UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CROW BUTTE RESOURCES' RESPONSE TO MOTION FOR ADDITIONAL CONTENTIONS BASED ON EPA PROPOSED RULES

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), Crow Butte Resources, Inc. ("Crow Butte") hereby answers the "Consolidated Intervenors' Motion for Additional Contentions Based on EPA Proposed Rules" ("EPA Contentions), dated March 16, 2015. For the reasons discussed below, the proposed new contentions do not meet the NRC's stringent criteria for admissible contentions and, in any event, are untimely.

BACKGROUND

The purported genesis for the proposed new contentions is a proposed rule published by the U.S. Environmental Protection Agency ("EPA") on January 26, 2015.[1] The Proposed Rule includes a new Subpart D in 40 C.F.R. Part 192 to explicitly address groundwater protection at uranium recovery operations, as well as amendments to the existing rule to address a judicial decision, delete an outdated standard, and correct minor errors.[2] Under the Atomic Energy Act ("AEA") the Nuclear Regulatory Commission ("NRC") licenses and regulates

1 80 Fed. Reg. 4156 ("Proposed Rule").

2 *Id*. at 4161.

source material and uranium recovery facilities. NRC's regulations in 10 C.F.R. Part 40, Appendix A, incorporate EPA's 40 C.F.R. Part 192 standards.[3] Accordingly, the EPA's proposed regulations, when and in whatever form they are finalized and become effective, will be implemented and enforced by the NRC in accordance with its statutory mandate under the AEA to ensure adequate protection of public health and safety. EPA is currently accepting public comments on the Proposed Rule. There is no published schedule for issuing a final rule.

ADMISSIBILITY AND TIMELINESS STANDARDS

Although CI filed their new contentions in accordance with the Board's Scheduling Order, dated March 9, 2015, the timeliness and admissibility of the proposed contentions still must be evaluated in accordance with the Commission's standards in 10 C.F.R. Part 2. In general, a contention must be based on the application or any other documents available at the time the hearing request and petition to intervene is filed.[4] The NRC's regulations provide that intervenors may file a new or amended environmental contention after the initial deadline only if: (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the new or amended contention is based is materially different from information previously available; and (3) the new or amended contention has been submitted in a timely fashion based on the availability of subsequent information.[5] The finding of good cause for late-filing of contentions is related to the

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3 *Id*. at 4167.

4 10 C.F.R. § 2.309(f)(2); *see also Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available).

5 10 C.F.R. § 2.309(c)(1).

total previous unavailability of information.[6] Documents that merely summarize earlier documents or compile pre-existing, publicly available information (*e.g.*, USGS Reports) into a single source do not render "new" the summarized or compiled information.[7]

New or amended contentions also must meet the admissibility standards that apply to all contentions, which the Commission has said are "strict by design."[8] As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Failure to comply with any of these requirements is grounds for the dismissal of a contention.[9]

DISCUSSION

Crow Butte addresses below each of the 11 proposed new contentions and concludes that none are admissible under the standards of 10 C.F.R. § 2.309. The Proposed Rule

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6 *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

7 *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 344 (2011).

8 *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

9 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

is not final and compliance with the proposed language is not required. The Proposed Rule raises generic issues and does not address Crow Butte specifically. Litigation of the ongoing generic rulemaking in this site-specific forum is not appropriate under longstanding NRC precedent. Additionally, the proposed contentions do not identify litigable environmental issues that could lead to relief under the National Environmental Policy Act ("NEPA"). Finally, nowhere in their proposed contentions do the intervenors attempt to show, much less affirmatively demonstrate, that their proposed contentions are based on new or materially different information. Indeed, for each contention, Crow Butte demonstrates that the contention could have been raised previously — for example, based on the original License Renewal Application ("LRA"), the Safety Evaluation Report ("SER"), the final Environmental Assessment ("EA"), or other publicly-available documents. All of the contentions therefore should be dismissed as inadmissible and untimely.

