LBP-26-8

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Jeremy A. Mercer, Chair
Nicholas G. Trikouros
Dr. Gary S. Arnold

In the Matter of:	Docket No. 40-9075-LR
POWERTECH (USA) INC.,	ASLBP No. 25-987-01-LR-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	September 10, 2026

MEMORANDUM AND ORDER
(Granting in Part and Denying in Part Organizational Intervenors' Motion for Leave to File New and Amended Contentions)

In this Memorandum and Order, we address nuanced, serious, and, in at least one instance, novel questions related to good cause and contention admissibility. Yet as all Parties recognized in their briefings and during oral argument, while we admit one amended contention and three new contentions, we generally are not expanding by much the scope of the substantive dispute already encompassed by already-admitted Contention 1A.

On July 17, 2026, Organizational Intervenors[1] filed a motion for leave to file new and amended contentions.[2] That Motion (i) urged the migration of already-admitted Contentions 1A and 1B, (ii) posited amendments to both Contentions 1A and 1B, and (iii) proposed six new contentions.[3] In this Memorandum and Order, we grant Organizational Intervenors' Motion as to

[1] Collectively, the Oglala Sioux Tribe, the Black Hills Clean Water Alliance, and the NDN Collective are the Organizational Intervenors.

[2] Organizational Intervenors' Motion for Leave to File New and Amended Contentions Based on the NRC Staff's Final Environmental Assessment, Finding of No Significant Impact, and Executed Section 106 Programmatic Agreement (July 17, 2026) ("Motion").

[3] Organizational Intervenors filed their new and amended contentions as an attachment to their Motion. *See id.* (attaching New and Amended Contentions of the Oglala Sioux Tribe, NDN

the migration of Contention 1A and the admission of proposed Amended Contention 1A, Contention 6, and aspects A and C of Contention 7. But we deny the Motion as to the migration of Contention 1B and the admission of proposed Amended Contention 1B, Contentions 5, 8, 9, and 10, and aspects B and D of Contention 7.

I. BACKGROUND

A. Procedural Background and Filings[4]

On January 31, 2025, this Licensing Board granted Organizational Intervenors' hearing request and admitted three contentions related to the license renewal application of Powertech (USA) Inc. ("Powertech") for an in situ uranium recovery facility in South Dakota.[5] Currently, two National Environmental Policy Act ("NEPA") related contentions remain before the Board.[6]

On June 17, 2026, the NRC Staff ("Staff") issued a Final Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") regarding Powertech's application.[7] On July 17, 2026, Organizational Intervenors timely filed their Motion.[8] The Staff and Powertech timely filed answers and Organizational Intervenors then timely filed their reply.[9] On August 13,

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Collective, and Black Hills Clean Water Alliance Based on the NRC Staff's Final Environmental Assessment, Finding of No Significant Impact, and Executed Section 106 Programmatic Agreement (July 17, 2026) ("Proposed New and Amended Contentions")).

4 See our prior decision on contention admissibility for a background on this matter, LBP-25-3, 101 NRC 56, 69–70 (2025), which we will not repeat here.

5 *See* LBP-25-3, 101 NRC at 118.

6 *See* CLI-26-6, 103 NRC __, __ (slip op. at 20) (June 15, 2026) (Nuclear Regulatory Commission ("NRC" or "Commission") affirmed the admission of Contentions 1A and 1B and reversed the admission of Contention 2).

7 Office of Nuclear Materials Safety and Safeguards (NMSS), NRC, Environmental Assessment for the License Renewal for the Dewey-Burdock Uranium Recovery Project in Custer and Fall River Counties, South Dakota, Final Report (June 2026) (ADAMS Accession No. ML26163A295) ("EA").

8 Motion at 1.

9 NRC Staff Answer to Organizational Intervenors' New and Amended Contentions (Aug. 4, 2026) ("Staff Answer"); Applicant Powertech (USA) Uranium Corporation's Response in Opposition to Organizational Intervenors' New and Amended Contentions (Aug. 4, 2026)

2026, the Board held video oral argument on the Motion, which was transcribed.[10]

B. Contentions Proposed

In addition to urging the migration of both currently admitted contentions, Organizational Intervenors propose two amended and six new contentions. Amended Contention 1A addresses "whether the EA's description of the affected environment omits or misdescribes the Oglala Sioux Tribe's cultural and historical resources, in violation of NEPA and 10 C.F.R. §§ 51.30, 51.45, and Part 51."[11] Amended Contention 1B addresses whether "the EA's conclusion that impacts to cultural and historic resources are not significant is unexplained, unsupported, and contrary to the record."[12]

New Contention 5 addresses "whether an [Environmental Impact Statement ("EIS")] or [Supplemental Environmental Impact Statement ("SEIS")], rather than an EA and FONSI, is required for this license renewal."[13] New Contention 6 addresses "whether the Staff's abandonment of the proposed tribal cultural resources survey, and the EA's failure to explain [that abandonment], violate [the Administrative Procedure Act ('APA'), NEPA, and reasoned-decisionmaking requirements."[14] New Contention 7 addresses "whether the Staff's Section 106 process, as documented in the EA and the executed [Programmatic Agreement],[15] complies

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("Powertech Answer"); Organizational Intervenors' Reply to the Responses of the NRC Staff and Powertech (USA) Inc. to the New and Amended Contentions (Aug. 11, 2026) ("Reply").

10 *See* Tr. at 218–319. In the Order scheduling the argument, the Board specifically provided to the Organizational Intervenors, Powertech, and Staff (collectively, "Parties") certain questions/topics that it intended to address at the argument. *See* Licensing Board Order (Scheduling Video Pre-Hearing Argument) (Aug. 6, 2026) at 2–3 ("Scheduling Order") (unpublished). Counsel for all Parties attended and participated in the argument. *See* Tr. at 219–20.

11 Proposed New and Amended Contentions at 5.

12 *Id.* at 8.

13 *Id.* at 11.

14 *Id.* at 15.

15 Final Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, U.S. Environmental Protection Agency, South Dakota State Historic Preservation Office, and Powertech (USA), Inc. Regarding the Dewey-Burdock In Situ

with the [National Historic Preservation Act ('NHPA')] and 36 C.F.R. Part 800."[16] New Contention 8 addresses "whether the EA adequately analyzes the on-site impacts of extended [central processing plant] operations processing offsite-derived resin."[17] New Contention 9 addresses "whether the identification of [Native American Graves Protection and Repatriation Act 'NAGPRA']-covered remains and cultural items on federal lands within the Oglala Sioux Tribe's ancestral territory requires a plan of action before the License may issue."[18] Finally, new Contention 10 addresses "whether the EA's terrestrial-ecology analysis and species effect determinations rest on an adequate evidentiary baseline."[19]

II. CONTENTIONS

A. Two Standards – Good Cause and Contention Admissibility

To prevail on a motion for leave to file a new or amended contention after the deadline specified in a *Federal Register* notice, a party must establish both that it (i) has demonstrated "good cause" for filing after the deadline and (ii) has submitted in or with the motion at least one new or amended admissible contention.[20] We apply these tests on a contention-by-contention

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Recovery Project Located in Custer and Fall River Counties, South Dakota (June 4, 2026) (ADAMS Accession No. ML26159A198); Final Appendices Related to the Final Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, U.S. Environmental Protection Agency, South Dakota State Historic Preservation Office, and Powertech (USA), Inc. Regarding the Dewey-Burdock In Situ Recovery Project Located in Custer and Fall River Counties, South Dakota (ADAMS Accession No. ML26159A199) (collectively, "Programmatic Agreement").

[16] Proposed New and Amended Contentions at 23.

[17] *Id.* at 25.

[18] *Id.* at 31.

[19] *Id.* at 35.

[20] *See* 10 C.F.R. § 2.309(c)(1) & (4); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), CLI-26-2, 102 NRC __ (slip op. at 3–4) (Mar. 4, 2026) (stating that "[t]o be accepted for hearing, contentions must meet strict contention standards under 10 C.F.R. § 2.309(f)" and "[c]ontentions filed after the deadline for initial intervention must also demonstrate good cause" by meeting the factors in 10 C.F.R. § 2.309(c)). Organizational Intervenors already have established standing; therefore, we need not address it here. *See* LBP-25-3, 101 NRC at 71; 10 C.F.R. § 2.309(c)(4). And as there are admitted contentions already in this proceeding, we need not address the reopening standard in section 2.326(a).

basis. The conjunctive nature of these two tests, though, means that if Organizational Intervenors do not meet either one of them for a particular contention, we must deny the Motion as to that contention.

To meet the first test, what we will call the "good cause" test, Organizational Intervenors must show that (i) "[t]he information upon which the filing is based was not previously available," (ii) "[t]he information upon which the filing is based is materially different from information previously available," and (iii) "[t]he filing has been submitted in a timely fashion based on the availability of the subsequent information."[21]

To meet the second test, Organizational Intervenors must submit a proposed contention that meets the Commission's six-part contention admissibility test in 10 C.F.R. § 2.309(f)(1). "A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[22] The failure to meet any one of the six requirements for contention admissibility requires a finding that the contention is not admissible.[23]

B. Contention Analysis

Before we turn to an analysis of each of the amended and new contentions proposed by the Organizational Intervenors to determine which, if any, meet both tests outlined above, we address two items, timely filing and migration.

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[21] 10 C.F.R. § 2.309(c)(1)(i)–(iii).

[22] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998).

[23] *See Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

1. Two preliminary items –timely filing element and migration

a. Timely filing element of "good cause" test

One element of the "good cause" test we address here generally is the timely filing element. Organizational Intervenors filed their Motion and Proposed New and Amended Contentions within thirty days of the Staff's issuance of the EA, in accordance with this Board's scheduling directives.[24] Therefore, unless noted otherwise below, when we address the "good cause" test, we conclude that Organizational Intervenors meet the timely filing element.[25]

b. Migration of Admitted Contentions 1A and 1B

In their Motion, Organizational Intervenors devote two sentences to a claim that admitted Contentions 1A and 1B, originally asserted as to Powertech's Environmental Report ("ER"), have "migrated" to be asserted as to the Staff's EA.[26] Under the tenet of migration, a party is not required to reassert already-admitted environmental contentions if the information in the Staff's environmental document is "sufficiently similar" to that in the applicant's environmental report, against which the initial contentions were framed.[27] "On the other hand, post-ER an intervenor would need to file a motion to amend an already-admitted contention or to admit a

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[24] *See* Footnotes 7 & 8, above; Licensing Board Order (Second Amended Case Scheduling and Management Order) (July 15, 2026) at 2 (unpublished) ("Second Amended Order").

[25] *See* 10 C.F.R. § 2.309(c)(1)(iii).

[26] *See* Motion at 3, 8 ("Here, where the Staff's documents treat contested issue[s] in substantially the same manner as the applicant's environmental report, admitted [C]ontentions 1A and 1B migrate to the Staff document without a new admissibility showing. . . . In the alternative, the admitted contentions migrate to the EA because the EA adopts the [ER's] omission of the Tribe's resources and its unexplained no-impact conclusion without material cure."). Organizational Intervenors approached the same issue from two angles (migration and seeking amendment of Contentions 1A and 1B) so that they properly can challenge the Staff's now-issued EA. While we address both angles, the end result is the same.

[27] *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 570 n.17 (2016); *see also Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC 33, 42 n.58 (2015); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2); CLI-02-28, 56 NRC 373, 382 (2002).

new contention if the information in the Staff's NEPA statement is sufficiently different from the information in the ER that supported the original contention's admission."[28]

i. <u>Contention 1A does migrate</u>

As to Contention 1A, we agree with Organizational Intervenors and Powertech that Powertech's ER and the Staff's EA are sufficiently similar and the admitted contention is deemed to have migrated.[29] We grant the Motion as to migration of Contention 1A.

ii. <u>Contention 1B does not migrate and is dismissed</u>

As admitted, Contention 1B was a contention of omission, contending that "Powertech's [ER] fails to explain its conclusion that the impacts of the Dewey-Burdock Project on cultural and historic resources will be 'none.'"[30] Unlike the ER, though, the Staff's EA acknowledges there will be impacts on cultural and historic resources and explains how those impacts will be mitigated: "The Dewey-Burdock [in situ recovery ("ISR")] project would result in adverse effects on historic and cultural resources."[31]

Organizational Intervenor's only argument in favor of migration of Contention 1B is their bare assertion that the EA treated the issues underlying Contention 1B in "substantially the same manner" as Powertech's ER.[32] That assertion, though, ignores the fact that the ER and

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[28] *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-13-10, 78 NRC 117, 133 (2013); *see also McGuire*, CLI-02-28, 56 NRC at 382 (distinguishing between migrated and new contentions).

[29] *See* Motion at 3; Powertech Answer at 9–10 ("As an initial matter, Powertech acknowledges that Contention 1A, as previously admitted, is eligible for migration. . . . Though the NRC Staff did consult with the Tribe during the development of the EA and gave due consideration to the 2021 Methodology, Staff did not ultimately implement the 2021 Methodology. Thus, because the original Contention 1A is based upon a disputed question of fact or law as to whether the 2021 Methodology was adequately accounted for and whether such methodology needed to be considered or implemented, the contention migrates."). The Staff does not address migration in its Answer.

[30] LBP-25-3, 101 NRC at 118.

[31] EA at 1-73; *see id.* at 1-46–1-51 (explaining mitigation).

[32] Motion at 3.

the EA reach different conclusions. That assertion also is undercut by the Organizational Intervenors' argument in support of proposed Amended Contention 1B that "[t]he Staff's [EA] document does not merely repeat the [ER]; it rests the no-significance conclusion on a new instrument and a new methodology."[33] Thus, while the Organizational Intervenors may disagree with the conclusion the Staff reached, they acknowledge the EA explains its conclusion, which is contrary to their claim in Contention 1B that the ER lacked an explanation. Accordingly, the information in the Staff's EA is not "sufficiently similar" to Powertech's ER as it relates to Contention 1B to allow for migration.

