STATEMENT OF JURISDICTION

Intervenor-Respondent Powertech (USA), Inc. (Powertech) hereby accepts the Jurisdictional Statement provided by Federal Respondents, the United States Nuclear Regulatory Commission and the United States of America. Powertech concurs that the Hobbs Act confers jurisdiction upon this Court for purposes of challenging an order of the Nuclear Regulatory Commission by an "aggrieved party" within the timeframe prescribed by law. Petitioner, the Oglala Sioux Tribe (hereinafter the "Petitioner"), challenges the determination of the Nuclear Regulatory Commission, an independent regulatory agency of the United States, to grant Powertech a combined NRC source and 11e.(2) byproduct material license to recover uranium using *in situ* leach uranium recovery processes at the Dewey-Burdock project site in the State of South Dakota. Petitioners challenge several aspects of the Atomic Safety and Licensing Board's ("Licensing Board") and Commission's determination below. Federal Respondents determined that Powertech's application was adequately protective of public health and safety and the environment and was compliant with the Atomic Energy Act of 1954, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, and the Nuclear Regulatory Commission's implementing regulations at 10 CFR Parts 20, 40 (including Appendix A Criteria), and 51.

STATEMENT OF THE ISSUES

Intervenor-Respondent Powertech hereby accepts the Statement of Issues offered by Federal Respondents.

STATEMENT OF FACTS

Intervenor-Respondent Powertech hereby accepts the Statement of Facts offered by Federal Respondents with the following additions.

The circumstances of this case are quite comprehensive and detailed, but Intervenor/Respondent Powertech will only account for what transpired after this Court's remand of the initial appeal to the Nuclear Regulatory Commission. After the initial appeal, this Court held that the case should be remanded for further action due to the lack of final resolution of Contentions 1A and 1B. In October of 2017, the Licensing Board resolved Contention 1B in favor of the Nuclear Regulatory Commission Staff. Nuclear Regulatory Commission Staff Exhibit-015 describes the Staff's consultation effort in this matter.

After remand, the agency and Petitioners, along with Powertech, continued discussions to resolve the remaining issues. Over the latter part of 2017 and leading up to March of 2018, the Licensing Board held status calls between all parties regarding the setting of an agreed-upon approach through which Contention

1A and, by implication, the National Environmental Policy Act would be satisfied without further litigation. In December of 2017, NRC Staff proposed a process and timeline for completion of Contention 1A. Further discussions and correspondence involved the submission of reasons and evidence for and/or against the proposed process for addressing Contention 1A. For Powertech's part, its correspondence within the confines of these discussions involved an interest to satisfactorily complete said process despite representations that Nuclear Regulatory Commission Staff's proposed approach would be cost-prohibitive. *See e.g., In the Matter of Powertech (USA) Inc.*, LBP-18-05, slip op. at 13 (2018).

As of March 2018, all parties agreed on a final approach, which was developed using feedback from the Oglala Sioux Tribe, and timeline for completing said process, including the preparation and issuance of a supplement to the Final Supplemental Environmental Impact Statement for public comment (hereinafter known as the "March 2018 Approach"). After all parties, including Petitioners, agreed to the March 2018 Approach, Nuclear Regulatory Commission Staff immediately commenced interactions with the Oglala Sioux Tribe and other identified Native American Tribes to complete said approach. Subsequently, in June 2018, Nuclear Regulatory Commission Staff informed the Licensing Board that circumstances associated with implementation of the agreed-upon March 2018 Approach were sufficiently frustrated to warrant a second abandonment of a non-

litigation approach to satisfaction of Contention 1A and requested a Licensing Board schedule for the filing of motions for summary disposition. The Licensing Board subsequently granted Nuclear Regulatory Commission Staff's request and set a schedule for the filing of such motions and responses thereto.

After both Nuclear Regulatory Commission Staff and Petitioners submitted motions, and all parties were afforded the opportunity to submit responses, the Licensing Board issued LBP-18-05 denying the Staff's and the Oglala Sioux Tribe's motions for summary disposition finding that a genuine issue of material fact remained for Contention 1A. Based on this ruling, NRC Staff recommenced efforts to implement the March 2018 Approach.

On November 21, 2018, Nuclear Regulatory Commission Staff sent a letter to the Oglala Sioux Tribe and other Lakota Tribes stating, "staff remains committed to an open dialogue to finalize the methodology to be used for conducting a physical site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribes and Lakota Sioux Tribes."[1] The letter confirmed that such a methodology, and not the previously agreed upon March 2018 Approach was to be the only subject of negotiation, consistent with the Board's ruling of October, 2018. The letter laid out a schedule for the activities including negotiation of the methodology during a period from December 2018 to

[1] *See* LBP-18-05 at 47-48.

February 2019, with the completion of a methodology planned for early March 2019 prior to proposed site survey fieldwork to start April 1, 2019. After significant correspondence and discussions, on March 1, 2019, the Staff provided a letter to the Oglala Sioux Tribe and other Lakota Tribes, affirming again the Board's directive that the March 2018 Approach was not subject to negotiation and that comments received were in direct conflict with the agreed-upon approach, though further stating that they wished to receive comments on the methodology in an upcoming March 5, 2019 teleconference and would want to confirm that the Oglala Sioux Tribe wishes to continue discussions by March 8, 2019. The teleconference was held without attendance by the Oglala Sioux Tribe and the Staff received a response from the Oglala Sioux Tribe on March 12, 2019, once again stating that they did not agree with the March 2018 Approach. In the March 21, 2019 teleconference with all parties and the Licensing Board, the Staff announced that the differences on the methodology were so fundamental that they did not see further negotiations to be productive or feasible. Citing an impasse in these discussions, including the Oglala Sioux Tribe's reluctance to agree to an approach within the agreed-upon March 2018 Approach's parameters, the Staff informed the Licensing Board that it believed the only way to effectively close the record on Contention 1A was to proceed to an evidentiary hearing. Powertech concurred with this conclusion while the Oglala Sioux Tribe and Consolidated

Intervenors claimed that further discussions would yield a positive result. The Staff argued that the Oglala Sioux Tribe continuously proposed changes to the Staff's proposed methodology that went far beyond the parameters of the agreed-upon March 2018 Approach and that there was no chance for resolution of these differences. As such, the Staff filed a motion with the Licensing Board requesting that an evidentiary hearing be granted and that a briefing schedule be established.

