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

Before Administrative Judges:
Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred W. Oliver

In the Matter of

CROW BUTTE RESOURCES, INC.
(In Situ Leach Facility, Crawford, NE)

Docket No. 40-8943
ASLBP No. 07-859-03-MLA-BD01

August 29, 2008

**PETITIONERS' REPLY TO APPLICANT'S AND NRC STAFF'S RESPONSES TO
POST-ARGUMENT SUBMISSION RE: NDEQ CONSENT DECREE**

Petitioners¹ hereby reply to Applicant's and NRC Staff's responses regarding the NDEQ Consent Decree. In response to the Petitioners' Post-Argument Submission Re: NDEQ Consent Decree, submitted in accordance with the Atomic Safety and Licensing Board's ("Board") Order dated August 5, 2008, the Applicant reiterates its unsupportable position "[a]s discussed in prior filings," that the 10 CFR §2.310(d) and 10 CFR Part 40 are inapplicable to whether Subpart G hearing on foreign ownership is appropriate for these proceedings. Applicant's Response, p. 2. The NRC Staff does not make this argument. Instead it argues that the NDEQ Consent Decree is irrelevant to this proceeding even though it relates to failure to follow NDEQ Permit conditions, reckless use of radioactive water for drilling and failure to self-report the violations for several weeks after discovery.

Without reiterating previously presented arguments to the contrary, the language of 10

¹ By email dated August 29, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Memorandum and authorized the undersigned to sign it on his behalf and to file it on behalf of his clients as well as WNRC represented by the undersigned. By email dated August 29, 2008, Elizabeth Lorina, Attorney for the Oglala Sioux Tribe and for the Black Hills Sioux Nation Treaty Council, joined in this Brief.

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CFR §2.310(d) states:

[W]here the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contest matter **will be conducted under subpart G of this part. (Emphasis added).**

See also similar language in 10 CFR §2.700 Scope of subpart G.² Contrary to Applicant's desires, nothing in 10 CFR Part 2 prohibits the use by the Board of Subpart G procedures. Section 2.310(a) provides clearly that Subpart L may be used for proceedings under Part 40 such as this proceeding. It does not say must, contrary to Applicant's assertions. Applicant's Brief at 1. In fact, Sections 2.310(b) to 2.310(h) lists certain proceedings **not including a Part 40 proceeding** which must be conducted under a particular Subpart. 10 CFR §2.310. Why would the NRC adopt regulations that specifically list certain kinds of proceedings and not list a Part 40 source material license proceeding if, as Applicant suggests, Subpart L must be used for a Part 40 proceeding. If Applicant were correct, a Part 40 proceeding would be listed in Section 2.310 as one of the proceedings that must be conducted under a stated Subpart. Such is not the case. Accordingly, Applicant's argument that Subpart L must be used in this proceeding is unpersuasive and must fail.

Likewise, the NRC Staff weakly argues that "license amendment proceedings are not a forum 'only to litigate historical allegations' or past events with no direct bearing

² "... resolution of the contention necessitates resolution of: issues of material fact relating to the occurrence of a past event, **where the credibility of an eyewitness may reasonable be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter**, ... , and any other proceeding as ordered by the Commission." (Emphasis added).

on the challenged licensing action.” NRC Staff’s Brief at (unnumbered) page 2, citing a footnote 22 of Georgia Power Co. (Vogtle Electric Generating Plant, units 1 and 2), CLI-93-16, 38 NRC 25, 36, n.22 (1993). (Emphasis added.) First, the NRC Staff’s argument itself suggests that if Petitioners were only litigating historical allegations, it would be inappropriate for this license amendment proceeding. However, Petitioners are clearly arguing much more than only historical allegations.