A. Contention F1: Failures Concerning Financial Assurances

In Contention F1, CI argues that "[t]he LRA, SER and Final EA fail to meet the requirements of the AEA, NEPA, Part 40, Appendix A to Part 40, and Part 51 and CEQ regulations because each lacks an adequate description of adequate financial assurances sufficient to ensure the payment of the costs of restoration and long-term monitoring of up to 30 years under the Proposed Rules."[10] According to CI, the LRA "omits … new requirements and costs related to compliance with the Proposed Rules."[11] But the proposed contention fails to raise a genuine dispute with respect to the current regulations and material to the proposed licensing action.

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10 EPA Contentions at 29.

11 *Id*.

It is not surprising that the LRA and NRC Staff review documents do not address the terms of the Proposed Rule. The Proposed Rule is precisely that — proposed. The Proposed Rule is not yet in force and therefore does not establish criteria for this licensing proceeding. There can be no contention, whether of substantive deficiency or omission, based on requirements that do not yet exist.[12] And the Proposed Rule does not create material issues for the licensing action now at issue. Ultimately, compliance with any new rules will be a matter for NRC oversight at the time the new rules become effective — as would be the case with any new regulation adopted by the NRC or other agency during the operating license term of a facility.

The issues raised by the Proposed Rule are also generic in nature and, on their face, would apply to all uranium recovery operators at the appropriate time. The mere existence of a proposed generic rule does not make the present application or review documents, which are based on the current regulations and guidance, inadequate or subject to challenge in a site-specific licensing proceeding. The issue of what rules should apply in the future is the subject of the rulemaking — in this case, EPA's rulemaking. The NRC has long held that contentions that are the subject of an ongoing rulemaking should not be accepted for litigation in individual proceedings.[13] There is no reason this principle would not apply to the current circumstances, simply because EPA is conducting a rulemaking rather than the NRC.

The intervenors also argue that Crow Butte was required under 10 C.F.R. § 40.9 to notify the NRC Staff regarding the existence of tax-related litigation. However, the contention

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[12] Analogously, contentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002).

[13] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985).

is entirely speculative regarding the outcome of that litigation and any impacts on the financial surety for Crow Butte's licensed operations. The intervenors do not link their concern to any specific, current facts or current requirement applicable to license renewal. Future compliance with the Commission's regulations is an issue for future NRC inspection and, if necessary, enforcement. Likewise, compliance with Section 40.9 is an oversight issue outside the scope of this proceeding, which is focused on the adequacy of Crow Butte's application. Any request for enforcement action must be pursued through 10 C.F.R. § 2.206.

To the extent that this proposed contention is a NEPA challenge to the EA, there is no basis for an admissible issue. The EA concludes that the proposed action does not involve a significant environmental impact (and therefore an EIS is not required). To reach a different result, CI would need to demonstrate that there is a significant environmental impact based on the issues raised in the contention.[14] But, the Proposed Rule would impose more stringent financial assurance requirements on Crow Butte, thereby lessening the possibility of environmental impacts. CI has pointed to no new or different environmental impacts identified in the Proposed Rule related to current operations or compliance with current regulations.[15] Nor has it explained why the impacts under the Proposed Rule would not be bounded by the impacts already considered in the EA. The intervenors therefore have not disputed a material issue under NEPA.

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[14] To be admissible, a contention must entitle a petitioner to relief. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 3), LBP-02-5, 55 NRC 131, 141 (2002).

[15] CI appears to be arguing, in effect, that the Proposed Rule by mere virtue of its existence suggests a current inadequacy in the regulatory scheme. But, even if that were true, CI does not show how that links to any environmental impacts not considered in an EA that assumes current regulations apply.

The proposed contention also is untimely. Although CI claims that the contention is based on the Proposed Rule, the bases for the rule itself are not new and could have been raised previously. New or amended contentions must be based on new facts not previously available.[16] Here, the EPA considered previously-available public information in developing the Proposed Rule.[17] If the CI perceived a gap in the regulations that created a safety issue, it should have raised that issue independent of the status of EPA's administrative process.[18] Now, CI is merely piggybacking the EPA process. To the extent that the Proposed Rule is based upon, and summarizes earlier documents or compiles pre-existing, publicly available information into a single document, the Proposed Rule does not render "new" the summarized or compiled information.[19]

In addition, the intervenors' complaints regarding the adequacy of the restoration and decommissioning cost estimates and related financial assurance instruments should have been raised based on the LRA, the SER, or the EA.[20] In the end, the intervenors have made no

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16 *Entergy Nuclear Generation Co. and Entergy Nuclear* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original).

