ATTACHMENT 38

January 31, 2025 Memorandum and Order (Granting, in Part, Organizational Petitioners' Request for Hearing and Denying Henderson's Request for Hearing)

LBP-25-03

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)	January 31, 2025

MEMORANDUM AND ORDER
(Granting, in Part, Organizational Petitioners' Request for Hearing and Denying Henderson's Request for Hearing)

Whether one views history from the perspective of John Jay Chapman,[1] Henry Ford[2] or some other on the vast continuum between, the related obligations of license renewal applicants before the Nuclear Regulatory Commission to identify and conserve cultural and historical resources is just one of the issues that looms large in this proceeding.

We address two intervention petitions filed in opposition to Powertech (USA) Inc.'s ("Powertech") application for a 20-year renewal of its operating license for a yet-to-be-constructed in-situ uranium recovery facility ("Dewey-Burdock Project") in western South

[1] "One of the deepest impulses in man is the impulse to record, - to scratch a drawing on a tusk or keep a diary, to collect sagas and heap cairns. This instinct as to the enduring value of the past is, one might say, the very basis of civilization." https://libquotes.com/john-jay-chapman/quote/lbz8u5e (last accessed Jan. 21, 2025).

[2] "I don't know much about history, and I wouldn't give a nickel for all the history in the world. History is more or less bunk. It is a tradition. We want to live in the present, and the only history that is worth a tinker's damn is the history we make today." https://www.age-of-the-sage.org/quotations/henry_ford_history_bunk.html (last accessed Jan. 21, 2025).

Dakota.[3] Those petitions raise a total of seven contentions, including claims that Powertech has not met its cultural and historical resource identification or preservation obligations under two federal statutes and Nuclear Regulatory Commission ("NRC" or "Commission") regulations and claims of its failure to analyze cumulative effects, as well as claims concerning water quantity and quality. In this Order, we determine that all the petitioners have standing and that two contentions are admissible, in part, as reformulated below.

I. BACKGROUND

A. Procedural Background and Filings.

For a description of the in-situ leach ("ISL") recovery process, we refer the reader to the cogent, detailed, and informative description by a prior licensing board in its decision on Powertech's initial license application.[4] Most importantly for this proceeding, Powertech's planned uranium recovery process will involve the infusion of a lixiviant (an aqueous solution) into the Inyan Kara geologic formation to dissolve the uranium from the rock into the surrounding groundwater of "the Fall River Formation and the Chilson Member of the Lakota Formation," extraction of that uranium-laden water, and processing out the uranium.[5] Susan Henderson, one of the petitioners, claims that her drinking water is supplied from the Lakota Sandstone (in the Inyan Kara geologic formation), proximate to the planned project area.[6]

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[3] 89 Fed. Reg. 65,401 (Aug. 9, 2024). The Powertech license renewal application ("LRA") was submitted in March 2024. See Letter from Peter Luthiger, Chief Operating Officer, Powertech, to Director, Office of Nuclear Materials Safety and Safeguards (NMSS) (Mar. 4, 2024) (ADAMS Accession No. ML24081A103). One of the enclosures to the LRA is a combined technical/environmental report. See id. 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). Because this report includes both technical/safety and environmental information supporting the application, we will refer to it in this decision as "Combined TR/ER."

[4] Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 378–80 (2010).

[5] Combined TR/ER at 1-3 to -6.

[6] Petition for Leave to Intervene from Susan Henderson at 2 (Oct. 8, 2024) [hereinafter

Powertech submitted its LRA to the NRC on March 4, 2024.[7] The NRC Staff ("Staff") accepted the application for docketing and issued a Notice in the Federal Register setting October 8, 2024, as the deadline for interested persons to submit petitions to intervene.[8] Two such petitions were filed.

The Oglala Sioux Tribe ("Oglala Sioux" or "Tribe"), the Black Hills Clean Water Alliance ("Alliance"), and the NDN Collective ("Collective") (together, the "Organizational Petitioners") timely filed a petition, with 19 attachments, raising four contentions, discussed below.[9] Susan Henderson ("Henderson") also timely filed a petition (Henderson Petition), raising three different contentions, also discussed below.

Following the NRC Secretary's October 10, 2024 referral of the petitions to the Chief Administrative Judge for appropriate action,[10] this Board was established on October 15, 2024, to rule on, among other things, standing and contention admissibility.[11] This Board then entered its Initial Prehearing Order on October 17, 2024, setting an Answer deadline of November 4, 2024, and a Reply deadline of November 12, 2024.[12] Both the Staff and Powertech timely filed Answers.[13] The Staff contested the standing only of the Alliance and the Collective but

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"Henderson Petition"] (referencing a water well in the Lakota Sandstone formation); Combined TR/ER at 2-12 fig. 2.2-3 (noting Lakota Formation is part of the Inyan Kara formation).

7 Note 3, above.

8 89 Fed. Reg. 65,401 (Aug. 9, 2024).

9 Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (Oct. 8, 2024) [hereinafter "Org. Pets. Petition"].

10 Referral Memorandum from Carrie M. Safford, NRC, Secretary, to E. Roy Hawkens, Atomic Safety and Licensing Board Panel, Chief Administrative Judge (Oct. 10, 2024).

11 Establishment of Atomic Safety and Licensing Board (Oct. 15, 2024).

12 Licensing Board Memorandum and Order (Initial Prehearing Order) (Oct. 17, 2024) (unpublished).

13 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 (Nov. 4, 2024) [hereinafter "Staff Answer"]; Applicant Powertech (USA) Uranium Corporation's Response to Consolidated Petitioners' Request for a Hearing/Petition for Intervention (Nov. 4, 2024) [hereinafter "Powertech Answer"].

contested the admissibility of all seven proffered contentions. Powertech contested the standing of all Petitioners[14] and contested the admissibility of all proffered contentions. The Organizational Petitioners timely filed a Reply.[15] Henderson did not file a Reply.

The Board held oral argument on December 3, 2024, via video conference, during which issues regarding standing and contention admissibility were addressed.[16] The Board requested supplemental briefing on two issues, with briefs due by December 17, 2024. Tr. at 141–43. Powertech, the Staff, and Organizational Petitioners timely filed supplemental briefs.[17] On December 18, 2024, the Board issued an Order concluding the initial pre-hearing conference and setting a deadline of January 31, 2025, for the issuance of this Order.[18]

B. Contentions Proposed.

The Organizational Petitioners raised four joint contentions. The first addressed a claimed lack of appropriate identification of cultural and historical resources and failure to engage in required Tribal consultation. Org. Pets. Petition at 13–20. The second addressed a claimed failure to consider the cumulative effects of ISL mining in the broader area. Id. at 21–26. The third raised an issue of a local ordinance declaring uranium mining to be a nuisance. Id. at 26. And the fourth addressed a claim that certain required data in the Combined TR/ER is

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[14] Collectively, Organizational Petitioners and Individual Petitioner are referred to as "Petitioners."

[15] Petitioners' Consolidated Reply to NRC Staff and Powertech Responses to Petition to Intervene (Nov. 12, 2024) [hereinafter "Reply"].

[16] Licensing Board Memorandum and Order (Order Scheduling Oral Argument) (Oct. 29, 2024) (unpublished); Powertech USA, Inc., Hearing Transcript (Dec. 3, 2024) [hereinafter "Tr."].

[17] Applicant Powertech (USA) Uranium Corporation's Supplemental Response Following Oral Argument (Dec. 17, 2024) [hereinafter "Powertech Brief"]; NRC Staff Response to Board Request for Additional Briefing (Dec. 17, 2024) [hereinafter "Staff Brief"]; Organizational Petitioners' Supplemental Brief in Support of Petition to Intervene (Dec. 17, 2024) [hereinafter "Org. Pets. Brief"]. Henderson did not file a brief.

[18] Licensing Board Memorandum and Order (Order Concluding Initial Pre-hearing Conference) (Dec. 18, 2024) (unpublished).

stale. Id. at 27–30. Henderson raised three contentions, each related to water quantity and/or quality. Henderson Petition at 3–7.

II. STANDING

To participate in a licensing proceeding, a petitioner first must demonstrate standing. Under Section 189a of the Atomic Energy Act ("AEA"), the NRC must provide a hearing "upon the request of any person whose interest may be affected by the proceeding."[19] The Board has an independent obligation to ensure a petitioner has standing, even if no participant objects on standing grounds.[20] As noted, the Staff conceded that the Tribe and Henderson have standing but contested the standing of Alliance and Collective. Powertech contested the standing of all Petitioners. As demonstrated below, we conclude that all Petitioners have standing.

A. Legal Requirements for Standing in NRC Proceedings.

"The petitioner bears the burden to provide facts sufficient to establish standing."[21] To establish standing, NRC regulations require that a request for hearing or intervention petition include four items:

> (i) [t]he name, address and telephone number of the requestor or petitioner;
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> (ii) [t]he nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
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> (iii) [t]he nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

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19 42 U.S.C. § 2239(a)(1)(A).

20 10 C.F.R. § 2.309(d)(2) ("In ruling on a request for hearing or petition for leave to intervene, [the Board] must determine, among other things, whether the petitioner has an interest affected by the proceeding ... ."); (emphasis added); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 391 (1979) ("[I]n determining the Guild's standing, the Licensing Board was not merely entitled but obligated to satisfy itself that there was at least one member of the Guild with a particularized interest which might be affected by the outcome of the proceeding … .").

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

> (iv) [t]he possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1). Because the Commission has refused to employ a "contention-based standing" concept, once an intervenor has established it has an injury to a protectable interest that can be alleviated by the denial of the licensing request, the intervenor can prosecute any admissible contention that would result in the denial of that requested licensing action.[22]

In accord with the elements above, the Commission requires petitioners to allege a particularized injury that is within the zone of interests protected by the statute governing the proceeding, fairly traceable to the challenged action, and likely to be redressed by a favorable decision.[23] To assess whether an interest falls within the "zone of interests," it is necessary to "first discern the interests 'arguably ... to be protected' by the statutory provision at issue," and "then inquire whether the [petitioner's] interests affected by the agency action are among them."[24] Here, the AEA, the National Environmental Policy Act ("NEPA"), and the National Historic Preservation Act ("NHPA") are the statutes at issue. The AEA "concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security."[25] The purpose of NEPA is to protect the environment.[26] The purpose of the NHPA is to protect tribal cultural resources and ensure tribes are consulted in accordance with section 106 of the NHPA.[27]

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22 Calvert Cliffs 3 Nuclear Project, LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 918 n.28 (2009).

23 Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

24 U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 272–73 (2001), (quoting Nat'l Credit Union Admin. v. First Nat'l Bank, 522 U.S. 479, 492 (1998)).

25 Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 14 (1998).

26 Id. at 9.

27 Crow Butte Res., Inc. (Marsland Expansion Area), LBP-13-6, 77 NRC 253, 271 (2013).

Injury-in-fact is "an invasion of a legally protected interest which is" (1) "concrete and particularized" and (2) "actual or imminent" and not "conjectural or hypothetical."[28] To establish causation, "a causal connection between the injury and the conduct complained of" is required and this connection must be "fairly ... trace[able] to the challenged action of the defendant."[29] To establish redressability, it must be likely "that the injury will be redressed by a favorable decision."[30]

While an individual must establish standing by satisfying the above criteria, an organization may demonstrate standing in two ways: organizational standing or representational standing.[31] Organizational standing involves alleged harm to the organization itself, while representational standing involves alleged harm to an organization's members.[32]

An organization seeking to establish organizational standing must satisfy the same standing requirements as an individual.[33] The organization must show that (1) the action at issue will cause an injury-in-fact to the organization's interests; and (2) the injury is within the zone of interests protected by the relevant statute.[34]

An organization also may obtain standing as a representative of one or more individual members.[35] A recent licensing board decision noted two divergent tests for representational

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28 Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992).

29 Id.

30 Id. at 561.

31 Ga. Inst. of Tech. (Ga. Tech Rsch. Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

32 Id.; Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-24-6, 100 NRC 1, 16 n.66 (2024) (citing cases).

33 Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411 (2007).

34 Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Ga. Tech Rsch. Reactor, CLI-95-12, 42 NRC at 115; Yankee Atomic, CLI-98-21, 48 NRC at 195–96.

35 Crow Butte Res., Inc. (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 18 (2014); Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 266, 268 (2008); Palisades, CLI-07-18, 65 NRC at 409.

standing employed in recent Commission decisions.[36] Under the first formulation of that test, a three-element test, entities "must show one of its members has standing, must identify that member by name and address, and must show, preferably by affidavit, the organization is authorized to request a hearing on behalf of that member."[37] Under the second formulation of that test, a five-element test, an entity must meet the aforementioned three-element test and also show that (1) the interests that the entity seeks to protect are germane to its purpose; and (2) neither the claim asserted nor the relief requested requires an individual member to participate in the entity's lawsuit.[38]

B. The Oglala Sioux Tribe Has Standing.

Despite contesting the Tribe's standing, Powertech agreed at oral argument that it did not dispute the land at issue to be aboriginal land of the Oglala Sioux Tribe. Tr. at 17–18. Powertech further conceded that "federal law recognizes that Native American tribes have a protected interest in cultural resources found on their aboriginal lands." Tr. at 18.

In a similar proceeding, another licensing board determined that the Oglala Sioux Tribe had standing to intervene in an in-situ leach recovery application proceeding because (i) the in-situ recovery operations were to be conducted on aboriginal lands of the Tribe; (ii) federal law protected a tribe's interest in the preservation of cultural traditions; (iii) the Tribe ascribed cultural and religious significance to the land; and (iv) it was likely that tribal artifacts would be

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[36] Diablo Canyon Nuclear Power Plant, Units 1 & 2, LBP-24-6, 100 NRC at 17–20 (citing cases), appeal pending.

[37] Id. at 17–18 (citations omitted).

[38] Id. at 18–20 (citations omitted).

found on the land at issue.[39] On appeal, the Commission "decline[d] to disturb the Board's ruling on this point."[40]

That same reasoning applies here given that (i) the recovery operations at the Dewey-Burdock site will be conducted on aboriginal lands of the Tribe;[41] (ii) federal law protects a tribe's interest in the preservation of cultural traditions;[42] (iii) the Tribe has ascribed cultural and religious significance to the land;[43] and (iv) the Tribe has asserted that tribal artifacts likely are to be found on the land at issue.[44] Thus, we conclude that the Tribe has established its standing.

C. The Black Hills Clean Water Alliance and the NDN Collective Have Standing.

The Alliance and the Collective each claim to have both representational and organizational standing. Tr. at 12. Neither has established representational standing but both have established organizational standing.

1. Representational Standing.

As noted above, regardless of which of two tests is employed, representational standing requires a showing that at least one member has standing and has authorized the entity to represent that member's interest in the proceeding. See Section II.A above. We conclude that neither entity has satisfied either of those elements and, thus, has not established representational standing.

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39 Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 713–14 (2008), aff'd in part and rev'd in part on other grounds, CLI-09-9, 69 NRC 331, 339 (2009).

40 Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 339 (2009).

41 Tr. at 17–18.

42 Crow Butte, LBP-08-24, 68 NRC at 713–14.

43 Org. Pets. Petition, attach. 7, ¶¶ 5–8 (Decl. of Reno Red Cloud (Oct. 8, 2024)) [hereinafter "Red Cloud Decl."].

44 Id. ¶ 8.

i. The Alliance and the Collective both fail to establish that their respective proffered members have standing.

