UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright
Christopher T. Hanson

In the Matter of POWERTECH (USA) INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-20-09

MEMORANDUM AND ORDER

On December 12, 2019, the Atomic Safety and Licensing Board issued its Final Initial Decision in this proceeding on Powertech (USA) Inc.'s (Powertech) application for an *in situ* uranium recovery license for the Dewey-Burdock site in South Dakota.[1] The Oglala Sioux Tribe (Tribe) and a group of individuals and organizations referred to as the "Consolidated Petitioners" (together, Petitioners) seek review of the Board's decision as well as two interlocutory Board orders.[2] In LBP-19-10, the Board ruled that the NRC Staff had fulfilled its responsibilities under the National Environmental Policy Act (NEPA) to characterize cultural resources at the

[1] LBP-19-10, 90 NRC 287 (2019).

[2] *Oglala Sioux Tribe's Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike* (Jan. 21, 2020) (Tribe Petition); *Consolidated Intervenors Petition for Review of LBP-19-10, LBP-17-09 and Board Ruling on Motion to Strike* (Jan. 21, 2020) (Consolidated Intervenors Petition)

proposed site using reasonably available information. For the reasons described below, we decline to review the challenged decisions.

I. BACKGROUND

A. Procedural History

In 2010, Petitioners sought and were granted a hearing in this proceeding on several contentions.[3] In 2015, after an evidentiary hearing, the Board ruled in favor of the Staff and Powertech with respect to all contentions except for Contentions 1A and 1B.[4] With respect to Contention 1A, the Board ruled that the Staff had not fulfilled its responsibilities under NEPA to assess the proposed facility's impacts on cultural resources because an adequate cultural resources survey of the site had not been performed.[5] In so holding, the Board pointed to the Staff's testimony that identifying cultural resources of significance to Native American tribes would require the tribes' participation.[6] With respect to Contention 1B, the Board held that the Staff had not adequately consulted with the Tribe as required by the National Historic Preservation Act (NHPA).[7] The Board's decision left the license in place while the Staff worked to remedy the NEPA and NHPA violations. The Staff and Powertech petitioned for review of the Board's ruling on both contentions as did the Tribe and Consolidated Intervenors (with respect

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[3] *See* LBP-10-16, 72 NRC 361 (2010).

[4] *See* LBP-15-16, 81 NRC 618, 653-57 (2015).

[5] *Id.* at 655.

[6] *Id*. at 653-54.

[7] *Id*. at 655-57; *see* 54 U.S.C. §§ 300101-307108.

to the remedy offered).[8] We denied all four petitions with respect to the Board's ruling and remedy for Contentions 1A and 1B.[9]

Following the Board's ruling, the Staff resumed its efforts to consult with the Tribe and to arrange for additional surveys of the Dewey-Burdock site with the Tribe's participation.[10] After two years of efforts to coordinate an additional cultural resources survey with the Tribe, the Staff concluded that further consultation would be fruitless and moved for summary disposition of Contentions 1A and 1B. In LBP-17-9, the Board ruled that the Staff had fulfilled its obligations to consult with the Tribe and granted summary disposition of Contention 1B. But the Board found, with respect to Contention 1A, that there was still a material question of fact concerning the reasonableness of the Staff's efforts to characterize cultural resources at the site.[11] We declined to review the Board's decision at that time because the ruling was not final.[12]

The Staff again resumed its efforts to organize a site survey with the Tribe's participation. On March 16, 2018, the Staff sent the Tribe a revised proposal for identifying historical, cultural, and religious resources on the site (March 2018 Approach).[13] The Staff understood that it had the Tribe's agreement to participate in the March 2018 Approach, and it hired a contractor and provided representatives to participate in the survey in mid-June 2018.[14] On June 12, 2018 and June 15, 2018, however, the Tribe sent the Staff proposals containing

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[8] *See* CLI-16-20, 84 NRC 219 (2016).

[9] *Id*. at 242-51.

[10] *See* LBP-17-9, 86 NRC 167, 179-83 (2017).

[11] *See id*. at 194-201.

[12] CLI-18-7, 88 NRC 1 (2018).

[13] Ex. NRC-192, Letter from Cinthya I Román, NRC to Trina Lone Hill, Oglala Sioux Tribe (Mar. 6, 2018) (ADAMS accession no. ML18075A499) (March 2018 Approach).

[14] *See* LBP-18-5, 88 NRC 95, 116-23 (2018).

additional conditions for the Tribe's participation in the surveys.[15] The Tribe's June 2018 proposals would take over a year to complete and cost more than $2 million.[16] The Staff viewed these counterproposals as "fundamentally incompatible" with the March 2018 Approach, and on June 15, 2018, it discontinued efforts to survey the site.[17]

The parties then filed cross-motions for summary disposition, both of which the Board denied.[18] The Board explained that because the Staff had not adequately identified Native American cultural resources on the site, in order to comply with NEPA the Staff would have to show that the information was "not reasonably available" under 40 C.F.R. § 1502.22, a Council on Environmental Quality (CEQ) regulation.[19] In LBP-19-10, the Board noted that the NRC is not bound by this regulation, but nonetheless such regulations can serve as guidance in carrying out our NEPA responsibilities:

> CEQ regulations generally are not controlling on the NRC, at least to the extent that they have not been incorporated by the agency into 10 C.F.R. Part 51, and the unadopted provisions of 40 C.F.R. § 1502.22 are not binding on the NRC Staff in this case. Nevertheless, the Commission has recognized that such CEQ regulations can be useful guides for determining what actions are reasonable under NEPA.[20]

Consistent with our case law and past practice, we consider this regulation as guidance.[21]

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[15] *See id.* at 119-21.

[16] *See id.* at 120-21.

[17] Ex. NRC-200, Letter from Cinthya I. Román, NRC, to Kyle White, Oglala Sioux Tribe (July 2, 2018) (ML18183A304).

[18] *See* LBP-18-5, 88 NRC at 130-32.

[19] *Id*. at 128-29.

[20] LBP-19-10, 90 NRC at 339 (internal citations omitted).

[21] *See*, *e.g.*, *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443-44 (2011).

In LBP-18-5, the Board considered various elements of the March 2018 Approach and found that if the Staff had implemented that approach, its duty to take a "hard look" at cultural effects "might well have been satisfied."[22] But the Board held that there remained a question whether the Staff's decision to discontinue all efforts to follow that approach was reasonable. It held that the parties could either continue their efforts to agree on a survey, or they could proceed to a second evidentiary hearing on the following questions: (1) whether the March 2018 Approach contained a reasonable methodology for the conduct of the site survey; (2) whether the Staff's decision to discontinue all work on June 15, 2018, was reasonable; and (3) whether the Tribe's proposed alternatives to the March 2018 Approach were cost-prohibitive.[23] We denied Powertech's request for interlocutory review of the Board's ruling.[24]

The Staff elected to continue its efforts to conduct a survey with the Tribe's cooperation and developed a plan that the Board refers to as the February 2019 Methodology.[25] On February 22, 2019, the Staff met with the Oglala Sioux Tribal Historic Preservation Officer (THPO) and with THPOs from the Standing Rock, Rosebud, and Cheyenne River Sioux Tribes at the Pine Ridge Reservation in South Dakota.[26] After discussions again broke down, the Staff determined that it would not be able to reach an agreement with the Tribe and elected to proceed to a second evidentiary hearing.[27]

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[22] LBP-18-5, 88 NRC at 126.

[23] *Id.* at 136.

[24] CLI-19-9, 90 NRC 121 (2019).

[25] *See* LBP-19-10, 90 NRC at 306-10; Ex. NRC-214, Proposed Draft Cultural Resources Site Survey Methodology (Feb. 2019) (ML19058A153) (February 2019 Methodology).

[26] *See* LBP-19-10, 90 NRC at 308.

[27] *Motion to Set Schedule for Evidentiary Hearing* (Apr. 3, 2019).

