

ATTACHMENT 39

November 4, 2024 NRC Staff Consolidated Answer to Intervention Petition of Susan Henderson
and Intervention Petition of the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN
Collective

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

POWERTECH (USA) INC.,

(Dewey-Burdock In Situ Uranium Recovery
Facility)

Docket No. 40-9075-LR

November 4, 2024

**NRC STAFF CONSOLIDATED ANSWER TO INTERVENTION PETITION
OF SUSAN HENDERSON AND INTERVENTION PETITION OF THE OGLALA SIOUX TRIBE,
BLACK HILLS CLEAN WATER ALLIANCE, AND NDN COLLECTIVE**

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INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) Staff hereby answers two petitions to intervene in this proceeding, both timely submitted on October 8, 2024. The first submitted by Ms. Susan Henderson¹ and the second submitted by the Oglala Sioux Tribe (Tribe or OST), the Black Hills Clean Water Alliance (BHCWA), and NDN Collective (collectively, Organizational Petitioners or OP).² Pursuant to 10 CFR 2.309(h)(3)(i)(1), the Staff's answer is timely filed.

As discussed below, while Ms. Henderson has demonstrated standing, she has not submitted any contentions that meet the NRC's standards for contention admissibility; thus, the Atomic Safety and Licensing Board (Board) should deny her petition. Also as discussed below, of the Organizational Petitioners, the Tribe has demonstrated organizational standing, but BHCWA and NDN Collective have not demonstrated standing. The Organizational Petitioners have not submitted an admissible contention; therefore, the Board should deny the Organizational Petitioners' petition.

BACKGROUND

I. Initial Licensing

The initial licensing for Powertech began in 2009³ and involved multiple evidentiary hearings before an Atomic Safety and Licensing Board and appeals to the Commission. Two petitioners in the current proceeding—Susan Henderson and the OST—participated as intervenors in the initial licensing proceeding. The NRC issued Powertech's initial Source and Byproduct Materials License on April 8, 2014. The parties to the initial licensing proceeding

¹ Petition for Leave to Intervene (Oct. 8, 2024) (Agencywide Documents Access Management System (ADAMS) Accession No. ML24282B055) (Henderson Petition).

² Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Oct. 8, 2024) (ML24284A129) (OP Petition).

³ See "Powertech (USA), Inc.'s Submission of an Application for a Nuclear Regulatory Commission Uranium Recovery License for its Proposed Dewey-Burdock In Situ Leach Uranium Recovery Facility in the State of South Dakota" (Feb. 25, 2009) (ML091030707).

completed litigation at the agency level in 2020, after which the OST appealed the NRC's licensing decision to the D.C. Circuit Court of Appeals, which ruled in favor of the NRC on December 22, 2022.⁴

II. Powertech's License Renewal Application

Consistent with the requirements of 10 C.F.R. §§ 40.42 and 40.43, on March 4, 2024, Powertech submitted a timely license renewal application (LRA) for its Source and Byproduct Materials License (SUA 1600) originally issued on April 8, 2014 (ML24081A108). The application package includes a Combined Technical/Environmental Report (Combined TR/ER) providing detailed information for the NRC staff's safety and environmental reviews. Powertech is seeking renewed authorization from the NRC to engage in commercial-scale uranium recovery at the Dewey-Burdock Project site, using an in-situ leaching process that involves the oxidation and solubilization of uranium from its reduced state using leaching fluid, also called "in situ recovery" (ISR).⁵ In its LRA cover letter (Cover Letter), Powertech estimated that the project might begin construction in two to three years.⁶ Currently, 115 exploration holes and 20 monitoring wells exist in the project area.⁷ Powertech's planned facilities include sequentially-developed well fields across the project area, a satellite processing plant located within the Dewey area, and a combination satellite processing plant and central resin processing plant (used to recover the final uranium product, yellowcake) to be located in the Burdock area.⁸

⁴ *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 45 F.4th 291 (D.C. Cir. 2022).

⁵ See Source and Byproduct Materials License SUA 1600 Renewal Application for the Dewey-Burdock Project, Custer and Fall River Counties, South Dakota, Encl., Combined Technical Report / Environmental Report at Sections 1.3, 1.4, 1.7 (Mar. 2024) (ML24082A062) (Combined TR/ER).

⁶ Letter from Peter Luthiger, COO, enCore Uranium, to NRC Document Control Desk "Source and Byproduct Materials License SUA 1600 Renewal Application for the Dewey-Burdock Project, Custer and Fall River Counties, South Dakota," (Mar. 4, 2024) (ML24081A103).

⁷ Combined TR/ER at 1-2.

⁸ See *id.* at 1-3, 3-57.

Once the yellowcake is packed in drums, a third party company will transport the yellowcake to a conversion facility in either Illinois or Ontario, Canada, for refining and conversion.⁹

The Cover Letter indicates that the licensee has not undertaken any activities at the site because Powertech continues to pursue the resolution of federal and state permitting and licensing processes. Thus, Powertech states that its LRA “focuses on the few items in the Licensing documents that could be updated” and that much of the information from the NRC’s initial licensing review to issue SUA 1600 “remains valid, unchanged, and relevant to current conditions.”¹⁰ Per 10 C.F.R. § 51.60(a), Powertech may limit the LRA’s updates to supplemental environmental information addressing “any significant environmental change” since the Dewey-Burdock ISR Project supplemental environmental impact statement (2014 SEIS)¹¹ for initial licensing. With its Cover Letter, Powertech enclosed a table that provides a section-by-section crosswalk identifying whether updated, supplemental information has been included in the Combined TR/ER and highlights applicable license conditions for the topical areas.

III. NRC Staff’s License Renewal Application Review

The NRC Staff accepted Powertech’s LRA for docketing on June 24, 2024,¹² and on August 9, 2024, issued a notice of opportunity to request a hearing and to petition for leave to

⁹ *Id.* at 7-56.

¹⁰ Cover Letter at 1.

¹¹ Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, Final Report, NUREG-1910, Supp. 4, Vols. 1-2, (Jan. 2014) (ML14024A477 (Chapters 1-5), ML14024A478 (Chapters 6-11 and Appendices)).

¹² Letter from Tom Lancaster, Project Manager, Office of Nuclear Material Safety and Safeguards, NRC, to Mr. Peter Luthiger, Chief Operating Officer, Powertech USA, Inc., “Acceptance Review, Powertech Dewey-Burdock Uranium Recovery Project, Custer and Fall River Counties, South Dakota, License SUA 1600, Docket 040-09075” (Jun. 24, 2024) (ML24206A049).

intervene in the *Federal Register*.¹³ The Staff's docketing review confers no regulatory approval. Its purpose is to determine whether the application has included sufficient information to allow the Staff to begin its detailed technical review, during which it will determine whether the LRA satisfies the requirements to issue a renewed license. The Staff may also identify safety and environmental issues for which it needs additional information from the licensee.

As with other ISR license renewal applications, the NRC Staff will conduct a detailed technical review of Powertech's application. The Staff's review will include both a safety review and an environmental review. The Staff's safety and environmental reviews will focus on the Combined TR/ER that Powertech submitted with its application. The Staff will conduct its safety review to determine whether Powertech's application meets all applicable requirements in 10 C.F.R. Part 20 and 10 C.F.R. Part 40. In particular, the Staff will assess whether the application meets the requirements in Appendix A of Part 40, "Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material from Ores Processed Primarily for Their Source Material Content."