The Alliance and the Collective each failed to include in the Organizational Petitioner's Petition an address and telephone number for their respective members on whose behalf each seeks representational standing.[45] In the Reply, the Alliance and Collective argued that the requirement to include an address and telephone number in the petition simply was a clerical omission and included supplemental affidavits with addresses and telephone numbers for themselves, but not for the members on whose behalf they seek representational standing.[46] The Alliance and Collective also argued that applying the address and telephone number requirement, and other regulatory elements of standing, is ultra vires and extra-statutory.[47]

The standing elements the Alliance and the Collective challenge as being extra-statutory and/or ultra vires, though, are found in a Commission regulation.[48] And neither the Alliance nor the Collective submitted the necessary waiver request to challenge application of that regulation.[49] Therefore, this Board is without the authority to consider a challenge to the application of that regulation and must enforce and apply the regulation.[50] This Board does not

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45 Org. Pets. Petition, attachs. 8–9 (Decl. of Dr. Lilias Jones Jarding (Oct. 6, 2024)) [hereinafter "Jarding Decl."]; (Aff. of Taylor Gunhammer (Oct. 7, 2024)) [hereinafter Gunhammer Aff.].

46 Reply at 2; id. at attachs. A–B (Addendum to Decl. of Dr. Lilias Jones Jarding (Nov. 7, 2024)) [hereinafter "Jarding Addendum"]; (Addendum to Decl. of Taylor Gunhammer (Nov. 7, 2024)) [hereinafter "Gunhammer Addendum"].

47 Id. at 1–5 (citing United States Supreme Court and United States Court of Appeals for the Fifth Circuit cases referenced below).

48 10 C.F.R. § 2.309(d)(1).

49 10 C.F.R. § 2.335(a).

50 See Nuclear Fuel Servs., Inc. (License Amendment Application), CLI-23-3, 98 NRC 33, 49 & n.105 (2023) (affirming restriction in 10 C.F.R. § 2.335 preventing licensing board from considering challenges to regulations absent a waiver from Commission); Union Elec. Co. (Callaway Plant, Units 1 & 2), ALAB-347, 4 NRC 216, 218 (1976) ("[T]he Commission … withheld jurisdiction from the licensing boards to entertain attacks on the validity of Commission regulations in individual licensing proceedings except in certain 'special circumstances.'"); New Jersey Dep't of Env't Prot. v. NRC, 561 F.3d 132, 135 (3d Cir. 2009) ("Unless a party obtains a waiver from the NRC, regulations are not 'subject to attack' during adjudications.").

read the recent Supreme Court decisions in Loper Bright or Corner Post or the recent Fifth Circuit decision in Texas v. NRC as providing it with the authority to review a challenge to the Commission's regulations. Any such challenge must be presented to the Commission itself.[51]

Nevertheless, even if we were to consider the argument advanced by the Organizational Petitioners, it would fail. They argue that the lack of an address and telephone number should not operate to deprive the Alliance and Collective of representational standing. Yet an Atomic Safety and Licensing Appeal Board upheld a licensing board's decision that an organization's refusal to provide the name and address of a member with standing was sufficient reason to deny the organization's intervention petition.[52] The Appeal Board noted the name and address of the member with standing serves an important and substantive role—it allows the licensing board to engage in the fact finding necessary to determine independently whether a member truly could establish standing.[53]

Moreover, the organizational addresses and phone numbers provided by the Alliance and the Collective in their Replies do not remedy this failure. At oral argument, counsel for the Organizational Petitioners stated that Dr. Jarding and Mr. Gunhammer "identify with, and are associated with the address submitted with the addendum[s] [to the Organizational Petitioners' Reply]. Both of those individuals are the only employees at that address for the organizations. Those addresses submitted with the addendum are the addresses for those individuals." Tr. at 14. Yet Commission caselaw holds that providing the address of a petitioning organization but

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51 10 C.F.R. § 2.335(d).

52 Allens Creek, ALAB-535, 9 NRC at 389–94.

53 Id. at 393–94; notes 37 and 38, above, and accompanying text (citing Commission decisions requiring submission of the name and address of an organization's member to establish representational standing); note 20, above.

not a residential address of any member of that organization fails to provide a basis for standing for both the organization and the individual.[54]

All elements of the Section 2.309(d) standing test must be met. The Alliance and the Collective failed to meet the first of those elements, even after having the opportunity in the Reply to correct their earlier omission.[55] Thus, they do not have representational standing.

ii. The Alliance and the Collective also both fail to provide written authorization from their respective members for either entity to represent that member's interests in this proceeding.

Moreover, to satisfy the Commission's test for representational standing, an entity must include the name and address of a member who authorizes the organization to request a hearing on behalf of that member.[56] Neither of the Declarations filed by the Alliance included an authorization by Dr. Jarding for the Alliance to represent her interests in this proceeding.[57] Likewise, neither of the Declarations filed by the Collective included an authorization by Mr. Gunhammer for the Collective to represent his interests in this proceeding.[58]

The Alliance and the Collective failed to meet yet another element of the Commission's representational standing test. Accordingly, neither the Alliance nor the Collective have established representational standing in this proceeding.

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54 Int'l Uranium (USA) Corp. (White Mesa Uranium Mill; Alternate Feed Material), LBP-97-12, 46 NRC 1, 8 (1997), aff'd, CLI-98-6, 47 NRC 116 (1998) (holding that a petitioner who "writes from a post office box and does not provide his residential home address" and another who uses the address of a historical foundation without providing a residential address of any member of the historical foundation fails to provide a basis for standing).

55 In its Answer, the Staff specifically called out the error. Staff Answer at 11–12. While a petitioner has the opportunity in a reply to cure standing defects in the petition, failure to do so can result in the denial of standing. Bell Bend, CLI-10-7, 71 NRC at 139–40.

56 Notes 37 and 38, above, and accompanying text (citing Commission decisions requiring submission of express authorization from a member that the organization may represent his or her interests).

57 Tr. at 15–16; Jarding Decl.; Jarding Addendum.

58 Tr. at 15–16; Gunhammer Aff.; Gunhammer Addendum.

2. Organizational Standing.

To satisfy the requirements for organizational standing, an entity "must establish a discrete institutional injury to the [entity's] interests, which must be based on something more than a general environmental or policy interest in the subject matter of the proceeding."[59] The Commission has found recreation, aesthetic, and other interests sufficient to demonstrate standing, especially when petitioners assert they "actually use the geographical areas which they claim to be associated with their purported aesthetic, recreational, and environmental/conservation interests" because this shows they will be "personally and individually injured."[60] These Commission decisions are consistent with rulings from the Supreme Court that an injury in fact may be established where "scenery, natural and historic objects and wildlife" may be adversely affected, although the party seeking review must "be himself among the injured."[61]

In line with the Supreme Court's holding, an entity may obtain organizational standing where the entity at issue submits an affidavit or declaration that the planned development at issue would affect the activities or pastimes of the entity or its members.[62] In the Sierra Club

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59 Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 177, aff'd, CLI-12-12, 75 NRC 603 (2012) (affirming licensing board's standing determination but declining to consider remaining claims).

60 Shieldalloy Metallurgical Corp. (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 356 (1999); Priv. Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323–24 (1999) (finding that "hiking, camping, birdwatching, study[ing], contemplation, solitude, photography, and other activities" are a "significant and genuine personal attachment to the affected area" sufficient to constitute standing); Fla. Power & Light (Turkey Point, Units 3 & 4), LBP-01-6, 53 NRC 138, 150 (2001), aff'd, CLI-01-17, 54 NRC 3 (2001) (finding standing where petitioner uses "the South Florida ecosystem for hiking, boating, bird watching, fishing, contemplation, and observation of the diverse plant and animal species that frequent the ecosystem.").

61 Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

62 Id. at 735. The failure to submit that affidavit or declaration can be fatal to establishing standing. Id. (the entity at issue failed to submit an affidavit or declaration that "it or its members would be affected in any of their activities or pastimes by the [ ] development. Nowhere in the pleadings or affidavits did the Club state that its members use [the area] for any purpose, much

decision, the Supreme Court rejected the Sierra Club's argument that it had organizational standing solely because its interest in environmental issues were impacted directly by the project at issue, without needing to submit any affidavits or declarations of an actual impact to the organization or the members of the organization.[63] By implication, then, the submission of such declarations or affidavits would have established standing.

i. The Black Hills Clean Water Alliance has organizational standing.

The Alliance satisfies organizational standing through the declaration of Dr. Lilias Jones Jarding, its Executive Director. Dr. Jarding describes the Rapid City, South Dakota-based Alliance as a "coalition of organizations, anglers, conservationists, scientists, and Native Americans dedicated to protecting the communities, wildlife, land, air, water and Native American resources of the Black Hills."[64] In her declaration, Dr. Jarding asserts that she and other Alliance members "view and photograph scenery and wild plant life, appreciate and value the cultural and historical resources at the site, and generally enjoy using the area of the Project for recreational, cultural, historical, conservation, and aesthetic purposes."[65] Those uses are intended to continue in the future and will be harmed by the Dewey-Burdock Project, according

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less that they use it in any way that would be significantly affected by the proposed actions of the respondents."); see also Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 989 (8th Cir. 2011) (upholding standing of Sierra Club and other entities in light of testimony from members that they took pictures in the area, hunted in the area, and studied history and archaeology of the area).

63 Sierra Club, 405 U.S. 734-39; id. at 735 ("The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development."); id. at 736 ("The Club apparently regarded an allegation[ ] of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public.' This theory reflects a misunderstanding of our cases involving so-called 'public actions' in the area of administrative law.").

64 Jarding Decl. ¶ 3.

65 Jarding Decl. ¶¶ 4–5, 10.

to Dr. Jarding.[66] As part of her aesthetic enjoyment of the area, Dr. Jarding asserts that she also uses and enjoys the riparian areas, which "will suffer loss or damage due to the Project's groundwater pumping and operation."[67]

In light of (i) the Alliance's interests in "protecting the communities, wildlife, land, air, water and Native American resources of the Black Hills," that potentially may be affected significantly by the proposed Project; (ii) Dr. Jarding's declaration detailing the use of the Project site by the Alliance's members; and (iii) the above-cited Commission decisions and caselaw from the Supreme Court and the United States Court of Appeals for the Eighth Circuit, we conclude that the Alliance provided sufficient support for its alleged injury-in-fact and sufficiently demonstrated its interests fall within the scope of the AEA, NEPA, and NHPA, which govern this proceeding. Any potential harm to the uses by the Alliance is fairly traceable to the proposed Dewey-Burdock Project. This injury would be redressed by a decision favorable to the Alliance. Thus, we conclude the Alliance has established its organizational standing.[68]

ii. The NDN Collective has organizational standing.

The Collective satisfies organizational standing through the affidavit of Taylor Gunhammer. The Collective is described as a "nonprofit corporation based in Rapid City, South

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66 Id. ¶¶ 4, 7. In its Answer, Powertech argues that Dr. Jarding's reference to returning to the property in the "Spring and Summer of 2025" is insufficient to demonstrate an injury because the project will not be commenced that early and, therefore, there will be no injury to Dr. Jarding or the Alliance in that timeframe. Powertech Answer at 14–15. That argument ignores the references in paragraph 4 of Dr. Jarding's Declaration that members of the Alliance "intend on continuing to use and value the lands near, at, and affected by the Project in future years." Jarding Decl. ¶ 4. Thus, taken as a whole, Dr. Jarding's Declaration establishes a sufficiently definitive past, present, and future use of the property at issue. See Priv. Fuel Storage, CLI-99-10, 49 NRC at 324–25.

67 Jarding Decl. ¶ 6.

68 The Board is aware of the prior Powertech licensing board denying the Alliance organizational standing. See Powertech, LBP-10-16, 72 NRC at 389. In that proceeding, though, the Alliance's environmental claims, as outlined in its Affidavit, were limited to water impacts. Moreover, the Affidavit the Alliance submitted in that proceeding did not contain the detail of impact to the organization and its members that the Jarding Declaration includes in this proceeding.

Dakota that is concerned with building the collective power of Indigenous Peoples, communities, and Nations to exercise [their] 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."[69] In his affidavit, Mr. Gunhammer asserts that "individual members of Oceti Sakowin tribes view and photograph scenery and wild plant life, appreciate and value the cultural and historical resources at the site, and generally enjoy using the area of the Project for recreational, cultural, ceremonial, historical, conservation, food and medicinal plant harvesting, and aesthetic purposes."[70] Mr. Gunhammer also uses and enjoys the land, riparian areas, and waters near the project.[71] Mr. Gunhammer asserts that he, along with other Collective members, intend to continue using the lands and/or waterways near the proposed project in the future.[72]

Due to the potential for the Dewey-Burdock project to affect significantly the Collective's interests as demonstrated by Mr. Gunhammer's affidavit detailing the Collective's use of the proposed site, and in light of the above-cited Commission decisions and Supreme Court and Eighth Circuit case law, the Collective has alleged sufficient injury-in-fact and sufficiently demonstrated that its interests fall within the AEA and NEPA, which govern this proceeding. Any potential harm to the uses by the Collective is fairly traceable to the proposed Dewey-Burdock project. This injury would be redressed by a decision favorable to the Collective. Thus, we conclude the Collective has established its organizational standing.

D. Susan Henderson Has Standing.

Ms. Henderson lives in Edgemont, South Dakota, and is the personal representative of an 8,000-acre cattle ranch in Fall River County, South Dakota, southeast of the proposed

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69 Gunhammer Aff. ¶ 4.

70 Id. ¶ 6.

71 Id. ¶¶ 7–8.

72 Id. ¶¶ 6, 14. Powertech makes the same argument about the timing of the Collective and Mr. Gunhammer's use of the property as it did relative to Dr. Jarding's use. Powertech Answer at 17. For the same reasons, we reject that argument. See note 66, above.

project.[73] Ms. Henderson's property is proximate to the proposed Powertech project and her primary source of water is from a well that draws water from the Lakota Sandstone aquifer (part of the Inyan Kara formation), which flows from the proposed uranium recovery area to the area where Ms. Henderson lives and operates her ranch.[74] Powertech argues that Ms. Henderson has not established standing.[75] For the same reasons cited by the Staff in its Answer,[76] we conclude that Ms. Henderson has established standing.

In its Answer, Powertech argues that Ms. Henderson fails to provide evidence "beyond unspecified 'published scientific research' studies that the alleged indirect connections between the Dewey-Burdock ISR Project and her property via these formations will actually result in contamination."[77] Powertech also argues that Ms. Henderson does not have standing based on proximity as she failed to define the proximity of her property to the site and failed to establish "a reasonable causal basis between the alleged harm that her well 'could be contaminated' and the activities proposed by the LRA."[78] Finally, Powertech argues that Ms. Henderson failed to provide evidence that the proposed activities will cause water contamination or that, if such contamination does occur, a "potential pathway to migrate to her property and her water sources exists."[79]

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73 Henderson Petition at 1. Ms. Henderson included in her petition the items required by 10 C.F.R. § 2.309(d)(1).

74 Henderson Petition at 1–2; Powertech, LBP-10-16, 72 NRC at 385 (finding that Ms. Henderson used well water from the Lakota Sandstone aquifer, which is a formation in the Inyan Kara); Combined TR/ER fig.2.2.-3 at 2-12.

75 Powertech Answer at 17–19.

76 Staff Answer at 8–10.

77 Powertech Answer at 18.

78 Id.

79 Id. at 19.

The Commission has held that proximity alone is not sufficient to establish standing in source material proceedings.[80] But in in-situ leach ("ISL") mining cases, the use of a substantial quantity of water "from a source that is reasonably contiguous to either the injection or processing sites" is sufficient to demonstrate an injury in fact.[81]

Here, Ms. Henderson asserted that her primary water well draws from the same geological formation that Powertech intends to target for its uranium recovery project.[82] Ms. Henderson also supplied the Board with information showing both the proximity of her well to the project site and a plausible flow pathway from the project site to her well.[83] Any potential harm associated with Ms. Henderson's use of well water from the Lakota Sandstone aquifer is fairly traceable to the proposed Dewey-Burdock Project.[84] We conclude that Ms. Henderson has standing.

