

January 5, 2009 (8:30am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of) Docket No. 40-8943
CROW BUTTE RESOURCES, INC.) ASLBP No. 08-867-02-OLA-BD01
(In Situ Leach Facility, Crawford, Nebraska)) January 2, 2009

PETITIONERS' ANSWER TO NRC STAFF'S APPEAL FROM LBP-08-27

Petitioners hereby respectfully submit this Answer to NRC Staff's appeal filed December 22, 2008, pursuant to 10 CFR Sections 2.311(a), and 2.341(c)(2).¹

INTRODUCTION

On December 10, 2008, the Atomic Safety and Licensing Board ("Board") issued LBP-08-27 admitting Safety Contention A. For the reasons discussed below, it would be inappropriate for the Commission to accept review. In the event that the Commission were to accept review and overturn the Board's rulings, such action by the Commission would itself be subject to being set aside as arbitrary, capricious, an abuse of discretion and not in accordance with law, all as described in Section 706 of the Administrative Procedure Act.

APPLICABLE STANDARD FOR REVIEW

The proper standard for review is found in Section 706 of the Administrative Procedure Act, which provides that the agency action, in this case, the Board's rulings, may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

¹ With the intervening Christmas and New Year's holidays, this filing is timely made on January 2, 2009.

with law.” 5 USC §706(2) (emphasis added). Such a finding would be made by a federal court reviewing the agency action.

Further, the Commission has expressed its “general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings’.” Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) [quoting, Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002)]. This is especially the case when the Commission itself is comprised of only four out of the five Commissioners due to the vacancy left by the passing of Commissioner McGaffigan in September 2007 and in light of the expiration of the term of Commissioner Lyons in June 2009.

The NRC Staff fails to discuss the standards to be applied by the Commission in determining whether to exercise its discretion to accept this interlocutory appeal, or the standard(s) of review to be used by the Commission in the event that discretion is exercised to allow the appeal. NRC Staff merely re-argues the merits. As a result, the appeal is defective and must be denied.

ARGUMENT

A. Interlocutory Review Is Not Available.

NRC Staff seeks interlocutory appeal under Sections 2.311(a) and 2.311(c)². NRC Staff Brief at 1. NRC Staff has not alleged that any immediate or serious irreparable impact would occur if the appeal is denied. Because Applicant continues operations during the licensing renewal proceeding, it is not prejudiced. There is ample time for the Board to review the

² Nothing in Section 2.311(c) authorizes an appeal of the admission of a new or amended

information resulting from Subpart L discovery, hear arguments, review briefing, complete its legal determinations, render a final decision in the case, and for Applicant and the NRC Staff to take up appeal(s) in due course. Accordingly, an interlocutory appeal is not necessary or appropriate and should be denied.

B. Even if the Commission Reviewed the Board, Reversal Would Be Contrary to the Administrative Procedure Act

Contrary to the NRC Staff's assertions, the decision of the Board was well-reasoned and factually supported by the Request for Leave. The Board made its decision based on its knowledge of the case including expert scientific information and findings concerning fractures and faults in the geology of the Mine site which create the potential for migration of toxics from the mined aquifer to drinking water aquifers. See, generally, LBP-08-24 and Dr. LaGarry opinions referred to therein. Nothing contained in LBP-08-27 is arbitrary or capricious, constitutes an abuse of discretion or is otherwise not in accordance with applicable law. Merely because the NRC Staff believes that its arguments should have prevailed does not sustain an appeal in the absence of reversible error.

C. The Board Properly Applied Section 2.309(f); There Is No Reversible Error.

Section 2.309(f) was clearly applicable in the evaluation of Safety Contention A and was properly applied by the Board. Section 2.309(f)(2) applies to determine whether leave of the Presiding Officer should be granted to allow an amended or new contention. 10 CFR §2.309. Since the Contention was 'timely' under Section 2.309(f)(2), the late-filed criteria of Section 2.309(c) are not relevant. Contrary to the NRC Staff's assertions, the stringent non-timely filing

contention after intervention and a hearing have already been granted as in the instant case.

standards of Section 2.309(c) do not apply unless the filing of the Request for Leave to the Presiding Officer was, itself, untimely. Such is not our case because the Request for Leave was filed within thirty (30) days after Petitioners became aware of the information giving rise to the filing. The Board properly found the filing of the Request for Leave to be timely.

Section 2.309(f)(2) Factors

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

The observational study and analysis could not have been conducted prior to the deadline of July 28, 2008 because the issue could not be discerned until Petitioners' Counsel had discussions with Chadron residents about the 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 relationship between 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.

The Johns Hopkins Study specifically focuses on **low-level** inorganic Arsenic in drinking water and the pancreatic ailment of Type 2, Adult-onset diabetes. In addition, it is well known that health concerns about Arsenic in the drinking water have increased dramatically since prior studies as evidenced by the lowering of the allowable MCL for Arsenic in 2000. In any case, the Board's findings that the information was new to Petitioners is not an abuse of discretion or

reversible error.

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 which concentrate Arsenic in the mined aquifer like a toxic soup. In any case, the information was previously unavailable and the Board properly concluded that the Petitioners complied with the first factor.

