UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	December 8, 2017

Oglala Sioux Tribe's Response in Opposition to Powertech (USA) Inc.'s Petition for Review of LBP-17-09

In accordance with 10 C.F.R. §§ 2.1212 and 2.341, Intervenor Oglala Sioux Tribe ("OST" or "Tribe") hereby submits this Response in Opposition to Powertech (USA) Inc.'s Petition for Review of LBP-17-09 filed by Powertech (USA) Inc. ("Powertech") on November 13, 2017.

INTRODUCTION AND SUMMARY

Powertech's Petition for Review ("Petition") fails to set forth a sufficient basis for the Commission to undertake review of the Atomic Safety and Licensing Board's ("ASLB" or "Board") ruling in LBP-17-09, which denied NRC Staff's Motion for Summary Disposition with respect to Contention 1A in this proceeding. Powertech submitted no Motion for Summary Disposition, but did file a Response in support of the NRC Staff's Motion. NRC Staff did not file a Petition for Review.

Powertech's Petition asserts both factual and legal errors in the form of general disagreements with an outcome it considers illogical, but the company fails to provide evidence of or citation to error that would warrant Commission review. The crux of Powertech's argument is that the Board could not have found compliance with the National Historic Preservation Act ("NHPA") for purposes of Contention 1B, while at the same time finding a lack

of compliance with the National Environmental Policy Act ("NEPA") with respect to Contention 1A. However, as discussed herein, there is no inherent, logical, or legal conflict in disparate rulings under these two separate statutes, which impose different mandates upon federal agencies. In trying to equate the two, Powertech urges the Commission to adopt an unsupportable interpretation of the National Environmental Policy Act ("NEPA") that would contravene Commission precedent and established law.

Powertech also misreads and misconstrues the Board's ruling as to Contention 1A in asserting that the Board's ruling is internally inconsistent regarding the holding that NRC Staff failed to conduct the requisite "hard look" at cultural resource impacts. The Board was not inconsistent. Rather, the Board relied on the established law holding that compliance with the National Historic Preservation Act ("NHPA") does not equate to compliance with NEPA. Further, the Board correctly found that the "rule of reason" principle under NEPA did not excuse NRC Staff's lack of any review of Sioux cultural resources impacts. The Board also made a reasonable and established distinction between NRC Staff's review of impacts to "historic" resources versus "cultural" resources, which Powertech neglects to comprehend. As a result, the Commission should not disturb the Board's legal or factual findings as proposed by Powertech.

Powertech's allegations that the Tribe has demonstrated "reticence" and "unwillingness to cooperate in the process" (among other dispersions) regarding completion of a cultural resources survey is demonstrably false. Indeed, recent discussions between the Tribe and NRC Staff have produced meaningful progress and both parties are preparing to move forward with an effort to conduct the necessary cultural resources survey to fulfill NRC Staff's NEPA responsibilities at issue in Contention 1A. The latest evidence of this effort comes in just the last week in a letter to the Tribe from NRC Staff. See December 6, 2017 letter from NRC Staff to

Oglala Sioux Tribe (ML17340B365). In any case, Powertech provides no evidentiary support for its attacks and certainly provides no demonstration of "clear error" with respect to the Board's factual findings.

Throughout its Petition, Powertech makes the unfounded assertion that somehow the Commission's grant of review would act to "moot" the pending litigation in the D.C. Circuit Court. Powertech neglects to inform the Commission that neither the merits of the Commission's findings on the lack of NEPA compliance with respect to the cultural resources survey nor compliance with NHPA are directly before that Court. To the contrary, the majority of issues pending in that case deal with NEPA compliance unrelated to cultural resources and would be entirely unaffected should the Commission grant Powertech's proposed relief.

Lastly, Powertech's prayer for relief is non-sensical. The company asks for the Commission to "direct NRC Staff to supplement the FSEIS with all data and information for activities conducted to date by NRC Staff on historic and cultural resources and order the closure of Contention IA upon completion of such supplement." Petition at 20. However, the record demonstrates that no such information exists, and thus no such supplement can be produced.

