

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-1059

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

OGLALA SIOUX TRIBE,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the
UNITED STATES OF AMERICA,

Respondents,

and

POWERTECH (USA), INC.,

Intervenor.

PETITION FOR REVIEW OF FINAL ORDER OF THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

**FINAL REPLY BRIEF OF PETITIONER
OGLALA SIOUX TRIBE**

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TABLE OF CONTENTS

<u>SUMMARY OF ARGUMENT</u>	1
<u>ARGUMENT</u>	2
A. NRC’s Ruling Was A Final Agency Action Subject to This Court’s Jurisdiction Under the Hobbs Act	2
1. The NRC Order Determines Rights, Obligations, or Legal Consequences	4
2. The NRC Order Makes the License Immediately Effective	4
3. This Court’s Review Will Not Disrupt an Administrative Proceeding	6
B. NRC Unlawfully Left a License in Place That Violates NEPA and the NHPA	8
C. Failure to Address Impacts Associated with Creation, Transport and Disposal of Radioactive Waste	14
D. Failure to Conduct Scoping	19
E. The FSEIS Fails to Adequately Analyze the Groundwater Quality Impacts Associated with the Thousands of Abandoned Boreholes and Faults at the Site	22
F. Failure to Adequately Analyze Water Quality Baseline	24
G. Failure to Adequately Review Mitigation Measures	27
<u>CONCLUSION</u>	29

TABLE OF AUTHORITIES

Federal Caselaw

<i>Adenariwo v. Fed. Maritime Comm’n</i> , 808 F.3d 74 (D.C. Cir. 2015)	3
<i>Allied-Signal, Inc. v. NRC</i> , 988 F.2d 146 (D.C. Cir. 1993)	11
<i>Balt. Gas & Elec. Co. v. NRDC</i> , 462 U.S. 87 (1983)	9
<i>Blue Ridge Environmental Defense League v. NRC</i> , 668 F.3d 747 (D.C. Cir. 2012)	7, 8
<i>Center for Biological Diversity v. EPA</i> , 861 F.3d 174 (D.C. Cir. 2017)	9, 10, 11
<i>Ctr. for Biological Diversity v. U.S. Forest Serv.</i> , 349 F.3d 1157 (9 th Cir. 2003)	23
<i>Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.</i> , 653 F.Supp.2d 1066 (E.D. Cal. 2009)	20
<i>City of Benton v. NRC</i> , 136 F.3d 824 (D.C. Cir. 1998)	7
<i>Colorado Environmental Coalition v. Office of Legacy Management</i> , 819 F.Supp.2d 1193 (D. Colo. 2011)	19
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974)	12
<i>Dept. of Transp. v. Public Citizen</i> , 541 U.S. 752 (2004)	9

<i>Environmental Defense Fund v. EPA</i> , 852 F.2d 1316 (D.C. Cir. 1988), <i>cert. denied</i> , 489 U.S. 1011 (1989).....	5
<i>Fidelity Television, Inc. v. FCC</i> , 502 F.2d 443 (D.C. Cir. 1974).....	3, 4, 7
<i>Florida Power & Light Co. v. Lorion</i> , 470 U.S. 729 (1985).....	3, 6
<i>Gen. Atomics v. United States Nuclear Regulatory Comm'n</i> , 75 F.3d 536 (9 th Cir. 1996).....	2, 3
<i>Great Basin Resource Watch v. BLM</i> , 844 F.3d 1095 (9 th Cir. 2016).....	18, 23, 24, 25
<i>Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci</i> , 857 F.2d 505 (9 th Cir. 1988).....	24, 25
<i>Massachusetts v. NRC</i> , 924 F.2d 311 (D.C. Cir. 1991).....	4, 6, 8
<i>Muhly v. Espy</i> , 877 F.Supp. 294 (W.D. Va. 1995).....	20
<i>NRDC v. NRC</i> , 823 F.3d 641 (D.C. Cir. 2016).....	13
<i>New York v. NRC</i> , 681 F.3d 471 (D.C. Cir. 2012).....	9, 12, 13, 19
<i>Northern Plains v. Surf. Transp. Brd.</i> , 668 F.3d 1067 (9 th Cir. 2011).....	25
<i>Public Citizen v. NRC</i> , 845 F.2d 1105 (D.C. Cir. 1988).....	7

<i>Pub. Citizen v. Nuclear Regulatory Com.</i> , 901 F.2d 147 (D.C. Cir. 1990).....	5
<i>Reno Air Racing Ass’n, Inc. v. McCord</i> , 452 F.3d 1126 (9 th Cir. 2006).....	12
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	23, 27, 29
<i>Sierra Club v. FERC</i> , ---F.3d ---, 2017 WL 3597014 (D.C. Cir., Aug. 22, 2017).....	18
<i>Sierra Club v. Hodel</i> , 848 F.2d 1068 (10 th Cir. 1988).....	15
<i>Sierra Club v. Marsh</i> , 872 F.3d 497 (1 st Cir. 1989).....	21
<i>South Fork Band Council of W. Shoshone of Nev. v. Dep’t of the Interior</i> , 588 F.3d 718 (9 th Cir. 2009).....	19
<i>Union of Concerned Scientists v. NRC</i> , 920 F.2d 50 (D.C. Cir. 1990).....	13

Federal Statutes

Administrative Procedure Act (APA), 5 U.S.C. § 706.....	8, 11, 12
5 U.S.C. § 706(2)	13, 14
5 U.S.C. § 706(2)(A).....	9
Hobbs Act, 28 U.S.C. § 2342	1, 2, 3, 4, 5, 6

