium, and the cycle is repeated until all of the economically recoverable uranium in the ore body has been removed.

The ion exchange resin used to remove the uranium from the lixiviant is used until its removal capacity has been exhausted. At that point, the ion exchange resin is flushed with salt water to wash the uranium from the ion exchange resin, and the resulting uranium-free ion exchange resin is reused. The uranium is then removed from the salt water solution by chemical precipitation, and the resulting uranium solids are then washed, dried, and packaged for offsite shipment. The packaged solid uranium powder is the final product of an ISL facility.

As noted above, there are both injection wells, which are used to inject the uranium-free lixiviant into the subsurface, and production wells, which are used to remove the uranium-laden lixiviant from the ground. In a typical configuration, four injection wells surround a center production well in a well field. In addition to continuously recycling the lixiviant, approximately

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[28] At oral argument, counsel for Powertech explained that ISL and ISR "are the same thing – just one is a newer term." Tr. at 31. Powertech's proposed uranium recovery method and process is described in Section 1.7 of the Technical Report submitted with its Application. (ADAMS Accession No. ML092870298).

one-half to three percent more groundwater is withdrawn from the production wells than is injected through the injection wells.

The purpose of withdrawing more water is to ensure that groundwater continuously flows from outside the ore zone, through the ore zone, and into the production well, which is intended to keep uranium-laden lixiviant from migrating beyond the injection wells and contaminating the surrounding groundwater. After treating the pregnant lixiviant to remove uranium (and associated radium), the bulk of the lixiviant is refortified with oxygen and carbon dioxide and reinjected into the ground through the injection well. The nominally uranium-free excess water (commonly referred to as "bleed") is either applied on the surface via irrigation or reinjected into the subsurface away from the ore zone.

In addition to injection and production wells, monitoring wells sited outside of and above the ore zone (and the associated injection and production wells) are designed to detect any uranium that might inadvertently migrate beyond well fields. In so doing, the monitoring wells serve to detect any underground uranium leaks (excursions of lixiviant) from the ideally self-contained process.[29]

IV. Standing of Petitioners to Participate in this Proceeding

A. Legal Requirements for Standing in NRC Proceedings

A petitioner's participation in a licensing proceeding hinges on a demonstration that the petitioner has standing. Section 189a of the Atomic Energy Act of 1954 (AEA)[30] mandates that the NRC provide a hearing "upon the request of any person whose interest may be affected by the proceeding."[31] The Commission's regulations specify that a petition for review and request for hearing must include a showing that the petitioner has standing and that the Board should

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[29] For a description of the proposed facility, see Technical Report at 3-1 to 3-57 (ADAMS Accession No. ML092870299).
[30] 42 U.S.C. §§ 2011 to 2297h-13 (2006).
[31] Id. § 2239(a)(1)(A).

consider (1) the nature of the petitioner's right under the AEA or the National Environmental Policy Act (NEPA)[32] to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.[33]

The Commission customarily follows judicial concepts of standing.[34] In order to establish standing in Federal court, a party must show three key elements: injury-in-fact, causation, and redressability.[35] As the Commission has stated, standing requires that a petitioner allege "a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision."[36] In proceedings involving nuclear power reactors a petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within fifty miles of the nuclear power reactor.[37] However, no such proximity presumption applies in source materials cases such as this one.[38]

1. Injury-in-Fact

Under judicial concepts of standing, a petitioner must suffer from, or be in imminent danger of suffering, an injury-in-fact. The Supreme Court has defined injury-in-fact as "an invasion of a legally protected interest which is . . . concrete and particularized and actual or imminent rather than conjectural or hypothetical."[39] An injury-in-fact must go beyond

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[32] 42 U.S.C. § 4321 (2006).
[33] 10 C.F.R. § 2.309(a), (d)(1)(ii)-(iv).
[34] Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998) (citing Portland Gen. Elec. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)).
[35] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
[36] Quivira, CLI-98-11, 48 NRC at 6 (citing Cleveland Elec Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).
[37] See, e.g., Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (observing that the presumption applies in proceedings for nuclear power plant "construction permits, operating licenses, or significant amendments thereto").
[38] See USEC, Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005).
[39] Lujan, 504 U.S. at 560 (internal citations omitted).

generalized grievances to affect a petitioner "in a personal and individual way."[40] Thus, standing generally has been denied when the threat of injury is not concrete and particularized.[41]

Additionally, a petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding.[42] In order to determine whether an interest is in the "zone of interests" of a statute, "it is necessary 'first [to] discern the interests "arguably . . . to be protected" by the statutory provision at issue,' and 'then to inquire whether the [petitioner's] interests affected by the agency action are among them.'"[43] Generally, the AEA and NEPA are the statutes that govern proceedings before the Licensing Board. In this case, however, interests protected by the National Historic Preservation Act (NHPA)[44] are at issue as well.

2. Causation

To establish causation, a petitioner must show that there is "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[45] In source materials cases, the petitioner has the burden of showing a "specific and plausible means" by which the proposed license activities

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[40] Id. at 560 n.1.
[41] See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 158–59 (1990); Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983).
[42] Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998).
[43] U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 273 (2001) (citing Nat'l Credit Union Admin. v. First Nat'l Bank, 522 U.S. 479, 492 (1998)).
[44] 16 U.S.C. § 470 to 470x-6.
[45] Lujan, 504 U.S. at 560 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

may affect him or her.[46] Petitioners must therefore demonstrate a plausible chain of causation between the licensed activity and the alleged injury. A Board's determination of standing "does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible."[47]

3. Redressability

The third requirement necessary for a petitioner to demonstrate standing is redressability. Redressability requires a petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal.[48] For example, if a petitioner showed that the modification or denial of Powertech's Application would mitigate or eliminate her alleged injuries, then she would have satisfied the redressability requirement.

4. Standing of Organizations

While an individual may establish standing by satisfying the foregoing criteria, an organization, such as an environmental group, state or local government, or Indian Tribe, must satisfy one of two additional criteria. It must demonstrate either "organizational" standing or "representational" standing.[49] Organizational standing involves an alleged harm to the

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[46] See USEC, CLI-05-11, 61 NRC at 311-12 ("Where there is no 'obvious potential' for offsite harm, the petitioner must show a 'specific and plausible means of how the challenged action may harm him or her.'" (internal citations omitted)).
[47] Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). See also Crow Butte Res., Inc. (Crow Butte II) (In-Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 345 (2009).
[48] Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13-14 (2001); Westinghouse Elec. Corp. (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994).
[49] Georgia Inst. of Tech. (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) ("An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members. To derive standing from a member, the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests." (internal citations omitted)).

organization itself, whereas representational standing is based on an alleged harm to an organization's members.

a. Organizational Standing

To establish organizational standing under 10 C.F.R. § 2.309(d)(1), an organization must demonstrate that (1) the action at issue will cause an injury-in-fact to the organization's interests and (2) the injury is within the zone of interests protected by NEPA or the AEA.[50] To assert an appropriate injury for organizational standing, an organization "must demonstrate a palpable injury in fact to its organizational interests."[51] The Supreme Court in Sierra Club v. Morton,[52] explained that the injury-in-fact necessary to establish organizational standing must be more than "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem . . . ."[53] Instead, an organization must go beyond asserting an injury to a broad, generalized interest – i.e., an interest in protecting the environment, an interest in preserving national parks – and establish that it is suffering, or will suffer, from a specific, concrete harm caused by a third party.

b. Representational Standing

Alternatively, an organization can show standing by asserting "representational" standing, i.e., that it seeks to participate in the proceeding as the authorized representative of one or more of its individual members who themselves have standing. An organization asserting "representational" standing must (1) demonstrate that the interest of at least one of its members will be harmed; (2) demonstrate that the member would have standing in his or her

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[50] See Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Georgia Tech, CLI-95-12, 42 NRC at 115; Yankee Atomic, CLI-98-21, 48 NRC at 194-95; Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530 (1991).
[51] Turkey Point, ALAB-952, 33 NRC at 530. See also Hydro Res., Inc. (HRI) (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 269 (1998), rev'd on other grounds, CLI-98-16, 48 NRC 119 (1998).
[52] 405 U.S. 727.
[53] Id. at 739.

own right; (3) identify that member by name and address; and (4) demonstrate that the organization is authorized to request a hearing on behalf of that member.[54] Representational standing is based on an alleged harm to an organization's members, whereas organizational standing involves an alleged harm to the organization itself.

B. Licensing Board's Ruling on Standing of Petitioners

1. Consolidated Petitioners

a. Individual Petitioners

As discussed supra, in cases involving ISL uranium mining and other source materials licensing, a petitioner must demonstrate the requisite elements of standing, i.e., injury, causation, and redressability, because the Commission has held that proximity to the proposed facility alone is not adequate to demonstrate standing.[55] Therefore, the Board must assess the standing claims of the individual Consolidated Petitioners, and each of the two organizations to determine whether the requisite elements for standing to intervene are met.

All of the individual Consolidated Petitioners base their claim of standing on the possibility that contaminants from Powertech's proposed ISL mining operation will contaminate the aquifer or surface waters from which Consolidated Petitioners obtain their water.[56] This is

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[54] See GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 194 (2000); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

[55] See Consumers Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007); Int'l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998).

[56] The Petition briefly mentions that fish in the region have tested positive for Uranium and that other big game might be affected by water contamination from the mine. Petition at 5-6, 18-19. The Petition also states that the area surrounding the mine contains substantial cultural resources. Petition at 6. Consolidated Petitioners are not clear whether they intended to base standing on these claims in addition to the claims of water contamination. If so, Consolidated Petitioners fail to establish how they will suffer a direct injury from the fish and wild game, or how the presence of cultural resources will be affected by mining operations. As such, we focus our standing determination on possible ground and surface water contamination as a result of the Dewey-Burdock facility.

based on conclusions drawn from effects of the ISL mining process itself, which are discussed supra.

The Commission has placed the burden on the petitioner to allege a "specific and plausible means" by which contaminants from mining activities may adversely affect him or her;[57] that is to say, each individual Petitioner must show that there is a "specific and plausible means" by which contaminants from Powertech's proposed mine will reach the aquifer or surface waters from which that Petitioner draws water. In Hydro Resources, Inc., the Board held that standing can be granted to a petitioner in a materials licensing case where that petitioner "uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites," as such a showing demonstrates a plausible injury-in-fact.[58] Because none of the individuals in this proceeding claims to live on or immediately adjacent to Powertech's proposed mining site, the Board must determine whether the individual Petitioners have presented sufficient evidence to establish that a plausible pathway exists through which contaminants could migrate from the proposed mining site to the Petitioners' water sources.[59] In addition, because Consolidated Petitioners live in different locations, take water from different sources, and make different uses of the water, we must look to each Consolidated Petitioner individually to determine whether or not a plausible pathway has been demonstrated.

Susan Henderson

Ms. Henderson lives in Edgemont, South Dakota, within twenty miles of the proposed Powertech operation.[60] She states in her affidavit that she uses "well water from the Lakota

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[57] Nuclear Fuel Servs., Inc. (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004) (citing Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)).
[58] HRI, LBP-98-9, 47 NRC at 275.
[59] See Crow Butte II, CLI-09-9, 69 NRC at 345.
[60] Tr. at 387.

Sandstone [part of Inyan Kara] aquifer for my residence and cattle operation."[61] Ms. Henderson's affidavit further indicates she owns an 8,160-acre ranch upon which she operates a substantial cattle business.[62] Neither the Applicant nor the Staff contests that Ms. Henderson uses well water from the Lakota Sandstone, which is a formation in the Inyan Kara, nor do they dispute that this is the same aquifer in which Powertech's ISL mining will occur. Because of the proximity of Ms. Henderson's property to the proposed Powertech operation and her use of well water from the Inyan Kara aquifer and because she lives within twenty miles of the Powertech operation,[63] we conclude that there is a sufficiently plausible hydrologic connection between Ms. Henderson and the Powertech operation to accord her standing. Any potential harm associated with her use of water from the Inyan Kara is fairly traceable to the proposed action.[64]

Dayton Hyde

Mr. Hyde resides at the Black Hills Wild Horse Sanctuary in Hot Springs, South Dakota, some sixteen miles from Powertech's proposed mining operation. The Black Hills Wild Horse Sanctuary consists of several thousand acres of privately-owned land as well as another large acreage leased from the Oglala Sioux Tribe. Mr. Hyde represents that he has lived on the Sanctuary property for twenty-two years and uses water for personal, household, irrigation, ranching and gardening purposes. The Sanctuary land is protected by a Conservation easement (in favor of The Nature Conservancy), which forbids environmentally harmful activities on the land. The Cheyenne River flows through the Sanctuary and is the primary water source for the wild horses, domestic horses, cattle, and wildlife on the Sanctuary's land. The Sanctuary's 11,000 acres are also watered by five wells in the Inyan Kara aquifer. Mr. Hyde fears that if the water becomes contaminated, the Sanctuary will have no way of watering the horses. The Sanctuary land is downstream from Beaver Creek and Pass Creek; therefore, it

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[61] Affidavit of Susan Henderson ¶ 4 (Mar. 5, 2010).
[62] Id.
[63] Tr. at 387
[64] Sequoyah Fuels, CLI-94-12, 40 NRC at 75.

could be subject to contamination in the event of any spills, leaks or excursions. Mr. Hyde states that his water comes from wells in the Inyan Kara aquifer, and that the Cheyenne River is the primary source of water for the horses and wildlife on his land.[65] Because Mr. Hyde' s property is sixteen miles downstream from the Applicant's operation[66] and he draws water from wells in the Inyan Kara aquifer, the Board finds Mr. Hyde has demonstrated standing in this proceeding.

David Frankel

Mr. Frankel lives in Buffalo Gap, South Dakota, and represents that he uses water from the Inyan Kara aquifer for gardening and irrigation, and tap water from the Madison aquifer for domestic purposes.[67] Mr. Frankel's residence is approximately 50-60 miles to the east of the proposed Dewey-Burdock site,[68] which is three times farther away than either Ms. Henderson or Mr. Hyde. Petitioners Dayton Hyde and Susan Henderson, whose livelihood is dependent upon the land, have shown that they might suffer economic harm as a result of contamination of the aquifer. Because of Mr. Frankel's relative distance from the project and the resultant less potential for harm, his standing claim is somewhat more tenuous. Nonetheless, because he uses water from the Inyan Kara,[69] Mr. Frankel has set forth a scenario by which he would suffer a direct harm and has articulated a plausible connection between his well and the Applicant's proposal. Accordingly, we find that Mr. Frankel has demonstrated his standing.

Gary Heckenlaible, Lilias C. Jones Jarding, and Theodore P. Ebert

Mr. Gary Heckenlaible, Dr. Lilias C. Jones Jarding, and Mr. Theodore P. Ebert all seek standing based on their use and consumption of drinking water from municipal water sources. Mr. Ebert lives in Hot Springs, South Dakota. According to the Petition, Mr. Ebert uses Hot

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[65] Affidavit of Dayton Hyde ¶ 8 (Feb. 26, 2010); Petition at 26.
[66] Tr. at 388.
[67] Affidavit of David Frankel ¶ 3 (Mar. 8, 2010); Petition at 24.
[68] Tr. at 61.
[69] Id. at 62-63.

Springs tap water that comes from the Madison aquifer for personal, household, and domestic purposes, including gardening, bathing and drinking.[70] However, in his affidavit, Mr. Ebert states that, to his knowledge, his water comes from the Oglala aquifer.[71] The record indicates that Hot Springs is 29-40 miles northeast of the proposed Dewey-Burdock site.[72]

Mr. Heckenlaible lives in Rapid City, South Dakota, and uses Rapid City tap water, which comes from the Madison aquifer, for personal, household and domestic purposes, including gardening, bathing and drinking.[73] Consolidated Petitioners acknowledge that the distance from the proposed Dewey-Burdock site to Mr. Heckenlaible's property is "pretty far," approximately 70-80 miles.[74]

Dr. Jarding also uses Rapid City tap water, which comes from the Madison aquifer, for personal, household, and domestic uses, including gardening, bathing, and drinking. According to the Petition, "Ms. Jarding is concerned that Applicant will consume 2,243 million gallons of water from the Madison Aquifer which represents a substantial withdrawal from the aquifer upon which she relies. She also notes that her water also comes from the Mennelusa [sic] which is hydrologically connected to the Madison. Ms. Jarding is concerned that a drawdown on the Madison would also lead to a drawdown on the Minnelusa."[75] As noted above in reference to Mr. Heckenlaible, the Consolidated Petitioners acknowledge that the distance from the proposed Dewey-Burdock site to Dr. Jarding's property is "pretty far," approximately 70-80 miles.[76]

As to the demonstration of a plausible chain of connection between mining operations at the Dewey-Burdock site and the source of their drinking water, Petitioners Ebert (in Hot

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[70] Petition at 23.
[71] Affidavit of Theodore Ebert ¶ 3 (Mar. 5, 2010).
[72] Tr. at 104.
[73] Petition at 24.
[74] Tr. at 65.
[75] Petition at 26-27.
[76] Tr. at 65.

Springs), Heckenlaible, and Jarding (both in Rapid City) fall short of the necessary demonstration to establish their standing. The source of their drinking water is the Madison and/or Minnelusa aquifers, both of which are located more than 2000 feet below the Inyan Kara uranium source aquifer[77] and separated from the Inyan Kara aquifer by several different geologic layers including a confining shale layer of the Morrison Formation.[78] More importantly, their locations are upgradient of the proposed mining area.[79] There is considerable information in the record that the groundwater flow of the aquifers in the Southwestern Black Hills region is toward the southwest.[80] There was a discussion at the prehearing conference of the possibility of some easterly flow in the southern part of the Black Hills area,[81] but there is no indication that any of the groundwater flow in the Inyan Kara, the Minnelusa, or the Madison aquifers would flow in a north or northeast direction toward Rapid City or even northeast toward Hot Springs. Because Petitioners Ebert, Heckenlaible, and Jarding all use groundwater considerably upgradient of the mining area and fail to explain how contaminated material from the Dewey-Burdock site might plausibly enter their drinking water, they fail to demonstrate they fulfill the causation element necessary to establish their standing.

