

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman  
Kristine L. Svinicki  
William C. Ostendorff  
Jeff Baran

In the Matter of

CROW BUTTE RESOURCES, INC.

(License Renewal for the  
*In Situ* Leach Facility, Crawford, Nebraska)

Docket No. 40-8943-OLA

**CLI-15-17**

**MEMORANDUM AND ORDER**

This decision addresses three petitions for review relating to the license renewal proceeding for the Crow Butte Resources, Inc. materials license for its *in situ* uranium recovery site near Crawford, Nebraska. The Oglala Sioux Tribe has petitioned for review of the Atomic Safety and Licensing Board's ruling denying a stay of the issuance of a renewed license.<sup>1</sup> Crow Butte and the NRC Staff have both petitioned for review of the Board's order admitting new and amended contentions sponsored by the Tribe and another intervenor group, known as the

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<sup>1</sup> LBP-15-2, 81 NRC 48 (2015); see *Petition for Review* (Feb. 16, 2015) (Tribe Petition).

Consolidated Intervenor (together, Intervenor).<sup>2</sup> For the reasons stated below, we deny review of all three petitions.

## I. BACKGROUND

This licensing proceeding began in November 2007, when Crow Butte filed an application to renew the license for its *in situ* uranium recovery site and processing center.<sup>3</sup> Crow Butte's previous license was set to expire in February 2008. The Board granted Intervenor's hearing requests in November 2008.<sup>4</sup> Both Crow Butte and the Staff appealed the Board's decision allowing intervention.<sup>5</sup> We affirmed the Board's decision in part and reversed it in part, narrowing the issues for hearing.<sup>6</sup>

The Staff proceeded with its review of the application. In October 2011, the Board brought to our attention repeated slips in the Staff's schedule for issuance of its Environmental Assessment.<sup>7</sup> In response, we directed the Staff to devote sufficient resources to complete its review in a timely manner.<sup>8</sup> The Staff's Safety Evaluation Report was released in 2012 and

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<sup>2</sup> LBP-15-11, 81 NRC 401 (2015); see *Petition for Interlocutory Review of LBP-15-11* (Mar. 25, 2015) (Crow Butte Petition); *NRC Staff Petition for Review of LBP-15-11* (Apr. 10, 2015) (Staff Petition). Consolidated Intervenor include Beatrice Long Visitor Holy Dance, Joe American Horse, Sr., Debra White Plume, Loretta Afraid of Bear Cook, Afraid of Bear/Cook Tiwahe, American Horse Tiospaye, and Owe Aku/Bring Back the Way.

<sup>3</sup> Application for 2007 License Renewal USNRC Source Materials License SUA-1534 Crow Butte License Area (Nov. 2007) (ADAMS accession no. ML073480264).

<sup>4</sup> LBP-08-24, 68 NRC 691, 698 (2008).

<sup>5</sup> *NRC Staff's Notice of Appeal of LBP-08-24, Licensing Board's Order of November 21, 2008, and Accompanying Brief* (Dec. 10, 2008); *Crow Butte Resources' Notice of Appeal of LBP-08-24* (Dec. 10, 2008).

<sup>6</sup> CLI-09-9, 69 NRC 331, 366 (2009).

<sup>7</sup> LBP-11-30, 74 NRC 627 (2011).

<sup>8</sup> CLI-12-4, 75 NRC 154, 158 (2012) (quoting *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Facility), CLI-09-1, 69 NRC 1, 5 (2009)).

revised in August 2014.<sup>9</sup> In compliance with the National Environmental Policy Act of 1969 (NEPA), the Staff finalized its Environmental Assessment in October 2014.<sup>10</sup> Shortly thereafter, the Staff issued the renewed license and provided the required notice to Board and the parties.<sup>11</sup>

Intervenors sought to stay the effectiveness of the renewed license.<sup>12</sup> Both the Tribe and Consolidated Intervenors (which includes members of the Tribe) argued that operations at the facility threatened to damage the Tribe's cultural resources and that contamination of surface waters endangered the tribal members' health.<sup>13</sup> The Board declined to issue a stay.<sup>14</sup>

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<sup>9</sup> See Safety Evaluation Report (Revised), License Renewal of the Crow Butte Resources ISR Facility, Dawes County, Nebraska, Materials License No. SUA-1534 (Aug. 15, 2014) (ML14149A433) (Safety Evaluation Report); Safety Evaluation Report, License Renewal of the Crow Butte Resources ISR Facility, Dawes County, Nebraska, Materials License No. SUA-1534 (Dec. 28, 2012) (ML103470470).

<sup>10</sup> "Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534" (Oct. 2014) (ML14288A517) (Environmental Assessment). See *generally* 42 U.S.C. § 4322; 10 C.F.R. §§ 51.25, 51.30.