Accordingly, we deny the Motion as to migration of Contention 1B and dismiss Contention 1B as moot.[34]

2. <u>Amended Contention 1A</u> – The NRC Staff's Environmental Assessment fails to comply with NEPA and 10 C.F.R. Part 51 because it contains an inadequate, inaccurate, or incomplete description of the cultural and historical resources of the Oglala Sioux Tribe in the Dewey-Burdock Project area, in that the EA (a) relies exclusively upon archaeological surveys conducted in 2007–2012 and a 2013 tribal survey in which the Oglala Sioux Tribe did not participate; (b) abandons, without reasoned explanation and solely in response to the applicant's cost-and-time objections, the tribal cultural resources survey the Staff itself proposed in the December 2025 draft Programmatic Agreement; and (c) defers all identification and evaluation of the Tribe's traditional cultural places until after licensing, if and when ground-disturbing activities occur.[35]

In addition to, and as an alternative to, seeking a determination that Contention 1A migrated, Organizational Intervenors also seek leave to file an Amended Contention 1A.[36] While we already concluded that Contention 1A migrated, for the reasons that follow, we also

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33 Motion at 8.

34 *See USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (2006) ("In such cases in which an earlier contention based upon an applicant's environmental report is rendered moot by the NRC's environmental impact statement, resolution of the mooted contention requires no more than a finding by the presiding officer that the matter has become moot. While this might be accomplished through a motion for summary disposition, it also may be accomplished as part of the contention admission phase of the proceeding.").

35 Proposed New and Amended Contentions at 2.

36 *See* Motion at 3, 8; New and Amended Contentions at 2–6.

conclude that proposed Amended Contention 1A meets the "good cause" test and posits an admissible contention. Thus, we will admit Amended Contention 1A.[37]

a. "Good cause" elements are met

To meet the remaining two "good cause" test elements, Organizational Intervenors must show that "[t]he information upon which the filing is based was not previously available" and "[t]he information upon which the filing is based is materially different from information previously available."[38] They have done so here.[39]

Proposed Amended Contention 1A is an attempt by Organizational Intervenors to update an already-admitted contention to address the actual treatment of the substance of that contention by the Staff in the EA. Contention 1A addressed the treatment of the issue by Powertech in its ER. However, the Staff's EA was not simply a cut-and-paste of that ER; it reflects original work by the Staff. For example, the aspect of proposed Amended Contention 1A that addresses the abandonment of a tribal cultural resources survey "proposed [by the Staff] in the December 2025 draft Programmatic Agreement" is new and materially different from Powertech's ER, which did not contemplate and then "abandon" (wrongly, from the perspective of the Organizational Intervenors) conducting a new survey.

And to the extent proposed Amended Contention 1A discusses or posits claims related to information available previously or not materially different from information available previously, it is not adding anything to the contention that was not included as part of the

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[37] For clarity, while formerly admitted Contention 1A migrated, given that we now admit Amended Contention 1A, only Amended Contention 1A remains.

[38] 10 C.F.R. § 2.309(c)(1)(i)–(ii); *see* Section II.B.1.a., above, regarding timely filing element of "good cause" test being met.

[39] The Staff concedes that proposed Amended Contention 1A is admissible, opting not even to address the "good cause" elements. *See* Staff Answer at 9–10 ("And having agreed that Amended Contention 1A is admissible, regarding NEPA compliance as to the NRC Staff's description of the Tribe's cultural and historic resources, the NRC Staff does not further discuss the contention admissibility requirements of 10 C.F.R. §§ 2.309(c) and 2.309(f)(1) with respect to this contention.").

already-admitted contention. We see nothing in the Commission's regulations or caselaw (and Powertech did not cite anything) that requires an amended contention to include only new information; the contention can continue to include existing information if that existing information continues to support an already-admitted aspect of the contention—which proposed Amended Contention 1A does.[40] And the amended contention may phrase that existing information differently from the prior contention as long as the substance of that aspect of the contention does not change. Indeed, such a practice simply results in a more efficient focusing at the evidentiary hearing on the actual document at issue.

b. Contention admissibility elements are met

We begin this section by noting that at oral argument, all Parties agreed Amended Contention 1A is not an attempt to enlarge or change the scope of already-admitted Contention 1A but simply is an amendment to direct it to the now-operative environmental document, the Staff's EA.[41] With that understanding, all Parties agreed that proposed Amended Contention 1A should be admitted.[42] Moreover, in its briefing, the Staff concedes that Organizational Intervenors' proposed Amended Contention 1A should be admitted in its entirety.[43]

In its briefing, Powertech overreaches when it argues that the three bases of the contention (as opposed to the contention itself) must satisfy the admissibility elements. While proposed Amended Contention 1A asserts three bases, the contention is that the EA "fails to comply with NEPA and 10 C.F.R. Part 51 because it contains an inadequate, inaccurate, or incomplete description of the cultural and historical resources of the Oglala Sioux Tribe in the

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40 *See Long Mott Energy, LLC* (Long Mott Generating Station), LBP-26-4, 103 NRC __, __ (slip op. at 15) (Jun. 25, 2026) ("Section 2.309(c) does not mandate that every underlying fact supporting an amended contention be footed in 'new information.'").

41 *See* Tr. at 234:2–235:10.

42 *See id.* at 230:9–11, 232:24–233:2, 234:22–235:16.

43 *See* Staff Answer at 9. The Staff also notes that it plans to present evidence at the evidentiary hearing on all three reasons supporting the asserted error raised by proposed Amended Contention 1A. *Id.*

Dewey-Burdock Project area . . . ."[44] That reading is confirmed later in their submission wherein the Organizational Intervenors detail the "[s]pecific statement" of their contention: "whether the EA's description of the affected environment omits or misdescribes the Oglala Sioux Tribe's cultural and historical resources, in violation of NEPA and 10 C.F.R. §§ 51.30, 51.45, and Part 51."[45]

Given that admitted Contention 1A was addressed to Powertech's ER and (as all concede) that contention migrated to the Staff's EA, we view this proposed amendment simply as a way to ensure the formulation of the contention accurately addresses the differently-worded document now at issue. Further, we view the three reasons provided by Organizational Intervenors as echoes of the claims they made in their initial petition when their contention challenged the ER, essentially ensuring the contention is directed to the Staff's now-issued environmental document. The first reason references the EA's reliance on surveys conducted that did not include the Oglala Sioux Tribe. That echoes, for example, the Organizational Intervenors' claims in the initial contention that "[t]he [ER] discusses cultural resources at §§ 2.4.1, 5.2.7, 7.2.4 but fails to account for the fact that the lack of involvement by the Oglala Sioux Tribe renders the description of cultural resources incompetent."[46] The second reason references the EA's failure to rely on a survey that included the Oglala Sioux Tribe's participation and the reasons given (or not given) for that failure. That echoes the entire gist of the admitted Contention 1A. The third reason references the EA's improper (in the view of the Organizational Intervenors) reliance on deferred identification and evaluation of cultural sites

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[44] *See* Proposed New and Amended Contentions at 2.

[45] *Id.* at 5.

[46] Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (Oct. 8, 2024) at 14 (citing unnumbered encl., Powertech, Dewey-Burdock Project, [LRA] for SUA-1600 Fall River and Custer Counties, South Dakota, Combined Technical Report/Environmental Report (Mar. 2024) (ADAMS Accession No. ML24082A062) ("ER"). The cited sections discuss prior completed cultural resources surveys, on which the ER relied.

until after discovery during Powertech's ground-disturbing activities. Even Powertech concludes that such a rationale is merely a continuation of the substance of already-admitted Contention 1A: "Powertech does not read basis (c) as expanding the scope of the existing Contention 1A, but rather a corollary to the existing basis of the contention that the lack of a survey involving the Tribe at any time raises a NEPA deficiency."[47]

Given that we find proposed Amended Contention 1A meets both the "good cause" and contention admissibility standards, we grant the Motion as to Amended Contention 1A and admit that amended contention as drafted by Organizational Intervenors.

3. <u>Amended Contention 1B</u> – The Environmental Assessment fails to explain or support its conclusion that the impacts of the Dewey-Burdock Project on cultural and historic resources will not be significant, where the EA concedes the project "would result in adverse effects on historic and cultural resources"; where the Staff's 2014 Supplemental Environmental Impact Statement assessed construction-phase impacts to those same resources as ranging from SMALL to LARGE; and where the no-significance conclusion rests entirely on avoidance buffers to be proposed and finalized by the licensee around sites, including burial sites, that have never been comprehensively identified or assessed with Oglala Sioux Tribe participation.[48]

As we explain below, Proposed Amended Contention 1B fails to cite legal support for its various assertions and fails to demonstrate a material dispute.[49] Thus, it is not admissible.

In support of proposed Amended Contention 1B, Organizational Intervenors make myriad legal assertions for which they fail to provide any legal support.[50] For example, they assert that "[a] finding of no significant impact cannot rest on avoidance buffers, proposed by the licensee, around sites of potential burial that have never been evaluated for eligibility with the participation of the Tribe whose members alone can assign their significance."[51] Yet they

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[47] Powertech Answer at 14; *see also* 10 C.F.R. §§ 2.319(j), 2.329(c)(1).

[48] Proposed New and Amended Contentions at 6.

[49] 10 C.F.R. § 2.309(f)(1)(v)–(vi).

[50] *Cf.* 10 C.F.R. § 2.309(f)(1)(vi).

[51] Proposed New and Amended Contentions at 7. Avoidance buffers are required by Stipulation 5 of the Programmatic Agreement and, generally, are areas around known or

cite no legal authority for that assertion.[52] In fact, the only legal authority Organizational Intervenors cite in the entirety of the section dealing with proposed Amended Contention 1B is 10 C.F.R. §§ 51.31–51.32, and that citation is made only to support the statement that "the significance conclusion is the FONSI—it is dispositive of whether an [EIS] must be prepared and whether the license may issue on this record."[53] As demonstrated below, though, that lone legal citation of two regulations cannot bear the weight of the posited amended contention.

Section 51.31 has three subsections, one dealing with environmental assessments in "general" situations (applicable here), one dealing with environmental assessments related to "standard design certification" (not applicable here), and the last dealing with environmental assessments related to a "manufacturing license" (not applicable here).[54] The "general" subsection merely directs the Staff to "determine whether to prepare an environmental impact statement or a finding of no significant impact on the proposed action" and allows (but does not require) preparation of a draft FONSI.[55] We fail to see how section 51.31 can support the proposed Amended Contention 1B as posited by Organizational Intervenors, and their proposed contention fails to provide any explanation beyond the single sentence cited above.[56]

Section 51.32 has two subsections, one detailing the six elements any FONSI must contain and the other setting forth a Commission FONSI in four discrete situations (none of

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discovered sites of religious and cultural significance within which, to the maximum extent possible, Powertech will not conduct ground disturbing activities. *See* Programmatic Agreement at 6–7.

52 *Cf. Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 611 (9th Cir. 2010) ("Plaintiffs have not demonstrated that the exclusion zones will fail to prevent any adverse effects to these features.").

53 Proposed New and Amended Contentions at 8; *see also* Section II.B.4.a., below, regarding whether the regulations require completion of an EIS here.

54 *See* 10 C.F.R. § 51.31.

55 *Id.* § 51.31(a).

56 *See* Proposed New and Amended Contentions at 6–8.

which are applicable here).[57] While citing section 51.32 might support a contention claiming the Staff's FONSI failed to comply with the requirements of what a FONSI must contain, that is not the amended contention Organizational Intervenors proffer. Thus, we also are at a loss to see how section 51.32 provides any legal support for the proposed amended contention as framed.

In addition to lacking legal support, proposed Amended Contention 1B also fails to demonstrate a genuine dispute with the Staff's EA because it fails to engage with that document. While we understand the Organizational Intervenors may disagree with the conclusion reached in the EA, they cannot turn that disagreement into an admissible omission contention simply by ignoring the contents with which they disagree.[58] The proposed amended contention states that the EA "fails to explain or support" the conclusion of no significant impact on historic and cultural resources.[59] Yet the EA does explain or support that conclusion—and does so in detail over the course of nearly four pages.[60] Further, the EA expressly incorporates and repeatedly cites and relies upon the Programmatic Agreement as additional support for its FONSI.[61] The failure to engage with that explanation equates to a failure to demonstrate a material dispute.[62]

Organizational Intervenors have not demonstrated that the proposed amended contention meets two of the six contention admissibility elements. The failure to meet even one

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[57] 10 C.F.R. § 51.32.

[58] We read proposed Amended Contention 1B as a contention of omission based on its plain language (e.g., "fails to explain or support"). However, our admissibility conclusion would remain the same even if the contention were read as one of sufficiency/adequacy given the Organizational Intervenors' failure to engage with the explanation and support in the EA, as we explain next.

[59] Proposed New and Amended Contentions at 6.

[60] *See* EA at 1-47–1-51.

[61] *See id.*; Programmatic Agreement.

[62] *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-24-3, 99 NRC 39, 61 (2024); 10 C.F.R. § 2.309(f)(1)(vi); *see also Oglala Sioux Tribe v. NRC*, 45 F.4th 291, 305 (D.C. Cir. 2022) (dismissing challenge to agency's NEPA analysis for "continu[ing] to ignore" and "fail[ing] to engage with the agency's actual . . . analysis").

of the contention admissibility elements means a contention is not admissible.[63] Thus, we must conclude that proposed Amended Contention 1B is not admissible, and we deny the Motion as to proposed Amended Contention 1B.