The Commission should deny Powertech's Petition for Review, and allow the course established by the Board and the parties, including NRC Staff and the Tribe, to continue. In this way, the NRC Staff will have the opportunity to work to ensure compliance with NEPA and the Tribe will have the opportunity to ensure that its cultural resources are given the analysis and protection they deserve.

STANDARD OF REVIEW

Pursuant to 10 C.F.R. § 2.341(b), the Commission may grant discretionary review of a Board order based on whether a "substantial question" exists as to: (1) A finding of material fact

is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) A substantial and important question of law, policy or discretion has been raised; (4) The conduct of the proceeding involved a prejudicial procedural error; or (5) Any other consideration which the Commission may deem to be in the public interest.

Powertech asserts that the "Commission should take review of this Petition, because the Licensing Board violated 10 CFR §§ 2.341(1, 3, & 5)." Petition at 6. The Commission's "standard of 'clear error' for overturning a Board factual finding is quite high." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11 (2003). It is not enough that Powertech "demonstrate[] only that the record evidence in this case may be understood to support a view sharply different from that of the Board." *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 N.R.C. 381, 381 (1995). "A 'clearly erroneous' finding is one that is not even plausible in light of the record viewed in its entirety." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004) (internal citations and quotation marks omitted).

Notably, Powertech expressly fails to cite 10 C.F.R. § 2.341(b)(2) as a basis for review, but nevertheless asserts in its Petition allegations of "clear legal error." In any case, for conclusions of law, the Commission's "standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law."' *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009) (citing *Tennessee Valley Authority* (Watts Bar

Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Brown's Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004)).

BACKGROUND ON NEPA STANDARDS

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

In a NEPA document, the government must disclose and take a "hard look" at the foreseeable environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

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

NEPA's implementing regulations require agencies to "insure the professional integrity, including scientific integrity of the discussions and analysis…." 40 C.F.R. § 1502.24

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

The CEQ regulations require that: "NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added). The statutory prohibition against taking agency action before NEPA compliance applies to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

To meet these requirements "an agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990), *citing Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986).

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

NEPA requires that mitigation measures be reviewed in the NEPA process. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), *accord New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

NEPA regulations require that an EIS: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.16(h).

NEPA requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement. See, *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) ("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements."); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff'd sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) ("The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement."); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot 'bring into compliance with NEPA an EIS that by itself is inadequate.' . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned."); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same).

NEPA makes clear that impacts of the license applicant's proposal on cultural resources are one of many categories of effects an agency must analyze, disclose, and compare in "a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences" in agency decisionmaking. 42 U.S.C. § 4332(2)(A). The regulations define direct and indirect impacts to include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." 40 C.F.R. § 1508.8(b). See also 40 C.F.R. § 1502.16(g) (NEPA analysis "shall include discussions of … historic **and** cultural resources….")(emphasis added).

POWERTECH HAS IDENTIFIED NO CLEARLY ERRONEOUS FACTUAL OR LEGAL FINDINGS

Powertech asserts that the Board made clearly erroneous factual and legal errors, but fails to identify any such errors with the specificity necessary to substantiate such an argument. Powertech argues that the Board erred in finding that the level of government-to-government consultation NRC Staff conducted after the Board's decision in LBP-15-16 met the "bare minimum" to comply with the NHPA (LBP-17-09 at 2), but was not sufficient to comply with NEPA. Petition at 13-14. However, Powertech fails to acknowledge that even though concurrent NHPA/NEPA analysis and public disclosure is preferred, the requirements of NHPA compliance are separate and distinct from NEPA compliance.

NHPA Compliance and NEPA Compliance are Separate Inquiries

As the federal courts have expressly held, "compliance with the NHPA 'does not relieve a federal agency of the duty of complying with the impact statement requirement 'to the fullest extent possible.'" *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) *quoting*

Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. Idaho 1982) *quoting* 42 U.S.C. § 4332. This express finding was incorporated into the Board's ruling in LBP-15-16:

> Although the NRC Staff points to the concurrence of the ACHP and the South Dakota State Historic Preservation Officer in the context of the NHPA Section 106 investigation as evidence that NEPA's hard look has been satisfied, it does not follow that a review that satisfies the NHPA necessarily satisfies NEPA requirements to take a hard look at cultural resources affected by a project. Although the NHPA and NEPA resemble each other in certain respects, compliance with the NHPA "does not relieve a federal agency of the duty of complying with the [environmental] impact statement requirement 'to the fullest extent possible.'"