III. ANALYSIS OF CONTENTIONS

In addition to standing, for an intervention petition to be granted, petitioners must demonstrate that they have submitted at least one admissible contention. 10 C.F.R. § 2.309(a). The Commission's six-part contention admissibility requirements are found in 10 C.F.R. § 2.309(f). It is a petitioner's obligation, not the Board's, to formulate a contention which

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80 Cogema Mining, Inc. (Irigaray & Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 177 (2009) (citing USEC Inc. (Am. Centrifuge Plant), CLI-05-11, 61 NRC 309, 311–12 (2005)).

81 Hydro Res., Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 275, rev'd in part on other grounds, CLI-98-16, 48 NRC 119 (1998).

82 Henderson Petition at 2.

83 Id. at 1–2; note74, above.

84 Staff Answer at 8–10; see also Crow Butte Res., Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 272–76 & 278–80 (2008) (finding standing where petitioners' alleged drinking water source was some distance from project site and in a geological formation that was connected to the target formation for the uranium recovery project), aff'd, CLI-09-12, 69 NRC 535, 544–48 (2009). If a petitioner with a drinking water well in a formation allegedly connected to the target formation can be found to have standing, it defies logic not to find standing for a petitioner whose well is in the target formation.

satisfies the six criteria necessary for the contention's admission.[85] The failure to meet any one of the six elements for contention admissibility requires a finding that the contention is not admissible.[86]

Petitioners are not required to prove their contentions at the admissibility determination stage and "we do not consider the merits of [petitioners'] arguments" at this stage.[87] "While the Board appropriately may view Petitioners' support for its contention in a light that is favorable to the Petitioner, it cannot do so by ignoring the [contention admissibility] requirements ... ."[88]

Applying those standards to each of the seven contentions before the Board, as explained below, we determine that the Organizational Petitioners have proffered two contentions (Contention 1 and Contention 2) that are admitted in part, as reformulated below. No other contentions are admitted.

A. Organizational Petitioners' 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.

In Contention 1, Organizational Petitioners raise two distinct issues. First, Organizational Petitioners claim the LRA lacks "an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural

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85 Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015).

86 Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

87 Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 443 (2011); S. Nuclear Operating Co. (Vogtle Elec. Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 221 (2011); U.S. Dep't of Energy (High Level Waste Repository), CLI-09-14, 69 NRC 580, 591 (2009) (noting merits are to be considered at a phase other than contention admissibility); Priv. Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004) ("[W]e do not expect a petitioner to prove its contention at the pleading stage ... .").

88 Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

resources," in violation of NRC regulations implementing NEPA.[89] Second, Organizational Petitioners claim the LRA fails to comply with the NHPA.[90] We address these issues in reverse order below and determine that a reformulated version of the first part of Contention 1 is admissible.

1. The LRA is not required to demonstrate compliance with the NHPA.

In its second part of Contention 1, the Organizational Petitioners claim a violation of the NHPA's consultation requirement.[91] But such a contention is not ripe at this point in the proceeding. The Commission has held, repeatedly and expressly, that claims of a violation of the consultation requirement under the NHPA may be interposed only after the Staff has issued its draft environmental review document.[92] "The agency granting the license, here the NRC, has the obligation to comply with the NHPA."[93]

When pressed at oral argument on these prior holdings by the Commission, counsel for the Organizational Petitioners responded that the NRC is to begin the consultation process at the earliest opportunity, and that it has not done so here. Tr. at 92–95. After the Board explained that it read Commission case law as expressly foreclosing such an argument until after the Staff issues a draft NEPA document, counsel for Organizational Petitioners admitted that he had no "contrary NRC case law." Tr. at 94.

Accordingly, the second part of Contention 1 is not admitted.

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89 Org. Pets. Petition at 13; Tr. at 91–92.

90 Org. Pets. Petition at 13; Tr. at 91–92.

91 Org. Pets. Petition at 13; Tr. at 91–92.

92 Marsland, CLI-14-2, 79 NRC at 20 n.49; North Trend, CLI-09-12, 69 NRC at 565-66; Crow Butte, CLI-09-9, 69 NRC at 350–51.

93 USEC, Inc. (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 447 (2006).

2. The LRA arguably fails to comply with NRC regulations implementing NEPA.

In the first part of Contention 1, Organizational Petitioners claim the LRA violates NRC regulations enacted to comply with NEPA "because it lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources." Org. Pets. Petition at 13. They assert that "[i]n this case the [Combined TR/ER] demonstrates that a significant number of archaeological, historical, and traditional cultural resources on site have not been competently evaluated; therefore, the potential impacts to these resources have not been addressed." Id. at 14. Moreover, Organizational Petitioners further take issue with the Combined TR/ER's unexplained conclusion that the impacts to cultural resources would be "none." Id. We determine that this aspect of Contention 1 is admissible, as reformulated below.

i. A contention claiming the LRA violates the NRC's regulations implementing NEPA is not premature.

Unlike NHPA consultation, where contentions must await issuance of the Staff's draft NEPA document, the Commission has stated unequivocally that its "regulations provide that for issues arising under NEPA, a petitioner must file contentions based on the applicant's environmental report."[94] In a prior proceeding involving the Oglala Sioux Tribe and Powertech over this very uranium recovery facility, the Commission expressly noted that NEPA claims must be filed based on the contents of Powertech's environmental report.[95] Moreover, "[w]hile agencies may coordinate their NEPA and NHPA reviews, the reviews remain separate, and the

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94 Id. at 444.

95 Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 231 (2016) ("Insofar as it could be interpreted as implying that the Tribe was premature in filing its environmental contentions on the application, the Board's decision was incorrect. Although it is true that 'the ultimate burden with respect to NEPA lies with the NRC Staff,' our regulations require that intervenors file environmental contentions on the applicant's environmental report.")

regulations associated with each Act must be independently satisfied – 'coordination' does not mean that NEPA regulations govern NHPA analysis or vice versa."[96]

In its Answer and at oral argument, the Staff argued that this NEPA aspect of Contention 1 was unripe for the same reason the NHPA aspect was unripe. The sole support offered by the Staff for this position was the Commission's 2020 decision in Crow Butte. Staff Answer at 25–26; Tr. at 101–03, 105–06.[97] When pressed, counsel for the Staff pointed the Board to the following sentence of that decision:

> In CLI-09-9, we agreed that the contention was not ripe and reversed the Board's contention admissibility determination, given that the contention centered on claimed deficiencies (under the NHPA and NEPA) said to stem from a failure to consult the Tribe, which Crow Butte itself had no obligation under the NHPA to consult the Tribe.

Crow Butte, CLI-20-8, 92 NRC at 261; Tr. at 131–32, 134–37. Counsel for the Staff placed great (if not sole) reliance on the parenthetical in that sentence and the fact that the decision containing that excerpt was issued in 2020.[98] We are not persuaded that the parenthetical bears the weight the Staff places on it, for five reasons.

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[96] Hydro Res., Inc. (P.O. Box 777, Crownpoint, N.M. 87313), CLI-04-11, 63 NRC 483, 493 (2006); see also Powertech, CLI-16-20, 84 NRC at 248 ("Federal case law supports the legal principle that NHPA and NEPA compliance do not necessarily mirror one another."). It is important to note that the Commission made that statement in rejecting a Staff argument that sufficient identification of cultural and historic resources under the NHPA should be equated to a finding of sufficiency under NEPA as well. At oral argument here, counsel for the Staff and counsel for Powertech agreed that simply meeting an obligation under the NHPA does not mean that NEPA obligations also have been met. Tr. at 97.

[97] See Crow Butte Res., Inc. (In Situ Leach Uranium Recovery Facility), CLI-20-8, 92 NRC 255 (2020).

[98] Counsel for the Staff relied on this 2020 case in response to a direction from the Board for the participants to be prepared at oral argument to discuss Marsland, CLI-14-2, 79 NRC at 20–21, wherein the Commission upheld the admission of a NEPA contention, worded identically to the NEPA contention here, over similar ripeness arguments.

First, the parenthetical relied upon by the Staff is contained in the "History of Contention B" section of that 2020 decision (not the "Analysis" section, which begins two pages later)[99] and cites a 2009 Commission decision (which predates the Commission's 2014 Marsland decision the Board requested the participants to discuss and which we discuss below).

Second, the precedential value of the 2020 decision is limited, in that a 3-2 majority of the Commission declined to exercise its discretionary review authority and thus denied a petition for review. Crow Butte, CLI-20-8, 92 NRC at 271; id. at 281 (Additional Views of Commissioner Wright) ("I do not view this case as setting precedent for other cases and licensing boards.").

Third, a review of the 2009 Commission decision relied on in the 2020 decision reveals no mention that the contention under consideration concerned a failure to consult under NEPA. In its cultural resources discussion, the Commission mentioned NEPA only twice—both times in reference to the agency's practice of incorporating the results of its NHPA review into its NEPA

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[99] The Commission has recognized that the location of text in decisions can impact the import of that text. Shieldalloy, CLI-99-12, 49 NRC at 357 ("The Presiding Officer's discussion of the entry of appearance and identification of clients is found not in the 'Analysis' section of LBP-99-12 but rather in a footnote attached to the 'Conclusion' section. Thus, it does not form a basis for the Presiding Officer's ruling on standing.").

We note that in its CLI–20-8 decision, the Commission also stated in an analysis section that Contention B's "claims spanned both NHPA and NEPA issues." Crow Butte, CLI-20-8, 92 NRC at 266. But each time the underlying licensing board referenced an obligation that was not met, it cited Section 106 of the NHPA, not NEPA. Crow Butte, LBP-08-24, 68 NRC at 719–23 ("The NRC Staff concedes that section 106 of the NHPA imposes a duty, not on Crow Butte in preparation of its application, but rather on the NRC to consult with the Tribe regarding cultural resources. … In fact, the NRC Staff notes that 'the NRC has not yet even begun the required section 106 evaluation process.' … The regulations that implement NHPA require federal agencies themselves to consult with a tribe if that tribe ascribes cultural or religious significance to properties not on tribal lands. … Although it is permissible for a federal agency to rely upon an applicant or an applicant's contractor to collect data and make recommendations regarding cultural resources, it may not delegate its duty to consult under section 106 of the NHPA. … Contrary to the NRC Staff's argument, ensuring that it meets its consultation obligations under section 106 of the NHPA is indeed 'an issue material to the findings the NRC must make in support of the action involved in this proceeding.'"). Most tellingly, the licensing board noted an argument by Crow Butte that "the Tribe fails to point to any legal requirement that it consult with the Tribe." Id. at 719. See also "Third" and "Fourth" reasons below.

review documents.[100] Further, there is no indication that the Tribe in that case was asserting a NEPA claim in addition to an NHPA claim.[101]

Fourth, in the five pages devoted to analyzing the relevant contention in the licensing board decision underlying the 2009 Commission decision, the board mentioned the NHPA myriad times but mentioned NEPA only once—in connection with a position advanced by the Staff (not the Tribe): "However laudable the NRC Staff's assurance to the Board that it will involve the Tribe in its NEPA review of cultural resources at the Crow Butte mining site, such assurances are no substitute for enabling the Tribe to prosecute its contention here."[102] Even in the section of the licensing board's decision discussing what the Commission later identified as the board's "concern,"[103] the board did not reference NEPA. Instead, throughout the licensing board's discussion, just like that of the Commission later, the focus remained upon the Section 106 consultation requirement under the NHPA.

Fifth, in the Staff-cited 2020 decision, the Commission did not address (let alone distinguish or overrule) its earlier 2014 Marsland holding rejecting the same ripeness argument

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100 Crow Butte, CLI-09-9, 69 NRC at 349 ("The Staff argues that this contention is not ripe. Because the NHPA requires the Staff, not the Applicant, to consult with the Tribe, the issue will not ripen until the Staff completes its NEPA review, they argue."); id. at 351 ("As to the Board's concerns that a contention would be subject to the late-filing standards if the Tribe must defer its contention until the NEPA review is complete, our rules of procedure explicitly allow the filing of new contentions on the basis of the draft or final environmental impact statement where that document differs 'significantly' from the information that was previously available."). It is noteworthy that the Commission said in a footnote in that same decision: "The NRC implements its responsibilities under NHPA in conjunction with the NEPA process." Id. at 348 n.89. See also note 96, above, and accompanying text.

101 See Crow Butte, CLI-09-9, 69 NRC at 348–51.

102 Crow Butte, LBP-08-24, 68 NRC at 719–23. Nor did the licensing board discuss NEPA in the standing section devoted to the Tribe's "cultural resources claims;" but it did discuss the NHPA. Id. at 712–15.

103 Crow Butte, CLI-09-9, 69 NRC at 351 ("As to the Board's concerns that a contention would be subject to the late-filing standards if the Tribe must defer its contention until the NEPA review is complete, our rules of procedure explicitly allow the filing of new contentions on the basis of the draft or final environmental impact statement where that document contains information that differs 'significantly' from the information that was previously available.").

advanced by the Staff here. In Marsland, the Tribe proffered a contention that is identical to its Contention 1 in this proceeding.[104] The licensing board declined to admit the NHPA aspect of that contention (as we do here) but did admit the NEPA aspect of that contention (also as we do here), and the Commission upheld that ruling.[105]

> The Staff's reasoning must be reconciled with the provisions in 10 C.F.R. § 2.309(f)(1) and (f)(2), requiring a petitioner to base its environmental contentions on information available at the time its intervention petition is to be filed, including the applicant's environmental report. Our regulations do not contemplate a petitioner waiting for the Staff to perform its responsibilities under the NHPA before the petitioner raises environmental contentions. Although our regulations do allow for contentions based upon the Staff's environmental review documents, a request to admit a new or amended contention requires a petitioner to show that the information upon which it is based was "not previously available" and "materially different from information previously available." The fact that the Staff will develop additional information relevant to cultural resources, as part of its NHPA review, does not preclude a challenge to the completeness of the cultural resources information in the application.

Marsland, CLI-14-2, 79 NRC at 21–22 (emphasis added).

The same analysis applies here. The Organizational Petitioners contend that the Combined TR/ER's identification of historic, scenic, and cultural resources is deficient. Org. Pets. Petition at 13–14. As in Marsland, the Organizational Petitioners include an affidavit, from the Oglala Sioux's Water Resources Director, that states:

> Since there are cultural resources identified in the license renewal application, [ ] there may well be more that only the Tribe can identify and ensure that they are properly protected … . …
>
> [T]he discovery of an Indian camp and prehistoric artifacts in the Tribe's treaty and aboriginal territory at issue in this license renewal application implicates important tribal interests such that

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104 Compare Org. Pets. Petition at 13, with Marsland, LBP-13-6, 77 NRC at 286, and Marsland, CLI-14-2, 79 NRC at 20.

105 Marsland, LBP-13-6, 77 NRC at 286–88; Marsland, CLI-14-2, 79 NRC at 20–22.

> the Tribe's rights are threatened by the Applicant's mining activity in its aboriginal territory.[106] …
>
> Included within the territory the Powertech application contemplates are current or extinct water resources. Such resources are known to be cultural resources themselves and have been known as favored camping sites of indigenous peoples, both historically and prehistorically, and the likelihood that cultural artifacts and evidence of burial grounds exist in these areas is strong. …
>
> Overall, the numbers and density of cultural resources at the site proposed for mining demonstrate that the mining activity is likely to adversely impact the cultural resources of the Oglala Sioux Tribe. The failure to involve the Tribe in the analysis of these sites, or to conduct any ethnographic studies in concert with a field study further exacerbate the impacts on the Tribe's interests as a procedural matter in negatively affecting the Tribe's ability to protect its cultural resources. …

Red Cloud Decl. ¶¶ 5–6, 8, 15; see also Marsland, CLI-14-2, 79 NRC at 22. For the same reasons relied upon by the Commission in Marsland, given Mr. Red Cloud's status as the Tribe's Water Resources Director, and the fact that the Dewey-Burdock Project is within the Tribe's aboriginal area, we conclude that the Tribe has established a genuine dispute with the Powertech license renewal application on a material issue of fact. See Marsland, CLI-14-2, 79 NRC at 22.