<sup>11</sup> Crow Butte Resources, Inc., Materials License No. SUA-1534 (Nov. 5, 2014) (ML13324A101); see Letter from Simon, Marcia J., counsel for the NRC Staff, to the Administrative Judges and Parties (Nov. 6, 2014) (advising parties of issuance of renewed license). NRC regulations authorize the Staff to issue the license when it has completed its review during the pendency of a hearing as long as it provides the Board and parties notice and an "explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter." 10 C.F.R. § 2.1202(a).

<sup>12</sup> *Application of the Oglala Sioux Tribe for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213* (Nov. 11, 2014) (Tribe's Stay Application); *Consolidated Intervenors' Application for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213* (Nov. 14, 2014) (Consolidated Intervenors' Stay Application).

<sup>13</sup> Tribe's Stay Application at 7, Consolidated Intervenors' Stay Application at 4-5.

<sup>14</sup> LBP-15-2, 81 NRC 48.

In January 2015, both the Tribe and Consolidated Intervenors submitted new and amended contentions challenging the Environmental Assessment.<sup>15</sup> The Tribe and Consolidated Intervenors submitted fourteen substantially identical contentions; the Board considered them as joint contentions.<sup>16</sup> Crow Butte opposed all of the proposed contentions as untimely and on other grounds.<sup>17</sup> The Staff also opposed all of the proposed new contentions, save one.<sup>18</sup> The Board admitted some of the new contentions (as limited) and rejected the others as untimely or unsupported, as described in more detail below. Nine contentions are set for hearing the week of August 24, 2015.<sup>19</sup>

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<sup>15</sup> See *Consolidated Intervenors' New Contentions Based on the Final Environmental Assessment (October 2014)* (Jan. 5, 2015) (Consolidated Intervenors' EA Contentions); *The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014)* (Jan. 5, 2015) (Tribe's EA Contentions); see also Order (Granting Intervenors' Unopposed Motion for Extension of Time to File New/Amended Contentions) (Nov. 24, 2014) (unpublished).

<sup>16</sup> The Tribe also proposed a "Contention F" claiming there is no federal jurisdiction over the Crow Butte site. Tribe's EA Contentions at 4. The Board rejected Contention F. See LBP-15-11, 81 NRC at 411.

<sup>17</sup> *Crow Butte Resources' Response to Proposed New Contentions Based on Final Environmental Assessment* (Jan. 30, 2015), at 5-6. Crow Butte and the Staff did not object to "migration" of the existing contentions. LBP-15-11, 81 NRC at 410 (citing Tr. at 605).

<sup>18</sup> See *NRC Staff's Combined Answer to New Contentions Filed by Consolidated Intervenors and the Oglala Sioux Tribe* (Jan. 30, 2015). The Staff initially did not oppose EA Contention 13, concerning endangered species consultation with the Fish and Wildlife Service. *Id.* at 62. The Board found EA Contention 13 to be moot because the consultation process was completed prior to its ruling. See LBP-15-11, 81 NRC at 406, 444-46.

<sup>19</sup> See *id.*, 81 NRC at 451; Order (Setting Schedule through Evidentiary Hearing and Providing Case Management Information) (Mar. 25, 2015) (unpublished) (Scheduling Order).

## II. DISCUSSION

### A. Standard of Review

Each of the petitions for review now pending before us challenges an interlocutory, or non-final, Board order. We generally disfavor interlocutory review.<sup>20</sup> The fact that a Board may have made an incorrect legal ruling typically does not warrant interlocutory review because such rulings can be reviewed on appeal from partial initial decisions or a final decision.<sup>21</sup> We will consider taking discretionary interlocutory review where the requesting party shows that the Board's ruling:

- (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.<sup>22</sup>

We have repeatedly rejected petitions for review challenging interlocutory Board rulings

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<sup>20</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Units 2 and 3), CLI-11-14, 74 NRC 801, 811-12 (2011); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

<sup>21</sup> *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 209-10 (2011); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

<sup>22</sup> 10 C.F.R. § 2.341(f).

admitting contentions,<sup>23</sup> rejecting contentions,<sup>24</sup> or related to the summary disposition thereof.<sup>25</sup>

## **B. The Tribe's Petition for Review of Decision Denying a Stay (LBP-15-2)**

The Tribe argued before the Board that the issuance of Crow Butte's renewed license was "premature and defective" because no hearing on the Tribe's contentions has taken place and that the Tribe was therefore denied due process.<sup>26</sup> The Tribe's stay application addressed the four factors relevant to a stay motion described in our regulations.<sup>27</sup> The Tribe claimed that it would suffer irreparable injury because Crow Butte's continued operations could endanger "spiritual, cultural, and natural resources of the Tribe and the health of its people" through

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<sup>23</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008) ("[T]he broadening of issues for hearing caused by the Board's admission of a contention that the applicant opposes does not constitute a 'pervasive and unusual effect on the litigation.'"); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001); *Rancho Seco*, CLI-94-2, 39 NRC at 94.

