LBP-15-15

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Richard E. Wardwell
Brian K. Hajek
Alan S. Rosenthal (Special Assistant to the Board)

In the Matter of	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the In Situ Leach Facility, Crawford, Nebraska)	April 28, 2015

MEMORANDUM AND ORDER
(Denying Motion to Admit Additional Contentions Based on EPA Proposed Rules)

I. INTRODUCTION

This proceeding involves a challenge to the application of Crow Butte Resources, Inc. (Crow Butte) to renew its Source Materials License No. SUA-1534 for continued operation of its in-situ leach uranium recovery (ISL) facility near Crawford, Nebraska.[1] On January 26, 2015, the U.S. Environmental Protection Agency (EPA) published a notice of proposed rulemaking (NOPR) "to add new health and environmental protection standards to regulations promulgated under the Uranium Mill Tailings Radiation Control Act of 1978."[2] EPA explained that "these

[1] Crow Butte, Application for 2007 License Renewal USNRC Source Materials License SUA-1534 Crow Butte License Area (Nov. 2007) (ADAMS Accession No. ML073480264) [hereinafter LRA].

[2] Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings, Proposed Rule, 80 Fed. Reg. 4156, 4156 (Jan. 26, 2015). In the same notice, EPA also proposed "to amend specific provisions in the current Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings." Id. The proposed regulatory language

proposed standards are intended to address the shift toward [ISL[3]] as the dominant form of uranium recovery" in the United States.[4] According to the NOPR, "[t]he general standards proposed today, when final, will be implemented by the Nuclear Regulatory Commission (NRC)."[5]

On February 24, 2015, Consolidated Intervenors[6] informed the Board that they intended to file new contentions based on the content of the NOPR,[7] and the Board set a schedule for pleadings.[8] On March 16, 2015, Consolidated Intervenors moved to admit eleven contentions.[9] On March 27, 2015, Crow Butte and the NRC Staff filed their answers.[10] Consolidated Intervenors filed their reply to the Crow Butte and the NRC Staff answers on April 1, 2014.[11] The Board concludes that all eleven proposed contentions are inadmissible because, inter alia,

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starting from page 4,183 of the Federal Register notice onwards is hereinafter called "Proposed Rules."

[3] EPA's NOPR abbreviates in-situ leach uranium recovery as "ISR," but for consistency, we use the abbreviation "ISL" throughout.

[4] 80 Fed. Reg. at 4156.

[5] Id.

[6] Consolidated Intervenors and the Oglala Sioux Tribe, the other intervening party in this proceeding, are collectively referred to herein as "Intervenors."

[7] Email from David Frankel, Consolidated Intervenors' Counsel, to Nicholas Sciretta, Board Law Clerk (Feb. 24, 2015).

[8] Licensing Board Order (Establishing a Briefing Schedule for Additional New/Amended Contentions) (Mar. 9, 2015) (unpublished).

[9] Consolidated Intervenors' Motion for Additional Contentions Based on EPA Proposed Rules (Mar. 16, 2015) [hereinafter Motion].

[10] Crow Butte Resources' Response to Motion for Additional Contentions Based on EPA Proposed Rules (Mar. 27, 2015) [hereinafter Crow Butte Answer]; NRC Staff's Answer to Consolidated Intervenors' New Contentions Based on Proposed EPA Rule (Mar. 27, 2015) [hereinafter NRC Staff Answer].

[11] Consolidated Intervenors' Combined Reply to NRC Staff's and Applicant's Answers (Apr. 1, 2015). The broader procedural history of this proceeding is otherwise set forth in LBP-15-11, 81 NRC __ (slip op.) (Mar. 16, 2015).

Consolidated Intervenors' new contentions either mistakenly assume that EPA's Proposed Rules are enforceable at this time, are based on EPA's tentative policy determinations, or are untimely filed.

II. LEGAL STANDARDS

To be admissible, a new or amended contention must satisfy the substantive contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1). Namely, the contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ; (ii) Provide a brief explanation of the basis for the contention; (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ; [and] (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.[12]

These rules are "strict by design,"[13] and exist to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[14] Failure to comply with any of these requirements is grounds for the Board not to admit a contention.

Additionally, pursuant to 10 C.F.R. § 2.309(c),[15] if a party submits a proposed contention after the initial filing deadline for submitting a hearing request, it "will not be entertained absent a

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[12] 10 C.F.R. § 2.309(f)(1).

[13] Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003).

[14] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[15] The current section 2.309(c) was promulgated on August 3, 2012. Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012). Shortly thereafter, the Board advised the parties that the standards set forth in the now-current § 2.309(c) would apply to any new or amended contentions in this proceeding. Licensing Board Order (Concerning Amended Rules of Practice) (Aug. 17, 2012) at 1 (unpublished).

determination by the presiding officer that a participant has demonstrated good cause."[16]

"[G]ood cause" exists when:

> (i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information.[17]

The first two "good cause" factors relate to the nature of the information that serves as the basis for the new/amended contention. The third factor concerns whether the new/amended contention and any supporting information—even if newly available and materially different from any information that was previously available—nonetheless was seasonably submitted. In contrast to section 2.309(b)'s provisions relating to an initial hearing petition, section 2.309(c)(1)(iii) does not stipulate when such a contention is considered to be "timely" filed. The Board has discussed this issue in a prior order.[18]

III. PROPOSED CONTENTIONS

Consolidated Intervenors propose eleven contentions. The first two contentions challenge Crow Butte's financial and decommissioning plans,[19] the third alleges the NRC Staff failed to perform an Environmental Impact Statement (EIS) instead of an Environmental Assessment (EA),[20] the next seven challenge specific portions of the agency's EA,[21] and the

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[16] 10 C.F.R. § 2.309(c)(1).

