UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OGLALA SIOUX TRIBE,	)	
	)	
Petitioner,	)	**No. 17-1059**
	)	
v.	)	
	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

FEDERAL RESPONDENTS' MOTION TO DISMISS

The U.S. Nuclear Regulatory Commission (NRC) and the United States of America (together, Federal Respondents) hereby move for dismissal of this petition for review for lack of jurisdiction.

Pursuant to the pertinent jurisdictional provision of the Hobbs Act, 28 U.S.C. § 2342(4), there must be a "final order" issued by the agency before this Court can exercise jurisdiction. Once a final order issues, a 60-day window opens in which petitions for review may be filed. Petitions filed before the 60-day window has opened are incurably premature and must be dismissed for lack of jurisdiction.

In this case, the NRC has expressly *not* finally decided all of the issues that Petitioner, the Oglala Sioux Tribe, raised in the NRC adjudicatory proceeding and that are now the subject of the Tribe's petition for review. In fact, the latest determination by the Commission on these issues is that some of the Tribe's concerns *have merit* and that the NRC staff accordingly needs to do additional work before the Tribe's adjudicatory claims can be resolved. The most recent Commission order in the proceeding thus directed "that the proceeding remain open" to allow this additional work to occur, after which final actions could potentially be taken to disposition the Tribe's claims. Currently, the proceeding remains open, and there has been no final disposition of the Tribe's claims.

Because the NRC proceeding for which review is sought was still open on the date the Tribe filed its petition in this Court and remains open today, there is not yet a "final order" reviewable under the Hobbs Act. When the NRC does finally dispose of the Tribe's remaining adjudicatory claims, the Tribe will be free at that time to file a petition for review within 60 days of the NRC's final order, should it choose to do so. Such petition for review could address any aspect of the NRC action with which the Tribe disagrees, including both the adjudicatory claims still unresolved today and those that have already been resolved. The petition for review the Tribe has filed here, however, is incurably premature. It must be

dismissed, without prejudice to any future petition for review that the Tribe may ultimately file.

BACKGROUND

Although the NRC adjudicatory proceeding at issue here is factually complex, involves a number of different claims, and has been ongoing for many years, the facts demonstrating its lack of finality are straightforward.

The NRC adjudicatory proceeding involves a license application filed by Powertech (USA), Inc. for its proposed Dewey-Burdock *in situ* uranium recovery facility in South Dakota's Custer and Fall River Counties.[1] The Tribe petitioned to intervene in the NRC licensing proceeding for this proposed facility, and the agency's Atomic Safety and Licensing Board (Board) granted the Tribe's petition, admitting the Tribe as a party to the proceeding.[2] In the proceeding before the Board, the Tribe raised a variety of claims—referred to in NRC proceedings as "contentions"—challenging various aspects of the review the NRC has performed to support its licensing decision.[3] Among the Tribe's contentions that the Board

---

[1] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20 (2016), 84 NRC __, Slip. Op. at 3 (Exhibit A).

[2] *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 2015 WL 7444635, 81 NRC 618, 629 (2015). The NRC Issuances volume containing the decision is available via the NRC public website at https://www.nrc.gov/docs/ML1634/ML16343B040.pdf.

[3] *See* Exh. A at 3-5.

accepted for adjudication in the proceeding were (1) a contention claiming that the NRC staff's analysis of cultural, historical, and religious resource impacts under the National Environmental Policy Act (NEPA) was insufficient to comply with that statute; and (2) a related contention by the Tribe claiming that the NRC staff had not engaged in sufficient National Historic Preservation Act (NHPA) consultation with the Tribe regarding these potential impacts.[4] These contentions were referred to in the proceedings as Contentions 1A and 1B, respectively.

Although the NRC staff issued the applied-for license to Powertech in 2014, while the contested adjudication was still ongoing,[5] NRC procedures allow for adjudication of contentions to proceed even after a license of the type at issue here has been granted. Such proceedings can potentially result in modification or revocation of the already-issued license.[6] NRC regulations also allow an

---

[4] LBP-15-16, 81 NRC 642-57 (discussing Tribe contentions "1A" and "1B"); *see also* Exh. A at 31-32. The Board also accepted for adjudication other Tribe contentions alleging different NEPA-compliance issues, and a separate group of intervenors—referred to in the NRC decisions as the "Consolidated Intervenors"—also participated in the proceeding. *See* LBP-15-16, 81 NRC at 628-30; 659-705.

[5] Exh. A at 4.

[6] *See* LBP-15-16, 81 NRC at 638 n.104; 10 C.F.R. § 2.1202(a). If issuing a license with a contested adjudication still pending, the NRC staff must file a notice explaining to the presiding officer and the parties why, in the NRC staff's view, "the public health and safety is protected and . . . the action is in accord with the common defense and security despite the pendency of the contested matter." 10 C.F.R. § 2.1202(a).

intervenor in the contested adjudication to request a stay of the license pending the outcome of the adjudication. *See* 10 C.F.R. § 2.1213 (allowing for stays in 10 C.F.R. Part 2, Subpart L proceedings, which includes the Powertech proceeding). Although the Tribe requested a stay, the Board denied the stay request based on Powertech's representations—which the Tribe did not dispute—that staying the license pending the adjudication would not actually prevent the potential near-term cultural-resource harms of concern to the Tribe.[7]

The Board held an evidentiary hearing on a number of the Tribe's contentions, and it subsequently issued a "Partial Initial Decision" on April 30, 2015. That decision resolved most, but not all, of the contentions in the proceeding.[8] Specifically, the contentions left unresolved were the Tribe's NHPA contention and its related NEPA contention. The Board determined in its Partial Initial Decision that the NRC staff had not made sufficient efforts to consult with the Tribe, thereby failing to satisfy a statutory obligation under the NHPA; relatedly, the Board also found insufficient the NRC Staff's analysis of cultural, religious, and historical resource impacts under NEPA.[9] Based on these findings,

---

[7] Order (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600) (May 20, 2014) at 6-8 (Exhibit B).

[8] LBP-15-16, 81 NRC 618.

[9] *Id.* at 653-57. What we refer to here as the Tribe's NEPA contention (Contention 1A) originally raised an NHPA-compliance issue as well. But the Board ruled in

the Board announced in the Partial Initial Decision that it would "retain[] jurisdiction over the final resolution of" the Tribe's NHPA and associated NEPA contentions and ordered the NRC staff to (1) take steps to remedy the identified deficiencies; (2) file monthly status reports with the Board; and (3) upon the completion of these additional steps, submit "an agreement reflecting the parties' settlement . . . or a motion for summary disposition" regarding these remaining contentions.[10]

The Tribe, the NRC staff, and Powertech appealed various aspects of the Board's decision to the Commission, the collegial body of NRC Commissioners that generally serves as the appellate authority in NRC adjudications.[11] On December 23, 2016, the Commission issued a decision upholding the Board's various contention-dismissal determinations as well as the Board's decision to

---

the NRC staff's favor on that specific NHPA-compliance issue, leaving the NEPA-compliance issue as the only still-pending element of that contention. What we refer to here as the Tribe's NHPA contention (Contention 1B) raised a separate NHPA-compliance issue, and that challenge remains pending at the NRC. *See id.* at 654; *see also* Exh. A at 38-39 (explaining the distinction between the pending NHPA challenge in Contention 1B and the separate, already-resolved NHPA challenge in Contention 1A).

[10] LBP-15-16, 81 NRC at 710

[11] *See* Exh. A at 5-9 (summarizing the parties' appeals). The other intervenor group in the NRC proceeding—the "Consolidated Intervenors"—also filed an appeal, which raised some of the same challenges as the Tribe's appeal. *See id.* at 5-8.

leave the adjudicatory proceeding open with respect to the Tribe's NHPA and related NEPA contentions.[12] This Commission decision is designated CLI-16-20 and is the most recent NRC order listed in the Tribe's petition for review in this Court,[13] as well as the most recent order issued in the proceeding.

As of February 21, 2017, when the Tribe filed the instant petition for review, the adjudicatory proceeding remained open (and it remains open today). Per the Board's direction in its Partial Initial Decision, the NRC staff continues to file monthly status updates with the Board regarding the staff's efforts to address the Board-identified deficiencies associated with the Tribe's remaining contentions. As the most recent of these status updates reflects, the consultations between the NRC staff and the Tribe regarding potential cultural, religious, and historic resource impacts remain ongoing.[14]

---

[12] Exh. A.

[13] Pet. for Rev. at 2.

[14] *See* March 1, 2017, NRC Staff Status Update (Exhibit C) (citing January 31, 2017, teleconference between NRC Staff and Tribe and indicating interest in another such teleconference in April 2017); *see also* "Summary of Teleconference with the Oglala Sioux Tribe Regarding the Dewey-Burdock in Situ Uranium Recovery Project" (Jan. 31, 2017) (Exhibit D).

ARGUMENT

The "final order" requirement for jurisdiction under the Hobbs Act ensures that judicial review of an agency action will not occur until the agency has completed its own effort to address any disputed issues. Here, the NRC adjudication remains ongoing, specifically to address the Tribe's NHPA and related NEPA contentions. Therefore, there is not yet a "final order" for this Court to review, and the Court must dismiss the instant petition for review for lack of jurisdiction.

I. Dismissal is appropriate because the NRC adjudication remains open to resolve two of the Tribe's contentions and no final order has issued.

This Court's jurisdiction under the Hobbs Act is premised on the existence of a "final order." *See* 28 U.S.C. § 2342(4). This requirement is a "jurisdictional prerequisite," not "merely a prudential consideration . . . with which [a court] may dispense." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002). When an agency issues a final order, a 60-day "window" commences during which any petitions for review must be filed. *Public Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988). Review petitions filed before this 60-day window must be dismissed for lack of jurisdiction, as the jurisdictional defect cannot be cured even if the agency subsequently issues a final order. *Id.*; *see also TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133-34 (D.C. Cir. 1989).

In considering whether a particular agency order is "final," this Court has explained that "[f]inality under the Hobbs Act is to be narrowly construed." *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 28 (D.C. Cir. 2014). Whether the agency has taken the requisite "final" action for jurisdictional purposes depends on "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Adenariwo v. Federal Maritime Commission*, 808 F.3d 74, 78 (D.C. Cir. 2015). Accordingly, "[i]n an administrative adjudication, a final order typically disposes of all issues as to all parties." *CSX Transp.*, 774 F.3d at 28 (internal quotation marks omitted).

An exception to this general rule applies where the agency has denied in full an intervention petition, thereby preventing the intervention petitioner from attaining "party" status in the agency adjudicatory proceeding. *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992); *see also* 28 U.S.C. § 2344 (Hobbs Act provision allowing only a "party aggrieved" by the agency's final order to petition for judicial review). Where (as here), however, the agency grants an intervention petition, the intervenor, as a party to the agency proceeding, must wait until the agency's final order before petitioning for judicial review under the Hobbs Act,

even if the agency has already resolved some disputed issues through interlocutory orders. *Id* at 763-64.

In this case, the NRC admitted the Tribe as a party to the Powertech licensing adjudication. And while the NRC adjudicatory decisions issued to date have disposed of several the issues raised by the Tribe, they have plainly not disposed of all of those issues. The administrative decisionmaking process at the NRC is still ongoing (and it was at the time the instant petition for review was filed). Although the Board's Partial Initial Decision did find merit in the some of the contentions filed by the Tribe—specifically, finding that the NRC staff had not fulfilled its NHPA and NEPA obligations in certain respects—that finding did not end the proceeding. And neither did the Commission's decision to uphold the Board's finding on these contentions.

Instead, per the Board's order, upheld by the Commission on appeal, the proceeding remains open to give the NRC staff an opportunity to *cure* the identified problems. The NRC staff must then either (1) convince the Tribe that its curative actions have been sufficient—such that the staff could reach a settlement agreement with the Tribe that could be presented to the Board—or, if that fails, (2) convince the Board via motion for summary disposition (and potentially the Commission as well, because a party might appeal the Board's decision on such a

motion to the Commission[15]) that its curative actions have been sufficient. One plausible outcome of this NRC staff curative effort, however, could be that the NRC staff convinces *neither* the Tribe *nor* the Board (or fails to convince the Commission, in the event of an appeal) that its actions have remedied the identified deficiencies, in which case further proceedings would presumably remain necessary. Thus, while a potential path toward finality in this matter has indeed been sketched out, that path has not yet been traversed and the result remains uncertain.

Given the nature of the Tribe's contentions that remain pending at the NRC, the current lack of finality cannot seriously be disputed. The Tribe asserted in adjudicatory proceedings before the agency that the NRC staff, in its licensing process for the Powertech facility, failed to engage in sufficient consultations with the Tribe under the NHPA to identify historical properties that the project could disturb and did not sufficiently discuss historical, cultural, and religious resource impacts in its NEPA environmental analysis. If the mere agreement by the Board and the Commission with these assertions, reflected in the Partial Initial Decision and CLI-16-20, sufficed to terminate the proceeding, what would have been the point of the contested adjudication? The NHPA and NEPA compliance problems would still remain, and yet Powertech would still have its license.

[15] *See* 10 C.F.R. § 2.341.

Instead, the NRC is pursuing the logical course: leaving the adjudicatory proceeding *open* to ensure the identified problems are actually *fixed* to the Tribe's satisfaction, or at least to the satisfaction of the NRC's adjudicatory decisionmakers, before the proceeding is terminated. Only once the NRC itself determines that the statutory-compliance issues raised by the Tribe have, one way or another, been resolved would the NRC be in a position to issue a final order that would permit appellate review.

Lastly, Federal Respondents recognize that, in many agency licensing proceedings (including NRC licensing proceedings for nuclear power plants), the order issuing the license is the typical "final order" for Hobbs Act jurisdictional purposes. *See City of Benton*, 136 F.3d 824, 825 (D.C. Cir. 1998); *see also* 10 C.F.R. § 2.1202(a)(1) (excluding applications "to construct and/or operate a production or utilization facility" from NRC rule allowing license issuance while a contested NRC adjudication on the application remains pending). The NRC's licensing process for Powertech and other uranium recovery facilities, however, does not fit the usual mold: as discussed above, the license may be issued before all issues are resolved in the NRC adjudication as to all parties. Therefore, the need to allow the agency to resolve all issues as to all parties prior to judicial review necessitates that the termination of the adjudicatory proceeding, rather than issuance of the license, serve as the jurisdictional final order in such proceedings.

Indeed, the Tribe has seemingly acknowledged this proposition, at least tacitly, given that it filed its review petition in this Court after the Commission's December 2016 CLI-16-20 adjudicatory decision, rather than within 60 days after the NRC staff issued the Powertech license in 2014.[16]

Given that Hobbs Act finality in this type of licensing proceeding depends on the finality of the contested adjudication rather than issuance of the license, judicial review must necessarily wait until the contested adjudication is actually final. We respectfully request, therefore, that the Court dismiss the Tribe's petition for review.

II. Dismissing the petition for review based on the absence of a final order would accord with court-recognized policy rationales underlying the final-order requirement.

A. The conservation of judicial resources requires dismissal.

While the considerations discussed above should, on their own, warrant dismissal for lack of jurisdiction, we also observe that such dismissal would be consistent with the policy rationales underlying finality requirements for judicial

[16] Of course, if, contrary to our position, this Court were to find that issuance of the license to Powertech constituted the jurisdictional "final order" here, then the jurisdictional window for the Tribe to file a petition for review under the Hobbs Act would have been the 60 days following April 8, 2014—making the instant petition for review over two years late. Again, however, we do not view license issuance in this type of proceeding to constitute the final NRC order for Hobbs Act purposes.

review of agency actions. As this Court has recognized, judicial review of non-final agency orders can result in "a waste of judicial time and effort," because "[f]uture developments" at the agency may moot issues being brought before the court; further, such review will "often result in delaying the final outcome and, just as often, needlessly intrude on the" ongoing proceedings below. *Alaska*, 980 F.2d at 764. Moreover, allowing judicial review of agency orders that do not finally resolve the issues before the agency "would make unclear the point at which agency orders become final." *City of Benton*, 136 F.3d at 826.

In the instant case, the Tribe has listed the NHPA and NEPA as statutes it believes that the NRC has violated. Pet. for Rev. at 2. The NRC, through its adjudicatory process, has determined that it *agrees* with the Tribe that the agency has not yet fully complied with those statutes; moreover, the agency has held open the adjudicatory proceeding for the express purpose of allowing for, and ensuring, resolution of the noncompliance findings. Litigating the instant case in this Court while the NRC staff's efforts to address NHPA and NEPA compliance remain ongoing would therefore likely create confusion in the litigation before this Court, in the ongoing NRC adjudicatory proceeding, or both. At minimum, certain aspects of the agency action being appealed would be undefined, still-moving targets during the pendency of this case. And in the event further NRC work to

comply with the NHPA and NEPA prompts the NRC to revoke Powertech's license, the Tribe's entire challenge to the license could become moot.

Furthermore, treating this unfinished adjudication as "final" under the Hobbs Act would also draw an unclear jurisdictional boundary line, because some of the Tribe's own litigative efforts before the NRC plainly remain ongoing, and the ostensible "final order" named in the petition for review—CLI-16-20—expressly left the adjudication "open." Treating an order that is non-final in common-sense terms as final for jurisdictional purposes could encourage future prospective litigants, out of an abundance of caution, to pepper courts with review petitions throughout the course of an agency adjudication.

Thus, rather than attempting to resolve the Tribe's concerns in parallel to the NRC's own efforts to resolve them, this Court should dismiss the petition for review for lack of jurisdiction. If the NRC's additional actions over the course of the adjudication address the Tribe's NHPA and related NEPA contentions to the Tribe's satisfaction, then the Tribe will remain free at that time to file, if it wishes, a new petition for review in court within 60 days to challenge the Powertech license based on NRC's disposition of any of the Tribe's other contentions in the adjudicatory proceeding. *See Alaska*, 980 F.2d at 763 (explaining that, under the Hobbs Act, a jurisdictionally proper petition for review of an agency's final order would allow the court to review any ruling the agency issued during that

proceeding); *NRDC v. NRC*, 680 F.2d 810, 816 (D.C. Cir. 1982); *Thermal Ecology Must be Preserved v. AEC*, 433 F.2d 524, 525-26 (D.C. Cir. 1970). Or, if the NRC's additional adjudicatory actions do not fully address the Tribe's NHPA and related NEPA concerns, the Tribe's new petition for review can address those issues as well. Importantly, the Tribe loses no judicial review rights by waiting until the proper time to file a review petition.

B. In the alternative, this Court should stay the petition for review until all proceedings before the NRC are concluded.

Should this Court nevertheless determine that the petition for review does challenge a "final order" under the Hobbs Act, the same concerns for clarity in the underlying proceedings (as well as future proceedings in a similar procedural posture) counsel in favor of a stay of the petition for review. In that circumstance, we would respectfully request that this Court stay the petition for review until all proceedings before the NRC are concluded, and any administrative appeals have been taken. After that, this Court could take up the petition for review and would have before it a complete record of the agency proceedings to review.

Should this Court decide not to resolve the motion to dismiss at this time, but to defer it to the merits panel instead, we would also respectfully request that this Court stay the petition for review pending completion of the NRC proceedings, including any administrative appeals. Deferment of the motion to dismiss without resolution would lead to uncertainty in the ongoing proceedings before the NRC

and would result in both the NRC and this Court proceeding in parallel tracks in the same matter but possibly taking different or even contrary actions.

CONCLUSION

Federal Respondents respectfully request that the Court dismiss the petition for review for lack of jurisdiction.