The Staff will conduct its environmental review in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 et seq., and the NRC's NEPA-implementing regulations at 10 C.F.R. Part 51. For Powertech's LRA, the Staff will begin its NEPA review with the preparation of an environmental assessment, as it has for other ISR license renewal applications. Pursuant to the requirements of NEPA and Part 51, the Staff will assess whether the license renewal would result in any significant environmental impact not previously considered in the 2014 SEIS.

As appropriate, the Staff will propose license conditions to ensure that Powertech's operations adequately protect health and safety and the environment. The LRA proposes no

¹³ Notice of Opportunity for Hearing, Powertech (USA) Inc.; Dewey-Burdock In-Situ Uranium Recovery Facility; License Renewal Application, 89 Fed. Reg. 65,401, 65,401 (Aug. 9, 2024) (Powertech Renewal).

changes to the conditions in the current license, but the Staff will determine whether any new or modified conditions are warranted.

DISCUSSION

IV. Standing to Intervene

A. Applicable Legal Requirements

In accordance with the Atomic Energy Act (AEA), “the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.”¹⁴ The Commission will grant a request for hearing if the petitioner meets the standing requirements of 10 C.F.R. § 2.309(d) and submits at least one admissible contention pursuant to 10 C.F.R. § 2.309(f)(1).¹⁵

The petitioner’s hearing request must contain the following information, as required by 10 C.F.R. § 2.309(d):

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

1. Traditional Standing Principles

In addition to fulfilling the general standing requirements of 10 C.F.R. § 2.309(d)(1), a petitioner “must demonstrate that it has an interest that may be affected by the proceeding.”¹⁶ The Commission applies contemporaneous judicial concepts of standing to evaluate whether

¹⁴ Hearings and Judicial Review, Atomic Energy Act § 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A).

¹⁵ See 10 C.F.R. § 2.309(a).

¹⁶ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015).

the petitioner has demonstrated the requisite interest.¹⁷ To this end, “a petitioner must (1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.”¹⁸ The injury claimed by the petitioner must be actual or threatened and both concrete and particularized.¹⁹ Further, the injury alleged must be “to an interest arguably within the zone of interests protected by the governing statute”—here, the AEA, the National Environmental Policy Act (NEPA), or the National Historic Preservation Act (NHPA).²⁰ The causation element of standing requires a petitioner to show “that the injury is fairly traceable to the proposed action.”²¹ The redressability element of standing “requires the intervenor to show that its actual or threatened injuries can be cured by some action of the tribunal.”²² The petitioner has the burden to demonstrate it meets standing requirements.²³ However, a licensing board will “construe the [intervention] petition in favor of the petitioner” when making a standing determination.²⁴

2. Proximity Plus Standing

¹⁷ See *id.*; see also *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

¹⁸ *Turkey Point*, CLI-15-25, 82 NRC at 394; see also *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71–72 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁹ *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001); see also *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 71 (stating that “standing has been denied when the threat of injury is too speculative”).

²⁰ *Calvert Cliffs*, CLI-09-20, 70 NRC at 915 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (internal quotations omitted)).

²¹ *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311–12 (2005) (quoting *Nuclear Fuel Servs. Inc.*, (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004) (internal quotations omitted)).

²² *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248.

²³ See *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 189 (2010).

²⁴ *Id.*

In cases involving reactor facilities, the Commission will apply a standing presumption based on proximity to the site.²⁵ However, no such presumption exists for nuclear materials proceedings.²⁶ In such cases, to obtain standing based on geographic proximity to a facility, a petitioner must demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”²⁷ This “proximity-plus” standard is applied on a “case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”²⁸ If “there is no ‘obvious’ potential for radiological harm at a particular distance frequented by the petitioner, it becomes the petitioner’s burden to show a specific and plausible means of how the challenged action may harm him or her.”²⁹ “[C]onclusory allegations about potential radiological harm” are insufficient for this showing.³⁰ Where a petitioner is unable to demonstrate “proximity-plus” standing to intervene, traditional standing principles will apply.³¹

3. Organizational and Representational Standing

When an organization requests a hearing, it must demonstrate either organizational or representational standing.³² An organization attempting to assert standing on its own behalf (“organizational” standing) “must demonstrate a palpable injury in fact to its organizational

²⁵ See *Fla. Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

²⁶ See *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248.

²⁷ *Georgia Institute of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111 at 116 (1995).

²⁸ *Id.* at 116–17.

²⁹ *American Centrifuge*, CLI-05-11, 61 NRC at 311–12 (quoting *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248 (internal quotations omitted)).

³⁰ *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248.

³¹ See *Schofield Barracks*, CLI-10-20, 72 NRC at 189.

³² See *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409, 411 (2007).

interests that is within the zone of interests protected by “the AEA, NEPA, or NHPA.”³³ Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify any such members by name and address.³⁴ Also, the organization must show that the identified members would have standing to intervene in their own right, and that these members have authorized the organization to request a hearing on their behalf.³⁵ In addition, “the interests that the representative organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action.”³⁶

B. Ms. Henderson’s Standing to Intervene

Ms. Henderson does not specifically address standing in her petition, but she does assert a “right and interest” to be made a party, based on her proximity to the site and assertion that her “property and financial interests” (presumably, her nearby ranching operation) may be affected by the application, noting that her ranch “has a well that could be contaminated by the proposed action in the application.”³⁷ In the background section of her petition, Ms. Henderson states she “primarily use[s] well water from the Lakota Sandstone aquifer” (also referred to as the Chilson Member)³⁸ for her residence and cattle operation, and she asserts that this aquifer

³³ *Hydro Res., Inc.* (Albuquerque, NM), LBP-98-9, 47 NRC 261, 271 (1998).

³⁴ *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI), CLI-00-14, 52 NRC 27, 47 (2000).

³⁵ *See Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 71 NRC 49, 51–52 (2010).

³⁶ *Consumers Energy Co.*, CLI-07-18, 65 NRC at 409.

³⁷ Henderson Petition at 1.

³⁸ The Lakota Sandstone aquifer is commonly referred to as its more specific stratigraphic sub-unit, the “Chilson Member.” See Combined TR/ER at 2-96; 2014 SEIS at 3-18; see also Combined TR/ER at 2-12. In this answer, the Staff refers to this aquifer as the “Lakota Sandstone (Chilson Member).”

flows southwest from the project site, before flowing east, below her property in western Fall River County.³⁹

While Ms. Henderson fails to assert the potential for radiological harm at a particular distance frequented by her, previous licensing boards have held that it is plausible for groundwater contamination to travel “considerable distances” from the project site, so long as it is plausible contamination could travel to the aquifer used by the Petitioner.⁴⁰ Given Ms. Henderson asserts she draws water directly from one of the two aquifers where Powertech intends to conduct ISR operations, and that the NRC Staff previously concluded that environmental impacts to these shallow ore-bearing aquifers would be SMALL,⁴¹ it is at least plausible that contaminants could migrate to the Lakota Sandstone (Chilson Member). According to the licensing board in *Hydro Res. Inc.*, Ms. Henderson’s assertion alone demonstrates injury in fact in this type of proceeding.⁴² This was confirmed by the *Crow Butte Resources, Inc.* licensing board, which noted a petitioner that “uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites” can be afforded standing in a materials licensing proceeding, provided the water comes “from a source that is reasonably contiguous to either the injection or processing sites.”⁴³ Even without knowing the exact proximity of Ms. Henderson’s ranching operation, it is plausible that contaminants could travel to the water she draws directly from the

³⁹ Henderson Petition at 2.