<sup>24</sup> *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54-55 (2013) (Board's rejection of contention, where petition had other contentions pending for hearing, did not constitute serious and irreparable harm or affect the structure of the proceeding in a pervasive or unusual manner).

<sup>25</sup> *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251, 256 n.24 (2011) ("[T]he expansion of issues for litigation that results [from admission of a contention or denial of motion for summary disposition] does not have a 'pervasive and unusual effect' on the litigation."); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33-35 (2008); *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63.

<sup>26</sup> Tribe's Stay Application at 2 (unnumbered). The Tribe also claimed that issuing the license before the hearing violated its treaty rights and territorial integrity, denied it equal protection and an adequate remedy, and violated the federal government's trust responsibility to the Tribe. *Id.* at 2-3.

<sup>27</sup> 10 C.F.R. § 2.1213(d). The four factors to be weighed in considering a stay of Staff action are 1) potential for "irreparable" injury to the requestor, 2) the likelihood that the requestor will prevail on the merits, 3) the potential harm to other parties, and 4) the public interest. *See also* 10 C.F.R. § 2.342(e) (similar factors applicable when the Commission or presiding officer is asked to stay the effectiveness of a presiding officer's decision or action during the pendency of an appeal).

“continuing contamination of the ground and surface water resources through spills, leaks and excursions from the facility and the continuing theft and conversion of the lands and natural resources of the Tribe.”<sup>28</sup> Addressing the other stay factors, the Tribe argued that it would prevail on the merits of its contentions and that the public interest favored preserving the status quo.<sup>29</sup> The Tribe also argued that because Crow Butte’s license has been in timely renewal, Crow Butte would not be harmed by waiting for an evidentiary hearing and final Board decision.<sup>30</sup> The Tribe therefore requested that the Board stay the renewed license until after the hearing at the earliest.<sup>31</sup>

The Board determined that Intervenor had not made the requisite showing for a stay, which it observed is an “extraordinary remedy” and rarely granted in NRC practice.<sup>32</sup> The Board accorded the greatest weight to the first stay factor: whether there would be irreparable injury to the requester, and that the irreparable injury must be “imminent,” “certain,” and “great.”<sup>33</sup> The Board found that although damage to cultural resources would be irreparable if it were to occur,

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<sup>28</sup> Tribe’s Stay Application at 7.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.* Under the timely renewal principle, if a licensee submits a renewal application within the time provided in the regulation, the license is deemed to continue until a final decision is made on the application: “Each specific license expires at the end of the day on the expiration date stated in the license *unless* the licensee has filed an application for renewal . . . not less than 30 days before the expiration date stated in the existing license.” 10 C.F.R. § 40.42(a) (emphasis added). Our regulation is based on the Administrative Procedure Act, 5 U.S.C. § 558(c).

<sup>31</sup> Tribe’s Stay Application at 8, 4. Consolidated Intervenor made substantially the same arguments in their application for a stay; they have not petitioned for review. Consolidated Intervenor’s Stay Application at 1, 4-5.

<sup>32</sup> LBP-15-2, 81 NRC at 53 (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005)).

<sup>33</sup> *Id.* at 54.

Intervenors had not specifically shown that such damage was either imminent or certain.<sup>34</sup> Similarly, the Board found that Intervenors had not sufficiently substantiated their claim that harm from water contamination was “imminent, certain, and great.”<sup>35</sup>

The Board went on to hold that, having shown no irreparable injury, Intervenors could only meet the stay standards if they could demonstrate a “virtual certainty” of success on the merits.<sup>36</sup> But the Board found that Intervenors had made only “general claims” that did not present a compelling case at that point in time.<sup>37</sup> Because the two most important considerations did not weigh in Intervenors’ favor, the Board concluded that it need not reach the other two factors—potential harm to the other parties and where the public interest lies.<sup>38</sup>

The Board also reasoned that staying the effectiveness of the renewed license could not redress the claimed harms. The Board noted that even if it stayed the effectiveness of the renewed license, Crow Butte’s operations could continue under the previous license, as that license still would be in timely renewal. As a result, the Board reasoned that a stay “would have no practical effect.”<sup>39</sup>

We consider the Tribe’s petition under our interlocutory review standard because neither the Staff’s issuance of the license nor the Board’s denial of a stay of the effectiveness of that

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<sup>34</sup> *Id.* at 55-56.

<sup>35</sup> *Id.* at 56-57.

<sup>36</sup> *Id.* at 58 (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 57.



license constitutes final agency action.<sup>40</sup> In its petition, the Tribe makes several claims of Board error, but as discussed below, we need not reach those that go beyond the threshold issue relating to the need for interlocutory review.