On May 10, 2019, the Licensing Board finalized a briefing schedule for an evidentiary hearing. On May 17, 2019, the Staff submitted its Statement of Position and pre-filed testimony arguing its position that further discussions with the Oglala Sioux Tribe will not yield a result in which additional historic, cultural, and religious resource information could be obtained. On May 22, 2019, Powertech submitted its Statement of Position and concurred with the Staff's arguments and presented some of its own. On June 29, 2019, the Oglala Sioux Tribe and CI submitted their Statements of Position arguing that Contention 1A should remain open for litigation and continued discussions. On July 29, 2019, the Staff, the Oglala Sioux Tribe, and Consolidated Intervenors submitted additional pleadings for their Statements of Position.

On August 28-29, 2019, the Licensing Board held a second evidentiary hearing in Rapid City, South Dakota at which expert testimony was heard from witnesses offered by the Staff and the Oglala Sioux Tribe, as well as additional

legal and factual argument from all parties. While the Licensing Board was reviewing the administrative record under a standard involving compliance with the NEPA/Council on Environmental Quality term "unavailable" information, the Commission ruled on Powertech's 2018 appeal and issued CLI-19-09 in which the Commission denied review. But, in the decision itself, the Commission also noted that it, and by implication the Licensing Board, is not bound by Council on Environmental Quality regulations, a proper determination of the "reasonableness" of NRC Staff's attempts to satisfy National Environmental Policy Act should take into account *all* actions taken by the agency under the full scope of both the National Historic Preservation Act and National Environmental Policy Act processes. *See Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-19-09, slip op. at 18-19 (2019). This language offered further clarification that the strict parameters of the 40 C.F.R. € 1502.22 standard for "unavailable" information do not apply to Nuclear Regulatory Commission Staff; but rather, it only required that NRC Staff engage in a "reasonable effort" to obtain relevant information.

In CLI-19-09, review of Powertech's interlocutory appeal was denied, but the Commission offered the following regulatory interpretation:

> "To clarify our stance on 40 C.F.R. § 1502.22, the Board suggests that we previously accepted "the procedural requirements included in [S]ection 1502.22(b), so their applicability in these circumstances continues to be appropriate" for addressing a situation where the agency has incomplete or unavailable information in the NEPA context. On the contrary, we have

> recently reiterated that as an independent regulatory agency we are not bound by [S]ection 1502.22 and reformulated a contention to remove references to that regulation's requirements for developing a NEPA analysis when information was incomplete or unavailable. Rather, we have consistently directed the Staff to undertake reasonable efforts to obtain unavailable information. As Chairman Svinicki noted in her earlier dissent in this proceeding, [S]ection 1502.22 can be a useful guide in determining what is reasonable, but it is not controlling. To the extent the Board has focused its analysis on whether the Staff advanced a reasonable proposal to conduct the survey and whether its determination to discontinue the survey was reasonable, we do not see a legal error with respect to [S]ection 1502.22. We offer this clarification to prevent overreliance on [S]ection 1502.22 throughout the remainder of this adjudicatory proceeding."[2]

On December 12, 2019, the Licensing Board issued a ruling determining that Contention 1A should be resolved in the Staff's favor and that administrative record on this case should be closed. Then Petitioners appealed the Licensing Board's final decision to the Commission. On October 8, 2020, the Commission upheld LBP-19-10 and certified the Licensing Board's final findings. Now, this Court has before it the instant appeal.

It is worth noting that, in over four (4) decades of operations, there have been *no significant, adverse impacts to underground sources of drinking water* from *in situ leach* uranium recovery operations in the United States. Well-field balancing, use of the "bleed," and extensive monitoring at *in situ leach* uranium recovery sites has been highly successful in assuring that the lixiviant solution is

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[2] United States Nuclear Regulatory Commission, *In the Mater of Powertech (USA) Inc.*, CLI-19-09, slip op. at 18 (2019)

contained within the ore (recovery) zone. Before monitoring ceases, restoration is conducted to minimize and/or eliminate the potential risk of excursion that could result in the migration of contaminants from the exempted recovery zone portion of the aquifer to adjacent, non-exempt portions of the aquifer. This regulatory approach has been a success because there has never been a report of contamination of adjacent, non-exempt underground sources of drinking water outside of the ore zone and into a related area of review as a result of *in situ leach* uranium recovery.

Since Appendix A Criteria were focused primarily on conventional uranium milling facilities, to facilitate the submission of complete license applications for *in situ leach* uranium recovery operations, the Nuclear Regulatory Commission created a Standard Review Plan (NUREG-1569).[3] NUREG-1569 identifies Appendix A and other relevant regulatory requirements, agency guidance,[4] and standard industry practices that should be used in preparing *in situ leach* uranium recovery license applications. NUREG-1569 also provides detailed insight into the nature of *in situ leach* uranium recovery projects and Nuclear Regulatory

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[4] It is important for this Court to note the facts in Footnote 9 *infra* and that, several years ago after reviewing the cited case law, Nuclear Regulatory Commission Staff issued a draft Standard Review Plan for conventional and heap leach uranium mills where they concluded:

Commission's approach to their regulation. As a general proposition, ISR uranium recovery projects are process-oriented, phased projects, as demonstrated, with clarity, by NUREG-1569 Chapter 2 entitled *Site Characterization* and Chapter 5 entitled *Operations*. These chapters show that ISR uranium recovery projects are developed through a process involving *pre-operational* site characterization followed by detailed, progressive *operational* site development that occurs only after licensing is complete. This iterative, "phased" approach is reflected in the sequential development of *in situ leach* uranium recovery well-fields, upper control limits for constituents of concern associated with operations and restoration, monitor wells to protect water quality, and appropriate financial assurance, which is reviewed on an annual basis.

