ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1489

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

OGLALA SIOUX TRIBE and ALIGNING FOR RESPONSIBLE MINING
Petitioners
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
Respondents,

and

POWERTECH (USA), INC.,
Intervenor.

On Petition for Review of an Order by the United States Nuclear Regulatory Commission

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Respondents United States Nuclear Regulatory Commission and the United States of America submit this Certificate as to Parties, Rulings, and Related Cases.

A. Parties, Intervenors, and *Amici*

The Petitioners are the Oglala Sioux Tribe and Aligning for Responsible Mining. The Respondents are the United States Nuclear Regulatory Commission (NRC) and the United States of America. Intervenor for Respondents is Powertech (USA), Inc. There are no *amici*.

B. Rulings Under Review

The Oglala Sioux Tribe's petition for review states that it seeks review of the following items issued by, and actions of, NRC:

1. NRC's January 2014 Final Environmental Impact Statement for the Dewey-Burdock *In-Situ* Recovery Project in Custer and Fall River Counties, South Dakota;
2. NRC's April 8, 2014, Record of Decision for the Dewey-Burdock Uranium *In-Situ* Recovery Project;
3. NRC's April 8, 2014, Materials License No. SUA-1600, Docket No. 040-09075, issued to Powertech (USA), Inc.;

4. NRC's December 23, 2016, Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-16-20.
5. Compliance with Judgment entered on a previous petition for review (*Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission, et al.*, Appeal No. 17-1059) on July 20, 2018.
6. NRC's July 24, 2018, Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-18-07.
7. The Commission's January 31, 2019, Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-19-01.
8. The Commission's September 26, 2019, Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-19-09.
9. The Commission's October 8, 2020, Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-20-09.

C. Related Cases

This Court previously resolved a petition for review related to NRC's licensing proceeding for this site. *See Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

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Judicial Decisions

* Authorities upon which we rely chiefly are marked with an asterisks.

Federal Statutes

Federal Regulations

Administrative Decisions

Nuclear Regulatory Commission

Atomic Safety and Licensing Board

GLOSSARY

EIS	Environmental Impact Statement
JA	Joint Appendix
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NRC	Nuclear Regulatory Commission

JURISDICTIONAL STATEMENT

The Hobbs Act grants courts of appeals jurisdiction over a petition for review, like the instant one, of a "final order" terminating a licensing proceeding before the NRC—in this case, the Commission's decision issued on October 8, 2020 (CLI-20-9)—when filed by a "party aggrieved" within 60 days of such order's entry. 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A), (b)(1); 42 U.S.C. § 5841.

STATEMENT OF ISSUES

1. Whether the Commission reasonably affirmed findings by NRC's Atomic Safety and Licensing Board (Board) that the NRC Staff's Tribal consultation activities, which featured the NRC Staff meeting individually with the Oglala Sioux Tribe (Tribe) and offering cultural-resource site-survey opportunities, cured deficiencies that the Board had previously identified under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).

2. Whether the Commission reasonably affirmed the Board's rulings that the Tribe's solid-byproduct-material contention, which mischaracterized NRC regulations and did not genuinely challenge NRC's Environmental Impact Statement (EIS), warranted no evidentiary hearing under NRC hearing regulations.

3. Whether the Commission reasonably affirmed the Board's rulings that NRC's EIS sufficiently addressed boreholes and faults, baseline groundwater quality, and mitigation, given the EIS's extensive discussions of these issues.

4. Whether the Commission reasonably determined that the Tribe's lack-of-scoping contention demonstrated only a harmless procedural mistake, given the extensive public participation and Generic-EIS scoping that supported the EIS's development.

STATUTES AND REGULATIONS

The text of pertinent statutes and regulations is set forth in a separate addendum to this brief.

STATEMENT OF THE CASE

I. Nature of the Case

This petition for review concerns NRC's review of an application filed in 2009 by Powertech (USA), Inc., for a license to possess and use uranium source and byproduct material in connection with a proposed *in situ* uranium recovery facility in Custer and Fall River Counties in South Dakota.

The Oglala Sioux Tribe (Tribe) and another intervenor group (which is referred to in NRC adjudications as "Consolidated Intervenors" and includes co-petitioner here, Aligning for Responsible Mining) filed administrative challenges, known as "contentions," against the application and the associated environmental

review, which were adjudicated through NRC's hearing process before the Board, with NRC's Commission adjudicating any appeals from Board decisions. In a series of orders, the Board and Commission found several contentions eligible for hearing, and several others not eligible. *See* LBP-10-16, 72 N.R.C. 361 (2010) (JA___); LBP-13-9, 78 N.R.C. 37 (2013) (JA___); LBP-14-5, 79 N.R.C. 377 (2014) (JA___); CLI-16-20, 84 N.R.C. 219 (2016) (JA__).[1]

The NRC Staff's application review, EIS development, and NHPA-compliance efforts continued in parallel to the hearing process. In 2014, once the NRC Staff considered its review of the application and its related NEPA and NHPA compliance actions to be complete, the NRC Staff issued a license to Powertech for the proposed facility, consistent with NRC regulations. NRC-012 (JA___) (license); NRC-11 (2014 Record of Decision). But the license remained subject to revision, suspension, or revocation, depending on the hearing results. LBP-15-16, 81 N.R.C. 618, 638 n.104 (2015) (JA___).

After conducting an evidentiary hearing in 2014, the Board found in the Tribe's favor on two related contentions involving consideration of the Tribe's own cultural resources per the NHPA and NEPA, while otherwise ruling in the NRC Staff's and Powertech's favor. *Id*. After the Commission upheld this Board

[1] NRC hearing decisions carry the designation "CLI" for Commission decisions and "LBP" for Board decisions.

ruling, including the Board's decision not to suspend or revoke Powertech's license pending resolution of the identified cultural resource concerns, CLI-16-20, 84 N.R.C. 219 (JA___), the Tribe petitioned for review in this Court challenging the Commission's decision on several grounds.

After briefing and argument, this Court, in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018), dismissed most of the issues raised in the Tribe's petition for lack of jurisdiction, because the proceeding at NRC was not yet complete, but it ruled against NRC on the interim status of Powertech's license pending resolution of the cultural resource issues, citing improper NRC reliance on an "irreparable harm" standard. (The Commission addressed the limited-scope remand in CLI-19-1, 89 N.R.C. 1 (2019) (JA___), keeping the license in place but requiring Powertech to comply with certain conditions prior to making any use of its license.)

Following the Court's ruling, the NRC Staff continued efforts to respond to the Board-identified concerns relating to the Tribe's cultural resources. Ultimately, in two separate decisions, including one following another evidentiary hearing, the Board determined that the NRC Staff's additional actions had rectified the NHPA and NEPA deficiencies the Board identified in 2015. LBP-17-9, 86 N.R.C. 167 (2017) (JA___); LBP-19-10, 90 N.R.C. 287 (2019) (JA___). The Tribe appealed these Board decisions to the Commission, which upheld them in

October 2020, thereby ending the adjudication at NRC over Powertech's license. CLI-20-9, Slip Op. (JA___). On December 4, 2020, the Tribe and Aligning for Responsible Mining filed the current petition for review challenging the Commission's October 2020 decision as well as various other NRC decisions and actions during the course of the licensing proceeding.

II. Statutory and regulatory background

A. *In situ* uranium recovery and relevant NRC regulations

In situ uranium recovery is widely employed in certain parts of the western United States. CLI-16-20, 84 N.R.C. at 222-23 (JA___-___). This uranium-recovery method involves a form of uranium milling in which an oxidizing solution called a "lixiviant" is injected through a well into an ore body. The lixiviant oxidizes and dissolves the uranium, and the resulting uranium-rich solution is pumped back towards the surface via recovery wells. *Id.* at 222 (JA___).

The Atomic Energy Act of 1954 authorizes NRC to issue licenses to qualified applicants for the receipt, possession, and use of source and byproduct material resulting from the removal of uranium ore from its place in nature, which includes *in situ* uranium recovery. 42 U.S.C. §§ 2093, 2111. NRC regulations within 10 C.F.R. Part 40 impose health and safety standards on uranium recovery operations. Although these regulations were developed primarily to address

conventional uranium mills and disposal of mill tailings they generate, some of these regulations also apply to *in situ* operations such as Powertech's. *See Hydro Resources, Inc.*, CLI-99-22, 50 N.R.C. 3, 8 (1999).

B. NRC's NEPA and NHPA reviews

NRC's NEPA-implementing regulations require NRC to prepare an EIS prior to issuing an *in situ* recovery license. 10 C.F.R. § 51.20(b)(8). To support NRC's own environmental analysis, an applicant for an *in situ* recovery license must submit an "Environmental Report" addressing a range of environmental impact issues regarding the proposed facility. *See id.* §§ 40.31(f), 51.45; 51.60(b)(1)(ii). This information is incorporated as appropriate into the EIS that the agency ultimately issues.

To help streamline and increase the efficiency of its NEPA reviews of *in situ* recovery applications, NRC developed a generic (i.e., programmatic) EIS specific to *in situ* uranium recovery. *See* Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (Generic EIS) (JA___). In doing so, NRC followed the same general process used for a traditional EIS, including scoping and publishing a draft Generic EIS for public comment. *Id.* at G-1 – G-4 (JA___-___). NRC issued its final Generic EIS in 2009 to address in advance those environmental impact issues that are similar across *in situ* recovery sites, while also identifying issues requiring further site-specific consideration. CLI-16-20, 84

N.R.C. at 223 (JA___). Thus, while a site-specific EIS (referred to by NRC as a "supplement" to the Generic EIS) is still required for any application for a new facility, that site-specific EIS uses the Generic EIS as a starting point and relies on its analysis as appropriate (and thus "tiers" off of it).[2] *Id*.

