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

Before Administrative Judges:
Michael M. Gibson, Chairman
Dr. Richard F. Cole
Mr. Brian K. Hajek

In the Matter of

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

Docket No. 40-8943
ASLBP No. 08-867-02-OLA-BD01

October 21, 2008

**PETITIONERS' REPLY TO APPLICANT AND NRC STAFF ANSWERS TO
NEWLY FILED CONTENTION RE: ARSENIC**

Petitioners hereby reply to the Answers of Applicant and the NRC Staff to the new contention re: Arsenic filed on September 22, 2008.

Applicable Standards

Section 2.309(f) clearly applies in the evaluation of this contention.¹ As noted by the NRC Staff, it is possible that this new contention may, in fact, be an amendment to Environmental Contention A and/or Environmental Contention B in this proceeding. NRC Staff Answer at 4. In either case, Section 2.309(f)(2) applies to determine whether leave of the Presiding Officer will be granted to allow the amended or new contention. Applicant correctly states that a contention may be amended if there has been compliance with Sections 2.309(f)(2)(i)-(iii). Applicant Answer at 3 and Footnote 6 at 4.

For the reasons discussed below and in the Request for Leave, this contention is 'timely' under Section 2.309(f)(2) and, therefore, the late-filed criteria of Section 2.309(c) are not relevant. Contrary to Applicant's assertions, the stringent non-timely

¹ Standing was briefed and argued in detail.

filing standards of Section 2.309(c) do not apply unless the filing of the Request for Leave to the Presiding Officer is, itself, untimely. Such is not our case because the Request for Leave was filed within thirty (30) days after Petitioner becoming aware of the information giving rise to the filing. Without explanation or citation, Applicant would like to apply the additional standards of “good cause,” “soundness of the record,” and “potential delay of the proceeding.” See Applicant’s Answer at 1-2. The NRC Staff correctly states that Section 2.309(c) non-timely filing standards would apply if the contention is not ‘timely’ pursuant to the criteria of Section 2.309(f)(2). NRC Staff Answer at 10. Accordingly, Applicant’s arguments concerning ‘good cause,’ ‘soundness of the record,’ and ‘potential delay of the proceeding,’² are misplaced and should be disregarded as irrelevant.

The Board should reject NRC Staff’s assertion that the failure to address the factors of Section 2.309(c) should result in summary denial of this contention.³ Rather, since the late-filed criteria are not relevant, such factors need not be addressed and the NRC Staff’s argument about failure to address such factors must fail.

Section 2.309(f)(2) Factors

(1) **First Factor: Information Not Previously Available**

A. **Reply to NRC Staff Arguments.** NRC Staff asks why the observational study and analysis could not have been conducted prior to the deadline of July 28, 2008. In response, Petitioners submit that the observational study was not possible until Petitioners’ Counsel had discussions with Chadron residents about the

² Applicant Answer at 1-2 (Background) & at 3-6 (Discussion, Section A).

³ NRC Staff Answer at 11.

potential connections between the Mine's activities (including Arsenic releases) and potential clusters of health impacts in Chadron. Such discussions were not possible prior to filing the initial petition because not enough information was known about the Mine's activities, its release of Arsenic and the nature of possible clusters of health impacts in Chadron. Further, it was not until the Johns Hopkins Study became available that Petitioners were made aware of the link between low-level inorganic Arsenic such as that released due to the massive oxidation of Uranium at the Mine, on the one hand, and damage to the pancreas such as is manifested in Type 2 Adult-onset diabetes and pancreatic cancer, on the other.

B. Reply to Applicant Arguments. Applicant argues that Petitioners could have raised this contention earlier because the existence of a potential link between Arsenic and diabetes is not new, referring to "Ingested Inorganic Arsenic and Prevalence of Diabetes Mellitus," by Mei-Shwu Lai et al., 139 American Journal of Epidemiology, No. 5:484-492 (1994). Applicant's Answer at 4. Petitioners submit that the Johns Hopkins Study constitutes new information because it specifically focuses on low-level inorganic Arsenic in drinking water and the pancreatic ailment of Type 2, Adult-onset diabetes. Applicant has not suggested that the prior 1994 Mei-Shwu Lai study considered either low-level Arsenic, drinking water pathways and/or Type 2 Adult-onset diabetes as compared with Type 1 diabetes.

