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
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	April 18, 2019
	)	

OGLALA SIOUX TRIBE'S RESPONSE IN OPPOSITION TO
NRC STAFF'S MOTION TO SET SCHEDULE FOR EVIDENTIARY HEARING

Pursuant to 10 C.F.R. § 2.323 and this Board's April 5, 2019 Order, April 12, 2019 Order, and April 15, 2019 Order, the Oglala Sioux Tribe ("Tribe") hereby submits this Response in Opposition to the NRC Staff's Motion to Set Schedule for Evidentiary Hearing ("NRC Staff Motion").

A. NRC Staff's Motion and Board's April 5 and April 15 Orders

In its Motion, NRC Staff asserts that an evidentiary hearing is necessary at this time to "resolve the disputed issues of fact as to the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable." NRC Motion at 2.

The Board's April 5 and April 15 Orders request that the parties provide input on a proposed schedule for a hearing, should NRC Staff's Motion be granted. Further, the Orders request the parties' input on whether, and when, motions in limine should be included in the schedule.

B. Background

The previous rulings from this Board, the Nuclear Regulatory Commission, and the U.S. Circuit Court for the D.C. Circuit provide important background to the NRC Staff Motion request for this Board to insert itself into the as-yet incomplete National Environmental Policy Act ("NEPA") process by conducting an evidentiary hearing.

The starting point is the initial ruling on the merits of Contention 1A from the Board finding "that the FSEIS [had] not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic, resources …" LBP-15-16, 81 NRC 618, 655 (2015). This ruling was affirmed by the Commission in CLI-16-20. Instead of following the NEPA process to remedy the licensing deficiencies, NRC Staff has twice attempted to dispose of Contention 1A through unsuccessful motions for summary disposition. LBP-18-05 (2018) at 33 (confirming that NEPA's "goals are "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences," and disseminate that information to the public.") *quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (*quoting Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

There is no dispute that NRC Staff has not supplemented or otherwise updated the FSEIS and has conducted no further cultural resource surveys or other substantive effort to identify, analyze impacts to, or develop mitigation for cultural resources at the proposed mine site. Despite NRC regulations, the NRC Staff Motion proffers no new NEPA-compliant environmental document, survey, analysis, or any other evidence that could rehabilitate the established NEPA violations. 10 C.F.R. § 2.323(c) ("a motion must […] be accompanied by any affidavits or other evidence relied on"). In its most recent Motion for Summary Disposition,

NRC Staff conceded that "the environmental record of decision in this matter does not include any new information". Motion for Summary Disposition (filed August 17, 2018)(ML18229A343) at 33. There has been no change to this situation.

In its most recent ruling denying summary disposition, the Board held that NRC Staff had not met the requirements of 40 C.F.R. § 1502.22. LBP-18-05 at 40. As remedy, NRC Staff was required to choose between "two avenues available to it." *Id*. at 47. NRC Staff reconsidered and chose to "move forward on the remaining elements of the March 2018 Approach." *Id*.; (ML18325A029) (November 21, 2018 Letter). NRC Staff has not engaged any NEPA procedures that would remedy violations found by the Commission and ASLB rulings. The D.C. Circuit has confirmed that "'preserv[ing] important historic, cultural, and natural aspects of our national heritage' constitutes an important goal of the statute." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (*quoting* 42 U.S.C. § 4331(b)(4)) *citing Oglala Sioux Tribe v. United States NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018).

C. NRC Staff's Motion Cannot be Granted

Two procedural issues preclude the Board from granting NRC Staff's Motion in its current form.

First, NRC Staff chose to move forward with the NEPA process to resolve Contention 1A instead of seeking an evidentiary hearing, thereby resolving the second motion for summary disposition. ML18325A029 (November 21, 2018 Letter). The NRC Staff Motion proffered no authority or evidence that would allow the Board or parties to discern the basis for the hearing request. 10 C.F.R. § 2.323(c). Indeed, the Tribe is not aware of any authority that provides a basis to reopen the previous motion or for the Board to hold an introductory hearing to advise the NRC Staff on the "reasonableness" of its interim decisions, absent a NEPA document. "As the

movant, the staff had the burden of pointing out exactly what allegedly new information or analysis [is contained in a NEPA document], and how exactly that new information or analysis provides a reasonable basis for concluding the information adequately addresses" the previous rulings. *In re Crow Butte Res., Inc*., 2018 NRC LEXIS 3 (N.R.C. March 16, 2018) *citing Fansteel Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 204 (2003). In short, the Board should not do NRC Staff's work for them. *Id*.

