

June 22, 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))	

**NRC STAFF'S RESPONSE TO OGLALA SIOUX TRIBE'S
PETITION FOR REVIEW OF LBP-15-16**

I. Introduction

The NRC Staff responds to the Oglala Sioux Tribe's petition for Commission review of the Atomic Safety and Licensing Board's Partial Initial Decision.¹ The Tribe asks the Commission to review the Board's rulings on four contentions that it did not admit in the hearing: Contention 7 (disposal of byproduct material), Contention 8 (environmental scoping), New Contention 1 (borehole data), and New Contention 2 (sufficiency of data on groundwater pathways). The Tribe also asks the Commission to review the Board's rulings on admitted Contentions 1A and 1B (both involving cultural resources), Contention 2 (baseline groundwater quality), Contention 3 (hydrogeological confinement), and Contention 6 (mitigation measures).

For Contentions 1A and 1B, the Staff agrees that the Commission should review the Board's rulings, for reasons stated in the Staff's own petition for review.² The Tribe itself does not identify any legal or factual error in the Board's rulings warranting review, however, and the Commission should therefore deny its petition as it relates to these contentions. The

¹ *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC __ (April 30, 2015) (slip op.).

² NRC Staff's Petition for Review of LBP-15-16 (ADAMS Accession No. ML15146A499) (May 26, 2015).

Commission should also decline review of the Board's rulings on the other contentions identified by the Tribe, because the Tribe likewise fails to identify any error in the Board's rulings.

II. Legal Standard

The Commission may review a partial initial decision and, where appropriate, reverse the Board's contention admissibility or merits determinations. In deciding whether to review the Board's decision, the Commission considers whether:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) [there is] Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.341(b)(4).

NRC precedent also addresses the manner in which the Commission reviews the Board's contention admissibility and merits determinations. For contention admissibility determinations, the Commission accords substantial deference to the Board's rulings. *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006). More specifically, the Commission defers to the Board's contention admissibility rulings unless the appeal identifies an "error of law or abuse of discretion." *Crow Butte Resources Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009). A party petitioning for review of the Board's rulings on contention admissibility must, in other words, do more than simply restate its contention and cite additional support for the contention. *Shieldalloy Metallurgical Corp.* (Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

The Commission also accords substantial deference to the Board's rulings on the merits of admitted contentions. Where the Board's decision rests on carefully made factual findings,

the Commission typically will not disturb the decision. *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 45 (2001).³ The Commission's standard of "clear error" for overturning a Board's factual findings is high, particularly where the Board made detailed factual findings based on expert witness testimony. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26–27 (2003). In particular, the fact that the Board assigned more weight to one party's evidence than to another party's evidence is not a basis for overturning the Board's decision. *David Geisen*, CLI-10-23, 72 NRC 210, 241 (2010).

IV. Discussion

A. Contention 7 (Disposal of Byproduct Material)

The Tribe argues that the Board improperly rejected Contention 7, in which it argued that Powertech's application failed to comply with NRC regulations and NUREG-1569 because it did not include a plan for disposing of byproduct material generated during in-situ uranium recovery (ISR) operations.⁴ The Tribe resubmitted Contention 7 as a challenge to both the Draft Supplemental Environmental Impact Statement (DSEIS) and the Final Supplemental Environmental Impact Statement (FSEIS), and on both occasions the Board rejected the contention. The Tribe's fundamental disagreement with the Board's rulings is that, while Powertech's license includes a condition requiring that it dispose of byproduct material at a licensed disposal facility, in the Tribe's view Powertech needed to identify a particular disposal site in its application. The Tribe argues that Powertech needed to identify a specific disposal site so that in the FSEIS the Staff could have analyzed the impacts of waste disposal at that site.

³ See also *id.* at 45–46 (holding that where the Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed).

⁴ Petition at 3–6. NUREG-1569 is the NRC's Standard Review Plan for In Situ Leach Uranium Extraction License Applications (Ex. NRC-013).

The Board rejected Contention 7 for three reasons. First, the Board found that the Tribe based its contention on requirements that apply to conventional uranium mills, rather than ISR sites, including those found in 10 C.F.R. § 40.31(h) and Criterion 1 in Appendix A to Part 40. Second, the Board noted that the Generic Environmental Impact Statement (GEIS) for ISR applications addressed waste disposal.⁵ The Board found that the Tribe failed to address, and therefore failed to raise a genuine issue concerning, sections of the GEIS and Dewey-Burdock SEIS that were relevant to the issues it raised. Finally, for some arguments in Contention 7 that the Tribe raised in response to the Dewey-Burdock DSEIS and FSEIS, the Board found that the arguments were untimely because the Tribe could have raised them on Powertech's application.

The Commission should decline review of the Board's ruling on Contention 7. The Board correctly rejected the Tribe's arguments based on 10 C.F.R. § 40.31(h) and Criterion 1 in Appendix A to Part 40. As the Board explained, "Commission precedent makes clear that 10 C.F.R. § 40.31(h) applies to uranium mills, and not to ISL facilities." LBP-10-16, 72 NRC 361, 434 (2010) (citing *Hydro Resources, Inc.* (Albuquerque, NM), CLI-99-22, 50 NRC 3, 8 (1999)). The Board also correctly found that "while Part 40 generally applies to ISL mining, Appendix A to Part 40, including Criterion 1, was designed to address the problems related to mill tailings and not problems related to injection mining." *Id.* (internal quotations omitted).⁶ In other words, the Board correctly found that, to the extent the Tribe relied on the NRC's safety regulations as support for its contention, the Tribe's claims lacked legal support.

