UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	May 26, 2015

OGLALA SIOUX TRIBE'S PETITION FOR REVIEW OF LPB-15-16 AND DECISIONS FINDING TRIBAL CONTENTIONS INADMISSIBLE

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Pursuant to 10 C.F.R. §§ 2.1212 and 2.341, Intervenor Oglala Sioux Tribe ("OST" or "Tribe") hereby submits this Petition for Review.

I. INTRODUCTION

This Petition for Review seeks Commission review of orders issued by the Atomic Safety Licensing Board ("ASLB" or "Board") that deny some of the Tribe's contentions on the merits, award limited relief on the Tribe's successful contentions, and find some Tribal contentions inadmissible. As detailed herein, the Tribe seeks review of 1) ASLB's rejection of requests for hearing on contentions in the Board's Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) dated August 5, 2010 (LBP-10-16), 72 NRC 361 (2010); 2) ASLB's rejection of requests for hearing on contentions in the Board's Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement) dated July 22, 2013 (LBP-13-09), 78 NRC 37 (2013); 3) ASLB's rejection of the requests for hearing on contentions in the Board's Memorandum and Order (Ruling on Proposed Contentions Related to the Final Supplemental Environmental Impact Statement) dated April 28, 2014 (LBP-14-5), 79 NRC 377 (2014); and 4) ASLB's rejection of the requests for hearing on contentions in the Board's Partial Initial Decision dated April 30, 2015 (LPB-15-16)(ML15068A281). Finally, the Tribe seeks review of the ASLB's rulings in LPB-15-16 in favor of the NRC Staff and Powertech (U.S.A.) Inc. ("Powertech" or "Applicant") on the merits of Contentions 2, 3, and 6, and the relief granted the Tribe that fails to remedy NRC Staff violations with respect to Contentions 1A and 1B.

In accordance with NRC regulations, this Petition contains the requisite discussion for each "substantial question" presented for review: (i) A concise summary of the decision or action of which review is sought; (ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if

they were not, why they could not have been raised; (iii) A concise statement why in the petitioner's view the decision or action is erroneous; and (iv) A concise statement why Commission review should be exercised. 10 C.F.R. § 2.341(b)(2), (4).

This case involves Powertech's application to conduct In Situ Recovery (ISR) mining in Custer and Fall River Counties, South Dakota. The proposed mine is within the ancestral land of the Oglala Sioux Tribe and threatens the Tribe's cultural and groundwater resources, among other substantial impacts. As a result, the Oglala Sioux Tribe petitioned for, and was granted, intervention in the proceeding, along with individuals and organizations collectively referred to as the Consolidated Intervenors. The Tribe was granted standing by the ASLB, which admitted several contentions based on Powertech's application materials as well as the subsequent Draft and Final Supplemental Environmental Impact Statement (DSEIS and FSEIS). The ASLB also excluded a number of the Tribe's contentions as inadmissible.

The ASLB held a multi-day adjudicatory hearing on August 19-21, 2014 in Rapid City, South Dakota. During the hearing, it was established that Powertech had failed to disclose a substantial amount of geological data in the form of borehole logs from thousands of holes and wells drilled in the project area. The ASLB ordered the production of the data and provided a narrow opportunity for additional testimony related to the newly-disclosed information.

The ASLB issued a Partial Initial Decision on April 30, 2015 resolving seven admitted contentions, five in favor of the NRC Staff and Powertech, and two in favor of the Tribe and Consolidated Intervenors. This Petition for Review seeks Commission review of three contentions resolved in favor of NRC Staff and Powertech, four of the contentions the ASLB excluded from the proceedings as inadmissible, and two contentions on which the Tribe prevailed, but the ASLB did not provide effective relief.

II. CONTENTIONS IMPROPERLY HELD INADMISSIBLE

Commission precedent establishes that the Commission will generally defer to the ASLB's contention admissibility rulings unless the appeal points to "an error of law or abuse of discretion." *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-21, 72 NRC 197, 200 (2010) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009)). When assessing the exclusion of NEPA contentions, ASLB's exercise of discretion undergoes "reasonableness review," as opposed to the less demanding abuse of discretion standard. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006)(upholding exclusion of Atomic Energy Act contentions, and reversing exclusion of NEPA contention).

A. Contentions Regarding Lack of Analysis of Impacts of 11e2 Byproduct Waste Disposal

In its Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) dated August 5, 2010 (LBP-10-16)(ML102170300), at 75-78, the ASLB ruled inadmissible the Tribe's Contention 7 asserting a failure to include in the Application material a reviewable plan for disposal of 11e2 Byproduct Material. In doing so, the Board erred at law and abused its discretion.