4. <u>New Contention 5</u> – The NRC Staff's preparation of an Environmental Assessment and Finding of No Significant Impact, rather than an environmental impact statement or supplement to an EIS, violates NEPA and 10 C.F.R. §§ 51.20(a) and 51.20(b)(8), because (1) licensing of a Part 40 uranium milling facility is an action for which the Commission's regulations require an EIS or a supplement to an EIS; and (2) in the alternative, the proposed action may significantly affect the quality of the human environment — including conceded adverse effects on historic and cultural resources that the Staff's prior EIS for this same project assessed as ranging up to LARGE — such that the FONSI is arbitrary and unsupported.[64]

Contention 5 does not meet all six contention admissibility elements and, therefore, is not admissible. At its core, Organizational Intervenors' proposed Contention 5 is based upon the view that (i) the NRC's regulations required the Staff to issue an EIS or SEIS instead of an EA or (ii) the claimed significant cultural and historical impacts mean the Staff's issuance of a FONSI was arbitrary and capricious.[65] Neither view presents an admissible contention.

a. NRC regulations do not require the Staff to complete an EIS for renewal of a source material license for uranium milling

Organizational Intervenors rely on three arguments to support their assertion that the NRC's regulations required the Staff to issue an EIS instead of an EA when renewing a source material license for uranium milling. All three arguments are based on a view that does not distinguish between the initial issuance of a source material license for uranium milling and the issuance of a renewed source material license for uranium milling. All three arguments are

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63 10 C.F.R. § 2.309(f)(1).

64 Proposed New and Amended Contentions at 8.

65 Proposed New and Amended Contentions at 8.

erroneous, meaning Organizational Intervenors have not demonstrated that a "genuine dispute exists . . . on a material issue of law or fact."[66]

First, Organizational Intervenors cite 10 C.F.R. § 51.20(b)(8) and claim it requires the NRC to issue an EIS when issuing a renewed source material license for uranium milling. We disagree.

The "interpretation of any regulation must begin with the language and structure of the provision itself. . . . Further, the entirety of the provision must be given effect."[67] Section 51.20(b)(8) "require[s] an [EIS] or [an SEIS]" for "[i]ssuance of a license to possess and use source material for uranium milling or production of uranium hexafluoride pursuant to part 40 of this chapter." While Organizational Intervenors' claim that an EIS or SEIS may be correct for the initial "[i]ssuance of a license," the regulation does not require an EIS or SEIS for *renewal* of a source material license for uranium milling.

That silence speaks volumes here when other subparts of section 51.20(b) specifically require an EIS or SEIS for the issuance of licenses *and renewals*. Section 51.20(b)(2) applies the EIS or SEIS requirement for the "[i]ssuance *or renewal* of a full power or design capacity license to operate a nuclear power reactor . . . ." (emphasis added). Further, section 51.20(b)(3) requires an EIS or SEIS for "[i]ssuance of a permit to construct or a design capacity license to operate *or renewal* of a design capacity license to operate an isotopic enrichment plant pursuant to part 50 of this chapter." (emphasis added). Finally, section 51.20(b)(11) requires an EIS or SEIS for "[i]ssuance *o[r] renewal* of a license authorizing receipt and disposal of radioactive waste from other persons . . . ." (emphasis added).

The Commission knows how to require the use of an EIS or SEIS for renewal of licenses; but did not require it for renewal of the type of license at issue here (uranium milling).

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66 10 C.F.R. § 2.309(f)(1)(vi).

67 *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988).

In such a situation, the law counsels against reading the missing text into the regulation at issue.[68] As the Commission knows how to require an EIS or SEIS for the issuance *or renewal* of a license for uranium milling but did not, we must give effect to that choice.[69] To do otherwise would, "under the guise of interpreting a regulation, [ ] create *de facto* a new regulation," something we are not permitted to do.[70]

Second, Organizational Intervenors argue that a Federal Register notice by the NRC in the licensing of the Moore Ranch ISR facility supports their view that an EIS or SEIS was required here.[71] Yet that notice related to the initial licensing of the Moore Ranch ISR facility,

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[68] *See, e.g.*, *La. Energy Servs, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299–301 (1997); *Exelon Generation Co., LLC* (Dresden Nuclear Power Station, Units 2 & 3), LBP-14-4, 79 NRC 319, 371 (2014) (quoting *Charlissa C. Smith* (Denial of Senior Reactor Operator License), LBP-13-3, 77 NRC 82, 90 (2013)); *see also Bittner v. United States*, 598 U.S. 85, 94 (2023) ("When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*). The government's interpretation defies this traditional rule of statutory construction.").

[69] *See, e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), CLI-22-2, 95 NRC 26, 32 (2022) ("The fact that the Commission deliberately confined the applicability of section 51.53(c)(3) to initial license renewal applicants (and subsequently declined to change this language, even when editing other parts of the provision through notice-and-comment rulemaking) reflects an intent—on which the public certainly would have been justified in relying . . . ."); *Claiborne Enrichment Ctr.,* CLI-97-15, 46 NRC at 302–03 ("For certain other licensing requirements, we specifically directed that Part 50 standards be applied. Our Hearing Order's silence as to Part 50 financial qualification standards supports the position we take today—that we are not bound as a matter of law to apply Part 50 financial qualification provisions to LES's Part 70 application.").

[70] *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). And to the extent Organizational Intervenors are challenging the regulations' failure to require an EIS or SEIS for renewals of uranium milling licenses, the NRC's regulations may not be challenged in any adjudicatory proceeding absent a waiver from the Commission. *See* 10 C.F.R. § 2.335(a); *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 76 NRC 377, 380 (2012). Organizational Intervenors did not seek such a waiver here.

[71] *See* Proposed New and Amended Contentions at 9.

not a renewal proceeding.[72] Thus, and especially in light of the above discussion, the treatment of the Moore Ranch ISR facility initial licensing is irrelevant.

In advancing their Moore Ranch ISR claim, Organizational Intervenors appear to rely on the ISR Generic Environmental Impact Statement ("GEIS") wherein they glean some uncited requirement that the Staff must complete an EIS or SEIS.[73] Yet such a reading is unsupported because while the GEIS states that the Staff "will prepare" an SEIS in the *initial* license application, it expressly allows the use of an EA in the context of a license *renewal* application.

> As discussed previously, the NRC staff will prepare an environmental review document in support of its review of ISL-related licensing actions (i.e., new license, renewal or amendment). *For new ISL license applications, the NRC staff will prepare a[n] SEIS.* . . .
>
> *Before taking a licensing action on a licensee's proposal to* amend or *renew its existing NRC license, the NRC may prepare an environmental assessment* and if so, also may make the draft EA and the accompanying draft Finding of No Significant Impact (FONSI) available for public comment.[74]

Third, Organizational Intervenors claim that the Staff's decision to issue an EA in this license renewal "is an unexplained departure from the agency's treatment of this very project," noting the Staff prepared an SEIS for the initial license application.[75] Far from being unexplained, the Staff's decision to issue an EA for the license renewal application simply follows the governing regulations and the GEIS, both outlined above. Also, the Staff's decision

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72 *See* Uranium One Incorporated; Moore Ranch [ISR] Project; New Source Material License Application; Notice of Intent to Prepare a[n] [SEIS], 74 Fed. Reg. 42,332, 42,332 (Aug. 21, 2009).

73 *See* Proposed New and Amended Contentions at 9–10.

74 NUREG-1910, Vol. 1, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, Final Report Chs. 1–4, at 1.8.4 (May 2009) (emphasis added) (ADAMS Accession No. ML091480244); *see also id.* at fig. 1.7-1 (providing flow chart for review process, which specifically notes the ability to issue an EA instead of an EIS); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 338 (2012) (GEIS documents are "nonbinding guidance").

75 Proposed New and Amended Contentions at 10.

to issue an SEIS in the initial license decision and an EA in this license renewal proceeding is not the NRC "changing course," which might carry with it certain legal obligations, as the Organizational Intervenors argue.[76] As Powertech explained, the fact that the Staff prepared

> two different documents under two separate regulations, one that applies to new projects that have not been previously evaluated and one that applies to projects that have been previously evaluated and licensed, is not a change in policy. Each of the cases cited by Organizational Intervenors involve a direct reversal of position on a single regulation, whether via changing the regulation or changing interpretation of how the regulation is applied. Here, there are two separate regulations that serve two separate purposes.[77]

Relatedly, Organizational Intervenors then attempt to argue that while the Staff has chosen this same path (issuing an EA in the license renewal proceedings) with other ISL facilities, the fact that those other facilities already had been constructed, unlike the Powertech facility, should result in a different outcome here.[78] Yet other than restating the constructed/not-constructed dichotomy and baldly asserting that "the renewal decision [when the facility is not yet constructed] is functionally the initial licensing decision made a second time,"[79] Organizational Intervenors fail to support the argument that license renewals should be treated differently only if the facility has been constructed. They fail to provide any explanation as to how the Commission's regulations, which do not differentiate between renewals dealing with constructed versus not-constructed facilities, require the Staff to consider anew via a second SEIS the environmental impacts of construction and operation. Nor do the Organizational Intervenors provide any argument (other than cultural and historical environmental issues

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76 *Id.*

77 Powertech Answer at 21 (noting the Staff prepared the SEIS pursuant to 10 C.F.R. § 51.20(b)(8) but prepared the EA pursuant to 10 C.F.R. § 51.31(a)).

78 *See* Proposed New and Amended Contentions at 10–11.

79 *Id.* at 11.

addressed in other contentions) that the environment has changed significantly since the SEIS was issued such that complete reconsideration via a new SEIS would be necessary.[80]

Despite the requirement in section 2.309(f)(1)(vi), Organizational Intervenors have failed to demonstrate a genuine dispute of fact or law with the Staff's preparation of an EA instead of an EIS or SEIS for the license renewal. Accordingly, we cannot admit that aspect of proposed Contention 5.

b. Organizational Intervenors' FONSI argument lacks support

While Organizational Intervenors include a one sentence alternative argument in their Contention 5 heading claiming the Staff's FONSI was arbitrary and unsupported, that argument appears nowhere else in the section supporting and explaining proposed Contention 5. That failing is fatal as it means Organizational Intervenors have not met the contention admissibility standards for a contention based on that claim. Organizational Intervenors are aware they must provide "a brief explanation of the basis for the contention," one of the contention admissibility elements.[81] Yet nowhere in their "basis" section do they explain the underpinning of the FONSI argument aspect of proposed Contention 5.[82] Moreover, that absence makes it impossible to meet the Commission's stringent contention admissibility standards that require an explication of both the facts "which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing" and "the supporting reasons for each dispute."[83]

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80 *Cf.* 10 C.F.R. § 2.309(f)(1)(ii), (iv), (vi).

81 *Id.* § 2.309(f)(1)(ii); *see also* Proposed New and Amended Contentions at 11.

82 *See* Proposed New and Amended Contentions at 9–11.

83 10 C.F.R. § 2.309(f)(1)(v), (vi); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016) (indicating Commission's contention admissibility standards are strict and the failure to satisfy any element disqualifies a contention from admission).

Neither aspect of proposed Contention 5 meets all six of the Commission's contention admissibility elements. Accordingly, we deny Organizational Intervenors' Motion relative to Contention 5.

5. <u>New Contention 6</u> – The Environmental Assessment violates NEPA's hard-look requirement and the APA's requirement of reasoned decisionmaking because the Staff declined to obtain reasonably available information essential to its analysis of impacts on the Oglala Sioux Tribe's traditional cultural places: having itself proposed, in the December 2025 draft Programmatic Agreement, a tribal cultural resources survey based on the methodology NRC Staff and the Tribe jointly developed in September 2021, the Staff abandoned that survey solely in response to the applicant's cost-and-time objections, contrary to the Staff's own site-visit.[84]

As explained below, we conclude that Organizational Intervenors have met both the "good cause" test and contention admissibility elements for proposed Contention 6. We thus will admit proposed Contention 6 as proffered but, presuming no summary disposition motion is filed by the October 2, 2026, deadline,[85] we will hold a status conference with the Parties early during the week of October 5, 2026, to discuss contention simplification and/or consolidation,[86] given the conceded overlap between this contention and Amended Contention 1A.[87]

a. "Good cause" test elements are met

The information on which the contention is based, i.e., the Staff's proposal of a survey and then its decision not to conduct that survey, was not available to Organizational Intervenors before issuance of the EA.[88] Moreover, the proffering and subsequent recantation of a survey,

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84 Proposed New and Amended Contentions at 11–12.

85 Second Amended Order at 7; *see also* Footnote 237, below.

86 *See* 10 C.F.R. §§ 2.319(g), (j), 2.329(c)(1).

87 Staff Answer at 15; Powertech Answer at 23; Tr. at 236:16–24, 240:6–13, 247:4–13.

88 We recognize the Staff included its changed view of conducting a survey in a second draft programmatic agreement it sent out for public comment. But the Staff's final decision not to conduct that survey was not known until it issued the EA, which incorporated the final programmatic agreement.

is materially different from the ER, which never contemplated conducting a new survey. We conclude that the "good cause" elements are met here.[89]

b. Contention admissibility elements are met

In its Answer, the Staff argues that proposed Contention 6 "raise[d] no issues that are not already encompassed by Amended Contention 1A, and so it should be dismissed."[90] At oral argument, counsel for the Staff expounded on that position by asserting an intent

> to present evidence on the merits as to Amended Contention 1A[,] . . . [which] evidence would also address the arguments in Contention 6 which is why we stated it was duplicative. And I don't think we have a specific response to the APA argument. We would consider that our evidence would address that as well.[91]

Powertech argues in its Answer that at least some part of proposed Contention 6 is duplicative of Amended Contention 1A, necessitating dismissal or consolidation of the duplicative aspect of this proposed contention.[92] Powertech's counsel then explained at oral argument that Powertech "generally viewed this [Contention 6] similarly to 1A but viewed some pieces of it as potentially expanding the scope."[93] Powertech's counsel went on to concede, though, that the issue of whether the Staff violated NEPA by declining to obtain reasonably available information essential to its analysis of impacts on the Oglala Sioux Tribe's traditional cultural places was the portion of this proposed contention that Powertech viewed as similar to Amended Contention 1A.[94]

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[89] *See also* Motion at 4–5; Section II.B.1.a., above.

The Staff does not address the "good cause" test elements as to this proposed contention in its Answer. *See* Staff Answer at 15–16. And Powertech challenges only the first element of the "good cause" test (whether the information was available previously) and only as it relates to one of the "bases" identified by Organizational Intervenors. *See* Powertech Answer at 22–25.

[90] Staff Answer at 15.

[91] Tr. at 240:7–13.

[92] Powertech Answer at 23–25.

