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
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

REPLY TO NRC STAFF AND APPLICANT RESPONSES TO THE PETITION TO INTERVENE AND REQUEST FOR HEARING OF THE OGLALA SIOUX TRIBE

Introduction

The Oglala Sioux Tribe (Tribe) hereby submits this Reply to the Responses of NRC Staff and Applicant Powertech (USA) Inc. (Powertech) in opposition to the Tribe's request for intervention in this matter.

In its Response, NRC Staff concedes standing for the Tribe based on an interest in protecting the significant cultural resources present at the site and threatened by the operation, but contends the Tribe lacks standing on any other basis. Despite its concession of standing for the Tribe, NRC Staff goes on to argue for the dismissal or deferral of each of the ten contentions set forth by the Tribe. Powertech argues that the Tribe lacks any meaningful interest in this case, even in the protection of its own cultural and historic resources at the site. Powertech also contends that the Tribe's Petition fails to state an admissible contention. As discussed in the Petition and herein, the Tribe has established standing in this case and each of the Tribe's contentions are properly stated and should be admitted.

The present Reply demonstrates that the joint effort of NRC Staff and Powertech fails to refute the Tribe's demonstration of standing. In its Petition for Intervention and Request for

Hearing (Petition), the Tribe provided detailed declarations from senior Tribal government officials demonstrating the significant legally protectable interests held by the Tribe in the lands, waters, and other resources, including significant cultural and historic resources, potentially threatened by this proposed project. Neither NRC Staff nor Powertech takes issue with the admissibility or veracity of these declarations. Instead, NRC Staff and Powertech ignore the pleading standards and argue that the Tribe should have provided information tantamount to that sufficient to support a ruling on the substantive merits.

Instead of engaging the facts and authority provided in the Petition, Powertech's Response mischaracterizes and misinterprets the Tribe's argument. Similarly, the NRC Staff's tactic of making a narrow concession of standing based solely on an interest associated with as-of-yet unidentified cultural resources, while mounting an attack on all other interests of the Tribe, is contrary to legal precedent.

The Tribe's Petition sets forth the necessary standing allegations and forwards well-pled contentions. In its Petition, the Tribe raised ten contentions, each set forth with specificity in accord with NRC regulations at 10 C.F.R. § 2.309(f)(1). To establish standing, the Tribe has pled concrete and cognizable interests, including substantial concerns about the impacts of the proposed in-situ leach uranium mining operation on the public health and environment. Each contention references the information (and omissions) in the existing application materials. In support of standing and several of the contentions, and in an abundance of caution, the Tribe also provided a detailed declaration from a highly trained professional hydrogeologist, Dr. Robert E. Moran, describing in detail the technical and scientific omissions and inadequacies of the currently proposed application. Notably, Dr. Moran's credentials and expertise go unchallenged by either NRC Staff or Powertech.

Throughout their objections to the Tribe's contentions, both NRC Staff and Powertech continually argue the merits of the proffered contentions, rather than keeping a proper focus on whether the contentions are admissible. Indeed, NRC Staff and Powertech engage in an extraordinary effort to flyspeck the Tribe's contentions, going far beyond simply reviewing for adequacy.

This Reply supports the Tribe's well-pled standing allegations and all ten contentions based on the regulatory standards and the standards that apply to the pleadings stage. Based on the detail set forth in the Petition, and as further described herein, the Board must find that the Oglala Sioux Tribe has sufficiently pled facts necessary to support standing in this proceeding and that each of the Tribe's proffered contentions is admissible based on the requirements of 10 C.F.R. § 2.309(f)(1).

Argument

At the outset, the Oglala Sioux Tribe is compelled to express disappointment in what appears to be an aggressively hostile stance taken in this proceeding by the NRC Staff to any participation whatever by the Tribe. One might expect the project proponent to fight all participation by the public or even by a sovereign Tribal government in a license proceeding. The same, however, should not be expected of federal agency employees.

Yet here, despite the fundamental and well-supported issues identified and raised in the Petition with respect to the failure of the application to meet regulatory requirements aimed at protecting public health and the environment, NRC Staff systematically attack each and every contention, often with substantive arguments not appropriate to the pleading stage of this adjudication. The Tribe's disappointment in the NRC Staff's over-zealous attempts to exclude the Tribe entirely from this proceeding is especially acute given the NRC's published policies

recognizing the special government-to-government relationship between the federal government and Tribal governments, and stating an intention to promote and encourage meaningful tribal government involvement in NRC licensing proceedings as full parties with the ability to raise issues determined by the Tribe. See *U.S. Nuclear Regulatory Commission Strategy for Outreach and Communication with Indian Tribes Potentially Affected by Uranium Recovery Sites*, U.S. Nuclear Regulatory Commission (2009). The Tribe's involvement is especially important in this case, given the significant concrete interests articulated by the Tribe and the substantial questions as to whether Powertech's application materials demonstrate compliance with controlling law and regulations.

Standing

NRC Staff concedes standing for the Tribe based on injury to the Tribe's concrete interests in protecting its cultural resources at the mine site. NRC Staff at 11. However, NRC Staff makes a muted opposition to the Tribe's assertions of standing based on the Tribe's procedural interests under the National Historic Preservation Act and National Environmental Policy Act. NRC Staff at 11-12. NRC Staff also challenges the Tribe's allegations of standing based on economic and other impacts associated with potential water quality impacts to lands in the area owned by the Tribe and leased for domestic and agricultural purposes. *Id*. However, NRC Staff does not challenge the specific allegations of fact made by the Tribe in declarations. Further, NRC Staff overstate and misapply the standard applicable to standing at the pleading stage of a federal proceeding.

Powertech launches an attack on every basis on which the Tribe pleads standing. However, Powertech provides little legal authority to support its attack and does not seriously dispute the legal authorities in the Petition. Instead, the company simply parses the declarations,

repeatedly alleging that the Tribe's declarations of harm are not sufficiently particularized. Powertech at 28-37. In making these arguments, Powertech ignores the detailed statements in the Tribe's declarations, misapplies the relevant legal standard applicable at this stage in the proceeding, and repeatedly confuses arguments relevant to standing with those on the merits of the case.

Powertech does recognizes that standing requires only a "specific and plausible" explanation of potential harms. Powertech at 28. However, Powertech wrongly asserts that the Tribe must also demonstrate that "the proposed Dewey-Burdock ISR project as reflected in its license application (including its technical and environmental reports and supplement) will **necessarily adversely affect** historic and cultural resources in areas where disturbance is planned…." Powertech at 29 (emphasis added). Powertech provides no authority to support its novel argument that the Tribe's standing allegations must demonstrate that the project will "necessarily adversely affect" its interests. Similarly, NRC Staff torture logic to argue the Tribe must prove that Powertech's activities will threaten specific artifacts at the site. NRC Staff at 10. Lastly, both NRC Staff and Powertech contend that the Tribe cannot establish standing at the pleading stage based on potential impacts to surface and ground water quality because it cannot prove the direction of flow of ground water in the area. NRC Staff at 12 (citing NRC Staff's Response to Hearing Request of Consolidated Petitioners at 12-13); Powertech at 35-37.

Prior Boards have encountered, and specifically rejected these precise tactics by license applicants and NRC Staff in contesting standing:

> We note, first, that many of [the applicant's] arguments address various alleged facts as if they were already proven. However, factual arguments over such matters as the geological makeup of the area, the direction of flow, and the time required for water to flow a certain distance, go to the merits of the case. We also note that a licensing board's review of a petition for standing is to "avoid 'the familiar trap of confusing the standing

> determination with the assessment of a petitioner's case on the merits.'" We recognize that the distances from Crow Butte's mining site to many of the petitioners' residences are considerable; however, neither Crow Butte nor the NRC Staff advances arguments refuting the plausibility that potential groundwater contamination from the Crow Butte mining site may travel through pathways of faults and joints and affect private wells at greater distances from the Crow Butte mining site, including petitioners at the Pine Ridge Indian Reservation. Petitioners are not required to demonstrate their asserted injury with "certainty," nor to "provide extensive technical studies" in support of their standing argument. These determinations are reserved for adjudicating the ultimate merits of a contention. We decline to burden the petitioners, at this preliminary stage, with the need to conduct extensive technical studies that may be required to meet their burden at a hearing. A determination that "the injury is fairly traceable to the [challenged] action … [does] not depend[] on whether the cause of the injury flows directly from the challenged action, but *whether the chain of causation is plausible.*"

In the Matter of Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), 68 N.R.C. 691, 707-708 (2009)(citations omitted).

Here, contrary to NRC Staff's argument that the Tribe fails to allege a potential impact to these interests (NRC Staff at 10), the Declaration of Wilmer Mesteth does just that. For instance, at ¶ 13, Mr. Mesteth quotes the applicant's own admission in its application that "the Project may have an affect on archaeological or historic sites that contain or are likely to contain information significant to the state or local history or prehistory." Based on Mr. Mesteth's declaration, the Tribe has sufficiently alleged standing based on impacts to the Tribe's interests in protecting cultural resources at the proposed mine site.

With respect to the Tribe's allegations of procedural injury, NRC Staff and Powertech fail to acknowledge that the Commission has previously recognized standing for the Oglala Sioux Tribe based on an interest in the protection of cultural resources and on the Tribe's procedural interest under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA):

> Crow Butte and the Staff argue that the Board erred in basing standing on the Tribe's injury stemming from the Staff's asserted failure to consult in compliance with the NHPA. They argue that the Staff's duty to "consult" under the NHPA in this proceeding has not yet ripened (that is, the Staff has not reached the consultation stage yet), and the "injury" does not arise from a deficiency in the application. These arguments misinterpret the Board's ruling. The Board found that the Tribe has a current, concrete interest in protecting the artifacts on the site, not simply a procedural interest. The past failure of the Staff to consult illuminates the difficulties faced in protecting that interest. In addition, the Board pointed to federal case law holding that, where a party's procedural right has been violated, that party has standing to contest the procedural violation even where the underlying interest the procedural right seeks to protect does not face an "immediate" threat. We decline to disturb the Board's ruling on this point.

In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford Nebraska), CLI-09-09, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 (N.R.C.) (May 18, 2009) at 3-4.