[17] Id. § 2.309(c)(1)(i)–(iii).

[18] LBP-15-11, 81 NRC at __ (slip op. at 7–9). As noted by the NRC Staff, Consolidated Intervenors' motion to admit new contentions was timely filed pursuant to the Board's March 9, 2015 Scheduling Order. NRC Staff Answer at 3–4. It is a separate question, however, whether the information on which these proposed contentions are based was previously publicly available. See infra section III.B.

[19] Motion at 28–36.

[20] Id. at 36–39; Office of Nuclear Material Safety & Safeguards, Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (Oct. 2014) (ADAMS Accession No. ML14288A517) [hereinafter EA].

final contention challenges Crow Butte's LRA and the NRC Staff's Safety Evaluation Report (SER).[22] All are summarized seriatim below.

A. Contention F1: Failures Concerning Financial Assurances

> The LRA, SER and Final EA fail to meet the requirements of the [Atomic Energy Act (AEA)], [National Environmental Policy Act (NEPA)], Part 40, Appendix A to Part 40, and Part 51 and [Council on Environmental Quality (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.[23]

In Contention F1, Consolidated Intervenors assert that Crow Butte's certification of financial assurance for decommissioning, which is included in section 6.6 of the LRA and section 5.2 of the NRC Staff's SER, does not satisfy 10 C.F.R. § 40.31(i).[24] Consolidated Intervenors argue that the financial assurance provided in the LRA and SER does not reflect financial strains caused by (1) new restoration standards that would be imposed under EPA's Proposed Rules; (2) $1.5 billion and $32 million in tax charges levied by the Canadian Revenue Agency and the U.S. Internal Revenue Service, respectively;[25] and (3) low uranium market prices.[26] Consolidated Intervenors argue that EPA's Proposed Rules would increase the extent of aquifer restoration and the scope of long-term monitoring, and that this will add $1.50 per

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[21] Motion at 40–68.

[22] See id. at 69; Office of Federal & State Materials & Environmental Management Programs, Safety Evaluation Report (Revised), License Renewal of the Crow Butte Resources [ISL] Facility Dawes County, Nebraska Materials License No. SUA-1534 (Aug. 2014) (ADAMS Accession No. ML14149A433) [hereinafter SER].

[23] Motion at 29. "Appendix A to Part 40" refers to the 10 C.F.R. Part 40 Appendix A, which "establishes technical, financial, ownership, and long-term site surveillance criteria" for those seeking "a license to possess and use source material in conjunction with uranium or thorium milling, or byproduct material at sites formerly associated with such milling."

[24] Id. at 29–30.

[25] Consolidated Intervenors attach two exhibits consisting of newspaper articles attesting to tax charges faced by Crow Butte and its parent corporation. Id., exs. A, B.

[26] Id. at 30–32.

pound of U_3O_8, or $9 to $15 million total in restoration costs "[o]ver the ten-year period of the [renewed] license."[27]

B. Contention F2: Crow Butte Is Now in Restoration per Its Plans

> The 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.[28]

In Contention F2, Consolidated Intervenors argue that since the SER indicates that production was expected to be completed in 2014, Crow Butte should already have begun restoration and decommissioning of the site for all inactive mines, i.e. Mine Unit 1 through Mine Unit 11.[29] Consolidated Intervenors claim that under EPA's Proposed Rules, any break in extraction would trigger restoration; therefore, "standby is inappropriate for the Crow Butte mine."[30] Consolidated Intervenors demand that Crow Butte submit a decommissioning plan, pursuant to 10 C.F.R. § 40.42(d), and updated financial plans related to decommissioning, pursuant to 10 C.F.R § 40.42(e) and (g)(4)(v).[31]

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

> The 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 is not an EIS as required because of the special circumstances in this case under the Proposed Rules. The Final EA fails to satisfy the NRC's requirement for an EIS when there are unresolved conflicts concerning reasonable alternatives under Section 102(E) of NEPA.[32]

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[27] Id. at 27, 31–32.

[28] Id. at 33.

[29] Id. (citing SER § 6.1.3.6); see also id. at 35. Consolidated Intervenors also contend that due to the Proposed Rules, it is unlikely "Crow Butte will ever commence productions on [Mine Unit 12], or others at the original Licensed Area." Id. at 35.

[30] Id. at 35.

[31] Id. at 36.

[32] Id. at 36–37.

