

April 4, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

**NRC STAFF'S ANSWER TO CONTENTIONS ON FINAL SUPPLEMENTAL
ENVIRONMENTAL IMPACT STATEMENT**

The NRC Staff responds to the contentions the Consolidated Intervenor and the Oglala Sioux Tribe (collectively, the "Intervenor") filed on March 17, 2014. The contentions challenge the Final Supplemental Environmental Impact Statement (FSEIS) the Staff prepared for Powertech (USA) Inc.'s proposed Dewey-Burdock facility. The Board should dismiss all but one of the Intervenor's previously admitted contentions and deny the Tribe's three new contentions challenging the FSEIS.

Background

I. Powertech's Application

Powertech seeks an NRC license in order to operate the Dewey-Burdock in-situ uranium recovery (ISR) facility in Fall River and Custer Counties, South Dakota. Along with its application for an NRC license, Powertech submitted an Environmental Report addressing its proposed facility's impact on the environment. The Environmental Report, which is required by NRC regulations in 10 C.F.R. Part 51, helps inform the Staff's independent review of a license application and thereby helps the Staff meet the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*

Since Powertech submitted its Environmental Report in 2009, it has provided additional information relevant to the Staff's NEPA review. In August and November 2010 Powertech submitted responses to the Staff's requests for additional information (RAIs) pertaining to the Environmental Report.¹ Powertech has also supplemented its application with other information, including responses to RAIs on the Technical Report it submitted to demonstrate compliance with the NRC's safety regulations.²

II. The Staff's NEPA Review

In accordance with NEPA and the NRC's regulations in 10 C.F.R. Part 51, the Staff has prepared a supplemental environmental impact statement (SEIS) in connection with Powertech's application. The SEIS supplements NUREG-1910, "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities." NUREG-1910 assesses the environmental impacts of ISR operations both generally and on a regional basis, with specific sections focusing on the Western South Dakota-Northeastern Wyoming Region, where Powertech's facility would be located.

On November 26, 2012, the Staff issued a draft version of the SEIS for public comment.³ The Draft SEIS (DSEIS) addressed environmental impacts related to the Dewey-Burdock Project. The Staff considered the impacts that might result from construction of the Dewey-Burdock facility and wellfields, ISR operations at the site, restoration of the aquifers associated with ISR operations, and decommissioning of the site. The Staff prepared the DSEIS in

¹ Powertech (USA) Inc.'s Response to the Request for Additional Information to Support the Environmental Review of its Application (August 26, 2010) (ADAMS Accession No. ML102380530); Powertech (USA), Inc.'s Responses to the U.S. Nuclear Regulatory Commission (NRC) Staff's Verbal and Email Requests for Clarification of Selected Issues Related to the Dewey-Burdock Uranium Project Environmental Review (November 4, 2010) (ADAMS Accession No. 103140318).

² E.g., Revised Responses to the Request for Additional Information (RAI) for the Technical Report (ADAMS Accession No. ML112071064) (June 28, 2011); Groundwater Model for Dewey-Burdock Project (ADAMS Accession No. ML120620195) (February 27, 2012); Additional Regional Meteorological Data for Proposed Dewey-Burdock Project (ADAMS Accession No. ML12173A038) (June 13, 2012).

³ *Supplemental Environmental Impact Statement for Proposed Dewey- Burdock In-Situ Uranium Recovery Project in Custer and Fall River Counties, SD*, 77 Fed. Reg. 70,486 (November 26, 2012).

cooperation with the U.S. Bureau of Land Management (BLM), which manages 240 acres of land within the Dewey-Burdock site. The Staff also consulted with numerous other federal and state agencies, including the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the South Dakota Department of Environment and Natural Resources. In addition, the Staff consulted with numerous American Indian tribes in order to obtain information on culturally significant properties that may qualify for protection under the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (NHPA).

When the Staff issued the DSEIS, it stated that there would be a 45-day period for the public to submit comments on the document. The Staff also explained, however, that it would attempt to consider any comments received after the formal comment period ended. The Staff received 820 comments from 349 individuals and 31 agencies or organizations. In the end, the Staff was able to accept all comments received on or before March 5, 2013. The Staff therefore effectively provided a 99-day comment period on the DSEIS.⁴

The Staff reviewed each of the comments on the DSEIS, and in certain cases revised DSEIS text in response to comments. While reviewing the DSEIS-related comments, the Staff continued to consult with other agencies regarding Powertech's application. The Staff also continued to independently review environmental issues related to the Dewey-Burdock Project, as well as additional information submitted by Powertech.

On January 31, 2014, the Staff issued the FSEIS for the Dewey-Burdock Project.⁵ The FSEIS updates the information in the DSEIS and the Staff's analysis of environmental impacts. The FSEIS also adds an Appendix E, which presents public comments on the DSEIS and the Staff's responses to the comments.

⁴ FSEIS Appendix E, Section E2.4.

⁵ *Final Supplemental Environmental Impact Statement, Proposed Dewey-Burdock Project in Fall River and Custer Counties, South Dakota, for In-Situ Leach Uranium Milling Facilities*, 79 Fed. Reg. 5468 (January 31, 2014). The FSEIS is Supplement 4, Vols. 1 and 2, to NUREG-1910 (ADAMS Accession Nos. ML104024A477 (Chs. 1–5) and ML104024A477 (Chs. 6–11 and Appendices)).

III. The Staff's NHPA Review

After the Staff issued the DSEIS, it continued to evaluate how properties eligible for inclusion on the National Register of Historic Places (NRHP) may be affected by the Dewey-Burdock Project. The Staff continued to consult with the South Dakota State Historic Preservation Officer, numerous American Indian tribes, and Powertech regarding such properties. Appendix A of the FSEIS includes correspondence of the Staff's consultation under the NHPA through November 2013.⁶ Table A-1 in Appendix A provides a chronology of the documents associated with the Staff's consultation.

As part of its consultation under the NHPA, the Staff arranged for a field survey of the Dewey-Burdock site. The Staff arranged for the survey so that each of the tribes with whom it was consulting could survey the Dewey-Burdock site for properties of religious or cultural significance to the tribe. After consulting with the tribes for an extended period over an appropriate methodology for a field survey, the Staff decided on an approach under which each tribe could send its own representatives to the Dewey-Burdock site. The tribal representatives could then survey the site using the methodology best suited to identifying properties significant to their tribes.

The Staff invited all consulting tribes to participate in the field survey of the Dewey-Burdock site. In April and May 2013, representatives from seven tribes conducted surveys at the site. Several tribes later provided the Staff with information on significant properties at the site, along with their NRHP eligibility recommendations. The Staff used this information to assess how the Dewey-Burdock Project might affect cultural resources. In December 2013, the Staff provided its impact assessment to all consulting tribes for comment.⁷

⁶ Appendix A includes correspondence related to the Staff's consultation under other acts, such as the Endangered Species Act. The vast majority of the correspondence, however, relates to the Staff's NHPA consultation efforts.

⁷ *E.g.*, Letter to Oglala Sioux Tribe Transmitting TCP Survey Report for Dewey-Burdock Project (ADAMS Accession No. ML13357A234) (December 23, 2013); NRC's Overall Determinations of Eligibility and

The Staff has used the information provided by the consulting tribes to develop a programmatic agreement (PA) to protect historic and cultural resources that may be affected by the Dewey-Burdock Project. Since August 2013, the Staff has been developing the PA in consultation with the tribes, Powertech, BLM, and the South Dakota Historic Preservation Officer.⁸ On March 19, 2014 the Staff provided a final PA to the consulting parties for signature.⁹

Although when the Staff issued the DSEIS it was using its NEPA process to satisfy the public participation requirements of the NHPA, in November 2013 the Staff separated the two processes, notifying the consulting tribes in advance of its decision.¹⁰ The Staff separated the processes because the FSEIS was largely complete, and the Staff did not want to delay making the FSEIS available to the public. The Staff also did so to avoid further delays in the hearing, understanding that issuing the FSEIS would likely trigger new contentions. Since the Staff separated the two processes, it has focused on preparing the PA for the Dewey-Burdock Project. Many of the documents listed in the Staff's recent hearing file updates pertain to the Staff's work on the PA.¹¹

Assessments of Effects (ADAMS Accession No. ML13357A234) (December 16, 2013); NRC NRHP Determinations (ADAMS Accession No. ML13343A155) (December 23, 2013); Table 1.0 for Draft PA (ADAMS Accession No. ML13354B948) (December 13, 2012). The Staff sent copies of these documents to all consulting tribes.