Overall, Powertech, and to a lesser extent NRC Staff, misstate the proper test for establishing standing in this case, and in doing so attempt to improperly increase the burden on parties seeking intervention. Previous proceedings have held that Petitioners need not provide comprehensive scientific proof of the impacts from a proposed project. Rather, a much less burdensome showing is required:

> A petitioner must have a "real stake" in the outcome of the proceeding to establish injury-in-fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP–79–10, 9 NRC 439, 447–48, *aff'd*, ALAB–549, 9 NRC 644 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct," or "genuine." *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requester must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP–82–74, 16 NRC 981, 983 (1982), *citing Allied–General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB–328, 3 NRC 420, 422 (1976); *id.*, LBP–82–26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP–91–38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI–92–11, 36 NRC 47 (1992).

In the Matter of Hydro Resources, Inc., 47 N.R.C. 261, 270 (1998) *compare Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)(At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim.")

In the present case, as conceded by NRC Staff (but not Powertech), the Tribe goes well beyond alleging a mere "abstract, hypothetical injury" and has shown, through allegations and declarations, that the Tribe has a "real stake" in the proceeding. No contrary declarations or other admissible evidence were provided by NRC Staff or Powertech, only argument of counsel. By contrast, the uncontested Declaration of the Oglala Sioux Tribe's Tribal Historic Preservation Officer recounts the strong interests the Tribe has in the cultural resources at the proposed mine site and the potential for harms arising from the proposed mining operation. Declaration of Wilmer Mesteth.

Powertech and NRC Staff arguments also contravene established federal case law on standing. As acknowledged by NRC Staff, the Commission has long applied contemporaneous judicial concepts of standing to determine if a party has a sufficient interest to intervene as a matter of right. NRC Staff at 8 (citing *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC ___ (Oct. 13, 2009)(slip op. at 2). As established by the U.S. Supreme Court, the burden of a Petitioner at this early stage in the proceeding is relaxed and specific facts are presumably contained in the general allegations. *Lujan*, 497 U.S. 871, 889 (1990).

Similarly, NRC Staff also contravenes established federal law regarding standing based on procedural injury. NRC Staff at 11. Powertech wholly ignores the Tribe's allegations of

standing based on procedural interests. The federal courts routinely afford procedural rights such as those held by the Tribe under the NHPA and NEPA with special consideration in an analysis of standing:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement ["EIS"], even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 n.7; discussed and applied in *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) and *State of Utah v. Babbitt*, 137 F.3d 1193, 1216 (10th Cir. 1998). The Supreme Court recently affirmed that standing is established based on a showing of possible relief for a procedural harm, particularly where territorial interests of a government are involved:

> When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

Massachusetts v. EPA, 549 U.S. 497, 518 (U.S. 2007)(holding standing established by Massachusetts based on procedural allegations and its "stake in protecting its quasi-sovereign interests" *Id*. at 536).

Similarly, contrary to the arguments put forth by NRC Staff and Powertech, the Tribe is not required to prove each evidentiary fact pled at this early stage in the proceeding. All that is required is a credible assertion of a concrete interest that may be impacted from the proposed project. *Bennett v. Spear*, 520 U.S. 154, 158 (1997)(examining standing and explaining that pleadings and declarations are sufficient to meet jurisdictional burdens during the pleading stage)

The Board should decline the invitation by NRC Staff and Powertech to elevate the test for standing into a full-blown evidentiary determination.

In this case, the Tribe has alleged a significant interest in the protection of both the cultural resources at the site and the surface and ground water quality on and off site, including on lands leased by the Tribe in the vicinity of the project area. *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000)(holding that an individual can establish injury in fact by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable if the area in question remains or becomes environmentally degraded) a*ccord Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (U.S. 2009)("[w]hile generalized harm to the forest or the environment will not alone support standing, **if that harm in fact affects the recreational or even the mere esthetic (sic) interests of the plaintiff, that will suffice**." (*citing Sierra Club v. Morton*, 405 U.S. 727, 734-736, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972))(emphasis supplied)("interest alleged to have been injured 'may reflect 'aesthetic, conservational, and recreational' as well as economic values.'")(*quoting Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (U.S. 1970)). A similar basis for standing is the allegation that the Tribe suffers "informational" injury due to the failure of the NRC Staff to prepare a NEPA analysis at the earliest stages of these proceedings. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Heartwood v. U.S. Forest Service*, 230 F.3d 947, 952 n. 5 (7th Cir. 2000) (informational injury from failure to comply with NEPA constitutes "injury in fact.")

NRC Staff ignore Circuit Court rulings directly contrary to the NRC Staff arguments. In *Rockford League of Women Voters v. U.S. Nuclear Regulatory Commission*, 679 F.2d 1218 (7th Cir. 1982), the court found that plaintiffs had standing to challenge the NRC's failure to revoke a

construction permit to build a nuclear reactor even though plaintiffs faced no immediate physical harm because the reactor could not operate until it received an operating license from the NRC itself. The plaintiffs alleged "that if the safety problems . . . are not solved before construction is completed they will never be solved – the Commission will be stampeded into granting a license regardless." 679 F.2d at 1221-22. The Seventh Circuit found "[t]his allegation . . . sufficient to confer standing . . .." *Id*. at 1222. In *Rockford*, it was the NRC itself that issued the initial construction permit and it was the NRC that retained authority to deny the subsequent operating license if plaintiffs' safety concerns were not addressed. Yet, the Court still found plaintiffs to have standing because of a "threat" of injury.

NRC Staff contest the Tribe's assertion of standing based on its procedural rights under the NHPA by attempting to distinguish the Commission's decision in Crow Butte. NRC Staff argues that here, unlike at Crow Butte, there has been "no history" of staff failing to consult with the Tribe regarding Dewey-Burdock. NRC Staff at 11. However, even under the NRC Staff's unreasonably narrow view, the NRC's failure to consult with the Oglala Sioux Tribe on another ISL uranium project in the region is relevant to the potential harm to the Tribe's interest with respect to the operation currently under review. This is particularly true given that both cases involve the same Tribe's demonstrated substantive interest in protecting cultural resources from direct and cumulative impacts of proposed ISL mining and the Tribe's procedural and informational interest in proper environmental and cultural resource review with respect to the project.

As set forth in the Petition, the NHPA requires involvement by the Tribe at the earliest possible time. Petition at 16. Yet, NRC Staff admits here that it has no intent to discharge any of its obligations under the NHPA until some undetermined date when it moves forward with

discharging its procedural duties under NEPA. The consultation with South Dakota without also consulting with the Tribe reiterates that the NHPA violations are currently ongoing and are consistent with the history of NRC Staff ignoring the sovereign and statutory rights of the Tribe. Even under the NRC Staff's unduly narrow statement of the standing standard, the Tribe has identified a concrete injury to its legally protected procedural rights under the NHPA to a process designed to identify and protect its cultural and historic resources at the site.

The argument advanced by Powertech asserting lack of standing ignores the Tribe's legitimate role as a party entitled to prosecute its own contentions in these proceedings, as recognized by the NRC's published strategy for outreach and communication with affected tribes in the specific context of ISL uranium mining. The official NRC position is to "promote government-to-government relations between itself and Federally-recognized Indian tribes that have a known interest in, or may be potentially affected by, NRC's regulation of uranium recovery facilities." *U.S. Nuclear Regulatory Commission Strategy for Outreach and Communication with Indian Tribes Potentially Affected by Uranium Recovery Sites* (2009)(ML092110101) Similarly, although not reflected in the current proceedings, in a report to the Commission, the NRC Staff reports that its relationship and communication with tribes is strong, emphasizing the actions NRC Staff currently takes to involve tribes in the NRC licensing proceedings:

> In an effort to **encourage tribal input and participation**, staff engages with tribes to provide information related to the Commission's mission and regulatory authority, **highlighting opportunities for tribal involvement and consultation during the regulatory process**. NRC staff also maintains regular channels of communication with relevant tribes and tribal organizations and provides interested tribes with general information upon request. Native American tribal officials often initiate interactions with staff based on tribal interest in particular NRC-regulated activities. **Tribal concerns often reflect issues associated with NRC licensing new or existing facilities located on or near reservation lands, or in the vicinity of places of historical or cultural**

> **tribal importance located off reservation lands.** Tribes' concerns also include NRC-regulated activities for which the tribe has developed a policy statement or position.

U.S. Nuclear Regulatory Commission Interaction With Native American Tribes, Policy Paper Information SECY-09-0180 (December 11, 2009). This document specifically recognizes the importance of tribal interests in cultural resource protection.

Lastly, both NRC Staff and Powertech challenge the Tribe's allegations of standing based on impacts to lands it leases in the vicinity of the project site for domestic and agricultural purposes. NRC Staff at 12; Powertech at 30. NRC Staff asserts that the Tribe fails to identify any lands owned by the Tribe. However, the Tribe did so in its Petition, at 10, where it specifies lands that it leases to Mr. Dayton Hyde. Should Mr. Hyde's property, water resources, or ability to economic viability become impacted, the Tribe's lands, and the ability of the Tribe to lease these lands, would be similarly negatively impacted. See Declaration of Denise Mesteth at ¶¶ 3-4.

NRC Staff also contends that the Tribe has failed to allege a "plausible pathway by which operations at the Dewey-Burdock might harm [Mr. Hyde's] interests." NRC Staff at 12. However, the Affidavit of Dayton Hyde specifically alleges that his ranch obtains water from the Cheyenne River and from five wells in the Inyan Kara aquifer. Affidavit of Dayton Hyde at ¶¶ 8-10. Mr. Hyde further alleges that his ranch on the Cheyenne River is downstream from the proposed mine site, which has Cheyenne River-connected surface streams that flow through the mine site and that his water could be impacted by any surface water impacting spills or leaks of mine waster or other contaminants containing toxic materials. *Id*. at ¶ 9. These allegations provide the very "plausible pathway" which NRC Staff assert is lacking.