42 U.S.C. § 2111	4
42 U.S.C. § 2239(a)	7
42 U.S.C. § 4332(2)(C).....	13

Federal Regulations

10 C.F.R. § 2.1210 (c)(1).....	3
10 C.F.R. § 2.344(b)	3, 7
10 C.F.R. Part 40, Appendix A, Criteria 5G(2).....	23
10 C.F.R. Part 40, Appendix A, criterion 7	25, 26
10 C.F.R. § 51.10	25
10 C.F.R. § 51.29(a)(1)-(5).....	20
10 C.F.R. § 51.70	25
10 C.F.R. § 51.71	25
40 C.F.R. § 1502.15	24
40 C.F.R. § 1502.16	18
40 C.F.R. § 1502.22	23
40 C.F.R. § 1503.1(a)(4).....	15, 16
40 C.F.R. § 1506.6	16
40 C.F.R. § 1508.8	18

40 C.F.R. § 1508.8(b)18

40 C.F.R. § 1508.25(c).....18

Other Regulatory Authority

In re Pac. Gas & Elec. Co.,

67 N.R.C. 1 (N.R.C. Jan. 15, 2008)12

GLOSSARY

AEA	Atomic Energy Act
APA	Administrative Procedure Act
ASLB or Board	Atomic Safety Licensing Board
FSEIS	Final Supplemental Environmental Impact Statement
NRC or Commission	Nuclear Regulatory Commission
NRC Staff	Nuclear Regulatory Commission Staff
NRC Order	CLI-16-20
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Powertech	Powertech (USA), Inc.
PA	Programmatic Agreement
ROD	Record of Decision
SERP	Safety and Environmental Review Panel

SUMMARY OF ARGUMENT

Federal Respondent U.S. Nuclear Regulatory Commission, or NRC, (Fed.Resp.) concedes that it violated the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) in approving the Record of Decision (ROD) and issuing an active and effective operating license. Nevertheless, NRC argues, echoed by Intervenor-Respondent Powertech (USA), Inc. (Interv.Resp.), that despite these failures, the ROD and license should not be set aside or vacated.

NRC attempts to blame the Tribe for the failure to prepare a legally compliant Final Supplemental Environmental Impact Statement (FSEIS) and failure to meaningfully consult with the Tribe. These failures are not the Tribe's fault, and NRC's tactic to cherry-pick facts in support of its attempt to shift the blame for its refusal to meet its duties should be rejected. Established caselaw strongly supports vacatur of the ROD and the license. NRC's assertion that environmental benefits accrue from leaving an effective license in place that allows ground disturbance at the site without any competent cultural resources survey are baseless.

NRC's and Powertech's arguments do not support depriving this Court of Hobbs Act jurisdiction. NRC issued a final decision (NRC Order) upholding the agency's grant of an effective license. Nothing more is required.

The Responses make much alleged ongoing efforts to remedy the confirmed NEPA and NHPA violations, but confirm that those efforts have halted without any further NHPA analysis or NEPA supplementation. This Court's review will not upset any ongoing administrative processes.

Lastly, NRC and Powertech fail to demonstrate compliance with NEPA, including the failure to adequately analyze the storage, transportation, and disposal of radioactive wastes at White Mesa, Utah; failure to conduct the mandatory scoping process; failure to analyze the impacts and risks associated with thousands of historic abandoned bore holes and geologic faults in the project area; illegal deferral of collection and analysis of baseline water quality data to a post-license and post-NEPA review; and an inadequate discussion of mitigation measures. NRC/Powertech concede that each of these issues were fully resolved in the NRC Order.

This Court should affirm jurisdiction, vacate the ROD and license, and remand the matter to the agency for compliance with federal law.

ARGUMENT

A. NRC's Ruling Was A Final Agency Action Subject to This Court's Jurisdiction Under the Hobbs Act

Both Responses concede that the Hobbs Act provides this Court review of "final orders". Fed.Resp. 1; Interv.Resp. 1. "[T]he Supreme Court held that the Hobbs Act is to be read broadly to encompass all final NRC decisions that are

preliminary or incidental to licensing.” *Gen. Atomics v. United States Nuclear Regulatory Comm’n*, 75 F.3d 536, 539 (9th Cir. 1996) citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). “All NRC orders regarding the granting or amending of a license are subject to exclusive court of appeals review.” *Id.*

Both Responses contest the finality of the NRC Order in this case, which affirmatively left in place an effective license allowing Powertech to construct and operate an otherwise prohibited uranium processing facility. Fed.Resp. 28-33, Interv.Resp. 23-24. NRC’s administrative hearing regulations contemplate the filing of contentions, followed by an initial decision by the Atomic Safety Licensing Board (ASLB) that resolves “all material issues of fact or law admitted as part of the contentions in the proceeding[.]” 10 C.F.R. § 2.1210(c)(1). That initial decision is then consummated by the Commission’s “final decision.” 10 C.F.R. § 2.344(b)(final decision “may adopt, modify, or set aside the findings, conclusions and order in the initial decision”). The NRC Order is a “final decision.” *Id.*

The Hobbs Act finality inquiry is case-specific, and is satisfied when: 1) “rights or obligations have been determined;” or, 2) “legal consequences will flow from the agency action.” Fed.Resp. 29; Interv.Resp. 23 quoting *Adenariwo v. Fed. Maritime Comm’n*, 808 F.3d 74, 78 (D.C. Cir. 2015) quoting *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974) (finality determined “by a realistic

assessment of the nature and effect of the order sought to be reviewed.”). Another finality consideration is whether this Court’s review will somehow substantially disrupt NRC’s administrative process. *Id.* All finality prongs are satisfied here.