The ASLB held that the Tribe had not successfully articulated a contention because it had "not identified a regulation that requires a disposal plan be included in an application." *Id.* at 77-78. However, the Tribe asserted that 10 C.F.R. § 40.31(h), and 10 C.F.R. Part 40, Appendix A, Criteria 1 and 2 require the applicant to present a plan in its application for the disposal of 11e2 Byproduct Material. *Id*. at 76-77. The ASLB based its ruling of inadmissibility on a finding that neither 10 C.F.R. § 40.31(h) nor 10 C.F.R. Part 40, Criterion 1 applies to ISL mines. LBP-10-16 at 77. The ASLB further held that while 10 C.F.R. Part 40, Appendix A, Criterion 2 does apply to ISL mines and does require that byproduct material from in situ extraction operations

"must be disposed of at existing large mill tailings disposal sites," somehow the applicant in this case was not required to provide any plan in the application for 11e2 Byproduct Material disposal. *Id.* at 77. The Tribe further demonstrated that NUREG-1569 specifically discusses the need for a site-specific waste disposal plan. Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe at 39-40 (ML101340870).

The ASLB further disregarded the Tribe's allegation that the environmental report failed to meet the standards of the National Environmental Policy Act, because in the ASLB's view "it is settled law that an applicant is not bound by NEPA, but by NRC Regulations in Part 51." LBP-10-16 at 78. However, 10 C.F.R. § 2.309(f)(2) specifically states that "[o]n issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report." Thus, the Board's ruling was in direct conflict with applicable regulations and federal court precedent and presents a "substantial question" for review. The Tribe's pleading contained all of the requirements of 10 C.F.R. § 2.309(f)(1). *See* OST Motion to Intervene (ML100960645) at 31-34 and OST Reply (ML101340870) at 34-41.

The presence of a "substantial question" is confirmed by the ASLB's express recognition of "the importance of planning for waste disposal at any NRC regulated facility" and the ASLB's explicit "concern" with its ruling that this issue need not be addressed at the license application stage. LBP-10-16 at 77. Although ASLB excluded Contention 7, the Board recommended "that this issue be considered by the Commission (or Board) when it conducts the mandatory review and hearing that must be held in this case." *Id.* The Tribe asserts that this important issue presents the type of "substantial question" that requires review by the Commission and further asserts that "reasonableness review" will confirm admission of the Tribe's contention that

application requirements must be interpreted as expressly including information on disposal of radioactive wastes. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1035 (9th Cir. 2006).

The Tribe raised this contention again upon issuance of the Draft Supplemental Environmental Impact Statement (DSEIS). At that time, the Board rejected the contention based on a finding that it was solely a contention of omission, that the DSEIS had generally identified the White Mesa Uranium Mill in Utah as the likely disposal site for its waste, and the Generic Environmental Impact Statement (GEIS) discusses disposal generally, and as such the contention was moot. LPB-13-09 at 42. This holding is contrary to law and an abuse of discretion because the Tribe's argument clearly identified the "lack of analysis of a plan for disposal of 11e2 byproduct material" that was site-specific to the Dewey-Burdock mine proposals. OST Reply on DSEIS Contentions at 15 (ML13084A453)(emphasis added). Thus, the alleged deficiency not only involved the failure to confirm an available location for disposal or generalized impacts, but the necessary site-specific analysis of the direct, indirect, and cumulative environmental impacts associated with the transportation, care, and disposal of the waste from this proposed mine. Tribe Statement of DSEIS Contentions at 29 (ML13026A004). Identification of the White Mesa Mill as a possible disposal site did not moot this asserted lack of analysis. The fact that the Generic Environmental Impact Statement makes general references to waste disposal requiring a dedicated facility also does not address the lack of such a plan for the Dewey-Burdock project.

Further, the ASLB found the contention inadmissible simply because the draft license contained a provision requiring the applicant to establish a disposal plan at some point in the future. This is precisely the type of omission raised by the Tribe. Thus, the Board was wrong to find this contention moot and wrong not to admit this contention in the proceeding. The ASLB's error is analogous to the Waste Confidence Decision where NRC "fail[ed] to properly analyze the environmental effects of its permanent disposal conclusion." *New York v. NRC*, 681 F.3d

471, 478 (D.C. Cir. 2012). The ASLB's rejection of the 11e2 Byproduct Material disposal contention also presents a "substantial question" analogous to the Court's rejection of the "Commission's conclusions regarding temporary storage because the Commission did not conduct a sufficient analysis of the environmental risks." *Id*. at 483.

The Tribe raised this important issue yet again in association with the Final SEIS, but the ASLB summarily rejected that contention as not based on materially different information, finding that because the DSEIS had identified the White Mesas Uranium Mill as a possible waste disposal site, the issue was not preserved. LPB-14-5 at 24.

