

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

POWERTECH (USA), INC.,
(Dewey-Burdock In Situ Uranium
Recovery Facility)

Docket No. 40-0975-MLA
ASLBP No. 10-898-02-MLA-BD01

April 30, 2010

**PETITIONERS' REQUEST FOR LEAVE TO FILE A NEW CONTENTION
BASED ON SUNSI MATERIAL**

Petitioners¹ hereby timely submit this request pursuant to the Board's Order dated April 1, 2010.²

I. INTRODUCTION

This new contention is based on the SUNSI material delivered to Petitioners' expert on April 1, 2010.³ The parties have argued standing in other pleadings that are before this Board and such arguments are not repeated here. Assuming that the Board finds standing for any Petitioner, this new SUNSI-based contention is to be added as an admitted contention.

II. NEW CONTENTION

The Application is not in conformance with 10 CFR §40.9 and 10 CFR §51.45 because the Application does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that cultural and historic resources within the PAA are identified and protected pursuant to Section 106 of the National Historic

¹ Theodore P. Ebert, David Frankel, Gary Heckenlaible, Susan Henderson, Dayton Hyde, Liliac C. Jones Jarding, Clean Water Alliance ("CWA"), and Aligning for Responsible Mining ("ARM").

² At p.2.

³ The SUNSI material consists entirely of the Augustana Report with certain site locations omitted and/or redacted.

Preservation Act. As a result, the Application fails to comply with Section 51.60 because its Environmental Report does not provide analyses that are adequate, accurate and complete in all material respects concerning archaeological sites and materials within the PAA. Applicant must be able to show that sub-surface testing was performed in order to demonstrate that archaeological sites within the PAA are properly identified, evaluated and protected and to show that it has submitted a proper analytic discussion under Sections 51.45 and 51.60.

III. BASES

1. Section 40.9 specifically requires that all information provided to the Commission by Applicant shall be complete and accurate in "all material respects." NRC Regulations Section 51.60 requires that Applicant prepare and submit an environmental report which contains the information specified in NRC Regulations Section 51.45, all of which must be accurate in all material respects under Section 40.9:

51.45 – (b) *Environmental considerations.* The environmental report shall contain a description of the proposed action, a statement of its purposes, a description of the environment affected, and discuss the following considerations:

(1) The impact of the proposed action on the environment. Impacts shall be discussed in proportion to their significance;

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(3) Alternatives to the proposed action. The discussion of alternatives shall be sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." To the extent practicable, the environmental impacts of the proposal and the alternatives should be presented in comparative form;

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(c) *Analysis.* The environmental report must include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects.... The analyses for environmental reports shall, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms. The environmental report should contain sufficient data to aid the Commission in its development of an independent analysis.

(d) *Status of compliance.* The environmental report shall list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action and shall describe the status of compliance with these requirements. The environmental report shall also include a discussion of the status of compliance with applicable environmental quality standards and requirements including, but not limited to, applicable zoning and land-use regulations, and thermal and other water pollution limitations or requirements which have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection. The discussion of alternatives in the report shall include a discussion of whether the alternatives will comply with such applicable environmental quality standards and requirements.

(e) *Adverse information.* The information submitted pursuant to paragraphs (b) through (d) of this section should not be confined to information supporting the proposed action but should also include adverse information.

2. Applicant relies heavily and almost entirely on the Augustana Report to satisfy its Section 106 requirements, which are required to be discussed in the Environmental Report under Section 51.45. However, the Augustana Report is merely an inventory of sites based on previously existing information; as such it lacks analytical content. The Augustana Report is not an evaluative report of the cultural resources in the

area as Applicant has characterized it and which would be required to satisfy Sections 51.45(c) and (d). Therefore, the Application fails to comply with Section 51.60.

3. The staff from the Archeology Laboratory of Augustana College (“ALAC”) found a number of sites to be ineligible for inclusion in the National Register of Historic Places solely by virtue of stating that the surface area was disturbed. No sub-surface testing was performed in these areas. None of the sites which ALAC determined were ineligible for inclusion were the subject of sub-surface testing.

