

May 21, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

NRC STAFF'S RESPONSE TO CONSOLIDATED PETITIONERS'
CONTENTION FILED APRIL 30, 2010

INTRODUCTION

The Nuclear Regulatory Commission (NRC or Commission) Staff responds to the "Request for Leave to File a New Contention Based on SUNSI Material"¹ that the Consolidated Petitioners filed on April 30, 2010.² The Board should reject the new contention because it fails to meet the requirements in 10 C.F.R. § 2.309(f)(1).

BACKGROUND

On January 15, 2010, the Consolidated Petitioners requested access to sensitive unclassified non-safeguards information (SUNSI) in this proceeding.³ The NRC Staff denied

¹ Although the Consolidated Petitioners state that their new contention is "Based on SUNSI Material," it appears the contention is based on only *non-SUNSI* portions of Powertech's Cultural Resources Evaluation. The Petitioners refer to "the SUNSI material delivered to Petitioners' expert on April 1, 2010," but the material to which the Petitioners appear to be referring—a compact disc that the Staff mailed the Petitioners on March 12, 2010—had all SUNSI redacted.

² The Consolidated Petitioners are Theodore P. Ebert, David Frankel, Gary Heckenlaible, Susan Henderson, Dayton Hyde, Liliás C. Jones Jarding, Clean Water Alliance, and Aligning for Responsible Mining.

³ "Request for Sensitive Unclassified Non-Safeguards Information (SUNSI) Regarding License Application (Continued . . .)"

this request, finding that the Petitioners did not meet the requirements for SUNSI access.⁴

Although the Petitioners could have appealed the Staff's determination, they did not do so.⁵

The Staff subsequently released to the public redacted versions of all documents in this proceeding that contained SUNSI relating to cultural resources.⁶ These documents are part of Powertech's Level III Cultural Resources Evaluation for the Dewey-Burdock site.⁷ This Evaluation was prepared by the Archaeology Laboratory of Augustana College (ALAC), which conducted on-the-ground field investigations at the Dewey-Burdock site in 2007 and 2008. The Staff placed the redacted version of the Evaluation in the NRC's Agencywide Documents Access Management System (ADAMS) in late March 2010. Because the Petitioners had previously expressed interest in cultural resources at the Dewey-Burdock site, the Staff also mailed the Petitioners a compact disc containing the redacted version of the Evaluation.⁸

Request of Powertech (USA) Inc., Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, S.D. (Federal Register Notice of Opportunity for Hearing, 75 Fed. Reg. 467 (January 5, 2010))" (ADAMS Accession No. ML100190028) (January 15, 2010).

⁴ "NRC Staff Response to David Frankel Denying Request for Access to SUNSI Information" (ADAMS Accession No. ML100252219) (January 25, 2010).

⁵ See *Notice of Opportunity for Hearing, License Application Request of Powertech (USA) Inc. Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, SD, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation*, 75 Fed. Reg. 467, 470 (January 5, 2010) (explaining how to challenge Staff's determination that requestor should not be granted SUNSI access).

⁶ These publicly available documents that have been redacted of SUNSI are included in ADAMS as part of the package that contains Powertech's Application. (ADAMS Accession No. ML091030742.)

⁷ This multi-volume document's full title is, "A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota." Portions of the Evaluation refer to the locations of archeological sites. These portions contain SUNSI because the release of records pertaining to the location of archaeological sites is restricted under South Dakota Codified Laws, specifically § 1-20-21.2.

⁸ "Letter to David Frankel" (ADAMS Accession No. ML100720007) (March 12, 2010).

On April 1, 2010, the Board issued an Order granting the Petitioners until April 30, 2010 to file additional contentions based on the Cultural Resources Evaluation.⁹ The Petitioners filed their new contention on April 30, 2010.

DISCUSSION

A hearing request must be denied unless the petitioner demonstrates that it has standing to intervene in the proceeding and submits at least one admissible contention. 10 C.F.R. § 2.309(a). The Staff has previously explained why none of the Consolidated Petitioners has demonstrated standing to intervene in this proceeding. The Staff respectfully refers the Board and the parties to the Staff's discussion of standing in its Response to the Consolidated Petitioners' Hearing Request.¹⁰ Below, the Staff addresses only whether the Consolidated Petitioners' new contention is admissible. As the Staff explains, this contention should be rejected because it does not meet the NRC's strict requirements for admitting a contention.