⁴⁰ *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), LPB-08-24, 68 NRC 691, 704-709 (2008) (citing *Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 280 (2008)).

⁴¹ 2014 SEIS at 4-52.

⁴² *Hydro Res. Inc.*, LBP-98-9, 47 NRC at 275.

⁴³ *Crow Butte*, LPB-08-24, 68 NRC 691, 704-705; see also *Crow Butte*, LBP-08-6, 67 NRC at 280 (2008).

Lakota Sandstone (Chilson Member) to supply her home and livestock. For this reason, Ms. Henderson has demonstrated standing for the purposes of this proceeding.

C. Organizational Petitioners Standing to Intervene

1. Oglala Sioux Tribe

The Tribe explains that its standing to participate in this proceeding is based on “substantive and procedural interests in protecting cultural and historic resources related to the Tribe’s heritage” within the project area, which “were held to have satisfied the standing requirements” by the licensing board in the initial licensing proceeding.⁴⁴ The Tribe references (as “Exhibit 7” in the attachments to the Organizational Petitioners’ Petition) the Declaration of Reno Red Cloud, who is the Tribe’s Director of Water Resources.⁴⁵ Among other reasons he provides to support the Tribe’s standing, Mr. Red Cloud states that “the lands encompassed by the Powertech proposal are within the Territory of the Great Sioux Nation, which includes the band of the Oglala Lakota (Oglala Sioux Tribe) aboriginal lands.”⁴⁶ He also states that there are cultural, historic, and archaeological resources of significance to the Tribe on the project site both that have been and have yet to be identified.⁴⁷ The Tribe’s participation in the proceeding, he says, is in part to “safeguard its interests in the protection of cultural and historic resources at and in the vicinity of the site.”⁴⁸

The Tribe has satisfied the requirements to demonstrate organizational standing by adequately demonstrating that the proposed action could cause an injury to the Tribe’s interests

⁴⁴ OP Petition at 10.

⁴⁵ *Id.*

⁴⁶ OP Petition Attach. 7 at ¶ 5.

⁴⁷ *Id.*

⁴⁸ *Id.* at ¶ 7.

that is within the zone of interests in this proceeding. This conclusion is consistent with the licensing board's conclusion regarding the Tribe's standing in the initial licensing proceeding.⁴⁹

2. Black Hills Clean Water Alliance

BHCWA supports its demonstration of standing by referencing (as "Exhibit 8" in the Organizational Petitioners' Petition) the Declaration of Dr. Liliias Jones Jarding, a member and Executive Director of BHCWA. Dr. Jarding states that the BHCWA "is a nonprofit corporation based in Rapid City, South Dakota, that is concerned with protecting the Black Hills' water, land, air, wildlife, and communities from the adverse impacts of hard rock mining."⁵⁰

BHCWA does not satisfy the requirements to demonstrate organizational standing. An organization that asserts it has standing to intervene in its own right must establish a discrete institutional injury to the organization's interests, which must be based on something more than a general environmental or policy interest in the subject matter of the proceeding.⁵¹ While Dr. Jarding's Declaration states BHCWA members use and enjoy the land in the area of the project site and the license renewal would harm the area, this does not constitute a discrete harm to the organization that would be caused by the project.⁵² BHCWA fails to demonstrate that its organizational interests are more than general environmental and policy interests as required to demonstrate organizational standing.⁵³

BHCWA also does not satisfy the requirements to demonstrate representational standing. To demonstrate representational standing, an "entity must then show it has an individual member who can fulfill all the necessary standing elements and who has authorized

⁴⁹ See *Powertech (USA), Inc.* (Dewek-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 393 (2010).

⁵⁰ OP Attach. 8 at ¶ 3.

⁵¹ *White Mesa*, CLI-01-21, 54 NRC at 250-51.

⁵² OP Attach. 8 at ¶ 4.

⁵³ See *White Mesa*, CLI-01-21, 54 NRC at 252.

the organization to represent his or her interests.”⁵⁴ Dr. Jarding does not, however, meet even the basic requirement in 10 C.F.R. § 2.309(d)(1)(i), which requires that a petitioner state his or her name, address, and telephone number. Dr. Jarding does not provide an address or telephone number; Dr. Jarding’s Declaration merely reflects that she signed it in Rapid City, South Dakota and, as such, she does not meet the requirements for individual standing. A “petitioner bears the burden to provide facts sufficient to establish standing.”⁵⁵

For the reasons detailed above, BHCWA does not satisfy the requirements for organizational or representational standing.

3. NDN Collective

NDN Collective supports its demonstration of standing by referencing (as “Exhibit 9” in the Organizational Petitioners’ Petition) the Declaration of Taylor Gunhammer. Mr. Gunhammer states that he is “an enrolled member of the Oglala Sioux Tribe” and is “employed as a Local Organizer for NDN Collective.”⁵⁶ He states that he has “been authorized to represent NDN Collective as a whole in asserting and contextualizing the organization’s multi-faceted standing in this matter.”⁵⁷ He describes NDN Collective as “a nonprofit corporation based in Rapid City, South Dakota that is concerned with building the collective power of Indigenous Peoples, communities and Nations to exercise our inherent right to self-determination, while fostering a world that is built on a foundation of justice and equity for all people and Mother Earth.”⁵⁸ The main organizational activities that advance this purpose are “philanthropic and capital

⁵⁴ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

⁵⁵ *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

⁵⁶ OP Attachment 9 at ¶¶ 2-3.

⁵⁷ *Id.* at ¶ 3.

⁵⁸ *Id.* at ¶ 4.

investment in Indigenous-led organizations, policy advocacy, skill-building, agenda setting, activism, and political actions, among other means”⁵⁹

NDN Collective does not satisfy the requirements of organizational standing. An organization that asserts it has standing to intervene in its own right must establish a discrete institutional injury to the organization’s interests, which must be based on something more than a general environmental or policy interest in the subject matter of the proceeding.⁶⁰ Mr. Gunhammer’s Declaration details his personal use and enjoyment of the lands at and near the Dewey-Burdock Project,⁶¹ and he notes that other NDN Collective members use and value the land at and near the project site.⁶² However, these statements do not address a discrete harm to the organization that would be caused by the project. In large part, Mr. Gunhammer’s Declaration focuses on his own interests, rather than addressing those of NDN Collective. Thus, NDN Collective fails to demonstrate that its organizational interests are more than general environmental and policy interests.⁶³

NDN Collective also does not satisfy the requirements to demonstrate representational standing. To demonstrate representational standing, an “entity must then show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests.”⁶⁴ Mr. Gunhammer does not, however, meet even the basic requirement in 10 C.F.R. § 2.309(d)(1)(i), which requires that a petitioner state his or her name, address, and telephone number. Mr. Gunhammer does not provide an address or telephone number; Mr. Gunhammer’s Declaration merely reflects that he signed it in Rapid

⁵⁹ *Id.*

⁶⁰ *See White Mesa*, CLI-01-21, 54 NRC at 252.

