UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	Docket No.: 40-9075-MLA
POWERTECH (USA) INC.	Date: October 4, 2019
(Dewey-Burdock In Situ Uranium Recovery Facility)	

POWERTECH (USA), INC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR REMAINING CONTENTION 1A

Pursuant to 10 CFR § 2.1209 and the Atomic Safety and Licensing Board's (hereinafter the "Board") Order dated September 6, 2019, the licensee Powertech (USA) Inc. (Powertech) hereby submits these proposed findings of fact and conclusions of law in the above captioned proceeding. At the outset, this proceeding involved seven (7) admitted contentions related to potential concerns associated with Powertech's United States Nuclear Regulatory Commission (NRC)-licensed Dewey-Burdock *in situ* leach uranium recovery (ISR) project in the State of South Dakota (hereinafter the "Dewey-Burdock ISR project"). By issuing Powertech's NRC license, NRC Staff made the affirmative finding that its issuance complied with its AEA statutory mission of adequately protecting public health and safety. Now, as of the date of this pleading, this proceeding involves one remaining contention (Contention 1A) pertaining to satisfaction of the National Environmental Policy Act's (NEPA) requirements for an environmental review of historic and cultural resources. These proposed findings of fact and conclusions of law support NRC Staff's issuance of Powertech's NRC license and its

accompanying record of decision (ROD) under 10 CFR Parts 40 and 51 and other applicable regulations, criteria, and guidance, as well as construction and operation of the Dewey-Burdock ISR Project.

As stated by Powertech's counsel at the August, 2019 evidentiary hearing, the proper assessment of whether the often-articulated NEPA "hard look" standard accompanied by the currently in question standard of "unavailable information" under evaluation in this proceeding, even though not legally binding on this Board or the Commission through CEQ regulations, requires a full and complete look at the *entire* evidentiary record to determine if NEPA has been satisfied. It is necessary for a credible inquiry into the "reasonableness" of NRC Staff's efforts in this endeavor to review the *entire* administrative record, including determinations and decisions rendered by *all* adjudicatory bodies, to reach a final conclusion. Thus, for purposes of this pleading, Powertech intends to incorporate elements of its 2014 findings of fact by reference to the extent necessary.

Further, as will be shown below and as stated at the August, 2019 evidentiary hearing, Powertech recognizes that the legal standards associated with the National Historic Preservation Act (NHPA) and satisfaction of its Section 106 Tribal consultation process are separate and distinct from those associated with satisfaction of NEPA's "hard look" standard. However, as previously stated, past actions taken by NRC Staff to obtain information associated with the Tribe's historic and cultural resources under the NHPA are substantially similar to those used to satisfy NEPA in that the NHPA Section 106 process' necessary steps are (1) site identification; (2) site assessment; and (3) mitigation to the extent necessary (i.e, the PA). Given that many agencies "marry" the NHPA Section 106 Tribal consultation and NEPA review processes for historic and cultural resources (as noted by NRC Staff in its May 17, 2019 position statement on

the issue of using information from the NEPA process in the FSEIS), the utter failure of the Tribe to provide relevant information through either process under a variety of fact-specific circumstances as proffered by NRC Staff and Powertech in position statements and expert testimony at the 2014 and 2019 evidentiary hearings serves as persuasive evidence that further engagement with the Tribe is futile and that the information should be deemed unavailable. Additionally, as shown by the Commission's recent CLI-19-09 decision, since the Board is not bound by CEQ regulations, a proper determination of the "reasonableness" of NRC Staff's attempts to satisfy NEPA should take into account *all* actions taken by the agency under the full scope of both the NHPA and NEPA processes. *See In the Matter of Powertech (USA), Inc.,* (Dewey-Burdock ISR Project), CLI-19-09, slip op. at 18-19 (2019).

I. CONCLUSIONS OF LAW

A. INTRODUCTION

1.1. These findings and conclusions address the license application submitted by Powertech and NRC Staff's ROD authorizing the construction and operation of the Dewey-Burdock ISR Project in the State of South Dakota.

1.2. For the reasons set forth below, Powertech continues to support NRC Staff's issuance of a source and byproduct materials license under the AEA and assert that the sole remaining contention (Contention 1A) should be resolved in favor of NRC Staff and Powertech and the administrative record for such contention should be closed and the proceeding terminated.

B. BACKGROUND

2.1. Under the AEA and the Commission's implementing regulations at 10 CFR Part 40 and Appendix A Criteria, an entity seeking to construct and operate a source material

(uranium) recovery project, such as an ISR facility, is required to submit an application for an initial operating license to possess and use such source material and 11e.(2) byproduct material generated by such project. Under NRC regulations, these combined source and 11e.(2) byproduct materials licenses are valid for a period of ten (10) years and, at that time, must be renewed. However, recently in SRM-17-0086, the Commission stated that NRC Staff can utilize its discretion to extend the license term for ISR projects for up to twenty (20) years depending on site-specific circumstances. *See* United States Nuclear Regulatory Commission, Staff Requirements Memorandum, SRM-17-0086, *Staff Requirements—SECY-17-0086—Increasing License Terms for Uranium Recovery Facilities,* (November 9, 2017):

> ("The Commission has approved the staff's recommendation to implement a maximum license term of 20 years for new applications and license renewals for uranium recovery facilities. The staff should identify the specific considerations that might warrant an exception to the 20-year term and provide the criteria to the Commission for information.")

2.2. Pursuant to the Commission's regulations implementing NEPA at 10 CFR § 51.20(b)(8), NRC Staff is required to evaluate the potential environmental impacts for a proposed ISR project, such as Powertech's Dewey-Burdock ISR Project, with an environmental impact statement (EIS) or supplemental environmental impact statement (SEIS).

2.3 NRC regulations at 10 CFR Part 40 and Appendix A Criteria and 10 CFR Part 51 and applicable guidance require the submission of an environmental report (ER) addressing resource areas related to potential health and safety issues at facilities allowing possession and use of source and/or 11e.(2) byproduct material.

