

March 7, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

**NRC STAFF'S ANSWER TO CONTENTIONS ON DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

The NRC Staff provides a single answer to the contentions the Consolidated Intervenors and the Oglala Sioux Tribe filed separately on January 25, 2013. The contentions challenge the Draft Supplemental Environmental Impact Statement the Staff prepared for Powertech (USA) Inc.'s proposed Dewey-Burdock facility. The Board should reject these contentions because each one fails to comply with NRC rules applying to new contentions.

**Background**

**I. Powertech's Application**

Powertech seeks an NRC license in order to operate the Dewey-Burdock in-situ uranium recovery (ISR) facility in Fall River and Custer Counties, South Dakota. Along with its application for an NRC license, Powertech submitted an Environmental Report addressing its proposed facility's impact on the environment. The Environmental Report, which is required by NRC regulations in 10 C.F.R. Part 51, helps inform the Staff's independent review of a license application and thereby helps the Staff meet the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*

Since Powertech submitted its Environmental Report in 2009, it has provided additional information relevant to the Staff's NEPA review. For example, in August and November 2010 Powertech submitted responses to the Staff's requests for additional information (RAIs) pertaining to the Environmental Report.<sup>1</sup> Powertech has also supplemented its application with other information, including responses to RAIs on the Technical Report it submitted to demonstrate compliance with the NRC's safety regulations.<sup>2</sup> This supplemental information is publicly available through the NRC's Agencywide Documents Access Management System (ADAMS), except in the relatively few cases where the information is sensitive or otherwise protected from disclosure.

## **II. The Staff's NEPA Review**

In accordance with NEPA and the NRC's regulations in 10 C.F.R. Part 51, the Staff is preparing a supplemental environmental impact statement (SEIS) in connection with Powertech's application. The EIS is a supplemental EIS because the Staff's analysis draws from, and adds to, the analysis in NUREG-1910, "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities." NUREG-1910 assesses the environmental impacts of ISR operations both generally and on a regional basis, with specific sections focusing on the Western South Dakota-Northeastern Wyoming Region, where Powertech's facility would be.

In November 2012, the Staff issued a Draft SEIS (DSEIS) for public comment.<sup>3</sup> The DSEIS addresses environmental impacts from construction of the Dewey-Burdock facility and ISR operations at the site, as well as impacts from the restoration of aquifers used during ISR

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<sup>1</sup> Powertech (USA) Inc.'s Response to the Request for Additional Information to Support the Environmental Review of its Application (August 26, 2010) (ADAMS Accession No. ML102380530); Powertech (USA), Inc.'s Responses to the U.S. Nuclear Regulatory Commission (NRC) Staff's Verbal and Email Requests for Clarification of Selected Issues Related to the Dewey-Burdock Uranium Project Environmental Review (November 4, 2010) (ADAMS Accession No. 103140318).

<sup>2</sup> *E.g.*, Revised Responses to the Request for Additional Information (RAI) for the Technical Report (June 28, 2011) (ADAMS Accession No. ML112071064).

<sup>3</sup> *Supplemental Environmental Impact Statement for Proposed Dewey- Burdock In-Situ Uranium Recovery Project in Custer and Fall River Counties, SD*, 77 Fed. Reg. 70,486 (November 26, 2012).

operations and decommissioning of the site. The DSEIS follows the standard format for NRC environmental impact statements and includes 11 chapters addressing topics such as alternatives to the proposed action (Chapter 2), impacts from the proposed action (Chapter 4), cumulative impacts (Chapter 5), and mitigation measures (Chapter 6).

The Staff prepared the DSEIS in cooperation with the U.S. Bureau of Land Management (BLM), which manages 240 acres of land within the Dewey-Burdock site. While preparing the DSEIS the Staff also consulted with numerous other federal and state agencies. These agencies include the U.S. Environmental Protection Agency, the U.S. Forest Service, the Army Corps of Engineers, and the South Dakota Department of Environment and Natural Resources. In addition, since 2010 the Staff has been consulting with numerous American Indian tribes in order to obtain information on culturally significant properties that may qualify for protection under the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (NHPA).

### **III. The Board's Initial Ruling on Contentions**

In their hearing requests, the Intervenors<sup>4</sup> submitted a combined 21 contentions raising a variety of safety and environmental challenges to Powertech's application. The Board admitted seven contentions in all, while rejecting the remaining contentions. *Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LPB-10-16, 72 NRC 361, 443–44 (2010). The contentions the Board admitted challenge Powertech's analyses of cultural resources that may be affected by the Dewey-Burdock Project, baseline groundwater quality, hydrogeological confinement of the aquifers in which Powertech intends to operate, and groundwater consumption. The Board rejected contentions challenging the organization of Powertech's application, Powertech's discussion of its plans for disposal of 11e.(2) byproduct material, and its analysis of actions connected to the Dewey-Burdock Project. The Board also

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<sup>4</sup> Throughout this answer, the Staff will use "Intervenors" to refer to the Consolidated Intervenors and the Oglala Sioux Tribe collectively.

rejected a contention challenging the requirement, imposed by NRC regulations, that petitioners file contentions prior to the Staff releasing its final NEPA document.

When ruling on the Intervenor's initial contentions, the Board did not specifically admit the contentions as safety contentions (*i.e.*, contentions challenging Powertech's Technical Report) or environmental contentions (contentions challenging the Environmental Report). The Board later scheduled a teleconference with the parties to discuss how it should characterize the admitted contentions. Based on the teleconference and the Board's subsequent order, it is the Staff's understanding that three of the contentions admitted in this hearing are environmental contentions, while the remaining four contentions are safety contentions with environmental components.<sup>5</sup> Accordingly, this hearing already involves a number of environmental issues. In their contentions challenging the DSEIS, the Intervenor's seek to either expand those issues or add new environmental issues for the hearing.

#### **IV. The New Contentions**

The Consolidated Intervenor's filed 4 new contentions on the DSEIS, while the Oglala Sioux Tribe filed 14 new contentions. The Consolidated Intervenor's contentions and the Tribe's first four contentions are very similar, however, raising the same general issues and relying on the same Supplemental Declaration from Dr. Robert Moran. These contentions also address the same issues as the contentions previously admitted in this hearing: cultural resources, baseline groundwater conditions, hydrogeological confinement of aquifers to be used during ISR operations, and groundwater consumption. Of the Tribe's ten remaining contentions, many are similar to contentions the Board previously rejected as challenges to Powertech's application. These include contentions challenging the organization of the DSEIS, the requirement that intervenor's submit contentions prior to the final SEIS being issued, and the Staff's analysis of

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<sup>5</sup> Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order) (October 16, 2012) at 2 (explaining that the parties consider Contentions K, 1, and 4 to be environmental contentions, and that they either consider the remaining contentions to have environmental components or do not dispute that characterization).

connected actions. A few of the Tribe's contentions raise different issues, such as the Tribe's claim that the Staff did not adequately consult with other agencies when preparing the DSEIS.

## **Legal Standards**

### **I. General Requirements for Contentions**

A contention cannot be admitted in an NRC hearing unless it meets the criteria in 10 C.F.R. 2.309(f)(1). This subpart requires that each contention:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention 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 which support the requestor's/petitioner's position on the issue . . . ;
- (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

..... Although contentions must typically be filed at the same time a petitioner submits its hearing request, a person may later file new or amended contentions ("late-filed contentions") based on subsequently released documents, such as the NRC Staff's draft or final NEPA document. 10 C.F.R. § 2.309(f)(2). Such a contention cannot be admitted, however, unless it meets the following additional requirements in 10 C.F.R. § 2.309(c)(2):

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The intervenor has the burden of demonstrating that any late-filed contention meets the standards in 10 C.F.R. § 2.309. *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

## II. Precedent Relevant to the Board's Review of Contentions

For late-filed contentions challenging the Staff's DSEIS, the following general principles govern whether the intervenor has demonstrated that its contentions are admissible.

### A. Contentions Must Be Based on New and Materially Different Information

Under the plain language of 10 C.F.R. § 2.309(c)(2)(i) and (ii), a late-filed contention cannot be admitted unless it is supported by information that is new and materially different from that previously available. In the context of a DSEIS, a contention cannot be admitted unless it rests on data or conclusions that "differ significantly" from those in the applicant's Environmental Report. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385 (2002). A new NEPA contention is not an occasion to raise additional arguments that could have been raised on the Environmental Report. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (late contention denied where only claim was that "certain concerns that were not dealt with in the [Environmental Report] have additionally not been dealt with in the DEIS" and no showing of "new or different data or conclusions" in the DEIS); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1049 (1983) (Commission expects that the filing of an environmental concern based on the applicant's Environmental Report will not be deferred simply because the Staff may subsequently provide a different analysis in its DEIS); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (no good cause for late filing where DEIS contained no new information relevant to contention). In other words, just because a DSEIS postdates the application does not mean that an intervenor can ignore relevant information in the application, waiting for the information to reappear in the DSEIS. *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), LBP-01-4, 53 NRC 121, 127 (2001).

## **B. Contentions Must Be Filed Promptly After Supporting Information Becomes Available**

The Staff's NEPA document does not provide the only opportunity for an Intervenor to submit a new contention in a hearing. To the contrary, an Intervenor must submit a contention whenever other information becomes available that in its view raises an issue for the hearing. The Intervenor must submit its new contention "in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(c)(2)(iii). In this particular hearing, the Board has issued two scheduling orders addressing the timeliness of contentions.<sup>6</sup> Under these orders, the Intervenor must submit contentions within 30 days after relevant information becomes available to them. The exception is the DSEIS, which the Intervenor was given until January 25, 2013 to challenge.<sup>7</sup> For information that was publicly available before the DSEIS issued, the 30-day deadline applied.

## **C. Contentions Must Be Based on a Reading of the Entire Record**

When submitting a contention, an intervenor must read all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing view. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). The Board must reject a contention that rests on an incomplete or inaccurate reading of a DSEIS. *Cf. Georgia Institute of Technology*, (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on a mistaken reading of the Safety Analysis Report). Further, when challenging a DSEIS the intervenor must do more than allege generally that there are deficiencies in the document. In order to demonstrate a genuine, material dispute with the DSEIS for a particular facility, the intervenor must address the specific

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<sup>6</sup> Order (Supplementing Initial Scheduling Order) (November 2, 2010) at 5–6; Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order) (October 16, 2012) at 3.

<sup>7</sup> Order (Granting Unopposed Joint Motion for Extension of Time to File Contentions) (December 18, 2012).

analysis in the document and explain how it is incorrect using facts that are specific to the facility in question. See *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) (“An expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate[.]”).

#### **D. The Staff’s NEPA Review Has a Defined Scope**

When preparing a DSEIS, the Staff takes a “hard look” at the environmental impacts of the proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The hard look standard does not, however, require that the Staff address every conceivable environmental impact in the DSEIS. *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)). For example, the Staff need not discuss remote and highly speculative consequences. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980). To the contrary, a “hard look” under NEPA requires only that the Staff provide “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]” *Trout Unlimited*, 509 F.2d at 1283.

NRC precedent likewise delimits the scope of the Staff’s NEPA review. As the Commission has explained, “NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original). The proper inquiry under the “hard look” standard is not whether an effect is “theoretically possible,” but whether it is “reasonably probable that the situation will obtain.” *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 49 (1978).