LBP-15-16, at 39 (citations omitted). The Commission ruled the same in CLI-16-20, holding that "Federal case law supports the legal principle that NHPA and NEPA compliance do not necessarily mirror one another." CLI-16-20 at 38. Thus, Powertech's principle argument – that compliance with NHPA's consultation requirements automatically equates to compliance with NEPA – cannot be squared with established precedent in this case, nor federal case law.

As set forth in the NEPA background, NEPA requires federal agencies to conduct a competent analysis of impacts to cultural resources – apart from and in addition to any consultation required under the NHPA. NEPA's dual purposes – public participation and informed decisionmaking – are informed by and additive to NHPA's consultation requirements. *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009)

NRC Staff did not Carry out any NEPA Analysis after the Commission Ruling

Powertech provides no evidence to suggest that NRC Staff has conducted the necessary cultural resource impact analysis. Indeed, since the Commission ruled in CLI-16-20, NRC Staff has not carried out any cultural resources analysis. As a legal matter, the Board has twice found that the NRC Staff has failed to gather the necessary information to consider and analyze cultural resources as part of its licensing decision – and the Commission has affirmed this finding. Powertech's only reference to such an effort improperly seeks to reopen the Commission's

previous decision, arguing that "NRC Staff did obtain considerable data and information from other tribes and included that in the SEIS, including Sioux tribes." Petition at 13. This factual allegation is false, and contradicted later by Powertech's own Petition. Petition at 14, n. 18. Powertech admits that "Mss. Yilma and Jamerson testified that detailed written reports with NRHP eligibility recommendations were received from the Northern Arapaho Tribe, Northern Cheyenne Tribe and the Cheyenne and Arapaho Tribes of Oklahoma and that the Crow Nation provided field notes identifying sites of interest to its members." *Id*. These Tribes have historic and cultural interests in the project area that must be considered, but none of these Tribes are Sioux. No Sioux Tribe provided any information to NRC Staff, and NRC Staff incorporated no information from a Sioux Tribe into its NEPA review. Powertech has failed to show any "clearly erroneous" factual or legal determinations. Instead, Powertech's Petition reinforces the ongoing importance of a NEPA analysis based on methodologically sound cultural resources surveys carried out by qualified persons.

Powertech ignores entirely the central holding of the Board regarding its denial of summary disposition on Contention 1A. The Board ruled:

> We conclude that these points—specifically, the Oglala Sioux Tribe's challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff's proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS.

LBP-17-09 at 36. Nowhere in Powertech's Petition are these central findings addressed, let alone rebutted or demonstrated to be "clearly erroneous". As such, Powertech has not met its burden for seeking Commission review of LBP-17-09.

Divergent NHPA and NEPA Rulings are neither Illogical nor Clearly Erroneous

Although Powertech fails to specifically assert 10 C.F.R. § 2.341(b)(2)(erroneous legal findings) as a basis for its Petition, the company nevertheless argues, "[i]t is legally illogical that you can conduct adequate consultation with a Native American Tribe on one hand and then be deemed to have failed to satisfied (sic) another statute with similar requirements on the other hand." Petition at 16. Similarly, Powertech asserts, "adequate work was done under the NHPA, which represents the exact same work the Licensing Board is now demanding of NRC Staff to complete NEPA." Petition at 17. However, as discussed, the Board, Commission, and federal courts have specifically dealt with this legal issue – and ruled directly contrary to Powertech's position. See CLI-16-20 at 35-37. In short, Powertech is legally and factually incorrect to assert that the requirements under the NHPA and NEPA are equivalent. The Petition presents no basis for the Commission to find the Board's distinction, which conforms with the Commission ruling, to be "'a departure from or contrary to established law."' *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009) (citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Brown's Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004)).