Respectfully submitted,

_/s/ Lane N. McFadden____
LANE N. MCFADDEN
Attorney
United States Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 7415
Washington, D.C. 20044-7415
Phone: (202) 353-9022
lane.mcfadden@usdoj.gov

_/s/ Andrew P. Averbach__
ANDREW P. AVERBACH
Solicitor

_/s/ James E. Adler_____
JAMES E. ADLER
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
Phone: (301) 287-9173
Fax: (301) 415-3200
james.adler@nrc.gov

Dated: March 17, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Federal Respondents' Motion to Dismiss complies with the formatting and type-volume restrictions of the rules of the U.S. Court of Appeals for the District of Columbia Circuit. The motion was prepared in 14-point, double spaced, Times New Roman font, using Microsoft Word 2013, in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The motion contains 3775 words and therefore complies with Fed. R. App. P. 27(d)(2)(A).

/s/ James E. Adler

James E. Adler
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Federal Respondents hereby submit the following list of parties and amici to the agency proceeding below and to the proceeding in this Court (D.C. Cir. No. 17-1059 – Oglala Sioux Tribe v. NRC):

Parties in this Court and in the agency proceeding below:

1. Oglala Sioux Tribe (Petitioner)
2. Nuclear Regulatory Commission (Respondent)
3. Powertech (USA) (Putative Intervenor – not yet admitted as a party)

Parties in this Court but not in the agency proceeding below:

1. United States of America (Respondent, by statute (28 U.S.C. § 2348))

Other parties in the agency proceeding below:

1. The "Consolidated Intervenors" group, whose members include: Theodore P. Ebert, David Frankel, Gary Heckenlaible, Susan Henderson, Dayton Hyde, Lilias C. Jones Jarding, the Clean Water Alliance, and Aligning for Responsible Mining.

/s/ James E. Adler

James E. Adler
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, the Federal Respondents' Motion to Dismiss was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

/s/ James E. Adler
James E. Adler
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

EXHIBIT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
Jeff Baran

In the Matter of POWERTECH (USA), INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-16-20

MEMORANDUM AND ORDER

This decision addresses four petitions for review relating to a materials license application for an *in situ* uranium recovery facility filed by Powertech (USA), Inc.[1] All parties to the proceeding—the Oglala Sioux Tribe, Consolidated Intervenors, Powertech, and the NRC Staff—have filed petitions for review of the Atomic Safety and Licensing Board's Partial Initial Decision and in the case of the Oglala Sioux Tribe and Consolidated Intervenors, earlier Board decisions finding several of their proffered contentions inadmissible.[2]

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

[2] LBP-15-16, 81 NRC 618 (2015); *see Oglala Sioux Tribe's Petition for Review of LBP-15-16 and Decisions Finding Tribal Contentions Inadmissible* (May 26, 2015) (Tribe's Petition); *Consolidated Intervenors' Petition for Review of LBP-15-16* (May 26, 2015) (Consolidated Intervenors' Petition); *Brief of Powertech (USA), Inc. Petition for Review of LBP-15-16* (May 26,

As discussed below, we take review of these petitions in part. We grant each party's petition with respect to the finality of the Board's ruling on Contentions 1A and 1B, find that these contentions should be considered "final" for the purposes of the petitions for review at issue here, and, pursuant to our inherent supervisory authority over agency adjudications, direct that the proceeding remain open for the narrow issue of resolving the deficiencies identified in Contentions 1A and 1B. We deny the remainder of Consolidated Intervenors' petition for review. With respect to Powertech's and the Staff's petitions for review, we also take review of the Board's direction to the Staff to address the deficiencies identified in Contentions 1A and 1B and we affirm the Board's direction to the Staff to submit monthly status reports and to file an agreement between the parties or a motion for summary disposition to resolve the deficiencies identified by the Board. We deny the remainder of Powertech's and the Staff's petitions for review. With respect to the Tribe's petition for review, we take review of the Board's rejection of Contention 8 as inadmissible. We find that the Board erred in its reasoning for dismissing Contention 8, but we affirm the Board's decision. We deny the remainder of the Tribe's petition for review.

I. BACKGROUND

In situ uranium recovery involves injecting a solution, called lixiviant, into an ore body through an injection well. As it flows through the ore body, the lixiviant dissolves the underground uranium. A separate production well extracts the uranium-containing solution from the ground. The uranium is then extracted from the solution though a process called ion

---

2015) (Powertech's Petition); *NRC Staff's Petition for Review of LBP-15-16* (May 26, 2015) (Staff's Petition).

The Board has referred to Susan Henderson, Dayton Hyde, and Aligning for Responsible Mining as Consolidated Intervenors, although it originally called them Consolidated Petitioners. *See* LBP-14-5, 79 NRC 377, 379 n.3 (2014); LBP-13-9, 78 NRC 37, 42 n.2 (2013).

exchange. After extraction, the lixiviant is recycled and reinjected into the ore body to dissolve more uranium.[3] The *in situ* uranium recovery process is used widely throughout Wyoming, South Dakota, Nebraska, and New Mexico to recover subterranean uranium for enrichment and later use in nuclear power plants.

In order to comply with its National Environmental Policy Act (NEPA) obligations and recognizing the widespread use of this technology in this region of the country, the Staff prepared a generic environmental impact statement (GEIS) to address certain aspects of the environmental analysis for these facilities that tend to be similar across sites.[4] The GEIS also identifies resource areas that require site-specific information to fully analyze the environmental impacts. It also notes that subsequent site-specific environmental review documents may summarize and incorporate by reference information from the GEIS.[5] Any subsequent site-specific environmental impact analysis must also include new and significant information necessary to evaluate the *in situ* recovery license application.[6]

This proceeding began in February 2009, when Powertech filed an application for an *in situ* uranium recovery facility in Custer and Fall River Counties, South Dakota. In response, the Oglala Sioux Tribe and Consolidated Intervenors challenged the license application.[7] The

---

[3] Ex. APP-021-A, "Powertech (USA), Inc., Dewey-Burdock Project Application for NRC Uranium Recovery License Fall River and Custer Counties, South Dakota Technical Report," (Feb. 2009), at 1-6 (ML14247A342).

[4] Exs. NRC-010-A-1 to NRC-010-B-2, "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (Final Report), NUREG-1910, vols. 1-2 (May 2009) (ML14246A328, ML14247A345, ML14246A333, ML14246A332, ML14246A351) (GEIS).

[5] Ex. NRC-010-A-1, GEIS, at xxxvii.

[6] *Id.*

[7] *Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe* (Apr. 6, 2010) (Tribe's Petition to Intervene); *Consolidated Request for Hearing and Petition for Leave to Intervene* (Mar. 8, 2010) (Consolidated Intervenors' Petition to Intervene).

Board granted their hearing requests in August 2010.[8] On November 26, 2012, the Staff issued the Draft Supplemental Environmental Impact Statement (DSEIS) for public comment.[9] The NRC Staff issued a Safety Evaluation Report (SER) in March 2013.[10] On January 29, 2014, the Staff issued the FSEIS.[11] The Staff issued the license to Powertech on April 8, 2014.[12] The

---

[8] LBP-10-16, 72 NRC 361, 443-44 (2010).

[9] Exs. NRC-009-A-1 to NRC-009-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Draft Report for Comment), NUREG-1910, Supplement 4, vols. 1-2 (Nov. 2012) (ML14247A350, ML14246A329, ML14246A330, ML14246A331) (DSEIS).

Both the Tribe and individual members of Consolidated Intervenors (Susan Henderson and Dayton Hyde) commented on the DSEIS and later filed proposed contentions relating to the DSEIS. Exs. NRC-008-A-1 to NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Final Report), NUREG-1910, Supplement 4, vols. 1-2 (Jan. 2014), app. E, at E-5 to E-6 (ML14246A350, ML14246A326, ML14246A327, ML14247A334) (FSEIS); *see Consolidated Intervenors' New Contentions Based on DSEIS* (Jan. 25, 2013) (Consolidated Intervenors' DSEIS Contentions); *List of Contentions of the Oglala Sioux Tribe Based on the Draft Supplemental Environmental Impact Statement* (Jan. 25, 2013) (Tribe's DSEIS Contentions). On July 22, 2013, the Board admitted three of the new contentions and migrated seven of the originally admitted contentions. LBP-13-9, 78 NRC at 113-15.

[10] Ex. NRC-135, "Safety Evaluation Report for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota" (Mar. 2013) (ML13052A182). The Staff issued a revised SER in April 2014 to correct certain technical references. Ex. NRC-134, "Safety Evaluation Report (Revised) for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota" (Apr. 2014) (ML14245A347).

[11] Exs. NRC-008-A-1 to NRC-008-B-2, FSEIS. On March 17, 2014, the Tribe and Consolidated Intervenors filed additional contentions related to the FSEIS. *Consolidated Intervenors' Statement of Contentions* (Mar. 17, 2014) (Consolidated Intervenors' FSEIS Contentions); *Statement of Contentions of the Oglala Sioux Tribe Following Issuance of Final Supplemental Environmental Impact Statement* (Mar. 17, 2014) (Tribe's FSEIS Contentions). The Board ruled that the contentions previously admitted in reference to the DSEIS migrated to the FSEIS and held inadmissible the remaining proposed contentions. LBP-14-5, 79 NRC at 401.

[12] Ex. NRC-012, License Number SUA-1600, Materials License for Powertech (USA) Inc. (Apr. 8, 2014) (ML14246A408) (License).

Board held an evidentiary hearing on all nine admitted contentions in August 2014. In November 2014, the Tribe moved to file two new environmental contentions.[13]

The Board decision, LBP-15-16, resolved seven contentions in favor of Powertech and the Staff but found deficiencies in the Staff's NEPA analysis and NHPA consultation.[14] The Board upheld the license with an additional license condition, ruled inadmissible the two post-hearing contentions proffered by the Tribe, and directed the Staff to submit monthly reports regarding its progress in resolving the identified deficiencies.[15]

Our decision today involves four petitions for review that were filed by the parties to this proceeding. We summarize each petition below, along with the relevant procedural history for each set of issues. A full procedural history can be found in the Board's various decisions on this matter.[16]

A. The Oglala Sioux Tribe's and Consolidated Intervenors' Petitions for Review

The Oglala Sioux Tribe appeals the Board's resolution of several of its admitted contentions in favor of Powertech and the Staff.[17] The Tribe also seeks review of the Board's ruling on two of its admitted contentions that left the license in place and required the Staff to conduct additional consultation.[18] Consolidated Intervenors petition for review of the Board's decision resolving their admitted contentions in favor of Powertech and the Staff.[19] They further

---

[13] *Motion for Leave to File New or Amended Contention on Behalf of the Oglala Sioux Tribe* (Nov. 7, 2014) (Tribe's Motion for New Contentions).

[14] LBP-15-16, 81 NRC at 657-58, 708-10.

[15] *Id.* at 708-10.

[16] *See id.* at 626-35; *see also* LBP-14-5, 79 NRC at 379-81; LBP-13-9, 78 NRC at 43-45; LBP-10-16, 72 NRC at 376-78.

[17] Tribe's Petition at 19-25.

[18] *Id.* at 18-19.

[19] Consolidated Intervenors' Petition at 2 & n.3, 4-7.

challenge the Board's ruling that left the license in place despite ruling in Consolidated Intervenors' favor on two of their admitted contentions.[20]

In Contentions 1A and 1B, the Tribe and Consolidated Intervenors challenged the NEPA analysis of cultural resources in the FSEIS and the Staff's compliance with the National Historic Preservation Act (NHPA).[21] The Board concluded that the Staff had fulfilled its NHPA obligations with respect to identification of historic properties. It nonetheless held that the Staff's analysis in the FSEIS did not satisfy NEPA's hard look requirement regarding cultural resources and that the Staff's consultation with the Tribe had been insufficient to comply with the Staff's additional obligations under the NHPA.[22] The Board retained jurisdiction over these contentions and required the Staff to "promptly initiat[e] a government-to-government consultation with the Oglala Sioux Tribe" to address the deficiencies identified in the Board's decision.[23] The Tribe and Consolidated Intervenors seek review of the Board's decision to leave the license in place pending resolution of Contentions 1A and 1B.[24]

---

[20] *Id.* at 3, 6-7.

Consolidated Intervenors have requested that we set a briefing schedule for any issues that we accept for review. *Id.* at 8-9. In accordance with 10 C.F.R. § 2.341(c)(2), we have decided these matters on the basis of the petitions for review, and therefore deny Consolidated Intervenors' request to establish a briefing schedule.

Consolidated Intervenors also challenge the Board's ruling in LBP-10-16 that "certain petitioners" lacked standing to intervene. *Id.* at 2. In their petition, Consolidated Intervenors do not identify which petitioners they are referencing. We therefore deny review of that portion of their petition.

[21] *Oglala Sioux Tribe's Post-Hearing Initial Brief with Findings of Fact and Conclusions of Law* (Jan. 9, 2015), at 12, 27 (Tribe's Post-Hearing Brief); *Consolidated Intervenors' Proposed Findings of Fact and Conclusions of Law and Response to Post-Hearing Order* (Jan. 9, 2015), at 1-2, 14 (Consolidated Intervenors' Post-Hearing Brief).

[22] LBP-15-16, 81 NRC at 653-57.

[23] *Id.* at 657-58, 708, 710.

[24] Tribe's Petition at 18-19; Consolidated Intervenors' Petition at 6-7.

In Contention 2, the Tribe and Consolidated Intervenors argued that the FSEIS did not contain sufficient background groundwater characterization.[25] The Board resolved this contention in favor of Powertech and the Staff, and the Tribe seeks review of the Board's decision.[26]

In Contention 3, the Tribe and Consolidated Intervenors argued that the FSEIS insufficiently analyzed certain geological and manmade features that may permit groundwater migration.[27] The Board resolved this contention in favor of Powertech and the Staff but added a license condition regarding the proper treatment of unplugged boreholes.[28] Both the Tribe and Consolidated Intervenors seek review of the Board's decision.[29]

In Contention 6, the Tribe and Consolidated Intervenors challenged the FSEIS's analysis of mitigation measures and argued that it impermissibly deferred the development of additional mitigation measures.[30] The Board resolved this contention in favor of Powertech and the Staff, and the Tribe seeks review of the Board's decision.[31]

Additionally, the Tribe challenges the Board's decision in LBP-15-16 to reject as inadmissible new contentions submitted after the hearing regarding borehole data and an Environmental Protection Agency (EPA) Preliminary Assessment regarding potential Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

---

[25] Tribe's Post-Hearing Brief at 38; Consolidated Intervenors' Post-Hearing Brief at 21.

[26] LBP-15-16, 81 NRC at 666, 708-09; *see* Tribe's Petition at 19-21.

[27] Tribe's Post-Hearing Brief at 43; Consolidated Intervenors' Post-Hearing Brief at 28, 47.

[28] LBP-15-16, 81 NRC at 681, 709.

[29] Tribe's Petition at 22-23; Consolidated Intervenors' Petition at 2 n.3, 4-7.

[30] Tribe's Post-Hearing Brief at 61-62; Consolidated Intervenors' Post-Hearing Brief at 53-56.

[31] LBP-15-16, 81 NRC at 697, 709; Tribe's Petition for Review at 23-25.

cleanup.[32] Further, it seeks review of earlier Board decisions that found two of its contentions (Contentions 7 and 8) inadmissible.[33] In proposed Contention 7, the Tribe argued that the application was deficient because it did not include a reviewable plan for disposal of byproduct material or discuss the environmental effects of such disposal.[34] The Tribe resubmitted this contention on both the DSEIS and the FSEIS, and the Board dismissed it as inadmissible each time.[35] In proposed Contention 8, the Tribe argued that the DSEIS had been issued without the requisite scoping process.[36] The Board held this contention inadmissible, finding that it did not articulate a material dispute, as required by the contention admissibility standards.[37]

Finally, Consolidated Intervenors challenge the Board's decision at the outset of the proceeding finding one of their contentions inadmissible.[38] In proposed Contention D, Consolidated Intervenors argued that Powertech's application was so disorganized that it violated 10 C.F.R. § 40.9, and the Board rejected this portion of the contention as inadmissible.[39]

---

[32] Tribe's Petition at 8-11; *see* LBP-15-16, 81 NRC at 704-06, 709.

[33] Tribe's Petition at 3-8.

[34] Tribe's Petition to Intervene at 31-34.

[35] Tribe's FSEIS Contentions at 33-39; Tribe's DSEIS Contentions at 27-30, *see* LBP-14-5, 79 NRC at 396-97; LBP-13-9, 78 NRC at 71-72.

[36] Tribe's DSEIS Contentions at 30-33.

[37] LBP-13-9, 78 NRC at 74-75.

[38] Consolidated Intervenors' Petition at 2 n.3, 3-4, 7.

[39] Consolidated Intervenors' Petition to Intervene at 36; *see* LBP-10-16, 72 NRC at 402.

B. Powertech's and the NRC Staff's Petitions for Review

On appeal, the Staff and Powertech challenge the Board's resolution of Contentions 1A and 1B in favor of the Tribe and Consolidated Intervenors.[40] Additionally, both parties seek review of the Board's retention of jurisdiction over these contentions.[41] Finally, Powertech challenges the Board's imposition of an additional license condition in resolving Contention 3 that requires Powertech to locate and properly abandon unplugged boreholes within each wellfield prior to operations.[42]

II. DISCUSSION

A. Standard of Review

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to 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) Any other consideration that we may deem to be in the public interest.[43]

---

[40] Powertech's Petition at 6-22; Staff's Petition at 17, 23. The Tribe filed a response to both petitions on June 22, 2015. *Oglala Sioux Tribe's Consolidated Response to Petitions for Review of LBP-15-16* (June 22, 2015) (Tribe's Response).

[41] Powertech's Petition at 5-6, 6 n.9; Staff's Petition at 13-16, 16 n.73.

[42] Powertech's Petition at 22-25; *see* LBP-15-16, 81 NRC at 709.

[43] 10 C.F.R. § 2.341(b)(4).

We review questions of law *de novo,* but we defer to the Board's findings with respect to the underlying facts unless they are "clearly erroneous."[44] The standard for showing "clear error" is a difficult one to meet: petitioners must demonstrate that the Board's determination is "not even plausible" in light of the record as a whole.[45] For this reason, where a petition for review relies primarily on claims that the Board erred in weighing the evidence in a merits decision, we seldom grant review.[46] In addition, we give substantial deference to the Board on issues of contention admissibility and will affirm admissibility determinations absent a showing of an error of law or abuse of discretion.[47] In *Pa`ina Hawaii, LLC* (Materials License Application) we said the following about our standard of review:

> We refrain from exercising our authority to make *de novo* findings of fact in situations where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact. As we have stated many times, while we have discretion to review all underlying factual issues *de novo*, we are disinclined to do so where a Board has weighed arguments presented by experts and rendered reasonable, record-based factual findings. Our standard of "clear error" for overturning a Board's factual findings is quite high. We defer to a board's factual findings, correcting only clearly erroneous findings—that is, findings not even plausible in light of the record viewed in its entirety—where we have strong

---

[44] *Honeywell International, Inc*. (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 18-19 (2013); *David Geisen*, CLI-10-23, 72 NRC 210, 224-25, 242 (2010).

[45] *Honeywell,* CLI-13-1, 77 NRC at 18 n.102; *Geisen,* CLI-10-23, 72 NRC at 224-25.

[46] *See, e.g.*, *DTE Electric Co*. (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 162-63 (2014); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc*. (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 46 (2012) (stating "where a Board's decision rests on a weighing of extensive fact-specific evidence presented by technical experts, we generally will defer"); *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 30 (2010) (noting that the Commission is "generally disinclined to upset *fact*-driven Licensing Board determinations") (internal quotations omitted).