2.4. NRC Staff's interpretation of these regulations addressing compliance with applicable safety and environmental requirements are contained in multiple guidance documents, including most notably, NUREG-1569 entitled *Standard Review Plan for In Situ Leach Uranium*

Extraction License Applications (NUREG-1569)[1]. The acceptance criteria in NUREG-1569 are intended to apply to both safety and environmental requirements under the aforementioned regulations.

2.5. NRC Staff's interpretation of the format and resource areas for an appropriate ER is contained in NUREG-1748 entitled *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs* (NUREG-1748)[2].

2.6 As endorsed by the Council on Environmental Quality (CEQ) as "tiering," for new ISR operating license applications, NRC Staff has created a programmatic or generic environmental impact statement (GEIS) in NUREG-1910 entitled *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities*[3]. After a lengthy public process, this GEIS is intended to serve as a programmatic document off of which site-specific SEISs will be tiered. To date, NRC Staff has prepared and finalized five (5) site-specific SEISs or supplements to the GEIS.

2.7. Pursuant to this regulatory program, Powertech prepared a detailed license application, including an assessment of environmental factors such as historic and cultural resources to the extent practicable. Then, on February 25, 2009, Powertech submitted a license application for a combined source and 11e.(2) byproduct materials license to construct and operate its proposed Dewey-Burdock ISR Project in South Dakota with an accompanying ER pursuant to 10 CFR Part 51 regulations and NUREGs-1910, 1569, and 1786.

[1] NRC Staff Exhibit NRC-013.
[2] NRC Staff Exhibit NRC-014.
[3] NRC Staff Exhibit NRC-010-A-1 through NRC-010-B-2.

2.8. After completing its ninety (90) day acceptance review, NRC Staff determined that Powertech's Dewey-Burdock license application required additional data and information prior to docketing it for detailed technical and environmental review. As a result, on June 19, 2009, Powertech voluntarily withdrew its license application pending re-submission of the required additional data and information.

2.9. On August 10, 2009, Powertech re-submitted its Dewey-Burdock license application with the additional data and information requested by NRC Staff. After completion of a second acceptance review, NRC Staff determined that Powertech's Dewey-Burdock license application was acceptable for detailed technical and environmental review and it was docketed on October 2, 2009.

2.10. After the Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested stakeholders and other members of the public with an opportunity to request a hearing on the application and to request access to sensitive unclassified non-safeguards information (SUNSI) associated with such application.[4] SUNSI information in this instance dealt with historic and cultural resources information deemed confidential under 10 CFR § 2.390(a)(3).

2.11. On January 15, 2010, counsel for CI and the Tribe submitted a request for access to SUNSI documentation. After reviewing this request, NRC Staff determined that Petitioners were not entitled to access to the SUNSI documentation.

2.12. On February 26, 2010, CI and the Tribe submitted a motion for a ninety (90) day extension of time to file their request for a hearing based on a number of factors including a lack of time to review the Dewey-Burdock license application. On March 3, 2010, both Powertech

[4] *See* 75 Fed. Reg. 467 (January 5, 2010).

and NRC Staff filed responses in opposition to Petitioners' motion and, on March 5, 2010, the Commission determined that Petitioners were not entitled to an extension of time.

2.13. On March 12, 2010, the Commission established an Atomic Safety and Licensing Board Panel (Licensing Board). On March 8, 2010, and April 6, 2010, Consolidated Intervenors (CI) and the Oglala Sioux Tribe (hereinafter the "Tribe") submitted requests for a hearing and proposed contentions. On April 12 and May 3, 2010, Powertech and NRC Staff submitted responses to CI's and the Tribe's requests respectively and argued that most, if not all, of the proffered contentions were not admissible under NRC regulations at 10 CFR Part 2.309.

2.14. On June 8 and 9, 2010, the Licensing Board conducted oral argument in Custer, South Dakota, where all parties' arguments on standing and admissible contentions were heard. In this proceeding, CI's and the Tribe's hearing requests proffered approximately twenty-one (21) contentions that raised a variety of safety and environmental issues of concern regarding Powertech's license application.

2.15. On August 5, 2010, the Licensing Board issued LBP-10-16 in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted. More specifically, the Licensing Board admitted several contentions related to historic and cultural resources, adequacy of baseline groundwater quality data, hydrogeological confinement in aquifers within which the proposed Dewey-Burdock Project is to occur, and groundwater consumption.

2.16. On January 20, 2010, NRC issued a Federal Register notice indicating its Notice of Intent to prepare a SEIS tiered off NUREG-1910 for the proposed Dewey-Burdock ISR project.[5] As part of the SEIS preparation process, NRC Staff contacted the United States Bureau

[5] *See* 75 Fed. Reg. 3261 (January 20, 2010).

of Land Management (BLM) and, per letter dated November 22, 2011, BLM agreed to serve as a cooperating agency and requested that NRC be designated as the lead agency for preparation of what would eventually become the Powertech FSEIS. By joining as a cooperating agency, BLM contributed expertise on a variety of resource areas including, but not limited to, historic and cultural resources.

2.17 On April 14, 2010, NRC Staff issued its requests for additional information (RAI) on its environmental review of Powertech's ER. On June 28, 2011 and August 12, 2010, respectively, Powertech submitted final responses to NRC Staff's RAIs regarding the ongoing safety and environmental reviews. These documents were made publicly available on NRC's ADAMS database on August 29, 2011 (ML112071064) and September 9, 2010 (ML102380530) respectively. Neither CI nor the Tribe filed a request for admission of a new or amended contention on any of Powertech's RAI responses.

2.18. On November 26, 2012, NRC Staff issued the draft SEIS (DSEIS) for the Dewey-Burdock ISR project for public comment. By rule, CI and the Tribe were entitled to thirty (30) days to file new or amended contentions. In compliance with this opportunity and after receiving an extension from December 31, 2012 to January 25, 2013, both CI and the Tribe filed requests to admit several new or amended contentions. On March 11 and 7, 2013, respectively, both Powertech and NRC Staff submitted responses to these requests opposing the admission, amendment or migration of any new/amended contentions. On March 25, 2013, CI and the Tribe submitted replies to such responses.