Lacking a tenable legal argument equating NHPA and NEPA, Powertech asserts that the Board committed "clearly erroneous" legal error by not relying on the Programmatic Agreement ("PA") incorporated into its license as satisfying NEPA. Specifically, Powertech argues that it "currently possess[es] an effective license with a license condition dealing with potential unanticipated discoveries at the site as well as a PA that includes the Tribe as consulting party for future site identification." Petition at 16. However, this argument suffers from the same flaw

– namely that the PA is wholly a creature of the NHPA compliance and was never meant to, and cannot, be treated as the equivalent to a lawful NEPA analysis of cultural impacts.

As the Board recognized in LBP-15-16, "[a]n agency may fulfill its **NHPA review** responsibilities through several means, one of which includes the issuance of a Programmatic Agreement." LBP-15-16 at 19(emphasis added). Indeed, Powertech and NRC Staff had strenuously argued during the original hearing process that the PA demonstrated compliance with NEPA. LBP-15-16 at 36 ("The NRC Staff concludes that it complied with NEPA by making repeated attempts to obtain information on cultural resources and by including mitigation measures in the Programmatic Agreement that will limit impacts to any unidentified resources."). This argument was rejected by the Board, which was upheld by the Commission. LBP-15-16 at 39-40 ("the FSEIS in this proceeding does not contain an analysis of the impacts of the project on the cultural, historical and religious sites of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes.").

By its terms, the PA does not include any actual analysis or reasonably developed mitigation plans for cultural resources, but rather only sets forth a proposed plan for attempting to gather additional information at a later date and to negotiate as-yet unidentified mitigation measures into a mitigation plan at some point in the future. Exhibit NRC-018-A, at 5-10. Even for these plans, the PA specifically excludes from the effect of its terms all cultural resources that do not rise to the level, in NRC Staff's view, of eligibility for the National Register of Historic Places. *Id*. at 6 ¶ 3(k); 9, ¶ 6(l); 11 ¶ 9(g).[1] As a result, the Board's ruling that neither reliance

[1] Notably, the authority for the use of a PA in the first instance derives from ACHP regulations at 36 C.F.R. § 800.14(b)(1)(ii). However, this section specifically requires that the use of a PA is allowable only where "effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii). In this case, no such demonstration has been made, rendering the use of a PA unwarranted.

on the PA nor other tribal surveys represents the "hard look" required by NEPA is well-supported by established law. Powertech has not demonstrated any new factual information or legal authority to call the prior rulings of the Board and Commission into question. As such, the Petition should be rejected.

Historic and Cultural Resources are Legally Distinct

Powertech appears to argue that the Board committed error by failing to equate "historic" resources with "cultural" resources. Petition at 15. This argument is premised on the Board's acceptance of the Class III archaeological survey performed as part of the license application process as satisfying NEPA's requirements for strictly historic resources, but nevertheless found the NEPA document lacking with respect to cultural resources. Powertech ignores the distinction recognized by NEPA, and the Board, between "historic" and "cultural" resources:

> A Class III survey, however, is not the same as a cultural resources survey or a traditional cultural properties survey. A Class III survey can satisfy the requirements of the NHPA and identify a property's eligibility to be added to the National Register of Historic Places. However, as the NRC Staff testified, a Class III survey "wouldn't necessarily identify all of the [Native American cultural and religious] resources primarily because some of the knowledge is not available to those conducting a Level 3 survey. That would be provided by the Native American groups themselves." The category of 'cultural resources' "covers a wider range of resources than 'historic properties,' such as sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections."

LBP-15-16 at 37-38. Similarly, NRC Staff witnesses testified along the same lines:

> Haimanot Yilma, NRC Staff witness and project manager for the Staff's environmental review of the Dewey-Burdock application, testified that "under NEPA, we're supposed to be looking at cultural resources. Historical property is a subset of cultural resources and so therefore any information that are provided under the NHPA historical properties are a subset of NEPA review. So we have to consider them under the NEPA review."

LBP-15-16 at 37.