Consolidated Intervenors claim that the LRA is not only a major federal action "significantly affecting the quality of the human environment," but also presents "[s]pecial circumstances . . . involv[ing] unresolved conflicts concerning alternative uses of available resources" per 10 C.F.R. § 51.22(b).[33] Thus, according to Consolidated Intervenors, the Commission's rules require development of a more expansive EIS in lieu of a more abbreviated EA.[34] Consolidated Intervenors contend that "special circumstances" exist due to the increased demands that would be imposed under EPA's Proposed Rules, including those related to aquifer restoration and long-term monitoring.[35]

D. Contention F4: Failure to Address Aquifer Restoration Under New Standards

> 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.[36]

In Contention F4, Consolidated Intervenors allege that the restoration procedures in the EA related to Mine Units 7 to 11 are insufficient to meet the new standards that would be imposed under EPA's Proposed Rules, specifically those related to "water consumption, long-term stability monitoring and Alternative Control Limit determinations."[37] As a result, Consolidated Intervenors argue that the EA's finding of no significant impact cannot be supported and a full EIS should be developed.[38]

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[33] Id. at 38, 39 (internal quotation marks omitted; emphasis removed).

[34] Id.

[35] Id. at 37, 39.

[36] Id. at 40.

[37] Id. Although Consolidated Intervenors use the term "Alternative *Control* Limit[s]," they appear to refer to the Proposed Rules' discussion regarding Alternative *Concentration* Limits. See id. (emphasis added); 80 Fed. Reg. at 4173.

[38] Motion at 40–41.

E. Contention F5: Inadequate Baseline Data

> 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.[39]

Contention F5 proceeds in two parts. First, Consolidated Intervenors contend that the Proposed Rules would implement recommendations from the Radiation Advisory Committee (RAC) of EPA's Science Advisory Board.[40] According to Consolidated Intervenors, the RAC proposed that EPA "[i]dentify indicators, both chemical and radioactive, for establishing conditions pre- and post-operationally," devote more effort to defining the background groundwater characterization and "preoperational groundwater quality," build flexibility into monitoring programs, and refine its hydrogeological modeling efforts, among other recommendations.[41]

Second, Consolidated Intervenors argue that EPA's Proposed Rules would require baseline values established by monitoring wells to account for the impacts on groundwater created by constructing the monitoring wells themselves.[42] Consolidated Intervenors quote from the NOPR: "[t]he physical act of penetrating the aquifer to install the well can cause localized changes in constituent concentrations or chemical parameters, which can lead to a misleading picture of background conditions."[43] Consolidated Intervenors add that "[w]ithout an accurate 'picture of background conditions'" the NRC Staff has no basis on which to ground its EA.[44] Consolidated Intervenors state that their expert Dr. Richard Abitz noted this very concern in

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[39] Id. at 41.

[40] Id. at 41–42.

[41] Id. (quoting 80 Fed. Reg. at 4166–67) (internal quotation marks omitted).

[42] Id. at 42–43.

[43] Id. at 42 (quoting 80 Fed. Reg. at 4174) (internal quotation marks omitted).

[44] Reply at 15–16 (quoting 80 Fed. Reg. at 4174).

conjunction with the filing of their initial petition to intervene.[45] While acknowledging that flawed baseline data cannot necessarily be fixed, Consolidated Intervenors claim that the use of this data means that the EA's finding of no significant impact cannot be supported and a full EIS is warranted.[46]

F. Contention F6: Failure to Analyze New Porosity and Permeability Concerns

> The Environmental Assessment fails to describe and analyze the environmental impacts of new porosity and permeability in the aquifer caused by mining activity.[47]

In Contention F6, Consolidated Intervenors state that EPA's Proposed Rules identify environmental impacts that can result from ISL recovery, including the alteration of subsurface areas and changes to rock porosity and permeability[48]—concerns allegedly raised by Consolidated Intervenors' expert Dr. Hannan LaGarry in 2008.[49] Consolidated Intervenors allege that a full EIS must be developed because the EA does not contain an analysis of either of these porosity pathways or of permeability, and "[w]ithout a description and analysis of the underground features that are altered by in situ leach mining, the NRC Staff's finding of no significant impact is meaningless and must be rejected."[50]

G. Contention F7: Failure to Analyze Hazardous Waste Impacts of Wellfields

> The Environmental Assessment fails to adequately describe and analyze the impacts of maintaining post-operational wellfields as long term hazardous waste facilities.[51]

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[45] Motion at 42 (citing Letter from Richard J. Abitz, Ph.D., Geochemical Consulting Services, LLC, to David Frankel, Counsel for Consolidated Petitioners, at 9 (July 28, 2008)).

[46] Id. at 43.

[47] Id.

[48] Id. at 43–44 (citing 80 Fed. Reg. at 4164–55).

[49] Id. at 44.

[50] Id. at 44–45.

[51] Id. at 45.

In Contention F7, Consolidated Intervenors state that EPA's Proposed Rules would adopt the hazardous waste control standards of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., to ensure that post-operational wells do not present long-term hazards.[52] Consolidated Intervenors quote from the NOPR, which asserts that wellfield behavior decades after ISL operations have ended has not been examined, and that "only a combination of longer stability monitoring and geochemical modeling using site-specific data can provide confidence that the [ISL] site poses no long-term hazards."[53] Since the EA does not include a description of such long-term monitoring, Consolidated Intervenors contend that it is inadequate and a full EIS is warranted.[54]

H. Contention F8: Failure to Consider All Reasonable Alternatives

> Under NEPA, an agency is required to consider all reasonable alternatives as required by 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations.[55]

In Contention F8, Consolidated Intervenors allege that the EA's description of the range of reasonable alternatives is inadequate.[56] According to Consolidated Intervenors, "[a]n agency violates NEPA by failing to 'rigorously explore and objectively evaluate all reasonable alternatives' to the proposed action."[57] Consolidated Intervenors maintain, in line with their

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[52] Id.