2.19. On January 29, 2014, NRC Staff issued the FSEIS which stated that, absent a safety-related concern to the contrary, its recommendation was that Powertech's requested license should be issued. *See* NRC Staff Exhibits NRC-008-A & 008-B. The FSEIS included an

assessment of the environmental aspects of groundwater, hydrogeology, wildlife and historic and cultural resources at the Dewey-Burdock site, as well as mitigation measures.

2.20. Based on the FSEIS, on March 17, 2014, both CI and the Tribe submitted a request to admit new/amended contentions, including migration of existing admitted contentions, to the FSEIS. On April 4, 2014, both Powertech and NRC Staff submitted responses to these requests and, on April 11, 2014, both CI and the Tribe submitted replies to these responses.

2.21. On April 28, 2014, the Licensing Board issued LBP-14-5 allowing the previously admitted contentions to migrate from the DSEIS to the FSEIS with no changes in the substance of such contentions.

2.22. On April 8, 2014, NRC Staff issued notice to the Licensing Board that it had issued Powertech NRC License No. SUA-1600, stating that "the Staff finds that the application complies with the Atomic Energy Act and the NRC's regulations….The Staff has considered the safety-related arguments raised by Intervenors [CI and the Tribe] in the hearing, but those arguments do not affect the conclusions in the Safety Evaluation Report."[6] The license allows Powertech to possess and use source and byproduct materials in connection with the Dewey-Burdock ISR project.

2.23. Included in the ROD issued by NRC Staff was the Programmatic Agreement (PA), which was the culmination of the NHPA Section 106 compliance process for which NRC served as the lead agency. The PA was executed by the Advisory Council on Historic Preservation (ACHP) on April 7, 2014 and signed by NRC Staff, BLM, the South Dakota State Historic Preservation Office (SHPO) and Powertech. *See* NRC Staff Exhibits NRC-018-A through 18-H. The PA was designed to, *inter alia*, allow for the gathering of post-license

[6] *See* ML14098A492.

issuance information on historic and cultural resources and to permit interested Native American Tribes the ability to participate in the process, including but not limited to, identification of potential historic and cultural resources, due to the phased nature of ISR project development.

2.24. On April 14, 2014, both CI and the Tribe submitted Motions for a stay of the effectiveness of Powertech's NRC license, citing various claims associated with Powertech's and NRC Staff's review and assessment of historic and cultural resources at the Dewey-Burdock site and other claims. On April 24, 2014, both Powertech and NRC Staff submitted responses to these Motions opposing the grant of a stay of SUA-1600.

2.25. On April 30, 2014, the Licensing Board issued a temporary stay of SUA-1600 pending oral argument, which was held via teleconference on May 13, 2014. After completion of oral argument on CI's and the Tribe's motions for a stay, on May 20, 2014, the Licensing Board issued an Order lifting the temporary stay and denying a stay of the effectiveness of License No. SUA-1600.

2.26. On June 20, 2014, all parties submitted initial statements of position outlining their initial legal and factual arguments regarding all admitted contentions. These initial statements of position included pre-filed testimony from expert witnesses on these admitted contentions and pre-filed exhibits.

2.27. On July 15, 2014, all parties submitted rebuttal statements of position and answering testimony and exhibits.

2.28. After submission of their initial and rebuttal position statements, on July 22, 2014, all parties submitted motions *in limine* to which each party submitted a response on July 29, 2014. The Board ruled on portions of the motions *in limine* on August 1, 2014 and deferred its ruling on other portions until the evidentiary hearing. In response to these motions, the Board

reached final decisions regarding the admissibility of identified position statement argument and pre-filed testimony, thereby setting the stage for the evidentiary hearing.

2.29 On August 18, 2014, the Board held two limited appearance statement sessions in Hot Springs, South Dakota. Members of the public were permitted to offer oral and/or written statements to the Licensing Board with counsel for all parties present. These limited appearance statement sessions were divided into two (2) three-hour sessions. Pursuant to 10 CFR § 2.315(a), limited appearance statements and information offered therein are not considered to be evidence in this proceeding.

2.30. On August 19-21, 2014, the Licensing Board held an evidentiary hearing on the remaining admitted contentions in Rapid City, South Dakota. The Licensing Board addressed the admitted contentions in three (3) separate panels of expert witnesses: (1) Panel 1 addressed historic and cultural resource issues under Contention 1A. During the evidentiary hearing, the Licensing Board admitted the pre-filed exhibits into evidence indicated on the exhibit list bound to the transcript of the evidentiary hearing. *See* 2014 Tr. at 713.

2.31. On September 8, 2014, the Licensing Board issued a post-hearing order containing logistical information regarding post-hearing briefs and additional data disclosure, including a directive to Powertech to disclose all of the requested data and information from the Tribe's August 16, 2014, motion to compel and additional borehole log data discussed in Powertech's August 7, 2014, electronic mail message to the Licensing Board. This order further established a schedule for the parties to submit supplemental testimony and exhibits based on the date of disclosure of the data and information. Motions to admit additional testimony and exhibits were due within 30 days of disclosure.

2.32. On September 19, 2014, Powertech, NRC Staff and the Tribe submitted proposed transcript corrections to the Board for its consideration. On September 30, 2014, the Board issued an order adopting the transcript corrections set forth in Appendix A of its September 30, 2014 order.

2.33. On December 10, 2014, the Board issued an order establishing a final briefing schedule that set dates for proposed findings of fact and conclusions of law (January 9, 2015) and replies to such pleadings (January 29, 2015).

2.34. In 2015, the Board issued LBP-15-16 in which it determined that all admitted contentions should be resolved in favor of Powertech and NRC Staff with two (2) exceptions: (1) Contention 1A regarding NEPA compliance for historic and cultural resources and (2) Contention 1B regarding NHPA compliance for historic and cultural resources with the Tribe as a consulting party. *See In The Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC 618 (2015).