⁸ In August 2013, the Staff sent a draft PA outline to the consulting parties for comment. Request for Availability to Discuss Development of a PA for the Dewey-Burdock Project (ADAMS Accession No. ML13267A221) (August 30, 2013).

⁹ Final Programmatic Agreement for Proposed Dewey-Burdock Project with Appendices (ADAMS Accession Nos. ML14066A347 and ML14066A350; ADAMS Accession Package No. ML14065A124) (March 19, 2014).

¹⁰ *E.g.*, Letter to Oglala Sioux Tribe re: Notification of Intention to Separate NHPA Section 106 Process from NEPA Review for Dewey-Burdock ISR Project. (ADAMS Accession No. ML13308B524) (November 6, 2013). As with other documents relating to consultation under the NHPA, the Staff sent copies to all consulting tribes.

¹¹ The Staff's recent hearing file updates reflect the progress the Staff and the consulting parties have made on the PA. (ADAMS Accession Nos. ML14091B173 (April 2014); ML14063A677 (March 2014); ML14034A386 (February 2014); ML14002A284 (January 2014)).

IV. The Board's Rulings on Contentions

In their hearing requests, the Intervenor submitted a total of 21 contentions raising a variety of safety and environmental challenges to Powertech's application. The Board admitted seven contentions. *Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LPB-10-16, 72 NRC 361, 443–44 (2010). These contentions related to cultural resources (Consolidated Intervenor's Contention A and Oglala Sioux Tribe's Contention 1), baseline groundwater conditions (Contentions B and 2), hydrogeology (Contentions C and 3), and groundwater consumption (Contention 4). The Board rejected contentions challenging, among other issues, Powertech's discussion of its plans for disposal of 11e.(2) byproduct material and its analysis of actions connected to the Dewey-Burdock Project.

After the Staff issued the DSEIS in November 2012, the Intervenor submitted 18 new or amended contentions. The Board found that each of the Intervenor's previously admitted contentions challenged information in the DSEIS that was sufficiently similar to information in Powertech's Environmental Report. Thus, the Board found that the contentions "migrated" from the Environmental Report to the DSEIS.¹² The Board also admitted three new contentions of the Oglala Sioux Tribe. The Board rejected the Intervenor's remaining contentions. After the Board combined the Intervenor's related contentions and split two contentions into subparts, the admitted contentions were as follows:¹³

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|----------------|---|
| Contention 1A: | Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources. |
| Contention 1B: | Failure to Involve or Consult All Interested Tribes as Required by Federal Law. |
| Contention 2: | The DSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality. |

¹² LBP-13-9, 78 NRC at 50–60 (2013).

¹³ The following list appears in Appendix A of the Board's decision. LBP-13-9, 78 NRC at 116.

Contention 3:	The DSEIS Fails to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater.
Contention 4:	The DSEIS Fails to Adequately Analyze Ground Water Quantity Impacts.
Contention 6:	The DSEIS Fails to Adequately Describe or Analyze Proposed Mitigation Measures.
Contention 9:	The DSEIS Fails to Consider Connected Actions.
Contention 14A:	Whether an appropriate consultation was conducted pursuant to the Endangered Species Act and implementing regulations.
Contention 14B:	Whether the DSEIS's impact analyses relevant to the greater sage grouse, the whooping crane, and the black-footed ferret are sufficient.

IV. The FSEIS Contentions

The Consolidated Intervenors filed four contentions on the FSEIS. The first three contentions mirror the Consolidated Intervenors' previously admitted contentions, while the fourth contention seeks to resurrect a contention that the Board rejected.¹⁴ The Oglala Sioux Tribe filed 10 contentions on the FSEIS. These include seven contentions that mirror previously admitted contentions and three new contentions that closely resemble contentions, or arguments within contentions, that the Board rejected.¹⁵

As with the DSEIS contentions, the Consolidated Intervenors' contentions and the Tribe's first four contentions are very similar, raising the same general issues and relying on the same three declarations from Dr. Robert Moran, including a newly submitted "Second Supplemental Declaration." These contentions address cultural resources (Contentions 1A and 1B), baseline groundwater conditions (Contention 2), hydrogeological confinement of aquifers

¹⁴ The Board rejected the Consolidated Intervenors' Contention D, which challenged the DSEIS's analysis of groundwater consumption. LBP-13-9, 78 NRC at 112. The Consolidated Intervenors' FSEIS Contention 4 likewise involves groundwater consumption.

¹⁵ Among the Tribe's DSEIS contentions that the Board rejected were Contention 7 (disposal of byproduct material), Contention 13 (air emissions and liquid waste), and the argument in Contention 14 that the Staff failed to consult as required by the Migratory Bird Treaty Act. LBP-13-9, 78 NRC at 71-72, 93, 101. The Tribe's FSEIS Contentions 1-3 raise similar issues.

that may be affected by ISR operations (Contention 3), groundwater consumption (Contention 4), mitigation measures (Tribe's Contention 6), related licensing actions (Tribe's Contention 9), and impacts to wildlife (Tribe's Contention 14). The Tribe's new contentions relate to the NRC Staff's consultation with the U.S. Fish and Wildlife Service (FSEIS Contention 1), disposal of byproduct material (FSEIS Contention 2), and air emissions (FSEIS Contention 3).

Legal Standards

I. General Requirements for Contentions

A contention cannot be admitted unless it meets the criteria in 10 C.F.R. § 2.309(f)(1).

This subpart requires that each contention:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
 - (ii) Provide a brief explanation of the basis for the contention;
 - (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
 - (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
 - (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ;
 - (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.
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Although contentions must typically be filed at the same time a petitioner submits its hearing request, a person may later file new or amended contentions ("late-filed contentions") based on subsequently released documents, such as the NRC Staff's draft or final NEPA document. 10 C.F.R. § 2.309(f)(2). Such a contention cannot be admitted, however, unless it meets the following additional requirements in 10 C.F.R. § 2.309(c)(2):

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The intervenor has the burden of demonstrating that any late-filed contention meets the standards in 10 C.F.R. § 2.309. *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

II. Precedent Relevant to the Board's Review of the FSEIS Contentions

The following principles are relevant to whether the Intervenor has met their burden of showing their contentions should be admitted.

A. Previously Admitted Contentions Do Not "Migrate" to a Final EIS unless the Challenged Analysis is Essentially the Same as in the Draft EIS

Under the "migration tenet," a Board may construe an admitted contention challenging the applicant's Environmental Report as presenting a similar challenge to the Staff's DEIS. *Nuclear Innovation N. Am. LLC* (South Texas Project Units 3 and 4), 75 NRC 227, 233 n.17 (2012). Under this tenet an admitted contention challenging the DEIS may also migrate to the FEIS. *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 468 (2012). The migration tenet does not apply, however, unless the information in the FEIS is *in para materia* with the information that is the focus of the contention challenging the DEIS. *Id.* If it is, the Board may decide that the contention migrates from the DEIS to the FEIS even if the intervenor does not amend its contention or file a new contention. If it is not, the Board must independently review whether the intervenor satisfies all requirements for a late-filed contention. *Id.*

B. Contentions Must Address All Relevant Information in the Record

When submitting a contention, an intervenor must read all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing view. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). The Board must reject a contention that rests on an incomplete or inaccurate reading of an EIS. *Cf. Georgia Institute of Technology*, (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281,

300 (1995) (rejecting a contention based on a mistaken reading of the Safety Analysis Report). Furthermore, when challenging an EIS the intervenor must do more than allege generally that there are deficiencies in the document. In order to demonstrate a genuine, material dispute with the EIS for a particular facility, the intervenor must address the specific analysis in the document and explain how it is incorrect using facts that are specific to the facility in question. See *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) (“An expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate”).