[93] Tr. at 237:5–7.

[94] *See* Tr. at 237:7–9; Scheduling Order at 2.

That view of the issue, though, is the sum and substance of proposed Contention 6 as it is nearly a verbatim recitation of the language before the colon in Organizational Intervenors' statement of the contention.[95] We view the items that follow the colon in the statement of the contention, i.e., the things Powertech's counsel identified at oral argument as possibly expanding the scope,[96] simply as "bases" or facts that support the proposed contention. As another licensing board explained in another uranium mining case, "bases" are "intended 'to put the other parties on notice as to what issues they will have to defend against or oppose,' bases can frame the scope of the contention."[97]

Here, the proposed *contention* claims that the Staff violated NEPA and the APA because the Staff "declined to obtain reasonably available information essential to its analysis of impacts on the Oglala Sioux Tribe's traditional cultural places."[98] That constitutes a specific statement of the issue of law or fact to be raised that no one questions (nor could they) as being within the scope of this proceeding.[99] The contention itself, along with the Organizational Intervenors' briefing, supply the required "brief explanation of the basis" for the contention.[100] The Organizational Intervenors also include myriad facts and documents in their New and Amended Contention filing sufficient to meet the requirement of 2.309(f)(1)(v), and neither the Staff nor Powertech challenge this element. Finally, the issue of impacts to Oglala Sioux Tribe historical

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[95] *Compare* Scheduling Order at 2 *with* Proposed New and Amended Contentions at 11–12 (statement of contention in bold).

[96] *See* Tr. at 237:10–18.

[97] *Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-18-3, 88 NRC 13, 21 (2018) (citation omitted); *see also Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, 68 NRC 431, 447 (2008) (citing *Entergy Nuclear Vt. Yankee* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 557 (2004)) ("[L]icensing boards admit contentions, not bases.").

[98] Proposed New and Amended Contentions at 11.

[99] *See* 10 C.F.R. § 2.309(f)(1)(i), (iii).

[100] *Id.* § 2.309(f)(1)(ii); *see also Marsland Expansion Area*, LBP-18-3, 88 NRC at 39 ("[M]andating an exhaustive summary of all aspects of a petitioner's argument would be tantamount to asking the petitioner to prove its case at the contention admissibility stage").

and cultural resources clearly is material to the findings the Staff must make (*see,* e.g., Amended Contention 1A) and this contention demonstrates a genuine dispute on a material issue of law or fact.[101] Accordingly, and subject to our caveat at the beginning of this section about possible simplification or consolidation with Amended Contention 1A, we grant the Motion as to proposed Contention 6 and admit Contention 6 as framed by Organizational Intervenors.

6. <u>New Contention 7</u> – The NRC Staff has failed to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, in that (a) the Staff has not made a reasonable and good faith effort to identify historic properties and properties of religious and cultural significance to the Oglala Sioux Tribe, 36 C.F.R. § 800.4(b); (b) the Staff failed to conduct government-to-government consultation with the Oglala Sioux Tribe through its Tribal Council as the Tribe's designated representative, 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2)(ii), despite the Tribe's formal request and the Staff's written acknowledgment; (c) the circumstances of this undertaking do not authorize the use of a programmatic agreement under 36 C.F.R. § 800.14(b)(1); and (d) the executed Programmatic Agreement is structurally incapable of satisfying Section 106 because it excludes affected Tribes from signatory status, enforceable dispute resolution, and meaningful participation in the resolution of adverse effects.[102]

As detailed below, we conclude that while Organizational Intervenors have met the "good cause" test for proposed Contention 7, they have met the contention admissibility elements only for aspects (a) and (c) thereof. Accordingly, we admit a reformulated version of proposed Contention 7 as detailed below.

Before we dive into the analysis of this proposed contention, an explanation of what the NHPA is and what it requires is in order. "Section 106 of NHPA is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs."[103] Pursuant to section 106, an agency must

> make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register . . .; assess the effects of the

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[101] *See* 10 C.F.R. § 2.309(f)(1)(iv), (vi).

[102] Proposed New and Amended Contentions at 16.

[103] *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013) (citation omitted).

> undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects. The [agency] must confer with [relevant tribes] and seek the approval of the Advisory Council on Historic Preservation.[104]

When consulting with a tribe,

> [t]he NHPA implementing regulations require agencies to provide a tribe with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."[105]

Additionally, that consultation "must recognize the government-to-government relationship between the Federal Government and Indian Tribes."[106]

a. "Good cause" test elements are met

As this proposed contention arises under the NHPA, Commission precedent dictates that such a contention is not ripe, i.e., it cannot be raised, until after the Staff has issued its NEPA document.[107] Yet, the Commission still requires that such a contention, after it ripens, meet the "good cause" test, in addition to the contention admissibility standards, before it can be admitted.[108] Organizational Intervenors meet that "good cause" test here.

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[104] *Te-Moak Tribe of W. Shoshone of Nev.*, 608 F.3d at 607 (citation omitted; last alteration added).

[105] *Id.* at 608 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)).

[106] *Id.* (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)).

[107] *See Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 20 n.49 (2014); *Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 565–66 (2009); *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350–51 (2009).

[108] *See Crow Butte*, CLI-09-9, 69 NRC at 350–51. We note that while the regulations cited by the Commission for this conclusion in its 2009 decision no longer contain the referenced language, the language that now appears in that cited regulation arguably is broader than what existed in 2009. *Compare Crow Butte*, CLI-09-9, 69 NRC at 351 n.104, *with* 10 C.F.R. § 2.309(f)(2) ("Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section."). Thus, even though

First, "[t]he information upon which the filing is based was not previously available."[109] The information on which proposed Contention 7 is based is the NRC's purported non-compliance with the NHPA and, as the Commission has emphasized, the NRC's attempts to comply with the NHPA are not complete until the Staff issues its NEPA document.[110] Second, "[t]he information upon which the filing is based is materially different from information previously available."[111] There was no information available previously on the issue of the NRC's compliance with the NHPA on the pending license renewal application, let alone a complete view of those compliance efforts via the agency's issuance of its NEPA document. Thus, *a fortiori* the information now available is materially different from what existed previously. We conclude, therefore, that proposed Contention 7 meets that "good cause" test.[112]

b. Two posited aspects of proposed Contention 7 meet all six contention admissibility factors

In proposed Contention 7, Organizational Intervenors claim the NRC "failed to comply with Section 106 of the [NHPA] and its implementing regulations" in four discrete but related

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a participant is precluded from filing an NHPA contention before the hearing opportunity notice deadline in the Federal Register, we appear to be bound to apply to any such contention filed after the Federal Register deadline the "good cause" test and the regular contention admissibility test. But given the Commission's repeated statements that obligations to comply with the NHPA, especially government-to-government consultation, are those of the NRC and not the applicant, it is difficult to see how an NHPA contention would not easily meet the "good cause" test as long as the contention is filed timely after the NEPA document issues, like Contention 7 was here. *See* Section II.B.1.a., above (finding timely filing element met for all proposed contentions unless stated otherwise).

[109] 10 C.F.R. § 2.309(c)(1)(i).

[110] *See, e.g.*, *Crow Butte*, CLI-09-9, 69 NRC at 350–51.

[111] 10 C.F.R. § 2.309(c)(1)(ii).

[112] Tellingly, the Staff devotes one sentence in its Answer to the issue whether proposed Contention 7 meets the "good cause" test, conceding that it did. *See* Staff Answer at 16 ("The claims in Contention 7 directed at the EA and PA meet the good cause criteria under 10 C.F.R. § 2.309(c) for contentions filed after the initial deadline."). Powertech devotes similar attention, also conceding that at least one part of proposed Contention 7 meets the "good cause" test. *See* Powertech Answer at 25 ("Without conceding the merits of Contention 7's claims, Powertech acknowledges that basis (a) meets the good cause and contention admissibility criteria and thus is admissible.").

aspects.[113] Of those four, we find that only the first and third meet the six-part contention admissibility requirements, resulting in an admissible contention as reformulated to incorporate only those two aspects.

i. Failure to make a reasonable and good faith effort to identify historic, religious, and cultural properties

We begin our analysis by noting that, without conceding the merits, both the Staff and Powertech concede the admissibility of this first aspect of proposed Contention 7.[114] We agree that the first aspect of proposed Contention 7 meets the contention admissibility standards and is admissible.

Organizational Intervenors provide a specific statement of the issue of law and fact they contest and provide a brief explanation for the basis thereof.[115] They also demonstrate that the issue they raise (i.e., the effort to identify historic, religious, and cultural properties) is within the scope of this proceeding and that it is "material to the findings the NRC must make to support the action that is involved in the proceeding."[116] Finally, Organizational Intervenors provide a "concise statement of the alleged facts or expert opinions which support [their] position on the issue and on which [they] intend[ ] to rely" and show "that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[117] Thus we grant the Motion as to this aspect of proposed Contention 7 and so admit this portion of the contention for further litigation as reformulated in Section II.B.6.c. below.

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113 Proposed New and Amended Contentions at 16.

114 *See* Powertech Answer at 25; Staff Answer at 16–17; Tr. at 227:20–228:1, 230:11–13, 249:8–15, 249:21–22.

115 *See* 10 C.F.R. § 2.309(f)(1)(i)–(ii); Proposed New and Amended Contentions at 16–18.

116 10 C.F.R. § 2.309(f)(1)(iii)–(iv); *see* Proposed New and Amended Contentions at 23.

117 10 C.F.R. § 2.309(f)(1)(v)–(vi); *see* Proposed New and Amended Contentions at 23–24.

ii. Failure to conduct government-to-government consultation

This second aspect of proposed Contention 7 is not admissible because Organizational Intervenors fail both to cite “facts or expert opinions which support [their] position on the issue” and to “show that a genuine dispute exists . . . on a material issue of law or fact.”[118] Organizational Intervenors base this aspect of the proposed contention upon a claim that the NRC failed to engage in required government-to-government consultation under the NHPA.[119] Yet such a contention ignores the substance of the very documents Organizational Intervenors cite. When the substance of those documents is considered, the entire purported support for this aspect of proposed Contention 7 falls away and reveals that the NRC attempted to engage the Oglala Sioux Tribe in government-to-government negotiations but the Oglala Sioux Tribe refused to participate.

By reviewing the documents Organizational Intervenors cite, we are not requiring that they prove their contentions now.[120] Instead, we simply are examining “the information, facts, and expert opinions provided by the petitioner . . . to confirm that the petitioner does indeed supply adequate support for the contention.”[121] Much like federal district courts are to ignore complaint allegations that are contradicted by the documents cited by a plaintiff in support of its

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118 10 C.F.R. § 2.309(f)(1)(v)–(vi).

119 *See* Proposed New and Amended Contentions at 19–21.

120 *See, e.g.*, *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 443 (2011) (“we do not consider the merits of [petitioners’] arguments” at the contention admissibility stage).

121 *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 955 (2009); *see also USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (“We expect our licensing boards to examine cited materials to verify that they do, in fact, support a contention.”); Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (“The Commission seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation. . . . The Commission should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”).

complaint,[122] licensing boards are not forced to accept as true allegations in a contention that are contradicted by the very documents relied upon by the petitioner or intervenor. "'[M]aterials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged,' otherwise, the aims of the rules and of Congress would be thwarted."[123] Here, engaging in that permitted review of the documents Organizational Intervenors cite reveals that this aspect of proposed Contention 7 is unsupported and fails to establish a genuine dispute.

The main support advanced for this aspect of the Organizational Intervenors' proposed contention is an April 23, 2025 response letter from the NRC to the Oglala Sioux Tribe.[124] That letter begins by noting the NRC "received your letter dated March 12, 2025, regarding the National Historic Preservation Act (NHPA) Section 106 process for the" license renewal at issue in this proceeding.[125] That referenced March letter was sent via email on March 20, 2025, from the Oglala Sioux Tribe's attorney in this proceeding, Jeff Parsons.[126] In his cover email, Mr.

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122 *See, e.g.*, *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 454 (7th Cir. 1998) ("It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.").

123 *Beyond Nuclear v. NRC*, 704 F.3d 12, 21 (1st Cir. 2013) (quoting *Calvert Cliffs 3 Nuclear Project, LLC. & Unistar Nuclear Operating Servs. LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 750 (2010)). There, the court of appeals upheld a Commission decision that denied admission of a contention because, in part, the documents cited by the petitioner did not support the allegations in the contention. *See also Beyond Nuclear, Inc. v. NRC*, 113 F.4th 956, 967–68 (D.C. Cir. 2024) (concluding that allegations in a contention unsupported by the documents cited are speculation, which are "insufficient to raise a genuine dispute of material fact.").

124 *See* Proposed New and Amended Contentions at 19–21; Letter from Michelle Rome, Chief, Office of Nuclear Material Safety and Safeguards, NRC, to Trina Lone Hill, Fifth Member's Office and Tribal Historic Preservation Office, Oglala Sioux Tribe (Apr. 23, 2025) (ADAMS Accession No. ML25101A288) ("April 23, 2025 Letter"); *see also* Programmatic Agreement, app. B, at B-4 (Cultural Resource Identification Efforts).

125 April 23, 2025 Letter at 1.

126 *See* Email from Jeffrey C. Parsons, Senior Attorney, Western Mining Action Project, to Diana Diaz Toro and Kevin Roach, NRC (Mar. 20, 2025) (ADAMS Accession No. ML25085A421) ("March 20, 2025 Email"); *see also* Programmatic Agreement, app. B, at B-4.