NRC Staff cites mere dicta in the Georgia Power Co. (Vogtle) case that is not on point or relevant to this proceeding and takes its authority from a footnote 22 of that case. Accordingly, the NRC Staff fails to cite persuasive legal authority for its position. Even assuming, *arguendo*, that the Georgia Power Co. (Vogtle) case stands for the proposition for which it has been cited, it is not applicable in this proceeding to bar consideration of the NDEQ Consent Decree concerning Petitioners’ request for Subpart G procedures. The NDEQ Consent Decree is hardly historical – it is dated May 23, 2008, and was issued during the pendency of this proceeding. Accordingly, it is appropriate for the Board to take official notice of the NDEQ Consent Decree under 10 CFR Section 337(f).

Further, Petitioners raise the NDEQ Consent Decree as evidence of Applicant’s continuing disregard for self-reporting obligations which clearly goes to the motive or intent of the Applicant to comply with voluntary disclosure obligations of Subpart L. Petitioners believe that Applicant’s failure to self-report and delay in self-reporting after discovery shows that Applicant should not be trusted to make full disclosures voluntarily under Subpart L procedures and shows why Subpart G procedures are needed in this proceeding in order for this matter to comply with underlying due process.

Here, Petitioners have raised issues regarding the foreign ownership of CBR as to the material potential problems with enforcement of NRC regulations designed to ensure protection of the health and safety of the public. Here, we have an Applicant which takes its orders from non-US persons living outside the United States and beyond the jurisdiction of the NRC under 10 CFR Section 40.2.

Petitioners contend that the facts surrounding the Nebraska Department of Environmental Quality (NDEQ) Complaint, undisclosed by Applicant, reflect the apparent continuous, undetected, and unreported three-year leak of radioactive wastewater by Cameco's Crow Butte Resources (CBR) operation are directly relevant to issues of the past activities of the foreign corporation in violation of its permit and applicable Nuclear Regulator Commission (NRC) regulations. Such facts are also directly relevant to Petitioners assertions that foreign ownership, domination and control leads to reckless disregard for applicable regulations and permit conditions and, therefore, are supportive of the contentions raised by Petitioners in this proceeding.³ Non-disclosure of the leak by the Applicant, its duration, and the existence of NDEQ enforcement proceedings (at the same time as Applicant asks that this Board not look into matters that are being regulated by the NDEQ) further demonstrate that the more limited and streamlined discovery procedures available under Subpart L (which are based on a

³ Likewise, the foreign ownership of Applicant's sister company, Power Resources, Inc., seems to breed reckless disregard for local water resources. Power Resources, Inc., which operates the Smith-Ranch Highlands mine in Wyoming, was fined \$1.4 million and had its surety bond increased from \$40 million to \$80 million in July 2008 for failure to diligently pursue groundwater restoration, failure to keep proper documentation, and failure to avoid spills. See ML080840312, "Letter dated March 11, 2008 from WDEQ Re: Settlement Agreement with PRI for November Dated 12/11/2007" and ML080840311, "Insitu Uranium Permits 603 and 633, Notice of Violation." (March 10, 2008).

precept of effective voluntary disclosure) are inadequate in this proceeding. The inadequacy of Subpart L procedures is due to a reasonably based lack of faith in Applicant's willingness to make full and complete disclosures.

Petitioners and the Board have reason to lack such faith in Applicant due to Applicant's repeated concealments of foreign ownership in the Application, its failure to disclose geologic data about fractures and faults and its failure to use recent research or site-specific data (all as outlined in the NDEQ Letter admitted as "Exhibit B" in this proceeding). Accordingly, it is incumbent on this Board to use its discretion to impose the more extensive discovery permitted under Subpart G.

Applicant argues that the Consent Decree "demonstrates Crow Butte's commitment to meeting its obligations." Applicant's Brief at 2. To Petitioners, the Consent Decree merely demonstrates Applicant's absolute business and financial need to possess the NDEQ permits to continue mining. To Petitioners, Applicant's three-year unreported violation and long delay in self-reporting after discovery and the fact that NDEQ was required to impose the Consent Decree shows that Applicant has a commitment only to itself, its foreign bosses and its foreign corporate parent's bottom line.