Applicant's argument that "there is no 'new' reason to be concerned with potential exposure to arsenic"⁴ must be rejected because it fails to consider that the Johns Hopkins Study deals with low-level Arsenic contamination. In addition, it is well known

⁴ Applicant's Answer at 4.

that health concerns about Arsenic in the drinking water have increased dramatically since the 1994 study as evidenced by the lowering of the allowable MCL for Arsenic in 2000.

Applicant admits that “arsenic exposure can have adverse consequences, including other forms of cancer.” Applicant’s Answer at 5. At the Renewal Hearing held on September 30 and October 1, 2008, Applicant stated that it does not test or monitor for Arsenic and it does not report any information about Arsenic to the NRC. See Hearing Transcript, September 30, 2008 (ML082820043), at 62, 73, 230, and 231, and October 1, 2008 (ML082820566), at 296-297, and 417-418.. Further, Applicant’s representatives stated at the Crow Butte Mine Tour on October 2, 2008, that the Mine does not filter Arsenic when it re-circulates the mined water. Accordingly, Petitioners submit that Applicant has recklessly failed to test, monitor or filter Arsenic in order to conceal the health impacts from the Mine’s operations.

Based on the foregoing, this First Factor has been satisfied.

(2) Second Factor: Information Materially Different

A. Reply to NRC Staff Arguments. The Johns Hopkins Study constitutes a major advance in the understanding on the association between **low-level** arsenic in the drinking water and adult-onset diabetes. That is why the Study was undertaken by Johns Hopkins and was published in the Journal of the American Medical Association instead of some lesser regarded publication. In medical science, even major advances seem small and measured due to the inherent conservatism of medical

researchers when expressing and publishing findings to their peers and the public. This indicates that the data and conclusions in the Study, or the data generated thereby, are unique – and materially different than previously available information. In fact, while there have been other studies concerning a connection between Arsenic in the drinking water, on the one hand, and adverse health impacts (including diabetes), on the other, this Johns Hopkins Study is the first to focus on low-level Arsenic in the water and a health impact related to the pancreas – diabetes. When correlated with the observational study about the high incidence of pancreatic cancer in Chadron, which is downstream and downgrade from the Mine, this provided a new understanding which derives from the Study and which is materially different from any understanding previously available.

B. Reply to Applicant's Arguments. Applicant does not make any arguments concerning this factor. To the extent that Applicant's arguments concerning the 1994 Mei-Shwu Lai study are found relevant to this factor, the arguments above related to the First Factor are restated here.

Based on the foregoing, this Second Factor has been satisfied.

(3) Third Factor: Contention Submitted in Timely Fashion

A. Reply to NRC Staff Arguments. NRC Staff makes a syllogistic argument to the effect that the Request for Leave is not timely and thus the Third Factor is not satisfied because of the purported failure by the Petitioners to satisfy the First Factor and the Second Factor. The NRC Staff misses the point that the Third Factor must be evaluated on its own – i.e., was the Request for Leave timely filed. This Third Factor of timeliness is determined based on the date the Request for Leave was filed compared

to the date that Petitioners became aware of the information or events giving rise to the filing. Because the Request for Leave was filed within thirty (30) days after the date Petitioners became aware of the information and/or events giving rise to the filing, the Request for Leave was timely filed.

* Reply to Applicant's Arguments. Applicant does not argue that Section 2.309(f)(2)(iii) has not been satisfied. In fact, all of Applicant's arguments concerning lateness relate to its discussions of Section 2.309(c), which is not relevant for the reasons discussed above. At no point in its Answer, does Applicant suggest that the September 22, 2008 filing was non-timely with respect to the new information being proffered by Petitioners in this contention.

Accordingly, this Third Factor has been satisfied. Because the Request for Leave was timely filed under Section 2.309(f)(2)(iii), it is not necessary to address the non-timely criteria of Section 2.309(c).

Section 2.309(f)(1) Criteria

Petitioners addressed the Section 2.309(f)(1) criteria in the Request for Leave. NRC Staff expresses its boilerplate responses about contention pleading (i.e., failure to provide sufficient particularity, failure to provide factual or expert support, failure to specify genuine disputes on a material issue of fact or law). NRC Staff Answer at 14-15. However, as discussed below, this contention meets the Section 2.309(f)(1) requirements.

It is recognized that "technical perfection is not an essential element of contention pleading," and that the "[s]ounder practice is to decide issues on their merits, not to avoid

them on technicalities.” LBP-08-06 at 58. Expert support is not required for admission of a contention; a fact-based argument may be sufficient on its own. LBP-08-06 at 94-95. The Request for Leave goes through each of the Section 2.309(f)(1) criteria and applies them to this contention.