Parsons explained that the March 12, 2025 letter he enclosed was from Trina Lone Hill, the Oglala Sioux Tribe's "Tribal Historic Preservation Officer" ("THPO").[127] Mr. Parsons further stated that any response to Ms. Lone Hill from the NRC should include "Ms. Stacy Two Lance, Oglala Sioux Tribal Secretary, copied here," as well as himself and his co-counsel in this proceeding, Travis Stills.[128]

Ms. Lone Hill's March 12 letter begins by stating that the "Oglala Sioux Tribe Cultural Affairs and Historic Preservation Office" had received the NRC's January 24, 2025, letter regarding NHPA consultation and expressed that the "Office wishes to confirm that it is interested in participating in the consultation processes."[129] Ms. Lone Hill, the THPO, then explained the Oglala Sioux Tribe's NHPA Section 106 Consultation Ordinance, a copy of which she attached to the letter.[130] The referenced ordinance provides that any request for consultation must be received by the Oglala Sioux Tribal Secretary, at which point the "Tribal Secretary [shall] immediately notify all members of the Executive Committee and Tribal Council of each request for consultation" and "the Tribal President, or council members under established procedures, shall call a special council meeting for the purpose of responding to the request for consultation."[131]

Ms. Lone Hill then stated that "no communications with Office Staff, including this letter, may be considered government-to-government consultation until the Oglala Sioux Tribal Council

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127 March 20, 2025 Email at unnumbered p. 1.

128 *Id.*

129 *Id.* at unnumbered p. 3.

130 *Id.*; *see* Ordinance No. 11-10 of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe (An Unincorporated Tribe), Ordinance of the Oglala Sioux Tribal Council Establishing Procedures for Government-to-Government Consultation Between the Oglala Sioux Tribe and the United States Government, and Other Governments (June 7, 2011) (ADAMS Accession No. ML25070A215) ("Consultation Ordinance").

131 Consultation Ordinance § 7(d)–(e).

acts in accordance with the Ordinance."[132] But, in her next paragraph, Ms. Lone Hill stated that her

> Office will proceed at all deliberate pace in bringing the NRC Staff's consultation request to the Oglala Sioux Tribal Council. Please advise as to whether NRC Staff would be willing to present to the Oglala Sioux Tribal Council to provide background information related to the proposed project, *and we will propose available dates and times*. After such meeting, the Office is prepared and willing to move forward with next steps as directed by the Oglala Sioux Tribal Council, consistent with Ordinance 11-10.[133]

In accordance with Mr. Parsons' direction, and also in compliance with section 7(c) of the Consultation Ordinance, when the NRC responded to Ms. Lone Hill's letter, it sent the response to the Tribal Secretary, as well as Ms. Lone Hill and the Tribe's legal counsel.[134] The letter expressed the NRC's desire to engage in government-to-government consultation with the Oglala Sioux Tribe, accepted the offer to present to the Tribal Council, and accepted Ms. Lone Hill's offer to provide dates for that presentation.

> We are honored by the opportunity to engage with and receive feedback from the Oglala Sioux Tribal Council and provide a presentation regarding the NRC staff's review of the license renewal application for the Dewey-Burdock uranium recovery project. While we welcome the opportunity to meet in person, we also understand that schedules and logistics can sometimes present challenges. If it would be more convenient for the Tribal Council, we can arrange a virtual meeting. *Please let us know your preferred dates and times*.
>
> . . .
>
> Again, we appreciate the opportunity to engage in a Government-to-Government dialogue.[135]

Despite the NRC complying with the Consultation Ordinance (and the direction from the Tribe's legal counsel), and despite Ms. Lone Hill offering to "proceed at all deliberate pace" to

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[132] March 20, 2025 Email at unnumbered p. 3.

[133] *Id.* (emphasis added).

[134] *See* April 23, 2025 Letter at 1.

[135] *Id.* at 2 (emphasis added).

advise the Tribal Council of the NRC's desire to engage in government-to-government consultation, and despite Ms. Lone Hill's commitment to "propose available dates and times" for the NRC to present to the Tribal Council, the Tribe failed to provide those dates or respond pursuant to its own ordinance for more than thirteen months.[136] Yet in its proposed Contention 7, the Organizational Intervenors argue that silence by the Tribe was a failing by the NRC, meaning the NRC did not comply with the NHPA's consultation requirements.[137] Without citation to any on-point authority, Organizational Intervenors argue that the NRC should have pursued the Oglala Sioux Tribe for a response; anything less is a failure to consult.[138] Such a conclusion is untenable and attempts to foist onto the NRC an obligation the statute does not impose. The documents cited by the Organizational Intervenors make clear that if there was any failure here, it was the Oglala Sioux Tribe's failure to participate, not the NRC's failure to consult.[139]

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[136] March 20, 2025 Email at unnumbered p. 3; Proposed New and Amended Contentions at 19 (noting "more than thirteen months" elapsed from NRC's April 2025 letter and the signature on the NHPA Programmatic Agreement).

[137] *See* Proposed New and Amended Contentions at 19.

[138] The Organizational Intervenors' citation to a regulation on page 19 of their New and Amended Contentions filing is taken out of context and does not support the argument they advance.

[139] *See Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 942 (D. Ariz. 2017) ("Consultation is a two-way street. The administrative record makes clear that the Forest Service made numerous and substantial efforts to consult, while the Tribe made no meaningful effort to engage with the Forest Service. Were the Court to find that an agency had not satisfied the NHPA's consultation requirements simply because no actual consultation occurred, a tribe could block any undertaking by refusing to cooperate. The NHPA does not guarantee actual meaningful consultation, only that the tribe will have a reasonable opportunity for such consultation. The Tribe had such an opportunity here."); *San Carlos Apache Tribe v. U.S. Forest Serv.*, 803 F. Supp. 3d 879, 944 (D. Ariz. 2025) ("First, the obligation to engage in consultation is not the same thing as an obligation to reach an outcome that is acceptable from the perspective of the party being consulted."). The NHPA regulations simply require that consultation "provides the Indian tribe . . . a *reasonable opportunity to* identify its concerns about historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A) (emphasis added). *See also Narragansett Indian Tribe v. McMaster*, 176 F.4th 671, 686 (D.C. Cir. 2026) (explaining consultation under NHPA).

The facts as evidenced by the documents cited by Organizational Intervenors match up meaningfully to the factual record relied upon by the United States Court of Appeals for the Ninth Circuit when it upheld summary judgment against a claim of failure to consult under the NHPA.[140] In that case, the court of appeals noted that the

> record shows that [Bureau of Land Management ("BLM")] coordinated and collaborated with the [State Historical Preservation Officer ("SHPO")] in developing the cultural resources analysis for the EIS and the [Risk Management Program ("RMP")]. To the extent the SHPO's involvement was limited, this was the SHPO's choice, not the result of BLM's failure to provide the SHPO with opportunities to participate. . . . Because BLM consulted the SHPO and afforded the SHPO an opportunity to participate in the process, there was no violation of the regulations.[141]

Relatedly, the Organizational Intervenors take issue with the fact that the NRC continued to correspond with Ms. Lone Hill as the THPO throughout 2025 and 2026 despite the fact that the THPO "changed hands at least twice after early 2025, and Trina Lone Hill . . . has not held that office since May of 2025."[142] But nowhere do the Organizational Intervenors assert that the Oglala Sioux Tribe advised the NRC of the change, either officially or in response to any of the myriad correspondence the Tribe notes was sent to her as the THPO.[143] Instead, Organizational Intervenors' allegations can be read only to argue, without any cited support, that somehow the NRC was required to check nearly continuously with the Tribe to ensure that the

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The Organizational Intervenors note the NRC continued to engage with the THPO and others regarding the Dewey-Burdock project, even extending invitations to attend "multi-tribe government-to-government meetings, and to attend a site visit." Proposed New and Amended Contentions at 20. Even though not directly with the Oglala Sioux Tribal Council, "it would be surprising if those consultation efforts were *irrelevant* for purposes of evaluating the adequacy of the [NRC's] consultation efforts." *San Carlos Apache Tribe*, 803 F. Supp. 3d at 945 (emphasis in original).

140 *See Mont. Wilderness Ass'n*, 725 F.3d at 1010.

141 *Id.*

142 Proposed New and Amended Contentions at 20.

143 The Tribe's legal counsel did identify Ms. Lone Hill as the THPO in the March 20, 2025 Email.

NRC still was communicating with the THPO.[144] On this issue too, the Tribe bears the responsibility for failing to notify the NRC that a previously designated individual no longer was serving in that designated capacity.[145]

Thus, when analyzed, the factual support relied upon by the Organizational Intervenors to support this aspect of proposed Contention 7 not only does not support the proposed contention but directly refutes it. Therefore, for this aspect of proposed Contention 7, Organizational Intervenors have neither cited "facts or expert opinions which support [their] position on the issue" nor "show[n] that a genuine dispute exists . . . on a material issue of law or fact."[146] As such, we deny the Motion as to this aspect of proposed Contention 7.

iii. Improper use of a programmatic agreement

Organizational Intervenors contend that the NRC failed to comply with the NHPA and its regulations because "the circumstances of this undertaking do not authorize the use of a programmatic agreement under 36 C.F.R. § 800.14(b)(1)."[147] We conclude that this third aspect of proposed Contention 7 meets the contention admissibility elements.

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144 The Organizational Intervenors do cite 36 C.F.R. § 800.2(c)(2)(ii)(C) while claiming that "[a]n agency that has not troubled to learn the identity of the tribal official responsible for historic preservation has not carried its affirmative duty to consult with 'the representatives designated or identified by the tribal government.'" Proposed New and Amended Contentions at 21. Even if we accept for argument purposes Organizational Intervenors' premise that the NRC did not attempt to learn the identity of the THPO (which is a big ask on the facts set forth in the documents cited), if anything, the cited regulation cuts against the Organizational Intervenors as, grammatically, it appears to place the duty of identification on the Tribe. *See also* Powertech Answer at 26.

145 *Cf. Mont. Wilderness Ass'n*, 725 F.3d at 1010 ("To the extent the SHPO's involvement was limited, this was the SHPO's choice, not the result of BLM's failure to provide the SHPO with opportunities to participate."); *Concerned Citizens & Retired Miners Coal.*, 279 F. Supp. 3d at 942 ("Consultation is a two-way street. The administrative record makes clear that the Forest Service made numerous and substantial efforts to consult, while the Tribe made no meaningful effort to engage with the Forest Service. Were the Court to find that an agency had not satisfied the NHPA's consultation requirements simply because no actual consultation occurred, a tribe could block any undertaking by refusing to cooperate.").

146 10 C.F.R. § 2.309(f)(1)(v)–(vi).

147 Proposed New and Amended Contentions at 16.

Section 800.14(b)(1)(ii) permits the use of a programmatic agreement "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." According to Organizational Intervenors, the "effects [here] can be determined before approval if the identification effort is performed. Any present indeterminacy is self-created by the refusal to conduct the survey . . . ."[148] Thus, in this aspect of proposed Contention 7, Organizational Intervenors claim that if the identification process employed by Powertech and the NRC is faulty as claimed in the admittedly admissible contentions (e.g., Contentions 1A, 6, and 7A), the legal underpinning for use of a programmatic agreement is lacking.

In their respective Answers, the Staff and Powertech fail to address this issue head-on. Instead, the Staff argues that this aspect of the contention is inadmissible because it fails to engage with the Staff's explanation in the Programmatic Agreement justifying the appropriateness of using that document.[149] The explanation to which the Staff cites, though, addresses the Staff's reasoning as to why it maintains it was unable to determine *whether* effects will occur on historical, cultural, or religious resources, not *what* those effects may be if they were to occur.[150]

In its Answer, Powertech argues solely that the use of a programmatic agreement was approved by the United States Court of Appeals for the District of Columbia in 2022 relative to its initial license, which means the "Organizational Intervenors have failed to raise a genuine dispute of fact or law and Contention 7, to the extent it relies on basis (c), is inadmissible."[151]

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148 *Id.* at 21. Essentially, Organizational Intervenors argue that knowing what resources are present (by doing a survey) will allow a determination of what effects would result if development occurred on resource-containing sites.

149 *See* Staff Answer at 19. The Staff also employs a straw man argument by attempting to refute any claimed failure to comply with the NRC's Tribal Policy Statement. *See id.* at 20. Organizational Intervenors do not raise the failure to comply with the Tribal Policy Statement as justification for this aspect of proposed Contention 7.

150 *See id.* at 19 (citing Programmatic Agreement, app. A, at A-3–A-4).

151 Powertech Answer at 28. The proceedings involving the initial licensing of the Dewey-Burdock facility were extensive, resulting in an appeal of the Commission's licensing decision to

Yet, the court of appeals in 2022 faced a different factual circumstance than we face here, and, more importantly, it was not asked to address whether the legal underpinning in section 800.14(b)(1)(ii) was present (due principally to the different factual scenario then-present).

We explored at oral argument this disconnect between the contention as framed by the Organizational Intervenors and the responses, especially in light of the concession by the Staff and Powertech that the issue of the adequacy of the description of the historical, cultural, and religious resources forms the basis of several admissible contentions.[152] During that discussion, we specifically posed to both the Staff and Powertech the legal argument being made by the Organizational Intervenors, calling out the difference between knowing what the effects are and whether the effects will occur, and asked how each responded to what the Board considered the proper understanding of the framing of this aspect of proposed Contention 7.[153] The Staff persisted in relying on its position in the Answer.

> I think the Staff would point again to the fact that due to the site characterization and the fact that the wells may move, we really don't know where exactly the drilling would be, is my understanding. So I think that explanation that the Staff gave would still hold.
>
> . . .
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> I think we would still state that our explanation of the PA I think would still cover that and is still a completely legally sound reading of the regulations and understanding the regulations in terms of the appropriateness of issuing the PA here.[154]

Powertech, though, argued that Organizational Intervenors' view resulted only in "knowing the maximum effects but not necessarily the exact effects."[155]

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the D.C. Circuit, which ultimately approved the use of a programmatic agreement to address effects on historical, cultural, and religious resources, based on the facts that then existed. *See Oglala Sioux Tribe v. US NRC*, 45 F.4th 291 (D.C. Cir. 2022).

152 *See* Tr. at 250:6–265:3.

153 *See, e.g.*, Tr. at 259:21–261:15, 261:22–262:9.

154 *Id.* at 261:16–262:15.

155 *Id.* at 262:18–263:16.