I. Legal Requirements for Contentions

The legal standards governing contention admissibility are set forth in the NRC's Rules of Practice at 10 C.F.R. § 2.309 (f)(1). In order to be admissible, a contention must:

- (i) Provide a specific statement of the legal or factual issue sought to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the

⁹ Order (Granting Motion for Extension of Time). In the Order the Board also granted Powertech and the Staff an extension of time to file answers to the Consolidated Petitioners' Hearing Request.

¹⁰ "NRC Staff's Response to Hearing Request of Consolidated Petitioners" (ADAMS Accession No. ML101020723) (April 12, 2010) at 8–16.

petitioner intends to rely at the hearing, together with references to the specific sources and documents, which the petitioner intends to rely to support its position on the issue; and

- (iv) Provide sufficient information to show that a genuine dispute with the applicant/licensee exists on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1).

The NRC's Rules of Practice impose additional requirements on contentions that are filed after the period for requesting a hearing ends. These requirements can be found at 10 C.F.R. § 2.309(f)(2). Under this section, an amended or new contention will not be considered timely unless:

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

If the amended or new contention is not timely filed, the board must consider the factors in 10 C.F.R. § 2.309(c)(i)–(viii) before deciding whether to reject or admit the contention.

II. The Board Should Reject the Petitioners' New Contention Because It Fails to Satisfy 10 C.F.R. §§ 2.309(f)(1)(v) and (vi)

The Petitioners filed their new contention by the deadline established in the Board's April 1, 2010 Order. Accordingly, the Staff does not dispute that the new contention is timely under 10 C.F.R. § 2.309(f)(2). The Board should still reject the new contention, however, because it does not meet multiple requirements in 10 C.F.R. § 2.309(f)(1). As the Staff explains below, the new contention lacks adequate support and fails to address relevant portions of Powertech's Cultural Resources Evaluation. The contention therefore fails to satisfy 10 C.F.R.

§§ 2.309(f)(1)(v) and (vi).

In their new contention the Petitioners argue that:

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 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.

Contention at 1–2. The Petitioners offer six bases in support of their contention. Contention at 2–4. The Petitioners also include a “Supporting Evidence” section, in which they refer to opinions from Louis A. Redmond, Ph.D., dated January 14 and April 21, 2010. Contention at 5–6.¹¹ Neither the Petitioners’ bases nor the opinions of Dr. Redmond supports admitting the contention.

Basis 1: In this basis the Petitioners merely cite the regulations upon which they rely in making their arguments in bases 2 through 6. The Petitioners claim that Powertech’s Cultural Resources Evaluation violates 10 C.F.R. §§ 40.9, 51.45 and 51.60 because it does not provide complete and accurate information regarding cultural resources at the Dewey-Burdock site. Contention at 2–3. As the Staff explained in its response to the Consolidated Petitioners’ Hearing Request, the Petitioners fail to show that section 40.9 is relevant to the issues they raise.¹² Further, while sections 51.45 and 51.60—regulations that require the submittal of an

¹¹ The Redmond Opinions are attached to the Petitioners’ new contention.

¹² Staff Response at 17–19. The Petitioners interpret 10 C.F.R. § 40.9(a) and (b) as requiring an applicant to disclose in its application “all information that a reasonably prudent regulator would consider important in making a licensing decision.” Petition at 30. This interpretation is incorrect. Subpart (a) of section 40.9 states that “[i]nformation provided to the Commission by an applicant for a license . . . shall be complete and accurate in all material respects.” This section does not, in itself, require an applicant to (Continued . . .)

environmental report (ER) and govern its contents—are relevant to this proceeding, the Petitioners fail to show there is a genuine dispute as to whether Powertech has complied with those regulations. The Staff next discusses the specific arguments the Petitioners raise in bases 2 through 6.