We find that the Tribe has not demonstrated that the Board's decision to allow the renewed license to take effect threatens the Tribe with "immediate and serious irreparable impact," or has a "pervasive and unusual effect" on the proceeding. We therefore deny review. In so doing, however, we address the Tribe's arguments to the extent that our interlocutory review standard is coextensive with the most important stay factor—whether the petitioner has demonstrated immediate, irreparable injury.<sup>41</sup>

The Tribe principally argues that the license was issued prior to completion of the NEPA process, and that this in itself constitutes "irreparable harm." It argues that that the Staff acted on incomplete information and without public participation in violation of NEPA.<sup>42</sup> The Tribe claims in particular that the Staff should have held public scoping meetings and should have circulated the draft Environmental Assessment for public comment.<sup>43</sup> Related to its claim that the procedural harm is "irreparable," the Tribe argues that issuance of the license gives Crow

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<sup>40</sup> See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320-21 (1998) (considering a petition for interlocutory review of a board order denying a stay motion under the criteria in § 2.341(f)(2)). The Staff and Crow Butte both oppose review of the Board's order. *NRC Staff's Answer to the Oglala Sioux Tribe's Petition for Review of LBP-15-2* (Mar. 13, 2015) (Staff Answer); *Crow Butte Resources' Response Opposing Petition for Review of LBP-15-2* (Mar. 13, 2015) (Crow Butte Answer).

<sup>41</sup> Compare 10 C.F.R. § 2.341(f)(2)(i) (the Commission may grant interlocutory review if the issue for which the party seeks review "threatens the party adversely affected by it with immediate and serious irreparable impact" which could not be alleviated through an appeal at the end of the case) with 10 C.F.R. § 2.1213(d)(1) (whether a stay requestor "will be irreparably injured unless a stay is granted").

<sup>42</sup> Tribe Petition at 7-11.

<sup>43</sup> *Id.* at 9.

Butte a “vested” interest in the new license and shifts the burden of proof to the Tribe to show that the license should be revoked.<sup>44</sup>

The Tribe’s claims do not warrant immediate review under either ground provided in our regulation. Immediate, irreparable harm is not presumed by a NEPA violation, even assuming such a violation has occurred—an issue we need not reach.<sup>45</sup> Further, we find that allowing the renewed license to take effect does not impair the Tribe’s procedural rights and thereby does not affect the “basic structure of the proceeding in a pervasive or unusual manner.”<sup>46</sup> The purpose of the upcoming evidentiary hearing is to evaluate the merits of the Tribe’s claims. Depending upon the results of the hearing, the license may be revoked, conditioned or modified, as appropriate.<sup>47</sup> If the Board’s findings after the evidentiary hearing affect the Staff’s conclusions in the Environmental Assessment, then those conclusions would have to be

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<sup>44</sup> *Id.* at 14.

<sup>45</sup> See *Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) (rejecting the argument that “the procedural violation of NEPA resulting from issuance of a defective [environmental impact statement] establishes irreparable injury” in itself); see also *Hydro Resources*, CLI-98-8, 47 NRC at 322 (claim of violation of the National Historic Preservation Act (NHPA) did not in itself establish “irreparable harm” warranting interlocutory review).

<sup>46</sup> The Tribe’s NEPA-related arguments are new on appeal; we decline to consider new arguments that the Board did not have the opportunity to consider. See 10 C.F.R. § 2.341(b)(5); *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

<sup>47</sup> See 10 C.F.R. § 2.1210(c)(3) (providing that the initial decision shall include the additional staff actions necessary if inconsistent with prior staff action approving or denying the application); see also, e.g., *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 236-38 (2006) (issuance of power uprate license amendment in advance of hearing did not deprive intervenor of hearing rights because the license amendment may be revoked or conditioned after hearing); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 121-22 (2009) (adjudicatory proceeding on license amendment was not terminated by issuance of the amendment).

revisited.<sup>48</sup> The evidentiary hearing therefore provides the Tribe with the opportunity to fully pursue its admitted NEPA contentions.

The procedural rules governing this proceeding authorize the Staff to issue the license immediately upon completion of its review even where a hearing is pending.<sup>49</sup> The Tribe is mistaken that this authorization shifts the burden of proof; regardless of the issuance of the license, the burden remains on the applicant, and, with respect to NEPA compliance, on the Staff.<sup>50</sup> Nor are we persuaded that the issuance of the license bestows a vested interest on Crow Butte. Both the Staff and Crow Butte represent that the renewed license does not authorize any new or different activities than did the previous license and in fact imposes additional restrictions on Crow Butte's activities.<sup>51</sup> In addition, as noted above, the license may be altered as a result of the evidentiary hearing.<sup>52</sup>

The Tribe's claims concerning scoping and public participation do not articulate immediate, irreparable harm.<sup>53</sup> But in any case, the Staff's issuance of the license after

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<sup>48</sup> See, e.g., *Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 81 (2010) (affirming Board's decision directing Staff to consider an additional alternative in its analysis).