In response to the Answers, Petitioners note:

1. Johns Hopkins Study. When this study was published, it was the subject of front page headlines in Indian Country. See, e.g., http://www.lakotacountrytimes.com/news/2008/0821/tiwahe_wicoiye/026.html. The Johns Hopkins Study stands for the proposition that there is a clear association between low-level inorganic arsenic exposure from drinking water with the prevalence of Type 2 Adult-onset diabetes. Previously information available did not involve low-level arsenic. Further, the mere fact that the Study recommends further studies does not detract from the association shown by the Study. At this early stage, pleadings must be read in the light most favorable to the Petitioners. Accordingly, the NRC Staff’s criticisms at pages 14-15 of the NRC Staff Answer, do not undermine the validity of this contention.

2. No Need for Expert Support. Expert support is not needed to properly file a contention. See, LBP-08-06 at 94-95. Therefore, Petitioner’s failure to provide expert support besides the scientific studies cited in the Request for Leave may not be used as a reason to deny this contention. The NRC Staff’s criticism that Petitioners do not provide expert support is irrelevant. Further, as Applicant notes, Fantsteel, Inc. (Muskogee, Okalahoma Site), CLI-03-13, 58 NRC 195 (2003) requires some tangible information, experts or substantive affidavits. Petitioners submit that the tangible information and

expert scientific analysis referred to in the Request for Leave as well as the supporting affidavit filed therewith collectively constitute “some” tangible information and transcend the level of “bare assertions and speculation.” for purposes of establishing the admissibility of this contention consistent with Fansteel.

3. Contaminant Pathways. NRC Staff complain that Petitioners fail to discuss the pathways by which contaminated water reaches and is being ingested by people living near the Mine. Petitioners have expressed the nature and extent of such pathways created by fractures and faults (see LaGarry Opinion and Petition) in great detail in the briefing and arguments in the North Trend proceeding and in this proceeding. Accordingly, it is not incumbent on Petitioners to repeat them in the Request for Leave or in this Reply. In any case, such information was expressly incorporated by reference into the Request for Leave at page 7 thereof.

4. Genuine Dispute with Applicant. NRC Staff suggests that Petitioners make no reference to any portion of the Application or any statement of fact or law in the Application with which Petitioners have a genuine dispute. See NRC Staff Answer at 20. However, in the Request for Leave, Petitioners incorporated all facts and contentions raised in the Petition including the specific references to the Application. See Request for Leave at 7. Petitioners have satisfied the contention pleading requirements of Section 2.309(f)(1).

Applicant argues that there is no data presented to suggest that private water wells such as those used by Petitioners contain Arsenic and that no evidence is offered to

suggest that the Mine has resulted in any Arsenic contamination outside the mining area.⁵ As discussed above, Applicant intentionally fails to test, monitor or treat mined water for Arsenic – a policy otherwise known as “NO DATA, NO PROBLEM.” Therefore, the lack of data about Arsenic levels in the water, due in part to Applicant’s actions or omissions, cannot be held against Petitioner at this stage of the proceeding to keep this contention out. To rule otherwise would violate the “Unclean Hands” doctrine. See Precision Inst. Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806 (1945) and the discussion in Petitioners’ Brief dated May 23, 2008 Concerning Contention E and Subpart G, ML081570141, at 17-18 (incorporated by reference into the Petition at 5).

CONCLUSION

For the reasons stated above, the Presiding Officer should grant Petitioners leave to file this Arsenic contention and/or amend an existing contention to include this Arsenic contention as to the Petitioners in this proceeding.

Dated this 21st day of October, 2008.

Respectfully submitted,



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⁵ Applicant’s Answer at 7 and at 8.

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October 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' REPLY TO APPLICANT AND NRC STAFF ANSWERS TO NEWLY FILED CONTENTION RE: ARSENIC" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (**); on this 21st day of October, 2008:

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Subject: Transmitting Document in Crow Butte Renewal - Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01
Attachments: Petitioners Reply to Answers to New Contention re Arsenic (Renewal) final 10212008.pdf; Petitioners (Renewal) EIE conformed COS 10212008.pdf

Dear All,

Attached are Petitioners Reply to Answers of Applicant and NRC Staff to newly filed contention re: Arsenic and related EIE conformed COS.

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