⁶¹ *Id.* at ¶¶ 7-12, 14, 16, 18-20.

⁶² *Id.* at ¶¶ 6, 16.

⁶³ *See White Mesa*, CLI-01-21, 54 NRC at 252.

⁶⁴ *See Vermont Yankee*, CLI-00-20, 52 NRC at 163.

City, South Dakota and, as such, he does not meet the requirements for individual standing. A “petitioner bears the burden to provide facts sufficient to establish standing.”⁶⁵

For the reasons detailed above, NDN Collective does not satisfy the requirements for organizational or representational standing.

V. Admissibility of Contentions

A. Legal Requirements for Contentions

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”⁶⁶ Pursuant to that section, a contention must:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and
- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.⁶⁷

⁶⁵ *Bell Bend*, CLI-10-7, 71 NRC 133 at 139.

⁶⁶ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571–72 (2006); *see also USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–437 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

⁶⁷ *See* 10 C.F.R. § 2.309(f)(1).

The failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention.⁶⁸

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁶⁹ The Commission has stated that it “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” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.⁷⁰ The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are “strict by design.”⁷¹ Attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”⁷² A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.⁷³

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as dictated by the Commission’s hearing notice.⁷⁴ Also, to show that a dispute is “material” pursuant to 10 C.F.R. § 2.309(f)(1)(iv) a

⁶⁸ *Priv. Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁶⁹ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁷⁰ *Id.*

⁷¹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), petition for reconsideration denied, CLI-02-01, 55 NRC 1 (2002).

⁷² *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

⁷³ See *Priv. Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974)).

⁷⁴ See *Pub. Serv. Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170–71 (1976).

petitioner must show that its resolution would make a difference in the outcome of the proceeding.⁷⁵

Further, pursuant to 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed contention together with references to specific sources and documents. Neither mere speculation nor bare or conclusory assertions, even by an expert, suffices to allow the admission of a proposed contention.⁷⁶ Additionally, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.⁷⁷ The Board is not expected to sift through attached material and documents in search of factual support.⁷⁸

Finally, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), a proposed contention must be rejected if it does not present a genuine dispute with Powertech on a material issue of law or fact. The Commission has emphasized that “contentions shall not be admitted if at the *outset* they are not described with reasonable specificity or are not supported by some alleged fact or facts *demonstrating* a genuine material dispute” with the applicant.⁷⁹ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”⁸⁰

B. Analysis of Ms. Henderson’s Contentions

⁷⁵ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333–34 (1999).

⁷⁶ See *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁷⁷ See *Fansteel*, CLI-03-13, 58 NRC at 204–05.

⁷⁸ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

⁷⁹ *Id.* at 307 (quoting *Oconee*, CLI-99-11, 49 NRC at 335).

⁸⁰ *Seabrook*, CLI-12-5, 75 NRC at 307 (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

As detailed below, the Staff opposes the admission of all three of Ms. Henderson's stated contentions, as they do not meet the Commission's contention admissibility standards and are not appropriate for litigation in this proceeding.

1. Henderson Contention 1 – Pollution and Depletion of Underground Water

Sources

Summary

In her first contention, Ms. Henderson describes possible impacts to her own ranch and the community, based on potential depletion and/or contamination of regional groundwater supplies. Her main concern is twofold, that Powertech may use "vast amounts of water (8500+ gallons per minute for 20 years)" and that Powertech may "pollute the aquifers by essentially dumping mining residues back into the aquifers in huge quantities."⁸¹ More specifically, she is concerned that the project operations may render her well, which she asserts draws from the Lakota Sandstone (Chilson Member), and an unknown spring on her property unusable. On depletion, Ms. Henderson asserts her concern regarding Powertech's plans to draw water from the Madison aquifer, stating she "know[s] of no Madison water deposit in the area that would deliver such a large amount of water," and she concludes that the planned withdrawals would leave her without "any volume of water for livestock use."⁸² She raises a similar concern regarding shallow wells on other properties throughout the region. Ms. Henderson also asserts that Powertech will be "essentially dumping mining residues back into the aquifers," and concludes that the project will "forever pollute the aquifers," highlighting that her ranch is "essentially downstream" from the Dewey-Burdock Project site.⁸³ She cites general concerns for nearby ranchers, for U.S. beef production as a whole, and that contamination in the Madison,

⁸¹ Henderson Petition at 3.

⁸² Henderson Petition at 3.

⁸³ *Id.*

Minnelusa, and Lakota Sandstone (Chilson Member) aquifers would harm neighboring communities, local businesses, and the regional economy, including tourism.

Discussion

Ms. Henderson's concerns regarding Powertech's water use, including possible depletion of local aquifers (and thereby her own "Lakota well")⁸⁴ are unsupported by any facts, expert opinions, or references.⁸⁵ Additionally, Ms. Henderson does not take issue with any relevant portion of the application.⁸⁶ Finally, she does not claim that any information in this contention addresses "any significant environmental change" from the 2014 SEIS, which is the required scope of supplemental information provided in the LRA.⁸⁷ Therefore, these claims do not present a genuine dispute with the application, as required, and are not admissible.

Ms. Henderson's assertions that Powertech's operations will contaminate local aquifers, including her own water supplies, are similarly unsupported and inadmissible. The contention does not reference any facts, expert opinions, or sources supporting her claims that the planned mining operations will lead to the contamination of the Lakota Sandstone (Chilson Member), Madison, or Minnelusa⁸⁸ aquifers, or that operations will render her water supplies unusable.⁸⁹ In addition, Ms. Henderson does not take issue with portions of the application analyzing the

⁸⁴ See Henderson Petition at 2, 3. Ms. Henderson asserts in the background section of her Petition that she uses a well which draws water from the Lakota Sandstone (Chilson Member).

⁸⁵ See 10 CFR 2.309(f)(1)(v).

⁸⁶ See *id.* at (vi); *see, e.g.*, Combined TR/ER at Section 1.7, "ISL Method and Leaching Process" (describing groundwater use during the ISL process), Section 2.7.2.4, "Groundwater Use," (describing use of deep aquifers as supply water), 2-228 Table 2.7-18 (describing net water usage); 2014 SEIS at Section 4.5.2.1, "Proposed Action (Alternative 1)".

⁸⁷ See 10 C.F.R. § 51.60(a).

⁸⁸ Ms. Henderson also provides no basis for her concern regarding the Minnelusa, an aquifer she does not claim to use as a water source. See 10 CFR 2.309(f)(1)(ii).

⁸⁹ See *id.* at (v); Henderson Petition at 3.

potential for groundwater contamination. In fact, she does not identify any part of the application in support of her claims.⁹⁰

Lastly, Ms. Henderson's concerns for the local economy, regional tourism, and the U.S. beef industry are generic in nature and immaterial to the findings the NRC must make in this license renewal action.⁹¹

As the Commission has observed, "pleadings must be something more than an ingenious academic exercise in the conceivable," such that this petitioner must allege she "will in fact be perceptibly harmed by the challenged agency action, not that [s]he can imagine circumstances in which [s]he could be affected by the agency's action."⁹² Overall, Ms. Henderson's first contention lacks specificity and is conclusory throughout, as it lacks explanation as well as supporting facts, opinions, and/or references to supporting documents required by the contention admissibility standards.⁹³ Furthermore, it fails to address the limited scope required of the LRA.⁹⁴ Mere speculation and conclusory assertions do not suffice to admit a proposed contention, and therefore the Board should dismiss this contention.⁹⁵

2. Henderson Contention 2

Summary

⁹⁰ See *id.* at (vi).; see, e.g., Combined TR/ER at Section 7.5.2 "Potential Groundwater Contamination Risks"; 2014 SEIS at Section 4.5.2 "Groundwater Impacts."