In April 2019, the Board granted the Staff's motion for a hearing on "the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable."[28] That is, the Board limited the scope of the hearing to whether the Staff had shown that the information on cultural resources was not reasonably available to the Staff under NEPA.

The NRC Staff filed an initial position statement and exhibits on May 17, 2019.[29] On July 17, the Staff filed reply testimony.[30] On August 2, 2019, the Tribe filed a motion to strike the Staff's prefiled testimony and exhibits in whole or in part.[31] The Board denied the Tribe's motion in an unpublished order on August 12, 2019.[32]

The hearing took place in Rapid City, South Dakota on August 28 and 29, 2019.

B. Board Decision in LBP-19-10

In LBP-19-10, the Board found that the Staff's proposals in the March 2018 Approach and the February 2019 Methodology were reasonable.[33] The Board noted that the Staff's approaches satisfied all five features the Tribe had described in May 2017 as important to an adequate survey, namely: "(1) hiring a qualified contractor; (2) involving other Tribes; (3)

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[28] Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (unpublished) (Order Granting Hearing).

[29] *NRC Staff's Initial Statement of Position on Contention 1A* (May 17, 2019); Ex. NRC-176, Prefiled Direct Testimony of NRC Staff (May 17, 2019) (refiled on May 21, 2019, as NRC-176-R) (ML19242C185).

[30] Ex. NRC-225, NRC Staff's Prefiled Reply Testimony (July 17, 2019) (ML19242C236).

[31] *See Oglala Sioux Tribe's Motion to Strike* (Aug. 2, 2019) (Motion to Strike).

[32] Order (Denying Oglala Sioux Tribe Motion to Strike) (Aug. 12, 2019) (unpublished) (August 12, 2019, Order).

[33] LBP-19-10, 90 NRC at 318.

providing iterative opportunities for a site survey; (4) engaging Tribal elders; and, most critically, (5) conducting a site survey using scientific methodology in collaboration with the Tribes."[34]

The Board further found that the Tribe's lack of cooperation resulted in the cultural resources information being not reasonably available.[35] It held that the Tribe's "last-minute attempts in June 2018 to renegotiate fundamental elements of the March 2018 Approach" were not reasonable.[36] The Board noted that it had already found, in its 2018 ruling on the motions for summary disposition, that the Tribe's June 2018 counterproposal involved "expanding timeframes and exorbitant costs."[37] As a result, it found that the Staff's decision to discontinue its efforts to obtain the Tribe's participation was reasonable.[38] It concluded that the Staff had satisfied NEPA's requirements relating to unavailable information, guided by CEQ regulations, and that the Staff had therefore satisfied NEPA's requirement to take a "hard look" at environmental impacts.[39]

The Board further observed that there is an existing Programmatic Agreement that governs how Powertech will protect any cultural resources that it may encounter as it undertakes construction and operation of its facility.[40] Compliance with the Programmatic

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[34] *Id.* at 318-29; *see* Ex. NRC-190, Oglala Sioux Tribe May 31, 2017, Letter Responding to NRC's April 14, 2017, Letter, at 3-8 (ML17152A109).

[35] LBP-19-10, 90 NRC at 329-34.

[36] *Id*. at 335.

[37] *Id*. at 331 & n.227.

[38] *Id.* at 334-38.

[39] *Id*. at 338-41, 345-48.

[40] *Id*. at 341-45; *see also* Ex. NRC-018-A, Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Recovery Project Located in Custer and Fall River Counties South Dakota (Mar. 19, 2014) (ML14246A421) (Programmatic Agreement).

Agreement is a condition of Powertech's license.[41] Among its provisions, the Programmatic Agreement requires that prior to commencing construction activities, Powertech will develop a monitoring plan and employ a qualified archeologist, with preference to employees of tribal enterprises, to serve as a monitor.[42] Citing the Staff's testimony, the Board amended the license to add a condition requiring that, prior to new construction activities, Powertech provide to the affected Tribes and signatories to the Programmatic Agreement thirty days advance notice of the identity of the monitor who will observe construction activities.[43]

Finally, the Board held that it was not necessary for the Staff to publish a supplement to its final supplemental environmental impact statement (FSEIS) for the project.[44] The Board relied on longstanding agency practice that a deficiency in an EIS identified during the hearing process can be rectified by the hearing record.[45]

The Tribe and the Consolidated Intervenors have sought review of LBP-19-10, the Board's summary disposition of Contention 1B (LBP-17-9) and its decision denying the Tribe's

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[41] *See* Ex. NRC-018-A, Programmatic Agreement, at 4 (Condition 1 (a)); *see also* LBP-19-10, 90 NRC at 341-42.

[42] *See* Ex. NRC-018-A, Programmatic Agreement, at 13 (Condition 13 (c)); *see also id.* at 10-11 (Condition 9).

[43] LBP-19-10, 90 NRC at 344-45; *see also* Tr. at 2037-42, 2047-51, 2075.

[44] LBP-19-10, 90 NRC at 348-49; *see* Exs. NRC-008-A-1 through NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities—Final Report," NUREG-1920 (supp. 4 Jan. 2014) (ML14246A350, ML14246A326, ML14246A327, ML14247A334) (FSEIS).

[45] LBP-19-10, 90 NRC at 350-52 (citing, among others, *NRDC v. NRC*, 879 F.3d 1202, 1209-12 (D.C. Cir. 2018) (upholding the agency practice of curing a deficiency in an EIS using the hearing record)).

motion to strike (August 12, 2019, Order).[46] The Staff and Powertech oppose the petitions for review.[47]

II. DISCUSSION

A. Standard of Review

We may grant review, in our discretion, where the petitioner raises a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.[48]

We show a high degree of deference to the Board as factfinder. Therefore, a petition claiming that the Board's findings of fact are "clearly erroneous" requires the petitioner to show that the Board's findings are "not even plausible in light of the record viewed in its entirety."[49]

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[46] *See* Tribe Petition, Consolidated Intervenors Petition.

[47] *NRC Staff's Answer Opposing Petitions for Review* (Feb. 13, 2020) (Staff Answer Opposing Review); *Brief of Powertech (USA), Inc. in Opposition to the Oglala Sioux Tribe's and Consolidated Intervenors' Petition for Review of LBP-19-10* (Feb. 18, 2020) (Powertech Answer Opposing Review); *see also Oglala Sioux Tribe's Reply to NRC Staff's Answer in Opposition to Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike* (Feb. 24, 2020) (Tribe Reply to Staff); *Oglala Sioux Tribe's Reply to Powertech's Answer in Opposition to Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike* (Feb. 28, 2020) (Tribe Reply to Powertech).

[48] 10 C.F.R. § 2.341(b)(4).

[49] *Kenneth G. Pierce* (Sherwood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)); *see also In the Matter of David Geisen*,

We are highly deferential, "particularly where much of [the] evidence is subject to interpretation."[50] And we give the highest deference to findings of fact that turn on witness credibility.[51] We review the Board's legal rulings *de novo*, but we only take review, as explained in the regulation, where the petitioner shows that the Board's rulings on a substantial and important question of law is without precedent or contrary to precedent.[52] In addition, we defer to the Board in its procedural case management decisions.[53]

B. The Tribe's Petition for Review

1. Final Initial Decision: LBP-19-10

The Board's ruling in LBP-19-10 centers on the question of whether additional information on cultural resources is unavailable, or too costly to obtain. Although as an independent agency the NRC is not bound by CEQ regulations unless adopted into Part 51, we "look to [them] for guidance, including section 1502.22."[54] That regulation, which pertained to unavailable information, provided the following:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
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> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are

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CLI-10-23, 72 NRC 210, 224-25 (2010); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 189 (2004).

[50] *Geisen*, CLI-10-23, 72 NRC at 225.

[51] *Id*.

[52] *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 11 (2010).

[53] *Id*. at 47; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 629 (2004).