The Board also properly found that the Tribe failed to raise a genuine issue under the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (NEPA). As the Board acknowledged in its rulings, when preparing the GEIS (NUREG-1910) and Dewey-Burdock

⁵ Final Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (NUREG-1910) (Exs. NRC-010-A-1 through NRC-010-B-2).

⁶ See *also* Ex. NRC-013 at 213 (explaining that Criterion 1 in Appendix A does not apply to ISR applications).

FSEIS the Staff did, in fact, consider impacts related to the disposal of byproduct material. The Staff addressed these impacts in GEIS Sections 4.2.12, 4.2.12.2, and 4.4.12.4.⁷ The Staff also identified potential disposal sites, and it listed these sites in Appendix G of the GEIS.⁸ In addition, the Staff addressed waste disposal in numerous sections of the Dewey-Burdock DSEIS and FSEIS.⁹ Because in its contention the Tribe did not challenge the analysis in any of these sections, the Board correctly found that the Tribe failed to raise a genuine issue under NEPA. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (holding that a contention must be rejected if it does not show that a genuine dispute exists on a material issue of law or fact).

Furthermore, for the Tribe's DSEIS and FSEIS versions of Contention 7, the Board properly found that some of the Tribe's arguments were untimely. In particular, in these versions of Contention 7 the Tribe argued that NEPA requires the Staff to analyze cumulative impacts from transporting and disposing of byproduct material. The Board correctly found that the Tribe could have raised this argument on Powertech's Environmental Report.¹⁰ See *Millstone*, CLI-01-24, 54 NRC at 358 (explaining that the NRC's rules on late-filed contentions are not meant to provide the intervenor a second chance to raise arguments it could have made previously). In any event, in the FSEIS the Staff considered the cumulative impacts of

⁷ Ex. NRC-010-A-3 at 574–75, 577.

⁸ Ex. NRC-010-B-2 at 487–88. The Staff did not discuss these disposal sites at length in the GEIS because it had previously evaluated the potential environmental impacts of the sites in other documents, including NUREG-0706, "Final Generic Environmental Impact Statement on Uranium Milling" (1980); and NUREG-0556, "Final Environmental Statement Related to the Operation of White Mesa Uranium Project, Energy Fuels Nuclear, Inc." (1979). See, e.g., Ex. NRC-010-B-2 at 292 (citing NUREG-0706).

⁹ See, e.g., FSEIS Sections 4.3.1.1.2, 4.3.1.2.2, 4.14.1.1.2, 4.14.1.1.3, 4.14.1.1.4, and 4.14.1.2.2 (Ex. NRC-008-A-2 at 325–26, 331, 541–43, 546–47).

¹⁰ Under the NRC's rules in 10 C.F.R. Part 51, an applicant for a new ISR license must submit an Environmental Report addressing the environmental impacts of its proposed project. 10 C.F.R. § 51.45(b)(1). "Impacts" include any cumulative impacts associated with the proposed project. 40 C.F.R. § 1508.7.

transporting waste material from the Dewey-Burdock Project, finding that the Project would have a small incremental impact, and the Tribe failed to challenge the Staff's analysis.¹¹

The Tribe also argues that the Board's rulings are inconsistent with NUREG-1569, which states that one criterion for accepting an ISR application is "an approved waste disposal agreement for 11e.(2) byproduct material disposal at an NRC or NRC Agreement State licensed disposal facility." Petition at 4. NUREG-1569, however, provides only one way of complying with the NRC's regulations; it does not, in itself, impose requirements. See *International Uranium (USA) Corp.*, CLI-00-1, 51 NRC 9, 19 (2000) (explaining that NUREGs and regulatory guides "are routine agency policy pronouncements that do not carry the binding effect of regulations."¹² Accordingly, the Tribe fails to show the NUREG's language demonstrates error in the Board's ruling on Contention 7.

Finally, the Tribe cites the D.C. Circuit's waste confidence decision in *New York v. NRC*, 681 F.3d 471 (2012).¹³ The Tribe argues that, as in *New York v. NRC*, the Staff has unreasonably assumed there will be a site available to dispose of the Dewey-Burdock Project's byproduct material. The differences between the two cases are, however, significant. Unlike in *New York v. NRC*, there is a long history of disposal sites accepting byproduct material from ISR facilities.¹⁴ Furthermore, Powertech's license includes a condition requiring it to have a disposal plan in place before beginning operations.¹⁵ In other words, unlike in *New York v. NRC*, there are currently disposal options available for the Dewey-Burdock Project, and

¹¹ Ex. NRC-008-A-2 at 591–92, 627–28.

¹² For the Dewey-Burdock application, as for other ISR applications, the Staff has imposed a license condition requiring Powertech to finalize a disposal agreement before it begins ISR operations. Ex. NRC-012 at 12 (License Condition 12.6). This license condition achieves the same result as the language in NUREG-1569, because it ensures the licensee will not begin generating byproduct material until it has an agreement to dispose of that material.

¹³ Petition at 5–6.

¹⁴ Ex. NRC-010-B-2 at 487–88.