When discussing impacts in certain resource areas, the DSEIS may take into account environmental mitigation measures proposed by the applicant or identified by the Staff. The



DSEIS need not contain “a complete mitigation plan,” however, nor does it need to include “a detailed explanation of specific [mitigation] measures which will be employed.” *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426–27 (2006). In fact, a mitigation plan “need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.” *Id.* The DSEIS need only discuss mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Id.* See also *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC 254, 265 (2011) (explaining that NEPA does not “demand the presence of a fully developed [mitigation] plan” or a “detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action”).

#### **E. The Staff’s Use of License Conditions is Consistent with NEPA**

Unlike with certain other types of facilities, the NRC does not have safety regulations written specifically for ISR facilities. The NRC Staff regulates ISR facilities by applying the general safety regulations in 10 C.F.R. Parts 20 and 40, applying pertinent requirements in Appendix A of Part 40, and using license conditions.<sup>8</sup> License conditions are legally binding, meaning that the Staff can take enforcement action against any ISR licensee who fails to comply with its license conditions.<sup>9</sup>

The Staff’s use of license conditions does not impede its review under NEPA, nor does it impede public review of the licensing action. Because license conditions are enforceable, the Staff evaluates the environmental impacts of the proposed action based on the license

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<sup>8</sup> Appendix A of Part 40 establishes nine criteria that apply to conventional uranium milling facilities. Some, but not all, of these criteria apply to ISR facilities as well. *Hydro Resources, Inc.*, CLI-99-22, 50 NRC 3, 8 (1999).

<sup>9</sup> The Staff issues draft licenses to ISR applicants to ensure that, if a license is granted, they will have a clear understanding of the conditions they must meet. The Staff issued Powertech a draft license on July 31, 2012 (ADAMS Accession No. ML12207A480); a second draft license on January 4, 2013 (ADAMS Accession No. 12355A670); and a third draft license on March 1, 2013 (ADAMS Accession No. ML13052A777). When referring to license conditions in this answer, the Staff will refer to the conditions as they are numbered in the second draft license, which was available when the Intervenor submitted their DSEIS-related contentions.

conditions being met. The Staff also includes a standard condition in all ISR licenses requiring the licensee to apply for a license amendment if it later proposes any change, test, or experiment that is *not* consistent with the findings in the Staff's NEPA document.<sup>10</sup> In other words, if the licensee proposes an action with potential environmental impacts that have not already been considered by the Staff, the licensee must seek a license amendment, which will trigger additional NEPA review. *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 17 (1999). The Staff's use of license conditions is therefore "fully consistent with the Commission's requirements and sound NEPA practice." *Id.*

## **Discussion**

### **I. Summary of Staff's Position**

For almost all of the 18 new contentions, the Intervenors fail to meet two specific requirements in 10 C.F.R. § 2.309(c)(2). First, the Intervenors do not show that the information upon which they base their contentions is new, as required by § 2.309(c)(2)(i). Second, for the few instances in which there is arguably new information relevant to a contention, the Intervenors do not explain how this information is materially different from information previously available, as required by § 2.309(c)(2)(ii). It is the Intervenors who have the burden of showing their contentions are admissible. *Oyster Creek*, CLI-09-7, 69 NRC at 260–61. The Board should not have to sift through the docket in a licensing proceeding to determine what information, if any, is new and how it is materially different from information previously available. *Cf. Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 46 (2001) ("The Commission should not be expected to sift unaided through large swaths of earlier briefs filed before the Presiding Officer in order to piece together and discern the

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<sup>10</sup> In Powertech's case, this condition appears as License Condition 9.4 in its draft license.

intervenors' particular concerns or the grounds for their claims.") Because the Intervenor's fail to address the requirements for late-filed contentions, their contentions must be rejected.

In fact, almost all the new contentions merely renew arguments that were either submitted as contentions on Powertech's Environmental Report or could have been submitted as contentions on that document. This is particularly so for the Consolidated Intervenor's four contentions and the Tribe's first four contentions, each of which tracks a contention the Board previously admitted. This is also true, however, for most of the Tribe's ten remaining contentions, some of which the Board rejected when they were submitted, in slightly different form, as contentions on Powertech's Environmental Report. Because the NRC's contention rules are not meant to provide a second opportunity to raise arguments that could have been made previously, or which *were* made previously, these contentions must also be rejected. *McGuire*, CLI-02-28, 56 NRC at 385–86.

The Intervenor's failure to explain whether their contentions rest on new and materially different information is not a mere technical deficiency that may be overlooked. To the contrary, it is a failure to address a threshold requirement for new contentions. 10 C.F.R. § 2.309(c)(2)(i), (ii). The practical effect of the Intervenor's oversight is that the Staff, in this answer to the late-filed contentions, must first address whether the information cited in the contentions is new and materially different from information previously available. This inverts the burden of proof with regard to contentions. It also denies the Staff the opportunity to address the Intervenor's arguments that information is new and materially different, while preserving the Intervenor's opportunity, in their reply briefs, to challenge the Staff's position. Admitting the Intervenor's contentions would therefore be inconsistent with the responsibilities assigned the parties under NRC regulations and Commission precedent. 10 C.F.R. § 2.309(f); *Oyster Creek*, 69 N.R.C. at 260–61.

Finally, even in those few cases where the Intervenor's point to information that is arguably new as support for a contention, the contention must still be rejected. In addition to

showing that their supporting information is new and materially different, the Intervenor must show there is a genuine dispute with the Staff on an issue that is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iv), (vi). The Intervenor must also provide adequate factual or expert support for their contentions. 10 C.F.R. § 2.309(f)(1)(v). The Intervenor fails to meet these requirements. For example, although the Tribe argues that the Staff's use of license conditions violates NEPA, Commission precedent states otherwise. *Hydro Resources*, CLI-99-22, 50 NRC at 17. As another example, while the Tribe argues that in preparing the DSEIS the Staff failed to consult with other agencies, it overlooks the Staff's extensive consultations with other federal agencies, state agencies, and Indian tribes.<sup>11</sup>

## **II. The New Contentions Are Inadmissible**

As stated above, the Consolidated Intervenor's four contentions and the Tribe's first four contentions raise the same general issues and rely on the same Supplemental Declaration from Dr. Robert Moran. These overlapping contentions also share the same deficiencies that render them inadmissible in this hearing. The Staff will therefore address these contentions together, before turning to the Tribe's ten remaining contentions.

### **A. Consolidated Intervenor's Contention A and Oglala Sioux Tribe's Contention 1 (Cultural Resources)**

The Intervenor argues that the DSEIS fails to comply with NEPA because it does not adequately address how the Dewey-Burdock Project may affect cultural resources. The Intervenor also argues that in preparing the DSEIS the Staff failed to consult with Indian tribes as required under Section 106 of the NHPA. The Tribe further argues that, based on these deficiencies, the Staff must recirculate the DSEIS for additional public comment.

Contentions A and 1 are inadmissible because the Intervenor does not point to any new and materially different information in the DSEIS as support for their contentions. *McGuire*, CLI-

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<sup>11</sup> The Staff discusses its consultations with Indian tribes in its response to the Intervenor's Contentions A and 1. The Staff discusses its consultations with federal and state agencies in its responses to the Oglala Sioux Tribe's Contentions 9 and 10.

02-28, 56 NRC at 385; *Catawba*, CLI-83-19, 17 NRC at 1049.<sup>12</sup> This should not be surprising, because the Staff is currently consulting with numerous Indian tribes to obtain additional information on historic properties that may be affected by the Dewey-Burdock Project. The analysis in the DSEIS is therefore based on archeological survey results Powertech submitted as part of its application, and this information is not new. As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties.<sup>13</sup> When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment. If the Intervenor disagree with the Staff's analysis, they will be able to submit comments or contentions on the supplement. There is, however, no basis for admitting the Intervenor's contentions at this time.

The Consolidated Intervenor further argue that the Staff's consultation with Indian tribes is lacking because the Staff failed to contact several tribes that are likely to have an interest in cultural resources in the Dewey-Burdock area. But this argument does not rest on any new information. In 2010, the Staff sent letters to numerous tribes inviting them to consult under Section 106 of the NHPA.<sup>14</sup> Since then the Staff has regularly sent letters to consulting tribes informing them of the status of the Dewey-Burdock licensing review. These letters are publicly available, and they could have served as the basis for a contention arguing that the Staff overlooked an interested tribe. The Consolidated Intervenor's argument is therefore

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<sup>12</sup> For example, at pages 5–6 of their contentions the Consolidated Intervenor challenge the methodology used in the archeological survey that Powertech submitted with its application. This information is not new, however, and the opinion of Dr. Redmond, upon which the Consolidated Intervenor rely, already formed part of the basis for admitted Contention K. *Dewey-Burdock*, LPB-06-16, 72 NRC at 417, 443.

<sup>13</sup> Notice of Availability of DSEIS (November 15, 2012) (ADAMS Accession No. ML12320A623) at 1–2.

<sup>14</sup> The Staff's first hearing file update (October 2010) shows the tribes to which the Staff sent consultation letters. The Staff's subsequent hearing file updates list other letters sent to consulting tribes.

impermissibly late. 10 C.F.R. § 2.309(c)(2)(iii); Order (Supplementing Initial Scheduling Order) (November 2, 2010) at 5–6.

The Oglala Sioux Tribe also challenges the Staff's consultation efforts, arguing that the Staff excluded tribes from the NEPA/NHPA process prior to releasing the DSEIS. This is incorrect. As the record reflects, the Staff has made substantial efforts to consult with interested tribes. Since 2010, the Staff has been consulting with approximately 20 tribes. The Staff has traveled to South Dakota three times to meet with tribal representatives on NHPA-related issues, held teleconferences to discuss these issues, provided regular updates to tribes on the status of the Dewey-Burdock licensing review, and sought the views of the tribes in numerous other ways.<sup>15</sup> The Staff recently invited consulting tribes to participate in a field survey of the Dewey-Burdock site that is scheduled to take place in the next few months.<sup>16</sup> To argue that the Staff has not consulted with Indian tribes fails to account for any of these efforts. The Tribe must do more in order to raise an admissible issue concerning the extent of the Staff's consultation efforts. *Millstone*, CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472. In any event, the Tribe points to no requirement that the Staff complete its consultations under Section 106 before the DSEIS is issued. In fact, this is *not* required. See *Hydro Resources*, CLI-99-22, 50 NRC at 13–14.

Although the Oglala Sioux Tribe additionally states that certain tribes have been dissatisfied with the Staff's consultation efforts, disagreements among the consulting parties do not prove a lack of consultation on the Staff's part. In fact, the disagreements to which the Tribe

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<sup>15</sup> The Staff's monthly hearing file updates identify documents associated with the Staff's NHPA consultation efforts. For example, the hearing file updates list transcripts and summaries of the Staff's meetings with tribal representatives. The hearing file updates also list numerous letters and emails sent between the Staff and tribal representatives.