In sum, we find that three of the Consolidated Petitioners – Ms. Henderson, Mr. Hyde, and Mr. Frankel – have alleged a plausible connection between the source of their water (the Inyan Kara) and the proposed Powertech operation sufficient to establish the possibility that they could be harmed by Powertech's mining operations. Though we acknowledge that the possibility of their groundwater being harmed by the ISL mining might be remote or tenuous, we cannot conclude at this early stage of the proceeding that there is no reasonable possibility that

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[77] Environmental Report at 3-8, Figure 3.3-2 (ADAMS Accession No. ML092870360), Plate 3.3-5 (ADAMS Accession No. ML092870386).
[78] Id.
[79] Staff Answer to Petition at 8, 9.
[80] Id. See also Technical Report at 2-10 (ADAMS Accession No. ML092870298), 2-160 to 2-161 (ADAMS Accession No. ML092870295); Tr. at 40.
[81] Tr. at 62-63, 70-71, 74.

such harm could occur.[82] A Board's standing analysis must "avoid 'the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits.'"[83] Petitioners are not required to demonstrate their asserted injury with certainty at this stage, nor to "provide extensive technical studies" in support of their standing argument.[84] Such determinations are reserved for adjudication of the merits. A determination that "the injury is fairly traceable to the [challenged] action . . . [does] not depend[ ] on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible."[85]

Conversely, the Board finds that Petitioners Heckenlaible, Jarding and Ebert, who base their standing claims on use of municipal tap water in Rapid City, South Dakota (or in the case of Mr. Ebert, Hot Springs, South Dakota), have not alleged a plausible pathway by which they could be harmed. Dr. Jarding and Mr. Heckenlaible live in excess of 70 miles from the project site, and none of these three Petitioners have shown a plausible pathway connecting the proposed Powertech operations in the Inyan Kara to the source of their water, which are the Madison and/or Minnelusa aquifers. The Madison and Minnelusa aquifers are too distant and their connection to the Inyan Kara is far too uncertain to establish the plausible pathway necessary to achieve standing in this proceeding.

For the reasons set forth above, we find that only Consolidated Petitioners Susan Henderson, David Frankel, and Dayton Hyde have demonstrated standing to intervene in this proceeding.

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[82] Crow Butte Res., Inc. (Crow Butte I) (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 280 (2008). See also Sequoyah Fuels, CLI-94-12, 40 NRC at 74 ("[W]e conclude that [petitioner] is not required to go further at this threshold stage to establish injury in fact.").
[83] HRI, LBP-98-9, 47 NRC at 272 (citing Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994)).
[84] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 31 (1999) (citing Sequoyah Fuels, CLI-94-12, 40 NRC at 72).
[85] Sequoyah Fuels, CLI-94-12, 40 NRC at 75 (emphasis added). See also id. at 74 ("It is enough that [petitioner] has demonstrated a realistic threat . . . of sustaining a direct injury as a result of contaminated groundwater flowing from the [site] to his property.").

b. Clean Water Alliance (CWA) and Aligning for Responsible Mining (ARM)

The organizational entities among the Consolidated Petitioners are Aligning for Responsible Mining (ARM) and the Clean Water Alliance (CWA).[86] As previously noted, when an organization requests a hearing, the organization may seek to establish standing either on its own behalf or on behalf of one or more of its members.[87] At oral argument, counsel for ARM stated that it seeks only representational standing in this proceeding.[88] We find that that neither the CWA nor ARM has demonstrated organizational standing in this proceeding. However, both CWA and ARM have met the standard for representational standing.

As discussed at length supra, an organization must, in order to obtain standing, demonstrate an effect upon its organizational interests or "show that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it. . . 'representational' standing."[89] At oral argument, counsel for CWA stated that the organization sought both organizational and representational standing in this proceeding.[90] In the Petition and supporting affidavits, CWA does not allege a discrete injury to its organizational interests as is required by Sierra Club v. Morton.[91] CWA states only a generalized interest in protecting "the natural resources of the Black Hills of South Dakota with a focus on groundwater contamination from uranium mining."[92] That being so, we cannot find that CWA has established that, as an organization, it is suffering, or will suffer, from a specific, concrete harm caused by Powertech's mining operations.

Regarding the adequacy of the CWA and ARM showings to establish representational standing, as we noted earlier, an organization seeking to establish representational standing

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[86] Petition at 27.
[87] Entergy Nuclear Ops., Inc. & Entergy Nuclear Palisades, LLC (Big Rock Point Plant), CLI-08-19, 68 NRC 251, 258-59, 266 (2008).
[88] Tr. at 103.
[89] HRI, LBP-98-9, 47 NRC at 271 (internal citations omitted).
[90] Tr. at 99.
[91] 405 U.S. at 727.
[92] Petition at 27.

must show that at least one of its members may be affected by the proceeding.[93] The organization must identify that member, and it must show that the member has authorized the organization to represent him or her and request a hearing on his or her behalf.[94] In this proceeding, as the Board has found, Mr. Frankel has established standing. Mr. Frankel has also authorized ARM to represent his interests in this proceeding.[95] Thus, ARM may participate in a representational standing capacity. Similarly, the Board has granted standing to Ms. Henderson and she has authorized CWA to represent her in this proceeding;[96] thus, CWA may participate because it has representational standing.[97]

We note, however, that an individual petitioner may not request to intervene in his or her own right while simultaneously authorizing other petitioners to represent his or her interests in the proceeding. The Commission has stated that such multiple representation might lead to confusion as to whether the individual or the organization was speaking for the petitioner.[98] Therefore, the Board directs Mr. Frankel and Ms. Henderson to elect whether they wish to proceed as individual parties to this proceeding or to have their interests represented by ARM and/or CWA. Such election must be made within ten (10) days of the issuance of this Order and served on all parties and the Board.

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[93] Consumers Energy Co. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-09 (2007); Vermont Yankee, CLI-00-20, 52 NRC at 163.
[94] Palisades, CLI-07-18, 65 NRC at 409; Vermont Yankee, CLI-00-20, 52 NRC at 163.
[95] Affidavit of David Frankel, Legal Director of Aligning for Responsible Mining ¶ 2 (Mar. 8, 2010).
[96] Affidavit of Susan Henderson ¶ 2 (Mar. 5, 2010).
[97] Although the Board has not granted personal standing to Mr. Ebert, Dr. Jones Jarding, and Mr. Heckenliable, we note that they are members of ARM or CWA and therefore their interests will be represented by these entities at the hearing to be held in this proceeding.
[98] Big Rock, CLI-07-19, 65 NRC at 426 (citing Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 316 (1989) ("[A petitioner] can have her interest protected by participating as an individual or by having [an organization] represent her interest. It would be detrimental to the process to have a person appear in the proceeding individually and to be represented by an organization . . . .")).

2. The Oglala Sioux Tribe

The Oglala Sioux Tribe is a federally-recognized Indian tribe[99] and may therefore seek to participate in this proceeding as provided in 10 C.F.R. § 2.309(d)(2). However, because the proposed Powertech facility will not be located within the Tribe's boundaries, the Tribe must meet the standing requirements imposed by 10 C.F.R. § 2.309(d)(1) by showing "a concrete and particularized injury that is . . . fairly traceable to the challenged action and [is] likely to be redressed by a favorable decision."[100]

The Tribe's central standing claim is its interest in protecting cultural and historical resources that have been or might be found on the Powertech site, which the Tribe claims is within the aboriginal territory of the Oglala Sioux Tribe under the 1868 Fort Laramie Treaty.[101] The Commission found in Crow Butte II that the Oglala Sioux Tribe has "a current, concrete interest in protecting the artifacts on the site"[102] and accordingly had standing to intervene. The Tribe makes the same claims in the present proceeding and supports its claims with affidavits from Wilmer Mesteth,[103] the Oglala Sioux Tribal Historic Preservation Officer, and Denise Mesteth,[104] Director of the Oglala Sioux Tribal Land Office. The Tribe also claims a procedural interest under Section 106 of the NHPA[105] in "identifying, evaluating, and establishing protections for historic and cultural resources."[106] The Tribe additionally bases its claim of standing on possible groundwater contamination from the proposed Dewey-Burdock project.[107]

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[99] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,555 (Apr. 4, 2008).
[100] See, e.g., Yankee Atomic, CLI-98-21, 48 NRC at 195; Georgia Tech., CLI-95-12, 42 NRC at 115; Perry, CLI-93-21, 38 NRC at 92 (citing Lujan, 504 U.S. at 561).
[101] Tribe Petition at 8-9.
[102] CLI-09-9, 69 NRC at 338.
[103] See Affidavit of Wilmer Mesteth (Apr. 1, 2010).
[104] See Affidavit of Denise Mesteth (Apr. 1, 2010).
[105] 16 U.S.C. § 470f.
[106] Tribe Petition at 9.
[107] Id. at 11.

Powertech opposes the Tribe's claims of standing on the ground that there is not a plausible pathway "through which contaminants from the proposed Dewey-Burdock ISL site potentially could reach areas where [the Tribe] could suffer some concrete, particularized injury-in-fact."[108] Further, Powertech claims that the Tribe has failed to demonstrate a concrete injury-in-fact with regard to the cultural and historic resources found or yet to be identified on the Dewey-Burdock site.[109] Based on the Commission's ruling in Crow Butte II, supra, the NRC Staff does not oppose the Tribe's standing "to the extent it is based on potential harm to cultural artifacts that may yet be found at the Dewey-Burdock site."[110]

The preservation of Native American cultural traditions is a protected interest under federal law.[111] If this interest is endangered or harmed, it qualifies as a cognizable injury for AEA standing purposes under Crow Butte II.[112] In the case before us, the Powertech mining site is within the boundaries of the 1868 Fort Laramie Treaty and was occupied by the Lakota people. Moreover, the Tribe ascribes cultural and religious significance to this land and represents that it is likely that artifacts are to be found there.[113] In fact, Powertech has identified

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[108] Powertech Answer to Tribe at 28.
[109] Id, at 29.
[110] Staff Answer to Tribe at 12.
[111] See Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990); United States ex rel. Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986); United States v. Pend Oreille County Pub. Util. Dist. No. 1, 585 F. Supp. 606 (D. Wash. 1984); Ute Indians v. United States, 28 Fed. Cl. 768 (Fed. Cl. 1993). See also Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-13 (1990) (providing notification and inventory procedures so that Indian cultural objects and burial remains found on federal lands will be repatriated to the appropriate Tribe); National Historic Preservation Act (NHPA), 16 U.S.C. § 470 to 470x-6 (providing notification and consultation procedures federal agencies must follow prior to a federal "undertaking" to consider the undertaking's effect on historic properties); Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa-470mm (providing criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands; and providing for notification to Indian Tribe if permits may result in harm to cultural or religious sites).
[112] But see Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912, 916 (D.C. Cir. 2003) ("Tribe does not have standing merely because it has statutory rights in burial remains and cultural artifacts. Rather, to establish standing, the Tribe must show . . . some actual or imminent injury.").
[113] Tribe Petition at 9.

a small number of sites in the mining area that it states are eligible for inclusion in the National Register of Historic Places and many more sites that remain unevaluated.[114]

In the NHPA, Congress declared that this Nation's historical heritage "is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."[115] Section 106 of the Act, inter alia, requires a federal agency, prior to the issuance of any license, to "take into account" the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places.[116]

Detailed regulations, developed to give substance to the requirements of Section 106, provide a complex consultative process that Federal agencies must follow to comply with the NHPA.[117] As part of this process, a tribe may become a consulting party if its property, potentially affected by a federal undertaking, has religious or cultural significance.[118] A consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, to advise on the identification and evaluation of historic properties (including those of traditional religious and cultural importance), to articulate its views on the undertaking's effects on such properties, and to participate in the resolution of adverse effects.[119] Moreover, the regulations under NHPA provide that the federal agency "should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties," and should "invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement."[120]

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[114] Id.
[115] 16 U.S.C. § 470(b)(4).
[116] Id. § 470f; see also id. § 470a(a) (National Register Guidelines).
[117] 36 C.F.R. Part 800; see Advisory Council on Historic Preservation, 65 Fed. Reg. 77,698 (Dec. 12, 2000).
[118] See 36 C.F.R. § 800.2(c)(2)(ii).
[119] See id. § 800.2(c)(2)(ii)(A).
[120] See id. § 800.1(c)(2)(iii).

In short, Section 106 of the NHPA provides the Tribe with a procedural right to protect its interests in cultural resources. The Supreme Court has held that a party claiming violations of this procedural right is to be accorded a special status when it comes to standing: "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[121] To establish an injury-in-fact, a party merely has to show "some threatened concrete interest personal" to the party that NHPA was designed to protect.[122] Here, the Tribe's concrete interest is clear: there are cultural resources on the Powertech site that have not been properly identified and may be harmed as a result of mining activities. Without consultation with the Tribe, culturally significant resources will go unidentified and unprotected. As a result, development or use of the land might cause damage to these cultural resources, thereby injuring the protected interests of the Tribe.

Federal law not only recognizes that Native American tribes have a protected interest in cultural resources found on their aboriginal land, but as well has imposed on federal agencies a consultation requirement under the NHPA to ensure the protection of tribal interests in cultural resources. The Tribe's threatened injury is therefore within the zone of interests protected by the NHPA. The Tribe thus is accorded standing here.[123]

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[121] Lujan, 504 U.S. at 572 n.7.

[122] Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (1st Cir. 2007) (citing Lujan, 504 U.S. at 572-73 nn.7-8).

[123] The cases that have addressed procedural violations of the NHPA have uniformly granted standing to tribes under this relaxed standard and have proceeded directly to the merits of the NHPA claim. See, e.g., Naragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161 (1st Cir. 2003); Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800 (9th Cir. 1999); Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 45 F.3d 1207 (9th Cir. 2008). See also Duncan's Point Lot Owners Ass'n, Inc. v. Fed. Energy Regulatory Comm'n, 522 F.3d 371 (D.D.C. 2008).

V. Contentions Proposed by Consolidated Petitioners and the Oglala Sioux Tribe

A. Standards for Admissibility of Contentions

In order to participate as a party in a proceeding before the Board, a petitioner must not only establish standing, but must also proffer at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f)(1).[124] An admissible contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (vi) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[125]

The purpose of these Section 2.309(f)(1) requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[126] The Commission has stated that "the hearing process [is intended only for] issues that are 'appropriate for, and susceptible to, resolution in an NRC hearing.'"[127] Furthermore, "[w]hile a board may view a petitioner's supporting information in a light favorable to the petitioner . . . the petitioner (not the board) [is required] to supply all of the required elements for a valid intervention petition."[128]

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[124] See 10 C.F.R. § 2.309(a).
[125] Id. § 2.309(f)(1).
[126] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).
[127] Id.
[128] Amergen Energy Co. (Oyster Creek Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

The rules on contention admissibility are "strict by design."[129] Further, absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications.[130] Failure to comply with any of these requirements is grounds for not admitting a contention.[131]

Several of the contentions we address below are alleged to be contentions of omission. A contention of omission claims that "the application fails to contain information on a relevant matter as required by law . . . and [provides] the supporting reasons for the petitioner's belief."[132] To satisfy Section 2.309(f)(1)(i)-(ii), the contention of omission must describe the information that should have been included in the ER and provide the legal basis that requires the omitted information to be included. The petitioner must also demonstrate that the contention is within the scope of the proceeding.[133]

Section 2.309(f)(1)(v) requires the petitioner to provide a concise statement of the alleged facts that support its position and upon which the petitioner intends to rely at the hearing. However, "the pleading requirements of 10 C.F.R. § 2.309(f)(1)(v), calling for a recitation of facts or expert opinion supporting the issue raised, are inapplicable to a contention of omission beyond identifying the legally required missing information."[134] Thus, for a contention of omission, the petitioner's burden is only to show the facts necessary to establish that the application omits information that should have been included. The facts relied on need

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[129] See, e.g., Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999).
[130] 10 C.F.R. § 2.335(a).
[131] Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).
[132] 10 C.F.R. § 2.309(f)(1)(vi).
[133] Id. § 2.309(f)(1)(iii).
[134] Virginia Elec. & Power Co. d/b/a/ Dominion Virginia Power & Old Dominion Elec. Corp. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC __, __ (slip op. at 27) (Aug. 15, 2008) (quoting Pa'ina Hawaii, LLC (Materials License Application), LBP-06-12, 63 NRC 403, 414 (2006)).

not show that the facility cannot be safely operated, but only that the application is incomplete. If an applicant cures the omission, the contention will become moot.[135]

Finally, if the contention makes a prima facie allegation that the application omits information required by law, "it necessarily presents a genuine dispute with the Applicant on a material issue in compliance with 10 C.F.R. § 2.309(f)(1)(vi) [and] . . . raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance"[136] in accordance with Section 2.309(f)(1)(iv).

B. Board Rulings on Consolidated Petitioners' Proposed Contentions

1. Consolidated Petitioners' Contentions A and B

Consolidated Petitioners state in Contention A:

> The Application does not accurately describe the environment affected by its proposed mining operations or the extent of its impact on the environment as a result of its use and potential contamination of water resources, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the Cheyenne River.[137]

Consolidated Petitioners provide no further explanation or information supporting this contention in their Petition or their Reply. A petitioner, especially one represented by counsel, bears the burden of going forward and specifically addressing each of the six elements in 10 C.F.R. § 2.309(f)(1) for each contention proffered.[138] A single sentence labeled a contention, with no reference to the six elements of Section 2.309(f)(1) does not an admissible contention make.

Both Powertech and the NRC Staff oppose admission of Contention A. Powertech argues that Consolidated Petitioners fail to point to any specific portions of the Application that

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[135] North Anna, LBP-08-15, 68 NRC at __ (slip op. at 27); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).
[136] Pa'ina, LBP-06-12, 63 NRC at 414.
[137] Petition at 34.
[138] See supra Section V.A.

they claim are inaccurate and fail to provide support for their claim that water resources will be affected.[139] Thus, Powertech argues that Contention A should be denied because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

The NRC Staff also asserts that Contention A fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). NRC Staff argues that Consolidated Petitioners fail to identify the portion or portions of Powertech's Application that are deficient, and fail to support their claims that contaminated groundwater could infiltrate surface water with facts or expert opinion.[140]

Consolidated Petitioners state in Contention B:

> Applicant's proposed mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the Cheyenne River.[141]

Consolidated Petitioners provide no further explanation or information supporting this contention in their Petition or their Reply.

Both Powertech and the NRC Staff oppose admission of Contention B. Powertech argues that, like Contention A, Consolidated Petitioners fail to identify the portion or portions of Powertech's Application that are inaccurate or deficient, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).[142] Furthermore, Powertech states that Consolidated Petitioners fail to identify the specific water resources that may be affected by intermixing and the means by which contaminants may be introduced into the Cheyenne River.[143] Powertech argues that because Consolidated Petitioners do not plead Contention B with the requisite specificity, and because they provide no facts or expert opinion to support their claims,[144] Contention B is inadmissible.