17 *See, e.g.*, 80 Fed. Reg. at 4172 n.23-25, 51-53 (citing technical and advocacy group reports from 2008, 2009, and 2012).

18 That issue could have been raised at the NRC by a petition for rulemaking. Now that the EPA rulemaking is underway, the issue may not be raised in a site-specific licensing matter as discussed above.

19 *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493-96 (2010) (finding that a contention based on pre-existing information compiled in a safety evaluation report was untimely).

20 *See* EPA Contentions at 31 ("There have been no increases for the increased costs of restorations in light of the extended time period and larger-than-expected number of pore volumes (in the case of MU-1, 34 pore volumes), and an unknown amount of water in the case of MU-2 to MU-6 currently in 'restoration'; and MU-7 to MU-11 which are schedule to go into restoration starting in 2015 according to the Final EA.").

attempt to demonstrate that the information in the Proposed Rule was previously unavailable or materially different from information previously available, or that the contention was submitted in a timely fashion based on the availability of information.[21]

B. Contention F2: Crow Butte Is Now In Restoration Per Its Plans

In Contention F2, the intervenors argue that "[t]he Final EA fails to meet the requirements of the AEA, NEPA, Part 40, Appendix A to Part 40, and Part 51 and CEQ regulations because it fails to describe that Crow Butte has or will soon cease production and move into restoration and decommissioning."[22] According to CI, "[i]t is expected that as of the end of 2014, production has completed" and "now that the extraction cycle has ceased, there has occurred an end of the operational phase and this should trigger initiation of the restoration phase for MU-7 to MU-11."[23]

The intervenors start with a flawed understanding of current conditions at Crow Butte. In fact, Mine Units 7, 8, 9, 10, and 11 are currently in production, while Mine Units 2, 3, 4, and 5 are in restoration. And, the NRC Staff is reviewing the restoration plan for Mine Unit 6. There is therefore no basis for CI's claim that Crow Butte should immediately begin restoration of Mine Units 7-11.

In any event, nothing in the proposed contention challenges the adequacy of the LRA, the SER, or the EA, with respect to current requirements for a licensing decision. The contention claims only that "standby is inappropriate for the Crow Butte mine" and that Crow

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21 10 C.F.R. § 2.309(c)(1).

22 EPA Contentions at 33. We note that an EA is a NEPA document and does not need to comply with the AEA or the Commission's regulations promulgated pursuant to the AEA.

23 *Id*. at 35.

Butte "should notify the Commission that it is either beginning to decommission or submit a decommissioning plan."[24] These are both challenges to NRC Staff oversight and inspection activities, not to the license application. The contention therefore raises issues outside the scope of this licensing proceeding. The intervenors have not established a genuine dispute on a material issue nor provided a factual basis for an admissible contention.

To the extent that this proposed contention is a NEPA challenge to the EA, there is no basis for an admissible issue. The EA concludes that the proposed action does not involve a significant environmental impact. CI does not demonstrate that there is a significant environmental impact based on the issues raised in the contention. CI has pointed to no new or different environmental impacts identified in the Proposed Rule related to Crow Butte's operations. Even assuming the Proposed Rule goes into effect, triggers immediate initiation of a restoration phase for certain mine units, and thereby (somehow) reduces environmental impacts, CI has not explained why the impacts under the Proposed Rule would not be bounded by the impacts already considered in the EA. Nor has it explained how this would compel an EIS. The intervenors therefore have not disputed a material issue under NEPA.

The proposed contention is also untimely. To the extent that the contention purports to challenge the LRA or the SER, it is clearly untimely. And, with respect to the EA, the intervenors make no effort to demonstrate that the information on which the contention is based was not previously available; not materially different from information previously available; and submitted in a timely fashion based on the availability of subsequent information.[25] In fact, the purported bases for the contention — timing of restoration and start of

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[24] *Id*. at 35, 36.