¹⁵ Ex. NRC-012 at 12.

Powertech cannot begin operating the Project unless such options remain available.

Accordingly, *New York v. NRC* does support the Tribe's argument that the Staff needed to analyze impacts related to a lack of disposal sites, and it does not call into question the Board's ruling on Contention 7.

In conclusion, because the Tribe does not identify any error of law or abuse of discretion in the Board's ruling, the Commission should decline review of Contention 7. *Crow Butte North Trend*, CLI-09-12, 69 NRC at 543; *Shieldalloy*, CLI-07-20, 65 NRC at 503–05.

B. Contention 8 (Environmental Scoping)

In Contention 8, the Tribe argued that the Staff violated NEPA and 10 C.F.R. Part 51 by not conducting a full environmental scoping process for the Dewey-Burdock application.

The Board found that, because the Dewey-Burdock SEIS is a supplement to the GEIS for ISR applications, it qualifies for the exception in 10 C.F.R. § 51.26(d) and § 51.92(d). LBP-13-9 at 46. Under this exception, the Staff need not conduct scoping when preparing an EIS supplement.

The Tribe argues that the Dewey-Burdock SEIS is not a true "supplement" to the GEIS, but simply a document that tiers off the GEIS.¹⁶ Because the Dewey-Burdock EIS is not a supplement to the GEIS, the Tribe argues, the Board erroneously found that the exception in 10 C.F.R. § 51.26(d) and § 51.92(d) applies to the Staff's NEPA review. The Tribe argues that because this exception does not apply, the Staff needed to conduct a full scoping process for the Dewey-Burdock FSEIS, including the preparation of a scoping summary report, which is required by 10 C.F.R. § 51.29(b). In support of its arguments the Tribe cites the August 2013

¹⁶ Petition at 7–8. "Tiering" is a practice by which an agency may eliminate discussions of issues that have been addressed in other NEPA documents. 10 C.F.R. Part 51, Appendix A, Footnote 1. "Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." *Id.* (citing 40 C.F.R. § 1508.28).

report of the NRC's Office of the Inspector General (OIG), which included findings that largely correspond to the Tribe's arguments.¹⁷

The Tribe fails to show there is a substantial question regarding the Board's ruling or any other basis for granting review under 10 C.F.R. § 2.341(b)(4). The Tribe presents a false choice when it argues that, because the Dewey-Burdock EIS tiers off the GEIS, it cannot also be a supplement to the GEIS.¹⁸ Neither the regulations of the Council on Environmental Quality (CEQ) nor the NRC's regulations in 10 C.F.R. Part 51 state that an EIS supplement cannot tier off another document. To the contrary, the CEQ's regulations acknowledge that an EIS supplement may tier off an EIS.¹⁹ Furthermore, while the Tribe argues that 10 C.F.R. § 51.92 "only allows site specific 'supplements' to a site specific EIS," not a GEIS, this regulation imposes no such limitation. Finally, the Tribe does not cite any federal court precedent supporting its argument that, in order for a document to be considered an EIS supplement, it cannot tier off another document.

The Tribe also argues that the Staff's failure to conduct scoping for the Dewey-Burdock Project denied the Tribe the opportunity to present its concerns about the Project.²⁰ In fact, the Tribe had ample opportunity to present its concerns. Although the Staff did not conduct a full scoping process when preparing the Dewey-Burdock FSEIS, it nonetheless invited the Tribe's input at an early stage in the document's development. In late 2009, the Staff proposed a meeting with the Oglala Sioux Tribe to discuss the Dewey-Burdock Project, a meeting the Tribe

¹⁷ Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements (ADAMS Accession No. ML13232A192) (August 20, 2013) at 17–26.

¹⁸ The Staff's response to OIG's draft findings on this issue can be found at pages 38–41 of the OIG's August 20, 2013 report.

¹⁹ 40 C.F.R. § 1508.28(b). Although the NRC is not bound by CEQ regulations it has not expressly adopted, it nonetheless defers to these regulations in appropriate cases. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61 (1991).

²⁰ Petition at 8.

was unable to attend.²¹ In early 2010, the Staff placed advertisements in six newspapers with circulation in the Dewey-Burdock area, including the Lakota Country Times and the Native Sun, inviting the public to comment on the Dewey-Burdock Project.²² When the Staff issued the DSEIS for public comment in November 2012, it accepted all comments received within a 99-day period, not just those comments received within the typical, 45-day comment period for a draft EIS.²³ The Staff also posted its analysis of tribal field survey results on the NRC's public webpage for the Dewey-Burdock Project, inviting both tribes and the general public to comment on its analysis.²⁴

In addition, the Staff conducted a full scoping process when preparing the GEIS for ISR applications. In the GEIS the Staff considered the need for, and the environmental impacts of, ISR facilities in four geographic areas. One of these areas is the Nebraska-South Dakota-Wyoming area, where the Dewey-Burdock facility will be located.²⁵ The Staff also focused its review on even narrower geographic areas, however, and it considered specific features of the Black Hills area, in which the Dewey-Burdock site lies. The Staff identified the prospective Dewey-Burdock facility in numerous maps and figures within the GEIS, and it explained that the GEIS would serve as part of the Staff's analysis for its review of the Dewey-Burdock application. The Staff held three public scoping meetings for the GEIS, and it provided a 103-day period for public comments on the draft version of the GEIS. In addition, during the public comment period the Staff held eight public meetings near sites for which the Staff anticipated receiving ISR applications. The Staff held three meetings in the Nebraska-South Dakota-Wyoming area,

²¹ Hearing Transcript at 771, lines 1–7; Ex. NRC-015 at 1.