⁹¹ See 10 CFR 2.309(f)(1)(i), (iv).

⁹² *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248 (quoting *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 688-89 (1973)).

⁹³ See 10 CFR § 2.309(f)(1)(i), (ii), and (v).

⁹⁴ See 10 C.F.R. § 51.60(a).

⁹⁵ See *American Centrifuge*, CLI-06-10, 63 NRC at 472; *Fansteel*, CLI-03-13, 58 NRC at 203.

Ms. Henderson's second contention is largely a continuation of the first: "[t]he loss of these shallow wells for the two counties would impact most housing developments and small livestock operations, ruining the tax base and rendering our beautiful area uninhabitable."⁹⁶

Discussion

In this contention, Ms. Henderson makes a general assertion that does not identify an issue of law or fact in controversy. Further, Ms. Henderson does not provide any explanation for the basis of her claimed contention and similarly fails to challenge any part of the application, making no demonstration of a genuine dispute.⁹⁷ Ms. Henderson's bare assertion does not constitute an admissible contention in this proceeding. As the Board in the initial *Powertech* licensing proceeding concluded, "[a] single sentence labeled a contention, with no reference to the six elements of section 2.309(f)(1) does not an admissible contention make."⁹⁸ Therefore, the Board should dismiss this contention.

3. Henderson Contention 3 – Determination of Baseline Ground Water Quality

Summary

Ms. Henderson's third contention covers three topics: groundwater contaminants, state and local regulations, and national security. The contention focuses on regional groundwater quality and contamination concerns stemming from the Dewey-Burdock Project site's proximity to the Black Hills Army Depot (BHAD), a historic munitions storage and maintenance facility operated by the U.S. Army between 1942 and 1967, which is located 14 miles south of the site.⁹⁹ Ms. Henderson contends Powertech has failed to consider chemical agents that may be present (and may have begun to enter groundwater supplies). She further contends that Powertech's planned activities at Dewey-Burdock may "cause the underground [Wind Cave]

⁹⁶ Henderson Petition at 4.

⁹⁷ See 10 CFR 2.309(f)(1)(i), (ii), and (vi).

⁹⁸ *Powertech*, LBP-10-16, 72 NRC at 396.

⁹⁹ See 2014 SEIS at 5-32 to -33.

structure and its contaminants to move in a wholly unpredictable fashion,” leading to the migration of these chemical agents away from BHAD, contaminating surface waters, shallow aquifers, shale, and deep aquifers.¹⁰⁰ In addition, Ms. Henderson asserts that old mining boreholes on the site have become conduits for contaminants, and Powertech’s use of leaching fluid in its ISR activities will cause unpredictable chemical reactions that will be “unmanageable from a remediation sense.”¹⁰¹ Ms. Henderson asserts that Powertech may intend to seek an exemption from the federal Safe Drinking Water Act (SDWA) and raises concerns regarding South Dakota Mining and Water Management Board regulations.¹⁰² Finally, Ms. Henderson also raises various local and national security concerns and asserts that the facility has “minimal protection from local theft of yellowcake for terrorist purposes.”¹⁰³

Discussion

Ms. Henderson’s claim that Powertech failed to consider possible BHAD site conditions in its LRA is not admissible. The scope of environmental information Powertech must provide in its LRA is limited, by 10 C.F.R. §51.60(a), to that which reflects “any significant environmental change” since the 2014 SEIS. Thus, a contention that does not identify a change and explain its significance does not raise a genuine dispute with the application on a material issue of law or fact.¹⁰⁴ Moreover, the Commission has found that a petitioner’s opportunity to challenge a supplemental environmental report “reasonably entails looking at the previous environmental

¹⁰⁰ Henderson Petition at 5.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 6–7.

¹⁰⁴ See 10 C.F.R. § 2.309(f)(1)(vi).

documents” prepared by an applicant or the NRC staff for the same site, particularly when those documents have been referenced by participants before the Board.¹⁰⁵

Regarding Ms. Henderson’s concerns about BHAD site conditions, she does not assert that this information represents an environmental change since the 2014 SEIS, and she does not acknowledge that the 2014 SEIS addresses BHAD site conditions.¹⁰⁶ Because she does not demonstrate that the LRA should have further addressed BHAD (e.g., by alleging that there is new and significant information available about it), she fails to demonstrate a genuine dispute with the LRA.

Ms. Henderson claims that existing boreholes on the Dewey-Burdock Project site (from previous mining exploration activities) allow for the migration of contaminants.¹⁰⁷ But, as above, she fails to allege that any of this information represents a significant environmental change. Ms. Henderson also fails to support her claims with any facts, expert opinions, or references, and fails to acknowledge or dispute portions of the LRA that characterize and analyze the boreholes and describe plans for testing and mitigation of hydrologic issues involving the boreholes.¹⁰⁸ For these reasons, Ms. Henderson’s concerns regarding existing boreholes and in situ chemical reactions fail to demonstrate a genuine dispute with the application.

Turning to her safe drinking water concerns, Ms. Henderson asserts that Powertech will “need to seek a permanent exemption” from the SDWA, stating her intention to challenge “any

¹⁰⁵ See *Nuclear Fuel Servs., Inc.* (License Amendment Application), CLI-23-03, 98 NRC 33, 42–43, n.84 (2023); see also Combined TR/ER at 7-1 (in its application, Powertech prefaces its discussion of “Potential Environmental Effects” by referencing the NRC’s conclusions in the 2014 SEIS.)

¹⁰⁶ See 2014 SEIS at 5-32 to -33. The NRC Staff concluded that the Dewey-Burdock ISR Project would have no impact on the site conditions at BHAD.

¹⁰⁷ See Henderson Petition at 4.

¹⁰⁸ See 10 CFR 2.309(f)(1)(v), and (vi); Combined TR/ER at 3-31 to -33 (describing pump testing), Section 5.7.1.3.4, “Exploration Hole Mitigation Procedures,” (describing Powertech’s commitment to plugging or mitigating problematic boreholes).

application for a permanent aquifer exemption by EPA.”¹⁰⁹ Both statements lack support and fail to challenge any relevant portion of Powertech’s application.¹¹⁰ Further, Ms. Henderson’s concern involving Powertech’s need for an exemption from the SWDA and her plans to challenge an application before the Environmental Protection Agency (or the State of South Dakota) are outside the scope of this proceeding and immaterial to findings the NRC must make on the LRA before it.¹¹¹

Ms. Henderson also asserts a concern involving reform to groundwater quality regulations set by the South Dakota Mining and Water Management Board,¹¹² claiming while original regulations required mining companies to “return ground water to its baseline conditions,” updated regulations are less restrictive.¹¹³ As an initial matter, Ms. Henderson does not specify the regulations at issue, and thus fails to demonstrate that they are material to findings the Staff must make in this proceeding.¹¹⁴ Moreover, these regulations are outside the scope of this license renewal proceeding;¹¹⁵ therefore, this claim is inadmissible.