[54] *Diablo* Canyon, CLI-11-11, 74 NRC at 443-44.

> not exorbitant, the agency shall include the information in the environmental impact statement.
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> (b) If the information relevant cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
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> (1) A statement that such information is incomplete or unavailable;
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> (2) A statement of the relevance of the incomplete or unavailable information to evaluating the reasonably foreseeable significant adverse impacts on the human environment;
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> (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and
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> (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[55]

In promulgating the regulation, the CEQ stated that the "term 'overall costs' encompasses financial costs and other costs such as costs in terms of time (delay) and personnel."[56] Recently, the CEQ revised this regulation to replace "the term 'exorbitant' with 'unreasonable'" because 'unreasonable' is "consistent with CEQ's description of 'overall cost' considerations in

[55] 40 C.F.R. § 1502.22.

[56] *See* Council on Environmental Quality, National Environmental Policy Act Regulations; Incomplete or Unavailable Information, Final Rule, 51 Fed. Reg. 15,618, 15,622 (Apr. 25, 1986).

its 1986 promulgation of amendments to this provision."[57] The CEQ's rulemaking reiterates that the term "overall cost" includes financial costs and other costs such as delay.[58]

a. Whether the Board Erred in Finding Additional Cultural Resources Information "Unavailable"

The Tribe raises several related challenges to the Board's factual finding that additional cultural resources information is not reasonably available.[59] First, the Tribe argues that it never agreed to the March 2018 Approach and that the approach was flawed.[60] The Tribe further asserts that the amount of compensation it was offered for its participation in the proposed survey was inadequate.[61] And it claims that the Staff's contractor did not have the required expertise to design and carry out an adequate cultural resources survey.[62] The Tribe also argues that it negotiated in good faith, whereas the Staff did not.[63]

The Board considered each of these arguments. With respect to whether the Tribe ever agreed to the March 2018 Approach, the Board found that the Tribe's THPO at the time, Trina Lone Hill, had agreed that the March 2018 Approach was reasonable but that Lone Hill's

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[57] *See* Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. 43,304, 43,332, 43,366 (Jul. 16, 2020). The revised regulation was also redesignated as § 1502.21. *See also* 51 Fed. Reg. 15,618 at 15,622 (stating that in using the term "overall costs" the CEQ "does not intend that the phrase be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the impacts, or to perform a cost-benefit analysis. Rather, it intends that the agency interpret "overall costs" in light of overall program needs").

[58] 85 Fed. Reg. at 43,332.

[59] Tribe Petition at 6-14, 15-17.

[60] *Id*. at 6-7.

[61] *Id*. at 8-9.

[62] *Id*. at 9-10.

[63] *Id*. at 10-13.

successor, Kyle White, withdrew the Tribe's agreement.[64] Moreover, the question before the Board was not whether the Tribe had agreed to the March 2018 Approach but whether the approach was reasonable.[65] In evaluating whether the approach was reasonable, the Board thoroughly discussed the five criteria that the Tribe had identified as necessary for a competent survey.[66] The Board's assessment of these factors reflects factual determinations that warrant deference.

The Board also discussed, at length, the parties' interactions on which it relied for its determination that the Tribe's lack of cooperation resulted in the unavailability of additional cultural resources information.[67] The Tribe has not shown that the Board's findings were implausible in light of the record as a whole.

The Tribe further argues that the Staff could have taken other steps to gather additional cultural resources information even if it had not completed a site survey, for example, through oral interviews.[68] It also argues that Staff could have procured information by hiring a competent contractor to perform a survey even without the Tribe's involvement.[69] And the Tribe argues that the information was available from tribal members, community members, and other Tribes.[70] But pursuing the Tribe's suggested options would have been a significant departure from the long path the Staff had taken in trying to resolve the Tribe's Contention 1A. These methods would not have satisfied all five criteria that the parties agreed would be necessary to

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[64] *See* LBP-19-10, 90 NRC at 330.

[65] *See* Order Granting Hearing at 4.

[66] LBP-19-10, 90 NRC at 318-29.

[67] *Id*. at 329-34.

[68] Tribe Petition at 15-16.

[69] *Id*. at 16-17.

[70] *Id*. at 17.

complete a satisfactory survey. The Board also discussed the Staff's reasons for not pursuing other information-gathering options that would not involve the Tribe and found that the Staff's decision was reasonable.[71]

We find that the Board's conclusion that the cultural resources information it found lacking in LBP-15-16 was not available due to the Tribe's non-cooperation was reasonable. The Tribe's arguments do not therefore show a clear error of fact in the Board's findings.

b. Need for FSEIS Supplementation

The Tribe argues that the Board erred in ruling that there was no need for the Staff to issue a supplement to the FSEIS.[72] According to the Tribe, without a supplement, the public does not have the opportunity to assess and comment on the Staff's finding that additional cultural resources information is unavailable.[73] Relatedly, it claims that the Board erred in denying its motion to strike the Staff's prefiled testimony.[74]

The Board relied on longstanding agency practice allowing the adjudicatory record to augment existing environmental analyses in considering whether the Staff should have to issue a supplement to the FSEIS.[75] The Board noted that federal courts of appeals cases have "accepted the validity" of the NRC's approach.[76] The Board also stated that in some situations

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[71] LBP-19-10, 90 NRC at 334-35.

[72] Tribe Petition at 14-15.

[73] *Id*. at 15.

[74] *Id*. The Tribe's argument is more fully explained in its Motion to Strike, where it asserted that any information not discussed or referenced in the FSEIS is not relevant or material and the Staff's attempts to "rehabilitate its FSEIS through post-hoc written testimony of witnesses . . . should be struck by the Board." Motion to Strike at 3.

[75] *See* LBP-19-10, 90 NRC at 350-53 (citing *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 595 (2016); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1013 (1973)).

[76] *Id*. at 351 & n.315 (citing *NRDC v. NRC*, 879 F.3d 1202, 1209-12 (D.C. Cir. 2018); *New England Coal. on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978); *Citizens for Safe*

publishing a supplemental environmental analysis would be appropriate, for example when the information developed during the adjudication represents a "fundamental . . . omission," where the "proposed project has been so changed by the Board's decision as not to have been fairly exposed to public comments during the initial circulation" of the FSEIS, or where the NRC Staff's evidence at hearing varies "markedly" from the information in the FSEIS.[77] It noted that our regulations in Part 51 require supplementation when the scope of the project has changed or there is significant new information.[78]

The Board also looked to 40 C.F.R. § 1502.22(b) and determined that all the elements of the CEQ regulation were met in its decision and the supporting record.[79] The Board observed that the original FSEIS stated that cultural resources information was limited in part because the Tribe, after initially agreeing to participate in the 2013 cultural resources survey, "withdrew its acceptance because the tribal council had not been briefed before the survey was scheduled to begin."[80] The Board found that because the Staff had not been able to conduct an additional cultural resources survey, the only potentially supplemental information was "the reasons why such additional cultural resources information still has not been obtained by the NRC Staff."[81] The Board concluded that a statement of "why this information was unavailable . . . does not

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Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974)).

[77] *Id.* at 352-53.

[78] *Id*. at 352 n.316 (citing 10 C.F.R. § 51.92).

[79] *See id*. at 340, 348-55.

[80] *Id*. at 354 (quoting FSEIS at F-2).

[81] *Id*.

appear to us to constitute the type of significant discussion that warrants employing the supplementation process."[82]

In its petition for review, the Tribe argues that it is improper for an environmental analysis to be augmented informally through the record of adjudication.[83] But the Tribe's arguments are insufficient to meet our standard for taking review; that is, they do not demonstrate to us that "a necessary legal conclusion [that the Board made] is without governing precedent or is a departure from or contrary to established law" or that the Board's decision raises a "substantial and important question of law, policy, or discretion."[84] It appears that in all respects the Board followed applicable law, both within our agency case law and federal court decisions.