[53] 80 Fed. Reg. at 4166.

[54] Motion at 46.

[55] Id. Consolidated Intervenors also assert that "[n]umerous unexplored and unreviewed alternatives exist, especially including those set forth by EPA in the Proposed Rules." Id. at 47.

[56] Id. at 46–47.

[57] Id. at 46 (quoting City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990) (quoting 40 C.F.R. § 1502.14) (internal quotation marks omitted)). According to Consolidated Intervenors, "NEPA requires that an actual 'range' of alternatives be considered, so that the Act will 'preclude agencies from defining the objectives of their actions in terms so unreasonably narrow [] they can be accomplished by only one alternative (i.e. the applicant's proposed

Contention F2, that EPA's Proposed Rules would ban "standby" status for non-operational ISL facilities, and therefore decommissioning should begin immediately.[58] Consolidated Intervenors also argue that the Proposed Rules will generate long-term employment opportunities to address increased restoration, decommissioning, and monitoring requirements, none of which are discussed in the No-Action Alternative section of the EA.[59]

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

> The Final EA violates 10 C.F.R. §§ 51.10, 51.70, 51.71, the National Environmental Policy Act and implementing regulations, by failing to conduct the required "hard look" analysis at impacts of the proposed mine associated with 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' relationship between NRC Staff and Industry compared to EPA as evidenced by the Proposed Regulations.[60]

In Contention F9, Consolidated Intervenors generally allege that EPA proposed its new rules because it is dissatisfied with the allegedly "confused" regulation of ISL facilities by the NRC and Agreement States.[61] According to Consolidated Intervenors, "regulators and operators have used high-end values as baselines and [] operators have been allowed to adopt alternates without showing efforts to achieve the regulatory standards."[62] Consolidated Intervenors quote from a large portion of the NOPR, emphasizing EPA's statements that current industry practices may not lead to adequate groundwater restoration and discussion of current,

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project).'" Id. at 47 (quoting Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999)).

[58] Id. (citing 80 Fed. Reg. at 4176).

[59] Id. at 47–48 (citing EA §§ 1.5, 4.6.3).

[60] Id. at 49.

[61] Id. at 50.

[62] Id.

improper implementation of Alternate Concentration Limits.[63] Consolidated Intervenors also cite to a 1987 Congressional oversight report critical of the NRC's relationship with the nuclear power industry at the time.[64] Referring to the many pages of cited commentary, Consolidated Intervenors assert that "the NRC Staff failed to take a 'hard look' at restoration standards" in the EA.[65]

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

> The Final EA violates 10 C.F.R. §§ 51.10, 51.70, 51.71, the National Environmental Policy Act and implementing regulations, by failing to conduct the required "hard look" analysis 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. Accordingly, the Final EA is inaccurate and violates NEPA.[66]

In Contention F10, Consolidated Intervenors first allege that the Proposed Rules would revise 10 C.F.R. Part 40 Appendix A, Criteria 5 and 7, thus making the restoration and decommissioning schedules in the EA inaccurate and misleading.[67] Second, Consolidated Intervenors allege that the Proposed Rules would expand the number of activities to be addressed within current groundwater restoration plans, none of which are reflected in the EA.[68] Consolidated Intervenors lastly allege that "all aspects of the Final EA concerning background concentrations, restoration standards, impacts on ground water quality and the like must be

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[63] Id. at 50–57 (citing 80 Fed. Reg. at 4164–75).

[64] Id. at 57–58 (citing Subcomm. on General Oversight & Investigations of the Comm. on Interior & Insular Affairs, An Investigative Report, H.R. Rep. No. 81-694, at 1–2 (1987)).

[65] Id. at 58.

[66] Id.

[67] Id.

[68] Id. at 60.

analyzed and re-done" to come into compliance with the Proposed Rules.[69] Consolidated Intervenors quote large portions of the EA in support of their arguments.[70]

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

The 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.[71]

In Contention F11, Consolidated Intervenors allege that, when viewed in light of EPA's Proposed Rules, various parts of the NRC's SER contain insufficient data and descriptions of the affected environment to satisfy the AEA, NEPA, and the NRC's regulations.[72] Consolidated Intervenors suggest that the Proposed Rules would impact the SER's analysis of: (1) the suitability of groundwater in the Pierre Shale for domestic use;[73] (2) the scope of required operational monitoring;[74] (3) the costs associated with extra pore volumes for restoration and stability and long-term monitoring;[75] (4) the adequacy of Crow Butte's monitoring programs;[76] (5) the stability of Mine Unit 1;[77] (6) the LRA's minimum required demonstrations;[78] (7) the effort required by Crow Butte prior to requesting an Alternate Concentration Limit;[79] and (8) the

[69] Id. at 63.

[70] Id. at 59–68.

[71] Id. at 69.

[72] Id. (citing SER § 2.4.3.2.2).

[73] Id.

[74] Id. at 72.

[75] Id.

[76] Id. at 74, 79.

[77] Id. at 75.

[78] Id. at 80.

