

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal)	)	

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CROW BUTTE RESOURCES' RESPONSE  
OPPOSING PETITION FOR REVIEW OF LBP-15-2

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Tyson R. Smith  
Winston & Strawn LLP  
101 California Street  
San Francisco, CA 94111

Mark D. McGuire  
McGuire Law Firm  
625 South 14th Street, Suite C  
Lincoln, Nebraska 68508

COUNSEL FOR CROW BUTTE  
RESOURCES, INC.

March 13, 2015

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), Crow Butte Resources, Inc., submits this response opposing the “Petition for Review,” dated February 16, 2015, filed by the Oglala Sioux Tribe (“OST”). In its petition, OST seeks review of a Licensing Board decision, LBP-15-2, dated January 21, 2015, which denied OST’s motion for the stay of the effectiveness of the renewed license for the Crow Butte facility.<sup>1</sup> As the Board noted in its decision, the grant of a stay is a rare and extraordinary remedy. Here, the Board denied the stay after concluding that OST had shown neither irreparable injury nor a strong likelihood of prevailing on the merits.<sup>2</sup>

In its petition, OST claims that the Board improperly “accepted the NRC Staff’s assertion that it was obligated to issue the License under 10 C.F.R. 2.1202(a)” and alleges that

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<sup>1</sup> “Application the Oglala Sioux Tribe for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213,” dated November 14, 2014 (“Stay Motion”). Consolidated Petitioners also filed a stay motion, but did not file a petition for review. “Consolidated Intervenors’ Application for a Stay of the Issuance of License No. SUA-1534 under 10 CFR Section 2.1213,” dated November 14, 2014 (“CI Stay Motion”).

<sup>2</sup> Because OST did not show irreparable injury or a likelihood of success on the merits, the Board did not reach the harm to participants or public interest factors associated with a stay. LBP-15-2 at 13; *see also* 10 C.F.R. § 2.1213(d).

license issuance violates the National Environmental Policy Act (“NEPA”) because the license was issued prior to completion of the hearing.<sup>3</sup> Neither reason provides a basis for reversing the Board’s decision below. The NRC Staff completed its NEPA process, as required by NRC regulations, and therefore was free to issue the renewed license to Crow Butte once it completed its technical and environmental reviews.

Nor is there any basis for granting the underlying stay request. None of the factors relevant to a stay support granting the motion. OST has not demonstrated it will be irreparably harmed in the absence of a stay of the NRC Staff’s licensing action. Nor has OST shown that it is likely to prevail on the merits at the hearing. The arguments made below in support of the stay rely on speculation and conclusory statements that do not justify the extraordinary remedy of a stay. The Commission should deny the Petition for Review.

#### STANDARD FOR REVIEW

Under 10 C.F.R. § 2.341(b)(4), the Commission may, in its discretion, grant a petition for review, giving due weight to the existence of a “substantial question” with respect to the following considerations: (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) a substantial and important question of law, policy or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public interest.<sup>4</sup> A Licensing Board ruling will be affirmed where the

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<sup>3</sup> Petition for Review at 5-11.

<sup>4</sup> 10 C.F.R. § 2.341(b)(4)(i)-(v); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-03-8, 58 NRC 11, 17 (2003).

“brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Board’s decision.”<sup>5</sup>

## DISCUSSION

OST’s arguments in support of Commission review are without merit. The Board’s decision is consistent with applicable NRC requirements and precedent. The request for a stay was properly denied and the appeal should be rejected.

### A. The Petition for Review Does Not Demonstrate a Substantial Question for Review

#### 1. *Issuance of the Renewed License Is Authorized by NRC Regulations*

OST argues that the NRC Staff should not have issued the renewed license, but points to no applicable regulation that prohibits the NRC Staff’s action.<sup>6</sup> OST claims that 10 C.F.R. § 2.1202(a)(1), which limits the effectiveness of NRC Staff action on matters involving production or utilization facilities, applies to Crow Butte’s application. But, Crow Butte is a Part 40 source material licensee, not a production or utilization facility.<sup>7</sup> The supposed prohibition on issuing the renewed license cited by OST simply does not exist.

Moreover, the NRC’s regulations specifically authorize the NRC Staff to issue the renewed license to Crow Butte after completing safety and environmental reviews — even if a contested hearing is ongoing. As OST recognizes, 10 C.F.R. § 2.1202(a) states:

During the pendency of any hearing under this subpart, consistent with the NRC staff’s findings in its review of the application or matter which is the subject of the hearing and as authorized by law, the NRC staff is expected to promptly issue its approval or denial of the application, or take other

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<sup>5</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

<sup>6</sup> Petition for Review at 6.

