ORAL ARGUMENT NOT YET SCHEDULED
No. 17-1059

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OGLALA SIOUX TRIBE,
Petitioner,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
Respondents,
and
POWERTECH (USA), INC.,
Intervenor.

On Petition for Review of an Order by the United States Nuclear Regulatory Commission

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), respondents United States Nuclear Regulatory Commission and the United States of America submit this Certificate as to Parties, Rulings, and Related Cases.

A. Parties, Intervenors, and *Amici*

The petitioner is the Oglala Sioux Tribe. The respondents are the United States Nuclear Regulatory Commission (NRC) and the United States of America. Intervenor for respondents is Powertech (USA), Inc. There are no *amici*.

B. Rulings Under Review

The Oglala Sioux Tribe's petition for review states that it seeks review of the following items issued by NRC:

1. NRC's January 2014 Final Environmental Impact Statement for the Dewey-Burdock *In-Situ* Recovery Project in Custer and Fall River Counties, South Dakota;
2. NRC's April 8, 2014, Record of Decision for the Dewey-Burdock Uranium *In-Situ* Recovery Project;
3. NRC's April 8, 2014, Materials License No. SUA-1600, Docket No. 040-09075, issued to Powertech (USA), Inc.; and

4. NRC's December 23, 2016, Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-16-20.

C. Related Cases

There are no related cases.

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GLOSSARY

EIS	Environmental Impact Statement
JA	Joint Appendix
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NRC	Nuclear Regulatory Commission

JURISDICTIONAL STATEMENT

The Hobbs Act grants courts of appeals jurisdiction over petitions for review of "final orders" issued in licensing proceedings before the Nuclear Regulatory Commission (NRC or Commission).[1] Petitioner Oglala Sioux Tribe (Tribe) seeks review of an interlocutory order issued by the Commission in an ongoing adjudicatory proceeding.[2] As this brief explains, the challenged order is non-final. Accordingly, this Court lacks jurisdiction under the Hobbs Act over the petition for review.

STATEMENT OF ISSUES

1. Is an interlocutory order of the Commission expressly holding the proceeding open and leaving certain claims unresolved a final order providing this Court jurisdiction over the entire licensing decision?

2. Was the Commission legally required to vacate an already-issued license pending resolution of procedural deficiencies identified regarding National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) compliance, where the Tribe demonstrated no irreparable harm and an effective

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[1] 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A), (b)(1). We use "NRC" to refer to the agency and "Commission" to refer to the 5-member body that manages the agency.

[2] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 N.R.C. 219 (Dec. 23, 2016) (CLI-16-20) (JA___).

license preserves the enforceability of existing legal protections for cultural resources?

3. Did the Commission reasonably affirm decisions by NRC's Atomic Safety and Licensing Board (Board) finding that the Tribe's concerns about byproduct material and site-specific scoping raised no genuine disputes material to NRC's NEPA review and licensing decision and thus did not warrant an evidentiary hearing?

4. Did the Commission reasonably affirm the Board's rulings that NRC's Environmental Impact Statement (EIS) sufficiently addressed boreholes and faults, baseline groundwater quality, and mitigation?

STATUTES AND REGULATIONS

The text of pertinent statutes and regulations is set forth in a separate addendum filed contemporaneously with this brief.

STATEMENT OF THE CASE

I. Nature of the Case

This petition for review concerns NRC's review of an application by Powertech (USA), Inc., for a license to possess and use uranium source and byproduct material in connection with a proposed *in situ* uranium recovery facility in Custer and Fall River Counties in South Dakota. After Powertech submitted an application in 2009, NRC's staff conducted an extensive technical and

environmental review, including preparing a draft EIS for public comment, a final EIS, a safety evaluation, and a Record of Decision. Based on this review, the NRC staff provisionally licensed this facility in April 2014, subject to the results of the Tribe's administrative challenge to the license.

The Board denied the Tribe's request to stay the license's effectiveness and held a three-day evidentiary hearing in August 2014 on the Tribe's allegations of NEPA and NHPA violations. In 2015, the Board issued a decision ruling in the NRC staff's and Powertech's favor on all but two of the issues presented by the Tribe (known in these proceedings as "contentions").[3] On two contentions, the Board ruled that the NRC staff had not fully complied with the NHPA's requirement to consult with the Tribe regarding historic properties, or with NEPA's requirement to address potential impacts to the Tribe's cultural, religious, and historic resources. But the Board declined to suspend Powertech's license. Instead, it retained jurisdiction over the adjudicatory proceeding and mapped out a process for the NRC staff, in consultation with the Tribe, to remedy the identified deficiencies and obtain final Board disposition of the Tribe's contentions.

[3] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-15-16, 81 N.R.C. 618 (2015) (LBP-15-16) (JA___).

The Tribe and other parties (including another group of intervenors that is not before this Court) filed petitions for review of the Board decision with the Commission.[4] The Commission then issued the decision that the Tribe asks this Court to review. The Commission generally upheld the Board's rulings, including its decision to keep the contested adjudicatory proceeding open, without suspending the license in the interim, to permit the parties to work toward resolution of the Tribe's remaining NHPA and NEPA contentions. The latter process remains ongoing, though the NRC staff recently filed a motion for summary disposition with the Board.

II. Factual and regulatory background concerning *in situ* uranium recovery

A. *In situ* uranium recovery and relevant NRC regulations

In situ uranium recovery, a form of uranium milling, involves injection of an oxidizing solution called a "lixiviant" through a well into an ore body. The lixiviant oxidizes and dissolves the uranium, and the resulting uranium-rich solution is pumped back towards the surface via recovery wells.

The Atomic Energy Act of 1954 authorizes NRC to issue licenses to qualified applicants for the receipt, possession, and use of byproduct and source

[4] The other intervenors were referred to as the "Consolidated Petitioners" or "Consolidated Intervenors."

material resulting from the removal of uranium ore from its place in nature, which includes *in situ* uranium recovery. NRC regulations impose health and safety standards on uranium recovery operations, including *in situ* operations such as Powertech's.[5] NRC regulations also require NRC to prepare an EIS prior to issuing an *in situ* recovery facility license.[6] To support NRC's own environmental analysis, *in situ* recovery facility license applicants must submit an "Environmental Report" addressing a range of environmental impact issues regarding the proposed facility.[7]

B. NRC's NEPA review for *in situ* uranium recovery licensing

In situ uranium recovery is widely used in certain parts of the western United States.[8] To help streamline and increase the efficiency of its NEPA reviews for these facilities, NRC has developed a Generic (i.e., programmatic) EIS specific to *in situ* uranium recovery. In doing so, NRC followed the same general process used for a traditional EIS, including engaging in a public scoping process and

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[5] *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 N.R.C. 3, 8 (1999) (discussing applicability of 10 C.F.R. Part 40 provisions to *in situ* recovery).

[6] 10 C.F.R. § 51.20(b)(8).

[7] *See id.* §§ 40.31(f), 51.60(b)(1)(ii), 51.45.

[8] CLI-16-20 at 3 (JA___).

publishing a draft Generic EIS for public comment.[9] NRC issued its final Generic EIS in 2009, to address in advance those environmental impact issues that are similar across *in situ* recovery sites while also identifying issues requiring further site-specific consideration in the context of a particular license application.[10] Thus, while a site-specific EIS (referred to at NRC in this context as a "supplemental" EIS, meaning a site-specific supplement to the Generic EIS) is still required for any application for a new *in situ* recovery facility, that supplemental EIS would use the Generic EIS as a starting point and rely on its analysis as appropriate.[11]

C. Statutory and regulatory requirements relating to NRC hearings

Section 189a. of the Atomic Energy Act provides that in any NRC proceeding for the "granting, suspending, revoking, or amending" of a license, the Commission must grant a hearing "upon the request of any person whose interest may be affected by the proceeding."[12] A hearing request must demonstrate the petitioner's standing and proffer at least one admissible "contention" that sets forth

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[9] Generic EIS at G-1 – G-4 (JA___).

[10] CLI-16-20 at 3 (JA___).

[11] *Id.* Even where the Generic EIS purports to address an issue thoroughly, if new and significant information later arises regarding the issue, site-specific supplemental EISs must address it. *Id*.

[12] 42 U.S.C. § 2239(a).

with particularity the issue(s) the petitioner seeks to raise.[13] Contentions must be based on documents or other information available at the time the petition is filed, and environmental contentions arising under NEPA must be based (at least initially) on the license applicant's Environmental Report.[14]

Once the NRC staff publishes a draft or final EIS, NRC permits "migration" of any already-admitted contentions to successive environmental analyses when the information that is the subject of the contention remains substantially the same.[15] NRC regulations also require that petitioners timely file new or amended contentions where the information in the draft or final EIS differs materially from information that was previously provided, should they want to continue to pursue those contentions.[16]

Once the staff's safety and environmental reviews are complete, the staff is "expected to promptly issue its approval or denial of the application, or take other appropriate action," even if adjudicatory challenges to the license application or

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[13] *See* 10 C.F.R. § 2.309.

[14] *Id.* § 2.309(f)(2).

[15] *See* LBP-15-16 at 630-32 (JA___); *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-13-9, 78 N.R.C. 37, 46-47 (2013) (LBP-13-9) (JA___).