Basis 2: The Petitioners argue that Powertech’s Cultural Resources Evaluation is “merely an inventory of sites based on previously existing information; as such it lacks analytical content. . . . [it] 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).” Contention at 3–4. The Petitioners repeat these claims in their “Supporting Evidence” section, where they cite the opinion of Dr. Redmond. Contention at 5 ¶ 2.

Powertech’s Cultural Resources Evaluation is clearly more than an “inventory of sites based on previously existing information,” as the Petitioners claim. The Evaluation summarizes the data ALAC collected and the analysis it performed during a multi-phase archeological survey. During this survey ALAC reviewed available literature and searched records maintained by the South Dakota Archaeological Research Center in order to identify archeological sites and determine their eligibility for inclusion on the National Register of Historic Places (NRHP).¹³ Further, ALAC conducted on-the-ground field investigations at the Dewey-Burdock site. ALAC’s

provide information to the Commission. Subpart (b) of section 40.9, on the other hand, requires an applicant to notify the Commission where it (1) has identified certain information as having a significant implication for public health and safety or common defense *and* (2) is not otherwise required to provide the information to the NRC. Without some showing that the applicant failed to notify the Commission of information it has identified as significant—the Petitioners make no claim that Powertech has done that here—there can be no violation of section 40.9(b).

¹³ See Evaluation: Vol. I, Chapter 1: Project Overview at 1.1.–1.3 (describing project objectives, area of potential effect, personnel and procedures) (ADAMS Accession No. ML100670302); Chapter 4: Research Design and Methodology at 4.1, 4.8–4.9 (describing the identification and evaluation of prior work) (ADAMS Accession No. ML100670309).

In this response the Staff will refer to sections of the Evaluation by volume number and, as applicable, chapter or page numbers. The Staff will also provide the ADAMS Accession numbers under which sections of the Evaluation can be found in public ADAMS.

fieldwork included a pedestrian survey covering 100% of the area of potential effect (APE) at Dewey-Burdock.¹⁴ Along with the pedestrian survey, ALAC conducted limited subsurface shovel tests as needed.¹⁵ ALAC collected data from each site identified in the pedestrian survey, analyzed this data, and summarized the data in its Evaluation, along with its recommendations on whether particular sites are eligible for inclusion on the NRHP or need additional evaluation.¹⁶ The Petitioners' claim that the Evaluation "is merely an inventory of sites based on previously existing information" is therefore wholly unsupported. Because the Petitioners' mistakenly assert that the Evaluation merely inventories existing information, their claim should be dismissed. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)).¹⁷

¹⁴ ALAC conducted the pedestrian survey in accordance with guidelines established by the South Dakota State Historic Preservation Office. See Evaluation at 4.9–4.11, 4.16–4.18 (discussing project objectives, field methodology and implementation, data recordation procedures, laboratory analysis, cataloging, and curation methodology) (ADAMS Accession No. ML100670309).

¹⁵ See, e.g., Evaluation, Addendum 2, Volume 1: Additional Survey Report; Sections 27, 31, and 34, T6S, R1 E and Sections 4, 5, and 14, T7S, R1E at 21 (2008) (ADAMS Accession No. ML100670466). The individual site descriptions provided throughout other parts of the Evaluation identify additional sites where subsurface testing was performed.

¹⁶ Evaluation, Vol. III, Chapter 7: Discussion and Project Summary at 7.1, 7.9–7.11, 7.16–7.19 (ADAMS Accession No. ML100670366). See generally Evaluation: Vol. I and II, Chapter 5: Custer County Cultural Resources Inventory and NRHP Recommendations (ADAMS Accession Nos. ML100670314, ML100670318, ML100670240, ML100670250, ML100670255, ML100670257, ML100670258, ML100670259, and ML100670261); Vol. II and III, Chapter 6: Fall River County Cultural Resources Inventory and NRHP Recommendations (ADAMS Accession Nos. ML100670261, ML100670267, ML100670277, ML100670286, ML100670289, ML100670363, ML100670365, and ML100670366). These chapters list site numbers, names, types and areas, as well as cultural affiliations, landscape positions, elevations, site conditions and NHPA recommendations. These chapters also state whether subsurface testing was conducted.