<sup>7</sup> *See* 10 C.F.R. § 50.2 (definitions of production and utilization facilities).

appropriate action on the underlying regulatory matter for which a hearing was provided.

The Commission reaffirmed the NRC Staff's authority to issue licenses pending completion of a hearing in a 2012 rule change, explaining that the NRC Staff "may act on a license, permit, or license amendment prior to the completion of a contested hearing."<sup>8</sup> Here, after completing its technical and environmental reviews of Crow Butte's application, the NRC Staff promptly issued the renewed license, as directed by 10 C.F.R. § 2.1202(a).

The only other limitation on NRC Staff action is the requirement that the NRC Staff notify the presiding officer and the parties if it takes action on an application while a hearing is pending.<sup>9</sup> The NRC Staff notified the Board and parties in a letter, dated November 6, 2014 (ADAMS Accession No. ML14310A434), that it had issued the license and included an explanation and references to the bases for its decision. OST makes no argument to the contrary. The NRC Staff therefore fully complied with NRC regulations in issuing the renewed license.

## 2. *Issuance of the Renewed License Does Not Violate NEPA*

OST argues that issuance of the license violates NEPA, vaguely alleging procedural non-compliances and implying that the license was issued prior to completion of the NEPA process.<sup>10</sup> However, the NRC Staff fully complied with NEPA and the NRC's implementing regulations in completing its environmental review prior to renewing the license.

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<sup>8</sup> 77 Fed. Reg. 46562, 46575 (Aug. 3, 2012).

<sup>9</sup> According to 10 C.F.R. § 2.1202(a), the notice must include the NRC Staff's explanation as to why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter.

<sup>10</sup> *See, e.g.*, Petition for Review at 9 ("Obviously, the decisionmaker cannot make a properly "informed" decision prior to completing the NEPA process and receiving submissions from the public and parties."); *id.* at 8 ("40 C.F.R. 1500.1 provides, in relevant part: 'NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made *and before* actions are taken.'")

First, under 10 C.F.R. § 51.21, the NRC Staff must prepare an environmental assessment (“EA”) for all licensing actions except those that specifically require an environmental impact statement (“EIS”) or that are otherwise exempted from environmental review. For the type of license issued to Crow Butte — a Part 40 source material license for uranium recovery — the regulations do not specifically trigger an environmental impact statement. Nor is a Part 40 license for Crow Butte categorically excluded or otherwise exempt from an environmental review. The NRC therefore appropriately prepared an EA.

Second, under 10 C.F.R. § 51.31, upon completion of the EA, the NRC must determine whether to prepare an EIS or a Finding of No Significant Impact (“FONSI”). Here, the NRC determined that renewal of Crow Butte’s license for a 10-year term would not significantly affect the quality of the human environment and that an EIS was not warranted. The NRC Staff published its FONSI in the *Federal Register* on October 30, 2014.<sup>11</sup> And, as required by 10 C.F.R. § 51.35, the NRC Staff did not issue the renewed license until after publishing the final EA/FONSI. The NRC Staff therefore satisfied NRC requirements relating to the timing and content of an EA/FONSI.

In its Petition for Review, OST claims that issuance of the renewed license before OST had an opportunity to “comment on the EA violated the heart and sole [sic] of NEPA.”<sup>12</sup> According to OST, the NRC Staff’s “failure to provide the parties or the public with any opportunity to comment prior to the issuance of the FONSI was a clear violation of NEPA that

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(emphasis in original); *id.* at 9 (“[I]ssuing a FONSI in a manner that forecloses any comments on the EA or on any of the pending contentions or upon any information and evidence from the hearing set for August on the License Renewal, prejudices not only the FONSI but the issuance of the License itself and is and should be impermissible.”).

<sup>11</sup> 79 Fed. Reg. 74629.