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[139] Powertech Answer to Petition at 47.
[140] Staff Answer to Petition at 19.
[141] Petition at 34.
[142] Powertech Answer to Petition at 48.
[143] Id.
[144] 10 C.F.R. § 2.309(f)(1)(v).

The NRC Staff argues that Contention B should be denied because Consolidated Petitioners fail to provide facts or expert opinions to explain which hydrologic mechanisms could result in groundwater contamination and how this contamination could possibly occur.[145] The Staff also claims that Consolidated Petitioners do not demonstrate a genuine dispute with Powertech's Application.[146] Because Consolidated Petitioners have not met the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), the Staff argues that Contention B is inadmissible.

Contentions A and B are exactly the same as Environmental Contentions A and B proffered by Consolidated Petitioners in the Crow Butte License Renewal proceeding (Crow Butte II).[147] In the Crow Butte License Amendment proceeding (Crow Butte I), Consolidated Petitioners submitted similar contentions, and these contentions were reformulated by the Board in that case. Consolidated Petitioners have used the contentions, as reworded by the Board in Crow Butte I, in Crow Butte II and in the present proceeding. We note that, although the Board in Crow Butte I admitted Contentions A and B as reformulated,[148] the Commission found that the Board abused its discretion, overturned the Board's decision and rejected Contentions A and B as reformulated.[149]

In Crow Butte II, Consolidated Petitioners proffered the exact same contentions as reformulated by the Board in Crow Butte I, but failed to provide the extensive support, allegations, and arguments provided in their Crow Butte I pleading, opting instead to incorporate their arguments in Crow Butte I into their Crow Butte II pleading.[150] The Board in Crow Butte II found the practice of "incorporating by reference" contrary to Commission case law and

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[145] Staff Answer to Petition at 21.
[146] Id.
[147] Crow Butte II, LBP-08-24, 68 NRC 691, 729 (2008).
[148] LBP-08-6, 67 NRC at 318-23.
[149] Crow Butte I, CLI-09-12, 69 NRC 535, 573 (2009).
[150] LBP-08-24, 68 NRC at 730.

subsequently denied both Contention A and Contention B based on the dearth of information given in that proceeding.[151]

In this proceeding, as in Crow Butte II, Consolidated Petitioners fail to provide the extensive support for Contentions A and B that was provided, and found to be admissible, by the Board in Crow Butte I. At oral argument, counsel for Consolidated Petitioners urged the Board to find support for Contentions A and B elsewhere in the Petition, namely in the introductory material.[152] Commission case law supports the conclusion that it is not the Board's duty to forage through a petition in order to find statements or other support that may be located in various portions of the petition but not referenced in the contention.[153] A properly pled contention needs to lay out explicitly the required criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi) in order to be admissible;[154] a licensing board cannot be expected to go on a veritable scavenger hunt to find the missing pieces needed for an admissible contention. Indeed, the 2004 changes to NRC regulations require potential intervenors to plead contentions with specificity, as opposed to the then-current practice of merely describing "areas of concern," in order to ensure that the licensing board is not "burdened with the need to sift through the record to identify the basic issues and pertinent evidence necessary for a decision."[155] If this Board were to comply with Consolidated Petitioners' request that we scour the entirety of the submitted information in order to piece together an admissible contention for them, the Board would be acting in

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[151] Id.
[152] Tr. at 288-96.
[153] Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989) ("The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack."). See also Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 146 (1993) ("[I]t is a settled rule of practice at this Commission that contentions ought to be interpreted in light of the required specificity, so that adjudicators and parties need not search out broader meanings than were clearly intended"); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 & n.26 (2004).
[154] 69 Fed. Reg. at 2221.
[155] Id. at 2202.

contravention of the spirit of the regulations and Commission precedent. We decline to do that here.

As it stands in this proceeding, the Board finds itself presented with two contentions that, as pled, do not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). We agree with the Board in Crow Butte II that Contentions A and B do not contain sufficient explanation of the basis or bases for these contentions, do not provide alleged facts or expert opinions to support Consolidated Petitioners' position, and fail to raise a genuine dispute with Powertech's Application. Accordingly, the Board concludes that Contention A and Contention B are inadmissible.

2. Consolidated Petitioners' Contention C

Consolidated Petitioners state in Contention C:

> Cost Benefits as discussed in the Application fail to include economic value of environmental benefits.[156]

Consolidated Petitioners read 10 C.F.R. § 51.45(c)[157] to require that Powertech's Application include a discussion of the economic value of the water to be taken from the Inyan Kara and Madison Aquifers and how the resulting "aquifer drawdown" will affect property values in the area.[158] Consolidated Petitioners assert that NRC regulations require a discussion of the economic value of environmental benefits be provided in the Application, and that Powertech's failure to include such a discussion renders the Application deficient.[159]

Both Powertech and the NRC Staff oppose admission of Contention C. Powertech claims that Contention C is inadmissible because it fails to meet the admissibility requirements

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[156] Petition at 35.
[157] 10 C.F.R. § 51.45(c) discusses the general requirements of environmental reports. Specifically it states, inter alia, "The environmental report must include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avaoid adverse environmental effects."
[158] Id.
[159] Id.

of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[160] First, Powertech argues that its Application does include an assessment of the potential impacts of the Dewey-Burdock facility on wetlands, which Consolidated Petitioners do not dispute.[161] Second, Powertech asserts that 10 C.F.R. Part 51 does not require that it "quantify the positive economic value of environmental benefits; but rather, it requires a 'hard look' at potential positive and negative impacts of a proposal."[162] Therefore, Powertech claims that it has not omitted requisite information from its Application. Finally, Powertech takes issue with one study Consolidated Petitioners cite to support Contention C. Powertech argues that the study, which references wetlands in Australia, is irrelevant to this proceeding and that Consolidated Petitioners fail to draw a correlation between the other studies they cited and the possible impacts that the proposed Dewey-Burdock facility might have on wetlands in the area.[163]

The NRC Staff supports Powertech's assertion that a discussion of water consumption is included in Powertech's Application and that Consolidated Petitioners fail to dispute the Application's analyses.[164] The NRC Staff further states that Consolidated Petitioners have failed to provide support for their claim that the Dewey-Burdock project will cause negative impacts to water resources and that Consolidated Petitioners fail to dispute the analyses of impacts to water resources that are included in Powertech's Application.[165] Therefore, the NRC Staff opposes the admission of Contention C because it fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

We determine that Contention C is inadmissible because Consolidated Petitioners have failed to provide the Board with sufficient information to support a contention that the drawdown of the Madison and Inyan Kara aquifers from mining operations would have a detrimental effect

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[160] Powertech Answer to Petition at 48-50.
[161] Id. at 49.
[162] Id. (citations omitted).
[163] Id. at 48, 50.
[164] Staff Answer to Petition at 22-23.
[165] Id. at 22.

on Petitioners' property values or on wetlands in the area. A similar contention was filed in Crow Butte II and was rejected by the Commission as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased.[166] Though counsel for Consolidated Petitioners states that the defect in the Crow Butte II contention has been cured here,[167] we do not agree. Consolidated Petitioners have provided no support for the assertion that drawdown in the mined aquifers will be significant enough to cause an economic injury to Petitioners. While the study cited by Consolidated Petitioners in the Petition does support the assertion that drawdown generally affects the economic benefits of wetlands,[168] Consolidated Petitioners have not provided support to demonstrate that a genuine dispute exists regarding the impact of water drawdown from the proposed Dewey-Burdock operation. Accordingly, Consolidated Petitioners have failed to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), and this contention must be denied.

3. Consolidated Petitioners' Contention D

Consolidated Petitioners state in Contention D:

> Section 51.43(e) requires disclosure of adverse information. Section 40.9 requires disclosure of all material facts and that the Application be complete. As described in the LaGarry Opinion and the Moran Opinion, the Application fails to disclose all required information in a comprehensible manner.[169]

Consolidated Petitioners contend that Powertech's Application violates 10 C.F.R. § 40.9 because it is disorganized and fails to relay important technical information in a comprehensible manner.[170] Consolidated Petitioners rely upon the opinion of Dr. Robert E. Moran,[171] who states

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[166] CLI-09-9, 69 NRC at 356.
[167] Tr. at 315.
[168] See Petition at 35.
[169] Id. at 34-35.
[170] Id. at 36.

that the information in the Application is presented in a confused, "technically inadequate manner" and thus lacks a "statistically-sound data set for all Baseline Water Quality . . . as is required in NUREG-1569" that is easy to identify and interpret.[172] Similarly, Consolidated Petitioners offer the opinion of Dr. Hannan E. LaGarry,[173] who claims that Powertech's Application violates 10 C.F.R. § 51.45 and Criterion 5B of Appendix A to Part 40 "by failing to adequately describe confinement of the host aquifer . . . to analyze properly secondary porosity in the form of faults and joints, artesian flow, and horizontal flow of water within the uranium-bearing strata."[174] In sum, Consolidated Petitioners are alleging that Powertech's Application "fails to disclose material information in a comprehensible manner."[175]

Both Powertech and the NRC Staff oppose admission of Contention D. Powertech states that Consolidated Petitioners misread 10 C.F.R. §§ 40.9 and 51.45 and therefore fail to raise a genuine dispute with the Application as required by 10 C.F.R. § 2.309(f)(1)(vi).[176] First, Powertech argues that 10 C.F.R. § 40.9 does not impose an organizational requirement on applicants, and that Consolidated Petitioners' claim that the Application is in violation of § 40.9 because it is presented in an incomprehensible manner is unfounded.[177] Secondly, Powertech asserts that Consolidated Petitioners misread § 51.45 by alleging that Powertech has omitted

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[171] Dr. Robert E. Moran is a hydrologist / geochemist who has over 38 years of domestic and international experience in conducting and managing water quality, geochemical and hydrogeologic work. Declaration of Robert E. Moran at 1.
[172] Id. at 36-37 (emphasis in original).
[173] Dr. Hannan E. LaGarry is a geologist who has taught at Ft Hayes State University, University of Nebraska, Chadron State College and Oglala Lakota College. Declaration of Hannan LaGarry at 1-2.
[174] Id. at 38.
[175] Id. at 36.
[176] Powertech Answer to Petition at 50.
[177] Id.

material information from its Application.[178] Powertech reads § 51.45 as providing "parameters for information that should be submitted in an environmental report but do[es] not prescribe any sort of 'technical adequacy' requirement."[179] Further, Powertech asserts that Consolidated Petitioners misread Criterion 5B of Appendix A to Part 40 as pertaining to ISL facilities.[180] Powertech argues that this section applies only to conventional uranium mills, and is therefore not applicable to the Dewey-Burdock Application. However, Powertech does concede that portions of Appendix A have recently been applied to ISL facilities by the Commission as a matter of policy.[181] According to Powertech, therefore, Consolidated Petitioners have failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) because they do not identify an omission from the Application, as is required by law.

Like Powertech, the NRC Staff argues that 10 C.F.R. § 40.9 does not impose any requirement that applicants organize their submissions in any specific manner.[182] The Staff further argues that the Application is not in fact disorganized, and that Consolidated Petitioners fail to support their claim that it is.[183] Additionally, the Staff contends that the Application does not need to include additional information on baseline water quality, as Dr. Moran asserts in the Petition.[184] Dr. Moran claims that this requirement can be found in NUREG-1569, to which the Staff responds that NUREGs are only guidance and do not have the same force and effect as NRC regulations.[185] Furthermore, the Staff argues that Consolidated Petitioners have not provided any support or expert opinion that supports their assertion that the baseline water quality data in the Application is deficient and that additional information is required.[186] Finally,

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[178] Id. at 51.
[179] Id. at 51-52.
[180] Id. at 52.
[181] Id.
[182] Staff Answer to Petition at 26.
[183] Id.
[184] Id. at 27.
[185] Id.
[186] Id. at 28.

the NRC Staff disputes Consolidated Petitioners' argument that the Application violates Criterion 5B of Appendix A to Part 40 by arguing that Consolidated Petitioners have not demonstrated that the alleged omissions regarding aquifer confinement and water flow are material to the findings the NRC must make, have failed to provide alleged facts or expert opinion to support their claim, and have failed to raise a genuine dispute with Powertech's Application, all in contravention of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

The Board concludes that Consolidated Petitioners' Contention D is inadmissible insofar as it challenges the organization and clarity of Powertech's Application. We do not believe that Consolidated Petitioners have shown Powertech's Application to be so incomprehensible as to be useless to the public. Furthermore, issues of disorganization in an application cannot be said to be germane to the licensing process. According to the Board in HRI, "[a]ny area of concern is germane if it is relevant to whether the license should be denied or conditioned."[187] The organization or format of an application was not considered by that Board to be germane because the objection to the application's organization was not an objection to the licensing action at issue in the proceeding.[188]

With regard to the portions of Contention D that challenge the technical adequacy of baseline water quality data and adequate confinement of the host aquifer, the Board determines that these portions are admissible under 10 C.F.R. § 2.309(f)(1). Consolidated Petitioners offer the expert opinion of Dr. Hannan LaGarry, who opines that conclusions regarding baseline water conditions have been biased by Powertech's technical presentation of the data in the Application.[189] Dr. LaGarry also identifies portions of the Application that deal with artesian and

[187] LBP-98-9, 47 NRC at 280.
[188] Id.
[189] Petition at 37.

horizontal flow in the host aquifer, and concludes that analyses of how such flow could impact surrounding aquifers and surface waters is lacking in Powertech's Application.[190]

Consolidated Petitioners identify an issue that is within the scope of this proceeding and material to the findings the NRC must make in evaluating Powertech's Application as required by 10 C.F.R § 2.309(f)(1)(iii) and (iv). Further, Consolidated Petitioners raise a genuine dispute with Powertech's Application, namely that Powertech's presentation of baseline water quality data is biased and its analyses of aquifer confinement are inadequate. Consolidated Petitioners provide the expert opinion of Dr. LaGarry to support their assertions. Whether Consolidated Petitioners are correct in their assertions is not a matter the Board can resolve at this stage in the proceeding; such a finding is reserved for a merits determination after hearing. We therefore conclude that Consolidated Petitioners have met the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and admit the portions of Contention D that challenge the technical adequacy of baseline water quality data and adequate confinement of the host aquifer.

Contention D is therefore admitted as follows:[191]

> Powertech's presentation and analysis of baseline water quality data in its Application is inadequate. Further, Powertech's analysis of aquifer confinement fails to include an analysis of how artesian and horizontal flow could impact surrounding aquifers and surface waters.

4. Consolidated Petitioners' Contentions E and J

Consolidated Petitioners state in Contention E:

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[190] Id. at 38-39.

[191] Crow Butte I, CLI-09-12, 69 NRC at 552-53 (citing Shaw Areva MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008) (emphasis omitted). See id. at 481-83 for a discussion of Board's legal authority to reformulate contentions. See also AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 237, 240-44 (2006); Entergy Nuclear Generation Co. & Entergy Nuclear Ops., Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006); Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), LBP-04-17, 60 NRC 229, 245, 252 (2004); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 271, 276 (2004).

> The License may not be granted because it would violate Section 40.32(d) because of lack of adequate confinement of the host Inyan Kara aquifer, the proposed operation would be inimical to public health and safety in violation of the AEA and NRC Regulations . . . .[192]

Consolidated Petitioners argue that the upper confining layers of the Inyan Kara aquifer are thin and that there are breaches in these layers due to joints, faults, and perforations made by wells.[193] According to Consolidated Petitioners, this lack of confinement can potentially enable lixiviant from mining activities to leak into drinking water supplies or into groundwater.[194] Consolidated Petitioners assert that, due to these circumstances, and the fact that little is known regarding the area's hydrology and the inter-connection between aquifers, the public health and safety would be at risk should the license be issued to Powertech.[195] Consolidated Petitioners support their argument with an opinion to that effect from Dr. Hannan LaGarry.[196]

Both Powertech and the NRC Staff oppose admission of Contention E. Powertech argues that Consolidated Petitioners point to no regulation in Part 40 that requires ISL processes to be conducted in a confined geologic area.[197] Further, Powertech asserts that the Application does in fact address issues regarding confinement in the Inyan Kara aquifer in some detail in Sections 3.3.2.2, 3.4.3.1.2, and 3.4.3.2.[198] In attempting to refute Consolidated Petitioners' claim that exploratory wells pose adverse public health and safety risks, Powertech argues that all wells are properly plugged within the project area.[199] Moreover, Powertech asserts that Consolidated Petitioners' claim is not based on any expert opinion or documentation.[200] In sum, Powertech opposes the admission of Consolidated Petitioners'

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[192] Petition at 39.
[193] Id. at 40.
[194] Id. at 39.
[195] Id.
[196] Id.
[197] Powertech Answer to Petition at 53.
[198] Id. at 54.
[199] Id.
[200] Id.

Contention E because it is based on "unfounded conjecture" and fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

The NRC Staff argues that Contention E is a reiteration of Contentions A, B, and D and is inadmissible for the same reasons.[201] First, the NRC Staff asserts that Consolidated Petitioners fail to explain why their concerns would make issuing a license to Powertech inimical to public health and safety because they do not point to any regulations, beyond 10 C.F.R. § 40.32(d), that the Application allegedly violates.[202] Secondly, the NRC Staff claims that the issues raised by Dr. LaGarry in Contention E are not material to the findings the NRC must make in this proceeding.[203] Finally, the NRC Staff argues that, as with Contention D, Consolidated Petitioners fail to dispute sections of the Application where Powertech addresses the likelihood of excursions and argue only that additional analyses are needed in the Application.[204] In sum, the NRC Staff claims that Contention E is inadmissible because it does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

The Board determines that Consolidated Petitioners' Contention E is admissible. Consolidated Petitioners identify an issue that is within the scope of this proceeding and material to the findings the NRC must make in evaluating Powertech's Application. Further, Consolidated Petitioners raise a genuine dispute with Powertech's Application, namely that issuance of the license would pose a threat to public health and safety due to lack of aquifer confinement and possible groundwater contamination. Consolidated Petitioners provide the expert opinion of Dr. Hannan LaGarry to support their assertion that there is a lack of confinement of the host aquifer. Whether or not the Board ultimately determines that there is indeed a lack of confinement of the host aquifer is not an issue for the contention admissibility stage of the proceeding. We therefore conclude that Consolidated Petitioners have met the

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[201] Staff Answer to Petition at 32.
[202] Id. at 33.
[203] Id.
[204] Id. at 34.

contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and admit Contention E as merged with Contention J, infra at 42.