Further, the fact that Mr. Hyde relies on wells drilled in the same aquifer planned for mining evidence another "plausible pathway" for impacts to his ranch. Thus, it appears that the NRC Staff contends not that a "plausible pathway" be identified, but that proof be made of impact. However, as cited above, "factual arguments over such matters as the geological makeup of the area, the direction of flow, and the time required for water to flow a certain distance, go to the merits of the case." *In the Matter of Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, 68 N.R.C. 691, 707 (2009). As in *Crow Butte*, neither NRC Staff nor the applicant has contravened Mr. Hyde's or Ms. Mesteth's allegations of harm, and thus standing has been sufficiently alleged.

In summary, the Tribe's Petition and supporting declarations and affidavits contain allegations that establish standing on all theories, including the Tribe's substantive interest in protecting its cultural resources both known and unknown at the site, its procedural interests in compliance with the National Historic Preservation Act, and its interests in protecting the economic and conservational viability of the lands it leases in the area of the proposed mining operation. The Board should rule in favor of the Tribe on standing on all grounds.

Contentions

Throughout their objections to the Tribe's contentions, NRC Staff and Powertech continually confuse the issues by arguing the merits of the contentions, rather than whether they have been properly stated and supported. For example, both NRC Staff and Powertech argue against the admissibility of several of the Tribe's contentions by citing material in the application they believe would support issuance of a permit on the topics challenged by the Tribe. See NRC Staff at 18, 22, 26-29, 33, 34; Powertech at 41, 43, 46, 52, 58. These arguments short circuit these proceedings by going straight to the merits and ignoring whether the Tribe's contention is

properly supported in the first instance. Similarly, Powertech attempts to defeat the Tribe's contentions that the application contains inadequate information in material respects by presenting repeated legal argument (albeit without any citations) as to what it believes is the proper level of scientific detail an application must provide. See Powertech at 38-39 (arguing that 10 C.F.R. §§ 51.45 and 51.60 require applicants to provide only very basic information, or provide for no "adequacy" requirement at all); 40 (arguing that 10 C.F.R. § 51.45 requires only "generalized" baseline information to support an application); 42 (same); 58 (same). If accepted, Powertech's argument would create an absurd process where an application need only provide "generalized" information to commence a licensing proceeding, but a contention must provide ultimate proof to be admitted in the proceeding.

"In passing on the admissibility of a contention, however, 'it is not the function of a licensing board to reach the merits of [the] contention.'" *Sierra Club v. United States Nuclear Regulatory Com.*, 862 F.2d 222, 226 (9th Cir. 1988) *quoting* In *re Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant)*, 23 N.R.C. 525, 541 (App. Bd. 1986) *accord* 69 Fed. Reg 2182, 2190 (January 14, 2004)("The contention standard does not contemplate a determination of the merits of a proffered contention."). Instead, as the regulations are interpreted, the Board review of admissibility of a well-plead contention is similar to a federal Court's review of claims in a well-plead Complaint:

> The relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated; whether it improperly invokes the hearing process by raising non-justiciable issues, such as the propriety of statutory requirements or agency regulations; and whether it raises issues that are appropriate for litigation in the particular proceeding. See *In re Texas Utilities Elec. Co.*, 25 NRC at 930; *In re Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 1 and 2), 8 AEC 13, 20-21 (App. Bd. 1974). The Sierra Club's zircaloy-fire contention satisfied these requirements. Accordingly, we conclude that the Appeal Board failed to follow its own standards when it rejected the

> contention as nonspecific. See *In re Philadelphia Elec. Co.*, 8 AEC at 20 ("Section 2.714 should not be read and construed as establishing secretive and complex technicalities. . . .").

Sierra Club v. United States Nuclear Regulatory Com., 862 F.2d 222, 228 (9th Cir. 1988).

The Commission has also recently expressly held that NRC Staff and applicant arguments going to the merits of a contention are not relevant to the inquiry into the admissibility of a contention. See *In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford Nebraska)*, CLI-09-09, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 (N.R.C.) (May 18, 2009). In that case, the Commission upheld the admissibility of contentions where the arguments against admissibility focused on the merits of the case, rather than admissibility:

> Crow Butte's appeal claims that the Tribe failed to call into question the adequacy of Crow Butte's biweekly monitoring program because its "application and experience shows [that] an undetected excursion is unlikely." It claims that the wellfield is ringed by monitoring wells in both the mined and overlying aquifers that would detect any excursions. It defends its decision to monitor for chloride rather than uranium, because chloride is naturally found in low concentrations and will be detected quickly by monitoring wells should an excursion occur. Crow Butte's arguments go to the merits of whether its monitoring program is adequate. They do not show that there is no genuine dispute over this matter. The Tribe explained its position in reasonable detail and provided expert reports to support that position.

Id. at 9. Elsewhere in the same decision, the Commission repeatedly admonishes NRC Staff and the applicant for confusing the standard for admissibility with a ruling on the merits of a contention:

> Whether the Tribe has proved its claim is not the issue at the contention pleading stage. The Board simply has to find that each of the elements of contention admissibility is satisfied, and need not weigh the merits of the petitioner's arguments.

Id. at 12 (see also *id*. at 13).

Apart from confusing their arguments on the merits with the admissibility of the Tribe's contentions, NRC Staff and Powertech repeatedly assert that the issues raised in the Tribe's contentions related to the inadequacy of the application materials are not valid. However, recent relevant documents pertaining to the NRC Staff's review of the application as well as the State of South Dakota's review of the project identify many of the same serious gaps in scientific analysis identified by the Tribe as the basis for several of its contentions. In particular, on April 14, 2010 (after the Tribe filed its Petition), NRC Staff provided Powertech with a detailed Request for Additional Information (RAI) (attached as Exhibit 1). This RAI requests substantial information from Powertech directly related to the discrete issues identified by the Tribe as lacking, including information on the confinement of the potentially impacted aquifers (Contention 3), the extent of ground water quantity impacts (Contention 4), and the disposal of waste material from the operation, including disposal of 11(e)(2) byproduct material (Contention 7).

Similarly, the State of South Dakota has recently rejected Powertech's application for a State of South Dakota Underground Injection Control (UIC) permit, which application includes substantially the same (and in large part identical) information as that submitted to NRC and at issue in this proceeding. Tellingly, the South Dakota analysis asserts that Powertech's scientific and baseline characterization information "lacks sufficient detail to address fundamental questions related to whether Powertech can conduct the project in a controlled manner to protect ground water resources." April 19, 2010 letter from Brian J. Walsh, Hydrology Specialist, Ground Water Quality Program, State of South Dakota Department of Environment and Natural Resources, at 1. (attached as Exhibit 2). This letter (issued after the Tribe submitted its Petition) supports the Tribe's contentions as discussed below.

These recently produced documents from NRC Staff and the State of South Dakota are directly relevant to this proceeding. Commission precedent clearly establishes that such documents form legitimate bases of support for contentions. The Tribe recognizes that "the NRC staff's mere posing of questions does not suggest that the application [is] incomplete." *In the Matter of Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 N.R.C. 328, 336 (1999) citing *Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2)*, CLI-98-25, 48 NRC 325, 349 (1998), 48 NRC at 349. The Commission has explicitly recognized, however, that an NRC Staff RAI pertaining to issues raised in contentions demonstrates that the subject matter of the contentions is material to the proceeding. *In the Matter of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, CLI-09-16, Nuclear Reg. Rep. P 31596 (July 31, 2009) at 4. State regulatory documents providing technical review of a state application based on the same application information also form a legitimate basis for establishing the relevance and material nature of a contention. As recently held by the Commission:

> [the state regulatory review document] is roughly analogous, in some respects, to an RAI, but this does not exclude it from the Board's consideration. On one hand we have held — repeatedly — that a petitioner may not simply wait for the Staff to identify missing information and then ground a new contention on that request. But on the other, we have acknowledged that in some cases, a petitioner may base a new contention on an RAI if the RAI or its response raises new information. In addition, Petitioners here did not simply use Exhibit B to identify new "omissions," but used it to bolster their original challenges to Crow Butte's application. And, significantly, the Board found that Exhibit B does not merely ask for additional information, but points out specific statements that the NDEQ staff reviewer found to be unsupported, misleading, or wrong.

See *In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford Nebraska)*, CLI-09-09, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 (N.R.C.) (May 18, 2009) at 8 (citations omitted).

Lastly, Powertech repeatedly argues that the Tribe cannot state an admissible contention regarding the lack of baseline information in the application because, in its view, NRC regulations at 10 C.F.R. §§ 51.45 and 51.60 require only the submission of "generalized information" regarding fundamental information concerning the baseline hydrologic, cultural, geologic, and other conditions at the site. See Powertech at 40, 42. If adopted, this argument would effectively shield all future NRC applications from any challenge as to sufficiency, and thus cannot be credibly maintained. In any case, the extent to which the regulations require competent, scientifically defensible baseline characterization data is a legal issue that goes to the merits of this case. The Board is not presented with a request to resolve this legal issue at this stage of the proceedings. Instead, the Tribe respectfully requests that the Board determine that the Tribe sufficiently pled contentions alleging a violation of these regulatory requirements, so that orderly record development and briefing pursuant to the appropriate standards and burdens can inform a Board determination on the merits of each contention.

Overall, NRC Staff and Powertech arguments would require contentions that contravene the mandate in the regulations that prospective petitioners provide only a "brief explanation" of the contention, and a "concise statement" of the facts supporting a contention. 10 C.F.R. § 2.309(f)(1). Despite this binding requirement to make only "brief" and "concise" statements in support of contentions, NRC Staff and Powertech repeatedly assert an unreasonable contention standard that conflicts with the regulations by requiring full and complete detail with lengthy expert discussion. The Tribe respectfully submits that it has taken a reasonable approach that conforms to the requirements and purposes of the NRC's contention-pleading regulations.

The Board should reject the NRC Staff and Powertech arguments that rely on an unreasonably heightened standard for stating contentions and which repeatedly argue the merits

of the contentions rather than the adequacy of the Tribe's presentation of the contention. Not only is the NRC Staff and Powertech approach contrary to the applicable standards, it demands an unreasonable commitment of government resources at this early stage of a licensing proceeding. In an effort to provide clarity, the Tribe will walk each contention through the objective standards set forth in the regulations and thereby demonstrate the admissibility of each contention. 10 C.F.R. § 2.309(f)(1).