<sup>12</sup> Petition for Review at 9.

requires the reversal of the issuance of the License.”<sup>13</sup> But neither NEPA nor the NRC’s implementing regulations mandate publication of a draft EA or an opportunity to comment on an EA. As provided in 10 C.F.R. § 51.33, the NRC Staff may, but is not required to, prepare and issue a draft FONSI. And, circulation of a draft EA is not required by NEPA.<sup>14</sup>

Lastly, OST argues that the NRC Staff “cannot make a properly ‘informed’ decision prior to completing the NEPA process” and that renewing the license “violated the public’s, including the parties, rights to participate.”<sup>15</sup> But the NRC Staff in fact completed the NEPA process, including preparing and publishing an EA/FONSI, before renewing the license. NEPA does not limit or dictate the procedures that the NRC may employ in conducting public hearings.<sup>16</sup> Nor does NEPA require public hearings before taking the underlying licensing action.<sup>17</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> See *Bering Strait Citizens v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 952 (9th Cir. 2008) (“We hold today that the circulation of a draft EA is not required in every case.”). The *Bering Strait* Court explained that its decision was “consistent with the views of other circuits, which uniformly have not insisted on the circulation of a draft EA.” *Id.*, citing *Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*, 398 F.3d 105, 114-115 (1st Cir. 2005) (concluding that “[n]othing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain ‘limited circumstances’”); *Pogliani v. U.S. Army Corps of Eng’rs*, 306 F.3d 1235, 1240 (2d Cir. 2002) (holding that a draft EA must be circulated only in certain limited circumstances); *Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996) (“[T]here is no legal requirement that an [EA] be circulated publicly and, in fact, they rarely are.”).

<sup>15</sup> Petition for Review at 9, 10.

<sup>16</sup> *Id.*; *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C. Cir. 1990).

<sup>17</sup> See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978).

For all of these reasons, the NRC Staff complied with NEPA and with the NRC's implementing regulations. Publication of the EA/FONSI and subsequent issuance of the renewed license did not violate NEPA.

B. There Is No Basis For Granting the Stay Request

The grant of a stay is a rare and extraordinary remedy.<sup>18</sup> In determining whether to grant or deny an application for a stay, a Board must balance: (1) whether the requestor will be irreparably injured unless a stay is granted; (2) whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) whether the granting of a stay would harm other participants; and (4) where the public interest lies.<sup>19</sup>

Of the four stay factors, “irreparable injury is the most important.”<sup>20</sup> For a potential injury to be irreparable, it must be shown to be both “imminent” and “certain and great.”<sup>21</sup> If a party moving for a stay fails to show irreparable injury, a stay may only be granted if the movant has made “an overwhelming showing” or a demonstration of “virtual certainty” that it will prevail on the merits.<sup>22</sup>

In the Petition for Review, OST argues that the Board “insisted that the moving parties prove up their harm before they’ve even had an opportunity to develop the evidence for

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<sup>18</sup> *U.S. Dep’t of Energy (High-Level Waste Repository)*, CLI-05-27, 62 NRC 715, 718 (2005).

<sup>19</sup> 10 C.F.R. § 2.1213(d).

<sup>20</sup> *So. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, CLI-12-11, 75 NRC 523, 529 (2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

the hearing in August on those same interests.”<sup>23</sup> OST claims that its alleged “procedural and due process violations were sufficient” to establish irreparable harm.<sup>24</sup> For example, OST argues that, because NEPA is a procedural statute, agency action taken in violation of NEPA must be set aside.<sup>25</sup> OST also alleges that issuance of the license “creates a ‘vested’ interest in CBR that carries with it the right to continue to develop its discovered resource” that prejudices the NEPA review.<sup>26</sup> OST, however, has not identified any irreparable harm that would warrant a stay.

In its Petition for Review, OST claimed irreparable harm stemming from a NEPA violation. OST, however, did not advance that argument before the Board. OST never cited to NEPA or alleged a specific NEPA violation in its Stay Motion. This reason alone provides a sufficient basis for rejecting the Petition for Review.<sup>27</sup> OST instead based its stay motion on the risk of irreparable injury to (1) cultural resources through construction and operation activities, and (2) tribal members’ health through contamination of ground and surface water from Crow Butte operations.<sup>28</sup> OST also alleged that the NRC Staff failed to engage in meaningful consultation with it, and asserted that this violation of the federal government’s trust responsibility “constitutes an additional incident of irreparable harm.”<sup>29</sup>

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<sup>23</sup> Petition for Review at 12.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 14.

<sup>27</sup> See 10 C.F.R. § 2.341(b)(5) (“A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer.”).

<sup>28</sup> LBP-15-2 at 8.

<sup>29</sup> *Id.* (internal citations omitted).