¹⁷ In *Prairie Island*, the Board admitted a contention challenging the ER's evaluation of cultural resources. In the contention, the intervenors argued that the ER was inadequate because it was "based *solely* on a review of collected literature." *Northern States Power Co. (Prairie Island Nuclear Generating Plant)*, LBP-08-26, 68 NRC 905, 920–23 (2008) (emphasis added). The intervenor later withdrew the contention, and (Continued . . .)

The Petitioners further argue that ALAC's Evaluation is not properly considered an "evaluative report." Contention at 3. The Petitioners, however, do not offer any support for their argument. The Petitioners do not explain what an evaluative report must include or why ALAC's Evaluation does not fit that definition. In any event, the Petitioners do not cite any NRC regulation or other standard requiring that an evaluative report or any particular form of archeological report be included with an application. See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (holding that a contention must be dismissed to the extent it reflects nothing more than a generalization regarding the petitioner's view of what the applicable policies ought to be).

Because the Petitioners do not support their claims, and because they do not even base their claims on a complete reading of Powertech's application, their claims must be rejected under both 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

Basis 3: The Petitioners argue that ALAC improperly "found a number of sites to be ineligible for inclusion in the [NRHP] solely by virtue of stating that the surface area was disturbed." Contention at 4. The Petitioners also cite the opinion of Dr. Redmond, who argues that ALAC could not properly evaluate cultural resources at the Dewey-Burdock site because it did not conduct in-depth surface and subsurface investigations. Contention at 5 ¶¶ 1–2.

The Petitioners and Dr. Redmond are incorrect to the extent they are claiming that ALAC did not use subsurface testing to determine whether sites were eligible for inclusion on the NRHP. After completing its pedestrian survey of the Dewey-Burdock site, ALAC conducted subsurface testing or excavations at a number of sites within the APE that it believed might be

the Board dismissed the contention, after the licensee conducted a survey of cultural resources at its facility, made license commitments to protect those resources, and amended its ER to include the survey results and new commitments. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant), Order (Approving Settlement and Dismissal of Contentions 1, 6, and 11) (April 14, 2009) (unpublished) (ADAMS Accession No. ML091040305). Unlike the initial ER in *Prairie Island*, Powertech's Evaluation is not based solely on a review of collected literature. In fact, the Evaluation provides cultural resources information that is arguably more extensive than that included with the *amended* ER in *Prairie Island*.

eligible for inclusion on the NRHP.¹⁸ ALAC initially conducted evaluative subsurface testing at fourteen sites in the APE that were expected to be impacted by Powertech's operations within the next five years.¹⁹ After the APE was expanded, ALAC used subsurface evaluative testing to identify and investigate twenty-nine sites within the expanded APE.²⁰ ALAC also conducted extensive excavations at four sites within the expanded APE, and those site analyses are presented in the Evaluation.²¹ In sum, the Evaluation makes clear that ALAC (1) used evaluative subsurface testing as part of its field methodology, (2) used the results of this testing in making determinations of NRHP eligibility, and (3) relied on subsurface testing results when making recommendations regarding the need for additional archeological investigation or mitigation measures. The Petitioners' claim that ALAC relied solely on surface disturbance in making NRHP determinations is therefore unsupported.

Dr. Redmond suggests that ALAC should have conducted subsurface testing of every site at Dewey-Burdock. Contention at 5–6.²² Dr. Redmond provides no support for his claim,

¹⁸ Evaluation, Addendum 1, Volume 1, Evaluative Testing Report (2008) (ADAMS Accession Nos. ML100670483 and ML100670485); Addendum 2, Volume 1: Additional Survey Report; Sections 27, 31, and 34, T6S, R1 E and Sections 4, 5, and 14, T7S, R1E (2008) (ADAMS Accession Nos. ML100670466, ML100670472, and ML100670474); Evaluative Testing of Four Sites within Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality, Southern Black Hills, Custer and Fall River Counties, South Dakota, Volume 1: Evaluative Testing Report (2009) (ADAMS Accession No. ML091070726).