C. The Staff’s NEPA Review Has a Defined Scope

When preparing an EIS, the Staff must take a hard look at the environmental impacts of the proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). This standard is, however, subject to a “rule of reason.” Under NEPA’s rule of reason, the Staff need not address every environmental effect that could potentially result from the proposed action. *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)). Rather, the Staff need only provide “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]” *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980).

NRC precedent follows Circuit Court precedent in limiting the scope of the Staff’s NEPA review. “NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original). The proper inquiry is not whether an effect is “theoretically possible,” but whether it is “reasonably probable that the situation will obtain.”

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 49 (1978).

When discussing impacts in certain resource areas, the EIS may take into account environmental mitigation measures proposed by the applicant or identified by the Staff. The EIS need not contain “a complete mitigation plan,” however, nor does it need to include “a detailed explanation of specific [mitigation] measures which will be employed.” *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426–27 (2006). In fact, a mitigation plan “need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.” *Id.* The EIS need only discuss mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Id.* See also *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC 254, 265 (2011) (explaining that NEPA does not “demand the presence of a fully developed [mitigation] plan” or a “detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action”).

D. The Staff Need Not Recirculate an EIS for Comment Unless There Are Changes That Cause Effects Which Are Significantly Different From Those Already Studied

The NRC’s regulations explain when the Staff must prepare a supplement to either a draft or final EIS. The Staff must prepare a supplement when:

- (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
- (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

10 C.F.R. § 51.72(a) (draft EIS); 10 C.F.R. § 51.92(a) (final EIS).¹⁶ If the Staff prepares an EIS supplement for either of these reasons, it must also circulate the supplement for public comment. 10 C.F.R. § 51.72(c); 10 C.F.R. § 51.73; 10 C.F.R. § 51.92(f)(1).

¹⁶ For an FEIS, this rule applies only if the proposed action has not yet been taken. 10 C.F.R. § 51.92(a).

Under this standard, the Staff need not prepare an EIS supplement every time it obtains new information that has some bearing on the proposed action. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (explaining that an EIS supplement is not required "every time new information comes to light"). Rather, the Staff must prepare a supplement "only [in response to] those changes that cause effects which are significantly different from those already studied." *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001). The changes must present a "seriously different picture of the environmental impact of the proposed project" and affect "the quality of the human environment in a significant manner or to a significant extent not already considered." *Hydro Resources*, CLI-99-22, 50 NRC at 14.

Discussion

Except for Contention 2, which addresses baseline groundwater conditions, the Intervenor's previously admitted contentions do not migrate from the DSEIS to the FSEIS. The contentions do not migrate between the documents because the FSEIS contains new information or analysis relevant to the Intervenor's claims. Because the contentions do not migrate from the DSEIS to the FSEIS, the Intervenor must show their contentions meet both the late-filing rules in 10 C.F.R. § 2.309(c)(2) and the general rules in § 2.309(f)(2). The Intervenor fails to do so, in most cases because they do not specifically challenge relevant sections of the FSEIS. The Intervenor's arguments therefore do not meet the requirements in paragraphs (ii), (v), or (vi) of 10 C.F.R. § 2.309(f)(1). *See also USEC*, CLI-06-10, 63 NRC at 472 (explaining that the intervenor must address the specific analysis in the document it is challenging and explain how it is incorrect using facts that are specific to the facility in question); *Millstone*, CLI-01-24, 54 NRC at 358 (explaining that an intervenor must read all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing view).

The Tribe's three new contentions also cannot be admitted. Each of these contentions mirrors a contention, or a basis within a contention, that the Board previously rejected, and the allegedly new information upon which the Tribe relies is not materially different from the information upon which the Board based its prior rulings. See 10 C.F.R. § 2.309(c)(2)(ii) (stating that a late-filed contention must be based on information materially different from information previously available).

The remaining contention, Contention 2, challenges FSEIS sections that rely on some of the same information used in the DSEIS. Although the Staff believes the Board should not have admitted Contention 2 in the first instance, the Staff acknowledges that the migration tenet could potentially be used to keep this contention in the hearing.

Before turning to specific contentions, the Staff would note that in multiple contentions the Intervenor cite regulations in 10 C.F.R. Part 40 or criteria in Appendix A to Part 40 as support for their arguments. These regulations and criteria do not, however, govern the Staff's NEPA review. Rather, they are standards that the Staff applies to determine whether an applicant has shown it meets the safety requirements for obtaining a license. The NRC's regulations in 10 C.F.R. Part 51, along with NEPA itself and relevant legal precedent, govern the Staff's NEPA review.

Contention 1 (Historic and Cultural Resources)

In Contention 1A, the Intervenor argue that the FSEIS inadequately describes how the Dewey-Burdock Project may affect archeological, historical, and traditional cultural resources. In Contention 1B, they argue that in preparing the FSEIS the NRC Staff failed to consult with American Indian tribes as required by NHPA and various executive orders.

Contention 1A (Protection of Resources)

Contention 1A does not migrate to the FSEIS because there is considerable new information relevant to the Intervenor's claims. This new information includes the reports of field surveys that tribes conducted at the Dewey-Burdock site. The Staff analyzed this information

and assessed how the Dewey-Burdock Project might affect cultural resources identified by the tribes. The Staff provided its assessment to all consulting tribes for comment, and it took into account the comments provided by the tribes. The Staff used the input from the tribes, as well as input from other consulting parties and its own analysis, to prepare a draft Programmatic Agreement (PA) to protect historic and cultural resources that may be affected by Dewey-Burdock Project. The Staff provided an initial draft PA to the consulting parties in August 2013,¹⁷ and since then it has been working with the consulting parties to finalize the PA. This new information—the tribal survey results, the Staff’s assessment of impacts to historic and cultural resources, the tribal comments on the survey results, and multiple versions of the draft PA—is directly relevant to the issues the Intervenor raised in Contention 1A. Because the relevant circumstances are not *in para materia* with those in November 2012, when the Staff issued the DSEIS, Contention 1A does not migrate to the FSEIS.

Because Contention 1A does not migrate to the FSEIS, the Board must consider whether the Intervenor provide support for amending their contention. They do not. The Intervenor argue that the FSEIS lacks an adequate description of cultural resources at the Dewey-Burdock site. The FSEIS does not contain all of the Staff’s analysis regarding cultural resources, however, particularly since the Staff separated the NHPA and NEPA processes in November 2013. Nowhere in their pleadings do the Intervenor address other information that is relevant to the issues they raise. For example, the Intervenor do not directly challenge the Staff’s December 2013 assessment of impacts to cultural resources at the Dewey-Burdock site. Nor do they address the multiple draft versions of the PA that the Staff has provided to the consulting tribes for comment. Because the Intervenor fail to challenge information that is directly relevant to the issues they raise, their contention cannot be admitted. 10 C.F.R.

¹⁷ Request for Availability to Discuss Development of a PA for the Dewey-Burdock Project (ADAMS Accession No. ML13267A221) (August 30, 2013).

§ 2.309(f)(1)(ii), (v), (vi); *Millstone*, CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472.