In this way, NRC Staff and ASLB have approved the creation and possession of 11e2 Byproduct Material without any site-specific plan and analysis of disposal of its 11e2 Byproduct Material wastes, and the applicant has been able to maneuver through the entire licensing process avoiding any close scrutiny of this issue. This issue is of great importance because, as argued by the Tribe in its pleadings, the White Mesa Uranium Mill does not currently have permitted capacity to accept these wastes, and has no public plans to do so. Tribe Statement of FSEIS Contentions at 35-36 (ML14077A004). The reversal of the Waste Confidence Decision confirms the "substantial question" presented by the ASLB exclusion of this contention challenging a similar failure to address disposal of 11e2 Byproduct Materials.

Where the ASLB noted the Commission should recognize the importance of the waste disposal issue, the Tribe respectfully submits that review is properly taken to confirm that NEPA and NRC regulations require that all waste disposal impacts be fully addressed before issuing a license that irreversibly commits resources necessary for "the disposition" and perpetual care of 11e2 Byproduct Material "resulting from such milling activities." OST Petition to Intervene at 31 (ML100960645) *quoting* 10 C.F.R. Part 40 Appendix A.

B. Contention Regarding Scoping

In its July 22, 2013 Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement)(LBP-13-09), 78 NRC 37 (2013), the ASLB found inadmissible the Tribe's proposed Contention 8 asserting NRC Staff failed to conduct NEPA's mandatory scoping process. LBP-13-09 at 46. Specifically, the Board ruled that 10 C.F.R. § 51.26(d) applies and when a supplement to an EIS is prepared, "NRC staff need not conduct a scoping process," and that scoping meetings on the Generic Environmental Impact Statement (GEIS) satisfied NEPA's scoping requirement. *Id* at 46-47.

The Board's ruling is contrary to law. The exception contained in 10 C.F.R. § 51.26(d) does not apply to site-specific EISs, such as the one at issue here, simply because NRC Staff labels it as a "supplement." NEPA terminology confirms that NRC Staff is "tiering" to a GEIS, which is allowable. However, "tiering" does not render site-specific EIS a "supplement" within the meaning of NEPA or 10 C.F.R. § 51.92 which only allows site-specific "supplements" to a site-specific EIS.

The Board's reliance on 10 C.F.R. § 51.26(d) to eliminate the requirement to conduct scoping has been specifically addressed and disavowed by the NRC Office of Inspector General (OIG)'s Audit Report titled "Audit of NRC's Compliance With 10 CFR Part 51 Relative to Environmental Impact Statements" OIG-13-A-20 (August 20, 2013). The OIG's Audit Report concluded, with specific reference to the Dewey-Burdock project, that "NRC did not fully comply with the scoping regulations because of incorrect understanding of the regulations related to scoping for EISs that tier off of a generic EIS." OIG-13-A-20 at 24. The OIG Audit identifies the specific error NRC Staff commits as "refer[ring] to the tiered site-specific EIS as a 'supplement' to the generic EIS, leading to the belief that the exception in 10 C.F.R. 51.26(d) applies to tiered EISs." *Id*. The Audit Report discusses this issue in depth, illuminating the

substantial policy issues and the resulting limited scope of NEPA analysis presented by this contention. *Id*. at 17-26. Thus, the Board wrongly denied the Tribe its opportunity for a hearing on this issue. At minimum, the strong OIG condemnation of NRC Staff practice, which the Board ruling followed, demonstrates a "substantial issue" for review.

The Tribe specifically argued that the NEPA process in this case was conducted without benefit of a scoping process. List of Contentions of the OST Based on the DSEIS at 32-33 (ML13026A004). The Tribe argued that the NRC Staff position that the exception in 10 C.F.R. § 51.26(d) applied to the Dewey-Burdock "supplement" was legally flawed. OST Consolidated Reply at 17-18 (ML13086A523). The Tribe identified the consequences of forsaking site-specific scoping, denying the Tribe the opportunity, among other things, to provide input to help define the proposed action, identify significant issues to be analyzed in depth, provide input on alternatives that NRC Staff proposed to eliminate from study, and ensure that other environmental review and consultation requirements related to the proposed action be prepared concurrently and integrated with the DSEIS. 40 C.F.R. § 51.29(a)(1)-(5). The ASLB legal error also denied the Tribe the benefit of 40 C.F.R. § 51.29(b), which requires that NRC Staff "will prepare a concise summary of the determinations and conclusions reached, including the significant issue identified, and will send a copy to each participant in the scoping process." In this case, no such summary was prepared.

The illegally truncated scoping process deprived the Tribe of the opportunity to present its concerns at the proper time ("as soon as practicable")(§ 51.29(a)) and to have significant issues identified and addressed when NRC Staff created the scope of the NEPA process.