The Tribe attempts to distinguish the Circuit Court for the District of Columbia's ruling in *NRDC v. NRC*, which rejected a challenge to our practice of augmenting an environmental analysis with the publicly available adjudicatory record.[85] The Tribe points out that in *NRDC v. NRC*, the analysis missing from the environmental document had been performed before the case had reached the court of appeals; therefore, remand to the agency for formal supplementation would be "pointless."[86] The Tribe argues that *NRDC v. NRC* is inapposite to this proceeding because no additional information has been gathered and no additional analysis has taken place.[87] In connection with this argument, the Tribe claims that the Board's August

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[82] *Id.* at 355.

[83] Tribe Petition at 14-15.

[84] *See* 10 C.F.R. § 2.341(b)(4).

[85] Tribe Petition at 14-15 (citing *NRDC v. NRC*, 879 F.3d at 1212).

[86] *Id.*

[87] *Id.*

12, 2019, ruling on its motion to strike also violates NEPA.[88] In its motion to strike Staff's prefiled testimony, the Tribe argued that the Staff was improperly trying to rehabilitate a deficient NEPA document with extraneous information.[89]

The Tribe does not raise a substantial question warranting our review because it misconstrues the purpose of the second evidentiary hearing. The Board and the parties knew at the outset of the hearing that no additional cultural resources information would be gathered in that process. The question before the Board was only whether the information was properly considered "unavailable" under NEPA. And under CEQ regulations, which we look to for guidance, "unavailable" information includes information the cost of which to gather would be "unreasonable" in terms of both money and time.[90] Therefore, we see no factual, procedural, or legal error in the Board's conclusion that the testimony it received at the hearing specifically convened for the purpose of determining whether information was unavailable eliminated the need for formal supplementation to the FSEIS to reflect that information's unavailability.

c. *Board License Amendment Concerning the Programmatic Agreement*

The Tribe raises three arguments with respect to the Board's license amendment concerning the Programmatic Agreement. The Tribe's arguments do not present an error warranting our review.

The Tribe first argues that the license condition was not "subject to notice and comment or otherwise incorporated into any NEPA document," so it cannot remedy a NEPA deficiency.[91]

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[88] *Id.*

[89] *See* Motion to Strike at 1-9.

[90] *See* 40 C.F.R. § 1502.21; *see also* Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. at 43,332.

[91] Tribe Petition at 18.

But as we have explained above, the FSEIS is properly augmented by the entire adjudicatory record, including the Board's decision. The Board appropriately found that no formal supplementation, including notice and comment, was necessary to comply with NEPA.

The Tribe additionally states that the Board's first initial decision in the case (LBP-15-16, which we affirmed in CLI-16-20) found the Programmatic Agreement to be insufficient to protect cultural resources.[92] It therefore argues that the Programmatic Agreement has been "invalidated by prior rulings."[93] But neither the Board decision in LBP-15-16 nor our decision affirming it found the Programmatic Agreement deficient for purposes for which it was entered, and those decisions did not invalidate the Programmatic Agreement.

We are not convinced by the Tribe's argument that because the Programmatic Agreement is "purely a creature of [the] NHPA," it has no role in satisfying NEPA.[94] The Tribe argues that the NHPA only protects sites eligible for inclusion within National Register of Historic Places; therefore, it asserts, "any cultural resources not eligible require no analysis under the NHPA or Programmatic Agreement, providing no basis to meet NEPA duties."[95] But the Programmatic Agreement provides means for protecting a variety of cultural objects or archeological finds beyond listing on the National Register.[96]

Moreover, with respect to all three arguments, the Tribe mischaracterizes the Board's ruling. The Board did not rely on the license amendment as a basis for its ruling that additional

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[92] *Id.* at 18.

[93] *Id*.

[94] *Id*. at 17.

[95] *Id*. at 17-18.

[96] *See, e.g*., Ex. NRC-018-A, Programmatic Agreement ¶ 9 (construction will be halted for all "unanticipated discoveries" until they can be evaluated), ¶ 10 ("human remains" will be protected), ¶ 11 (disposition of artifacts).

cultural resources information is unavailable under NEPA. The license amendment provides that the signatories to the Programmatic Agreement and interested Tribes, even if not signatories, will receive thirty days prior notice of who will be monitoring future groundbreaking activities.[97] This notice provision does not alter the substantive rights of the signatories to the Programmatic Agreement or of the Tribe.

Therefore, the Tribe's arguments concerning the Programmatic Agreement-related license amendment do not raise a substantial question of fact, law, or policy, and we do not accept them for review.

d. The Board's Application of NEPA's "Rule of Reason"

Next, the Tribe challenges the Board's ruling because it claims that NEPA's "rule of reason" only applies to exclude a discussion of "remote and speculative" effects.[98] The Tribe argues that because there are certainly some Native American cultural resources on the site (some of which have already been identified) that could be adversely affected by this project, adverse impacts to them are not remote and speculative. Therefore, the Tribe contends, the rule of reason does not apply to the issues it raised in Contention 1A.[99]

We disagree with the Tribe's argument. In promulgating 40 C.F.R. § 1502.22, CEQ explained that the new regulation "requires that analysis of impacts in the face of unavailable information be grounded in the 'rule of reason.'"[100] Moreover, reviewing courts have applied the rule of reason to evaluate agencies' compliance throughout the NEPA process. For example, in

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[97] *See* LBP-19-10, 90 NRC at 344-45.

[98] Tribe Petition at 18-19.

[99] *Id*.

[100] 51 Fed. Reg. at 15,621; *see also* Council on Environment Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. 43,304, 43,332 (Jul. 6, 2020) (reiterating that the rule of reason applies when discussing incomplete or unavailable information).

Marsh v. Oregon Natural Resource Council, the U.S. Supreme Court found that an agency must use a rule of reason to decide whether new information warrants a supplemental environmental impact statement.[101] Similarly, the Court ruled in *Department of Transportation v. Public Citizen* that the rule of reason should govern the decision to prepare an environmental impact statement, where the statement would serve no purpose because the agency was required by law to undertake the action in question.[102] Thus, the Tribe's "rule of reason" argument does not raise a substantial question of law.

e. Whether the Board Improperly "Inserted Itself" into Negotiations or Was Biased in Staff's Favor

The Tribe argues that the Board improperly involved itself in settlement negotiations, used the Tribe's confidential settlement negotiations against the Tribe, and was biased in favor of the Staff.[103] The Tribe argues that it was improper for the Board to admit its own exhibits.[104] We find that these arguments do not present a prejudicial procedural error.

The Tribe's arguments that the Board improperly involved itself in settlement negotiations or improperly used settlement negotiations against the Tribe are unavailing.[105] The Board did not act as a settlement judge and in fact offered at several points in this proceeding to

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[101] 490 U.S. 360, 373 (1989).

[102] 541 U.S. 752, 767 (2004); *see also Utahns for Better Transp. v. Dept. of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002) (reviewing court applies "rule of reason" in deciding whether claimed deficiencies in NEPA document are significant or merely "flyspecks").

[103] Tribe Petition at 20-21; *see also* Tribe Reply to the Staff at 4-5; Tribe Reply to Powertech at 4-5.

[104] Tribe Petition at 21-22.

[105] The Tribe argues that the Board forced it to participate in alternative dispute resolution (ADR), which is inaccurate. Tribe Petition at 21. However, the record does not reflect that the parties used ADR.

appoint a settlement judge.[106] In 2015, in its first initial decision, the Board acknowledged that it had no authority to direct the Staff in its NEPA duties, and it required monthly status updates from the Staff.[107] More than a year later, after the Staff's status reports showed no significant progress in the Staff's efforts to resolve its differences with the Tribe, the Board arranged for telephonic status calls.[108] Between October 2016 and April 2019, the Board held eleven on-the-record teleconferences with the parties concerning the status of the proceeding.[109] The Tribe's only specific argument challenging the Board's actions is that the Board forced the Tribe to accept the March 2018 Approach when it ruled on the parties cross-motions for summary disposition.[110] But the Board did not act inappropriately in ruling on the motions for summary disposition or in its underlying findings of fact that the Tribe had at one time accepted the March 2018 Approach. Ruling on motions, making findings of fact, and holding status conferences are within the scope of a Board's core responsibilities.