Even if we were to consider the argument advanced for the first time at oral argument by Powertech,[156] we conclude that Organizational Intervenors have framed an admissible contention on this aspect of proposed Contention 7. Whether the legal underpinning for a programmatic agreement exists on the facts to be developed in an evidentiary hearing is a genuine dispute on a material issue of law.[157] Further, and critically, whether the Staff may rely on a programmatic agreement, including as partial justification for issuance of a FONSI, is material to the findings the NRC must make to support the issuance of a license renewal.[158] Neither the Staff nor Powertech challenge whether Organizational Intervenors meet the other contention admissibility elements, and we conclude that those other elements are met here. Organizational Intervenors provide a specific statement of the issue raised, provide a brief explanation of the basis of that contention, demonstrate that it is within the scope of this proceeding, and provide a concise statement of the facts that support their position on this aspect of the contention.[159] Thus, we grant the Motion as to this aspect of proposed Contention 7 and admit this portion of the contention as reformulated in Section II.B.6.c. below.

iv. <u>Programmatic Agreement wrongly excludes the Oglala Sioux Tribe from signatory status</u>

In this fourth aspect of proposed Contention 7, the Organizational Intervenors claim the NRC violated the NHPA because the Programmatic Agreement "excludes affected Tribes from signatory status, enforceable dispute resolution, and meaningful participation in the resolution of

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156 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-16-3, 83 NRC 169, 180 (2016) ("To permit [applicant] and the NRC Staff to blindside [intervenors] with this new argument would violate case law and implicate due process concerns." (citing *United States v. Almaraz*, 306 F.3d 1031, 1041 (10th Cir. 2002)); *USEC, Inc.*, CLI-06-10, 63 NRC at 476 (new arguments raised by petitioners during a prehearing conference are "barred on lateness grounds" because the other participants did not have the chance to consider and address these arguments in their answers).

157 *See* 10 C.F.R. § 2.309(f)(1)(vi).

158 *See id.* § 2.309(f)(1)(iv).

159 *See id.* § 2.309(f)(1)(i)–(iii), (v); Proposed New and Amended Contentions at 16, 21, 23–24.

adverse effects."[160] We conclude that this aspect of proposed Contention 7 does not demonstrate a genuine dispute on a material issue of law of fact. Therefore, we do not admit this aspect of proposed Contention 7.

Before reviewing the Parties' arguments, it is helpful to review a recent decision by the United States Court of Appeals for the District of Columbia that addressed a similar issue. Among other things, that court provided a distillation of the three signature statuses under the NHPA regulations.

> The regulations promulgated by the Advisory Council enumerate three kinds of signatories to programmatic agreements or memoranda of understanding. *See* 36 C.F.R. § 800.6(c). First, "[s]ignatories"—what we will call "required signatories" for clarity—are parties that "have sole authority to execute" an agreement. 36 C.F.R. § 800.6(c)(1). Without each required signatory, an agreement cannot go into effect.
>
> The second tier is "[i]nvited signatories[,]" who are "additional parties" that the agency official "may invite" to join the agreement. 36 C.F.R. § 800.6(c)(2)(i). For example, an "agency official *may* invite an Indian tribe . . . that attaches religious and cultural significance to historic properties located off tribal lands" to be an invited signatory, and the agency official also "*should* invite any party that assumes a responsibility" under the agreement. *Id.* § 800.6(c)(2)(ii), (iii) (emphases added). Invited signatories are not necessary for the execution of an agreement, but they can "seek[ ] amendment or termination" once the agreement is in place. *Id.* § 800.6(c)(2)(i), (iv).
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> Finally, an agency "may invite all consulting parties to concur" in an agreement. 36 C.F.R. § 800.6(c)(3). The signature of concurring parties is not necessary to execute an agreement, and they do not enjoy the termination and amendment powers accorded to invited signatories. *Compare id.* § 800.6(c)(3), *with id.* § 800.6(c)(2)(i).[161]

As Organizational Intervenors' counsel explained at oral argument, at its core, this aspect of proposed Contention 7 challenges the decision of the NRC to invite the Oglala Sioux

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160 Proposed New and Amended Contentions at 16.

161 *Narragansett Indian Tribe*, 176 F.4th at 682–83 (alterations and emphasis in original). The specific issue addressed in that case (the meaning of a virgule in a regulation), though, is irrelevant to the issue raised in this aspect of proposed Contention 7.

Tribe to sign the Programmatic Agreement only as a concurring party under 36 C.F.R. § 800.6(c)(3) and not as an invited signatory under 36 C.F.R. § 800.6(c)(2).[162] Organizational Intervenors explain that the NRC had the ability to invite the Oglala Sioux Tribe to be a "signatory," which would have given the Tribe "the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories," or it had the ability to invite the Tribe simply to "concur" in the Programmatic Agreement.[163] The Organizational Intervenors contend that the NRC erred by opting simply to invite the Tribe to "concur," especially given that the NRC invited Powertech to be a "signatory."[164]

The Staff respond by arguing that this aspect of the contention does not articulate a material dispute because the Organizational Intervenors fail to acknowledge, or contest, the explanation in the appendices of the Programmatic Agreement wherein the Staff explained its rationale for the signature status of both Powertech and the Tribe.[165] Similarly, Powertech

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162 *See* Tr. at 273:23–274:9. We note that Organizational Intervenors' description of the basis for this aspect of the contention in their New and Amended Contentions filing appears to be broader than this summary by their counsel at oral argument. *See* Proposed New and Amended Contentions at 22 (first paragraph of section E). Organizational Intervenors' written explanation appears to challenge the Programmatic Agreement because they disagree with how the buffer zone establishment process works. Beyond castigating the process, though, Organizational Intervenors do not identify what makes the process arrived at by the signatory parties to the document legally improper or deficient under NHPA. *Cf. Te-Moak Tribe of W. Shoshone of Nev.*, 608 F.3d at 611 ("Plaintiffs have not demonstrated that the exclusion zones will fail to prevent any adverse effects to these features."). Moreover, that same process existed in the version of the 2014 Programmatic Agreement, which the court of appeals upheld under the NHPA. Thus, even if we considered this view of this aspect of proposed Contention 7, it still would not be admissible for failure to show a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi).

163 36 C.F.R. § 800.6(c)(2)(i), (3).

164 *See* Proposed New and Amended Contentions at 21–22.

165 *See* Staff Answer at 20–21. In the Programmatic Agreement, the Staff explained that "Powertech is the party responsible for the construction and operation of the Dewey-Burdock ISR project and therefore has additional responsibilities related to the implementation of measures to avoid, minimize[,] and mitigate adverse effects and why the NRC staff invited Powertech to sign as an invited signatory. . . . The NRC staff is inviting Tribes to sign the PA as concurring parties, per discretion afforded to the NRC under 36 CFR 800.6(c)(3), in recognition of the efforts during the tribal survey conducted in 2013, development of this PA, and expertise in evaluating NRHP eligibility of tribal cultural resources, traditional cultural

argues the contention fails to articulate a material dispute. In support, Powertech relies on the fact that the programmatic agreement entered in the initial licensing proceeding had the same signature statuses and that agreement was upheld by the court of appeals in 2022.[166]

We agree with the Staff and Powertech that Organizational Intervenors do not demonstrate a genuine dispute on a material issue of law or fact. Nowhere do Organizational Intervenors identify a legal authority that would require the NRC to invite the Tribe to be a "signatory" of the Programmatic Agreement, even if the facts cited by the Organizational Intervenors were accurate. Even more to the point, the Organizational Intervenors nowhere address the Staff's stated reasons for its decision,[167] much less do they attempt to show how those reasons are improper, undercut, or wrong. The closest the Organizational Intervenors come is in their Reply where they state that a "rationale that cites the Tribes' expertise explains why their participation matters; it does not explain why the Tribes were given fewer procedural rights under the agreement than the applicant."[168]

Even assuming that statement is true, though, the Organizational Intervenors fail to set out an argument that the Staff's decision to give the Tribe fewer rights is wrongful, violates the regulations that expressly *allow* (but do not *require*) an agency to invite an Indian Tribe to be a signatory,[169] or is wrong here notwithstanding it was not found by the court of appeals to be wrongful when the 2014 programmatic agreement was challenged. At bottom, Organizational

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places, adverse effects[,] and measure to avoid, minimize, and mitigate adverse effects on eligible tribal cultural resources and TCPs." Programmatic Agreement, app. B, at B-17.

166 *See* Powertech Answer at 28. Powertech also addressed some of the aspects of the programmatic agreement called out by the Organizational Intervenors as examples of provisions the Tribe could not dispute as a concurring signatory, concluding those "minor changes" were not tied to "any legal standard that would overcome the previous approval of the materially similar 2014 PA by the DC Circuit." *Id.* at 28–29.

167 *See* Footnote 165, above.

168 Reply at 18.

169 *See* 36 C.F.R. § 800.6(c)(2)(ii).

Intervenors' argument appears to be an unstated challenge to the NHPA regulations. Organizational Intervenors contend that the Tribe, "whose ancestral and religious resources the PA purports to govern" must be given signatory status simply because of that interest in the resources at issue.[170] Yet they fail to do anything more than rely on *ipse dixit*, which is fatal when the regulations expressly recognize an Indian Tribe may "attach[ ] religious and cultural significance to historic properties" but then simply *allows*, not requires, the agency to invite that Tribe to be a "signatory."[171] For all of these reasons, Organizational Intervenors fail to demonstrate a genuine dispute of a material issue of law or fact, meaning this aspect of proposed Contention 7 is not admissible. Thus, we deny the Motion as to this aspect of proposed Contention 7.

c. Reformulated Contention 7

To simplify the contentions and clarify the proceedings in light of the above, and given that only some of the contention as proposed by the Organizational Intervenors is admissible, we reformulate the admissible aspects of proposed Contention 7 as the following two admitted contentions: *Contention 7A:* The NRC Staff failed to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations because the Staff has not made a reasonable and good faith effort to identify historic properties and properties of religious and cultural significance to the Oglala Sioux Tribe. *Contention 7C:* The NRC Staff failed to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations because the legal justification set forth in 36 C.F.R. § 800.14(b)(1)(ii) fails to justify a programmatic agreement in this instance.

7. <u>New Contention 8</u> – The Environmental Assessment fails to take a hard look at the direct and indirect on-site environmental impacts of the proposed action's authorization of extended central processing plant operations to process uranium-loaded resin from offsite sources for several years after decommissioning of the Dewey-Burdock wellfields,

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170 Reply at 18.

171 36 C.F.R. § 800.6(c)(2)(ii).

> ***including (a) the volume, on-site storage, and disposal of additional 11e.(2) byproduct material and liquid waste generated at the site; (b) transportation of loaded resin to the site; (c) prolonged deferral of site decommissioning and completion of aquifer restoration; and (d) radiological and non-radiological exposures during the extended operational period.***[172]

As is evident to anyone who practices in the NEPA arena, the Supreme Court's recent decision in *Seven County Infrastructure* represents a sea change in how *courts* review agency NEPA decisions.[173] But as also is evident, we are not a reviewing court; we are an independent adjudicatory body within the agency whose NEPA decision may end up being subjected to that deferential judicial review.[174] Thus, we are not required to give deference to the Staff's NEPA conclusions but are required by the Commission in contested proceedings like this one to engage in the necessary adjudication and fact-finding to reach a determination as to whether the Staff complied with its obligations under NEPA.[175] And one of those adjudicatory duties we

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172 Proposed New and Amended Contentions at 24.

173 *See Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 179 (2025) ("As we will explain, the central principle of judicial review in NEPA cases is deference.").

174 *See* 42 U.S.C. § 2241.

175 *See, e.g.*, *Crow Butte Res., Inc.* (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255, 270–78 (2020) (detailing Board's findings and conclusions); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 247–48 (2016) ("In its brief, the Staff describes the efforts it undertook and argues that those efforts were sufficient to meet the hard-look standard. The Staff asks us to view the Board's application of the hard look standard as a legal issue under 10 C.F.R. § 2.341(b)(4)(ii). But the fundamental issue here — whether Staff complied with NEPA — is inherently factual. As a general matter, we defer to the Board's findings with respect to the underlying facts unless they are 'clearly erroneous.' Here, the Board weighed the evidence and determined that the analysis of the environmental effects on cultural resources in the FSEIS was insufficient. . . . Given the complexity of this proceeding, which involved hundreds of exhibits and over five years of litigation, we are not inclined to second guess the Board's fact-finding."); *see also Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (NEPA's requirement of a "detailed statement," among others, "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. . . . NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own."); *id.* at 1128 ("The procedural duties, the duties to give full *consideration* to environmental protection, are subject to a much more strict standard of compliance. By now, the applicable principle should

must fulfill as it relates to NEPA is to determine whether a proposed NEPA contention meets the Commission's six-element test for admissibility.[176]

As we explain below, we conclude that Organizational Intervenors do not meet three of those elements as it relates to proposed Contention 8—they fail to demonstrate materiality of the issue to a finding the Staff must make, they fail to provide alleged facts or expert opinions to support their position, and they fail to demonstrate a genuine dispute on a material issue of fact or law.[177] And it just so happens that the reason for those failings lines up with a statement by the Supreme Court in its *Seven County Infrastructure* decision:

> Even if [an agency's NEPA-required environmental document] falls short in some respects, that deficiency may not necessarily require a court to vacate the agency's ultimate approval of a project, at least absent reason to believe that the agency might disapprove the project if it added more to the [environmental document].[178]

Here, Organizational Intervenors claim that the Staff's treatment of potential on-site environmental impacts of continued use of the central processing plant ("CPP") fails NEPA's "hard-look" requirement because that treatment was cursory or brief.[179] We agree with Organizational Intervenors that the Staff's treatment of that issue indeed is quite brief. From our review of the EA, it appears to have been handled in about two sentences.[180] But, perhaps in

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be absolutely clear. NEPA requires that an agency must–to the *fullest* extent possible under its other statutory obligations–consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. . . . Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.") (emphasis in original).

176 *See* 10 C.F.R. § 2.309(f)(1).

177 *See id.* § 2.309(f)(1)(iv)–(vi).

178 *Seven Cnty. Infrastructure Coal.*, 605 U.S. at 185.