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 as Required by Federal Law**

NRC Staff argues that Contention 1 should be dismissed because the "Tribe does not specifically challenge the analysis or conclusions in any portion of the [Level III Cultural] Evaluation." NRC Staff at 16. This is incorrect. As recognized by NRC Staff, among the basis for this contention is the Declaration of Wilmer Mesteth, the Oglala Sioux Tribe Tribal Historic Preservation Officer. In that Declaration, Mr. Mesteth specifically challenges the analysis and conclusions of Powertech's evaluation. For instance, at ¶ 12, Mr. Mesteth challenges Powertech's analysis in failing to locate or analyze some twenty-eight previously recorded sites that were not relocated during Powertech's evaluation. This specific allegation is reinforced at ¶ 19 where Mr. Mesteth identifies the fact that some eighty-one sites which have been identified on the proposed mine project area, but have not been evaluated in the Powertech study. Further, at ¶ 13, Mr. Mesteth specifically takes issue with Powertech's conclusion that the impacts to cultural resources will be "none" while elsewhere in the application materials there is an explicit recognition that impacts will occur. With respect to each of these criticisms, Mr. Mesteth identifies specific portions of the application materials, exposing a gaping flaw in the NRC

Staff's argument to the contrary. NRC Staff at 19 (alleging that the contention should be dismissed because "Mr. Mesteth does not address Powertech's application specifically....").

Mr. Mesteth, at ¶ 14, also takes specific issue with Powertech's failure to involve any Tribal government officials or Oglala Sioux Tribal members in order to properly discern the significance of the numerous cultural resources present at the site. Lastly, Mr. Mesteth, at ¶ 17, specifically challenges Powertech's failure to include relevant information in its analysis "including the failure to conduct any inquiry into or an evaluation of the ethnographic information available for the site. This information includes consultation with members of the indigenous community, the elders who have been in the area, medicine people, oral historians, and others who are familiar with the area." Based on these highly specific issues, NRC Staff's unsupported assertion that the Tribe failed to "specifically challenge the analysis or conclusions in any portion of the [Level III Cultural] Evaluation" should be rejected.

Ironically, in apparent recognition that the Tribe did indeed provide specific challenges to Powertech's analysis and conclusions, NRC Staff contests the merits of the Tribe's specific challenges. NRC Staff at 17-19. Instead of confining itself to arguing over the admissibility of Contention 1, NRC Staff attempts to require the Tribe to provide definitive proof of its contention that the application contains an inadequate information and analysis of cultural resources. NRC Staff at 17. NRC Staff previews its full argument on the merits, citing those portions of the application materials that it thinks support Powertech's compliance with the law, thus conceding that Contention 1 raises a material issue. NRC Staff at 17-18. It bears repeating that arguments on the merits are not proper at the contention pleading stage. Whether or not the applicant can demonstrate compliance with the requirements of 10 C.F.R. §§ 51.45 and 51.60 are matters to be resolved at a hearing.

For its part, Powertech simply launches directly into a full argument on the merits of the contention, setting forth its view of the legal standard for compliance with 10 C.F.R. §§ 51.45 and 51.60, arguing that these regulations impose no "technical adequacy" requirement. Powertech at 38. Powertech also engages in an effort to cite the portions of its application that it contends support its view that the application adequately analyzes cultural resources and the project's impacts. Powertech at 39. These arguments clearly go to the merits, dealing with the legal interpretation of what the regulations require of an applicant and where the application supposedly meets those requirements. As such, the Board should reject these merits arguments as misplaced at this stage in the hearing, while simultaneously recognizing that the issues raised in Contention 1 are material and within the scope of these proceedings. 10 C.F.R. § 2.309(f)(1)(i-vi).

Powertech and NRC Staff contend that the Tribe's Contention 1 is actually two contentions, one challenging the adequacy of Powertech's cultural resources information, and one challenging NRC Staff's compliance with NHPA and NEPA with respect to fulfilling the agency's Tribal consultation duties. As such, NRC Staff and Powertech argue that the second contention: (1) is not ripe for administrative review (NRC Staff at 20, Powertech at 39), and (2) is not proper in this forum because it is the equivalent of a challenge to the agency's regulatory process, rather than a challenge to the application (NRC Staff at 39-40). Both of these arguments should be rejected by the Board.

With respect to the ripeness of the challenge in Contention 1 to NRC Staff's compliance with the NHPA, this contention is ripe. As stated in the Petition at 16-17, the circumstances in this case warrant consideration of this claim as soon as practicable. Primary among these reasons is that the NHPA violation is currently ongoing. This is a result of the NHPA's mandate

that federal agencies initiate and conduct tribal consultation as early as possible in consideration of an undertaking. As set forth in the Petition, to exclude the Tribe from the cultural resources evaluation required under the NHPA until NEPA is conducted violates the NHPA and hampers the Tribe's ability to protect its cultural resources by relegating NHPA compliance to the latest stages of these proceedings where federal law requires that these issues be addressed as early as possible. See Petition at 17.

Regarding Powertech's argument that the Tribe's contention is really aimed at challenging the regulatory framework and NRC Staff's implementation of its duties under NEPA and the NHPA, such a distinction should not preclude review at this time. As stated, the harms occurring as a result of NRC Staff's failure to comply with NHPA are ongoing. Further, the Board and Commission neglect to address this regulatory compliance issue during this proceeding at their own peril, as federal courts routinely allow for "as-applied" challenges to regulatory regimes in the context of site-specific permit or license challenges. *Ayers v. Espy*, 873 F.Supp. 455, 463 (D. Colo. 1994).

Overall, the Tribe's Contention 1 meets the requirements for stating contentions found at 10 C.F.R. § 2.309(f)(1). The Contention is specific and provides a brief description of the basis in alleging failure to comply with specific NRC regulations (10 C.F.R. §§ 51.45 and 51.60), and the NHPA and its implementing regulations. The contention is within the scope of the proceeding, as Powertech is required to provide a supportable evaluation of cultural resources, and NRC Staff is required to comply with the NHPA and NEPA. The Tribe provides the supporting facts, through the Declaration of Mr. Mesteth and specific references to the relevant application materials. Lastly, the Tribe has shown a genuine dispute on an issue of material law and fact, as evidenced by the arguments put forth by NRC Staff and Powertech on the proper

interpretation of the relevant legal authority as well as the competency of the cultural resources study in the application.

Contention 2: Failure to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality

NRC Staff argue that the Tribe's Contention 2 should be dismissed for failure "to show there is a genuine issue as to whether Powertech needs to provide additional information on baseline water conditions." NRC Staff at 21. NRC Staff bases this argument on repeated assertions that the Tribe has failed to "cite any requirement that Powertech include" relevant information related to baseline water quality at the site." NRC Staff at 22, 23, 24, 25. Lastly, NRC Staff argues that the Tribe "fails to address relevant sections of Powertech's application." NRC Staff at 25.

Contrary to NRC Staff's position, the Tribe set forth multiple authorities requiring scientifically defensible baseline ground water information. For instance, the Tribe identifies 10 C.F.R. § 51.45, requiring a description of the affected environment; 10 C.F.R. Part 40, Appendix A, criterion 7, which specifically requires an applicant to provide "complete baseline data on a milling site and its environs"; and NUREG-1569, which in multiple places evidences the need for "reasonably comprehensive" data shown to have been "collected by acceptable sample procedures." NUREG-1569 §§ 2.7.1, 2.7.3, 2.7.4. See Petition at 18.

Thus, given these specific citations, it becomes clear that NRC Staff's argument is not whether the contention is sufficiently stated, but rather an issue on the merits of the contention as to what the applicable legal standard is for how detailed an applicant's baseline information must be, and whether that data must be collected in a scientifically defensible manner. These are

genuine disputes as to a material issue of law in this proceeding, and should be resolved in the proper litigation of this Contention.

NRC Staff's argument that the Tribe failed to cite to specific and relevant portions of the application materials is unsupportable. The Declaration of Robert E. Moran goes through specific portions of the application materials at depth, as recounted in detail in the Tribe's Petition. Petition at 18-21. These expert analyses by Dr. Moran line up the relevant portions of the application materials and demonstrate the basis for the Tribe's contention that the existing data in the application materials is insufficient and that the data collection methodologies are improper. NRC Staff cites to those portions of the application materials that it believes supports an argument that the applicant provided the baseline information required by the applicable regulations (NRC Staff at 22), but again, this is an argument on the merits of the contention, not on whether the contention has been adequately pled.

Powertech argues that the Tribe's Contention 2 should be dismissed because the binding regulations cited by the Tribe require only "generalized information regarding pre-operational baseline water quality ...." Powertech at 40. Although Powertech provides no supporting citations or other basis for this position, this argument explicitly recognizes, at minimum, that the Tribe's Contention 2 raises a genuine dispute over a material issue of law with respect to the level of detail and scientifically-defensible methodology an applicant must demonstrate with respect to its presentation of baseline water quality data. Further, Powertech proceeds to argue the merits of the contention by providing references to application materials that it asserts support its baseline ground water quality characterization. Powertech at 41. These arguments go directly to the merits of the contention and are inappropriate at this stage in the proceeding.

Lastly, Powertech asserts that the NRC regulations do not allow for the filing of vague, unparticularized contentions unsupported by affidavit, expert, or documentary support. Powertech at 41. This argument wholly ignores the detailed and specific presentation of the Contention in the Petition (at 17-21), and the detailed expert declaration supporting the contention.

The Tribe's Contention 2 meets the 10 C.F.R. § 2.309(f)(1) requirements for stating contentions. The Contention is specific and provides a brief description of the basis in alleging failure to comply with specific NRC regulations (10 C.F.R. § 51.45, 10 C.F.R. Part 40, Appendix A, criterion 7, as interpreted by NUREG-1569). The contention is within the scope of the proceeding, as Powertech is required to provide a supportable evaluation of baseline ground water quality conducted using scientifically defensible methodology. The Tribe provides the supporting facts, through the detailed Declaration of Dr. Robert E. Moran and specific references to the relevant application materials. Lastly, the Tribe has shown a genuine dispute on an issue of material law and fact, as evidenced by the arguments put forth by NRC Staff and Powertech on the proper interpretation of the relevant legal authority as well as the competency of the ground water baseline characterization in the application.