In light of these five reasons, the Board is unwilling to ignore the express holding by the Commission that a licensing board appropriately admitted the NEPA aspect of an identically worded contention, over a similar ripeness objection, in favor of a parenthetical found in the background section of a different Commission decision not directly addressing that issue. Instead, we hold, like the Commission did in the Marsland proceeding, that the Commission's "regulations do not contemplate a petitioner waiting for the Staff to perform its responsibilities

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[106] We recognize the Supreme Court decided, against the Tribe, the Tribe's claim to rights under the 1868 Fort Laramie Treaty. Crow Butte, CLI-09-9, 69 NRC at 336–37.

under the NHPA before the petitioner raises environmental contentions."[107] Moreover, the "fact that the Staff will develop additional information relevant to cultural resources, as part of its NHPA review, does not preclude a challenge to the completeness of the cultural resources information in the application."[108]

ii. The Organizational Petitioners have identified possible deficiencies under NRC regulations implementing NEPA, which require an identification of and description of the impacts of the project on historical and traditional cultural resources.

In Section 102(2) of NEPA, all agencies of the federal government, which includes the NRC, must:

> (A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this Act, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations; [and]
>
> (C) consistent with the provisions of this chapter and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> > (i) reasonably foreseeable environmental effects of the proposed action,
> >
> > (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented … .

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107 Marsland, CLI-14-2, 79 NRC at 21; see also Powertech, CLI-16-20, 84 NRC at 231 ("Insofar as it could be interpreted as implying that the Tribe was premature in filing its environmental contentions on the application, the Board's decision was incorrect. Although it is true that 'the ultimate burden with respect to NEPA lies with the NRC Staff,' our regulations require that intervenors file environmental contentions on the applicant's environmental report.").

108 Marsland, CLI-14-2, 79 NRC at 21–22.

42 U.S.C. § 4332(2). The Commission's regulations in Part 51 implement NEPA's requirements. 10 C.F.R. § 51.1.[109]

Thus, any "application for a license to possess and use source material for uranium milling … shall be accompanied by any Environmental Report required pursuant to subpart A of part 51 of this chapter." Id. § 40.31(f). Section 51.60 then provides that an "'Applicant's Environmental Report' shall contain the information specified in § 51.45." Id. § 51.60(a). That cross-referenced section, in turn, requires an environmental report to include "a description of the environment affected, and discuss[ion of] the following considerations: (1) The impact of the proposed action on the environment. … ." Id. § 51.45(b); Id. § 51.45(c) (requiring "an analysis of the cumulative impacts of the proposed action when added to the impacts of such excluded site preparation activities on the human environment."). The Commission's regulations also impose upon those seeking a materials license a requirement that all "information provided … by a licensee or information required by statute or by the Commission's regulations … shall be complete and accurate in all material respects." Id. § 40.9(a).

At oral argument, counsel for the Staff and counsel for Powertech agreed that an applicant has a duty to comply with the Commission's NEPA-implementing regulations in 10 C.F.R. Part 51. Tr. at 96–97. Counsel also agreed at oral argument that a license renewal application environmental report for an ISL facility must address cultural and historical resources. Tr. at 96.[110] We likewise agree and base that holding not only on the concessions of counsel during oral argument but our review of several Commission guidance documents.

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[109] "The NRC meets its NEPA responsibilities by complying with the NRC's regulatory requirements in 10 CFR Part 51, 'Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'" NUREG-2173, Rev. 1, Tribal Protocol Manual, at 17 (July 2018) (ADAMS Accession No. ML18214A663) [hereinafter "Tribal Protocol Manual"], 83 Fed. Reg. 42,944 (Aug. 24, 2018); Powertech, CLI-16-20, 84 NRC at 231 ("It is settled law that an applicant is not bound by NEPA, but by NRC regulations in Part 51.").

[110] See 10 C.F.R. § 51.14(b) (noting certain Council on Environmental Quality ("CEQ") definitions are to be used in the NRC's implementation of its NEPA obligations). The NRC

The Generic Environmental Impact Statement for ISL facilities provides:

> As the basis for its independent evaluation, the NRC staff will rely initially on the applicant's detailed environmental report for information on the proposed action. The applicant's environmental report would include detailed information about the potential ISL facility location, the extent of proposed operations and schedule, and the surrounding local and regional affected environment. … The NRC staff will focus on the applicant's assessment of potential environmental impacts from the proposed action and the identified alternatives.[111]

Additionally, the Standard Review Plan for In-Situ Leach Uranium Extraction License Applications, cited by the Organizational Petitioners, provides that the "staff shall review discussion of the historic, cultural, and scenic resources, if any, within the area of potential

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adopted that regulation in 1984 and it remains unchanged to this date. Compare Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9383 (Mar. 12, 1984), with 10 C.F.R. § 51.14(b). One of the CEQ definitions used by the NRC is "effects," which in 1984 was defined to include the following:

> Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.

40 C.F.R. § 1508.8 (1984) (emphasis added).

Given the NRC's voluntary determination to adopt certain CEQ definitions, rather than being bound to them by operation of some law or external regulation, the recent decision in Marin Audubon Soc'y v. FAA, 121 F.4th 902 (D.C. Cir. 2024) determining the CEQ lacked authority to issue "binding NEPA regulations" (an argument raised by counsel for Powertech at oral argument, Tr. at 139) is not relevant. Marin Audubon Soc'y, 121 F.4th at 914 ("If an agency adopts CEQ's rules or incorporates them by reference into its NEPA regulations, would that be a permissible exercise of its own rulemaking authority? The question is a good one, but it does not describe this case.") (footnote omitted).

[111] 1 Office of Federal and State Materials and Environmental Management Programs (FSME), NRC, et al., NUREG-1910, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, Final Report at 1-28 (May 2009) (emphasis added) [hereinafter "ISL GEIS"] (ADAMS Accession No. ML091480244). We recognize that while a GEIS is not binding, the Commission does consider a GEIS as carrying "special weight as a guidance document that has been approved by the Commission." NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 338 (2012). The ISL GEIS "provides a starting point for NRC's NEPA analyses on site-specific license applications for new ISL facilities, as well as for applications to amend or renew existing ISL licenses." ISL GEIS at xxxv.

effect. Historic properties include districts, sites, buildings, structures, or objects of historical archaeological, architectural, or traditional cultural significance."[112] The ISL Review Plan also requires the "application [to] document evidence of contact with knowledgeable sources when no historic, scenic, or cultural resources are identified by the applicant within the study area." ISL Review Plan at 2-10.

As argued by the Organizational Petitioners on pages 14–15 of their Petition, the ISL Review Plan, in the "Acceptance Criteria" section, notes one element of an acceptable characterization by the applicant/licensee of regional historic, scenic, and cultural resources:

> Discussions are incorporated of the treatment of areas of historic, scenic, and cultural significance that follow guidance equivalent to that provided by the National Park Service Preparation of Environmental Statements: Guidelines for Discussion of Cultural (Historic, Archeological, Architectural) Resources (National Park Service, 1973). Where appropriate, tribal authorities have been consulted on the likely impacts on Native American cultural resources (White House, 2000).

ISL Review Plan at 2-11, ¶ 3 (emphasis added).[113] Later in the section entitled "South Dakota Tribal Consultation," it is noted that "Projects proponents must, however, contact tribal cultural

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[112] NMSS, NRC, NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications, Final Report at 2-9 (June 2003) (ADAMS Accession No. ML032250177) [hereinafter "ISL Review Plan"]. We recognize that "[r]eview plans are not substitutes for the Commission's regulations, and compliance with a particular standard review plan is not required." ISL Review Plan at xviii. Yet "[w]hile recognizing the 'guidance' nature of such review plans, the Commission has also indicated that, having been developed to assist an applicant in complying with applicable regulations, such plans are entitled to 'special weight.'" Crow Butte Res., Inc. (Marsland Expansion Area), LBP-19-2, 89 NRC 18, 39 n.54 (2019) (citing Priv. Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)). Powertech expressly stated in its Combined TR/ER that it used the ISL Review Plan to "ensure that all information is provided to allow NRC to complete their review of this amendment application." Combined TR/ER at 1-1.

Notably, as quoted in text above, the ISL Review Plan requires the Staff to "review" an applicant's cultural and historical resources discussion. The Staff cannot "review" something if the applicant does not provide it. And the information provided by the applicant must be "complete and accurate in all material respects." 10 C.F.R. § 40.9(a).

[113] Under a reasonable reading of the criteria's language, the "consulted" requirement does not mean the consultation requirement under the NHPA because this criteria is directed to review of applications and, as the Commission repeatedly has held, the NHPA consultation

resources personnel as part of the consultation process along with the South Dakota SHPO [State Historic Preservation Officer]." ISL GEIS at 3.4-68, § 3.4.8.3.1 (emphasis added).[114] Yet, the Organizational Petitioners allege, Powertech did not reach out to the Oglala Sioux Tribe in preparing the LRA to consult on resources or see if an agreement could be reached on a survey protocol. Tr. at 123; Red Cloud Decl. ¶ 14.

Thus, Organizational Petitioners' contention raising the inadequate nature of Powertech's description of the affected environment and the impacts of the project on cultural and historic resources (for example, by failing to include reference to the agreement the Tribe

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requirement applies only to the Staff, not to the applicant. Note 92, above. Additionally, paragraphs 4 and 5 of the ISL Review Plan's acceptance criteria begin with "[i]f delegated by NRC." ISL Review Plan at 2-11, ¶¶ 4–5. That language, notably absent from paragraph 3, can be interpreted to mean the requirements in those paragraphs are NHPA requirements. Moreover, the "where appropriate" does not require a contrary interpretation. It simply could mean that not every ISL project will occur on land where Native American cultural resources are impacted.

[114] Under a reasonable reading on this language, the "consultation" here again does not appear to be referencing the NHPA consultation because: (i) NHPA consultation applies only to the NRC and the NRC is not a project's proponent and (ii) the language requires consultation with "tribal cultural resources personnel," not a "THPO" [Tribal Historic Preservation Officer], a position referred to by the NHPA and used later in that same section.

As to the first point, the Commission has recognized that "[o]nly when authorized by Federal statute may non-Federal entities be delegated legal responsibility for Section 106 compliance." Tribal Protocol Manual at 17–18, 83 Fed. Reg. 42,944 (Aug. 24, 2018); note 92, above. No such Federal statute exists or is cited in the ISL Review Plan that would allow the Commission to delegate the NHPA consultation process to the applicant. Moreover, the role of a proponent of nuclear projects, a role often played by the former Atomic Energy Commission, specifically was not given to the NRC at its creation fifty years ago. NUREG/BR-0175, Rev. 3, A Short History of Nuclear Regulation, 1946-2024, at 33 (July 2024) (ADAMS Accession No. ML24211A051); compare Atomic Energy Act of 1946, Pub. L. No. 79-585, § 1(b), 60 Stat. 755 (1946) with 42 U.S.C. § 5842 (1974) and 42 U.S.C. § 5801 (1974).

As to the second point, the use of different terminology in the same section generally is interpreted to mean different things. Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-7, 61 NRC 188, 195 (2005) ("In conformity with the general rules of construction for statutory and regulatory provisions, these are different terms and thus should be accorded different meanings … ."); cf. Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (noting, as a "usual rule", "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."); Nat'l Insulation Transp. Comm. v. ICC, 683 F.2d 533, 537 (D.C. Cir. 1982) ("presum[ing] that the use of different terminology within a statute indicates that Congress intended to establish a different meaning.").

reached with the NRC on conducting surveys for Oglala Sioux Tribe cultural and historic resources) appears to be material and within scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii)-(iv).

iii. Organizational Petitioners advance a reasonable argument that an LRA requires inclusion of the identified information.

At oral argument, but not in their Answers, Powertech and the Staff argued that, as this is a license renewal proceeding, the LRA was not required to include an updated cultural and historic resources section. We reject this argument for two independent reasons.

First, neither the Staff nor Powertech raised this argument in their respective Answers. Thus, this argument is not timely and cannot be considered. We agree with another licensing board that held, when faced with a similar attempt by the Staff and a licensee, "[t]o permit [Powertech] and the NRC Staff to blindside [Organizational Petitioners] with this new argument would violate case law and implicate due process concerns."[115]

Second, even if we were to consider the argument, it would fail. Section 51.60(a) of the Commission's regulations notes that licensees seeking a license renewal (or license amendment to authorize an expanded area of production, as in the Marsland proceeding) are permitted to submit an environmental report "supplement" that "may be limited to incorporating by reference, updating or supplementing the information previously submitted to reflect any significant environmental change … ." 10 C.F.R. § 51.60(a) (emphasis added). Here, Organizational Petitioners argue that the fact the Oglala Sioux Tribe reached agreement on the procedure for a survey that would identify and allow for evaluation of Oglala Sioux cultural and

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115 Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-16-3, 83 NRC 169, 180 (2016) (citing United States v. Almaraz, 306 F.3d 1031, 1041 (10th Cir. 2002)). The Commission has found that 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. USEC Inc. (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 476 (2006). We see no reason that same logic and rationale should not apply to new arguments raised by Staff and applicants.

historical resources on a neighboring project (Crow Butte) qualifies as a significant environmental change that should have been incorporated into the Combined LR/ER,[116] given what the Commission has recognized as "the nature of Native American aboriginal culture."[117]

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[116] Org. Pets. Petition at 20; Red Cloud Decl. ¶ 16. Notably, the NRC has a history of treating the Dewey-Burdock Project and the Crow Butte project in a combined manner as it relates to cultural and historical resources. Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-16-7, 83 NRC 340, 370 (2016), denied review, CLI-20-8, 92 NRC 255 (2020) (the Staff treated "the Crow Butte license area, the North Trend Expansion, and the Powertech projects as one unified TCP [Traditional Cultural Properties] consultation until October 31, 2012.").

[117] Marsland, CLI-14-2, 79 NRC at 22. As to the "nature of Native American aboriginal culture," the Commission has recognized that certain tribes have a different relationship to the earth and its resources (such as cultural resources) than other tribes may have. See Tribal Protocol Manual at 15 ("As is true of the overall U.S. population, religious and spiritual beliefs vary widely among Native Americans. … Certain Native religious and belief systems incorporate spiritual aspects that focus on the relationship of humans to the natural environment. Many Native American religious beliefs involve respect for and protection of the Earth and its resources. Some Native American Tribes believe all living things are interconnected–the spiritual world and the natural world are one. Threats to the environment are often viewed as direct threats to Tribal health, culture, and spiritual wellbeing. In addition to being a food source, plants and animals also have spiritual importance for many Tribes. Accordingly, sites known for their abundance for gathering food or medicinal plants may often be historically and culturally significant."). The Board recognizes that this Manual relates to the NHPA consultation process. But the recognition of the special relationship certain tribes have with the environment and cultural resources is not limited to just that context.