Section 106 of the NHPA establishes a legal regime to ensure that federal agencies take into account the effects of their activities on historic properties. It mandates a "consultation" process to help identify such properties and determine how to avoid, minimize, or mitigate any adverse effects of the federal action on those properties. 54 U.S.C. § 306108. *See generally* 36 C.F.R. Part 800 (implementing Section 106). NEPA does not mandate consultation in the same way, but it requires consideration of "cultural resources" (a broader category than the NHPA's "historic properties"). *See* 40 C.F.R. § 1502.16(a)(8) (2020); *see also id.* § 1508.27(b)(3) (2019). Agencies often coordinate their NEPA and NHPA reviews. *See* CEQ and ACHP, "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106," https://www.achp.gov/sites/default/files/2017-02/NEPA_NHPA_Section_106_Handbook_Mar2013_0.pdf; *see also* LBP-15-16 at 649 (JA___); Final EIS at A-161 - A-162 (JA___-___). The NHPA process

[2] For simplicity, this Brief refers to the site-specific EIS for the Powertech project as the "Final EIS" (or "Draft EIS" for the site-specific draft issued for public comment).

culminates in an agreement—which in the instant case took the form of a "Programmatic Agreement"—signed by the federal agency and certain other parties that specifies how adverse effects on historic properties will be avoided, minimized, or mitigated. *See* 36 C.F.R. § 800.6(b)-(c); NRC-018-A (JA___).

C. Statutory and regulatory requirements relating to NRC hearings

The Atomic Energy Act provides that NRC licensing proceedings must provide hearing opportunities for interested persons. 42 U.S.C. § 2239(a). To be admitted as a party to a proceeding, an NRC hearing petitioner must demonstrate standing and proffer at least one admissible "contention" setting forth with particularity the issue(s) the petitioner seeks to raise. *See* 10 C.F.R. § 2.309. Environmental contentions arising under NEPA must be based (at least initially) on the license applicant's Environmental Report, *id.* § 2.309(f)(2), but they become, via "migration," challenges to the draft or final EIS if the information that is the subject of the contention remains substantially the same. *See* LBP-13-9, 78 N.R.C. 37, 46-47 (2013) (JA___-___). NRC regulations generally require the filing of contentions early in the licensing proceeding, but later-filed or amended contentions can also be considered if timely filed based on materially new information. 10 C.F.R. § 2.309(c), (f)(2).

III. Factual Background

A. License Application, Review, and Issuance

Powertech applied for an NRC materials license for an *in situ* uranium recovery facility in 2009. LBP-15-16, 81 N.R.C. at 626-27 (JA___-___). In April 2014, after issuing a safety evaluation report addressing the application's compliance with NRC safety regulations, issuing a draft site-specific EIS for public comment and a final site-specific EIS, and executing a Programmatic Agreement under the NHPA that documents actions already taken to identify and protect historic properties as well as protective efforts that will continue for the life of the project, the NRC Staff issued a license to Powertech for the proposed facility, accompanied by a Record of Decision. LBP-15-16 at 632 (JA___); NRC-012 (JA___) (license); NRC-011 (JA___) (Record of Decision); NRC-018-A (JA___) (Programmatic Agreement); NRC-018-B (JA___) (Appendices to Programmatic Agreement); NRC-018-D (JA___) (Letter from Advisory Council on Historic Preservation approving Programmatic Agreement and confirming NHPA compliance).

B. Resolution of Contentions in NRC Hearing

After NRC received Powertech's license application, the Tribe and Consolidated Intervenors filed petitions to intervene and requests for hearing on various contentions, and NRC established a Board, consisting of three NRC

administrative judges, to consider them. LBP-15-16, 81 N.R.C. at 628 (JA___). After a two-day oral argument, the Board granted the Tribe's hearing request and intervention petition. It found several contentions eligible for evidentiary hearing and rejected others for failing to meet NRC's hearing-eligibility standards. *Id.* at 629-30 (JA___-___); LBP-10-16, 72 N.R.C. at 419-442, 444 (JA___-___, JA___). The procedural history of contentions relevant to the instant petition in this Court is summarized below.

1. Contentions 1A and 1B (historical and cultural resources)

The Board found eligible for hearing, and ultimately designated as contentions "1A" and "1B," contentions filed by the Tribe and Consolidated Intervenors at the outset of the proceeding claiming that the agency's consideration of Tribal historic and cultural resources did not satisfy NEPA or the NHPA. *See* LBP-10-16, 72 N.R.C. at 419-22; (JA___-___) LBP-13-9, 78 N.R.C. at 48-51, 113 (JA___-___, JA___); LBP-14-5, 79 N.R.C. at 385-87 (JA___-___).

After the 2014 evidentiary hearing, the Board summarized the NRC Staff's relevant NEPA and NHPA compliance efforts, which included consultations with numerous Indian tribes (including the Oglala Sioux Tribe), archeological and cultural resource site surveys, development of the Programmatic Agreement, and analysis in the Final EIS of potential impacts and planned mitigation steps. LBP-15-16, 81 N.R.C. at 644-49, 654 (JA___-___, JA___); *see also* Final EIS at 1-18 –

1-26, 3-72 – 3-94, 4-159 – 4-189, 5-45 – 5-49, F-1 – F-30 (JA___-___, JA___-___, JA___-___, JA___-___, JA___-___). Though finding the NHPA largely satisfied, the Board found one NHPA-compliance deficiency regarding Contention 1B: that the NRC Staff should have consulted individually with the Tribe given its unique connection to the project area, rather than involving the Tribe only in multi-Tribe consultations. LBP-15-16, 81 N.R.C. at 654-57 (JA___-___). The Board relatedly found, regarding Contention 1A, that the NRC Staff's evaluation of cultural resource impacts under NEPA was insufficient with respect to the Tribe's cultural resources, and it explained that the NRC Staff could remedy this deficiency (and the Contention 1B NHPA deficiency) by initiating consultations directly with the Tribe and taking any appropriate steps that might result from such consultations. *Id.* at 653-55, 657-58 (JA___-___, JA___-___). The Board acknowledged, though, that the Tribe bore some responsibility for the insufficiency of the consultations to that point and noted that the Tribe had made some "patently unreasonable" requests, such as proposing a roughly $1 million contractor-developed survey approach. *Id.* at 655-57 & n.229 (JA___-___), citing to Hearing Transcript at 807 (JA___); *see also* LBP-19-10, 90 N.R.C. at 331 n.227 (JA___). After the parties appealed various aspects of this Board decision, the Commission upheld the Board's rulings. CLI-16-20, 84 N.R.C. at 242-51 (JA___-___).

The NRC Staff accordingly initiated individualized consultations with the Tribe. The Board found, as of 2017, that these new consultations had cured the NHPA deficiency, LBP-17-9, 86 N.R.C. at 173, 179-90 (JA___, JA___-___), but found that genuine disputes remained relating to the adequacy of the NRC Staff's proposed survey methodologies under NEPA. *Id.* at 190-201 (JA___-___). The NRC Staff subsequently developed a survey approach (the "March 2018 Approach") that addressed various criteria the Tribe had identified as important during consultations and later proposed a methodology that fit within this approach (the "February 2019 Methodology"), but the Tribe ended up objecting to both, countering with proposals roughly twice as costly as the original Tribe proposal the Board had found "patently unreasonable." *See* LBP-18-5, 88 N.R.C. 95, 109-21 (2018) (JA___-___); LBP-19-10, 90 N.R.C. at 306-10 (JA___-___); NRC-192 (JA___) (March 2018 Approach); NRC-214 (JA___) (February 2019 Methodology). After an evidentiary hearing, the Board found that the NRC Staff had established, based on these consultation efforts and the Tribe's unyielding stance, that further cultural resource information was not reasonably available for NEPA purposes and that the hearing record sufficiently documented the reasons why, and it ruled for the NRC Staff on Contention 1A. LBP-19-10, 90 N.R.C. at 317-57 (JA___-___).

The Commission upheld the Board's rulings on appeal. Two Commissioners (Chairman Svinicki and Commissioner Caputo) provided additional views challenging the notion that there had been a true NEPA or NHPA deficiency in the first place. A third Commissioner (Commissioner Baran) issued a partial dissent, agreeing that additional cultural resource information was unavailable under NEPA but disagreeing with NRC's practice of using the hearing record as an EIS-supplementation substitute. CLI-20-9, Slip Op. (JA___-___).

2. Contention 2 (baseline groundwater quality)

The Tribe's Contention 2, filed at the outset of the proceeding and admitted for hearing by the Board, alleged a failure "to include necessary information for adequate determination of baseline ground water quality" and associated noncompliance with NEPA and certain NRC regulations. *See* LBP-10-16, 72 N.R.C. at 423-24 (JA___-___); LBP-13-9, 78 N.R.C. at 51-55 (JA___-___); LBP-14-5, 79 N.R.C. at 387-88 (JA___- ___). After the 2014 evidentiary hearing, the Board ruled in the NRC Staff's favor, finding that the analysis of baseline water quality data in the EIS met NEPA's hard look requirement and that the Tribe had not established any noncompliance with NRC regulations. LBP-15-16, 81 N.R.C. at 659-66 (JA___-___). The Commission upheld the Board's ruling on appeal. CLI-16-20, 84 N.R.C. at 251-53 (JA___-___).

3. Contention 3 (boreholes)

The Tribe's Contention 3, filed at the outset of the proceeding and admitted for hearing by the Board, alleged a failure "to include adequate hydrogeological information" relating to various types of site features, such as pre-existing boreholes, to "demonstrate ability to contain fluid migration." *See* LBP-10-16, 72 N.R.C. at 424-26 (JA___-___); LBP-13-9, 78 N.R.C. at 55-58 (JA___-___); LBP-14-5, 79 N.R.C. at 388-89 (JA___-___).

After the 2014 evidentiary hearing, the Board ruled in the NRC Staff's favor, finding no deficiencies in the NRC Staff's consideration of impacts related to this issue apart from the apparent absence in Powertech's license of a particular requirement—binding Powertech to a commitment it had made to identify and plug unplugged or improperly plugged boreholes—that the NRC Staff had testified existed and that was discussed in the EIS. LBP-15-16, 81 N.R.C. at 667-81 (JA___-___). The Board attached a new condition to Powertech's license expressly binding Powertech to its commitment. *Id.* at 679 (JA___). On appeal, the Commission observed that Powertech's license had *already* bound Powertech to its borehole-plugging commitment, but the Commission left the Board-added condition in the license anyway, finding its addition "harmless," while also upholding the other aspects of the Board's ruling. CLI-16-20, 84 N.R.C. at 253-58 (JA___-___).

4. Contention 6 (environmental-impact mitigation)

Tribe Contention 6, filed after the NRC Staff issued the Draft EIS for comment and admitted for hearing by the Board, alleged that the EIS failed "to adequately describe or analyze proposed mitigation measures." LBP-13-9, 78 N.R.C. at 65-69 (JA___-___); LBP-14-5, 79 N.R.C. at 391-92 (JA___-___).