[79] Id. at 82.

adequacy of current and proposed restoration methods.[80] Consolidated Intervenors quote large portions of the SER and the NOPR in support of their arguments.[81]

IV. BOARD RULING

A. The Entirety of Contentions F2, F4, F7, F8, F9, F10, and F11, and Portions of Contentions F1, F3, and F5, Impermissibly Rely on EPA's Proposed Rules

At the outset, Consolidated Intervenors "admit that the Proposed Rules are just that, 'proposed,' and acknowledge that after the notice and comment period, the Proposed Rules may be amended significantly or withdrawn entirely."[82] Nonetheless, Consolidated Intervenors base a number of their contentions in whole or in part on the substantive requirements of EPA's Proposed Rules as if such rules had already been adopted.

The law is clear that proposed rules are not binding upon administrative agencies and are not ripe for review by this Board.[83] As the licensing board stated in the South Texas combined license proceeding, "a proposed rule or proposed law may not support an admissible contention" as "its ultimate effect is at best speculative."[84] Reviewing such proposed actions "improperly intrudes into the agency's decisionmaking process."[85] Precedence requires a

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[80] Id. at 84–85.

[81] See generally id. at 69–90.

[82] Id. at 2; see also Reply at 2.

[83] Am. Petroleum Inst. v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) ("Courts decline to review 'tentative' agency positions because doing so 'severely compromises the interests' the ripeness doctrine protects." (quoting Pub. Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21, 31 (D.C. Cir. 1984))); see also Pub. Citizen, Inc. v. Shalala, 932 F. Supp. 13, 18 n.6 (D.D.C. 1996) ("[A] tentative conclusion articulated in a nonfinal, proposed rule does not command deference from the Court nor is it binding on the agency." (citing Pub. Citizen Health Research Group, 740 F.2d at 32)).

[84] Nuclear Innovation N. Am. LLC (South Texas Project, Units 3 and 4), LBP-11-7, 73 NRC 254, 290 n.233, petition for review denied as premature, CLI-11-6, 74 NRC 203 (2011).

[85] Utility Air Regulatory Group v. EPA, 320 F.3d 272, 279 (D.C. Cir. 2003) (quoting Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986)) (internal quotation marks omitted).

licensing board to let EPA's rulemaking run its course, allowing "intelligent resolution of any remaining claims" instead of piecemeal and repetitive litigation.[86]

Consolidated Intervenors dispute that EPA's findings are tentative. According to Consolidated Intervenors, "by publishing its [NOPR], the EPA is bound to address the inadequacies and shortcomings its analyses uncovered," and, therefore, Consolidated Intervenors can rely on the concerns EPA identified to form the bases of new contentions.[87] They contend that courts have relied on language accompanying proposed rulemakings to determine agency intent.[88] Consolidated Intervenors challenge the licensing board's conclusion in South Texas that proposed rules are speculative, since, in this case, the "prior interpretations/activities of NRC Staff" have already been found to be incorrect in the NOPR.[89] Consolidated Intervenors argue that the NOPR "contains immediately effective legal interpretations of existing Part 192 regulations, over which EPA has primacy,"[90] and that the requirements of Part 192 "are already applicable," and "the last word on groundwater protection."[91]

Consolidated Intervenors fundamentally misinterpret the purpose of NOPRs. The purpose of an NOPR is not to set binding law or policy, but instead "to provide interested members of the public an opportunity to comment in a meaningful way on the agency's proposal," pursuant to the requirements of section 552(b) of the Administrative Procedure Act

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[86] Am. Petroleum Inst., 683 F.3d at 387.

[87] See Reply at 4–5.

[88] Id. at 4 (citing Anderson Bros. Ford v. Valencia, 452 U.S. 205, 212–13 (1981)).

[89] Id. at 9–11. Consolidated Intervenors emphasize that EPA has definitively found that "the way the requirements were being applied by NRC Staff was wrong." Id. at 12, 13, 14, 15, 19, 20.

[90] Id. at 10.

[91] Id. at 12–13.

(APA).[92] In an NOPR, an agency need not submit a full draft of a rule.[93] Likewise, even a statement of the subjects and issues involved can suffice as long as it provides notice to the public.[94] Moreover, an agency is free to make significant changes from the NOPR, and is not bound by it. An agency is generally not required to issue a new NOPR if it changes its position, as long as the final rule is a "logical outgrowth" of the proposed rule.[95] In addition, an agency can cease a rulemaking all together after an NOPR has been issued. As such, we are not persuaded by Consolidated Intervenors' arguments on the significance of EPA's notice.[96]

Consolidated Intervenors discuss at length the decision of the United States Court of Appeals for the District of Columbia Circuit in Center for Auto Safety v. National Highway Traffic Safety Administration to argue that a non-final rulemaking action can be ripe for review.[97]

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[92] Richard J. Pierce, Jr., Administrative Law § 7.3 (5th Ed. 2010). According to Pierce, the legislative history of the APA emphasized the notice requirement in order to "fairly apprise" the public of the agency's potential action. Id. (citing Sen. Doc. No. 248, 79 Cong. 200, 248 (1946)).

[93] 5 U.S.C. § 553(b)(3).