In the initial Powertech licensing proceeding, in an apparent nod to this nature of Native American aboriginal culture, a Staff witness testified that, in the NEPA context "probably the best [tribal cultural resource] survey approach is to involve Tribal Elders, wherein if it's one tribe or a group of tribes would supply elders of their choice and then there would be a facilitator, something along the lines of a cultural anthropologist who would accompany the elders and provide logistics support, documentation, recording support, report preparation if that were necessary." Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 199 (2017) (brackets in original); see also Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-20-9, 92 NRC 295, 313 (2020) ("As the Board recognized in its first initial decision, a Class III survey can identify a property's eligibility to be included on the National Register of Historic Places but 'wouldn't necessarily identify all of the [Native American cultural and religious] resources primarily because some knowledge [must be] provided by the Native American groups themselves.'") (brackets in original).

The import of this was borne out by the NHPA consultation process employed by the Staff during the initial license application process for this project. Despite a "Level III" cultural resources investigation and evaluative testing report having been prepared by a consultant (the same one referenced in Powertech's LRA here – Combined TR/ER at 2-33), after the Staff engaged with individual tribes to conduct a survey in which those tribes participated (but in which the Oglala Sioux Tribe did not participate), an additional "47 new discoveries were

A survey for cultural and historical resources was conducted previously of the area for the Dewey-Burdock Project. Combined TR/ER at 2-33; Red Cloud Decl. ¶¶ 9–12, 15. Yet it is undisputed that the Oglala Sioux Tribe did not participate in that prior survey. Red Cloud Decl. ¶¶ 9–10, 15. Thus, the Oglala Sioux contend, the prior survey does "not contain an adequate or comprehensive study identifying the Tribe's cultural resources." Id. ¶ 9.[118] That failure, it argues, now can be remedied, which is significant as it comes to identifying and evaluating cultural and historical resources of Indian tribes.[119] The Oglala Sioux argues, not without force, that the lack of participation of its Tribal Elders in the initial survey means the "renewal application materials do not contain an adequate or comprehensive study identifying the Tribe's cultural resources." Id.; cf. 10 C.F.R. § 40.9(a) (requiring complete and accurate information to

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recorded as a result of the tribal cultural survey." 1 FSME, NRC, NUREG-1910, Supp. 4, Vol. 1, 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 at 3-76, 3-88 (supp. 4 Jan. 2014) (ADAMS Accession No. ML14024A477) [hereinafter "2014 EIS Vol. 1"]. Additionally, the tribal surveys "identified new artifact discoveries or cultural features of interest to tribes at 24 previously reported archaeological sites." 2 FSME, NRC, NUREG-1910, 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 app. F, at F-8 (Summary Report Regarding the Tribal Cultural Surveys Completed for the Dewey-Burdock Uranium In-Situ Recovery Project) (ADAMS Accession No. ML14024A478) [hereinafter "2014 EIS Vol. 2"]. Further in that document, the NRC noted that "Tribal survey teams recorded 81 cultural features within the boundaries of 24 known archaeological sites. Some of the cultural features recorded by tribal survey teams correspond to features identified in the archaeological surveys; however, many represent new discoveries." Id.; see also 2014 EIS Vol. 1 at 3-85 ("What is important from a tribal perspective is the interconnectedness between the physical world and spiritual world. … Some tribal members are able to interpret a 'sacred' landscape or feature and recognize the same spiritual and physical features that made the place sacred to their ancestors.") (emphasis added).

[118] Nowhere in the Combined TR/ER or in its Answer does Powertech argue that the prior survey actually identified Oglala Sioux cultural and historical resources. Nor does the Staff make this claim in its Answer. See Marsland, CLI-14-2, 79 NRC at 20–21 ("Crow Butte's application stated that two surveys were performed on the site; these surveys found no Native American cultural sites or artifacts on the site. … The Board found a litigable contention (as narrowed) because the project area contains potential cultural objects and sites that were not accounted for in the application.").

[119] See note 117, above.

be provided by applicants).[120] The Organizational Petitioners argue the ability to remedy that deficiency now exists, but Powertech did not account for that fact in the Combined TR/ER.

Thus, we determine the Organizational Petitioners' claim that the Combined TR/ER was required to include this information is reasonable. Support for our conclusion that the Organizational Petitioner's interpretation is reasonable can be found in (i) the NRC's requirement that an applicant provide "complete and accurate" information, 10 C.F.R. § 40.9(a); (ii) the logical implications of holding otherwise; and (iii) in the decisions in other proceedings.

If we were to adopt the approach advocated at oral argument by Powertech and the Staff, i.e., that the project at issue has not changed since the initial permit and that the Oglala Sioux had its chance to participate in the identification process at that time but did not, Tr. at 122, 126, and allow that to be the final word on whether cultural or historical sites are analyzed as required by NEPA, it could open the door to a dangerous precedent for any cultural and historical resources review, potentially locking in future litigants to outdated conclusions.[121]

Concluding that the existence of the Oglala Sioux Tribe's willingness to agree to a survey protocol could be "new" or changed environmental information also is supported by a

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120 "The fact that the Staff will develop additional information relevant to cultural resources, as part of its NHPA review, does not preclude a challenge to the completeness of the cultural resources information in the application." Marsland, CLI-14-2, 79 NRC at 21–22.

121 For example, consider a developer who appeared to engage a tribe in efforts to identify cultural and historical resources but, at the same time, obstructed any attempt to allow for the involvement of tribal elders and/or refused to compensate the tribe for its participation beyond a meager amount. That developer then continued that mode of engagement for several years, convincing the Staff and ultimately the Commission that the identification of those resources was not reasonably available from that tribe. Should that less-than-forthright engagement process be upheld when it came time for license renewal, even in light of evidence from the tribe that it was able to reach an agreement with other developers in the same area as to identification of cultural and historical resources? Wouldn't that incentivize the developer to play hardball at the beginning to reduce its costs and avoid possible development interruptions or limitations by not having to address historical or cultural resources on the project site? That cannot be what NEPA envisioned when it was passed and required government agencies to analyze impacts to those cultural and historical resources.

prior licensing board's determination in a power reactor operating licensing case.[122] In that proceeding, an intervenor sought the admission of two contentions supported by the fact that a recommendation for listing on the National Register of Historic Places ("NRHP") had occurred after the construction permit was issued in 1974 but prior to the 1981 operating license application. Limerick, LBP-82-43A, 15 NRC at 1430, 1483, 1485. Despite there being no actual change to the environment, and despite the recommendation for listing on the NRHP being simply a recommendation and not a final action,[123] the licensing board determined the recommendation was "a sufficiently significant change since the time the construction permit was issued that it merits present consideration."[124] After the licensing board reconsidered that decision and dismissed the contention, the Appeal Board reversed the dismissal, agreeing with the original decision that the recommended NRHP listing was "a significant change in circumstances that … warrant[ed] consideration in the … proceeding."[125] Thus, there is precedent for the conclusion that a change in views as to cultural and historic resources can be a "significant change." Moreover, the fact there is no guarantee an agreement will be reached between the Tribe and Powertech (just as there was no guarantee that the SHPO's recommendation would be accepted) does not undermine the potentially significant change evidenced by the agreement that the Tribe references in its petition.

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122 Phila. Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423 (1982).

123 In that instance, although the SHPO had recommended the listing in the NRHP, id. at 1483, under the applicable NHPA regulations, the National Park Service was responsible for making the final determination as to whether the listing would occur. [NHPA] 46 Fed. Reg. 56,183, 56,191 (Nov. 16, 1981) (text to be codified at of 36 C.F.R. § 60.6(r) noting the right of the Park Service to "disapprove" an SHPO recommendation).

124 Limerick, LBP-82-43A, 15 NRC at 1483; see also id. at 1485 (noting the SHPO recommendation was "potentially significant").

125 Phila. Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 875 (1984).

This situation also can be compared favorably to the admissibility of a contention in the initial Diablo Canyon operating license renewal proceeding.[126] There, the Commission upheld a licensing board admission of a contention concerning the effect of a newly discovered offshore fault, the Shoreline Fault. There was no dispute that the physical environment had not changed, i.e., the Shoreline Fault had not formed, during the time between the initial operating license application and the license renewal at issue. But what changed was the awareness of the existence of the fault, which became available during the time between the initial application and the license renewal request at issue, allowing the effect thereof to be addressed.

A similar situation appears to exist here. The information available at the time of Powertech's initial application did not include information about the Oglala Sioux Tribe's cultural and historical resources in the project area. The Organizational Petitioners claim that the licensee now has the ability to learn of, identify, and determine the effect on those cultural and historical resources. And the Oglala Sioux Tribe's position is that Powertech is under a similar obligation to make use of its ability to attempt to identify what very likely already exists in the physical environment but is unidentified currently, i.e., Oglala Sioux Tribe cultural and historical resources in the project area. Moreover, based on this Commission precedent and agency guidance documents, we believe it reasonably could be concluded that the existence of a geologic fault is of the same import to the NRC in fulfilling its obligations under NEPA as are the cultural and historical resources of Indian tribes.[127]

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[126] Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-10-15, 72 NRC 257 (2010); Diablo Canyon, CLI-11-11, 74 NRC 427.

[127] Powertech argues that "stare decisis" operates to prevent the consideration of this issue. But Powertech's argument fails to recognize that the earlier decision on this matter determined that the Oglala Sioux Tribe's cultural and historical resources identification was not available due to "the Tribe's non-cooperation." Powertech, CLI-20-9, 92 NRC at 306. Here, though, the Tribe is the one advancing a cultural resources survey agreement it reached with the NRC and another uranium recovery entity and noting that it "demonstrates that the information related to cultural resources is obtainable and available." Red Cloud Decl. ¶ 16. Thus, the factual situation here is demonstrably different from the prior proceeding's such that we are not

Accordingly, even were we to consider the untimely argument advanced by the Staff and Powertech, we would reject it. The fact that this is a license renewal application proceeding, versus an initial license application proceeding, does not undermine the Organizational Petitioners' NEPA aspect of contention 1.

iv. The LRA also fails to provide an explanation for its conclusion that the project will have no impacts on the Tribe's historical or cultural resources.

In Section 8.6 and Table 8.6-1 of the Combined TR/ER, Powertech asserts that the predicted "Historical and Cultural Impacts" of the Dewey-Burdock Project will be "none."[128] Yet, Organizational Petitioners argue in their Petition, Powertech provides no factual basis or explanation for this new conclusion in the Combined TR/ER that the cultural and historical impacts from the project will be "none," especially in light of the fact that Powertech's prior survey did not include the participation of the Oglala Sioux Tribe and, therefore, cannot include a fulsome or informed identification of the Oglala Sioux Tribe's cultural and historical resources.[129] That conclusion can be juxtaposed with the 2014 EIS Vol. 2 for the initial application of Powertech for the Dewey-Burdock Project wherein the Staff concluded that the "[i]mpact on cultural and historic resources during the ISR construction phase will be SMALL to

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precluded from considering this issue. Moreover, the case Powertech cites as being entitled to stare decisis is a prior licensing board decision. Powertech Answer at 20–21 (citing Powertech (USA) Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-19-10, 90 NRC 287 (2019)). Yet, as long has been known, stare decisis requires the other decision to be "binding authority." Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1257–58 (D.C. Cir. 1996); Hudson v. Md. Cas. Co., 22 F.2d 791, 792 (8th Cir. 1927). Powertech has not demonstrated that the other licensing board decision is binding on this Board.

[128] Combined ER/TR tbl.8.6-1, at 8-9 (Comparison of Environmental and Socioeconomic Impacts based on Proposed Action and Alternatives).

[129] Org. Pets. Petition at 14; Red Cloud Decl. ¶ 10; see also note 117, above.

LARGE." 2014 EIS Vol. 2 tbl.9-1, at 9.9 (Summary of Environmental Impacts of Proposed Action.[130]

Powertech argued in its Answer that a prior licensing board concluded that a Programmatic Agreement "will provide protection for onsite cultural resources as they may be encountered during facility construction and operation," notwithstanding the lack of a cultural resources survey that included Oglala Sioux participation.[131] Yet Powertech's argument fails to account for the "as they may be encountered" portion of that language, which we read as the

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[130] Moreover, Powertech does not explain the contradiction between the assertion of no impact in Table 8.6-1 and the fact that Powertech entered into a Programmatic Agreement recognizing the possibility that its activities may affect archaeological or historical sites despite the cultural resources surveys already completed on its site. Compare Combined TR/ER at 2-33, with Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 640 (2015) (indicating that a programmatic agreement may be used "in situations where the effects to historic properties cannot be fully determined prior to the approval of an undertaking … .") (emphasis added) Because of that unexplained dichotomy, Powertech recognizes in one section of the Combined TR/ER that it cannot fully determine the effects the Dewey-Burdock project will have on the cultural and historic resources within the project area but then, without any explanation, categorically asserts that there will be no cultural and historical impacts as a result of the Dewey-Burdock Project during the license renewal term. Cf. Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 & 3), LBP-19-5, 89 NRC 483, 495 n.49 (2019) (finding that NRC regulation 10 C.F.R. § 51.45(c) requires environmental reports to "contain sufficient data to aid the Commission in its development of an independent analysis [in the 2014 EIS Vol. 1]."), rev'd in part on other grounds, CLI-22-4, 95 NRC 44 (2022).

We do not believe a simple reference to the Programmatic Agreement can serve as an explanation for the "none" determination, as opposed to a categorization that recognizes some possible impact. That Agreement is meant to "mitigate" impacts. Mitigation is not elimination. Compare Mitigate, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/mitigate (last accessed January 6, 2025) ("to cause to become less harsh or hostile") with Eliminate, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/eliminate (last accessed January 6, 2025) ("to put an end to or get rid of").

[131] Powertech Answer at 20 (quoting Powertech, LBP-19-10, 90 NRC at 342; Combined TR/ER at 2-33; 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 Recovery Project Located in Custer and Fall River Counties, South Dakota (Mar. 19, 2014) (ADAMS Accession No. ML14066A347) [hereinafter "Programmatic Agreement"]. We note that under its terms the Programmatic Agreement remains in effect for 10 years from its date of execution, unless extended by agreement of the signatories. Programmatic Agreement at 14. As far as we are aware, the Programmatic Agreement has not been renewed.

prior licensing board recognizing that not all cultural resources of the Oglala Sioux will be recognized as such, even with the protections of the Programmatic Agreement. In fact, earlier in its decision the licensing board noted several times the need for participation by the Oglala Sioux Tribe in order for a fulsome identification of those resources to be completed.[132] Further, the quoted language does not constitute a finding that there will be "no" impact to any Oglala Sioux cultural resources, as Powertech now claims, but simply that the Programmatic Agreement will provide some level of protection for those cultural resources that may be identified and encountered as the project moves forward.[133] Providing protection for something does not guarantee that no harm will come to the thing being protected. History is replete with examples where protections were in place for various things or people and yet those things or people were impacted (or destroyed, injured, or killed) anyway.

Powertech relatedly argues that even without the Tribe's participation in the survey process initially, the existence of the now-expired Programmatic Agreement operates to protect

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[132] Powertech, LBP-19-10, 90 NRC at 321 ("To be sure, having one or more individuals with Tribal knowledge about cultural resources that might be found on the Powertech site would be a critical component of the survey process in properly identifying/interpreting cultural resources for protection and preservation."); id. at 326 ("we still find reasonable the NRC Staff's decision to provide an opportunity for Tribal elder input into the identification and interpretation of cultural resources on the Powertech site as an essential element of the NRC Staff's approach."); id. at 329 ("the NRC Staff developed a survey proposal that would describe the observable characteristics of sites of tribal significance in a sound manner by blending the scientific method with tribal cultural knowledge."); id. at 334–35 ("According to the NRC Staff, while an archaeologist with some experience dealing with Native American cultural resources, such as the NRC Staff's contractor Mr. Spangler, 'might be able to identify physical remains of certain activities, … only Tribal members can assign significance to those sites; and identify 'sacred locations that are intangible or not readily identifiable as archaeological sites, such as landforms or places of worship and ceremony.' … The NRC Staff thus concluded, and we find reasonably so, that it could not complete these elements of the March 2018 Approach without the cooperation and participation of the Oglala Sioux Tribe.") (first ellipsis in original); id. at 341 n.272 ("Nonetheless, given … the recognition that only Tribal personnel will be fully cognizant of what constitutes a Tribal cultural resource, … there can be no doubt that, although their significance is indeterminant, some as-not-yet identified Oglala Sioux Tribe cultural resources can be found on the Powertech site.").

