

February 6, 2015

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-OLA
)	
(License Renewal for the In Situ Leach)	ASLBP No. 08-867-08-OLA-BD01
Facility, Crawford, Nebraska))	

NRC STAFF'S PROPOSED AMENDED RESPONSE TO CONTENTION 13

On January 30, 2015, the NRC Staff submitted its Combined Answer to Contentions Submitted by Consolidated Intervenors and the Oglala Sioux Tribe (January 30 Answer). In that document, the Staff concluded that the portion of Contention 13 asserting failure to consult under Section 7 of the Endangered Species Act was admissible.¹ On February 6, 2015, the Staff notified the Board and parties that it had changed its position on this issue and moved to file an amended written response explaining the Staff's change in position.² Subsequently, the Board issued an Order directing the Staff to file its proposed amendment to the January 30 Answer on February 6, "with all proposed changes to its original answer highlighted with track changes."³

The text of the Staff's proposed amended response to Contention 13 is provided in Attachment 1. Attachment 1 consists of the original response to Contention 13 from the

¹ January 30 Answer at 62.

² NRC Staff Notice of Change in Position and Motion to Amend Response to Contention 13 at 1 (February 6, 2015)

³ Order (Seeking Additional Information and Replies on NRC Staff's Motion to Amend Answer to EA Contention 13) at 2 (February 6, 2015).

January 30 Answer, amended by showing deleted text as strikethrough and inserted text as bold.⁴

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 6th day of February 2015.

⁴ Footnote numbers in Attachment 1 are not preserved from the January 30 Answer, but for reference, footnote 1 in Attachment 1 corresponds to footnote 291 in the January 30 Answer.

ATTACHMENT 1 – TEXT OF AMENDED RESPONSE TO CONTENTION 13

M. Contention 13 (Endangered Species)

Contention 13 asserts that ESA Section 7 consultation was not completed and impacts to “imperiled” species were not analyzed and reviewed as required.¹ For the reasons discussed below, Contention 13 is ~~admissible only with respect to the Staff’s failure to complete the informal Section 7 consultation process by receiving concurrence from FWS on the Staff’s determination that threatened and endangered (T&E) species will not be affected. In all other respects, this contention is~~ inadmissible because it fails to raise a genuine dispute with the EA.

With regard to Section 7 consultation, the NRC Staff contacted the FWS in 2007 requesting information on **threatened and endangered (T&E)** species in connection with the CBR LRA.² The FWS responded in June 2008 with a list of species that may be present in the vicinity of the site.³ The Staff incorporated the information obtained from FWS, as well as other sources, in its discussion of impacts to wildlife, including T&E species, in the EA. ~~Under 50 C.F.R. § 402.13(a), when engaging in informal consultation, an agency must provide its determination as to whether the proposed action will affect T&E species to FWS and request FWS concurrence. If FWS concurs with that determination, no further consultation is required.~~

~~The Staff has realized that it did not complete the informal consultation process by requesting and receiving concurrence from FWS on the Staff’s determinations regarding T&E species. To remedy this oversight, the Staff has provided the final EA to FWS for review and has requested concurrence with the determination that T&E species will not be impacted.⁴~~

¹ OST New Contentions at 109-114.

² Letter from Gregory Suber, NRC, to John Cochnar, FWS (May 15, 2008) (ADAMS Accession No. ML081270752).

³ Letter from John Cochnar, FWS, to Gregory Suber, NRC (Jun. 15, 2008) (ADAMS Accession No. ML15022A235).

⁴ ~~Letter from Lydia Chang, NRC, to John Cochnar, FWS (Jan. 22, 2015) (ADAMS Accession No. ML15022A217). Although not required to complete Section 7 consultation, the Staff has also asked for concurrence from the Nebraska Department of Game and Parks (NDGP). Letter from Lydia Chang, NRC, to Michelle Koch, NDGP (Jan. 22, 2015) (ADAMS Accession No. ML15022A421).~~

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~~When concurrence is received, the Staff will supplement the EA as necessary to describe the completed consultation process and its results. But at this point, the contention is admissible on this basis because the informal consultation concurrence has not been received.~~

Under the implementing regulations in 50 C.F.R. Part 402, formal Section 7 consultation is required only if an agency determines that an action “may affect” listed species or critical habitat.⁵ “*If such a determination is made, formal consultation is required*” unless an exception in 50 C.F.R. § 402.14(b) applies.⁶ One exception is to seek informal consultation under 50 C.F.R. § 402.13.⁷

In this case, the Staff did not determine that the action “may affect” Federally listed species. Rather, as stated in the EA, the Staff determined there would be no effect on those species.⁸ Therefore, the Staff was not required to initiate formal consultation under 50 C.F.R. § 402.14(a).⁹ Consequently, there was no need to engage in informal

⁵ 50 C.F.R. § 402.14(a).