[25] 10 C.F.R. § 2.309(c)(1); *see also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573, 579-80 (2006) (rejecting petitioner's

decommissioning — are challenges to the adequacy of ongoing NRC oversight, and, in any event, are not licensing issues. They are unrelated to the EPA rulemaking or the licensing action under review and cannot be rendered timely by the notice of that rulemaking. Any challenge to the adequacy of Crow Butte's decommissioning funding plan could have been raised earlier. Contention F2 is therefore untimely.

C. Contention F3: Failure of the NRC Staff to do EIS, Scoping Instead of EA

In Contention F3, CI alleges that the EA "fails to meet the requirements of the AEA, NEPA, Part 40, Appendix A to Part 40, and Part 51 and CEQ regulations because it is not an EIS as required because of the special circumstances in this case under the Proposed Rules."[26] According to CI, Sections 6.1.3.6 and 6.1.4 of the SER "are modified by the Proposed Rules" and must "be reviewed in light of the Proposed Rules requirements for 3-year stability and for long-term monitoring under Subpart F; Regulations Sections 192.53(d), 192.53(e)."[27]

Contention F3 is inadmissible. A proposed rule cannot modify an SER, nor is the Proposed Rule itself yet applicable to Crow Butte. Any challenge based on an alleged failure to specifically address the Proposed Rule is premature. Moreover, it is not sufficient to merely claim that the SER "must be reviewed" in light of the Proposed Rule. Notice pleading is not permitted in NRC proceedings.[28] An admissible contention must directly challenge the adequacy

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attempt to "stretch the timeliness clock" because its new contentions were based on information that was previously available and petitioners failed to identify precisely what information was "new" and "different").

26 EPA Contentions at 36-37. We note again that an EA is a NEPA document and does not need to comply with the AEA or the Commission's regulations promulgated pursuant to the AEA.

27 *Id.* at 37.

28 *Oyster Creek*, CLI-06-24, 64 NRC at 119 (internal quotation omitted).

of the application or NRC review document with support — and demonstrate a genuine dispute regarding compliance with an applicable regulation (*i.e.,* a material issue).

The proposed contention is a NEPA challenge to the EA and to the conclusion that the proposed action does not involve a significant environmental impact and therefore an EIS need not be prepared. To reach a different result, CI would need to demonstrate that there is a significant environmental impact based on the issues raised in the contention. CI has pointed to no new or different environmental impacts identified in the Proposed Rule. The proposed contention makes general allusions to additional "reasonable alternatives" to be considered, but this is an issue to be addressed only if an EIS was required. The proposed contention also makes vague references to the proposed new requirements "for 3-year stability and long-term monitoring," but does not tie this to any specific environmental impacts not considered in the EA. Nor has CI explained why it could not have alleged a need for an EIS earlier.[29] CI does not even address the timeliness requirements in 10 C.F.R. § 2.309(c)(1). For these reasons, Contention F3 is both inadmissible and untimely.

D. <u>Contention F4</u>: The Environmental Assessment Fails to Adequately Describe and Analyze Aquifer Restoration Goals in Light of New Standards for Determining Alternative Control Limits in the Proposed Rules

In Contention F4, the intervenors claim that "the restoration procedures accepted in the [EA] are likely to be insufficient to meet the more stringent requirements under the Proposed Rules."[30] The intervenors allege that the EA "fails to describe and analyze the environmental impacts, specifically related to water consumption, long term stability monitoring

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[29] In fact, CI argued in the past that an EIS was necessary. *See, e.g.*, CI EA Contentions at 17, 21, 75, 87.

[30] EPA Contentions at 40.

and Alternative Control Limit [("ACL")] determinations that are impacted by the Proposed Rules."[31] None of this supports an admissible contention.

To the extent that the contention is based on the EPA's Proposed Rule or an omission of any discussion of the Proposed Rule in the LRA, it is premature. The public comment period on the Proposed Rule has not even ended. And, to the extent that the intervenors challenge the use of an ACL, this is an impermissible challenge to an NRC regulation, which explicitly allow the use of ACLs.[32]

To the extent that the contention is based on an alleged inadequacy regarding the restoration discussion in the EA, it is based on speculation. The intervenors claim only that the current restoration procedures "are likely" to be inadequate.[33] To be admissible, a contention must allege, with support, a specific deficiency in the application or the environmental review document. Speculation is not enough.[34] And, the intervenors do not specifically dispute any specific aspects of the LRA, SER, or EA discussion of groundwater restoration or stability monitoring in light of the Proposed Rule.[35] An admissible contention must directly challenge the adequacy of the application or NRC review document with support — and demonstrate a

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31 *Id*.