The Board carefully evaluated each of these claims and concluded that OST's general allegations, which were submitted without any supporting declarations, lacked the specificity and detail needed to demonstrate serious, immediate, and irreparable harm to cultural and historic resources or to the health of OST members.<sup>30</sup> The Board rightly pointed out that, even assuming injuries to OST, staying renewal of Crow Butte's license would not prevent these injuries from continuing because Crow Butte could continue to operate under the NRC's timely renewal provision.<sup>31</sup> The renewed license also does not authorize any new or different activities that could conceivably result in irreparable harm relative to the status quo.<sup>32</sup> The Board properly concluded that the harm, if any, from a renewed license is neither imminent nor certain and great. OST has not identified any error of law or abuse of discretion with respect to the Board's discussion of irreparable harm that might serve as grounds for reversal of the Board's decision.

If a party moving for a stay fails to show irreparable injury, a stay may only be granted if the movant has made "an overwhelming showing" or a demonstration of "virtual

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<sup>30</sup> OST did not identify any specific harm resulting from Crow Butte's operations and there is no information in the record of the proceeding to suggest that Crow Butte's operations are causing any contamination outside the mine area. Speculation about the possibility of future contamination or the existence of contamination pathways falls far short of showing the specific irreparable injury necessary for a stay. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 748 n.20 (1985).

<sup>31</sup> Crow Butte has been operating in accordance with the NRC license since the early 1990s, including during the pendency of the license renewal review. Under 10 C.F.R. § 2.109(a), the facility is allowed to continue to operate under its existing license until the NRC completes its review and reaches a decision on the request.

<sup>32</sup> If anything, issuance of the renewed license resulted in imposition of additional, more stringent requirements on Crow Butte than the prior license. "Safety Evaluation Report (Revised) for License Renewal of the Crow Butte Resources ISR Facility Dawes County, Nebraska" (August 2014) at x-xvi (identifying facility specific items that the NRC Staff determined required additional or modified license conditions to ensure that the operation of the facility will be adequately protective of public health and safety).

certainty” that it will prevail on the merits.<sup>33</sup> While OST is not required to prove its case to obtain a stay, it must make a stronger showing than the minimum necessary to have a contention admitted for hearing.<sup>34</sup> In its decision denying the stay, the Board noted that OST has to date advanced only general allegations and speculation regarding possible harm from Crow Butte’s operations. OST did not file any new affidavits or provide supplemental information with its Stay Motion that would support its general claims. The Board therefore correctly found that OST had not demonstrated a virtual certainty of prevailing at the hearing.<sup>35</sup> As a result, even if the Commission were to disagree with the Board and find that OST would suffer irreparable harm, no stay would be warranted because there was no showing of a likelihood of success on the merits.

At bottom, OST failed to identify any error of law or abuse of discretion that undermines the Board’s decision denying the Stay Motion. The request for a stay was properly denied and the appeal should be rejected.

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<sup>33</sup> *Vogtle*, CLI-12-11, 75 NRC at 529.

<sup>34</sup> OST must demonstrate a deficiency that would lead the Board to invalidate, or at least condition, the license the NRC Staff has awarded. *CFC Logistics, Inc.* (Materials License), LBP-03-16, 58 NRC 136, 144 (2003).

<sup>35</sup> LBP-15-2 at 13. OST’s Petition for Review does not even dispute this portion of the Board’s decision.

CONCLUSION

For the reasons articulated by the Board and for the reasons set forth above, the Board's decision in LBP-15-5 should be upheld.

Respectfully submitted,

/s/ signed electronically by  
Tyson R. Smith  
Winston & Strawn LLP  
101 California Street  
San Francisco, CA 94111

Mark D. McGuire  
McGuire Law Firm  
625 South 14th Street, Suite C  
Lincoln, Nebraska 68508

COUNSEL FOR CROW BUTTE  
RESOURCES, INC.

Dated at San Francisco, California  
this 13th day of March 2015

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CERTIFICATE OF SERVICE

I hereby certify that copies of “CROW BUTTE RESOURCES’ RESPONSE OPPOSING PETITION FOR REVIEW OF LBP-15-2” in the captioned proceeding have been served this 13th day of March 2015 via electronic mail to Consolidated Intervenors at [davidcoryfrankel@gmail.com](mailto:davidcoryfrankel@gmail.com) and [Arm.legal@gmail.com](mailto:Arm.legal@gmail.com), and via the Electronic Information Exchange (“EIE”), which to the best of my knowledge resulted in transmittal of the foregoing to all those on the EIE Service List for the captioned proceeding other than Consolidated Intervenors.

/s/ signed electronically by \_\_\_\_\_  
Tyson R. Smith  
Winston & Strawn LLP  
101 California Street  
San Francisco, CA 94111

COUNSEL FOR CROW BUTTE  
RESOURCES, INC.