Second, the NRC Staff's arguments are interlocutory and are not ripe for ASLB review. Because NRC Staff failed to address the issues identified by the ALSB, Commission, and United States Court of Appeals for the D.C. Circuit, denial of the Motion based on NRC Staff's failure to proffer any evidence of NEPA compliance is the proper result. As addressed more fully below, until the NRC Staff has completed the NEPA process on remand, including the requirements of 40 C.F.R. § 1502.22, the matter is not ripe for adjudication.

The facts referenced by NRC Staff focus on the same underlying dispute over cultural resources surveys presented at the 2014 hearing in Rapid City. Indeed, Powertech's Response asserts that no new evidence exists and that the proposed hearing would essentially be a rehash of arguments and evidence that was already litigated based on the 2014 evidentiary hearing. As discussed herein, without a final NEPA document that either contains a competent cultural resources impact analysis or uses the standards and procedural requirements of 40 C.F.R. § 1502.22 to disclose and invite public comment on NRC's decision to abandon its NEPA analysis of cultural resources impacts, an evidentiary hearing is premature.

As a practical matter, NRC Staff has been granted an "indefinite amount of time to resolve this deficiency" that emerged from Powertech's inadequate application, and providing for further evidentiary hearings without requiring NRC Staff to proffer admissible evidence,

including NEPA documentation, "would be counter to the Commission's policies and regulations." *In re Calvert Cliffs 3 Nuclear Project, LLC*, 76 N.R.C. 184, 2012 NRC LEXIS 38, 2012 NRC LEXIS 38 (N.R.C. August 30, 2012). NRC Staff and Powertech have failed to proffer any evidence that NRC Staff has met the NEPA requirements and procedures that are conditions precedent for the issuance of a license, and the ASLB should enter an order that invalidates the license and thereby adheres to Commission's policies and regulations. *Id*.

D. NRC Staff Offered No Evidence on Adjudicated NEPA Violations

The relevant NEPA procedures and requirements have been articulated throughout this case by the Board, Commission, and the United States Court of Appeals for the D.C. Circuit. As currently postured, the burden of proof rests on NRC Staff, the movant that seeks an evidentiary hearing. 10 C.F.R. § 2.323(c) ("a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on"). NRC Staff has not met the burdens imposed by NRC's motion regulations or by NEPA.

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); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (2018).

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).

1. NRC Staff's Motion Fails to Provide Necessary Specificity as to the Issues of Fact and Law to be Determined at the Evidentiary Hearing

NRC Staff's Motion requests that this Board set a hearing for the purposes of resolve disputed issues of fact as to the reasonableness of the NRC Staff's proposed draft methodology for a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable. In support, the Motion cites to the Board's October 26, 2018 Order in which the Board set forth options NRC Staff might pursue to resolve Contention 1A. LBP-18-05. However, NRC Staff has neglected to include in its request for an evidentiary hearing all of the elements identified by the Board. As a result, the Motion fails to provide the Tribe and the Board with sufficient specificity as to the hearing request. 10 C.F.R. § 2.323(c) ("a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on").

Specifically, the Board's October 26, 2018 Order specified three elements NRC Staff would have to satisfy in order to provide the Board a sufficient basis to resolve Contention 1A in NRC Staff's favor. Specifically, the Board ruled:

> There are three interrelated disputed material issues of fact that must be addressed. before Contention 1A will be ripe for resolution by summary disposition. First, the NRC Staff must show that its March 2018 Approach contained a reasonable methodology for the conduct of the site survey. Second, the NRC Staff must show that its decision to discontinue work completely on June 15, 2018 was reasonable. Finally, consistent with 40 C.F.R. § 1502.22, the NRC Staff must show that proposed tribal alternatives to its March 2018 Approach would be cost prohibitive. With respect to the cost prohibitive factual dispute, the NRC Staff must provide information establishing the 40 C.F.R. § 1502.22(b)(3) and (4) requirements that set forth a "summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts [of the Dewey-Burdock project] on the human environment," and "the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." In other words, in these circumstances, if the NRC Staff concludes there is no affordable alternative to the open-site survey for assessing the missing Native American cultural resources, to satisfy NEPA, the NRC Staff must at a minimum provide a sufficiently detailed explanation addressing the cultural resources analysis for the Oglala Sioux Tribe and the other Native American tribes that is currently missing from the FSEIS.