The Intervenor also argue that the field surveys the tribes conducted at the Dewey-Burdock site lacked a proper methodology, thus indirectly challenging the Staff's analysis of impacts to historic and cultural resources, which relied upon the tribes' input. The Intervenor do not, however, support their argument with facts or expert opinion, as required under the NRC's rules. 10 C.F.R. § 2.309(f)(1)(v). Although the Tribe cites a Declaration from Willmer Mesteth, the Oglala Sioux Tribal Historic Preservation Officer, Mr. Mesteth's Declaration is from April 2010, three years before the tribal surveys began. The Consolidated Intervenor cite two Declarations from Louis Redmond, but these Declarations are from 2010 and 2012, and they likewise do not challenge the survey methodology. In sum, the Intervenor do not cite facts or expert opinion to support their claim that the tribal surveys lacked a proper methodology.

The Intervenor further claim that the Staff's analysis of cultural resources violates NEPA because the FSEIS does include a finalized PA for the Dewey-Burdock Project. The Staff has not yet taken the proposed action—issuing Powertech a license—and the Staff will not reach any licensing decision until it finalizes a PA. The Intervenor fail to explain how this approach is inconsistent with the NRC's regulations or with NEPA generally. This is not the first case where the Staff issued its EIS before issuing a PA. The Commission has found that this approach does not violate either NEPA or the NHPA, as long as the Staff completes its reviews under both statutes before it issues a license. *Hydro Resources*, CLI-99-22, 50 NRC at 14.

Finally, the Intervenor argue that the Staff's NEPA and NHPA analyses are inadequate because certain historic or cultural properties at the Dewey-Burdock site have not been evaluated. The Intervenor do not, however, cite any requirement under NEPA or the NHPA that all sites be evaluated before an agency takes the proposed action. Any unevaluated sites at the Dewey-Burdock site will be protected under the PA that the Staff expects to soon issue. The Intervenor fail to address the terms of the PA, and they do not explain why the draft PA is

insufficient to protect cultural resources. The Intervenor's therefore fail to meet multiple requirements in the NRC's rules for contentions. 10 C.F.R. § 2.309(f)(1)(ii), (v), (vi).¹⁸

In sum, Contention 1A does not migrate to the FSEIS, and the Intervenor's fail to challenge documents that are directly relevant to their arguments. The Board must therefore reject the contention.

Contention 1B (Consultation)

Contention 1B also does not migrate to the FSEIS. Since the Staff issued the DSEIS in November 2012, it has continued consulting with interested tribes and other parties on issues related to the NHPA. Appendix A to the FSEIS includes documentation that reflects the Staff's ongoing consultation efforts. The Staff's hearing file updates also show that the Staff has been consulting under the NHPA, with the more recent updates listing correspondence related to the Staff's development of the PA for the Dewey-Burdock Project. In brief, the Staff's consultation under the NHPA has progressed substantially since November 2012, and Contention 1B does not migrate to the FSEIS.

The Intervenor's also fail to show there is a genuine issue that warrants keeping Contention 1B in the hearing. The Intervenor's state correctly that under the NHPA "a federal agency must make a reasonable and good faith effort to identify historic properties."¹⁹ The Intervenor's do not, however, address the specific steps the Staff has taken to identify historic properties and explain why these steps are insufficient. For example, the Intervenor's fail to acknowledge the extensive NHPA-related correspondence in Appendix A of the FSEIS, as well as documents relating to the PA that the Staff has developed. While the Intervenor's state that certain tribes have been dissatisfied with the Staff's efforts, this alone does not raise a genuine

¹⁸ To the extent the Intervenor's are arguing that the Staff must evaluate *all* properties at the Dewey-Burdock site before reaching a licensing decision, the Intervenor's' argument is foreclosed by precedent stating that an agency may take a phased approach to identifying historic properties. *Hydro Resources*, CLI-99-22, 50 NRC at 12-13.

¹⁹ Tribe's FSEIS Contentions at 10, Consolidated Intervenor's' FSEIS Contentions at 16 (both citing *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999)).

issue over whether the Staff has made reasonable efforts to identify properties. To raise a genuine issue, the Intervenor must specifically address the evidence of the Staff's consultation efforts. 10 C.F.R. § 2.309(f)(1)(ii), (v), (vi); *Millstone*, CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472. They do not do so here.

The Intervenor also argue that the Staff violated the NHPA because the Staff issued the FSEIS before completing its NHPA-related consultation. The Intervenor fail to show that this approach is impermissible. As long as the Staff completes its NHPA review before taking the proposed action, the Staff will have complied with both NEPA and the NHPA. See *Hydro Resources*, CLI-99-22, 50 NRC at 14 ("Even if one assumes that the FEIS did not contain all the information considered by the Staff in its decision, the overall record for the licensing action includes a complete analysis of the cultural resources for Section 8."). The Staff has not yet acted on Powertech's application, and it will not do so until it finalizes the PA for the Dewey-Burdock Project.

Finally, the Intervenor argue that the Staff began its NHPA consultations too late. The Staff began its consultations over four years ago, however, and the Intervenor do not cite any standard under which the Staff could be found to have improperly delayed consultation. The Intervenor also argue that the Staff has failed to engage in government-to-government consultations with the tribes. Here too, they fail to cite any standard under which the Staff's consultation might be deemed inadequate. The Intervenor do not allege, for example, that the Staff consulted with tribal members who were not authorized to represent their tribal governments.

Because Contention 1B does not migrate to the FSEIS, and because the Intervenor fail to show that the Contention 1B should be amended, the Board should dismiss the contention.

Contention 2 (Baseline Groundwater Conditions)

The Intervenor challenge the FSEIS's analysis of baseline conditions in groundwater that may be affected by the Dewey-Burdock Project. The Intervenor rely on three declarations

from Dr. Moran, including his Second Supplemental Declaration dated March 17, 2014. The Intervenor also refer to a declaration from Dr. Richard Abitz that the Tribe submitted with its hearing request.

In the FSEIS, the Staff expands on the DSEIS's discussion of baseline groundwater conditions. For example, in Section 3.5.3.5 of the FSEIS the Staff specifically describes the methods Powertech used to obtain baseline data. The Staff compares these methods to methods described in relevant NRC guidance and concludes that Powertech collected its baseline data consistent with that guidance. In addition, in a number of comment responses the Staff addresses arguments the Intervenor previously raised concerning baseline conditions.²⁰

That said, the information underlying the Staff's analysis of baseline conditions is similar to the information in the DSEIS. This information includes baseline information Powertech obtained from sampling 19 wells at the Dewey-Burdock site on a quarterly basis from June 2007 to June 2008. This information also includes additional baseline data Powertech submitted in June 2011. The Board admitted the Intervenor's contentions challenging the adequacy of that information and the DSEIS's use of that information, and in their current contentions the Intervenor raise arguments similar to those set forth previously. The Staff therefore does not oppose Contention 2 migrating to the FSEIS.

The Staff would, however, note that the Intervenor continue to argue the Staff is improperly allowing Powertech to defer collecting data required under Criterion 5(B)(5) in Appendix A of 10 C.F.R. Part 40 until it obtains a license. But neither Criterion 5(B)(5) nor Criterion 7, which the Intervenor also cite, governs the Staff's preparation of the FSEIS. These are safety criteria the applicant must meet. In any event, Criterion 5(B)(5) does not prescribe baseline information an applicant must obtain, but preoperational monitoring data a licensee must obtain in specific wellfields. If the Board keeps Contention 2 in this hearing, it should

²⁰ *E.g.*, FSEIS Appendix E, Section E5.4.2 (Responses to Comments 127-000005 and 127-000008) and Section E5.21.4 (Response to Comments 042-000010, 127-000013, and 136-000021).

clarify that neither 10 C.F.R. Part 40 nor Appendix A provides a basis for an environmental contention relating to baseline groundwater conditions.

Contention 3 (Hydrogeological Confinement)

The Intervenor argues that the FSEIS does not sufficiently describe the hydrologic and geologic setting of the Dewey-Burdock area. They argue that more information is needed in order to assess how the Dewey-Burdock Project may affect surface water and groundwater. The Intervenor relies on Dr. Moran's two prior declarations in this hearing, as well as his Second Supplemental Declaration dated March 17, 2014.