32 *See* LBP-15-11 at 40-41, n.212 ("The concentration of a hazardous constituent must not exceed . . . (c) An alternate concentration limit established by the Commission." 10 C.F.R. Part 40, Appendix A, Criterion 5B(5)(c).").

33 A contention based on application of additional or stricter requirements than those that are imposed by regulation is inadmissible. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)

34 *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

35 For example, the EA notes (at 13) that a well field will not be scheduled for decommissioning and surface reclamation until after "ground water restoration and stability have been accepted by the NRC and other State regulatory agencies."

genuine dispute regarding compliance with a currently-applicable regulation (*i.e.,* a material issue).

Moreover, the contention does not show how there is a significant environmental impact from the current operations. CI appears to assume that the Proposed Rule would impose more stringent requirements on Crow Butte. But this would presumably result in reducing the environmental impacts. In that case, the EA would reflect a conservative assessment of impacts (*i.e.*, a "bounding" analysis), which is permitted under NEPA.[36] Because the intervenors have not specifically alleged that impacts of operation under the Proposed Rule would be greater than those considered in the EA, the intevenors have not disputed a material issue under NEPA. The intervenors therefore fail to demonstrate a genuine dispute that could support an admissible contention.

Contention F4 is also untimely. The intervenors made no effort to demonstrate that the contention was timely. The fact that EPA published a proposed rule is not itself new information. To be timely, the intervenors must demonstrate that the facts underlying the contention could have not been raised earlier. Here, the LRA, SER, and EA all discuss restoration procedures and criteria. Any challenge to the adequacy of that discussion should have been raised based on those documents.

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[36] *NRDC v. NRC*, 685 F.2d 459, 486 (D.C. Cir. 1982), *rev'd on other grounds*, *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983). A "bounding analysis" refers to an evaluation that is based on conservative assumptions regarding environmental impacts. A bounding analysis provides an assessment of impacts that includes (or bounds) anticipated impacts of alternatives with lesser environmental impacts.

E. Contention F5: The Environmental Assessment, License Renewal Application and Associated Monitoring Values and Restoration Goals Rely on Baseline Data Calculations that are Inadequate and Unacceptable Under the Proposed Rules

In Contention F5, CI claims that "[t]he lack of accurate baseline data, whether due to intentionally skewed findings at the preoperational stage or not, requires, at a minimum, the preparation of a full EIS to determine how to characterize and evaluate the impacts the continued operation of the CBR facility." According to CI, the Proposed Rule "specif[ies] detailed procedures for establishing baseline values and require[s] a minimum monitoring period of one year in order to develop an accurate picture of the groundwater characteristics prior to the commencement of mining activities."[37] But CI does not link this to any deficiency in the EA or any significant environmental impact that would compel an EIS. The proposed contention fails to demonstrate a genuine dispute on an issue that could lead to relief in this proceeding. The contention is therefore inadmissible.

To the extent that the proposed contention is alleging that Crow Butte has failed to comply with the Proposed Rule, the contention is premature for the reasons previously discussed. And, to the extent that it is claiming that Crow Butte failed to properly collect baseline data, and that this somehow compels an EIS, the contention is wholly unsupported. CI makes no effort to compare or contrast the procedures actually employed by Crow Butte against those proposed by EPA. Nor does CI explain how any differences will lead to a significant environmental impact to be considered under NEPA. A contention that does not directly controvert a position taken by the applicant in the application (or a conclusion in the

[37] EPA Contentions at 41.

environmental review) is subject to dismissal.[38] The proposed contention therefore fails to demonstrate (or support) a genuine dispute.

To the extent that the contention is challenging the adequacy of the LRA, SER, or EA discussion of baseline water quality, it also comes too late. As the intervenors acknowledge, they previously proffered a contention alleging inadequacies in baseline data collection.[39] And, they make no effort to demonstrate that the facts underlying the contention were unavailable until the EPA's Proposed Rule. New contentions must be based on new facts not previously available.[40] The EPA Proposed Rule does not "reset" the timeliness clock for contentions on these issues. This contention is therefore also untimely.