NEPA regulations specifically distinguish between the "historic" and "cultural" resources, requiring that the "effects" that must be reviewed in a NEPA document include

"ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. Similarly, the joint Advisory Council on Historic Preservation ("ACHP") and Council on Environmental Quality ("CEQ") NEPA Handbook relied upon by the applicant and NRC Staff includes provisions specifically echoing this point:

> WHAT IS A "CULTURAL RESOURCE?"
>
> Effects considered under NEPA include cultural and historic. [40 C.F.R. § 1508.8]. The term "cultural resources" covers a wider range of resources than "historic properties," such as sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections.

Exhibit NRC-048 at 4. Thus, contrary to Powertech's misguided argument, the Board's conclusions of law are entirely consistent with the fact that NEPA's "hard look" standard applies to historic properties and cultural resources.

NRC Staff has not met NEPA's "Hard Look" Mandate

Lastly, Powertech reveals its Petition improperly seeks to reopen the Commission's previous decision in CLI-16-20 by contending that "[t]he Commission also should take note of Commissioner (now Chairman) Svinicki's dissent in CLI-16-20." Petition at 17. Specifically, Powertech asserts that NEPA's "'hard look' requirement is tempered by a 'rule of reason' that requires agencies to address only impacts that are reasonably foreseeable-not remote or speculative. Petition at 7. See also Petition at 17. However, Powertech fails to show a "clearly erroneous" legal finding because it ignores the controlling federal case law that renders this "rule of reason" argument inapplicable in this case.

In previously holding the FSEIS inadequate to meet NEPA's "hard look" mandate, the Commission confirmed that 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." *In re Powertech (USA), Inc.,* 2016 NRC LEXIS 36 at *53 (N.R.C. Dec. 23, 2016) (emphasis supplied)(CLI-16-20). As such, the Board ruling in LBP-17-09 was based on the previously adjudicated and settled question that the Powertech proposal will have certain impacts on "Native American cultural, historic, and religious resources." *Id*. The only dispute remaining for Board consideration was whether NRC Staff carried out a NEPA analysis of these impacts sufficient to remedy the deficiencies previously identified by the Board and Commission. As now repeatedly held by the Board, and upheld at least once by the Commission, NRC Staff has not met NEPA's "hard look" mandate. Simply put, the consequences of the NRC license are not remote or speculative, and the "rule of reason" does not excuse NRC's failure to prepare any NEPA analysis to address the deficient FSEIS.

The legal analysis by the Court in *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082 (9th Cir. 2004), demonstrates that the "rule of reason" is limited to situations where "'[a]n EIS need not discuss remote and highly speculative consequences.' 383 F.3d. at 1283; see also *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir.1980)." See also, *id*. at n.6 ("For example, we have held that agencies performing NEPA review are not required to consider the environmental consequences of the increased risk of nuclear war resulting from construction of military communications towers, *No GWEN,* 855 F.2d at 1381, 1386, the environmental effects from the failure of a dam from a catastrophic, but highly unlikely, earthquake, *Warm Springs,* 621 F.2d at 1026-27, or how remotely possible land-use changes might bear on the environmental effects of a new dam, *Trout Unlimited,* 509 F.2d at 1283-84."). As another Court explained:

> An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an [action] merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program …."

Kern v. BLM, 284 F.3d 1062, 1072 (9th Cir. 2002). As such, NEPA case law does not support Powertech's position.

Commission precedent is similarly unsupportive of Powertech's argument. In *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002), the Commission ruled that a NRC Staff NEPA analysis need not consider the highly remote potential for a terrorism attack on a nuclear fuel facility. In so ruling, the Commission held:

> It is well established that NEPA requires only a discussion of "reasonably foreseeable" impacts. Grappling with this concept, various courts have described it as a "rule of reason," or "rule of reasonableness," which excludes "remote and speculative" impacts or "worst-case" scenarios. Courts have excluded impacts with either a low probability of occurrence, or where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the "proximate cause" of that impact. NEPA does not call for "examination of every conceivable aspect of federally licensed projects." Here, the possibility of a terrorist attack on the PFS facility is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.

Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002)(footnotes and citations omitted).

Thus, Powertech confuses the application of NEPA's "rule of reason" in an attempt to unlawfully evade analysis of reasonably foreseeable impacts that must be considered in a NEPA document. The cited "rule" does not allow NRC Staff to abandon its NEPA analysis of impacts, such as those to cultural resources at issue here, that are an expected, foreseeable, and natural consequence of its actions. Powertech has not, and cannot, make the necessary showing that impacts to cultural resources are somehow highly remote or speculative. Here, the Board's previous order in LBP-15-16 confirmed that impacts are non-speculative by emphasizing the fact

that the FSEIS's lacked analysis of "potentially necessary mitigation measures" for "environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources." *In re Powertech USA, Inc*., 81 N.R.C. 618 at 655 (N.R.C. Apr. 30, 2015)(LBP-15-16).

POWERTECH HAS NOT DEMONSTRATED A SIGNIFICANT QUESTION OF LAW AND/OR POLICY

Powertech argues that the Commission should accept its Petition because of a "significant question of law and/or policy or discretion within the ambit of 10 CFR § 2.341(b)(3)." Petition at 16. Similarly, Powertech argues that "pursuant to 10 CFR § 2.34l(b)(5), there is greater policy issue at stake in this case." Petition at 18. However, with respect to both arguments, the only issue identified in the Petition is a claim that the Advisory Council on Historic Preservation (ACHP) sent a letter to NRC Staff asserting that NRC Staff had, in a view expressed without the benefit of testimony or hearing, complied with the requirements of the NHPA. Petition at 18.

As the company does throughout the Petition, this argument simply fails to recognize the distinction between compliance with the NHPA and compliance with NEPA. As discussed, the two statutes are not equivalent and compliance with the NHPA does not equate to compliance with NEPA. Further, the ACHP has no expertise or other authority over any federal agency's compliance with NEPA. The ACHP's sole purview is with regard to the regulations designed to implement the NHPA. Thus, because only NEPA issues are at stake with respect to Contention 1A, Powertech's argument fails to raise any significant question of law or policy.

POWERTECH'S ATTEMPTS TO BLAME THE TRIBE FOR THE LACK OF A CULTURAL RESOURCES SURVEY ARE CONTRARY TO THE RECORD AND SHOULD BE REJECTED

Powertech argues that "[t[here is no evidence in the record that the Tribe would agree to any terms that would be offered by NRC Staff and/or Powertech and, considering that the Tribe

is an adverse party to Powertech, no such resolution should be expected." Petition at 14. However, recent communications between the Tribe and NRC Staff demonstrate precisely the opposite. Specifically, on May 31, 2017, the Tribe sent NRC Staff a detailed letter setting forth at length a summary of the types of components it would expect and like to see in an approach to a cultural resources survey at the site. See ML17152A109.

In response to this letter, NRC Staff sent the Tribe a letter on December 6, 2017 providing a detailed summary of proposed terms and conditions on which NRC Staff proposes to move forward with a cultural resources survey. See ML17340B365. This exchange of ideas and proposals is a far cry from the characterization put forward by Powertech – of an intractable dispute warranting Commission intervention. Indeed, the Board is actively involved in holding regular and frequent conference calls between the parties aimed at generating meaningful discussion amongst the parties. See notices of conference calls for November 16, 2017 (ML17306A158) and December 12, 2017 (ML17325B679). The Commission should reject Powertech's invitation to upset the process the parties are currently engaged in.

In any case, Powertech's attempt to shift NEPA duties onto the Tribe should be rejected. Federal case law is replete with cases that drive home the fact that the public (including Tribes) are not responsible for providing an agency with the required NEPA analysis. For instance, the Ninth Circuit has repeatedly held that it is the agency's duty under NEPA, not the public's, to provide the needed information and analysis for public review and comment.

> To hold otherwise would require the public, rather than the agency, to ascertain the … effects of a proposed action. Such a requirement would thwart one of the ''twin aims'' of NEPA—to ''ensure[ ] that the *agency* will inform the *public* that it has indeed considered environmental concerns in its decisionmaking process.'' *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (emphasis added).