LBP-18-05 at 48-49 (footnotes omitted) (emphasis supplied).

NRC Staff's Motion fails to address, or even mention, the requirements of 40 C.F.R. § 1502.22. Notably, this CEQ regulation is the only avenue identified in this proceeding that would allow NRC Staff to satisfy its NEPA obligations absent the on-the-ground cultural resources survey the Tribe has been requesting, and working toward, since the proceeding began. Thus, given the lack of any treatment in the NRC Staff Motion, the Tribe is unable to determine the scope or basis for NRC Staff's hearing request. As argued herein and confirmed in the NRC Staff's November 2018 letter choosing to resume the March 2018 approach, this binding NEPA requirement must be addressed in the context of a Supplement to the FSEIS. ML18325A029 at 6 ("Mid-December 2019: NRC staff publishes draft supplemental analysis to the FSEIS for 45-day public review and comment period.; January 2020: NRC staff considers public comments and

revises supplemental analysis to the FSEIS, as appropriate.; February 2020: NRC staff publishes final supplemental analysis to the FSEIS.").

With respect to the hearing process and the schedule, the regulations require the movant to support its motion and provide clarity as to the issues sought to be determined in an evidentiary hearing. It is not the role of the Tribe or ASLB to "'plumb the record' for arguments that there is a reasonable basis to conclude that the new information adequately addresses the deficits, or generally 'do counsels' work for them.'" *In re Crow Butte Res., Inc*., 2018 NRC LEXIS 3 (N.R.C. March 16, 2018*) quoting Nat. Res. Def. Council*, 879 F.3d at 1209. NRC Staff's failure to define the scope of the issues or basis for a hearing necessarily affects the Tribe's preparation, including basic matters such as what experts and other witnesses the Tribe will need to engage and provide testimony from. Without the clarity required by NRC motions practice and NEPA, the Tribe is unable to provide the Board with a concrete position on the proposed hearing schedule.

2. NRC Staff's Proposal for an Evidentiary Hearing is Premature Until A Supplemental NEPA Document is Prepared, made Available for Public Comment, and Finalized

Previously in this case, the Commission ruled that the Board correctly concluded that NEPA imposes obligations on NRC that NRC Staff's FSEIS failed to satisfy. *In re Powertech (USA), Inc*., CLI-16-20 (N.R.C. Dec. 23, 2016) (upholding Board finding that "analysis of the environmental effects on cultural resources in the FSEIS was insufficient"); *see also*, *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018). While "the ultimate burden with respect to NEPA lies with the NRC Staff," NRC Staff has not presented any further NEPA analysis or documentation that could meet its NEPA obligations. CLI-16-20 at 15. As recently acknowledged by the Board, "[i]n both April 2015205 and October 2017, this Board found that

the NRC Staff failed to satisfy its NEPA obligation to address the impacts on tribal cultural, historical, and religious sites at the Dewey-Burdock project site." LBP-18-05 at 34. In LBP-18-05, the Board ruled "[o]nce more, we conclude that the NRC Staff has failed to fulfill its obligation…." LBP-18-05 at 35.

The Board confirmed that NRC Staff must support its NEPA compliance, if at all, "by a preponderance of the evidence." *In re Powertech USA, Inc*., 81 N.R.C. 618, 642 (LBP-15-16, Apr. 30, 2015). However, NRC Staff has expressly admitted in its most recent Motion for Summary Disposition that "the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site; any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites." NRC Staff Motion for Summary Disposition at 33-34 (filed August 17, 2018)(ML18229A343).

NRC Staff now seeks an evidentiary hearing on what appear to be interlocutory issues of whether its *draft*, and admittedly incomplete, proposed methodology and the unilateral abandonment of the attempts to conduct a survey were "reasonable." NRC Staff Motion at 2. However, an evidentiary hearing limited to these issues will not resolve Contention 1A. There is no support in NEPA or relevant caselaw for a "reasonable effort" standard that would allow NRC Staff to escape the requirements of NEPA. At most, in cases such as *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202 (2010), the Commission held that "NEPA requires the NRC to provide a 'reasonable' mitigation alternatives analysis, containing 'reasonable' estimates, including,

where appropriate, full disclosures of any known shortcomings in available methodology, disclosure of incomplete or unavailable information and significant uncertainties, and a reasoned evaluation of whether and to what extent these or other considerations credibly could or would alter the Pilgrim SAMA analysis conclusions on which SAMAs are cost-beneficial to implement." *Id*. at 208. At base, this case merely re-states the 40 C.F.R. § 1502.22 standard.