²² Ex. NRC-008-A-1 at 63–64.

²³ Ex. NRC-008-B-2 at 376.

²⁴ In addition, the Staff mailed the survey results directly to the Oglala Sioux Tribe and other tribes, specifically requesting their input on the results. Ex. NRC-015 at 15.

²⁵ The “Wyoming-South Dakota-Nebraska” area refers to the area at the junction of these states; it does not refer to the entirety of the three states, as reflected by the fact that two of the other areas addressed in the GEIS are “Wyoming West” and “Wyoming East.”

including meetings in Newcastle, Wyoming, which is approximately 30 miles from the Dewey-Burdock site, and Chadron, Nebraska, which is approximately 50 miles from the Oglala's Sioux Tribe's Pine Ridge Reservation.

In sum, the Dewey-Burdock EIS is properly considered a supplement to the GEIS, and the Staff repeatedly sought both the Tribe's and the general public's input when preparing the GEIS and Dewey-Burdock FSEIS. The Tribe therefore does not show that the Board's ruling on Contention 8 is erroneous, nor does it raise a substantial question regarding the ruling.

C. New Contention 1 (Borehole Data)

The Tribe argues that the Board incorrectly rejected New Contention 1, which the Tribe filed based on Powertech's disclosure of additional borehole data after the oral hearing.²⁶ According to the Tribe, these data support its position that there are numerous pathways by which ISR solutions could migrate out of the production zones at the Dewey-Burdock Project, and which the Staff did not adequately consider in the FSEIS. The Tribe also argues that, in rejecting its contention, the Board improperly ruled on the merits of the contention, rather than simply on whether the contention was admissible.

The Tribe fails to show there is any issue warranting Commission review. Contrary to the Tribe's arguments, the Board applied the correct standard for determining whether New Contention 1 was admissible. In particular, the Board found that the Tribe's contention failed to meet 10 C.F.R. § 2.309(c)(2) because it relied on information that was not materially different from information already in the record. LBP-15-16 at 107. The Board also found that the Tribe's contention failed to meet 10 C.F.R. § 2.309(f)(1)(vi) because it did not raise a genuine dispute concerning the adequacy of the Staff's review. *Id.* Although the Board also stated that the new borehole data "did not 'paint a seriously different picture of the environmental landscape,'" language which in the Tribe's view reflects a merits determination, in context it is clear that the Board simply found the Tribe failed to raise a genuine issue as to whether this was

²⁶ Petition at 8–10.

the case. *Id.* at 108 (citation omitted). In fact, in the very next sentence the Board cites the contention admissibility standard at section 2.309(f)(1)(vi). *Id.*

The Tribe also argues that in ruling on New Contention 1 the Board incorrectly rejected its arguments challenging the “random ‘spot-check’ methodology” the Staff used to evaluate the new borehole data. As the Board’s decision reflects, however, the Staff did not conduct a “random spot-check” of these borehole logs. Because of the large number of logs available, the Staff “review[ed] *representative* borehole logs” in areas relevant to the issues raised in the Intervenor’s contentions. LBP-15-16 at 108 (emphasis added). As the Staff’s expert witnesses explained, this allowed them to assess both statements Powertech made in support of its application and claims the Intervenor had made during the hearing.²⁷ Furthermore, although the Tribe states that it did not previously understand the Staff’s approach to involve reviewing representative logs, rather than every available log, it fails to show that information about the Staff’s review methodology was previously unavailable. The Tribe had ample opportunity to challenge the Staff’s review methodology during the hearing, including the opportunity to propose questions for the Staff’s witnesses on this issue. Accordingly, the Tribe’s arguments do not call into question the Board’s finding that the Staff’s approach had not changed materially over the course of the hearing, rendering New Contention 1 inadmissible under 10 C.F.R. § 2.309(f)(1)(vi).

Because the Tribe does not show any error in the Board’s ruling on New Contention 1, the Commission should decline review of the Board’s decision regarding the contention. See *Crow Butte North Trend*, CLI-09-12, 69 NRC at 543 (holding that the Commission defers to the Board’s contention admissibility rulings unless the appeal identifies an “error of law or abuse of discretion”).

²⁷ Ex. NRC-175 at A23, A24.

D. New Contention 2 (Sufficiency of Data on Groundwater Pathways)

The Tribe argues that the Board erred by not admitting New Contention 2, where it claimed that the Staff failed to consider a new groundwater contamination pathway identified for the first time in a Preliminary Assessment that the U.S. Environmental Protection Agency (EPA) released in September 2014, eight months after the Staff issued the FSEIS.²⁸ The Tribe argues that the Board “simply glossed over th[e] critical issue” of a new contamination pathway, dismissing its contention based on Staff testimony that did not discuss the specific issues it raised.²⁹

The Tribe fails to show that the Commission should review the Board’s ruling. As the Board explains in its decision, the FSEIS refers to the same key information contained in the EPA’s Preliminary Assessment regarding potential contamination pathways. LBP-15-16 at 109. In fact, the EPA acknowledges that the Staff presented this information in the FSEIS, and the EPA refers to the Staff’s conclusions throughout the Preliminary Assessment. *Id.* The Preliminary Assessment is, in any event, just what its title states—a *preliminary* review of possible contamination pathways in the Dewey-Burdock area—and the EPA does not reach any conclusions that could give rise to a dispute with the FSEIS. Accordingly, the Board properly rejected the Tribe’s contention for failing to identify a genuine dispute with the FSEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi).