1. The NRC Order Determines Rights, Obligations, or Legal Consequences

Neither Response disputes that rights or obligations are determined by the NRC Order. There is no dispute that legal consequences flow from the NRC Order upholding the effective license for Powertech to carry out otherwise prohibited uranium processing activities and creation of radioactive wastes. 42 U.S.C. § 2111 (“No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material” without an NRC license). The first finality prong is satisfied.

2. The NRC Order Makes the License Immediately Effective

NRC’s Response essentially concedes that the finality inquiry is satisfied when the Hobbs Act petition is filed to “challenge the decision to make the license effective.” Fed.Resp. 32 *citing Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991). The NRC Order is a decision making the license effective, despite confirmed NEPA and NHPA violations. Fed.Resp. 22. The NRC Order thus has distinct legal consequences, and NRC makes no serious challenge on this point.

Instead, NRC asserts a novel argument suggesting that review of the NRC Order is time-barred. Fed.Resp. 33. The agency argues that the Tribe should have

immediately sought Hobbs Act review of NRC Staff's original issuance of the license in 2014, before any hearing had taken place and prior to any rulings from the Board or Commission. Fed.Resp. 33.

This argument is nonsensical. When the ASLB denied the Tribe's request to stay the license, neither the Board nor Commission had yet considered any of the Tribe's merits arguments. The ASLB had not yet ruled that NRC Staff's FSEIS violated NEPA and the NHPA. Seeking interlocutory judicial review of the stay request denial is not equivalent to the NRC Order making the license effective despite confirmed violations of federal law.

NRC's argument focusing on the Board's stay decision also contradicts this Court's holding "that to the extent that an agency's action 'necessarily raises' the question of whether an earlier action was lawful, review of the earlier action for lawfulness is not time-barred." *Pub. Citizen v. Nuclear Regulatory Com.*, 901 F.2d 147, 152 (D.C. Cir. 1990) *citing Environmental Defense Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). NRC's attempt to foreclose review of a final licensing decision based on a time bar not found in the regulations fails to recognize that "agencies have an ever present duty to insure that their actions are lawful." *Id.*

Instead of peppering the Court with Hobbs Act suits at every colorable opportunity occasioned by unlawful NRC action, the Tribe properly seeks review

of the NRC Order in a single Hobbs Act suit after the Commission failed to remedy unlawful actions of the Board and Staff. *Florida Power & Light Co.*, 470 U.S. 729 (1985) (Hobbs Act review encompasses all final NRC decisions that are preliminary or incidental to licensing).

3. This Court's Review Will Not Disrupt an Administrative Proceeding

Another, and prudential, finality inquiry looks at whether judicial review would disrupt the administrative review process. *Massachusetts v. NRC*, 924 F.2d at 322. On the facts of this case, no disruption will occur. NRC/Powertech mischaracterize the facts to allege that NRC's Order, issuing a final and effective license, is not final and this Court's review will disrupt ongoing proceedings. Interv.Resp. 23; Fed.Resp. 28-29 n. 89. However, NRC concedes that the NRC Order disposed of all NEPA claims raised herein. Fed.Resp. 29. Further, like the review conducted in *Massachusetts v. NRC*, this Court's review of a license issued despite confirmed NEPA and NHPA violations will not disrupt any ongoing attempts to remedy these violations.

NRC contends that it "has been working to cure the procedural deficiencies identified by the Board." *Id.* This argument from its Motion to Dismiss is not supported. Shortly after the Tribe filed its Initial Opening Brief, NRC Staff filed a Motion for Summary Disposition confirming that NRC Staff terminated any attempt to remedy the NEPA and NHPA violations. JA1028 *cited by* Fed.Resp. 23

n. 78. NRC asserts that “NRC has now fully complied with the NHPA and NEPA.” Fed.Resp. 23. Thus, no disruption will occur to any purportedly ongoing administrative negotiations or efforts to remedy the NEPA and NHPA violations.

NRC also argues that the Tribe is too early and too late to seek judicial review. Fed.Resp. 28-32 *citing e.g Public Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988) (rulemaking challenge was too late, and a challenge based on a rulemaking petition was too early). This argument contradicts the *Public Citizen* approach to finality that analyzed the two separate proceeding on their own merits. *Id.* Here, there is a single license proceeding, and the NRC Order is reviewable as a “final order” based on its “realistic assessment of the nature and effect.” *Fidelity Television, Inc.*, 502 F.2d at 448, 10 C.F.R. § 2.344(b) (license proceeding concludes with Commission’s “final decision”).

Further, the NRC Order must be assessed consistently with 42 U.S.C. § 2239(a), which “permits review of ‘[a]ny final order’ entered by the NRC in any proceeding ‘for the granting, suspending, revoking, or amending of any license.’” *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998). When an effective license is upheld by the NRC Order, even if the opportunity for post-licensing NEPA/NHPA compliance were lawful, it makes no difference that additional proceedings remained before the agency. *See Blue Ridge Environmental Defense League v. NRC*, 668 F.3d 747, 757 (D.C. Cir. 2012)(“order issued during ongoing

administrative proceedings is reviewable ... if, for example, it authorizes a plant operator to operate at full power pending further review by the Commission”), *citing Massachusetts*, 924 F.2d at 322.