We disagree that the Board improperly "based its opinion regarding the reasonableness of the Tribe's negotiating position on letters exchanged during negotiations."[111] The Tribe argues that the Board's actions contravened Federal Rule of Evidence 408, which prohibits the admission of settlement negotiations into evidence in order "to prove or disprove the validity or

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[106] *See, e.g.*, LBP-18-5, 88 NRC at 135 n.255 (reminding the parties that they may request the appointment of a Settlement Judge and noting that the Board had suggested they do so in "a number of telephone conferences" as well as in LBP-17-9, 86 NRC at 209); *see also* Staff Answer Opposing Review at 21; Powertech Answer Opposing Review at 21.

[107] LBP-15-16, 81 NRC at 658.

[108] *See* Memorandum and Order (Requesting Scheduling Information for Telephone Conference Call) (Oct. 13, 2016), at 2 (unpublished).

[109] The transcripts of these teleconferences are publicly available in ADAMS.

[110] Tribe Petition at 20, 23 (citing LBP-18-5, 88 NRC at 135-36).

[111] *Id.* at 22.

amount of a disputed claim."[112] The Federal Rules of Evidence do not apply directly to our proceedings, although the boards look to them as guidance.[113] In any event, the Board did not violate the principle behind the federal rule. Rule 408 also provides that statements made during negotiations may be admitted for "another purpose," such as proving bias or prejudice.[114] The "another purpose" exception has been interpreted to include showing that a party acted in bad faith during the negotiations and establishing the intent of the settlement reached.[115] Here, the Board considered the communications between the parties not to establish the validity of a disputed claim but to determine whether the Tribe had unjustifiably refused to cooperate during the negotiations and whether Staff reasonably abandoned further negotiations as futile. In our view, the Board did not err in considering the parties' communications in that context.

The Tribe also does not show prejudicial procedural error in the Board's admission and reliance on its own exhibits.[116] The Board provided a list of twelve exhibits in an August 20, 2019, pretrial order, and the Tribe did not object to the admission of any of them.[117] The Tribe does not discuss the substance of the Board's exhibits or describe specifically how it was prejudiced by them. In our proceedings, the Board has an "inquisitorial role" in the development

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[112] *See* Fed. R. Evid. 408(a).

[113] *Southern California Edison Co*. (San Onofre Nuclear Generating Station Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983); *see, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

[114] *See* Fed. R. Evid. 408(b).

[115] *See, e.g.*, *Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000) (proof of bad faith); *Coakley & Williams Const., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 349, 353-54 (4th Cir. 1992) (intent of settlement).

[116] Tribe Petition at 21-22.

[117] *See* Memorandum (Regarding Board Exhibits for Evidentiary Hearing on Contention 1A and Opportunity to Address Recent Judicial Decision) (Aug. 20, 2019) (unpublished).

of a complete record.[118] Our rules of procedure grant the Board the authority to receive evidence; examine witnesses; strike irrelevant, immaterial, unreliable, duplicative, or cumulative evidence; and take "any other action consistent" with applicable law in its conduct of proceedings.[119] We therefore disagree with the Tribe's argument that the Board's admission of its own exhibits constituted prejudicial procedural error.

3. LBP-17-9: Summary Disposition of Contention 1B

In LBP-17-9, the Board found that the Staff had made reasonable efforts under the NHPA to consult with the Tribe concerning the project's effects on cultural resources that may be located on the site, and it granted summary disposition to the Staff on Contention 1B. According to the Tribe, the Board concluded that the Staff had met its duty to consult based on "a single . . . face to face meeting that occurred on May 16, 2016, one follow up conference call on January 31, 2017, and an exchange of letters [that] even the Board characterized as lacking substance."[120] The Tribe also argues that the "events that have transpired since . . . confirm the inadequate effort to address historic and cultural resources under NEPA that flow from the failure to satisfy NHPA standards."

As an initial matter, the Tribe's arguments that the Staff had not identified historic properties in compliance with the NHPA, challenges the Board's finding in LBP-15-16, not its ruling in LBP-17-9.[121] The argument is therefore impermissibly late.

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[118] *Vermont Yankee*, CLI-10-17, 72 NRC at 47-48.

[119] 10 C.F.R. § 2.319(d), (g), (s).

[120] Tribe Petition at 24 (citing LBP-17-9, 86 NRC at 190).

[121] *Id*. In LBP-15-16, the Board found that "NRC Staff has complied with the NHPA requirement to make a good faith and reasonable effort to identify properties that are eligible for inclusion in the National Register of Historic Places within the Dewey-Burdock ISL project area." LBP-15-16, 81 NRC at 654.

Whether the Staff's attempts to consult with the Tribe adequately fulfilled its NHPA consultation duties is a question of fact subject to the "clear error" standard of review. Moreover, the Tribe's references to the Staff's actions subsequent to the summary disposition ruling are irrelevant to the Board's conclusion regarding summary disposition. The Tribe does not meet the "clear error" standard; it does not explain how the Board's findings of fact "are not plausible." We therefore decline to take review of this claim.

C. Consolidated Intervenors Petition for Review

The Consolidated Intervenors seek review of the Board's merits decision in LBP-19-10, its summary disposition ruling in LBP-17-9, and its August 12, 2019, order with a single argument. They argue that the Staff has a responsibility under NEPA to "preserve important historic, cultural, and natural aspects of our national heritage" regardless of whether a "federally recognized tribe appears to assert and prosecute a claim."[122] They argue that the Staff's approach, "now adopted by the Board[,] makes the consideration of cultural resources values entirely dependent upon the active participation of the [Oglala Sioux Tribe]."[123]

Contrary to these claims, the Staff and the Board have not put the onus of identifying cultural resources on a single Native American tribe. Powertech submitted a Class III cultural resources survey with its application.[124] As the Board recognized in its first initial decision, a Class III survey can identify a property's eligibility to be included on the National Register of Historic Places but "wouldn't necessarily identify all of the [Native American cultural and religious] resources primarily because some knowledge [must be] provided by the Native

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[122] Consolidated Intervenors Petition at 1-2 (quoting *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 530 (D.C. Cir. 2018)).

[123] *Id*. at 2.

[124] Ex. APP-009, Level II Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota (Mar. 2008) (ML14240A418).

American groups themselves."[125] The Staff began its efforts to consult with various affected Tribes in 2011, and a field survey was conducted on the site with three Tribes (although not the Oglala Sioux Tribe) participating.[126] And the March 2018 Approach that the Staff proposed would have involved qualified archeologists, not solely tribal members, to complete the survey, and it would have provided an opportunity for other tribes to participate.[127] Therefore, Consolidated Intervenors' assertions that consideration of cultural resources was entirely dependent on the Tribe are inconsistent with the record.

Accordingly, we find no clear error in the Board's ruling that the Staff has satisfied its NEPA responsibilities, and we deny the Consolidated Intervenors' petition for review.

III. CONCLUSION

For the foregoing reasons, we *deny* the petitions for review.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of October 2020.

[125] LBP-15-16, 81 NRC at 653 (quoting Tr. at 762-63).

[126] *See id.* at 644-49.

[127] *See* Ex. NRC-192, March 2018 Approach, at 2-3.