C. Contention Regarding Additional Borehole Data

In LPB-15-16, the ASLB ruled inadmissible the Tribe's proposed New Contention 1: The NRC Staff's Review of Newly-Disclosed Borehole Data was Inadequate Under, and Failed to

Comply with, the National Environmental Policy Act and Implementing Regulations. In doing so, the ASLB held that "[t]he results of the review by both the NRC Staff and the Oglala Sioux Tribe of Powertech's newly disclosed well log data did not 'paint a seriously different picture of the environmental landscape'" and as a result "does not give rise to a genuine issue in dispute." LPB-15-16 at 108.

However, the ASLB ruling misstates the law in that it conflates the contention admissibility standard with the substantive standard of whether the new information would require a supplement to the NEPA documents. The ASLB misapplied the contention pleading rules to require that the Tribe demonstrate, without the benefit of any of the hearing process, that the Tribe would prevail on the merits of the contention that plead a violation of the NEPA process. By ruling on the merits of the ultimate question presented when denying the Tribe the ability to develop and present its case on this contention, ASLB abused its discretion. It is well recognized that, "in passing on the admissibility of a contention . . . it is not the function of a licensing board to reach the merits of [the] contention." *Sierra Club v. NRC*, 862 F.2d 222, 226 (9th Cir. 1988) (citations omitted); *Crow Butte Res.*, 2009 WL 1393858 *1, *14 (May 18, 2009) ("[w]hether a [petitioner] has proved its claim is not the issue at the contention pleading stage"); *In the Matter of Duke Power Co.*, 9 NRC 146, 151 (1979).

Further, the ASLB errs in its conclusion that the newly-disclosed data did not "paint a seriously different picture of the landscape." Indeed, the testimony submitted by Dr. Hannan LaGarry (Exhibit OST-029)(ML14325A866) demonstrated that the data shows significant problems associated with the geologic setting that were not evaluated or reviewed in any NEPA document. For instance, Dr. LaGarry found evidence within the project area of 140 open, uncased holes, 16 previously cased, redrilled open holes, 4 records of artesian water, 13 records of holes plugged with wooden fenceposts, 6 records of holes plugged with broken steel, and 12

records of faults within or beside drilled holes. Exhibit OST-029 at 2. The ASLB's denial of the Tribe's request to develop and present this contention presents a substantial question, particularly where the contention was rejected despite the confirmed failure of the applicant to disclose the unlawfully withheld data. See Post-Hearing Order dated September 8, 2014 (ordering disclosure of withheld documents, denying request for 10 C.F.R. § 2.336(e)(1) sanctions, and holding Powertech request to reconsider "mandatory disclosure of data relevant to admitted contentions [as] without merit.")(ML14251A377).

Lastly, the ASLB failed to provide any support for its factual conclusion that the random "spot check" methodology employed by NRC Staff in reviewing the new-disclosed borehole data is supportable because the NRC Staff allegedly "spot checked" data earlier in the proceedings. In rejecting the contention, the ASLB asserted without any support or citation to any evidence in the record that the "spot check" technique "is not new or a materially different approach relative to this proceeding." LPB-15-16 at 108. To the contrary, Dr. LaGarry opined that the NRC Staff's use of "spot checks" instead of analysis was not evident in earlier NRC Staff reviews. Dr. LaGarry provided further expert testimony that "spot check" is not a reliable methodology and is not in keeping with established scientific standards. Exhibit OST-029 at 4-5 (¶¶ 6-11)(ML14325A866).

D. Contention Regarding EPA Preliminary Assessment

In LPB-15-16, the ASLB also held inadmissible the Tribe's New Contention 2: The NRC Staff NEPA Analysis Fails to Adequately Address or Review the Findings in the EPA's CERCLA Preliminary Assessment or the EPA's Reasonably Foreseeable CERCLA Removal Action. The ASLB ruled that the Tribe had failed to present a genuine dispute as to a material issue of law or fact, asserting that the FSEIS reviewed all of the issues raised by the EPA documents. LPB-15-16 at 109.

However, the ASLB erred where neither the FSEIS nor any of the NRC Staff testimony contains any review of the new disclosure made by the EPA document that contaminated water is leaking from the unreclaimed uranium mines into groundwater at the site and nearby ground water wells. Exhibit OST-026 at 30 (ML14311B007). The EPA identified a new contamination pathway with implications for pollution containment at the site that is not addressed in the application, any NRC materials, or the FSEIS. The ASLB simply glossed over this critical issue, relying on NRC Staff testimony that the FSEIS discussed the unreclaimed mines, but failing to recognize that none of that discussion includes any disclosure, analysis, or review of the contamination pathway from the unreclaimed mines to the groundwater. As such, the existing scope of review is insufficient, thus establishing a genuine issue of material fact and law that presents a "substantial question" of the propriety of ALSB rejecting this NEPA contention.

III. CONTENTIONS RULED UPON IN ERROR

A. Legal Framework

The contentions subject to this Petition involve allegations of violations of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).