After the 2014 evidentiary hearing, the Board ruled in favor of the NRC Staff, finding that the Tribe's EIS-inadequacy arguments resulted, apparently, from the Tribe failing to recognize that most mitigation details were included in Final EIS Chapter 4, rather than in the "summary" mitigation-measure listings in Chapter 6. LBP-15-16, 81 N.R.C. at 687-92 (JA___-___). The Board also rejected the Tribe's arguments that NRC must create or require fully developed mitigation plans, and discuss these fully developed plans in the EIS, to comply with NEPA. *Id.* at 692-97 (JA___-___). The Commission upheld the Board's ruling on appeal. CLI-16-20, 84 N.R.C. at 258-62 (JA___-___).

5. Contention 7 (byproduct-material disposal)

At three different stages of the proceeding, the Tribe filed a contention asserting that, because Powertech had not provided NRC with a specific plan to dispose of Powertech-generated byproduct material at a specific disposal facility, NRC's environmental analysis did not contain "a meaningful review of impacts" associated with such disposal. LBP-10-16, 72 N.R.C. at 432-35 (JA___-___);

LBP-13-9, 78 N.R.C. at 69-72 (JA___-___); LBP-14-5, 79 N.R.C. at 396-97 (JA___-___) (addressing assertion as "FSEIS Contention 2").

The Board found this contention ineligible for hearing each time under NRC's contention-screening regulations, ruling the first time that it was unripe and that the Tribe's proposed interpretation of NRC regulations was incorrect, the second time that the Tribe had not raised a genuine dispute of material fact with the Draft EIS, and the third time that the contention was not based on materially different information relative to the second (thus rendering this third version untimely). LBP-10-16, 72 N.R.C. at 432-35 (JA___-___); LBP-13-9, 78 N.R.C. at 69-72 (JA___-___); LBP-14-5, 79 N.R.C. at 396-97 (JA___-___). The Commission upheld the Board's rulings on appeal. CLI-16-20, 84 N.R.C. at 229-34 (JA___-___).

6. Contention 8 (scoping)

The Tribe's Contention 8 alleged (in addition to other issues not raised in the instant case) that the NRC Staff violated NEPA by not conducting scoping before developing its site-specific EIS. LBP-13-9, 78 N.R.C. at 72-75 (JA___-___). The Board denied admission of this contention for lack of a legal basis, reasoning that NRC's NEPA-implementing regulations do not require scoping for a site-specific EIS derived from a Generic EIS that has already gone through a public scoping process. *Id.* at 74-75 (JA___-___).

On appeal, the Commission rejected the Board's interpretation of NRC's NEPA-implementing regulations. CLI-16-20, 84 N.R.C. at 235-36 (JA___-___). Yet based on the extensive public engagement that had already occurred during NRC's development of the site-specific EIS, the "full scoping" already conducted for the Generic EIS (which, in fact, had "specified that it would serve as part of [the Powertech project] environmental analysis"), and the apparent lack of any harm to the Tribe, the Commission found the Board's error harmless and saw no basis to order a hearing on the contention. *Id.* at 236-37 (JA___-___).

SUMMARY OF ARGUMENT

Petitioners raised numerous contentions through NRC's adjudicatory hearing process, challenging various aspects of Powertech's license application and the associated NEPA and NHPA compliance efforts by the NRC Staff. The Board, and the Commission on appeal, thoroughly considered these contentions over the course of a decade-long adjudication, issuing a series of orders addressing the contentions and ultimately resolving them in favor of Powertech and the NRC Staff.

The Petitioners now challenge NRC's resolution of some of these hearing contentions. NRC's hearing decisions addressing these contentions provide detailed, well-reasoned explanations as to why issuance of Powertech's license complied with applicable NRC licensing requirements, why the agency had

satisfied both NHPA's and NEPA's requirements in connection with the application review, why certain contentions did not warrant an evidentiary hearing, and why the Petitioners' various arguments in support of their contentions failed to demonstrate otherwise.

The Petitioners, however, largely fail to reckon with NRC's hearing decisions, often completely ignoring their reasoning while presenting arguments to the Court that consistently lack any developed legal or factual basis.

As NRC reasonably and correctly found in its hearing decisions, the NRC Staff consulted in good faith on an individual basis with the Tribe to seek information from the Tribe pertinent to historic and cultural resources, thus directly addressing the one, limited-scope NHPA-compliance concern the Board had identified in 2015. NRC's hearing decisions also describe the NRC Staff's substantial efforts to obtain the Tribe's participation in a new cultural-resource site survey, which included tailoring survey approaches and methods to address feedback received from the Tribe. The decisions explain why these efforts—and the hearing record chronicling them—satisfied any outstanding NEPA obligations associated with the Board's NEPA-deficiency finding in 2015.

Regarding the Tribe's byproduct-material-disposal contention, NRC correctly rejected the Tribe's assertion that Powertech's license application must include a specific disposal plan involving a specific disposal site, basing this

decision on the plain text of NRC's regulations as well as NEPA principles and established NRC practices. The Petitioners also do not meaningfully question NRC's finding, in its hearing decisions, that the Tribe's pleadings at NRC failed to challenge the specific sections of NRC's EIS analyses of byproduct-material-disposal impacts.

NRC also reasonably and correctly determined that NRC's Final EIS contained sufficient, NEPA-compliant analysis of environmental impacts related to pre-existing drill holes at the site as well as a NEPA-compliant analysis of baseline groundwater conditions using sampling data obtained from the site. And NRC correctly (and sensibly) rejected, based on longstanding NRC precedent, the Tribe's theory that NRC operational requirements requiring confirmatory data gathering from wellfields once they are *constructed* must somehow be satisfied before NRC even conducts its NEPA review or issues a license.

NRC likewise correctly concluded that the Tribe's claims of insufficiently detailed or analytical EIS discussions of mitigation measures overlooked the EIS sections that did, in fact, contain detailed discussion and analysis of mitigation measures. And, finally, the Commission properly and reasonably found that the Tribe's contention claiming lack of site-specific EIS scoping showed no harm or prejudice meriting a redo of the EIS, given the extensive public participation

involved in the Final EIS's development as well as the already-completed scoping for the Generic EIS.

ARGUMENT

I. Standard of Review

This Court's review is governed by the Administrative Procedure Act, which permits this Court to set aside an agency order only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 42 U.S.C. § 2239(b).

This deferential standard applies in cases such as the instant one, involving judicial review of NRC orders dispositioning hearing contentions filed in an NRC licensing proceeding. *Blue Ridge Env't. Def. League v. NRC*, 716 F.3d 183, 195-96 (D.C. Cir. 2013); *Massachusetts v. NRC*, 708 F.3d 63, 77 (1st Cir. 2013). Thus, agency factual conclusions are reviewed for "substantial evidence," a standard more deferential than the "clearly erroneous" standard for appellate review of trial court findings. *See Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999). When a high level of expertise is required, such as when NRC makes "technical judgments and predictions," this court must defer to the agency's weighing of the evidence as long as its decisionmaking is informed and rational. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *Blue Ridge*, 716 F.3d at 195 (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)). And when NRC's decision

involves the application of its adjudicatory rules to Petitioners' contentions, the relevant question is whether the agency's determination constitutes a reasonable application of its rules; if so, the agency's conclusions are entitled to deference. *Blue Ridge*, 716 F.3d at 196.

If an agency regulation's meaning is ambiguous, courts defer to the agency's interpretation if it is reasonable, constitutes an official agency position, implicates the agency's substantive expertise, and reflects the agency's fair and considered judgment. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019).

Finally, where the issues raised involve NEPA compliance, the Court should set aside the agency's substantive findings only where it has committed a clear error of judgment. *Blue Ridge*, 716 F.3d at 195; *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (courts do not "flyspeck" an agency's environmental analysis looking for minor deficiencies). Accordingly, courts "must give deference to agency judgments as to how best to prepare an EIS." *Indian River Cnty. v. U.S. Dept. of Transp.*, 945 F.3d 515, 533 (D.C. Cir. 2019).

II. NRC acted reasonably and lawfully in its consideration of cultural resources.

As discussed below, NRC's hearing decisions finding that NRC has complied with NEPA and the NHPA regarding consideration of historic and cultural resources were well reasoned, consistent with those statutes' requirements,

and grounded in substantial record evidence. In their brief, Petitioners rarely even engage with NRC's hearing decisions and provide no basis to disturb them.

A. Petitioners show no error in NRC's ruling finding NHPA compliance.

Petitioners' first argument targets NRC's resolution of Contention 1B (regarding NHPA). *See* Brief at 23-25. The NHPA requires NRC, when licensing a project like the proposed Powertech facility, to "ensure that consultation" under NHPA Section 106 provides Indian tribes "a reasonable opportunity," on a "government-to-government" basis, to provide input regarding historic properties that may be affected. *See* 54 U.S.C. §§ 302706, 306108; 36 C.F.R. § 800.2 (government-wide NHPA-implementing regulation). The Board, as upheld by the Commission, found that sufficient good faith, government-to-government consultations seeking such input from the Tribe had occurred as of 2017 to resolve the limited-scope NHPA deficiency (lack of individualized consultations with the Tribe) that the Board identified in 2015. *See* LBP-17-9, 86 N.R.C. at 179-90 (JA___-___); CLI-20-9, Slip Op. at 23-24 (JA___-___); *see also* LBP-15-16, 81 N.R.C. at 655-57 (JA___-___) (Board's original NHPA-deficiency finding).

Petitioners acknowledge that the relevant consultations occurred, Brief at 23-24; *see also* LBP-17-9, 86 N.R.C. at 179-82 (JA___-___); NRC-186 (JA___) (summarizing face-to-face meeting between NRC Staff and Tribe discussed in LBP-17-9); NRC-188 (JA___) (summarizing 2017 teleconference discussed in

LBP-17-9); NRC-189 (JA___) (NRC Staff letter proposing survey approach); NRC-190 (JA___) (Tribe response objecting to survey proposal), but argue that the NRC Staff's consultation efforts were not undertaken in good faith. Their arguments fail to demonstrate any error by the Board or Commission or any failure by the agency.