2.35. NRC Staff and Powertech submitted a Petition for Review of LBP-15-16 to the Commission in which they challenged the Board's LBP-15-16 findings with respect to Contentions 1A and 1B. Specifically, both parties argued that the Board erred in finding that the statutory and regulatory requirements with both the NHPA and NEPA were not fully satisfied;

2.36. In 2016, the Commission issued CLI-16-20 in which it sustained the Board's findings in LBP-15-16. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-16-20, 84 NRC 219 (2016). On October 5, 2017, the Tribe appealed CLI-16-20 to the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) claiming that the Commission should have reversed the Board's findings in LBP-15-16 that resolved outstanding contentions in favor of NRC Staff and Powertech and that the Board's findings with

respect to Contentions 1A and 1B warranted suspension or revocation of Powertech's NRC license. On July 20, 2018, the DC Circuit remanded the appeal to the Commission for further deliberation on the issue of suspending or revoking Powertech's NRC license and did not vacate the Commission's ruling leaving the license legally effective. In CLI 19-01, the Commission implemented a requirement that Powertech provide NRC with a minimum of sixty (60) days notice prior to engaging in site development activities under its license but declined to suspend or revoke the license. *See In the Matter of Powertech (USA) Inc.* (Dewey-Burdock ISR Project), CLI-19-01, (2019).

2.41 In the interim, in both 2017 and 2018, NRC Staff, supported by Powertech, submitted motions for summary disposition to the Board seeking to close the evidentiary record with respect to Contentions 1A and 1B in 2017 and Contention 1A in 2018. For the first (August, 2017) summary disposition motion, the Board found that NRC Staff had met its NHPA burden and closed the evidentiary record. However, in the same decision, the Board declined to close the evidentiary record for Contention 1A claiming that NRC Staff had not yet met its burden required under summary disposition case law to warrant closing the record. Powertech appealed this decision to the Commission requesting that the Board's finding with respect to Contention 1A be reversed. In CLI-18-7, the Commission declined review. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR project), CLI-18-7, 88 NRC 1 (2018);

2.42. For the second (August, 2018) summary disposition motion, the Board issued LBP-18-5 in which it continued to find that there existed a genuine dispute of material fact as to whether or not NRC Staff approach to satisfying Contention 1A was reasonable and further defined the scope of the remainder of the proceeding. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-18-5, 88 NRC 95 (2018). On November 26, 2018,

Powertech submitted a Petition for Review to the Commission requesting that the Board's refusal to close the evidentiary record for Contention 1A be reversed.

2.43. After continued discussions with the Tribe resulted in no foreseeable conclusion and considering the long time span within which overall discussion occurred, NRC Staff discontinued negotiations with the Tribe and filed a motion with the Board (dated April 3, 2019) in which an evidentiary hearing was requested on actions to date. On April 29, 2019, the Board granted NRC Staff's motion.

2.44. From August 28-29, 2019, the Board held an evidentiary hearing as requested by NRC Staff in Rapid City, South Dakota in which argument and expert testimony were heard on Contention 1A. Transcript corrections were submitted to the Board on September 13, 2019 through a joint motion amongst all the parties and approved by the Board on September 18, 2019.

2.45 On September 26, 2019, the Commission issued CLI-19-09 in which it declined review of Powertech's Petition for Review, but added that strict compliance with CEQ regulations for "unavailable information" was not necessary for NRC compliance with NEPA:

> ("To clarify our stance on 40 C.F.R. § 1502.22, the Board suggests that we previously accepted "the procedural requirements included in section 1502.22(b), so their applicability in these circumstances continues to be appropriate" for addressing a situation where the agency has incomplete or unavailable information in the NEPA context. On the contrary, we have recently reiterated that as an independent regulatory agency we are not bound by section 1502.22 and reformulated a contention to remove references to that regulation's requirements for developing a NEPA analysis when information was incomplete or unavailable. Rather, we have consistently directed the Staff to undertake reasonable efforts to obtain unavailable information.")

2.46. Further, Chairman Svinicki noted in her "Additional Views" that prolonged delay in a hearing process may be a contributing factor in meeting the otherwise strict standard associated with interlocutory review:

("As I observed in my previous additional views accompanying CLI-18-07, the order upheld in CLI-16-20 led to an unworkable adjudicatory proceeding resulting in now three years of adjudicatory delay. That delay, and associated expense, forms the basis for much of Powertech's instant appeal. While I concur with the majority that the Commission has not historically found concerns related to delay and expense sufficient to warrant interlocutory review, Powertech's appeal illustrates to me that extreme cases of adjudicatory delay might.")

2.47. Despite the recent finding of the Commission in CLI-19-09, NRC Staff has determined, as a matter of law, that it has adequately complied with 40 CFR Part 1502.22 as its approach to Contention 1A has yielded a result of "unavailable information" from the Tribe and that future actions, coupled with actions to date, satisfy the requirements of cost-exorbitance;

II. STANDARDS OF LAW

A. HEARING RIGHTS

3.1. An NRC licensing action gives rise to hearing rights if it can be considered one of the circumstances specifically described in Section 189 of the AEA. Section 189a.(1)(A) states:

> "In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under section 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

AEA hearing rights attached to licensing actions such as the instant case when Powertech initially applied for its license.

3.2. On August 10, 2009, Powertech submitted a license application for a combined source and 11e.(2) byproduct materials license under the AEA. On October 2, 2009, when NRC Staff formally docketed Powertech's license application, AEA hearing rights attached to the license application.

B. ADMINISTRATIVE HEARING REGULATIONS

4.1. The applicable hearing regulations pursuant to the January 5, 2010, Federal Register Notice are found at 10 CFR Part 2, Subparts C and L. Under 10 CFR § 2.1206 & 2.1207, administrative hearings are to be conducted with an oral evidentiary hearing. 10 CFR § 2.1206 permits any party to request concurrence from all other parties to conduct the administrative evidentiary hearing solely through written pleadings, testimony, and evidence. No such requests were proffered by the parties in the course of this proceeding.