Consolidated Petitioners state in Contention J:

> Section 51.45(c), (e) are violated because: the Application fails to describe the extent to which the affected area contains faults and fractures horizontally and vertically between aquifers, through which the groundwater can spread thorium, radium 226 & 228, arsenic and other heavy metals disturbed through the ISL mining process.[205]

Consolidated Petitioners assert that water containing these metals can travel through faults and fractures in the aquifer to contaminate clean drinking water and water used for household purposes, thereby making ill anyone who ingests the water.[206]

Both Powertech and the NRC Staff oppose admission of Contention J. Powertech argues that Contention J should not be admitted for the same reasons as Contentions D, F, and H.[207] Again, Powertech makes the argument that 10 C.F.R. § 51.45 does not "prescribe any form or specificity requirements for the type or extent of information that should be included" in an application.[208] Furthermore, Powertech claims that the information Consolidated Petitioners allege is missing is in fact in the Application, and that Contention J therefore does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi) because it fails to raise a genuine dispute with Powertech's Application.

The NRC Staff argues that the information Consolidated Petitioners claim is omitted from Powertech's Application is indeed there, and that Consolidated Petitioners do not address these sections of the Application, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).[209] Furthermore, the NRC Staff argues that Consolidated Petitioners fail to provide any alleged facts or expert opinion to support their "blanket assertion[ ]" that harmful materials could be transported through

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[205] Petition at 56.
[206] Id.
[207] Powertech Answer to Petition at 97.
[208] Id.
[209] Staff Answer to Petition at 92.

faults into surrounding aquifers.[210] Therefore, the NRC Staff asserts that Contention J is inadmissible because it does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v).

At oral argument, counsel for Consolidated Petitioners conceded that Contention J was the same as Contention E except that Contention J expresses concern that the faults and fractures allegedly existing between aquifers can spread heavy metals, such as thorium, radium and arsenic.[211] For the same reasons the Board found Contention E to be admissible,[212] we determine that Contention J is admissible. To assure a more efficient proceeding,[213] we merge the two contentions, hereinafter to be designated Consolidated Petitioners' Contention E so that it now reads:

> The lack of adequate confinement of the host Inyan Kara aquifer makes the proposed operation inimical to public health and safety in violation of Section 40.31(d). Further, Applicant's failure to describe faults and fractures between aquifers, through which the groundwater can spread uranium, thorium, radium 226 and 228, arsenic, and other heavy metals, violates Section 51.45(c) and (e).

5. Consolidated Petitioners' Contention F

Consolidated Petitioners state in Contention F:

> The Application violates Section 51.45(c), (e) and 51.45(b)(5) by failure to describe irretrievable commitment of resources in the form of water resources taken from the Inyan Kara and Madison Aquifers in the form of the 'bleed' and in connection with restoration which involves 320 gpm from the Inyan Kara and up to 500 gpm from the Madison, as described in the Application and referenced in this Petition above.[214]

Consolidated Petitioners provide no further explanation or information supporting this contention in their Petition or their Reply.

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[210] Id. at 93.
[211] Tr. at 381-82.
[212] See supra at 40-41.
[213] See Progress Energy Florida, Inc. (Levy County Nuclear Plant, Units 1 and 2), CLI-10-2, 71 NRC __, __ (slip op. at 6) (Jan. 7, 2010) (citing Crow Butte I, CLI-09-12, 69 NRC at __ (slip op. at 23)).
[214] Petition at 40.

Both Powertech and the NRC Staff oppose admission of Contention F. Powertech argues that, like Contention D, Consolidated Petitioners' Contention F should be denied because Part 51.45 "does not prescribe the form or specificity of the information to be offered."[215] Powertech claims that a discussion concerning the commitment of water resources is included in its Application.[216] Therefore, according to Powertech, Consolidated Petitioners' claim that Powertech's discussion of commitment of resources in their Application is inadequate and cannot support an admissible contention under 10 C.F.R. § 2.309(f)(1)(vi).

The NRC Staff argues that this contention is inadmissible because it fails to account for the sections of Powertech's Application that contain the information Consolidated Petitioners claim is missing.[217] Because Consolidated Petitioners do not dispute any of the conclusions in the Application, in contravention of 10 C.F.R. § 2.309(f)(1)(vi), the Staff argues that Contention F is inadmissible.

Contention F, like Contentions A and B, is a single sentence without any additional support. Because Consolidated Petitioners' Contention F, as pled, does not attempt to address or otherwise discuss the six criteria of 10 C.F.R. § 2.309(f)(1), it is <u>not admitted</u>.[218]

6. <u>Consolidated Petitioners' Contention G</u>

Consolidated Petitioners state in Contention G:

> The Application violates Section 51.45(c) and (e) by failing in ER Section 1.3 to explain the details involved and exposures related to Applicant's proposal to "receive and process uranium loaded resins from other Proposed Projects such as Powertech's nearby Aladdin and Dewey Terrace Proposed Satellite Facility Projects planned in Wyoming or from other licensed ISL operators or other licensed facilities generating uranium-loaded resins."[219]

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[215] Powertech Answer to Petition at 56.
[216] <u>Id.</u>
[217] Staff Answer to Petition at 34.
[218] The issue raised by Consolidated Petitioners' Contention F is similar to the Oglala Sioux Tribe's Contention 4, which is addressed <u>infra</u> at 67-69.
[219] Petition at 40.

Consolidated Petitioners contend that, if Powertech is to be accepting resins from other mines, the Application must provide all plans and information "for those ores and for their processing before a permit is issued."[220] Consolidated Petitioners claim that issues such as the amount of nuclear material that will be handled, the amount of water to be used, how wastes will be disposed, and the impacts of having the additional resins on site must be discussed in the Application before a license can be issued.[221]

Both Powertech and the NRC Staff oppose admission of Contention G. Powertech claims that this contention is outside the scope of the proceeding, in contravention of 10 C.F.R. § 2.309(f)(1)(iii).[222] It argues that, though Consolidated Petitioners accurately cite statements made by Powertech concerning possible future mining and processing of resins from other sites, "they ignore the fact that this Dewey-Burdock license application is strictly limited to the recovery and processing of uranium only from the Dewey and Burdock sites."[223] Powertech categorizes its statements regarding recovery of resins from other sites as "forward-looking" and not part of the current Application.[224]

The NRC Staff argues that Consolidated Petitioners cite no alleged facts or expert opinions to support Contention G, therefore not meeting the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v).[225] Consolidated Petitioners contend that, simply because Powertech has identified the mining and processing of resins at other sites to be a possibility, the action and the impacts must be addressed in the Application.[226] The NRC Staff asserts that this is

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[220] Id.
[221] Id. at 40-41.
[222] Powertech Answer to Petition at 57.
[223] Id. at 58.
[224] Id.
[225] Staff Answer to Petition at 35.
[226] Id. at 37.

legally incorrect, and that Consolidated Petitioners fail to provide support for their assertion that Powertech needs to include this information in the Application.[227]

The Board determines that Consolidated Petitioners' Contention G is inadmissible because it is outside the scope of the current licensing proceeding and therefore is barred by 10 C.F.R. § 2.309(f)(1)(iii). In their pleadings and at oral argument, both Powertech and the NRC Staff asserted that the current Application is for a facility at the Dewey-Burdock site only, and that they do not consider a license to receive or process uranium from other facilities to be part of the current licensing request.[228] Indeed, counsel for NRC Staff stated that if Powertech were to receive resins from other sites under a license for the current Application, it would be in violation of that license and subject to enforcement measures, and possible revocation of the license.[229] Further, both Powertech and the NRC Staff agree that if Powertech were to decide to accept resins from other sites, a license amendment would be required, which would include a public notice and the opportunity to request a hearing before a licensing board.[230]

The Board notes Consolidated Petitioners' concern that, because Powertech stated in its Application that it may process resins from outside sources at the Dewey-Burdock facility in the future, it will be permitted to do so without having to file a license amendment. Consolidated Petitioners have not, however, provided the Board with any information that would lead the Board to believe that Powertech's statement was anything more than "forward-looking." We expect that, as both Powertech and the NRC Staff have represented to the Board, the public will be provided with an opportunity for a hearing in the event that Powertech decides to accept resins from other facilities at Dewey-Burdock.

For the foregoing reasons, we conclude that Consolidated Petitioners' Contention G is inadmissible.

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[227] Id.
[228] Tr. at 361, 363.
[229] Id. at 363.
[230] Id. at 361-62.

7. Consolidated Petitioners' Contention H

Consolidated Petitioners state in Contention H:

> Section 51.45(c) and (e) is violated because in the Application Section 3.4.3.1.7 ER on hydraulic connection of aquifers, the Applicant provides information that is not local and fails to include studies that are closer to the proposed project area.[231]

Consolidated Petitioners provide no further explanation or information supporting this contention in their Petition or their Reply.

Both Powertech and the NRC Staff oppose admission of Contention H. Powertech argues that Contention H should not be admitted for the same reasons as Contentions D and F, namely that 10 C.F.R. § 40.9 does not impose an organizational requirement on applicants and that a claim of inadequacy in the Application under 10 C.F.R. § 51.45 cannot be the basis for a contention.[232] Powertech claims that Consolidated Petitioners must allege "specific 'safety or legal reasons' requiring rejection of the Dewey-Burdock license application."[233] Further, Powertech asserts that its Application does in fact include discussions of hydraulic connections between aquifers and that Consolidated Petitioners fail to address the sections of the Application that discuss local aspects of aquifers and site hydrology.[234] Powertech insists that Contention H is therefore inadmissible.

The NRC Staff argues that Contention H is inadmissible because it fails to discuss portions of Powertech's Application that contain local information related to hydraulic connections between aquifers.[235] Also, the NRC Staff contends that Consolidated Petitioners fail to cite any regulation or legal authority that would require Powertech to include local information in its Application.[236] Based on these arguments, the NRC Staff claims that

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[231] Petition at 41.
[232] Powertech Answer to Petition at 59.
[233] Id.
[234] Id.
[235] Staff Answer to Petition at 38.
[236] Id.

Contention H is inadmissible because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

The Board determines that Consolidated Petitioners' Contention H, like Contentions A, B and F, supra, is inadmissible because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). As pled, Contention H consists of a single sentence that alleges the Application fails to include studies on the hydraulic connection of aquifers that are local to the proposed Dewey-Burdock site.[237] At oral argument, however, Consolidated Petitioners contended that the studies they believe should have been included in Powertech's Application are attached to Dr. Jarding's expert opinion and cited a number of regulations they believe require Powertech to use local studies.[238]

Contention H fails for two reasons. First, Consolidated Petitioners fail to cite to any local studies in their Petition that Powertech could have or should have used in its Application. At oral argument, counsel for Consolidated Petitioners claimed that examples of local studies were attached to "Dr. Jarding's geological summary of published studies"[239] but failed to specify which of the more than a dozen studies cited in Dr. Jarding's summary are examples that would support this contention. As discussed with regard to Consolidated Petitioners' Contentions A, B and F above, the Board cannot be expected to search through the Petition to find information that may support Consolidated Petitioners' contentions. Consolidated Petitioners did not refer to these studies in their pleading of Contention H, and Dr. Jarding did not make the allegation in her summary that these studies should have been used by the Applicant. Therefore, Consolidated Petitioners fail to provide adequate alleged facts or expert opinion to support Contention H, in contravention of 10 C.F.R. § 2.309(f)(1)(v).

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[237] Petition at 41.
[238] Tr. at 369, 370.
[239] Id. at 369.

Secondly, and more importantly, Consolidated Petitioners do not point to any NRC regulation that would require Powertech to include local studies in its Application. NRC Staff stated at oral argument that they are unaware of a regulation that requires this.[240] Consolidated Petitioners' failure to point to a regulation that requires the inclusion of omitted information in an application is fatal under 10 C.F.R. § 2.309(f)(1)(vi) and thus precludes the admission of Contention H. The Board therefore concludes that Consolidated Petitioners' Contention H is inadmissible.

8. Consolidated Petitioners' Contention I[241]

Consolidated Petitioners' Contention I consists of an amalgam of allegations asserting that Powertech's Application violates 10 C.F.R. Part 40, Appendix A and 10 C.F.R. § 51.45(c) and (e). Consolidated Petitioners support their claim of alleged violations with 100 statements of various lengths that are apparently meant to serve as bases for this contention. Due to the sheer length of Consolidated Petitioners' Contention I and the wide-ranging bases used to support it, the Board will not attempt to discuss each individually here. We note that some of the bases provided by Consolidated Petitioners raise issues that also are presented by other contentions proffered by Consolidated Petitioners.[242]

In the first 68 bases, Consolidated Petitioners allege that Powertech's Application violates 10 C.F.R. § 51.45(c) and (e) and Appendix A to Part 40 because it fails to provide specific analyses and omits the disclosure of adverse information. Bases 1-68 point to specific

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[240] Id. at 370.
[241] Ordinarily the Board would include Contention I as presented by Consolidated Petitioners in their Petition. However, Contention I spans fifteen pages of the Petition and will not be reproduced in full here. See Petition at 41-56.
[242] For example, Bases 1, 4, and 5 raise issues similar to the ones raised in Contention D, Bases 6 and 89 raise issues similar to the ones raised in Contention F, Bases 10 and 11 raise issues similar to the ones raised in Contention H, and Bases 14, 71, and 94 raise issues similar to the ones raised in Contention K.

portions of the Application and take issue with the adequacy of the analyses provided or allege that Powertech fails to disclose information that may be adverse to its interests.

Consolidated Petitioners provide Bases 69-90 to support their claim that Powertech's Application is in violation of 10 C.F.R. § 40.9 because Powertech's Application does not provide the NRC with information that is both complete and accurate. Consolidated Petitioners list twenty-one examples of Powertech's alleged misrepresentations in the Application. Finally, Bases 91-100 allege that Powertech's Application violates 10 C.F.R. § 40.32(d) because Consolidated Petitioners claim that the above mentioned misrepresented, inaccurate, or missing information poses unacceptable environmental risks that make issuance of the license inimical to the public health and safety.

Both Powertech and the NRC Staff oppose admission of Contention I and diligently refute each of the 100 bases provided by Consolidated Petitioners. Again, due to the length of the responses submitted by both parties, the Board will not attempt to discuss their arguments in detail. The vast majority of Powertech's responses to Consolidated Petitioners' asserted bases state that the alleged omissions or misstatements do not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi) because "they do not have a basis in law and are discussed in Powertech's Application."[243] Additionally, Powertech refutes some bases on the grounds that Consolidated Petitioners have not provided any alleged facts or expert opinion to support their statements.[244]

Like Powertech, the NRC Staff attempts to refute all of Consolidated Petitioners' bases on the grounds that they do not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and/or (vi). The Staff argues that most of the bases are "merely two- or three-sentence assertions with no apparent factual, legal or expert support."[245] Furthermore, the Staff

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[243] See, e.g., Powertech Answer to Petition at 71, 75, 76.
[244] See, e.g., id. at 89, 93, 94.
[245] Staff Answer to Petition at 39.

claims that "the Petitioners do not cite the specific language of [the] regulations and explain why, as a matter of law, the information they identify must be included with the Application."[246]

Contention I is problematic from a number of perspectives. The first question that Contention I raises is whether it is a single contention with 100 bases, 100 separate contentions under a single heading, or three separate contentions in which the 100 bases are divided by the regulations the Consolidated Petitioners believe Powertech has, or the Commission will, violate if a license is granted. Secondly, does Contention I, as submitted by Consolidated Petitioners, satisfy all the subparts of § 2.309(f)(1) necessary to admit this contention whether it is viewed as a single contention, 100 contentions, or three contentions?

If Contention I is viewed as 100 separate contentions, it is clearly not admissible. None of the 100 bases taken individually addresses the six elements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).[247] Indeed, many of the 100 bases are but a single phrase or sentence that at best alludes to only one element of Section 2.309(f)(1). The NRC Staff and Powertech address each of the bases in their Answers as if it were a separate contention, citing to an element of § 2.309(f)(1) that is not addressed in that single basis and conclude one-by-one that none of the 100 bases is admissible as a contention. Of course, when using such an "atomizing" approach, no single basis would be admissible as a contention.[248]

If Contention I is viewed as three separate contentions, divided by the regulation allegedly violated, it also is not admissible. Counsel for the Consolidated Petitioners at oral

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[246] Id.

[247] See Attachment A to this Memorandum and Order, which specifies in a three-page chart the infirmities of Contention I, if it is analyzed as 100 separate contentions. Cf. System Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 15 (2005) (Commission explains why Board decisions on contention admissibility are permissibly and "customarily terse.").

[248] See Levy County, CLI-10-2, 71 NRC at __ (slip op. at 10-11).

argument seemed to recommend that the Board approach this contention as three separate contentions.[249] The three separate contentions would be as follows:

> Contention I(A): Powertech's Application violates 10 C.F.R. § 51.45(c) and (e) and Appendix A to Part 40 because it fails to provide specific analyses and omits the disclosure of adverse information. Bases 1 through 68 are associated with Contention I (A).

Contention I(A), as supported by bases 1 through 68, is not admissible because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). Contention I(A) does not contain references to the specific sources and documents on which Consolidated Petitioners intend to rely to support their position on the issue. Apparently, Consolidated Petitioners would have the Board sift through the totality of their filed pleadings, attachments, and declarations to stitch together various statements to satisfy 10 C.F.R. § 2.309(f)(1). A Licensing Board is to rule upon the admissibility of a contention as that contention is spelled out in the pleadings. Further, for those bases in which Consolidated Petitioners allege the Application fails to contain information on a relevant matter as required by law, the Consolidated Petitioners fail to identify each failure, refer to the specific portions of the Application that contain this failure, or provide the supporting reasons for Consolidated Petitioners' belief. This contention thus does not comply with 10 C.F.R. § 2.309(f)(1)(vi).

> Contention I(B): Powertech's Application is in violation of 10 C.F.R. § 40.9 because it is not complete and accurate. Bases 69 through 90 are associated with Contention I(B).