Simply put, the license is required for Powertech’s uranium facility, and Hobbs Act review of the NRC Order making the license effective is neither too early nor too late, it is timely. Without judicial relief, Powertech remains free to carry out otherwise prohibited activities based on a license issued without compliance with federal law. See License SUA-1600 at 1 (confirming that “a license is hereby issued authorizing the licensee to receive, acquire, possess, and transfer byproduct, source, and special nuclear material designated....”). JA744.

B. NRC Unlawfully Left a License in Place That Violates NEPA and the NHPA

NRC does not dispute that the ASLB, as affirmed by the NRC Order, found that the ROD and license were issued without compliance with NEPA and the NHPA. Nor does the NRC confront the controlling U.S. Supreme Court and D.C. Circuit caselaw confirming the standard remedy is to set aside and vacate agency actions that are found arbitrary, capricious, or contrary to law. See Tribe Op.Br. 23. Rather, NRC attempts to evade the plain language of the federal Administrative Procedure Act (APA), intimating that NRC decisions are somehow not subject to APA standards. Fed.Resp. 34.

Tellingly, NRC provides no authority to support the novel proposition that the APA standard of review is not applicable. Applying the APA standard of review to NRC's decisionmaking is well established. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 90 (1983) (applying APA standard of review to allegations that NRC violated NEPA). NRC's unlawful NEPA process "must be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *New York v. NRC*, 681 F.3d 471, 477 (D.C. Cir. 2012), citing *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004)(quoting 5 U.S.C. § 706(2)(A)).

NRC relies on *Center for Biological Diversity v. EPA*, 861 F.3d 174 (D.C. Cir. 2017), arguing that leaving the license in place would actually benefit the environment by giving NRC discretion to enforce cultural resource protections in the license. Fed.Resp. 35. Further, NRC argues that the Tribe has failed to "identify any reason why failure to vacate the license causes the Tribe harm." *Id.*

Center for Biological Diversity does not support NRC's position. There, the Court found that vacatur of an EPA decision to authorize a pesticide issued without proper Endangered Species Act consultation would result in *more* harm to the environment because the leading chemical alternatives already in use were more toxic to wildlife. 861 F.3d at 189. Further, the Court allowed the decision to remain in place during remand because EPA had conducted a thorough "Ecological Risk Assessment" for the pesticide. *Id.* at 188-89.

Here, the FSEIS lacks any credible survey, inventory, or analysis of Lakota cultural resources at the proposed mine site. The NRC identifies no record evidence comparable to EPA's thorough analysis of impacts that EPA had conducted in *Center for Biological Diversity* for the authorized pesticide. Instead, NRC asserts that when it issued the license, NRC Staff "believed it had completed the full, statutorily required processes under NEPA and the NHPA...." Fed.Resp. 37. However, no legal authority is offered to excuse the standard vacatur remedy simply because the agency wrongly "believed" it acted lawfully.

NRC points to the promises of future analysis in the Programmatic Agreement (PA) as the critical aspect of the license that will help protect the environment. Fed.Resp. 36. Again, NRC ignores the lack of any competent cultural resources survey confirmed by the NRC Order, which renders PA's purported cultural resources protections insignificant. The Tribe's uncontested declaration and its references to the administrative record demonstrate the harm to Lakota cultural resources and other aspects of standing resulting from the license approval. Tribe Op.Br. 22.

NRC has acknowledged in testimony that neither the company nor the NRC staff possessed or obtained the necessary expertise to identify the impacted cultural resources. JA1007-1010. Further, the PA applies only to those cultural resources that the agency determines eligible for the National Register of Historic Places

pursuant to NHPA. JA919. By contrast, the scope of the NEPA process extends to all of the cultural resources that have yet to be identified, disclosed, or analyzed in a NEPA document. The PA is thus not equivalent to the substantial and reliable impact analysis present in *Center for Biological Diversity*.

Similarly, NRC's reliance on *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993) is misplaced. There, APA vacatur of a procedurally invalid regulation was avoided because "the consequences of vacating may be quite disruptive." 988 F.2d at 151. The Court found that if the regulation was vacated, the Commission would need to refund substantial amounts of fees collected and would be unable to recover those fees under a later-enacted regulation. *Id.* NRC identifies no such disruption here, identifies no reason that the license in this case could not be re-issued after a competent NEPA and NHPA review, and identifies no agency resources would be irrevocably lost.

NRC contends vacatur is not appropriate here because the Tribe did not demonstrate immediate and irreparable harm during the 2014 stay proceedings. Fed.Resp. 36. However, this argument wrongly equates the denial of an administrative stay (or preliminary injunction) based on the movant's burden to show immediate and irreparable injury with the test for whether an agency has met its burden to show that the standard remedy of vacatur should not apply.

Because vacatur is the presumptive, statutory remedy under the APA, any departure from that remedy would be equitable relief for the agency that has acted unlawfully. See *Curtis v. Loether*, 415 U.S. 189, 194–97 (1974) (distinguishing “legal rights and remedies” created by statute from “equitable relief”). The burden of proof and persuasion thus is on the defendant agency to show why equity demands anything less than vacatur of the unlawful agency action. See *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1139 (9th Cir. 2006) (party asserting equitable defense “must show” that it satisfies all elements of the defense). NRC/Powertech have not met their APA or equitable burden.