1. National Environmental Policy Act

NEPA is an action-forcing statute applicable to all federal agencies. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). The statute requires "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 97 (1983). The United States Supreme Court has explained that the government must disclose and take a "hard look" at the foreseeable environmental consequences of its decision in a NEPA

document. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Closely related to NEPA's "hard look" mandate, NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data. *Citizens Against Toxic Sprays, Inc. v. Bergeland*, 428 F.Supp. 908 (1977). "Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] …. Such documents must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review." *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993).NEPA's implementing regulations require agencies to:

> [I]nsure the professional integrity, including scientific integrity of the discussions and analysis in environmental impact statements. [Agencies] shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24 (Methodology and Scientific Accuracy). Further, where data is not presented in the NEPA document, the agency must justify not requiring that data to be obtained. 40 C.F.R. § 1502.22.

CEQ regulations require that: "NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added). As the federal circuit courts have held:

> NEPA ensures that a federal agency makes informed, carefully calculated decisions when acting in such a way as to affect the environment and also enables dissemination of relevant information to external audiences potentially affected by the agency's decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). ... NEPA documentation notifies the public and relevant government officials of the proposed action and its environmental consequences and informs the public that the acting agency has considered those consequences.

Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429, 1437 (10th Cir. 1996). The statutory prohibition against taking agency action before NEPA compliance applies to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). Otherwise, NEPA's mandate that agencies "shall […] utilize a systematic, interdisciplinary approach" is reduced to an after-the-fact formality. 42 U.S.C. § 4332(2)(A).

NEPA also requires that all connected, similar and cumulative actions be considered in the same environmental review. NEPA defines connected actions as those which are "closely related," including those that "[c]annot or will not proceed unless other actions are taken," or those that are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Cumulative actions are those that "have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id*. at § 1508.25(a)(2). Similar actions include those that have "common timing or geography." *Id*. at § 1508.25(a)(3).

A federal agency may not simply claim that it lacks sufficient information to assess the impacts of its actions. The courts are very clear with respect to an agency's statements in a NEPA document that "[a] conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives." *Seattle Audubon Society v. Moseley,* 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), *aff'd* 998 F.2d (9th Cir. 1993).

NEPA requires that mitigation measures be reviewed in the NEPA process. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action forcing' function of NEPA. Without such a discussion, neither the agency nor other

interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), *accord New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). NEPA regulations require that an EIS: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.16(h). In a similar case involving the Forest Service, the federal courts ruled:

> The Forest Service's perfunctory description of mitigation measures is inconsistent with the "hard look" it is required to render under NEPA. "Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Carmel-By-The-Sea v. Dept. of Transportation*, 123 F.3d 1142, 1154 (9th Cir. 1997) (*quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439 (1988).
> * * *
> It is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted, or given a reasoned explanation as to why such an estimate is not possible. … The Forest Service's broad generalizations and vague references to mitigation measures … do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide.

Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380-81 (9th Cir. 1998).

> Federal regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 CFR §§ 1508.20(a)-(e). ... In order to be effective, a mitigation measure must be supported by analytical data demonstrating why it will "constitute an adequate buffer against the negative impacts that may result from the authorized activity." **The proposed monitoring program fails this test, as it could detect impacts only after they have occurred.** [The agency's] statement that it would reserve the authority to modify approved operations does not provide enough protection under this standard. A court must be able to review, in advance, how specific measures will bring projects into compliance with environmental standards. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 ("The Parks Service proposes to increase the risk of harm to the environment and then perform its studies.... This approach has the process exactly backwards."). **Monitoring may serve to confirm the appropriateness of a mitigation measure, but that does not make it an adequate mitigation measure in itself.**

*Alaska Wilderness League v. Kempthorne***,** 548 F.3d 815, 827-828 (9th Cir. 2008)(emphasis

added).

NEPA requires that the relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of NEPA's public comment and review procedures. See, *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) ("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements."); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff'd sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) ("The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement."); *Dubois v. U.S. Dept. of Agriculture*, 102F.3d1273, 1287 (1st Cir. 1996), *cert. denied sub nom; Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot 'bring into compliance with NEPA an EIS that by itself is inadequate.' . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned.") (*citations omitted*); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir.1980) (even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate.").

Last, "for contentions based on NEPA, such as the one at issue here, the burden shifts to the Staff, because the NRC, not the applicant, bears the ultimate burden of establishing

compliance with NEPA." *In re Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-17, 76 N.R.C. 71, 80 (2012); *In re Pac. Gas & Elec. Co.*, 67 N.R.C. 1, 13 (N.R.C. Jan. 15, 2008)("There is no genuine dispute that NEPA and AEA legal requirements are not the same [. . .] and NEPA requirements must be satisfied.").

2. National Historic Preservation Act

The federal courts have addressed the strict mandates of the National Historic Preservation Act:

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c)**.** The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 C.F.R. § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as this Project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. 36 C.F.R. § 800.4(d)(2). See also *Pueblo of Sandia*, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii).