Contention I(B) is not admissible because bases 69 through 90 do not provide a concise statement of the alleged facts or expert opinions that support Consolidated Petitioners' position on the issue and on which Consolidated Petitioners intend to rely at hearing. Further, Contention I(B), and bases 69 through 90, make no reference to "the specific sources and documents on which the Petitioner intends to rely to support its position on the issue."[250]

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[249] Tr. at 370-71.
[250] 10 C.F.R. § 2.309 (f)(1)(v).

Contention I(B) is merely a listing of issues with which Consolidated Petitioners disagree with the Application. It is the form of notice pleading that the Commission has long held is insufficient.[251]

> Contention I(C): Powertech's Application violates 10 C.F.R. § 40.32(d) because issuance of the license would be inimical to the public health and safety. Bases 91 through 100 are associated with Contention I(C).

Contention I(C) is inadmissible as well. As was the case with Contention I(B), it does not provide a concise statement of the alleged facts or expert opinions that support Consolidated Petitioners' position on the issue and on which Consolidated Petitioners intend to rely at hearing. Further, Contention I(C), and bases 91 through 100, make no reference to "the specific sources and documents on which the Petitioner intends to rely to support its position on the issue."[252] Contention I(C) is merely another listing of issues with which Consolidated Petitioners disagree with the Application. Once again, it is the form of notice pleading that the Commission has long held is insufficient.[253]

Given that Contention I fails if considered as 100 separate contentions or as three contentions organized based on purported Application deficiencies with particular regulatory requirements, this leaves us only to consider, as was suggested at one point during the oral argument by counsel for Consolidated Petitioners, that Contention I be treated as a single contention.[254] Viewed as a single contention, Contention I is a veritable "kitchen sink" of a contention. It touches upon literally dozens of topics, including air and water quality, environmental justice, historical and cultural impacts, emergency planning, meteorological impacts, work force and aging population impacts, wildfires, and transportation impacts, but nowhere does it provide for any of them the "specific statement of the issue of law or fact to be

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[251] See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC __, __ (slip op. at 5) (June 17, 2010); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).
[252] 10 C.F.R. § 2.309(f)(1)(v).
[253] See supra note 251.
[254] Tr. at 373. But see id. at 381.

raised or controverted" required by 10 C.F.R. § 2.309(f)(1)(i). Contention I, read as a single contention, is a lengthy list of issues on which Consolidated Petitioners indicate they disagree with the Application. The contention does not, however, demonstrate that any "issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding," as required by 10 C.F.R. § 2.309(f)(1)(iv); nor does it satisfy the requirements of Section 2.309(f)(1)(vi) because it does not provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact.

In reaching this conclusion, we note that at oral argument, the Board tried to focus the inquiry to ascertain how each of the contentions proffered by the Consolidated Petitioners met the six requirements of 10 C.F.R. § 2.309(f)(1). Counsel for Consolidated Petitioners replied that the Board must piece together and complete a contention by searching the Petition, the declarations, and the exhibits appended to the Petition.[255] Instead of having each contention cite to an affidavit, or portion of an affidavit or exhibit relied upon, Consolidated Petitioners simply contend that all the affidavits submitted with their Petition "apply to all of the contentions."[256] Consolidated Petitioners contend further that "all the information submitted is to be read as a whole."[257] As the Commission has made clear in the cases cited in Section V.A above, it is not within the province of a Licensing Board to piece together and create an admissible contention from a lengthy petition with numerous affidavits, declarations, and exhibits in an effort to create a viable contention. Rather, it is the responsibility of the petitioner to submit a contention containing all six elements required by 10 C.F.R. § 2.309(f)(1) in an orderly and organized fashion. Simply put, it is a petitioner's burden of going forward at this stage of the proceeding to submit a complete, self-contained contention addressing each of the elements required by 10 C.F.R. § 2.309(f)(1). To be admissible, a contention must comply with

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[255] Id. at 288-96.
[256] Id. at 343.
[257] Id.

every requirement listed in 10 C.F.R. § 2.309(f)(1).[258] Because the contention here fails to meet each of the contention admissibility requirements, it must be rejected.[259] Contention I is not admitted.

9. Consolidated Petitioners' SUNSI Contention (Designated Contention K)

On April 30, 2010, Consolidated Petitioners filed a new contention which it states is based on recently released SUNSI material.[260] The Board designates this new contention as Contention K. Contention K states:

> The Application is not in conformance with 10 C.F.R. § 40.9 and 10 C.F.R. § 51.45 because the Application does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that cultural and historic resources . . . are identified and protected pursuant to Section 106 of the National Historic Preservation Act. As a result, the Application fails to comply with Section 51.60 . . . .[261]

Consolidated Petitioners contend that Powertech's Environmental Report (ER) is not complete in all material respects because Powertech's analysis of cultural resources in the mining area is based on the Augustana Report,[262] which Consolidated Petitioners maintain is flawed.[263] Consolidated Petitioners argue that the Augustana Report disregarded a number of historic sites by designating them ineligible for inclusion on the National Register and under-evaluated a number of other sites that Consolidated Petitioners call "unknowns."[264] Consolidated Petitioners attach the expert opinion of Louis Redmond to support their assertion

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[258] U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 447 (2006).
[259] Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); 69 Fed. Reg. at 2226.
[260] See New Contention.
[261] Id. at 1-2.
[262] The Augustana Report is part of Powertech's Level III Cultural Resources Evaluation for the Dewey-Burdock site. This evaluation was prepared by the Archaeology Laboratory of Augustana College (Rock Island, IL). The publicly available documents have been redacted of SUNSI material and are included in ADAMS as part of Powertech's Application (ADAMS Accession No. ML091030742).
[263] New Contention at 3-4.
[264] Id. at 4.

that the Augustana Report is an inadequate source upon which to base Powertech's analysis of cultural resources.[265]

Both Powertech and the NRC Staff oppose admission of Contention K. Powertech argues, again, that 10 C.F.R. § 51.45 does not prescribe any technical adequacy requirements, and that "Petitioners offer no support for how Section 51.45 requires Powertech to submit its historic and cultural resource evaluation of the proposed Dewey-Burdock ISL site in the manner in which Petitioners allege."[266] Further, Powertech maintains that the Augustana Report is analytically complete and correct and that Consolidated Petitioners must not have read the entire report.[267] Powertech also asserts that the regulations do not require Powertech to investigate further the "unknown" sites or to perform subsurface testing on sites that were determined by Augustana to be ineligible for inclusion in the National Register.[268] Finally, Powertech argues that Contention K fails to dispute the data and conclusions offered by Powertech in its Application, and is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(vi).[269]

The NRC Staff maintains that 10 C.F.R. § 40.9, cited by Consolidated Petitioners in this Contention, is irrelevant to the issues they raise, and that Consolidated Petitioners fail to show that Powertech has not met the requirements of 10 C.F.R. §§ 51.45 and 51.60.[270] Furthermore, the Staff argues that Consolidated Petitioners mischaracterize the Augustana Report, in that the report is more than a mere listing of existing sites.[271] The NRC Staff also submits that, contrary to Consolidated Petitioners' assertion, subsurface testing was in fact conducted at the Dewey-Burdock site, but that subsurface testing of <u>every</u> possible cultural site is not required under the

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[265] <u>Id.</u> at 5.
[266] Powertech Answer to New Contention at 11-12. Powertech also argues that 10 C.F.R. §§ 40.9 and 51.60, both cited by Consolidated Petitioners, will offer them no relief because both sections merely set forth Commission requirements, and do not prescribe the ways in which an applicant is to meet these requirements.
[267] New Contention at 13.
[268] <u>Id.</u> at 14-15.
[269] <u>Id.</u> at 16.
[270] Staff Answer to New Contention at 5-6.
[271] <u>Id.</u> at 7.

regulations.[272] With regard to the "unknown" sites, the NRC Staff states that any unevaluated sites are located outside the Dewey-Burdock area that will initially be disturbed and so will be evaluated at a later date.[273] In sum, the NRC Staff claims that Consolidated Petitioners fail to explain why Powertech needs to evaluate all archaeological sites at this time, and fail to raise a genuine dispute with Powertech's Application, in contravention of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[274]

The regulations cited by Consolidated Petitioners in Contention K (10 C.F.R. §§ 40.9, 51.45, and 51.60) concern the information that needs to be included in an applicant's ER in order for a license to be issued. Part 51 of the NRC's regulations implements NEPA and requires an agency assessment of environmental impacts when a project is proposed, as is the case here. Under 40 C.F.R. § 1502.16(g) of the Council on Environmental Quality's (CEQ) NEPA implementing guidance regulations,[275] cultural and historic resources are to be considered as part of the environmental impacts assessment that must be completed.[276] While the duty to comply with NEPA falls upon the agency and not upon the applicant or licensee,[277] the requirements of Part 51 must be met by the applicant. Section 51.45 clearly requires an

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[272] Id. at 8-9.
[273] Id. at 11.
[274] Id. at 12.
[275] CEQ's regulations receive substantial deference from the federal courts in interpreting the requirements of NEPA. See, e.g., Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004); Andrus v. Sierra Club, 442 U.S. 347, 356-58 (1979). The Supreme Court, however, has expressly left open the issue whether CEQ regulations are binding on the NRC. See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 99 n.12 (1983). The NRC takes the position that "NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions." 49 Fed. Reg. 9352 (Mar. 12, 1984). But the Commission also has "an announced policy to take account of the [CEQ regulations] voluntarily, subject to certain conditions." 10 C.F.R. § 51.10(a).
[276] See HRI (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-26, 62 NRC 442, 450 (2005).
[277] Levy County, CLI-10-2, 71 NRC at __ (slip op. at 8-9).

applicant to discuss in its ER "[t]he impact of the proposed action on the environment."[278] Since an impact analysis under NEPA requires that cultural and historic resources be considered, we conclude that a sufficient discussion of cultural and historic resources must be included in an applicant's ER.

Though such a discussion is present in Powertech's Application, Consolidated Petitioners allege that the cultural resources information included is inadequate. Whether the information Powertech provides is adequate to satisfy 10 C.F.R. §§ 40.9, 51.45 and 51.60 is a merits determination that this Board is prohibited from making at this time. In other words, whether or not the Augustana Report is an adequate study upon which to base many of Powertech's conclusions in its Application raises a genuine dispute with Powertech's Application. Additionally, Consolidated Petitioners have provided alleged facts and the expert opinion of Louis A. Redmond[279] to support their assertion that the cultural resources information in the Application is inadequate. Contrary to the arguments of the NRC Staff and Powertech, the Board concludes that Consolidated Petitioners therefore meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). Contention K is admitted.

C. Board Rulings on the Oglala Sioux Tribe's Proposed Contentions

1. The Tribe's Contention 1

The Oglala Sioux states in Contention 1:

> Failure to meet applicable legal requirements regarding protection of historical and cultural resources, and failure to involve or consult the Oglala Sioux Tribe as required by Federal law.[280]

The Oglala Sioux claims that Powertech has failed to comply with federal law and NRC regulations because it has not consulted with the Oglala Sioux regarding historical and cultural

[278] 10 C.F.R. § 51.45(b)(1).
[279] Dr. Redmond is president of Red Feather Archaeology and has prepared cultural resource and heritage resource surveys.
[280] Tribe Petition at 12.

sites that have been identified by Powertech in its Application.[281] The Oglala Sioux also states that it is concerned that the number of sites that might be impacted by Powertech's project may be higher than the number reported in the Application due to Powertech's failure to consult with the Oglala Sioux.[282] The Oglala Sioux cites a number of federal regulations, such as the NHPA, NEPA,[283] and an Executive Order,[284] that require consultation with those Indian Tribes "that attach[ ] religious and cultural significance" to cultural and historical sites. The Tribe asserts that these regulations require consultation as soon as possible in the application process, and that Powertech has been dilatory in satisfying this requirement.[285]

Furthermore, the Oglala Sioux points to NRC regulations and guidance that it claims require the Applicant to consult with it regarding these cultural sites. The Tribe argues that 10 C.F.R. § 51.45(b) and NUREG-1569 implement the requirements of NEPA and the NHPA, thereby requiring Powertech to consult with the Tribe.[286] The Oglala Sioux distinguishes the circumstances currently before the Board from those in the Crow Butte II proceeding, where the Commission determined that the Tribe's contention regarding compliance with the consultation requirements was not ripe.[287] The Oglala Sioux argues that here, "the NHPA requires consultation under Section 106 to begin as early as possible in the consideration of an undertaking."[288]

Both Powertech and the NRC Staff oppose admission of Contention 1. Powertech makes two arguments in attempting to refute the admissibility of Contention 1. First, Powertech claims that 10 C.F.R. § 51.45(b)-(d) does not require it to consult with the Tribe, as the Tribe

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[281] Id.
[282] Id. The Oglala Sioux provides the affidavit of Wilmer Mesteth as support for this contention. See Affidavit of Wilmer Mesteth (Apr. 1, 2010).
[283] 42 U.S.C. § 4321.
[284] Presidential Executive Order 13,007, Indian Sacred Sites, 61 Fed. Reg. 22,951 (May 24, 1996); Tribe Petition at 16.
[285] Tribe Petition at 16.
[286] Id. at 12-13.
[287] Id. at 16. See also Crow Butte II, CLI-09-9, 69 NRC at 348-51.
[288] Id. at 17.

argues, but instead "only describe[s] the categories of potential impacts, to the extent relevant, that a license applicant should address in an environmental report."[289] Because Powertech's Application analyzes the cultural and historic resources involved, Powertech asserts that Part 51 has not been violated because it does not impose an adequacy requirement on Powertech.[290]

Powertech's second argument deals with its duty to satisfy the consultation requirements under NEPA and the NHPA. Powertech argues that the duty to consult with the Oglala Sioux Tribe under these two Acts is the duty of the NRC Staff and not the duty of the applicant.[291] NEPA and the NHPA, according to Powertech, impose the duty to consult on a federal agency, and not a licensee.[292] Furthermore, Powertech submits that Contention 1 is not ripe for the Board's consideration at this time, because, under the Commission's ruling in Crow Butte II,[293] the Oglala Sioux Tribe cannot claim that the NRC Staff has failed to comply with its duty when the NEPA review process has only just begun.[294]

The NRC Staff argues that the Tribe fails to support its claim that Powertech insufficiently evaluated historic and cultural resources at its proposed ISL site.[295] The Staff claims that the affidavit of Mr. Mesteth, on which the Oglala Sioux relies for many of its assertions, rests on statements that are either unsupported or are misreadings of Powertech's Application.[296] For this reason, the Staff argues that Contention 1 fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and fails to raise a genuine dispute with Powertech's Application in contravention of 10 C.F.R. § 2.309(f)(1)(vi). Like Powertech, the

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[289] Powertech Answer to Tribe at 39.
[290] Id. at 39.
[291] Id.
[292] Id.
[293] Crow Butte II, CLI-09-9, 69 NRC at 348-51.
[294] Powertech Answer to Tribe at 39-40.
[295] Staff Answer to Tribe at 16.
[296] Id.

Staff also argues that Contention 1 is not ripe for review by this Board under the Commission's ruling in Crow Butte II.[297]

In its Reply, the Oglala Sioux maintains that the declaration of Mr. Mesteth does challenge the adequacy of Powertech's cultural resources information, contrary to what Powertech and the NRC Staff assert.[298] The Tribe asserts that this contention is ripe because the violations to the NHPA and NEPA are ongoing and should not be relegated to the later part of the proceedings before being redressed.[299] Finally, the Oglala Sioux claims that the NRC Staff is inappropriately arguing the merits of Contention 1, and that this contention meets all the requirements necessary at this stage of the proceeding.[300]

Insofar as Contention 1 challenges the adequacy of the cultural resource information in Powertech's Application, the Board determines that Contention 1 is admissible for the same reasons we concluded that Consolidated Petitioners' Contention K was admissible. The Tribe provides the opinion of Mr. Mesteth to support its assertion that the cultural resource information in Powertech's Application is inadequate to meet the requirements of 10 C.F.R. §§ 51.45 and 51.60. Moreover, this information is adequate, as far as this Board is concerned, to raise a genuine dispute with Powertech's application. Accordingly, contrary to the arguments of Powertech and the NRC Staff, the Board concludes that the Tribe's Contention 1 does in fact meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

In Contention 1, the Tribe also alleges that Powertech has failed to consult with the Tribe regarding identified and potential cultural and historic resources found on the proposed mining site. As far as this issue is concerned, the Board is obligated under existing Commission precedent to deny this portion of Contention 1. In Crow Butte II, the Commission denied a similar contention submitted by the Oglala Sioux Tribe because it found the matter to be unripe

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[297] Id. at 20. See also Crow Butte II, CLI-09-9, 69 NRC at 348-51.
[298] Tribe Reply at 22.
[299] Id. at 23.
[300] Id. at 21.

at the contention admissibility stage of the proceeding.[301] At oral argument, counsel for the Tribe attempted to distinguish the present proceeding from the Commission's decision in Crow Butte II by arguing that NEPA and the NHPA require consultation to begin as early as possible in the licensing process and that there is an ongoing violation of federal law since this process has yet to begin here.[302]

As the Commission made clear in Crow Butte II, it is not the duty of an applicant to consult with a Tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process.[303] The alleged failure to consult in this proceeding, therefore, cannot be the fault of Powertech. And, because the NRC Staff has not completed its environmental review of the Dewey-Burdock proposed project, this Board cannot find that they have been dilatory in their duty to consult with the Tribe.[304] As noted by the Commission in its Crow Butte II ruling, the Tribe is free to file a contention later on in this proceeding if, after the Staff releases its environmental documents, the Tribe believes that the Staff has failed to satisfy its obligations under NEPA and the NHPA.[305]

In sum, the Board concludes that the component of Contention 1 that deals with the inadequacy of the historic and cultural resource information in Powertech's Application is admissible. However, the Board will not consider at this time[306] the issue of the alleged failure to consult with the Tribe regarding cultural and historic resources on Powertech's proposed Dewey-Burdock site. Consultation with the Tribe is material and within the scope of this proceeding. However, this portion of Contention 1 is not ripe. The Tribe must wait until the draft supplemental environmental impact statement (SEIS) is issued by the NRC Staff to interpose

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[301] Crow Butte II, CLI-09-9, 69 NRC at 350-51.
[302] Tr. at 129-31.
[303] 36 C.F.R. § 800.2(c)(2)(ii)(D) (stating that "[w]hen Indian tribes . . . attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes . . ." (emphasis added)).
[304] Tr. at 132-33.
[305] Crow Butte II, CLI-09-9, 69 NRC at 351.
[306] Id.

the issue of the adequacy of the agency's consultation efforts.[307] Whether and how the Staff fulfills its NHPA and NEPA obligations are issues that could form the basis of a new contention.[308]

At this time we determine that the portion of Contention 1 that deals with a failure to consult inadmissible. Contention 1 is admitted as follows:

> Powertech's Application is deficient because it fails to address adequately protection of historical and cultural resources.