[47] *Entergy Nuclear Operations, Inc*. (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 354-55 (2015); *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009); *Southern Nuclear Operating Co*. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 35 (2009).

reason to believe that a board has overlooked or misunderstood important evidence.[48]

B. Contentions Rejected Prior to Hearing

The Tribe and Consolidated Intervenors seek review of three Board decisions that found several of their proposed contentions inadmissible.

1. The Tribe's Proposed Contention 7

In proposed Contention 7, the Tribe challenged the lack of a reviewable plan for disposal of byproduct material as defined in Section 11e.(2) of the Atomic Energy Act of 1954, as amended (byproduct material).[49] The Tribe submitted this contention three times: with respect to the environmental report, the DSEIS, and the FSEIS.[50] In each case, the Tribe provided a different basis for the contention, and the Board dismissed each iteration as inadmissible.[51] In its petition for review, the Tribe argues that the Board "erred at law and abused its discretion" each time it found Contention 7 inadmissible.[52] We do not find that the Tribe raises a substantial question regarding the admissibility of this contention. With respect to each Board decision, the Tribe provides a separate basis to support its petition.

---

[48] *Pa`ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 72-73 (2010) (internal quotations and citations omitted).

[49] Tribe's Petition to Intervene at 31-34. Section 11e.(2) of the Atomic Energy Act of 1954, as amended, defines "byproduct material" as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2).

[50] Tribe's FSEIS Contentions at 33-39; Tribe's DSEIS Contentions at 27-30; Tribe's Petition to Intervene at 31-34.

[51] *See* Tribe's FSEIS Contentions at 33-39; Tribe's DSEIS Contentions at 27-30; Tribe's Petition to Intervene at 31-34; *see also* LBP-14-5, 79 NRC at 397; LBP-13-9, 78 NRC at 71-72; LBP-10-16, 72 NRC at 434-35.

[52] Tribe's Petition at 3.

a. Proposed Contention and Board Orders LBP-10-16, LBP-13-9, and LBP-14-5

The Board rejected Contention 7 in LBP-10-16, finding that the Tribe did not show that Powertech had failed to comply with any NRC or other federal regulation.[53] The Tribe argued that 10 C.F.R. § 40.31(h) and Criterion 1 in Appendix A to 10 C.F.R. Part 40 require Powertech to provide a specific plan for disposal of byproduct material in its application. The Board rejected this argument and explained that—per our case law—these provisions apply to uranium mills, not *in situ* recovery sites.[54] Additionally, the Tribe argued that NEPA required that the application contain a specific disposal plan. The Board disagreed, holding that the Staff, not the applicant, is bound by NEPA.[55] But the Board noted that the Tribe would have the opportunity, if it were not satisfied with the treatment of this issue in the Staff's environmental documents, to renew this contention after issuance of those documents.[56]

The Tribe did just that when it filed a similar contention with respect to the analysis in the DSEIS, which the Board ruled inadmissible in LBP-13-9.[57] The Board determined that the Staff had addressed impacts related to byproduct material in both the DSEIS and the GEIS.[58] The Board observed that, insofar as the Tribe claimed that the contention was one of "omission," the

---

[53] LBP-10-16, 72 NRC at 434. The Tribe called this Contention 7 in its initial petition and its DSEIS Contentions. It refers to the same contention as FSEIS Contention 2 in its FSEIS Contentions. To minimize confusion, we will refer to this contention as Contention 7 throughout this decision.

[54] *Id.* (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 8 (1999) ("We agree with the Presiding Officer's general conclusion that section 40.31(h) and Part 40, Appendix A, 'were designed to address the problems related to mill tailings and not problems related to [*in situ*] mining.'")).

[55] *Id.* at 435.

[56] *Id.*

[57] Tribe's DSEIS Contentions at 27-30; *see* LBP-13-9, 78 NRC at 71-72.

[58] LBP-13-9, 78 NRC at 71.

contention was moot because the DSEIS contained the information the Tribe claimed was missing.[59] The Board stated that

> because the Oglala Sioux Tribe neither substantively disputes the analysis of impacts related to disposal of byproduct material in relevant sections of the DSEIS and the GEIS, nor addresses the license condition related to disposal of byproduct material, the Board rejects this contention as failing to comply with the admissibility dictates of 10 C.F.R. § 2.309(f)(1)(vi).[60]

Upon issuance of the FSEIS, the Tribe refiled an identical contention alleging inadequate analysis of direct, indirect, and cumulative impacts of disposal of byproduct material.[61] The Board found the contention inadmissible and explained that the section of the FSEIS the Tribe cited did not differ materially from the parallel section in the DSEIS. Accordingly, the Board held that the Tribe failed to meet the requirements of 10 C.F.R. § 2.309(c)(1)(ii) for the filing of a new contention.[62]

b. The Tribe's Petition for Review

On appeal, the Tribe challenges the Board's ruling, supported by both the plain language of the regulation and our precedent, that 10 C.F.R. § 40.31(h) and Part 40 Appendix A, Criterion 1, are inapplicable to *in situ* recovery facilities. We disagree—this point is well settled and we see no reason to revisit it here.[63]

Further, the Tribe argues that Part 40 Appendix A, Criterion 2, which is applicable to *in situ* uranium recovery facilities, requires a plan for waste disposal in the application. Based on

---

[59] *Id.*

[60] *Id.* at 71-72.

[61] Tribe's FSEIS Contentions at 33-39.

[62] LBP-14-5, 79 NRC at 397. Additionally, the Board noted that Powertech's draft license contained license conditions requiring that "Powertech [have a] byproduct material disposal contract in place prior to the commencement of operations." *Id.*

[63] *Hydro Resources, Inc.*, CLI-99-22, 50 NRC at 8.

the plain language of Criterion 2, we disagree. Criterion 2 states that "byproduct material from [*in situ*] extraction operations … must be disposed of at existing large mill tailings disposal sites …."[64] This provision mandates that disposal of byproduct material take place at an existing disposal site—it does not require that the application include a waste disposal plan or designate which waste disposal site will be used.

Next, the Tribe argues that the Standard Review Plan "specifically discusses the need for a … waste disposal plan."[65] But the Tribe's argument regarding the Standard Review Plan does not demonstrate Board error. The Standard Review Plan is not a regulation; it is guidance for the Staff in reviewing an application, and it provides one way to comply with our regulations.[66] Additionally, as the Board explained in LBP-10-16, the Staff's standard practice allows applicants *either* to identify a waste disposal site in their applications *or* to implement a license condition regarding waste disposal.[67] As discussed below, Powertech's license includes two conditions related to waste disposal.[68] The Tribe has not identified any regulation to the contrary.

Additionally, the Tribe takes issue with the Board's statement that an applicant is not bound by NEPA.[69] The Board had stated that although "[t]he Tribe also argue[d] that a specific disposal plan must be included in Powertech's Application in order to comply with NEPA. … It is

---

[64] 10 C.F.R. pt. 40, app. A, Criterion 2.

[65] Tribe's Petition at 4.

[66] *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 23 n.70 (2014) (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995)).

[67] LBP-10-16, 72 NRC at 435.

[68] *See* Ex. NRC-012, License, at 6, 12.

[69] Tribe's Petition at 4.

settled law that an applicant is not bound by NEPA, but by NRC regulations in Part 51."[70] Insofar as it could be interpreted as implying that the Tribe was premature in filing its environmental contentions on the application, the Board's decision was incorrect. Although it is true that "the ultimate burden with respect to NEPA lies with the NRC Staff," our regulations require that intervenors file environmental contentions on the applicant's environmental report.[71] In any case, any Board error here was harmless because it also stated that the Tribe would have the opportunity to formulate a contention regarding disposal of byproduct material on the DSEIS, and indeed, the Tribe did so.[72]

The Tribe asserts that the Board's recognition that planning for waste disposal is an important aspect of our regulations necessarily raises a substantial question for our review.[73] In support of this argument, the Tribe refers to concerns the Board expressed regarding whether waste disposal would be addressed in Powertech's license.[74] In LBP-10-16, the Board noted that "if a condition dealing with … byproduct material is not included in the license, the Tribe has no recourse because it cannot challenge the license at that time."[75] However, Powertech's

---

[70] LBP-10-16, 72 NRC at 435.

[71] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 34 (2010); *see* 10 C.F.R. § 2.309(f)(2).

[72] LBP-10-16, 72 NRC at 435. *See* Tribe's DSEIS Contentions at 27-30; *see also Geisen*, CLI-10-23, 72 NRC at 245 ("[T]o prevail on appeal, [a party] must show not only that the majority erred but also that the error had a prejudicial effect on the [party's] case." (citations omitted)).

[73] The Tribe argues that "[a]lthough the [Board] 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.'" Tribe's Petition at 4 (quoting LBP-10-16, 72 NRC at 435). The Board cited 10 C.F.R. § 51.107(a), which refers to issuance of a combined license for a nuclear power reactor; it has no applicability to *in situ* leach facilities. Mandatory hearings are not held in materials licensing proceedings like this one.

[74] Tribe's Petition at 4.

[75] LBP-10-16, 72 NRC at 435.

license contains multiple conditions regarding disposal of byproduct material. License Condition 12.6 requires Powertech to submit to the NRC a disposal agreement with a licensed disposal site before beginning operations.[76] License Condition 9.9 requires Powertech to maintain such a disposal agreement; if the agreement expires or otherwise terminates, Powertech must halt operations.[77]

Although the Board held that Contention 7 was rendered moot by the analysis of the impacts of the disposal of byproduct material in the DSEIS, the Tribe argues that the DSEIS only identified a possible site for the disposal of byproduct material; the Tribe reiterates its argument that the DSEIS's analysis of the impacts of byproduct material disposal was lacking.[78] On appeal, the Tribe argues that the Board erred in rejecting Contention 7 as a contention of omission.[79] But, as explained above, the Board found that the DSEIS and the GEIS analyzed the impacts of the disposal of byproduct material, and it pointed to specific sections of both documents.[80] The Board's ruling did not rest on the distinction between a contention of omission and one of inaccuracy—it found that the Tribe's proposed contention failed to challenge or address the information in the DSEIS and the draft license condition related to waste disposal.[81] On appeal, the Tribe argues that the discussion of waste disposal in the GEIS was insufficient to fulfill the Staff's responsibilities, but the Tribe fails to consider that, as the

---

[76] Ex. NRC-012, License, at 12.

[77] *Id.* at 6.

[78] Tribe's Petition at 5; *see* LBP-13-9, 78 NRC at 71.

[79] Tribe's Petition at 5. As the Board noted, the Tribe itself characterized this contention as one of omission. *See* Tribe's DSEIS Contentions at 28; *see also* LBP-13-9, 78 NRC at 71.

[80] LBP-13-9, 78 NRC at 71.

[81] *Id.* at 71-72.

Board noted, both the DSEIS and the draft license condition also addressed waste disposal.[82] The Tribe does not identify any error regarding the Board's ruling on this point; therefore it does not raise a substantial question for our review.

Next, the Tribe argues that the Board dismissed Contention 7 as inadmissible "simply because the draft license contained a provision requiring the applicant to establish a disposal plan at some point in the future."[83] But the Tribe misstates the Board's basis for its ruling. The Board based its ruling on the Staff's analysis in the GEIS, the DSEIS, and expectation that the license would include conditions regarding waste disposal.[84] Given the Board's reliance on the Staff's analysis and the expected license conditions—which, are indeed present in Powertech's license—we see no substantial question for review here.

The Tribe's final argument in its petition for review with respect to Contention 7 invokes the United States Court of Appeals for the District of Columbia Circuit's decision vacating the waste confidence rule, now called the continued storage rule (10 C.F.R. § 51.23).[85] The Tribe argues that the court's vacatur of the former waste confidence rule confirms that the Tribe has raised a substantial question regarding the Board's dismissal of its proposed Contention 7 in LBP-14-5 and is analogous to this proceeding.[86]

But the court's decision regarding continued storage has no bearing on this issue. Neither the waste confidence rule nor the continued storage rule applies to 11e.(2) byproduct

---

[82] Tribe's Petition at 5; *see* LBP-13-9, 78 NRC at 71-72.

[83] Tribe's Petition at 5.

[84] LBP-13-9, 78 NRC at 71-72.

[85] Tribe's Petition at 5-6; *see New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

[86] In a decision issued on June 3, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied the petitions for review challenging the NRC's updated continued storage rule. *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016), *reh'g denied* 2016 U.S. App. LEXIS 14584 (D.C. Cir. Aug. 8, 2016).

material. These rules only apply to environmental impacts of spent fuel storage at power reactors and spent fuel storage facilities after the end of a reactor's license term and before disposal in a deep geologic repository.[87] Moreover, License Condition 12.6 expressly prevents Powertech from beginning operations—and therefore producing byproduct material—before it has in place an agreement with a licensed waste disposal site. And License Condition 9.9 prevents Powertech from continuing to operate if the waste disposal agreement expires or is otherwise terminated. In sum, the continued storage rule is inapplicable to Powertech's facility and Powertech's license is conditioned to ensure that it will not produce byproduct material without a plan for disposal. Accordingly, the Tribe does not raise a substantial question for review.

2. The Tribe's Proposed Contention 8

The Tribe petitions for review of the Board's rejection of its proposed Contention 8, in which it argued that the DSEIS had been issued without the requisite scoping process.[88] The Board rejected the contention for failing to demonstrate that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact."[89] The Board held that 10 C.F.R. §§ 51.26(d) and 51.92(d) both exempt the Staff from conducting a scoping process for a

---

[87] *See* 10 C.F.R. § 51.23.

[88] Tribe's Petition at 7; *see* Tribe's DSEIS Contentions at 30-33; LBP-13-9, 78 NRC at 74-75. In Contention 8, which the Tribe submitted on both the application and the DSEIS, the Tribe also challenged the requirement to submit environmental contentions before the Staff's completion of its NEPA analysis. The Board rejected—in both LBP-10-16 and LBP-13-9—the Tribe's argument that this requirement violates NEPA. LBP-13-9, 78 NRC at 74; LBP-10-16, 72 NRC at 437-38. The Board explained that the challenge "could be properly characterized as 'an impermissible attack on NRC regulations, in contravention of 10 C.F.R § 2.335.'" LBP-13-9, 78 NRC at 74 (quoting LBP-10-16, 72 NRC at 436). The Tribe has not challenged the Board's reasoning on this portion of Contention 8.

[89] LBP-13-9, 78 NRC at 74-75 (quoting 10 C.F.R. § 2.309(f)(1)(vi)).

"supplemental" EIS based on a plain language reading of the regulation.[90] Further, the Board found that the Staff had engaged in a scoping process when it developed the GEIS and had conducted additional outreach during development of the SEIS, thereby satisfying the scoping requirement.[91] Therefore, the Board concluded that the Tribe's contention was inadmissible.[92]

In its petition for review, the Tribe argues that the exceptions to the scoping requirements in 10 C.F.R. §§ 51.26(d) and 51.92(d) do not apply to site-specific EISs that tier off of a GEIS merely because the Staff may describe them as supplements.[93] In support of this argument, the Tribe refers to an Office of Inspector General (OIG) Audit Report from August 2013.[94] With respect to scoping, the Audit Report concluded 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. Specifically, NRC staff refer 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. Some NRC managers assert that the public scoping process for the generic EIS for [*in situ*] uranium recovery suffices for subsequent, site-specific uranium recovery applications.
>
> However, during that generic EIS scoping process in 2007, NRC staff emphasized in response to public comments that all applications would receive a site-specific review. Staff also emphasized that there would be a request for public input on scoping through a "scoping meeting" on site-specific issues if an EIS were prepared for a future application.[95]

---

[90] *Id.* at 75.

[91] *Id.*

[92] *Id.*

[93] Tribe's Petition at 7.

[94] "Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements," OIG-13-A-20 (Aug. 20, 2013) (ML13232A192) (Audit Report). The OIG published the Audit Report after the Board's dismissal of the scoping portion of the Tribe's proposed Contention 8 in LBP-13-9.

[95] *Id.* at 24.

The Audit Report specifically identified the DSEIS for this project as deficient because it lacked a formal scoping process.[96]

We take review of the Board's denial of the Tribe's proposed Contention 8 with respect to scoping pursuant to 10 C.F.R. § 2.341(b)(4)(ii).[97] The Tribe's contention identifies an issue of law with respect to our NEPA scoping process. We find that the Board's reasoning was flawed because it relied on a section of our NEPA regulations (10 C.F.R. § 51.92) that is not applicable here. Despite this error on the part of the Board, we affirm the Board's ruling and find that, even without a separate scoping process on the SEIS, the Staff provided the Tribe with ample opportunities at an early stage in the process to participate in the development of the site-specific, supplemental EIS. The Tribe had the opportunity to participate in the NEPA process from the beginning, and it has not demonstrated harm or prejudice resulting from the lack of a separate, formal scoping process on the site-specific SEIS; thus, the Board's error was harmless.

We agree with the Staff's observation that tiering and supplementing are not mutually exclusive concepts.[98] However, we agree with the petitioners that the exception in 10 C.F.R. § 51.92(d) does not apply to a supplemental, site-specific EIS that tiers off a GEIS. Section 51.92(d) states: "[t]he supplement to a *final environmental impact statement* will be prepared in the same manner as the *final environmental impact statement* except that a scoping process need not be used."[99] This provision provides an exception from the scoping process for supplements to *final* EISs. The GEIS is not a final EIS for the purpose of the specific federal

---

[96] *Id.* at 22; *see* Tribe's Petition at 7.

[97] We review questions of law *de novo*. *See Geisen*, CLI-10-23, 72 NRC at 242.

[98] *NRC Staff's Response to Oglala Sioux Tribe's Petition for Review of LBP-15-16* (June 22, 2015), at 8 (Staff's Response to Tribe).

[99] 10 C.F.R. § 51.92(d) (emphasis added).

action here—the proposed licensing of Powertech's *in situ* uranium recovery facility. The Powertech site-specific SEIS is not a supplement in the sense meant by 10 C.F.R. § 51.92(d). The Staff's reference to the SEIS for this project as a supplement does not change the applicability of the exception in 10 C.F.R. § 51.92(d)—it applies to supplements to final EISs, not site-specific supplements to a GEIS.

Because we determine that the Tribe is correct that 10 C.F.R. § 51.92 does not apply here, we now turn to the effect of the Board's error. After considering the Staff's involvement with the Tribe and other interested stakeholders throughout the NEPA process, we find that the Tribe has not shown that the lack of scoping resulted in harm or prejudice. Despite the fact that the Staff did not engage in a separate, formal scoping process in preparing the DSEIS, the Staff provided the Tribe with ample opportunities at an early stage in the process to participate in the development of the site-specific EIS.[100] For example, the Staff states that in 2009 it proposed a meeting with the Tribe to discuss the project, but that the Tribe was unable to attend.[101] Further, "[i]n 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."[102] This public outreach demonstrates that the Tribe and the public had sufficient opportunity to provide input to the Staff regarding the scope of the Staff's environmental analysis. Moreover, the Staff conducted full scoping for the GEIS, which considered specific features of the Black Hills and identified Dewey-Burdock on

---

[100] *See, e.g.*, Staff's Response to Tribe at 8-9 (listing opportunities for the Tribe's participation).

[101] *Id.* at 8-9; *see* Tr. at 771.