4. There were a number of sites that were found to be unevaluated and needing further work. These sites cannot be counted as either ineligible or eligible for inclusion to the National Register of Historic Places. These unknowns must be resolved in order for the Application to be in compliance with Sections 51.45, 51.60 and 40.9.

5. The Augustana Report implies by omission that these unevaluated sites are ineligible. Since no sub-surface testing was done, any such implications are inappropriate and must be resolved in order for the Application to be in compliance with Sections 51.45, 51.60 and 40.9.

6. The Augustana Report, the Archaeological submission upon which Applicant relies, is not adequate, accurate and complete in all material respects and does not demonstrate that the cultural and historic resources identified at the sites within the PAA are not eligible for inclusion in the National Register of Historic Places. Further it does not provide sufficient information as an inventory alone, lacking analytic content and without results of sub-surface testing, in order to be compliant with Sections 40.9, 51.45 and 51.60.

IV. SUPPORTING EVIDENCE

1. Attached hereto is the expert opinion of Louis A. Redmond, PhD, Red Feather Archeology, dated April 21, 2010. Also attached hereto is the expert opinion of Dr. Redmond dated January 14, 2010. Dr. Redmond is a qualified expert in his field, having worked for almost 20 years as a Principal Archaeological Investigator in South Dakota.⁴ Dr. Redmond states:

It is my considered opinion that without an in-depth investigation of any of these areas, involving both surface and subsurface areas on at least a strong sampling effort, that there is the strong possibility of massive disturbance of cultural materials.

It has been my experience that in the majority of areas that are defined by either current or extinct water resources, there is a high degree of probability of encountering both historic and prehistoric cultural remains, to include human burials (see the above reports and overview). As both a professional archeologist and a responsible citizen of this region, I would find any degree of ground disturbance without some form of in-depth surface and subsurface investigation to be not only remiss, but disrespectful of our collective heritage.

2. Dr. Redmond has rendered a professional opinion, based on his knowledge, experience and review of the relevant portion of the Application, that there is a strong possibility of massive disturbance of cultural materials and that the Augustana Report:

is essentially an inventory of cultural resources in the area and primarily avoids the required analyses directed by the State of South Dakota. A number of the sites were found by ALAC personnel to be ineligible for inclusion to the National Register of Historic Places. Apparently by the information currently available to me, this was accomplished by simply stating that the surface area was disturbed; no sub-surface testing was performed in these areas. In the approximately 20 years that I have

⁴ A copy of Dr. Redmond's abbreviated CV is attached.

worked as a Principal Investigator in South Dakota, it has always been required that prior to the finding of ineligibility of any cultural materials, sub-surface testing must be accomplished; this is so even if the item involved is an isolated artifact. This sub-surface testing must be a specific size, minimum of 50 by 50 centimeters, and taken down through a minimum of 2 sterile 10-centimeter levels. None of the sites that I reviewed where a finding of ineligibility was recorded was this accomplished.

Also there were a number of sites that were found to be unevaluated and needing further work. These sites cannot be counted as either ineligible or eligible for inclusion to the National Register of Historic Places. There is, however, an implication by omission that these sites or at least a majority of them, are ineligible; this finding is erroneous at best.

At this point, no true professional evaluation of the impact of the current proposed project(s) in this area can be done with the information available, as required in a Section 106 investigation/evaluation.

3. Dr. Redmond's final conclusion is that there has been no true professional evaluation of the current proposed project, as required by Section 106 of NHPA.

VI. CONCLUSION

For all the foregoing reasons, the Board should find that this new contention is admissible based on the SUNSI material described above.

Dated this 30th day of April, 2010.

Respectfully submitted,

/s/ - **electronically signed by**

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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' REQUEST FOR LEAVE TO FILE A NEW CONTENTION BASED ON SUNSI MATERIAL" in the above captioned proceeding has been served on the following persons listed on the EIE Service List by electronic mail and via the EIE system; on the 30th day of April, 2010:

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Respectfully submitted,

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