[94] Id.; Tucker v. Atwood, 880 F.2d 1250, 1250 (11th Cir. 1989) ("The APA requires no more than '. . . a description of the subjects and issues involved.'" (quoting 5 U.S.C. § 553(b)(3))); Pennzoil Co. v. FERC, 645 F.2d 360, 371 (5th Cir. 1981) ("This requirement is to sufficiently and fairly apprise interested parties of the issues involved, rather than to specify every precise proposal that the agency may ultimately adopt."); Pierce, Administrative Law § 7.3.

[95] Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 699 (D.C. Cir. 2008) (internal quotation omitted); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005); see also Natural Res. Def. Council v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988) (noting that "a contrary rule would lead to the absurdity that . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary" (quoting Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973)) (internal quotation marks omitted; modification in original)).

[96] Consolidated Intervenors claim that the licensing board in South Texas ruled that "intervenors . . . were correct to file contentions based on proposed rules." Reply at 10. In actuality, the licensing board ruled that intervenors were correct to file contentions on a "newly adopted rule" because, unlike a proposed rule, "it now has indisputable legal effect." South Texas, LBP-11-7, 73 NRC at 290 n.233.

[97] Reply at 3 (citing Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983)).

Center for Auto Safety, however, concerned an agency actively withdrawing a proposed rule.[98] Although the court determined that the basis behind the determination not to proceed with the rulemaking was a final agency ruling allowing for judicial review, the earlier advance notice of proposed rulemaking itself was not held to have any binding effect on the public.[99] There is no functional difference between the advance notice of proposed rulemaking addressed in Center for Auto Safety and EPA's NOPR on ISL facilities.[100]

Consolidated Intervenors in their reply also make the point that apart from the substantive regulations, EPA's NOPR contains a 26-page preamble, containing "studies, data, analyses and rationale" that themselves constitute "final agency action."[101] According to Consolidated Intervenors, "[i]t is this preamble that forms the substance of the Consolidated Intervenors' proposed new contentions."[102] Consolidated Intervenors state that the preamble

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[98] 710 F.2d at 844–45 (withdrawing an advance notice of proposed rulemaking due to changes in market demand).

[99] See id. at 846.

[100] See also A Guide to the Rulemaking Process, Office of the Fed. Register, at 3–4 (2011), available at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (An advance notice of proposed rulemaking "is a formal invitation to participate in shaping the proposed rule.").

Consolidated Intervenors also argue that under the District of Columbia Circuit's decision in Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980), the APA "broadly defines [] 'rule' to include nearly every statement an agency may make," thus implying even proposed rules have force and effect under the APA. Reply at 14 (internal quotation marks omitted; modification in original). However, the statement quoted by Consolidated Intervenors actually refers only to those circumstances where the APA's procedural requirements apply. It does not apply to whether particular agency statements have force and effect. The District of Columbia Circuit in Batterton clarified that many agency statements, including statements sometimes called "rules," do not have force and effect, and that "[a]dvance notice and public participation are required for [rules] that carry the force of law." 648 F.2d at 701. EPA's Proposed Rules, having not yet benefited from public participation, do not carry force under Batterton and thus do not bind the NRC.

[101] Reply at 2–3.

[102] Id. at 2.

addresses "the agency's duty 'to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.'"[103]

While Consolidated Intervenors have accurately stated how studies or data disclosed by EPA in its NOPR preamble, if timely utilized, might have formed the basis for an admissible contention, in fact, Consolidated Intervenors have not availed themselves of such studies or data as support for the bulk of their new contentions. Rather, Consolidated Intervenors have instead based several of these new contentions on the substance and effect that would result from EPA's adoption of its Proposed Rules as described by the NOPR's preamble. For example, in Contention F4, Consolidated Intervenors contend that "the restoration procedures accepted in the Environmental Assessment are likely to be insufficient to meet the more stringent requirements under the Proposed Rules."[104] In Contention F7, although Consolidated Intervenors cite to the NOPR's preamble, they argue that the EA is insufficient because the "[t]he EPA's decision to apply RCRA standards" in the Proposed Rules "belies [Crow Butte's] and NRC Staff's descriptions of aquifer 'restoration.'"[105]

In other instances, Consolidated Intervenors have relied, not on the substance and effect of a proposed rule itself, but on the preamble's discussion of EPA's policy determinations. These, however, are tied to the substance of the Proposed Rules and, like them, can change. For example, in Contention F9 Consolidated Intervenors rely on EPA's policy determinations behind the rulemaking,[106] including statements such as "we believe it is necessary to take a longer view of groundwater protection than has been typical of current [ISL] industry practices,"

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[103] Id. at 2–3 (quoting Solite Corp. v. EPA, 952 F.2d 473, 484–85 (D.C. Cir. 1991) (internal quotation marks omitted) (quoting Conn. Light & Power Co. v. NRC, 673 F.2d 525, 530–31 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982))).

[104] Motion at 40 (emphasis added).

[105] Id. at 45 (citing 80 Fed. Reg. at 4169).

