

January 26, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.)
) ASLBP No. 13-926-01-MLA-BD01
(Marsland Expansion Project))

NRC STAFF'S MOTION TO DENY MIGRATION
OF ENVIRONMENTAL PORTION OF CONTENTION 2

INTRODUCTION

In accordance with 10 C.F.R. § 2.323, the staff of the U.S. Nuclear Regulatory Commission (Staff) files this motion to deny the migration of the environmental component of Contention 2 into a challenge to the Staff's draft Environmental Assessment (EA).¹ As discussed below, because the Oglala Sioux Tribe (OST) did not seek to amend Contention 2 to apply to the Staff's draft EA, and because the information and analysis in the draft EA related to Contention 2 are not sufficiently similar to the information and analysis in the applicant's 2012 Environmental Report (ER),² the migration tenet does not apply. Therefore, the Board should

¹ Draft Environmental Assessment for the Marsland Expansion Area License Amendment Application, Docket No. 40-8943 (December 2017) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML17334A870)). As required by 10 C.F.R. § 2.323(b), counsel for the NRC Staff consulted with the other parties by e-mail on January 24, 2018, regarding this motion. Counsel for Crow Butte Resources (CBR) replied and stated that CBR supports the Staff's motion. As of the time of filing, Staff counsel had received no response from counsel for the Oglala Sioux Tribe (OST).

² Contention 2 was filed as a challenge to the original version of the ER, which was submitted in 2012. "Application for Amendment of USNRC Source Materials License SUA-1534, Marsland Expansion Area – Volume I, Environmental Report" (May 16, 2012) (ADAMS Accession No. ML12160A512). The applicant submitted updates to the ER in August 2013 (ADAMS Accession No. ML13240A075), January 2014 (ADAMS Accession No. ML14028A475) and April 2014 (ADAMS Accession No. ML14125A466). The applicant also submitted additional information and updates to portions of its Technical Report (TR) related to Contention 2 in 2015 (ADAMS Accession No. ML15328A422), 2016 (ADAMS Accession Nos. ML16155A267 and ML16155A268), and 2017 (ADAMS Accession No. ML17193A314). In its environmental review, the Staff considered information in these updates. See EA at 10-4 to 10-5. Because Contention 2 has not been amended to account for any updated information in those submittals, it remains a challenge to the original 2012 ER and the information therein.

not migrate the environmental (i.e., National Environmental Policy Act (NEPA)-related) portion of Contention 2 to the draft EA.

BACKGROUND

On May 16, 2012, Crow Butte Resources, Inc. (CBR or applicant) filed its application for a license amendment to construct and operate an *in-situ* uranium recovery (ISR) facility at the Marsland Expansion Area (MEA) in Dawes County, Nebraska. On January 29, 2013, the OST submitted a request for hearing and petition to intervene in this proceeding. In LBP-13-6, the Board admitted OST Contention 2,³ which states as follows:

The application fails to provide sufficient information regarding the geological setting of the area to meet the requirements of 10 C.F.R. § 40.31(f); 10 C.F.R. § 51.45; 10 C.F.R. § 51.60; 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2); the National Environmental Policy Act; and NUREG-1569 section 2.6. The application similarly fails to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by 10 C.F.R. § 51.45, NUREG-1569 section 2.7, and the National Environmental Policy Act.⁴

In admitting this contention, the Board identified “four specific deficits” that the contention raised against CBR’s application: (1) insufficient description of the affected environment to establish potential effects on adjacent surface and groundwater resources; (2) absence of a description of effective porosity, hydraulic conductivity, hydraulic gradient, and “other information relative to the control and prevention of excursions”; (3) inadequately developed conceptual model of site hydrogeology to demonstrate that area hydrogeology will result in confinement of extraction fluids; and (4) the ER contains “unsubstantiated assumptions as to the isolation of aquifers in ore-bearing zones.”⁵ The Board later stated that, in its view, the intervenors were challenging

³ *Crow Butte Resources* (Marsland Expansion Area), LBP-13-6, 77 NRC 253, 289-95 (2013), *aff’d* CLI-14-2, 79 NRC 11 (2014). The Board also admitted Contention 1, concerning cultural resources, but that contention was later dismissed via summary disposition. See Memorandum and Order (Ruling on Summary Disposition of Contention 1) at 14 (Oct. 22, 2014) (unpublished).

⁴ Oglala Sioux Tribe’s Request for Hearing and Petition to Intervene (Jan. 29, 2013), at 17.

⁵ *Crow Butte Resources*, LBP-13-6, 77 NRC at 289.