Of course, there is no completed survey methodology, only the beginnings of a draft. Further, the Tribe disputes as a matter of fact that NRC Staff made a "reasonable effort" to negotiate a survey methodology, even though whether or not NRC Staff made such a "reasonable effort" during negotiations is not a determining factor. Nor is this inquiry into "reasonable effort" a reasonable inquiry. *In re Chaisson*, 80 N.R.C. 125, 2014 NRC LEXIS 28, 2014 NRC LEXIS 28 (N.R.C. September 8, 2014) (declining "to rehash who said what to whom during the" attempts to reach compromise.") *citing* F.R.E. 408.

Rather, it is NEPA's procedural and "hard look" requirements that control the outcome of Contention 1A. As this Board has recognized, NEPA's "hard look is intended to foster both informed agency decision-making and informed public participation so as to ensure that the agency does not act upon incomplete information." LBP-15-16, 81 N.R.C. 618 at 637. "The NEPA hard look must emerge from an engagement in informed and reasoned decision making, as the agency 'obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.'" *Id*. at n. 98 *quoting Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (*citing Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378–85 (1989)).

NRC Staff has not identified any competent new cultural resource information or analysis. NRC Staff has not provided any of the information necessary to meet its burden under

40 C.F.R. § 1502.22. *Native Village of Point Hope v. Salazar* (D. Alaska 2010) 730 F.Supp.2d 1009, 1018 ("Defendants argue that *Plaintiffs* have the burden to demonstrate that the information they claim is missing meets both the 'relevant' and 'essential' prongs of § 1502.22, and that Plaintiffs have failed to meet this burden. The Court finds, however, that this conflicts with the plain language of § 1502.22, which requires the agency to make the findings.").

40 C.F.R. § 1502.22 applies only where the agency makes a conclusive showing that the "overall costs of obtaining it are exorbitant or the means to obtain it are not known…." 40 C.F.R. § 1502.22(b). NRC Staff's Motion does not request an evidentiary hearing on this issue, and NRC Staff has provided no evidence or any other factual demonstration to support any finding regarding estimated costs of implementing the *draft* methodology, let alone a finding of "exorbitant" cost. Further, NRC Staff has not provided nor disclosed any suitable data or information on either what it has spent to date, nor any information on what it or other agencies may spend on such studies in other circumstances – despite specific requests from the Tribe. *See* February 19, 2019 meeting notes prepared by NRC Staff with Oglala Sioux Tribe edits (ML19079A400), at 3.

Despite the mandatory disclosures, NRC Staff and Powertech have disclosed almost no evidence of actual costs incurred or estimates of what compliance may cost. LBP-17-9, 10 C.F.R. § 2.336. The most recent information in the Record pertaining to cost is NRC Staff's February 15, 2018 filing with the Board, in which NRC Staff concedes that despite this Board's mandate since April 30, 2015 (LBP-15-16) to resolve Contentions 1A and 1B, "since April 30, 2015, the NRC has billed Powertech $20,073.75 under 10 CFR Part 170 in connection with the NRC Staff's efforts to resolve Contentions 1A and 1B." ML18046B427 at 1. Not surprisingly,

NRC Staff has never attempted to argue that $20,073.75 in costs over almost four years is exorbitant.

Importantly, the plain language of 40 C.F.R. § 1502.22 requires all of the necessary information to be "included within the environmental impact statement" and federal courts require such evidence-supported decision-making – contained in a Supplemental EIS – to show compliance with 40 C.F.R. § 1502.22. *See Sierra Club v. US DOT*, 962 F.Supp. 1037, 1043 (N.D. Ill. 1997)(requiring "that the final impact statement was at least required to explain in some meaningful way why such a study was not possible. 40 C.F.R. § 1502.22; cf. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 526–27 (9th Cir.1994) (suggesting that a final impact statement cannot rely on a single socioeconomic forecast unless the statement relies on existing needs or explains why an alternative study is not possible); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir.1993) (an impact statement, which did not address in any meaningful way the uncertainties of the evidence it relied on, must undertake further study or explain why such study is not necessary or feasible).