F. Contention F6: The Environmental Assessment Fails to Describe and Analyze the Environmental Impacts of New Porosity and Permeability in the Aquifer Caused by Mining Activity

In Contention F6, the intervenors assert that the EA "does not describe and analyze the existence, let alone the potential impacts, of the new porosity pathways and permeability identified in the discussion of the Proposed Rules."[41] But, the intervenors do not identify any specific aspect of Crow Butte's application (or the NRC Staff review documents) that are alleged to be deficient.[42] And, the proposed EPA rule does not on its face demonstrate

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38 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

39 EPA Contentions at 42.

40 *Pilgrim*, CLI-12-10, 75 NRC at 493 n.70.

41 EPA Contentions at 44.

42 The LRA, SER, and EA all conclude, based on site-specific data and assessments, that there is adequate confinement, control of underground mining fluid, and monitoring to ensure protection of public health and safety and the environment. CI does not specifically challenge (or even cite) any of these data or conclusions.

(or assert) anything specific about the situation at Crow Butte, or that Crow Butte's application is deficient. Even assuming that the Proposed Rule identified new issues for consideration, to plead an admissible contention intervenors must do more than just assert that a matter ought to be considered by the applicant or the NRC.[43] Intervenors have an obligation to specifically identify the portions of the application that they dispute and provide support to call into question that adequacy of that information. CI has not met that standard here. Contention F6 therefore lacks the specificity and factual or legal support necessary to genuinely dispute the application on a material issue.

There is also no genuine dispute with respect to NEPA. The EA concludes that the proposed action does not involve a significant environmental impact. To reach a different result, CI would need to demonstrate that there is a significant environmental impact based on the issues raised in the contention. CI has pointed to no new or different environmental impacts identified in the Proposed Rule. Nothing in the Proposed Rule is specific to the Crow Butte operation. CI has not explained why the impacts described in the EA are inadequate or do not bound impacts based on the issues of "new porosity pathways and permeability" described in the Proposed Rule. The proposed contention again amounts to vague speculation. The intervenors therefore have not demonstrated a genuine dispute on a material issue under NEPA.

Moreover, as the intervenors acknowledge,[44] they raised the same issues regarding baseline water quality calculations previously in this proceeding. The intervenors make no effort to identify any new information in the Proposed Rule that could form the basis for a timely contention. Publication of the EPA Proposed Rule again does not "reset" the

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43 *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 324 (2007).

44 EPA Contentions at 44.

timeliness clock and allow admission of contentions that could have been, or were in fact, raised previously. Contention F6 is therefore inadmissible and untimely.

G. Contention F7: The Environmental Assessment Fails to Adequately Describe and Analyze the Impacts of Maintaining Post-Operational Wellfields as Long Term Hazardous Waste Facilities

In proposed Contention 7, the intervenors assert that EPA in the Proposed Rule "adopts" standards found in RCRA regarding stability monitoring and geochemical modeling to assess long-term hazards. CI states that "[t]he EPA's decision to apply RCRA standards belies CBR's and NRC Staff's descriptions of aquifer 'restoration.'"[45] According to CI, the Environmental Assessment "does not describe" the long term monitoring requirements in EPA's Proposed Rule and "accordingly cannot analyze what impact these requirements will have on the environment."

First, as already discussed, the Proposed Rule is not a requirement and does not apply to Crow Butte. To the extent that the intervenors are alleging that Crow Butte's compliance with current NRC requirements would be insufficient if the EPA rule were finalized as proposed, the contention is premature. To the extent that it argues that some new standards from RCRA must be applied now to Crow Butte, the contention is a challenge to Commission regulations and therefore inadmissible under 10 C.F.R. § 2.335(a).

Contention F7 also fails to raise an admissible challenge to the EA. The proposed contention offers vague speculation about "post-operational" scenarios and Crow Butte's allegedly pending "insolvency."[46] It is not clear at all what the intervenors seek or how the EA should analyze the impacts of the requirements on the environment. NEPA requires the NRC to

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45 *Id.* at 45.