Petitioners first reference the Tribe's own objections, raised during consultations, to the NRC Staff's proposed survey approach and a brief summary by the Board of some of those objections. Brief at 23-24 (citing NRC-190 (JA___) and LBP-17-9, 86 N.R.C. at 182-83 (JA___ -___)). But the Board reasonably explained that the NRC Staff's disagreement with the Tribe about survey-methodology adequacy does not prove a lack of good faith, LBP-17-9, 86 N.R.C. at 189-90 (JA___-___), a point Petitioners never acknowledge or attempt to rebut. And the Board reasonably found that the consultations provided the Tribe a meaningful opportunity to provide input regarding the NRC Staff's survey proposal and to present counterproposals of its own, *id.* at 188, a conclusion that is uncontested. Moreover, Petitioners provide no legal basis or developed argument to support their assertion that the NRC Staff's survey proposals were inadequate in the first place, Brief at 23-24, let alone so inadequate as to indicate bad faith. Indeed, the only support Petitioners cite for their "inadequacy" claim is the Board's summary of the Tribe's *own arguments* (86 N.R.C. at 182-83 (JA___-___)) from a

Board decision finding that the NRC Staff had consulted in *good* faith. *Id.* at 189-90 (JA___-___).

Petitioners also claim, referencing 54 U.S.C. §§ 306108 and 302706 and 36 C.F.R. § 800.2, that NRC failed to provide the Tribe a reasonable opportunity to provide input regarding historic properties. But as discussed above, the NRC Staff offered the Tribe an opportunity to participate in a site survey that would have allowed the Tribe to provide this input, and the Tribe declined the opportunity. The NRC Staff's proposed survey approach was akin to that used for the 2013 cultural resource survey in which seven other tribes participated, which the Board in 2015 had found sufficient for NHPA purposes given the criteria listed in government-wide NHPA regulations and the concurrences provided by the Advisory Council on Historic Preservation and the South Dakota State Historic Preservation Officer. *See* LBP-15-16, 81 N.R.C. at 654 (JA___); LBP-17-9, 86 N.R.C. at 176, 180-82 (JA___-___); CLI-20-9, Slip Op. at 23 n.121 (JA___). Petitioners nowhere dispute (nor could they) that NRC offered the Tribe this opportunity to survey the site and provide input or explain how, given the Tribe's *rejection* of the opportunity, NRC could or should be deemed to have violated its consultation obligations under NHPA.[3]

[3] For the same reason, Petitioners' citations to various NHPA regulations (Brief at 23) do not demonstrate any NHPA violation by NRC. And to the extent

B. Petitioners fail to show NRC acted unreasonably or unlawfully regarding agency responsibilities for the financial aspects of a site survey.

Petitioners next make a series of arguments concerning NRC's final merits decision on Contention 1A regarding the agency's consideration of cultural-resource impacts under NEPA. None is compelling.

First, Petitioners assert that NRC violated NEPA by improperly attempting to outsource to the Tribe, without paying the Tribe for its services, the development of a methodology for surveying the site to identify cultural resources, with Petitioners even alleging that NRC never developed a methodology at all. Brief at 25-27. But the Board specifically found that the NRC Staff, via NRC's own contractor, *did* develop an adequate site-survey methodology—the "February 2019 Methodology"—and presented it to the Tribe to obtain any feedback the Tribe wished to provide. LBP-19-10, 90 N.R.C. at 308, 326-29 (JA___, JA___-___); *see also* CLI-20-9, Slip Op. at 13 (JA___) (upholding Board's findings on the "five criteria that the Tribe had identified as necessary for a competent survey,"

Petitioners provide these citations as a broader NHPA-compliance argument reaching beyond the narrow Contention 1B issue identified by the Board involving the NRC Staff's need to consult individually with the Tribe and address any new information those consultations might elicit, the Commission specifically found that the Tribe did not timely raise that broader challenge in the NRC proceeding, CLI-20-9, Slip Op. at 23 & n.121 (JA___), and Petitioners nowhere challenge this conclusion or otherwise provide a basis to resurrect these waived arguments here.

which include the Board's findings regarding the February 2019 Methodology); NRC-214 (JA___) (February 2019 Methodology). Petitioners, rather than attempting to demonstrate some error in this Commission-affirmed Board finding, proceed as if it did not exist. *See* Brief at 25-27.

To be sure, the February 2019 Methodology allowed for certain Sioux tribes, including the Oglala Sioux Tribe, to provide input, which NRC's contractor could then consider in finalizing the methodology. *See generally* NRC-214 (JA___) (encouraging tribe input on various methodological details); *see also* NRC-204 at 2-3 (JA___) (NRC Staff letter to Tribe explaining that NRC had hired a contractor for methodology development rather that leaving it to the Tribe); NRC-215 at 4-5 (JA___) (responding to objections by tribes that tribes should have been *more* involved in the February 2019 Methodology's development); LBP-19-10, 90 N.R.C. at 323-24. But NRC allowing interested stakeholders to provide input on a draft document is not akin to the agency outsourcing the task or otherwise shirking legal responsibilities, and Petitioners cite no authority indicating otherwise.

Regarding the financial issues Petitioners raise, Brief at 25-27, NRC asked Powertech to consider compensating the Tribe in connection with an actual survey of the site, and Powertech agreed to do so. NRC-192 at 3 (JA___); NRC-210 at 1-2 (JA___-___); *see also* LBP-19-10, 90 N.R.C. at 330, 332 n.231 (JA___, JA___). NRC was also prepared to devote time and resources of its own to this surveying

effort. *See* NRC-192 at 3-4 (planning for approximately $400,000 in NRC Staff time and $250,000 in contractor costs to support March 2018 Approach); *see also* Brief at 26-27 (acknowledging NRC's anticipated costs). In reviewing the financial aspects of these matters, the Board found the NRC Staff's approach reasonable and identified no legal mandate for NRC to do more,[4] while at the same time finding that the Tribe's counterproposals throughout the proceeding involved "exorbitant costs."[5] LBP-19-10, 90 N.R.C. at 329-34 (JA___-___); *see also* CLI-20-9, Slip Op. at 13 & n.67 (JA___) (upholding these Board findings). Petitioners cite no legal authority (under NEPA or otherwise) requiring any particular approach to compensating the Tribe or requiring NRC to calculate what the Tribe's own participation costs would be. *See* Brief at 25-27. Nor do Petitioners explain the relevance of their objection to NRC's contractor's hiring authority. *Id* at 27.

Petitioners also assert that NRC refused to conduct a "defensible" site survey because of cost and schedule considerations—thus implying that NRC's own proposed approaches were not "defensible." Brief at 25. Petitioners cite to the

[4] Petitioners claim the Board "conceded" the financial arrangement was "objectively insufficient," but the Board-decision footnote Petitioners cite merely postulated an "open question" under "different factual circumstances than existed here." *See* Brief at 26; LBP-19-10, 90 N.R.C. at 332 n.231 (JA___).

[5] The Tribe proposal's contractor costs would have been in addition to, not inclusive of, the NRC Staff's own costs. *See* LBP-19-10, 90 N.R.C. at 304 (JA___).

Board's decision (JA___) to buttress their assertion, but that cited page does not support a proposition that NRC's approach or methodology is not "defensible"; indeed, the Board, in that very decision, specifically found the *opposite* to be true. *See* LBP-19-10, 90 N.R.C. at 318-29 (JA___-___); CLI-20-9, Slip Op. at 13 (JA___). The Court should therefore reject this unsupported claim.

C. NRC complied with NEPA requirements related to information unavailability.

In response to the Board's 2015 ruling that the NRC Staff needed to do more to consider potential impacts specific to Oglala Sioux Tribe cultural resources, the NRC Staff attempted to gather information from the Tribe to add to the information NRC had already gathered and analyzed in the Final EIS regarding historic and cultural resources at the project site. *See* LBP-15-16, 81 N.R.C. at 653-55, 657-58 (JA___-___, JA___-___). *See generally* LBP-19-10, 90 N.R.C. 287 (JA___); CLI-20-9, Slip Op. (JA___). But the Staff found, and the Board agreed, that this additional information specific to the Tribe was "unavailable" under 40 C.F.R. § 1502.22 because (1) only a tribe can meaningfully determine what resources at the site are of cultural importance to that tribe; (2) the Tribe did not agree to the NRC Staff's reasonable site-survey proposals; and (3) the costs and timeframes of the Tribe's own site-survey counterproposals were exorbitant, greatly exceeding those of the NRC Staff's reasonable proposals. LBP-19-10, 90

N.R.C. at 318-38 (JA___-___); CLI-20-9, Slip Op. at 6-7, 12-14 (JA___-___, JA___-___).[6]

Petitioners argue that NRC violated NEPA requirements related to impacts for which information is unavailable, asserting that (1) NRC needed to supplement the EIS to document any information-unavailability findings; and (2) the information-unavailability findings that NRC made in its hearing decisions were incorrect. Brief at 27-32. Each aspect of this argument is meritless.

NRC determined that EIS supplementation to address the events that followed the Board's 2015 decision was unnecessary here for two reasons. First, in this case, there was no new impact information to report, meaning that legal standards regarding EIS supplementation would not require a supplement. CLI-20-9, Slip Op. at 14-17 (JA___-___); LBP-19-10, 90 N.R.C. at 352-55 (JA___-___); *see also Stand Up for California! v. U.S. Dept. of Interior*, 994 F.3d 616, 629 (D.C. Cir. 2021) (supplemental EIS only required "where new information provides a *seriously* different picture of the environmental landscape" (internal quotation marks omitted)). Petitioners do not explain how the agency's identification of

[6] The Board's analysis considered the version of § 1502.22 in effect as of 2019, while the Commission also considered the revised but very similar version (now at § 1502.21) issued in 2020. *See* LBP-19-10, 90 N.R.C. at 340 (JA___); CLI-20-9, Slip Op. at 11-12, 17 & n.90 (JA___-___, JA___); *see also* 40 C.F.R. § 1506.13 (2020) ("An agency may apply the [new regulations] to ongoing activities and environmental documents begun before September 14, 2020.").

impacts would in any way be enhanced by putting out for notice and comment its conclusion, already known to Petitioners, that the information could not be obtained from the Tribe.

Second, NRC's public hearing record already documents—extensively—NRC's determination on this information-unavailability question, and NRC precedent, upheld by courts (including this Court), permits NRC's public hearing record to supplement the NEPA record. CLI-20-9, Slip Op. at 14-15 (JA___-___) (discussing NRC practice and also referencing court decisions upholding it, including *NRDC v. NRC*, 879 F.3d 1202, 1209-12 (D.C. Cir. 2018), *New England Coal. on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978), *Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975), and *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974)); LBP-19-10, 90 N.R.C. at 350-52, 355 (JA___-___, JA___). Thus, any NEPA-required documentation of NRC's information-unavailability determination has already occurred via NRC's hearing record.