4.2 Under NRC regulations, an applicant generally has the burden of proof in a licensing proceeding. *See* 10 CFR § 2.325. In cases involving environmental contentions, NRC Staff bears the burden because it is the entity with the ultimate responsibility for NEPA compliance. *See e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1049 (1983). The applicant also may serve as a proponent of a particular position set forth in an EIS and, as a proponent, also has the burden on that matter. *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 338-39 (1996) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978)), *rev'd on other grounds*, CLI-97-15, 46 NRC 294 (1997).

4.3 The showing necessary to meet the burden of proof is the "preponderance of the evidence" standard.[7] The Licensing Board therefore must consider the evidence and testimony and determine whether NRC Staff and Powertech have shown by a preponderance of the evidence that NRC Staff complied with NEPA in the SEIS and ROD. To the extent that an SEIS does not address an issue or does not adequately address a topic, the information presented at the hearing

[7] The definition of "preponderance of the evidence" in Black's Law Dictionary, 6th ed. (p. 1182), is "[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

can be relied upon to satisfy NRC's NEPA obligation. *Louisiana Energy Servs., L.P.* (Nat'l Enrichment Facility), LBP-06-08, 63 NRC 241, 285-286 (2006); *see also Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 53 (2001) ("[I]n an adjudicatory hearing, to the extent that any environmental findings by the Presiding Officer (or the Commission) differ from those in the FEIS, the FEIS is deemed modified by the decision.").

4.4. In NRC licensing proceedings, "the ultimate NEPA judgments regarding a facility can be made on the basis of the entire record before a presiding officer, such that the [SEIS] can be deemed to be amended *pro tanto*."[8] Therefore, the Board may consider the full record before it, including the testimony and exhibits at the hearing, to conclude that "the aggregate is sufficient to satisfy the agency's obligation under NEPA" to take a "hard look" at the potential environmental consequences of issuing a license.[9]

4.5. The Licensing Board's evaluation of the merits of CI and the Tribe's environmental contentions (e.g., NEPA contentions) are limited to issues pled with particularity by CI and the Tribe.[10]

4.6. It is well-understood that where a matter has been considered and decided by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. *See e.g., Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980).

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[8] *Louisiana Energy Servs., L.P.* (Nat'l Enrichment Facility), LBP-05-13, 61 NRC 385, 404 (2005) (emphasis in original).

[9] *Louisiana Energy Servs., L.P.*, LBP-06-08, 63 NRC at 286.

[10] *See Southern Nuclear Operating Co.*(Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 100-01 (2010):

> "The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules."

4.7. The legal standard used by the Commission in *Hydro Resources, Inc.* to evaluate license issuance is "reasonable assurance:"

> "The intervenors are correct that '"[p]ost-hearing resolution [of licensing issues] must not be [employed] to obviate the basic findings prerequisite to a license, including a reasonable assurance that the facility can be operated without endangering the health and safety of the public.'" But here the basic findings on groundwater protection necessary for a licensing decision have been made. The Presiding Officer in LBP-05-17 found reasonable assurance that groundwater at the Section 17, Unit 1, and Crownpoint sites will be adequately protected."

63 NRC at 11-12.

5.1. 10 CFR Part 51 regulations represent the Commission's interpretation of Council on Environmental Quality (CEQ) regulations under NEPA. As an independent regulatory agency, the Commission is not required to comply with portions of CEQ regulations that have some substantive impact on the manner in which the Commission performs its primary regulatory responsibilities. 10 CFR § 51.20(b)(8) specifically requires that source material milling operating licenses be subject to EIS-level environmental reviews, requiring either an EIS or SEIS. Further, as expressly noted by the Commission in CLI-19-09, strict compliance with CEQ requirements, especially for purposes of this proceeding with respect to "unavailable information," is not required to demonstrate NEPA compliance. *See* CLI-19-09, slip op. at 18-19. (2019).

5.2. NRC Staff has prepared, issued for public comment, and finalized a programmatic EIS or GEIS for ISR facilities that is intended to have SEISs tiered off of its programmatic findings. It is this GEIS that serves as the primary, programmatic basis for the Dewey-Burdock ISR Project SEIS. To date, five (5) SEISs have been prepared and finalized for ISR projects since the development of the GEIS, including the Dewey-Burdock ISR Project.

5.3. For environmental reviews, NRC Staff is required to take a "hard look" at the potential environmental impacts of a proposed action under NEPA. This "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.

5.4. If an admitted contention alleges that an environmental review document such as an SEIS is inadequate, "the 'rule of reason' by which NEPA is to be interpreted provides that agencies need not consider 'remote and speculative' risks or 'events whose probabilities they believe to be inconsequentially small.'"[11]

5.5. NEPA analyses often must rely upon imprecise and uncertain data, particularly when forecasting future technological developments, which should be judged on their reasonableness. When faced with uncertainty, NEPA only requires "reasonable forecasting." In short, NEPA allows agencies "to select their own methodology as long as that methodology is reasonable."[12]

5.6. NRC Staff's environmental review is deemed to be adequate unless NRC Staff "has failed to take a 'hard look' at significant environmental questions –i.e., the Staff has unduly ignored or minimized pertinent environmental effects."[13] NEPA provides no guarantee that federally approved projects will not *have* adverse environmental impacts, nor does NEPA require agencies to select the most environmentally advantageous or benign option available.[14]

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[11] *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC 29, 44 (1989) (citation omitted).
[12] *See The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (finding that an EIS need not be based on the "best scientific methodology available").
[13] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003) (discussing what an intervenor must allege, with adequate support, to litigate a NEPA claim).
[14] *See Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-29, 64 NRC 417, 429 (2006).