Finally, the general national and local security concerns Ms. Henderson raises regarding the shipment of yellowcake offsite and the security of the yellowcake at the facility also do not establish the bases for an admissible contention. These statements are inadmissible because they are unaccompanied by any alleged facts, expert opinions, or references substantiating them.¹¹⁶ Further, Ms. Henderson has not specifically disputed any portion of the application,

¹⁰⁹ Henderson Petition at 6.

¹¹⁰ See 10 CFR 2.309(f)(1)(i), (ii), and (vi); see also Combined TR/ER at Section 6.1.1, “Groundwater Restoration Criteria.”

¹¹¹ See 10 CFR 2.309(f)(1)(iii), (iv).

¹¹² The Staff notes this particular Board operated from 1987-2018.

¹¹³ Henderson Petition at 6.

¹¹⁴ See 10 CFR 2.309(f)(1)(iv).

¹¹⁵ See *id.* at (iii).

¹¹⁶ See *id.* at (v).

including Powertech's discussion of facility security.¹¹⁷ If Ms. Henderson seeks to take issue with the NRC's regulations in the area of security, NRC regulations preclude such a challenge absent a waiver.¹¹⁸

Overall, as detailed above, Ms. Henderson's third contention fails to meet the contention admissibility requirements and is, therefore, inadmissible.

C. Analysis of Organizational Petitioners' Petition

1. OP Contention 1 – Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources, and Failure to Involve or Consult the Oglala Sioux Tribe and the Interested Public as Required by Federal Law

Summary

In this contention the Organizational Petitioners claim that Powertech has not complied with NEPA and the NHPA, certain regulations in 10 C.F.R. Part 51, and with NUREG-1569.¹¹⁹ They claim that the NRC has not complied with the NHPA and express concerns that they are being excluded from participating in consultation until a NEPA document is prepared.¹²⁰ The Organizational Petitioners also assert that a cultural resources survey methodology finalized for the Crow Butte ISR Facility in September of 2021 constitutes new and significant information, which requires the conduct of surveys on the Dewey-Burdock site in order to complete NHPA consultation.¹²¹

Discussion

¹¹⁷ See *id.* at (vi); Combined TR/ER at Section 5.6, "Facility Security."

¹¹⁸ See 10 C.F.R. § 2.335(a).

¹¹⁹ OP Petition at 13.

¹²⁰ *Id.* at 18.

¹²¹ *Id.* at 20.

This contention is not ripe for adjudication. Compliance with the NHPA, including consultation with the Oglala Sioux Tribe, is the responsibility of the NRC Staff, not Powertech. At this early stage of the LRA review, the Staff is still preparing to initiate the consultation required under the NHPA. As part of its responsibilities under the NHPA, the NRC must consult before the issuance of the subject renewed license with any Indian tribes that “attach[] religious and cultural significance to historic properties that may be affected” by the issuance of the renewal license.¹²² In general, the NRC implements its responsibilities under the NHPA in conjunction with the NEPA process, which is also in its early stages.¹²³ Thus, the NRC is not required to consult with the Tribe at this stage of its review but will do so in accordance with its processes for complying with NEPA and the NHPA.

The Organizational Petitioners’ arguments regarding compliance with the NHPA at this stage of the proceeding were addressed by the Commission analyzing a similar contention in the *Crow Butte* license renewal proceeding.¹²⁴ In *Crow Butte*, the Commission reversed the licensing board’s decision admitting—at the outset of the proceeding, prior to the Staff’s development of any NEPA documents—a contention challenging the failure to consult with the Oglala Sioux Tribe concerning properties of potential cultural significance.¹²⁵ The Commission reasoned that the contention would not be ripe until the Staff’s NEPA review was complete, and once it was complete, a contention challenging “whether and how the Staff fulfills its NHPA obligations are issues that could form the basis for a new contention.”¹²⁶ In a subsequent

¹²² 36 C.F.R. § 800.2(c)(2)(ii). Regarding the timing of consultation on historic properties of significance to Indian tribes, § 800.2(c)(2)(ii)(A) states that “[c]onsultation *should* commence early in the planning process.”

¹²³ See *American Centrifuge*, CLI-06-9, 63 NRC at 437-38.

¹²⁴ *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350-51 (2009).

¹²⁵ *Id.*

¹²⁶ *Id.*

decision, the Commission elaborated on the rationale for its earlier conclusion: “we agreed that the contention was not ripe. . .given that the contention centered on claimed deficiencies (under the NHPA and NEPA) said to stem from a failure to consult with the Tribe while Crow Butte itself had no obligation under the NHPA to consult the Tribe.”¹²⁷

Contention 1 is premised on alleging defects under NEPA and the NHPA in connection with the NRC’s responsibility to consult with the Tribe. It therefore falls within the ambit of the Commission’s rationale in the *Crow Butte* Orders discussed above, which found a similar contention unripe. Relatedly, given that a contention based on challenging the NRC’s compliance with the NHPA consultation requirements should challenge the NRC’s NEPA documents, rather than the LRA, this contention does not raise a genuine dispute with the LRA on a material issue of law or fact.¹²⁸ The Board should, therefore, deny this contention.

2. OP Contention 2 - Failure to Consider Cumulative Effects

Summary

The Organizational Petitioners argue in this contention that the LRA fails to consider several types of changes to the Dewey-Burdock Project and related cumulative impacts. In particular, they assert that the LRA must analyze changes to the Dewey-Burdock Project’s scope, area, configuration, and waste streams.¹²⁹ They further argue that the LRA must address cumulative impacts related to the development of other uranium and mining projects in the region, including impacts related to the Dewey-Burdock Project’s central processing facility serving as a regional processing facility for several other ISR projects that have not yet been developed.¹³⁰

¹²⁷ *Crow Butte Res., Inc.* (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255, 261 (2020).

¹²⁸ See 10 C.F.R. § 2.309(f)(1)(vi).

¹²⁹ OP Petition 21-26.

¹³⁰ *Id.*

Discussion

To demonstrate that there are project changes that Powertech must address in the LRA, the Organizational Petitioners reference a number of securities filings, reports, or press releases by entities other than the license renewal applicant, Powertech.¹³¹ In doing so, they incorrectly impute significance to non-application documents that are not before the NRC and, therefore, are immaterial to this licensing action. These documents lack regulatory significance because they are unrelated to the authorization the NRC would provide if it granted a renewed license to Powertech. Additionally, to the extent the Organizational Petitioners purport to use information from non-applicants to challenge information in the LRA—such as challenges to the project scope, area, configuration, wastes and other project aspects controlled by the license and described in the LRA—they do not controvert the LRA, as they fundamentally must at this stage of the proceeding, to raise a genuine dispute with the application.¹³² Matters raised by the information are also not within the scope of the proceeding,¹³³ which is defined by the notice of hearing and the order referring the proceeding to the Board,¹³⁴ and not material to the findings that the NRC Staff must make on the application.¹³⁵ The Commission has stated that NRC proceedings are to consider “. . . the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding,” such as references to potential future project changes or not-yet-developed new projects in the documents provided by the Organizational Petitioners.¹³⁶

¹³¹ See *id.*, Attach. 12, 14-17.

¹³² See *Crow Butte Res. Inc.*, (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 557 (2009); see also 10 C.F.R. § 2.309(f)(1)(vi).

¹³³ See 10 C.F.R. § 2.309(f)(1)(iii).