[16] 10 C.F.R. § 2.309(c) (standards for contentions filed after the initial deadline), 2.309(f)(2).

the associated NEPA review remain pending at the agency.[17] The NRC staff must notify the presiding officer and parties in the adjudication explaining why, in the staff's view, "the public health and safety is protected and . . . the action is in accord with the common defense and security despite the pendency of the contested matter."[18] A pending adjudication renders the license effectively provisional, as the ongoing adjudication could potentially result in modification or revocation of the already-issued license.[19]

III. Statement of Facts

A. Powertech's license application and procedural rulings on the Tribe's contentions

After Powertech applied for an NRC materials license for an *in situ* uranium recovery facility in 2009,[20] the Tribe filed a hearing request and petition to

[17] 10 C.F.R. § 2.1202(a). Thus, the NRC staff would issue an *in situ* recovery facility license only after completing, *inter alia*, a final site-specific supplemental EIS and providing the traditional NEPA forms of public involvement when developing it, including the opportunity to comment on a draft EIS. *See* LBP-15-16 at 630-31 (JA___).

[18] 10 C.F.R. § 2.1202(a).

[19] *See* LBP-15-16 at 638 n.104 (JA___); *see also id.* at 679 (Board amending Powertech's license after evidentiary hearing to add new license condition and referencing similar modification in another recent case) (JA___).

[20] *Id.* at 626-27 (JA___).

intervene.[21] After a two-day oral argument, the Board granted the Tribe's hearing request and intervention petition. It found four of the Tribe's contentions admissible for evidentiary hearing, rejecting others for failing to meet NRC's contention admissibility standards.[22] The Tribe's contentions admitted for evidentiary hearing at that stage included, as relevant here:

- Contention 1, challenging the application as "deficient because it fails to address adequately protection of historical and cultural resources" under the NHPA and NEPA;[23]
- Contention 2, alleging that the application failed "to include necessary information for adequate determination of baseline ground water quality"; and

[21] *Id.* at 628 (JA___).

[22] *Id.* at 629-30 (JA___); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 N.R.C. 361, 419-442, 444 (2010) (LBP-10-16) (JA___, ___).

[23] The Board later merged this contention with two similar contentions filed by the Consolidated Intervenors that the Board had also admitted for hearing, yielding two contentions labeled "1A" (alleging insufficient analysis of historic and cultural resources under NEPA and the NHPA) and "1B" (alleging insufficient consultation under the NHPA). LBP-13-9 at 48-51, 113 (JA___, ___). Accordingly, going forward, we refer to Contentions 1A and 1B.

- Contention 3, alleging that the application failed "to include adequate hydrogeological information to demonstrate ability to contain fluid migration."[24]

The Tribe's contentions found *inadmissible* for an evidentiary hearing included a contention alleging "[f]ailure to include in the Application a reviewable plan for disposal of [11e.(2)] Byproduct Material."[25] In deeming this contention inadmissible, the Board found that the Tribe had not identified any NRC regulation requiring a final disposal plan before *in situ* recovery facility license issuance and cited NRC's established practice of using license conditions to prohibit a newly licensed *in situ* recovery facility from commencing operations until a disposal plan is in place.[26] The Board did, however, suggest that the Tribe could potentially challenge the adequacy of any staff analysis of the environmental impacts of byproduct-material disposal in the forthcoming EIS.[27]

After the NRC staff issued for public comment the draft site-specific Supplemental EIS for the Powertech application, the Tribe filed new contentions

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[24] LBP-10-16 at 419-26 (JA___).

[25] *Id.* at 432-35 (JA___). Section 11e.(2) of the Atomic Energy Act, 42 U.S.C. § 2014(e)(2), is the relevant portion of that Act's "byproduct material" definition.

[26] LBP-10-16 at 432-35 (JA___).

[27] *Id.* at 435 (JA___).

challenging this draft and reiterated previously filed contentions that had challenged Powertech's Environmental Report.[28] The Board migrated the Tribe's prior admitted contentions and admitted for hearing a new Contention 6 challenging NRC's alleged failure to adequately describe or analyze proposed mitigation measures.[29]

The Tribe also unsuccessfully tried to renew its contention objecting to the lack of a disposal plan for byproduct material.[30] The Board found that both the draft Supplemental EIS and the Generic EIS analyzed potential impacts from the disposal of byproduct material, and that the draft license would require a disposal plan prior to operations.[31] The Board observed that the Tribe did not "substantively dispute[]" these analyses or address the draft license condition, and it found the contention inadmissible for hearing.[32]

The Board also held inadmissible for hearing a new Contention 8 proposed by the Tribe, which challenged the lack of a formal EIS-scoping process for the

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[28] LBP-15-16 at 630 (JA___); LBP-13-9 at 42-43, 48-101 (JA___, ___).

[29] LBP-13-9 at 48-60, 65-69. (JA___, ___).

[30] *Id.* at 69-75 (JA___).

[31] *Id.* at 71-72 (JA___).

[32] *Id.* (citing 10 C.F.R. § 2.309(f)(1)(vi)).

Powertech site-specific Supplemental EIS. The Board found that this contention presented no genuine dispute of material fact, ruling that NRC regulations do not require scoping for site-specific EISs that are supplements to generic EISs.[33]

After consideration of public comments, the NRC staff issued the final Supplemental EIS for the Powertech project in January 2014.[34] This prompted another round of filings by the Tribe.[35] The Board migrated the Tribe's NEPA-related contentions previously admitted for hearing as challenges to the final Supplemental EIS (rather than the draft).[36] The Board declined to admit for hearing any of the Tribe's new contentions, including an updated version of the Tribe's already-twice-rejected contention regarding disposal of byproduct material (which the Board rejected this time for the same reasons it had before).[37]

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[33] *Id.* at 74-75 (JA___). The Board also referred to the substantial scoping and public comment processes conducted for the *in situ* recovery Generic EIS. *Id.* at 75 (JA___).

[34] LBP-15-16 at 631 (JA___).

[35] *Id.* at 631-32 (JA___).

[36] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-14-5, 79 N.R.C. 377, 385-92 (2014) (LBP-14-5) (JA___).

[37] LBP-15-16 at 631-32 (JA___); LBP-14-5 at 396-97 (JA___).

B. NHPA consultations

Section 106 of the NHPA establishes a legal regime to ensure federal agencies take into account their activities' effects on "historic properties."[38] Section 106 mandates a "consultation" process, wherein agencies identify consulting parties (including Indian Tribes), identify historic properties in consultation with those parties, determine any adverse effects the federal activity will have on identified properties, and determine how to avoid, minimize, or mitigate those effects.[39] NEPA does not mandate consultation in the same way, but it requires consideration of "cultural resources" (a broader category than the NHPA's "historic properties").[40] Agencies often coordinate their NEPA and NHPA reviews.[41] The NHPA process culminates in an agreement—which in the instant case took the form of a "Programmatic Agreement"—signed by the federal

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[38] 54 U.S.C. § 306108.

[39] *See generally* 36 C.F.R. Part 800 (implementing NHPA Section 106).

[40] *See* 40 C.F.R. § 1508.27(b)(3).

[41] *See* CEQ and ACHP, "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106," *at* *http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf*; *see also* LBP-15-16 at 649 (discussing NEPA/NHPA coordination regarding the Powertech application) (JA___); Supplemental EIS at A-162 (JA___).

agency and certain other parties that specifies how adverse effects on historic properties will be avoided, minimized, or mitigated.[42]

During the years between receiving Powertech's application and issuing Powertech's license, the NRC staff conducted a range of consultative activities to identify historic properties, as well as other cultural resources subject to consideration under NEPA, including several efforts to engage with the Tribe.[43] The Tribe ultimately declined to participate in the NRC staff's plan to obtain resource surveys from various tribes, taking issue with the parameters of the survey activities.[44] The staff did, however, obtain surveys from other tribes, and it developed a final Programmatic Agreement detailing how historic properties will be protected at the site.[45]

The Advisory Council on Historic Preservation, the agency charged with administering the NHPA, participated in the Programmatic Agreement's development. On April 7, 2014, the Council signed the agreement and notified

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[42] *See* 36 C.F.R. § 800.6(b)-(c); NRC-018-A (JA___) (Programmatic Agreement).

[43] *See* LBP-15-16 at 644-49 (JA___); *see also, e.g.*, NRC-015 (JA___) (timeline of NRC staff tribal outreach efforts); NRC-016 (JA___) (Letter from Tribe commenting on draft Programmatic Agreement).

[44] LBP-15-16 at 648 (JA___).

[45] *Id.* at 648-49 (JA___); NRC-018-A (JA___).

NRC—a step that formally "complete[d] the requirements of Section 106 of the [NHPA] and the [Council's] regulations at 36 CFR Part 800."[46]

C. Issuance of Powertech's license

On April 8, 2014, with the final Supplemental EIS and safety evaluation report for the application complete and the Final Programmatic Agreement executed, the NRC staff issued a license to Powertech for the proposed facility, accompanied by a Record of Decision.[47] The license contains a range of enforceable conditions, including conditions:

- binding Powertech to comply with commitments made to NRC during the application process;
- binding Powertech to comply with the Programmatic Agreement;
- prohibiting Powertech from commencing or continuing operations before demonstrating to NRC that a valid byproduct-material disposal agreement with a licensed disposal facility is in place; and

[46] NRC-018-D (JA___).

[47] LBP-15-16 at 632 (JA___); NRC-012 (license) (JA___); NRC-011 (Record of Decision) (JA___).

- requiring Powertech to monitor for "excursions" of lixiviant and take prompt action upon finding one.[48]

The Tribe and the Consolidated Intervenors each filed motions to stay the license's effectiveness, which the Board granted on a temporary basis pending oral argument.[49] After argument on the motions, however, the Board lifted the temporary stay and denied the stay requests.[50] While the Board accepted the premise that "[h]arm to tribal cultural resources does constitute irreparable injury" in theory, it found that "the intervenors' allegations and their supporting declarations lack the specificity needed to demonstrate a serious, immediate, and irreparable harm to cultural and historic resources."[51] The Board also cited the intervenors' failure to "address[] the argument," raised by the NRC staff in response to the stay motions, "that the Programmatic Agreement protects the cultural and historic resources in the area."[52]

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[48] NRC-012 at 1, 6, 10-12 (JA___, ___, ___).