Here, NRC Staff has not identified any issues under 40 C.F.R. § 1502.22, has not provided any information required to comply with 40 C.F.R. § 1502.22, and has not requested these requirements be included in the evidentiary hearing. Notably, 40 C.F.R. § 1502.22 expressly mandates that where necessary information is unavailable:

> The agency **shall include within the environmental impact statement**:
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

40 C.F.R. § 1502.22(b). *See also Sierra Club v. US DOT*, 962 F.Supp. 1037, 1045 (N.D. Ill. 1997)(finding lack of NEPA compliance were the analysis "was not incorporated into the final impact statement.) "By itself, this flaw makes defendants' analysis inadequate." *Id* citing *Sierra Club v. Marsh*, 976 F.2d 763, 770 (1st Cir.1992) (citations omitted). "Failing to incorporate the study into the final impact statement deprives the public and other participants in the process of the opportunity to comment on it." *Id*.

The NRC Staff's request for an evidentiary hearing is not compliant with the letter or spirit of NEPA's procedural requirements. The Commission itself has made clear that "[t]he Commission intends to follow the standard in 40 CFR 1502.22(a)" despite any potential rare substantive issues with its implementation. 49 Fed.Reg. 9352, 9353–54 (1984). *See also* LBP-18-05 at 39-40 ("The Commission made clear that it accepts the procedural requirements included in section 1502.22(b), so their applicability in these circumstances continues to be appropriate.").

The D.C. Circuit has very recently rejected NRC's unique approach to NEPA, confirming that NRC Staff must comply with NEPA's procedural requirements before taking action. *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018)("If even 'significant' deficiencies in NEPA reviews are forgiven because they are merely procedural, there will be nothing left to the protections that Congress intended [NEPA] to provide."). Repairing NEPA violations within the confines of NRC's contention-based administrative litigation similarly eviscerates NEPA's twin purposes. "[I]t is not an adequate alternative . . . to merely include scientific information in the administrative record. NEPA requires that the EIS itself 'make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.'" *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002). *See also* 40 C.F.R. § 1502.24; *Save the*

Yaak Committee v. Block, 840 F.2d 714, 718-19 (9th Cir. 1988) (biological assessment was not functional equivalent of NEPA analysis and also came too late).

In *League of Wilderness Defenders v. Forsgren*, the Ninth Circuit noted:

> the Forest Service relies upon post-EA submissions and declarations to the court, as well as assurances that its experts were aware of plaintiffs' concerns and considered them, in arguing that there are no uncertainties or unknown risks surrounding the Hash Rock proposal. This is insufficient under NEPA.

184 F. Supp. 2d 1058, 1069 (D. Or. 2002). *See also, League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (study relied upon by BLM was not in AR at the time of final NEPA document; "A federal agency's defense of its positions must be found in its EA"); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980)(NEPA does not contemplate that documents "contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate"); *Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095, 1104 (9th Cir. 2016) ("[A] post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS. *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003). The public never had an opportunity to comment on the 'double-check' analysis, frustrating NEPA's goal of allowing the public the opportunity to "play a role in … the decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351.").

The federal courts have specifically held that analyses submitted during an adjudicatory hearing process also cannot remedy a NEPA violation:

> The preparation of an EIS also entails similar public and interagency participation. [. . .] This cross-pollinization of views could not occur within the enclosed environs of a courtroom.

Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds, Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). The D.C Circuit has recently confirmed that NEPA violations are not remedied in adjudication but are properly remedied by setting aside the agency action and remanding for the agency to conduct a new NEPA analysis. *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1089 (D.C. Cir. 2019).

Thus, now that NRC Staff has determined that it will not conduct any additional cultural resources survey efforts, it must follow NEPA procedures in preparing a supplement to its NEPA document, and must include the information required by 40 C.F.R. § 1505.22 and provide the public and Tribes the opportunity to assess and comment on that analysis – as NEPA requires. In coordination with this public NEPA process, the Tribe and any other parties (including other tribes not party to this adjudicatory proceeding) would have the opportunity to submit comment to inform NRC Staff's analysis, as well as submit new or amended contentions to the extent the supplemental NEPA analysis is found wanting. This is the same process NRC Staff employed when preparing its Draft and Final Supplemental Environmental Impact Statements. This is same process NRC Staff committed to in its Draft Final Supplemental Environmental Impact Statement. NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement at 13 (ML13066B030) ("As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment.").

