

August 22, 2008 (3:23pm)

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RULEMAKINGS AND
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
)	
(License Amendment Application for North Trend Expansion Project))	ASLBP No. 07-859-03-MLA-BD01

APPLICANT'S RESPONSE TO PETITIONERS'
POST-ARGUMENT SUBMISSION RE: NDEQ CONSENT DECREE

I. INTRODUCTION

In accordance with the August 5, 2008 Order of the Atomic Safety and Licensing Board in this matter,¹ Crow Butte Resources, Inc. ("Crow Butte" or "Applicant") hereby submits its response to "Petitioners' Post-Argument Submission Re: NDEQ Consent Decree," dated August 15, 2008.

II. DISCUSSION

Petitioners' submission does not support its request for a hearing under the NRC's rules of practice at 10 C.F.R. Part 2, Subpart G. As discussed in prior filings, 10 C.F.R. § 2.310(d), by its clear terms, applies only to nuclear power reactors and not to license amendment proceedings under 10 C.F.R. Part 40. License amendment proceedings under Part 40 must be conducted using the procedures in 10 C.F.R. Part 2, Subpart L or Subpart N. See 10 C.F.R. §§ 2.310(a) and (h). According to the Commission, unless one of the applications

¹ See Order (Confirming Matters Addressed at July 23, 2008, Oral Argument), dated August 5, 2008.

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specified in paragraphs (b) through (h) are at issue, “the listed proceedings are to be conducted under Subpart L.”² See “Final Rule: Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2206 (Jan. 14, 2004) (emphasis added). Thus, according to the plain language of the Commission’s regulations, the only available hearing procedures in the instant case are those in Subpart L.³

Even if Subpart G procedures were hypothetically available, petitioners post-argument submission does not support use of Subpart G procedures. The specific issue raised by petitioners regarding Crow Butte’s underground injection control permit issued by the State of Nebraska is outside the scope of any NRC proceedings, which are necessarily limited to Crow Butte’s compliance with the Federal AEA and NRC regulations. The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. *Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

Contrary to the inflammatory statements in petitioners submission, the consent decree demonstrates Crow Butte’s commitment to meeting its obligations. The consent decree includes the stipulation from the Nebraska DEQ that Crow Butte was recycling its well development water as a conservation measure and its acknowledgement that such treatment “did not result in any pollution of either the surface of the ground of any aquifer thereunder.” Consent Decree, at ¶2. Crow Butte discovered that this process potentially violated the literal

² The regulations governing the selection of hearing procedures authorize use of Subpart G procedures in only four circumstances: (1) enforcement matters, § 2.310(b); (2) licensing and construction of enrichment facilities, § 2.310(c); (3) certain power reactor licensing proceedings, § 2.310(d); and (4) high-level waste repository proceedings, § 2.310(f). None of these provisions applies to a Part 40 source material license amendment proceeding.

³ Under certain circumstances not present here (*e.g.*, agreement among the parties), the procedures in 10 C.F.R. Part 2, Subpart N, could be used.

terms of its permit on March 31, 2006 and self-reported it to the Nebraska DEQ's on-site inspector on or about April 7, 2006 (not May 12, 2006 as petitioners allege). *Id.* Contrary to petitioners groundless accusations, this demonstrates that Crow Butte maintains high standards of integrity.⁴

Furthermore, the petitioners' inflammatory arguments regarding Crow Butte's trustworthiness and willingness to engage in the hearing process and meet its obligations are baseless, unwarranted, and should not be tolerated. Nothing in 10 C.F.R. § 2.310 justifies argument of this type. Alleging generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or representatives will not satisfy the "credibility" or "motive" elements of either criterion so as to trigger a Subpart G proceeding. *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 700 (2004). There is simply no basis to utilize Subpart G procedures on such grounds.

Finally, petitioners' mere references to 10 C.F.R. § 40.9 do not provide an independent basis for using Subpart G procedures, *i.e.*, a mere allegation that some substantive information is, in their view, incomplete or inaccurate, represents an independent reason to use Subpart G procedures. Instead, 10 C.F.R. § 40.9 is tied to an enforcement mechanism whose use is within the sole discretion of the Commission through its Staff and has not been delegated to the Board.⁵ As stated in the Commission's General Statement of Policy and Procedures for NRC

⁴ Petitioners claim to have learned of the consent decree through costly and burdensome independent research and also assert that this is an example of a "culture of concealment." These claims are without credibility. Both the complaint and the consent decree are readily available at the Nebraska DEQ website.

⁵ *Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285, 312-313 (1994), *aff'd* *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995). The appropriate

Enforcement Action: “A violation of the regulations involving the submittal of incomplete and/or inaccurate information . . . can result in the full range of enforcement sanctions.” NRC Enforcement Policy, at 43.⁶ In essence, the reliance by petitioners on § 40.9 is an attempt to litigate the completeness of the application and its docketing by the Staff. This is beyond the scope of the matter before this panel.⁷ Mere citation of Section 40.9 by the petitioners does not trigger use of Subpart G procedures.

III. CONCLUSION

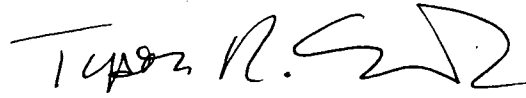
Petitioners’ submission does not support its request for a hearing under the NRC’s rules of practice at 10 C.F.R. Part 2, Subpart G. As discussed in prior filings, 10 C.F.R. § 2.310(d), by its clear terms, applies only to nuclear power reactors and not to license amendment proceedings under 10 C.F.R. Part 40. Accordingly, any hearing on Crow Butte’s license application must be conducted under the procedures in 10 C.F.R. Part 2, Subpart L.

mechanism to pursue this matter would be a petition under 10 C.F.R. § 2.206. *See, e.g.*, DD-03-02, License No. SNM-770. *Westinghouse Electric Company LLC*, Waltz Mill Service Center, Madison, PA; Notice of Issuance of Director’s Decision Under 10 CFR 2.206, 68 Fed. Reg. 52432 (September 3, 2003) (requesting to abate a violation of 10 CFR 50.5).

⁶ The most recent version of the Enforcement Policy can be found on the NRC’s website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html> (last visited on August, 16, 2008).

⁷ As another Licensing Board explained, “[t]he completeness of [an application] is not a matter that this Board should or can decide . . . [as the] decision whether to accept the [application] for docketing is made by the NRC Staff . . .” *Id.* at 336 (quoting *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 634 (D. R.I. 1977)).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tyson R. Smith". The signature is written in a cursive style with a horizontal line underneath it.

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RESOURCES, INC.

Dated at Washington, District of Columbia
this 22nd day of August 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
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CROW BUTTE RESOURCES, INC.) Docket No. 40-8943
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(License Amendment Application for North) ASLBP No. 07-859-03-MLA-BD01
Trend Expansion Project))

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO PETITIONERS' POST-ARGUMENT SUBMISSION RE: NDEQ CONSENT DECREE" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 22nd day of August 2008. Additional e-mail service, designated by *, has been made this same day, as shown below.

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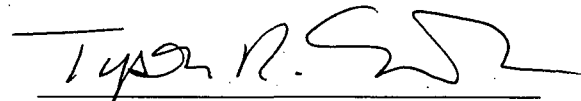
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