¹⁹ Evaluation, Addendum 1, Volume 1, Evaluative Testing Report (2008) at ii, 1, 9–12, and individual site summaries (ADAMS Accession No. ML100670483).

²⁰ Evaluation, Additional Survey Report; Sections 27, 31, and 34, T6S, R1 E and Sections 4, 5, and 14, T7S, R1E at ii, 1, 21-23, and individual site summaries (ADAMS Accession Nos. ML100670466, ML100670472, and ML100670474).

²¹ Evaluative Testing of Four Sites within Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality, Southern Black Hills, Custer and Fall River Counties, South Dakota, Volume 1: Evaluative Testing Report at ii, 1, 7–9, and individual site summaries (2009) (ADAMS Accession No. ML091070726).

²² The Staff notes that certain sites ALAC determined to be ineligible for inclusion on the NRHP do not appear to have any remaining subsurface which could be tested. See, e.g., Evaluation, Vol. I and II, Chapter 5 at 5.40, ("The integrity of [Site 39CU451] has been compromised by sheet wash erosion. The deflated (Continued . . .)

however, other than citing his own experience. He does not cite any professional publications, guidelines or criteria to support his position. Nor does Dr. Redmond address the standards ALAC applied in preparing the Evaluation, standards under which subsurface testing need not be conducted in all cases to determine that a site is ineligible for inclusion on the NRHP. As stated in the Evaluation, ALAC conducted its survey of the Dewey-Burdock site using standard procedures found in South Dakota State Historical Society publications and by applying National Register criteria for evaluating archeological sites.²³ Dr. Redmond does not explain why ALAC was required to follow his suggested approach for evaluating NRHP eligibility, rather than the standards to which the Evaluation refers.²⁴

In brief, the Petitioners do not accurately describe the methods by which ALAC determined sites were ineligible for inclusion on the NRHP, overlook the subsurface testing ALAC performed, and offer no support for their claim that ALAC needed to conduct subsurface

nature of the landform on which the site is located indicates no potential for buried, intact cultural material or features. . . .”) (ADAMS Accession No. ML100670314).

²³ Evaluation, Vol. III, Chapter 7: Discussion and Project at 7.1, 7.9–7.11, 7.16–7.19 (ADAMS Accession No. ML100670366); Addendum 2, Volume 1: Additional Survey Report; Sections 27, 31, and 34, T6S, R1E and Sections 4, 5, and 14, T7S, R1E at 22–23 (ADAMS Accession No. ML100670466).

²⁴ See, e.g., State Historic Preservation Office, Guidelines for Cultural Resource Surveys and Survey Reports in South Dakota (For Review and Compliance), South Dakota State Historical Society, Office of History, Pierre (2005) at 9:

Based on professional judgment, the principal investigator may carry out additional minimal subsurface testing as necessary. If the principal investigator feels more information is required than what is revealed by the ground surface or minimal subsurface testing, e.g. shovel probing, augering, or some other preliminary subsurface testing method, the principal investigator should consult SHPO and others to develop an appropriate strategy for gaining necessary information with minimal damage to the site. Extensive testing during survey within sites is not recommended, though some testing is often warranted as an exploratory tool within and between features or activity areas and to determine boundaries. All decisions to test or not to test should be justified.

(Emphases added.) http://history.sd.gov/Preservation/PresLaws/r&c_guidelines.pdf.

testing of every site at Dewey-Burdock in order to conclude a site is ineligible for inclusion on the NRHP. The Petitioners' claims fail to satisfy 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

Basis 4: The Petitioners argue that a number of archeological sites at Dewey-Burdock need further evaluation. Contention at 4. The Petitioners argue that "[t]hese sites cannot be counted as either ineligible or eligible for inclusion to the [NRHP]. . . . "[t]hese unknowns must be resolved in order for the Application to be in compliance with Sections 51.45, 51.60 and 40.9." *Id.*