Additional Views of Chairman Svinicki and Commissioner Caputo

We fully agree with the majority's determination that neither petitioner provided a sufficient reason to take review of the Board's holding in this proceeding. The Board's holding rests on the observation that "NEPA's rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis."[1] In such circumstances, the agency must "undertake reasonable efforts to obtain unavailable information."[2] The Board found that "although unsuccessful, the NRC Staff acted reasonably in seeking to obtain information from the Tribe regarding the location and significance of Tribal cultural resources on the Dewey-Burdock site for the purpose of its NEPA impacts analysis."[3] We write separately to emphasize that the Staff's efforts went far beyond what was required by any "rule of reason" worthy of the name.[4]

The conclusion to this proceeding illustrates the fruitlessness of compelling the Staff to take extraordinary measures to gather missing information under NEPA when clearly reasonable steps have failed. This quixotic search for more information followed from the Board's and Commission's failure to articulate clearly the attributes of a reasonable effort to obtain missing information. The details of the failed consultation, adjudication, and NEPA process in the instant case are worth examining because they demonstrate significant and recurring flaws in our process. Until agency adjudicators effectively address these short

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[1] LBP-19-10, 90 NRC at 314 (citing National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,621 (Apr. 25, 1986)).

[2] *Id*. at 316.

[3] *Id*. at 356.

[4] Chairman Svinicki has made this point many times over the course of this now ten-year proceeding. CLI-19-09, 90 NRC 121, 136 (2019) (Additional Views of Chairman Svinicki); CLI-18-7, 88 NRC at 11 (Chairman Svinicki, Additional Views); CLI-16-20, 84 NRC at 263-68 (Commissioner Svinicki, dissenting in part).

comings, efficiency and balance will elude our NEPA reviews when the agency lacks complete information.

A. The Staff's Efforts to Obtain Information on Cultural Resources

1. Four Years of Consultation

The Staff began its search for information regarding cultural resources many years ago. In early 2010, the Staff contacted the South Dakota State Historic Preservation Officer, who identified twenty Native American Tribes "that might attach historic, cultural, and religious significance to historic properties within the Dewey-Burdock ISL Project area."[5] The Staff sent letters to these Tribes that asked for assistance in identifying cultural resources on March 19, 2010, September 10, 2010, and March 4, 2011.[6] On June 8, 2011, at the Prairie Winds Casino and Hotel on Pine Ridge Reservation, the Staff held a meeting with six Tribes to gather information informally.[7] The Staff held a follow up meeting on February 14-15, 2012, in Rapid City, South Dakota; thirteen Tribes attended.[8] In the following months, the Staff continued to exchange letters and emails with tribal entities.[9]

Between June 19, 2012, and October 19, 2012, the Staff received and considered a variety of proposals to conduct a survey of the site.[10] As part of this effort, on September 5, 2012, the Staff held a meeting in Bismarck, North Dakota, with representatives from seven Tribes to further discuss "a statement of work to identify religious and cultural properties within

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[5] LBP-15-16, 81 NRC at 644.

[6] *Id*.

[7] *Id*. at 645.

[8] *Id*.

[9] *Id*. at 646.

[10] *Id*. at 646-47.

the area of potential effects."[11] Notably, the Board found that the survey approach favored by the Oglala Sioux Tribe, which would have cost over one million dollars to survey a fraction of the site, was "patently unreasonable."[12] At the end of the year, the NRC Staff stated that it intended to conduct an alternate field survey in the spring.[13] On February 8, 2013, the Staff "invited twenty-three tribes to participate in a field survey between April 1 and May 1, 2013, and described procedures for site access, and compensation for survey participation."[14]

The Oglala Sioux Tribe objected to the terms of the survey, which began on April 1, 2013; nonetheless, seven Tribes participated in the survey, and three of those Tribes ultimately provided survey reports to the NRC.[15] "The survey reports documented sites of religious and cultural significance identified during site surveys [and] mitigation measures recommended for each identified site."[16] The Staff issued the final Environmental Impact Statement in January of 2014, which contained the three reports arising from the April 2013 survey.[17]

2. Is Four Years Enough?

Before the Board, the Staff did not argue that the Final Environmental Impact Statement catalogued and provided mitigation measures for all potential cultural resources that could be present on site. Instead, the Staff contended that it complied with NEPA by making "'a reasonable and good faith effort – an effort that lasted almost 4 years – to obtain information on

[11] *Id*. at 646.

[12] *Id*. at 657 & n.229; LBP-19-10, 90 NRC at 331 n.227).

[13] LBP-15-16, 81 NRC at 648.

[14] *Id*.

[15] *Id*. at 648-49, 652.

[16] *Id*. at 649.

[17] *Id*.

religious and cultural resources that are significant to the tribes.'"[18] However, rather than consider the Staff's plea, the Board simply concluded, "the FSEIS in this proceeding does not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe and the majority of other consulting Native American tribes."[19] Thus, the Board found the Staff's review did not comport with NEPA.[20] The Board noted that the Staff "can remedy this deficiency . . . by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic, or religious sites of significance to the Oglala Sioux Tribe that may be impacted by the Powertech Dewey-Burdock project."[21] However, the Board provided no guidance to the Staff or parties about what efforts would be sufficient to comply with NEPA's rule of reason in the event that the parties held to their clearly established positions and no additional survey occurred.

On appeal, the Staff argued that "the Board misapplied NEPA's hard-look standard as a matter of law, under which the Board should assess whether the Staff 'made reasonable efforts' to obtain complete information on the cultural resources at issue here."[22] The Staff's appeal posed a critical legal question, which the Commission reviews *de novo*: whether the Board applied the appropriate legal standards in considering if four years of work to obtain cultural resources information was a sufficient effort under NEPA's "rule of reason." Rather than answer, the majority sidestepped this foundational inquiry entirely and, over Chairman Svinicki's dissent, simply observed, "the fundamental issue here – whether the Staff complied with NEPA

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[18] *Id*. at 651 (quoting *NRC Staff's Reply Brief* (Jan. 29, 2015) at 5).

[19] *Id*. at 655.

[20] *Id*.

[21] *Id*. at 657-58.

[22] CLI-16-20, 84 NRC at 247 (quoting *NRC Staff's Petition for Review of LBP-15-16* (May 26, 2015) at 17-18).

– is inherently factual."[23] Moreover, as Chairman Svinicki noted in her dissenting opinion, the Board's holding that the Oglala Sioux Tribe's proposal for a cultural resources was "patently unreasonable" logically entailed a conclusion that the information that would be gleaned from that survey was not reasonably available.[24] Thus, the result of the Commission's and Board's rulings left the Staff with no recourse but to double down on the same unavailing efforts with the Tribe when the Tribe had already indicated that the information sought was not reasonably available. Unsurprisingly, the ensuing four years of consultation would prove no more productive than the first four years.

3. Four More Years

The Staff renewed its efforts to obtain information on cultural resources on June 23, 2015, when the Staff sent a letter to the Oglala Sioux Tribes asking to reinitiate government-to-government consultations.[25] The parties exchanged correspondence and held another meeting in Pine Ridge, South Dakota on May 19, 2016.[26] Concerned by the lack of progress in consultation, the Board convened the first of a series of teleconferences on November 7, 2016; shortly afterwards, on November 23, 2016, the Staff invited the Tribe to join a teleconference on the parameters of a cultural survey.[27] The teleconference occurred on January 31, 2017, but the Staff and Tribe were again unable to agree on a survey methodology.[28] Thereafter, the parties exchanged letters through the spring of 2017, which culminated in a letter from the Tribe on May 31, 2017, that detailed the Tribe's ongoing objections to the Staff's proposed

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[23] *Id.*

[24] *Id.* at 264-65 (Commissioner Svinicki, dissenting in part).

[25] LBP-17-9, 86 NRC at 179.

[26] LBP-19-10, 90 NRC at 300.

[27] *Id.* at 301.