As an independent regulatory agency, the Nuclear Regulatory Commission is not bound by regulations promulgated by the Council of Environmental Quality under the National Environmental Policy Act of 1969.[5] As stated in the Federal Register in 1984:

> "as a matter of law, the NRC [Nuclear Regulatory Commission] as an independent regulatory agency can be bound by CEQ's [Council on Environmental Quality's] regulations only so far as those regulations are procedural or ministerial in nature. NRC *is not bound* by those portions of

[5] 42 U.S.C. § 4321 *et seq*.

> CEQ's regulations which have a substantive impact on the way in which the Commission performs its regulatory functions."[6]

However, the Nuclear Regulatory Commission promulgated regulations at 10 CFR Part 51 designed to facilitate compliance with National Environmental Policy Act. Pursuant to these regulations, the agency requires a detailed environmental evaluation of the potential impacts of, and alternatives to, proposed uranium recovery operations.[7] Unless mandated by regulation to perform an environmental impact statement, Nuclear Regulatory Commission Staff is required to conduct an initial environmental assessment and to determine whether the potential impacts of the proposed action warrant a finding of no significant impact or an environmental impact statement.[8] In the event that an environmental impact statement is warranted, NRC first prepares a draft document for issuance and public comment and, upon completion of the public comment period, NRC

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[6] 49 Fed. Reg. 9352 (March 12, 1984) (emphasis added).

[7] *See generally* 10 CFR Part 51; *see also* CLI-19-09, slip op at 18 (stating that the standard for the Commission is "best efforts" and not strict compliance with Council on Environmental Quality regulations.

[8] 10 CFR §§ 50.20-51.21; *see also* United States Nuclear Regulatory Commission, NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs,* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1748/ (August, 2003).

responds to comments and issues an final document for use in the final record of decision.[9]

[9] *See* 10 CFR € 51.20(b)(8) for reference on how an environmental impact statement is required for a uranium milling facility, including the Dewey-Burdock project.

STANDARD OF REVIEW

Intervenor-Respondent Powertech hereby accepts the Standard of Review offered by Federal Respondents.

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SUMMARY OF THE ARGUMENT

Intervenor-Respondent Powertech hereby accepts the Summary of the Argument provided by Federal Respondents. Powertech also adds that, with respect to Contentions 1A and 1B, the Advisory Council on Historic Preservation deemed by letter in 2014 that Nuclear Regulatory Commission Staff had met the standard for the National Historic Preservation Act Section 106 process under 36 CFR € 800 *et seq.* regulations by exercising a reasonable and good faith effort to obtain information from consulting parties, including but not limited to the Petitioners. After a second evidentiary hearing, the National Environmental Policy Act process through the Final Supplemental Environmental Impact Statement, which is typically informed by the Section 106 process, was finally deemed appropriate by the Licensing Board and, on appeal, by the Commission.

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ARGUMENT

As a preliminary matter, Intervenor-Respondent Powertech hereby adopts each of the arguments raised and the text of pertinent statutes and regulations set forth by Federal Respondents in their Initial Brief. Intervenor-Respondent Powertech also offers the following arguments in support of Federal Respondents. Powertech also directs this Court to its summary of the argument above which details how Contentions 1A and 1B were resolved.

A. This Court Should Take Notice of the Dissent of Commissioner Svinicki in This Proceeding and Additional Views of Commissioners Svinicki and Caputo Regarding The Resolution of Contentions 1A and 1B

When the Licensing Board's initial decision was appealed to the Commission by all parties, the Commission denied review of several aspects of the appeals, however the Commission did accept review of Contentions 1A and 1B. *See generally Powertech (USA), Inc.,* (Dewey-Burdock ISR Project), CLI-16 20, 2016 NRC LEXIS 36. During the course of its evaluation of all parties' appeals, the Commission assessed the Licensing Board's handling of Contentions 1A and 1B with respect to the Advisory Council on Historic Preservation's role in the agency's conduct of the Section 106 process. With respect to Contention 1A based on compliance with National Environmental Policy Act, Commissioner Svinicki stated:

> "While the Commission would normally hesitate to wade through such a detailed factual record ourselves, particularly when we have not had the advantage of observing testimony first hand, in this case other findings from the Board indicate that the missing information was not reasonably available. Specifically, upon reviewing the record in its entirety, the Board concluded that the amount of 'funds requested to collect tribal cultural information' by the Oglala Sioux was 'patently unreasonable.' If information is only available at a patently unreasonable cost, here potentially four million dollars to conduct one part of the cultural survey (itself only one part of the larger NEPA review), it follows that such information is not reasonably available. Moreover, because this information missing from the FSEIS was not reasonably available, its absence from the FSEIS analysis cannot be a basis upon which the FSEIS fails to meet NEPA's hard look standard."

Id. at 100-101.

Over the course of the past decade, Petitioners have consistently been reticent to engage the Commission or Powertech in an effort to participate in an identification effort despite its constant assertions that there are properties of cultural and/or historical/religious significance at the Dewey-Burdock *in situ leach* uranium recovery project site. Commissioner Svinicki's references to "patently unreasonable" demands for financial compensation are further exacerbated by the fact that the Petitioner had multiple opportunities to participate in an identification effort, the first of which was an opportunity under parameters and with financial compensation offered by Powertech and endorsed by Nuclear Regulatory Commission Staff and which initially was accepted by the Petitioner, though later rejected by the Petitioner along with a counter-proposal being made that the

Licensing Board deemed "patently unreasonable." This opportunity for a site survey was conducted in 2013 with seven other Native American Tribes. Multiple opportunities to gather data from Petitioners followed as Nuclear Regulatory Commission attempted to resolve contention 1A over the coming years, ultimately resulting in another proposal from Petitioners at an estimated cost of more than double that of the original "patently unreasonable" proposal and, despite concessions to Petitioners on their required approach to a site survey. Petitioners constantly obstructed the negotiating process, and backtracked on *previously agreed-upon* parameters, including the March 2018 Approach. Even subsequent to the Licensing Board's order stating that the only parameter of the agreed-upon March 2018 Approach open for discussion was the methodology, Petitioners presented a fundamentally incompatible approach that would take over one year to complete (the March 2018 Approach agreed two-two week periods for the site survey to be conducted) and would cost more than twice that of the original "patently unreasonable" proposal made by the Oglala Sioux Tribe and substantially more than the cost estimates associated with the Agreed-upon March 2018 Approach, which included agreed upon costs for Tribal reimbursements. The only aspect of the Petitioners negotiating position and conduct through this proceeding was obstinacy. Indeed, the Licensing Board specifically noted the uncooperative

nature of the Tribe as part of the reasoning behind deeming the relevant information sought "unavailable."