[49] LBP-15-16 at 632 (JA___).

[50] *Id.*; Order (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600) (unpublished) (May 20, 2014) (Stay Denial Order) (JA___).

[51] Stay Denial Order at 6 (JA___).

[52] *Id.*

Moreover, the Board found that even if the Tribe had demonstrated irreparable harm, the requested stay would not remedy it.[53] The Board explained: "At oral argument, counsel for Powertech stated, without contradiction, that the ground disturbing work contemplated for the next few months could be accomplished without the NRC license. Therefore, staying the license would not address the intervenors' concerns nor would it protect any cultural or historic sites."[54] The Board also noted the NRC staff's observation that "having the license remain in effect was more protective because the staff could then take enforcement actions should it find violations of the NRC license or the Programmatic Agreement."[55]

The Board noted that an interlocutory appeal to the Commission of the stay denial was available where the decision "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review" filed later in the proceeding (e.g., after a Board merits decision following the evidentiary hearing).[56] But no interlocutory appeal was filed.

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[53] *Id.* at 6-8 (JA___).

[54] *Id.* at 7 (footnote omitted) (JA___).

[55] *Id.* at 7-8 (JA___).

[56] 10 C.F.R. § 2.341(f)(2)(i); *see* Stay Denial Order at 10 (JA___).

D. Post-hearing Board and Commission decisions

After denying the stay requests, the Board held an evidentiary hearing on the contentions it had admitted for hearing. Subsequently, the Tribe filed two new contentions, including one alleging that the NRC staff must analyze newly disclosed data from Powertech regarding boreholes at the site as part of its NEPA analysis.[57]

On April 30, 2015, the Board issued a "Partial Initial Decision."[58] The Board ruled against the Tribe on the merits of several contentions.[59] The Board ruled that the Supplemental EIS sufficiently analyzed baseline groundwater quality.[60] It generally found the analysis in the EIS of groundwater migration impacts, including those related to boreholes and faults, to be sufficient. The Board did, however, impose an additional condition on Powertech's license

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[57] LBP-15-16 at 634, 704-05 (JA___, ___).

[58] *Id.* at 626 (JA___); *see also* CLI-16-20 at 30 ("By its terms, the Board presented LBP-15-16 as a 'partial initial decision' that left the ultimate resolution of Contentions 1A and 1B for a future decision.") (JA___).

[59] LBP-15-16 at 659-97 (JA___). Not every Tribe contention ruled upon in LBP-15-16 is involved in the instant case.

[60] *Id.* at 665-66 (JA___).

expressly requiring Powertech to identify and plug boreholes.[61] And the Board found both that the Supplemental EIS contained "extensive mitigation discussions in which risks to the environment have been thoroughly analyzed and license conditions imposed to mitigate those risks," and that the Tribe's arguments that mitigation discussions were insufficiently detailed "overlook[ed]" large chunks of this EIS analysis.[62] The Board also found no deficiency in the Supplemental EIS's discussion of mitigation plans that were not yet fully developed, noting in particular the ongoing monitoring requirements imposed by Powertech's license to verify the mitigation measures' success and to alert Powertech and NRC if additional mitigation steps may be necessary.[63]

Regarding Contentions 1A and 1B, relating to historic, cultural, and religious resources, the Board found inadequate the NRC staff's consultation with the Tribe under the NHPA and, relatedly, the final Supplemental EIS's discussion of environmental effects on the Tribe's resources.[64] Thus, the Board stated it

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[61] *Id.* at 676-81 (JA___). The Board also acknowledged that Powertech had already committed to undertake this task. *Id.* at 679 (JA___).

[62] *Id.* at 690-92 (JA___).

[63] *Id.* at 694-97 (JA___).

[64] *Id.* at 642-58 (JA___); *see also* CLI-16-20 at 31-32 (summarizing Board ruling) (JA___).

would "retain jurisdiction of this case pending the NRC Staff's curing of the deficiencies in Contentions 1A and 1B" and directed the NRC staff to submit monthly status reports to the Board "describing the consultations with the Oglala Sioux Tribe and the [progress] being made in identifying Sioux tribal cultural, historic, or religious sites impacted by the Powertech project."[65] The Board further ordered that the NRC staff's "final monthly report shall . . . include an agreement reflecting the parties' settlement of their dispute regarding the contentions or a motion for summary disposition of Contentions 1A and 1B."[66]

The Board declined to suspend Powertech's license pending this remedial work regarding Contentions 1A and 1B, reasoning that the Tribe "bears some responsibility for lack of information on this issue, and did not participate in the April 2013 field survey effort" to identify religiously, culturally, and historically significant sites.[67] However, the Board stated: "In the interim, if the [Tribe] can identify specific cultural, historic, or religious sites that are subject to immediate and irreparable harm by the Powertech project, [it] may, within 10 days of this

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[65] LBP-15-16 at 658 (JA___).

[66] *Id.* at 710 (JA___).

[67] *Id.* at 658 (JA___).

Order, petition this Board for a stay of the license's effectiveness, as may be necessary to halt ground disturbing activities."[68]

The Tribe did not file a stay request, instead appealing various Board rulings to the Commission.[69] The Commission issued an interim ruling on December 23, 2016.[70] The Commission upheld the Board's decision not to suspend Powertech's license after the Contention 1A and 1B rulings. Relying on federal case law, the Commission reasoned that voiding the licensing action based on the Board's finding noncompliance with certain NEPA and NHPA procedural requirements is not required in the absence of demonstrated harm or prejudice.[71] The Commission explained that "the Tribe has not articulated any harm or prejudice; in fact, it did not request a stay of the effectiveness of the license" following the Board's ruling on Contentions 1A and 1B, "despite the Board's invitation for it to do so."[72] Seeing no legal error or other substantial question raised by the Tribe, the Commission denied the Tribe's petition for review regarding these contentions.

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[68] *Id.*

[69] CLI-16-20 at 5-8 (JA___).

[70] *Id.*

[71] *Id.* at 33 (JA___).

[72] *Id.*

The Commission also upheld the Board's rulings on the merits of Contentions 2, 3, and 6, as well as the Board's rulings denying hearings on the Tribe's byproduct-material disposal and NEPA-scoping contentions, finding that the Tribe had raised no "substantial questions" that would cause the Commission to second-guess the Board's various findings and legal rulings.[73] The Commission did identify one potential error regarding the Board's findings on Contention 6 (challenging the agency's review of mitigation measures)—specifically, that the Board's finding in the context of Contention 6 that mitigation was adequately analyzed seemed inconsistent with its finding on Contention 1A that the mitigation analysis for cultural, historical, and religious resources was inadequate under NEPA.[74] But given that "the mitigation measures for cultural resources are covered by Contentions 1A and 1B," which remained pending and unresolved, the error was "harmless" and a separate ruling was unnecessary.[75] The Commission also identified a legal error in the Board's analysis of the Tribe's scoping contention, ruling that NRC regulations do *not*, in fact, allow site-specific scoping to be skipped merely because an associated generic EIS had already undergone

[73] *Id.* at 43-45, 46-49, 54-57 (JA___, ___, ___).

[74] *Id.* at 56 (JA___).

[75] *Id.* at 56-57 (JA___).

scoping; but the Commission found the error harmless in this case, given the extensive public engagement that had occurred (both site-specific and on the generic environmental review).[76]

Because the Commission upheld the Board's decision to leave the adjudicatory proceedings open to allow resolution of Contentions 1A and 1B, consultation efforts between the NRC staff and the Tribe have continued since, with the NRC staff filing monthly status updates with the Board.[77] On August 3, 2017, the NRC staff filed a motion for summary disposition with the Board, arguing that NRC has now fully complied with the NHPA and NEPA.[78] The Tribe and Powertech are scheduled to file responses by September 1, 2017.

SUMMARY OF ARGUMENT

The Tribe seeks review of a non-final NRC order. Plainly, the contested adjudicatory proceeding addressing the Tribe's challenges to the Powertech licensing action remains open and pending at NRC. The Board found that the Tribe was *correct*, in its Contentions 1A and 1B, that NRC compliance with the NHPA and related NEPA requirements involving Tribe resources was inadequate.

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[76] *Id.* at 20-23 (JA___).

[77] *See, e.g.,* NRC Staff Hearing File and Status Update (April 2017) (JA___).

[78] NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (August 3, 2017) (JA___).

Accordingly, the Board, as upheld by the Commission, expressly left the proceeding open and directed the NRC staff to consult with the Tribe to move toward resolving these deficiencies, so that Contentions 1A and 1B could be finally resolved while allowing the Tribe to remain a party to their resolution. To the extent the Tribe suggests that Powertech's existing license mandates judicial review now, the Tribe has had the right to seek a stay of the Powertech license from NRC and to petition for immediate review should it disagree with an NRC stay denial decision. Instead, the Tribe seeks full merits review of the NRC licensing decision while in active administrative litigation on that very decision at NRC. This petition is therefore incurably premature, and the Court should dismiss it for lack of jurisdiction.

If, however, the Court finds jurisdiction, the Court should still rule in the Federal Respondents' favor. The Tribe's arguments against the Board and Commission adjudicatory decisions consistently fail to respond to meaningfully—and often do not even acknowledge—the reasoned justifications those decisions provide. The Tribe does not address the Board or Commission reasons for finding that the NEPA and NHPA deficiencies the Board identified did not require vacating Powertech's already-issued license. The Board and Commission reasons center on the Tribe itself bearing some responsibility for the identified deficiencies (which pertain to the project's impacts on the Tribe's own cultural resources) and

the fact that vacating a license due to an identified procedural deficiency is not required absent demonstrated harm or prejudice from leaving the license in place. As court precedent confirms, such factors are permissible considerations when fashioning a remedy in connection with an already-issued license.