Following NEPA procedures to satisfy NEPA duties is also the process NRC Staff proposed as part of its March 2018 approach, which it carried through to its most recently

abandoned attempt to conduct a cultural resources survey. *See* ML18325A029 at 6 ("Mid-December 2019: NRC staff publishes draft supplemental analysis to the FSEIS for 45-day public review and comment period.; January 2020: NRC staff considers public comments and revises supplemental analysis to the FSEIS, as appropriate.; February 2020: NRC staff publishes final supplemental analysis to the FSEIS."). Alternatively, since it appears that NRC Staff has asserted it will not prepare a Supplemental EIS and Powertech has supported that position, Contention 1A is properly resolved in the Tribe's favor, and the license is properly set aside.

Here, NRC Staff's proposal for an evidentiary hearing is inappropriately truncated and premature. The parties should not be forced to participate in a hearing on the "reasonableness" of NRC Staff's March 2018 framework and its subsequent decision to wholly and unilaterally abandon that proposal unless and until a supplement to the NEPA document is prepared which either satisfies NEPA's "hard look" requirement for cultural resources impacts and mitigation or satisfies the requirements of 40 C.F.R. § 1502.22. Otherwise, the parties are faced with the prospect of yet another evidentiary hearing in the future to address these issues.

E. Conclusion

Despite the confirmed NEPA violations, NRC Staff is seeking an evidentiary hearing prior to providing the necessary analysis in a supplemental NEPA document and the required opportunities for public involvement. NRC Staff's request for a hearing lacks clarity and fails to demonstrate how a hearing on the two issues NRC Staff identifies will resolve Contention 1A. This Board should reject NRC Staff's premature request for an evidentiary hearing until NRC Staff presents information sufficient to comply with NEPA's "hard look" requirements related to cultural resources impacts or makes some competent demonstration of compliance with 40 C.F.R. § 1502.22.

F. Board Proposed Schedule

In its April 5, 2019 and April 15, 2019 Orders, the Board provided a proposed schedule for an evidentiary hearing and requested input on those proposed dates and whether Motions in Limine would be appropriate to also include. The lack of information in the NRC Staff Motion prevents the Tribe from providing a fully informed position. 10 C.F.R. § 2.323(c) ("a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on"). However, because the Board has requested input from the parties each question is addressed in turn.

The Board should require NRC Staff to clarify the scope of its requested hearing and the process which the agency proposes to use to ensure compliance with the public involvement requirements of NEPA. To the extent the Board may approve a properly supported motion for an evidentiary hearing, should NRC Staff elect to refile, the Board should clarify the scope of the hearing it intends to conduct – particularly given NRC Staff's imprecision in its Motion as to the relevance of 40 C.F.R. § 1502.22 and the lack of any legally-supported explanation as to how an evidentiary hearing on NRC Staff's "reasonableness" in its prior actions is expected to fully resolve Contention 1A.

As to the draft schedule proposed by the Board, because the Tribe cannot discern from NRC Staff's Motion the scope of the hearing, it cannot concretely identify the experts and witnesses it needs and whether those witnesses have scheduling conflicts. Depending on the defined scope of the hearing, the Tribe does request the ability to challenge proposed evidence to the hearing via motions in limine. The paucity of mandatory disclosures on relevant issues - particularly costs - was noted in previous motions and hearings and is one of the likely bases for motions in limine.

As has been recognized, July is an important cultural, spiritual, and religious month for the Tribe, and deadlines should be set to respect the fact that Tribal Officials, and other persons likely to testify, have multiple competing obligations in July, and have various preparatory obligations that may affect their availability in late June and early August.

Further, the Tribe notes (as has NRC Staff) that the dates in early August the Board has proposed for a hearing overlap with the Sturgis motorcycle rally in the area scheduled for August 2-11, which draws somewhere in excess of 500,000 participants to the Black Hills area and is likely to result in significant crowding and competition for airline and hotel space across the region. By scheduling any hearing for a later date, it would avoid competition with the Sturgis gathering and allow for motions in limine.

Lastly, the Tribe requests that should any hearing be scheduled, that it be held on the Pine Ridge Reservation, which has secure Justice Center facility to accommodate the hearing.

Respectfully Submitted this 18th Day of April 2019,

/s/ Jeffrey C. Parsons

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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
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE TO MOTION TO SET EVIDENTIARY HEARING in the above-captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 18th day of April 2019, 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_____

Jeffrey C. Parsons
Western Mining Action Project