Apart from requiring that an affected Tribe be involved in the identification and evaluation of historic properties, the NHPA requires that "[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c) (emphasis added). The ACHP has published guidance specifically on this point, reiterating in multiple places that consultation must begin at the earliest possible time in an agency's consideration of an undertaking, even framing such early engagement with the Tribe as an issue of respect for tribal sovereignty. ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (November 2008), at 3, 7, 12, and 29.

Regarding respect for tribal sovereignty, the NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 C.F.R. § 800.2(c)(2)(ii)(C). See also Presidential Executive Memorandum

entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771. The federal courts echo this principle in mandating all federal agencies to fully implement the federal government's trust responsibility. See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981)("any Federal Government action is subject to the United States' fiduciary responsibilities toward the Indian tribes").

B. Relief Granted the Tribe in Prevailing on Contentions 1A and 1B

The ASLB found that the FSEIS "has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources, and the required meaningful consultation between the Oglala Sioux Tribe and the NRC Staff has not taken place." LPB-15-16 at 42. Despite this finding of violations and a lack of compliance with both NEPA and the National Historic Preservation Act, the Board nevertheless allowed the Record of Decision and the license itself to stand. Federal law prohibits such a result, as it is contrary to the statutory requirement that NEPA and the NHPA compliance precede and inform the agency action, which here, is the license to conduct operations and possess/dispose of 11e2 Byproduct Material. The Commission should exercise review over this important issue to ensure that its programs maintain compliance with federal statutory mandates.

NHPA Section 106 specifically requires that the NRC "shall, **prior to the approval** of the expenditure of any Federal funds on the undertaking or **prior to the issuance of any license**, as the case may be, take into account the effect of the undertaking…." 16 U.S.C. § 470(f)(emphasis added). Similarly, "[u]nder NEPA, each federal agency must prepare an Environmental Impact Statement ('EIS') **before taking** a 'major Federal action[] significantly affecting the quality of the human environment.' 42 U.S.C. § 4332(2)(C)." *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012), *accord*, 40 C.F.R. § 1500.1(b)("NEPA procedures must

ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken.")(emphasis added).

Given that the ASLB confirmed the NRC Staff failure to comply with NEPA and the NHPA with regard to consideration of impacts to cultural and historical resources of the Oglala Sioux Tribe, the proper remedy is that employed by the federal courts up a finding of a violation of NEPA: to vacate the decision and remand back to the agency for further proceedings necessary to achieve compliance. See *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). Here, where the licensed activity has not commenced and wastes requiring perpetual care have not been created, there is no legal or practical reason for the ASLB to keep a license in place where it has held that NRC Staff issued the license without compliance with NEPA and NHPA.

C. Contention 2: The FSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Groundwater Quality

In its Partial Initial Decision dated April 30, 2015, the ASLB ruled in favor of NRC Staff and Powertech that the FSEIS presents an adequate analysis of baseline water quality conditions at the site. This determination constitutes an error of law in that the Board misapplied Commission precedent in *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 6 (2006) by following, without detailed analysis, the ruling of another ASLB panel in *Strata Energy, Inc.*(Ross In Situ Recovery Uranium Project), LBP-15-3, 80 NRC ___ (Jan. 23, 2015).

Specifically, the ASLB misapplied the *Hydro Resources, Inc.* and *Strata* results to render ineffective both 10 C.F.R. § 51.45(b) requiring a scientifically defensible analysis of baseline water quality, and 10 C.F.R. Part 40, Appendix A, Criterion 5, requiring "complete" baseline data. The Board instead followed the NRC Staff and Powertech arguments that these provisions can be effectively supplanted by the post-licensing establishment of "pre-operational"

background quality associated with 10 C.F.R. Part 40, Appendix A, Criterion 7. *See* LBP-15-16 at 46-49, 53-54.

The ASLB committed legal error by endorsing the concept that baseline water quality can be established by "collection of groundwater quality data in a staggered manner" after the licensing process is complete and outside of the NEPA review. LPB-15-16 at 54. In agreeing with the NRC Staff and Powertech, the Board also adopted the NRC Staff's unsupportable legal position that "the EIS is sufficient as long as it adequately describes the process by which the monitoring data will be obtained" in the future. LPB-15-16 at 48. While additional data gathering in the future under Criterion 7 is contemplated under the NRC regulations, it is only for purpose of "confirming" the already "complete" baseline data required to be included as part of the application and analyzed in the NEPA document as per Criterion 5. See LPB-15-16 at 53, quoting *Hydro Resources, Inc.*, 63 NRC at 6. Establishing the baseline water quality after licensing presents substantial questions regarding NEPA and NRC regulation and policy.