As stated by Nuclear Regulatory Commission Staff, LBP-15-16[10] directed it to satisfy the "hard look" standard under the statute and prevailing case law and concluded that the Final Supplemental Environment Impact Statement should be supplemented with identification of any properties of historic or cultural/religious significance and an assessment of said properties. *See* LBP-15-16 at 708. However, the pivotal reason that no solution was reached under the Licensing Board's directive is that Petitioners would not participate in the *identification* phase of this process.

According to the National Environmental Policy Act's "rule of reason," it is mandated that the inquiry is limited to address only impacts that are reasonably foreseeable—not remote or speculative. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC 29, 44 (1989) (citation omitted). Based on this and the fact that there has been no progress over the past decade, including Petitioners' constant delay tactics and reneging on the agreed-upon March 2018 Approach for the Staff to obtain information from the Petitioner on properties of historic or cultural/religious significance, the National Environmental Policy Act's inquiry must stop here.

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[10] *See In the Matter of Powertech (USA), Inc.,* LBP-15-16, 81 NRC 618 (2015).

Thus, it is important that this Court take notice of Commissioner Svinicki's dissent in CLI-16-20 as it argues persuasively that the Staff has now satisfied its National Environmental Policy Act responsibilities for the Dewey-Burdock *in situ leach* uranium recovery project site, as the Licensing Board subsequently concluded in LBP-19-10.

With respect to Contention 1B based on compliance with the National Historic Preservation Act, Commissioner Svinicki also stated:

> "As noted above, the Commission generally hesitates to make factual findings in the first instance, but again the record developed by the Board is sufficient to answer the question posed: here, whether the Staff provided a reasonable opportunity for consultation. One of the most striking aspects of this record is that the ACHP, the agency expert in implementing the NHPA, signed the NRC's Programmatic Agreement for the Dewey-Burdock project, and in so doing, found that it set forth a phased process for compliance with section 106. While the ACHP's agreement is not binding on the Commission, its findings are entitled to considerable weight."

See Powertech (USA), Inc., CLI-16-20, 2016 NRC LEXIS 36, 106 (2016).

With respect to the Commission's decision in CLI-20-09, Commissioners Svinicki and Caputo offered additional views on their decision to uphold the Licensing Board as follows:

> "'We write separately to emphasize that the agency's efforts went far beyond what was required by any "rule of reason" worthy of the name. The conclusion to this proceeding illustrates the fruitlessness of compelling the agency to take extraordinary measures to gather missing information under NEPA when clearly reasonable steps have failed. The Supreme Court has also cautioned, "'The scope of the agency's inquiries must remain

> manageable if NEPA's goal of ensuring a fully informed and well considered decision is to be accomplished."'[11]

Nuclear Regulatory Commission Staff has successfully completed the Section 106 process for six (6) new ISR projects using NUREG-1910 entitled *Generic Environmental Impact Statement for In Situ Leach Uranium Milling Facilities* to create a programmatic basis for site-specific supplemental environmental impact statements.

B. The Petitioners Fail to Demonstrate That There Were Significant Pre-Licensing Defects Associated With the National Historic Preservation Act and the National Environmental Policy Act

Petitioners allege that Nuclear Regulatory Commission erred in several manners under the National Historic Preservation Act and the National Environmental Policy Act during the licensing process. These allegations are without merit. Many of the alleged National Environmental Policy Act defects are addressed in the sections below pertaining to groundwater, 11e.(2) byproduct material handling, and mitigation measures. For purposes of this section, Powertech offers argument on the National Historic Preservation Act and National Environmental Policy Act.

A major argument presented by Petitioner alleging a violation of the Nationl Environmental Policy Act is based on the dissenting opinion offered by NRC

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[11] CLI-20-09 *citing to Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quotations omitted).

Commissioner Baran in CLI-16-20 in which he opines that the Board should have suspended Powertech's license pending supplementation of the final SEIS to address potential impacts of continued NHPA Section 106 consultation. *See Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-16-20 at 110-112. Essentially, Petitioners argue that this dissent necessitates that any license should be stayed or vacated if additional information is identified or further NHPA Section 106 consultation is ordered in a hearing after a license and final record of decision have been issued.

First and foremost, as stated above, the Commission is not required to comply with portions of Council on Environmental Quality regulations that have some substantive impact on the manner in which the Commission performs its primary regulatory responsibilities.[12] Nuclear Regulatory Commission Staff has been delegated the authority to interpret the Commission's Atomic Energy Act regulations *inter alia* at 10 CFR Part 40 and Appendix A, as well as other regulations applicable to Powertech's requested and currently effective combined source and 11e.(2) byproduct material license pursuant to 10 CFR § 1.41(b)(18 & 19). Its interpretation of the Commission's 10 CFR Part 51 regulations yielded a result that, pursuant to 10 CFR § 51.20(b)(8), an environmental impact statement-level analysis was required for Powertech's Dewey-Burdock ISR project and that

[12] *See generally* 49 Fed. Reg. 9352 (March 12, 1984).

tiering off NUREG-1910 was expressly permitted by Council on Environmental Quality regulations and required preparation of a site-specific supplemental environmental impact statement.[13] *See* 40 CFR § 1502.20 (2017). This document was prepared in accordance with NRC regulations and was issued in draft form for public comment. The SEIS was then finalized and submitted for United States Environmental Protection Agency (EPA) concurrence pursuant to applicable rules. Even though Powertech's license was issued prior to the conclusion of the administrative litigation below, Petitioners are not entitled to a retroactive application review based on a simple modification by the Board. According to *Swinomish Tribal Community* and *Friends of the River,* this Court has endorsed the practice of modification of an EIS by either Board or Commission order or the adjudicatory record, as such information or requirement is part of the final record of decision under NRC's rules and regulatory practices.[14] Petitioners offer no contradictory precedent that would give this Court reason to overturn these cases.