Further, the Tribe's arguments regarding its various other adjudicatory contentions, including those found inadmissible for hearing on procedural grounds and those decided on the merits after the evidentiary hearing, lack merit. Several of its arguments—on byproduct-material disposal, borehole plugging, and impact-mitigation generally—incorrectly portray NEPA as requiring agencies to develop (and even execute) detailed final mitigation plans, despite well-established court precedent to the contrary. Regarding baseline groundwater quality, the Tribe presumes, but makes no attempt to demonstrate, that NRC regulatory requirements for future data gathering render the EIS's own analysis of this issue insufficient under NEPA. The Tribe also attacks NRC's purported reliance on a guidance document without meaningfully addressing the Board's and Commission's reasoned, record-supported responses to this attack.

The Tribe's byproduct-material-disposal argument advances an incorrect interpretation of NRC regulations that the Commission long ago reasonably rejected. The Tribe's NEPA-scoping claims present only abstract concerns and ignore the range of relevant NRC scoping and public-outreach activities supporting

the Commission's harmless-error finding. The Tribe's claims regarding geologic faults do not meaningfully respond to the Board's and Commission's reasonable decision rationales explaining why the facts the Tribe presents are ultimately immaterial to the EIS's conclusions. And throughout, the Tribe repeatedly overlooks critical EIS discussions that readily undercut its various claims of EIS inadequacies. Ultimately, even if the Court did have jurisdiction to consider them, none of the Tribe's arguments on these matters demonstrates arbitrary and capricious decisionmaking.

ARGUMENT

I. Standard of Review

This Court's review is governed by the Administrative Procedure Act, which permits this Court to set aside an agency order only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[79]

In reviewing NEPA-compliance challenges, the Court's role is to ensure the agency has taken the requisite "hard look" at the environmental impacts of a

[79] 5 U.S.C. § 706(2)(A); *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 195 (D.C. Cir. 2013) (*BREDL*); *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112-17 (D.C. Cir. 2006).

proposed action, setting aside the agency's substantive findings only where it has committed a clear error of judgment.[80]

On factual questions, "the role of [the] court is not to weigh the evidence, but to determine whether substantial evidence supports the [agency]'s decision."[81] And when a high level of expertise is required, such as when NRC makes "technical judgments and predictions," this court must defer to the agency's weighing of the evidence as long as its decisionmaking is informed and rational.[82]

Where an agency has interpreted its own regulations, courts defer to that interpretation "unless that reading is plainly erroneous or inconsistent with the regulations."[83]

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[80] *BREDL*, 716 F.3d at 195; *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (courts do not "flyspeck" an agency's environmental analysis looking for minor deficiencies).

[81] *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 753 (3d Cir. 1989).

[82] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *BREDL*, 716 F.3d at 195 (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

[83] *Neustar, Inc. v. FCC*, 857 F.3d 886, 896 (D.C. Cir. 2017).

II. The Court should dismiss this petition for review of an NRC interlocutory order for lack of jurisdiction.

Under the Hobbs Act, this Court has jurisdiction only to review "final orders."[84] This requirement is a "jurisdictional prerequisite," not "merely a prudential consideration . . . with which [a court] may dispense."[85] When NRC issues a final order, a 60-day "window" commences during which any petitions for review must be filed.[86] Petitions filed before this 60-day window must be dismissed for lack of jurisdiction, as the jurisdictional defect cannot be cured even if the agency subsequently issues a final order.[87]

"Finality under the Hobbs Act is to be narrowly construed."[88] Whether the agency has taken the requisite "final" action for jurisdictional purposes depends on "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from

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[84] *See* 28 U.S.C. § 2342(4).

[85] *Clifton Power Corp. v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002).

[86] *Public Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988).

[87] *Id.*; *see also TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133-34 (D.C. Cir. 1989).

[88] *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 28 (D.C. Cir. 2014).

the agency action."[89] Accordingly, "[i]n an administrative adjudication, a final order typically disposes of all issues as to all parties."[90]

In this case, NRC's adjudicatory decisions have disposed of several of the contentions the Tribe raised, but they have not disposed of all of them. The administrative decisionmaking process at NRC was ongoing when this petition for review was filed (and it still is). The Commission's CLI-16-20 decision, the purported basis for jurisdiction in this case (Tribe's Br. at 1), explicitly left the proceedings open for further action by the parties and did not finally resolve Contentions 1A and 1B.

The Tribe continues to participate in these proceedings, and, meanwhile, the NRC staff has been working to cure the procedural deficiencies identified by the Board. The staff must either (1) reach a settlement agreement with the Tribe, or (2) convince the Board (and potentially the Commission[91]) in a motion for summary disposition that its actions were sufficient. One plausible outcome of this

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[89] *Adenariwo v. Fed. Maritime Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015).

[90] *CSX Transp.*, 774 F.3d at 28 (internal quotation marks omitted). A court-recognized exception allows immediate review from an agency order completely denying an intervention petitioner party status, but that exception is inapplicable here, as the Tribe successfully intervened. *See Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992).

[91] *See* 10 C.F.R. § 2.341 (providing for appeals from Board decisions).

effort, however, is neither the Tribe nor the Board is persuaded that the deficiencies are cured, in which case further proceedings would remain necessary. Depending on the circumstances, these ongoing proceedings could also involve the license being vacated on an interim or permanent basis or one or more license conditions being added.[92] Further, although the Tribe correctly states that a "final EIS already has been published" (Br. at 54), that assertion misses the point, because one purpose of the ongoing proceedings is to consider whether *additional* EIS discussion remains necessary.[93]

Thus, while a potential path toward finality in this matter has been sketched out, that path has not yet been traversed and the result remains uncertain. Review now by this Court could well result in "a waste of judicial time and effort," because "[f]uture developments" at the agency may moot some issues presented in

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[92] *See supra* note 19 and accompanying text. The express direction of additional proceedings that could materially alter Powertech's license distinguishes this case from *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016), upon which the Tribe relies (Br. at 55-56). That case involved a decision that the agency itself deemed to be a "final agency action" and that defined a property owner's exposure to potential legal liability for a five-year period, and for which no further proceedings were contemplated. 136 S. Ct. at 1814.

[93] LBP-15-16 at 658 (explaining that after the NRC staff's post-remand consultation efforts are complete, "[t]he [Final Supplemental EIS] and Record of Decision in this case must be supplemented, if necessary, to include any cultural, historic, or religious sites identified and to discuss any mitigation measures necessary to avoid any adverse effects").

the opening brief. This Court should be wary of premature review, which will "often result in delaying the final outcome and, just as often, needlessly intrude on the" ongoing proceedings below.[94] Moreover, allowing interlocutory judicial review of agency orders that do not finally resolve the issues before the agency "would make unclear the point at which agency orders become final."[95] In those circumstances, this Court might see petitions for review at every stage of an administrative proceeding, simply to ensure a Hobbs Act "window" is not missed.

Two additional points warrant mention. First, under NRC's licensing process for Powertech and other uranium recovery facilities, licenses may be issued before all issues are resolved in the NRC adjudication as to all parties.[96] Therefore, in order for the agency to resolve all issues as to all parties prior to judicial review, the adjudicatory proceeding's termination, rather than license issuance, must serve as the jurisdictional final order in such proceedings. The Tribe seemingly accepts this proposition, as it filed its petition in this Court after

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[94] *Alaska*, 980 F.2d at 764.

[95] *City of Benton v. NRC*, 136 F.3d 824, 826 (D.C. Cir. 1998).

[96] 10 C.F.R. § 2.1202(a). This NRC rule does exclude certain licensing proceedings from its reach, including those for issuance of licenses for "production and utilization facilities" (which includes nuclear power plants), but uranium recovery licensing proceedings are not among the excluded proceedings. *Id*.

the Commission's December 2016 decision, rather than within 60 days after the NRC staff issued Powertech's license in 2014.[97]

Second, although the Tribe repeatedly emphasizes that the license is currently effective (Br. at 50-56), that is no reason for this Court to grant review prematurely. In *Massachusetts v. NRC*, this Court recognized a right to petition for review directly from an NRC action making a license effective, even if administrative proceedings were ongoing, but only to narrowly challenge the decision to make the license effective.[98] To challenge the underlying merits of the overall licensing decision, a petitioner must wait until administrative proceedings are concluded.[99] Indeed, in that case, this Court specifically "reject[ed] petitioners' argument that immediate effectiveness renders the Licensing Board's decisions and all related 'intermediate, procedural or preliminary non-final actions or rulings' of the NRC reviewable by this court."[100]

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[97] If, contrary to our position, this Court held that license issuance constituted the jurisdictional "final order" allowing full merits review of NRC's licensing decision, the jurisdictional window for the Tribe to file a Hobbs Act petition for review would have been the 60 days following April 8, 2014—making the instant petition for review two years late. Again, however, we do not view license issuance in this type of proceeding as the final NRC order allowing general Hobbs Act review of the licensing decision.

[98] *See* 924 F.2d 311, 322 (D.C. Cir. 1991).

[99] *Id.*

[100] *Id.*

In any event, it is much too late now for the Tribe to directly challenge NRC's license-issuance decision. Powertech's license became effective in 2014, and the Tribe declined to challenge that decision directly in court in a manner contemplated by *Massachusetts v. NRC*. Although the Tribe requested a stay from the Board after the license was issued, the Board denied that request and the Tribe chose not to appeal that denial to the Commission, let alone challenge a Commission affirmance (if that were the outcome of the appeal) in court. The Tribe must wait for the conclusion of administrative proceedings before seeking relief from this Court, as a result of decisions made by the Tribe itself.