[102] Staff's Response to Tribe at 9; *see* Ex. NRC-008-A-1, FSEIS § 1.4.2.

maps and figures. The GEIS also specified that it would serve as part of Dewey-Burdock's environmental analysis.[103]

It is well settled that parties challenging an agency's NEPA process are not entitled to relief unless they demonstrate harm or prejudice—and the Tribe has not done so here.[104] Federal case law makes clear that procedural violations of NEPA do not automatically void an agency's ultimate decision.[105] For example, in *Northwest Coalition for Alternatives to Pesticides v. Lyng*, although the Bureau of Land Management had not properly notified the plaintiff during the scoping process, the Ninth Circuit upheld the District Court's determination that the plaintiff was unable to demonstrate prejudice after having participated in the development of the EIS.[106] Also in *Lyng*, the court, discussing the high bar for overturning a federal administrative decision, referred to a Fourth Circuit case holding that individuals not given notice of public hearings on a proposed wastewater treatment plant did not suffer prejudice, even though they were not provided the opportunity to participate until "the eleventh hour" of the NEPA process.[107] Here, by contrast, the Tribe was involved from the beginning of the process, despite the acknowledged lack of formality in the scoping for this EIS.

Further, the scoping process is intended to provide notice to individuals potentially affected by the proposed federal action.[108] Here, although the Staff did not conduct a formal

---

[103] *See* Staff's Response to Tribe at 9.

[104] *Nw. Coal. for Alts. to Pesticides v. Lyng*, 844 F.2d 588, 594-95 (9th Cir. 1988); *Cty. of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984); *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1086-87 (E.D. Cal. 2009); *Muhly v. Espy*, 877 F. Supp. 294, 300-01 (W.D. Va. 1995).

[105] *Lyng*, 844 F.2d at 595.

[106] *Id.* at 594-95.

[107] *Id.* at 595 (citing *Providence Rd. Cmty. Ass'n v. EPA,* 683 F.2d 80, 82 (4th Cir. 1982)).

[108] *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1116 (9th Cir. 2002) ("The primary purpose of the scoping period is to notify those who may be affected by a proposed government

scoping process for the DSEIS for the Dewey-Burdock project, the Tribe had ample notice of the project and numerous opportunities throughout the process to participate in the development of the DSEIS. The Tribe argues that it was "deprived … of the opportunity to present its concerns at the proper time," but it has not argued that any particular section of the site-specific EIS is deficient because of the lack of a formal scoping process.[109]

We are satisfied that the Tribe had the opportunity to provide input on the development of the DSEIS in this case; therefore, the Tribe has not demonstrated harm or prejudice resulting from the lack of a formal scoping process. We find that any error by the Board was harmless and decline to order a hearing on the merits of this contention.[110]

3. Consolidated Intervenors' Proposed Contention D

a. Proposed Contention and Board Order

Consolidated Intervenors challenge the Board's partial denial of their proposed Contention D in LBP-10-16.[111] In the dismissed part of Contention D, Consolidated Intervenors argued that Powertech's application violated 10 C.F.R. § 40.9 "by being disorganized …."[112] In

---

action which is governed by NEPA that the relevant entity is beginning the EIS process; this notice requirement ensures that interested parties are aware of and therefore are able to participate meaningfully in the entire EIS process, from start to finish." (citing *Lyng*, 844 F.2d at 594–95)), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

[109] Tribe's Petition at 8.

[110] Notably, the Tribe has not articulated a request for any specific relief regarding the Board's dismissal of this portion of Contention 8 on the DSEIS. Because the Staff has revised its guidance to provide for scoping for future supplemental EISs that tier off of a generic EIS, we decline to delve into the underlying legal issue. Memorandum from Catherine Haney, NMSS, to Stephen D. Dingbaum, OIG (June 30, 2015), at 2 (ML15166A406).

[111] Consolidated Intervenors' Petition at 2 n.3, 3-4, 7. In their petition for review, Consolidated Intervenors cite LBP-15-16 as the Board order that dismissed portions of their proposed Contention D. *Id.* at 2 n.3. To clarify, the Board actually held inadmissible the relevant portions of Contention D in LBP-10-16. *See* LBP-10-16, 72 NRC at 402-03.

[112] Consolidated Intervenors' Petition to Intervene at 36; *see* LBP-10-16, 72 NRC at 400-01. The Board only denied Consolidated Intervenors' Contention D with respect to the

denying this portion of Contention D, the Board found that the application was not "so incomprehensible as to be useless to the public" and stated that "issues of disorganization in an application cannot be said to be germane to the licensing process."[113]

b. Consolidated Intervenors' Petition for Review

On appeal, Consolidated Intervenors argue that the Board created "new standards for accuracy and completeness under [10 C.F.R. § 40.9]" and held "that [a]pplications must be 'incomprehensible' and 'useless to the public' to be deficient under [10 C.F.R. § 40.9]."[114] They claim that the Board's decision "undermines the entire purpose of having an [a]pplication if the standard is so low that it will pass muster if it is barely comprehensible and a hair better than 'useless.'"[115] Finally, Consolidated Intervenors argue that "[t]he public has a strong interest in the standard for accuracy and completeness of source material license applications being higher than that set by the Board ('incomprehensible'[;] 'useless to the public')."[116]

We find that Consolidated Intervenors have not identified a substantial question for our review here. They have not demonstrated that the Board erred at law or abused its discretion in dismissing this portion of Contention D. Consolidated Intervenors have misconstrued the Board's holding; the Board did not adopt or create a new standard for an application to be deemed deficient under 10 C.F.R. § 40.9. Rather, the Board determined that Powertech's application was sufficiently comprehensible for compliance with our regulations. That is, the

---

comprehensibility of the application. LBP-10-16, 72 NRC at 402-03. The Board admitted portions of the contention that related to the technical adequacy of baseline water quality and adequate confinement of the host aquifer. *Id.* at 403.

[113] *Id.* at 402-03 (quoting *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 280 (1998)).

[114] Consolidated Intervenors' Petition at 2 n.3, 7.

[115] *Id.* at 3-4.

[116] *Id.* at 7.

Board simply disagreed with Consolidated Intervenors' argument that the application was incomprehensible and useless. Pursuant to 10 C.F.R. § 2.341(b)(4)(i), we will take review of a Board's factual findings when those findings are clearly erroneous or in conflict with a finding regarding the same fact in a different proceeding.[117] Consolidated Intervenors have not raised a substantial question with respect to the Board's factual conclusions here. Therefore, we deny Consolidated Intervenors' petition for review.

C. New Contentions Held Inadmissible

The Tribe has petitioned for review of the Board's ruling in LBP-15-16 finding its two newly proposed contentions inadmissible.[118] The Tribe filed these two contentions after the conclusion of the evidentiary hearing in August 2014 in response to the Board's post-hearing order directing Powertech to disclose to all parties additional information regarding borehole log data concerning the project site.[119] The Staff reviewed the data and determined that it did not contradict the findings in the FSEIS.[120] Thereafter, the Tribe proposed two new contentions: the first related to the Staff's October 2014 submissions regarding the data and the second related to EPA documents regarding potential CERCLA cleanup at the Powertech site.[121]

---

[117] *See Honeywell*, CLI-13-1, 77 NRC at 18-19; *Geisen*, CLI-10-23, 72 NRC at 224-25.

[118] Tribe's Petition at 8-11; *see* LBP-15-16, 81 NRC at 704-06.

[119] Post Hearing Order (Sept. 8, 2014), at 19 (unpublished) (Post-Hearing Order); *see* Ex. OST-19, Press Release, Powertech Uranium Corp., Powertech Uranium (Azarga Uranium) Enters into Data Purchase Agreement for Dewey-Burdock Project (July 16, 2014) (ML14247A415).

[120] *NRC Staff's Motion to Admit Testimony and Exhibits Addressing Powertech's September 14, 2014 Disclosures* (Oct. 14, 2014), at 1; Ex. NRC-158, Supplemental Testimony Regarding NRC Staff Analysis of TVA Well Log Data (Oct. 14, 2014), at 12 (ML14344A931) (Staff's Supplemental Testimony).

[121] Tribe's Motion for New Contentions at 2-3.

1. The Tribe's New Contention 1

a. Proposed Contention and Board Order

In its first new contention, the Tribe argued that the Staff was required to evaluate the well log data as part of the NEPA process, and that the methodology the Staff used to evaluate the well logs (by conducting a "spot check") was unacceptable.[122]

The Board found that the contention did not meet the requirements of 10 C.F.R. § 2.309(c)(1)(ii) because the information in the well logs was not materially different from information already in the record.[123] The Board also noted that the Tribe failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) because it had not raised a genuine dispute on a material issue of law or fact—the Staff's method for evaluating borehole data by reviewing representative borehole logs had not changed throughout the proceeding.[124] Further, the Board noted that the Tribe had not met the requirements in 10 C.F.R. § 51.92 for demonstrating the need to supplement a FSEIS—in particular that the information in question was "new and significant."[125]

---

[122] *Id.* at 6-9.

[123] LBP-15-16, 81 NRC at 704-05. *See* 10 C.F.R. § 2.309(c)(1)(i)-(iii); *see also* Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012) (clarifying the requirements governing hearing requests, intervention petitions, and motions for leave to file new or amended contentions). Although this proceeding began in 2009, the Board ruled on the Tribe's proposed new contentions in 2015 and had previously adopted the 2012 amendments to 10 C.F.R. Part 2 for this proceeding. Order (Concerning Changes to 10 C.F.R. Part 2) (Aug. 21, 2012) (unpublished).

[124] LBP-15-16, 81 NRC at 705.

[125] *Id.* The Tribe objects to the Board's discussion of this point in its petition for review. The Tribe argues that the Board "conflate[d] the contention admissibility standard with the substantive standard of whether the new information would require a supplement to the NEPA documents." Tribe's Petition at 9. Regardless, the Tribe's challenge does not raise a substantial question for review, because the Tribe's New Contention 1 did not meet the requirements of 10 C.F.R. §§ 2.309(c)(1)(ii) and 2.309(f)(1)(vi). If the information is not materially different from previously available information, it stands to reason that it does not "paint a seriously different picture of the environmental landscape" for this proceeding. *Hydro*

b. The Tribe's Petition for Review

On appeal, the Tribe argues that the Board's denial of the Tribe's request to develop and present its contention presents a substantial question for review.[126] It challenges the Board's factual determinations that new well log data did not present materially different information and that the NRC's "spot check" methodology has been used throughout the Staff's review and issuance of the Powertech's license.[127] But this challenge does not show how the Board's determination here is in error. The Board determined that the Tribe did not present any information that was materially different than what was previously available.[128] The Tribe raised this contention after the hearing was complete and the Board had the benefit of hearing from all of the parties on the borehole information and the Staff's review methodology. On appeal, the Tribe does not give us a reason to find that the Board, which was familiar with the information available throughout the pendency of the proceeding, committed an error or abuse of discretion. Therefore, we decline to take review of the Board's dismissal of this contention as inadmissible.

2. The Tribe's New Contention 2

a. Proposed Contention and Board Order

In its second new contention, the Tribe argued that the Staff had not considered in its NEPA analysis information in a newly released EPA assessment regarding a historic hardrock

---

Resources, Inc., CLI-99-22, 50 NRC at 14 (quoting *Sierra Club v. Froehike*, 816 F.2d 205, 210 (5th Cir. 1987)).

[126] The Tribe argues that the Board's post-hearing order provides support for its argument that rejection of this contention presents a substantial question for review. Tribe's Petition at 10. There, the Board ordered disclosure of various documents. Post-Hearing Order at 10-12, 19. The Board denied the Tribe's request for sanctions, and denied Powertech's motion for reconsideration. *Id.* at 12, 16. While the Tribe's description of the Board's post-hearing order is accurate, those rulings do not support its petition for review.

[127] Tribe's Petition at 8-10.

[128] *See* LBP-15-16, 81 NRC at 704-05; *see also* Ex. NRC-158, Staff's Supplemental Testimony, at 9-13.

uranium mine site within the Dewey-Burdock project area.[129] The Tribe argued that "the EPA states that it has determined that a CERCLA removal action is recommended for the site and will proceed."[130] In its contention, the Tribe asserted that the CERCLA removal action was therefore reasonably foreseeable, and that the Staff should have considered the action in the cumulative impacts analysis in the EIS.[131]

The Board held this contention inadmissible because the Tribe "fail[ed] to present sufficient information to show a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi)."[132] Moreover, the Board found that the Tribe disregarded the analysis in the FSEIS of the environmental concerns raised in the EPA Preliminary Assessment, as well as the EPA Preliminary Assessment's repeated references to the FSEIS.[133] Given that the EPA documents themselves referred to the Staff's analysis in both the DSEIS and FSEIS, the Board concluded that the Tribe had not met the contention admissibility requirements, specifically 10 C.F.R. § 2.309(f)(1)(vi).[134]

b. The Tribe's Petition for Review

In its petition for review, the Tribe argues that the Board erred because it "glossed over" the fact that "[t]he 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

---

[129] Tribe's Motion for New Contentions at 11; *see also* Ex. OST-026, Letter from Ryan M. Lunt, Task Order Project Manager, Seagull Envtl. Techs., Inc., to Victor Ketellapper, Site Assessment Team Leader, U.S. Envtl. Prot. Agency, Region 8 (Sept. 24, 2014), attach. "Preliminary Assessment Report Regarding the Darrow/Freezeout/Triangle Uranium Mine Site Near Edgemont, South Dakota" (ML14344A926).

[130] Tribe's Motion for New Contentions at 11.

[131] *Id.*

[132] LBP-15-16, 81 NRC at 706.

[133] *Id.*

[134] *Id.*

FSEIS."[135] The Tribe asserts that the FSEIS discusses the unreclaimed mines but does not address "the contamination pathway from the unreclaimed mines to the groundwater" and argues that this presents a substantial question for our review.[136]

Contrary to the Tribe's argument on appeal, the Board did not overlook the Tribe's arguments regarding environmental concerns related to the abandoned mines. In finding New Contention 2 inadmissible, the Board determined that the Tribe had "fail[ed] to show that the Preliminary Assessment is or contains significant new information" and therefore did not demonstrate a genuine dispute on a material issue of law or fact.[137] The Board's ruling was based on its determination that the information in the Preliminary Assessment, including information regarding groundwater contamination, did not differ significantly from that in the FSEIS so as to demonstrate that a genuine dispute existed on a material issue of law or fact.[138] The Tribe's petition does not raise a substantial question regarding the Board's finding that the information in the Preliminary Assessment about unreclaimed mines was insufficient to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Therefore, we deny review of the Board's dismissal of New Contention 2.

We now turn to the parties' claims with respect to the Board's merits decision.

D. Contentions Decided on the Merits

1. Contentions 1A and 1B

As we discuss in detail below, we find that the Board's ruling on Contentions 1A and 1B is final, and consideration of the petitions for review under 10 C.F.R. § 2.341(b)(4) is appropriate at this time. We deny each party's petition for review with respect to Contentions 1A and 1B—

---

[135] Tribe's Petition at 11.

[136] *Id.*

[137] LBP-15-16, 81 NRC at 706.

[138] *Id.*

thus leaving in place the Board's ruling in favor of the Tribe and Consolidated Intervenors. Further, under our inherent supervisory authority over agency adjudications, we leave the proceeding open for the narrow issue of resolving the deficiencies identified by the Board.

a. Partial Initial Decision

First, we must clarify the appropriate standard of review of the Board's decision on these contentions. By its terms, the Board presented LBP-15-16 as a "partial initial decision" that left the ultimate resolution of Contentions 1A and 1B for a future decision.[139] Under this approach, the Board retained jurisdiction pending the Staff's remedy of the deficiencies the Board identified in the Board's ruling on Contentions 1A and 1B.[140] Each party, in turn, questioned the Board's decision to retain jurisdiction.[141]

The Board received full briefing and held oral argument and a merits hearing on the issues raised in Contentions 1A and 1B. The Board found in favor of the Tribe and Consolidated Intervenors and identified deficiencies in the Staff's efforts to comply with NEPA and the NHPA.[142] With briefing on these issues completed and the Board's having found in favor of the Tribe and Consolidated Intervenors, we find that the Board's resolution of Contentions 1A and 1B is final and consideration of the petitions for review of these contentions is appropriate at this time.[143]

---

[139] *Id.* at 658, 710.

[140] *Id*.

[141] Consolidated Intervenors' Petition at 2 & n.3, 3, 6-7; Powertech's Petition at 5-6, 6 n.9; Staff's Petition at 13-16; *see also* Tribe's Petition at 18-19 (arguing that the "proper remedy" is to "vacate the [licensing] decision and remand back to the agency for further proceedings").

[142] *See* LBP-15-16, 81 NRC at 708.

[143] *See* 10 C.F.R. § 2.341(b)(4); *Pa`ina*, CLI-10-18, 72 NRC at 69-74 (fully reviewing appeals from a licensing board order on an issue where the board ruled in favor of the intervenor on the merits but directed further corrective action); *Vermont Yankee*, CLI-10-17, 72 NRC at 4-9 (same).

b. Contentions and Board Order

In Contention 1A, the Tribe and Consolidated Intervenors challenged the FSEIS's treatment of historic and cultural resources under the NHPA and NEPA.[144] In Contention 1B, the Tribe and Consolidated Intervenors challenged the adequacy of the Staff's NHPA consultation process.[145]

With respect to Contention 1A, the Board held that the Staff had complied with the NHPA requirement to "make a good faith and reasonable effort to identify properties … eligible for inclusion in the National Register of Historical Places within the Dewey-Burdock [*in situ* leach] project area."[146] The Board found that the Staff had largely complied with Advisory Council on Historic Preservation (ACHP) guidance on identification of historic properties.[147] However, with respect to the Staff's NEPA responsibilities, the Board found insufficient the Staff's analysis of the environmental effects of the Dewey-Burdock project on Native American cultural, historic, and religious resources.[148] Accordingly, it held that the Record of Decision was incomplete because the Staff "did not give this issue its required hard look in the FSEIS."[149] Regarding Contention 1B, section 106 consultation, the Board acknowledged that it could not

---

[144] Tribe's FSEIS Contentions at 5-9; Consolidated Intervenors' FSEIS Contentions at 6-14. The Tribe and Consolidated Intervenors previously filed similar contentions on the application and the DSEIS. *See* Tribe's DSEIS Contentions at 4-10; Consolidated Intervenors' DSEIS Contentions at 2-7; *Petitioners' Request for Leave to File a New Contention Based on SUNSI Material* (April 30, 2010), at 1-6; Tribe's Petition to Intervene at 12-17.

[145] Tribe's FSEIS Contentions at 9-14; Consolidated Intervenors' FSEIS Contentions at 14-20. The Tribe previously filed similar contentions on the application and the DSEIS. Tribe's DSEIS Contentions at 4-10; Tribe's Petition to Intervene at 12-17.

[146] LBP-15-16, 81 NRC at 654.

[147] *Id.*

[148] *Id.* at 655. More specifically, the Board found a deficiency in the analysis of sites that might be significant to the Oglala Sioux Tribe.

[149] *Id.*

definitively determine whether the Staff or the Tribe bore responsibility for what the Board considered a breakdown in consultation. But the Board found that the NHPA consultation process between the Staff and the Tribe was inadequate because it did not provide sufficient opportunity for the Tribe to articulate its views on the Dewey-Burdock project's effects on historic properties and participate in the resolution of adverse effects.[150]

The Board directed the Staff to conduct additional consultation with the Tribe "to satisfy the hard look at impacts required by NEPA … [and] to satisfy the consultation requirements of the NHPA."[151] By the terms of its order, the Board issued a partial initial decision with respect to these contentions and, therefore, retained jurisdiction over the proceeding pending the Staff's curing of the deficiencies in the FSEIS and consultation with the Tribe.[152] On appeal, each party challenged the Board's issuance of a partial initial decision and retention of jurisdiction.[153]

c. Petitions for Review

(1) THE TRIBE'S AND CONSOLIDATED INTERVENORS' PETITIONS FOR REVIEW

Although the Board found in favor of the Tribe and Consolidated Intervenors, both parties have appealed the relief the Board granted with respect to these contentions.

---

[150] *Id.* at 656-57.

