

February 5, 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 Area) |) | |

CROW BUTTE RESPONSE TO NRC STAFF
MOTION TO DENY MIGRATION OF CONTENTION 2

In accordance with 10 C.F.R. § 2.323(c), Crow Butte Resources (“Crow Butte” or “CBR”) files this response in support of the “NRC Staff’s Motion to Deny Migration of Environmental Portion of Contention 2,” dated January 26, 2018 (“Motion”). The information presented in the Draft Environmental Assessment (“EA”) relevant to Contention 2 is materially different than the information presented in the original Environmental Report (“ER”) on which Contention 2 was based. Accordingly, the migration tenet does not apply. Because the migration tenet does not apply, Contention 2 cannot migrate and should be dismissed as moot.

BACKGROUND

In the Licensing Board’s Memorandum and Order (Ruling on Intervention Petitions) (“LBP-13-06”), dated May 10, 2013, the Board admitted Contention 2 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.

The Board explained that Contention 2 was a challenge to ER section 3.4.3.2, “Aquifer Testing and Hydraulic Parameter Identification Information,” and section 3.4.3.3, “Hydrologic Conceptual Model for the Marsland Expansion Area.”¹ The Board identified four alleged deficiencies: “(1) the descriptions of the affected environment are insufficient ‘to establish the potential effects of the proposed [ISR] operation on the adjacent surface water and ground water resources’; (2) ‘a description of the ‘effective porosity, hydraulic conductivity, and hydraulic gradient’ of site hydrogeology,’ is absent along with ‘‘other information relative to the control and prevention of excursions’’; (3) ‘an acceptable conceptual model of site hydrology adequately supported by the data presented in the site characterization’ has not been adequately developed to demonstrate ‘with scientific confidence that the area hydrogeology, including horizontal and vertical hydraulic conductivity, will result in the confinement of extraction fluids and expected operational and restoration performance’; and (4) the ER contains ‘unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones.’”²

The NRC Staff notified the parties that the Draft EA was publicly available on December 11, 2017, and published a notice of availability in the *Federal Register* on December 15, 2017.³ The Board had previously set January 16, 2018, as the deadline for filing a motion for new or amended contentions on the Draft EA or for filing “migration declaration[s].”⁴ OST did not file a motion for new or amended contentions, nor did it submit a migration declaration.

¹ See *Crow Butte Resources* (Marsland Expansion Area), LBP-13-06, at 40 (May 10, 2013) (citing ER at 3-40 to -45).

² *Id.* at 34.

³ NRC Staff Letter to the Atomic Safety and Licensing Board, dated December 11, 2017; “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).

⁴ Memorandum and Order (Revised General Schedule), dated April 20, 2017, at Appx. A.

OST's silence in the face these deadlines is particularly notable given that the Board had specifically highlighted the need for OST to request application of the migration tenet.⁵ The NRC Staff subsequently filed the Motion, seeking to deny migration of Contention 2.

DISCUSSION

As the NRC Staff explained in its Motion, a challenge to an applicant's ER may "migrate" to become a challenge to the NRC Staff's environmental review document. Under this migration tenet, an existing contention may be "deemed to apply to the Staff's review document as it did to the application."⁶ However, the migration tenet only applies if the information in the Staff's EA is "sufficiently similar to the information in the ER" with respect to the basis of the admitted contention.⁷ As a result, where the information in the Staff environmental review document is materially different than that in the ER, the migration tenet cannot apply. If the

⁵ See Memorandum and Order (Revised General Schedule), dated February 11, 2016, at 4 ("So there is no doubt regarding OST's position concerning the status of any admitted contentions, we request that at the time any motion to admit new/amended contentions is due regarding either the staff's draft EA/FONSI or its final EA/FONSI or SER, OST provide a submission indicating whether, and if so why, it believes any admitted contention should migrate."). The need for a statement from OST on migration highlighting which portions of the contention is particularly acute here, given the lack of specificity in the original petition. See *Crow Butte Resources* (Marsland Expansion Area), CLI-14-02, at 20 (2014) (deferring to the Board on admissibility, but agreeing that the issue presents a "close question"); *id.* (Svinicki, K., dissenting) at 4 (concluding that nothing in the petition contravenes CBR's analysis regarding confinement).

⁶ *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 570 n.17 (2016) (internal quotations omitted) (citing *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-13-10 (2013)).

⁷ *Strata*, LBP-13-10, at 8-9; see also *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, No. 16-1298, ___ F.3d ___, 2018 WL 472547, at *2 (D.C. Cir. Jan. 19, 2018) ("NRDC").

migration tenet does not apply and the intervenor does not file a new or amended contention addressing the different information, then the “contention may be lost.”⁸

Here, as discussed below, the Draft EA is not substantially similar to the ER with respect to the bases for Contention 2. Accordingly, Contention 2 does not migrate, and Contention 2 is therefore moot.