<sup>16</sup> Transmittal of Letter to the THPOs of an Upcoming Field Spring 2013 Survey for the Proposed Dewey-Burdock Project (February 8, 2013) (ADAMS Accession No. ML13039A336). The Staff sent copies of this letter to the leaders of all Indian tribes that are in consultation with the Staff under Section 106 of the NHPA.

refers are evidence that the Staff has engaged the consulting tribes on relevant issues. While the Staff continues to work to resolve any remaining disagreements among the consulting parties, the NHPA requires *consultation*, not necessarily agreement among the parties.<sup>17</sup>

Finally, the Tribe claims that because the DSEIS lacks information on cultural resources, it must be recirculated for public comment. This argument is moot given the Staff's stated intention of supplementing the DSIES to address the results of any field survey involving the tribes. As explained previously, the Staff will make the cultural resources supplement available for public comment.<sup>18</sup>

**B. Consolidated Intervenors' Contention B and Oglala Sioux Tribe's Contention 2 (Baseline Groundwater Conditions)**

Both Intervenors challenge the DSEIS's analysis of baseline conditions in groundwater that may be affected by the Dewey-Burdock Project. As support for their contentions, the Intervenors rely on Dr. Moran's Supplemental Declaration. The Tribe also cites a declaration from Dr. Richard Abitz that it submitted with its hearing request. Although the Intervenors' arguments vary, they all make the same basic claim: that by failing to fully assess baseline conditions, the DSIES does not adequately describe how the Dewey-Burdock Project may affect groundwater.

Although the Board admitted the Intervenors' contentions challenging Powertech's analysis of baseline groundwater conditions, it must reject the new contentions on the DSEIS. Here, the Intervenors fail to meet the requirements for new contentions. The Intervenors cite repeatedly to the DSEIS, but they do not explain whether the cited language is new or materially different from information in Powertech's application. In fact, many of the paragraphs in Dr.

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<sup>17</sup> See 36 C.F.R. § 800.4(b)(1) (regulation of the Advisory Council on Historic Preservation requiring that an agency make a "reasonable and good faith effort" at identifying historic properties).

<sup>18</sup> Notice of Availability of DSEIS (November 15, 2012) (ADAMS Accession No. ML12320A623) at 2. Although the supplement will be publicly available, the Staff will work with the consulting Tribes to ensure that culturally sensitive information is protected to the fullest extent possible.

Moran's Supplemental Declaration merely restate arguments from his original Declaration, with DSEIS references substituted for references to Powertech's application. For example, in paragraphs 70–72 of his Supplemental Declaration, Dr. Moran focuses on Powertech's application, not the DSEIS. His only fault with the DSEIS appears to be that Powertech's analyses have been "carried forward in the DSEIS."<sup>19</sup> Dr. Moran follows this same approach in other paragraphs, taking arguments he raised on Powertech's application and repeating them as challenges to the DSEIS, without explaining how the DSEIS's information is different from that in the application.<sup>20</sup> These arguments do not support admitting a new contention. *Catawba*, CLI-83-19, 17 NRC at 1049; *Perry*, LBP-82-79, 16 NRC at 1118.

Although the Tribe further cites the declaration from Dr. Abitz as support for its contention, this report cannot serve as a basis for admitting the Tribe's contention. The Abitz Declaration is from 2009, before the Tribe submitted its initial contentions, and it therefore does not refer to the DSEIS. Although the Tribe argues that the concerns Dr. Abitz raised with respect to Powertech's application apply equally to the DSEIS, this does not support admitting a new contention. *McGuire*, CLI-02-28, 56 NRC at 385; *Private Fuel Storage*, 52 NRC at 223. The Tribe needs to address the DSEIS specifically and explain how Dr. Abitz's statements apply to any new information in the DSEIS, something it fails to do. *Millstone*, CLI-01-24, 54 NRC at 358.

Nor do the Intervenor address whether the information in the DSEIS is materially different from the supplemental information Powertech has submitted in support of its application. In June 2011, Powertech submitted additional information on baseline groundwater conditions at Dewey-Burdock.<sup>21</sup> To the extent the Intervenor found this supplemental

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<sup>19</sup> Supplemental Declaration at ¶ 70.

<sup>20</sup> *E.g.*, ¶¶ 57–69.

<sup>21</sup> Revised Responses to the Request for Additional Information (RAI) for the Technical Report (June 28, 2011) (ADAMS Accession No. ML112071064).



information inadequate, under the Board's scheduling orders they had 30 days to amend their previously admitted contentions to challenge the new information.<sup>22</sup> Instead, the Supplemental Declaration from Dr. Moran seeks to belatedly challenge this information through its reappearance in the DSEIS. For example, in paragraphs 61–65 of his Supplemental Declaration, Dr. Moran challenges Table 3.5-3 in the DSEIS, which presents groundwater samples with values exceeding maximum contaminant levels. As the reference to “Powertech 2011” at the bottom of this table makes clear, however, this information is not new. As another example, the alkali pond area Dr. Moran relies on in paragraphs 55–56 of his Supplemental Declaration was likewise identified by Powertech in its 2011 RAI response.

The Intervenor also argue that the DSEIS violates NEPA because the Staff does not present complete information on baseline groundwater conditions, instead allowing Powertech to submit information after a license is issued. In addition, the Intervenor claim there is no basis for the Staff allowing Powertech “to only consider, review, and propose[ ] monitoring (both quality and quantity) for groundwater wells within 2km of the proposed mining area.” But both arguments rest on a misreading of the DSEIS. The DSEIS pages cited by the Intervenor address groundwater monitoring programs that Powertech will implement during ISR *operations*.<sup>23</sup> The programs are not for establishing baseline conditions. Because the Intervenor's arguments rest on an inaccurate reading of the DSEIS, the Board must reject these arguments. *Georgia Tech*, LBP-95-6, 41 NRC at 300.<sup>24</sup>

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<sup>22</sup> Order (Supplementing Initial Scheduling Order) (November 2, 2010) at 5–6; Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order) (October 16, 2012) at 3.

<sup>23</sup> See Consolidated Intervenor's Contentions at 19 and Oglala Sioux Tribe's Contentions at 14 (referring to numerous DSEIS pages that discuss groundwater monitoring programs).

<sup>24</sup> At page 12 of its brief the Tribe cites two cases holding that agencies must address baseline conditions in their NEPA analyses. These cases address baseline conditions generally, and they say nothing about the specific factors the Staff must consider when reviewing an ISR application. The Staff need not obtain all conceivable environmental data in order to discuss baseline conditions in a DSEIS. *Ground Zero Ctr. for Non-Violent Action*, 383 F.3d at 1089–90. Rather, it need only obtain sufficient data to provide “[a]

**C. Consolidated Intervenor’s Contention C and Oglala Sioux Tribe’s Contention 3 (Hydrogeological Confinement)**

The Intervenor’s argue that the DSEIS provides insufficient information on the hydrologic and geologic setting of the Dewey-Burdock area. The Intervenor’s claim that, as a result, the DSEIS inadequately discusses potential impacts to surface water and groundwater resources. The Intervenor’s rely on Dr. Moran’s Supplemental Declaration as support for their contentions, citing paragraphs where Dr. Moran criticizes the DSEIS’s description of water-bearing and other geologic units in the Dewey-Burdock area.

Here again the Intervenor’s do not explain how the information in the DSEIS is new and materially different from the information in Powertech’s application. Many of the cited paragraphs from Dr. Moran’s Supplemental Declaration merely restate arguments he previously raised on Powertech’s 2009 application. Paragraphs 42, 44, 45, and 49 are four examples. Other paragraphs challenge DSEIS sections that refer to information in Powertech’s supplements to its application, but without explaining what new information is presented in the DSEIS. Paragraphs 55 and 82 fall into this category. In all cases, the Intervenor’s arguments must be rejected for failing to address the requirements for late-filed contentions. *McGuire*, CLI-02-28, 56 NRC at 383.

Although Dr. Moran further argues in paragraphs 82–84 that a baseline spring and seep survey of the Dewey-Burdock area needs to be conducted, he overlooks relevant information in Powertech’s June 2011 RAI response. In its response, Powertech summarizes its investigations of springs and seeps using infrared photography. Powertech concludes that, except for a single alkali lake area, no such features are present at the Dewey-Burdock site.<sup>25</sup> The issue Dr. Moran raises therefore does not rest on new information. If the Intervenor’s

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reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]” *Trout Unlimited*, 509 F.2d at 1283.

<sup>25</sup> Revised Responses to the Request for Additional Information (RAI) for the Technical Report (June 28, 2011) (ADAMS Accession No. ML112071064) at Responses TR RAI-2.7-9 and 2.7-10, as well as Figures TR RAI-2.7.9.1 through 2.7.9.4.

disagreed with Powertech's conclusions, they needed to file a contention within 30 days of Powertech's RAI response. Order (Supplementing Initial Scheduling Order) (November 2, 2010) at 5–6.

The Board must also reject Contentions C and 3 because they rest on an incomplete reading of the DSEIS. In paragraphs 33–35, Dr. Moran alleges that the DSEIS fails to provide detailed information on the hydrogeologic performance of the bounding geologic units in the Dewey-Burdock area. But he cites only two pages of the DSEIS as supporting examples—one page each in Chapters 2 and 7—overlooking broad sections of the DSEIS that provide the very data he claims are missing. In Chapter 3 of the DSEIS, the Staff provides detailed information on aquifer systems (Section 3.5.3.1), confining units (Section 3.5.3.2), directional groundwater flow and hydraulic gradients within aquifers (Section 3.5.3.2), and the confinement of uranium-bearing aquifers (Section 3.5.3.3). Because Dr. Moran does not address these relevant analyses, the Board must reject the Intervenor's claims of deficiencies in the DSEIS. *Millstone*, CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472.

The same is true for the Intervenor's claim that the DSEIS inadequately addresses potential interconnection between water-bearing units. The Intervenor relies on paragraphs 39–48 in Dr. Moran's Supplemental Declaration for their arguments, but Dr. Moran fails to address relevant DSEIS sections. In fact, in these 10 paragraphs Dr. Moran refers to only two DSEIS pages specifically.<sup>26</sup> Dr. Moran does not challenge the analysis in specific DSEIS sections relevant to his claims. For example, he does not challenge DSEIS sections discussing aquifer pump test results (Section 3.5.3.2); natural structural features, including faults and breccia pipes (Sections 3.4.3 and 3.5.3.1); numerical groundwater modeling based on site-specific information (Section 4.5.2.1.1.2.2); historic exploratory drilling in the Dewey-Burdock area (Section 3.4.3); and potential contamination from improperly plugged and abandoned boreholes (Section

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<sup>26</sup> In paragraph 44, Dr. Moran refers to DSEIS page 3-32; in paragraph 47, he refers to page 3-14.

4.5.2.1.1.2.2). As above, the Board must reject the Intervenor's arguments because they fail to specifically address the DSEIS. *Millstone*, CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472.

The Intervenor's also challenge the DSEIS's reliance on a license condition requiring that, before Powertech operates in a wellfield, it submit to the Staff a data package with additional information on hydraulic connectivity. The Board must reject this argument because the Staff's use of a license condition is consistent with Commission precedent and NRC regulations. *Hydro Resources*, CLI-99-22, 50 NRC at 17. The license condition the Staff relies upon in the DSEIS describes the process by which the Staff will acquire additional information on hydraulic connectivity.<sup>27</sup> To the extent any of the information Powertech submits under this license condition departs from the analysis in the SEIS, Powertech will have to seek a license amendment,<sup>28</sup> which will trigger additional NEPA review. In sum, the Staff's reliance on the license condition in the DSEIS is consistent with Commission precedent and NEPA generally.