46 *Id*.

analyze the impacts of the proposed licensing action, not the impacts of EPA's proposed rulemaking. (Presumably EPA will meet its NEPA obligations in connection with its rulemaking.) When issued as a final rule, the regulations would presumably decrease or have no effects on the already insignificant environmental impacts of the Crow Butte operations. The intervenors fail to dispute any specific aspect of Crow Butte's application or the EA. Speculation cannot form the basis for an admissible contention.

Contention F7 is also untimely. New contentions must be based on new facts that were not previously available.[47] The intervenors could have raised concerns regarding long-term stability monitoring earlier. And, nothing in the proposed rule is itself new information. There is no data or information in the proposed rule that directly disputes Crow Butte's restoration activities. CI therefore does not show that the late contention is timely based on the availability of new information.

H. Contention F8: Failure to Consider All Reasonable Alternatives

Contention F8 alleges that "[n]umerous unexplored and unreviewed alternatives exist, especially including those set forth by the EPA in the Proposed Rules."[48] This contention in inadmissible.

First, while the intervenors suggest that some unreviewed alternatives could be explored, they never identify any support for any specific alternative. The intervenors state that "there is no 'standby' and once production ceases, decommissioning should be triggered" and claim that decommissioning "is contemplated to occur imminently." But they never articulate

47 *Pilgrim*, CLI-12-10, 75 NRC at 493 n.70 (emphasis in original).

48 EPA Contentions at 47.

how this relates to an alternative for the proposed licensing action.[49] Alternatives for the EPA rulemaking are more appropriately addressed in that forum.

The intervenors also claim that the EA should address the potential for long-term employment related to a 30-year monitoring period, but provide no expert or factual support for this claim. Moreover, they provide no basis for including this discussion in an EA (as opposed to a full EIS), where the EA finds no significant environmental impact. Nor do they show how this consideration would change the EA conclusion. Intervenors must do more than assert that a matter ought to be considered.[50]

This contention is also untimely Although the intervenors claim (at 47) that there is new information in EPA's Proposed Rule regarding alternatives, they never identify that information. Nor do the intervenors explain that the allegedly "new" information was not previously available or that it materially differs from previously-available information. The intervenors do reference the current status of production at Crow Butte (inaccurately), but likewise fail to show that this is new information. The intervenors have not met the requirement to demonstrate that the contention is timely based on new information.

I. Contention F9: Failure to Take a Hard Look at Impacts Related to Restoration Standards and Alternate Standards Due to NRC Staff 'Cozy' Relationship With Industry Compared to EPA

Contention F9 alleges that the EA lacks the required "hard look" at impacts of "restoration standards, difficulty and cost in achieving the same and the use of the alternative standards permitted under the Proposed Rules, especially in light of and due to the 'cozy'

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49 *Id*.

50 *Susquehanna*, LBP-07-4, 65 NRC at 324.

relationship between NRC Staff and Industry compared to EPA as evidenced by the Proposed Regulations."[51] This contention is inadmissible.

First, the intervenors provide lengthy excerpts of the Proposed Rule, but never link the discussion to any specific deficiency with Crow Butte's application or the EA finding of no significant impact. Nor do they show how use of "alternative standards" for restoration would change the conclusion of the EA. To be admissible, a contention must clearly identify and summarize the specific portions of the application or review document that it disputes. Generalized concerns regarding a supposed "cozy" relationship between the NRC and its licensees fall far short of this standard.

The EA concludes that the proposed action does not involve a significant environmental impact. To reach a different result, CI would need to demonstrate that there is a significant environmental impact based on the issues raised in the contention. But, the Proposed Rule would presumably impose more stringent requirements on Crow Butte, thereby lessening the environmental impacts. CI has pointed to no new or different environmental impacts identified in the Proposed Rule, nor has it explained why the impacts under the Proposed Rule would not be bounded by the impacts already considered in the EA. The intervenors therefore have not disputed a material issue under NEPA.

The proposed contention is also untimely. The intervenors have already challenged the adequacy of restoration standards in this proceeding and have not identified any new factual information in the EPA's Proposed Rule that could form the basis for a timely contention.[52] CI's excerpts from the EPA *Federal Register* notice on Alternate Concentration

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51 EPA Contentions at 49.