2. The Tribe's Contention 2

The Oglala Sioux states in Contention 2:

> Failure to include necessary information for adequate determination of baseline ground water quality.[309]

The Oglala Sioux argues that Powertech's Application violates 10 C.F.R. § 51.45, Appendix A to Part 40 and NEPA by failing to "provide an adequate baseline groundwater characterization or demonstrate that groundwater samples were collected in a scientifically defensible manner, using proper sample methodologies."[310] The Tribe provides the expert opinion of Dr. Robert Moran to support Contention 2. Dr. Moran alleges analytical deficiencies in the groundwater baseline characterization (e.g., there is no "statistically sound data set for all Baseline Water Quality data,"[311] the historic water quality data is not statistically summarized in

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[307] The Staff has indicated that it will issue an SEIS to supplement the analysis in its generic EIS for ISL facilities. See Staff Answer to Tribe at 4; Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities – Draft Report for Comment, Vol. 1, NUREG-1910 (July 28, 2008) (ADAMS Accession No. ML0914802440).

[308] See 10 C.F.R. § 2.309(f)(2) (providing that, with respect to issues arising under NEPA, the petitioner may file new contentions "if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents"). Such a contention is usually considered timely if filed within thirty (30) days of publication of the draft environmental impact statement. See, e.g., Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008).

[309] Tribe Petition at 17.

[310] Id.

[311] Id. at 19.

one place for the reader, and it is unclear whether Powertech has baseline data for non-ore zone regions),[312] deficiencies with regard to characterization of non-ore zone regions, and deficiencies regarding the integrity of the baseline water quality data obtained by Powertech.[313]

Both Powertech and the NRC Staff oppose admission of Contention 2. Powertech argues that the pertinent regulation, 10 C.F.R. § 40.32(e), does not require detailed groundwater baseline information at this stage of the licensing process.[314] Also, Powertech identifies specific areas in the Application that contain the information the Tribe claims was omitted.[315] Finally, Powertech claims that Contention 2 "does not offer any information demonstrating a significant link between its allegations and a specific potential health and safety or environmental impact."[316]

The NRC Staff attempts to refute each of Dr. Moran's assertions in Contention 2.[317] The Staff argues that Dr. Moran fails to dispute the baseline data provided in Powertech's Application and fails to cite requirements that Powertech include more information in the Application.[318] The NRC Staff submits that Contention 2 cannot be admitted because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[319]

In its Reply, the Oglala Sioux argues that the NRC Staff and Powertech are again arguing the merits of Contention 2 in their answers and that Contention 2 is properly pled under 10 C.F.R. § 2.309(f)(1).[320]

The Board determines that the Tribe's Contention 2 is admissible. Counsel for Powertech submitted at oral argument that 10 C.F.R. § 40.32(e) prohibits it from gathering

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[312] Id. at 18-19.
[313] Id.
[314] Powertech Answer to Tribe at 40.
[315] Id. at 40-41.
[316] Id. at 41.
[317] Staff Answer to Tribe at 21-24.
[318] Id at 22, 23, 24.
[319] Id. at 25.
[320] Tribe Reply at 25.

complete information on baseline water quality.[321] The Board disagrees with this interpretation of the regulation. The last sentence of 10 C.F.R. § 40.32(e) explicitly exempts "preconstruction monitoring and testing to establish background information" from the prohibition on commencement of construction. We believe that such preconstruction monitoring includes adequate assessments of baseline water quality. This interpretation is supported by the requirement in Criterion 7 of Appendix A to Part 40, which states that an applicant must provide "complete baseline data on a milling site and its environs." We acknowledge that, as discussed infra, Appendix A to Part 40 does not always apply to ISL facilities. However, at oral argument, the Staff conceded that the first sentence of Criterion 7, which requires complete baseline data, applies to Powertech in this case.[322] Furthermore, the NRC Staff has refused to take a position on whether Powertech has provided the complete and necessary baseline water quality data in its Application because its review is ongoing.[323]

We conclude that the Tribe has raised a genuine dispute as to the adequacy and completeness of the information Powertech provided in its Application. We also conclude that the Tribe identifies an issue that is within the scope of this proceeding and material to the findings the NRC must make in evaluating Powertech's Application. Further, the Tribe raises a genuine dispute with Powertech's Application, namely whether Powertech has provided sufficient detail and scientifically defensible methodology for its baseline water quality data. The Oglala Sioux, with the expert opinion of Dr. Moran, provides supports its assertions. We therefore conclude that the Oglala Sioux has met the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and admit Contention 2.

3. The Tribe's Contention 3

The Oglala Sioux states in Contention 3:

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[321] Tr. at 163.
[322] Id. at 158.
[323] Id.

> Failure to include adequate hydrogeological information to demonstrate ability to contain fluid migration.[324]

The Oglala Sioux argue that Powertech fails to meet the requirements of 10 C.F.R. §§ 40.31(f), 51.45, 51.60, Appendix A to Part 40, NEPA, and NUREG-1569[325] by neglecting "to provide sufficient information regarding the geological setting of the area . . . ."[326] The Oglala Sioux submits that adequate information is necessary "to adequately characterize the site and off-site hydrogeology to ensure confinement of the extraction fluids."[327] If the hydrogeology is not properly characterized, the Oglala Sioux contends, the effects of Powertech's proposed project on surface and ground waters cannot be properly evaluated.[328] The Tribe provides the expert opinion of Dr. Moran, who supports the Tribe's arguments that Powertech's Application includes "unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones and failure to account for natural and man-made hydraulic conductivity through natural breccias pipe formations and the historic drilling of literally thousands of drill holes in the aquifers and ore-bearing zones in question, which were not properly abandoned."[329] The Oglala Sioux also cite an EPA document that criticizes the Commission's environmental review process for ISL mining.[330]

Both Powertech and the NRC Staff oppose admission of Contention 3. First, Powertech asserts that the Commission "only requires generalized information regarding pre-operational baseline water quality in the proposed recovery zone and at prospective monitor well locations on a regional basis and does not require detailed site-specific information until the 'post-

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[324] Tribe Petition at 21.
[325] NUREG-1569 is the NRC Staff's Standard Review Plan for In-Situ Leach Uranium Extraction License Applications. (ADAMS Accession No. ML032250177).
[326] Id.
[327] Id. at 22.
[328] Id.
[329] Id.
[330] Id.

licensing.'"[331] Powertech then goes on to attempt to discredit specific statements made by Dr. Moran in support of Contention 3. With regard to each statement, Powertech asserts that the Oglala Sioux has failed to offer any genuine dispute on a material issue of fact because Contention 3 does not challenge the information provided in Powertech's Application, as 10 C.F.R. § 2.309(f)(1)(vi) requires.[332]

The NRC Staff argues that Contention 3 should be dismissed by the Board because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[333] The NRC Staff asserts that Dr. Moran's statements in support of Contention 3 fail to take into account sections of Powertech's Application that address regional hydrogeology, mine data, and other site-specific data.[334] Moreover, the NRC Staff claims that Dr. Moran's statements are based on a misreading of Powertech's Application or are unsupported assertions.[335]

In its Reply, the Oglala Sioux maintains that Dr. Moran's statements, as a whole, support the admission of Contention 3, and that the NRC Staff's and Powertech's practice of attacking his statements in isolation is "spurious, akin to setting up a straw man."[336] Further, the Oglala Sioux asserts that it did in fact take issue with specific analyses and data in Powertech's Application, and cites portions of the Application it felt were inadequate, thereby raising a genuine dispute with the Application.[337]

The Board determines that the Tribe's Contention 3 is admissible. The Tribe identifies an issue that is within the scope of this proceeding and material to the findings the NRC must make in evaluating Powertech's Application. Further, the Tribe raise a genuine dispute with Powertech's Application, namely with respect to the adequacy of information needed to

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[331] Powertech Answer to Tribe at 42.
[332] See id. at 42, 43, 44, 45.
[333] Staff Answer to Tribe at 26.
[334] Id. at 26, 27, 28, 29, 30.
[335] Id. at 26.
[336] Tribe Reply at 26-27.
[337] Id. at 27-28.

characterize the site and off-site hydrogeology to ensure confinement of the extraction fluids. The Oglala Sioux provides the expert opinion of Dr. Moran to support its assertions. We therefore conclude that the Oglala Sioux has met the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and admit Contention 3.

4. The Tribe's Contention 4

The Oglala Sioux states in Contention 4:

Inadequate analysis of Ground Water Quantity Impacts.[338]

The Oglala Sioux argues that Powertech's Application violates 10 C.F.R. §§ 40.32(c), (d), and 51.45 by failing to analyze the impacts of groundwater consumption on public health and safety and property.[339] The Oglala Sioux also submits that Powertech's Application presents conflicting groundwater consumption information, thereby making this information impossible to evaluate accurately.[340] To support Contention 4, the Oglala Sioux provides the declaration of Dr. Moran.[341]

Both Powertech and the NRC Staff oppose admission of Contention 4. Again, Powertech makes the argument that 10 C.F.R. § 51.45 does not impose an adequacy requirement on Powertech and that its inclusion of information on groundwater consumption in the Application is sufficient to comply with that regulation.[342] Indeed, Powertech asserts that the Application addresses groundwater consumption impacts and that neither the Oglala Sioux nor Dr. Moran provides information that contradicts Powertech's data or analyses.[343] Therefore, Powertech claims that Contention 4 should be denied because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi).

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[338] Tribe Petition at 25.
[339] Id.
[340] Id.
[341] Id. at 26.
[342] Powertech Answer to Tribe at 46.
[343] Id.

The NRC Staff argues that Contention 4 should be dismissed because Powertech does, in fact, provide an analysis of groundwater impacts in its Application.[344] Furthermore, NRC Staff submits that Dr. Moran's statements that Powertech's estimates of water usage are inconsistent are not supported and fail to establish a genuine issue with Powertech's Application, thereby failing to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[345]

In its Reply, the Oglala Sioux once more accuses the NRC Staff and Powertech of arguing against the admission of Contention 4 based on a merits analysis.[346] In addition, the Oglala Sioux maintains that, contrary to Staff's and Powertech's assertions, the Tribe Petition does reference portions of the Application that it determined were relevant to the issues raised in Contention 4.[347]

The Board determines that the Tribe's Contention 4 meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). The issue raised is within the scope of this licensing proceeding and is material to the findings the NRC must make. The Tribe supports its assertions with the expert opinion of Dr. Moran, who, according to Tribe counsel, opines that "there is no credible project water balance that investigates the potential impact on local groundwater levels."[348] In that regard, Dr. Moran describes the project area as semi-arid with an average yearly precipitation of about twelve to thirteen inches. Yearly evapotranspiration (ET) estimates are roughly seventy inches per year, or about five times the yearly precipitation.[349] Dr. Moran states that with the project expected to operate between seven and twenty years, it will require the use of tremendous volumes of local groundwater and, without a

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[344] Staff Answer to Tribe at 33.
[345] Id. at 34.
[346] Tribe Reply at 30.
[347] Id.
[348] Tr. at 215.
[349] See Environmental Report at 3-176, -177, Figure 3.6-27.

credible project water balance, it is not possible to more seriously investigate the potential that such large volume water use might impact local/regional groundwater levels.[350]

Though there seems to be some confusion as to exactly how much water will be used during operations, the Tribe has still established a genuine material dispute with Powertech's Application. At oral argument, counsel for the Tribe stated that "the [environmental] impacts associated with . . . drawdown have not been disclosed and reviewed in the application materials."[351] Powertech and NRC Staff disagree with this assertion, but it is not for the Board to decide at this point in the proceeding which party is correct. The adequacy of the information provided in Powertech's Application will be evaluated by the Board as part of a merits analysis. Because of the time cycle of uranium mining and reclamation operations, water use patterns vary and some confusion was involved with review of the information in the Application. The basic requirement needed to satisfy this contention is a detailed description of sources and amounts of groundwater used and the effects of the use and consumption of the groundwater in the mining operations, including restoration and waste water disposal.

For the foregoing reasons, the Board conclude that the Tribe's Contention 4 is admissible.

5. The Tribe's Contention 5

The Oglala Sioux states in Contention 5:

Failure to adequately calculate bond for decommissioning.[352]

The Oglala Sioux claims that, in contravention of the requirements of Appendix A to Part 40, Powertech has failed to provide a sufficient financial assurance cost estimate "to assure the availability of sufficient funds to complete the reclamation plan and the activities in the

[350] Declaration of Robert E. Moran at 9 (Apr. 4, 2010).
[351] Tr. at 212.
[352] Tribe Petition at 27.

application by an independent contractor."[353] The Oglala Sioux takes issue with Powertech's decommissioning cost estimates in the Application, which are based on the assumption that there will be full production of the mine in 2011, only minor production in 2012, and no production beyond 2012. Because the Application states that operation of the mill will continue for seven to twenty years,[354] the Oglala Sioux submits that these estimates are insufficient for the assurance of adequate funding.[355] Furthermore, the Oglala Sioux points out that the Application indicates that restoration times for the mine may be longer than anticipated, yet the financial surety calculations do not reflect longer restoration time.[356] This Contention is supported by a declaration by Dr. Moran.

Both Powertech and the NRC Staff oppose admission of Contention 5. Powertech claims that Contention 5 should be dismissed because it is not required by law to "submit financial cost estimates for any site activities beyond the initial stages of site construction and development."[357] Powertech argues that admitting Contention 5 would require it to calculate the financial assurance for the entire Dewey-Burdock project.[358] Finally, Powertech contends that Contention 5 is essentially moot because the Commission requires Powertech "to provide updated NRC-approved financial assurance every year that accounts for the status of activities at the site . . . ."[359] Therefore, the cost calculations the Oglala Sioux is asking Powertech to furnish now will in fact be furnished over the life of the project.[360] As a result, Powertech states that Contention 5 is inadmissible because it does not raise a genuine dispute with the Application, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).

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[353] Id.
[354] Id.
[355] Id.
[356] Id.
[357] Powertech Answer to Tribe at 47-48.
[358] Id.
[359] Id. at 48.
[360] Id.

NRC Staff asserts that Contention 5 should be dismissed because the Oglala Sioux failed to explain why Powertech needs to provide additional cost estimates to those already presented in their Application.[361] Additionally, the NRC Staff argues that, because the Oglala Sioux does not challenge the methodology Powertech used to calculate total decommissioning costs, Contention 5 does not raise a genuine dispute with the Application and therefore does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi).[362] Finally, the NRC Staff claims that NRC procedures "will be sufficient to ensure that funds are available to carry out decommissioning of the Dewey-Burdock facility by an independent contractor."[363]

In its Reply, the Oglala Sioux counters NRC Staff's argument that Powertech has provided sufficient decommissioning information by stating that the NRC issued a request for additional information (RAI) regarding decommissioning, suggesting that the NRC Staff does not believe that the information provided by Powertech is sufficient.[364]

Criterion 9 in Appendix A to 10 C.F.R. Part 40 requires an applicant to establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site.[365] Criterion 9 provides little instruction regarding how calculations should be made, and addresses decommissioning and decontamination matters very generally. Where regulatory authority is lacking, the Commission has indicated that turning to NRC Staff guidance documents can be useful.[366] In NUREG-1569,

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[361] Staff Answer to Tribe at 35.
[362] Id.
[363] Id. at 36.
[364] Tribe Reply at 31.
[365] See 10 C.F.R. Part 40, App. A, Criterion 9; see also HRI (P.O. Box 15910, Rio Rancho, NM 87174), LBP-04-3, 59 NRC 84, 88 (2004).
[366] HRI (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-33, 60 NRC 581, 596 (2004) (Commission acknowledges that Staff guidance documents are not legally binding, yet recognizes the usefulness in instances where legal authority is lacking).

surety bond calculations are to be estimated "[t]o the extent possible," and based on the applicant's "experience with generally accepted industry practices."[367]

The Board determines that the Tribe has not identified any specific inadequacies with Powertech's surety bond calculations as set forth in its Application. Nor has the Tribe cited any specific regulations that would require Powertech to include more information in its Application than was already included. In fact, the Tribe argues that Powertech's estimate should be higher than what it was, but does not account for the fact that these estimates are not final and will need to be updated before the license is issued.[368] As the Commission has noted, "[s]urety arrangements are matters appropriately addressed after issuance of the license, and even after completion of a hearing. Criterion 9 [of 10 C.F.R. Part 40, Appendix A] makes clear that a surety arrangement is necessary as a prerequisite to operating, not as a prerequisite to licensing."[369] As such, the Board concludes that the Tribe has not met the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), and its Contention 5 is accordingly not admitted.

6. The Tribe's Contention 6

The Oglala Sioux states in Contention 6:

> Inadequate technical sufficiency of the application and failure to present information to enable effective public review resulting in denial of due process.[370]

In Contention 6, which is similar to portions of Consolidated Petitioners' Contention D, the Oglala Sioux claims that NEPA, Reg. Guide 3.46, and NUREG-1569 are being violated because Powertech fails to present information in its Application in a concise, easily

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[367] NUREG-1569 at 6-24.
[368] See Tr. at 318-19.
[369] HRI (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 240 n.15 (2000).
[370] Tribe Petition at 28.

understandable manner.[371] Dr. Moran, whose declaration supports admission of this Contention, states that the information in the Application is "so disorganized and technically-deficient that it does not comply with the terms of NUREG-1569 . . . and should be revised."[372]

Both Powertech and the NRC Staff oppose admission of Contention 6. Powertech claims that it complied with all NRC guidance in its preparation of the Application, and that the Commission would not have accepted the Application for review if it were disorganized and technically inadequate.[373] Further, Powertech submits that many of Dr. Moran's claimed omissions are actually present in the Application, thereby rendering Contention 6 inadmissible because it fails to raise a material dispute with the Application, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).[374]

The NRC Staff argues that Contention 6 should be denied because the Oglala Sioux does not present a genuine dispute with the Application and fails to support its arguments, thereby failing to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[375] Simply put, the NRC Staff's position is that the Oglala Sioux fails to support its claim that Powertech's Application violates NEPA or NUREG-1569 by being disorganized.[376] Indeed, the Staff maintains that the five examples of disorganization provided by Dr. Moran are not indicative of the readability of a 6,000-plus page document.[377]

As in Contention 5, the Oglala Sioux seeks to rebut the Staff's and Powertech's arguments against admissibility of Contention 6 by citing the fact that an RAI was issued by the Staff asking Powertech to furnish basic technical information that was lacking from the

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[371] Id.
[372] Id. at 29.
[373] Powertech Answer to Tribe at 49.
[374] Id. at 50.
[375] Staff Answer to Tribe at 37.
[376] Id.
[377] Id. at 38.