[28] LBP-17-9, 86 NRC at 181.

methodology.[29] After receipt of the letter, the Staff concluded that additional consultation would be "'unlikely to result in a mutually acceptable settlement of the dispute.'"[30] Thus, the Staff moved for summary disposition, which the Board denied with respect to the Staff's NEPA obligations.[31]

Thereafter, the Board continued to hold teleconferences with the parties to monitor progress on resolving the contention.[32] At a November 16, 2017, teleconference the Staff "revealed that it was working on a path forward that it hoped to present to the other parties in the next several weeks."[33] On December 6, 2017, the Staff sent a new proposed approach to the Tribe and Consolidated Intervenors, who expressed a "tentative approval" of the proposal in a follow-on December 12, 2017, teleconference with the Board. On January 19, 2018, the other parties provided written responses to the Staff proposal, which the Staff took into account in the finalized approach it provided to the parties on March 16, 2018, the "March 2018 Approach."[34] At a further teleconference with the Board, all parties expressed comfort with the parameters of the March 2018 Approach.[35]

Among other things, the March 2018 Approach called for the parties to begin "the field survey process in mid-June 2018 for a two week period" and also provided for a follow-on

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[29] *Id*. at 182.

[30] *Id*. (quoting Letter from Cinthya I Román, Chief, Environmental Review Branch, Division of Fuel Cycle, Safety, Safeguards, and Environmental Review, to Trina Lone Hill, THPA, Oglala Sioux Tribe at 2 (July 24, 2017)).

[31] *Id*. at 201.

[32] LBP-19-10, 90 NRC at 301.

[33] *Id*.

[34] *Id*. at 302-03.

[35] *Id*. at 303.

survey in September of that year.[36] Under the March 2018 Approach, the Staff would prepare a draft survey report in October of 2018, with an opportunity for Tribal review through late December, followed by publication of a draft supplement to the FSEIS in February 2019 and a final supplement in May.[37] Shortly before the June survey period began, "the Oglala Sioux Tribe presented the NRC Staff with an alternative survey proposal."[38] The alternate proposal called for visits by tribal elders "over several days during the different seasons of the year"; field work that would last over a year; and a budget of over $2 million.[39] The Staff "responded by indicating that it considered the Tribe's alternative survey methodology to be a constructive rejection of the March 2018 Approach and terminated implementation of the March 2018 Approach."[40] In light of the failed survey attempt, the Staff and Oglala Sioux Tribe both moved for summary disposition; but the Board again declined to grant summary disposition and provided two options to resolve the contention: further negotiation to implement the March 2018 Approach or an evidentiary hearing.[41]

Once more, the Staff sought to obtain the missing information through further discussions with the Oglala Sioux Tribe. On November 21, 2018, the Staff sent the Oglala Sioux Tribe and other Tribes a letter indicating that the Staff would resume efforts to complete the March 2018 Approach.[42] The Tribe responded on January 11, 2019, in a letter that raised concerns with the Staff's approach. The following month, the Staff developed a Proposed Draft

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 304.

[40] *Id.* at 305.

[41] *Id.* at 305-06.

[42] *Id.* at 307.

Cultural Resources Site Survey Methodology (February 2019 Methodology), which it provided to the Oglala Sioux Tribe for review.[43] The Staff met at the Pine Ridge Reservation in South Dakota with the Oglala Sioux Tribal Historic Preservation Advisory Council and THPOs from other Sioux Tribes to discuss the February 2019 Methodology.[44] During the meeting, the Tribes voiced concerns with the February 2019 Methodology as well as the March 2018 Approach.[45] Once more, the parties exchanged letters in which the Staff committed to working within the framework of the March 2018 Approach and the Tribe cautioned that it did not agree to a rigid application of the March 2018 Approach.[46] Once again at impasse, the Staff advised the Board during a subsequent teleconference on March 21, 2019, that "'the differences that remain were so fundamental that it was not feasible to have further negotiation meetings'" and that the Staff would pursue the option for an evidentiary hearing.[47] The evidentiary hearing that is the subject of the instant appeal followed.

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[43] *Id*. at 308.

[44] *Id*.

[45] *Id*.

[46] *Id*. at 308-09.

[47] *Id*. at 309-10 (quoting Tr. 1564-65, 1619-20 (Mar. 21, 2019)).

B. Analysis

The Council on Environmental Quality recently issued a final rule to update its regulations on NEPA compliance.[48] Although we are not bound by CEQ regulations, the NRC gives them "substantial deference" in applying NEPA.[49] The CEQ rule added a new provision specifying a presumptive two year time limit for preparing Environmental Impact Statements.[50] While this would not be an inflexible rule, allowing a senior agency official to waive its applicability for a given project, it demonstrates the relative amount of time and effort expected of agencies in preparing an EIS.[51]

This is in keeping with Federal Court's descriptions of NEPA's limited requirements. The Supreme Court has clarified that NEPA is a procedural statute: it "does not mandate particular results, but simply prescribes the necessary process."[52] The purpose of the EIS is (1) to ensure that the agency "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and (2) to guarantee "that the relevant information will be made available to the larger audience."[53] 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."[54] Likewise, the

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[48] Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. 43,304 (Jul. 16, 2020).

[49] *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007).

[50] 85 Fed. Reg. at 43,362-63.

[51] *Id*.

[52] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[53] *Id*. at 349.

[54] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quotations omitted).

First Circuit has emphasized that an environmental impact statement "is not, after all, a research document."[55]

A ten-year adjudicatory process to comply with NEPA in this proceeding is difficult to reconcile with these interpretations of NEPA. Clearly, the additional efforts at negotiating a survey methodology came to nothing, and the Oglala Sioux Tribe remained consistent in its position that a satisfactory survey would require resources deemed unreasonable by the Board.[56] When the Staff, tasked with preparing the EIS and reasonably presumed to have the competency and expertise in NEPA matters sufficient for the job, advised us that it believed it could not obtain information on cultural resources despite having undertaken what it considered reasonable efforts, it should have rung alarm bells for agency decisionmakers. In essence, the Staff was informing the Commission that it did not know how to find the missing information through reasonable efforts. Repeatedly, the Board and Commission response to the Staff argument that it could not obtain information on cultural resources consisted of no more than ordering the Staff to try again. Obviously, a successful survey would have discharged the agency's NEPA obligations; but completion of that survey was never fully in the agency's hands. The agency could only control the effort it took to complete the survey. A more appropriate response would have considered whether the initial effort at consultation was a reasonable one and if not, what the Staff could have done differently that would have been reasonable (even if it never led to the hoped for survey). Without such guidance, it is unsurprising that the parties wandered aimlessly through nearly a decade of discussion. Ultimately, the agency is left with nothing to show for the ten years of the parties' wasted time and resources.

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[55] *Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 13 (1st Cir. 2008).

[56] *Compare* LBP-19-10, 90 NRC at 331 n.227) *with id*. at 12.

The NRC has frequently addressed the difficulties of producing an Environmental Impact Statement while missing information.[57] Most recently, the Commission considered this issue in a companion case to this order, *Crow Butte*. *Crow Butte* also involved the Staff's efforts to secure the Oglala Sioux Tribe's assistance to identify TCPs impacted by uranium recovery operations. We dissented from a similarly aimless remand in *Crow Butte* and instead would have found the Staff's efforts met NEPA's rule of reason because the Staff 1) identified the source of the missing information, 2) undertook reasonable efforts to acquire the information from that source, and 3) discontinued those efforts upon learning that the information could not be reasonably obtained.[58] In our view, the Staff's initial efforts to obtain cultural resources information in this proceeding would also meet these basic requirements. First, the Staff identified the source that was most likely to be able to provide the missing information by contacting the South Dakota SHPO to identify Tribes with a connection to the site.[59] Second, the Staff took steps that were likely to lead to obtaining the missing information, in this case by seeking to conduct an on-site cultural resources survey.[60] Third, the Staff discontinued further

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[57] *E.g. Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 438-44 (2011) (considering claim that applicant must provide a probabilistic analysis of new seismic information or show that the cost of such analysis would be exorbitant); *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1 (2008) (considering claim that NRC did not fully disclose potential radiological impacts of a terrorist attack in its supplemental environmental impact statement); *North Anna,* CLI-07-27, 66 NRC at 235-36 (discussing the extent to which missing information constitutes a "fatal flaw" to a NEPA analysis for an Early Site Permit).