<sup>49</sup> 10 C.F.R. § 2.1202(a). Because the Subpart L rules governing this proceeding expressly authorize the issuance of the license before hearing, the Tribe's suggestion that this practice is inappropriate *per se* constitutes an attack on the regulation itself, which is not allowed in an individual adjudication in the absence of a waiver. See 10 C.F.R. § 2.335.

<sup>50</sup> 10 C.F.R. § 2.325; see *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1) ALAB-697, 16 NRC 1265, 1271 (1982).

<sup>51</sup> Staff Answer at 13 ("the new license provides the same protections for cultural resources as the previous license, and imposes stricter license conditions related to groundwater protection than the previous license"); Crow Butte Answer at 9 & n.32 ("The renewed license also does not authorize any new or different activities," and in fact imposes "additional, more stringent requirements" on Crow Butte).

<sup>52</sup> 10 C.F.R. § 2.1210(c)(3).

<sup>53</sup> We make no judgment on the merits of the Tribe's arguments to the extent that they concern pending contentions. We observe, however, that no scoping process was done because our rules do not require it. Scoping is the first step in the preparation of an environmental impact

completing its own review does not deprive the Tribe of its right to be heard in this matter. The Tribe has taken advantage of the opportunity to make its concerns known to the Staff, first in filing contentions on Crow Butte's environmental report and later, by filing contentions on the Staff's Environmental Assessment.

The Tribe's petition for review does not expressly address the harm that it originally asserted in its stay application—that is, damage to cultural resources and contamination of groundwater.<sup>54</sup> We briefly consider the issue nonetheless and find that the Tribe did not articulate irreparable harm to such resources. With respect to the claimed harms to cultural resources, in order to show imminent, irreparable harm the Tribe would need to describe with specificity the resources and the manner in which they are threatened.<sup>55</sup> The Tribe's stay application only generally asserted that "spiritual, cultural, and natural resources" were at risk from Crow Butte's continuing operations, and its petition for review offers no elaboration on this claim.<sup>56</sup> Likewise, with respect to the Tribe's claim that continuing operations could lead to

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statement, but because the Environmental Assessment resulted in a "finding of no significant impact," a full environmental impact statement was found to be unnecessary. 10 C.F.R. § 51.26. As far as public comment, while our regulations permit the Staff to publish a draft finding of no significant impact for public comment, it is not required in all cases. 10 C.F.R. § 51.33. This approach is consistent with Council on Environmental Quality regulations. 40 C.F.R. § 1501.4(e)(2). Several courts of appeal, including the D.C. Circuit, have agreed that NEPA does not require the circulation of a draft environmental assessment in all cases. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010); *Bering Strait Citizens v. U.S. Army Corps of Eng'rs*, 524 F.3d 398, 952 (9th Cir. 2008); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 1235, 1240 (1st Cir. 2005); *Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996); see also *Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013) (observing that NEPA "afford[s] agencies considerable discretion to decide the extent to which . . . public involvement is 'practicable.'").

<sup>54</sup> Tribe's Stay Application at 7.

<sup>55</sup> *Hydro Resources*, CLI-98-8, 47 NRC at 322.

<sup>56</sup> The Tribe's Stay Application asserted that "[t]he license issuance puts spiritual, cultural, and natural resources of the Tribe and the health of its people at risk of further destruction by Licensee's continuing operation and construction activities that may [continue] contamination of the ground and surface water resources through spills, leaks, and excursions from the facility."

contamination of the Tribe's drinking water, the Tribe offered only general assertions that Crow Butte's continuing operations are harming it. It has not shown that this harm is "imminent"—or even that it is likely to occur prior to the hearing or prior to the Board's final decision.

In sum, the Tribe has not demonstrated entitlement to a stay or to interlocutory review because it has not demonstrated imminent irreparable harm.

### **C. Petitions for Review Related to New and Amended Contentions (LBP-15-11)**

#### *1. Board's Ruling on New Contentions Based on the Environmental Assessment*

In LBP-15-11, the Board ruled on Intervenors' proposed new and amended contentions based on the Staff's Environmental Assessment.<sup>57</sup> The Board "migrated" four of the original environmental contentions that had been admitted at the outset of this proceeding.<sup>58</sup> It admitted all or parts of nine contentions (consolidating the admissible parts of two proposed contentions into one new contention and merging the admissible portions of three more contentions into one of the "migrated" contentions).<sup>59</sup> The Board rejected five new contentions in their entirety.<sup>60</sup> Of particular significance to Crow Butte's petition, the Board rejected all or parts of four contentions as untimely, because the Tribe and Consolidated Intervenors did not show "good cause" why

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Tribe's Stay Application at 7. The Tribe's petition for review only mentions cultural or natural resources in the context of relating the arguments before and rulings of the Board. See Petition for Review at 4, 6.