5.7. "NEPA does not require 'a fully developed plan that will mitigate environmental harm before an agency can act,' rather, NEPA requires only that 'mitigation be discussed in sufficient detail to ensure that environmental consequences have been evaluated." *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992), *quoting Methow Valley*, 490 U.S. at 352-53; *see also Hydro Resources, Inc.*(Crownpoint Uranium Project), CLI-06-29, 64 NRC 417, 427 (2006) (discussing that an EIS need not contain "a complete mitigation plan" or even "a detailed explanation of specific [mitigation] measures which will be employed" and stating that mitigation measures "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.")

5.8. "The discussion of effectiveness of mitigation measures does not need to be highly detailed." *Moapa Band of Paiutes v. United States BLM,* No. 10-CV-02021-KJB-(LRL), 2011 U.S. Dist. LEXIS 116046 (D. Nev. Oct. 6, 2011); *see also Wilderness Society v. United States BLM,* 822 F. Supp. 2d 933, 943-44 (D. Ariz. 2011) *aff'd Wilderness Society v. BLM,* 526 Fed. Appx. 790, 2013 U.S. App. LEXIS 10708 (9th Cir. 2013) (providing examples of how courts assess mitigation measures).

5.9. NEPA does not require that NRC Staff restrict its discussion of mitigation measures to a single FSEIS chapter, rather than discussing such measures throughout the FSEIS. This is how the NRC Staff typically prepares an EIS, and it is consistent with how other agencies prepare such documents. *See, e.g., Wilderness Soc'y v. United States BLM*, 822 F. Supp. 2d 933, 942–943 (D. Ariz. 2011).

5.10. NEPA does not require an agency to prove that the mitigation measures it identifies will be effective in reducing environmental impacts. *See Biodiversity Conservation*

Alliance v. Bureau of Land Management, No. 09-CV-08-J, 2010 U.S. Dist LEXIS 62431 (D. Wyo. 2010).

5.11. Courts have confirmed that an agency need not assign an effectiveness rating to mitigation measures. *See North Alaska Envtl. Ctr v. Norton,* 361 F. Supp 2d., 1069, 1080 (2005).

5.12. The rule for consideration of "connected actions" can be found at 40 CFR § 1508.25(a)(1) and exists to ensure that "proposals for…actions that will have cumulative or synergistic environmental impact upon a region…*pending concurrently before an agency*…be considered together." *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976) (emphasis added). No such applications of this type are currently pending before NRC Staff.

5.13. A agency need only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]" *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1026–27 (9th Cir. 1980). *See also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) ("NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.") (emphasis in original).

C. ADDITIONAL NEPA LEGAL DOCTRINE

6.1. The Commission has stated that "NEPA 'should be construed in the light of reason if it is not to demand' virtually infinite study and resources." NEPA does not call for certainty or precision, but rather an *estimate* of anticipated impacts in an EIS. As a consequence, an agency is given broad discretion "to keep [its] inquiries within appropriate and manageable boundaries." In preparing an EIS, which "is not intended to be a 'research document,'" an agency "must have some discretion to draw the line and move forward with decisionmaking." In

assessing foreseeable impacts, the agency is not required to use "the best scientific methodology." Rather, the agency is free to "select [its] own methodology as long as that methodology is reasonable."

6.2. NEPA's rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis. CEQ regulations require that when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS "and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." The agency should include in the EIS:

> "(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."

See 40 CFR € 1502.22(b)(1) (2019).

6.3. With respect to costs associated with the assessment of historic and cultural resources, CEQ has explained that the term "overall costs " is intended to encompass "financial cost and other costs such as costs in terms of time (delay) and personnel" and that overall costs" should be interpreted "in light of overall program needs."

6.4. "Overall costs" is intended to address "financial costs and other costs such as costs in terms of time (delay) and personnel" and that :overall costs" should be interpreted "in light of overall program needs." Federal courts have refused to "give a hyper-technical reading" of 40 CFR 1502.22 to require inclusion of a separate, formal statement in an EIS where the administrative record of a given proceeding supplies relevant information.

6.5. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural purpose of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, but however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. *See* 40 CFR €€ 1500.3, 1500.6, 1507.1, and 1507.3.

As an independent regulatory agency, NRC is not bound by those portions of CEQ's NEPA regulations that, like [40 CFR] 1502.22, "'have substantive impact on the way in which the Commission performs its regulatory functions.'" However, where appropriate, the Commission will look to CEQ's regulations as guidance. But, as reaffirmed in CLI-19-09, the Commission has noted that it may look to 40 CFR Part 1502.22 for guidance, but it has specifically declined to declare it binding. The Commission also have noted that its policy of taking account of CEQ regulations voluntarily is tempered by its overriding responsibilities as an independent regulatory agency." *See* CLI-19-09 slip op. at 18, *citing Pacific Gas and Electric Co.*, (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 438, 444 (2011);

6.6. It is typical for an administrative record to be deemed sufficient to remedy an alleged deficiency in an environmental document assuming that the Board finds that the information is in such record. *LES*, CLI-98-3, 47 NRC 77, 89 (1998). *See also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 707 n.91 (2006); *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566, 595 (2016), *aff'd, Nat. Res. Def. Council & Powder River Basin Res. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (the "hearing record, and subsequent decision on a contested environmental matter augment the environmental record of decision"). Indeed, the Commission has stated that the

administrative hearing process is a more rigorous exercise in scrutinizing the available facts and party positions on a given matter, especially a properly admitted contention. *In the Matter of Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 53 (2001) (*quoting Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706–07 (1985)).

6.7. Lastly, it is well-understood that absent specific circumstances, Commission regulations are not up for challenge in a Board proceeding. *See* 10 CFR 2.336(a). This makes logical sense as Commission regulations are subject to formal rulemaking proceedings involving public notice and comment pursuant to the applicable provisions of the Administrative Procedure Act, which itself was subject to extensive public scrutiny and whose time for legal challenge has long since run out. Thus, for example, the Commission's reliance on properly implemented regulations concerning federal procurement procedures, including but not limited to, contractor selection processes, are not subject to challenge.