Application.[378] The Oglala Sioux maintain that this RAI is evidence of the fact that the Application did not present sufficient information to the public in a way that is understandable.[379]

The Board determines that the Tribe's Contention 6 inadmissible. The Tribe's argument that Powertech's Application is disorganized and, therefore, technically deficient, is not adequately supported, as the Tribe identifies only five instances in the entire Application where it claims disorganization presented an obstacle to their expert. The Board is also unaware of any legal precedent or any NRC regulations that require an application to meet any organizational criteria or else risk being classified as technically inadequate. Though the Tribe cites to the NEPA requirement that environmental documents "be written in plain language . . . so that decision-makers and the public can readily understand them,"[380] the Tribe has not shown how this requirement applies to the Applicant, as NEPA itself is binding only on the agency.[381]

Furthermore, as we noted relative to Consolidated Petitioners' Contention D above, issues of disorganization in an application cannot be said to be germane to this licensing proceeding. According to the Board in HRI, "[a]ny area of concern is germane if it is relevant to whether the license should be denied or conditioned."[382] The organization or coherence of an application was not considered by that Board to be germane because it was not an objection to the licensing action at issue in the proceeding.[383] In this contention, the Tribe has not raised a dispute with a specific portion of the Application that would lead this Board to question whether the license should be denied or conditioned. A general complaint about how the information is presented is not sufficient to raise a genuine dispute with the Application that is germane to the purpose of this licensing proceeding. Accordingly, the Tribe's Contention 6 is not admitted.

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[378] Tribe Reply at 33-34.
[379] Id. at 32-33.
[380] Tribe Petition at 29. See also 40 C.F.R. § 1502.8.
[381] 36 C.F.R. § 800.2(c)(2)(ii)(D).
[382] LBP-98-9, 47 NRC at 280.
[383] Id.

7. The Tribe's Contention 7

The Oglala Sioux states in Contention 7:

> Failure to include in the Application a reviewable plan for disposal of 11e2 Byproduct Material.[384]

The Oglala Sioux argues that Powertech's Application is deficient because plans for disposal of mill tailings "merely state that permanent disposal will occur" and do not provide specifications for disposal, as is required by 10 C.F.R. Part 40, Appendix A.[385] The Oglala Sioux asserts that Powertech's Application should be rejected completely, without further inquiry, for this omission, as it allegedly violates NRC regulations and NEPA.[386] Under NEPA, the Oglala Sioux argues, an examination of all direct, indirect, and cumulative impacts of the proposed action must be executed.[387] According to the Oglala Sioux, Powertech's failure to identify the disposal facility or provide specifications for its disposal plans avoids this required examination, and the Application must therefore be rejected.[388]

Both Powertech and the NRC Staff oppose admission of Contention 7. Powertech argues that the Oglala Sioux mischaracterizes the requirements for a license application, and claims that Appendix A to Part 40 requires disposal of mill tailings at a licensed facility and does not require the information the Oglala Sioux is demanding.[389] Furthermore, Powertech asserts that the Application does provide a detailed discussion of off-site disposal of 11e(2) byproduct material, despite what the Oglala Sioux claims. Therefore, Powertech opposes admission of Contention 7 because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi).

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[384] Tribe Petition at 31.
[385] Id.
[386] Id.
[387] Id. at 33.
[388] Id.
[389] Powertech Answer to Tribe at 50-52.

The NRC Staff argues that Contention 7 fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv) because the Oglala Sioux fails to identify an issue material to the findings the NRC must make in this licensing action.[390] The Staff maintains that 10 C.F.R. § 40.31(h) and Criterion 1 in Appendix A to Part 40, both cited by the Oglala Sioux in its Petition, do not require Powertech to provide more information than it has already provided in its Application.[391] Furthermore, the Staff asserts that NEPA does not require Powertech to be more specific about its disposal practices, mandating only "that the Staff consider the reasonably foreseeable environmental effects of the actions Powertech has proposed."[392] Therefore, according to the Staff, Contention 7 should be denied by the Board.

In its Reply, the Oglala Sioux argues that Powertech's and the NRC Staff's responses to Contention 7 are "contrary to facts known to Staff and Powertech and [are] contrary to established interpretations of NRC regulations."[393] The Oglala Sioux cites the issuance of an RAI by the NRC Staff as evidence that the information Powertech provided on 11e(2) byproduct material was incomplete to conduct the relevant analyses.[394] Further, the Oglala Sioux argues that the responses of Powertech and the NRC Staff establish that there is a genuine and material legal dispute with the Application because the Oglala Sioux disagrees with the NRC Staff's interpretation of 10 C.F.R. § 40.31(h) as not applying to in-situ facilities.[395] Finally, the Oglala Sioux argues that Powertech's and the NRC Staff's responses to Contention 7 address the merits of the contention and do not successfully dispute its admissibility in this proceeding.[396]

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[390] Staff Answer to Tribe at 39.
[391] Id. at 39-40.
[392] Id. at 40.
[393] Tribe Reply at 34.
[394] Id. at 34-35.
[395] Id. at 35.
[396] Id. at 36.

While we agree with the Tribe that the disposal of 11e(2) byproduct material is an issue that should be addressed more fully before a license is issued to Powertech, we do not agree the Tribe has shown that Powertech has, at this point in the proceeding, failed to comply with NRC or federal regulations. The Tribe points to 10 C.F.R. § 40.31(h) and Criterion 1 in Appendix A to Part 40 as support for its assertion that Powertech is required to include a specific plan for disposal of 11e(2) byproduct material in its Application. However, Commission precedent makes clear that 10 C.F.R. § 40.31(h) applies to uranium mills, and not to ISL facilities.[397] In fact, the Commission has held that, while Part 40 generally applies to ISL mining, Appendix A to Part 40, including Criterion 1, was "designed to address the problems related to mill tailings and not problems related to injection mining."[398] There are, however, certain safety provisions in Appendix A, such as Criterion 2, that are relevant and do apply to ISL mining.[399] Criterion 2, for instance, requires that "byproduct material from in situ extraction operations . . . must be disposed of at existing large mill tailings disposal sites . . . ."[400] Besides referring the Board to Appendix A, the Tribe has not identified a regulation that requires a disposal plan be included in an application. The Presiding Officer in HRI concluded that the principal regulatory standards for ISL applications are 10 C.F.R. § 40.32(c) and (d), "which mandate protection of public health and safety";[401] an exceedingly general requirement.

With regard to Part 40's applicability to ISL facilities, the NRC Staff often relies on guidance documents and license conditions when regulatory specificity is lacking.[402] At oral argument, the NRC Staff stated that it is standard practice, and consistent with NUREG-1569, to require the applicant either to supply a specific disposal plan or to implement a license condition

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[397] HRI (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 8 (1999).
[398] Id. (citing HRI (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-1, 49 NRC 29, 33 (1999)).
[399] Id.
[400] 10 C.F.R. Part 40, App. A, Criterion 2.
[401] HRI, CLI-09-22, 50 NRC at 9.
[402] Id.

that deals with waste disposal.[403] Because the Tribe has not pointed to any regulation that requires this plan to be in the Application itself, the Board finds it is appropriate to look to NRC guidance to determine how Powertech is to proceed. Because the NRC guidance allows Powertech to deal with the issue of waste disposal in one of two ways (i.e., in its Application or as a license condition), the fact that the information is not in the Application is not fatal to the Application, as the Tribe contends. Accordingly, the Tribe fails to raise a genuine dispute with the Application, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).

The Tribe also argues that a specific disposal plan must be included in Powertech's Application in order to comply with NEPA. We do not agree. It is settled law that an applicant is not bound by NEPA, but by NRC regulations in Part 51.[404] The NRC Staff, however, is bound by NEPA. At oral argument, the Staff recognized this obligation and conceded that NEPA "would require possibly an analysis by the Staff"[405] regarding waste disposal. If, at the time the Staff issues its environmental documents, the SEIS does not include an analysis of waste disposal, or if the Tribe feels the analysis is inadequate, the Tribe may file a contention at that time under 10 C.F.R. § 2.309(f)(2). Contention 7 is inadmissible.

The Board does recognize, however, the importance of planning for waste disposal at any NRC regulated facility, and we are concerned that this issue need not be addressed until the license is issued. At that point, of course, if a condition dealing with 11e(2) byproduct material is not included in the license, the Tribe has no recourse because it cannot challenge the license at that time. Due to these concerns, the Board recommends that this issue be considered by the Commission (or Board) when it conducts the mandatory review and hearing that must be held in this case.[406]

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[403] Tr. at 242.
[404] Levy County, CLI-10-2, 71 NRC at __ (slip op. at 8-9).
[405] Tr. at 240.
[406] 10 C.F.R. § 51.107(a). See also Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 112 (2009).

8. The Tribe's Contention 8

The Oglala Sioux states in Contention 8:

Requiring the Tribe to formulate contentions before an EIS is released violates NEPA.[407]

The Oglala Sioux contends that the NRC procedures requiring the Oglala Sioux to formulate contentions before the Staff's NEPA document, the SEIS, is complete violate the "public participation and informed decision-making mandates of NEPA."[408] The Oglala Sioux claims that it is being denied the benefit of a complete NEPA analysis under present NRC procedures and that the NRC's allowance of additional contentions to be filed after the SEIS is issued[409] wastes resources and denies the public the opportunity to participate in the agency's decision-making process.[410]

Both Powertech and the NRC Staff oppose admission of Contention 8. Powertech asserts that Contention 8 is an impermissible attack on NRC regulations, in violation of 10 C.F.R. § 2.335 and is therefore not a proper contention for this proceeding.[411] Furthermore, Powertech submits that the Oglala Sioux will have an opportunity to participate in the environmental review process by submitting comments when the NRC Staff issues the draft SEIS.[412] In sum, Powertech claims that the Oglala Sioux's Contention 8 is inadmissible as an impermissible attack on NRC regulations and that Oglala Sioux's claims of an exclusion from the environmental review process are unfounded.[413]

Like Powertech, the NRC Staff argues that Contention 8 is inadmissible as an impermissible attack on NRC regulations, in violation of 10 C.F.R. § 2.335.[414] Also, the Staff argues that the NRC's hearing procedures "provide substantial opportunities for public

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[407] Tribe Petition at 34.
[408] Id. at 35.
[409] 10 C.F.R. § 2.309(f)(2).
[410] Id. at 36.
[411] Powertech Answer to Tribe at 54.
[412] Id. at 55.
[413] Id.
[414] Staff Answer to Tribe at 42.

involvement apart from the hearing process," such as participating in the public comment period.[415]

In its Reply, the Oglala Sioux maintains that Contention 8 is not an attack on NRC regulations, as argued by Powertech and the NRC Staff.[416] Instead, the Oglala Sioux argues that the present proceeding fails to comply with the CEQ regulations, which they assert the NRC is bound to follow.[417] Further, the Oglala Sioux takes issue with the fact that the "NRC Staff has recommended that the Board make final rulings that prohibit admission of the Tribe's contentions, without the benefit of the required NEPA analysis."[418]

We agree with Powertech and the NRC Staff that Contention 8 is inadmissible. To begin, we note that the Oglala Sioux's main concern in this contention is that the NRC is not complying with CEQ regulations, which require that the NEPA process begin "at the earliest possible time."[419] As we understand it, the Tribe takes issue with the Commission's practice of requiring petitioners to file NEPA-based contentions contesting an applicant's ER, because the Staff's SEIS, the product of its NEPA review, is not ready at this stage of the proceeding. The Tribe argues that the NEPA review process is not conducted early enough in the proceeding to allow petitioners to file contentions on the completed SEIS, which is in violation of CEQ regulations. There are a number of reasons why the Board cannot accept this argument as the basis for an admissible contention.

First, while this agency gives substantial deference to CEQ regulations, it is not bound to follow them.[420] As an independent agency, the NRC has the authority to promulgate its own regulations implementing NEPA and is only bound by CEQ regulations when the NRC expressly

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[415] Id. (emphasis in original).
[416] Tribe Reply at 42.
[417] Id. at 43.
[418] Id. at 47.
[419] Tr. at 246.
[420] HRI (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-06-19, 64 NRC 53, 62 n.3 (2006) (citing Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002)); see also supra note 275.

adopts them.[421] The NRC has recognized its obligation to comply with NEPA, however, and has promulgated the regulations in Part 51, which govern "the consideration of the environmental impact of the licensing and regulatory actions of the agency."[422]

Secondly, Contention 8 constitutes an impermissible attack on NRC regulations, in contravention of 10 C.F.R. § 2.335. At oral argument, counsel for the Tribe stated that he was concerned with the way NRC's NEPA procedures were being used in the present proceeding, but conceded that he understood the Staff's NEPA review procedures are "not unique to this case."[423] Indeed, the regulations clearly state that a petitioner must file a NEPA contention challenging an applicant's ER at the time the petitioner requests a hearing.[424] Any challenge by the Tribe to this regulation is not litigable in this proceeding, and cannot be admitted as a contention under 10 C.F.R. § 2.335.[425] Absent a showing of 'special circumstances' under 10 C.F.R. § 2.335(b), which the Tribe has not made, this matter must be addressed through Commission rulemaking.[426]

Finally, we do not agree with the Tribe that current NRC procedures for filing NEPA-related contentions violate "public participation and informed decision-making mandates of NEPA."[427] NRC regulations provide opportunities for public involvement in the NEPA review process. For example, in this case the NRC Staff has stated that a draft SEIS will be issued, and will be circulated for public comment before the final SEIS is issued.[428] Additionally, the

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[421] Louisiana Energy Servs., LP (National Enrichment Facility), LBP-06-8, 63 NRC 241, 257 n.14 (2006); Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 154 (2005).
[422] Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 725 (3d Cir. 1989).
[423] Tr. at 246.
[424] 10 C.F.R. § 2.309(f)(2) ("On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.").
[425] See also Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC __, __ (slip op. at 38) (Mar. 11, 2010); Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004).
[426] North Anna, LBP-04-18, 60 NRC at 270.
[427] Tribe Petition at 35.
[428] Staff Answer to Tribe at 42; Tr. at 248.

regulations allow for new or amended contentions to be filed by the Tribe in the event that "there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents."[429] These new or amended contentions are not required to meet a higher standard than original contentions filed under 10 C.F.R. § 2.309(f)(1), as long as the new or amended contentions are founded on data or conclusions in the EIS that are new and significantly different from those in the ER and are timely filed.[430]

For the foregoing reasons, the Board concludes that the Tribe's Contention 8 is inadmissible.

9. The Tribe's Contention 9

The Oglala Sioux states in Contention 9:

Failure to consider connected actions.[431]

The Oglala Sioux states that Powertech's proposed ISL project is being considered by multiple federal agencies besides the NRC.[432] For example, according to the Oglala Sioux, Powertech has applied to the Environmental Protection Agency (EPA) for a Class V deep injection well permit for injection of hazardous materials.[433] The Oglala Sioux argues that the NRC has failed to consider the actions that will be taken by other agencies in its review of Powertech's Application, in violation of NEPA.[434] The Oglala Sioux submits that the Class V

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[429] 10 C.F.R. § 2.309(f)(2).
[430] The Board takes this opportunity to remind the NRC Staff of its increased notification commitments to Native American tribes as spelled out in the "U.S. Nuclear Regulatory Commission's Strategy for Outreach and Communication with Indian Tribes Potentially Affected by Uranium Recovery Sites" (ADAMS Accession No. ML092110101), especially as it pertains to environmental review.
[431] Tribe Petition at 36.
[432] Id.
[433] Id. at 37.
[434] Id.

permit process is a "connected action" and needs to be considered by the NRC under NEPA.[435] In the alternative, the Oglala Sioux argues that the Class V permit process must still be analyzed in the NRC's cumulative impact analysis.[436]

Both Powertech and the NRC Staff oppose admission of Contention 9. Powertech argues that the Oglala Sioux has failed to cite any regulations in 10 C.F.R. Part 51 that require the NRC Staff to coordinate its NEPA review of Powertech's Application with any other regulatory agency, such as the EPA.[437] Further, Powertech argues that the issue of underground injection of hazardous waste is wholly independent of NRC's review of Powertech's Application; because whether the EPA grants Powertech a Class V permit or not has no bearing on NRC Staff's s review.[438] Finally, Powertech asserts that Contention 9 is not ripe for consideration by the Board at this time because the NRC has only just begun to solicit EPA's input on the licensing of ISL facilities.[439]

Like Powertech, the NRC Staff argues that Contention 9 is not ripe for the Board's review at this time because the NRC Staff has not yet issued a draft or final SEIS for Powertech's proposed ISL facility.[440] According to the NRC Staff, because the Oglala Sioux is challenging NRC's ongoing NEPA review, Contention 9 must be rejected because it fails to comply with 10 C.F.R. § 2.309(f)(1)(vi).[441] Finally, the NRC Staff asserts that it will in fact be consulting with other agencies regarding Powertech's proposed action.[442]

In its Reply, the Oglala Sioux alleges that Powertech and the NRC Staff have provided no authority to rebut Contention 9.[443] The Oglala Sioux cites 10 C.F.R. § 51.10(b)(2) as

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[435] Id.
[436] Id.
[437] Powertech Answer to Tribe at 56.
[438] Id. at 57.
[439] Id.
[440] Staff Answer to Tribe at 42.
[441] Id. at 43.
[442] Id.
[443] Tribe Reply at 47.

requiring the participation of other agencies as cooperating agencies in the NEPA process.[444] As for ripeness, the Oglala Sioux argues that NEPA regulations require contentions to be pled at the earliest stages of a proceeding, and the NRC Staff's SEIS will not be issued until the latter end of these proceedings, in violation of NEPA regulations.[445] Finally, the Oglala Sioux argues that Powertech is mistaken in its assertion that other agencies must request cooperating status from the NRC.[446] On the contrary, according to the Oglala Sioux, as lead agency the NRC must request participation at the earliest possible time in the review process.[447]

The Board agrees with Powertech and the NRC Staff that Contention 9 is inadmissible. We conclude that Contention 9 presents the same issues of prematurity found in the Tribe's Contention 1. In the context of the NEPA review process, the duty of the lead agency to consider the actions of other federal agencies involved in a licensing action, is the responsibility of the NRC and not of the applicant.[448] Accordingly, the issue raised in Contention 9 will not ripen until the NRC Staff has completed its NEPA review.[449] The Tribe, as well as the public, will be given an opportunity to comment on the NRC Staff's draft SEIS. Additionally, after the NRC Staff has issued its draft or final SEIS, the Tribe will have the opportunity to file new or amended contentions under 10 C.F.R. § 2.309(f)(2) if it believes the Staff has not properly carried out its consultation responsibility.[450] Accordingly, Contention 9 is inadmissible.