Finally, the Board should clarify that certain arguments the Intervenor's raise in Contentions C and 3 lack a legal basis. Both Intervenor's cite Criteria 4(e) and 5G(2) in Appendix A of Part 40 as requiring a level of analysis that the Staff allegedly did not present in the DSEIS. These are safety criteria applying to applicants and licensees, however, and they do not govern the Staff's NEPA review. In any event, these criteria apply to tailings and impoundments associated with conventional milling, not ISR activities. See *Hydro Resources*, CLI-99-22, 50 NRC at 9 ("We agree that those requirements in Part 40, such as many of the provisions in Appendix A, that, by their own terms, apply only to conventional uranium milling activities, cannot sensibly govern ISL mining.").

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<sup>27</sup> License Condition 10.10. As explained in DSEIS Section 2.1.1.1.2.3.4, this condition requires a data package that includes the results of delineation drilling, data relevant to establishing background water quality, and pump test results. DSEIS Section 2.1.1.1.2.3.3 provides additional information on what will be required of Powertech under the license condition.

<sup>28</sup> License Condition 9.4.

**D. Consolidated Intervenors' Contention D and Oglala Sioux Tribe's Contention 4 (Quantity of Groundwater Used)**

The Intervenors argue that the DSEIS does not adequately assess the quantity of groundwater to be used during the Dewey-Burdock Project. Both Intervenors rely exclusively on Dr. Moran's Supplemental Declaration as support for their contentions. In paragraphs 20–32 of his supplemental declaration, Dr. Moran raises a number of concerns regarding groundwater consumption. Although the concerns vary, Dr. Moran's essential claim is that the DSEIS lacks sufficient data in this area.

As with the prior contentions, the Board must reject Contentions D and 4 because the Intervenors do not explain how the information in the DSEIS is materially different from information previously available. The estimates of groundwater consumption the Staff cites in the DSEIS are based on information Powertech submitted either in its Environmental Report or with various supplements to its application. The information in the Environmental Report has already served as the basis for the Consolidated Intervenors' Contention F, which the Board rejected, and the Tribe's Contention 4, which the Board admitted. While Powertech's supplemental information might have served as the basis for a late-filed contention, the contention would have been due within 30 days after the information became available.<sup>29</sup> The Intervenors could not wait until that information reappeared in the DSEIS to file their contentions. *Catawba*, CLI-83-19, 17 NRC 1041, 1049; *Fitzpatrick*, LBP-01-4, 53 NRC 121, 127. In any event, because the Intervenors fail to even explain what new information they are relying upon, their contentions cannot be admitted. 10 C.F.R. §2.309(c)(2)(i), (ii); *Oyster Creek*, CLI-09-07, 69 NRC at 260–61.

The Board must also reject the Intervenors' contentions because they rest on an incomplete or inaccurate reading of the DSEIS. For example, while Dr. Moran claims the DSEIS presents conflicting information on groundwater consumption, the pages he cites do not

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<sup>29</sup> Order (November 2, 2010) at 5–6; Order (October 16, 2012) at 3.

support his claim.<sup>30</sup> As another example, while Dr. Moran claims the DSEIS presents no information on groundwater consumption beyond the construction phase, he overlooks DSEIS pages 4-57 through 4-60 (discussing groundwater consumption during operations), 4-64 and 4-65 (during restoration), 4-70 (operations again), and 4-71 and 4-72 (restoration again). See *Georgia Tech*, LBP-95-6, 41 NRC at 300 (rejecting a contention based on a mistaken reading of a Staff document).

In sum, the Intervenor fails to show there is any new and materially different information supporting their contentions. They also base their contentions on an incomplete reading of the DSEIS. The Board must therefore reject the contentions.

**E. Oglala Sioux Tribe's Contention 5 (Presentation and Sufficiency of Information)**

The Tribe argues that the DSEIS fails to present information in a clear and concise manner that is readily accessible to the public. In particular, the Tribe argues that the DSEIS citations to Powertech's application should be more precise. The Tribe also argues that, because the Staff issued a revised draft license to Powertech near the end of the comment period on the DSEIS, members of the public had a limited opportunity to address this document in their comments. The Tribe argues that the Staff therefore needs to recirculate the DSEIS for additional public comment.

The Tribe fails to show there is a genuine issue as to whether the citations in the DSEIS comply with NEPA. The Tribe cites regulations requiring that environmental documents be written clearly, concisely, and in plain language, but these regulations do not mandate any particular citation format. Nor must an agency support every assertion in its NEPA document with references to data, authorities, or explanatory information. While a NEPA document must contain more than conclusory statements, the document is adequate if as a whole it adequately

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<sup>30</sup> Supplemental Declaration at ¶ 22 (citing DSEIS pages 2-15, 2-34, and 4-57 through 4-59). What Dr. Moran appears to be referring to as inconsistencies are actually different water usage estimates for different processes and different permitting scenarios.

references the data it relies on. *Western Watersheds Project v. BLM*, 552 F. Supp. 2d 1113, 1129–30 (D. Nev. 2008).

The Tribe also cites a regulation stating that the incorporation of materials into a NEPA document by reference should be done “without impeding . . . public review of the action.” But the Tribe fails to explain how the public’s ability to review the DSEIS is impeded by certain general references to Powertech’s application. In the DSEIS the Staff does not merely cite Powertech’s application. To the contrary, the Staff summarizes relevant information from Powertech’s application and, where appropriate, reproduces figures and tables from the application. Rather than impeding public review of the proposed action, the Staff’s approach enhances public review by reducing the need to consult Powertech’s application. While more specific citations to the application might have been appropriate if the Staff had broadly incorporated large sections of the application by reference, the Tribe fails to show there is a genuine issue about whether that approach was required here, where the Staff includes relevant information from the application in the DSEIS.

The Tribe further claims that certain general references to Powertech’s application in the DSEIS make it “impossible to identify and assess the referenced materials.” This claim lacks support, because the Tribe fails to acknowledge the overall structure of the DSEIS. The DSEIS follows the format recommended in NUREG-1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs,” a format that Powertech itself followed in its Environmental Report.<sup>31</sup> In other words, references to Powertech’s application in the DSEIS generally refer to parallel sections in the Environmental Report. Additionally, if the Tribe continued to have questions about the material in the DSEIS, it could have contacted the NRC Staff’s Environmental Project Manager, as explained on page (ii) of the DSEIS.

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<sup>31</sup> In particular, the format of the DSEIS is consistent with Chapter 5 of NUREG-1748, “Preparing an Environmental Impact Statement: Format and Technical Content.”

The Tribe similarly fails to show there is a genuine issue regarding the Staff's issuance of a revised draft license during the comment period. The Staff issued the revised draft license to capture commitments Powertech made in various documents submitted after the Staff issued the initial draft license in July 2012. These documents were publicly available during the comment period, and the Tribe could have either addressed them in its comments on the DSEIS or filed new contentions based on the documents. Although the Tribe refers to the revised draft license as an "environmental document," it fails to identify any new environmental information in the draft license.

The Tribe also provides no support for its argument that, based on issuance of the revised draft license, the Staff needs to recirculate the DSEIS for public comment. The Staff need not circulate a supplemental NEPA document every time new information becomes available. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-39, 60 NRC 657, 659 (2004). Rather, recirculation is required only when the new information presents a "seriously different picture of the environmental impact[s]." *Id.* (internal quotation marks omitted). The Tribe makes no such claim here.

Finally, the Tribe's reliance on Dr. Moran's Supplemental Declaration for this contention is misplaced. In the paragraphs cited by the Tribe, Dr. Moran addresses neither the citation formats used in the DSEIS nor the revised draft license. Rather, his comments are directed toward the support for the Staff's conclusions regarding issues such as baseline water quality and hydrogeologic connectivity. The Staff addresses these comments above, in its responses to the Intervenor's second and third contentions.

#### **F. Oglala Sioux Tribe's Contention 6 (Mitigation Measures)**

The Tribe argues that the DSEIS violates NEPA and NRC regulations because it inadequately discusses mitigation measures. In particular, the Tribe argues that the DSEIS improperly relies on mitigation measures that are not fully described at this time, but which will



be developed later, outside the NEPA process. The Tribe also argues that the DSEIS does not sufficiently address whether various mitigation measures are likely to be effective.

The Tribe's arguments focus on Powertech's groundwater restoration plans for the Dewey-Burdock site, which the Tribe argues are unlikely to return aquifers to baseline conditions. Powertech's groundwater restoration plans were, however, discussed at length in both its Environmental Report and Technical Report.<sup>32</sup> The Tribe thus had ample opportunity to raise its arguments previously. In fact, the Tribe *did* raise arguments concerning groundwater restoration plans as part of admitted Contention 2, which focuses on baseline groundwater conditions. The Tribe does not point to any information in the DSEIS concerning mitigation measures that is significantly different from the information in the Environmental Report. In fact, while in the DSEIS the Staff identifies numerous mitigation measures, in the area of groundwater restoration the Staff does not identify any mitigation measures beyond those proposed by Powertech.<sup>33</sup> It is thus unclear what new information might support the Tribe's contention.

The Tribe also fails to show that the DSEIS needs to address more fully whether mitigation measures at ISR projects are effective in restoring groundwater to baseline conditions. The Tribe overlooks Section 2.11.5 of the GEIS, "Aquifer Restoration," which provides data on this very issue. Included in this section are two tables addressing baseline groundwater conditions, aquifer restoration goals, and final restoration values at NRC-licensed ISR facilities. Because the Tribe fails to challenge information in the GEIS that is directly relevant to the issue it raises, its argument must be rejected. *Millstone*, CLI- CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472.

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<sup>32</sup> See, e.g., Environmental Report Sections 4.6.2.5 through 4.6.2.7. See also Technical Report Section 6.0, "Groundwater Quality Restoration, Surface Reclamation, and Facility Decommissioning."

<sup>33</sup> Compare page 6-7 of the DSEIS (listing Powertech's proposed mitigation measures) to pages 6-13 and 6-14 (measures identified by the Staff).

In any event, the Tribe misidentifies the proposed mitigation measure at issue. The proposed mitigation measure is groundwater *restoration*, not necessarily restoration to baseline conditions. As the Staff explains in Section 4.5.2.1.1.3 of the DSEIS (pages 4-64 through 4-66), in some cases a licensee may be unable to return certain groundwater constituents to either background conditions or maximum contaminant levels listed in NRC regulations. In such a case, the licensee may seek use of an alternate concentration limit, which the NRC will approve only if it is protective of human health. The requirement that a licensee restore groundwater to one of these standards is captured as an enforceable license condition, meaning the NRC itself could ensure that mitigation is effective.

Finally, the Tribe's argument that the DSEIS needs to more fully describe mitigation measures finds no support in Commission precedent. The DSEIS need not contain "a complete mitigation plan" or "a detailed explanation of specific [mitigation] measures which will be employed." *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 427 (2006). The mitigation measures "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Id.* Here, the DSEIS specifically describes the mitigation measures the Staff is relying upon in its analyses, and the DSEIS explains how the mitigation measures will limit the environmental impacts of the Dewey-Burdock Project. More is not required. *Id.*; *South Texas*, LBP-11-07, 73 NRC at 265.

#### **Oglala Sioux Tribe's Contention 7 (Disposal of Byproduct Material)**

The Tribe argues that the DSEIS inadequately discusses impacts related to Powertech's disposal of 11e.(2) byproduct material. This contention mirrors Contention 7 in the Tribe's hearing request, where the Tribe argued that Powertech's Environmental Report was similarly deficient. Although the Board rejected the Tribe's contention, it nonetheless agreed that Powertech's disposal plans merited further review by the Staff.