Thus, Applicant itself has identified a contested material fact relevant to the resolution of the contention or contested matter "relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter." This fits squarely into the requirements for Subpart G.

Petitioners contend that the NDEQ Consent Decree excused a more than 1,000,000 gallon radioactive /toxic leak that was perpetrated by Applicant shows the importance of Petitioners' intervention and the need for a Subpart G hearing. Due to the frequency of spills and excursions by Applicant and Applicant's intentional delay in self-reporting to NDEQ after it had clearly 'discovered' its own violations, suggest that this incident is part of a pattern of practice by Cameco of non-compliance with NRC regulations and that such pattern of non-compliance is integral to this Board's determination of whether the foreign ownership of CBR is a factor for consideration in whether to issue a license for the proposed new mine and whether Petitioners' other contentions will be found valid.

For some reason Applicant cites 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), for the proposition that 10 CFR 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. Applicant's Brief at 3, footnote 5. A close reading of the Advanced Medical Systems case does not reveal any holding or dicta that supports Applicant's statement. As a result, this proposition must be wholly disregarded. The Advanced Medical Systems concerned a challenge by a licensee after the NRC suspended its license and made such action immediately effective as a result of a pattern of noncompliance with NRC regulations. The Board upheld the immediate suspension and the NRC upheld the Board and was affirmed by the Court of Appeal. Nothing in this case supports Applicant's position in this case. In fact, the NRC in Advanced Medical Systems takes a

position that is supportive of Petitioners in this matter:

As the Licensing Board put it, “[t]he fundamental principle guiding all Commission licensing actions is the paramount consideration of public safety.” LBP-90-17, 31 NRC 540 at 554. The activities in question hardly concerned trivial matters, nor were they isolated occurrences. The alleged violations involved significant license conditions and procedures that were intended to provide assurance of the safe handling and maintenance of devices containing radioactive material.

In our case, the Board is guided by the same principle – the paramount consideration of public safety. In our case, as in Advanced Medical Systems, the activities in question hardly concern trivial matters, nor were are they isolated occurrences. The alleged violations involved significant license conditions and procedures that were intended to provide assurance of the safe handling of radioactive substances. As a result, despite the wishes of the NRC Staff and Applicant, the NDEQ Consent Decree is highly relevant. In fact, Petitioners submit that NRC Staff and Applicant should have advised the Board and Petitioners of the NDEQ Consent Decree.

CONCLUSION

Applicant’s handling of the NDEQ Consent Decree to keep it from the Board and exclude it from consideration in this proceeding, once again demonstrates that these are not isolated occurrences. Rather, this is part of a pattern and practice of concealment and obfuscation which undermines the principles of open and full disclosure embodied in 10 CFR 40.9 and upon which Subpart L procedures are based.

Simply put, if there is good reason to have faith in an applicant that it will make open and full disclosures of material facts, Subpart L would be appropriate. Since Applicant has repeatedly failed to make full disclosures and has litigated the existence of

obligations to make such disclosures, there is no reasonable basis to have any faith that this Applicant would make the full disclosures necessary for Subpart L to comply with the Due Process Clause in this case. As a result, Subpart G is required in this case. To rule otherwise, in light of the relevant facts and circumstances in the record in this case, would itself be arbitrary and capricious.

For all the foregoing reasons, the Board should exercise its discretion and determine that the introduction of the facts surrounding Applicant's lack of detection, failure to timely self-report, and failure to immediately engage in remedial efforts regarding the spill and practice of improper use of wastewater as described in the NDEQ Consent Decree, are all relevant to whether Subpart G will be applied in this proceeding.

Dated this 29th day of August, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' RESPONSE TO APPLICANT'S AND NRC STAFF'S RESPONSES TO POST-ARGUMENT SUBMISSION RE: NDEQ CONSENT DECREE" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (**), and by deposit in the United States Mail as indicated by an asterisk (*); on this 29th day of August, 2008:

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