Moreover, 10 CFR § 2.1213 provides express requirements for parties seeking to stay the effectiveness of a license, which are substantially similar to the

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[13] The Staff prepared, issued for public comment, and finalized a programmatic or generic environmental impact statement for *in situ leach* uranium recovery facilities that is intended to have environmental analyses tiered off of its findings. It is this generic document/analysis that serves as the primary, programmatic basis for the Dewey-Burdock Project supplemental environmental impact statement.

[14] *Swinomish Tribal Comty v. FERC,* 627 F.2d 499 (D.C. Cir. 1980); *Friends of the River v. FERC,* 720 F.2d 93 (D.C. Cir. 1983).

requirements for an injunction in civil adjudicatory proceedings. Petitioners failed to avail themselves of this opportunity after issuance of LBP-15-16 and CLI-16-20 and have not made a factual showing that the process followed by NRC Staff, the Board, and the Commission would require suspension or vacatur of the license. Most importantly, absent a showing of irreparable harm, there is no need for vacatur of Powertech's license. No imminent hazard can be demonstrated as a result of the additional National Historic Preservation Act Section 106 consultation in light of the presence of the approved programmatic agreement that ensures that Petitioner can be included in further consultation on properties identified but not yet assessed and those that have not yet been identified. Moreover, Petitioner previously attempted to seek a stay of Powertech's license based on improper Section 106 consultation and failed in 2014. Therefore, this Court should uphold the Commission's determination that the record of decision is adequate to sustain Powertech's license despite the imposition of a new license condition imposing additional safeguards.

As a general matter, the Commission has consistently permitted the issuance of a license to an entity despite the pendency of litigation. This happened in the *Strata Energy* case, which was not struck down by this Court. Under the National Historic Preservation Act, which is typically used to provide the information for the Supplemental Environmental Impact Statement, a federal agency conducts the

Section 106 process. This process usually commences shortly after the Staff has accepted a license application for detailed technical and environmental review. In the case of Powertech, the process took on the same form.

Nuclear Regulatory Commission Staff immediately sent letters to identified consulting parties. The Petitioners were one of the parties identified and communicated with in this process. The process continued with multiple opportunities to conduct a site survey.

Petitioners continue to promote their concept of a "meaningful" consultation which, based on the history of the case, is a combination of the Oglala Sioux Tribe demanding continued negotiations spreading across four (4) phases of the litigation (i.e., initial pre-license issuance, post-license issuance after the issuance of the Licensing Board's Initial Decision, and two phases resulting first in a motion for summary disposition and successful closing of Contention 1B on the National Historic Preservation Act, and a final phase resulting in the second evidentiary hearing, closure of Contention 1A and a successful proceeding on appeal of said contentions. As stated by former Chairman Svinicki and Commissioner Caputo, this process took over ten (10) years and is finally complete at the agency level. But, Petitioners also seem to think "meaningful consultation" is consistent with spending massive amounts of Powertech's resources, more than twice the amount

already found to be "patently unreasonable" by the Licensing Board as discussed above. This approach is not "meaningful," it is cost-prohibitive.

Petitioners' claim that, even though the Licensing Board and the Commission ruled in favor of the Staff to close Contention 1B, they state that the standard was barely met and that this means that the reasonable and good faith effort standard was not met. This is plainly incorrect. At the end of the day, the Advisory Council on Historic Preservation, which is considered to the expert agency and is promulgator and interpreter of 36 CFR Part 800 regulations, signed a letter attesting to satisfaction of this standard. This letter, while not found dispositive by the Licensing Board initially, is proof positive that the standard was indeed met, especially given that the Council rarely ever does this. Plus, Petitioners claim that the Staff did not obtain Petitioners' information with a site survey and that this renders the findings of such an effort being inadequate is contradicted by the fact that the aforementioned letter was issued prior to the initial phases of the licenses being complete, including consultations and any offer of a site survey to Petitioners.

To claim that the Staff did not allocate sufficient time and resources for a site survey is without merit. Further, the financial resources agreed upon by Powertech to support multiple site survey opportunities were large, especially in light of what had been spent throughout this process. Next, if Petitioners really

cared about doing a site survey, they would have shown up for it. As discussed above, Petitioners reneged on more than one occasion. In addition, as stated above, there is nothing in the National Historic Preservation Act or in the National Environmental Policy Act that requires a site survey be conducted, especially with respect to the Commission which opined that all that is required to satisfy the National Historic Preservation Act is "best efforts." The agency offered a site survey, because this approach is what Petitioners requested.

Petitioners also argue that the Licensing Board and the Commission violated Council on Environmental Quality regulations when it declared information on Petitioners "unavailable." While 40 CFR € 1502.22 does indeed state what Petitioners claim, they once again ignore that the Commission is an independent regulatory agency that is not subject to the substantive requirements of the Council on Environmental Quality's National Environmental Policy Act regulations and is free to implement its requirements that interpret the agency's requirements. As stated by the Commission, the Staff is required to execute "best efforts" to obtain the information and then may declare the information "unavailable." Additionally, it is hard to conceive of a best efforts scenario where over 10 years of litigation and licensing and millions of dollars spent, including a number of efforts to engage Petitioners is not exercising "best efforts."

Lastly, Petitioners' claim that Licensing Board amendments to Powertech's license and, by definition, the record of decision violate both the National Historic Preservation Act and the National Environmental Policy Act flies in the face of time-tested Commission case law that the record of decision may be modified by Licensing Board or Commission order or alteration. Further, as stated in this pleading, this Court held in *Strata Energy* that the order or alteration can modify the record of decision. *Strata Energy v. NRDC,* slip op. at 21 (2018).