The Staff would first emphasize that it has, in fact, considered impacts related to the disposal of byproduct material. The Staff addresses these potential impacts in numerous

sections of the DSEIS, including Sections 1.4.4, 1.4.5, 4.14 (pages 4-194 and 4-195), 4.3.1.1.2, and 4.3.1.2.2. The Staff also addresses these impacts in GEIS Sections 4.2.12, 4.2.12.2, and 4.4.12.4. In addition, the draft licenses the Staff has issued to Powertech include a license condition requiring that Powertech have a disposal plan for byproduct material in place before beginning operations.<sup>34</sup> Because the Tribe does not dispute the analysis in these relevant sections of the DSEIS and the GEIS, or address the relevant license condition, the Board must reject its contention. *Millstone*, CLI-01-24, 54 NRC at 358.

The Board must also reject Contention 7 because the Tribe fails to explain how the information in the DSEIS is materially different from information previously available. The Tribe makes no attempt to compare the information in the DSEIS to that in Powertech's Environmental Report, focusing its arguments on the new information. Rather, the Tribe repeats arguments made on the Environmental Report, effectively arguing no more than that certain deficiencies in the Environmental Report are carried forth in the DSEIS. This argument cannot support admitting a late-filed contention. *Id.*; *Private Fuel Storage*, LBP-00-27, 52 NRC at 223.

Even without these deficiencies, the Board would have to reject Contention 7 because it lacks a legal basis. The Tribe claims that both 10 C.F.R § 40.31(h) and Criterion 1 in Appendix A to Part 40 require that the Staff further analyze impacts related to the disposal of byproduct material. But neither standard applies to an ISR applicant like Powertech. In its initial ruling on contentions, this Board explained that "Commission precedent makes clear that 10 C.F.R. § 40.31(h) applies to uranium mills, and not to ISL facilities." *Dewey-Burdock*, LPB-10-16, 72 NRC 434. The Board also pointed to the Commission's holding "that while Part 40 generally applies to ISL mining, Appendix A to Part 40, including Criterion 1, was designed to address the

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<sup>34</sup> License Condition 12.6.

problems related to mill tailings and not problems related to injection mining[.]<sup>35</sup> *Id.* at 434 (footnote omitted). The Tribe's contention is therefore inadmissible because its legal bases have already been rejected by this Board. *Id.* at 435.

The Tribe also argues that NEPA requires the Staff to analyze the cumulative impacts of transporting and disposing of byproduct material. The Board must reject this argument first because it could have been raised on Powertech's Environmental Report. The Tribe's prior contention on waste disposal raised very similar issues, and the Tribe could have expanded its argument to raise concerns over cumulative impacts. The NRC's rules on late-filed contentions are not meant to provide the Tribe a second chance to raise arguments it could have made previously. *Millstone*, CLI-01-24, 54 NRC at 358; *Private Fuel Storage*, LBP-00-27, 52 NRC at 223.

The Tribe's arguments also fail because they do not address the Staff's entire NEPA review. For example, in Section 4.2.12.4 of the GEIS the Staff explains:

NRC regulations (10 CFR Part 40, Appendix A, Criterion 2) require that 11e.(2) byproduct material be disposed at existing disposal sites. . . . Licensees are required to have an agreement in place with a licensed disposal facility prior to starting operations. Requiring such an agreement ensures sufficient disposal capacity will be available for 11e.(2) byproduct wastes generated by decommissioning activities.<sup>36</sup>

In the GEIS the Staff further explains that requiring ISR licensees to submit a decommissioning plan for NRC review ensures the safe handling, storage, and disposal of byproduct material in

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<sup>35</sup> The Commission found that "a number of general safety provisions in Part 40, Appendix A, such as Criteria 2, 5A, and 9 . . . are relevant to ISL mining [,]" but not Criterion 1. *Hydro Resources*, CLI-99-22, 50 NRC at 8 (footnote omitted).

<sup>36</sup> Potential disposal sites are listed in Appendix G of the GEIS at pages G-157 and G-158. The GEIS and DSEIS do not discuss these disposal sites at length because the potential environmental impacts from the sites have been evaluated separately from ISR reviews. See NUREG-0706, Final Generic Environmental Impact Statement on Uranium Milling (1980); NUREG-0556, Final Environmental Statement Related to the Operation of White Mesa Uranium Project, Energy Fuels Nuclear, Inc. (1979). The GEIS does, however, incorporate these NUREGs by reference, an approach that is consistent with NEPA guidance.

the form of decommissioning waste.<sup>37</sup> In the GEIS the Staff also analyzes the impacts of transporting waste material and concludes that the associated impacts will be small.<sup>38</sup> Further, in Section 2.8 of the GEIS the Staff provides estimates of the number of decommissioning-related waste shipments and explains that all radioactive waste shipments must follow applicable NRC and U.S. Department of Transportation safety requirements. The DSEIS cites these evaluations in Chapter 4.<sup>39</sup> Because the Tribe does not address these DSEIS and GEIS sections that are directly relevant to the issues it raises, the Board must reject its contention. *Millstone*, CLI-01-24, 54 NRC at 358; *Georgia Tech*, LBP-95-6, 41 NRC at 300.

In sum, the Board must reject Contention 7 because it lacks an adequate legal basis, fails to address relevant sections of the DSEIS and GEIS, and fails to identify any allegedly new and materially different information as support.

#### **G. Oglala Sioux Tribe's Contention 8 (Timing of Contentions)**

The Tribe argues that the Staff “has violated NEPA by requiring that the Tribe formulate and submit detailed contentions before the NEPA process is complete, denying the Tribe the benefit of a final NEPA analysis.” The Tribe raised this same contention in its hearing request, and the Board rejected the contention. The Board must do so again here.

The Tribe incorrectly states that it is the *Staff* who is requiring the Tribe to submit contentions on the DSEIS. In fact, that is an obligation the NRC's *regulations* impose on parties who challenge the Staff's environmental findings. 10 C.F.R. § 2.309(f)(2). Because the NRC's regulations are not subject to collateral attack in NRC hearings, the Board must reject the

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<sup>37</sup> This is discussed further in GEIS Sections 2.6 and 2.7 (Effluents and Waste Management), 2.8 (Transportation), 2.9 (Radiological Health and Safety), 4.2.12.4 (Decommissioning Impacts to Waste Management), and other impact sections of Chapter 4.

<sup>38</sup> GEIS Sections 4.2.12 (Waste Management Impacts), 4.2.12.2 (Operations Impacts to Waste Management), and 4.4.12.4 (Decommissioning Impacts to Waste Management).

<sup>39</sup> DSEIS Sections 4.14 (Waste Management Impacts), 4.3.1.1.2 (Operations Impacts), and 4.3.1.2.2 (Operations Impacts and Transportation).

Tribe's contention. 10 C.F.R. § 2.335(a). See also *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant), CLI-10-09, 71 NRC 245, 255 (2010) (holding that a contention must be rejected to the extent it challenges NRC regulations).

In any event, the Tribe incorrectly states that it will be denied the benefit of a final NEPA analysis. The Staff is preparing a final SEIS, which it will provide to the Tribe, and the Tribe will have an opportunity to submit contentions on the final SEIS. 10 C.F.R. § 2.309(f)(2). The requirement that the Tribe submit contentions on the draft SEIS does not deny it the opportunity to participate at a later time. To the contrary, it provides an additional opportunity for Tribal participation.

The Tribe further argues that the Staff issued the draft SEIS without following the scoping process described in 10 C.F.R. § 51.29(a). But this regulation applies to an initial EIS, not a supplemental EIS. The Staff prepared the Dewey-Burdock draft SEIS in compliance with § 51.92, "Supplement to the final environmental impact statement." Under this regulation, "a scoping process need not be used." 10 CFR 51.92(d).

In sum, the Tribe's complaint is with the NRC's regulations, not the Staff's environmental review for the Dewey-Burdock application. The Tribe's arguments are outside the scope of this proceeding, and its contention must therefore be rejected. 10 C.F.R. § 2.309(f)(1)(iii).

#### **H. Oglala Sioux Tribe's Contention 9 (Connected Actions)**

The Tribe argues that the Staff has failed to engage other federal agencies that are considering actions connected to Powertech's application for an NRC license. According to the Tribe, the DSEIS therefore fails to adequately consider the impacts of these other actions. In particular, the Tribe cites the EPA's review of Powertech's applications for Class III and Class V injection well permits, arguing that because these are actions connected to the NRC licensing process, they need to be addressed in the same NEPA document.

The Tribe provides no support for its claim that the DSEIS inadequately addresses Powertech's applications for Class III and Class V permits. The DSEIS discusses Powertech's

applications with the EPA in numerous sections.<sup>40</sup> The Tribe cannot merely claim that the DSEIS fails to address the EPA applications satisfactorily; it must address the DSEIS's analysis and provide specific support for its claims. *Millstone*, CLI-01-24, 54 NRC at 358. Because the Tribe fails to do so, its argument must be rejected. *Id.*; 10 C.F.R. § 2.309(f)(1)(vi).

In any event, the Tribe fails to show that the DSEIS contains any new information related to Powertech's applications for Class III and Class V injection permits. The Environmental Report, like the DSEIS, discusses other permits Powertech is seeking.<sup>41</sup> Had the Tribe found Powertech's discussion of these other permits lacking, it needed to raise that issue in its hearing request. The Tribe cannot use the DSEIS to belatedly raise arguments it could have presented on the Environmental Report or on supplements to Powertech's application. *McGuire*, CLI-02-28, 56 NRC at 382; *Catawba*, CLI-83-19, 17 NRC at 1049; *Fitzpatrick*, LBP-01-4, 53 NRC at 127.

Nor does the Tribe show there is a genuine issue over whether the Staff has adequately consulted with federal agencies during its review of Powertech's application. The Tribe fails to address information showing that the Staff has, in fact, consulted with numerous agencies, including those cited by the Tribe. As explained in Chapter 1 of the DSEIS, the NRC and BLM are preparing the DSEIS as cooperating agencies, in accordance with the Memorandum of Understanding between the agencies.<sup>42</sup> Although the EPA is not involved as a formal cooperating agency, the NRC has consulted with the EPA to clarify aspects of their permitting

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<sup>40</sup> See, e.g., DSEIS Sections 2.1.1.1.2.3.1 (Injection and Production Wells), 2.1.1.1.2.4.1 (Deep Class V Injection Well Option), 2.1.1.1.4 (Aquifer Restoration Activities), 2.1.1.1.6.2 (Liquid Wastes), and 2.1.1.2 (Alternative Liquid Waste Disposal Options).

<sup>41</sup> See, e.g., Table 1.6-1 (Permits and Licenses for the Proposed Project) and Sections 4.19, 4.21, and 4.30.

<sup>42</sup> See DSEIS Sections 1.1 through 1.3 (referring to Final Signed Memorandum of Understanding; Memorandum of Understanding between NRC and Bureau of Land Management (December 9, 2009) (ADAMS Accession No. ML093430201)).

process as it relates to the Dewey-Burdock project. In fact, before the Staff issued the DSEIS, the EPA commented on analyses in numerous sections of the DSEIS.<sup>43</sup> The EPA's review encompassed DSEIS sections addressing wellfield construction and monitoring, groundwater resources, air quality, aquifer restoration, and Class III and Class V disposal wells.