Te-Moak Tribe v. Dept. of Interior, 608 F.3d 592, 605 (9th Cir. 2010)(citation omitted). "Compliance with [the National Environmental Policy Act] is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *City of Carmel-By-The-Sea v. U.S. Dept. Trans.*, 123 F.3d 1142, 1161 (9th Cir. 1997).

Directly contrary to Powertech's assertions, the exchange of letters between the NRC Staff and the Tribe demonstrate that a functional discussion is ongoing between the two parties, guided by the active involvement of the Board, regarding terms for conducting a cultural resources survey that holds potential for resolving Contention 1A to the satisfaction of both NRC Staff and the Tribe.

GRANTING OF POWERTECH'S PETITION FOR REVIEW WOULD NOT MOOT THE ONGOING D.C. CIRCUIT PROCEEDINGS

Powertech contends that "there is an appeal that has been lodged by the Tribe before the D.C. Circuit alleging issues with the Board's LBP-15-16 decision on Contention 1A, which can be rendered moot by the Commission's consideration of this Petition." Petition at 20-21. However, Powertech never explains either how the Commission's consideration of its Petition could render any D.C. Circuit appeal moot, nor how this legal argument, even if it were true, factors into the standards for review established by 10 C.F.R. § 2.341(b). Given this lack of explanation, the Commission should disregard this argument.

To the extent the Commission sees this assertion colorable or relevant, it is false. The appeal pending before the United States Court of Appeal for the D.C. Circuit raises a number of issues that have no relation to the merits of the issues raised in Powertech's Petition. See Oglala Sioux Tribe's Final Opening Brief, Case No. 17-1059 (ML17284A154). Further, there is no basis for Powertech to speculate on the effect of the Commission accepting review of its Petition,

and the Tribe asserts that no decision granting the relief sought by Powertech would render the D.C. Circuit case moot. Rather, a plausible means for the Commission to moot the pending litigation would involve a Commission order invalidating the license and remanding the matter to NRC Staff to ensure full compliance with NEPA. *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)). Powertech has not sought such an order.

POWERTECH'S PRAYER FOR RELIEF IS NON-SENSICAL

Powertech repeatedly requests in its Petition that the Commission, "direct NRC Staff to supplement the FSEIS with all data and information for activities conducted to date by NRC Staff on historic and cultural resources and order the closure of Contention 1A upon completion of such supplement." Petition at 1-2, 5, 11, 20. However, this relief is not sensical, as the evidence in the record demonstrates that NRC Staff has not yet undertaken **any** efforts to date nor collected or analyzed any additional cultural resources information that could form the basis of any such supplement.

For instance, in the conference call held in November 2016, NRC Staff informed the Board that it had not yet engaged in any effort to conduct any independent cultural resource impact analysis. See Transcript of November 7, 2016 conference call (ML16314A843) at page 35, lines 9-11. Similarly, in the conference call held November 16, 2017, NRC Staff indicated again that no substantive decisions had yet been made on a path forward for collecting the necessary cultural resources information and conducting the requisite NEPA analysis. See Transcript of November 16, 2017 conference call (ML1732A616) at page 1188, lines 8-11. The NRC Staff's letter dated December 6, 2017 sets forth a proposal for collecting and analyzing the information, but that has not yet occurred. As a result, Powertech is requesting a supplement to a

NEPA document for which no information or analysis exists. As a result, the Commission should reject Powertech's Petition and allow the proceedings to continue on the established path they are on.

CONCLUSION

Based on the forgoing, the Tribe asserts that Powertech has not demonstrated a sufficient basis for the Commission to review the Board's ruling on Contention 1A in LBP-17-09. The company has identified no "clearly erroneous" factual or legal determinations, nor demonstrated any other overriding law, policy, or public interest reason for the Commission to undertake review. To the contrary, accepting review based on Powertech's Petition will be more likely to upend the proceedings being actively overseen by the Board.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 8th day of December, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response in Opposition to Powertech's Petition for Review of LBP-17-09 in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 8th day of December, 2017, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by_____

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