Lastly, NRC asserts that because the administrative proceeding confirming NEPA and the NHPA violations involved the Atomic Energy Act, somehow NRC is exempt from the procedural requirements of NEPA and the NHPA. Fed.Resp. 38. NRC offers no credible support for this argument and this Court should strongly reject the blanket “carve out” NRC seeks. Neither NEPA nor the NHPA provide any procedural exemption for NRC licensing actions. See *In re Pac. Gas & Elec. Co.*, 67 N.R.C. 1, 13 (N.R.C. Jan. 15, 2008)(“There is no genuine dispute that NEPA and AEA legal requirements are not the same [. . .] and NEPA requirements must be satisfied.”) *accord* *New York v. NRC*, 681 F.3d at 477 (finding NEPA violations based on APA standards).

NRC cites *NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016) to support its novel deference argument. Fed.Resp. 38 n. 113. However, the *NRDC* Court gave deference not to the agency's interpretation of appropriate remedies for violations of NEPA, but merely to the factual question as to "what constitutes significant new information" in context of "severe accident mitigation alternatives" at a nuclear power station. *Id.* at 649(citations omitted). The Court ruled simply that NEPA does not mandate specific hearing procedures for the Commission. *Id.* at 652. Nowhere does the Court rule, or even imply, that the Atomic Energy Act alters NEPA's statutory prohibition against taking agency action before NEPA compliance. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d at 476.

NRC also cites *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990) to argue that NRC is exempt from NEPA's mandate that NEPA compliance occur before licensing decisions. Fed.Resp. 38 n. 114. That case contains no such support. Rather, it merely reiterates that NEPA does not itself mandate any particular administrative hearing process. 920 F.2d at 56.

NRC cannot circumvent NEPA's and the NHPA's procedural requirements simply because those violations were confirmed through NRC's administrative review process. The NHPA and NEPA violations have been ruled upon and confirmed by the agency itself, and this Court should apply the standard remedy – vacatur. 5 U.S.C. § 706(2)(“reviewing court shall [...] hold unlawful and set aside

agency action, findings, and conclusions found to” violate the APA standard of review.)

C. Failure to Address Impacts Associated with Creation, Transport, and Disposal of Radioactive Waste

NRC argues that it reasonably denied a hearing on the Tribe’s contentions regarding the impacts of creation, storage, transport, and disposal of radioactive waste. Fed.Resp. 40. NRC asserts that the Tribe failed to raise any genuine dispute during the administrative process as to the completeness of the NEPA analysis. *Id.* However, the Tribe’s contentions demonstrate a genuine dispute and render NRC’s refusal to provide a hearing arbitrary, capricious, and contrary to law. NRC does not respond to the Tribe’s Initial Opening Brief setting out contention pleading standards, identifying a “substantive” dispute, and explaining the fallacy of the NRC Order’s rejection of a hearing. See Tribe Op.Br. 25. In its contentions pleadings, the Tribe specifically challenged the inadequate NEPA analyses and unsupported conclusions as to the impacts of radioactive waste creation, transportation, and disposal, in compliance with NRC’s contention pleading standards. *Id.* For instance, the Tribe specifically cited to relevant portions of the FSEIS, asserting:

The FSEIS confirms that White Mesa lacks a license approval from Utah to accept and dispose of the wastes created by the draft license or other NRC-licensed ISL facilities in the region. FSEIS at 3-116. However, the FSEIS does not analyze the impacts such disposition would entail, does not compare those impacts to other reasonable disposal alternatives, and does

not analyze whether disposal at White Mesa facility can be accomplished in accordance with 40 C.F.R. Part 40 Appendix A or the corresponding Utah Agreement State provisions.

Oglala Sioux Tribe FSEIS Contentions, at 35-36 (JA999-1000). See also *id.* at 33-39 citing multiple specific portions of the FSEIS that lack the required NEPA analysis. The Tribe's contentions also pled and described the failure of NRC Staff to conduct the required NEPA analysis in the Generic Environmental Impact Analysis, alleging failure to "analyze the site-specific impacts and alternatives sites, along with cumulative impacts of shipping other regional wastes not analyzed in the GEIS." *Id.* at 38 (JA1002).

Nevertheless, the ASLB rejected the NEPA contention on a finding that "the Oglala Sioux Tribe fails to challenge relevant sections of the environmental analysis." LPB-14-5, 79 NRC 377, 397 (JA413). When the Tribe's contention, alleging a lack of the required analysis and also referencing specific portions of GEIS and FSEIS where the NEPA analysis was inadequate, is rejected on such an inaccurate basis, it is appropriate for this Court to remand the issue to the Commission for a hearing on the specifics of the issue. Alternatively, because NRC's contention pleading imposes a more stringent gatekeeping standard for NEPA violations than the federal courts require, it is appropriate for this Court to reach the issue and set aside the FSEIS with direction to remedy the NEPA violations. *Sierra Club v. Hodel*, 848 F.2d 1068, 1094 (10th Cir. 1988) citing 40

C.F.R. §§ 1503.1(a)(4), 1506.6 (“The preparation of an EIS [...] entails [...] public and interagency participation. [...]. This cross-pollination of views could not occur within the enclosed environs of a courtroom.”).

Most of NRC’s Response on the waste issue argues that the FSEIS complied with NEPA, an issue the NRC Order did not reach. Yet, NRC admits that its analysis lacks site-specific review of impacts from the transportation and disposal of wastes at the White Mesa Mill. NRC asks the Court to accept a post hoc litigation rationalization by arguing that the White Mesa Mill was not chosen by the company as the disposal site. Fed.Resp. 41. However, the agency’s own FSEIS specifically states that “The applicant has identified the White Mesa site as the disposal location for solid byproduct material....” FSEIS at 3-116 (JA616).