The Draft EA contains new information and analysis pertinent to the four alleged deficiencies identified by the Board that goes beyond what had been presented in ER sections 3.4.3.2 and 3.4.3.3. For example, one alleged deficiency related to the effects of operation on adjacent groundwater resources. The Draft EA expands on the ER discussion by assessing the potential for contamination of an irrigation well within the MEA license area based on a hypothetical ISR well casing leak.⁹ The Draft EA also develops additional information on various hydrogeological characteristics of the Marsland site, including those alleged to have been lacking in the ER. Specifically, the Draft EA expands on regional groundwater flow (see Figures 3-7 and 3-8) and includes additional details on porosity and other characteristics of the mining and confining units.¹⁰ The Draft EA further contains new and different information and analysis regarding confinement, including a comprehensive review and assessment of the potential for, and impacts of, faulting.¹¹ And sections 3.2.2.2, 3.3.2.3, and 3.3.2.5 of the Draft EA reflect Crow Butte’s commitment to perform additional aquifer pumping tests in all mining units not

⁸ *NRDC*, 2018 WL 472547, at *2 (citing *Strata*, LBP-13-10, at 21 n.15).

⁹ Draft EA at 4-22 to 4-23. There was no discussion of the impacts of a hypothetical casing leak in the ER.

¹⁰ *Id.* at 3-26, 3-39 to 3-46, 4-16 to 4-19.

¹¹ *Id.* at 3-27 to 3-30.

covered by the regional pump test described in the original ER.¹² Finally, with respect to Dr. LaGarry's assertions that the ER relies on a simplified, "layer-cake" concept,¹³ the Draft EA explains the basis for the selection of nomenclature to be used and provides additional detail regarding the various geologic units.¹⁴

Because the NRC Staff has introduced new information relevant to Contention 2, expanded the discussion of various alleged concerns raised in Contention 2, and performed additional analyses that go beyond those included in the ER, the information in the Draft EA is not "substantially similar" to the ER. Accordingly, Contention 2 cannot migrate. Because the ER on which Contention 2 is based has been superseded by the Draft EA, Contention 2 is now moot.¹⁵ Contention 2 therefore should be dismissed.¹⁶

¹² *Id.* at 3-30, 3-47, and 3-50.

¹³ *See Marsland, CLI-14-02*, at 17. Although not directly relevant, the same issue was raised by Dr. LaGarry and litigated in the Crow Butte license renewal proceeding. *See Crow Butte Resources (License Renewal)*, LBP-16-13, at 174-175 (2016) (finding that neither the License Renewal Application nor the NRC Staff's EA assumed a "layer cake concept" of on-site stratigraphy with uniform thickness and limits, as Intervenors had suggested, and further that the name selected for strata has little practical impact on the resolution of the contentions in this proceeding because the application and NRC review documents referenced actual lithologic and geophysical characteristics).

¹⁴ Draft EA at 3-24, n.12 (explaining that Crow Butte, the NRC, the U.S. Geological Survey, and the Nebraska Department of Environmental Quality all use the traditional stratigraphic terms and noting that "nothing in the naming conventions for the geologic units ... changes the interpretation of the physical or hydrogeologic features of the rock units"); *id.* at 3-42 (Figure 3-6); *id.* at 3-39 to 3-50 (describing regional and site geologic and hydrogeologic conditions).

¹⁵ In its Motion (at 3), the NRC Staff characterizes Contention 2 as a "hybrid" contention, citing Tr. at 114-117. Crow Butte does not agree. The contention is clearly and unambiguously an environmental contention. The citations to the application that the Board identified as the basis for the contention are to the ER (*e.g.*, sections 3.4.3.2 and 3.4.3.3), and the bases for the contention—10 C.F.R. § 40.31(f), 10 C.F.R. § 51.45, 10 C.F.R. § 51.60, the National Environmental Policy Act, and NUREG-1569—involve environmental analyses. The fact that some information in the ER and Draft EA might also appear in the Safety Evaluation Report does not change the fact that Contention 2 is

CONCLUSION

For the above reasons, Crow Butte supports the NRC Staff motion. Contention 2 cannot migrate and is therefore moot. Contention 2 should be dismissed.

Respectfully submitted,

/s/ signed electronically by
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Dated at San Francisco, California
this 5th day of February 2018

an environmental contention. Moreover, technical/safety issues generally cannot migrate, so issuance of the NRC Staff's SER does not trigger the migration tenet. *Strata*, 78 NRC, LBP-13-10 at 7 n.7. Consequently, the entirety of Contention 2 is moot, and Contention 2 should be dismissed.

¹⁶ *Exelon Generation Company* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 182 (2005).

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CERTIFICATE OF SERVICE

I hereby certify that copies of “CROW BUTTE RESPONSE TO NRC STAFF MOTION TO DENY MIGRATION OF CONTENTION 2” in the captioned proceeding have been served this this 5th day of February 2018 via the Electronic Information Exchange (“EIE”), which to the best of my knowledge resulted in transmittal of the foregoing to all those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by
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COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at San Francisco, California
this 5th day of February 2018