[133] Under its terms, the Programmatic Agreement is designed to "avoid, minimize, or mitigate" impacts to historic properties. Programmatic Agreement at 2, 6, 7.

the cultural and historical sites of the Oglala Sioux. Powertech Answer at 20–21. The main thrust of that argument centers on the argument that the Programmatic Agreement requires new sites to be protected from development if they are identified as the project moves forward. Combined TR/ER at 2-35. Yet neither Powertech nor the Staff even attempt to explain how protection is possible for Oglala Sioux tribal resources given those resources have not been identified in consultation with Tribal members with cultural resources identification knowledge and experience. How is Powertech to know, for example, whether sites it selects for a well, processing plant, or other infrastructure construction location have spiritual importance for the Tribe? See notes 117 and 132, above.

Simply put, Organizational Petitioners argue the categorical declaration by Powertech that impacts to cultural and historical resources will be "none" is not substantiated or explained by Powertech in the Combined TR/ER. That omission serves as a basis for the admission of this aspect of Contention 1.

v. The NEPA aspect of Contention 1 meets the contention admissibility requirements.

All agree the project area includes aboriginal land of the Oglala Sioux. Tr. at 18. Also undisputed, Powertech did not engage with the Oglala Sioux on the issue of cultural and historical resources prior to submitting its Combined TR/ER or include in the Combined TR/ER information about the Tribe's prior agreement with the NRC on a survey protocol. E.g., Tr. at 123. Thus, the Organizational Petitioners claim that there is no complete identification in the Combined TR/ER of any historical or cultural resources of the Oglala Sioux in the project area—despite the NRC's regulations requiring such identification in the Combined TR/ER to comply with the Commission's NEPA-implementing regulations. Org. Pets. Petition at 14; Red Cloud Decl. ¶¶ 8–10; Sections III.A.2.ii–iii above. Nor, they claim, does Powertech explain how it reached the conclusion that there would be no impacts on any previously unassessed Oglala Sioux cultural or historic resources, or even other already identified cultural and historical

resources, as a result of the project. Org. Pets. Petition at 14; Red Cloud Decl. ¶¶ 13–14; Section III.A.2.iv above. Both of those failings establish the six necessary elements for contention admissibility.

First, the Organizational Petitioners have provided a specific statement of the issue of law or fact to be raised or controverted, i.e., the failure of Powertech to meet its obligations under the NRC's NEPA-implementing regulations to identify the cultural and historical resources for the uranium recovery facility operations and/or explain how it concluded there would be no impacts on those resources associated with facility construction and operation during the license renewal term. Org. Pets. Petition at 14; Red Cloud Decl. ¶¶ 8–10, 13–14. Second, the Organizational Petitioners have provided a brief explanation for the basis of the contention. Org. Pets. Petition at 14; Red Cloud Decl. ¶¶ 8–10, 13–14. Third, the Organizational Petitioners have demonstrated that the issues are within the scope of the proceeding by challenging the treatment or absence of this issue in Powertech's Combined TR/ER. Sections III.A.2.ii–iv above. Fourth, the issues raised by the Organizational Petitioners are material to the findings the NRC must make to support its NEPA review in this matter. Sections III.A.2.ii–iv above. Fifth, the Organizational Petitioners have provided a concise statement of the alleged facts and expert opinions that support their position and on which they intend to rely. Org. Pets. Petition at 14; Red Cloud Decl. ¶¶ 8–10, 13–14. Sixth, and finally, the Organizational Petitioners have shown that a genuine dispute exists with Powertech's Combined TR/ER on this issue. Sections III.A.2.ii–iv above.

vi. Reformulated Contention 1.

Because Organizational Petitioners' Contention 1 alleges both NEPA and NHPA inadequacies but only the NEPA component is admissible, we admit Contention 1, reformulated as two related contentions as follows:

- Contention 1A: Powertech's Combined Technical Report and Environmental Report fails to comply with the NRC's regulations in that it contains an

inadequate, inaccurate, or incomplete description of the cultural and historical resources as to the Oglala Sioux Tribe in the Dewey-Burdock Project area.

- Contention 1B: Powertech's Combined Technical Report and Environmental Report fails to explain its conclusion that the impacts of the Dewey-Burdock Project on cultural and historic resources will be "none."

B. Organizational Petitioners' Contention 2 – Failure to Consider Cumulative Effects.

In this contention, the Organizational Petitioners take issue with a purported lack of analysis or consideration in the Combined TR/ER of other uranium operations or expanded mining operations by Powertech. They claim "the LRA fails to discuss the expanded scope of the Project area, the additional processing proposals, and the current site configuration, and therefore requires additional analysis before the license can be renewed." Org. Pets. Petition at 22. According to Organizational Petitioners, Powertech included in the Combined TR/ER and in other company documents, which Organizational Petitioners attached to their Petition, information that demonstrates Powertech intends to use the facilities to be constructed at Dewey-Burdock for processing uranium from other locations but failed to include a consideration of the cumulative effects of those other uranium recovery locations in the Combined TR/ER. Org. Pets. Petition at 21–26.

Under the agency's NEPA-implementing regulations, the applicant (and ultimately the NRC) is required to consider the cumulative effects of a proposed licensing action. The relevant cumulative effects are those that result from "the incremental effects of the proposed action in conjunction with past, present, and reasonably foreseeable future actions."[134]

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[134] Strata, LBP-12-3, 75 NRC at 201 (citing 10 C.F.R. § 51.14(b); 40 C.F.R. §§ 1508.7, 1508.25(c)). As noted above, see note 110, Relevant to Section III.B of this Order, another identified CEQ definition to be used by the NRC was "cumulative impacts":

> "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeably future actions

To support their claim that Powertech failed to consider cumulative effects, the Organizational Petitioners refer to Section 1.9 of the Combined TR/ER wherein Powertech states:

> It is likely that the CPP [central processing plant] at the Burdock site will continue to operate for several years following the decommissioning of the well fields. The CPP may continue to process uranium-loaded resin from other ISL projects such as the nearby Powertech (USA) satellite ISL projects of Aladdin and Dewey Terrace planned in Wyoming, as well as possible tolling arrangements with other operators.

Combined TR/ER at 1-7. Similar language is found in Section 3.2.1 of the Combined TR/ER where it states:

> The CPP will serve production from Dewey-Burdock ISL operations, and possibly resin from other potential Powertech (USA) satellite projects in the area. In addition, depending on market conditions and regional demand for yellowcake processing, the CPP may be used for tolling arrangements with other ISL operations licensed under a different operator.

Id. at 3-63.

In combination with this language from the Combined TR/ER, the Organizational Petitioners then cite several documents from Powertech's Canadian parent, which were

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> regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (1984); see 10 C.F.R. § 51.14(b) (listing CEQ definitions to be used in implementation of NEPA section 102(2)). That definition is substantively identical to the CEQ's current definition of cumulative effects. 40 C.F.R. § 1508.1(i).

While the CEQ currently has a definition of "reasonably foreseeable," 40 C.F.R. § 1508.1(ii) (2024), that definition was not included in any of the CEQ definitions the Commission voluntarily agreed to apply to its proceedings, 10 C.F.R. § 51.14(b). The CEQ did not provide a definition for "reasonably foreseeable" until 2020. Update to the Regulations Implementing the Procedural Provisions of [NEPA], 85 Fed. Reg. 43,304, 43,351, 43,376 (July 16, 2020); Update to the Regulations Implementing the Procedural Provisions of [NEPA], 85 Fed. Reg. 1684, 1710 (Jan. 10, 2020).

prepared to comply with Canadian law.[135] In those required documents, numerous excerpts reveal Powertech's planned use of the Dewey-Burdock site for operations beyond the Dewey-Burdock Project:

- In the document for the Dewey-Burdock project, a section entitled "Other Relevant Data and Information" states that "[t]here are several projects controlled by Azarga which could potentially be satellites to the Dewey-Burdock Project once a CPP is constructed. This could potentially include Azarga's Aladdin (Wyoming), Gas Hills (Wyoming), Dewey Terrace (Wyoming) and Centennial (Colorado) projects." 2019 PEA at 131. Those sites range from 10 to 250 miles from the Dewey-Burdock Project site. Id.

- The May 2021 document regarding the Gas Hills (Fremont and Natrona Counties, Wyoming) project states that the "[p]roduction of a final product can be achieved at existing central processing facilities of multiple companies in Wyoming under a toll milling agreement or also at Azarga's Dewey-Burdock Project should this US NRC-licensed central processing facility be constructed in time." 2021 MRR at 70.

- The August 2021 document regarding the Gas Hills (Fremont and Natrona Counties, Wyoming) project states that the "IX resin will be transported to Azarga's Dewey-Burdock Uranium Project in South Dakota for processing." 2021 PEA at 4 (emphasis added); Id. at 74 ("Because the [Gas Hills] Project will be a satellite facility to Azarga's Dewey-Burdock Project, only the first major solution circuit (the IX circuit) will be located at the Project. Loaded resin will be transported to the Dewey-Burdock Project, where the uranium will be eluted, precipitated, dried, and packaged.") (emphasis added); id. at 75 (diagram showing material will be transported to the Dewey-Burdock Project); Org. Pets. Petition at 23, 25.

As was evident at oral argument, the issues of what qualifies as "reasonably foreseeable" and whether the operations at other Powertech ISL facilities that will produce uranium-loaded resins that will be processed at the Dewey-Burdock facility CPP qualified as cumulative effects were significant issues with substantial divergence between the participants. See Tr. at 54–80. Thus, we requested supplemental briefing. Tr. at 141.

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[135] Org. Pets. Petition at attachs. 15–17 (NI 43-101 Technical Report Preliminary Economic Assessment Dewey-Burdock Uranium ISR Project South Dakota, USA (Dec. 2019) [hereinafter "2019 PEA"]; NI 43-101 Technical Report Preliminary Economic Assessment Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (June 2021) [hereinafter "2021 PEA"]; NI 43-101 Technical Report Mineral Resource Report Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (March 2021) [hereinafter "2021 MRR"]). Tr. at 145–46 (explaining documents were prepared to comply with Canadian law).

1. What is "reasonably foreseeable"?

Organizational Petitioners, in their brief, cited a 2016 decision by the United States Court of Appeals for the District of Columbia Circuit wherein the court stated that an effect was reasonably foreseeable if it was "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[136] The Eighth Circuit has held similarly.[137]

The Staff, in its brief, cited the Commission's 2002 McGuire/Catawba decision, which pre-dates the regulatory and judicial authority in footnotes 136 and 137 above and which appears to require a level of interrelation between the project being licensed and the other action/effect, as well as a 2016 Commission Strata decision in an ISL facility initial licensing proceeding.[138] In that 2016 decision, according to the Staff, the Commission "held that a possible future action must 'be in a sufficiently advanced stage to be considered a "proposal" for action that "bring[s] NEPA into play."'"[139]

Powertech, in its brief, argued that recent legislative amendments cabin the consideration of cumulative effects and that the other projects identified by Organizational Petitioners are not reasonably foreseeable because they do not rise to the same level found by

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136 Org. Pets. Brief at 2 (citing EarthReports, Inc. v. FERC, 828 F.3d 949, 955 (D.C. Cir. 2016)).

137 Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003); see also Crow Butte Res., Inc. (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), CLI-19-5, 89 NRC 329, 347 (2019) (Comm'r Baran, dissenting) ("Under NEPA, an environmental impact is 'reasonably foreseeable' if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.' Whether an impact is reasonably foreseeable, or whether a person of ordinary prudence would consider it, is a question of fact.").

138 Staff Brief at 2–3 (citing Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 577 (2016); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station Units 1 & 2), CLI-02-14, 55 NRC 278, 295 (2002)).

139 Id. (quoting Strata, CLI-16-13, 83 NRC at 577 (quoting McGuire/Catawba, CLI-02-14, 55 NRC at 295)).

the Prairie Island licensing board in a 2012 issuance.[140] Powertech distinguished that prior licensing board decision wherein the board determined that because the applicant there had applied for a state Certificate of Need particular effects were reasonably foreseeable.[141] In support of its position, Powertech submitted a Declaration of its Chief Executive Officer, who stated that the "Applicant has not applied for any licenses, permits, or amendments to licenses or sought any governmental approval in connection with" any of the projects in the materials cited by the Organizational Petitioners. Powertech Brief, attach. A, ¶ 5 (Decl. of William Paul Goranson (Dec. 17, 2024)) [hereinafter "Goranson Decl."].

After reviewing the supplemental briefing,[142] we believe the appropriate test for determining whether an action is reasonably foreseeable is whether the other action is in such a sufficiently advanced stage that a person of ordinary prudence would take it into account in reaching a decision. We believe this formulation of the "reasonably foreseeable" test appropriately distills the cited Commission and federal appeals court decisions.

2. Organizational Petitioners have met, for contention admissibility standards, the "reasonably foreseeable" test.

As noted above, it is black letter law that "for the purposes of contention admissibility, we do not consider the merits of [Petitioners'] arguments," and petitioners are not required to prove their contentions at the contention admissibility stage.[143] We also keep in mind, relative to the factual determination about the scope and severity of impacts and whether they are reasonably

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140 Powertech Brief at 2–4 (citing N. States Power Co. (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503 (2012)).

141 The Prairie Island licensing board found that the application before it "strongly suggested" that the effect was reasonably foreseeable. Id. at 514. That board went on to say that "[a]dded to this" was that an application for an expansion of the ISFSI several years into the future would be necessary to allow the associated nuclear plant to continue operations to the end of its then-current operating license. Id. But the Prairie Island licensing board did not say, as Powertech implies in its brief, that the "added" fact was necessary before the effect was determined to be reasonably foreseeable.

142 Ms. Henderson did not file a supplemental brief.

143 Note 87, above.

foreseeable,[144] the nearly universal determination that whether a person of ordinary prudence would do something or take something into account is a factual determination.[145] Here, though, Organizational Petitioners sufficiently raised a question as to whether the Gas Hills and Dewey Terrace projects they identify are "reasonably foreseeable" such that Powertech should have included a discussion of their cumulative effects in its LRA. See 10 C.F.R. § 2.309(f)(1)(vi).

Powertech and the Staff argue that the projects are not related or sufficiently advanced that they need to be considered because, according to Powertech, no licenses, permits, or amendments have been sought, and, according to the Staff, the projects are too inchoate because they are "merely contemplated."[146] The Organizational Petitioners counter that argument by including with their brief a Management's Discussion & Analysis document from Powertech's parent company that states:

> During the three months ended September 30, 2024, the Company conducted resource development drilling on its Dewey Terrace project area. The Dewey Terrace project is located across the Wyoming-South Dakota border from [the] western extent of the Dewey-Burdock ISR Uranium Project.
>
> The Company has commenced the initial permitting work to advance the Gas Hills Uranium Project (Gas Hills) as an ISR [sic] uranium recovery operation located in central Wyoming, approximately 60 miles west of Casper, WY. As part of the initial data collection for project permitting, the Company initiated core drilling during the three months ended September 30, 2024. Gas Hills has a current resource and robust economics as described in a 2021 [Preliminary Economic Assessment]. It is ideally located in the Gas Hills Uranium Mining District, a brownfield area of extensive previous mining. The Company has Dewey-Burdock

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144 See Pa'ina Haw., LLC (Materials License Application), CLI-10-18, 72 NRC 56, 90 (2010) ("The scope and severity of such impacts, and whether they are reasonably foreseeable in the first instance, involve questions of fact that are at the very heart of the contested issue.").