The Staff also consulted with other agencies when preparing the DSEIS. For example, the Staff met with multiple federal and state agencies during an information-gathering trip to South Dakota between November 30 and December 4, 2009.<sup>44</sup> Further, the Staff has consulted with other agencies on issues involving specific resource areas.<sup>45</sup> Because the Tribe neither addresses the documents showing the Staff has consulted with other agencies nor explains why these efforts are insufficient, the Board must reject its contention. *Millstone*, CLI-01-24, 54 NRC at 358; 10 2.309(f)(1)(vi).

Although the Tribe further claims that the Staff's discussion of certain environmental impacts amounts to "blind reliance" on the analyses of other agencies, it offers no support for that claim. The Staff in fact conducted an *independent* analysis of environmental impacts, giving appropriate weight to the regulatory roles of other agencies. This is reflected in numerous sections of the DSEIS.<sup>46</sup> The Tribe neither addresses these analyses nor explains why this approach is inconsistent with NEPA. Accordingly, the Tribe fails to raise a genuine dispute with the DSEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi).

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<sup>43</sup> Comment of Suzanne J. Bohan of the U.S. Environmental Protection Agency on the Proposed Dewey-Burdock ISR Project (January 10, 2013) (ADAMS Accession No. ML13036A159).

<sup>44</sup> Information Gathering Meetings Trip, Summary Report for Dewey-Burdock Proposed ISR Facility (December 9, 2009) (ADAMS Accession No. ML093631627). These agencies included BLM, U.S. Army Corps of Engineers, U.S. Forest Service, U.S. Geological Survey, the SDDENR, South Dakota Game, Fish and Parks (SDGFP), and the SDSHPO.

<sup>45</sup> For example, the Staff worked with SDGFP to obtain survey information on the location of bald eagle roosting locations at the Dewey-Burdock site. DSEIS Section 4.6.1.1.1.4. See *also* E-mails Re: South Dakota Game, Fish and Parks Wildlife Data (January 31, 2012) (ADAMS Accession No. ML12249A230).

<sup>46</sup> See, e.g., DSEIS Sections 3.6 (Ecology) and 4.6 (Ecological Resources Impacts) (explaining that the Staff independently constructed isopach maps to assess possible impacts of leakage through Fuson shale).



As an example, the Tribe argues that while the DSEIS refers to Powertech seeking Class III and Class V permits for injection wells, the Staff overlooked that Powertech in fact requires a Class I permit, which is prohibited in South Dakota. But the Tribe fails to address DSEIS pages where the Staff explains that Powertech plans to treat liquid wastes injected into deep disposal wells to meet applicable criteria in 10 C.F.R. Part 20.<sup>47</sup> This means that the liquid wastes injected into deep disposal wells will be non-hazardous and will meet EPA criteria for disposal into Class V injection wells.<sup>48</sup> In sum, the Tribe's argument is based on an incomplete reading of the DSEIS, and for that reason it must be rejected. *Georgia Tech*, LBP-95-6, 41 NRC at 300.

Finally, the Tribe makes a passing reference to "South Dakota state permits," without explaining whether it is arguing that these permitting processes also need to be discussed in the DSEIS. To the extent this is the Tribe's claim, it lacks both the specificity and support required by 10 C.F.R. § 2.309(f)(1). In any event, the Tribe fails to address DSEIS sections that do, in fact, discuss South Dakota permitting processes.<sup>49</sup> The Tribe also fails to address other documents showing that the Staff has considered South Dakota permitting processes while preparing the DSEIS.<sup>50</sup> Because the Tribe fails to address relevant DSEIS sections and other documents, its contention must be rejected. *Millstone*, CLI-01-24, 54 NRC at 358; 10 2.309(f)(1)(vi).

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<sup>47</sup> DSEIS Section 2.1.1.1.6.2 at pages 2-48 and 2-49.

<sup>48</sup> See 40 C.F.R. § 144.80(e) (criteria for Class V wells). As described in the text box on p. 2-15 of the DSEIS, most Class V wells are used to dispose of liquid wastes into shallow wells. However, § 144.80(e) does not prohibit disposal of non-hazardous liquid waste in deep formations. The Tribe fails to address these statements in the DSEIS.

<sup>49</sup> *E.g.*, DSEIS Section 1.5 and Table 1.6-1. The DSEIS also discusses South Dakota permitting processes in Sections 4.5.1.1.1.1 (page 4-40), 4.5.1.1.2.2 (page 4-47), and 4.5.1.1.2.3 (page 4-47).

<sup>50</sup> Site Visit to the Proposed Dewey-Burdock Uranium Project, Fall River and Custer Counties, South Dakota, and Meetings with Federal, State, and County Agencies, and Local Organizations (November 30–December 4, 2009) (ADAMS Accession No. ML093631627); SDGFP Email Subject "SDGFP wildlife data" and attachments from S. Michals, SDGFP Energy and Minerals Coordinator, to A. Hester, CNWRA (January 31, 2012) (ADAMS Accession No. ML12249A230).

## I. Oglala Sioux Tribe's Contention 10 (Scope of NEPA Process)

The Tribe argues that the allegedly narrow scope of the Staff's NEPA review excludes other actions, alternatives, impacts, and agencies. In particular, the Tribe argues that the DSEIS does not analyze impacts subject to the jurisdiction and control of other agencies. The Tribe claims that, as a result, the DSEIS omits information required by 40 C.F.R. § 1508.25, which defines the scope of an EIS.

The Tribe fails to set forth an admissible contention. The Tribe's first example of the DSEIS's allegedly narrow scope repeats an argument from Contention 9, where the Tribe claims the DSEIS fails to address EPA permitting processes. As explained above, this argument rests on an incomplete reading of the DSEIS. In fact, the DSEIS addresses EPA permits in numerous sections. The Board must therefore reject the Tribe's argument. *Millstone*, CLI-01-24, 54 NRC at 358; *Georgia Tech*, LBP-95-6, 41 NRC at 300.

The Tribe next argues that the DSEIS improperly excludes impacts in areas covered by numerous federal laws, including the National Historic Preservation Act, the Endangered Species Act, the Safe Water Drinking Act, the Migratory Bird Treaty Act, and the Clean Air Act. Here again the Tribe overlooks sections of the DSEIS containing the allegedly missing information. The Staff summarizes activities associated with its consultations under the NHPA and the Endangered Species Act in DSEIS Sections 1.7.1, 1.7.2, and 1.7.3.5. The Staff discusses environmental impacts in areas covered by these two statutes in DSEIS Sections 4.6.1 and 4.9.1. As for the Safe Drinking Water Act, the Staff discusses the underground injection process and the protection of aquifers at ISR facilities in GEIS Section 1.7.2.1 and DSEIS Sections 2.1.1.1.2.3.1 and 2.1.1.1.4. The Staff discusses the application of Safe Drinking Water Act provisions to groundwater resources at the Dewey-Burdock Project in DSEIS Section 4.5.2.1. Regarding the Migratory Bird Treaty Act, the Staff discusses how its provisions apply to ecological resources at Dewey-Burdock in DSEIS Section 4.6. The Staff addresses provisions of the Clean Air Act in GEIS Section 1.7.2.2 and DSEIS Section 3.7.2.

The Staff discusses the application of Clean Air Act provisions to air quality at the Dewey-Burdock project in DSEIS Section 4.7. In sum, the Tribe relies on a blanket claim that the DSEIS lacks required information, failing to address the actual content of the DSEIS and the GEIS. For that reason, the Tribe's arguments do not form an admissible contention. *Millstone*, CLI-01-24, 54 NRC at 385.

The Tribe also suggests that the DSEIS needs to address impacts in areas covered by the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901 *et seq.* (UMTRCA). Under UMTRCA, the U.S. Department of Energy is responsible for the reclamation and long-term maintenance of uranium mill sites. The Tribe appears to be referring to UMTRCA because, as explained in Section 3.13.2 of the DSEIS, Powertech has identified the White Mesa site in Utah as its disposal site for solid byproduct material. The White Mesa site is an operating conventional uranium mill with an additional 1.9 million cubic yards of impoundment capacity.<sup>51</sup> To the extent the Tribe is arguing that the DSEIS needs to consider impacts related to the reclamation and long-term maintenance of the White Mesa site—an argument not at all apparent from its passing reference to UMTRCA—the Tribe fails to show those impacts are within the scope of this proceeding. NEPA only requires that the DSEIS address the *reasonably foreseeable* impacts of licensing the Dewey-Burdock project. *Trout Unlimited*, 509 F.2d at 1283; *LES*, CLI-05-20, 62 NRC at 536. As for impacts related to the reclamation and maintenance of the still-operating White Mesa site, the Tribe fails to show they are anything but remote and speculative.

The Tribe's claim that the DSEIS excludes any discussion of impacts in areas within the jurisdiction of other agencies fails for another reason as well. This claim could have been raised on Powertech's Environmental Report. As required by 10 C.F.R. § 51.45(d), Powertech's Environmental Report addresses other federal and state permits Powertech must obtain in order

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<sup>51</sup> DSEIS Section 3.13.2.

to move forward with its proposed project.<sup>52</sup> As required by § 51.45(b), this document also addresses the environmental impacts of the proposed project. Had the Tribe believed Powertech's application lacked information on impacts within the jurisdiction of other agencies, it was obligated to raise its arguments as a contention on the Environmental Report. 10 C.F.R. § 2.309(f)(2). The Tribe fails to explain how the information in the DSEIS is materially different from the information in the Environmental Report, and for that reason its contention must be rejected. *McGuire*, CLI-02-28, 56 NRC at 358.

Finally, the Tribe argues that in preparing the DSEIS the Staff improperly failed to invite other government agencies to participate as cooperating agencies. This argument is a variant of Contention 9, where the Tribe argues that the Staff failed to consider impacts within the jurisdiction of other agencies. In any event, the Tribe does not point to any legal standard requiring that the Staff enlist other agencies as cooperating agencies. The regulation the Tribe cites, 10 C.F.R. § 51.10, specifically reserves the NRC's right to prepare an independent EIS whenever the NRC has regulatory authority over an activity.

Further, the Tribe overlooks the substantial steps the Staff has taken to engage other agencies in the development of the DSEIS. As stated in Chapter 1 of the DSEIS, the NRC and BLM are working as cooperating agencies to evaluate the environmental impacts of the Dewey-Burdock Project. Section 1.7.3 of the DSEIS provides summaries of the Staff's interactions with other agencies and organizations, including the U.S. Army Corps of Engineers, the U.S. Forest Service, the U.S. Geological Survey, the South Dakota Department of Environment and Natural Resources, the South Dakota State Historic Preservation Office, the Edgemont Area Chamber of Commerce, and Custer County Planning and Economic Development.

In addition, the Staff has consulted with other agencies and non-governmental organizations concerning specific resource areas. For example, the Staff consulted with South

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<sup>52</sup> See, e.g., Environmental Report Table 1.6-1 and Sections 4.19, 4.21, and 4.30.

Dakota Game, Fish and Parks to obtain survey information on the location of bald eagle roosting locations at the proposed project site.<sup>53</sup> The Staff also contacted the operator of the Custer-Fall River Waste Management District landfill in Edgemont, South Dakota to determine the remaining permitted solid waste capacity of the landfill.<sup>54</sup> Finally, although the Staff is unaware of any American Indian Tribe with jurisdiction over resources at the Dewey-Burdock site, the Staff continues to consult with numerous Tribes under Section 106 of the NHPA.