III. FINDINGS OF FACT

As the administrative record associated with this proceeding with respect to NEPA assessments of is voluminous, these findings of fact will incorporate by reference elements of prior pleadings and testimony to the extent practicable. Further, the facts currently before the Board prior to the issuance of LBP-15-16 are already part of the administrative record and need not be rehashed here. Additionally, events taking place after issuance of LBP-15-16 between NRC Staff and the Tribe and CI regarding NHPA and NEPA compliance were strictly limited to participation by those parties and not Powertech. Powertech's involvement in these matters related to whether or not the licensee would be willing to provide the financial and human resources necessary to facilitate compliance through site surveys and other information-gathering

techniques and whether the affected portion of the Dewey-Burdock ISR project would be made available for a site survey. Thus, for purposes of these findings of fact, Powertech cannot attest to the accuracy and validity of any claims beyond the fact that it agreed to comply with the parties' requests for such resources and access up to and including the March 2018 approach. Therefore:

7.1. For purposes of these findings of fact, Powertech hereby incorporates by reference each of NRC Staff's and Powertech's statements of position and expert testimony to the extent applicable to Contentions 1A and 1B, as well as all evidentiary hearing transcripts as approved by the Board.

7.2. As a general proposition, the date of license application preparation which spanned from the commencement of the Class III archaeological study pre-application submission is the earliest point at which CI and the Tribe were or should have been aware of the possibility of NHPA and NEPA-related historic and cultural resource assessments for the Dewey-Burdock ISR project, this proceeding has spanned approximately ten (10) years.

7.3. From the date of license application submittal until the 2019 evidentiary hearing, the Tribe and CI were afforded several opportunities to participate in a site survey and information gathering exercises to facilitate both NHPA and NEPA compliance for historic and cultural resources;

7.4. After a series of government-to-government meetings held by NRC Staff with potential consulting parties, in April of 2013, the tribe was offered its first opportunity to participate in a site survey. After attempts by NRC Staff and Powertech to develop an approach for the Tribe to use in conducting such a survey, the Tribe provided its own proposal prepared by

Makoche Wowapi/Mentz-Wilson Consultants, LLP. This proposal was priced at approximately $818,000. This Board found in LBP-15-16 that this proposal was "patently unreasonable." *See* LBP-15-16 at 656-657.[15] For purposes of the finding of fact, it is worth noting that the subsequent offerings from the Tribe *after* it agreed to the original parameters under the March, 2018 approach would have been in excess of two (2) million dollars;

7.5. Negotiations between NRC Staff and the Tribe, along with assistance from Powertech, continued until the initial evidentiary hearing. These negotiations essentially resulted in the Tribe's continued unwillingness to participate in a site survey;

7.6. In November of 2012, NRC Staff proposed to allow the Tribe access to the Dewey-Burdock ISR project site, with Powertech's permission, so that it may conduct its own survey using its own parameters and would be granted an honorarium for such work. Seven (7) Native American Tribes, including one Sioux Tribe conducted site surveys using commonly accepted survey practices and methodologies;

7.7. In a letter dated March 22, 2013, the Tribe indicated its unwillingness to participate in such a survey but stated that it would attend a subsequent government-to-government meeting in May of 2013 to discuss the Powertech application *and* other uranium recovery applications. But the Tribe never attended this meeting;

[15] *See* LBP-17-09 at fn. 33. "Specifically, the Board found that the cost of the survey proposal, estimated at close to $1 million, Tr. at 807 (Aug. 19, 2014),) was unreasonable. LBP-15-16, 81 NRC at 657 n.229. The Makoche Wowapi proposal was estimated to cost approximately $818,000. Makoche Wowapi/Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey Burdock Project (Sept. 27, 2012) at 1 (ADAMS Accession No. ML15244B360)."

7.8. Information was indeed provided to NRC Staff from the participating Native American Tribes and, as stated by NRC Staff, was "considered…in both its NEPA and NHPA reviews." This information was incorporated into the FSEIS. Despite the then-unavailable information from the Lakota Sioux Tribes, NRC Staff was able to evaluate the information provided from the other Native American Tribes in Section 3 of the FSEIS with an accompanying impact assessment in Section 4 of the FSEIS, as well as mitigation measures in Section 5 of the FSEIS. As part of this FSEIS and the administrative record associated with the NHPA process, NRC Staff adopted the most stringent of mitigation measures under 36 CFR 800 *et seq.* or a PA. A PA is an administrative mechanism endorsed by the Advisory Council on Historic Preservation (ACHP) that allows for future measures to be employed in the event that sites identified and potentially subject to impact during site development and operation, sites previously identified but not yet assessed, and sites not yet identified may be properly identified and assessed prior to continuation of site development and operation. *See generally* NRC-018-A(18-H) & (NRC-031). Powertech's NRC License was also conditioned with License Condition 9.8 also known as an "unanticipated discovery" license condition requiring immediate cessation of site development activities if a site with potential historic or cultural significance not previously identified is located so that a proper assessment and application of appropriate mitigation measures can be implemented;

7.9. The ACHP, which has been recognized as the expert federal agency in the promulgation, implementation, and interpretation of NHPA regulations, which appear to directly reflect not only the requirements on the NHPA for site identification, impact assessment, and mitigation, but also represent the form and substance of the information typically used by agencies such as NRC for NEPA compliance and which also represented the directive of the

Board in LBP-15-16 for NEPA compliance, specifically concurred that NRC Staff satisfied the NHPA standard for a "reasonable and good faith" effort to engage the Tribe and to obtain relevant historic and cultural resource information for the Dewey-Burdock ISR project area of potential effect (APE). This fact was previously accepted as part of the initial evidentiary hearing. It stands to reason that, by implication, a "reasonable and good faith effort" to obtain and assess this information under the NHPA would satisfy the elements of a "reasonable" approach to obtaining such information under NEPA.