These contentions do not migrate from the DSEIS because there is significant new information relevant to the Intervenor's concerns. In February 2012, Powertech submitted a 125-page report titled "Numerical Modeling of Hydrogeologic Conditions at the Dewey-Burdock Project, South Dakota."²¹ The report evaluates the hydraulic response of the Fall River and Chilson Aquifers to Powertech's proposed uranium extraction. The Staff incorporates Powertech's numerical modeling into numerous sections of the FSEIS. For example, the staff discusses the modeling results in Section 3.4.1.2, "Dewey-Burdock Geology"; Section 3.5.3.2, "Aquifer Systems in the Vicinity of the Proposed Dewey-Burdock Project"; and 4.5.3.1.1.2.2, "Operations Impacts to Production and Surrounding Aquifers." Because the FSEIS's analysis of hydrogeology is not *in para materia* with the DSEIS's analysis, Contention 3 does not migrate from the DSEIS to the FSEIS.

Because Contention 3 does not migrate to the FSEIS, the Board must consider whether the Intervenor's current pleadings support keeping Contention 3 in this hearing. They do not, most obviously because the Intervenor fails to specifically challenge numerous FSEIS sections and comment responses that are relevant to their claims. The Intervenor refers to paragraphs 51–56 in Dr. Moran's Second Supplemental Declaration, but Dr. Moran does not discuss the FSEIS in these paragraphs; he refers solely to the numerical modeling report Powertech

²¹ ADAMS Accession No. ML120620195 (February 27, 2012).

submitted in February 2012. Although in their pleadings the Intervenor's cite several FSEIS sections where they claim the Staff relied on the numerical modeling report, they do not specifically challenge the Staff's analysis in any of these sections. Nor, for that matter, do the Intervenor's explain which statements in Dr. Moran's Declarations relate to which FSEIS sections. The Intervenor's must do more to have their contention admitted. See *Millstone*, CLI-01-24, 54 NRC at 358 (explaining that in order for a contention to be admitted, an intervenor must read all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing view); *USEC*, CLI-06-10, 63 NRC at 472 (holding that an intervenor must address the specific analysis in the challenged document and explain how it is incorrect).

The Intervenor's also repeat their claim, first raised on the DSEIS, that the Staff is violating NEPA because it has proposed a license condition requiring that, before Powertech operates in a wellfield, it submit to the Staff a data package with additional information on hydraulic connectivity. As the Staff explained in its answer to the DSEIS contentions, the Staff's use of a license condition for these purposes is consistent with Commission precedent and NRC regulations. In this case, the license condition describes the process by which the Staff will acquire additional information on hydraulic connectivity.²² To the extent any of the information Powertech submits under this license condition departs from the analysis in the FSEIS, Powertech will have to seek a license amendment,²³ which will trigger additional NEPA review. In sum, the Staff's use of a license condition is consistent with Commission precedent and with NEPA generally. *Hydro Resources*, CLI-99-22, 50 NRC at 17.

²² License Condition 10.10. As explained in FSEIS Section 2.1.1.1.2.3.4, this condition requires a data package that includes the results of delineation drilling, data relevant to establishing background water quality, and pump test results. FSEIS Section 2.1.1.1.2.3.3 provides additional information on what will be required of Powertech under the license condition.

²³ License Condition 9.4.

The Intervenor further argue that they did not have an opportunity to comment on Powertech's numerical modeling report during the DSEIS comment period. That is incorrect. The Staff specifically mentioned this report in its March 1, 2012 status update to the Board and the parties, a full year before the Staff stopped accepting comments on the DSEIS.²⁴ The Staff again cited the report in its April 2, 2012 status update, this time providing the ADAMS accession number for the report.²⁵ Accordingly, the Intervenor had ample time to review and comment on this report.

In sum, Contention 3 does not migrate from the DSEIS to the FSEIS, and the Intervenor fail to meet the requirements applying to amended contentions. The Board should therefore dismiss Contention 3.

Contention 4 (Quantity of Groundwater Used)

The Intervenor argue that the FSEIS does not adequately assess the quantity of groundwater to be used during the Dewey-Burdock Project. The Intervenor also argue that the FSEIS presents conflicting information on groundwater consumption.

In the case of the Consolidated Intervenor, Contention 4 does not migrate to the FSEIS because the Board did not admit the Consolidated Intervenor's DSEIS contentions related to groundwater consumption.²⁶ For the Tribe, Contention 4 does not migrate to the FSEIS because the FSEIS contains substantial new information relevant to the Tribe's claims. The new information includes water balance information for the Dewey-Burdock Project. The Staff discusses this information at FSEIS Sections 2.1.1.1.3.3 through 2.1.1.1.4.2, and it summarizes this information in Table 2.1-14. The Staff also presents additional information on Powertech's state applications to draw water from the Inyan Kara and Madison Aquifers. For example, in

²⁴ ADAMS Accession No. ML12061A457 (March 1, 2012).

²⁵ The Staff's April 2, 2012 hearing file update can be found at ADAMS Accession No. ML12093A360.

²⁶ LBP-13-9, 78 NRC at 112.

FSEIS Section 4.5.2.1 the Staff presents revised estimates of groundwater withdrawals and related impacts. In addition, in Appendix E the Staff responds to numerous comments on water usage and addresses the claims raised in Contention 4.²⁷ The FSEIS's discussion of water usage therefore is not *in para materia* with the DSEIS's discussion, and Contention 4 does not migrate from one document to the other.

Because Contention 4 does not migrate to the FSEIS, the Board must consider whether the Intervenor's nonetheless present an admissible contention. They do not, because the Intervenor's fail to address almost any of the new information listed above. The only new information the Intervenor's challenge is the water balance information that the Staff discusses in FSEIS Section 2.1.1.1.3.3. The Intervenor's rely on the opinion of Dr. Moran, who argues that the water balance information is insufficient because it does not include "measured inputs and outputs related to all mine operations and all sources of water that might influence these operations."²⁸ Dr. Moran states that the water balance should include "detailed, measured data for volumes of water entering the system and [for] losses[.]"²⁹

Dr. Moran's arguments do not warrant admitting the Intervenor's' contention. The information Dr. Moran identifies is, in fact, impossible to obtain at the pre-license stage of an ISR project. The Staff cannot obtain "measured inputs and outputs related to all mine operations" because Powertech is prohibited from beginning operations until it obtains a license. Even if Powertech obtains a license, the nature of ISR operations generally is that operators do not know precisely which, and how many, wellfields they will develop during a project's lifecycle. See FSEIS Section 2.1.1.1.2.3 (describing development of wellfields).

²⁷ FSEIS, Appendix E, Section E5.21.1 (Concerns About Groundwater Consumptive Use), Section E5.21.3 (Drawdown), Section E5.21.8 (Aquifer Recharge).

²⁸ Second Suppl. Declaration at ¶ 31.

²⁹ Second Suppl. Declaration at ¶ 32.

In conclusion, Contention 4 does not migrate to the FSEIS, and the Intervenor do not provide support for an amended contention (for the Tribe) or a new contention (for the Consolidated Intervenor). The Board should therefore dismiss Contention 4.

Contention 6 (Mitigation Measures)

The Tribe argues that the FSEIS does not adequately discuss mitigation measures. As with its contention challenging the DSEIS, the Tribe argues that the Staff's "mitigation measure discussion consists of a multi-page chart which simply lists a series of proposed mitigation measure[s]."³⁰ The Tribe states that, to comply with NEPA, each mitigation measure must be described specifically and supported with data showing whether the measure will be effective.