Contention 3: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration

In arguing for the dismissal of the Tribe's Contention 3, NRC Staff and the applicant engage in an exercise of parsing out each statement the Tribe references in the supporting Declaration of Robert E. Moran, then repeatedly arguing that based on that isolated paragraph alone, "Dr. Moran" has failed to state an admissible contention. NRC Staff at 25-32; Powertech at 42-45. However, it is the Tribe that is the Petitioner, and it is the Petition as a whole that sets

forth the Contention, using Dr. Moran's expert discussion as a basis. Thus, the Tribe asserts that the various portions of Dr. Moran's Declaration together support Contention 3, as specifically laid out in the Petition at 21-25. Thus, the NRC Staff's and Powertech's tactic of isolating each individual paragraph in the Declaration submitted by Dr. Moran and searching for a contention is spurious, akin to setting up a straw man.

NRC Staff argues that Contention 3 should not be admitted because "Dr. Moran does not argue that Powertech has failed to identify boreholes or mine workings," and that "Dr. Moran does not specifically challenge Powertech's data or analyses ...." NRC Staff at 28. The Tribe's Petition, however, does set forth these allegations and arguments. Notably, NRC Staff ignores the Tribe's explicit assertions that "the application fails to present sufficient information in a scientifically-defensible manner to adequately characterize the site and off-site hydrogeology to ensure confinement of the extraction fluids. These deficiencies include unsubstantiated assumptions about the supposed isolation of the aquifers in the ore-bearing zones and failure to account for natural and man-made hydraulic conductivity through natural breccias pipe formations and the historic drilling of literally thousands of holes in the aquifers and ore-bearing zones in question which were not properly abandoned." Petition at 22. Thus, contrary to the assertions of NRC Staff, the Tribe does state with particularity that Powertech has failed to identify boreholes, and takes issue with specific aspects of Powertech's data and analysis. Notably, the State of South Dakota also takes strong issue with Powertech's data and analysis with respect to the company's attempted demonstration as to the confinement of the aquifers at issue. For instance, in the State's April 19, 2010 inadequacy letter (attached as Exhibit 2), at pages 5-10, the State raises substantial issues with respect to the company's data and analysis

with respect to the supposed confining layers. The Tribe relies on this letter as support for Contention 3.

In fighting the admissibility of Contention 3, NRC Staff inexplicably argues that the Tribe fails to cite to specific portions of the application. NRC Staff at 26. However, the Tribe indeed frequently does so through the Declaration of Dr. Robert E. Moran. For instance, paragraphs 36, 39, 40, 41, 42, 44, 45, and 46 of the Declaration each cite to specific portions of the Environmental, Technical, or Supplemental Report, as appropriate in describing the inadequacies in the Applicant's description of the local geology and the basis for the assertion that the company will be able to contain the chemicals in the aquifer.

NRC Staff repeatedly argues that the Contention should be dismissed because the Tribe did not cite to the portions of the application materials that the NRC Staff believes supports the company's studies. NRC Staff at 26. However, NRC Staff cite to no requirement that a Contention discuss and refer to each and every portion of an application that bears any relation to the issue being contested. Such a requirement makes no sense, given the regulatory requirement for petitioners in these proceedings to provide a "brief explanation" of the basis for the contention and a "concise statement" as to the alleged facts. See 10 C.F.R. § 2.309(f)(1). Adopting NRC Staff's argument in this regard would wholly undermine these requirements by encouraging petitioners to literally overwhelm the proceedings with unnecessary information. In any case, the NRC Staff's repeated references to portions of the application materials that it believes supports the applicant's compliance with the law bear on the merits of the contention, not its admissibility. See NRC Staff at 26, 27, 28, 29, 30, 31.

The NRC Staff's trend of arguing the merits of the contention rather than admissibility continues throughout the NRC Staff's response to Contention 3. NRC Staff attempts to escape

this fact by arguing the merits, then turning each such argument into an allegation that "Dr. Moran" has not identified a genuine dispute. The Board should reject this practice of framing the argument on the merits as one asserting the lack of a genuine dispute.

To the contrary, Powertech's response on Contention 3 demonstrates the presence of a genuine dispute on a material issue of law and fact. For instance, Powertech argues (again) that NRC regulations only require "generalized information regarding pre-operational" conditions. Powertech at 42. Thus, there exists a genuine dispute on a material issue of law and fact as to what level of detail is required in the application materials. The Tribe has set forth specific areas where the application is deficient with respect to the characterization of the area geology and the ability of the applicant to confine the extraction fluid.

In sum, the Tribe has set forth an admissible contention in Contention 3. The Contention is specific and provides a brief description of the basis in alleging failure to comply with specific NRC regulations (10 C.F.R. §§ 40.31(f), 51.45, 51.60, 10 C.F.R. Part 40, Appendix A, criteria 4(e) and 5(g)(2), as interpreted by NUREG-1569). The contention is within the scope of the proceedings as Powertech is required to provide a supportable description of the geologic setting and demonstrate the ability to confine the extraction fluids. The Tribe provides the supporting facts, through the detailed Declaration of Dr. Robert E. Moran and specific references to the relevant application materials, as well as the letter from South Dakota raising substantially similar, if not identical, issues. Lastly, the Tribe has shown a genuine dispute on an issue of material law and fact, as evidenced by the arguments put forth by NRC Staff and Powertech on the proper interpretation of the relevant legal authority as well as the competency of the geologic characterization and the attempted demonstration of the ability to confine the extraction fluids.

Contention 4: **Inadequate Analysis of Ground Water Quantity Impacts**

NRC Staff's argument with respect to the admissibility of the Tribe's Contention 4 goes straight to the merits of the issue, rather than the admissibility. NRC Staff at 33. For instance, NRC Staff cites and refers to sections of the application materials that it believes support its position that the company's discussion of groundwater quantity impacts is not insufficient or contradictory. NRC Staff at 33-34. Powertech takes the same tack – focusing its objection to the admissibility of Contention 4 entirely on the merits, asserting that the regulations do not impose an "adequacy" requirement and running through its analysis of the portions of the application that it believes supports its position that the application sufficiently discusses groundwater quantity impacts. Powertech at 46. As discussed herein, argument on the merits is inappropriate at this stage in the proceeding.

Further, NRC Staff contends that the Tribe has failed to identify portions of the application materials that it takes issue with. NRC Staff at 33-34. However, the Declaration of Robert E. Moran cites to specific references and materials in the application. Petition at 26-27.

NRC Staff repeats its unsupported argument that a Petitioner must specifically reference to each portion of the application materials that the NRC Staff feels is relevant to the contention at issue. This is a misreading of the regulations, which only require that a petitioner "include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.309(f)(1)(iv). In this case, the Petition sets forth Contention 4 in compliance with the regulation.

Contention 5: **Failure to Adequately Calculate Bond for Decommissioning**

The Tribe has provided a specific statement, a brief explanation, and undisputed expert opinion which raises a genuine dispute over the information and calculations provided by Powertech regarding the decommissioning bond. There is no dispute that 10 C.F.R. Part 40 Appendix A establishes the decommissioning bond as a material issue in these proceedings. In opposing the Contention 5, NRC Staff and Powertech assert that a phased bonding approach is allowed under Appendix A, Criteria 9 and the phased approach relieves the applicant from providing information beyond that associated with the first years of operation. Both NRC Staff and Powertech also assert that the application contained the necessary information.

Importantly, NRC Staff assert that an admissible contention would take issue with the methodology for calculating a bond. NRC Staff at 35("Because the Tribe does not challenge that methodology, its contention must be dismissed."). However, neither NRC Staff nor Powertech take issue with Mr. Moran's statement regarding bond calculation methodology. Moran Decl. at ¶ 71. The Tribe, through Mr. Moran's unchallenged declaration, provides an undisputed expert opinion that any methodology which generates a reliable bonding calculations cannot be speculative or generic, but must instead rely on an "actual reclamation and restoration costs incurred, long-term, from a statistical sampling of the previously-licensed ISL sites." Moran Decl. at ¶ 71. No such actual costs are identified by NRC Staff or Powertech.

Further, although NRC Staff argues that Powertech has provided sufficient information regarding decommissioning, the RAI establishes that NRC Staff has actually concluded otherwise. Exhibit 1, RAI at 18. Indeed, the NRC Staff recognized that the volume of contaminated soils, the radiological characteristics of the 11e(2) Byproduct Materials, and the

transport distances are necessary information which were not included in the decommissioning bond calculation. *Id*.

As explained more completely in this reply concerning Contention 7, there is no dispute that Powertech has failed to provide information required to calculate decommissioning costs associated with the 11e(2) Byproduct Material. This omission is particularly relevant where Powertech has not proffered an actual agreement which establishes the actual costs of disposal. The interrelated issues of cost and availability of disposal facilities at a currently licensed disposal facility, along with transportation costs to the specific facility with ability to accept the 11e(2) Byproduct Material at an established price, is information on a material issue that is lacking in the Powertech application.

Contention 5 provides a specific, brief statement of a material issue which is supported by undisputed expert opinion and admissions of NRC Staff regarding both the inadequate methodology and the lack of information to satisfy the decommissioning bond requirements of 10 C.F.R. Part 40, Appendix A.

Contention 6: **Inadequate technical sufficiency of the application and failure to present information to enable effective public review resulting in denial of due process**

Contention 6 relies on several procedural requirements, including NEPA regulations and NRC Guidance, to allege that the application prevents meaningful and effective review of the information which Powertech provided. Although NRC Staff argues otherwise, Powertech's disorganized, inaccessible, and incomplete presentation of information is material to the findings necessary for the NRC to issue the requested license. 10 C.F.R. §2.309(f)(vi).