<sup>57</sup> See Environmental Assessment and Finding of No Significant Impact; Issuance, 79 Fed. Reg. 64,629 (Oct. 30, 2014).

<sup>58</sup> LBP-15-11, 81 NRC at 406, 409-10. As the Board explained, a contention "migrates" when a licensing board construes a contention challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without the petitioner amending the contention. *Id.* at 409-10 & n.38 (citing *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 470-71 (2012)).

<sup>59</sup> *Id.* at 406.

<sup>60</sup> *Id.*

the contentions could not have been raised earlier.<sup>61</sup> All told, nine contentions have been admitted in the proceeding.<sup>62</sup>

Crow Butte claims that five of these contentions, and parts of a sixth, should not have been admitted because they were proposed too late.<sup>63</sup> The Staff also petitioned for review on different grounds, arguing that the Board introduced issues into the litigation that were not advanced by either intervenor. Intervenors oppose review with respect to both petitions.<sup>64</sup>

## 2. *Crow Butte Has Not Met the Standard for Interlocutory Review*

Crow Butte argues that the Board erroneously considered the release of the Environmental Assessment as the trigger date for assessing the timeliness of new contentions and thereby disregarded the requirement that new contentions be submitted in a “timely fashion based on the availability” of the information on which they are based.<sup>65</sup> Crow Butte claims that some of the newly admitted contentions are based on information that became available during

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<sup>61</sup> The Board rejected proposed EA Contention 4 (Baseline Water Quality) and EA Contention 8 (Air Quality Impacts) in their entirety as untimely. See LBP-15-11, 81 NRC at 418-19, 429. It also rejected portions of EA Contention 6 (Water Quality Impacts) and EA Contention 12 (Air Emissions and Liquid Waste) as untimely. See *id.* at 426, 437.

<sup>62</sup> See *id.* at 451 (summary of admitted contentions). In March 2015, Consolidated Intervenors moved to admit additional contentions concerning new proposed Environmental Protection Agency regulations relating to uranium and thorium tailings, but the Board found that none of the proposed contentions were admissible. See LBP-15-15, 81 NRC \_\_ (Apr. 28, 2015) (slip op.).

<sup>63</sup> Crow Butte Petition at 1. Crow Butte challenges the Board’s ruling with respect to EA Contentions “1, 3, 5, 6, 9, 12 and 14.” But proposed EA Contention 3 was admitted only in part, and merged into the previously admitted Contention D, and the Board found that any admissible claim in EA Contention 5 was already encompassed in Contention D. See LBP-15-11, 81 NRC at 417, 424, 449.

<sup>64</sup> See *Consolidated Intervenors’ and Oglala Sioux Tribe’s Joint Response to Applicant’s Petition for Interlocutory Review* (Apr. 20, 2015); *Consolidated Intervenors’ and Oglala Sioux Tribe’s Joint Response to NRC Staff’s Petition for Interlocutory Review* (May 5, 2015).

<sup>65</sup> 10 C.F.R. § 2.309(c).

the seven-year period between the time Crow Butte submitted its application and the issuance of the Environmental Assessment.<sup>66</sup>

Crow Butte argues that interlocutory review is appropriate because the Board's decision "affects the basic structure of the proceeding in a pervasive and unusual manner."<sup>67</sup> It also notes that two other uranium recovery proceedings involving the same parties are currently pending before two other boards, and claims that this Board's contention admissibility rulings could provide the foundation for those boards to improperly admit untimely contentions.<sup>68</sup> Crow Butte asks that we reverse and remand the contentions to the Board for further consideration of whether the challenged contentions should have been raised earlier.<sup>69</sup>

We find that the Board decision does not "[affect] the basic structure of the proceeding in a pervasive and unusual manner." First, it is well established that a board's contention admissibility rulings do not "affect the basic structure of the proceeding in a pervasive and unusual manner" such that immediate review is appropriate.<sup>70</sup> The Board's ruling in LBP-15-11 simply expands the issues for a hearing that will take place in any case, which does not merit

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<sup>66</sup> For example, Crow Butte argues that the Board should not have admitted a narrow portion of proposed EA Contention 12 that challenges the Environmental Assessment's lack of discussion of the potential impact of a tornado on air emissions from the facility. Crow Butte argues that even though the Environmental Assessment does not discuss impacts from a tornado, Intervenors could have challenged the Safety Evaluation Report, which stated that Crow Butte's emergency plan for tornados is adequate. See Crow Butte Petition at 8 n.19 (challenging LBP-15-11, 81 NRC at 437 (citing Safety Evaluation Report at 158, § 7.3.5)).

<sup>67</sup> Crow Butte Petition at 13.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.* at 3 (citing 10 C.F.R. § 2.341(f)(2)(ii) (interlocutory review at request of a party)).