C. The Petitioners Have Failed to Show That There Are Any Solid 11e.(2) Byproduct Material Storage and Disposal and Solid Waste Management Issues Representing a Fatal Defect in the National Environmental Policy Act Process

Petitioners claim that the National Environmental Policy Act's requirements have not been satisfied because there has not been sufficient analysis of 11e.(2) solid waste management. Petitioners claim that their Contention 7 should not have been dismissed, because it met the Commission's requirements for an admissible contention. Further, Petitioners allege that the National Environmental Policy Act was violated due to a failure of Powertech's license to address the creation, and possession of said 11e.(2) byproduct material. First and foremost the Commission's Appendix A Criteria are specifically tailored to dealing with disposal of solid 11e.(2) byproduct material. Any solid 11e.(2) byproduct material must be disposed of at a properly Atomic Energy Act-licensed solid 11e.(2) disposal facility. Powertech's license also will not allow it to commence

operations without a disposal contract in place with an appropriately licensed facility. No solid 11e.(2) byproduct material associated with any ISR project is allow to be disposed on-site. The FSEIS specifically addresses waste management in its analysis. No *in situ leach* uranium recovery facilities may generate solid 11e.(2) byproduct material without a disposal contract in place.

D. The Petitioners Fail to Show that the Administrative Record Fails to Adequately Analyze the Groundwater Quality Impacts Associated with the Thousands of Abandoned Boreholes and Faults at the Project Site and That Adding a New License Condition Requiring Post-Licensing Data Gathering and Analysis or That Water Quality Baseline Data Was Improperly Analyzed

Petitioners consistently raise concerns regarding the Licensing Board's handling and the Commission's review of how groundwater quality is assessed and protected within the scope of a license application review and the conduct of licensed activities. Indeed, each of Petitioners' admitted contentions pertains directly to how NRC regulations address groundwater quality for uranium recovery licensees. More specifically, Petitioners raise concerns regarding the adequacy of NRC Staff's analysis of baseline groundwater quality conditions in order to establish standards to identify the potential for excursions and for groundwater restoration during and after licensed ISR operations. Petitioners also raise concerns about the Commission's approval of the Licensing Board's ruling on site boreholes.

Petitioners concerns aside, their claims regarding site boreholes should be dismissed per the discussion in Federal Respondents' brief. Powertech also adds that the Commission has been empowered with the ability to implement the requirements of the Atomic Energy Act and, more specifically, the safe handling of source material and 11e.(2) byproduct material. As such, the Commission's implementing regulations demonstrates that Powertech's license and its record of decision were issued in accordance with the Atomic Energy Act. First of all, with the addition of the license condition on groundwater by the Licensing Board, the record of decision was modified. This factor puts this case squarely within the ambit of this Court's decision in *Strata Energy v. NRDC.* In that case, this Court stated that modification of the record of decision even without an NEPA supplement resulted in a "no harm, no foul" finding. *See Strata Energy v. NRDC* at slip op. at 21. The license in that case is still held to the letter of that license condition and could suffer enforcement action if they do not comply.[15]

With respect to Petitioners' insistence that the final supplemental environmental impact statement did not adequately address groundwater quality

[15] This philosophy is consistent with all license conditions in Powertech's license. For example, with respect to Contentions 1A and 1B, Powertech's license is conditioned with what is referred to as an "unanticipated discovery" requirement. This requirement mandates that should it begin site construction and uncovered a potential historic or cultural resource requiring assessment, Powertech must immediately cease work and assess the resource before continued on with construction.

appropriately, this assertion is inconsistent with existing NRC regulations at 10 CFR Part 40, Appendix A, Criterion 5B(5) to *in situ leach* uranium recovery operations, which has now been deemed to apply as a matter of law.[16] Petitioners' claim that a full suite of groundwater data and testing should have been conducted is equally invalid, as such actions would fly in the face of the Commission's "construction rule" at 10 CFR € 40.32(e) which would essentially force a license applicant to risk denial of its license application if it were to do so.

As a general proposition, the development of final groundwater quality standards on a wellfield-by-wellfield basis at ISR sites is conducted in a "phased" manner. There are two "phases" to gathering of site-specific groundwater quality data and the formulation of groundwater quality standards. The first phase under 10 CFR Part 40, Appendix A, Criterion 7 envisions gathering and analysis of "baseline" groundwater quality data sufficient to obtain an NRC license under the Atomic Energy Act. "Baseline" data gathering requires a license applicant to gather sufficient groundwater quality data to *characterize* the affected

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[16] *See* United States Nuclear Regulatory Commission, Regulatory Issue Summary 2009-05, *Uranium Recovery Policy Regarding: (1) The Process for Scheduling Licensing Reviews of Applications for New Uranium Recovery Facilities and (2) The Restoration of Groundwater at Licensed Uranium In Situ Recovery Facilities* (April 29, 2009) ("Accordingly, the requirements in Criterion 5B of Appendix A apply to restoration of groundwater at uranium ISR facilities").

environment. This interpretation of Criterion 7 is reflected by language in NUREG-1569 when it states:

> "Reviewers should keep in mind that the development and initial licensing of an in situ leach facility is not based on comprehensive information. This is because in situ leach facilities obtain enough information *to generally locate the ore body and understand the natural systems involved.* More detailed information is developed as each area is brought into production….[R]eviewers should ensure that sufficient information is presented to reach only the conclusion necessary for initial licensing."

NUREG-1569 at 1-1.

As discussed in the final supplemental environmental impact statement, Criterion 7 data gathering requirements result in the development of pre-operational *baseline* water quality levels which are used to license the project and *are not intended to represent final groundwater quality standards* which are addressed by Criterion 5B(5) and is consistent with Appendix A Criteria tailored specifically to handling safety and environmental standards for both source and 11e.(2) byproduct material.[17]

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[17] 10 CFR Part 40.32(e) otherwise known as the "construction rule," which specifically states that "commencement of construction prior to this conclusion [full environmental evaluation] is grounds for denial of a license to possess and use source and byproduct material in the plant or facility." 10 CFR § 40.32(e) (2017). The Commission's interpretation of this Rule is that installation of a full wellfield and monitor well network, which is necessary to determine Criterion 5B(5) groundwater quality standards, constitutes construction and, thus, would result in denial of a license application. As a result, NRC issues ISR licenses allowing licensees to begin to address detailed plans for installation of wellfields and monitor wells and development of groundwater quality standards only after their license is granted.