NRC Staff and Powertech argue that Contention 6 does not involve a material issue because the NRC Staff would not have issued a completeness determination if the information

was inadequately presented or inconsistent with the Guidance relied on by NRC Staff. NRC Staff at 38, Powertech at 49. Shortly after reviewing the Tribe's Contentions and Dr. Moran's declaration, however, NRC Staff issued a twenty-two page request for additional information. The RAI concedes materiality of Contention 6 by requesting Powertech to provide information to "complete the description of the proposed action and affected environment and **to provide a consistent technical basis for determining the impacts of land disturbance** from the proposed project." Exhibit 1, RAI at 2. See *In the Matter of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4),* CLI-09-16, Nuclear Reg. Rep. P 31596 (July 31, 2009) at 4. (NRC Staff RAI pertaining to issues raised in contentions demonstrates that the subject matter of the contentions are material to the proceeding).

Of special importance to the Tribe, the NRC Staff recognizes that "information is needed for the staff to evaluate the environmental justice impacts of the proposed project on low-income populations." Exhibit 1, RAI at 15. Further, the NRC Staff issued the completeness determination despite a lack of information on the "technical basis and rationale for the choice of deep aquifers for liquid waste disposal at the proposed site." *Id.* at 10. As stated by NRC Staff, ["t]his information is needed to determine the impacts to groundwater quality resulting from deep well disposal of liquid wastewaters at the proposed project." *Id.* Similarly, the technical information regarding the well field baseline sampling plan was deemed inadequate by the NRC Staff's RAI. *Id*. at 21.

The RAI sent to Powertech by NRC Staff after reviewing the Tribe's contentions is consistent with the unopposed expert opinion of Dr. Moran. Neither NRC Staff nor Powertech mention, despite their actual knowledge, that the NRC Staff had identified similar problems as were raised by the Tribe in Contention 5, and as supported by the declaration of Dr. Moran.

The Tribe has presented a specific statement and brief explanation of the failure of the application materials to satisfy the requirements of federal law, substantiated by an un-rebutted expert opinion. The materiality of Contention 5 is further established by an April 14, 2010 RAI which seeks basic technical information which the application failed to contain, despite NRC Staff's completeness determination. The Tribe respectfully submits that this contention meets of the admissibility requirements of the contention pleading regime.

Contention 7: Failure to Include in the Application a Reviewable Plan for Disposal of 11e(2) Byproduct Material

The Staff and Powertech forward similar arguments against Board consideration of Oglala Sioux Tribe's Contention 7, which alleges that Powertech's Application failed to include required information to establish a lawful, concrete proposal for the handling and disposal of 11e(2) Byproduct Material. Both Staff and Powertech rely on the spurious argument that a fully informed analysis of the characteristics, handling, transport, and disposal of 11e(2) Byproduct Material created at an in situ leach facility is not an "issue material" to the Board's consideration of a 11(e)2 Byproduct Material License. NRC Staff at 39. The opposition does not contest any of the other six requirements for a well-pled contention, only the materiality. 10 C.F.R. § 2.309(f)(1)(iv). The opposition to Contention 7 is contrary to facts known to Staff and Powertech and is contrary to established interpretations of NRC regulations.

On April 14, 2010, eight days after the Tribe filed its contentions, the Staff sent Powertech a Request for Additional Information ("Staff RAI"), which sought information regarding the 11e(2) Byproduct Material for which Powertech seeks a license. Exhibit 1 (Staff RAI) at 18-19. The Staff's RAI is admissible evidence which was not available when Contention 7 was pled and which concedes that Tribe's Contention 7 was properly pled; the

Applicant does not provide information necessary to conduct the environmental analysis and/or technical analysis of the radioactive characteristics, operational handling, interim storage, transport, disposal, long-term care, or environmental impacts of the 11e(2) Byproduct Material. See Petition at 31-34; NRC Staff at 2 (recognizing an "application for a combined NRC source and 11e.(2) byproduct material license."). The Staff RAI, even without more, establishes that this contention is material. *In the Matter of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4),* CLI-09-16, Nuclear Reg. Rep. P 31596 (July 31, 2009) at 4. (NRC Staff RAI pertaining to issues raised in contentions demonstrates that the subject matter of the contentions are material to the proceeding).

Read in conjunction with the Staff RAI, the Response confirms that Contention 7 provides a genuine legal dispute over the Staff's error in deeming the application complete based on Staff's erroneous legal conclusion that 10 C.F.R. 40.31(h) does not apply to an in situ facility. NRC Staff at 39. Contention 7 briefly and specifically states that the plain language of the regulations required the Staff to reject the application as not containing information required for technical review and prevents issuance of a license. Petition at 32 *citing* 10 C.FR. Part 40 Appendix A; 10 C.F.R § 41.31(h) *accord* NUREG-1569 at xviii ("The applicant's failure to demonstrate compliance with requirements [10 CFR 40.31(h)], or refusal or failure to supply information requested by the staff to complete the review (10 CFR 2.108) is also grounds for denial of the application.").

The materiality of this issue is also demonstrated by the Staff RAI. First, Contention 7 is admissible where the Staff RAI recognizes that the application lacks the most basic information regarding the creation, handling, and disposal of 11e(2) Byproduct Material during operations:

> Th[e Application] indicates the radium settling pond bottoms would be periodically removed, stored onsite, and disposed of as 11e.(2) byproduct waste at a licensed disposal facility, but does not provide additional details about the radiological characteristics of the waste material or the proposed approach to transporting the material to an offsite disposal facility.
>
> [. . .] This information is needed for staff to more completely evaluate the radiological characteristics of the waste materials the proposed action will generate, describe the proposed transportation activities for this material, estimate the number of shipments, and evaluate the potential impacts associated with these activities.

Exhibit 1, Staff RAI at 18. Second, the Staff RAI recognizes that Powertech has not provided the most basic information on the 11e(2) Byproduct Material that will require disposal at decommissioning:

> The staff could not locate any entries in the spreadsheet or elsewhere in submitted documentation that estimated the volume of contaminated soil (e.g., from well field leaks, spills, or excessive land application buildup of constituents) expected to be excavated and sent offsite for disposal during decommissioning.
>
> [. . .] This information is needed for staff to accurately assess the expected amount of 11e.(2) byproduct waste generated during decommissioning to support both the description of produced wastes and to estimate the magnitude of expected waste shipments to an offsite disposal facility.

Id. at 19. As addressed more fully in Contention 5, the Criteria 9 requirements regarding decommissioning and long term care costs for 11e(2) Byproduct Materials is a material issue related to the lack of information identified by this Contention 7, the Staff RAI, and the Powertech admission that it has provided only generalized information regarding 11e(2) Byproduct Material.

In direct contradiction to the Staff RAI, the NRC Staff Response relies on an erroneous legal argument to assert that the consideration of the transport and fate of the 11e(2) Byproduct Material is not material to the consideration of an 11e(2) Byproduct Material license. NRC Staff at 39. The NRC Staff not only contradicts itself, the Staff position is contrary to the

requirements of the AEA and UMTRCA, as implemented by regulation and as previously interpreted by the NRC. The existing authority can be summarized as preventing the NRC from permitting a new source of 11e(2) Byproduct Materials until the Applicant has provided a detailed, well-reasoned, practical, and enforceable plan (with an accompanying agreement) for storage and eventual disposal of the 11e2 Byproduct Material. See 10 C.F.R § 41.31(h), 10 C.F.R. Part 40 Appendix A, NUREG-1569. By contrast, Powertech asserts, without citation to authority, that the application materials are consistent with some unstated standard, which only requires information regarding "broad parameters for such disposal." Powertech Response at 52.

Again going past the pleading standard to argue the merits of Contention 7, NRC Staff/Powertech rely on the erroneous argument that there is a general presumption that the existing NRC regulations do not apply to 11e(2) Byproduct Material created at an ISL facility. To the contrary, the NRC regulations, including those at 10 C.F.R § 41.31(h) and 10 C.F.R. Part 40 Appendix A, are generally applicable to ISL facilities. *Hydro Resources II* 50 N.R.C. 3 (N.R.C. 1999). Where exceptions are sought, the NRC takes a case-by-case approach to determine whether a particular regulatory provision is aimed only at conventional milling. *Id*. ("Until the Commission develops regulatory requirements specifically dedicated to the particular issues raised by ISL mining, we will have no choice but to follow the case-by-case approach taken by our Staff in issuing HRI's license."). Neither Staff nor Powertech point to any decision that establishes that the regulations relied upon by the Tribe are not material to this ISL proceeding. Instead, Staff and Powertech omit the *Hydro Resources II* acknowledgement that "there are a number of general safety provisions in Part 40, Appendix A, such as Criteria 2, 5A, and 9, that are relevant to ISL mining." *Id.*

Further, NRC Staff fails to address the Board's subsequent decision in the *Hydro Resources* matter, which explicitly acknowledges the materiality of the NRC regulations:

> In addition, we note that 10 C.F.R. § 40.31(h) places heavy emphasis on the requirement that license applicants show how the requirements and objectives of Appendix A, which includes Criterion 9, will be achieved. Indeed, "[f]ailure to clearly demonstrate how the requirements and objectives in appendix A have been addressed shall be grounds for [even] refusing to accept an application." We, therefore, believe that the most reasonable interpretation of Criterion 9 is that an applicant must submit the plan for the NRC staff's review prior to the license's issuance.

Hydro Resources III, 51 N.R.C. 227 (N.R.C. 2000)(finding that license was improperly issued where decommissioning costs were not fully examined). Although *Hydro Resources III* allowed the deficiencies to be cured on the unique facts of that case, no similar facts exist here. Here, where Powertech does not hold a current license, the requirements of 10 C.F.R. § 40.31(h) must be fulfilled at the earliest stages of the proceedings to satisfy the overlapping requirements of NRC regulations and the informed decisionmaking requirements of NEPA and the Administrative Procedure Act.

Powertech argues that the relevant statutes and regulations cannot be operative without prior staff interpretation. Powertech at 51("Petitioner cites to no Commission or NRC Staff interpretation of Criterion 1 that mandates the submission of materials requested by Petitioner."). However, Powertech's argument fails where the requirements of Appendix A are presumed to apply to an ISL facility, unless shown to be specific to conventional mills. *Morris v. United States NRC*, 598 F.3d 677, 695 FN 17 (10th Cir. 2010)(recognizing that Appendix A applies generally to ISL operations, but that "some of Appendix A's criteria, because they are aimed at uranium milling, are not directly relevant to ISL mining."). Powertech has not attempted to make any showing based on the particular facts and circumstances of the present case that rebut the general rule that Appendix A applies to ISL mining.