With that said, if a *new* development arose that could potentially support an irreparable harm demonstration, the Tribe could seek a stay from the Board on that basis, and if that request were denied, the Tribe could appeal that decision to the Commission and then seek judicial review if necessary.[101] But that is not the situation here, and there is no reason in this case to alter existing rules of finality to protect the Tribe's interests.

Accordingly, this Court should dismiss the Tribe's petition for review for lack of jurisdiction.

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[101] *See id*.

III. Assuming *arguendo* that this Court possesses jurisdiction, the Commission reasonably affirmed the Board's decisions.

A. The Commission reasonably affirmed the Board's decision not to vacate Powertech's license.

The Commission was not required to vacate Powertech's license simply because of procedural deficiencies identified during the adjudicatory process in the agency's compliance with NEPA and the NHPA. Despite the Tribe's suggestion to the contrary (Br. at 23), the Board and Commission are not courts, and so 5 U.S.C. § 706 does not govern their choices of remedy when reviewing NRC staff actions.[102] Nonetheless, even if NRC's own adjudicatory proceeding *were* a court review pursuant to § 706, vacatur is not required in every such case where a deficiency is found. This Court has long held when considering remedies under § 706 that the "decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[103] Vacatur of an agency decision in light of procedural deficiencies is an especially inappropriate remedy when vacating "would at least temporarily

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[102] *See* 5 U.S.C § 706 (addressing its provisions to a "reviewing court").

[103] *Center for Biological Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017) (quoting *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)).

defeat . . . the enhanced protection of the environmental values covered by" the agency decision.[104]

In this case, the Commission reasonably left the license in place—thereby ensuring NRC's continued ability to enforce the cultural-resource protections the license already imposes on Powertech—while allowing the agency to address the procedural deficiencies identified by the Board. NRC determined that vacating the license would not prevent potential harm to the Tribe's cultural resources and would not be fair under the circumstances, given the Tribe's own role in contributing to the identified procedural deficiencies. The Tribe has given this Court no reason to reverse that decision.

Notably, the Tribe's opening brief does not identify any reason why failure to vacate the license causes the Tribe injury. Further, the Tribe conspicuously omits the fact that the Board's decision was based in part on the Tribe's own actions making the NHPA consultation process unnecessarily difficult. As the Board determined, the Tribe made "patently unreasonable" demands of the staff and "did not participate in the April 2013 field survey effort" to identify affected

[104] *Center for Biological Diversity*, 861 F.3d at 188 (quoting *Envtl. Def. Fund, Inc. v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) (ellipsis in original)).

resources.[105] And the Board reasonably considered the Tribe's role, since the underlying issue was the project's potential effect on the Tribe's *own cultural resources*.[106]

Additionally, the Board had already found (when ruling on the Tribe's 2014 stay request) that potential threats to tribal cultural resources did not actually depend on the Powertech license's effectiveness.[107] To the contrary, the Board noted favorably the NRC staff's point that keeping the license in place preserved NRC's authority to enforce Powertech's compliance with the Programmatic Agreement's cultural-resource protections.[108] Thus, vacating the license could actually *diminish* legal protections for the Tribe's cultural resources. Nonetheless, in its 2015 ruling that Powertech's license need not be suspended based on the Contention 1A and 1B findings, the Board offered the Tribe another opportunity to request a stay if it could identify any immediate and irreparable harm from Powertech's license remaining in effect.[109] But the Tribe did not request a stay.

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[105] LBP-15-16 at 656-58 (JA___).

[106] *Cf. Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1340 (10th Cir. 1982).

[107] Stay Denial Order at 7-8 (JA___).

[108] *Id.* These include protections even for unanticipated resources identified during the project's implementation. NRC-018-A at 10-11 (JA___).

[109] LBP-15-16 at 658 (JA___).

On appeal from the Board's 2015 ruling, the Commission affirmed, holding that procedural errors do not warrant automatic vacatur of an already-issued license in the absence of demonstrated harm or prejudice.[110] The Commission's lack-of-prejudice finding was reasonable on the facts before it, where "the Tribe has not articulated any harm or prejudice" and did not file a stay request.[111] And its approach is well-supported by the law of this Court, and others, involving court review in comparable circumstances (i.e., where the agency action in question had already been taken when the procedural deficiency was identified).[112]

The Tribe emphasizes (Br. at 24) that an agency must complete its compliance with the NHPA and NEPA prior to making a decision. But when the NRC staff issued Powertech's license in 2014, the NRC staff believed it had completed the full, statutorily required processes under NEPA and the NHPA (including issuing an EIS, finalizing a Programmatic Agreement, and issuing a Record of Decision). Thus, this is not a case where the agency "bypassed" its

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[110] CLI-16-20 at 33 (JA___).

[111] *Id.*

[112] *Id.* at 22, 33 (citing *Nw. Coal. for Alts. to Pesticides v. Lyng,* 844 F.2d 588, 594-95 (9th Cir. 1988); *Cty. of Del Norte v. United States,* 732 F.2d 1462, 1467 (9th Cir. 1984); *Cent. Delta Water Agency v. U.S. Fish & Wildlife Servs.,* 653 F. Supp. 2d 1066, 1086-87 (E.D. Cal. 2009); *Muhly v. Espy,* 877 F. Supp. 294, 300-01 (W.D. Va. 1995)) (JA___, ___); *cf. Center for Biological Diversity*, 861 F.3d at 188; *Allied-Signal, Inc.*, 988 F.2d at 150-151.

statutory obligations before making its decisions, as the Tribe suggests. Furthermore, NRC's adjudicatory hearing process, which led to the identification of deficiencies in NRC's compliance with NEPA and the NHPA, did not arise from those statutes, but, rather, from the Atomic Energy Act.[113] And NEPA and the NHPA neither dictate NRC's procedures for implementing this Atomic Energy Act hearing requirement nor require that the hearing provided under the Atomic Energy Act necessarily be completed prior to the issuance of a license, even if contentions alleging noncompliance with those statutes have been raised.[114]

In short, the additional process provided by the agency pursuant to the Atomic Energy Act enabled the Tribe to litigate its NEPA and NHPA contentions, afforded the Tribe opportunities to seek a stay of the license's effectiveness during the hearing process in light of any harms that could not otherwise be prevented, and provided the chance for the Tribe to argue, as it would before a reviewing court, that the deficiencies ultimately identified warranted vacatur of the license in view of applicable equitable considerations. And the Board and Commission acted

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[113] *See NRDC v. NRC*, 823 F.3d 641, 652 (D.C. Cir. 2016) (addressing NEPA's lack of hearing requirement); 36 C.F.R. Part 800; 42 U.S.C. § 2239(a).

[114] *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) (explaining that "NEPA . . . does not itself provide for a hearing" and "[a]s a result, NEPA does not alter the procedures agencies may employ in conducting public hearings"); *see also id.* at 53-54 (discussing the especially broad latitude the Atomic Energy Act grants NRC for implementing the statute).

in accordance with settled standards in declining to disturb the license during the staff's attempt to cure these deficiencies. Thus, the Commission's affirmance of the Board's decision not to vacate Powertech's already-issued license after finding in the Tribe's favor on Contentions 1A and 1B was neither contrary to law nor an abuse of discretion, and the Tribe has failed to demonstrate otherwise.

B. The Commission reasonably affirmed the Board's rulings that certain of the Tribe's contentions raised no genuine dispute of material fact, thereby rendering those contentions ineligible for merits consideration in a hearing.

1. The Commission reasonably affirmed the Board's decisions denying a hearing on the Tribe's byproduct-material disposal contentions.

Three times the Tribe raised complaints about the disposal of radioactive byproduct material generated by the proposed Powertech facility, and three times the Board concluded that the Tribe had raised no genuine dispute of material fact with either the license application or the EIS.[115] The Board determined that the EIS sufficiently analyzed the anticipated environmental impacts from byproduct-material waste disposal, notwithstanding that—as the EIS recognized—the particular disposal facility Powertech would use remained uncertain at that time. Further, the Board found that the NRC staff permissibly used a license condition to require Powertech to have a disposal agreement with a licensed disposal facility in

[115] *See supra* at 10-12.

place *before operations* (i.e., before the facility would start generating byproduct-material waste), rather than insisting on the agreement as a prerequisite to license issuance. This disposal agreement would address any remaining concerns about disposal and its potential environmental impacts. The Commission upheld the Board's decisions on appeal.

Here again, the Tribe's brief does not come to grips with the Board's and Commission's rationales. The Tribe accuses the Board of "side-step[ping] the issue," objects to the Board's no-genuine-dispute finding, and then asserts that the Commission's affirmance of that purportedly incorrect finding must therefore itself be "without basis in, and contrary to, the record." (Br. at 25.) Yet, the Tribe simply ignores the Board's and Commission's reasoning and repeats the same basic arguments it raised unsuccessfully below. Fundamentally, as both the Board and the Commission concluded, the NRC staff conducted a sufficiently comprehensive NEPA analysis of byproduct-material waste disposal, and the Tribe's arguments before NRC effectively ignored the substance of that analysis while incorrectly asserting that NRC regulations require a final disposal plan to be in place prior to license issuance.[116]

[116] CLI-16-20 at 13, 16-17 (JA___, ___); LBP-14-5 at 397 (JA___); LBP-13-9 at 71-72 (JA___); LBP-10-16 at 434 (JA___).