The Board’s ruling on New Contention 2 is also correct because the Tribe failed to show its contention should be admitted under the legal standard applying to supplementation of an EIS. Because the EPA did not issue the Preliminary Assessment until eight months after the Staff released the FSEIS, the Tribe needed to show there was a genuine issue as to whether the Assessment “paint[ed] a seriously different picture of the environmental landscape” than that

²⁸ Petition at 10–11.

²⁹ *Id.* at 11.

presented in the FSEIS or suggested there may be impacts affecting “the quality of the human environment in a significant manner or to a significant extent not already considered” in the FSEIS. See *Hydro Resources, Inc.* (Crownpoint, NM), LBP-04-23, 60 NRC 441, 447–48 (2004) (addressing when the Staff must prepare an EIS supplement and explaining that a supplement is not required “every time new information comes to light”).³⁰ The Tribe, however, did not identify any conclusions in the FSEIS that are called into question by the Preliminary Assessment. Accordingly, the Board’s finding that New Contention 2 did not satisfy 10 C.F.R. § 2.309(f)(1)(vi) is correct.

In conclusion, the Commission should decline to review the Board’s ruling on New Contention 2.

E. Contentions 1A and 1B (Cultural Resources)

In Contention 1A the Board found that the Staff complied with the NHPA, but not with NEPA, when evaluating impacts to cultural and religious properties of the Sioux tribes. LBP-15-16 at 40. In Contention 1B the Board found that the Staff failed to consult with the Oglala Sioux Tribe as required under the NHPA. *Id.* at 42. The Tribe does not challenge the Board’s rulings on these issues. Rather, the Tribe argues that based on its findings the Board should have vacated the Record of Decision for the Dewey-Burdock application and suspended Powertech’s NRC license.³¹ The Tribe argues that these actions are consistent with the NHPA and NEPA, which require that an agency comply with the statutes’ requirements before taking action. The Tribe also argues that these actions are consistent with federal court practice because, upon finding a NEPA violation, a federal court will vacate the agency’s decision and remand the matter to the agency for further proceedings.

The Tribe does not show that there is an issue warranting Commission review.

³⁰ Citing *Hydro Resources, Inc.* (Albuquerque, NM), CLI-99-22, 50 NRC 3, 14 (1999).

³¹ Petition at 18–19.

If the Board's ruling on Contention 1A or 1B stands, the Staff will need to take additional action, and it will likely supplement the Record of Decision. This does not mean, however, that the current Record of Decision must be vacated. In fact, vacating the Record of Decision would involve vacating the Board's decision itself, which is part of the NRC's Record of Decision for the Dewey-Burdock licensing action.³² Nor has the Tribe shown that federal case law requires the Commission to vacate the Record of Decision. The case the Tribe cites on page 19 of its petition, *New York v. NRC*, refers only to the actions a court itself may take; it does not address what approach may be required under an agency's internal procedures.³³

The Tribe also fails to show there is a substantial question about whether Powertech's license should be suspended. The Board in fact invited the Tribe to file a motion to stay the effectiveness of Powertech's license based on harm to cultural, historic, or religious sites. LBP-15-16 at 44–45. The Tribe did not, however, file a motion within the 10 days allotted by the Board. Furthermore, contrary to the Tribe's suggestion, the federal courts do not routinely enjoin either an agency from proceeding with its proposed action, or a private applicant from using its license, based on a NEPA violation alone. See, e.g., *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) (remanding for further proceedings consistent with the court's opinion but not imposing any conditions on NRC licensing actions). Rather, the courts ordinarily take such action only in circumstances that are functionally equivalent to those which would support a stay under 10 C.F.R. § 2.1213, which the Tribe declined to seek here. See *Half Moon Bay Fishermans' Marketing Ass'n. v. Carlucci*, 857 F.2d 505, 507 (9th Cir. 1988) (discussing criteria for granting a preliminary injunction based on an alleged NEPA violation).

³² *Indian Point*, CLI-15-6, 81 NRC at ___ (slip op. at 62); *Philadelphia Electric Co.* (Limerick Generating Company, Units 1 and 2), ALAB-819, 22 NRC 681, 706 (1985), aff'd in part, CLI-86-5, 23 NRC 125 (1986), remanded in part on other grounds, *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (1989)).

³³ 681 F.3d at 476.

In conclusion, the Tribe does not identify any issue related to Contention 1A or 1B meriting Commission review.