[58] *Crow Butte Resources Inc.* (In Situ Leach Uranium Recovery Facility), CLI-20-__, 92 NRC at __ (slip op. at __) (2020) (Chairman Svinicki and Commissioner Caputo, dissenting).

[59] LBP-15-16, 81 NRC at 644.

[60] *See supra* notes 5-17 and accompanying text.

efforts upon learning that the information could not be reasonably obtained.[61] Had the majority simply invoked such a straightforward application of NEPA's rule of reason earlier in this proceeding, years of wasted effort and resources may have been averted.

Moreover, as discussed by us in our *Crow Butte* dissenting opinion, the Commission perpetuates a veil of mystery around the question of what level of effort to acquire missing information is reasonable. As a result, licensing applicants and the NRC staff face the ongoing prospect that a demand for additional detail in NEPA documents may give rise to a years-long sojourn with no clear destination. Thus, our adjudicatory process remains vulnerable to the type of profoundly regrettable, decade-long delay demonstrated by this proceeding. Given the complex and time-sensitive applications on the agency's licensing horizon, we can ill-afford to sustain this persistent trap for those who wander into our jurisprudence.

[61] LBP-19-10, 90 NRC at 331 & n. 227) (noting that the Tribe's suggested survey approach in 2012 entailed "unreasonable" costs); LBP-15-16, 81 NRC at 657 (finding aspects of the Tribe's proposed survey to be "patently unreasonable").

Commissioner Baran, Dissenting in Part

I agree with the majority that it was reasonable for the Board to conclude that the cultural resources information it found lacking in LBP-15-16 is not available for National Environmental Policy Act (NEPA) purposes. However, I dissent from the majority's holding that the Staff need not issue a supplement to the Final Supplemental Environmental Impact Statement (FSEIS). The Oglala Sioux Tribe contends that it is improper for a NEPA environmental analysis to be augmented after the fact through the record of adjudication. The Commission should grant review of this aspect of the petition because the Tribe has raised a substantial and important question of law and policy. We should conclude that the Staff must supplement the FEIS with an explanation of its determination that additional cultural resources information is unavailable. The Board previously found that the Staff's FSEIS did not meet the requirements of NEPA because the FSEIS was deficient with respect to the effects of the licensing action on Native American cultural, religious, and historic resources.[1] Without a supplement explaining why this information is unavailable, the significant deficiency will remain uncorrected and the agency will not meet its NEPA obligations.

NRC cannot avoid supplementing the FEIS by allowing the significant deficiencies of the environmental review to be corrected by adjudicatory proceedings conducted *after* the Powertech license was issued. As the Commission has observed many times, NEPA is a procedural statute.[2] It establishes a process to ensure that, when an agency makes a decision that could affect the environment, that decision is informed by a thorough evaluation of the expected environmental impacts. A basic premise of the statute is that informed

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[1] LBP-15-16, 81 NRC at 708, 655-58. The Board also identified a NEPA deficiency with respect to hydrogeological information, the subject of Contention 3, and conditioned Powertech's license to cure this deficiency. *See id.* at 679, 681, 709.

[2] *See e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 (2011).

decisionmaking will help protect the environment by forcing agencies to consider the consequences of potential actions as well as alternatives that could be less environmentally damaging. That commonsense approach simply does not work if the agency decision precedes the environmental review. Thus, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[3] When the Commission allows a Board to correct a significantly inadequate NEPA document through augmentation *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

Here, the licensing decision was made on April 8, 2014, when the Staff issued a Part 40 source material license to Powertech. There was nothing provisional about that license. After Powertech received the license, it was authorized by NRC to possess source material. Like many agency decisions – whether they be licenses, orders, or rulemakings – issuance of the Powertech license could be challenged in an agency adjudicatory proceeding and in federal court. But the possibility of judicial (or quasi-judicial) review does not change the fact that the licensing decision was made on April 8, 2014. The Board's hearing on whether the information was unavailable did not take place until August 2019 – more than five years *after* the agency's licensing decision was made. The Board's final initial decision finding the information unavailable was not issued until four months later, on December 12, 2019. Relying on the Board's August 2019 hearing and December 2019 decision to cure the significant deficiencies of a March 2014 FSEIS that the Staff relied on to issue an April 2014 license would not comply with the basic requirements of NEPA.

In two recent cases, the D.C. Circuit Court of Appeals made it clear that it does not approve of the Commission's current practice of allowing for the augmentation of an inadequate NEPA environmental review after the decision to issue a license has already been made.

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[3] *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

In *NRDC v. NRC*, the Court examined this practice. While the Court of Appeals found that there was no concrete harm in that particular case, the Court stated:

> We do not mean to imply the procedure the Board followed was ideal or even desirable. Certainly it would be preferable for the FEIS to contain all relevant information and the record of decision to be complete and adequate before the license is issued.[4]

The second case is the very one before us now. In *Oglala Sioux Tribe*, the Court of Appeals went even further than it had in *NRDC v. NRC* in broadly criticizing the agency's practice. The Court explained:

> The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm.[5]

The Court added:

> The agency's decision in this case and its apparent practice are contrary to NEPA. The statute's requirement that a detailed environmental impact statement be made for a "proposed" action make clear that agencies must take the required hard look *before* taking that action.[6]

The Court of Appeals held that "once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm."[7] It then remanded the case to the Commission to decide whether to leave Powertech's license in place.

The Court of Appeals decisions are a strong signal that the Commission must act to bring the agency's doctrine and practice into compliance with NEPA. The Board is correct that,

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[4] *NRDC v. NRC*, 879 F.3d 1202, 1212 (D.C. Cir. 2018).

[5] *Oglala Sioux Tribe*, 896 F.3d at 523.

[6] *Id.* at 532.

[7] *Id.* at 538.

for many years, the Commission has permitted NEPA environmental reviews to be augmented by adjudicatory decisions occurring after issuance of a materials license. But by allowing the significant deficiencies of NEPA analyses to be corrected by adjudicatory proceedings *after* a license has already been issued, the Commission has put NRC on course to repeatedly and predictably violate a core requirement of NEPA. We have a responsibility to avoid this result.

Therefore, we should now hold that the Board cannot correct significant deficiencies of a NEPA environmental review through the hearing process after a licensing action has already been taken in reliance on the deficient NEPA analysis.[8]

Aside from bringing the agency into compliance with NEPA, requiring the Staff to supplement the FSEIS would also provide interested stakeholders with the opportunity to comment on the Staff's determination that additional cultural resources information is unavailable. Although adjudicatory hearings can provide for "more rigorous public scrutiny" of a NEPA environmental review that a public comment period, they are also much more restrictive.[9] Many interested stakeholders likely would be unable to demonstrate standing to intervene or to submit a contention that meets NRC's stringent admissibility standards. Or they may lack the financial resources to participate in an adjudicatory hearing. Yet, these stakeholders may offer insightful and valuable comments for the agency to consider as part of a public comment period on a supplement to the FSEIS.

For these reasons, I would grant review of this aspect of the Oglala Sioux Tribe's petition and direct the Staff to supplement the FEIS with an explanation of (1) its determination that

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[8] This approach would not require completing the hearing before making a licensing decision, and it would not change Commission jurisprudence allowing for augmentation of the environmental record *before* a licensing action is taken. Rather, if a licensing decision is based on an environmental review that the Board or Commission later finds to be significantly deficient, then after-the-fact augmentation of the environmental review with the hearing record is not available as an option to correct the deficiency.

[9] *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 53 (2001).

additional cultural resources information is unavailable and (2) the relevance of the unavailable information to evaluating the reasonably foreseeable significant adverse impacts on the human environment.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-20-09)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

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Dated at Rockville, Maryland,
This 8th day of October 2020.