NRC attempts to excuse this lack analysis involving transportation and disposal at White Mesa, Utah by relying on a truncated discussion in the Generic EIS “regarding disposal of byproduct-material waste from in situ recovery facilities generally....” Fed.Resp. 41. However, nowhere does NRC reconcile the lack of cumulative impact analysis of using the White Mesa Mill as the identified disposal facility with the Mill’s lack of authorization to receive or dispose of Powertech’s radioactive wastes. *Id.* The FEIS identifies no other disposal facility. NRC deflects the issue by claiming that the mining operation must have a disposal agreement in place before operations – but that does nothing to remedy the lack of

NEPA analysis identifying radioactive waste disposal impacts at White Mesa. See Fed.Resp. 43.

NRC accuses the Tribe of failing to identify specific impacts of the failure to analyze the impacts of immediate, long term, and perpetual management of radioactive wastes, when it is the FSEIS that must, but does not, provide that meaningful review of foreseeable impacts of the wastes. Fed.Resp. 42. NRC simply repeats the conclusory FSEIS statement that the impacts will be “small.” *Id.* NRC instead refers to FSEIS statements regarding transportation of yellowcake (a precursor to the final uranium fuel), pointing to no specific analysis of the transportation of processing wastes. Even more glaring is the lack of any argument or demonstration that either the Generic EIS or the Supplemental EIS addressed the lack of licensed capacity or environmental impacts at the White Mesa facility.

The record shows evidence of violations of state and federal standards at the White Mesa Mill, along with issues associated with ongoing groundwater contamination and off-site air deposition of radioactive materials. See Oglala Sioux Tribe Contentions on Draft Supplemental EIS at 27-30 (JA989-992), with attached comments on Draft Supplemental EIS (JA814-15). The lack of review of these impacts and violations is compounded by NRC’s failure to acknowledge or analyze the environmental justice issues implicated by disposing additional waste at the

White Mesa Ute community, a Tribal community whose fate has not been disclosed in NRC's NEPA analysis. *Id.*

Simply put, because the company and FSEIS identify White Mesa as the only foreseeable disposal site for the wastes, NRC must analyze the foreseeable impacts associated with the operation's disposal of its radioactive wastes at the White Mesa location. A mere license condition requiring that a future agreement be in place for disposal and a statement that disposal must be lawful (see FSEIS at 2-53, JA601) does not meet NEPA's hard look mandate. Reliance on future state or other permitting does not substitute for the required federal NEPA analysis. "[T]he existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Sierra Club v. FERC*, ---F.3d ---, 2017 WL 3597014, *11 (D.C. Cir., Aug. 22, 2017). See also *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103-04 (9th Cir. 2016) (same).

Rather, NEPA specifically requires that NRC review all direct, indirect, and cumulative impacts related to the activity under review. 40 C.F.R. §§1502.16, 1508.8, 1508.25(c). 'Indirect effects' are those that 'are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable.' *Id.* § 1508.8(b)." *Sierra Club v. FERC*, 2017 WL 3597014, *8(agency must analyze impacts from facilities receiving impacts from project).

Notably, neither Response addressed the Tribe's demonstration that an EIS for a mining operation must review the impacts from off-site ore processing and transportation. See Tribe Op.Br. 29-30 citing *South Fork Band Council of W. Shoshone of Nev. v. Dep't of the Interior*, 588 F.3d 718 (9th Cir. 2009) and *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193 (D. Colo. 2011). Similarly, here, the agency's failure to analyze the impacts from the processing and transportation of the wastes from the Dewey-Burdock site violates NEPA. This Circuit has similarly ruled that NRC's NEPA analysis of waste disposal must precede agency action involving the wastes. *New York v. NRC*, 681 F.3d at 477.

D. Failure to Conduct Scoping

NRC asserts it properly denied consideration of the Tribe's scoping contention despite the NRC Order's finding that the ASLB misapplied the applicable law when rejecting the contention. Fed.Resp. 44-45. NRC asserts this denial of an opportunity to raise this issue in the administrative hearing constitutes harmless error. *Id.* Yet, NRC's denial of a hearing precluded the Tribe from developing the precise factual record that NRC now claims lacks evidence of the resulting harms to the Tribe's ability to ensure meaningful participation at the earliest stages of the NEPA analysis.

NRC cites to two district court cases, *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F.Supp.2d 1066 (E.D. Cal. 2009) and *Muhly v. Espy*, 877 F.Supp. 294 (W.D. Va. 1995), in support of its “harmless error” argument. However, in both cases, the courts declined to rule in favor of the plaintiff because the agency had not issued a final permit. There was no basis for either court to determine any harm because no decisions had been. Here, the license has been issued and harms realized.

Even without a hearing opportunity, the Tribe identifies concrete consequences of having been deprived a scoping opportunity, which NRC fails to meaningfully address in its brief. NRC regulations require scoping to provide an opportunity “as soon as practicable” for input to help define the proposed action, identify significant issues to be analyzed in depth, provide input on alternatives that NRC Staff proposed to eliminate from study, and ensure that other environmental review and consultation requirements related to the proposed action be prepared concurrently and integrated with the Draft SEIS. 10 C.F.R. § 51.29(a)(1)-(5). In this case, this level of early involvement would have, at a minimum, allowed the Tribe to address the cultural resources survey and NHPA consultation issues that have severely plagued NRC Staff’s licensing from the start.