⁶ *Id.* (emphasis added).

⁷ 50 C.F.R. § 402.14(b)(1); Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). When an agency pursues informal consultation under 50 C.F.R. § 402.13 in lieu of initiating formal consultation, the consultation process can be terminated without any need for formal consultation if the agency determines the action is not likely to affect listed species or critical habitat and the FWS provides written concurrence with that determination. 50 C.F.R. §§ 402.13(a) and 402.14(b)(1).

⁸ EA at 98.

⁹ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-10, 75 NRC 633, 657 (2012); *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009) (citing *Southwest Center for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir.1996)). Statements by the FWS in rulemakings and guidance also support the view that consultation is not required when an agency makes a “no effect” determination. See Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47,868, 47,870 (Aug. 15, 2008) (proposed rule) (stating that although current regulations do not explicitly state that consultation is not required when a “no effect” determination is made, “an evaluation of the current regulations makes it clear that no consultation was contemplated for these situations” and “[b]y policy and practice” the FWS has not required consultation under such circumstances); see also “Consultations: Frequently Asked Questions,” available at <http://www.fws.gov/endangered/what-we-do/faq.html> (last accessed February 4, 2015) (stating that “A Federal agency is not required to consult with the Services if it determines an action will not affect listed species or critical habitat.”).

consultation under 50 C.F.R. § 402.13(a) as an exception to required formal consultation, and there was no requirement to obtain written FWS concurrence.

The remainder of Contention 13 consists of several unsupported assertions of inadequacies or omissions in the EA. First, Intervenors assert that the EA fails to provide the “required analysis of conservation objectives that could be adopted to protect four endangered species that have the potential to occur in the CBR facility area.”¹⁰ Because Intervenors do not identify the source of this requirement or why it applies here, they fail to raise a genuine dispute with the EA on this issue.

Second, Intervenors assert that the EA describes the whooping crane as transient but fails to mention that evaporation ponds are places where a whooping crane would probably touch down.¹¹ Intervenors provide no factual basis for the assertion that whooping cranes are likely to be found at the CBR facility or that they would “probably touch down” at an evaporation pond. Again, this is a bare assertion that fails to raise a genuine dispute.

Third, Intervenors assert failure to seek consultation regarding the whooping crane, and assert that the EA states that a “no effect” determination was not available for the project.¹² But in Section 4.10.8 of the EA, the Staff concluded that there would be no adverse effect on the four Federal or state-listed species that may occur in this part of Nebraska.¹³ Thus, the EA does not state that a “no effect” determination is not available. Because Intervenors have misread the EA, they have not raised a genuine dispute on this issue. As discussed above, the NRC sought consultation with FWS on threatened and endangered species, including the whooping crane. The NRC has determined that there would be no adverse effects on

¹⁰ OST New Contentions at 112.

¹¹ *Id.*

¹² *Id.* at 112-13.

¹³ EA at 97-98.

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threatened or endangered species; ~~and is awaiting concurrence from FWS~~ **therefore, no formal consultation was required.**

Fourth, Intervenor assert that the NRC ignored advice from FWS regarding the impacts of selenium on birds, especially waterfowl such as the whooping crane.¹⁴ This repeats assertions made in Contention 5 and is addressed in the Staff's response to that contention.

Fifth, Intervenor assert, without further explanation, that the discussion in the EA about the black-footed ferret is "unreasonably bounded."¹⁵ Intervenor do not explain what they mean by "unreasonably bounded," nor do they provide any additional explanation or support for this. Without any further explanation of this bare assertion, Intervenor fail to raise a genuine dispute on this issue. Similarly, Intervenor's restatement of two paragraphs from sections 4.10.5 and 4.10.6 of the EA, without identifying any issues with those paragraphs,¹⁶ fails to raise a genuine dispute with the information contained in them.

Finally, Intervenor assert that the EA does not contain "a detailed examination of impacts on wildlife from waste disposal" or a discussion of waste disposal or land application in operations or decommissioning.¹⁷ Again, Intervenor have provided no further explanation for why such discussions are required. With regard to the latter assertion, Section 2.2. of the EA discusses waste disposal and Section 2.4 discusses decommissioning of evaporation ponds.¹⁸ Intervenor have not raised any issues with these sections. For these reasons, Intervenor fail to raise a genuine dispute with the EA on this issue.

¹⁴ OST New Contentions at 113.

¹⁵ *Id.*

¹⁶ *Id.* at 113-114.

¹⁷ *Id.* at 114.

¹⁸ EA at 8-10, 12-13.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S PROPOSED AMENDED RESPONSE TO CONTENTION 13" in the above captioned proceeding have been served this 6th day of February, 2015, via the NRC's Electronic Information Exchange ("EIE"), and via e-mail to David Frankel and Thomas Ballanco, counsels for Consolidated Intervenor, 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.

Signed (electronically) by

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