Petitioners fail to demonstrate any error in NRC's decisions concerning supplementation. Indeed, Petitioners *concede* that there is no new cultural resource information to report, but they nowhere respond to the Board and Commission explanations discussed above as to why this conclusion undermined the Tribe's EIS-supplementation demands. *See* Brief at 27-31. And while Petitioners argue

that NRC cannot decline to follow 40 C.F.R. § 1502.22, Brief at 29, they ignore the Commission's finding that NRC had *satisfied* this NEPA regulation based on NRC's court-approved practice of relying on its public hearing record in lieu of EIS supplementation and the associated hearing findings on information unavailability, which the Board's decision extensively documented. CLI-20-9, Slip Op. at 15-17 (JA___-___); *see also* LBP-19-10, 90 N.R.C. at 318-334, 340, 348-55 (JA___-___, JA___, JA___-___). Thus, the question of whether NRC could decline to follow this Council on Environmental Quality NEPA regulation based on NRC's independent agency status (Brief at 29) is academic here, and the Court need not resolve it.

While Petitioners take issue with NRC's use of its hearing record for NEPA purposes, Brief at 30-31, Petitioners do not meaningfully address the case law supporting this practice. Petitioners rely principally on *NRDC v. NRC*, 879 F.3d 1202, Brief at 30-31, but that case *upheld* NRC's practice. 879 F.3d at 1209-12. And Petitioners' efforts to distinguish *NRDC* are unpersuasive. First, Petitioners assert that EIS supplementation in *NRDC* would have been "utterly pointless" because "the required analyses were already completed and part of the evidentiary record," and they then suggest this case is distinguishable because "the cultural resources impact and mitigation analysis has *not* been conducted" here. Brief at 30-31. But what mattered in *NRDC* was that the information that could have been

added to the EIS by supplementation was already in a public NRC hearing record. *See NRDC*, 879 F.3d at 1212. The same is true here. The public hearing record already documents why NRC found additional cultural resource information to be unavailable, LBP-19-10, 90 N.R.C. at 329-34, 354-55 (JA___-___, JA___-___); CLI-20-9, Slip Op. at 15-17 (JA___-___), and that is the only new information an EIS supplement here could provide. EIS supplementation would be just as "utterly pointless" here as it was in *NRDC*.

Petitioners also contend that the lack of notice-and-comment on NRC's information-unavailability rationale contained in the hearing record likewise distinguishes *NRDC*. Brief at 30-31. But there was no public-comment opportunity on the NRC Staff hearing testimony that this Court held had lawfully augmented the NEPA record in *NRDC*. *See NRDC*, 879 F.3d at 1209-10.

Regarding NRC's efforts to obtain information, Petitioners argue that NRC should still have found a way to obtain more Tribe-specific information about cultural resources—for example, by bypassing the "government-to-government" approach and engaging directly with Tribe members. Brief at 31-32. But as the Commission explained, "pursuing [these] suggested options would have been a significant departure from the long path the Staff had taken in trying to resolve the Tribe's Contention 1A" and "would not have satisfied all five criteria that the parties agreed would be necessary to complete a satisfactory survey." CLI-20-9,

Slip Op. at 13-14 (JA___-___); *see also id.* at 6-7 (JA___-___) (discussing the five criteria); LBP-19-10, 90 N.R.C. at 318-29 (JA___-___) (same); *id.* at 334-35 (JA___-___) (finding reasonable NRC Staff's decision not to pursue a scaled-down version of its proposed approach without Tribe cooperation); NRC-190 (JA___) (Tribe's 2017 letter to NRC Staff that was the basis for much of the Board-identified "five criteria"). As the Commission concluded, it was reasonable for the NRC Staff not to make a major, last-minute shift to pursue alternative cultural resource survey methods that the Tribe would not have supported anyway. Petitioners' Brief is silent on NRC's explanation and thus provides no reason to disturb NRC's well-supported conclusion that, in light of the factual record, the information was unavailable.

Finally, Petitioners raise a meritless argument that NRC should have hired a contractor or otherwise relied on "qualified" personnel. Brief at 31-32. In actuality, NRC *did* hire a contractor, whom the Board expressly found well-qualified, to lead the survey effort and who was attempting to obtain "significant input, participation, and consultation from the relevant tribes," and Petitioners nowhere meaningfully dispute these facts. *See* Brief at 31-32; LBP-19-10, 90 N.R.C. at 318-22 (JA___-___); NRC-192 at 2-4 (JA___-___); NRC-214 at 14, 16-17 (JA___, JA___-___). Indeed, NRC's approach is similar to the approach found sufficient in a case on which Petitioners rely. *See* Brief at 32 (citing *Biological*

Diversity v. United States Bureau of Land Management, 2017 WL 3667700 (D. Nev. Aug. 23, 2017)). But despite NRC doing the very thing Petitioners now claim NRC should have done, the Tribe objected rather than utilizing the opportunity to provide NRC with cultural-resource information. *See* LBP-19-10, 90 N.R.C. at 318-38 (JA___-___); *see also* CLI-20-9, Slip Op. at 13-14 (JA___-___).

D. NRC did not violate NEPA or the NHPA in connection with the Programmatic Agreement.

Petitioners' final argument regarding cultural resource issues focuses on the Programmatic Agreement developed in connection with the NHPA. Brief at 32-34. But Petitioners again ignore or mischaracterize NRC's hearing decisions and therefore fail to identify any error by the agency.

First, Petitioners argue that NRC improperly relied on the Programmatic Agreement and a Board-required amendment to it to remedy the Board-identified NEPA deficiency. Tribe Brief at 32-34. But as the Commission explained, the Board relied on "the entire adjudicatory record" for this purpose, not the Programmatic Agreement specifically or the amendment thereto. CLI-20-9, Slip Op. at 17-18 (JA___-___); *see also* LBP-19-10, 90 N.R.C. at 341 (JA___) (referring to the Programmatic Agreement as a separate matter the Board was turning to after having *already* found NEPA's requirements related to information

unavailability satisfied). Thus, Petitioners' arguments overstate the Agreement's role in NRC's hearing decisions.

The Commission also correctly rejected the Tribe's assertion that the Programmatic Agreement protects nothing beyond properties eligible for the National Register of Historic Places (thereby limiting its NEPA-compliance value), *see* Brief at 33, pointing to examples of Agreement provisions reaching beyond those eligible properties. CLI-20-9, Slip Op. at 18 & n.96 (JA___) (referencing paragraphs 9, 10, and 11 in Programmatic Agreement); *see also* NRC-018-A at 10-12 (JA___-___) (Programmatic Agreement paragraphs 9-11); LBP-19-10, 90 N.R.C. at 342-43 & n.278 (discussing Agreement's protections for cultural resources discovered during project activities, even those not ultimately found Register-eligible). Petitioners provide no response to the agency's reasoning or evidentiary basis on this matter.

And to the extent Petitioners are also claiming that the Board improperly relied on the Programmatic Agreement, or the amendment that the Board required, to find an *NHPA* deficiency cured, *see* Brief at 33-34, their assertion makes no sense. As discussed in Argument section II.A, *supra*, the Board found the lone Board-identified NHPA deficiency to be cured as of 2017, based on the NRC Staff's consultations with the Tribe in 2016 and 2017, not based on the existence of

the Programmatic Agreement or the Board-ordered amendment issued two years later.

Petitioners also argue that NRC's hearing decisions effectively "invalidated" the Agreement. Brief at 33-34. But NRC's hearing decisions never found that the limited-scope NHPA and NEPA deficiencies identified in 2015 undermined the Agreement. *See* CLI-20-9, Slip Op. at 18 (JA___); CLI-16-20, 84 N.R.C. at 243-44 (JA___-___) (Commission-decision excerpt Petitioners cite for their claim). And the Board's 2015 decision found the original surveys adequate—not "incomplete and incompetent" (Brief at 34)—for historic-property identification under the NHPA, the statute directly governing the Agreement. *See supra* at 24. Moreover, NRC's more recent hearing decisions have since found that no NHPA or NEPA deficiencies remain. CLI-20-9, Slip Op. at 3-8, 12-25 (JA___-___, ___-___); *see also* LBP-19-10, 90 N.R.C. at 341-45 (JA___-___) (discussing Programmatic Agreement's value going forward). Petitioners' "invalidation" theory is therefore baseless.

III. NRC's rejection of the Tribe's byproduct material contention in its various iterations was reasonable and consistent with NRC's regulations.

One category of radioactive waste the Powertech facility would generate is referred to as solid byproduct material. Final EIS at 2-53 – 2-54 (JA___-___). Contrary to Petitioners' arguments, the Tribe's contention relating to disposal of

this material did not demonstrate a genuine dispute worthy of an evidentiary hearing regarding NRC regulatory requirements, and Petitioners nowhere show that the Tribe's pleadings at NRC raised a genuine dispute with the EIS sections analyzing impacts from disposing of this material.

A. NRC's rejection of the Tribe's contentions was consistent with NRC's uranium recovery regulations.

In challenging NRC's findings that the Tribe's contentions relating to disposal of solid byproduct material did not merit an evidentiary hearing, Petitioners reiterate the central theory behind those contentions—namely, that NRC regulations supposedly require *in situ* recovery facility license applications to include something Powertech's application did not: a specific plan to dispose of this type of waste at an identified disposal site. Brief at 36-40. Petitioners also suggest that NRC's approach of allowing Powertech to finalize such a plan after licensing, but before operations, effectively leaves disposal of this kind of material unregulated. *Id.* at 35-40. Petitioners' claims ignore NRC's hearing decisions addressing these issues and show no error in NRC's dismissal of the Tribe's contentions.

To establish the alleged NRC regulatory requirement that Powertech's licensing application include a specific disposal plan, Petitioners purport to interpret the "plain language" of 10 C.F.R. § 40.31(h). Brief at 37. Petitioners do quote *some* of the text from § 40.31(h) , as well as some language from Appendix

A to 10 C.F.R. Part 40 that describes § 40.31(h)'s requirements. But Petitioners' quotations leave out the key language from § 40.31(h), which states that the regulation applies only to "sites *formerly* associated with [uranium and thorium] milling." 10 C.F.R. § 40.31(h) (emphasis added). Powertech is proposing a *new* uranium milling site, not seeking a license for a site "formerly associated with" uranium milling.