NRC’s denial of any hearing on this contention was unwarranted, given that the ASLB’s sole basis for denying the hearing was a misapprehension of the law

confirmed by the NRC Order. See LBP-13-9 (JA386-87). NRC's harmless error conclusion denied the Tribe any opportunity for factual development or presentation of evidence regarding the harm. Even so, the Tribe did provide evidence of harm in its Statement of Contentions on the DSEIS. JA993-95. The Tribe showed how the deprivation of the NEPA-mandated interdisciplinary analysis engendered through the scoping process affected the Tribe's ability to shape the project. *Id.* at JA993 (acknowledging the "bureaucratic steam roller" aimed at approval, but without the public participation and informed decisionmaking requirements of NEPA. See *Sierra Club v. Marsh*, 872 F.3d 497, 504 (1st Cir. 1989)).

NRC emphasizes opportunities to participate in the limited NEPA process that resulted from the lack of scoping. Fed.Resp. 45-46. However, these later comment periods did not provide the Tribe the same opportunity. Indeed, even before the NEPA process produced any draft documents, NRC Staff had already solidified its aggressive litigation position against the Tribe, opposing the Tribe's involvement in the hearing process with respect to every single contention – in lockstep with the license applicant. See ASLB rulings on Intervention (LBP-10-16)(JA305), DSEIS contentions (LBP-13-9)(JA354), and FSEIS contentions (LBP-14-5)(JA397), all demonstrating coordinated NRC Staff and Powertech opposition to every contention offered by the Tribe at every stage of the administrative

proceedings. NRC's unyielding opposition to the Tribe's involvement in the process did not provide the same opportunities to help establish and guide the NEPA analysis that the initial scoping process requires.

E. The FSEIS Fails to Adequately Analyze the Groundwater Quality Impacts Associated with the Thousands of Abandoned Boreholes and Faults at the Site.

NRC concedes that improperly plugged boreholes and faults and fractures at the Powertech site could cause groundwater impacts if not properly plugged.

Fed.Resp. 47, 51. Further, NRC concedes that the only way to gauge or analyze the extent of these impacts is with additional identification of the boreholes and fractures, and conducting additional testing at the site. *Id.* Instead of conducting this admittedly required analysis in the FSEIS and subjecting such analysis to public review under NEPA, the agency relies on a license condition that purports to require the company to conduct these activities post-NEPA and to have the well field data packages reviewed by a Safety and Environmental Review Panel (SERP). FSEIS at 2-18. JA596. SERP review would take place long after public review opportunities have ended and without NEPA analysis. *Id.* As discussed in the Tribe's Opening Initial Brief at 33-34, NEPA does not allow for the deferral of analysis necessary to determine project impacts.

The NRC attempts to deflect this issue by mislabeling the impacts analysis as a *mitigation* issue, asserting that the FSEIS need not contain a "fully developed

plan to mitigate impacts before taking the proposed action.” Fed.Resp. 49 citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). However, the Tribe presented the issue of whether NRC had taken the necessary “hard look” at the *impacts* to groundwater – which cannot be deferred to a post-NEPA process except under specific circumstances, which the Commission does not assert. See 40 C.F.R. § 1502.22 (requiring a demonstration of impossibility or exorbitant costs to excuse the failure to obtain information necessary for impacts analysis). “[A] post-EIS analysis—conducted without any input from the public—cannot cure deficiencies in an EIS. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003).” *Great Basin Resource Watch v. BLM*, 844 F.3d at 1104.

NRC also fails to address the hearing testimony where Powertech and NRC Staff witnesses admitted that the agency neglected to obtain necessary information to enable a “hard look” review of *impacts* in the FSEIS. Tribe Op.Br. 32-34. Similarly, NRC fails to address the Tribe’s argument regarding 10 C.F.R. Part 40 Appendix A, Criteria 5G(2). Tribe Op.Br. 31.

NRC’s violates NEPA by confirming that it will not collect the required information nor analyze foreseeable groundwater impacts until *after* the NEPA process, opting instead for a non-NEPA process designed to mitigate groundwater impacts during licensed operations.

F. Failure to Adequately Analyze Water Quality Baseline

NRC argues that the Tribe has not shown any flaws in the FSEIS analysis of baseline water quality, pointing to four FSEIS pages NRC claims provides all the information necessary. Fed.Resp. 53. However, NRC fails to address the Tribe's argument that the NRC Order unlawfully approved the FSEIS analysis despite finding the FSEIS lacks "complete" baseline water quality information. *Id.* NRC also fails to address the Tribe's arguments that the Commission erred by affirming the ASLB's endorsement of the concept that baseline water quality can be established by "collection of groundwater quality data in a staggered manner" after the licensing process is complete and outside of the NEPA review. 81 NRC at 665. JA464. Lastly, NRC failed to address the Tribe's argument that the NRC Order erred in excusing the NEPA violation based on the ASLB's ruling that "the EIS is sufficient as long as it adequately describes the process by which the monitoring data will be obtained" in the future. *Id.* at 661. JA460.

NEPA requires the agency to fully "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. §1502.15. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process:

Establishing appropriate baseline conditions is critical to any NEPA analysis. "Without establishing the baseline conditions which exist ... before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply

with NEPA.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

Great Basin Resource Watch v. BLM, 844 F.3d at 1101(EIS for mining project failed to obtain adequate baseline air quality data). “[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.” *Northern Plains v. Surf. Transp. Brd.*, 668 F.3d 1067, 1085 (9th Cir. 2011).