The second phase of groundwater data gathering envisioned by the Commission under its 10 CFR Part 40, Appendix A Criteria and its Commission-endorsed performance-based licensing program is Criterion 5B(5) "Commission-approved background" groundwater quality standard, which is the basis for appropriate site-specific groundwater standards against which operational groundwater and restoration goals are set. Pursuant to 10 CFR Part 40, Appendix A, Criterion 5B(5), three (3) permissible groundwater protection standards for uranium recovery facilities such as *in situ leach* uranium recovery facilities are identified: (1) "Commission-approved background" or (2) a maximum contaminant level, *whichever is higher*, or (3) an alternate concentration limit. Under the Uranium Mill Tailings Radiation Control Act of 1978, the Environmental Protection Agency conducted a rulemaking (resulting in 40 CFR Part 192) pursuant to its responsibility to develop *generally applicable standards* for uranium mill tailings facilities, including Part 192.32 which specifically incorporates the Resource Conservation and Recovery Act of 1976 (RCRA)[18] 40 CFR § 264 groundwater protection standards. The Commission's conforming 10 CFR Part 40 rulemaking to comply with the Atomic Energy Act's requirement that the Commission conform its regulations to the Environmental Protection Agency's *generally applicable standards* for possession and use of source and 11e.(2)

[18] 42 U.S.C. § 6901 *et seq.* (2017).

byproduct material incorporate 40 CFR § 192.32's groundwater corrective action standards into the Commission's regulations (e.g., 10 CFR Part 40, Appendix A, Criterion 5B(5)).

Alternate concentration limits are Commission-approved *alternative* groundwater quality standards originating with the United States Environmental Protection Agency's Resource Conservation and Recovery Act regulations, which were promulgated through a full rulemaking, including notice and public comment. These Resource Conservation and Recovery Act regulations at 40 CFR Part 264, Subpart F prescribe groundwater protection standards for such facilities, including Part 264.94(a)(3) which discusses alternate concentration limits.

Pursuant to the Commission's regulations, an *in situ leach* uranium recovery licensee is required to cease licensed uranium recovery operations when the identified ore body is depleted and immediately commence groundwater restoration. Given that the Supreme Court has stated that when a court is reviewing an agency's action(s), the "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation," and as such, the Commission's interpretation of the application of 10 CFR Part 40, Appendix A, Criterion 5B(5) to ISR

operations should be sustained as consistent with its implementing AEA regulations, guidance, and prior decisions regarding such interpretations.[19]

Petitioners' assertion that 40 CFR § 1502.15 requires that an agency "fully describe the environment of the areas to be affected or created by the alternative under consideration" does not comport with the analyses performed and the conclusions reached by the Commission. The Petitioner's argument first wholly omits the broad-based, region-specific conclusions established in NUREG-1910 which were incorporated into Powertech's supplemental environmental impact statement for the Dewey-Burdock project. Then, the Petitioner fails to show how the Commission's interpretation of its own regulations, which it is empowered to do under the Atomic Energy Act, is inadequate to satisfy its mandate of adequate protection of public health and safety. Indeed, its reference to Regulatory Guide 4.14 as an "outdated" document fails to account for the fact that this document, like other guidance documents, serves as a "guide" to NRC Staff when reviewing site-specific conditions and is not, in and of itself, dispositive. The Petitioner's assertions have not shown, as a scientific or technical matter, that NRC Staff's analyses of Criterion 7 *baseline* groundwater quality under Criterion 7 was inadequate and that further development of Commission-approved background under Criterion 5B(5) will not adequately satisfy Commission regulatory

[19] *See e.g., Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

requirements. Therefore, the Commission's application of the groundwater quality analysis requirements, as approved in *Hydro Resources, Inc.* and *Strata Energy, Inc.*[20] was correct, and this Court should grant appropriate deference to the Commission's findings.

But, as stated above and more importantly, the Commission is an independent regulatory agency and not subject to compliance with substantive Council on Environmental Quality requirements except to the extent to which the Commission deems it appropriate. As stated above, in CLI-19-09, with respect to National Environmental Policy Act, the Staff is required to exercise best efforts to obtain information. Given that the practice of the Staff on groundwater evaluations was consistent with Commissions regulations and Commission case law, this Court should uphold the Commission's findings.

E. The Petitioner Cannot Demonstrate that the Licensing Board's Ruling and the Commission Upholding of Such Ruling Requires Disturbing the Final Environmental Impact Statement

Petitioners' claim that the ruling issued by the Licensing Board and upheld by the Commission is inadequate and requires further action in the agency's environmental analysis. As stated by the Licensing Board and as stated in LBP-15-16 page 68-69:

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[20] *See Strata Energy, Inc.* (Ross ISR Project), CLI-16-13, 2016 NRC LEXIS 21 (2016).

> "According to the FSEIS, the geologic confinement required for an ISL license is providedin the Dewey-Burdock area by the Morrison Formation below the ore-bearing units and the three formations of the Graneros Group above those units. Aside from a statement questioning whether testing has been adequate to demonstrate the confining ability of the Morrison Formation, Intervenors offered little evidence relating specifically to these stratigraphic units.
>
> Powertech expert witness Mr. Lawrence testified that pumping tests in the Chilson showed no response in the Unkpapa aquifer (below the Morrison Formation), which he maintained supported '"a no-flow boundary for the Morrison Formation for modeling purposes."'
>
> "Powertech expert witness Mr. Demuth, citing the FSEIS and license application, noted that the overlying Graneros Group is up to 550 feet thick and is present across the project area, except where eroded in the eastern edge of the site. In contrast, the Intervenors offered very little evidence to support their claim that the Graneros Group and Morrison Formation were not effective aquitards. Accordingly, we conclude the NRC Staff has given the confinement of the overall ore zone a hard look and agree with the conclusion in the FSEIS that the general confinement requirement for the Dewey-Burdock project has been met."

The Petitioner points to a hydrological response or "leakage" observed intermediary formation layer (the "Fuson") between the two production formation of the project (the "Chilson Member of the Lakota" and "Fall River Formation" as observed during hydrologic testing of the Dewey-Burdock project and acknowledged by the agency and Powertech experts, and extensively analyzed in the final supplemental impact statement (Section 3.5 and 4.5 for example). However, the Petitioner fails to explain how this condition disturbs the overall geologic confinement of the project provided above and below the Chilson member of the Lakota and the Fall River formations. The Petitioners argument

does not provide any explanation on how the license requirements to locate and plug any abandoned boreholes in advance of operations is not sufficient mitigation. Instead, the Petitioner ignores the findings of the Board and does not ever dispute the Boards finding that:

> "With the condition that unplugged boreholes be located and properly abandoned, the FSEIS and the record in this proceeding include adequate hydrogeological information to demonstrate the ability to contain fluid migration and assess potential impacts to groundwater."