The ASLB committed additional error and abused its discretion in endorsing the NRC Staff position that "it was unnecessary to account for past mining activity in its baseline water quality data." LPB-15-16 at 48. The Board even ignored evidence from the EPA Preliminary Assessment (Exhibit OST-026)(ML14311B007) confirming the lack of meaningful data as to the impacts associated with historic mining at the site and how that impacts current water quality and future impacts from the Dewey-Burdock project. *Id.* at 55.

Lastly, the ASLB abused its discretion by ignoring the Tribe's argument, based on evidence in the record, that NRC Staff's reliance on NRC Regulatory Guide 4.14 is unsupportable in the context of ISR mining. See LPB-15-16 at 46-47. NRC Regulatory Guide 4.14 is an outdated document, created in 1980, and applicable by its own terms only to conventional uranium mills. See Exhibit NRC-074. NRC Staff applied the Guide to establish

only a 2 kilometer boundary for collecting baseline water quality. The ASLB accepted this 2 kilometer limit despite unrebutted evidence in the record that the 2 kilometer radioactive plume "rule" is inapplicable to and unreliable in the context of ISR. LPB-15-16 at 52, *quoting* Exh. NRC-076 (recognizing that "uranium plumes…[e]xceed roughly 2km in length only in special cases e.g. where in situ leaching has been carried out."). The Board also conceded that despite unsupported assertions by NRC Staff witnesses that 2 kilometers is sufficient for ISR sites, it "was unable to find a specific mention of a 2 kilometer radius" in the NRC Staff exhibits. LPB-15-16 at 53 n. 284. As such, the Board's finding that NRC Staff properly relied on 35-year old, pre-UMTRCA, conventional milling guidance for setting 2 kilometer limits on baseline water quality data collection is not supported by the record and is an abuse of discretion.

Importantly for the Commission's consideration of this Petition, the ASLB's ruling presents internal NRC confusion that would benefit from Commission review of the important issues of establishing the proper baseline water quality at ISR facilities, for which the Commission has not promulgated NEPA-based regulations. The ASLB expressly recognized the ambiguity and lack of clarity presented by the regulations and staff guidance with respect to these matters. LPB-15-16 at 53. The Board also wrestled with the lack of clarity as to how the 10 C.F.R. Part 40, Appendix A Criteria is meant to apply to ISR operations. LPB-15-16 at 45. Similarly, the Board noted with emphasis the fact that key terms such as "baseline" and "background" are not defined with any precision in the 10 C.F.R. Part 40 regulations or Appendix A, nor in NUREG-1569 or NRC Regulatory Guide 4.14. The Commission should take this opportunity to attempt to resolve these long-standing and "substantial questions" involving gaps in the regulatory process, which create confusion and consternation in the affected public and the reviewing ASLB.

D. Contention 3: The FSEIS Fails to Include Adequate Hydrogeological Information to Demonstrate the Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater

In its Partial Initial Decision dated April 30, 2105 (LPB-15-16), the Board ruled that "[w]ith the condition that unplugged boreholes be located and properly abandoned, the FSEIS and the record in this proceeding include adequate hydrogeological information to demonstrate the ability to contain fluid migration and assess potential impacts to groundwater." LPB-15-16 at 75. However, the Board's ruling presents legal error and an abuse of discretion in that it acknowledges that no analysis was presented in the FSEIS or otherwise that details the impacts and effects associated with the abandoned boreholes on lixiviant migration and contamination. Nor does the FSEIS explain or provide other information to demonstrate the ability of the applicant to successfully identify and abandon thousands of boreholes, nor how these efforts would be undertaken and accomplished. Rather, the Board relies entirely on a license condition that simply requires Powertech to "attempt" to locate these problems while carrying out NRC-licensed activities and outside of any NEPA process. LPB-15-16 at 73. Commission review of ASLB conclusions and orders involving fluid containment is supported by the ASLB's express finding that "all parties acknowledge that thousands of historical boreholes penetrate the Dewey-Burdock site" and that "it is apparent that some boreholes on the site have not been adequately plugged" and are causing leakage within the supposedly confining layers. LPB-15-16 at 72.

The omission and inadequacy of NRC Staff analysis of leakage issues was confirmed during and after the hearing, and the ASLB deferral of the analysis necessary to an undetermined point in the future violates NEPA. As recognized by the ASLB, the Tribe specifically argued that "the FSEIS must discuss how old boreholes will be identified and explain the methodology that will be used to assess the effectiveness of plugging and abandonment." LPB-15-16 at 66, *citing* Oglala Sioux Tribe Statement of Position at 33 (ML14171A776). However, nowhere does

the ASLB address this argument in its ruling or identify any authority that contemplates how a future promise to "attempt" to identify and properly close and abandon boreholes could satisfy NEPA requirements. The Commission should review this issue, as it presents a fundamental gap in the analysis associated with the groundwater impacts associated with this in situ mining proposal, and the lack of any review during the NEPA process undermines the credibility of the NRC Staff's conclusions as to those impacts.