52 *See id*. at 40-41 (holding that a challenge to the use of an ACL is an impermissible challenge to an NRC regulation).

Limits ("ACLs") cite 2008 and 2009 reports. The mere repackaging of old information in a new document (an EPA rulemaking or any other document) does not trigger an opportunity to submit new contentions or revisit old ones.[53] And, a reference to a 1987 Congressional Report is obviously not new information.

J. Contention F10: Failure to Take a Hard Look or Adequately Analyze or Describe Restoration Standards and Schedules, Including Delays, Resulting from Proposed Rules

Contention F10 claims that the final EA violates NEPA because it fails to take a "hard look" at "impacts of the Proposed Regulations associated with restoration standards and schedules, including delays, resulting from the Proposed Rules, and failure to describe such impacts in the Final EA."[54] The intervenors assert that the Proposed Rule "will affect changes" to Part 40, Appendix A, and claim that the restoration and decommissioning schedules in the final EA "are now inaccurate and misleading and violate NEPA."[55] The contention is based on a proposed rule that is not yet in effect and has no legal import. Any contention alleging a failure to comply with the Proposed Rule is premature. If the rule is finalized, the Commission can apply it, as appropriate, to Crow Butte at that time. But, there is no basis for a contention now based solely on speculation as to the outcome of an ongoing EPA rulemaking.

Moreover, the proposed contention does not identify any deficiency in the NRC Staff's NEPA review. The impacts of the Proposed Rule are not part of the Crow Butte EA, nor do they need to be. The NRC is not conducting a NEPA review of the EPA rulemaking in this forum. Speculation about schedules and delays is just that, speculation. CI has not made any

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53 *Vermont Yankee*, CLI-11-2, 73 NRC at 344.

54 EPA Contentions at 58.

55 *Id*.

connection between its concerns and the NRC's site-specific environmental review for Crow Butte.

K. Contention F11: In Light of the Proposed Rules, the SER Fails to Adequately Evaluate Adverse Impacts on Public Health & Safety

Contention F11 claims that the "[t]he LRA and SER fail to meet the requirements of the AEA, NEPA, Part 40, Appendix A to Part 40, and Part 51 regulations because each lacks an adequate description" of site restoration and stability monitoring.[56] According to the intervenors, the Proposed Rule renders sections of the SER "inaccurate."[57] They also claim that Crow Butte's "groundwater and surface water monitoring programs" do not comply with the "new" EPA rule and allege, referring to the Proposed Rule, that the SER "violates applicable regulations."

This contention is inadmissible. The only basis for the contention is the Proposed Rule (and accompanying discussion). But, a proposed rule is not a legal requirement. Any contention alleging a failure to comply with the Proposed Rule is therefore premature. The SER cannot be inadequate, as alleged, based on the Proposed Rule. If the rule is finalized, the Commission can apply it, as appropriate, to Crow Butte at that time. But, there is no basis for a contention in this licensing proceeding based solely on speculation as to the outcome of an ongoing EPA rulemaking. The Commission's processes provide appropriate mechanisms (*e.g.*, 10 C.F.R. § 2.206) for raising compliance issues and seeking enforcement action if a new rule becomes applicable to a licensee and the licensee does not meet the requirements. Accordingly,

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56 EPA Contentions at 69. The proposed contention states that it is a challenge to the SER, which is not a NEPA document and cannot be inadequate based on NEPA or Part 51. Conversely, we note again that an EA is a NEPA document and does not need to comply with the AEA or the Commission's regulations promulgated pursuant to the AEA.

57 *Id*.

the proposed contention provides no basis for a litigable issue. It fails to demonstrate a specific dispute with the application or the SER. Contention F11 is inadmissible.

CONCLUSION

For the foregoing reasons, none of the proposed new contentions are admissible or timely. Contentions F1-F11 should be denied.

Respectfully submitted,

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Dated at San Francisco, California
this 27th day of March 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES' RESPONSE TO PROPOSED NEW CONTENTIONS BASED ON FINAL ENVIRONMENTAL ASSESSMENT" in the captioned proceeding have been served this 27th day of March 2015 via electronic mail to Consolidated Intervenors at davidcoryfrankel@gmail.com, Arm.legal@gmail.com, and harmonicengineering@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
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