[151] *Id.* at 657. The Board noted that it could have suspended Powertech's license, and it attributed its decision to leave the license in place to the Tribe's incomplete participation in the consultation process. *Id.* at 658.

[152] *Id.* at 710.

[153] Consolidated Intervenors' Petition at 2 & n.3, 3, 6-7; Powertech's Petition at 5-6, 6 n.9; Staff's Petition at 13-16; *see also* Tribe's Petition at 18-19 (arguing that the "proper remedy" is to "vacate the [licensing] decision and remand back to the agency for further proceedings").

(a) The Tribe's Petition for Review

The Tribe challenges the Board's decision to leave the license in place, despite finding that the NRC Staff's analysis did not comply with NEPA or the NHPA.[154] Given the Board's decision, the Tribe argues that NEPA and the NHPA prohibit the Board from leaving the license in place and asserts that "the proper remedy is that employed by federal courts up[on] a finding of a violation of NEPA: to vacate the decision and remand back to the agency for further proceedings necessary to achieve compliance."[155]

We disagree. It is well settled that a failure to comply with every aspect of procedural statutes like those at issue here does not necessarily void agency action; federal courts have required that parties demonstrate harm or prejudice to disturb an agency's decision.[156] Here, the Tribe has not articulated any harm or prejudice; in fact, it did not request a stay of the effectiveness of the license, despite the Board's invitation for it to do so.[157] Nor has the Tribe raised a substantial question that would merit granting its petition for review with respect to this issue.[158] Therefore, we deny this portion of the Tribe's petition for review and its request that we vacate Powertech's license.

(b) Consolidated Intervenors' Petition for Review

Consolidated Intervenors argue that "the Board improperly withheld an initial decision and refused to rule on Contentions 1A [and] 1B thereby depriving the Tribe and tribal

---

[154] Tribe's Petition at 19.

[155] *Id.* (citing *New York*, 681 F.3d at 471).

[156] *Lyng*, 844 F.2d at 594-95; *Cty. of Del Norte*, 732 F.2d at 1467; *Cent. Delta Water Agency*, 653 F. Supp. 2d at 1086-87; *Muhly*, 877 F. Supp. at 300-01.

[157] *See* LBP-15-16, 81 NRC at 658.

[158] *See Pa`ina*, CLI-10-18, 72 NRC at 69-74 (noting that the board ruled in favor of the intervenor after a merits hearing but directed the parties to undertake additional action to cure identified deficiencies); *Vermont Yankee*, CLI-10-17, 72 NRC at 4-9 (same).

members … an opportunity to appeal the Board's decision."[159] Despite their argument that the Board's decision deprived them of an opportunity to appeal the decision, Consolidated Intervenors challenge the Board's decision to leave the license in place—tying their objection to the NRC's federal trust responsibility.[160] But they do not articulate why the federal trust responsibility precludes the Board from finding as it did; nor do Consolidated Intervenors attempt to demonstrate the existence of a substantial question that would merit granting their petition for review. Instead, they argue that the Board misconstrued the trust responsibility federal agencies owe to the Tribe by "presuming that the Tribe will act '[u]nreasonably.'"[161] This argument misconstrues the Board's decision and does not raise a legal question or demonstrate factual error on the part of the Board. In ruling on Contentions 1A and 1B, the Board did not presume that the Tribe would act unreasonably. Rather, the Board stated that "[e]ven after a thorough review of the record … [it was] not able to decide definitively which party or specific actions led to the impasse preventing an adequate tribal cultural survey."[162] Therefore, the Board directed the Staff to resume consultation with the Tribe, but it reminded the Tribe of its obligation to engage in a meaningful manner with the Staff.[163] We do not see how this statement presumes any unreasonable action or misconstrues the NRC's trust responsibility, nor does it satisfy our standards for granting a petition for review. Therefore, we deny Consolidated Intervenors' petition for review with respect to these contentions.

---

[159] Consolidated Intervenors' Petition at 2.

[160] *Id.* at 3.

[161] *Id.*; *see also id.* at 6.

[162] LBP-15-16, 81 NRC at 656.

[163] *Id.* at 657-58, 658 n.236.

(2) POWERTECH AND THE STAFF'S PETITIONS FOR REVIEW

Powertech and the Staff appeal the Board's rulings on Contentions 1A and 1B as well as the Board's retention of jurisdiction.[164]

(a) Powertech's Petition for Review

On appeal, Powertech argues, at length, that the Board's ruling on Contentions 1A and 1B was inconsistent, legally flawed, and factually incorrect. Specifically, Powertech claims that the Board erred in finding the Staff's NHPA analysis deficient by committing clear error of law, ignoring the ACHP's determinations regarding the propriety of the Staff's analysis, providing "special treatment" to the Tribe as a litigant and consulting party, and ignoring critical facts regarding the nature of the government-to-government consultation between the NRC Staff and the Tribe.[165] With respect to the Board's NEPA determination, Powertech argues that the Board erred in finding that the Staff's analysis does not comply with NEPA. In Powertech's view, the NRC Staff has satisfied its NEPA obligation to assess the impacts to historic and cultural resources by considering and evaluating all the available information or information that could reasonably be obtained.[166] Powertech asserts that in requiring more from the Staff, the Board has committed a clear error of law.[167] We disagree. At bottom, Powertech's dispute with the Board's decision is factual, not legal. When assessing a petition for review on factual issues, we typically defer to a Board's findings, absent a showing of clear error.[168] Here, Powertech challenges the Board's weighing of the evidence to find that the Staff's NEPA and NHPA

---

[164] Powertech's Petition at 6-22; Staff's Petition at 14-25.

[165] Powertech's Petition at 7, 9-11, 16.

[166] *Id.* at 20-22.

[167] *Id.* at 17.

[168] 10 C.F.R. § 2.341(b)(4)(i).

analyses do not satisfy the NRC's statutory obligations. For example, with respect to the Staff's NEPA analysis, Powertech claims that the Staff considered and evaluated "all available information or information that reasonably could be obtained …."[169] Yet none of Powertech's claims show clear error on the part of the Board, absent which we will not reconsider the Board's resolution of factual issues.[170] We therefore deny Powertech's petition for review with respect to the Board's findings in Contentions 1A and 1B.

(b) The Staff's Petition for Review

On appeal, the Staff argues that the Board misapplied NEPA's hard look standard as a matter of law, under which the Board should assess whether the Staff "made reasonable efforts" to obtain complete information on the cultural resources at issue here.[171] In its brief, the Staff describes the efforts it undertook and argues that these efforts were sufficient to meet the hard-look standard.[172] The Staff asks us to view the Board's application of the hard-look standard as a legal issue under 10 C.F.R. § 2.341(b)(4)(ii).[173] But the fundamental issue here—whether Staff complied with NEPA—is inherently factual.

---

[169] Powertech's Petition at 21-22.

[170] We recognize that, as Powertech notes, the ACHP participated in the section 106 process and concluded that the NRC Staff's process complies with the "content and spirit" of the section 106 process. Ex. NRC-031, Letter from John Fowler, ACHP, to Waste Win Young, Standing Rock Sioux Tribe, at 3 (Apr. 7, 2014) (ML14241A473); *see* Powertech's Petition at 3, 9, 11, 15-16. The Staff likewise asks us to treat the ACHP's and North Dakota SHPO's views as dispositive of the fact that it complied with the NHPA. Staff's Petition at 24. Here, where the Board has weighed the relevant facts, including the cited exhibits, and determined that the Staff has not satisfied its obligations under the NHPA and NEPA, we will not disturb the Board's findings absent clear error.

[171] Staff's Petition at 17-18.

[172] *Id.* at 19-20.

[173] *Id.* at 17.

As a general matter, we defer to the Board's findings with respect to the underlying facts unless they are "clearly erroneous."[174] Here, the Board weighed the evidence and determined that the analysis of the environmental effects on cultural resources in the FSEIS was insufficient.[175] The Staff challenges this determination, describing the efforts it made to gather information on cultural resources, but the Staff has not demonstrated that the Board's findings are clearly erroneous.[176] Given the complexity of this proceeding, which involved hundreds of exhibits and over five years of litigation, we are not inclined to second guess the Board's fact-finding.

The Staff next challenges the Board's determination that, on the one hand, the Staff complied with the NHPA regarding identification of historic properties, but the Staff's analysis of cultural, religious, and historic resources under NEPA was insufficient. It argues that the Board's finding that it had complied with the NHPA in identifying historic properties compels the Board to conclude that the Staff also complied with NEPA with respect to cultural resources.[177] The Staff acknowledges that the Board relied on precedent in stating that NEPA compliance does not necessarily follow from NHPA compliance.[178] But it challenges the Board's application of that legal principle to the facts in this case, stating that it had taken a hard look at cultural resources in the FSEIS and arguing that "[t]he Board did not cite any authority supporting its divergent findings on whether the Staff complied with a common requirement of both

---

[174] *Honeywell*, CLI-13-1, 77 NRC at 18-19; *Geisen*, CLI-10-23, 72 NRC at 224-25.

[175] LBP-15-16, 81 NRC at 644-55.

[176] Staff's Petition at 19-20.

[177] *Id.* at 21-22.

[178] *Id.*; *see* LBP-15-16, 81 NRC 654-55 (citing *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 606, 610 (9th Cir. 2010); *Hydro Resources, Inc.* (P.O. Box 777 Crownpoint, New Mexico 87313), LBP-05-26, 62 NRC 442, 472 (2005)).

statutes …."[179] The Staff's challenge to the Board's alleged failure to cite authority for its findings is misplaced. Federal case law supports the legal principle that NHPA and NEPA compliance do not necessarily mirror one another.[180] The Board found that NEPA requires an analysis of the effects on all of the cultural resources present at the site, not only those properties eligible for listing on the National Register of Historic Places, which is the standard for further analysis under the NHPA.[181] The Staff does not demonstrate that the Board's factual finding was implausible. Therefore, we decline to disturb the Board's finding here.

Next, the Staff seeks review of the Board's ruling on Contention 1B that the Staff failed to adequately consult with the Tribe under the NHPA.[182] The Staff argues that the Board's holdings on Contentions 1A and 1B are contradictory because in Contention 1A the Board held "that the Staff complied with the NHPA when identifying cultural resources" while in Contention 1B, the Board held that the NHPA consultation process was inadequate.[183] But the Board's rulings on compliance with the NHPA are not contradictory; its rulings on NHPA compliance in Contentions 1A and 1B relate to different obligations.

The NHPA imposes several obligations on federal agencies, which proceed in a step-by-step manner.[184] The consultation requirement continues throughout the steps. The first step is identifying any historic properties that might be affected by the federal undertaking (here

---

[179] Staff's Petition at 22.

[180] *See Te-Moak*, 608 F.3d at 606-07, 610.

[181] *See* 36 C.F.R. § 800.4 (requiring agencies to identify "historic properties"); *id.* § 800.16 (defining historic properties as "districts, sites, buildings, structures, or objects included in or eligible for inclusion in, the National Register of Historic Places"); *see generally id*. § 60.4 (providing the criteria for inclusion in the National Register of Historic Places).

[182] Staff's Petition at 23.

[183] *Id. Compare* LBP-15-16, 81 NRC at 654, *with id.* at 657.

[184] *Id.* at 638-41.

licensing), and in doing so, making a reasonable and good faith effort to seek information from consulting parties, including Native American Tribes, to aid in that identification.[185] In ruling on Contention 1A, the Board determined that the Staff had satisfied the NHPA's consultation requirements with respect to identifying historic properties.[186] In other words, the Board determined that the Staff had satisfactorily completed the first step in the process.

But, as discussed by the Board, the identification of historic properties is not the end of the NHPA consultation process. After it identifies eligible sites that might be affected by the project, an agency must assess[187] and resolve[188] potential adverse effects in consultation with tribes that attach religious and cultural significance to those sites.[189] In its ruling on Contention 1B, the Board found that the Staff had not adequately consulted with the Tribe on the second and third steps; that is, despite its good faith effort to consult in order to identify historic properties, the Staff had not demonstrated that it provided the Tribe with the opportunity to identify concerns about those properties and participate in the resolution of any adverse effects.[190] The Board, after a merits hearing, reasonably concluded that the Staff's consultation with the Tribe was insufficient to meet these requirements. Thus, the Staff has not raised a substantial question for review. For the reasons stated above, we deny review of the Staff's petition with respect to Contentions 1A and 1B.

---

[185] 36 C.F.R. § 800.4.

[186] LBP-15-16, 81 NRC at 654.

[187] 36 C.F.R. § 800.5.

[188] *Id.* § 800.6.

[189] *Id.* § 800.2(c)(2)(ii)(A).

[190] LBP-15-16, 81 NRC at 656-57. *See also* 36 C.F.R. § 800.2(c)(2)(ii)(A).

(3) RETENTION OF JURISDICTION

Both the Staff and Powertech appeal the Board's retention of jurisdiction pending resolution of the deficiencies identified in Contentions 1A and 1B.[191] In retaining jurisdiction, the Board directed the Staff to: (1) initiate government-to-government consultation with the Tribe; (2) file monthly status reports; and (3) submit "an agreement reflecting the parties' settlement … or a motion for summary disposition of Contentions 1A and 1B."[192] Both the Staff and Powertech argue that in each instance the Board "exceeded its authority" by retaining jurisdiction over the proceeding and prescribing "a process for the Staff to resolve" the deficiencies identified in Contentions 1A and 1B.[193] Consolidated Intervenors also questioned the Board's retention of jurisdiction over these contentions. Consolidated Intervenors argue that doing so constitutes prejudicial procedural error.[194]

With respect to the Board's specific direction to the Staff to initiate "government-to-government" consultation, we agree in principle with the Staff and Powertech. To the extent that the Board's ruling can be viewed as providing specific direction to the Staff, the Board overstepped its authority.[195] But, based upon our review of the Board's decision, the Board has not stated that it will direct or oversee the Staff's review of cultural resources; instead, it leaves it to the Staff—either by agreement among the parties or by motion for summary disposition—to

---

[191] Staff's Petition at 15-16; Powertech's Petition at 6.

[192] LBP-15-16, 81 NRC at 708, 710.

[193] Staff's Petition at 15-16; *see also* Powertech's Petition at 5-6, 6 n.9.

[194] Consolidated Intervenors' Petition at 6-7.

[195] *See, e.g.*, *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) ("NRC Staff Reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not the licensing boards.").

determine when it has addressed the deficiencies identified by the Board.[196] All the Board has required is that the Staff provide reports regarding its consultation efforts in a manner similar to that in which it reports on the progress of its review and the Board's directions to the parties in this respect do not exceed the bounds of its authority. Our regulations provide the Board with the authority to "take appropriate action to control the … hearing process," "[r]egulate the course of the hearing and the conduct of the participants," and "[i]ssue orders necessary to carry out the presiding officer's duties and responsibilities under [10 C.F.R. Part 2]."[197] In circumstances like these, we have made it clear that a Board has relative latitude to fashion appropriate remedies regarding issues properly before it.[198] The Staff is free to select whatever course of action it deems appropriate to address the deficiencies identified in the Board's order, including, but not limited to further government-to-government consultation.[199] For these reasons, we decline to disturb the Board's approach—the Staff must still file monthly reports, along with an agreement or a motion for summary disposition—depending on the outcome of its efforts to

---

[196] LBP-15-16, 81 NRC at 710.

[197] 10 C.F.R. § 2.319.

[198] *Pa`ina*, CLI-10-18, 72 NRC at 96 (affirming the Board's decision to require an additional period for written public comment on a supplemental EA); *see also Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206 (1978) ("[T]he boards have broad and strong discretionary authority to conduct their functions with efficiency and economy. However, they must exercise it with fairness to all the parties …." (citation omitted)); *Wisconsin Electric Power Co., et al.* (Point Beach, Unit 2), ALAB-82, 5 AEC 350, 351 (1972) ("Administrative agencies and courts have long been accepted as 'collaborative instrumentalities of justice.'" (quoting *United States* v. *Morgan*, 313 U.S. 409, 422 (1941))); *Duke Power Co., et al.* (Catawba Nuclear Station, Units 1 and 2), LBP-83-24A, 17 NRC 674, 680 (1983).

[199] We note, however, that in licensing reviews such as this one, where Native American Tribes could be affected by the NRC's licensing action, we expect the Staff's actions to be guided by the principles outlined in the NRC's Tribal Protocol Manual. "Tribal Protocol Manual," NUREG-2173 (2014) (ML14274A014).

address the deficiencies. Therefore, we deny Powertech's, the Staff's, and Consolidated Intervenors' petitions for review of the Board's retention of jurisdiction over these contentions.

2. Contention 2

a. Contention and Board Order

The Tribe seeks review of the Board's resolution of Contention 2 in favor of Powertech and the Staff. In Contention 2, the Tribe argued that

> the FSEIS violates 10 C.F.R. Part 40, Appendix A, Criterion 7, 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations … in that it fails to provide an adequate baseline groundwater characterization or demonstrate that ground water samples were collected in a scientifically defensible manner, using proper sample methodologies.[200]

The Tribe also challenged the fact that "while the FSEIS contains data from 2007-2009, the background water quality for use in the actual regulatory process for the facility will be established [at] a future date, outside of the NEPA process, and outside of the public's review."[201] The Tribe objected to the collection of additional background groundwater quality data after issuance of the license, but before the facility begins operating, and argued that the practice violates NEPA.[202]

In ruling on Contention 2, the Board noted that NRC case law supports the industry practice of definitively establishing groundwater quality baselines after licensing but before operation.[203] Additionally, the Board noted that it found the testimony offered by the Staff's and Powertech's witnesses more detailed and persuasive than the testimony offered by the Tribe's

---

[200] Tribe's Post-Hearing Brief at 38.

[201] *Id.* at 39.

[202] *Id.* at 38-39.

[203] LBP-15-16, 81 NRC at 665 (quoting *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 6 (2006)).

witness.[204] In reaching its decision, the Board examined the Tribe's exhibits regarding the EPA's Preliminary Assessment to determine that document's relevance to this contention.[205] The Board found unavailing the Tribe's argument that the conclusions in the Preliminary Assessment translated to an insufficient discussion of historic mining operations in the FSEIS.[206]

b. The Tribe's Petition for Review

On appeal, the Tribe challenges the Board's ruling, claiming that the Board erred as a matter of law when it permitted Powertech to defer collection of groundwater data to after licensing but before operation.[207] Based on our review of the record, we find that the Tribe has not raised a substantial question of law with respect to the applicable standards for site characterization. The Tribe mischaracterizes the Board's ruling when it claims that the Board allowed the Staff and Powertech to defer gathering groundwater data until after licensing.[208] The Board did not rule that "meaningful" baseline characterization may be deferred until the post-licensing period. Rather, it held that the pre-licensing groundwater monitoring used to describe the site for NEPA purposes need not conform to the post-licensing, pre-operation groundwater monitoring requirements applicable to a licensed facility because the monitoring

---

[204] *Id.* at 666.

[205] *Id.*

[206] *Id.* The Board reasoned that the conclusion in the Preliminary Assessment that lack of groundwater sampling data limited the availability of background concentrations did not force a conclusion that the FSEIS's discussion of background water quality data was insufficient. It explained that the Preliminary Assessment was focused on CERCLA and the FSEIS was focused on our environmental regulations and the CEQ regulations. CERLCA's objectives are different from NEPA's objectives. With respect to CERCLA, it is important to determine the background levels to assess the impact of *past* mining activities on the site. By contrast, for NEPA purposes, the site's current baseline is important to determine the potential future impacts of the proposed project on the site.

[207] Tribe's Petition at 19-20.

[208] *Id.* at 20.

activities at these two stages serve different purposes.[209] We see no substantial question of law relating to NEPA's site characterization requirements.