F. Contention 2 (Baseline Groundwater Quality)

For Contention 2, the Board rejected the Tribe's argument that the FSEIS inadequately characterizes baseline water quality in the Dewey-Burdock area. The Tribe argues that the Commission should review the Board's decision because the Board "improperly endors[ed] the concept that baseline water quality can be established by 'collection of groundwater quality in a staggered matter' after the licensing process is completed and outside of the NEPA review."³⁴ The Tribe also argues that the Board erred by finding that, when evaluating baseline water quality, the Staff did not need to account for contamination from past mining activity in the Dewey-Burdock area.³⁵ The Tribe further argues that the EPA's Preliminary Assessment, the basis for New Contention 2, likewise shows deficiencies in the Staff's analysis of baseline water quality, and that the Board failed to give appropriate weight to the Assessment.³⁶ Finally, the Tribe argues that the Board improperly excused the Staff's reliance on NRC Regulatory Guide 4.14 when evaluating baseline water quality. According to the Tribe, Regulatory Guide 4.14 is both "outdated" and applicable only to conventional uranium mining, not the ISR activities proposed by Powertech.³⁷

The Tribe fails to show that the Commission should grant review on any of these issues. The Tribe's first argument seeks to relitigate an issue the Commission rejected in *Hydro Resources Inc.* (Crownpoint, NM), CLI-06-01, 63 NRC 1 (2006). In *Hydro Resources*, the Intervenor challenged the Staff's use of license conditions to gather certain data relevant to

³⁴ Petition at 20 (quoting LBP-15-16 at 54).

³⁵ Petition at 20.

³⁶ *Id.*

³⁷ Petition at 20–21.

establishing groundwater quality standards and upper control limits for detecting potential groundwater contamination. The Intervenor argued that both NEPA and Criterion 7 in Appendix A of 10 C.F.R. Part 40 require the Staff to gather these data at the pre-license stage.³⁸ The Commission rejected this argument, explaining:

Waiting until after licensing (although before mining operations begin) to establish definitively the groundwater quality baselines and upper control limits is, as the Presiding Officer stated, “consistent with industry practice and NRC methodology,” given the sequential development of in situ leach well fields. The site-specific data to confirm proper baseline quality values, and confirm whether existing rock units provide adequate confinement cannot be collected until an *in situ* leach well field has been installed, a point described by the NRC staff’s expert.

Hydro Resources, Inc., CLI-06-01, 63 NRC at 5–6. In the present case, the Board cited this very language from *Hydro Resources* and found that it disposed of the Tribe’s arguments. LBP-15-16 at 53 (quoting CLI-06-01, 63 NRC at 5–6). The Tribe argues that *Hydro Resources* is distinguishable from the present case because it addressed only “confirmatory” data, implying that the Staff’s data collection methods related to the Dewey-Burdock application differed from those in *Hydro Resources*.³⁹ The Tribe provides no support for this argument, however, and therefore provides no basis for finding that the Board applied *Hydro Resources* incorrectly when ruling against the Tribe.

The Tribe also fails to show there is a substantial question regarding the Board’s finding that, when evaluating baseline water quality, the Staff did not need to account for contamination from past mining activity in the Dewey-Burdock area. As the hearing record demonstrates, the Staff did, in fact, evaluate how contamination from past mining activity may affect water quality in the Dewey-Burdock area. The Staff’s evaluation can be found in FSEIS Chapter 5,

³⁸ Under Criterion 7, “At least one full year prior to any major site construction, a preoperational monitoring program must be conducted to provide complete baseline data on a milling site and its environs.”

³⁹ Petition at 20.

“Cumulative Impacts.”⁴⁰ The Staff did not repeat this information in FSEIS sections addressing baseline water quality because these sections focused on baseline conditions for the Dewey-Burdock Project, not baseline conditions as they existed prior to earlier projects in the Dewey-Burdock area.⁴¹

The Tribe’s arguments based on the EPA’s Preliminary Assessment likewise fail to show any error in the Board’s ruling. As the Board explains in its decision, the Preliminary Assessment focuses on the EPA’s potential obligations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). LBP-15-16 at 55. To better define its potential obligations under CERCLA, the EPA must consider how past mining activities may have contributed to current baseline groundwater conditions in the Dewey-Burdock area. The Staff’s focus under the NRC’s regulations and NEPA, on the other hand, is on determining *current* baseline conditions so that it can evaluate the impacts—direct, indirect, and cumulative—of the Dewey-Burdock Project. The Preliminary Assessment, which states that the EPA intends to gather more data in certain areas, therefore does not call into question the Staff’s analysis in the FSEIS.

Finally, the Tribe fails to show Commission review is warranted because the Staff referred to Regulatory Guide 4.14 when explaining why the FSEIS used a two-kilometer radius for gathering sampling data on groundwater quality in the Dewey-Burdock area. The Board in fact agreed with the Tribe that Regulatory Guide 4.14 did not provide a sufficient basis for using a two-kilometer radius for sampling data. LBP-15-16 at 52. The Board nonetheless found that the two-kilometer radius was justified, citing Staff testimony regarding historical and current monitoring data from NRC-licensed sites. *Id.* at 53. In other words, the Tribe fails to identify

⁴⁰ In particular, in Section 5.5.2 the Staff discusses cumulative impacts to groundwater resources. Ex. NRC-008-A-2 at 598–603.

⁴¹ See Ex. NRC-001 at A2.4 (explaining how the Staff addressed impacts from prior mining activity), A2.6(1) (same); Ex. NRC-151 at A2.1 (same).

any error in the Board's decision, because Regulatory Guide 4.14 did not form the basis for the Board's ruling.