Despite the Tribe's attempt (Br. at 26-30) to portray NRC's approach as deferring NEPA analysis of these impacts until later, the EIS *does* analyze these impacts, both in the Generic EIS and in the site-specific Supplemental EIS.[117] The Supplemental EIS—contrary to the Tribe's assertion that it "firmly identifies the White Mesa Mill as the repository for [Powertech's] waste" (Br. at 27)—specifically acknowledges that Powertech has not yet identified an official destination for its facility's byproduct-material waste, and that White Mesa would require additional permitting to receive Powertech waste.[118] Nonetheless, the NRC staff determined, based on the analysis in the Generic EIS regarding disposal of byproduct-material waste from *in situ* recovery facilities generally and the available site-specific information discussed in the Supplemental EIS, that the byproduct-material disposal impacts should be "small" (i.e., not significant) *regardless* of the specific licensed disposal facility ultimately chosen.[119]

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[117] *See* LBP-14-5 at 397 (JA___); LBP-13-9 at 71 (JA___).

[118] Supplemental EIS at 3-116 (recognizing that no disposal agreement is yet in place with White Mesa and that White Mesa still needs an additional state approval before it could accept waste from Powertech) (JA___); *id.* at 4-237 ("[T]he applicant does not have a disposal agreement in place with a licensed site to accept solid byproduct material.") (JA___).

[119] *See id.* at 4-237 (basing environmental impact prediction "on the disposal options currently available for byproduct material," not on Powertech's anticipated use of White Mesa specifically) (JA___); *id.* at 4-242 – 4-243 (same) (JA___). It is well established that generic review of environmental impacts, including impacts

The Tribe's brief lacks any meaningful argument as to why the considerable analysis of these impacts in the Generic EIS and Supplemental EIS, which *accounts* for the uncertainty as to which specific licensed disposal facility would be used, fails to comply with NEPA. The Tribe casts as a "naked assertion" (Br. at 28) the Supplemental EIS's determination that the expected impacts from yellowcake transportation—which the EIS expects to be "small"[120]—bound (i.e., are necessarily greater than) the anticipated byproduct-material-waste-transportation impacts, meaning that the latter impacts must be "small" as well. But the EIS *explained why* this determination was made. The Supplemental EIS reasonably concluded, relying on Generic EIS section 4.2.2.2, that the expected impacts from transporting byproduct-material waste would necessarily be smaller than the expected "small" impacts of transporting yellowcake, because yellowcake is more concentrated and is shipped more frequently and for longer distances.[121] The Supplemental EIS further discusses Powertech's proposed transportation practices and explains that "[a]ll shipments will be required to comply with applicable USDOT regulations governing the transportation of radioactive material

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involving radioactive waste, is permissible under NEPA. *See New York v. NRC*, 824 F.3d 1012, 1019-20 (D.C. Cir. 2016); *NRDC*, 823 F.3d at 653.

[120] Supplemental EIS at 4-17 – 4-18 (JA___).

[121] *Id.* at 4-19, 4-21 – 4-23 (JA___, ___); Generic EIS at 4.2-8 (JA___).

(including quantity limits, packaging requirements, and conveyance dose rate limits)."[122] The Tribe's brief contains no counterargument addressing these specifics or explaining why more detail is needed, providing instead (Br. at 28) only vague, unexplained suggestions that container type, mountains, and moisture content are relevant concerns.

Further, Powertech's license *prohibits* Powertech from actually generating byproduct-material waste without a specific arrangement in place to dispose of it at a proper facility. As the Commission explained, Powertech's license expressly "requires Powertech to submit to the NRC a disposal agreement with a licensed disposal site before beginning operations" and "to maintain such a disposal agreement" and states that "if the agreement expires or otherwise terminates, Powertech must halt operations."[123] Indeed, the Supplemental EIS repeatedly addresses this license-driven approach.[124] Thus, the Tribe's claim that the Supplemental EIS "reveals that Powertech proposes to create and store . . . byproduct materials on site for an indefinite period, with no disposal license" is simply wrong.

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[122] Supplemental EIS at 4-27 (JA___). Regulatory requirements may be considered when predicting environmental impacts under NEPA. *See, e.g.*, *New York*, 824 F.3d at 1022.

[123] CLI-16-20 at 15-16 (JA___).

[124] Supplemental EIS at 2-54, 3-116, 4-237, 4-242 (JA___, ___, ___, ___).

Lastly, the Tribe incorrectly claims (Br. at 27) that NRC regulations in 10 C.F.R. Part 40 (specifically, § 40.31(h) and Appendix A) require a disposal plan at the time of licensing. As both the Board and Commission explained, NRC concluded long ago that these particular requirements *do not apply* to *in situ* recovery facilities, as these regulations' intent, consistent with their terms, was to address issues "posed only by conventional uranium milling operations," and in particular the "mill tailings" associated with such operations, "not problems related to injection mining" (i.e., *in situ* recovery).[125] Accordingly, the Commission has determined that these regulations "cannot sensibly govern" the separate and distinct *in situ* recovery process.[126] The Commission's reasonable interpretation of its own regulations' scope is entitled to deference.[127]

2. The Commission reasonably affirmed the Board's decision denying a hearing on the Tribe's lack-of-scoping claim.

The Board found that the Tribe failed to demonstrate a genuine dispute on a material issue of law or fact regarding NRC's alleged lack of site-specific scoping

[125] CLI-16-20 at 12-13 (JA___); *Hydro Resources, Inc.*, CLI-99-22, 50 NRC at 8; LBP-10-16 at 434 (JA___).

[126] *Hydro Resources, Inc.*, CLI-99-22, 50 NRC at 9.

[127] *Neustar, Inc.*, 857 F.3d at 896.

for the Supplemental EIS.[128] While the Commission found the Board's reasoning to be based on an incorrect reading of NRC's scoping regulations, it nonetheless found the Board's error harmless given the lack of any apparent harm or prejudice from the NRC staff's procedural misstep.[129]

The Commission's conclusion was reasonable. Scoping noncompliance does not, on its own, generally warrant overturning an agency action.[130] Even though there was not something called a "scoping process" specific to the Powertech Supplemental EIS, functionally equivalent site-specific engagement with the public occurred anyway, starting early in NRC's review process, and the Tribe had ample notice and opportunity to participate.[131] These early engagement activities included meeting "with federal, state, tribal, and local agencies and authorities" during a site visit in late 2009 (in connection with this, NRC specifically invited the Tribe, but the Tribe declined), contacting "potentially interested . . . tribes and local authorities, entities, and public interest groups in

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[128] LBP-13-9 at 74-75 (JA___).

[129] CLI-16-20 at 20-23 (JA___).

[130] *See Cent. Delta Water Agency*, 653 F. Supp. 2d at 1087; *Muhly*, 877 F. Supp. at 300.

[131] *See* CLI-16-20 at 21 (JA___); *see also* NRC Staff's Response to Oglala Sioux Tribe's Petition for Review of LBP-15-16 at 8-9 (NRC Staff Response) (discussing the history in more detail) (JA___).

person, by email, and by telephone" in order "to gather additional site-specific information to support the NRC staff's environmental review," and, in early 2010, soliciting and receiving public comments via advertisements in six local newspapers.[132] The Tribe never explains what, specifically, it missed out on because of these early activities not being formally labeled "scoping." Further, the agency already employed a comprehensive *generic* scoping process, which included multiple public scoping meetings, for *in situ* recovery facilities in developing the Generic EIS.[133] The Tribe never explains what additional environmental impact analyses were absent from the Supplemental EIS due to the latter's reliance on the Generic EIS's scoping process.[134]

In fact, the Tribe's only attempt to demonstrate harm or prejudice is by providing (Br. at 49-50) a summary of the NRC regulation (10 C.F.R. § 51.29) that

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[132] Supplemental EIS at 1-5 – 1-6 (JA___). NRC also published, in early 2010, a notice of intent to prepare the Supplemental EIS for Powertech. 75 Fed. Reg. 3261 (Jan. 20, 2010). These notice and outreach efforts furthered the same basic goals as NEPA's scoping requirements. *See Wyoming v. USDA*, 661 F.3d 1209, 1238-40 (10th Cir. 2011).

[133] CLI-16-20 at 21-22 (JA___); LBP-13-9 at 75 (JA___); Generic EIS at 1-8 – 1-15 (JA___).

[134] Of course, the contested adjudicatory proceeding has also afforded the Tribe opportunities to bring NEPA issues to NRC's attention; indeed, the Tribe *prevailed* on Contentions 1A and 1B, prompting the curative efforts in the still-ongoing NRC proceeding.

identifies the general purposes of scoping. The Tribe does not explain how any of those general purposes were unfulfilled in *this specific NEPA review*, notwithstanding NRC's other early public engagement activities specific to the Powertech review and the Generic EIS's own scoping process. Because this Court, in NEPA cases, applies a "rule of reason" and "consistently decline[s] to 'flyspeck' an agency's environmental analysis,"[135] the Tribe's purely abstract concerns about scoping do not justify holding the Commission's decision to be arbitrary and capricious.

C. The Commission reasonably upheld the Board's rulings against the Tribe on the merits of the Tribe's contentions considered in the evidentiary hearing.

1. The Commission reasonably upheld the Board's ruling on the Tribe's contention regarding abandoned boreholes and faults.

The Supplemental EIS discusses the potential for impacts on groundwater due to improperly plugged (or "abandoned") boreholes at the Powertech site. It expressly recognizes that such boreholes could cause groundwater impacts if not properly plugged, but it explains that Powertech's commitment to plug or otherwise mitigate improperly plugged boreholes, combined with testing and post-

[135] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011).

operations aquifer restoration requirements, is expected to keep associated environmental impacts in the "small" range.[136]

The Board held that the only thing missing from the agency's treatment of potential environmental impacts from unplugged boreholes was an express license condition requiring Powertech to identify and plug boreholes. The Board accordingly added such a condition to Powertech's license.[137] On appeal, the Commission recognized that the Board missed that Powertech's license *already* had required Powertech to identify and plug boreholes, because Powertech had expressly committed to do so and a license condition bound Powertech to that commitment. Unsurprisingly, the Commission found the Board's error "harmless."[138] Otherwise, no "deficiency" (*see* Tribe's Br. at 30) was identified by the Board or the Commission in the NRC staff's NEPA analysis of groundwater impacts associated with abandoned boreholes.[139]

The Tribe's arguments concerning boreholes (Br. at 30-35) largely focus on the fact that the actual mitigation efforts referenced in the EIS and in testimony

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[136] *See* Supplemental EIS at 2-18, 3-20 – 3-21, 3-36, 4-45, 4-63 – 4-65, 4-74 (JA___, ___, ___, ___, ___, ___).