[106] Id. at 50–58.

and "current industry practices for restoration and monitoring of the affected aquifer may not be adequate to prevent . . . the further degradation of water quality."[107] Similarly, in Contention 11, Consolidated Intervenors cite to policy determinations for support,[108] such as "the Agency believes that it is in the national interest to preserve the quality of groundwater resources to the extent practicable, and that the best way to do so is to prevent contamination by addressing its source."[109]

EPA is recognized as an expert in environmental protection, and its final policy determinations certainly deserve consideration.[110] Its initial statements, however, like its Proposed Rules, are tentative and can change after receiving comments from the public, and thus do not in any way bind EPA, much less the Applicant or the NRC Staff. As the District of Columbia Circuit has made clear, debating compliance with another agency's proposed policies before they have been finalized would subject administrative agencies to needless and repetitive litigation.[111]

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[107] Id. at 51 (quoting 80 Fed. Reg. at 4164) (internal quotation marks omitted; emphasis removed).

[108] Id. at 69–71.

[109] Id. at 70 (quoting 80 Fed. Reg. at 4164) (internal quotation marks omitted).

[110] See Nat'l Ass'ns of Clean Water Agencies v. EPA, 734 F.3d 1115, 1138 (D.C. Cir. 2013).

[111] Am. Petroleum Inst., 683 F.3d at 387.

The Board briefly notes that Contentions F9 and F11 are inadmissible on other grounds as well. Contention F9 raises general concerns that the NRC has a "cozy" relationship with industry. Although Contention F9 quotes text from the NOPR for eight pages, it never ties the statements from the NOPR to any specific section of the EA, and thus fails to raise a genuine dispute with the EA. See 10 C.F.R. § 2.309(f)(1)(vi); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 337 (1999); cf. Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 267, aff'd, CLI-09-22, 70 NRC 932 (2009). Further, although Consolidated Intervenors claim at the outset that Contention F11 challenges the LRA, the discussion of Contention F11 focuses exclusively on the SER. See generally Motion at 59–90. This contention must fail as it contests the NRC Staff's safety review rather than the Crow Butte LRA. See Dominion Nuclear Conn. (Millstone Power Station, Unit

B. Contention F6 (Along with the Other Proposed Contentions) Is Untimely Filed Based on New Information

Insofar as Consolidated Intervenors' contentions rely on information and findings discussed in the NOPR, as opposed to tentative rules or policy determinations, they are not timely filed, as required by 10 C.F.R § 2.309(c)(1)(iii).

This particularly is the case with Contention F6, which brings attention to EPA's discussion of environmental impacts that can result from ISL recovery, including the alteration of subsurface areas and changes to rock porosity and permeability.[112] However, the portion of EPA's NOPR quoted by Consolidated Intervenors only provides a well-known general description of the ISL recovery process.[113] None of this information is timely, new, or materially different to what was known before Crow Butte's LRA was submitted. Indeed, Consolidated Intervenors assert that the NOPR here "echo[s] certain concerns raised early in these proceedings by the Consolidated Intervenors' expert Dr. LaGarry," back in 2008.[114]

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3), CLI-09-05, 69 NRC 115, 123 n.39 (2009); Pa'ina Hawaii, LLC, CLI-08-3, 67 NRC 151, 168 n.73 (2008).

[112] Motion at 43–44 (citing 80 Fed. Reg. at 4164–55).

[113] 80 Fed. Reg. at 4164–65. The section of the Federal Register Notice quoted by Consolidated Intervenors is entitled "What are the environmental impacts of uranium [ISL]?" Id. at 4164 (emphasis omitted).

[114] Motion at 44. We note that Dr. LaGarry's opinion was used to support the admission of previously admitted Contention D. See LBP-08-24, 68 NRC 691, 726–27 (2008).

In addition, in their reply, Consolidated Intervenors cite to 10 C.F.R. § 2.319 as support for the notion that this Board has the power to take "necessary and appropriate actions consistent with the Atomic Energy Act" to conduct a fair hearing. Reply at 8–9 (citing 10 C.F.R. § 2.319). Specifically, Consolidated Intervenors argue that "it never seems to be a 'good' time to bring new contentions as far as Applicant and the NRC Staff are concerned." Id. at 8. In fact, Consolidated Intervenors' contentions would be inadmissible even if they were timely filed. Although the Board is accorded considerable discretion to manage a proceeding before it under 10 C.F.R. § 2.319, we need not exercise it here. DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC __, __ n.38 (slip op. at 9 n.38) (Dec. 16, 2014) ("[W]e give broad discretion to our licensing boards in the conduct of NRC adjudicatory proceedings, and we generally defer to board case-management decisions." (citing 10 C.F.R. § 2.319)); id. at __ n.39 (slip op. at 10 n.39) ("The Commission's Rules of Practice provide the board with

C. The Remaining Portions of Contention F1, F3, and F5 Are Inadmissible on Other Grounds

Contention F1 alleges in part that tax charges levied on Crow Butte, as well as low uranium prices, risk forcing Crow Butte into bankruptcy, affecting Crow Butte's ability to restore affected areas in or near the ISL facility.[115] However, Crow Butte's financial assurance plan, discussed in its LRA, includes a "USNRC-approved financial surety arrangement consistent with 10 CFR 40, Appendix A, Criterion 9 to cover the estimated costs of reclamation activities."[116] A surety is a financial instrument assuring "that the cost of decommissioning will be paid by another party should the licensee default."[117] Consolidated Intervenors contend that once EPA's rules go into effect, "the surety will need to be increased from the current $45 [million] to some greater number."[118] The NRC Staff correctly responds that "[s]hould the proposed EPA rule go into effect, when it is implemented by NRC, [Crow Butte's] next annual surety update

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substantial authority to regulate hearing procedures." (quoting 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981)) (internal quotation marks omitted)). Not admitting these contentions, however, does not mean that Intervenors cannot attempt to rely on the studies and data contained in the NOPR as evidence in support of already-admitted contentions regarding water quality and restoration.