145 Bennie v. Munn, 822 F.3d 392, 398 n.2 (8th Cir. 2016) (noting that "what would a person of ordinary prudence have done in certain circumstances" is a factual question); cf. 3B Fed. Jury Prac. & Instr. § 162:300 (6th ed.) ("Plaintiff ____ must prove by a preponderance of the evidence the injury alleged by plaintiff ____ was the direct and reasonably foreseeable result of defendant's alleged *[misrepresentations][omissions]*.") (blanks, brackets, and italics in original).

146 Goranson Decl. ¶ 5; Staff Brief at 3.

> and Gas Hills as its mid-term production assets within the planned production pipeline.

Org. Pets. Brief, attach. 1, at 3–4 (Management's Discussion & Analysis (Nov. 14, 2024)) [hereinafter "Management's Discussion & Analysis"] (emphasis added).[147]

Keeping in mind we are not to resolve factual questions or issues at this stage, we conclude that Organizational Petitioners have provided the Board with sufficient information to raise a genuine dispute that the uranium recovery in the Gas Hills and Dewey Terrace are reasonably foreseeable effects that must be addressed as cumulative effects in the Combined TR/ER.[148] This issue also meets the other contention admissibility elements: there is a

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147 We recognize this document was submitted with the supplemental briefing and not the Petition. But we find it appropriate for consideration for two reasons. First, Powertech itself submitted with its supplemental brief a declaration that was not included with its Answer and that relates to the same topic as the Management's Discussion & Analysis. Goranson Decl. ¶ 5. Second, consideration of the document meets the analogous three-part test in 10 C.F.R. § 2.309(c)(1) for consideration of petitions filed after the deadline for submitting hearing requests. The document was not available by the deadline for filing petitions in that the hearing petition filing deadline was October 8, 2024, and the document discusses activities that occurred as late as October 24, 2024. Compare Hearing Opportunity Notice, 89 Fed. Reg. at 65,401, with Management's Discussion & Analysis at 7. Moreover, the information is materially different in that, unlike the Management's Discussion & Analysis document, none of the documents attached to the hearing petition discuss actual commencement of permitting work at the Gas Hills project or drilling at the Dewey Terrace project. And the document was submitted timely, fewer than 60 days after the last date, October 24, 2024, referenced in the Management's Discussion & Analysis document.

148 Regarding the Staff's citation to McGuire/Catawba as establishing a requirement of some measure of interrelation between the project being licensed and the other action/project/effect, we agree with the Prairie Island licensing board that "[i]n more recent decisions, however, the Commission has acknowledged that cumulative impact analysis is required for actions covered by CEQ regulation 40 C.F.R. § 1508.7 -- that is, reasonably foreseeable future actions -- without suggesting that the test for connected actions in CEQ regulation 40 C.F.R. § 1508.25 must be satisfied." N. States Power Co. (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-14-6, 79 NRC 404, 423 (2014). But even if we were to require some level of interrelation, the materials provided by the Organizational Petitioners sufficiently raise a question of its existence.

The Dewey-Burdock Project is due east of and in the same geographic area as the Dewey Terrace and Gas Hills projects, which also are proposed to be ISR projects by the same entity. Powertech's parent company also noted in its August 2021 PEA that the "evaluation presented in this report assumes flowrates at the satellite plant/wellfield will be very similar to those in the Dewey-Burdock facility. Given the similarities in operational details[,] reagent and electricity use costs will be similar to those for the Dewey-Burdock PEA." 2021 PEA at 74

statement of the issue to be raised, Org. Pets. Petition at 21; there is a brief explanation for the basis of the contention, Org. Pets. Petition 21–26; the issue is within the scope of this proceeding, Org. Pets. Petition at 25–26; Section III.B, above; the issue is material to the findings that must be made, Org. Pets. Petition at 22–26; Section III.B, above; there is a concise statement of facts supporting the Organizational Petitioners' position (along with reference to documents), Org. Pets. Petition at 21–26; Org. Pets. Brief, attach. 1; Section III.B, above; and there is a genuine dispute with the Combined TR/ER (i.e., the cumulative effects were not addressed therein), Org. Pets. Petition at 25–26.

But as this contention of omission is overbroad as formulated by Organizational Petitioners,[149] we admit the following narrowed and reformulated version of Organizational Petitioner's Contention 2: "Powertech's License Renewal Application fails to account for, address, or analyze the cumulative effects of Powertech's uranium recovery in the Gas Hills and Dewey Terrace project areas as reasonably foreseeable effects of construction and operation of the Dewey-Burdock Project."

C. Organizational Petitioners' Contention 3 – The Fall River County Ordinance Demonstrates that the Proposed Project Is Unlawful Under Local Laws.

In their third contention, the Organizational Petitioners claim that a November 2022 ordinance in Fall River County declares uranium mining to be a nuisance and, therefore, the

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(demonstrating Powertech's parent company relies on a relationship between the Gas Hills and Dewey-Burdock Project to describe its Gas Hills project). Additionally, if more is needed, we have been provided documentation by Organizational Petitioners indicating that materials will be shipped from the Gas Hills project to the Dewey-Burdock Project to be eluted, precipitated, dried, and packaged, with only the ion exchange circuit located at the Gas Hills site. Id. at 4; id. at 74–75; Org. Pets. Petition at 23. And even further, the PEA relied upon by Management's Discussion & Analysis, and cited by the Organizational Petitioners as Attachment 16 to their Petition, undercuts the "unrelated" argument by its very terms: "Figure 17.1 presents a simplified process flow diagram illustrating the relationship between the [Gas Hills] Project satellite facility and the Dewey-Burdock Project." 2021 PEA at 74 (emphasis added).

[149] As formulated by Organizational Petitioners, Contention 2 refers to cumulative effects of "other mining activities." Org. Pet. Petition at 21. But Organizational Petitioners have provided sufficient documentation and argument only as to ISL recovery at two sites (Gas Hills and Dewey Terrace) as possibly being cumulative effects that should be addressed.

NRC cannot permit the project to move forward. Org. Pets. Petition at 26. They also claim that moving forward without considering the impact of this local ordinance would violate the Administrative Procedure Act as being arbitrary and capricious. Id. We conclude that this contention is inadmissible.

The Commission has instructed its licensing boards that a proceeding before them is not the appropriate forum in which to consider the impacts of a local regulation or whether a regulatory waiver or a non-NRC permit may be required for a project to move forward.[150] And as Powertech argued in its brief, the Supreme Court recognized that the NRC was authorized to regulate in the area of radiological safety but that states (and by implication, local governments) retain their traditional responsibilities outside that field of regulation.[151] Therefore, this issue is not within the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii).

Moreover, beyond citing the APA generally, Organizational Petitioners have not argued that the alleged local ordinance binds the NRC or this Board.[152] Nor have they argued that a license renewal by the NRC, if issued, would restrict or prevent the local municipality in any way

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150 Hydro Res., CLI-98-16, 48 NRC at 119, 121, 122 n.3

151 Powertech Answer at 28 (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983)).

152 The documentation submitted by the Organizational Petitioners to support the existence of the nuisance ordinance does not, in fact, do so. See Staff Answer at 29. So even if we presume this contention is within scope, Organizational Petitioners have not demonstrated a material dispute. See 10 C.F.R. § 2.309(f)(1)(vi).

Nor did Organizational Petitioners address the legal effect of a local ordinance essentially outlawing a business that already was permitted (at least by the NRC) to operate prior to that local ordinance going into effect. Underscoring the limited role this Board has, resolution of that state law legal issue is better suited for a different adjudicatory body. Cf. Hydro Res., CLI-98-16, 48 NRC at 120. That same rationale applies to the issue of resolving whether the purported local ordinance actually prevents the construction and operation of an ISL recovery facility (even assuming the ordinance is a valid exercise of local authority).

from attempting to enforce its ordinance. Thus, like a licensing board in 2004, we are not convinced that this issue is material to the matter pending before the NRC.[153]

Finally, aware of a Commission decision noting that local approval of certain projects may be relevant for the siting of an irradiator,[154] the Board is unaware of any similar authority for license renewals of uranium recovery facilities. When asked at oral argument whether the Organizational Petitioners were aware of any such authority, counsel was unable to provide any. Tr. at 81–82.

Thus, Organizational Petitioners' Contention 3 is not admissible.

D. Organizational Petitioners' Contention 4 – Data Required for NRC's Endangered Species Act and National Environmental Policy Act Evaluation Is Stale or Absent.

In their filings, Organizational Petitioners appear to assert two disparate but related claims in Contention 4. First, Organizational Petitioners assert that certain information in the Combined LR/ER is outdated or stale and that the NRC employs a practice that improperly shifts the burden onto petitioners to fill in that outdated or stale data with more current information. Org. Pets. Petition at 28. Second, Organizational Petitioners vaguely allege that certain, unidentified NRC practices, policies, guidance, and/or regulations used to review/approve ISL facility licenses/renewals are illegal, allowing a challenge to them in light of the Supreme Court's recent decision in Corner Post, Inc. v. Board of Governors of the Federal

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153 See Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 248 (2004) ("[T]he Clinton Petitioners do not contend that the Illinois State laws they cite bind this Board or the agency of which it is part, and the parties agree that issuance of an ESP will have no effect whatsoever on the rights of Illinois State agencies to enforce State laws restricting the issuance of construction authorizations or certificates of convenience and necessity, making the outcome of this ESP proceeding immaterial relative to the matter raised by this contention.").

154 Pa'ina Haw., LLC (Materials License Application), CLI-08-3, 67 NRC 151, 163 (2008) ("An entire section of the [Statement of Considerations] is devoted to the topic of 'Siting, Zoning, Land Use, and Building Code Requirements.' There, the Staff explains its view that irradiators in general are unlikely to pose a significant offsite risk, and therefore can be safely located *anywhere* local governments allow industrial facilities to be built … .") (italics emphasis in original).

Reserve System, 144 S. Ct. 2440 (2024). Org. Pets. Petition at 29–30. We address these aspects of Contention 4 sequentially and conclude neither is admissible.

1. Organizational Petitioners contend the LRA contains outdated or stale data and the NRC improperly shifts the burden onto petitioners to update that information.

In their Petition, Organizational Petitioners essentially define this aspect of Contention 4 as follows: The Combined LR/ER lacks updated information, which means the Staff, in reviewing the Combined LR/ER, will not possess the information it needs to comply with NEPA and/or the Endangered Species Act ("ESA"). Id. Organizational Petitioners also claim the lack of updated information in the Combined TR/ER wrongly forces them to anticipate what that updated information will be and/or to supply the licensee's missing information. Id. Therefore, claims the Organizational Petitioners, the NRC cannot comply with its legal obligations. Id. at 28. The Organizational Petitioners then provide examples of data from the Combined TR/ER they claim to be "stale" or outdated. Id. at 28–29.

In describing this aspect of Contention 4 in their Reply, Organizational Petitioners claim that "[t]he question is whether or not the LRA fails to provide the necessary information required for NRC to meet its statutory duties while also requesting NRC Staff to continue its unlawful licensing practices." Reply at 12. They then assert that no data post-2008 appears in the Combined TR/ER, other than meteorological and census data, which Organizational Petitioners claim is not contested. Id. at 12–13.[155]

The fatal flaw in admissibility of this aspect of Contention 4, though, is that beyond referencing the dates for the information contained in the Combined TR/ER, Organizational Petitioners do nothing to show that the actual data is, in fact, stale or outdated. They have failed to provide any information (including expert reports) showing that, or even raising a

[155] This 2008 cutoff contradicts Organizational Petitioners' assertion in their Petition that some of the Combined TR/ER data (other than meteorological and census data) is from 2010 and 2011. Org. Pets. Petition at 29.

question as to whether, newer specific data is available, much less that it would be materially different.[156] That failing means Organizational Petitioners cannot meet three contention admissibility elements.

- First, Organizational Petitioners do not demonstrate that this issue is "material to the findings the NRC must make to support the action" at issue. See 10 C.F.R. § 2.309(f)(1)(iv). Without knowing what specific data is claimed to be outdated or stale (i.e., that changed data actually exists), Organizational Petitioners have not demonstrated that the "staleness" of the data is material. For example, assuming for purposes of argument that Organizational Petitioners are correct as to the date of data, the fact that the ecological data in the Combined TR/ER is from 2008 is immaterial if more recent ecological data is unchanged or not available.

- Second, Organizational Petitioners do not provide a concise statement of the facts or opinions on which they will rely. See 10 C.F.R. § 2.309(f)(1)(v). In fact, as noted above, their Petition is devoid of any facts or expert opinions showing that updated data would be available or different in any respect (other than date of collection).

- Third, Organizational Petitioners fail to "show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." See 10 C.F.R. § 2.309(f)(1)(vi). Again, beyond pointing to the date of the data reported in the Combined TR/ER, Organizational Petitioners fail to demonstrate there is a genuine dispute that (i) data collected contemporaneously with the Combined TR/ER would be different in any material way from the data that is referenced in the Combined TR/ER or (ii) the data was required to be updated but was not.

The failure to meet any one contention admissibility element renders a proffered contention inadmissible. Note 96, above. But here, Organizational Petitioners failed to meet three such elements. Accordingly, this aspect of Contention 4 is inadmissible.

Nor is this aspect of the contention saved by Organizational Petitioners' argument that the NRC wrongly requires petitioners, not the applicant, to provide updated information. Organizational Petitioners fail to cite any caselaw, statutory provisions, or regulations supporting their claim that the NRC's requirements are improper.[157] Organizational Petitioners also failed

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[156] Nor did Organizational Petitioners cite any authority, beyond the general "action forcing" nature of the ESA and NEPA, that would have required Powertech to ensure updated data was included in the Combined TR/ER. Tr. at 85–87.

[157] Organizational Petitioners do cite a few cases that interpret the Administrative Procedure Act, 5 U.S.C. §§ 551–559, and that discuss the general purpose of NEPA, but none of this

to submit in this adjudicatory proceeding a 10 C.F.R. § 2.335 waiver request that would allow them to challenge the agency's contention admissibility regulations as they apply in this instance.

Therefore, this aspect of Contention 4 is not admissible.

2. Organizational Petitioners contend the NRC employs practices, procedures, and standards that wrongfully inhibit petitioners' ability to challenge those practices, procedures, and standards in adjudicatory proceedings.

In this aspect of Contention 4, Organizational Petitioners claim that the NRC's regulations and procedures wrongfully do not allow them to challenge, in adjudicatory proceedings, allegedly illegal practices, procedures, and standards. Org. Pets. Petition at 27, 29–30. For their legal support, Organizational Petitioners primarily rely on the Supreme Court's recent Corner Post decision. Org. Pets. Petition at 29.[158]

Nowhere in their Petition, though, do Organizational Petitioners identify what exactly are the allegedly illegal practices, procedures, and standards they wish to challenge. Instead, they simply make vague references to unspecified NRC "unlawful practices, policies, guidance, and regulations that allow they [*sic*] paucity of data and analysis found in the LRA documents may be shielded by NRC practices, but are raised here to provide the NRC the opportunity to address them in an attempt to reduce or avoid the need for judicial review." Id. at 27; id. at 29–30.[159] Thus, at the very least, Organizational Petitioners have not "[p]rovide[d] a specific

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caselaw establishes the proposition that the NRC has erred in placing the burden on petitioners, rather than the applicant, to provide more recent data than is contained in the Combined TR/ER.