[137] LBP-15-16 at 679 (JA___).

[138] CLI-16-20 at 50 (JA___).

[139] *See* LBP-15-16 at 679 (JA___); CLI-16-20 at 47-48 (JA___).

before the Board were not carried out *before* the EIS was completed and the license issued. Logically, the Tribe is not wrong that actually going through with mitigation work to identify boreholes, plug them, and conduct testing to ensure they have been plugged properly would provide additional information that, if available at the time, could have been discussed in the EIS. But as NEPA does not even require agencies to have a fully developed *plan* to mitigate impacts before taking the proposed action,[140] it surely cannot require that agencies delay the proposed action until a mitigation plan's *execution*. Moreover, NRC's requirement that Powertech take future steps to ensure adequate protection of groundwater reflects the ongoing nature of NRC safety regulation at *in situ* recovery sites; it does not demonstrate that the EIS's own analysis was insufficient to satisfy NEPA.

The Tribe (Br. at 31-32, 34) discusses record information revealing suspected borehole-related groundwater leakage at the site, but these references do not demonstrate a NEPA deficiency. Rather, they are *consistent with* the Supplemental EIS, which already discloses that the site contains old boreholes, that such boreholes can cause groundwater migration if improperly plugged, and that

[140] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) ("[I]t would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.").

this is likely responsible for observed groundwater leakage at the site.[141] The EIS also summarizes the approach Powertech will take to find improperly plugged boreholes and points readers to the publicly available Powertech response to an NRC Request for Additional Information (the "Powertech, 2011" reference) that also details Powertech's plans for plugging identified boreholes in accordance with applicable South Dakota state regulatory standards.[142] Thus, the Tribe's brief merely identifies an issue that the EIS already addressed based upon the information reasonably available to the NRC staff at the time; it does not identify a NEPA deficiency.

Regarding faults and fractures at the site, the Tribe (Br. at 34-35) points to record evidence indicating that the site area contains such features and claims this evidences a NEPA deficiency, because the EIS did not include "any actual physical surveys to confirm or deny the presence of these geological features." This argument again ignores the Board and Commission decisions. As the Commission explained, "the Board made clear that '[t]his is not simply a question of whether faults and joints are present, but rather whether they are large and open enough to

[141] Supplemental EIS at 4-64 (JA__).

[142] *Id.*; APP-16-B at 31-33 (JA__) (borehole discussion in Powertech's 2011 response to NRC Staff Request for Additional Information).

produce a substantial breach in the confining layers.'"[143] In weighing the evidence presented in the hearing, including the evidence the Tribe discusses in its brief here, the Board found strong evidence that faults are present at the site, but it explained that the evidence does not show that these faults have resulted in any "significant displacements" and that, in fact, evidence was "convincing" that faulting was not "significant" in the area.[144] The Board also cited testimony that *in situ* recovery operations "have operated successfully" despite "small scale" faults.[145] Thus, the Board determined that faulting in the area is not significant enough to raise a concern, and the Tribe, in focusing solely on the existence, rather than the significance, of these faults, has not demonstrated otherwise.

In sum, NRC's findings on these technical environmental-impact issues are supported by substantial evidence and worthy of deference, and the Tribe's brief does not demonstrate otherwise.

2. The Commission reasonably upheld the Board finding that the EIS's baseline water quality discussion satisfied NEPA.

The Board determined, after the evidentiary hearing, that the NRC staff's NEPA analysis of baseline groundwater quality at the site complied with NEPA

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[143] CLI-16-20 at 47 (JA___) (quoting LBP-15-16 at 677 (JA___)).

[144] LBP-15-16 at 678 (JA___) (citing NRC-167 (JA___), NRC-168 (JA___), and NRC-169 (JA___)).

[145] *Id.* (citing Tr. at 1079 (JA___)).

and that the Tribe's testimony and arguments to the contrary did not demonstrate otherwise. In its brief, the Tribe argues that the EIS contains an incomplete analysis of baseline groundwater quality and also that the Board improperly relied on NRC Regulatory Guide 4.14 in ruling against its contention. These arguments lack merit.

First, in attacking the Board's decision regarding the completeness of the EIS's baseline water quality analysis, the Tribe (Br. at 36-37) mischaracterizes the Board's reasoning. Specifically, the Tribe claims the Board held that a NEPA-required baseline analysis could be accomplished after the license is issued. Yet, as the Commission explained when confronting the same argument, that is not what the Board held:

> The Board did not rule that "meaningful" baseline characterization may be deferred until the post-licensing period. Rather, it held that the pre-licensing groundwater monitoring used to describe the site for NEPA purposes need not conform to the post-licensing, pre-operation groundwater monitoring requirements applicable to a licensed facility because the monitoring activities at these two stages serve different purposes.[146]

The Tribe's brief ignores, and makes no attempt to rebut, this Commission explanation.

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[146] CLI-16-20 at 43-44 (JA___). The Commission noted it had also recently resolved "a contention that was substantially similar to the Tribe's . . . on the same grounds" in another *in situ* recovery licensing proceeding. *Id*. at 44 n.209 (JA___).

Indeed, the Supplemental EIS contains detailed analysis of baseline water quality at the site.[147] While, as the Tribe correctly observes, additional baseline groundwater data will also be collected later, the Commission has explained that this additional data will serve a specific regulatory purpose under NRC safety regulations in 10 C.F.R. Part 40 and that it "cannot be collected until an *in situ* leach well field has been installed."[148] The fact that NRC, as part of its safety regulations, requires an *in situ* recovery facility licensee to conduct further baseline groundwater testing *after it has constructed its licensed facility* hardly demonstrates, *ipso facto* (as the Tribe suggests), that any baseline groundwater analysis performed during the pre-licensing NEPA review must be inadequate under NEPA. Because the Tribe's brief does not actually explain why the baseline groundwater quality analysis in the EIS is deficient in any way (beyond pointing to the mere fact that more data will also be gathered later) or respond to the Commission's decision rationale, it fails to demonstrate error with respect to this issue.

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[147] Supplemental EIS at 3-38 – 3-41 (JA___).

[148] LBP-15-16 at 665 (quoting Commission decision in *Hydro Resources, Inc.*, (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 N.R.C. 1, 6 (2006)) (JA___).

The Tribe's only other challenge to the baseline water quality analysis is its attack on the Board's purported reliance on Regulatory Guide 4.14, which deems a 2-kilometer boundary acceptable when collecting baseline water quality data for conventional uranium mills. The Tribe (Br. at 38) points out that Regulatory Guide 4.14 was not developed to address *in situ* recovery sites, it and claims that there is "unrebutted evidence in the record that the 2 kilometer radioactive plume 'rule' is inapplicable to and unreliable in the context of" *in situ* recovery.

This argument is perplexing given what the Board and Commission decisions actually said. First, the Commission specifically explained that "the Regulatory Guide did not form a basis for the Board's decision."[149] Moreover, the Board specifically quoted the Tribe's purportedly "unrebutted" evidence, and it immediately thereafter quoted *other* evidence, in the form of NRC staff testimony, that rebutted it.[150] Specifically, the staff testimony referenced a document demonstrating that groundwater contamination stretching beyond NRC-licensed *in situ* recovery sites has not occurred at all (which explains why that document, as the Board noted,[151] had no occasion to discuss specific distances beyond the site,

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[149] CLI-16-20 at 45 n.215 (JA___).

[150] LBP-15-16 at 664 (JA___).

[151] *Id.* at 664 n.284 (JA___).

such as 2 kilometers).[152] There is also additional testimony in the record explaining why use of a 2-kilometer boundary is likely *conservative* for *in situ* recovery facilities, because such facilities should pose lower groundwater-contamination risks than conventional milling.[153] As a result, the Tribe's arguments about the 2-kilometer value in Regulatory Guide 4.14 are unavailing.

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[152] *See Id.* at 664 (quoting staff testimony, based on staff exhibit NRC-075 in the Board proceeding, that "[t]here are no reported instances of contamination of any monitored private wells *within or beyond* 2 km of an [*in situ* recovery] wellfield at any sites historically or currently licensed by the NRC" (emphasis added)) (JA___); NRC-075 at 5 (addressing groundwater monitoring of aquifers "at a distance from operations" and reporting that "[b]ased on a review of historical licensing documentation, data from the regional monitoring at all existing [*in situ* recovery] facilities indicate that *no impacts attributable to an* [in situ *recovery*] *facility* were observed at the regional monitoring locations" (emphasis added)) (JA___); *see also* NRC-076 at 25 (describing the "anomalous" finding at an *in situ* recovery site that appears to underlie the statement the Tribe quotes about "special cases" (Br. at 38), but indicating that it comes from a mine in Germany utilizing sulfuric acid injections) (JA___); Generic EIS at 2-16 (explaining that commercial *in situ* recovery facilities in the United States have *not* used sulfuric acid or other acid-based lixiviants, whose use would cause issues requiring "additional remediation") (JA___); Supplemental EIS at 2-30 (explaining that Powertech will use an oxygen and carbon dioxide lixiviant) (JA___); Brief of Powertech (USA), Inc. in Opposition to the Oglala Sioux Tribe's Petition for Review of LBP-15-16 (June 22, 2015) at 18 (discussing relevance of this distinction) (JA___).