The Tribe further asserts that the Board "committed … error and abused its discretion" by not requiring the Staff to account for past mining activity in its baseline water quality data.[210] In support of this argument, the Tribe argues that "[t]he Board even ignored evidence from the EPA Preliminary Assessment … 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 site."[211] Contrary to the Tribe's assertions, the Board did not disregard the Preliminary Assessment; it specifically addressed the Tribe's argument regarding the Preliminary Assessment in its decision.[212] The Board found that due to the different objectives of NEPA and CERCLA, the Preliminary Assessment's finding regarding background data did not impact the adequacy of the analysis in the FSEIS.[213] The Tribe does not explain how the Board's determination on this point constitutes clear error or abuse of discretion.[214] The

---

[209] LBP-15-16, 81 NRC at 665 (quoting *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), LBP-15-3, 81 NRC 65, 91-92 (2015)). In the *Strata* proceeding, we recently denied review of the Board's decision on a contention that was substantially similar to the Tribe's Contention 2, on the same grounds. *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566, 583-84 (2016) ("[T]he groundwater monitoring used to describe the environmental conditions at the site for NEPA purposes need not conform to the groundwater monitoring requirements applicable to an operating facility. The two standards serve different purposes.") (citations omitted).

[210] Tribe's Petition at 20.

[211] *Id.*

[212] LBP-15-16, 81 NRC at 666.

[213] *Id.*

[214] *See* Tribe's Petition at 20.

Tribe does not present a substantial question for review with respect to the Board's ruling on Contention 2; therefore, we decline to take review.[215]

3. Contention 3

a. Contention and Board Order

In Contention 3, the Tribe and Consolidated Intervenors argued that the Dewey-Burdock site contains numerous geological and man-made features that will permit groundwater migration.[216] Overall, the Board resolved this contention in favor of Powertech and the Staff.[217] The Board carefully and extensively considered evidence presented by all four parties, and it concluded that the Staff had taken the required hard look at the confinement of the overall ore zone.[218] Because of the numerous issues covered by this contention, the Board explained its ruling on each specific technical issue related to fluid containment separately.[219]

In its ruling on Contention 3, the Board conditioned Powertech's license as follows:

> Prior to conducting tests for a wellfield data package, the licensee will attempt to locate and properly abandon all historic drill holes located within the perimeter well ring for the wellfield. The licensee will document, and provide to the NRC, such efforts to identify and properly abandon all drill holes in the wellfield data package.[220]

---

[215] The Tribe also argues that the Board abused its discretion in disregarding the Tribe's argument that Regulatory Guide 4.14 is outdated. *Id.* at 20-21. The Tribe's dissatisfaction with Regulatory Guide 4.14 does not demonstrate Board error presenting a substantial question for our review, particularly since, as the Staff points out, the Regulatory Guide did not form a basis for the Board's decision. *See* LBP-15-16, 81 NRC at 665-66; *see also* Staff's Response to Tribe at 17-18.

[216] *See* Tribe's Post-Hearing Brief at 43-56.

[217] LBP-15-16, 81 NRC at 681.

[218] *Id.* at 676.

[219] *See id.* at 676-81.

[220] *Id.* at 679, 709.

The Board explained that it conditioned the license because "despite the NRC Staff's claim that 'because there are a number of improperly plugged or abandoned boreholes at the Dewey-Burdock site, as a condition of its license Powertech must address these boreholes before beginning operations,' [the Board] did not find any such explicit condition in the license."[221] It concluded that with the additional license condition, the FSEIS and the record contain "adequate hydrogeological information to demonstrate the ability to contain fluid migration and assess potential impacts to groundwater."[222]

b. Petitions for Review

Both the Tribe and Consolidated Intervenors have petitioned for review of the Board's ruling on this contention.[223] Additionally, Powertech has petitioned for review of the license condition the Board imposed as part of its ruling.[224] As explained below, none of the petitions for review regarding this contention raise a substantial question.

(1) THE TRIBE'S PETITION FOR REVIEW

Although the Tribe characterizes its challenges to the Board's ruling on Contention 3 as legal arguments, the arguments generally relate to how the Board weighed the evidence.[225] With respect to those challenges, based upon our review of the record, we find that none of the Tribe's arguments demonstrate a substantial question for review regarding the Board's factual findings.

---

[221] *Id.* at 679 (quoting *NRC Staff's Reply Brief* (Jan. 29, 2015), at 26).

[222] *Id.* at 681.

[223] Tribe's Petition at 22-23; Consolidated Intervenors' Petition at 2 & n.3, 4-7.

[224] Powertech's Petition at 22-25.

[225] *See* Tribe's Petition at 22.

The Tribe argues that the Board committed legal error in holding that, while "small faults and joints may be present in the project area, their presence does not support Intervenors' assertions [regarding the impacts of the faults and joints.]"[226] The Tribe asserts that the Board "appl[ied] an inappropriate legal standard when it effectively placed the burden on the Tribe to demonstrate the impacts associated with these faults and fractures."[227] We disagree—the Board has neither shifted the burden of proof nor applied an inappropriate legal standard. In its ruling, the Board made clear that "[t]his is not simply a question of whether faults and joints are present, but rather whether they are large and open enough to produce a substantial breach in the confining layers …."[228] The Board carefully weighed the evidence and made a factual finding that the faults and joints would not provide pathways for groundwater migration.[229] We defer to the Board's findings with respect to the underlying facts unless they are "clearly erroneous."[230] Here, the Tribe has not raised a substantial question of clear error on the part of the Board.

Next, the Tribe objects to the Board's imposition of a license condition requiring Powertech to attempt to locate and abandon boreholes.[231] The Tribe characterizes the license condition imposed by the Board as the sole means of achieving compliance and preventing leakage.[232] We disagree. In addition to the license condition imposed by the Board, License Condition 11.5 requires Powertech to monitor for excursions and take corrective action—

---

[226] LBP-15-16, 81 NRC at 678.

[227] Tribe's Petition at 23.

[228] LBP-15-16, 81 NRC at 677.

[229] *Id.* at 671-73; 677-78.

[230] *Honeywell*, CLI-13-1, 77 NRC at 18-19; *Geisen*, CLI-10-23, 72 NRC at 224-25.

[231] Tribe's Petition at 22-23.

[232] *Id.* at 22.

including potentially terminating injection of lixiviant within the wellfield until the excursion is corrected.[233] This requirement provides incentive for Powertech to locate and abandon the boreholes. Moreover, the Board's additional license condition requires Powertech to "document its efforts" to find and fill the boreholes, enabling the Staff to assess whether Powertech's efforts are undertaken in good faith.[234] Additionally, absent evidence to the contrary, we assume at the licensing stage that a licensee will comply with its obligations.[235]

The Tribe argues that the Board "relie[d] entirely" on a license condition outside the NEPA process.[236] But the Tribe's assertion is inaccurate. As explained above, the Board relied on much more than one license condition; it weighed all parties' evidence and testimony on this contention, along with the information in the FSEIS and the record.[237] We see no clear error in the Board's reasonable conclusion that the additional license condition will ensure Powertech's compliance with the requirement to attempt to find and plug historic boreholes. Accordingly, we deny the Tribe's petition for review with respect to Contention 3.

(2) CONSOLIDATED INTERVENORS' PETITION FOR REVIEW

Like the Tribe, Consolidated Intervenors challenge the Board's weighing of the evidence in its ruling on Contention 3. Consolidated Intervenors argue that the Board shifted the burden of proof and instituted "a new 'compelling' standard"; they refer to the Board's findings with

---

[233] Ex. NRC-012, License, at 10-11.

[234] LBP-15-16, 81 NRC at 679, 709.

[235] *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 400 (1995); *cf. Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003).

[236] Tribe's Petition at 22.

[237] LBP-15-16, 81 NRC at 676-81; Ex. NRC-008-A-2, FSEIS § 4.5.2.1.1.2.2.

respect to whether leakage was caused by unplugged boreholes or by naturally occurring fissures and joints.[238]

Contrary to Consolidated Intervenors' argument, the Board's decision contains careful consideration of the parties' evidence regarding several subjects in dispute.[239] The Board neither shifted the burden of proof nor created a new standard of proof. It appropriately weighed the evidence presented by the parties and made factual determinations based on that evidence.[240]

Additionally, Consolidated Intervenors argue that the Board erred when it accepted a witness's "unsubstantiated opinion," and they argue generally that the Board committed factual error regarding leakage at the site.[241] Consolidated Intervenors argue that the Board should not have credited an expert witness proffered by Powertech because that witness was "speaking from the perspective of the mining industry" rather than in the interest of public health and safety.[242] The witness the Board cited is an experienced engineer and hydrologist.[243] Consolidated Intervenors have raised no objection to his qualifications aside from the fact that he testified for the applicant. Our deference to the Board is particularly great when it comes to weighing the credibility of witnesses.[244] Our review of the record demonstrates that the Board examined the exhibits, questioned witnesses, and considered the parties' pleadings and

---

[238] Consolidated Intervenors' Petition at 2 & n.3, 4, 6-7; *see* LBP-15-16, 81 NRC at 677.

[239] LBP-15-16, 81 NRC at 676-81.

[240] *Id.*

[241] Consolidated Intervenors' Petition at 2 & n.3, 4-6.

[242] *Id.* at 5.

[243] *See* Ex. APP-014, Curriculum Vitae of Hal. P. Demuth, M.S., Petrotek Engineering Corporation (ML14240A422).

[244] *See, e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003) (citations omitted).

statements of position in making its decision.[245] Because Consolidated Intervenors have not raised a substantial question regarding the Board's findings of fact, we deny their petition with respect to this contention.

(3) POWERTECH'S PETITION FOR REVIEW

Powertech seeks review of the Board's imposition of an additional license condition regarding location and abandonment of historic boreholes. It argues that the Board's addition of this license condition constituted clear error of fact because Powertech had already committed to plugging historic boreholes.[246] We find that any factual error in the Board's determination that the license did not contain an explicit condition regarding historic boreholes was harmless. While Powertech is bound by License Condition 9.2 to its commitment to plug boreholes, we do not see the inherent conflict between that commitment and the Board's additional license condition that Powertech and the Staff assert exists. The Board's general license condition can be implemented through the more specific procedures contained in Powertech's commitment. We also see little in the way of additional burden here, particularly if, as Powertech asserts, the Dewey-Burdock site's artesian conditions make it easier to identify improperly plugged boreholes, and it has documentation that historical boreholes were plugged according to State regulations.[247]

Next, Powertech asserts that the Board committed factual and legal error in imposing the license condition *sua sponte*.[248] Powertech argues that because "[n]one of the argument or testimony pertained to plugging and abandoning *all* boreholes prior to the commencement of

---

[245] *See, e.g.*, LBP-15-16, 81 NRC at 667-81.

[246] Powertech's Petition at 22-23.

[247] *Id.* at 25 n.57.

[248] *Id.* at 23-25.

licensed operations in a given wellfield," the Board imposed the license condition *sua sponte*.[249] But as the record reflects, historical boreholes were one of the issues raised in Contention 3; the Board imposed this license condition in ruling on that contention, which was the subject of a full evidentiary hearing.[250] Moreover, as the Staff points out in its response to Powertech's petition, "[the Tribe's and Consolidated Intervenors'] arguments could reasonably be construed as claiming that, in order to ensure adequate containment, Powertech must properly abandon all boreholes within the perimeter of each wellfield."[251] The Board ruled on a matter properly before it in imposing an additional license condition on Powertech. Powertech's argument that the license condition was imposed *sua sponte* does not raise a substantial question for review. We deny review of Powertech's petition regarding Contention 3.

4. Contention 6

In Contention 6, the Tribe argued that discussion of mitigation measures in the FSEIS was inadequate for two reasons. First, the Tribe asserted that the FSEIS's discussion and evaluation of mitigation measures was insufficiently detailed.[252] Second, it argued that the Staff erroneously deferred development of further mitigation measures until after the issuance of the FSEIS and the Record of Decision.[253] In its petition, the Tribe challenges the Board's ruling by asserting that the Board failed to address several of its arguments and that the Board's ruling on Contention 6 is inconsistent with its ruling on Contention 1A.

---

[249] *Id.* at 24.

[250] *See* LBP-15-16, 81 NRC at 674-75, 679.

[251] *NRC Staff's Response to Powertech's Petition for Review of LBP-15-16* (June 22, 2015), at 7 n.16.

[252] *Oglala Sioux Tribe's Statement of Position on Contentions* (June 20, 2014), at 27-28 (Tribe's Statement of Position). Consolidated Intervenors adopted the Tribe's arguments with respect to Contention 6. *Consolidated Intervenors' Opening Statement* (July 7, 2014), at 9.

[253] Tribe's Statement of Position at 28.

a. Contention and Board Order

With respect to the portion of its contention that challenged the discussion of mitigation measures in the FSEIS, the Tribe argued before the Board that NEPA requires an EIS to "detail[] with [a] specific description, supporting data, and analysis of process and effectiveness" each mitigation measure.[254] The Tribe asserted that the Dewey-Burdock project FSEIS merely listed potential mitigation measures and lacked scientific evidence or analysis regarding the effectiveness of each measure.[255]

The Board, after a merits hearing and review of the record, determined that the Staff's discussion and evaluation of mitigation measures was sufficient.[256] The Board agreed with the Tribe's arguments regarding NEPA's requirements for analysis of mitigation measures, but it found that the Staff had met those requirements.[257] In its holding, the Board determined that the Tribe completely overlooked Chapter 4 of the FSEIS, which contained extensive analysis of mitigation measures.[258] Further, the Board stated that the FSEIS "fully evaluated the impacts and mitigation strategies detailed under other [expert agency] permits."[259] Finally, the Board concluded that Powertech's license requires compliance with mitigation and monitoring measures described in the FSEIS, the Record of Decision, and the license.[260] Accordingly, the

---

[254] *Id.* at 38.

[255] *Id.* at 30-32.

[256] LBP-15-16, 81 NRC at 690-91.

[257] *Id.* at 690.

[258] *Id.* at 690-91.

[259] *Id.* at 692.

[260] *Id.* at 691.

Board found that Powertech would be required to comply with mitigation strategies analyzed in the FSEIS from initial, pre-licensing activities through decommissioning.[261]

In the second portion of Contention 6, the Tribe argued that the Staff violated NEPA by deferring development of certain mitigation measures—particularly mitigation of adverse effects on cultural resources—until after issuance of the FSEIS.[262] The Tribe also challenged the Staff's analysis of the proposed monitoring well network, historical well hole plugging, and wildlife protections and monitoring.[263]

Regarding the development of mitigation measures after FSEIS completion, the Board ruled that "[t]he release of an FSEIS does not mark the completion of the NEPA review process."[264] The Board noted that the FSEIS referenced the yet-to-be-issued Programmatic Agreement and explained that mitigation measures adopted in the Programmatic Agreement could mitigate impacts on historic or cultural resources.[265] Further, the Board determined that the FSEIS included analysis of certain mitigation measures to be implemented post-licensing.

In finding the FSEIS's analysis adequate, the Board relied upon the generally accepted presumption that Powertech will comply with its obligations as listed in the license, the FSEIS, and associated documents.[266] The Board noted that monitoring programs are "a principal aid" to the Staff and the licensee in determining whether mitigation measures are effective.[267] Moreover, it stated that several of Powertech's license conditions require Powertech to

---

[261] *Id.*

[262] Tribe's Statement of Position at 28.

[263] *Id.* at 33-34.

[264] LBP-15-16, 81 NRC at 694.

[265] *Id.*

[266] *Id.* at 695.

[267] *Id.*

document, maintain, and submit to NRC its monitoring results.[268] In sum, the Board held that the mitigation and monitoring plans in the FSEIS, while not final, complied with NEPA.[269] Accordingly, the Board resolved Contention 6 in favor of Powertech and the Staff.

b. The Tribe's Petition for Review

On appeal, the Tribe argues that it had identified significant analytical gaps in the agency's review of mitigation measures, and that the Board failed to address all of its arguments when ruling on Contention 6.[270] We disagree. The Board, after a careful examination of the record, determined that the FSEIS contained sufficient analysis of mitigation measures.[271] Absent clear error, which the Tribe has not demonstrated, we decline to disturb the Board's determination that the FSEIS's analysis of mitigation measures was sufficient for NEPA compliance. Therefore, we deny the Tribe's petition with respect to this point.

The Tribe also seeks review of the Board's decision regarding deferral of development of mitigation measures and argues that the Board erred at law and abused its discretion.[272] For the reasons stated below, we deny the Tribe's petition for review with respect to this issue.

First, the Tribe argues that future development of mitigation measures through the Programmatic Agreement violated NEPA.[273] The Tribe asserts that the Board's ruling disregarded the Tribe's claim that the Programmatic Agreement failed to include "any actual

---

[268] *Id.* at 695-97.

[269] *Id.* at 694 (quoting *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426-27 (2006)).

[270] Tribe's Petition at 24 (citing LBP-15-16, 81 NRC at 689).

[271] LBP-15-16, 81 NRC at 690-92.

[272] Tribe's Petition at 24.

[273] *Id.*

mitigation [measures]," in violation of NEPA.[274] We disagree with the Tribe's argument regarding lack of analysis in the Programmatic Agreement. Our examination of the record reveals that the Programmatic Agreement and the FSEIS contain discussion of mitigation measures for cultural resources, and the Board did not find deficiencies in those discussions.[275] Because the Tribe fails to address these discussions, it does not raise a substantial question for review of the Board's finding that they are adequate for NEPA compliance.

Next, the Tribe challenges the Board's ruling regarding the FSEIS's discussion of mitigation measures in numerous areas, including wildlife protection, wellfield testing, air impacts, and historical well hole plugging and abandonment.[276] It argues that "the [Board's] ruling also substantially ignore[d] the Tribe's arguments regarding other mitigation issues," which, in the Tribe's view, the Staff did not sufficiently describe or analyze in the FSEIS.[277]

We disagree. In ruling on these points, the Board did not disregard the Tribe's arguments; it determined—based on precedent and its review of the record—that the mitigation and monitoring plans discussed in the FSEIS and Programmatic Agreement contained the level

---

[274] *Id.*

[275] *See, e.g.*, Ex. NRC-018-A, "Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock [*In Situ*] Recovery Project Located in Custer and Fall River Counties, South Dakota" (Mar. 3, 2014), at 5 (requiring Powertech to protect all unevaluated properties until National Register-eligibility determinations are completed), at 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) (ML14246A401) (Programmatic Agreement); Ex. NRC-008-A-2, FSEIS § 4.9.1.1.1. The Staff's mitigation recommendations appear in the far-right columns of Tables 4.9-1 through 4.9-6.

[276] Tribe's Petition at 25.

[277] *Id.*

of detail required by NEPA.[278] The Tribe's petition does not articulate a substantial question for review with respect to this portion of the Board's decision.

Finally, the Tribe asserts that the Board's ruling with respect to Contention 6 is "internally inconsistent" because it conflicts with the Board's ruling on Contention 1A where it found, in part, that the Staff's analysis of mitigation measures for cultural resources did not satisfy NEPA.[279] The Board found generally that the Staff's analysis of mitigation was sufficient. Specifically regarding mitigation of cultural resources, the Board ruled that

> [t]he FSEIS … explains that mitigation measures adopted in the Programmatic Agreement "could reduce an adverse impact to a historic or cultural resource." … Therefore, the Board finds that the NRC Staff completing the Programmatic Agreement after the FSEIS was released, but before the issuance of the Record of Decision or the license, adequately satisfied NEPA.[280]

Regarding Contention 6, the Board concluded that the Staff's analysis of mitigation measures for cultural resources fulfilled NEPA's requirements. We agree with the parties, however, that this statement is inconsistent with the Board's ruling on Contention 1A. Specifically, there the Board stated that "the FSEIS does not include mitigation measures sufficient to protect [the Tribe's] cultural, historical, and religious sites that may be affected by the Powertech project."[281] With this statement, the Board appears to be mixing the requirements of NEPA and the NHPA—NEPA does not require the adoption of mitigation measures, only a discussion of their potential effects. Regardless, by pointing out these inconsistent Board statements, the Tribe has demonstrated only harmless error because the mitigation measures for cultural resources are covered by Contentions 1A and 1B. Thus, a separate ruling on this specific issue under

---

[278] LBP-15-16, 81 NRC at 694-95.