179 Proposed New and Amended Contentions at 24–25.

180 *See* EA at 1-70 ("If the Dewey-Burdock ISR CPP is used to process uranium-loaded resins from these two projects, potential impacts at the CPP would be similar to those impacts discussed in this EA. . . . The magnitude of impacts from transporting uranium-loaded resins from these two potential projects to the Dewey-Burdock CPP would not be significantly different than the magnitude of impacts described in Section 3.11 of this EA.").

line with its ascription as "the soul of wit,"[181] brevity such as this does not establish, in and of itself, that the Staff failed to take a "hard-look" at the environmental impacts.[182]

A petitioner or intervenor always can identify something that they contend the Staff did not address in an environmental analysis, perhaps even more so now with the statutory page limits for the agency's written environmental report.[183] But without showing that the additional thing or information to be considered has the possibility of changing the analysis or ultimate conclusion, such requests are nothing more than engaging in flyspecking of the environmental documents, which the Commission prohibits us from doing.[184]

The Organizational Intervenors here, though, simply identify things they contend are not addressed or quantified by the Staff (e.g., volumes of waste generation, delay of aquifer restoration, extended radiological exposure).[185] They fail to make any allegation (let alone one supported by an expert opinion or facts as required by section 2.309(f)(1)(v)) that if the Staff had quantified or addressed those items, its conclusion of no significant impacts could have changed or that certain mitigation measures could have been required or that any number of

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[181] William Shakespeare, *Hamlet*, act 2, sc. 2.

[182] *See Seven Cnty. Infrastructure Coal.*, 605 U.S. at 181 ("Brevity should not be mistaken for lack of detail. A relatively brief agency explanation can be reasoned and detailed; an EIS need not meander on for hundreds or thousands of pages."); *see also* 42 U.S.C. § 4336a(e) (setting page limits for EISs and EAs).

[183] *See USEC Inc.*, CLI-06-10, 63 NRC at 477 ("It is always possible to come up with more details or areas of discussion that could have been included in [a NEPA document]. A petitioner's mere 'demand for more precision does not justify an NRC adjudicatory hearing.'" (citation omitted)); 42 U.S.C. § 4336a(e).

[184] *Exelon Generation Co.,* LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) ("There may, of course, be mistakes in the DEIS, but in an NRC adjudication, it is Intervenors' burden to show their significance and materiality. 'Our boards do not sit to "flyspeck" environmental documents or to add details or nuances.'" (citation omitted)); *cf. Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551–54 (1978) (noting that NEPA does not require going down every rabbit hole; there has to be a materiality to the alleged deficiency, otherwise "administrative proceedings [become] a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be'" considered).

[185] *See* Proposed New and Amended Contentions at 24–25.

different outcomes could have resulted. That is insufficient to prevail on admissibility of a contention asserting a NEPA violation.

We recognize that NEPA is a process-forcing statute[186] and that Organizational Intervenors claim the Staff did not comply with the required process here due to the brevity or conclusory nature of one aspect of the Staff's EA. Yet not all violations of process, even a process set out by NEPA, necessitate the time, expense, delay, and inefficiency of redoing an extensive analysis when there is not even a suggestion by the party pointing out the process violation that fixing the violation may change the analysis or ultimate result. "The goal of [NEPA] is to inform agency decisionmaking, not to paralyze it."[187] "NEPA does not command exploration of every possibility, however remote or speculative."[188]

In the end, Organizational Intervenors fail to give us "reason to believe that the agency might [change its analysis or conclusion] if it added more to the" EA.[189] We conclude, therefore, that Organizational Intervenors have not met all six contention admissibility requirements. We do not admit proposed Contention 8, and we deny the Motion as to that contention.

8. <u>New Contention 9</u> – NRC Staff have been provided actual knowledge identifying discovered burials, human remains, and cultural items on federal public lands portion of the project area that are likely to be impacted and/or excavated, but has taken no steps to comply with the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 et seq. Burials and covered items were identified in Appendix B to the Final PA, confirming that actual knowledge imposed a number of duties on federal agencies, such as NRC, who is taking a lead role in managing Powertech's private activities on federal public lands. These duties include preparation of a plan of action for each burial and consultation with the Oglala Sioux Tribe and potential individual descendants. NRC Staff, knowingly and in concert with the BLM and other PA signatories, has unlawfully delayed compliance with NAGPRA duties

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186 *See Seven Cnty. Infrastructure Coal.*, 605 U.S. at 173.

187 *Id*.

188 *Public Serv. Co. of Okla.* (Black Forest Station, Units 1 & 2), ALAB-573, 10 NRC 775, 781 (1979).

189 *Seven Cnty. Infrastructure Coal.*, 605 U.S. at 185; *see also Clinton ESP Site*, CLI-05-29, 62 NRC at 811 (flyspecking alone is not enough; intervenors must show materiality and significance of the identified errors).

> ***involving existing discoveries until after license renewal. The PA unlawfully limits NAGPRA duties during constructions [sic] and shifts all NAGPRA duties into the inadvertent discovery provision.***[190]

In an apparent issue of first impression, we must determine whether the NAGPRA requirements cited by Organizational Intervenors apply to the NRC as the agency issuing a license renewal for activities on "Federal" (as well as private) land. As explained below, we conclude that they do not and thus the proposed contention does not meet the contention admissibility requirements.

We begin by acknowledging that no Party cites any authority (statutory, regulatory, or caselaw) that addresses specifically whether the fact that the NRC is issuing a permit for the activity here, which will occur at least partially on concededly "Federal land," makes the NRC responsible for complying with NAGPRA. At oral argument, the Staff relied on a United States District Court decision from the Northern District of New York.[191] In its brief, Powertech refers us to a NAGPRA regulation, 43 C.F.R. § 10.4, and at oral argument referred us to a United States District Court decision from the District of South Dakota.[192] In both of their submissions and at oral argument, Organizational Intervenors referred us to several NAGPRA regulations, specifically 43 C.F.R. §§ 10.2–10.4, and the same district court decision from the District of South Dakota relied upon by Powertech.[193] Yet none of those citations directly answer the question we posed: whether the NRC was required to consult with the Tribe to complete a plan of action under NAGPRA.[194]

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190 Proposed New and Amended Contentions at 26.

191 *See* Tr. at 278:5–279:18, 291:6–20; *W. Mohegan Tribe & Nation of N.Y. v. New York*, 100 F. Supp. 2d 122 (N.D.N.Y. 2000).

192 *See* Powertech Answer at 30; Tr. at 280:13–281:21, 285:21–287:25; *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047 (D.S.D. 2000).

193 *See* Proposed New and Amended Contentions at 27–28; Reply at 28–30; Tr. at 292:10–295:14.

194 *See* Scheduling Order at 3 ("Does 43 C.F.R. § 10.4 require a Plan of Action to be completed for this project? If so, what agency (the NRC, the Bureau of Land Management,

The case from the Northern District of New York is inapposite because it addressed the related question whether issuing a permit transformed land into “Federal land,” a defined term in NAGPRA.[195] Here, by contrast, all Parties concede there is at least some “Federal land” on which the Dewey-Burdock project will operate.[196]

The regulatory citations do not provide an answer to our question either, as they generally were the impetus for our question. Section 10.4 places an obligation on “[e]ach . . . Federal agency . . . that has responsibility for Federal or Tribal lands . . .” but does not provide a definition of what qualifies as “responsibility.” Section 10.2 defines various terms used in the regulations, but none include a definition of “responsibility” or anything to answer the question of whether simply issuing a license that permits an activity on “Federal land” qualifies as having “responsibility” for “Federal land.” Finally, section 10.3 deals with how to determine cultural affiliation, not whether a federal agency’s issuance of a permit makes that agency responsible under NAGPRA.

The case from the District of South Dakota comes the closest to answering the question we asked but does not do so directly.[197] In that case, the court was not asked to determine whether the Army Corps of Engineers had responsibility for the “Federal land” at issue; all parties agreed that it did. But the court’s discussion of the text of NAGPRA and the court’s use of certain language in its analysis of the issues before it points us to the answer to our question.

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both, a different agency) constitutes a ‘Federal agency’ for purposes of that section relative to this project?”).

195 *See W. Mohegan Tribe & Nation of N.Y.*, 100 F. Supp. 2d at 125.

196 Proposed New and Amended Contentions at 26; Staff Answer at 23 n.87; Powertech Answer at 29–30; *see also* Footnote 205, below, regarding Organizational Intervenors’ belated argument that private land may qualify as “Federal land.”

197 *Yankton Sioux Tribe*, 83 F. Supp. 2d 1047.

NAGPRA itself consists of thirteen sections.[198] And while one of those sections contains definitions, like regulation 10.2 cited above, there is no statutory definition that addresses whether simply issuing a permit makes a federal agency "responsible" for compliance with the statute or its accompanying regulations.[199] The relevant section for answering our question, though, is section 3002, entitled "Ownership." That section contains directions for what must occur in the two different instances when Native American remains or objects are disturbed—intentional excavation/removal or inadvertent discovery.[200] In the case of an inadvertent discovery, the person who makes that discovery "shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having *primary management authority with respect to the Federal lands* . . . ."[201] The Secretary or agency head receiving that notification then is required to comply with certain obligations, including those the Organizational Intervenors cite as flowing from the regulations at issue here, such as the duty to consult and develop a "plan of action."[202] Thus, for the NRC to have consultation and plan development obligations under NAGPRA, it must be the agency with "primary" authority with respect to managing the "Federal land." The 1990 edition of Black's Law Dictionary defined

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198 *See* 25 U.S.C. §§ 3001–3013.

199 *See id.* § 3001.

200 *See id.* § 3002(c)–(d). The activity at issue here would fall under an inadvertent discovery as no one argues Powertech intends to excavate and remove such remains or objects as, for example, in the course of an archaeological site study.

201 *Id.* § 3002(d)(1) (emphasis added).

202 *See id.* § 3002(d); *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1055; 43 C.F.R. § 10.5(c) (placing obligation on the Federal agency that "receiv[ed] written documentation of a discovery" to approve and sign a plan of action, which results from the consultation required in section 10.4(b)(1)); Proposed New and Amended Contentions at 26, 29; *see also Yankton Sioux Tribe*, 83 F. Supp. 2d at 1057 ("As the inadvertent discoverer of remains protected by § 3002(d) *and as the federal agency with primary management authority over the land on which they were discovered*, the Corps has three duties." (emphasis added)).

"primary" as "First; principal; chief; leading."[203] Under that definition, there can be only one entity with "primary" management authority over the land.

No one has argued that the NRC has first, principal, chief, or leading management authority with respect to BLM-managed lands. Nor is such a conclusion possible; the very description of the lands as "BLM-managed" answers the question. At best, Organizational Intervenors argue that NRC and BLM share management authority.[204] But that best is not good enough; only one agency can have "primary" management authority for the land. And Organizational Intervenors concede that authority resides with BLM.[205] Moreover, one must remember that the statute places responsibility on the agency with "primary management authority" over the "Federal lands," not the project at issue.[206] Thus, simply issuing a permit for an activity on "Federal land" does not impose on the NRC obligations under NAGPRA that are borne by an agency with "primary management authority with respect to Federal lands."[207]

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203 Primary, Black's Law Dictionary (6th ed. 1990); *see also* Primary, Black's Law Dictionary (5th ed. 1979) (same). NAGPRA was enacted in 1990. NAGPRA of 1990, Pub. L. No. 101-601, 104 Stat. 3048, 3048–58 (codified as amended at 25 U.S.C. §§ 3001–3013).

204 *See* Reply at 28 ("BLM and NRC are Both NAGPRA Federal Agencies").

205 *See id.* ("[T]he NAGPRA definition of 'federal agency' is similarly broad enough to include both BLM, the agency with *primary management duties* flowing from the United States surface and subsurface ownership, ..." (emphasis added)). Thus, even if for purposes of argument we were to accept Organizational Intervenors' view that reservation of mineral rights under private land turned that private land into "Federal lands," above, their concession that BLM is the agency with "primary management duties flowing from the United States . . . subsurface ownership" would not change our analysis or conclusion that the NRC is not the agency with responsibility for NAGPRA compliance on that private land.

206 25 U.S.C. § 3002(d).

207 *Id.* That conclusion is bolstered by the Department of Interior's response to comments in 2023 when it published revised regulations implementing NAGPRA. *See* [NAGPRA] Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86,452, 86,452 (Dec. 13, 2023). In that response, the Department addressed comments that assumed the Bureau of Indian Affairs ("BIA") was a responsible agency for discovery, excavation, and disposition on Tribal lands. While the Department "agree[d] that . . . under the existing regulations, the BIA is responsible for issuing an [Archaeological Resources Protection Act ("ARPA")] permit on private lands that are also Tribal lands[, n]either the existing regulations nor the Secretary assign the

The Organizational Intervenors also argue that certain consultation and plan development obligations fall to the NRC because it "discovered" Native American remains and artifacts as a result of the survey conducted in connection with issuance of the initial license to Powertech.[208] Even assuming the NRC was considered to be the inadvertent discoverer of remains and artifacts, proposed Contention 9 still fails to raise a genuine dispute on a material issue of law or fact.[209] The statute and the regulations[210] only require an inadvertent discoverer of remains or artifacts to "notify, in writing" the head of the department or agency with primary management authority of the discovery (which was done by transmitting the survey results to BLM[211]), cease the activity for at least 30 days (which was done–the surveys took place in 2007 and 2008 and no ground disturbing activity yet has occurred, nearly 20 years later[212]), and "make a reasonable effort to protect the items discovered before resuming such activity" (which also was done by execution of the 2014 programmatic agreement[213]). The duties of consulting

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BIA responsibility for consultation, obtaining consent, or disposition of human remains or cultural items on Tribal lands." *Id.* at 86,488.

208 *See* Proposed New and Amended Contentions at 27.

209 *See* 10 C.F.R. § 2.309(f)(1)(vi).

210 *See* 25 U.S.C. § 3002(d)(1); 43 C.F.R. § 10.5.