10. The Tribe's Contention 10

The Oglala Sioux states in Contention 10:

The Environmental Report does not examine impacts of a direct tornado strike.[451]

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[444] Id.
[445] Id. at 48.
[446] Id.
[447] Id.
[448] Levy County, CLI-10-2, 71 NRC at __ (slip op. at 8-9).
[449] See, e.g., Crow Butte I, CLI-09-12, 69 NRC at 566; Crow Butte II, CLI-09-9, 69 NRC at 351.
[450] Crow Butte II, CLI-09-9, 69 NRC at 351; Tr. at 254.
[451] Tribe Petition at 38.

The Oglala Sioux argues that CEQ guidelines require agencies in their NEPA analysis to "consider low-probability environmental impacts with catastrophic consequences, if those impacts are reasonably foreseeable."[452] The Oglala Sioux claims that tornado strikes are relatively common in the Black Hills region of South Dakota, but that Powertech has failed to consider the impact of these strikes in its Application.[453] The Oglala Sioux claims that an analysis of the impacts of a tornado strike must be considered by Powertech and the NRC Staff in its NEPA analysis in order to comply with federal regulations.[454]

Both Powertech and the NRC Staff oppose admission of Contention 10. First, Powertech points out that the CEQ guidelines are not binding on the NRC and that the Oglala Sioux has failed to identify any NRC regulations that would support its argument that Powertech's Application is inadequate.[455] Powertech also asserts that its Application does in fact include information on tornado strikes and concludes "that no design or operational changes would be required for an ISL facility, but that chemical storage tanks should be located far enough apart to prevent contact during a potential tornado."[456] Finally, Powertech argues that the Oglala Sioux's data regarding tornado strikes in the Black Hills area is irrelevant because the data actually refers to tornado strikes in Oklahoma.[457]

The NRC Staff argues that Contention 10 does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi) because Powertech's Application includes an analysis of tornado strikes and the Oglala Sioux does not challenge Powertech's analysis.[458] Further, the NRC Staff argues that Powertech is not required by law to address tornado strikes. It claims that the Oglala Sioux has not cited any NRC regulations that would require Powertech

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[452] Id. (internal citations omitted).
[453] Id.
[454] Id. at 39.
[455] Powertech Answer to Tribe at 58.
[456] Id.
[457] Id. at 59.
[458] Staff Answer to Tribe at 44.

to include this type of analysis and argues that tornado strikes are not reasonably foreseeable, and therefore not required to be considered under NEPA.[459]

In its Reply, the Oglala Sioux rebuts the NRC Staff's claim that the threat of a tornado strike is "low" by stating that no fewer than nine tornadoes have struck Custer County and twenty-eight have struck Fall River County since 1950.[460] Moreover, the Oglala Sioux maintains that it did not rely on Oklahoma-based information for Contention 10, but merely cited Oklahoma tornado statistics to show that the Fansteel plant had been affected by a tornado, thereby making tornado strikes on facilities foreseeable.[461] Finally, the Oglala Sioux argues that Powertech's statement that the tornado-related information already in the Application is "good enough" provides evidence of a genuine dispute with the Application and supports admission of Contention 10.[462]

The Board determines that Contention 10 is inadmissible. Powertech has cited portions of its Application in which it discusses the possibility of a tornado strike and determined that no operational design changes would be necessary should such a strike occur.[463] The Tribe does not dispute this determination in Contention 10, stating merely that tornado strikes are reasonably foreseeable and not considered by Powertech in its Application. Because the Tribe does not challenge the analyses of tornado strikes that do appear in Powertech's Application, the Tribe does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, the Board denies admission of Contention 10.

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[459] Id. at 44-45.
[460] Tribe Reply at 49.
[461] Id. at 50.
[462] Id.
[463] Tr. at 272.

VI. Selection of Hearing Procedures

A. Legal Standards

As required by 10 C.F.R. § 2.310(a), upon admission of a contention in a licensing proceeding, the Board must identify the specific hearing procedures to be used to settle the contention. NRC regulations provide for a number of different hearing procedures, two of which are relevant here.[464] First, there is Subpart G,[465] which is mandated for certain proceedings,[466] and establishes NRC "Rules for Formal Adjudications," in which parties are permitted to "propound interrogatories, take depositions, and cross-examine witnesses without leave of the Board."[467] Second, there is Subpart L[468] which provides for more "informal" proceedings in which discovery is generally prohibited (except for (1) specified mandatory disclosures under 10 C.F.R. § 2.336(f), (a), and (b); and (2) the mandatory production of the hearing file under 10 C.F.R. § 2.1203(a)).[469] Under Subpart L, the Board has the primary responsibility for questioning the witnesses at any evidentiary hearing.[470]

B. Ruling

The Board concludes that, at this juncture, the Subpart L hearing procedures will be used to adjudicate each of the contentions we have admitted. We reach this result as follows. First, we conclude that there has been no showing under 10 C.F.R. § 2.310(d) that the Subpart G procedures are mandated for any of the admitted contentions. Second, exercising our discretion under 10 C.F.R. § 2.310(a), we have seen no reason or need to apply the Subpart G

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[464] If the hearing on a contention is "expected to take no more than two (2) days to complete," 10 C.F.R. § 2.310(h)(1), the Board can impose the Subpart N procedures for "Expedited Proceedings with Oral Hearings" specified at 10 C.F.R. § 2.1400-1407. These procedures are highly truncated, but may prove appropriate for certain contentions at a later stage.
[465] 10 C.F.R. Part 2.
[466] See, e.g., id. § 2.310(d).
[467] Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006).
[468] 10 C.F.R. Part 2.
[469] Id. § 2.1203(d).
[470] Id. § 2.1207(b)(6).

procedures to any of the admitted contentions. We therefore rule that, for the time being, the procedures of Subpart L will be used for the adjudication of each of the admitted contentions.[471] This determination is, of course, subject to reconsideration should there be reason to do so at a later date.

VII. Conclusion

Based on the foregoing, it is hereby ORDERED as follows:

A. Consolidated Petitioners Susan Henderson, Dayton Hyde, David Frankel, CWA, and ARM are admitted as parties in this proceeding, and a Subpart L hearing is granted with respect to the following contentions, as limited and reworded by the Licensing Board:

> Contention D – Powertech's presentation and analysis of baseline water quality data in its Application is inadequate. Further, Powertech's analysis of aquifer confinement fails to include an analysis of how artesian and horizontal flow could impact surrounding aquifers and surface waters.
>
> Contentions E (merged with J) – The lack of adequate confinement of the host Inyan Kara aquifer makes the proposed operation inimical to public health and safety in violation of Section 40.31(d). Further, Applicant's failure to describe faults and fractures between aquifers, through which the groundwater can spread uranium, thorium, radium 226 and 228, arsenic, and other heavy metals, violates Section 51.45(c) and (e).
>
> Contention K – The Application is not in conformance with 10 C.F.R. § 40.9 and 10 C.F.R. § 51.45 because the Application does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that cultural and historic resources . . . are identified and protected pursuant to Section 106 of the National Historic Preservation Act. As a result, the Application fails to comply with Section 51.60 . . . .

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[471] The selection of hearing procedures for contentions at the outset of a proceeding is not immutable because, inter alia, the availability of Subpart G procedures under 10 C.F.R. § 2.310(d) depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified, under 10 C.F.R. § 2.336(a)(1), until after contentions are admitted. See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 272 (2007); see also 10 C.F.R. § 2.1402(b).

B. Consolidated Petitioners Gary Heckenlaible, Lilias Jones Jarding, and Theodore Ebert are denied party status in this proceeding. Further, the Board finds inadmissible the following contentions set forth by Consolidated Petitioners: Contentions A, B, C, F G, H and I.

C. The Oglala Sioux Tribe is admitted as a party in this proceeding, and a Subpart L hearing is granted with respect to the following contentions, as limited and reworded by the Licensing Board:

> Contention 1 – Powertech's Application is deficient because it fails to address adequately protection of historical and cultural resources.
>
> Contention 2 – Failure to include necessary information for adequate determination of baseline ground water quality.
>
> Contention 3 – Failure to include adequate hydrogeological information to demonstrate ability to contain fluid migration.
>
> Contention 4 – Inadequate analysis of Ground Water Quantity Impacts.

D. The Board finds inadmissible the following contentions set forth by the Oglala Sioux Tribe: Contentions 5, 6, 7, 8, 9, and 10.

E. Within ten (10) days of the issuance of this Order, Petitioners David Frankel and Susan Henderson must elect to participate in this proceeding as individuals or to have their interests represented by CWA or ARM.

F. The Licensing Board will hold a telephone conference with the parties in which we will discuss a schedule of further proceedings in this matter.

G. This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311. Any petitions for review meeting applicable requirements set forth in that section must be filed within ten (10) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[472]

_____*/RA/*_____
William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

_____*/RA/*_____
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

_____*/RA/*_____
Dr. Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 5, 2010

[472] Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Powertech USA, Inc.; (2) Consolidated Petitioners; (3) the Oglala Sioux Tribe; and (4) NRC Staff.

ATTACHMENT A
Contention I – Basis-by-Basis Analysis

Basis	Subparts of 10 C.F.R. § 2.309(f)(1) not met	Element(s) not met
Basis 1	(v), (vi)	Failure to provide support and no genuine dispute
Basis 2	(vi)	No genuine dispute
Basis 3	(v), (vi)	Failure to provide support and no genuine dispute
Basis 4	(v), (vi)	Failure to provide support and no genuine dispute
Basis 5	(v), (vi)	Failure to provide support and no genuine dispute
Basis 6	(v)	Failure to provide support
Basis 7	(v), (vi)	Failure to provide support and no genuine dispute
Basis 8	(v), (vi)	Failure to provide support and no genuine dispute
Basis 9	(v), (vi)	Failure to provide support and no genuine dispute
Basis 10	(v)	Failure to provide support
Basis 11	(v), (vi)	Failure to provide support and no genuine dispute
Basis 12	(iv), (v), (vi)	Not shown as material, failure to provide support and no genuine dispute
Basis 13	(v), (vi)	Failure to provide support and no genuine dispute
Basis 14	(v), (vi)	No genuine dispute and failure to provide support
Basis 15	(iii), (v), (vi)	Outside the scope of the proceeding, failure to provide support and no genuine dispute
Basis 16	(v), (vi)	Failure to provide support and no genuine dispute
Basis 17	(v), (vi)	Failure to provide support and no genuine dispute
Basis 18	(v), (vi)	Failure to provide support and no genuine dispute
Basis 19	(v), (vi)	Failure to provide support and no genuine dispute
Basis 20	(v), (vi)	Failure to provide support and no genuine dispute
Basis 21	(iv), (v), (vi)	Not shown as material, failure to provide support and no genuine dispute
Basis 22	(iv), (v), (vi)	Not shown as material, failure to provide support and no genuine dispute
Basis 23	(v), (vi)	Failure to provide support and no genuine dispute
Basis 24	(v), (vi)	Failure to provide support and no genuine dispute
Basis 25	(v), (vi)	Failure to provide support and no genuine dispute
Basis 26	(v), (vi)	Failure to provide support and no genuine dispute
Basis 27	(v), (vi)	Failure to provide support and no genuine dispute
Basis 28	(v), (vi)	Failure to provide support and no genuine dispute
Basis 29	(v), (vi)	Failure to provide support and no genuine dispute
Basis 30	(v), (vi)	Failure to provide support and no genuine dispute
Basis 31	(v), (vi)	Failure to provide support and no genuine dispute
Basis 32	(v), (vi)	Failure to provide support and no genuine dispute
Basis 33	(vi)	No genuine dispute
Basis 34	(vi)	No genuine dispute
Basis 35	(iv), (v), (vi)	Not shown to be material, failure to provide support and no genuine dispute
Basis 36	(v), (vi)	Failure to provide support and no genuine dispute
Basis 37	(v), (vi)	Failure to provide support and no genuine dispute
Basis 38	(v), (vi)	Failure to provide support and no genuine dispute
Basis 39	(v), (vi)	Failure to provide support and no genuine dispute

Basis 40	(v), (vi)	Failure to provide support and no genuine dispute
Basis 41	(v), (vi)	Failure to provide support and no genuine dispute
Basis 42	(v), (vi)	Failure to provide support and no genuine dispute
Basis 43	(v), (vi)	Failure to provide support and no genuine dispute
Basis 44	(v), (vi)	Failure to provide support and no genuine dispute
Basis 45	(v), (vi)	Failure to provide support and no genuine dispute
Basis 46	(v), (vi)	Failure to provide support and no genuine dispute
Basis 47	(v), (vi)	Failure to provide support and no genuine dispute
Basis 48	(v), (vi)	Failure to provide support and no genuine dispute
Basis 49	(v)	Failure to provide support
Basis 50	(i), (iv), (v), (vi)	Not shown to be material, failure to provide support, no genuine dispute, and failure to raise an issue of law or fact
Basis 51	(v), (vi)	Failure to provide support and no genuine dispute
Basis 52	(v), (vi)	Failure to provide support and no genuine dispute
Basis 53	(v), (vi)	Failure to provide support and no genuine dispute
Basis 54	(v), (vi)	Failure to provide support and no genuine dispute
Basis 55	(v), (vi)	Failure to provide support and no genuine dispute
Basis 56	(v), (vi)	Failure to provide support and no genuine dispute
Basis 57	(v), (vi)	Failure to provide support and no genuine dispute
Basis 58	(iii), (v), (vi)	Not within the scope of the proceeding, failure to provide support and no genuine dispute
Basis 59	(v)	Fail to provide support
Basis 60	(v), (vi)	Failure to provide support and no genuine dispute
Basis 61	(v)	Failure to provide support
Basis 62	(v)	Failure to provide support
Basis 63	(v)	Failure to provide support
Basis 64	(v)	Failure to provide support
Basis 65	(v), (vi)	Failure to provide support and no genuine dispute
Basis 66	(v)	Failure to provide support
Basis 67	(iv), (v), (vi)	Not shown to be material, failure to provide support and no genuine dispute
Basis 68	(v), (vi)	Failure to provide support and no genuine dispute
Basis 69	(v), (vi)	Failure to provide support and no genuine dispute
Basis 70	(v), (vi)	Failure to provide support and no genuine dispute
Basis 71	(vi)	No genuine dispute
Basis 72	(iv), (v), (vi)	Not shown to be material, failure to provide support and no genuine dispute
Basis 73	(v), (vi)	Failure to provide support and no genuine dispute
Basis 74	(v)	Fail to provide support
Basis 75	(v), (vi)	Failure to provide support and no genuine dispute
Basis 76	(v)	Failure to provide support
Basis 77	(v)	Failure to provide support
Basis 78	(v), (vi)	Failure to provide support and no genuine dispute
Basis 79	(v), (vi)	Failure to provide support and no genuine dispute
Basis 80	(v), (vi)	Failure to provide support and no genuine dispute
Basis 81	(v)	Failure to provide support
Basis 82	(v), (vi)	Failure to provide support and no genuine dispute
Basis 83	(v), (vi)	Failure to provide support and no genuine dispute

Basis 84	(v), (vi)	Failure to provide support and no genuine dispute
Basis 85	(v), (vi)	Failure to provide support and no genuine dispute
Basis 86	(v), (vi)	Failure to provide support and no genuine dispute
Basis 87	(v), (vi)	Failure to provide support and no genuine dispute
Basis 88	(iv), (v), (vi)	Not shown to be material, failure to provide support and no genuine dispute
Basis 89	(v), (vi)	Failure to provide support and no genuine dispute
Basis 90	(v), (vi)	Failure to provide support and no genuine dispute
Basis 91	(v)	Failure to provide support
Basis 92	(iv), (v)	Not shown to be material and failure to provide support
Basis 93	(v), (vi)	Failure to provide support and no genuine dispute
Basis 94	(v), (vi)	Failure to provide support and no genuine dispute
Basis 95	(iv), (v), (vi)	Not shown to be material, failure to provide support and no genuine dispute
Basis 96	(v), (vi)	Failure to provide support and no genuine dispute
Basis 97	(v), (vi)	Failure to provide support and no genuine dispute
Basis 98	(v), (vi)	Failure to provide support and no genuine dispute
Basis 99	(v), (vi)	Failure to provide support and no genuine dispute
Basis 100	(v), (vi)	Failure to provide support and no genuine dispute

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility	)	
Source Materials License Application)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **MEMORANDUM AND ORDER (Ruling on Petitions to Intervene and Requests for Hearing) (LBP-10-16)**, dated August 5, 2010, have been served upon the following persons by Electronic Information Exchange.

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
wjf1@nrc.gov

Richard F. Cole
Administrative Judge
richard.cole@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

Anthony C. Eitreim, Esq., Chief Counsel
ace1@nrc.gov
Megan Wright, Law Clerk
megan.wright@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
OCAA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
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
Catherine Scott, Esq.
clm@nrc.gov
Michael Clark, Esq.
mjc1@nrc.gov
Brett Klukan, Esq.
brett.klukan@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov

OGC Mail Center:
OGCMailCenter@nrc.gov

Counsel for the Applicant
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher Pugsley, Esq.
cpugsley@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Counsel for the Oglala Sioux Tribe
Gonzales Law Firm
522 7th Street, Suite 202
Rapid City, SD 57701
Grace Dugan, Esq.
dugan@wavecom.net

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 Minerals Law Center
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for multiple petitioners -

Organizations:
Aligning for Responsible Mining
Clean Water Alliance

Individuals:
Theodore P. Ebert
Gary Heckenlaible
Susan Henderson
Dayton Hyde
Lilias Jones Jarding

David Frankel, Esq., Legal Director
Aligning for Responsible Mining
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

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

Thomas J. Ballanco, Esq.
Attorney for Dayton Hyde
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering1@mac.com

[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

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