Likewise, NRC Staff fails to address the case-by-case standard the NRC has elected to use. Here, the portions of the regulations relied upon by the Tribe do not consider matters unique to a conventional uranium mill. The Preamble of Appendix A is plain language of general application that requires specific information regarding "the disposition of tailings or wastes resulting from such milling activities." The Preamble is material to the present ISL proceedings where the Staff has recognized that the radiological characteristics were not identified in the application, disposal is a mere hypothetical, and there is no plan for decommissioning that could be subjected to review pursuant to the applicable Criteria in Appendix A.

Powertech contradicts its own position by acknowledging that NUREG-1569 provides evidence of the regulatory requirements. Powertech at 51 (*citing* NUREG 1569 at 3-2). Yet, Powertech ignores the requirement that an approved disposal agreement must be provided for the Staff to review a new facility: "The reviewer **shall** examine the terms of the approved waste disposal agreement." *Id*. 3-2 (emphasis supplied). Powertech does not claim that any agreement exists, but does acknowledge the materiality of Contention 7 by stating that it "will supply a waste disposal agreement" at some undetermined future date. Powertech at 52. This admission is directly contrary to Section 3 of NUREG-1569 (relied upon by Powertech's response), which recognizes that that in order to meet the requirements of the statute and regulations, an approved agreement must be provided with the application:

> The *in situ* leaching process and equipment are acceptable if they meet the following criteria: [. . .]
>
> > 11. The applicant has an approved waste disposal agreement for 11e.(2) byproduct material disposal at an NRC or NRC Agreement State licensed disposal facility. This agreement is maintained onsite. The applicant has committed to notify NRC in writing within 7 days if this agreement expires or is terminated and to submit a new agreement for NRC approval within 90 days of the expiration or

> termination (failure to comply with this license condition will result in a prohibition from further lixivient injection).

Id. at 3-7. The requirement for an actual agreement is also set out in Section 4 of NUREG-1569:

> (4) Review procedures: [. .]
>
> > (4) Ensure that an agreement is in place for disposal of 11.e(2) byproduct material in an NRC licensed disposal facility or a licensed mill tailings facility.

Id. at 4-4. Information on the actual agreement and the contracted cost of 11e(2) Byproduct Material disposal is also material to the Criteria 9 determination of the costs of decommissioning and therefore a proper decommissioning bond:

> The application should provide an estimate of the amount of contaminated material that will be generated and objective evidence of an agreement for disposal of these materials either in a licensed waste disposal site or at a licensed mill tailings facility.

Id. at 4-8

> The procedures for removing and disposing of structures, waste materials, and equipment are acceptable if they meet the following criteria: [. . .] (5) A contract between the licensee and a waste disposal operator exists to dispose of 11e.(2) byproduct material.

NUREG-1569 at 6-20. Yet, the NRC Staff knew when filing its Response that it lacked information on "radiological characteristics," "magnitude," "transport," and "description" of the 11e(2) Byproduct Material during both the operational and decommissioning phases. Exhibit 1, Staff RAI at 18-19.

Last, the NRC-specific requirements operate in tandem with NEPA's procedural requirements. Here, there is no dispute that the NRC Staff, the Tribe, the public, and this Board are unable to carry out the relevant inquiries and NEPA duties due to Powertech's failure to provide relevant information material to the review, license issuance, operation, and decommissioning activities involving 11e(2) Byproduct Material. Although the Responses of

NRC Staff and Powertech ignore known deficiencies, the Staff RAI provides clear evidence that the Application and accompanying Environmental Report do not contain information necessary for the Staff, the Tribe, or this Board to engage in the informed decisionmaking NEPA procedures require. 10 C.F.R. § 2.309(f)(1)(iv).

Under plain language of the NRC regulations, where material information is lacking, the Tribe need not wait until the NEPA analysis is completed before pleading a NEPA-based contention. 10 C.F.R. § 2.309(f)(2)("On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report."). However, the Tribe does reserve the right to amend its contentions and plead new contentions, as appropriate. *Id*.

The Tribe respectfully submits that the NRC Staff and Powertech arguments are based on statements of law and fact contrary to the law and facts material to these proceedings, which was known to both when they submitted their respective Responses. As matter of fact and law, the Tribe has pled an admissible contention within the scope of the proceedings which is material to findings that the NRC must make under the NRC regulations applicable to issuance of the requested 11e(2) Byproduct Material license.

The Tribe respectfully requests that Contention 7 be ruled admissible. Further, although the Board claims wide discretion in addressing 11e(2) Byproduct Material where a license has already issued, where an application for a new facility is submitted without the necessary information, the regulations at 10 C.F.R. 40.31(h) establish a timely and proper remedy, which is to not award a license based on an application lacking the most basic information on the 11e(2) Byproduct Materials. *Hydro Resources III,* 51 N.R.C. 227 (N.R.C. 2000).

Contention 8: **Requiring the Tribe to Formulate Contentions before an EIS is Released Violates NEPA**

NRC Staff and Powertech misconstrue Contention 8 as a facial attack on the NRC regulations. It is not. Instead, Contention 8 alleges that the present proceeding fails to conform with the statutory requirements of the National Environmental Policy Act, as interpreted and implemented by the NRC regulations at 40 C.F.R Part 51 **and** the regulations promulgated by the Council on Environmental Quality ("CEQ"). 40 C.F.R. 1500, *et seq.* Despite being characterized as mere procedural impediments by NRC Staff and Powertech, the NEPA process is the means by which Congress has chosen to ensure that "the most intelligent, optimally beneficial decision will ultimately be made." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). It is the policy decision of Congress to require all federal agencies – including NRC – to place their data and conclusions before the public at the earliest stages of the decisionmaking process to ensure that NEPA's procedural requirements result in open, honest, interdisciplinary and public discussion "in the service of sound decisionmaking." *Id*. at 1143.

Contention 8 briefly explains the basis for the contention and provides a specific statement of a legal issue, alleging that the facts and circumstances of this particular proceeding fail to meet the dual statutory purposes of NEPA that apply to all federal agencies: informed decisionmaking and public participation. See Petition at 35-36. Neither NRC staff nor Powertech attempt to address NEPA's statutory mandate, as recognized by the federal court cases which form the legal basis of Contention 8, rightly conceding that NRC is bound by the informed decisionmaking and public participation purposes of NEPA.

Further, Powertech concedes that the duly promulgated regulations of the "CEQ" **and** the NRC apply to these proceedings, except where substantive matters requiring special expertise relieve the NRC of compliance with CEQ regulations. Powertech at 53 *accord* 10 C.F.R § 51.10 (agreeing to comply with CEQ regulations, with limited exceptions). NRC Staff make a misleading argument based on the assertion that CEQ *Guidance* does not bind NRC Staff, but NRC Staff is silent as to the binding force of the CEQ *Regulations* on procedures used by NRC Staff. NRC Staff at 37, n. 49. In sum, there is no dispute that because Contention 8 does not involve any substantive matter that requires any special expertise of the NRC Staff or the Board, Contention 8 raises a material dispute over whether the CEQ regulations provide binding legal requirements material to the procedures used in these proceedings, and whether compliance has been achieved. 10 C.F.R. § 2.309(f)(1)(i-vi).

Five pages later, however, Powertech forwards a novel "independent agency" theory that contradicts its own admission that the procedural aspects of the CEQ regulations do apply to these proceedings. Powertech at 58 (NRC "is not directly subject to CEQ regulations"). Although it is unsettled whether NRC would be bound by CEQ *Guidance* regarding substantive matters where NRC, and not CEQ, is the expert agency, there can be no question that the CEQ's *Regulations* apply to and bind all federal agencies, including NRC, particularly where procedural matters are at issue. See Powertech at 53 *accord* NUREG--1748 ("NRC maintains its view that, as a matter of law, independent regulatory agencies can be bound by the CEQ NEPA regulations only insofar as those regulations are procedural or ministerial in nature").

Moreover, these NEPA duties are material where Congress has imposed mandatory duties that regulate the conduct of all federal agencies, including the Board and NRC Staff during these proceedings. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Commission*,

146 U.S. App. D.C. 33, 449 F.2d 1109, 1114-1115 (1971)(NEPA requires an agency to comply with the procedural directives "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."). Nowhere does Powertech or NRC Staff even suggest that NRC Staff or this Board can lawfully discharge its duties without complying with the procedural aspects of the CEQ regulations that implement NEPA.

By contrast, it appears that NRC Staff intends to rely on the CEQ regulations that establish the procedures for tiering a site-specific NEPA analysis back to a Generic Environmental Impact Statement. NRC Staff at 4, 42 n.52, Powertech Response at 53 n.15 (*citing* CEQ tiering regulations). NRC Staff apparently intends to prepare an EIS which "tiers" back to relevant portions of the GEIS, assuming *arguendo* that the GEIS were a lawfully prepared document that contained any relevant or useful analysis. *Accord* NUREG-1748 ("Tiering (defined in [CEQ regulations at] 40 CFR 1508.28) is a procedure by which more specific or more narrowly focused environmental documents can be prepared without duplicating relevant parts of previously prepared, more general, or broader documents."). The Tribe reserves the right to amend or supplement its contentions to address any specific shortcoming which the NEPA analysis may contain, until such time as the NEPA analysis is conducted, but the ability to supplement or amend these contentions has no bearing on the ripeness of the present contention.

NRC Staff's attempts to remedy its violation of NEPA's procedural mandates by suggesting that the Tribe should address the Powertech proposal in forums outside of these proceedings, as a member of the public, with no formal role in these proceedings. NRC Staff at 42. However, Contention 8 establishes that NEPA, as implemented by CEQ and NRC regulations and enforced by federal courts, requires that NRC conduct itself in accordance with

the informed decisionmaking and public participation requirements of NEPA, particularly where the Tribe seeks to rely on information in the NEPA analysis to inform its own decisionmaking and participation. Lesser alternatives will not suffice to satisfy legal mandates or the government-to-government relationship afforded Tribes. The failure of NRC Staff to respect either is evinced by the RAI, where NRC Staff continues to expend significant federal resources working with Powertech to review and repair a deficient Application but has elected to delay the NEPA analysis which would benefit the Tribe's ability to participate in these federal agency proceedings.