(2) Second Factor: Information Materially Different

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 that previously available information. The NRC Staff has not raised any facts to controvert this point. 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.

(3) **Third Factor: Contention Submitted in Timely Fashion**

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. The NRC Staff has not argued to the contrary.

Section 2.309(f)(1) Contention Admissibility Criteria

Petitioners addressed the Section 2.309(f)(1) criteria in the Request for Leave and the Board properly found that such criteria were satisfied. The NRC re-argues its boilerplate objections that Petitioners Request for Leave failed to provide sufficient particularity, failed to provide factual or expert support, failed to specify genuine disputes on a material issue of fact or law, ‘mere’ notice pleading not allowed. NRC Staff Brief at 17. However, because the Request for Leave detailed responses to each of the Section 2.309(f)(1) criteria and applied them to the contention, the Board properly concurred and admitted the contention (as re-framed) and its decision is not reversible error because there was no abuse of discretion. The NRC Staff has failed to argue any abuse of discretion or that the Board’s decision was arbitrary or capricious. Accordingly, the NRC Staff’s appeal must fail.

Section 2.309(c) Not Implicated

Even if Section 2.309(c) applied, it would require a balancing of the factors enumerated

therein “*to the extent that they apply to the particular nontimely filing.*” 10 CFR §2.309(c). Accordingly, since the Board already made certain findings in support of its ruling in LBP-08-24, it found good cause due to the new information not being previously available and it then reasonably used its discretion to balance the other factors, or to not apply them, to the extent such factors were or were not implicated. In doing so, the Board properly applied the standards, there was no abuse of discretion and there is no reversible error.

The NRC Staff has failed to argue that it was an abuse of discretion to find, implicitly, that the other factors of Section 2.309(c) were not implicated. Accordingly, the NRC Staff’s arguments related to Section 2.309(c) are unpersuasive and must fail.

D. Specific Rebuttals to Miscellaneous NRC Staff Arguments

In response to the Appeal Brief, 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. Contrary to Applicant’s assertions (Applicant Brief at 7), the Johns Hopkins Study is not the only new piece of information. As described above, the new information is the new understanding found by correlating the Johns Hopkins Study with the observational study concerning pancreatic cancer in Chadron to draw tentative conclusions concerning health

impacts from Arsenic contamination resulting from the Mine's operations which oxidize Uranium and release Arsenic in massive quantities without monitoring or filtering the Arsenic.

2. "Some Tangible Information" Provided. All parties agree that Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195 (2003), requires some tangible information, experts or substantive affidavits. Petitioners submitted, and the Board concurred, that the tangible information and expert scientific analysis referred to in the Request for Leave as well as the supporting affidavit filed therewith collectively constituted "some" tangible information and transcend the level of "bare assertions and speculation" for purposes of establishing the admissibility of this contention consistent with Fansteel. See LBP-08-27 at 6, Footnote 28 (expert support not required; a fact based argument may be sufficient.) Such a conclusion is supported by law and the Request for Leave and was not arbitrary, capricious or an abuse of discretion. While NRC Staff disagrees with the Board³, such is not reversible error.

3. Contaminant Pathways. NRC Staff argues it is impossible to believe that the Mine's operations are causing public exposures to Arsenic that might cause cancer. NRC Staff Brief at 19. In fact, Petitioners clearly identify the pathways by which contaminated water reaches and is being ingested by people living near the Mine due to fractures and faults, artesian pressures and migration up The White River (see LaGarry Opinion and Petition).

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 Petitioners. To rule otherwise would violate the "Unclean Hands" doctrine and would reward

³ NRC Staff Brief at 18.

scofflaws. 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).

Petitioners have shown how the Mine's operations can result in the concentration of Arsenic in the mined aquifer and how the concentrated Arsenic, a known carcinogen, can migrate to the drinking water of Petitioners. Therefore, it is entirely plausible and even likely that such migration of contaminants has occurred and that over many years such contamination would have caused cancer in people living near the Mine. Unfortunately, the NRC Staff turns a blind eye and then argues such can't be possible. Fortunately, the Board chose not to turn a blind eye and admitted Safety Contention A. In any case, it was not reversible error for the Board to admit the contention over the objections of the NRC Staff because it was not arbitrary, capricious or an abuse of discretion.

CONCLUSION

For all the foregoing reasons, the Commission should refuse to review the Board's decision in LBP-08-27 and deny NRC Staff's appeal.

Dated this 2nd day of January, 2009.

Respectfully submitted,

/s/ - signed electronically

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
) Docket No. 40-8943
CROW BUTTE RESOURCES, INC.)
)
(Renewal for the In Situ Leach Facility,) ASLBP No. 08-867-02-OLA-BD01
Crawford, Nebraska))

CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' ANSWER TO NRC STAFF'S APPEAL FROM LBP-08-27" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (**); on this 2nd day of January, 2009:

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Attachments: Petitioners Answer to NRC Staff NOA (Renewal) 01022009.pdf; Petitioners (Renewal) EIE conformed COS 01022009.pdf

Dear All,

Attached for filing are Consolidated Petitioners Answer to NRC Staff Appeal from LBP-08-27 and related COS.

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