NRC regulations at 10 C.F.R. §§ 51.10, 51.70 and 51.71, implementing NEPA, also require a description of the affected environment containing sufficient data to conduct an independent NEPA analysis. Further, NRC’s own regulations require the applicant to provide “**complete** baseline data on a milling site and its environs.” 10 C.F.R. Part 40, Appendix A, Criterion 7(emphasis added). The scheme to allow the operative data to be collected at a later date, after license issuance, violates these requirements.

Importantly, NRC’s admissions are confirmed by record evidence that “complete” data has not been collected. At the hearing, the Tribe’s expert Dr. Moran confirmed that additional data is necessary for a “complete” baseline analysis, including the collection of data for water quality constituents not presented in the application or FSEIS, such as strontium and lithium. August 20, 2014 Testimony at p. 1007, line 24 to p. 1008, line 1 (JA763-64). Consistent with

Dr. Moran's testimony, Powertech witness Mr. Demuth admitted that additional data is necessary to provide complete baseline data. *Id.* at p. 1012, lines 16-20 (JA766). NRC admissions and the record confirm the FSEIS lacks the information required by Criterion 7 and fails to provide a NEPA-compliant analysis of existing conditions at the site.

Lastly, NRC asserts that the Tribe's argument regarding the FSEIS' misplaced reliance on NRC Regulatory Guide 4.14 is "unavailing" because support allegedly exists in the record for the use of the 2-kilometer boundary for ground water baseline monitoring the Guide established. Fed.Resp. 54-55. NRC's argument is contradicted by the ASLB's express finding that it "was unable to find a specific mention of a 2 kilometer radius" in NRC Staff's exhibits. 81 NRC at 664 n. 284. JA463. In other words, NRC relies on an argument repudiated by ASLB.

Further, the purported evidence in NRC's Response speaks only to "no reported instances of contamination of any monitored private wells" within the 2 kilometer area. Fed.Resp. 55 n. 152. This post hoc rationalization relies on a small, unidentified, subset of data with no context. NRC's Response provides no evidence to contradict the ASLB finding. As demonstrated by the Tribe, the only concrete evidence in the record demonstrates that that the 2 kilometer radioactive plume "rule" is inapplicable to and unreliable in the context of ISL. 81 NRC at

664, *quoting* Exh. NRC-076 (recognizing that “uranium plumes...[e]xceed roughly 2km in length only in special cases e.g. where in situ leaching has been carried out.”). JA664.

As such, the Board’s contrary conclusion that that NRC Staff properly relied on 35-year old, pre-UMTRCA, conventional milling guidance for setting 2 kilometer limits on baseline water quality data collection for at in situ leach facilities is contradicted by its own findings and is not supported by the record.

G. Failure to Adequately Review Mitigation Measures

NRC/Powertech misstate the Tribe’s arguments, attempting to portray the Tribe as seeking “fully developed mitigation plans.” Fed.Resp. 56, Interv.Resp. 34. However, the Tribe unambiguously argued that NRC failed to include a “reasonably complete discussion of possible mitigation measures.” Tribe Op.Br. 14 *quoting Robertson*, 490 U.S. at 353 (1989).

Instead of identifying “reasonably complete discussion” of unreviewed mitigation plans, NRC concedes that the FSEIS “identifies where specific detailed mitigation plans *would be developed after or apart from the NEPA review.*” Fed.Resp. 57 (emphasis supplied). As discussed in the Tribe’s Initial Opening Brief, reliance on a future, as yet-unsubmitted, mitigation to prevent/mitigate adverse impacts to these resources also violates NEPA. Tribe Op.Br. 40-41.

NRC/Powertech reinforce the NEPA violation by relying on the Programmatic Agreement (PA). Fed.Resp. 57, Interv.Resp. 36. The PA contains no reasonable discussion of mitigation measures, but rather simply statements that mitigation plans would be developed in the future. Tribe Op.Br. 45-46.

Similarly, NRC relies on FSEIS 4-165–4-182 as providing an “extended discussion” of mitigation. Fed.Resp. 57. Importantly, the NRC Order confirmed NEPA violations for failure to competently survey or otherwise identify Lakota Sioux cultural sites, rendering the PA hollow for the as-yet unidentified resources. In any case, the cited FSEIS pages consist primarily of charts simply listing blanket “management recommendations” devoid of any mitigation discussion. Indeed, the so-called discussion text in the FSEIS simply states that for many of the identified sites “submission of additional information will be required to assess” while many others remain “unevaluated” (see e.g. FSEIS 4-171, 172, 176)(JA667-672).

NRC points to FSEIS 4-127–4-132 for air quality mitigation (Fed.Resp. 61 n. 165), but those pages, while including a small list of minor mitigations, address only the construction impacts from the development of the proposed waste disposal wells. JA648-653. For wildlife mitigation, NRC points to FSEIS 4-108, but that page simply states that the company has committed to implement mitigation, with no discussion. JA642.

In sum, NRC/Powertech promises of future mitigation plans and post-NEPA analysis misstates the standard and demonstrates that the FSEIS lacks the “reasonably complete discussion of possible mitigation measures” required by *Robertson*. See Tribe Op.Br. 39-48.

CONCLUSION

Based on the foregoing, the Tribe respectfully requests the Court vacate the FSEIS, ROD, and License, and remand this matter to the Commission to comply with its statutory duties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32

I hereby certify that the foregoing Reply Brief for Petitioner Oglala Sioux Tribe contains 6477 words excluding the parts of the brief exempted by the Federal Appellate and Circuit Rules.

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CERTIFICATE OF SERVICE

I, Jeffrey C. Parsons, hereby certify that the foregoing Final Reply Brief for Petitioner Oglala Sioux Tribe 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.

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