In conclusion, the Tribe fails to show that there is new and materially different information supporting its contention. The Tribe also bases its contention on an incomplete reading of the DSEIS, and it fails to show there is a genuine issue regarding the Staff's degree of cooperation with other agencies. The Staff has actively sought out the views of other agencies, and the Tribe does not address this outreach, much less explain why it falls short under NEPA. Because the Tribe fails to meet multiple requirements in 10 C.F.R. § 2.309, the Board must reject its contention.

#### **J. Oglala Sioux Tribe's Contention 11 (Cumulative Impacts)**

The Tribe argues that the DSEIS inadequately analyzes cumulative impacts associated with the Dewey-Burdock Project.<sup>55</sup> The Tribe specifically alleges that the DSEIS does not address cumulative impacts from abandoned uranium mines within the project area; present and foreseeable uranium development, including the potential Dewey Terrace and Aladdin

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<sup>53</sup> The Staff summarizes its consultations with South Dakota Game, Fish and Parks in DSEIS Section 4.6.1.1.1.1.4.

<sup>54</sup> DSEIS Section 3.13.2. *See also* Barker Concrete & Construction, Inc. "Custer Fall River Landfill" (email from A. Giese, Barker Concrete & Construction, Inc., to H. Yilma, Project Manager, Office of Federal and State Materials and Environmental Management Programs, Nuclear Regulatory Commission) (June 28, 2012) (ADAMS Accession No. ML12249A250).

<sup>55</sup> "Cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7.

uranium projects in Wyoming<sup>56</sup> and Cameco's operations in Nebraska; the proposed Bear Lodge rare earth minerals mine in Wyoming; and the Black Hills Ordnance Depot.

The Tribe fails to set forth an admissible contention related to cumulative impacts. The Tribe claims that other uranium recovery projects are only briefly mentioned in Chapter 3 of the DSEIS, the chapter describing the affected environment. In Chapter 5, however, the Staff analyzes the cumulative impacts from past, present, and reasonably foreseeable uranium recovery actions in the vicinity of the Dewey-Burdock Project. The Staff addresses abandoned uranium mines within the project area; potential uranium recovery projects, including the Dewey Terrace and Aladdin projects in Wyoming; and existing and proposed uranium recovery sites owned by Cameco in Nebraska.<sup>57</sup> In other words, Chapter 5 discusses the very projects the Tribe identifies. Because the Tribe fails to address the DSEIS chapter directly relevant to its contention, the Board must reject the Tribe's arguments regarding other uranium recovery projects. *Millstone*, CLI-01-24, 54 NRC at 358; 10 C.F.R. § 2.309(f)(1)(vi).

The Tribe also fails to raise an admissible issue concerning the proposed Bear Lodge rare earth minerals mine or the Black Hills Ordnance Depot. Although the DSEIS does not discuss these projects, the Tribe fails to identify any information regarding these sites that is new and materially different from information previously available. Given that the DSEIS does not mention these projects, the Tribe must be referring to some other source of information as the basis for its contention. Under the Board's scheduling orders the Tribe needed to file its contention within 30 days after that information became available. Even in the unlikely event the information became available within 30 days of when the Tribe's DSEIS-related contentions

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<sup>56</sup> The Tribe identifies the potential Aladdin Project as only 13 km [8 mi] from the proposed Dewey-Burdock ISR Project (page 42 of the contention). This is incorrect. The potential Aladdin Project is 137 km [85 mi] northwest of the proposed project in Crook County, Wyoming, while the potential Dewey Terrace Project is 13 km [8 mi] from the proposed project (see SEIS Table 5.1.1).

<sup>57</sup> DSEIS Section 5.1.1.1 at page 5-2. The Staff explains that, although it is uncertain whether the Dewey Terrace and Aladdin Projects will go forward, these projects will be discussed within the context of cumulative impacts in this SEIS based on the available information." *Id.*

were due, the Tribe still needed to explain in its contentions why the information upon which it relied was new and materially different from that previously available. *McGuire*, CLI-02-28, 56 NRC at 385. Because the Tribe fails to meet these threshold requirements, the Board must reject its contention.<sup>58</sup>

#### **K. Oglala Sioux Tribe's Contention 12 (Alternatives)**

The Tribe argues that the DSEIS fails to consider all reasonable alternatives. In particular, the Tribe argues that the DSEIS should address alternative mitigation measures that include (1) prohibiting the use of Alternate Concentration Levels (ACLs) for groundwater restoration; (2) limiting future wellfield development until Powertech has both restored the groundwater and demonstrated the long-term stability of groundwater restoration in previously developed wellfields; (3) allowing operations in either the Dewey or Burdock areas only upon a showing that uranium extraction in the other area has been accomplished without excursions and with stable, long-term restoration of groundwater; and (4) disallowing uranium extraction from aquifers, or portions of aquifers, for which Powertech has not yet demonstrated confined conditions.

The Board must reject this contention because the Tribe's arguments come too late. Powertech's Environmental Report addresses alternatives to the proposed action (Section 2.0), mitigation measures generally (Section 5.0), mitigation measures for groundwater protection specifically (Section 5.4.1), and groundwater monitoring techniques (Section 6.2). Accordingly, at the time it requested a hearing, the Tribe had all the information it needed to make its

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<sup>58</sup> The Black Hills Ordnance Depot has been closed since 1967, so it appears unlikely there is any significant new information regarding that site.

[http://denr.sd.gov/des/gw/Superfund/Federal\\_Facilities.aspx#Black](http://denr.sd.gov/des/gw/Superfund/Federal_Facilities.aspx#Black)

As for the Bear Lodge Mine, the project would be located near Sundance, Wyoming, which is approximately 76 miles from the Dewey-Burdock site. This is outside the geographic study boundary the Staff considered when assessing cumulative impacts in areas such as land use (Section 5.2), water resources (Section 5.5), ecological resources (5.6), and air quality (Section 5.7). Given the distance of the Bear Lodge Mine from the Dewey-Burdock site, it is incumbent on the Tribe to address just what cumulative impacts might be expected to result from development at both sites.

arguments concerning alternative mitigation measures. Section 5.4.1 of the Environmental Report lists 11 mitigation measures, and the Tribe could have submitted a contention with its hearing request arguing that this list was unduly narrow. The Tribe did not, however, and its new contention is therefore a belated attempt to raise issues that could have been raised on the Environmental Report. For that reason, the Board must reject the contention. *McGuire*, CLI-02-28, 56 NRC at 385; *Private Fuel Storage*, LBP-00-27, 52 NRC at 223; *Catawba*, CLI-83-19, 17 NRC at 1049.

In any event, the Board must reject the Tribe's contention for other reasons. The fourth condition proposed by the Tribe would prevent Powertech from operating in portions of aquifers that have not yet been shown to be confined. But the Tribe overlooks that such a license condition has already been proposed.<sup>59</sup> The potentially unconfined aquifers at Dewey-Burdock are in Burdock proposed wellfields 6, 7, and 8. License Condition 10.10.B prohibits Powertech from operating in these wellfields without NRC review and approval. In other words, Powertech would need to obtain a license amendment in order to operate in these wellfields.

The Board must reject the Tribe's remaining arguments because the Tribe fails to show there is a genuine issue as to whether the alternative mitigation measures it identifies are feasible. Under NEPA, an agency need not discuss alternatives that are "infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area[.]" *Northern Alaska Env'l Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (quotation marks and internal citations omitted); see also *Fuel Safe Washington v. Federal Energy Regulatory Commission*, 389 F.3d 1313, 1323 (10th Cir. 2004) (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir.1992) (holding that an "agency need not analyze the 'environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.'")). An alternative might not be feasible for a

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<sup>59</sup> This is explained in Section 4.5.2.1.1.2.2 of the DSEIS, at page 4-62.



variety of reasons, including a failure of the alternative to meet the project's purpose and need. *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806 (2005) (excluding an energy efficiency alternative because it would not advance the applicant's goals), *aff'd Environmental Law and Policy Center v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676 (7th Cir. 2006).

The Tribe's suggestion that the NRC impose a license condition prohibiting the use of ACLs overlooks the very purpose of ACLs, which is to address situations where restoring groundwater to baseline conditions or MCLs would not be practicable. The Tribe's second and third proposed mitigation measures—conditions precluding ISR operations in new wellfields or project areas until the licensee has restored and demonstrated long term stability of aquifer restoration in prior wellfields or project areas—would require a licensee to suspend ISR operations for at least one year and likely longer.<sup>60</sup> The Tribe fails to address whether these types of conditions are feasible for ISR operations generally or whether they are consistent with operations at Dewey-Burdock specifically.

In sum, the Tribe fails to show the DSEIS contains any new and materially different information related to alternative mitigation measures. The Tribe also fails to raise a genuine dispute with the DSEIS, because it does not address whether its proposed mitigation measures would be feasible. The Board must therefore reject Contention 12.

#### **L. Oglala Sioux Tribe's Contention 13 (Air Emissions and Liquid Waste)**

The Tribe argues that the DSEIS's analyses of air emissions and liquid waste disposal are based on incomplete information. The Tribe argues that the air modeling data cited in the DSEIS is flawed, and that the DSEIS should include a more detailed inventory of particulate emissions. The Tribe further claims that the DSEIS's methodology fails to account for

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<sup>60</sup> As the DSEIS explains, at least one year is needed to establish the stability of aquifer restoration. DSEIS Section 2.1.1.1.4.2. Historically, aquifer restoration at ISR facilities has taken much longer than one year. GEIS Section 2.11.5.

differences in wind direction and velocity, as well as tornadoes. Regarding liquid waste disposal, the Tribe argues that the DSEIS addresses neither the quality of such wastes nor impacts from their disposal.

The Tribe's challenge to the air emissions model in the DSEIS rests on an incomplete reading of the document. The model presented in the DSEIS is based on a Powertech submission from July 2012. As stated in Section 4.7.1 of the DSEIS (page 4-110), "[T]he applicant revised the mobile source emission inventory in part to incorporate mitigation measures and improve the accuracy of the emissions expected from the ISR activities. . . . Section C.2.1 describes the differences between the initial and revised emission inventory." The Tribe overlooks the new inventory, however, arguing solely that the prior inventory needs to be supplemented. Because the Tribe fails to challenge information directly relevant to its arguments, those arguments must be rejected. *Millstone*, CLI-01-24, 54 NRC at 358; *Georgia Tech*, LBP-95-6, 41 NRC at 300. Further, even if the Tribe were challenging Powertech's revised emissions inventory, it could not wait until the inventory reappeared in the DSEIS. The Tribe had to challenge the inventory within 30 days after it became publicly available, which it did not do. Order (Supplementing Initial Scheduling Order) (November 2, 2010) at 5–6.

For similar reasons, the Board must reject the Tribe's challenges to DSEIS sections discussing wind speed, wind direction, tornadoes, and other wind events. The Tribe fails to explain what information in these sections is "new" and how it is materially different from information previously available. Much of the Staff's air quality analysis in Section 3.7.2 of the DSEIS is based on Powertech's submissions, none of which is new. For example, although the Tribe challenges the wind rose data presented in Figure 3.7-1 of the DSEIS (page 3-63),<sup>61</sup> these data are taken from Powertech's 2011 submission to the NRC. The Tribe's argument regarding tornadoes was, in fact, raised on Powertech's Environmental Report as Contention 10 in the

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<sup>61</sup> The Tribe cites page 3-6 of the DSEIS, but it appears to be referring to page 3-63.