Contention 6 does not migrate to the FSEIS because the FSEIS's discussion of mitigation measures is not essentially the same as that in the DSEIS. In the FSEIS the Staff further discusses many of the mitigation measures identified in the DSEIS. The Staff also identifies new measures that were not included in the DSEIS. For example, the staff provides additional information on mitigation measures in FSEIS Sections 4.4.1.1.2 (injection pressure at wellheads), 3.12.1.3 (radon monitoring), 4.6.1.1.1.1 (wildlife protection), 4.6.1.2.2 (wildlife protection), 4.6.1.2.2 (wastewater disposal and wildlife protection), 4.6.1.2.4 (revegetation during decommissioning), and 4.7.1.1.1 (air emissions). FSEIS Section 4.9, "Historic and Cultural Resources Impacts," also includes new information on mitigation measures.

Because Contention 6 does not migrate to the FSEIS, the Board must decide whether the Tribe provides adequate support for amending its contention. The Tribe does not, because it fails to specifically challenge any of the numerous mitigation measures described in Chapter 4 of the FSEIS. The Tribe implies that Chapter 6 contains the entirety of the Staff's discussion, when in fact Chapter 6 is only a *summary* of proposed measures. In Chapter 4 the Staff explains how these measures will reduce environmental impacts in various resource areas.

³⁰ FSEIS Contentions at 25.

Chapter 4 contains well over a hundred references to either “mitigation” or “mitigation measures,” as well as numerous references to “mitigate.” In order to show a genuine dispute with the FSEIS, the Tribe must address the specific sections of Chapter 4 that are relevant to its concerns. The Tribe must also explain specifically how the analysis in those sections falls short under NEPA. See *Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)*, 75 NRC 742, 766 (2012) (rejecting contention challenging certain mitigation measures described in the DEIS because the intervenors ignored other mitigation measures relevant to their concerns); *USEC, CLI-06-10*, 63 NRC at 472 (holding that even an expert opinion is insufficient if it merely asserts that the challenged document is wrong or inadequate). The Tribe does not meet either of these requirements.

The Tribe’s DSEIS contention also lacks a legal basis. The Tribe argues that “each mitigation measure must be detailed with specific description, supporting data, and analysis of process and effectiveness within the context of a NEPA Document.”³¹ The two Ninth Circuit cases the Tribe cites, however, do not support this statement. These cases involved NEPA documents that provided no more than “broad generalizations and vague references” concerning mitigation measures. In one case, the agency’s own expert admitted that the measures identified by the agency were not actually mitigation measures.³² These cases are inapposite here, where the Staff specifically, and at length, discusses the measures that can be used to mitigate certain impacts of the Dewey-Burdock Project. Furthermore, the Tribe’s arguments conflict with Commission precedent holding that an EIS need not contain “a complete mitigation plan” or even “a detailed explanation of specific [mitigation] measures which will be employed.” *Hydro Resources*, CLI-06-29, 64 NRC at 427 (stating that mitigation measures “need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements”); *South Texas*, LBP-11-07, 73 NRC at 265 (holding that a mitigation

³¹ FSEIS Contentions at 26.

³² *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998).

plan need not be fully developed or contain specific mitigation measures but need only show a fair evaluation of environmental consequences).

In sum, Contention 6 does not migrate to the FSEIS, and the Tribe does not provide sufficient support for amending its contention as a challenge to the FSEIS. The Board should dismiss the contention.

Contention 9 (Related Licensing Actions)

The Tribe argues that the Staff continues to improperly defer to other agencies' assessments of the environmental impacts of the Dewey-Burdock Project. In admitting this contention as a challenge to the DSEIS, the Board found the Tribe had raised an issue as to whether the Staff was improperly deferring to the EPA and to South Dakota state agencies by not fully analyzing the impacts of other licensing actions. These actions included the issuance of various permits Powertech needs to operate injection wells at the Dewey-Burdock Project and dispose of waste generated during operations.

The migration tenet does not apply here because the FSEIS's discussion of environmental impacts is not "essentially the same" as that in the DSEIS. The Staff has updated its analysis in Chapter 4 of the SEIS, the chapter where the Staff specifically discusses the impacts of the Dewey-Burdock Project. The updates are too numerous to list in their entirety, but they include revisions to Section 4.3.1.1.1, pages 4-14 and 4-15 (impacts from traffic during construction); Section 4.4.1.1.2, page 435 (operations controls related to wellhead injection pressure); Section 4.5.2.1.1.3, page 4-75 (aquifer restoration impacts); Table 4.5-2 (impacts from liquid waste disposal for each ISR project phase); Section 4.6.1.1.2, pages 4-100 through 4-102 (impacts from disposal via Class V injection wells); and Section 4.6.1.2.2, pages 4-108 through 4-111 (impacts from liquid waste disposal via land application). The Staff has also updated its assessments of impacts from air emissions, making numerous changes to Chapter 4 based on the air emissions data presented in Appendix C. Because in the FSEIS the

Staff presents revised analyses that are directly relevant to Contention 9, the migration tenet is not a basis for keeping this contention in the hearing.

Because the migration tenet does not apply, the Tribe must show that its contention meets the requirements in 10 C.F.R. § 2.309(c) and (f). The Tribe does not make the necessary showing. The Tribe first argues that “the FSEIS fails to conduct any NEPA analysis of [Powertech’s] proposal for [the Class III and Class V] injection wells.”³³ This argument ignores almost the entirety of the FSEIS, which the Staff prepared precisely because Powertech seeks to inject lixiviant into underground aquifers (thus requiring a Class III injection permit) and will need to dispose of resulting waste (with one method of disposal requiring a Class V injection permit). The Tribe must do more in order to have its contention admitted. In particular, the Tribe must specifically challenge those sections of the FSEIS it disputes and explain why the Staff’s analysis is inadequate. *Millstone*, CLI-01-24, 54 NRC at 358; *USEC*, CLI-06-10, 63 NRC at 472.

To support its contention, the Tribe also cites several FSEIS sections where it alleges the Staff defers its NEPA analysis and relies on future analyses that will be conducted by other agencies.³⁴ This, however, is a misreading of the FSEIS. In none of the cited sections does the Staff fail to assess the environmental impacts of the proposed action. The Staff cites the permitting processes of other agencies simply to explain how the Staff itself determined what the likely impacts would be in a particular resource area. For example, on page 4-69 of the FSEIS the Staff states:

EPA will evaluate the suitability of the proposed deep well injection wells and will only allow deep well injection if the waste fluids can be suitably isolated in a deep aquifer. Consequently, NRC staff determine that the potential environmental impact from the Class V injection well disposal option on targeted deep aquifers below the production zone aquifers will be SMALL.

³³ FSEIS Contentions at 26.

³⁴ FSEIS Contentions at 27–28.

This does not show that the Staff is deferring its assessment of impacts from Class V disposal until some future EPA action, as the Tribe alleges. Rather, it shows that the Staff assessed the impacts of Class V wells on its own, taking into account EPA regulations. The Tribe does not cite any authority suggesting it was impermissible for the Staff to consider EPA regulations, or regulations of other agencies, when assessing the impacts of the Dewey-Burdock Project. Because Contention 9 fails to raise a genuine issue about whether the Staff's analysis complies with NEPA, the Board must reject the contention. 10 C.F.R. § 2.309(f)(1)(vi).

The Tribe's final argument in Contention 9 is that the FSEIS erroneously relies on Powertech's intent to dispose of liquid chemical waste through a Class V underground injection permit.³⁵ The Tribe argues that Powertech will not be able to obtain a Class V permit. What the Tribe overlooks is that the Staff also analyzes the environmental impacts if Powertech's Class V permit application is denied. In other words, the Staff evaluates the environmental impacts of Powertech disposing of waste through a Class V permit, *and* it evaluates the impacts of Powertech disposing of waste through alternative methods.³⁶ The Tribe's argument thus does not support admitting Contention 9.

