

**UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION**

In the Matter of)
) Docket No. 40-8943
CROW BUTTE RESOURCES INC.) ASLBP No. 08-867-02-OLA-BD01
)
(License Renewal for the) February 8, 2017
In Situ Leach Facility, Crawford, Nebraska))

**CONSOLIDATED INTERVENORS COMBINED REPLY TO
CROW BUTTE AND NRC STAFF’S ANSWERS OPPOSING
CONSOLIDATED INTERVENORS’ PETITION FOR REVIEW**

Pursuant to 10 CFR 2.341(b)(3), Consolidated Intervenors¹ (“CI”) hereby timely file this Combined Reply to NRC Staff’s Answer (“NRC Answer”) and Crow Butte Resources, Inc.’s Answer (“CBR Answer”), each opposing the Petition for Review filed by CI (“CI Petition for Review”).

At page 2 of the CBR Answer, Crow Butte asserts that “The NRC has fully satisfied the National Environmental Policy Act (“NEPA”).” At page 7, Crow Butte asserts that “Commission precedent holds that the adjudicatory record and a licensing board decision become part of the NEPA record of decision.”

At 4-5 of the NRC Answer, NRC Staff asserts that “[u]nder longstanding Commission practice, “a Board’s hearing, hearing record, and subsequent decision on a

¹ Western Nebraska Resources Council (“WNRC”), Owe Aku/Bring Back the Way, Debra White Plume, Beatrice Long Visitor Holy Dance (deceased), Joe American Horse & Tiospaye, Thomas Cook, Loretta Afraid-of-Bear Cook & Tiwahe. Debra White Plume, Joe American Horse and Loretta Afraid-of-Bear Cook are members of the Oglala Sioux Tribe (the “Tribe”) at Pine Ridge Indian Reservation. The term “Intervenors” refers to CI and the Tribe collectively.

contested environmental matter augment the environmental record of decision developed by the Staff with respect to this issue[.]”

The Supreme Court has explained that the government must (1) disclose and (2) take a “hard look” at the foreseeable environmental consequences of its decision in a NEPA document. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). CEQ regulations require that: “NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis added.)

However, in this case, the license renewal, i.e., the federal action, occurred before the completion of the NEPA document and before the hearing and decision that supposedly corrected the deficiencies identified by the Board. This violates NEPA.

NEPA documentation notifies the public and relevant government officials of the proposed action and its environmental consequences and informs the public that the acting agency has considered those consequences. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1437 (10th Cir. 1996). The statutory prohibition against taking agency action before NEPA compliance applies to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) cited by *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

It is impossible to inform the public of the environmental consequences of the proposed action before it is taken where the Board actions and decision being part of the

administrative record serve to cure the deficient Final EA and there is no further publication of the corrected Final EA and no further opportunity to comment. This violates NEPA.

("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements."); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), aff'd sub nom *Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984). See also *Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot 'bring into compliance with NEPA an EIS that by itself is inadequate.' . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well- reasoned.") (citations omitted); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir.1980) (even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate.").

The NEPA document in this case was circulated to the public prior to being amended, supplemented and corrected by the Board during the hearing and pursuant to the Board's decision but it was not circulated for public comment after being so amended by the Board. Therefore, NEPA has been violated. Under *Grazing Fields*, even though there may be information in the administrative record that is curative of the deficiencies

in a NEPA document, but not incorporated in the NEPA document and not thereafter published for comment to the public, using the administrative record in such a way does not bring the deficient NEPA document into compliance with NEPA.

NRC Staff simply cannot have it both ways. Either the agency makes a licensing decision that is fully informed by a NEPA analysis, or, the Record of Decision is amended during the adjudicatory process before the Licensing Board. Here, NRC Staff has issued a license based on a NEPA document that the Licensing Board has deemed incomplete.

Had a decision not already been made by NRC Staff, prior to the hearings and decision by the Licensing Board, then the EA as published would be insufficient to support the issuance of a license renewal. The only remedy at this point, is for the Commission to direct NRC Staff to suspend CBR's license renewal until the deficiencies in the EA are remedied in accordance with the Licensing Board's Order. Further, the Commission should direct the NRC Staff to re-commence the curative actions to address the deficiencies found by the Board. Any other course of action is a prima facie violation of NEPA.

Conclusion

The CI's Petition for Review should be granted for the reasons set forth above. The NRC Staff should be ordered to re-commence curative actions under the Board's guidance regarding Contention 1 and Contention 12B despite CBR's protestations about its effort to 'save money'.

Dated this 8th day of February, 2017.

Respectfully submitted,

_____/s/_____

Thomas J. Ballanco
Counsel for CI
945 Taraval Ave. # 186
San Francisco, CA 94116
(650) 296-9782
E-mail: HarmonicEngineering@gmail.com

Signed (electronically) by David C. Frankel

David Frankel
Counsel for CI
1430 Haines Ave., Ste. 108-372
Rapid City, SD 57701
Tel: 605-515-0956
E-mail: arm.legal@gmail.com

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the foregoing were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: February 8, 2017.

Signed (electronically) by David C. Frankel

David Frankel
Counsel for Consolidated Intervenors
1430 Haines Ave., Ste. 108-372
Rapid City, SD 57701
Tel: 605-515-0956
E-mail: arm.legal@gmail.com