Tribe's hearing request, but the Board rejected that contention. The Tribe's new arguments must therefore be rejected as a belated attempt to raise issues that could have been raised on the Environmental Report, or which *were* raised on that document but rejected. *Private Fuel Storage*, LBP-00-27, 52 NRC at 223.

The Tribe also argues that the Staff is improperly allowing Powertech to submit additional air emissions data prior to the final SEIS being finalized. The Tribe fails to explain, however, why this is inconsistent with NEPA. In the DSEIS the Staff considers impacts related to air emissions based on the data currently available. As the Staff explains in the DSEIS, the potential impacts in this area could change based on new data.<sup>62</sup> This is no different than in other areas where new data, or even public comments, may cause the Staff to reassess impacts between when the DSEIS and the final SEIS are issued. Although the Staff may be required to recirculate an SEIS for public comment in cases where new information presents a "seriously different picture of the environmental impact[s],"<sup>63</sup> there is no error in the Staff basing its NEPA analysis on the data currently available.

Turning to liquid waste disposal, The Tribe claims the DSEIS fails to consider the limits of reverse osmosis for treating liquid wastes. The Tribe relies on Dr. Moran's Supplemental Declaration, in which he argues that the DSEIS needs more information in several areas.<sup>64</sup> But the allegedly missing information is in the GEIS. The GEIS discusses the reverse osmosis process and related chemical processes (Section 2.5.3), the use of reverse osmosis in aquifer applications (Sections 2.5, 4.2, 4.3, 4.5), impacts on groundwater and waste management (Sections 4.2.12.2, 4.2.4.2, 4.3.4.2.3), and recovery rates for treated water reused as permeate (Sections 2.5.3 and 4.3.4.2.3). In addition, Powertech provided information on these processes

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<sup>62</sup> DSEIS Section 4.7.1 at pages 4-112 and 4-113.

<sup>63</sup> *Hydro Resources, Inc.* CLI-04-39, 60 NRC at 659.

<sup>64</sup> Moran Supplemental Declaration at ¶¶ 52–53, 99–100.

in Sections 4.15.1 and 4.6.2.4 of its Environmental Report. Dr. Moran neither addresses this information nor explains how the information in the DSEIS is new or materially different from that in the GEIS or Environmental Report. Although the Tribe also cites a report from the University of North Dakota State University as support for its contention, this report is from 2008, and it is not new information supporting the Tribe's late-filed contention.<sup>65</sup> For these reasons, the Tribe's arguments must be rejected. *McGuire*, CLI-02-28, 56 NRC at 385.

The Tribe further argues that the DSEIS fails to account for impacts if the EPA denies Powertech's application for a Class V Underground Injection Control permit. This is incorrect. The DSEIS states that if Powertech's Class V application is denied, "the applicant would need to rely solely on land application disposal methods or seek an NRC amendment to approve another disposal option before it initiated operations."<sup>66</sup> The DSEIS next discusses alternative wastewater disposal methods, including evaporation ponds and discharge to surface waters.<sup>67</sup> The DSEIS summarizes impacts from these alternative methods and refers to the GEIS, which further discusses these alternatives. For example, the GEIS discuss impacts associated with evaporation ponds and surface water discharge in Sections 4.4.3.1, 4.4.3.2, and 4.4.4.1. Because the Tribe fails to address information in the DSEIS and GEIS that is relevant to the issue it raises, the Board must reject the Tribe's arguments. *Millstone*, CLI-01-24, 54 NRC at 358.

Finally, the Tribe argues that the DSEIS does not properly account for impacts to wildlife that might result from Powertech's use of land application as a disposal method. As support, the Tribe cites a 2007 letter from the U.S. Fish and Wildlife Service to the NRC and a 2000 Fish and Wildlife Service report. This information was available well before the Tribe submitted its

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<sup>65</sup> In any event, the Tribe fails to show how the report, which addresses small-scale reverse osmosis technology used in home products, is relevant to equipment in ISR facilities.

<sup>66</sup> Section 2.1.1.2 at page 2-54.

<sup>67</sup> DSEIS Sections 2.1.1.2.1 and 2.1.1.2.2 and Table 2.1-8.

hearing request, however, and the Tribe was therefore required to present its arguments as challenges to Powertech's Environmental Report. The Tribe's arguments are now impermissibly late. *McGuire*, CLI-02-28, 56 NRC at 385; *Private Fuel Storage*, LBP-00-27, 52 NRC at 223.

#### **M. Oglala Sioux Tribe's Contention 14 (Wildlife)**

The Tribe argues that the DSEIS violates NEPA, the Endangered Species Act, and the Migratory Bird Treaty Act because the Staff has failed to consult with the U.S. Fish and Wildlife Service. Specifically, the Tribe claims that the DSEIS fails to analyze impacts to certain species. The Tribe argues that the Staff must obtain either a Biological Assessment or Biological Opinion from the Fish and Wildlife Service under 50 C.F.R. §§ 402.02 and 402.14. The Tribe also claims that the black-footed ferret, several species of grouse, whooping cranes, and migratory birds may be harmed because the NRC has not documented "any attempt to seek USFWS concurrence" or consultation regarding these species. Finally, the Tribe argues that the DSEIS inadequately addresses how offsite disposal of 11e.(2) byproduct material might affect endangered or threatened species.

Contention 14 is a belated attempt to raise issues that could have been presented on Powertech's Environmental Report. The Environmental Report describes wildlife that may be affected by the Dewey-Burdock Project, stating that the effects on wildlife will be small.<sup>68</sup> Had the Tribe disagreed with Powertech's analysis of either the impacts to wildlife or the species Powertech identified as potentially affected, it was obligated to submit a contention on the Environmental Report. Similarly, if the Tribe believed the Environmental Report failed to address wildlife impacts from the disposal of byproduct material, the Tribe had to raise that

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<sup>68</sup> See Environmental Report Sections 4.4.2, Potential Traffic Impacts (minimal and temporary); 4.7 Potential Ecological Resource Impacts, (insubstantial and temporary); 4.7.2, Wildlife and Fisheries (impacts not significant, no significant adverse impacts); 5.5, Proposed Mitigation Measures for Potential Ecological Resources Impacts from the Proposed Action (will decrease potential impacts).

issue with its initial contentions. The Tribe's arguments here come too late, and the Board must therefore reject Contention 14. *Catawba*, CLI-83-19, 17 NRC at 1049; *Perry*, LBP-82-79, 16 NRC at 1118; *Fitzpatrick*, LBP-01-4, 53 NRC at 127.

The Board must also reject Contention 14 because the Tribe fails to address documents directly relevant to its concerns. As early as March 2010, the Staff consulted with the Fish and Wildlife Service concerning potential impacts to wildlife at the Dewey-Burdock site.<sup>69</sup> The Fish and Wildlife Service advised the Staff:

If the Nuclear Regulatory Agency or their designated representative determines that the project "may adversely affect" listed species in South Dakota, it should request formal consultation from this office. If a "may affect - not likely to adversely affect" determination is made for this project, it should be submitted to this office for concurrence. If a "no effect" determination is made, further consultation may not be necessary. However, a copy of the determination should be sent to this office.

The Staff later informed the Fish and Wildlife Service of its determination that the Dewey-Burdock Project would have no effect on listed species.<sup>70</sup> Although the Tribe argues that the Staff needs to initiate consultations with the Fish and Wildlife Service under Section 7 of the Endangered Species Act, this section applies only where threatened and endangered species or critical habitats are present and impacts on a species are expected as a result of the proposed project. 50 C.F.R. §§ 402.02 and 402.13. Because the Tribe fails to address the Staff letter and DSEIS sections that effectively explain why Section 7 does not apply, there is no basis for admitting the Tribe's contention. *Millstone*, CLI-01-24, 54 NRC at 358; *Georgia Tech*, LBP-95-6, 41 NRC at 300.

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<sup>69</sup> Letter Re: Request for Information Regarding Endangered or Threatened Species and Critical Habitat for the Powertech Inc Proposed Dewey-Burdock In-Situ Recovery Facility Near Edgemont South Dakota (March 15, 2010) (ADAMS Accession No. ML100331503).

<sup>70</sup> The NRC advised the Fish and Wildlife Service by email that the "NRC staff determines that a biological assessment or Section 7 consultation under the Endangered Species Act are not warranted for this proposed project because no adverse effects to federally threatened, endangered, or candidate species are expected. The bases for our determination will be provided in the draft SEIS." (ADAMS Accession No. ML12240A317.)

The Tribe also fails to address other documents showing the Staff has consulted on wildlife issues with BLM<sup>71</sup> and South Dakota Game, Fish and Parks Division (SDGFP) and accepted recommendations from both agencies.<sup>72</sup> For example, the DSEIS incorporates BLM's recommendations for restricting human access in areas of known wildlife nests.<sup>73</sup> The Staff has also met with both SDGFP and the South Dakota Department of Environment and Natural Resources to discuss issues related to protecting wildlife at the Dewey-Burdock site.<sup>74</sup> The Tribe cannot merely claim that the DSEIS fails to satisfactorily address impacts to wildlife; it must evaluate the underpinnings of the DSEIS analysis and provide specific support for its claims. The Board must therefore reject Contention 14 because the Tribe does not address relevant documentation. *Millstone*, CLI-01-24, 54 NRC at 358; *Georgia Tech*, LBP-95-6, 41 NRC at 300.

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<sup>71</sup> Email from Mitchell Iverson of BLM, dated June 25, 2012 (ADAMS Accession No. ML12249A044); Wildlife Stipulations in the current 1986 SD RMP, dated June 25, 2012 (ADAMS Accession No. ML12249A0480.)

<sup>72</sup> S. Michals Email re: South Dakota Game, Fish and Parks Wildlife Data (ADAMS Accession Package No. ML12249A230); Beaver Creek Nest Results 2007-2011 (ADAMS Accession No. ML12249A238); Total Birds per Lek by Year. (ADAMS Accession No. ML12249A240); Sage Grouse Lek Location Fall River County (ADAMS Accession No. ML12249A243) (Non-public documents).

<sup>73</sup> DSEIS Section 4.6 Ecological Resources Impacts at 4-85 and 4-86 (summarizing interactions with various agencies).

<sup>74</sup> Informal Information-Gathering Meetings Trip Summary (December 9, 2010) (ADAMS Accession No. ML093631627).

## Conclusion

For the foregoing reasons, the Board should reject the Intervenors' contentions on the DSEIS.

Respectfully submitted,

*/Signed (electronically) by/  
Michael J. Clark  
Michael J. Clark  
Counsel for the NRC Staff*

*/Signed (electronically) by/  
Patricia A. Jehle  
Patricia A. Jehle  
Counsel for the NRC Staff*

Dated at Rockville, Maryland  
this 7<sup>th</sup> day of March 2013



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
POWERTECH (USA) INC	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02- MLA-BD01
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	Date: March 7, 2013
Facility)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that copies of the foregoing "STAFF'S ANSWER TO DSEIS CONTENTIONS" in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC's E-Filing System, this 7<sup>th</sup> day of March 2013.

***/Signed (electronically) by/  
Patricia A. Jehle***

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