Because Contention 9 does not migrate to the FSEIS, and because the Tribe does not provide support for amending Contention 9, the Board should dismiss the contention.

Contentions 14 and FSEIS Contention 1 (Wildlife)

As admitted by the Board, Contention 14A claimed that, when the Staff issued the DSEIS, it had not yet consulted with the U.S. Fish and Wildlife Service (FWS) as required under the Endangered Species Act (ESA). Contention 14B claimed that the DSEIS did not adequately discuss impacts to certain species. The Tribe now argues that these contentions migrate from the DSEIS to the FSEIS. The Tribe also argues, in FSEIS Contention 1, that the Staff has failed

³⁵ FSEIS Contentions at 28–29.

³⁶ In each section of Chapter 4, the Staff discusses the impacts of Powertech disposing of waste through land application, rather than through Class V injection wells. FSEIS Sections 4.2.1.2, 4.3.1.2, 4.4.1.2, *etc.*

to consult with FWS in developing measures to mitigate impacts to species protected under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA).

Contention 14A (ESA Consultation)

Contention 14A does not migrate to the FSEIS, and the Tribe provides no new basis for keeping this contention in the hearing. In admitting this contention, the Board recognized that the NRC staff had communicated with FWS regarding endangered species.³⁷ The Board noted, however, that the DSEIS did not include documentation showing that FWS *concurred* on the Staff's finding of no adverse effects to federally threatened, endangered, or candidate species.³⁸ The Staff has since obtained FWS's concurrence in this area. In a September 2013 email to the Staff, a FWS biologist stated:

I can confirm that no formal or informal Section 7 consultation is required based upon your determination and we have no records of any federally listed species in the area of the project. Please be aware that this does not apply to migratory birds or bald and golden eagles protected under the Migratory Bird Treaty Act and/or the Bald and Golden Eagle Protection Act.³⁹

This email shows that the NRC Staff has completed the consultation required under Section 7 of the Endangered Species Act. Because this email is directly relevant to the Tribe's claim in Contention 14A, this contention does not migrate to the FSEIS. Because in its current pleading the Tribe does not otherwise challenge the Staff's consultation under the ESA, the Board should dismiss the contention.

³⁷ LBP-13-9, 78 NRC at 100.

³⁸ *Id.* at 100–101.

³⁹ FSEIS at A-157, E-mail from Terry Quesinberry, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, to Haimanot Yilma, Environmental Project Manager for Dewey-Burdock, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission. (ADAMS Accession No. ML13256A314) (September 9, 2013). See *also* FSEIS Section 1.7.1 (referring to FWS's concurrence regarding the Staff's finding of no adverse effects).

Contention 14B (Impacts to Greater Sage-Grouse, Whooping Crane, and Black-Footed Ferret)

Contention 14B also does not migrate to the FSEIS, and the Tribe likewise provides no basis for keeping this contention in the hearing. In admitting Contention 14B, the Board limited the contention to whether the DSEIS sufficiently considered impacts to the Greater sage-grouse, the whooping crane, and the black-footed ferret.

The FSEIS provides additional information on all three species. For example, in FSEIS Section 3.6.3 the Staff explains that Greater sage-grouse were not observed within 6.4 km [4 mi] of the proposed Dewey-Burdock boundary and that the nearest Greater sage-grouse lek is almost 8 km [5 mi] west of the boundary. The Staff also revised FSEIS Section 3.6.1.2.2 to correct the location of the nearest sage-grouse lek. In FSEIS Appendix E, the Staff describes the occurrence of whooping cranes in the Dewey-Burdock area, discusses impacts to whooping cranes, and explains that the avian monitoring and mitigation plan being developed in connection with Powertech's large-mine application will include mitigation measures to protect cranes.⁴⁰ In addition, in FSEIS Sections 4.6.3 and 4.6.1.1.1.4 the Staff explains that construction of the Dewey-Burdock Project will not directly affect current or future populations of black-footed ferrets.⁴¹

Given the new information in the FSEIS, Contention 14B does not migrate to this document.⁴² Furthermore, because the Tribe fails to challenge any of the data and analyses in the FSEIS, the Board must dismiss Contention 14B for failing to raise an issue in controversy. 10 C.F.R. § 2.309(f)(1)(v), (vi).

⁴⁰ Appendix E, Section E5.22.1.

⁴¹ Many other FSEIS sections address impacts to protected species. See, e.g., FSEIS Sections 1.7.1 (Greater sage-grouse, whooping crane, black-footed ferret); 1.7.3.7 (black-footed ferret); 3.6.1.2.3 (Greater sage-grouse, black-footed ferret); 3.8 (black-footed ferret); 4.6.1.1.1.2 (Greater sage-grouse); 4.6.1.2.1 (black-footed ferret); 5.6.1 (Greater sage-grouse); and 5.6.3 (whooping crane).

⁴² In addition to the FSEIS sections cited above, in Appendix E of the FSEIS the Staff responds to public comments on threatened and endangered species. See Appendix E, Section E5.22.1 through Section E5.22.4.

FSEIS Contention 1 (MBTA and BGEPA Consultation)

In FSEIS Contention 1, the Tribe argues that the FSEIS inadequately describes how various mitigation measures will protect migratory birds and eagles. The Tribe argues that the FSEIS's description of mitigation measures is inadequate because the Staff failed to consult with FWS regarding these measures. This argument would have been more appropriately made under Contention 6, which specifically addresses mitigation measures. In any event, the Tribe does not provide a basis for admitting either Contention 6 or FSEIS Contention 1.

The Tribe's basis for FSEIS Contention 1 appears to be its claim that "the NRC did not conduct the required consultation under the MBTA and Eagle Protection Act."⁴³ The Board previously rejected this argument as a basis for the Tribe's Contention 14:

Insofar as the Oglala Sioux Tribe is making additional claims related to the MBTA, the Board finds that it has not provided a sufficient explanation of its concern nor has it provided a concise statement of the alleged facts supporting its position, as required by 10 C.F.R. § 2.309(f)(1)(ii) and (v).⁴⁴

Although the Tribe again claims that the MBTA and BGEPA require the NRC to consult with FWS, the Tribe cites only to the statutes themselves, which contain no such requirement. Even if the Board were to look to the regulations that implement these statutes, it would not find such a requirement.⁴⁵ The Tribe's contention thus lacks a legal basis.

The Tribe also cites the email from FWS to the NRC quoted in the Staff's response to Contention 14A as support for its arguments. The Tribe focuses on the second sentence in the email, suggesting that FWS's qualification—"this does not apply"—refers to pending consultation requirements under the MBTA and BGEPA. When the email is read in its entirety, however, it should be reasonably clear that FWS is not referring to additional consultation requirements. In the first sentence, the FWS refers to consultation under *Section 7 of the ESA*.

⁴³ FSEIS Contentions at 30.

⁴⁴ LBP-13-9, 78 NRC at 101.

⁴⁵ 50 C.F.R. Part 21 (MBTA), 50 C.F.R. Part 22 (BGEPA).

If consultation were required under the MBTA or BGEPA, it would not be under Section 7 of the ESA, but under the relevant section of the MBTA or BGEPA. The Staff's response to the email shows that the Staff understood FWS to be stating only that there are separate requirements under the MBTA and BGEPA, and FWS did not send any follow-up email disputing that interpretation.⁴⁶ In any event, given that neither these statutes nor their implementing regulations contain specific consultation requirements, it is implausible that FWS was referring to such requirements.

Finally, the Tribe claims that the FSEIS omits analysis and mitigation measures for species protected by the MBTA and the BGEPA. This is incorrect. In the FSEIS, the Staff analyzes impacts to protected species and discusses relevant mitigation measures at length. The Staff explains that Powertech is developing an avian monitoring and mitigation plan in cooperation with BLM, the South Dakota Department of Environment and Natural Resources (SDSENDR), and the South Dakota Department of Game, Fish, and Parks.⁴⁷ If SDDENR issues Powertech a large-mine permit, this plan will be incorporated into the permit.⁴⁸ Although the mitigation plan has not yet been finalized, this does not prevent the Staff from assessing impacts to protected species, which is all NEPA requires. See *LES*, CLI-05-20, 62 NRC at 536 (“NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.”) (emphasis in original). The Staff did not have to postpone releasing the FSEIS until SDDENR issues a large-mine permit to Powertech, as the Tribe implies.