[279] Tribe's Petition at 25; *see* LBP-15-16, 81 NRC at 655.

[280] LBP-15-16, 81 NRC at 694.

[281] *Id.* at 655.

Contention 6 is not necessary. Therefore, we find that the Tribe does not raise a substantial question for our review with respect to Contention 6.

III. CONCLUSION

For the foregoing reasons, we *deny* in part each party's petition for review. We *grant* each party's petition with respect to the finality of the Board's ruling on Contentions 1A and 1B and find that these contentions should be considered "final" for the purposes of the petitions for review at issue here. We *grant* the Staff's and Powertech's petitions for review with respect to the Board's direction to the Staff regarding the resolution of Contentions 1A and 1B. Pursuant to our inherent supervisory authority over agency adjudications, we *direct* that the proceeding remain open for the narrow purpose of resolving the deficiencies identified by the Board in Contentions 1A and 1B and *affirm* the Board's direction to the Staff to submit monthly status reports and the Board's direction to file an agreement between the parties or a motion for summary disposition to resolve the deficiencies identified by the Board. We *grant* the Tribe's petition for review with respect to proposed Contention 8 and dismiss that contention.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of December, 2016

Commissioner Svinicki, dissenting in part.

I fully join the majority's order today with one exception: the Staff's and Powertech's appeals of Contentions 1A and 1B. For the reasons expressed below, I would take review of these petitions because the Board applied the wrong legal standards to these contentions. Moreover, when considered under the correct legal standards, the evidentiary record supports resolving Contentions 1A and 1B in favor of the Staff. Therefore, I would enter judgment in favor of the Staff and direct the Board to terminate this proceeding.

A. Contention 1A

On appeal, the Staff argues that the Board's ruling on Contention 1A constitutes legal error because it misapplied NEPA's hard look standard, under which the Board should assess whether the Staff "made reasonable efforts" to obtain adequate information on the cultural resources at issue here.[1] In its brief, the Staff describes the efforts it undertook and argues that these efforts were sufficient to meet the hard look standard.[2] The Staff asks us to view the Board's application of the hard look standard as a legal issue under 10 C.F.R. § 2.341(b)(4)(ii).[3] I would take review of the Staff's petition for review of Contention 1A and reverse the Board's ruling that the Staff's environmental analysis did not adequately address the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources.

We have previously acknowledged that for some NEPA reviews, necessary data may "prove to be unavailable, unreliable, inapplicable, or simply not adaptable."[4] In such cases, we

---

[1] Staff's Petition at 17-18.

[2] *Id.* at 19-20.

[3] *Id.* at 17.

[4] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010).

have directed the Staff to provide a reasonable analysis of the available information with a "disclosure of incomplete or unavailable information."[5] Likewise, Federal courts have upheld agency determinations not to analyze impacts "for which there are not yet standard methods of measurement or analysis."[6] Moreover, the NRC looks for guidance to the Council on Environmental Quality's implementing regulations for NEPA, which specify that an agency need not include relevant information if "the overall costs of obtaining it are exorbitant."[7]

While the Board cited to these principles in its discussion of legal standards, it did not apply these rules to the FSEIS.[8] Instead of responding to the Staff's argument that "it complied with NEPA by making repeated attempts to obtain information on cultural resources,"[9] the Board examined whether the FSEIS "adequately catalogued" the "cultural, historical, and religious sites of the Oglala Sioux Tribe."[10] Because it found that the FSEIS did not contain this information, the Board concluded that the "NRC Staff did not give this issue its required hard look in the FSEIS."[11] Consequently, the Staff is correct that the Board's ruling on Contention 1A constitutes legal error. Instead of considering whether the Staff could reasonably obtain the information it acknowledged was missing, the Board invalidated the FSEIS simply because the

---

[5] *Id*.

[6] *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 13 (1st Cir. 2008).

[7] 40 C.F.R. § 1502.22; *see also Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443-44 (2011) (observing that while the NRC is not bound by CEQ regulations, it looks to them for guidance).

[8] LBP-15-16, 81 NRC at 638 (noting that "an environmental impact statement is not intended to be a research document" (internal quotation marks omitted)).

[9] *Id*. at 652.

[10] *Id*. at 655.

[11] *Id*.

information was missing in the first place.[12] This approach is facially inconsistent with our precedent, Federal case law, and the CEQ regulations, which recognize that in some instances information relevant to an EIS will not be reasonably available and direct the agency to proceed in accord with NEPA's rule of reason in the face of such lacunae.[13] Therefore, the Board's ruling on Contention 1A rests on a legal error.[14]

While the Commission would normally hesitate to wade through such a detailed factual record ourselves, particularly when we have not had the advantage of observing testimony first hand,[15] in this case other findings from the Board indicate that the missing information was not reasonably available. Specifically, upon reviewing the record in its entirety, the Board concluded that the amount of "funds requested to collect tribal cultural information" by the Oglala Sioux was "patently unreasonable."[16] If information is only available at a patently unreasonable cost, here potentially four million dollars to conduct one part of the cultural survey (itself only one part of the larger NEPA review), it follows that such information is not reasonably available.[17] Moreover, because this information missing from the FSEIS was not reasonably available, its absence from the FSEIS analysis cannot be a basis upon which the FSEIS fails to meet NEPA's hard look standard.

In its Response, the Tribe argues that the precedents cited by Staff do not stand for the legal principle that when relevant information to an EIS is unavailable, the agency must only

---

[12] *Id*.

[13] *Pilgrim*, CLI-10-22, 72 NRC at 208; *Town of Winthrop*, 535 F.3d at 13; 40 C.F.R. § 1502.22.

[14] 10 C.F.R. § 2.341(b)(4)(ii).

[15] *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975) (noting that "Licensing Boards are the Commission's primary fact finding tribunals").

[16] LBP-15-16, 81 NRC at 657 & n.229.

[17] Staff's Petition at 6 (citing Tr. at 804, 807).

make reasonable efforts to obtain the information.[18] Specifically, the Tribe argues that many of the cases relied on by the Staff only hold that agencies need not consider remote and speculative impacts in an EIS.[19] But, it appears that the Staff only cited to these precedents to establish NEPA's general rule of reason.[20] Moreover, several of the authorities relied on by the Staff appear to support the position that agencies need only undertake reasonable efforts to acquire missing information, such as 40 C.F.R. § 1502.22, *Town of Winthrop*, and *Pilgrim.*[21] For the most part, the Tribe did not discuss these authorities in its response.[22] While the Tribe asserts that *Pilgrim* "simply confirmed" that an EIS is "not intended to be a research document,"[23] these quotations from *Pilgrim* support the Staff's position because they indicate that an agency need not take extraordinary efforts to obtain or create missing information.

B. Contention 1B

Powertech advances a similar argument with respect to Contention 1B — that the Board did not apply the correct standard for tribal consultation under the NHPA implementing regulations.[24] I would take review of Powertech's petition with respect to Contention 1B and

---

[18] Tribe's Response at 15-17.

[19] *Id*. (citing *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287 (2010)).

[20] Staff's Petition at 17-18.

[21] *Id*. (citing *Pilgrim*, CLI-10-22, 72 NRC at 208; *Town of Winthrop*, 535 F.3d at 13; 40 C.F.R. § 1502.22).

[22] Tribe's Response at 16.

[23] *Id*. (quotation marks omitted).

[24] *See* Powertech's Petition at 9-11 ("T]he Licensing Board's attempt to distinguish between the characterizations of consultation as 'reasonable' versus 'meaningful' is not part of the NHPA statutory framework or regulatory regime.").

reverse the Board's ruling that the consultation process between the Staff and the Tribe was inadequate.

Under the NHPA's implementing regulations, the NRC must provide every 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 view on the undertaking's effects on such properties, and participate in the resolution of such adverse effects."[25] While the "Tribe is entitled to 'identify its concerns,' to 'advise,' to 'articulate,' and to 'participate,'" courts have warned that "consultation is not the same thing as control over a project."[26] Even if a party's involvement is limited, if that limited involvement is by choice, the agency has provided the party with a reasonable opportunity to participate.[27]

With regard to Contention 1B, the Board initially stated the correct legal standard, whether the Staff provided a "reasonable opportunity" for consultation.[28] However, in evaluating Contention 1B, rather than apply that standard, the Board sought to determine "which party or specific action led to the impasse preventing an adequate tribal cultural survey."[29] Ultimately, the Board determined that the "NRC Staff is at least partly at fault for the failed consultation process" largely because it never "held a single consultation session, on a government-to-government basis, solely with members of the Oglala Sioux Tribe."[30] Likewise, the Board

---

[25] 36 C.F.R. § 800.2(c)(2)(ii)(A).

[26] *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 168 (1st Cir. 2003).

[27] *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1009 (9th Cir. 2013).

[28] LBP-15-16, 81 NRC at 639 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)).

[29] *Id*. at 656.

[30] *Id*. And the Tribe's status as a litigant in this proceeding does not alter its role as a consulting party. To be sure, the ACHP's regulations list various consulting parties, including both Indian tribes and "[c]ertain individuals and organizations with a demonstrated interest in the

concluded that the "Oglala Sioux Tribe does share some responsibility for the ... lack of meaningful consultation."[31] Therefore, because the Board focused its attention on apportioning culpability for what became an impasse, instead of determining whether the opportunity for consultation itself was a reasonable one, the Board's decision constituted legal error.[32]

As noted above, the Commission generally hesitates to make factual findings in the first instance, but again the record developed by the Board is sufficient to answer the question posed: here, whether the Staff provided a reasonable opportunity for consultation. One of the most striking aspects of this record is that the ACHP, the agency expert in implementing the NHPA, signed the NRC's Programmatic Agreement for the Dewey-Burdock project, and in so doing, found that it set forth a phased process for compliance with section 106.[33] While the ACHP's agreement is not binding on the Commission, its findings are entitled to considerable

---

undertaking … due to their legal or economic relation to the undertaking or affected properties." *See* 36 C.F.R. § 800.2(c)(2) and (5). But the Board's implication that the Tribe's status as an intervenor somehow elevates its status as a consulting party is incorrect. *See* LBP-15-16, 81 NRC at 656.

[31] LBP-15-16, 81 NRC at 656.

[32] 10 C.F.R. § 2.341(b)(4)(ii).

[33] Ex. NRC-018-D, Letter from Charlene Dwin Vaughn, Advisory Council on Historic Preservation, to Kevin Hsueh, NRC (Apr. 7, 2014) (ML14246A405); *see* Ex. NRC-18-E, Advisory Council on Historic Preservation Signature Page of Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock [*In Situ*] Recovery Project Located in Custer and Fall River Counties South Dakota (Apr. 7, 2014) (ML14246A417); *see also* Ex. NRC-018-A, Programmatic Agreement, at 2; Ex. NRC-018-B, Appendices Related to the Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock [*In Situ*] Recovery Project Located in Custer and Fall River Counties South Dakota, app. A, at 2-7 (ML14246A406); 36 C.F.R. § 800.4(b)(2).51-52.

weight.[34] On balance, the record demonstrates that the Staff has committed to phased compliance with section 106, as endorsed by the ACHP. I fully expect the Staff to satisfy its obligations under the Programmatic Agreement, which include consultation. Accordingly, I would conclude that the Staff has provided the Tribe with a reasonable opportunity to consult and will continue to take appropriate actions under the Programmatic Agreement.

In its Response, the Tribe argues that the factual record contains sufficient information to rebut the Staff's and Powertech's efforts to "blame the Tribe for the problems with NRC Staff's NHPA compliance."[35] But, as noted above, the correct standard is not whether there is sufficient evidence to apportion blame, but whether the opportunity to consult was reasonable. While the Tribe may well be disappointed with how the consultation unfolded, courts have consistently held that "a reasonable opportunity to consult" does not guarantee any specific results.[36] Consequently, this argument is not persuasive.

Next, the Tribe argues that Federal case law supports the reasonableness of the Board's holding.[37] But, it appears that these cases involve very different factual backgrounds.[38] Indeed,

---

[34] *Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977).

[35] Tribe's Response at 19.

[36] *Narragansett Indian Tribe*, 334 F.3d at 168. While some courts have determined that agency shortcomings, such as misrepresenting important facts or only relying on written communications, may render an opportunity to consult unreasonable, *Pueblo of Sandia v. United States*, 50 F.3d 856. 860-62 (10th Cir. 1995), on balance the record does not support such findings here.

[37] Tribe's Response at 19-21 (citing *Quechan Indian Tribe of Fort Yuma Indian Reservation v. Dep't of the Interior*, 755 F. Supp. 2d 1104 (D. Ariz. 2008); *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990); *Slockish v. U.S. Federal Highway Admin.*, 682 F. Supp. 2d 1178 (D. Or. 2010); *Pueblo of Sandia*, 50 F.3d at 856).

[38] *Quechan Tribe*, 755 F. Supp. 2d at 1119 (noting that the Tribe was not provided with adequate information or time); *Slockish*, 682 F. Supp. 2d at 1197 (stating that in deciding whether the NHPA claim was moot, the court "must begin by assuming ... that the defendants have violated the NHPA").

the Tribe concedes that many of the cases have distinguishing characteristics from the instant case.[39] Finally, some aspects of these cases appear to be unfavorable to the Tribe's position; for example one district court noted, "None of this analysis is meant to suggest federal agencies must acquiesce to every tribal request."[40] Consequently, I am not persuaded by the Tribe's efforts to rehabilitate the Board's legal analysis.

Therefore, because the Board applied the incorrect legal standards to Contentions 1A and 1B, I would overturn the Board's determinations with respect to those two contentions and find (1) that the Staff's NEPA analysis of the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources was adequate and (2) the Staff has provided the Tribe with a reasonable opportunity to consult under the NHPA. Consequently, I would find in favor of the Staff on these two contentions and direct the Board to terminate this proceeding.

---

[39] Tribe's Response at 21-22 (observing that *Attakai* and *Pueblo of Sandia* involved cases in which the agency wholly failed to consult with an affected Tribe).

[40] *Quechan Tribe*, 755 F. Supp. 2d at 1119.

Commissioner Baran, dissenting in part.

I join in the Commission's decision except for the portion of the decision that denies review of the Tribe's claim that the Board erred by not vacating the license for failure to complete an adequate NEPA review. I respectfully dissent on this issue.

As I stated in my partial dissent in the *Strata* proceeding and my dissent in the *Turkey Point* proceeding, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[1] If the Commission allows a Board to supplement and cure an inadequate NEPA document *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

In this case, the Board found that the Staff's FSEIS did not meet the requirements of NEPA because the FSEIS was deficient with respect to the effects of the licensing action on Native American cultural, religious, and historic resources.[2] Thus, the agency did not have an adequate environmental analysis at the time it decided whether to issue the license. In fact, the deficiencies in the NEPA analysis remain unaddressed today, and therefore the Staff still cannot make an adequately informed decision on whether to issue the license. The Staff's licensing decision was based on (and continues to rest on) an inadequate environmental review. As a result, the Staff has not complied with NEPA.

The Commission should suspend the license until the Staff has, in accordance with the Board's order, filed its final monthly status report demonstrating that the FSEIS complies with

---

[1] *Strata*, CLI-16-13, 83 NRC at 604 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)), *appeal docketed*, No. 16-1298 (D.C. Cir. Aug. 24, 2016); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-16-18, 84 NRC __ (Dec. 15, 2016) (slip op.).

[2] LBP-15-16, 81 NRC at 708, 655-58. The Board also identified a NEPA deficiency with respect to hydrogeological information, the subject of Contention 3, and conditioned Powertech's license to cure this deficiency. *See id.* at 679, 681, 709.

NEPA and our regulations. Once the Staff had satisfied the Board's order and completed an adequate NEPA analysis on which to base its decision, the Staff would then be in a position to decide whether to modify, reinstate, condition, or revoke the license.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-16-20)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
william.froehlich@nrc.gov

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

G. Paul Bollwerk, III
Administrative Judge
paul.bollwerk@nrc.gov

Margaret J. Bupp, Esq., Chief Counsel
margaret.bupp@nrc.gov

Cooper J Strickland, Law Clerk
Cooper.Strickland@nrc.gov

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

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Mary Spencer, Esq.
mary.spencer@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov
Susan Vrahoretis, Esq.
Susan.Vrahoretis@nrc.gov
Emily Monteith, Esq.
emily.monteith@nrc.gov
Sabrina Allen, Paralegal
sabrina.allen@nrc.gov
OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
COMMISSION MEMORANDUM AND ORDER (CLI-16-20)

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher S. Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Consultant to Applicant (Powertech)
WWC Engineering
1849 Terra Ave.
Sheridan, WY 82801
Jack Fritz
jfritz@wwcengineering.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy & Conservation Law
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for Consolidated Intervenors
Aligning for Responsible Mining (ARM)
David Frankel, Esq.
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Counsel for Consolidated Intervenors
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.*
belli4law@aol.com
Roxanne Andre, Paralegal*
roxanneandre@yahoo.com

Counsel for Consolidated Intervenor
(Dayton Hyde)
Thomas J. Ballanco, Esq.*
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering@gmail.com

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 23RD day of December, 2016

EXHIBIT B

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 40-9075-MLA
POWERTECH USA, INC.	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	May 20, 2014

ORDER
(Removing Temporary Stay and
Denying Motions for Stay of Materials License Number SUA-1600)

I. INTRODUCTION

On April 8, 2014 the NRC Staff issued NRC Source Materials License No. SUA-1600[1] to Powertech (USA), Inc. (Powertech) pursuant to 10 C.F.R. § 2.1202(a).[2] The license allows Powertech to possess and use source and byproduct material in connection with the Dewey-Burdock Project.[3] On April 14, 2014 the Oglala Sioux Tribe and the Consolidated Intervenors

[1] Materials License, NRC Form 374 (Apr. 8, 2014) (ADAMS Accession No. ML14043A392). See also, ADAMS Accession Package Number ML14043A052, which includes the license transmittal letter, the license, and the Final Safety Evaluation Report. The NRC Staff also issued its Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery (ISR) Project at ADAMS Accession No. ML14066A466. The Final Programmatic Agreement was executed April 7, 2014 and is available in ADAMS Accession Package No. ML14066A344.

[2] Under 10 C.F.R. § 2.1202(a) the NRC Staff may issue a license "during the pendency of any hearing under this subpart."

[3] Materials License, NRC Form 374 (Apr. 8, 2014) (ADAMS Accession No. ML14043A392) at 1.

filed timely applications for a stay of the effectiveness of the NRC staff's licensing action on a matter involved in this hearing.[4] On April 24, 2014 the NRC Staff and Powertech filed oppositions to Intervenors' motions.[5] The Oglala Sioux Tribe filed an answer in support of the Consolidated Intervenors' motion on April 24, 2014.[6]

On April 30, 2014 the Board granted a temporary stay of Powertech's NRC license, pending an oral argument among the parties.[7] The temporary stay was issued to prevent any immediate and irreparable harm to any cultural or historic resources caused by earthwork or ground disturbance within the Dewey-Burdock sites and to preserve the status quo until the Board was able to hold an oral argument on the motions for a stay. The oral argument was held by telephone on Tuesday, May 13, 2014.[8]

II. LEGAL STANDARDS

The purpose in granting a stay is to preserve the status quo until a decision can be made on the merits of the underlying controversy. The grant of a stay is an extraordinary

[4] Oglala Sioux Tribe's Motion for Stay of Effectiveness of License (Apr. 14, 2014) [hereinafter OST Stay Motion]; Consolidated Intervenors' Application for a Stay of the Issuance of License No. SUA-1600 Under 10 CFR Section 2.1213 (Apr. 14, 2014) [hereinafter CI Stay Motion].