In conclusion, the Tribe fails to identify any "clear error" in the Board's ruling on Contention 2. The Commission should therefore decline review of the Board's decision on this contention. See *Private Fuel Storage*, CLI-03-8, 58 NRC at 26–27 (explaining that the Commission's standard of "clear error" for overturning a Board's factual findings is high, particularly where the Board made detailed factual findings based on expert witness testimony).

G. Contention 3 (Hydrogeological Confinement)

The Tribe argues that the Board erred in finding that the Staff adequately characterized the hydrogeological conditions in the Dewey-Burdock area.⁴² In particular, the Tribe argues that the Board "acknowledge[d] 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."⁴³ The Tribe acknowledges that the Board added a condition to Powertech's license addressing abandoned boreholes, but it claims the condition is inadequate because it simply requires Powertech to "attempt" to locate abandoned boreholes that could affect the containment of ISR solutions.⁴⁴ The Tribe also argues that the Board incorrectly affirmed the Staff's analysis in the FSEIS despite finding that the Staff overlooked evidence of faults and fractures at the Dewey-Burdock site.⁴⁵ In addition, the Tribe argues that the Board improperly assigned it the burden of proving whether faults are present in the Dewey-Burdock area.⁴⁶

None of the Tribe's arguments raises a substantial question warranting Commission review. During the hearing the Board considered extensive evidence from all parties on

⁴² Petition at 22–23.

⁴³ *Id.* at 22.

⁴⁴ *Id.*

⁴⁵ *Id.* at 23.

⁴⁶ *Id.*

hydrogeological features that could potentially affect the containment of ISR solutions. The Board considered the parties' prefiled testimony and exhibits, their testimony during the oral portion of the hearing, and post-hearing testimony and exhibits concerning additional borehole data that Powertech obtained after the Staff had finalized the FSEIS. At bottom, the Tribe simply challenges the Board's findings of fact regarding certain hydrogeological issues. The general principle that the Commission defers to the Board's findings of fact is particularly apt here, where the Board made its findings after a lengthy hearing involving complex evidence on site-specific issues. *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC at 45–46 (where the Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed). Accordingly, the Tribe fails to show that the Commission should review the Board's rulings on Contention 3.

More specifically, the Tribe incorrectly states that the Staff presented “no analysis” on how abandoned boreholes might allow ISR solutions to migrate away from the Dewey-Burdock production zones. In fact, the Staff discussed this issue at length in both its testimony and in the FSEIS and Safety Evaluation Report (SER) for the Dewey-Burdock application.⁴⁷ The Staff recognized that boreholes may provide pathways through which ISR solutions could migrate out of the production zones, and it imposed measures to avoid such events.⁴⁸ In particular, the Staff obtained Powertech's commitment to locate and plug any improperly abandoned

⁴⁷ *See, e.g.*, Ex. NRC-001 at A3.5, A3.8, A3.16, A3.24, A3.27; Ex. NRC-151 at A3.4, A3.5, A3.9, A3.11, A3.12. Moreover, contrary to the Tribe's claim on page 22 of its petition, the Board did not find that the Staff presented “no analysis” on whether historical boreholes might allow ISR solutions to migrate away from production zones at the Dewey-Burdock Project. *See* LBP-15-16 at 66–68 (summarizing evidence on boreholes), 72–73 (ruling on this evidence).

⁴⁸ *E.g.*, Ex. NRC-135 at 27–28, 49–52, 181–83, 200–01; Ex. NRC-008-A-1 at 112, 192; Ex. NRC-008-A-2 at 351, 369–70; Hearing Transcript at 1057–58.

boreholes that could affect the containment of ISR solutions.⁴⁹ Powertech's commitment is captured by Condition 9.2 in its license, making the commitment legally enforceable.⁵⁰ In brief, the Tribe wrongly states that the Staff failed to analyze impacts potentially related to abandoned boreholes. The Staff considered this issue thoroughly in the FSEIS and SER, and the Board correctly found that the Staff complied with NEPA.

The Tribe also incorrectly states that the Board "found the evidence demonstrates faults and fractures do exist at the [Dewey-Burdock] site." Petition at 23. The Board actually found only that "small faults and joints *may be* present in the project area[.]" LBP-15-16 at 71 (emphasis added). More importantly, the Board found that, even if such features are present, "their presence does not support Intervenors' assertions that such faults produced significant offsets, much less that such faults and joints provide pathways for groundwater to migrate between aquifers." *Id.* In other words, the Board found that, to the extent small faults and joints exist, they do not call into question the Staff's analysis in the FSEIS.

Finally, there is no merit to the Tribe's claim that the Board assigned it the burden of proving whether faults are present in the Dewey-Burdock area. *Id.* The Staff submitted extensive evidence on this issue.⁵¹ After reviewing this evidence and the other parties' submissions, the Board reasonably concluded that there are no major faults in the area and that, even if there are small faults, this will not affect the containment of ISR solutions. LBP-15-16 at 71. The Board, in other words, did not shift the burden of proof to the Tribe; it simply found that the evidence as a whole supports the Staff's analysis in the FSEIS. The Tribe therefore fails to show there is any legal issue requiring Commission review.

⁴⁹ The Staff found that the environmental impact of excursions involving ISR solutions would be "SMALL" based in part on Powertech's commitment to locate, plug, and properly abandon boreholes that could affect the containment of these solutions. Ex. NRC-008-A-2 at 371.