¹³⁴ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

¹³⁵ See 10 C.F.R. § 2.309(f)(1)(iv).

¹³⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002).

Furthermore, the Organizational Petitioners' contention fails because it improperly asserts that the LRA should address information beyond the scope of information required in license renewal, which only requires the application to supplement the environmental review that was already conducted for the site. Under 10 C.F.R. § 51.60(a), the Combined TR/ER need only provide supplemental information to address any "significant environmental change" since the 2014 SEIS. The Organizational Petitioners argue that Powertech has not adequately addressed impacts from potential plans to use the Dewey-Burdock Project as a central processing facility for satellite mining operations, and from an exploratory gold drilling project in the northern Black Hills.¹³⁷ These arguments fall short, however, as both of these topics were addressed by the 2014 SEIS,¹³⁸ and the Organizational Petitioners establish no "significant environmental change" that would necessitate Powertech supplementing the environmental report on either topic.¹³⁹ Thus, the Organizational Petitioners' arguments lie outside the scope of the proceeding, are not material to the findings that the Staff must make on the application, and fail to show a genuine dispute with the application exists.¹⁴⁰

The Organizational Petitioners likewise fail to provide bases for an admissible contention with their arguments that the LRA fails to address waste storage issues and the permanent disposal of radioactive solids.¹⁴¹ The Organizational Petitioners do not acknowledge that the LRA addresses these topics or substantively dispute its adequacy. As such, these fail to show a genuine dispute with the application.¹⁴²

¹³⁷ OP Petition at 23-26.

¹³⁸ See 2014 SEIS at 5-2 to 5-7; see also 2014 SEIS at Sec. 5.1.1, "Other Past, Present, and Reasonably Foreseeable Actions," Sec. 5.1.1.6, "Other Mining."

¹³⁹ See 10 C.F.R. § 51.60(a).

¹⁴⁰ See 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).

¹⁴¹ OP Petition at 23.

¹⁴² See 10 C.F.R. 2.309(f)(1)(vi).

In sum, the Organizational Petitioners fail to support their contention alleging unaddressed cumulative impacts, by referencing documents that are immaterial to the findings for this application. They further do not demonstrate any “significant environmental change”¹⁴³ that would require Powertech to supplement the environmental review as to this LRA or specifically dispute application information they claim was omitted.¹⁴⁴ For the foregoing reasons, the Organizational Petitioners fail to meet the admissibility criteria, and the contention should be denied.

3. OP Contention 3 - The Fall River County Ordinance Demonstrates that the Proposed Project is Unlawful Under Local Laws

Summary

The Organizational Petitioners argue that a November 2022 Fall River County ordinance, in which voters declared uranium mining a nuisance, demonstrates that the Dewey Burdock Project is unlawful under local law, and therefore, Powertech and the NRC staff are required to address this local ordinance.¹⁴⁵ The Organizational Petitioners further argue that the NRC “cannot permit activities that are illegal in the jurisdiction in which they are proposed.”¹⁴⁶

Discussion

In support of this contention, the Organizational Petitioners reference their “Exhibit 19,” which is a petition that a proposed ordinance regarding uranium mining being declared a nuisance in Fall River County be submitted to voters for their approval or rejection. This document does not establish that the proposed ordinance was accepted by Fall River County to bring to a vote, whether a vote was conducted, the results of any vote, or that ultimately a local ordinance deeming uranium mining a nuisance became effective in Fall River County.

¹⁴³ 10 C.F.R. § 51.60(a).

¹⁴⁴ See 10 C.F.R. §2.309(f)(1)(vi).

¹⁴⁵ OP Petition at 26.

¹⁴⁶ *Id.*

Therefore, at the outset this contention does not provide the proper support to present a genuine dispute with the applicant on a material issue of law or fact.¹⁴⁷

Even if such a local ordinance were in effect, however, this contention is not admissible. To the extent that the contention alleges that Powertech's planned activities will violate the local ordinance, Powertech's compliance with the local ordinance is outside the scope of, and not material to, this proceeding.¹⁴⁸ The Commission has held both that the NRC's adjudicatory process is not the proper forum to resolve matters of local law¹⁴⁹ and that it is not the place of the NRC "to take affirmative action to determine whether other agencies' permits are required or to enforce other agencies' requirements."¹⁵⁰ Moreover, the license renewal would have no effect on the rights of Fall River County or its residents with respect to the effect of a valid ordinance, rendering the outcome of this proceeding immaterial to the concerns raised in the contention.¹⁵¹ As such, the contention does not satisfy the criteria for admissibility.¹⁵²

To the extent that the contention alleges that Powertech's environmental review must address the local ordinance pursuant to NEPA, the contention also fails, as the local ordinance is outside the scope of, and not material to, this proceeding.¹⁵³ This aspect of the contention also does not demonstrate a genuine dispute with the LRA on a material issue of law or fact.¹⁵⁴

¹⁴⁷ See 10 C.F.R. § 2.309(f)(1)(vi). The Commission has emphasized that "contentions shall not be admitted if at the outset they are not described with reasonable specificity or are not supported by some alleged fact or facts demonstrating a genuine material dispute" with the applicant. *Oconee*, 49 NRC at 335.

¹⁴⁸ See 10 C.F.R. § 2.309(f)(1)(iii), (iv).

¹⁴⁹ See *PPL Susquehanna LLC*, (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 105-06 (2007).

¹⁵⁰ *Hydro Res., Inc.* (Albuquerque, NM), CLI-98-16, 48 NRC 119, 121-22 (1998).

¹⁵¹ See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 247-48 (2004).

¹⁵² See 10 C.F.R. § 2.309(f)(1)(iii), (iv).

¹⁵³ See *id.*

¹⁵⁴ See *id.* at (vi).

The Commission has confirmed that there is no requirement for the applicant to address state or local law in their environmental review, submitted in conjunction with the federal, NRC licensing process. Under similar facts, a licensing board recently rejected the argument that an applicant's environmental report for the license renewal of an independent spent fuel storage installation (ISFSI) "improperly fails to reconcile the ISFSI license renewal with California law and policies regarding the creation and storage of spent fuel."¹⁵⁵ The Board ruled that the applicant need not address state law and policies in the license renewal proceeding.¹⁵⁶ As in that case, this proceeding concerns Powertech's compliance with NRC regulations, not with state and local law, which is outside the scope of this proceeding.¹⁵⁷ And also similarly, the Organizational Petitioners identify no federal regulation requiring Powertech to address the local ordinance raised here.¹⁵⁸ As Powertech was not required to address the local ordinance in its environmental review, the Organizational Petitioners' contention is inadmissible, as it is outside the scope of, and not material to, this proceeding, and fails to demonstrate a genuine dispute with the LRA on a material issue of law or fact.¹⁵⁹

In sum, the Organizational Petitioners did not submit evidence establishing that a local ordinance is indeed in effect. Even if the local ordinance were in effect, however, the contention does not meet the criteria for admissibility, as Powertech had no obligation to address the local ordinance in its LRA for this federal licensing process.

4. OP Contention 4 – Data Required for NRC's Endangered Species Act and National Environmental Policy Act Analysis is Stale or Absent

¹⁵⁵ See *Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-23-7, 98 NRC 1, 19 (2023).

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).