In conclusion, the Tribe does not provide sufficient support for admitting FSEIS Contention 1.

⁴⁶ Another interpretation is that FWS's statement in the second sentence—“this does not apply”—refers to FWS's statement in the first sentence that “we have no records of any federally listed species.” In other words, FWS did not wish to be misconstrued as stating that it had no records of species protected under the MBTA or BGEPA being present at the Dewey-Burdock site.

⁴⁷ FSEIS Section 7.4.2 at 7.16–7.17, Section E5.22 at A-153–A-157.

⁴⁸ FSEIS Section 6-9, Appendix A at A-153–A-157.

FSEIS Contention 2 (Disposal of Byproduct Material)

In FSEIS Contention 2 the Tribe argues that the FSEIS violates NEPA because it does not include a reviewable plan for disposal of byproduct material resulting from ISR operations. This contention mirrors the Tribe's prior Contention 7, which the Tribe originally submitted as a challenge to Powertech's Environmental Report, and which it resubmitted as a challenge to the DSEIS. The Board rejected both contentions.

Because the Board rejected the contention originally, the migration tenet does not apply, and the Tribe must meet NRC requirements applying to new contentions. Among these requirements, the contention must be based on information materially different than the information previously available. 10 C.F.R. § 2.309(c)(2)(ii).

Here, the Tribe does not identify any information that differs materially from the information available when the Staff issued the DSEIS. According to the Tribe, the new information is the FSEIS's statement that Powertech assumes it will obtain an agreement to use the White Mesa site in Utah for disposal of solid byproduct material.⁴⁹ The DSEIS listed White Mesa as a possible disposal site, however, and in DSEIS Contention 7 the Tribe assumed that White Mesa would be used for disposal.⁵⁰ In sum, the change in White Mesa's designation from a possible disposal site to the site Powertech assumes it will use is not materially different information. Thus, it does not support admitting the Tribe's current contention. 10 C.F.R. § 2.309(c)(2)(ii).

Equally important is that, when the Board rejected the Tribe's DSEIS contention on this same issue, the Board did not do so because of uncertainty over whether Powertech would use the White Mesa site to dispose of solid byproduct material. Rather, the Board found that the Tribe failed to challenge numerous sections in both the DSEIS and the GEIS that were relevant

⁴⁹ FSEIS Contentions at 33.

⁵⁰ On page 28 of its DSEIS contentions, the Tribe cited Utah law to support its arguments.

to its concerns.⁵¹ Because the Tribe failed to challenge those sections previously, the NRC's rules do not permit the Tribe to have its contention admitted now. 10 C.F.R. § 2.309(c)(2)(ii).

In any event, the Tribe again fails to challenge relevant sections of the Staff's analysis. Although the Tribe makes one general reference to the GEIS,⁵² it does not challenge specific sections addressing waste disposal.⁵³ The Tribe also fails to challenge comment responses where the Staff provides information relevant to the Tribe's contention.⁵⁴

Because the Tribe fails to meet the requirements for a new contention, the Board must reject FSEIS Contention 2.

FSEIS Contention 3 (Air Emissions)

The Tribe argues that the FSEIS does not adequately consider impacts from air emissions.⁵⁵ The Tribe refers to information from an air quality application Powertech submitted to SDDENR in November 2012. The Staff used data from the application to update several sections of the SEIS. Appendix C of the FSEIS summarizes the new data, and Table C-18 compares the relevant impact assessments in the FSEIS to those in the DSEIS.

The Tribe fails to explain why its contention should be admitted. The Tribe challenges neither the new air emissions information nor the Staff's analysis of that information.⁵⁶ Instead, the Tribe argues that because some of the air emissions information did not appear in the

⁵¹ LBP-13-9, 78 NRC at 71-72.

⁵² Contentions at 38.

⁵³ *E.g.*, GEIS Sections 4.2.12, 4.3.12.2, 4.4.12.4.

⁵⁴ Appendix E, Section E5.29.2.

⁵⁵ Although the Tribe refers to liquid waste disposal at the beginning of its contention, the remainder of the contention focuses solely on air emissions.

⁵⁶ The Staff discusses air emissions in numerous FSEIS sections, including Sections 3.7.2, 4.7.1, and Appendix C. Also, Section E5.23.1 in Appendix C of the FSEIS contains the majority of the comments and responses related to air emissions. The Tribe does not challenge the information or analysis in any of these sections.

DSEIS, the Staff must prepare a supplemental DSEIS and circulate the supplement for public comment.

The Staff does not need to recirculate its NEPA document for public comment every time it obtains new information having some bearing on the proposed action. 10 C.F.R. § 51.72(a), § 51.92(a). The Staff must circulate a supplement to an FSEIS "only [in response to] those changes that cause effects which are significantly different from those already studied." *Hydro Resources*, CLI-01-4, 53 NRC at 52. The changes must present a "seriously different picture of the environmental impact of the proposed project" and affect "the quality of the human environment in a significant manner or to a significant extent not already considered." *Hydro Resources*, CLI-99-22, 50 NRC at 14. The Tribe does not claim that the air emissions data in Appendix C meet these standards, nor does it even address these standards. Accordingly, there is no basis for admitting the Tribe's contention.

In fact, the new air emissions data do not point to any impacts materially different from those identified in the DSEIS. In the DSEIS the Staff anticipated that Powertech would update its air emissions data.⁵⁷ Thus, the Staff used a bounding analysis in the DSEIS to assess impacts from air emissions. The emissions data presented in the FSEIS fall within the Staff's bounding analysis. As the Staff explains in its comment response on page E-165 of the FSEIS:

The updated information considered when developing the final SEIS does not significantly change the staff's analysis of air impacts as presented in the draft SEIS. To the contrary, as described in final SEIS Table C-19,^[58] the draft analysis bounds the final NRC analysis. Peak year, construction phase, and cumulative impact magnitudes in the draft and final SEISs were the same (i.e., SMALL to MODERATE). For the operations, aquifer restoration, and decommissioning phases, the draft SEIS impact magnitude of SMALL to MODERATE was reduced to SMALL in the final SEIS.

⁵⁷ See DSEIS Section 4.7.1 at 4-110 through 4-113 (explaining that modeling and associated impact analyses would likely be updated in the FSEIS); DSEIS Appendix C at C-1, C-5, C-6 (referring to updated modeling results).

⁵⁸ The citation should be to Table C-18, as there is no Table C-19.

In other words, rather than presenting a “seriously different picture of the environmental impact of the proposed project,” the updated air emissions data confirmed the Staff’s assessment of the Dewey-Burdock Project’s impact. In sum, the Tribe fails to show the air emissions data is grounds for admitting its contention.

Conclusion

Except for Contention 2 (Baseline Groundwater Conditions), the Board should dismiss the Intervenor’s previously admitted contentions and reject the Tribe’s new contentions.

Respectfully submitted,

/Signed (electronically) by/
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/Signed (electronically) by/
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Dated at Rockville, Maryland
this 4th day of April 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02- MLA-BD01
)	
(Dewey-Burdock In Situ Uranium Recovery)	Date: April 4, 2014
Facility))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that copies of the "NRC STAFF'S RESPONSE TO FSEIS CONTENTIONS" have been served via the NRC's Electronic Information Exchange (EIE) or, for those participants exempted from filing through the EIE, by electronic mail, on this 4th day of April, 2014.

***/Signed (electronically) by/
Patricia A. Jehle***

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