[115] Motion at 30–32.

[116] LRA § 6.6.2. Criterion 9 in 10 C.F.R. Part 40 Appendix A requires that financial surety arrangements "be established by each mill operator before the commencement of operations to assure that sufficient funds will be available to carry out the decontamination and decommissioning of the mill and site and for the reclamation of any tailings or waste disposal areas." The NRC Staff found that Crow Butte's financial surety was satisfactory pursuant to Criterion 9. SER § 6.5.3.

[117] Financial Assurance for Decommissioning, NRC, http://www.nrc.gov/waste/decommissioning/finan-assur.html (last updated Dec. 9, 2013).

[118] Reply at 14.

would have to reflect any additional costs associated with compliance."[119] There is no requirement to act now. Therefore, this portion of Contention F1 does not challenge the LRA.[120]

Contention F3 calls for an EIS by the NRC Staff, instead of an EA, due to the alleged "special circumstances" surrounding this project.[121] These special circumstances allegedly stem from certain monitoring requirements set forth in the Proposed Rules,[122] and the presence of "unresolved conflicts concerning alternative uses of available resources," per 10 C.F.R. § 51.22(b).[123] As discussed above, the former argument is impermissible as it relies on the substance of the Proposed Rules. The latter argument is impermissible per 10 C.F.R. § 2.309(c)(1), both because it is not based on any new or material information, and because the "unresolved conflicts" alleged by Consolidated Intervenors refer not to circumstances when an EIS is required for a project, but to circumstances when under section 51.22(b) it is inappropriate to issue a categorical exclusion for a proposed project.[124]

The Commission has set forth the triggers for an EIS in 10 C.F.R. § 51.20, including, most notably, whether the proposed project "is a major Federal action significantly affecting the quality of the human environment."[125] As discussed in LBP-15-11, the Board does not have

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[119] NRC Staff Answer at 10.

[120] Consolidated Intervenors also assert that Crow Butte failed to alert NRC to certain tax litigation, in contravention of 10 C.F.R. § 40.9. Motion at 31–32. That regulation only requires that Crow Butte inform the NRC "of information that the applicant or licensee has identified as having a significant implication for public health and safety or common defense and security." 10 C.F.R. § 40.9. There is nothing about pending tax litigation that would have a "significant implication" on public health and safety in this circumstance. In addition, to the extent this claim is viable, it would be better handled through a 10 C.F.R. § 2.206 enforcement action.

[121] Motion at 37–39.

[122] Id. at 37.

[123] Id. at 38–39 (internal quotation marks omitted; emphasis removed).

[124] See 10 C.F.R. § 51.22.

[125] Id. § 51.20(a)(1).

sufficient information at this point to contravene the NRC Staff's determination that there are no significant impacts from the license renewal.[126] However, the Board may, after a hearing, find that there are indeed significant impacts to the environment as a result of the proposed license renewal, warranting an EIS instead of an EA.

Consolidated Intervenors assert in Contention F5 that the Proposed Rules make available EPA RAC's recommendations regarding monitoring, restoration, and groundwater characterization.[127] Consolidated Intervenors, however, do not identify specifically how this alleged new information challenges the EA, but posit generally that it "appl[ies] to the collection of accurate baseline data and the integration of that data into meaningful monitoring values and post-operational restoration goals."[128] This does not raise a genuine dispute with the EA.[129] Nonetheless, the RAC study and other studies cited in the NOPR may be relevant to already-admitted contentions, such as Contentions C and D, and EA Contention 9, which concern water quality and mitigation.[130] In addition, any information supporting Consolidated Intervenors' general claim that the NRC Staff failed to use recent research may apply to already-admitted Contention F.[131]

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[126] LBP-15-11, 81 NRC at __ (slip op. at 16) (citing Environmental Assessment and Finding of No Significant Impact; Issuance, 79 Fed. Reg. 64,629, 64,630 (Oct. 30, 2014)).

[127] Motion at 41–42 (citing 80 Fed. Reg. at 4166–67).

[128] Id. at 42.

[129] See 10 C.F.R. § 2.309(f)(1)(vi); Oconee, CLI-99-11, 49 NRC at 337.

[130] See LBP-15-11, 81 NRC at __ (slip op. at 36–38, 61); LBP-08-24, 68 NRC at 724–27.

[131] See LBP-08-24, 68 NRC at 739 (concerning "whether Crow Butte has simply cherry-picked its supporting data" instead of using the most recent research available).

V. CONCLUSION

For the reasons stated above, we deny Consolidated Intervenors' motion to admit additional contentions based on EPA's recent NOPR and Proposed Rules regarding the regulation of ISL facilities.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chair
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

/RA/

Brian K. Hajek
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 28, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-OLA
	)	
In-Situ Leach Uranium Recovery Facility, Crawford, Nebraska	)	
	)	
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to Admit Additional Contentions Based on EPA Proposed Rules) (LBP-15-15)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 28th day of April, 2015