Sections 3.4.3.2 and 3.4.3.3 of the applicant's ER.⁶ However, because the contention deals with hydrogeology, a topic that is common to both the Staff's environmental and safety reviews, both the Staff and applicant have expressed to the Board that this contention is a "hybrid" environmental/safety contention.⁷

On December 11, 2017, the Staff notified the Board and parties that its draft EA was publicly available in ADAMS.⁸ Shortly thereafter, on December 15, 2017, the Staff's Finding of No Significant Impact (FONSI) was published in the *Federal Register*.⁹ Pursuant to the Board's Revised Scheduling Order dated April 20, 2017, the deadline for filing a motion for new or amended contentions on the draft EA was January 16, 2018.¹⁰ The OST did not file such a motion, nor did it file any other submission indicating its position that Contention 2 should migrate.¹¹

⁶ *Id.* at 293.

⁷ See Tr. at 114-17.

⁸ NRC Staff Letter to the Atomic Safety and Licensing Board (Dec. 15, 2017), at 1. In the same notification, the Staff informed the Board and parties that it had prepared a compiled version of the ER (current as of the most recent update of the ER in April 2014), and provided the ADAMS accession number for the compiled ER package. *Id.*

⁹ Draft Environmental Assessment and Draft Finding of No Significant Impact; Notice of Availability and Request for Comments, 82 Fed. Reg. 59,665 (Dec. 15, 2017).

¹⁰ Memorandum and Order (Revised General Schedule), Appendix A (Apr. 20, 2017) (unpublished).

¹¹ In its Scheduling Order dated February 11, 2016, the Board outlined the circumstances under which migration might occur. See Memorandum and Order (Revised General Schedule) at 4 (Feb. 11, 2016) (unpublished). In addition, to ensure there was "no doubt regarding OST's position concerning the status of any admitted contentions," the Board requested that the OST "provide a submission indicating whether, and if so why, it believes any admitted contention should migrate," and that it do so at the time the motion to admit new or amended contentions was due. *Id.* at 5.

Had a motion to file new or amended contentions (or alternatively, a submission regarding migration) been filed, the Staff would have had an opportunity to present its position regarding migration of the environmental portion of Contention 2 in its responsive filing. Absent such an opportunity, the Staff views this motion as the appropriate procedural vehicle to assert its objection. It appears that licensing boards and the Commission expect a party to object to migration of an environmental contention at the time new or amended contentions on the Staff's draft or final environmental review document have been submitted and are being considered by a licensing board. See *Crow Butte Resources* (In Situ Leach Facility, Crawford, Nebraska), LBP-15-11, 81 NRC 401, 410 (noting lack of objection to migration during oral argument on admissibility of new/amended contentions); accord *Crow Butte Resources* (In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC 33, 36 n.17 (same); see also *Strata Energy, Inc.* (Ross

DISCUSSION

I. Legal Standards for Migration

Commission case law recognizes that, under certain circumstances, a NEPA-related challenge to an applicant's ER may "migrate" as a challenge to the Staff's environmental review document without an affirmative showing by the contention's proponent that the 10 C.F.R. §§ 2.309(c)(1) and (f)(1) factors have been met.¹² Under this "migration tenet," an existing contention challenging an application can be "deemed to apply to the Staff's review document as it did to the application."¹³ Thus, the migration tenet can operate to "amend" a contention on the applicant's ER into a challenge to the Staff's draft EA if the EA adopts the same information and analyses from the ER that were challenged as inadequate, or maintains the same omission alleged in the ER.¹⁴ However, the migration tenet only applies if the information the Staff's EA is "sufficiently similar to the information in the ER" with respect to the issues challenged as deficient in the ER-based contention.¹⁵ The Court of Appeals for the District of Columbia Circuit recently characterized this standard as a finding that "the analysis at which [the contention] is directed is substantially the same" in the two documents.¹⁶

In Situ Recovery Uranium Project), LBP-13-10, 78 NRC 117, 143 n.15 (2013), *aff'd*, CLI-16-13, 83 NRC 566 (2016) (contemplating an applicant or Staff filing if the contention's sponsor chooses not to make a submission regarding migration).

¹² *Strata*, LBP-13-10, 78 NRC at 132-33.

¹³ *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 570 n.17 (2016), (citing LBP-13-10, 78 NRC at 132-33).

¹⁴ *Strata*, LBP-13-10, 78 NRC at 132.

¹⁵ *Id.* at 133 (citing *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008)); *see also Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 46-47 (2013); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 470-71 (2012); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 NRC 19, 26 (2011).

¹⁶ *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, No. 16-1298, slip op. at 8-9 (D.C. Cir. Jan. 19, 2018).