This issue is similar to an issue the Oglala Sioux Tribe raised in Contention 1 of its Hearing Request in this proceeding. There, the Tribe argued that Powertech's Cultural Resources Evaluation is deficient because it does not fully evaluate all archeological sites within the Dewey-Burdock boundary.²⁵ As the Staff noted in its response to the Tribe's Hearing Request, Powertech's application states that any sites yet to be evaluated are *outside* the area that will be disturbed during the initial phases of operations at Dewey-Burdock.²⁶ In other words, Powertech has proposed a phased approach to archeological investigations. Such an approach is generally acceptable under Commission precedent. *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-11, 63 NRC 483, 489 (2006) (explaining that "the NHPA regulations continue to expressly *permit* a phased approach to cultural resource review") (emphasis in original). See also *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120) CLI-99-22, 50 NRC 3, 13 (1999) ("phased compliance [with the

²⁵ "Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe" (ADAMS Accession No. ML100960645) (April 6, 2010) at 12–13.

²⁶ ER Supplement § 4.10 at p. 4-46 and § 5.8 at p. 5-10. (ADAMS Accession No. ML092870360). See also ER § 3.8.1 at 3-180 (discussing commitments to protect against, avoid, or mitigate potential impacts on cultural resources). Powertech states, "Sites that may require additional data evaluation or recovery will be avoided as well field development progresses." ER at p. 7-11. See also, Evaluation, Chapter 7, Table 7.8, "Documented Archeological Properties Requiring Additional Evaluation in APE" (ADAMS Accession No. ML100670366) at 7.14–7.15 and Evaluation, Volume V, Appendix F, "Project Scope-of-Work" (ADAMS Accession No. ML100670232).

NHPA] is acceptable under applicable law”). As with the Tribe, the Petitioners here do not address Powertech’s plans for a phased approach. They are therefore unable to raise a genuine dispute with Powertech’s plans. The Petitioners’ blanket claim that “unknowns need to be resolved in order for the Application to be in compliance” with applicable regulations fails to take into account Commission precedent on this very point. The Petitioners’ claims must therefore be rejected under 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

Basis 5: The Petitioners claim the Evaluation “implies by omission” that unevaluated sites are ineligible for inclusion on the NRHP. Contention at 4. The Petitioners argue that because no subsurface 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.” *Id.* These claims are repeated in Dr. Redmond’s opinions, to which the Petitioners refer. Contention at 5–6, ¶ 2.

The Board should reject the Petitioners’ claim that the Evaluation “implies by omission” that unevaluated sites are ineligible for inclusion on the NRHP. The plain language of the Evaluation makes clear that ALAC simply reached no conclusion about the eligibility of unevaluated sites. The Petitioners’ additional claim that eligibility for the NRHP must be resolved at this time is a variant of its arguments in Basis 4. As explained above, the Petitioners fail to explain why Powertech needs to evaluate all archeological sites at the present time. The Petitioners do not address Powertech’s plans for a phased approach to evaluating such sites, and for that reason they fail to raise a genuine dispute with Powertech. The Petitioners’ claims must therefore be rejected under 10 C.F.R. § 2.309(f)(1)(vi).

Basis 6: Here the Petitioners merely repeat claims made in prior bases. The Petitioners argue that the Evaluation “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.” Contention at 4. The Petitioners further argue that the Evaluation “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.” *Id.* The Petitioners do not offer any new arguments in support of their claim that at the present time Powertech needs to further evaluate sites for inclusion on the NRHP. Further, as explained above, the Petitioners fail to support their claim that Powertech’s Evaluation is merely an “inventory” of existing data. The Petitioners’ claim that Evaluation is not based on any subsurface testing is likewise unsupported.

CONCLUSION

The Board should reject the Consolidated Petitioners’ new contention because it fails to meet multiple requirements in 10 C.F.R. § 2.309(f)(1).

Respectfully submitted,

/Signed (electronically) by/
Patricia A. Jehle
Patricia A. Jehle
Counsel for the NRC Staff

/Signed (electronically) by/
Michael J. Clark
Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 21st day of May, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO CONSOLIDATED PETITIONERS' CONTENTION FILED APRIL 30, 2010" in this proceeding have been served via the Electronic Information Exchange (EIE) this 21st day of May 2010, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

/RA/

Michael J. Clark
Counsel for the NRC Staff