The ASLB erroneously upheld NRC Staff analyses that ignored impacts and risks posed by faults and fractures within the Dewey-Burdock area. Despite NRC Staff and Powertech positions throughout the proceedings, and within the FSEIS, that deny the presence of faults or fractures at the site, the Board correctly found the evidence demonstrates faults and fractures do exist at the site. LPB-15-16 at 71. The Board committed legal error by applying an inappropriate legal standard when it effectively placed the burden on the Tribe to demonstrate the impacts associated with these faults and fractures. *Id*.

The applicable standard under NEPA is the requirement that the NRC Staff bears the burden of proof to demonstrate that it took a "hard look" at the potential impacts within the FSEIS. Here, where NRC Staff and Powertech consistently denied even the presence of such faults and fractures, and the ASLB ruled that faults and fractures do exist, the NEPA documents lack the necessary "hard look" disclosing the effect and risks to ground water presented by these faults and fractures. The Commission should exercise its review to ensure that NRC Staff conducts its NEPA analyses in a credible manner, that the Board applies the proper standard of review, and to provide relief for NEPA violations confirmed by the ASLB's findings of fact.

E. Contention 6: The FSEIS Fails to Adequately Describe or Analyze Proposed Mitigation Measures

In its April 30, 2015 Partial Initial Decision (LPB-15-16), the ASLB found that "the FSEIS adequately describes proposed mitigation measures" and found for NRC Staff and

Powertech on Contention 6. However, the Board's analysis contains legal error and constitutes abuse of discretion as it is internally inconsistent and fails to address several of the arguments presented by the Tribe. The Commission should exercise its discretion to review this issue due to the extensive use of mitigation by NRC Staff to manage impacts associated with ISR projects, including the Dewey-Burdock project. Further, NRC Staff's pervasive reliance on license conditions and future, undeveloped plans to mitigate impacts, yet failing to include a description, let alone and analysis of these measures and their effectiveness, represents a departure from and contrary to established law and an important issue of policy.

In this case, the Tribe asserted significant analytical gaps in the agency's review of mitigation measures. LPB-15-16 at 86-87. A principal concern was the Tribe's assertion of a lack of adequate analysis of mitigation for impacts to cultural resources. *Id*. at 90. Specifically, the Tribe argued that the reliance on wholly future development of mitigation measures through a process described in a Programmatic Agreement was not compliant with NEPA. *Id*. The Board ruled that the finalization of a Programmatic Agreement after the FSEIS was completed but before the Record of Decision was finalized was not itself a violation of NEPA, but failed to address the Tribe's argument that the failure to specify any actual mitigation in the Programmatic Agreement, other than an intent to design them in the future, also violated NEPA's requirement that mitigation be discussed in a FSEIS. *Id.* at 92-93. As a result, the Board ruled in favor of the NRC Staff and Powertech on Contention 6.

The ASLB correctly held earlier in its ruling, in association with Contention 1A, that "[b]ecause the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the FSEIS does not include mitigation measures sufficient to protect this Native American tribe's cultural, historical, and religious sites that may be affected by the Powertech project" and that "NEPA's hard look requirement has not been satisfied, and

potentially necessary mitigation measures have not been established." LPB-15-16 at 40. See also OST Post-Hearing Initial Brief with Findings of Fact and Conclusions of Law at 68-69 ("OST COL")(ML15010A048)(detailing repeated admissions by NRC Staff of its reliance on entirely future efforts to develop mitigation for cultural resource impacts). Thus, despite an express finding that the FSEIS lacked sufficient discussion of mitigation measures specifically with regard to cultural resources, the ASLB nevertheless ruled in favor of NRC Staff and Powertech on Contention 6. Such a ruling is internally inconsistent, contrary to established law, and an abuse of discretion warranting Commission review.

The ASLB's ruling also substantially ignores the Tribe's arguments regarding other mitigation issues, which are also not described or sufficiently analyzed in the FSEIS. The Tribe had contested the reliance on mitigation measures to be designed based on as-yet unreviewed plans including: an admittedly still "Draft" Avian Plan (OST COL at 65 (ML15010A048); the unsubmitted post-hearing pump-test and hydrologic well-field packages (*id.* at 64), waste land application mitigation plans (*id*. at 64), borehole plugging and abandonment plans (*id.* at 69), monitoring network plans (*id.* at 70), air impacts (*id*. at 71), "BMP's" for stormwater control (*id.* at 71), and a list of others specifically identified by the Tribe (*id*. at 71-72)(providing bullet list of specific mitigation measures deferred for development until after the FSEIS and license are final). As such, the Commission should exercise review on this issue.

IV. CONCLUSION

Because the Tribe has shown "substantial questions" this request for Commission review should be granted.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 26th day of May, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 26th day of May 2015, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by

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