Here, long after the close of opportunity to file contentions not subject to discretionary denial, the EIS will presumably contain additional information and data relevant to the Tribes' present ten contentions.

> The EIS should include a description of site-specific and regional data on the characteristics of surface and ground water quality in sufficient detail to provide the necessary data for other reviews dealing with water resources. The EIS should include a discussion of water quantity available for use and possible conflicts between Federal, State, regional, local and American Indian tribe, in the case of a reservation, water-use plans, policies, and controls for the site.

NUREG-1748 at 5-8. Further, the NRC regulations contemplate that the Tribe will play a special role in the preparation of the EIS itself.

> The NRC's regulations require that any affected Indian tribe be invited to participate in the scoping process for an EIS. During scoping meetings for an EIS, for example, staff will solicit input on environmental issues, and the affected communities should be encouraged to develop and comment on possible alternatives to the proposed agency action.

Id. at C-5.

> Potentially interested or affected groups, including civic, American Indian tribes, ethnic, special interest groups, and local residents may have special concerns about the proposed action. Identifying those groups and understanding their interests are effective tools for

> emphasizing important environmental issues and de-emphasizing less important issues. The NRC encourages enhanced public participation in agency decisions.

Id. at 4-11. Based on the NRC's own Guidance, a Board decision to require the Tribe to participate in these proceedings without the benefit of a full NEPA analysis, including information on impacts of alternatives developed by the Tribe during a NEPA analysis, is material to the question of whether procedures used in these proceedings would violate the timing and informed decisionmaking requirements of NEPA.

Last, the Staff and Powertech ignore a third, important requirement of the CEQ regulations regarding timing, including the requirement that Staff recommendations be informed by NEPA analysis**.** The applicable regulations state, in relevant part:

> An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (Sec. 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (Secs. 1500.2(c), 1501.2, and 1502.2). [. . .]

40 C.F.R 1502.5 (Timing).

Here, without conducting any NEPA analysis, NRC Staff has recommended that each and every one of the Tribes' well-pled contentions be rejected and requests that the Board reach the same conclusion. A violation of NEPA has already occurred where NRC Staff's recommendations are not informed by any NEPA analysis that considers the site specific issues of the Powertech application. 42 U.S.C. § 4332(C). Should the Board adopt the Staff's position, it would be the final word on the ability of the Tribe to plead admissible contentions that the Board must consider admitting as a matter of right. Current interpretations make the admission

of later contentions subject to the discretion of the Board. See *Crow Butte*, CLI-09-09, 69 NRC at 348–51; *Crow Butte*, CLI-09-12, 69 NRC at 566.

Regardless, it is of no consequence that the Tribe may seek discretionary admission of additional contentions at some later date. What does matter is that the Tribe has been required to plead ten contentions without benefit of NEPA analysis, and NRC Staff has taken action on these contentions without conducting any NEPA analysis. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (U.S. 1989)(setting out "NEPA's 'action-forcing' purpose"). Compounding this problem is that NRC Staff has recommended that the Board make final rulings that prohibit admission of the Tribe's contentions, without the benefit of the required NEPA analysis.

Contention 8 provides a specific statement and explanation of a legal issue material to this licensing proceeding which has allowed the NRC Staff and Powertech to mount a premature attack on the merits of Contention 8. The Tribe respectfully requests that the NEPA timing issues in Contention 8, as applied to the facts and circumstances of this proceeding, be admitted.

Contention 9: Failure to Consider Connected Actions

Neither NRC Staff nor Powertech provides any specific authority to rebut the Tribe's Contention 9, which alleges that NRC Staff and the Environmental Report have failed to comply with NEPA regarding actions being taken by other federal agencies. Moreover, the procedural regulations addressing connected actions and the participation of other agencies as cooperating agencies in the NEPA process are explicitly recognized: "the Commission will [f]ollow the provisions of 40 CFR 1501.5 and 1501.6 relating to lead agencies and cooperating agencies [. . .]." 10 CFR 51.10(b)(2). Neither NRC Staff nor Powertech takes issue with the applicability of the specific legal authority on which Contention 9 is based. Petition at 37 *citing* 40 C.F.R. §

1508.25. Although mischaracterized by both NRC Staff and Powertech, Contention 9 is a brief, concise, and specific statement of a material legal issue: CEQ regulations impose a duty on the NRC to invite other agencies to participate as cooperating agencies and require compliance with the CEQ procedural requirement that all connected actions be analyzed in a single EIS.

NRC Staff concedes that Contention 9 is material, but argues that is contention is prematurely pled. NRC Staff at 42-43. The NRC Staff disregards the plain language of 10 C.F.R. § 2.309(f)(2), which requires that NEPA contentions be plead at the earliest stages of the proceedings, even though NRC Staff does not intend to prepare an EIS until the latest stages of the proceedings. NRC Staff's "ripeness" argument is frivolous and directly contrary to the very regulations it relies upon.

For its part, Powertech mocks the Tribe's contention by alleging an **"**apparent failure to understand that the ISR (sic) process is regulated by several different regulatory programs." Powertech at 56. Contrary to Powertech's condescending slur, it is precisely the regulation and involvement of numerous agencies at the earliest stages of these proceedings that provides the basis for Contention 9. Moreover, Powertech is wrong when it states that the "NRC regulations do not provide for any coordination requirements on a license application such as the one submitted by Powertech unless an agency requests permission to be a 'coordinating' or 'cooperating agency.'" Powertech at 56.

Here, Powertech asserts that other agencies must request cooperating agency status. Powertech is wrong. Instead, NEPA compliance requires that NRC, as the "[l]ead agency **shall [r]equest** the participation of each cooperating agency in the NEPA process at the **earliest possible time**." 40 C.F.R. §1506(a)(emphasis supplied). This requirement is explicitly adopted by the very NRC regulations cited by Powertech. 10 CFR 51.10(b)(2). On response, NRC Staff

does not allege that it has requested cooperating agency status and Powertech has not provided information in its Environmental Report regarding these companion proceedings, which the Tribe contends are "connected actions." Petition at 36-37. No serious argument is made to rebut this contention.

The Tribe respectfully submits that Contention 9 is a timely submitted, specific, brief, and concise statement of a legal issue where there is a genuine dispute of law, and that Contention 9 must be admitted.

Contention 10: The Environmental Report does not Examine Impacts of a Direct Tornado Strike

Both the NRC Staff and Powertech concede that the Environmental Report does not examine impacts of a direct tornado strike.

Powertech, but not NRC Staff, suggests that this reasonably foreseeable impact is not material based on the argument that 40 C.F.R. § 1502.22(b)(3) does not apply to the NRC. Powertech's argument is without basis and contradicts its concession that all procedural requirements of the CEQ regulations, and substantive requirements that do not contradict NRC expertise do apply to the NRC proceedings. See Powertech at 53

Further, the fact that Contention 10 contains sufficient explanation and information is confirmed by Powertech's unsubstantiated allegation that only one tornado has struck Edgemont, South Dakota area over a 15 year period. However, Powertech's allegation is demonstrably wrong. Publicly available information from the federal National Climatic Data Center indicates that between 1950 and 2010, there were nine reported tornadoes in Custer County and twenty-eight tornadoes in Falls County, which resulted in property damage in excess of $1 million. See Exhibit 3 (Fall River County) Exhibit 4 (Custer County). Contention 10 has therefore provided

sufficient information to show that the risk of a tornado strike, and the resulting impacts, are a material issue in the present proceedings. The NRC Staff attempts to rebut site-specific information provided by the Tribe by resting on a generic bare assertion in NUREG-6733/CR that the risk is of a tornado strike is "low." NRC Staff at 44. The NRC Staff claim no meteorological expertise and rely on no site-specific information in making its unsubstantiated attack on the merits of Contention 10.

In direct contrast to the specificity NRC Staff demands of the Tribe's contentions, NRC Staff takes a "good-enough" approach to Powertech's application relying on passing mention of severe weather in the Technical Report, which relies entirely on a generic statement in NUREG/CR 6733. NRC Staff at 44-45. Likewise, Powertech confirms that the only information regarding severe weather is the recitation of generic information contained in "NRC Staff's programmatic assessment in NUREG- 6733/CR" and points to no site-specific information in either the Environmental Report or the Technical Report on which it relies. Powertech at 58. Powertech's attempt to rehabilitate the lack of information in the Environmental Report simply concedes the relevance of severe weather and provides further basis for the admissibility of Contention 10.

Neither Powertech nor Staff takes issue with the reliability of the South Dakota-specific information contained in Contention 10. Instead, Powertech relies on the misleading argument that Oklahoma's tornado frequency is "irrelevant to this Proceeding." Powertech at 59. Here, the Tribe did not rely on the Oklahoma information to provide information regarding tornado frequency in South Dakota. Instead, the proffered NRC records show that a tornado has struck the Fansteel Facility, thereby providing unchallenged and unrebuttable evidence that a tornado strike presents a foreseeable risk of damage to an NRC licensed facility. The Tribe again

declines to engage in merits arguments as to the full extent of the risk where it is the duty of the Applicant and NRC Staff, in the Environmental Report and the NEPA analysis respectively, to provide this information. Passing mention in a Technical Report of a generic guidance document cannot substitute for information required in an Environmental Report and site-specific NEPA analysis where the National Oceanographic Atmospheric Administration has advised that everyone in this region should "[h]ave a storm safety plan and follow safety guidelines to protect yourself from these hazards." See http://www.crh.noaa.gov/unr/?n=svrtor (NOAA National Weather Service information for Black Hills region of South Dakota).

Contention 10 provides a specific, brief, concise statement and explanation of a genuine dispute which is based on sufficient information to satisfy the NRC requirements for admissibility. 10 C.F.R. §2.309(f)(1).

Conclusion

For the reasons set forth herein, the Board should rule in favor of standing for the Tribe to intervene in this matter, and should admit all contentions.

Respectfully Submitted,

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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
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 14th day of May, 2010, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

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