[153] NRC-001 at 29-30, 34-35 (JA___, ___).

3. The Commission reasonably upheld the Board's findings that the discussions of mitigation measures in the EIS satisfied NEPA.

The Supplemental EIS features extensive discussion of environmental-impact mitigation.[154] The Board determined, and the record confirms, that the Tribe's claims to the contrary are founded on the Tribe's narrow focus on specific Supplemental EIS excerpts and collapse once other pertinent portions of the Supplemental EIS are considered.[155]

The Tribe's principal theme regarding mitigation (*see* Br. at 40-48) is that the Supplemental EIS does not satisfy NEPA because it fails, for various impacts, to present fully developed mitigation plans, instead leaving specific mitigation decisions until later. Yet, as this Court has explained, "NEPA does not require agencies to discuss any particular mitigation plans that they might put in place, nor does it require agencies—or third parties—to effect any."[156] Accordingly, the fundamental premise underlying the Tribe's mitigation arguments is incorrect.

In any event, even with some mitigation plans not yet developed, the NRC staff still included a robust discussion of mitigation in the Supplemental EIS.

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[154] *See* LBP-15-16 at 690-91 (JA___); CLI-16-20 at 54 (JA___).

[155] LBP-15-16 at 690-92 (JA___).

[156] *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010); *see also Robertson*, 490 U.S. at 353.

Appropriately, the Supplemental EIS identifies where specific detailed mitigation plans would be developed after or apart from the NEPA review and discussed the expected parameters of such plans. For example, even though cultural-resource-impact mitigation was to be addressed as well in the Programmatic Agreement entered into for NHPA purposes, the Supplemental EIS contains an extended discussion of anticipated cultural-resource impacts, complete with several tables identifying specific resources and associated mitigation strategies.[157] Although the Tribe suggests (Br. at 41-42, 45) that the Supplemental EIS cultural-resource mitigation analysis must necessarily be incomplete because it does not provide the specifics of the Programmatic Agreement (which was not finalized until April 2014, three months after the Supplemental EIS's publication in January 2014), the Tribe nowhere explains what in the Programmatic Agreement renders the Supplemental EIS's extended discussion insufficient to comply with NEPA.

The Tribe also claims (Br. at 44) that the EIS insufficiently addresses the *effectiveness* of the mitigation measures discussed, citing an increased need to do so where such effectiveness "is challenged in the comments" in the draft EIS. To

[157] Supplemental EIS at 4-165 – 4-182 (JA___); *see also* CLI-16-20 at 55 (JA___).

support the latter assertion, the Tribe appears to rely on a comment it submitted that is the first enclosure to its "OST-011" exhibit in the NRC hearing.[158]

The Tribe's comment addresses mitigation measures at pages 5-6 of the first enclosure to OST-011, and its challenge to the effectiveness of mitigation measures focuses on the history of groundwater restoration at other *in situ* recovery facilities.[159] Yet, the Supplemental EIS *responds* to this very point (which was raised by multiple commenters). Specifically, the Supplemental EIS identifies shortcomings of the past groundwater-restoration efforts to which the Tribe's comment referred, specifying the particular substances that have remained above preoperational concentrations despite restoration efforts; it also puts these past shortcomings in context, explaining why, in the NRC staff's view, there was still no "threat to human health and the environment."[160] The Tribe nowhere explains why this mitigation-effectiveness analysis is flawed.

The Tribe also claims (Br. at 47) that the Supplemental EIS discusses "a proposed, but unevaluated, monitoring well network for the Fall River aquifer in the Burdock area," and it asserts that the Supplemental EIS, "[d]espite having none

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[158] *See* OST-011 at 64-65 (JA___).

[159] *Id*.

[160] Supplemental EIS at 4-67, E-61 (explaining that pertinent regulatory standards were still met and impacts would continue to decrease over time) (JA___, ___).

of this information or plans developed . . . concludes that the risks of [the contamination type at issue] are 'expected to be small.'" Here again, the Tribe incorrectly presupposes that NEPA requires EISs to include final detailed mitigation plans. Moreover, the Supplemental EIS describes in detail, in two sections dedicated to "Excursion Monitoring," Powertech's planned approach to developing monitoring well networks to detect groundwater excursions, the factors pertinent to such networks' effectiveness, and the requirements for prompt responsive actions if excursions are detected.[161] These extensive technical discussions, about which the Tribe's brief is silent, lay the groundwork for the Supplemental EIS's other discussions of Powertech's planned monitoring wells, such as the comment-response appendix excerpt the Tribe cites (Br. at 47) discussing one particular instance where monitoring wells will be required. Thus, apart from its insistence on fully developed mitigation plans (which NEPA plainly does not require), the Tribe's brief effectively leaves the EIS's primary monitoring-well analysis unchallenged.

Likewise, the Tribe, citing the same comment-response exchange (*see* Br. at 46), claims that the Supplemental EIS insufficiently discusses borehole identification and plugging and aquifer pump testing (in addition to, again,

[161] *Id.* at 2-31 – 2-32, 7-10 – 7-12 (JA___, ___).

monitoring wells). Yet, the main body of the Supplemental EIS explains that Powertech "will use available information and best professional practices—including historical records, color infrared imagery, field investigations, and potentiometric surface evaluation—to locate or detect improperly plugged boreholes or wells in the vicinity of potential wellfield areas" and that Powertech will also use pump testing to aid this search.[162] The Supplemental EIS then points readers to Powertech's detailed explanations of its planned approach to these activities in Powertech's publicly available 2011 Responses to NRC Staff Requests for Additional Information.[163] The Supplemental EIS also discusses the license requirement that Powertech employ monitoring wells to detect any excursions, such as those resulting from improperly plugged boreholes, and take prompt corrective action as necessary.[164] The point of this monitoring is, among other things, to ensure that boreholes have, in fact, been properly found and plugged, and, if not, to ensure prompt corrective action is taken to avoid significant negative

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[162] *Id.* at 4-64 (JA___).

[163] *See id.* (summarizing Powertech's plans regarding boreholes and pump testing in light of Powertech's 2011 RAI Responses (i.e., "Powertech, 2011")) (JA___); APP-016-D at 282-85 (section entitled "TR RAI 5.7.8-14," providing detailed information on Powertech's pump testing program) (JA___); *see also* Supplemental EIS at 2-17 – 2-18 (section 2.1.1.1.2.3.3 on "Pumping Tests") (JA___).

[164] Supplemental EIS at 4-62 – 4-63 (JA___).

environmental impacts. Further, as discussed above, the main body of the Supplemental EIS discusses monitoring-well use and effectiveness extensively. In sum, the Tribe's claim that there are "no discussions or analysis" of these issues (Br. at 46) is belied by the record, and its challenge fails to account for, let alone demonstrate the insufficiency of, NRC's analysis.

Similarly, the Tribe's rapid-fire, undeveloped attacks on the Supplemental EIS's discussion of mitigation of "air impacts," "land disposal of radioactive waste," and "wildlife protections" (Br. at 47) all cite to comment-response appendix excerpts, ignoring the much more detailed primary discussions of these issues in the Supplemental EIS's main body.[165] The Tribe's reference to six pages of the evidentiary hearing transcript to demonstrate that the Supplemental EIS does not provide detail on best management practices it discusses at various points (Br. at 48) also ignores that the Generic EIS, off of which the Supplemental EIS tiers,

[165] *See id.* at 4-127 – 4-132, 6-15 – 6-16 (discussing air impacts and potential mitigation strategies, which would focus on limiting the primary source of air impacts (i.e., "[f]ugitive dust and combustion emissions from construction equipment and vehicles")) (JA___, ___); *id.* at 7-17 – 7-22 (detailing Powertech's plans for monitoring land disposal of radioactive waste to ensure it does not harm the environment) (JA___); *id.* at 4-108 (discussing impacts on wildlife and the anticipated approach to mitigation, which would fall within the jurisdiction of the South Dakota Department of Environmental and Natural Resources) (JA___).

specifies the various best management practices considered in the Supplemental EIS and provides the references that support them.[166]

Lastly, we note that the Tribe's brief does not appear to challenge NEPA mitigation analyses specifically with respect to the Tribe's own cultural resources (as opposed to cultural resources more generally). Even if, however, the Tribe's mitigation-related arguments *were* construed as encompassing that specific topic, as the Commission explained it remains a live issue within the still-pending NRC adjudicatory proceedings to resolve the Tribe's Contentions 1A and 1B.[167] Thus, even if the Court found jurisdiction over this review petition generally despite the ongoing nature of the underlying NRC adjudication, the specific issue of NEPA-mitigation analysis regarding the Tribe's own cultural resources would still clearly remain unripe for judicial review.[168]

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[166] *See* Generic EIS at 7-2 – 7-6 (JA___); Supplemental EIS at 6-1 (explaining that mitigation measures being considered are either (1) "*general* best management practices" or (2) "more site-specific management actions" (emphasis added)) (JA___); *see also* NRC Staff's Reply Brief at 39 n.37 (Jan. 28, 2015) (JA___).

[167] CLI-16-20 at 56-57 (JA___).

[168] *See American Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87 (D.C. Cir. 2012).

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction or, if jurisdiction is found, the petition for review should be denied.

Respectfully,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(C), I hereby certify:

The foregoing Initial Brief of Federal Respondents complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), the Brief contains 12,947 words, as calculated by the word processing software program with which the Brief was prepared.

The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it was prepared in a proportionally spaced typeface in 14-point Times New Roman font using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2017, the foregoing Initial Brief of Federal Respondents was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

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