[5] NRC Staff's Opposition to Applications for a Stay (Apr. 24, 2014) [hereinafter Staff Opposition]; Powertech (USA) Inc's Response to Consolidated Intervenors and the Oglala Sioux Tribe Motions for Stay of the Effectiveness of NRC License No. SUA-1600 (Apr. 24, 2014) [hereinafter Powertech Response].

[6] Oglala Sioux Tribe's Answer in Support of Consolidated Intervenors' Motion for Stay of Effectiveness of License (Apr. 24, 2014).

[7] Order (Temporarily Granting Stay of Materials License Number SUA-1600) (Apr. 30, 2014) (unpublished).

[8] Tr. at 578–637.

remedy, and a rare occurrence in NRC practice.[9] In determining whether to grant or deny an application for a stay, a Board must balance:

> (1) Whether the requestor will be irreparably injured unless a stay is granted; (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) Whether the granting of a stay would harm other participants; and (4) Where the public interest lies.[10]

Discussing these four factors in the context of 10 C.F.R. § 2.342(e), the Commission has stated that "of these factors, irreparable injury is the most important."[11] And for a potential injury to be irreparable, it must be shown to be "imminent . . . certain and great."[12] If a strong showing of irreparable injury can be shown, "a movant need not always establish a high probability of success on the merits."[13] But if a party moving for a stay fails to show irreparable injury, a Board may still grant a stay if the movant has made "an overwhelming showing" or a demonstration of "virtual certainty" that it will prevail on the merits.[14] If the movant cannot show either irreparable injury or that it is likely to prevail on the merits, a Board "need not consider the

---

[9] U.S. Dep't of Energy (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005) (treating a stay as "an extraordinary equitable remedy" (quoting Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977))).

[10] 10 C.F.R. § 2.1213(d).

[11] S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012) (citing Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 151 (2010) and David Geisen, CLI-09-23, 70 NRC 935, 936 & n.4 (2009)).

[12] Vogtle, CLI-12-11, 75 NRC at 529 (quoting Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)).

[13] Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (quoting Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985).

[14] Vogtle, CLI-12-11, 75 NRC at 529 (quoting AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008) and Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 154 (2010)).

remaining factors."[15] In addressing the stay criteria in a Subpart L proceeding, "a litigant must come forth with more than general or conclusory assertions in order to demonstrate its entitlement" to relief.[16] On a motion for a stay, the burden of persuasion on the four factors of listed in 10 C.F.R. § 2.1213, supra, is on the movant.[17]

III. DISCUSSION

A. Irreparable Injury

To qualify as an irreparable injury, the potential harm cited by the moving party first "must be related" to the underlying claim that is the focus of the adjudication.[18] Here, the Oglala Sioux Tribe and Consolidated Intervenors both base their motions for a stay on potential destruction of the Tribe's cultural resources and alleged continuing violations of NEPA and NHPA compliance.[19] These issues are the contentions at issue in the upcoming evidentiary hearing. Contention 1A concerns the protection of historical and cultural resources, and Contentions 1B, 2, 3, 4, 6, 9, and 14B concern alleged failures in the FSEIS and NHPA processes.[20]

---

[15] Vogtle, CLI-12-11, 75 NRC at 529. This Order will discuss irreparable injury and the likelihood to prevail on the merits, but will not consider the remaining factors.

[16] Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992) (citing United States Dep't of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983)).

[17] Public Serv. Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

[18] Vogtle, CLI-12-11, 75 NRC at 530–31 (quoting United States v. Green Acres Enters., Inc., 86 F.3d 130, 133 (8th Cir. 1996).

[19] OST Stay Motion at 2–4; CI Stay Motion at 6–7.

[20] LBP-14-5, 79 NRC at __ (slip op. at Appendix A) (Apr. 28, 2014).

A party seeking a stay must also specifically and "reasonably demonstrate [an injury], not merely allege" generalized harm.[21] The Oglala Sioux Tribe and Consolidated Intervenors both attach declarations purporting to demonstrate the specific irreparable injury that may be suffered.[22] These declarations allege that a comprehensive cultural resource study has not been adequately conducted, and that the FSEIS is "not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe."[23] The Tribe alleges that "construction activities slated for the site" before the evidentiary hearing will cause irreparable harm by not ensuring adequate mitigation techniques are used.[24] Consolidated Intervenors claim cultural resources are at risk if construction, including "earthwork, massive ground disturbance, roadmaking, and other preparations" begins at the site.[25]

The NRC Staff counters that the Programmatic Agreement, with which the Intervenors find fault, is sufficient to protect cultural resources, and that the Intervenors' motions lack specificity.[26] Powertech argues that Consolidated Intervenors' and the Oglala Sioux Tribe's claims are nothing more than conclusory statements, and unsupported conjecture that historic and cultural resources will be damaged or destroyed within the scope of the NRC licensed activities.[27]

---

[21] Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985).

[22] See OST Stay Motion, Decl. of Michael CatchesEnemy and Decl. of Wilmer Mesteth; CI Stay Motion, Exs. 1–11 and A1–A2.

[23] OST Stay Motion, Decl. of Michael CatchesEnemy ¶ 9.

[24] OST Stay Motion at 3–4.

[25] CI Stay Motion at 6.

[26] Staff Opposition at 3.

[27] Powertech Response at 8–10; 12–14.

Harm to tribal cultural resources does constitute irreparable injury.[28] In a District Court case granting a preliminary injunction enjoining a solar energy project, the Quechan Tribe claimed that the project would not avoid most of the 459 cultural sites identified, and that the NEPA and NHPA process had been insufficient.[29] In determining that the irreparable harm element of the test for issuance of injunctive relief was met, the court found that the Tribe's evidence showed that phase one of the project would involve damage to at least one known site, and "virtually ensure[d] some loss or damage."[30]

Here, however, the intervenors' allegations and their supporting declarations lack the specificity needed to demonstrate a serious, immediate, and irreparable harm to cultural and historic resources. As the Eighth Circuit has said, "[A] party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."[31] In this case, the intervenors have not shown that the activities proposed at the Dewey Burdock site are imminent nor that the harm is certain. Indeed, the intervenors have not shown that a clear and present need exists for a stay nor have they addressed the argument that the Programmatic Agreement protects the cultural and historic resources in the area.

Even if it was certain that irreparable harm would result from Powertech's pre-construction activities, staying the effectiveness of the NRC materials license will not forestall these injuries. The NRC license, for which a stay is sought, was issued pursuant to 10 C.F.R. Part 40. It authorizes Powertech to receive, acquire, possess, transfer, use, and deliver

---

[28] United States v. Jenkins, 714 F. Supp. 2d 1213, 1222 (S.D. Ga. Dec. 5, 2008) ("Harming Native American artifacts would constitute an irreparable injury because artifacts are, by their nature, unique, and their historical and cultural significance make them difficult to value monetarily.").

[29] Quechan Tribe v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1106–07 (S.D. Cal. Dec. 15, 2010).

[30] Id. at 1120.

[31] Iowa Util. Bd. v. FCC, 109 F.3d 418, 425 (8th Cir. 1996).

byproduct, source, and special nuclear material.[32] Further, the license permits Powertech to commence construction, as construction is defined in 10 C.F.R. § 40.4. Construction is defined as:

> the installation of wells associated with radiological operations (e.g., production, injection, or monitoring well networks associated with in-situ recovery or other facilities), the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security.[33]

The term "construction" in Part 40 specifically excludes site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values.[34] It also excludes excavation and preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas.[35]

At oral argument, counsel for Powertech stated, without contradiction, that the ground disturbing work contemplated for the next few months could be accomplished without the NRC license.[36] Therefore, staying the license would not address the intervenors' concerns nor would it protect any cultural or historic sites. Indeed, counsel for the NRC Staff observed that in its view having the license remain in effect was more protective because the staff could then take

---

[32] Materials License, NRC Form 374 (Apr. 8, 2014) at 1 (ADAMS Accession No. ML14043A392).

[33] 10 C.F.R. § 40.4.

[34] Id.

[35] Id.

[36] Tr. at 592–93.

enforcement actions should it find violations of the NRC license or the Programmatic Agreement.[37]

Based on the C.F.R. definitions, staying the effectiveness of Powertech's NRC issued license would have a very limited and incomplete effect on preventing the irreparable injuries the Intervenors claim Powertech may cause. Even if its NRC license is stayed by the Board, Powertech will still be permitted to engage in the earth moving activities on which the irreparable injury claim is premised. As a result, the injuries alleged in the Intervenors' motions are not redressable by the Board granting a stay of Powertech's license. The Board declines to issue an Order which would have no practical effect.[38]

B. Likelihood to Prevail on the Merits

At its heart, the dispute over a stay boils down to a disagreement over the NHPA consultation process. Intervenors argue that the process by which the Programmatic Agreement was created was inadequate, and therefore fails to fully protect the Tribe's sensitive and significant historic and cultural resources. Powertech and the NRC Staff disagree and believe the Programmatic Agreement memorialized a fair and adequate process that fully protects all potential cultural and historic resources at the Dewey-Burdock sites.

This issue will be adjudicated by this Board at the upcoming evidentiary hearing.[39] At this hearing, and in the prefiled statements of position and testimony, all parties will have the

---

[37] Tr. at 620.

[38] In Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-10, 58 NRC 127, 129 (2003) the Commission held a stay request in abeyance during settlement negotiations, basing the delay, in part, on the rationale that "in practical terms, [the stay request would have] no current effect." See also Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), LBP-74-42, 7 AEC 1022, 1037 (1974) (declining to take a "meaningless" action and allow a hearing request when that hearing had already been held). In the context of Article III standing, a court may only hear a case when the relief requested is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992).

[39] Memorandum (Summarizing the February 12, 2014 Teleconference) (Feb. 20, 2014) at Appendix A (unpublished) (setting the evidentiary hearing to begin on August 19, 2014).

opportunity to present specific and detailed evidence supporting their respective positions to the Board. The Board will then make its decision based on this specific and detailed evidence. Since the potential harm is not redressable by the Board, we decline to make any estimation as to the Intervenors' likelihood of success on the merits at this point in time.

IV. BOARD ORDER

The Board rules that:

A. The temporary stay of Materials License Number SUA-1600, issued April 30, 2014[40] is lifted.

B. The motions for a stay of the effectiveness of Materials License Number SUA-1600 filed by Consolidated Intervenors and the Oglala Sioux Tribe on April 14, 2014[41] are denied.

C. As the Board ruled during the May 13, 2014 teleconference,[42] the unopposed Joint Motion to Clarify Filing Deadlines filed on April 30, 2014[43] is granted.

D. Consolidated Intervenors' Motion to Strike Pages 11-21 of Powertech Response to Stay filed May 13, 2014[44] was untimely[45] and is therefore denied.[46]

---

[40] Order (Temporarily Granting Stay of Materials License Number SUA-1600) (Apr. 30, 2014) (unpublished).

[41] OST Stay Motion; CI Stay Motion.

[42] Tr. at 635.

[43] Joint Motion to Clarify Filing Deadlines (Apr. 30, 2014).

[44] Consolidated Intervenors' Motion to Strike Pages 11-21 of Powertech Response to Stay (May 13, 2014).

[45] 10 C.F.R. § 2.323(a)(2) requires all motions to be filed within ten days from the occurrence which triggers the motion. This motion to strike was filed eight days after this ten day period ended on May 5, 2014. Tr. at 636.

[46] The Board, however, notes that it finds Powertech's answer in violation of the Commission's regulations because it exceeded the ten-page reply length intended by 10 C.F.R. § 2.342(d). The regulation permits an answer to be filed "opposing the granting of a stay. This answer may

E. No specific section of the Commission's regulations, including 10 C.F.R. § 2.1210 and 10 C.F.R. § 2.1212, permits appeals from an order ruling on a request for a stay of the effectiveness of the NRC staff's action on a matter involved in a hearing under Subpart L. Nonetheless, interlocutory review of decisions and actions of a presiding officer may be available pursuant to § 2.341(f)(2) of the Commission's regulations.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

/RA/

_____
Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

_____
Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 20, 2014

---

not be longer than ten (10) pages." The regulation contemplates a single ten-page opposition to a stay, not ten pages of opposition to each motion filed.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk*.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
william.froehlich@nrc.gov

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

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

Anthony C. Eitreim, Esq., Chief Counsel
anthony.eitreim@nrc.gov

Nicholas Sciretta, Law Clerk
nicholas.sciretta@nrc.gov

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

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Mary Spencer, Esq.
mary.spencer@nrc.gov
Michael Clark, Esq.
michael.clark@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov
Sabrina Allen, Paralegal
sabrina.allen@nrc.gov
OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
ORDER (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600)

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher S. Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com
Alison Bimba, Legal Assistant
abimba@thompsonlaw.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy & Conservation Law
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for the Oglala Sioux Tribe
Gonzalez Law Firm
522 Seventh Street, Suite 202
Rapid City, SD 57701
W. Cindy Gillis, Esq.
cindy@mariogonzalezlaw.com

Counsel for Consolidated Intervenors
Aligning for Responsible Mining (ARM)
David Frankel, Esq.*
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Counsel for Consolidated Intervenors
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.*
belli4law@aol.com
Roxanne Andre, Paralegal*
roxanneandre@yahoo.com

Counsel for Consolidated Intervenor
(Dayton Hyde)
Thomas J. Ballanco, Esq.*
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering1@mac.com

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2014.

EXHIBIT C

March 1, 2017

William J. Froehlich, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Mark O. Barnett
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

G. Paul Bollwerk, III
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

In the Matter of
POWERTECH (USA) INC.,
Docket No. 40-9075-MLA; ASLBP No. 10-898-02-MLA-BD01

Dear Administrative Judges:

In its Partial Initial Decision issued on April 30, 2015, the Board directed the Staff to submit monthly reports regarding its consultation efforts with the Oglala Sioux Tribe.

The Staff provides notice that it has issued a public summary of the January 31, 2017 teleconference meeting between representatives from the NRC Staff and Oglala Sioux Tribe. The Staff incorporated input from the Oglala Sioux Tribe in this summary, and has included it in this month's disclosures.

In addition, by emails dated February 23 and February 28, 2017, the Staff requested that the Oglala Sioux Tribe inform the Staff of their availability for another teleconference meeting in early April 2017.

The Staff will update the Board on the status of its consultations with the Tribe on April 3, 2017.

Respectfully submitted,

/Signed (electronically) by/
Emily Monteith

_____
Emily Monteith
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
POWERTECH (USA) INC	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02- MLA-BD01
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	Date: March 1, 2017
	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the "NRC STAFF'S CONSULTATION STATUS REPORT" in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC's E-Filing System, this 1st day of March, 2017. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its update by electronic mail, also on March 1, 2017.

/Signed (electronically) by/
Emily Monteith

_____

Emily Monteith
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-14A44
Washington, DC 20555-0001
(301) 287-9119
Emily.Monteith@nrc.gov

EXHIBIT D

SUMMARY OF TELECONFERENCE WITH THE OGLALA SIOUX TRIBE REGARDING THE DEWEY-BURDOCK IN SITU URANIUM RECOVERY PROJECT

JANUARY 31, 2017

Meeting Participants and Affiliation:
Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe
Jeff Parsons, Counsel, Oglala Sioux Tribe
Travis Stills, Counsel, Oglala Sioux Tribe
Kellee Jamerson, Project Manager, U.S. Nuclear Regulatory Commission
Diana Diaz-Toro, Project Manager, U.S. Nuclear Regulatory Commission
Cinthya I. Román, Environmental Review Branch Chief, U.S. Nuclear Regulatory Commission
Emily Monteith, Attorney, U.S. Nuclear Regulatory Commission
David Cylkowski, Attorney, U.S. Nuclear Regulatory Commission
Sabrina Allen, Paralegal Specialist, U.S. Nuclear Regulatory Commission

Summary:

The U.S. Nuclear Regulatory Commission (NRC) staff met with representatives of the Oglala Sioux Tribe on January 31, 2017, via teleconference. The purpose of the meeting was to (1) continue consultation and exchange views regarding the methodology to identify and survey cultural resources at the Dewey-Burdock in situ uranium recovery (ISR) project site, (2) discuss the Tribe's concerns with the Dewey-Burdock Programmatic Agreement, and (3) discuss the role of other Tribes in the survey.

The NRC staff expressed its commitment to working with the Oglala Sioux Tribe to conduct a tribal survey in the near future. The NRC staff presented its preliminary tribal survey approach, which would consist of the following parameters:

- Open site survey of the Dewey-Burdock license area
- Opportunity to conduct the survey as early as April-May 2017 timeframe
- Per diem and mileage reimbursement for up to three Tribal representatives
- An honorarium of $10,000

The NRC staff stated that the open site approach provides the flexibility of conducting a tribal survey using any survey methodology that the Tribe finds acceptable to identify cultural sites of importance to them. The Oglala Sioux Tribe expressed its disappointment with this proposal and noted that it was the same proposal offered to Tribes and rejected by the Oglala Sioux Tribe during the NRC's licensing review of the Dewey-Burdock ISR Project.

The Oglala Sioux Tribe expressed its commitment to work with the NRC and its desire to reach an agreement on a survey of the license area that identifies the Oglala Sioux and other Tribes' cultural resources and traditional cultural properties impacted by the Dewey-Burdock project. The Oglala Sioux Tribe expressed its preference to develop a survey methodology similar in nature to the Makoche Wowapi survey proposal that was submitted to the NRC in September 2012. The Oglala Sioux Tribe stated its opinion that NRC staff never provided input on the methodology set out in the Makoche Wowapi proposal, which the Oglala Sioux Tribe proposed should serve as the basis for future discussions of a methodologically sound survey. The Oglala Sioux Tribe also stated its desire to include other interested Tribes in the development of the survey approach and recommended that those Tribes participate in conducting the tribal survey.

In addition, the Oglala Sioux Tribe stated that the Programmatic Agreement contemplates that a survey would need to be conducted for the transmission line corridor area. The Tribe asked whether the licensee, Powertech, could better define the transmission line route and recommended that such routes be included as part of the tribal survey. The NRC staff also expressed interest in receiving information about the survey methodology/approach, number of tribal representatives to participate, cost/reimbursement, and timeframe. The Oglala Sioux Tribe committed to provide the NRC staff with information about a tribal survey approach by mid-March 2017 to aid the discussion and establishment of a survey. The NRC staff and the Tribe agreed to hold a teleconference tentatively scheduled for the beginning of April 2017 to continue consultation on a cultural resources survey.

The NRC staff asked the Tribe whether it would be willing to share information about known cultural and historic resources that may be impacted by the Dewey-Burdock project. The Tribe discussed the significance of the Black Hills to the Tribe's history and culture. The Tribe expressed its willingness to share historical information about the significance of the Black Hills region with the NRC staff.

During the teleconference, the Oglala Sioux Tribe also shared its concerns regarding the Programmatic Agreement. The Tribe expressed concerns focused on how some information was presented and characterized in the Programmatic Agreement; the Tribe's opinion that Powertech is responsible for identification of cultural resources and historic properties, assessment of adverse effects and identification of mitigation measures; and the role of the Oglala Sioux Tribe in the Programmatic Agreement. The Tribe committed to providing the NRC staff with a more detailed list of its concerns with the Programmatic Agreement.