LBP-15-16 at 75.

Thus, Petitioner's claim is without merit and this Court should defer to the Commission's findings.

F. The Petitioner's Assertions on Adequate Review of Mitigation Measures Have No Merit

Briefed in the Initial Appeal to this Court, Petitioner alleges that the Commission's analysis for the Dewey-Burdock project was inadequate due to a failure to properly assess mitigation measures. These allegations completely ignore current case law on this subject and the existence of additional safeguards in Powertech's NRC license and Record of Decision, including the final supplemental impact statement.

As a matter of law, "NEPA [National Environmental Policy Act] does not require 'a fully developed plan that will mitigate environmental harm before an agency can act,' rather, NEPA requires only that 'mitigation be discussed in

sufficient detail to ensure that environmental consequences have been evaluated." *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992), *quoting Methow Valley*, 490 U.S. at 352-53; *see also Hydro Resources, Inc.*(Crownpoint Uranium Project), CLI-06-29, 64 NRC 417, 427 (2006) (discussing that an EIS [environmental impact statement] need not contain "a complete mitigation plan" or even "a detailed explanation of specific [mitigation] measures which will be employed" and stating that mitigation measures "need not be legally enforceable, funded or even in final form to comply with National Environmental Policy Act procedural requirements.")

"The discussion of effectiveness of mitigation measures does not need to be highly detailed." *Moapa Band of Paiutes v. United States BLM,* No. 10-CV-02021-KJB-(LRL), 2011 U.S. Dist. LEXIS 116046 (D. Nev. Oct. 6, 2011); *see also Wilderness Society v. United States BLM,* 822 F. Supp. 2d 933, 943-44 (D. Ariz. 2011) *aff'd Wilderness Society v. BLM,* 526 Fed. Appx. 790, 2013 U.S. App. LEXIS 10708 (9th Cir. 2013) (providing examples of how courts assess mitigation measures).

The National Environmental Policy Act does not require that the Nuclear Regulatory Commission restrict its discussion of mitigation measures to a single environmental analysis chapter, rather than discussing such measures throughout such a document. This is how the Staff typically prepares an environmental impact

statement, and it is consistent with how other agencies prepare such documents. *See, e.g., Wilderness Soc'y v. United States BLM*, 822 F. Supp. 2d 933, 942–943 (D. Ariz. 2011). The National Environmental Policy Act also does not require an agency to prove that the mitigation measures it identifies will be effective in reducing environmental impacts. *See Biodiversity Conservation Alliance v. Bureau of Land Management*, No. 09-CV-08-J, 2010 U.S. Dist LEXIS 62431 (D. Wyo. 2010). Courts have confirmed that an agency need not assign an effectiveness rating to mitigation measures. *See North Alaska Envtl. Ctr v. Norton,* 361 F. Supp 2d., 1069, 1080 (2005). The assessment of resource areas such as mitigation measures also involve the preparation of action plans after issuance of a license, which is consistent with the Commission's approved policy of performance-based licensing. *See Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-99-22 (July 23, 1999).

Powertech's FSEIS at Chapters 4, 5 & 6 specifically addresses mitigation measures in both a specific manner (site-specific analysis and parameters for future mitigation plans). Powertech's record of decision also includes the aforementioned programmatic agreement which specifically prescribes mitigation in the form of future consultation with all consulting parties, if interested, including the Petitioner. Given that federal and State agencies/officials signed the programmatic agreement, it appears mitigation measures were adequately assessed in the FSEIS

for historic and cultural resources. Further, the Staff does not limit its analysis of mitigation measures in its environmental analysis, Chapters 3, 4, & 5, but also discusses mitigation measures throughout the impact analysis.[21] Further, Powertech is subject to licensee conditions expressly requiring implementation of and compliance with mitigation measures such as standard operating procedures and execution of a disposal agreement. Therefore, Petitioner's allegations with respect to mitigation measures are unfounded.

[21] It is important to note that Powertech defers to the Federal Respondents' argument on Petitioners' allegation regarding scoping for the environmental analysis. However, another point worth noting is the generic environmental impact statement (NUREG-1910) was done on a programmatic basis, but took into account different regions of the Midwest, including the region where the Dewey-Burdock project is planned. Then, the final supplemental environmental impact statement was highly site-specific. Thus, this allegation has no merit.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Pursuant to Fed. R. App. P. 29(g), in the event that this Court grants oral argument to the principal parties, it is hereby requested that the Court allow Powertech to participate in oral argument.

Dated this 10th day of June, 2021:

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POWERTECH (USA), INC.'S SUBMISSION OF CERTIFICATE OF COMPLIANCE

On June 10, 2021, Powertech submitted its Initial Brief in this proceeding. This Court advised Powertech that a Certificate of Compliance was required to accompany its Response. Per this Court's direction, Powertech hereby submits its Certificate of Compliance.

Dated this 10th day of June, 2021:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), Powertech (USA), Inc. makes the following certifications:

1. This brief complies with the type-volume limitation of words for briefs on behalf of Intervenors as it contains 8,775 words excluding endnotes and footnotes and opening organizational sections and, thus complies with Fed. R. App. P. 27(d)(2)(A);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in monospaced typeface using Microsoft Word 2016 in 14 pitch font, Times New Roman Style.

Dated this 10th day of June, 2021:

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CONCLUSION

For the reasons discussed above, Powertech respectfully requests that this Court deny the Petition for Review.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/

/s/ Christopher S. Pugsley, Esq.

_____

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CERTIFICATE OF SERVICE

I, Christopher S. Pugsley, hereby certify that I caused a true and correct copy of Powertech (USA), Inc.'s Certificate of Compliance to accompany its Unopposed Motion to Amend the Briefing Schedule to be served by United States Mail and electronic mail via the Court's electronic filing system on the following this 10th day of June, 2021:

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