Not surprisingly, the Board and Commission rejected Petitioners' argument, citing a longstanding agency precedent that relies on the *actual* plain language of § 40.31(h). LBP-10-16, 72 N.R.C. at 434 (JA___); CLI-16-20, 84 N.R.C. at 230-31 (JA___-___) (describing the issue as "well settled"). Specifically, in the *Hydro Resources in situ* recovery licensing proceeding in 1999, NRC confirmed that § 40.31(h) was inapplicable because the site was "not 'formerly associated with such milling,'" while also explaining that this result is consistent with the purposes of § 40.31(h) and the related Part 40 Appendix A provisions, which were focused on mill tailings issues associated with conventional uranium mills, not *in situ* recovery. *See Hydro Resources, Inc.*, LBP-99-1, 49 N.R.C. 29, 33 (1999) (Board decision); *Hydro Resources, Inc.*, CLI-99-22, 50 N.R.C. 3, 8 (1999) (Commission upholding Board decision).

NRC's interpretation is compelled by the regulatory text, as described above. And even if the text were ambiguous, NRC's interpretation warrants

deference, as it is consistent with the regulatory text, was announced in official NRC hearing decisions, directly implicates substantive issues within NRC's expertise, and resulted from NRC's considered judgment in resolving a hearing dispute. *See Kisor*, 139 S. Ct. at 1215-18. Petitioners, by selectively leaving out the key regulation language and ignoring NRC's hearing decisions that rely on that language, show no error in NRC's interpretation of its own regulations.[7]

Petitioners are also flatly wrong in suggesting that NRC's approach raises the specter of "indefinite" byproduct material waste storage at the Powertech site or leaves byproduct-material-waste disposal effectively unregulated. *See* Brief at 36, 39. As Petitioners concede, Powertech's NRC license *expressly prohibits* Powertech from operating its facility—meaning Powertech cannot even begin generating any byproduct material—until Powertech reaches an agreement with a permissible licensed disposal site. Brief at 35; NRC-012 at 6, 12 (Conditions 9.9 and 12.6 of Powertech's license) (JA___, JA___).

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[7] Petitioners also mention Criterion 11C from Part 40 Appendix A, Brief at 39, but that criterion's text contains no requirement that an application contain a specific disposal plan. *See* 10 C.F.R. Part 40, App. A, Criterion 11C. The Tribe also never raised this specific criterion before the Commission when challenging the dismissal of its contentions, so the argument is forfeited. *See* Tribe's 2015 Petition for Commission Review at 3-6 (JA___-___) (addressing only Criteria 1 and 2, to which the Commission responded in CLI-16-20, 84 N.R.C. at 230-31 (JA___-___)); Tribe Reply to Responses to 2015 Petition for Commission Review at 1-2 (JA___-___); *Nuclear Energy Institute v. EPA*, 373 F.3d 1251, 1297-98 (D.C. Cir. 2004).

Moreover, Powertech's license permits disposal only "at a site that is *licensed* by the NRC or an NRC Agreement State to receive byproduct material." NRC-012 at 6 (JA___) (emphasis added). Thus, rather than being "unregulated," as Petitioners imply (Brief at 36), any disposal of Powertech byproduct material would *necessarily* be subject to an NRC licensing and regulatory regime or that of an "Agreement State"—a State that NRC has authorized to regulate byproduct material based on a demonstration that the State's regulatory regime is sufficient to protect public health and safety and is compatible with NRC's own regulatory program. *See* 42 U.S.C. § 2021(d)(2) (establishing required findings before NRC can discontinue its regulatory authority). For example, the White Mesa facility that Powertech has identified as a likely disposal site for its byproduct material is licensed by the State of Utah (an NRC Agreement State) and would need to obtain approval from Utah, per the terms of its Utah license, before accepting byproduct material from Powertech. *See* Final EIS at 3-116 (JA___).

Equally meritless are Petitioners' efforts to cast doubt upon the Final EIS, made amidst their arguments about NRC safety regulations at 10 C.F.R. Part 40 related to waste disposal. Brief at 38-40.[8] Petitioners assert that the EIS's

[8] The Tribe did not raise these specific issues regarding the EIS to the Commission when challenging the Board's rejection of its byproduct-material-disposal contentions, Tribe Petition for Review of LBP-15-16 at 3-6 (JA___); Tribe Reply to Responses to Petition for Review of LBP-15-16 at 1-2 (JA___), meaning these

discussion of the possibility of disposal at White Mesa is somehow deficient, Brief at 38, yet they never explain why that discussion was incomplete or what "testimony" or "evidence" at a hearing might have contributed. Petitioners also suggest that White Mesa might not end up as the disposal site for Powertech waste after all, citing potential site closure and licensing issues. *Id* at 38-39. Yet, in the Final EIS, the NRC Staff determined that the impacts of disposing of byproduct material disposal should be "small" (i.e., not significant) regardless of the specific licensed disposal facility ultimately chosen, and that conclusion was based on the analysis in the Generic EIS regarding disposal of byproduct waste from *in situ* recovery facilities[9] and information about the Powertech project. *See* Final EIS at 4-19, 4-21 – 4-23, 4-232 – 4-237, 4-240 – 4-243 (JA___, JA___-___, JA___-___, JA___-___) (basing environmental impact prediction "on the disposal options currently available for byproduct material"); Generic EIS at 4.2-6 – 4.2-9, 4.4-3 – 4.4-4, JA___-___, JA___-___) (analysis for another region's byproduct-material-disposal transportation impacts and determination that this analysis also applies to Powertech site's region). Thus, the EIS's analysis does not depend on White Mesa

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issues are waived for purposes of this Court's review of the Commission's final order on these contentions.

[9] It is well established that generic review of environmental impacts, including impacts involving radioactive waste, is permissible under NEPA. *See New York v. NRC*, 824 F.3d 1012, 1019-20 (D.C. Cir. 2016).

being the ultimate disposal site for Powertech's byproduct material waste, and Petitioners provide no basis to disturb the agency's technical judgment.

Finally, Petitioners cast as a "naked assertion" (Brief at 39-40) the Final EIS's conclusion that byproduct-material-waste transportation "poses the same risks as" transportation involving uranium in "yellowcake" form. But NRC explained in the Final EIS that the expected impacts from transporting byproduct material waste would necessarily be smaller than the already insignificant impacts of transporting yellowcake (thus rendering byproduct-material-disposal transportation impacts insignificant as well), reasoning that yellowcake is more concentrated and is shipped more frequently and for longer distances. Final EIS at 4-16 – 4-26 (JA___-___); Generic EIS at 4.2-6 – 4.2-9 (JA___-___). And NRC further explained that "[a]ll shipments will be required to comply with applicable [U.S. Department of Transportation] regulations governing the transportation of radioactive material (including quantity limits, packaging requirements, and conveyance dose rate limits)." Final EIS at 4-27 (JA___). Agencies may properly consider regulatory requirements when analyzing environmental effects under NEPA. *See, e.g.*, *New York*, 824 F.3d at 1022. Petitioners' brief contains no developed argument explaining why NEPA requires more detail than NRC provided, a particular problem here given that an EIS "shall discuss impacts in proportion to their significance," 40 C.F.R. § 1502.2(b) (2020), and the Final EIS

found the impacts at issue here to be insignificant. Petitioners' unexplained suggestions that container type and moisture content are relevant concerns, Brief at 40, do not undermine NRC's amply supported conclusions.

B. Petitioners fail to challenge NRC's articulated reasons for dismissing the Tribe's EIS-inadequacy claims.

The Board and Commission ruled that the Tribe's pleadings filed at NRC failed to raise a genuine dispute with the Final EIS's consideration of impacts from solid-byproduct-material disposal. Petitioners challenge this ruling, Brief at 40-43, asserting that the Tribe's contentions were "well pled." *See id.* at 36, 43. Yet Petitioners cite the Tribe's pleadings from NRC's adjudication only once, and then only to support their *erroneous* assertion that the Commission "failed to cite to any of the Tribe's contention-stage filings." *Id.* at 43. The Commission *did* cite—and consider—the Tribe's filings. *See* CLI-16-20, 84 N.R.C. at 229-230, 232 (JA___-____, JA___) (addressing and citing, in footnotes 49-51, 57, 61, 72, and 79 and the accompanying text, the Tribe's first, second, and third contention filings).

Petitioners' failure to discuss the Tribe's pleadings filed at NRC is critical here. Under NRC hearing regulations, a contention, to be found eligible for a hearing, must "include references to specific portions" of the application or the environmental review document "that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of

each failure and the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.309(f)(1)(vi); *see also* CLI-16-20, 84 N.R.C. at 230 (JA___); *Blue Ridge*, 716 F.3d at 196 (upholding NRC's dismissal of contention per this regulation). Additionally, for a contention challenging a final EIS after NRC has found a similar contention challenging the draft EIS inadmissible for hearing, the contention pleading must show that the information supporting the new contention was not previously available and is materially different from previously available information. *See* 10 C.F.R. § 2.309(c)(2)(i)-(ii); *see also* CLI-16-20, 84 N.R.C. at 230 (JA___); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52, 55-56 (D.C. Cir. 1990) (upholding earlier version of this regulation).

NRC's hearing decisions found that the Draft EIS *did* "contain information on the relevant matter"—i.e., it evaluated impacts from byproduct material disposal. LBP-13-9, 78 N.R.C. at 71 (JA___) (referencing Draft EIS sections 1.4.4, 1.4.5, 4.14, 4.3.1.1.2, 4.3.1.2.2 (JA___-___, JA___-___, JA___-___) and Generic EIS sections 4.2.12, 4.2.12.2, and 4.4.12.4 (JA___-___, JA___-___, JA___,___)[10]; LBP-14-5, 79 N.R.C. at 397 (JA___); *see also* CLI-16-20, 84 N.R.C. at 230-33 (JA___-___) (summarizing and upholding these Board rulings).

[10] Petitioners do not reference any, let alone all, of these sections when asserting that the Final EIS contains no "analysis" of byproduct waste disposal. *See* Brief at 42 (citing only to Final EIS at 2-53 (JA___)).