211 *See* Appendices Related to the Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Uranium Recovery Project Located in Custer and Fall River Counties, South Dakota (2014) at 10 (ADAMS Accession No. ML14066A350) (noting involvement of BLM in reviewing survey results and efforts to identify historic properties of religious and cultural significance to tribes); *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1052–53, 1057 (verbal notice to government agency of discovery was sufficient).

212 *See* Programmatic Agreement, app. B, at B-1 (survey dates); EA at 1-1 ("There have been no activities undertaken at the site.").

213 *See Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-19-10, 90 NRC 287, 341–45 (2019).

with the Tribe and developing a plan of action then fall to the department or agency with primary management authority over the land, BLM.[214]

At oral argument, we explored whether section 10.4 places a regulatory obligation on every federal agency, regardless of whether it is one with primary land management authority: "Any permit, license, . . . or other authorization issued for an activity on Federal . . . lands must include a requirement to report any discovery of human remains or cultural items under § 10.5 of this part."[215] In their Reply, the Organizational Intervenors quote that language and argue that "the license [issued here] neglects to address NAGPRA, referencing only the NHPA and the ARPA."[216] But even if we were to apply this one sentence in the NAGPRA-implementing regulations to the NRC, and ignore the question whether the regulation is enforceable to *all* federal agencies, we still would conclude proposed Contention 9 fails to raise a genuine dispute on a material issue of law or fact.[217]

Organizational Intervenors are incorrect in their assessment of the license renewal's treatment of NAGPRA. The license renewal does include a requirement to report discoveries of human remains or objects as required by NAGPRA. Administrative Condition 9.8 of the renewed materials license states that Powertech "shall comply with the terms and conditions included in the PA."[218] Final Appendix C to the Programmatic Agreement dictates that in the

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214 25 U.S.C. § 3002(d); *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1055 ("[T]he regulations implementing § 3002(d) impose six additional obligations on responsible federal agency officials who receive notification that Native American cultural remains have been inadvertently discovered on federal lands."); 43 C.F.R. § 10.4(a) ("To ensure compliance with the Act, the . . . Federal agency . . . that has responsibility for Federal . . . lands must designate one or more appropriate officials to carry out the requirements of this subpart [43 C.F.R. §§ 10.4–10.7] . . . .]"); 43 C.F.R. § 10.5(c)–(d).

215 43 C.F.R. § 10.4; Tr. at 293:8–14, 294:11–22, 300:16–22.

216 Reply at 29.

217 *See* 10 C.F.R. § 2.309(f)(1)(vi).

218 NRC, Powertech (USA) Inc., Materials License No. SUA-1600 for the Dewey-Burdock Project in Fall River and Custer Counties, South Dakota at 5 (June 18, 2026) (ADAMS Accession No. ML26156A025).

case of any "inadvertent discovery of human remains or funerary objects on BLM Administered Land . . . [t]he **On-site Manager/Contractor** shall notify the **BLM on BLM administered land**. Immediately contact the BLM official of [*sic*] the discovery by telephone or email."[219] Further, that obligation would remain even if the Programmatic Agreement were terminated because Stipulation 15(c) of the Programmatic Agreement requires Powertech, in such a situation, to "follow the terms and conditions of this PA for current ground-disturbing activities" and prohibits it from "begin[ning] any such activities in new areas."[220]

Finally, we reject the Organizational Intervenor's request that we apply the Supreme Court's presumption of liberal construction "in favor of the Indians" because there is no ambiguity in the scope of the statute's obligations.[221] The statute's use of "primary management authority with respect to the Federal lands" makes clear which agency is to receive notification and, resultingly, to bear the obligation of consultation and development of a plan of action. The regulations' continued use of "primary" throughout the relevant sections in 10.4 and 10.5 further solidifies the lack of ambiguity.

Therefore, Organizational Intervenors do not demonstrate that the issue they propose for resolution is one that is material to the findings the NRC must make in this proceeding, and they fail to demonstrate a dispute on a material issue of law or fact. Accordingly, we do not admit proposed Contention 9, and we deny the Motion as to that contention.

9. <u>New Contention 10</u> – The EA's analysis of impacts to the northern long-eared bat (endangered), the tricolored bat (proposed endangered), the monarch butterfly (proposed threatened), and the western regal fritillary (proposed threatened) does not satisfy NEPA's hard-look requirement, the ESA's best available science requirement, or the APA's demand for reasoned decisionmaking, because the effects determinations for all four species rest on habitat suitability, conservative assumptions of presence,

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[219] Programmatic Agreement, app. C, Treatment of Human Remains on State, Private, and U.S. Bureau of Land Management at C-2 (emphasis in original).

[220] Programmatic Agreement at 14.

[221] *Cnty. of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992); 25 U.S.C. § 3002(d)(1); *see* Reply at 27 (urging application of the presumption).

and ecological baseline data now seventeen years old, without any species-specific field survey conducted during a window in which the species could be detected or their habitat use characterized.[222]

Organizational Intervenors' proposed Contention 10 asserts that the EA's analysis of impacts to four species fails to satisfy three requirements: (1) NEPA's hard-look requirement, (2) the Endangered Species Act's best available science requirement, and (3) the APA's demand for reasoned decisionmaking.[223] We conclude, for the reasons that follow, that Organizational Intervenors do not meet all six of the contention admissibility elements. Specifically, proposed Contention 10 lacks sufficient legal and factual support and fails to demonstrate that a genuine dispute exists on a material issue of law or fact.[224] Thus, we do not admit proposed Contention 10.

Organizational Intervenors argue that the EA's analysis fails to satisfy NEPA's hard-look requirement and the ESA's best available science requirement.[225] And as it relates to the ESA, agencies are required to use "the best scientific and commercial data available" to ensure agency actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[226]

The factual basis proffered by Organizational Intervenors to support both assertions is the same—the Staff's reliance on outdated surveys, some conducted during hibernation

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[222] Proposed New and Amended Contentions at 32.

[223] *Id*. Other than referencing it in the text of the actual contention, Organizational Intervenors never discuss in the Motion or the New and Amended Contentions the APA or how the EA here fails to comply therewith. *See* Motion at 5–6, 10; Proposed New and Amended Contentions at 32–35. Thus, we deem that aspect of the contention to be waived. Alternatively, we hold that aspect of the Contention not to be admissible for failure to comply with the requirements in 10 C.F.R. § 2.309(f)(1)(ii), (iv)–(vi).

[224] 10 C.F.R. § 2.309(f)(1)(v), (vi).

[225] Proposed New and Amended Contentions at 32.

[226] 16 U.S.C. § 1536(a)(2).

seasons, and the mere assumption of the presence of the various species. As to NEPA, Organizational Intervenors assert that it "requires the Staff to take a hard look at the environmental impacts of the proposed action, and that look must rest on accurate, reasonably current information sufficient to permit a reasoned evaluation of impacts to protected species."[227] They argue that this has not occurred here because "[t]he only ecological field surveys of the site are the vegetation and wildlife baseline studies Powertech conducted from July 2007 through August 2008."[228] And as to the ESA, Organizational Intervenors argue the EA did not meet the ESA's best available science requirement because the Staff did not "characterize the extent or intensity of any of the four species' use of the action area."[229] And without that characterization, "the EA cannot support a reasoned conclusion regarding the significance of impacts, and cannot assess whether the species-specific mitigation on which the Staff relies . . . is adequate to the occupancy that actually exists."[230] Yet these proffers are not sufficient to meet Organizational Intervenors' burden in either instance.

Contentions that propose "alternative inputs or methodologies must present some factual or expert basis for why the proposed changes in the analysis are warranted (e.g., why the inputs or methodology used are unreasonable, and the proposed changes or methodology would be more appropriate)."[231] Here, Organizational Intervenors fail to provide a factual or expert basis for their claims.[232] Further, simply pointing to the age of the survey is not enough.

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227 Proposed New and Amended Contentions at 32.

228 *Id.*

229 *Id.* at 34.

230 *Id.*

231 *Seabrook*, CLI-12-5, 75 NRC at 323–24. When challenging NRC's compliance with NEPA, "simply suggesting that additional information could be considered is not enough." *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-24-8, 100 NRC 95, 106 (2024) (citing *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323–24 (2012)); *see also* Section II.B.7., above.

232 Proposed New and Amended Contentions at 34.

As this Board opined previously, "the fact that the ecological data . . . is from 2008 is immaterial if more recent ecological data is unchanged or not available."[233] Organizational Intervenors attempt to avoid the same conclusion here by arguing that they have shown specific deficiencies in the old surveys and are not simply relying on the age of those surveys.[234] But they still have not provided any support, in the form of expert opinions, specific sources, or documents, to show that more recent *changed* data exists or that conducting an updated survey could change the result reached in the earlier survey, the way in which the Staff mitigated for the presence of the species, or the conditions that would be included in the license renewal. Indeed, as counsel for the Staff confirmed at oral argument, the Staff's approach conservatively presumed the ubiquitous presence of all four species and addressed the impact of development on all four at the same time at all locations throughout the project area.[235]

Accordingly, Organizational Intervenors fail to raise a genuine dispute on a material issue of fact or law and fail to provide necessary support.[236] Therefore, we deny Organizational Intervenors' Motion relative to proposed Contention 10.

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[233] LBP-25-3, 101 NRC at 111.

[234] *See* Proposed New and Amended Contentions at 35.

[235] *See* Tr. at 303:15–305:3, 307:2–8.

[236] 10 C.F.R. § 2.309(f)(1)(v), (vi); *Holtec Decommissioning Int'l, LLC, & Holtec Palisades, LLC* (Palisades Nuclear Plant), LBP-25-5, 101 NRC 211, 229 (2025) (citing *Seabrook*, CLI-12-5, 75 NRC at 341–42); *see also* Staff Answer at 27 ("Most fundamentally, given the conservatism of the NRC Staff's determination that all four species could be present at the site, the Organizational Intervenors do not explain why new or additional survey information would plausibly alter the appropriateness of the conservation measures that were in fact selected, let alone to a degree that would have the potential to contradict the NRC Staff's impact conclusion.").

In light of this conclusion, we need not reach, and we do not address, the Staff's argument advanced at oral argument that the mere fact that Fish and Wildlife Service concurred with the NRC meant that the NRC met the best available science standard. *See* Tr. at 313:20–25, 314:16–315:18.

III. CONCLUSION

For the foregoing reasons, and in furtherance of our obligations under the Commission's regulations, we:

A. GRANT Organizational Intervenor's Motion as to its request to migrate already-admitted Contention 1A to the Staff's EA.

B. DENY Organizational Intervenor's Motion as to its request to migrate already-admitted Contention 1B to the Staff's EA and DISMISS Contention 1B as moot.

C. GRANT Organizational Intervenor's Motion as to proposed Amended Contention 1A, Contention 6, and aspects A and C of Contention 7 and ADMIT the following new or amended contentions:

1. *Amended Contention 1A*: The NRC Staff's Environmental Assessment fails to comply with NEPA and 10 C.F.R. Part 51 because it contains an inadequate, inaccurate, or incomplete description of the cultural and historical resources of the Oglala Sioux Tribe in the Dewey-Burdock Project area, in that the EA (a) relies exclusively upon archaeological surveys conducted in 2007–2012 and a 2013 tribal survey in which the Oglala Sioux Tribe did not participate; (b) abandons, without reasoned explanation and solely in response to the applicant's cost-and-time objections, the tribal cultural resources survey the Staff itself proposed in the December 2025 draft Programmatic Agreement; and (c) defers all identification and evaluation of the Tribe's traditional cultural places until after licensing, if and when ground-disturbing activities occur.

2. *Contention 6*: The Environmental Assessment violates NEPA's hard-look requirement and the APA's requirement of reasoned decisionmaking because the Staff declined to obtain reasonably available information essential to its analysis of impacts on the Oglala Sioux Tribe's traditional cultural places: having itself proposed, in the December 2025 draft Programmatic Agreement, a tribal cultural resources survey based on the methodology NRC Staff and the Tribe jointly developed in September 2021, the Staff abandoned that survey solely in response to the applicant's cost-and-time objections, contrary to the Staff's own site-visit.

3. *Contention 7A*: The NRC Staff failed to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations because the Staff has not made a reasonable and good faith effort to identify historic properties and properties of religious and cultural significance to the Oglala Sioux Tribe.

4. *Contention 7C*: The NRC Staff failed to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations because the legal justification set forth in 36 C.F.R. § 800.14(b)(1)(ii) justifying a programmatic agreement here is lacking.

D. DENY Organizational Intervenors' Motion as to proposed Amended Contention 1B, Contentions 5, 8, 9, and 10, and aspects B and D of Contention 7.

E. Per Section B of our Second Amended Case Scheduling and Management Order, remind the Parties of:

1. Their respective disclosure obligations related to all now-admitted contentions and the applicable due dates for same;

2. Their obligation to file their next Joint Status Report on September 28, 2026; and

3. The telephonic status conference scheduled for 11:00 a.m. Eastern Time on September 30, 2026.

F. Remind the Parties of the October 2, 2026, deadline for summary disposition motions directed to any contention admitted in this Memorandum and Order.[237]

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Jeremy A. Mercer, Chair
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 10, 2026

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[237] If the Parties collectively agree before October 2, 2026, that they will not be filing summary disposition motions and concur that a status conference for contention consolidation before the week of October 5, 2026, would be beneficial and more efficient, *see* Section II.B.5., above, they should advise us as soon as possible and we will hold that status conference sooner. We remind the Parties of the October 20, 2026, deadline for submission of their respective Statements of Position and Direct Testimony (with Exhibits), if no summary disposition motions are filed. *See* Second Amended Case Scheduling and Management Order at 7.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting in Part and Denying in Part Organizational Intervenors' Motion for Leave to File New and Amended Contentions) (LBP-26-8)** have been served upon the following persons by Electronic Information Exchange.

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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
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CLARA SOLA Digitally signed by CLARA SOLA Date: 2026.09.10 12:46:40 -04'00'

Office of the Secretary of the Commission

Dated at Brunswick, Maryland,
This 10th day of September 2026.