[158] In light of the Hobbs Act's specific provision governing the timing of judicial review of agency licensing and rulemaking actions, we share the Staff's view of the inapplicability of the Corner Post decision as supporting this aspect of Contention 4. Staff Answer at 34–35. Organizational Petitioners cite purported additional authority for this aspect of Contention 4 in their Reply, Reply at 13–14, which we likewise find inapposite here.

[159] In their Reply, Organizational Petitioners appear to take a different tack. Reply at 13–14. But Commission case law precludes a petitioner from expanding or changing the scope of a contention via a reply. E.g., La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224–25 (2004) (indicating reply briefs are not the place to "attempt to reinvigorate

statement of the issue of law or fact to be raised or controverted … ." 10 C.F.R. § 2.309(f)(1)(i). Nor have Organizational Petitioners demonstrated that this aspect of Contention 4 is within the scope of this proceeding as defined in the Federal Register hearing opportunity notice for this proceeding defining what can be raised in this adjudication. See 10 C.F.R. § 2.309(f)(1)(iii).[160]

Moreover, nowhere in their Petition do Organizational Petitioners address the NRC regulation that precludes a challenge in an adjudicatory proceeding to any Commission rule or regulation without first seeking and obtaining a waiver from the Commission. See 10 C.F.R. § 2.335. The Commission routinely has held that a licensing board lacks the authority to consider such challenges without a waiver being granted by the Commission.[161] Organizational Petitioners filed no such waiver petition here.[162] As such, in addition to the Organizational Petitioners' failure to meet the required contention admissibility requirements, we find we are without the authority to admit this aspect of Contention 4.[163]

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thinly supported contentions by presenting entirely new arguments" or "what effectively amount to entirely new *contentions.*") (italics emphasis in original). Instead, a "reply brief should be 'narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.'" Id. at 225. "There simply would be 'no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements' and add new bases or new issues that 'simply did not occur to [them] at the outset.'" Id. (brackets in original); Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.").

160 Even were we to consider the expanded/changed aspect of Contention 4 in the Reply, it fails to meet either (f)(1)(i) or (iii) of the contention admissibility standards in section 2.309.

161 E.g., Nuclear Fuel Servs., CLI-23-3, 98 NRC at 49 & n.105 (affirming restriction in 10 C.F.R. § 2.335 preventing licensing board from considering challenges to regulations absent a waiver from Commission); Conn. Yankee Atomic Power Co. (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 6–9 (2003); see also Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 A.E.C. 79, 89 (1974) (even assuming a specified regulation may be contrary to the Atomic Energy Act, the licensing board "is not the proper forum for consideration of such matters.").

162 Nor are we aware of Organizational Petitioners having filed a rulemaking petition to address the allegedly illegal rules or regulations, which would not come before this Board in any event. See Haddam Neck Plant, CLI-03-7, 58 NRC at 6–8.

163 This same result would be attained even if we were to consider the expanded/changed explication of this aspect of the contention in the Reply.

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

In her first contention, Ms. Henderson attempts to frame a contention that addresses both pollution of, and the depletion of, underground water sources. Henderson Petition at 3–4. We examine both aspects of this contention and determine that neither is admissible.

1. The pollution aspect of Contention 1 is not admissible.

One of the elements for contention admissibility is the requirement that a petitioner provide a "concise statement of the alleged facts or expert opinions which support the … position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." 10 C.F.R. § 2.309(f)(1)(v). As it relates to an assertion of pollution, Ms. Henderson's petition contains only two bases, both of which are bald assertions:

> Of grave concern to me is the potential for Powertech … to pollute the aquifers by essentially dumping mining residues back into the aquifers in huge quantities. … My conclusion is that this project will forever pollute the aquifers with contaminants that we cannot remove from the water.

Henderson Petition at 3.

Beyond those two statements, Ms. Henderson does not provide any factual support for the potential for contamination by Powertech. At oral argument, her counsel agreed that such information was lacking. Tr. at 19–22. Therefore, this aspect of her Contention 1 fails to meet one of the required six elements for contention admissibility and is inadmissible.

2. The depletion aspect of Contention 1 is not admissible.

In the context of her depletion claim, Ms. Henderson calls out Powertech's assertion that a water well from the Madison formation, providing 500 gallons per minute, will be available for Powertech's remediation efforts. Henderson Petition at 3 ("I note that the Powertech application calls for a 500 gallon per minute well from the Madison."). But Ms. Henderson, who (i) has

ranched in the area for more than 30 years and buys water from the Madison formation for her cattle; and (ii) has served for more than a decade as the Chair of the Igloo-Provo Water Project District and for a decade as the Chairwoman of the Restoration Advisory Board for the Black Hills Army Depot cleanup in Igloo, South Dakota, states that she "know[s] of no Madison water deposit in the area that would deliver such a large amount of water." Id.

The Combined TR/ER states that, in the case of land application for aquifer restoration, "the usage of water from the Madison Limestone or another suitable aquifer will be about 430 to 510 gpm." Combined TR/ER at 2-227. In its Table 4.2-10, the Combined TR/ER also notes that land application without groundwater sweep will require 507 gallons per minute from the Madison formation. Id. at tbl.4.2-10, 4-30 (Typical Project-Wide Flow Rates during Concurrent Uranium Recovery and Aquifer Restoration). Further, in its section 4.2.2.4.2, Aquifer Restoration Water Balance, the Combined TR/ER states expressly that "[t]he total project-wide restoration extraction flow rate will be approximately 500 gpm … ."[164] Nowhere, though, in the Combined TR/ER does Powertech address the availability of a 500 gpm well from the Madison formation. Section 2.7.2.3 of the Combined TR/ER (the Summary of Previous Pumping Tests section) solely addresses pumping tests on wells in a formation other than the Madison formation. Id. at 2-214 to -223.

Thus, the 500 gpm figure of concern to Ms. Henderson does seem to be established in the Combined TR/ER. Nonetheless, and fatal to the admissibility of this aspect of the contention, is the fact that Powertech's initial application also called for 500 gpm from the Madison formation. See 2014 EIS Vol. 1, fig.2.1-14, at 2-36 (Typical Project Wide Flow Rates);

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[164] Combined TR/ER at 4-31; id. tbl.2.7-19, at 2-230 (Net Water Usage, Land Application Option (without Groundwater Sweep)) (identifying a consumptive use need for 495 gpm from the Madison formation); id. tbl.2.7-19a, at 2-231 (Net Water Usage, Land Application Option (with Groundwater Sweep)) (identifying a consumptive use need for 427 gpm from the Madison formation); id. fig.4.2-1, at 4-29 (Typical Project-wide Flow Rates during Uranium Recovery and Aquifer Restoration) (identifying a need for 248 gpm [column G] and 248 gpm [column M] from the Madison formation for restoration operations).

see also id. at 2-38. Nothing regarding Powertech's use of 500 gpm has changed between its initial application and the Combined TR/ER. Moreover, in considering Powertech's initial application, the Staff specifically noted the need for 500 gpm from the Madison formation and conducted a "3-layer model to study the effects of a large withdrawal from the Madison formation."[165] After reviewing the results of that study, the Staff concluded that "the proposed maximum Madison withdrawals at the Dewey-Burdock project do not appear to affect water supplies in the City of Edgemont, South Dakota." SER at 88. Based upon that, and other evaluations, the Staff found Powertech's "water balance information," which included the need for 500 gpm from the Madison formation, to be "acceptable." Id. Yet the Staff went even further and noted that it

> recognizes that a significant quantity of water will be required from the Madison Aquifer, if land application is utilized. However, the staff analyzed these withdrawals and the associated effects. Based on its review of the water balance information, the staff finds that it is consistent with Section 3.1.3 of the standard review plan and complies with 10 CFR 40.32(c) and 40.41(c).

Id.; Tr. at 34–35.

Given that (i) this issue already was included in Powertech's initial application and reviewed by the Staff and (ii) Ms. Henderson has not identified any changed circumstances or new information,[166] this aspect of her Contention 1 is outside the scope of this proceeding. Accordingly, this aspect of her Contention 1 fails to meet the required six elements for contention admissibility and also is inadmissible.

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165 FSME, NRC, Safety Evaluation Report (Revised) for the Dewey-Burdock Project, Fall River and Custer Counties, South Dakota – Materials License No. SUA-1600 at 87 (April 2014) [hereinafter "SER"] (ADAMS Accession No. ML14043A347).

166 Nowhere in her petition did Ms. Henderson raise any claims that climate change or precipitation changes in the intervening years undercut the analysis conducted by the Staff 10 years ago.

F. Henderson Contention 2 – The 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.

Ms. Henderson's second contention consists of only the twenty-nine words in the above heading. Henderson Petition at 4. Ms. Henderson did not provide any additional information or explanation as support for her second contention. Despite the requirements in section 2.309(f)(1), she failed to include an explanation of the basis for her contention; a statement of the facts, opinions, or documents on which the contention is based; an explanation as to how the contention is within the scope of this proceeding; an explanation as to how this issue is material to the findings the NRC must make; or an explanation as to how this shows a genuine dispute with the Combined TR/ER. This failing is fatal to the admissibility of her second contention. "While a board may view a petitioner's supporting information in a light favorable to the petitioner …. the petitioner (not the board) [is required] to supply all of the required elements for a valid intervention petition."[167]

Accordingly, Henderson Contention 2 fails to meet the second, third, fourth, fifth, and sixth elements of the six-part contention admissibility test. Therefore, Henderson Contention 2 is inadmissible.

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

Ms. Henderson's third contention simply states: "Determination of Baseline Ground Water Quality." Henderson Petition at 4. She then provides approximately two-and-a-half pages of text addressing a number of issues purportedly related (some tangentially, some not at all) to water quality:

- the underground structure of the caverns, fissures, and caves, which resemble "Swiss Cheese;"

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[167] Amergen Energy Co., LLC (Oyster Creek Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

- the Black Hills Army Depot and chemical agents dumped there, including sarin gas;
- the ”inescapable conclusion” that because of the “Swiss cheese” nature of the underground terrain one “should never disturb this area with any mining” because such mining will “cause the underground structure and its contaminants to move in a wholly unpredictable fashion,” including causing chemical warfare agents to reach the surface;
- Powertech’s failure to consider the chemical warfare agents; “[c]ommon sense” tells us the acids and carbon dioxide to be injected by Powertech “will surely create carbonic acid which will dissolve whatever it touches” and cause unpredictable and unmanageable chemical reactions;
- the South Dakota Mining and Water Management Board’s recent removal of the requirement that ISL recovery companies prove they can return ground water to its baseline condition;
- Powertech’s alleged seeking of a permanent exemption from the federal Safe Drinking Water Act, which Ms. Henderson commits to fighting;
- the allegation that the foreign ownership of Powertech is seeking to locate its operations in South Dakota due to lax environmental enforcement at the state level; and
- local and national security issues due to the foreign ownership of Powertech and lack of ability to control ownership of the mined uranium once it is shipped outside the United States.[168]

Yet nowhere in her explication of Contention 3 does Ms. Henderson demonstrate how any of these concerns are within the scope of this proceeding. Nor does she demonstrate any material dispute with the Combined TR/ER. And, as to the alleged “Swiss cheese” nature of the underground geology and the potential for sarin gas (and/or other warfare chemicals) to make its way to the surface, Ms. Henderson fails to provide any scientific or other specialized knowledge beyond “common sense” or “inescapable conclusion[s].” Henderson Petition at 5.

The only item that appears to be related to the denominated Contention 3 is Ms. Henderson’s assertion that the South Dakota Mining and Water Management Board recently removed the requirement that ISL recovery companies prove they can return ground water to its baseline condition. Henderson Petition at 6. Yet that is a concern that must be directed not to

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[168] Henderson Petition at 4–7.

the NRC, but instead to another governmental agency, such as the South Dakota Mining and Water Management Board. As such, Ms. Henderson has failed to establish that her concern falls within the scope of this license renewal proceeding.[169]

As Henderson's Contention 3 fails to meet the required six elements for contention admissibility, it is not admitted.

IV. CONCLUSION

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

A. Conclude that all Petitioners (the Oglala Sioux Tribe, the Black Hills Clean Water Alliance, the NDN Collective, and Susan Henderson) have standing;

B. Conclude that all three of Susan Henderson's contentions are inadmissible and that her petition is denied;

C. Conclude that Contention 1 of the Organizational Petitioners (the Oglala Sioux Tribe, the Black Hills Clean Water Alliance, and the NDN Collective) is admitted as two reformulated contentions:

> Organizational Petitioners' Contention 1A: Powertech's Combined Technical Report and Environmental Report fails to comply with the NRC's regulations in that it contains an inadequate, inaccurate, or incomplete description of the cultural and historical resources as to the Oglala Sioux Tribe in the Dewey-Burdock Project area.
>
> Organizational Petitioners' Contention 1B: Powertech's Combined Technical Report and Environmental Report fails to explain its conclusion that the impacts of the Dewey-Burdock Project on cultural and historic resources will be "none."

D. Conclude that Contention 2 of the Organizational Petitioners is admitted as reformulated:

> Powertech's License Renewal Application fails to account for, address, or analyze the cumulative effects of Powertech's uranium recovery in the Gas Hills and Dewey Terrace project areas as reasonably foreseeable effects of construction and operation of the Dewey-Burdock Project;

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[169] Importantly, Ms. Henderson does not allege in Contention 3 that Powertech will not be able to return the local water supply to its baseline condition. Moreover, if Powertech does seek an exemption from drinking water standards, presumably because it is not able to return the water to baseline conditions, Ms. Henderson affirmatively states that such a request will be made to an agency other than the NRC and she will fight that request before that agency.

E. Conclude that Contentions 3 and 4 of the Organizational Petitioners are inadmissible;

F. Conclude that the Organizational Petitioners' Petition is granted as to reformulated Contentions 1 and 2 but denied as to Contentions 3 and 4, and that Organizational Petitioners (the Oglala Sioux Tribe, the Black Hills Clean Water Alliance, and the NDN Collective) are admitted as parties to this proceeding.

G. Select 10 C.F.R. Part 2, Subpart L as the hearing procedures to be used (10 C.F.R. § 2.310);

H. Remind the Staff of its obligation, within 15 days of the date of this Order, to comply with 10 C.F.R. § 2.1202(b)(2) regarding notification of its status as a party to this proceeding;

I. Order the parties to submit a joint proposed Case Scheduling and Management Order, within 10 business days of the date of this Order, proposing relevant dates for the remainder of this proceeding (E.g. 10 C.F.R. §§ 2.332, 2.1205, 2.1207);

J. Remind the parties of their mandatory disclosure obligations, which are to occur within 30 days of the date of this Order (10 C.F.R. § 2.336(a)&(b)), subject to being adjusted in a subsequent Order based upon the joint proposed Case Scheduling and Management Order;

K. Establish the last business day of the month, beginning on March 31, 2025, as the date by which updated mandatory disclosures are to be made (10 C.F.R. § 2.336(d)), subject to being adjusted in a subsequent Order based upon the joint proposed Case Scheduling and Management Order; and

L. Remind the parties of the 15-day deadline in 10 C.F.R. § 2.1206 for submission of any joint request that an evidentiary hearing be conducted based on written submissions only.

NOTICE TO ALL PARTICIPANTS: Any appeal of this Memorandum and Order must be made in compliance with 10 C.F.R. § 2.311, including being filed no later than 25 days from the service of this Memorandum and Order. 10 C.F.R. § 2.311(b).

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
January 31, 2025

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, Organizational Petitioners' Request for Hearing and Denying Henderson's Request for Hearing)** have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of January 2025.