<sup>70</sup> *Pilgrim*, CLI-08-2, 67 NRC at 35; *Seabrook*, CLI-13-3, 77 NRC at 54-55; see also *Haddam Neck*, CLI-01-25, 54 NRC at 374; *Rancho Seco*, CLI-94-2, 39 NRC at 94.

interlocutory review.<sup>71</sup> Further, the possibility that the Board may have made an erroneous ruling in admitting a contention does not warrant interlocutory review.<sup>72</sup>

Second, Crow Butte's claim that the Board's decision potentially affects a "broad class" of contentions mischaracterizes the decision. The Board did not find, as a general matter, that any contention based on an environmental assessment would be timely; indeed, the Board rejected several proposed new environmental contentions as untimely.<sup>73</sup> Rather, the Board considered the timeliness of each contention in its decision and specifically noted that intervenors are "not allowed to postpone filing a contention challenging [publicly available information or analysis] until the Staff issues some document 'that collects, summarizes, and places into context the facts supporting that contention.'"<sup>74</sup> The Board found that in particular situations, the release of the Staff's environmental review document may be the first opportunity for a petitioner to question the accuracy of the Staff's environmental analysis.<sup>75</sup> While we do not address the validity of the Board's individual timeliness determinations here, we do not find the sweeping determination that Crow Butte asserts would rise to the level of a "pervasive and unusual" effect on the structure of this proceeding—or others.

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<sup>71</sup> See, e.g., *Levy County*, CLI-11-10, 74 NRC at 256 n.24 ("expansion of issues for litigation . . . does not have a 'pervasive and unusual effect' on the litigation" (citing *Haddam Neck*, CLI-01-25, 54 NRC at 374 and *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63)).

<sup>72</sup> *Rancho Seco*, CLI-94-2, 39 NRC at 94; *Private Fuel Storage*, CLI-01-1, 53 NRC at 5; *Sequoyah Fuels*, CLI-94-11, 40 NRC at 61.

<sup>73</sup> The Board rejected as untimely Proposed EA Contention 4 (Baseline Water Quality) and EA Contention 8 (Air Quality Impacts) in their entirety, and portions of EA Contention 6 (Water Quality Impacts) and EA Contention 12 (Air Emissions and Liquid Waste). See LBP-15-11, 81 NRC at 418-19, 426, 429, 437.

<sup>74</sup> *Id.* at 409 (quoting *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 484-85 (2010)).

<sup>75</sup> *Id.* at 408 (citing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008)).



Finally, we note that Crow Butte has not been prejudiced by Intervenor's filing of new contentions late in the licensing process. The Board's decision to admit the contentions will not significantly delay the conclusion of this proceeding. Our rules of practice provide that an evidentiary hearing on environmental contentions may not take place prior to completion of the Staff's review.<sup>76</sup> After the Staff released the Environmental Assessment, the Board issued scheduling orders and set hearing-related deadlines in accordance with our model milestones in preparation for the evidentiary hearing now set for August.<sup>77</sup> Even had Intervenor proposed their contentions earlier, the hearing could not take place until the Staff's environmental review was complete. In sum, we find that Crow Butte's petition does not identify a basis for interlocutory review of this matter. For the reasons discussed above, we deny Crow Butte's petition for review of LBP-15-11.

### 3. *The Staff Has Not Met the Standard for Interlocutory Review*

The Staff has petitioned separately for review of LBP-15-11 and argues that the Board erred in admitting portions of several proposed new and amended contentions, thereby

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<sup>76</sup> See Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. at 2187 (explaining that hearings on environmental contentions must be delayed until after the Staff issues its environmental review document: "the staff may not be in a position to provide testimony or take a final position on some issues until these documents have been completed. This may be the case in particular with regard to the NRC staff's environmental evaluation"); *id.* at 2202 (explaining difference between safety and environmental contentions with respect to burden of proof); see *also* 10 C.F.R. § 2.332(d) ("Where an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS.").

<sup>77</sup> See Order (Scheduling Filing of New/Amended Contentions and Requesting Proposed Evidentiary Hearing Dates) (Oct. 28, 2014); see *also* Scheduling Order; see *also* 10 C.F.R. part 2, app. B, "Model Milestones To Be Used By a Presiding Officer as a Guideline in Developing a Hearing Schedule for the Conduct of an Adjudicatory Proceeding in Accordance with 10 CFR 2.332." According to the model milestones, an evidentiary hearing should begin 175 days after the release of the Staff's environmental review document. Although the Board granted an unopposed motion extending the time to file new or amended contentions by 40 days, it asked the parties to agree on a time for the hearing to start "no sooner than April 20, 2015"—175 days exactly following the Environmental Assessment's October 27, 2014, release.

expanding the issues for hearing. Acknowledging that the mere expansion of issues for hearing generally does not qualify for interlocutory Commission review, the Staff contends that the Board raised several issues on its own initiative and that such Board action “affects the basic structure of the proceeding in a pervasive and unusual manner.”<sup>78</sup>