The Board found that the Tribe's contention filed at the Draft EIS stage failed to "substantively dispute[]"[11] the relevant EIS sections, LBP-13-9, 78 N.R.C. at 71-72 (JA___-___) (rejecting contention under 10 C.F.R. § 2.309(f)(1)(vi)). And the Board later concluded that the version of the contention at the Final EIS stage did "not identify any information that differs materially from the information available" in the Draft EIS and, in any event, again "fail[ed] to challenge relevant sections of the" EIS. LBP-14-5, 79 N.R.C. at 397 (JA___) (rejecting contention under 10 C.F.R. § 2.309(c)(2)(ii)); *see also* CLI-16-20, 84 N.R.C. at 232-33 (JA___-___) (rejecting Tribe's challenges to these Board rulings). The Board also determined that NEPA, while requiring analysis of the impacts of byproduct-material-waste disposal, does not override NRC's regulatory determination not to require a specific disposal plan in the license application.[12] LBP-10-16, 72 N.R.C. at 435 (JA___); *see also* CLI-16-20, 84 N.R.C. at 231-32 (JA___-___) (rejecting Tribe challenge to this Board ruling); *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) ("NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency." (internal quotation marks omitted)).

[11] Petitioners also appear to distinguish between a "genuine" dispute and a "substantive" dispute, *see* Brief at 35-36, but do not explain the significance of this semantic distinction.

[12] *See also* Argument Section III.A, *supra*.

Thus, NRC correctly and reasonably dismissed the Tribe's byproduct material contentions because they did not satisfy the requirements for a hearing under applicable NRC regulations. By failing to show that the Tribe's contention pleadings contained the information that the Board and Commission found lacking, Petitioners leave those findings unrebutted and provide the Court no basis to disturb them.

IV. The Commission reasonably upheld the Board's ruling on the Tribe's borehole-related contention.

Petitioners raise no serious challenge to NRC's analysis of potential impacts related to preexisting drill holes at the site (referred to as "boreholes") and other site features. Petitioners' arguments on these subjects (Brief at 43-47) mischaracterize the Commission and Board findings and recycle arguments about NRC regulations that NRC properly rejected in a reasoned decision that Petitioners ignore.

After the 2014 evidentiary hearing, the Board generally found that the NRC Staff, as documented in the EIS, *did* take the NEPA-required "hard look" at groundwater impacts related to boreholes, faults, and other similar site features. LBP-15-16, 81 N.R.C. at 676-81 (JA___-___); *see also id.* at 667-75 (JA___-___) (summarizing the key record evidence); Final EIS at 2-18, 3-20 – 3-21, 3-36, 4-45, 4-63 – 4-65, 4-74, E-51 – E-52 (JA___, JA___-___, JA___, JA___, JA___-___, JA___, JA___-___). The only thing the Board found missing was an express

license condition requiring Powertech to carry out the commitment discussed in the Final EIS to address improperly plugged boreholes. *See* LBP-15-16, 81 N.R.C. at 679 (JA___); *see also* Final EIS at 4-64 (JA___) (describing Powertech's commitment). The Board accordingly added a condition to Powertech's license expressly binding Powertech to its commitment. LBP-15-16, 81 N.R.C. at 679 (JA___).

This missing license condition is the only "NEPA deficiency" to which Petitioners could possibly be referring. *See* Brief at 43; LBP-15-16, 81 N.R.C. at 676-81 (JA___-___) (requiring this license condition but otherwise finding compliance with NEPA); CLI-16-20, 84 N.R.C. at 253-57 (JA___-___). But while Petitioners state that "[t]he Commission upheld the Board's finding of a NEPA deficiency," the Commission actually *rejected* the Board's deficiency finding, concluding instead that the 2014 license (specifically, license condition 9.2) *already* bound Powertech to carry out its commitment, even without the Board-added condition. CLI-16-20, 84 N.R.C. at 257 (JA___); *see also* NRC-012 at 1. While the Commission left in place the Board-added license condition, it did so only because the redundancy was "harmless." *Id.* Petitioners never mention any of this, *see* Brief at 43-47, and their claim of a Commission-upheld "NEPA

deficiency" mischaracterizes the record and undermines their associated claim that NRC used improper procedures to remedy this supposed "NEPA deficiency."[13]

Petitioners also argue that NRC violated its safety regulations and NEPA by requiring *in situ* recovery licensees to conduct additional testing and collect additional data only *after* licensing, rather than requiring these actions as a prerequisite to licensing. Brief at 43-47. This issue was a centerpiece not only of the Tribe's Contention 3 on boreholes, but also its Contention 2 on baseline groundwater quality (*see* Argument section V, *infra*), as each contention challenged NRC allowing an *in situ* recovery applicant to address 10 C.F.R. Part 40 Appendix A Criterion 5 requirements regarding groundwater data collection *after* license issuance. *See* LBP-15-16, 81 N.R.C. at 659-66 (JA__-___) (Board discussion and ruling on Contention 2); *id.* at 667 (JA___) (summarizing parties' positions on Contention 3). Criterion 5 describes standards "which apply during operations and prior to the end of closure." *See* 10 C.F.R. Part 40 App. A Criterion 5.

The Board and Commission provided a reasoned explanation for rejecting this argument when the Tribe raised it at NRC. Specifically, the Board relied on a

[13] In fact, Petitioners' only citation to the Commission majority opinion in CLI-16-20 is to the "Background" section (Brief at 43, citing 84 N.R.C. at 226 (JA___)), not to the Commission's subsequent analysis of, and ruling on, the issue. *See* CLI-16-20, 84 N.R.C. at 253-58 (JA___-___).

2006 Commission ruling explaining that the data collection and testing, the purpose of which is "to confirm proper baseline quality values, and confirm whether existing rock units provided adequate confinement," cannot occur "until an *in situ* leach well field has been installed" and supports "the operational stages of mining." LBP-15-16, 81 N.R.C. at 665 (JA___); *Hydro Resources, Inc.*, CLI-06-1, 63 N.R.C. 1, 6 (2006); *see also* CLI-16-20, 84 N.R.C. at 252-53 (JA___-___). Logically, NRC does not require the applicant to construct much of the proposed facility (i.e., by installing the various well fields) before deciding whether to issue a license. NRC's interpretation, which is consistent with Criterion 5's stated applicability "during operations" and was announced and explained in an NRC hearing decision on a topic implicating NRC's substantive regulatory expertise, merits deference. *See Kisor*, 139 S. Ct. at 1215-18; CLI-06-1, 63 N.R.C. at 3-6 (JA___-___). Yet, regardless of whether deference is warranted, Petitioners provide no response to this reasoned basis for NRC's decision.

As to Petitioners' claim that NRC's approach violates NEPA, Brief at 46, well-settled NEPA principles undermine their arguments. The post-licensing confirmatory data gathering from constructed wellfields and the plugging of boreholes are *mitigation* measures intended to avoid or limit potential environmental impacts. Indeed, Petitioners concede this later in their Brief. *See id.* at 52 (describing the "post-license issuance . . . hydrologic wellfield packages"

as "the undeveloped mitigation relied upon in the" Final EIS). And the Final EIS already discusses the planned approach to mitigating environmental impacts related to boreholes. *See* Final EIS at 2-18, 4-64 – 4-65 (JA___, JA___-___); *see also id.* at E-51 – E-52 (JA___-___) (responding to public comment on this issue).

Thus, Petitioners are not arguing that NRC failed to disclose or discuss these mitigation issues in the Final EIS, but, rather, that NRC failed to require Powertech to conduct mitigation *before* the EIS was drafted, so that NRC could then discuss the mitigation *results* in the Final EIS. Yet it is well settled that NEPA does not require agencies to have fully developed plans to mitigate impacts—much less require execution of such plans—before the agency takes the proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (rejecting notion that NEPA requires "a fully developed plan that will mitigate environmental harm before an agency can act"); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010); *see also Indian River County*, 945 F.3d at 533. Petitioners' argument therefore fails.

V. The Commission reasonably upheld the Board finding that the EIS's baseline water quality discussion satisfied NEPA.

Petitioners' argument (Brief at 47-48) regarding the Tribe's baseline water quality contention is essentially the same as their argument discussed above regarding boreholes, and it fails for the same reason: NRC is not obligated to

require data collection from *installed* wellfields as part of its evaluation of the environmental impacts of an *in situ* recovery license application.

The Board determined, after considering the Tribe's contention in a 2015 evidentiary hearing, that the NRC Staff's analysis of baseline groundwater quality at the site complied with NEPA and that the Tribe's testimony and arguments did not demonstrate otherwise. LBP-15-16, 81 N.R.C. at 659-66 (JA___-___); CLI-16-20, 84 N.R.C. at 252-53 (JA___- ___) (upholding Board's findings). Indeed, the Final EIS contains detailed analysis of baseline water quality data from the site obtained through groundwater sampling. Final EIS at 3-38 – 3-41 (JA___- ___). While, as Petitioners correctly observe, additional groundwater data will also be collected later, the Commission has explained that this additional data will serve a specific purpose under NRC safety regulations in 10 C.F.R. Part 40 and that it "cannot be collected until an *in situ* leach well field has been installed." *See* LBP-15-16 at 665 (JA___) (quoting Commission decision in *Hydro Resources, Inc.*, CLI-06-1, 63 N.R.C. at 6); CLI-16-20, 84 N.R.C. at 252-53 (JA___-___) (summarizing and upholding Board's rationale).

That NRC is requiring Powertech to conduct further groundwater testing after it has constructed its licensed facility hardly demonstrates (as Petitioners seem to suggest) that the groundwater analysis performed during the pre-licensing review is inadequate under NEPA. Because Petitioners never explain why the

baseline groundwater quality data and analysis in the Final EIS is deficient (beyond pointing to the mere fact that more groundwater data will be gathered later) or respond to the Commission's decision rationale, *see* Brief at 47-48, they have failed to demonstrate any error.

VI. The Commission reasonably upheld the Board's findings that the discussions of mitigation measures in the EIS satisfied NEPA.

Next, Petitioners challenge NRC's analysis of impact mitigation in the Final EIS. After an evidentiary hearing, the Board found, as upheld by the Commission, that the Final EIS features "extensive"—and NEPA-compliant—mitigation analysis. LBP-15-16, 81 N.R.C. at 690-92 (JA___-___); CLI-16-20, 84 N.R.C. at 258-59 (JA___-___). And the Board and Commission found that the Tribe had simply *overlooked* the primary mitigation discussions in the Final EIS, including the "extensive" analysis in Final EIS Chapter 4. LBP-15-16, 81 N.R.C. at 690-91 (JA___-___); CLI-16-20, 84 N.R.C. at 259 (JA___).