Where it is not obvious that a contention will be migrated, the contention's proponent should seek to amend the contention to apply to the Staff's environmental review document or seek its admission as new contention, "failing which the contention may be lost."¹⁷ A new or amended contention challenging portions of the Staff's EA that are not substantially similar to the challenged portions of the ER must meet the "good cause" and contention admissibility standards in 10 C.F.R. §§ 2.309(c)(1) and (f)(1).¹⁸ Boards are not required to infer "good cause" on behalf of the contention's proponent or to amend a contention *sua sponte* to apply to the contention's ER-based arguments to the EA where the contention's proponent has not met its affirmative burden to demonstrate that a contention satisfies the 10 C.F.R. §§ 2.309(c)(1) and (f)(1) factors.¹⁹

II. OST's Failure to Address Updated Information in the Draft EA Precludes Application of the Migration Tenet

Applying the above standards to Contention 2, migration is only appropriate if the relevant discussion and analysis in the draft EA is "substantially the same" as in the original 2012 ER on which the contention was based.²⁰ However, the EA contains new information and analysis in several areas related to confinement and the ability to contain production fluids. For example, Section 4.3.2.2 of the EA discusses an assessment of potential contamination of an irrigation well within the MEA license area based on a hypothetical ISR well casing leak.²¹ Section 3.2.2.2 of the EA contains an independent review of literature related to reported faults in the area of the MEA, as well as the Staff's conclusions as to why the reported faults, even if

¹⁷ *Id.*, slip op. at 5-6 (citing *Strata*, LBP-13-10, 78 NRC at 143 n.15).

¹⁸ *Strata*, LBP-13-10, 78 NRC at 130-31.

¹⁹ See *id.* at 143 n.15; see also *NRDC v. NRC*, No. 16-1298, slip op. at 9.

²⁰ *NRDC v. NRC*, No. 16-1298, slip op. at 8.

²¹ EA at 4-22.

they exist, will not contribute to impacts on surface or groundwater.²² Sections 3.2.2.2, 3.3.2.3, and 3.3.2.5 of the EA discuss CBR's commitment in its 2015 TR update to perform additional aquifer pumping tests in all mine units not covered by the regional pump test described in the 2012 ER.²³ Section 3.3.2.1 of the EA contains additional and updated information and discussion related to regional groundwater flow, along with information on effective porosity, hydraulic conductivity, and hydraulic gradient (information asserted to be lacking in the 2012 ER) and calculations of groundwater velocities.²⁴

Given these examples, it was incumbent on the OST to identify why, and to what extent, the deficiencies identified in Contention 2 still apply to the draft EA.²⁵ However, the OST did not submit a motion to file new or amended contentions on the Staff's draft EA. Nor did the OST, as requested by the Board, otherwise provide a submission asserting that migration was warranted and explaining its reasons.²⁶ In light of the substantive differences between the 2012 ER and the draft EA, and the OST's failure to articulate why its prior concerns remain applicable, the Board should conclude that the standards for migration of Contention 2 have not been met.

²² *Id.* at 3-27 to 3-30.

²³ *Id.* at 3-30, 3-47, 3-50.

²⁴ *Id.* at 3-39 to 3-45.

²⁵ See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 686-87 (2012) (stating that "our process places on the intervenor the obligation to raise new contentions" based on new information, and that "our rules require the filing of contentions on new information as early as possible after the information becomes available"); see also *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496, 2010 (internal citations omitted) (stating longstanding NRC policy that "a petitioner has an 'iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention"). Also, as noted previously, the information and analysis in the EA reflects new information provided by CBR in updates to its ER or TR. See *supra* note 2. The OST was obligated to review those updates to the application (which were disclosed in Staff hearing file updates) for information relevant to Contention 2 and to seek to amend the contention as necessary. *Prairie Island*, CLI-10-27, 72 NRC at 496.

²⁶ See *supra* note 11.

CONCLUSION

The OST did not submit a motion to file new or amended contentions on the draft EA or otherwise provide a submittal explaining why migration of Contention 2 to the draft EA is appropriate. For the reasons stated above, migration is not warranted, and the Staff therefore requests that the Board deny migration of the environmental portion of Contention 2 to the Staff's draft EA.

Respectfully submitted,

/Signed (electronically) by/

Marcia J. Simon

Counsel for the NRC Staff

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop: O14-A44

Washington, D.C. 20555-0001

(301) 287-9176

Marcia.Simon@nrc.gov

Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S MOTION TO DENY MIGRATION OF ENVIRONMENTAL PORTION OF CONTENTION 2" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 26th day of January, 2018, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding.

/Signed (electronically) by/

Marcia J. Simon
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O14-A44
Washington, D.C. 20555-0001
(301) 287-9176
Marcia.Simon@nrc.gov