The Staff claims that the Board fundamentally expanded the scope of the hearing by adding bases to three contentions and by failing to narrow a fourth. First, the Staff argues that the Board improperly introduced the issue of whether the Staff should have performed a new baseline groundwater quality assessment into contentions that had been pending in the proceeding since 2008.<sup>79</sup> Second, the Staff argues that the Board erroneously interjected the issue of cumulative impacts from Crow Butte’s three proposed expansion sites into an environmental justice contention that had not specifically raised cumulative impacts.<sup>80</sup> Third, the Staff argues that in admitting EA Contention 14, which claims that the Environmental Assessment did not adequately consider impacts from earthquakes, the Board itself suggested that earthquakes centered outside Nebraska’s borders could be material.<sup>81</sup> Finally, the Staff

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<sup>78</sup> Staff Petition at 1, 4.

<sup>79</sup> *Id.* at 7-10. The Board rejected as untimely EA Contention 4, which advocated a new baseline groundwater quality study, but the Board observed that “the information presented in support of EA Contention 4 might well be relevant to already-admitted Contentions C and D . . . [and] Contention F.” See LBP-15-11, 81 NRC at 419.

<sup>80</sup> Staff Petition at 11. The Board rejected most of proposed EA Contention 10 (which argued that the Environmental Assessment failed to consider cumulative impacts) because it found the Environmental Assessment had discussed cumulative impacts in every respect except for environmental justice. The Board added the environmental justice element to Contention D, which had been admitted at the outset of the proceeding. LBP-15-11, 81 NRC at 433.

<sup>81</sup> Staff Petition at 11-12. Intervenors specifically cited two 2011 earthquakes that were felt in Crawford, Nebraska, but which were centered outside Nebraska and were not discussed in the Environmental Assessment. See LBP-15-11, 81 NRC at 446-48.

argues that the Board erred in admitting EA Contention 1 by failing to specify its admissible bases.<sup>82</sup>

The Staff cites Commission case law for the proposition that a Board may not supply its own bases for a contention, but it offers no support for its claim that this particular error would “affect the structure of the proceeding in a pervasive or unusual manner.”<sup>83</sup> The Staff does not explain why litigating the contentions as admitted (that is, the Staff asserts, with bases supplied by or not specified by the Board) would affect the “basic structure” of the proceeding any differently than litigating other contentions.

As we stated above, the mere expansion of issues for hearing resulting from a board’s assertedly erroneous ruling does not constitute a “pervasive and unusual effect” on the proceeding.<sup>84</sup> We do not find that the Staff’s claims of error warrant interlocutory review.<sup>85</sup>

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<sup>82</sup> Staff Petition at 13-14. Proposed EA Contention 1 argued that the Environmental Assessment failed to adequately describe historic and cultural resources on the site, and proposed EA Contention 2 argued that the Staff had failed to adequately consult with the Tribe concerning cultural resources. Following a discussion wherein the Board found certain claims inadmissible (such as claim that the Staff must complete an Environmental Impact Statement) it combined proposed EA Contentions 1 and 2 into a single contention. LBP-15-11, 81 NRC at 411-15.

<sup>83</sup> See Staff Petition at 12 (citing CLI-09-9, 69 NRC at 355, and *NextEra Energy Seabrook* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 348 (2012)).

<sup>84</sup> See *Levy County*, CLI-11-10, 74 NRC at 256 n.24; *Pilgrim*, CLI-08-2, 67 NRC at 35; *Haddam Neck*, CLI-01-25, 54 NRC at 374; *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63; *Rancho Seco*, CLI-94-2, 39 NRC at 94.

<sup>85</sup> The Staff also argues that the Board “broadened the proceeding” in two respects not related to LBP-15-11; these arguments are now moot. The Staff essentially argues that during a teleconference, the Board suggested to Intervenors that they should file new proposed contentions with respect to new proposed Environmental Protection Agency rules on health standards for uranium and thorium milling and with respect to Endangered Species Act concurrence letters that the Staff had just received. Staff Petition at 5-6 (citing Tr. at 598-99, 868-69). Although Intervenors proposed contentions concerning the EPA health standards, the Board rejected them. LBP-15-15, 81 NRC at \_\_\_ (slip op. at 14-23). Intervenors did not propose a contention related to the Endangered Species Act concurrences.

**III. CONCLUSION**

For the foregoing reasons, we *deny* all three petitions for interlocutory review of the Board's decisions in LBP-15-2 and LBP-15-11.

IT IS SO ORDERED.<sup>86</sup>

For the Commission

**NRC Seal**

/RA/

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6<sup>th</sup> day of August, 2015

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<sup>86</sup> Chairman Burns did not participate in this matter.

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 **COMMISSION MEMORANDUM AND ORDER (CLI-15-17)** 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 ]  
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Dated at Rockville, Maryland  
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