7.10. This Board also offered CI and the Tribe an opportunity to participate in a site walkover sponsored by the Board prior to the initial evidentiary hearing. The Tribe initially indicated that it would attend with official Tribal representatives and participate but later failed to appear. Further, the Board's holding in LBP-15-16 determined that, while "[t]he NRC Staff [wa]s at least partly at fault for the failed consultation process[,] . . . the Oglala Sioux Tribe [did] share some responsibility for the inadequacy of the FSEIS and the lack of meaningful consultation" because "some of its demands to engage with the NRC Staff were patently unreasonable."

7.11. After issuance of LBP-15-16, NRC Staff afforded the Tribe, as well as other Lakota Sioux Tribes, multiple additional opportunities to participate in a site survey within the scope of a variety of parameters, including the March 2018 approach;

7.12. As stated by the Commission in CLI-19-09:

> "On June 8, however, counsel for the Tribe informed the Staff that the Tribe would not participate in the field survey scheduled to start on June 11. On June 12, the Tribe provided the Staff and Dr. Nickens with a document entitled "Discussion Draft – Cultural Resources Survey Methodology" (June 12 Discussion Draft), which proposed numerous additions to Dr. Nickens's proposed survey methodology. The June 12 Discussion Draft proposed bringing several dozen tribal elders, spiritual leaders, warrior society leaders, and technical staff to visit the site over several days in each of the seasons of the year and

> a field survey performed at 10-meter intervals throughout the site (approximately 10,500 acres). These additions would cause the survey to take more than a year to complete and, by the Tribe's estimate, cost over $2 million to perform. On June 13, 2018, the Tribe held an emergency meeting of its Cultural Affairs and Historic Preservation Advisory Council to discuss the survey methodology, with the NRC Staff and Dr. Nickens in attendance. The tribe provided an updated 'discussion draft' on June 15, 2018 (June 15 Discussion Draft), which, in addition to the conditions stated in the June 12 Discussion Draft, also called for examining areas over 20 miles from the Dewey-Burdock site. The June 15 Discussion Draft further stated that the Tribe was aware that the Staff expected the budget to be much lower than the Tribe's proposal and that it was "now NRC's task to either accept the [Tribe's] proposal or to propose an approach that limits the [Tribe's] proposed survey methodology to meet what NRC considers a reasonable budget."

See CLI-19-09 slip op. at 5-6.

Powertech knows of no record evidence to dispute this factual finding by the Commission. Also, the Commission stated in CLI-19-09 that, if the Staff chose to move forward with the survey,

> "the only aspect of the Approach that is open for discussion is the site survey methodology. Therefore, "any tribal negotiating position or proposal should *only* encompass the specific scientific method that would fit into the two week periods set out in the March 2018 Approach."

CLI-19-09 slip op. at 11 (emphasis in original).

7.12. Based on the cessation of negotiations and the Tribe's continued unwillingness to cooperate in a manner that would lead one to believe that a mutually acceptable solution could be reached, in August of 2017 and with the support of Powertech, NRC Staff filed for summary disposition of Contentions 1A and 1B and, once again in 2018, filed for summary disposition of Contention 1A after issuance of LBP-17-18. Despite the clear differences between the statutory and regulatory goals and requirements of the NHPA and NEPA, the Board's LBP-15-16 directive and NRC Staff's process to obtain relevant Tribe-specific information showed a direct link between NHPA and the NEPA with respect to substance.

7.13. NRC Staff initial statement of position and expert testimony dated May 17, 2019 at pages 11-12 provide an accurate representation of the Board's findings with respect to

Contention 1A in LBP-17-9 and provides the scope of the evidentiary hearing, as now tailored by the Commission's conclusions in CLI-19-5.

7.14. The sheer length of this proceeding, including the cost-exorbitant nature of this proceeding associated with financial expenditures, delays, and other associated factors for the lowest risk portion of the nuclear fuel cycle comports with Chairman Svinicki's "Additional Views" in which time delay can be a contributing factor in satisfaction of the otherwise high standard for Commission interlocutory review. *See* CLI-19-09 slip op. at 1-2, "Additional Views") ("That delay, and associated expense, forms the basis for much of Powertech's instant appeal. While I concur with the majority that the Commission has not historically found concerns related to delay and expense sufficient to warrant interlocutory review, Powertech's appeal illustrates to me that extreme cases of adjudicatory delay might").[16] If that is indeed the case, then it stands to reason that this should be a contributing factor in finding that the totality of NRC Staff approach to NEPA compliance for historic and cultural resources was "reasonable."

7.15. The statement in Part 7.14 above should also be considered in light of the fact that the vast array of resource areas evaluated by NRC Staff pursuant to its AEA statutory mission of adequate protection of public health and safety, historic and cultural resources is a relatively small portion of the overall endeavor. Yet, as reflected in Chairman Svinicki's "Additional Views" referenced above, the agency has gone so far as to create an otherwise wasteful judicial proceeding over a subject matter that could have been readily dispensed with under existing laws

[16] This is consistent with the Commission's 2017 determination (SRM-SECY-17-0086) that uranium recovery facilities may seek license terms for up to 20 years ("The Commission has approved the staff's recommendation to implement a maximum license term of 20 years for new applications and license renewals for uranium recovery facilities. The staff should identify the specific considerations that might warrant an exception to the 20-year term and provide the criteria to the Commission for information.")

several years ago, especially considering the fact that adequate safeguards are in place for future historic and cultural resource/site identification and assessment/mitigation in a manner that is commonly accepted in information gathering practices and techniques under statutory programs such as the NHPA and NEPA.

IV. CONCLUSION

For the reasons set forth above, Powertech respectfully requests that the Licensing Board determine that NRC Staff has satisfied its burden under NEPA for historic and cultural resources as proffered by CI and the Tribe in Contention 1A, close the administrative record, and terminate this proceeding.

Respectfully submitted,

/Signed (electronically) by/ Christopher S. Pugsley

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Dated: October 4, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	Date: October 4, 2019
(Dewey-Burdock In Situ Uranium Recovery Facility)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "**POWERTECH (USA), INC.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR REMAINING CONTENTION 1A**" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 4th day of October 2019, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.

_____

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Dated: October 4, 2019