⁵⁰ Ex. NRC-012 at 1.

⁵¹ *E.g.*, Ex. NRC-001 at A3.1, A3.8, A3.19, A3.25; Ex. NRC-151 at A3.5, A3.6, A3.10; Ex. NRC-175 at A8, A9, A16, A17.

In sum, the Board's ruling on Contention 3 rests on carefully made factual findings that the Board reached after reviewing an extensive record in detail. Under these circumstances, the Commission should decline to review the Board's ruling. *Hydro Resources, Inc.*, CLI-01-4, 53 NRC at 45–46. See also *Geisen*, CLI-10-23, 72 NRC at 241 (holding that the Board's decision to assign more weight to one party's evidence than to another party's evidence is not a basis for overturning the Board's decision).

H. Contention 6 (Mitigation Measures)

The Tribe argues that the Board erred in finding that the Staff adequately considered measures that could be used to mitigate the environmental impacts of the Dewey-Burdock Project.⁵² The Tribe first argues that the Programmatic Agreement for the Dewey-Burdock Project does not include specific measures for mitigating impacts to cultural resources, and that the Board erred by relying on the Agreement to find that the Staff adequately considered mitigation measures. The Tribe also argues that the Board's ruling on Contention 6 conflicts with its ruling under Contention 1A, where the Board found that the Staff violated NEPA because it had not developed mitigation measures for Sioux cultural resources. Finally, the Tribe claims the Board ignored its argument that, rather than identifying specific mitigation measures in the FSEIS, the Staff relied on yet-to-be-developed measures in numerous areas, including wildlife protection, wellfield testing, land application of wastewater, and borehole plugging and abandonment.

Regarding the Tribe's first argument, the Programmatic Agreement does, in fact, contain mitigation measures.⁵³ While the Programmatic Agreement also establishes a process for developing additional mitigation measures in certain areas, the Tribe inaccurately states that the

⁵² Petition at 23–25.

⁵³ See, e.g., Ex. NRC-018-A at 5 (requiring Powertech to protect all unevaluated properties until National Register-eligibility determinations are completed), 10 (requiring Powertech to halt ground-disturbing activities within a 150-foot area and take numerous additional steps if a previously unknown cultural resource is discovered during the implementation of the Dewey-Burdock Project).

Agreement lacks specific mitigation measures. In any event, as the Board correctly found, under NRC and federal court precedent an EIS “need not . . . contain a complete mitigation plan,” and a “mitigation plan ‘need not be . . . in final form to comply with NEPA’s procedural requirements.’” LBP-15-16 at 93 (citing *Hydro Resources, Inc.* (Crownpoint, NM), CLI-06-29, 64 NRC 417, 427 (2006)). Furthermore, although the Tribe focuses on the Programmatic Agreement, it neglects to mention that the FSEIS itself lists measures for mitigating impacts to cultural resources.⁵⁴ In other words, the record well supports the Board’s finding that the Staff adequately considered measures for mitigating impacts to cultural resources.

As for the Tribe’s second argument, the Staff agrees that the Board’s rulings on Contention 1A and Contention 6 appear to be inconsistent. For reasons stated in the Staff’s petition for review, however, the Commission should reverse the Board’s ruling under Contention 1A and find that the Staff fully complied with NEPA by evaluating cultural resources and developing appropriate mitigation measures.⁵⁵ To the extent the Commission reverses the Board’s ruling on Contention 1A, it would resolve the inconsistency between Contention 1 and Contention 6, removing the need to take any action regarding the latter contention.

Finally, the Tribe fails to show that the Board erred by rejecting its argument that the Staff inadequately considered mitigation measures in numerous other areas. After considering extensive testimony on mitigation measures, the Board stated:

The Board also finds that the other mitigation measures designated in the FSEIS for post-licensing development, including monitoring well networks, historical well hole plugging, and wildlife protections and monitoring, have been adequately explained and satisfy NEPA requirements.

LBP-15-16 at 93. In objecting to the Board’s finding, the Tribe simply renews its argument that NEPA required the Staff to develop complete mitigation measures in each of the resource areas the Tribe identifies. The Board, however, correctly found that in appropriate circumstances an

⁵⁴ Ex. NRC-008-A-2 at 466–86. The Staff’s mitigation recommendations appear in the far-right columns of Tables 4.9-1 through 4.9-6.

⁵⁵ Staff’s Petition for Review at 17–22.

agency may rely on draft mitigation plans, and that in this particular case the Staff discussed mitigation measures in sufficient detail to comply with NEPA. *Id.*

Because the Tribe does not show that the Board erred in ruling on Contention 6, the Commission should decline review of the contention. *Private Fuel Storage*, CLI-03-8, 58 NRC at 26–27.

III. Conclusion

The Tribe does not identify any legal or factual error in the Board's decision warranting review under 10 C.F.R. § 2.341(b)(4). Accordingly, the Commission should deny the Tribe's petition for review.

Respectfully submitted,

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Dated at Rockville, Maryland
this 22nd day of June 2015

June 22, 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

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the "NRC Staff's Response to the Oglala Sioux Tribe's Petition for Review of LBP-15-16" via the NRC's Electronic Information Exchange (EIE) on June 22, 2015. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on June 22, 2015.

***/Signed (electronically) by/
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