Summary

The Organizational Petitioners assert that “NRC has adopted practices, policies, guidance, and regulations that NRC decisions recognize as non-compliant with NEPA, ESA, and the APA.”¹⁶⁰ Relevant to this contention, the Organizational Petitioners contend that the NRC fails to require necessary data to support agency actions and that the LRA is an example of a document that is inadequate.¹⁶¹ The Organizational Petitioners take issue with “an almost total lack of updated licensing data provided by the applicant” that could not support compliance with NEPA or ESA.¹⁶² The Organizational Petitioners point out that ecological resources information relies on “decades-old vegetative surveys” and other references that do not post-date the 2008 initial application.¹⁶³ Without updated data in the LRA, the Organizational Petitioners argue that NRC issuing a renewed license would be unlawful.¹⁶⁴ The Organizational Petitioners conclude that they seek to adjudicate their concerns regarding NRC agency policies, rules, and practices in the current license amendment proceeding based on their reading of the Supreme Court case *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*¹⁶⁵

Discussion

In Contention 4, the Organizational Petitioners present challenges both to the LRA and to aspects of the NRC’s regulatory framework. Both challenges fall short. The challenge to the LRA does not raise a specific issue material to the findings the NRC Staff must make in the LRA proceeding and does not provide sufficient information to show a genuine dispute with the

¹⁶⁰ OP Petition at 27.

¹⁶¹ *Id.*

¹⁶² *Id.* at 28.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 29

¹⁶⁵ *Id.* at 29-30.

licensee on a material issue of law or fact.¹⁶⁶ The challenge to the NRC's regulatory framework is outside the scope of the proceeding, does not raise a material issue to the findings the Staff must make in the LRA proceeding, and does not provide sufficient information to show a genuine dispute with the licensee on a material issue of law or fact.¹⁶⁷ Additionally, the precedent the Organizational Petitioners argue should permit them to challenge NRC's regulatory framework is inapposite in this proceeding.

Contention 4's challenge to the LRA consists of a conclusory argument, the crux of which is that environmental information in the LRA is self-evidently stale, and it would, therefore, be unlawful for the NRC to rely on this information to issue a renewed license.¹⁶⁸ But beyond pointing broadly to the age of information, the Organizational Petitioners provide no analysis addressing whether any particular LRA information, surveys, or analyses in the LRA are unreliable or inadequate. The Organizational Petitioners do not identify any applicable criteria for evaluating the LRA information for staleness or a requirement precluding use of information developed for initial licensing in the LRA. Without including specific information challenging the adequacy of the LRA information or identifying specific and applicable requirements for the age of information, the Organizational Petitioners do not demonstrate that their challenge is material to the findings the Staff must make in this proceeding or that it raises a genuine dispute with the application on a material issue of fact or law.¹⁶⁹

The Organizational Petitioners also fail to acknowledge that Powertech has not undertaken any activities on the Dewey Burdock site since initial licensing. Organizational Petitioners do not explain whether they believe significant changes have nevertheless occurred, and what those changes might be. The LRA is only required to provide new information to

¹⁶⁶ See 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

¹⁶⁷ See *id.* at (iii), (iv), and (vi).

¹⁶⁸ OP Petition at 28-29.

¹⁶⁹ See 10 C.F.R § 2.309(f)(1)(iv), (vi).

address “any significant environmental change” since the 2014 SEIS;¹⁷⁰ the NRC will independently review this information in its NEPA review and complete any required consultations.¹⁷¹ At bottom, the basis for this portion of the contention is a bare assertion that the LRA is inadequate, which is insufficient to demonstrate a genuine dispute with the application.¹⁷²

The portion of Contention 4 purporting to challenge the NRC’s regulatory framework in this licensing proceeding also falls short of forming the basis for an admissible contention. First, NRC regulations preclude challenges to Commission rules or regulations in adjudicatory proceedings, absent a waiver granted by the Commission.¹⁷³ The Organizational Petitioners did not request a waiver to challenge an NRC rule or regulation; therefore, this challenge is outside the scope of the proceeding.¹⁷⁴ Second, the Organizational Petitioners’ general argument attacking the NRC’s regulatory framework lacks specificity—they provide no information on the particular NRC policies, rules, and practices in this proceeding that they seek to challenge. Thus, they fail to provide a specific statement of the issue of law or fact to be raised or controverted or to explain the basis for their contention as required by 10 C.F.R. § 2.309(f)(1)(i)-(ii).

The Organizational Petitioners’ invocation of the Supreme Court’s *Corner Post* decision¹⁷⁵ is inapposite to this proceeding and provides no basis for challenging rules or regulations of the Commission. The holding of *Corner Post* addresses the timing of accrual of a plaintiff’s injury under the Administrative Procedure Act’s 6-year statute of limitations for

¹⁷⁰ See 10 C.F.R. § 51.60(a).

¹⁷¹ See 10 C.F.R. § 51.41.

¹⁷² See *Fansteel*, CLI-03-13, 58 NRC at 203.

¹⁷³ See 10 C.F.R. § 2.335(a).

¹⁷⁴ See 10 C.F.R. § 2.309(f)(1)(iii).

¹⁷⁵ *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. ___, 144 S. Ct. 2440 (2024).

challenging final agency actions.¹⁷⁶ However, the Hobbs Act—not the APA provision at issue in *Corner Post*—is the applicable statute providing for judicial review of NRC licensing and rulemaking actions.¹⁷⁷ The Court pointedly distinguished the intent of the APA’s “accrual” language from the Hobbs Act’s specific requirement for an aggrieved party to submit a petition for review within 60 days after the entry of the final agency action.¹⁷⁸ As such, not only does *Corner Post* not bear on the timing for review of NRC licensing and rulemaking actions in Federal court, it also does not support expanding the scope of the licensing proceeding beyond the parameters of the notice of opportunity for hearing.¹⁷⁹ The Organizational Petitioners are precluded from challenging NRC rules and regulations in this license renewal proceeding.¹⁸⁰

In conclusion, neither portion of this contention provides the basis for an admissible contention. The Board should, therefore, reject this contention.

CONCLUSION

For the reasons stated above, Ms. Henderson has demonstrated standing to intervene in this proceeding, but has not submitted an admissible contention, therefore the Board should deny her request. Of the Organizational Petitioners, only the Tribe has demonstrated standing; however, the Organizational Petitioners have not submitted an admissible contention. Accordingly, both petitions should be denied.

¹⁷⁶ See *id.* at 2447.

¹⁷⁷ See, e.g., *Blue Ridge Environmental Defense League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012).

¹⁷⁸ *Corner Post*, 144 S. Ct. 2440, 2454-55 (2024).

¹⁷⁹ *Powertech Renewal*, 89 Fed. Reg. at 65, 401.

¹⁸⁰ See 10 C.F.R. § 2.335(a).

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§ 2.304(d)/

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Dated this 4th day of November 2024

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

POWERTECH (USA) INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

Docket No. 40-9075-LR

Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing “NRC STAFF CONSOLIDATED ANSWER TO INTERVENTION PETITION OF SUSAN HENDERSON AND INTERVENTION PETITION OF THE OGLALA SIOUX TRIBE, BLACK HILLS CLEAN WATER ALLIANCE, AND NDN COLLECTIVE” dated November 4, 2024, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the captioned proceeding, this 4th day of November 2024.

/Signed (electronically) by/

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Dated November 4, 2024