Inexplicably, Petitioners' mitigation arguments in their Brief never once mention either the Board's or the Commission's decision, even though Petitioners are ostensibly challenging them. *See* Brief at 48-54. Moreover, Petitioners continue, in their Brief, to ignore the most relevant portions of the EIS.

That Petitioners have evaluated the EIS mitigation analysis with blinders on is evident when comparing the EIS excerpts Petitioners reference to those they do not. For example, Petitioners state that the Final EIS "simply lists and mentions

mitigation measures," citing to the Final EIS at 6-1 to 6-19 as the record support for this claim. Brief at 49. Yet, the two "lists" in the 19-page-long Chapter 6 provide only a "Summary of Mitigation Measures," *see* Final EIS at 6-1 – 6-19 (JA___-___), while NRC's full discussion of many of those mitigation measures is in Chapter 4, which spans 262 pages. *See* Final EIS at 4-1 – 4-262 (JA___-___).

In fact, Petitioners' lone reference to Chapter 4 is to a single page, when suggesting that NRC was waiting until issuance of the Programmatic Agreement, after EIS issuance, to address historic and cultural resource mitigation. *See* Brief at 50 (referencing Final EIS at 4-157 (JA___)). Yet Chapter 4 contains an extended discussion of anticipated historic and cultural resource impacts that addresses numerous identified resources and associated mitigation strategies. Final EIS at 4-159 – 4-182 (JA___-___); *see also* CLI-16-20, 84 N.R.C. at 260-61 & n.275 (JA___-___) (summarizing Board's findings and referencing this portion of the Final EIS (i.e., Section 4.9.1.1.1) in support). Although Petitioners suggest that the Final EIS cultural-resource mitigation analysis must necessarily be incomplete because it does not provide the specifics of the Programmatic Agreement (which was not finalized until April 2014, three months after the Final EIS's publication in January 2014), Petitioners nowhere explain how the later-issued Programmatic Agreement renders the Final EIS's extended discussion of impacts and related

mitigation steps inaccurate or otherwise insufficient to comply with NEPA. *See* Brief at 49-51.

As another example, Petitioners cite to a single comment/response exchange in an EIS appendix to support its claim that the Final EIS "merely refers to groundwater mitigation via future license conditions" related to possible "draw-down induced migration of radiological contaminants from abandoned open pit mines in the Burdock area." Brief at 53 (citing Final EIS at E-135 to E-136 (JA___-___)). The mitigation measure at issue is a "proposed monitoring well network." *See* Final EIS at E-136 (JA___). But Petitioners ignore that the Final EIS describes in detail, in two sections dedicated to "Excursion Monitoring," Powertech's planned approach to developing monitoring well networks to detect groundwater excursions, the factors pertinent to such networks' effectiveness, and the requirements for prompt responsive actions if excursions are detected. *Id*. at 2-31 – 2-32, 7-10 – 7-12 (JA___-___, JA___-___).

Similarly, Petitioners' undeveloped attacks on the Final EIS's discussion of mitigation of "air impacts," "land disposal of radioactive waste," "wildlife protections," and "storm water control" (Brief at 53) also cite only to comment-response appendix excerpts and a hearing-transcript excerpt, ignoring the primary discussions of these issues in the Final EIS's main body. *See* Final EIS at 4-127 – 4-132, 6-15 – 6-16 (JA___-___, JA___-___) (discussing air impacts and potential

mitigation strategies, which would focus on limiting the primary source of air impacts (i.e., "[f]ugitive dust and combustion emissions from construction equipment and vehicles")); *id.* at 7-17 – 7-22 (JA___-___) (detailing Powertech's plans for monitoring land disposal of radioactive waste to ensure it does not harm the environment); *id.* at 4-77 – 4-114 (JA___-___) (discussing impacts on wildlife and associated mitigation); *id.* at 4-31 – 4-32, 4-36, 4-39 – 4-49, 4-57 – 4-58, 4-70 – 4-72, 4-76 (JA___-___, JA___, JA___-___, JA___-___, JA___-___, JA___) (discussing stormwater-related impacts and mitigation); *see also* Generic EIS at 7-2 – 7-7 (summarizing "best management practices" associated with *in situ* recovery and providing references).

Finally, we observe that the fundamental legal premise underlying much of Petitioners' argument—that an EIS must present fully developed mitigation plans (*see* Brief at 48-54)—is incorrect. As discussed in Argument Section IV, *supra*, it is well established that NEPA does not require this. Thus, Petitioners' cherry-picked references to less-detailed EIS discussions and their baseless insistence on the EIS containing fully developed mitigation plans provide no basis to overturn NRC's decision.

VII. Petitioners' arguments regarding the Tribe's scoping-related contention provide no basis to overturn NRC's decision.

The Tribe's Contention 8 objected to NRC not utilizing a "scoping" process for the site-specific EIS—wherein NRC, before starting to develop the EIS, would

have requested public input on the topics and issues the EIS should address. *See* Tribe's Brief at 54-59. In considering this contention, the Board found the contention raised no dispute requiring a hearing and dismissed it, based on an NRC regulation that, in the Board's view, exempts from scoping requirements any site-specific EIS that tiers off of a generic EIS. LBP-13-9, 78 N.R.C. at 74-75 (JA___-___). While the Commission, on appeal, rejected the Board's reading of that NRC regulation, it nonetheless found the Board's error (and the NRC Staff's underlying procedural error) harmless in this particular case, citing the extensive and timely public involvement that had occurred during EIS development, which the Commission found had served the same purposes as a formal site-specific "scoping" process. CLI-16-20, 84 N.R.C. at 234-37 (JA___-___). Petitioners provide no reason to disturb this conclusion.

NEPA-scoping noncompliance does not, on its own, generally warrant overturning an agency action, as courts have recognized that other public-participation opportunities associated with NEPA reviews can ameliorate any potential harm stemming from it. *See Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1087 (E.D. Cal. 2009); *Muhly v. Espy*, 877 F. Supp. 294, 300 (W.D. Va. 1995); *see also Nw. Coal. for Alts. to Pesticides v. Lyng*, 844 F.2d 588, 594-96 (9th Cir. 1988).

This principle apples here. As the Commission found, even though there was not a formal "scoping process" for the site-specific EIS, NRC provided public notice of its site-specific review and sought public and stakeholder input beginning early in the review process, and the Tribe had ample notice and opportunity to participate. *See* CLI-16-20, 84 N.R.C. at 236 (JA___); *see also* NRC Staff's Response to Oglala Sioux Tribe's Petition for Review of LBP-15-16 at 8-10 (discussing the history in more detail) (JA___-___).

NRC's early engagement activities included meeting with federal, state, tribal, and local agencies and authorities during a site visit in late 2009 (NRC invited the Tribe, but the Tribe declined), contacting "potentially interested . . . tribes and local authorities, entities, and public interest groups in person, by email, and by telephone" in order "to gather additional site-specific information to support the NRC staff's environmental review," and, in early 2010, soliciting and receiving public comments via advertisements in six local newspapers. Final EIS at 1-5 – 1-6 (JA___-___). NRC also published, in early 2010, a notice of intent to prepare the site-specific EIS for Powertech's license application. 75 Fed. Reg. 3261 (Jan. 20, 2010). These notice and outreach efforts furthered the same basic goals as NEPA's scoping requirements. *See Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209, 1238-40 (10th Cir. 2011). And NRC already employed a comprehensive scoping process, which included multiple public scoping meetings,

in developing the Generic EIS for *in situ* recovery facilities, from which the site-specific EIS tiers. LBP-13-9, 78 N.R.C. at 75 (JA___); CLI-16-20, 84 N.R.C. at 236 (JA___); Generic EIS at 1-8 – 1-15 (JA___-___).

Petitioners' only attempt to demonstrate harm or prejudice related to its scoping contention is by providing a summary of NRC's regulation (10 C.F.R. § 51.29) that identifies the general purposes of scoping and citing to the previous version of a government-wide regulation (40 C.F.R. § 1501.7—the current version is at 40 C.F.R. § 1501.9) that does the same. *See* Brief at 58-59. But Petitioners do not explain how any of those general purposes were unfulfilled in *this specific NEPA review*, given (1) NRC's early public engagement activities specific to its review of Powertech's application; and (2) the Generic EIS's scoping process.[14] Petitioners' failure to demonstrate any specific harm from the lack of a dedicated site-specific scoping process gives this Court no basis to overturn NRC's licensing decision. *See* 5 U.S.C. § 706 (requiring courts to take "due account" of the rule of prejudicial error); *Nevada v. Dept. of Energy*, 457 F.3d 78, 90-91 (D.C. Cir. 2006) (applying prejudicial error rule when rejecting NEPA-compliance challenge).

[14] Petitioners also vaguely allude to harm related to cultural resource impacts, *see* Brief at 55, but consideration of such impacts plainly *was* treated as within the scope of the Final EIS. *See, e.g.,* Final EIS at 4-159 – 4-182 (JA___-___).

Finally, Petitioners rely on this Court's earlier decision in *Oglala Sioux Tribe v. NRC* to support the opposite view (Brief at 55, 56-57, 59), but that decision is distinguishable on its face. This Court held there "only that, once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm," while the Court expressly did *not* reject harmless-error principles categorically. 896 F.3d at 538. Moreover, this Court *itself* left Powertech's license in place given that "no harm—irreparable or otherwise" would result from doing so. *Id.* Here, the Commission did not rely on an "irreparable harm" standard, and, as discussed above, it explained why the procedural error was *not* significant in this case.

In sum, the Commission's decision was reasonable, and Petitioners, in any event, have demonstrated *at most* only a "procedural irregularit[y] in the early stages of the NEPA process," *see Central Delta Water Agency*, 653 F. Supp. 2d at 1087, not harm or prejudice that could support court-ordered relief.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(C), I hereby certify:

The foregoing Initial Brief of Federal Respondents complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), the Brief contains 12,936 words, as calculated by the word processing software program with which the Brief was prepared.

The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it was prepared in a proportionally spaced typeface in 14-point Times New Roman font using Microsoft Word.

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