

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Richard E. Wardwell
Dr. Thomas J. Hirons

In the Matter of

CROW BUTTE RESOURCES, INC.

(Marsland Expansion Area)

Docket No. 40-8943-MLA-2

ASLBP No. 13-926-01-MLA-BD01

May 21, 2018

MEMORANDUM AND ORDER

(License Amendment Effectiveness Stay Application, In Limine Motions, and
Site Visit/Limited Appearance Session/Evidentiary Hearing Scheduling)

During a May 16, 2018 prehearing conference, see Tr. at 142–93, the Licensing Board sought information from the parties on a number of different subjects associated with this proceeding and its current schedule. Based on the parties' input, the Board provides the following additional information and guidance:

1. License Amendment Issuance and Potential Stay Application

During the prehearing conference, the NRC staff indicated that with the April 30, 2018 issuance of its final environmental assessment, pursuant to 10 C.F.R. § 2.1202(a) it plans to notify the Board and the parties of the issuance of the license amendment sought by Crow Butte Resources, Inc., (CBR) authorizing in situ uranium recovery (ISR) operations in the Marsland Expansion Area (MEA) sometime during the week of May 20, 2018. See Tr. at 182. That notification, in turn, triggers the opportunity for intervenor Oglala Sioux Tribe (OST) to request a

stay of the license amendment's effectiveness pursuant to section 2.1213(a). The Board advised that in the absence of a joint request to establish another filing schedule or a party request for an extension of time submitted three business days before the due date for a stay application, the schedule set forth in section 2.1213 will govern the filing of any stay motion and responses. See Tr. at 182–83. This would include the section 2.1213(a) requirement that any stay application must be filed within five days after the staff provides notice of its action approving issuance of the amendment.¹

2. In Limine Motions

During the prehearing conference, the Board and the parties discussed a Board-suggested alternative filing schedule for in limine motions. Under this Board proposal, rather than filing two sets of in limine motions and responses (i.e., one after prefiled direct testimony and one after prefiled rebuttal testimony), only one set of motions and responses would be submitted after all prefiled direct and rebuttal testimony, along with any supporting exhibits, had been filed. See Tr. at 154–55. CBR and the staff objected to this proposal, based primarily on the concern that if the Board decided to disallow direct prefiled testimony and supporting exhibits based on their motions regarding that testimony, the parties would not have to prepare rebuttal testimony regarding the rejected portions of the prefiled evidentiary material. See Tr. at 155–56. Intervenor OST, on the other hand, supported the Board's proposal as a useful simplification of the in limine motion filing process. See Tr. at 156–57.

¹ As the Board indicated, however, it agrees with the position of the licensing board in the Ross ISR proceeding that the computation of time for this five-day period shall not include any non-business days, i.e., Saturday, Sunday, or a federal holiday. See Tr. at 183; see also Licensing Board Memorandum and Order (Computation of Time for Filing 10 C.F.R. § 2.1213(a) Stay Application), Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), Docket No. 40-9091-MLA (Apr. 4, 2014) at 2–3 (unpublished).

As the Board noted during the prehearing conference, when in limine motions were last discussed during the prehearing conference in January 2016, the Board expressed concern about their usefulness in 10 C.F.R. Part 2, Subpart L proceedings in which the Board has the responsibility both for deciding what questions will be asked of the witnesses relative to the prefiled testimony and exhibits that are submitted and for making materiality/relevance determinations about evidentiary submissions. See Tr. at 96. In response, the parties supported filing such motions, citing particularly the need to ensure that their evidentiary objections were preserved for appellate purposes. See Tr. at 98–100. Ultimately, the Board acceded to this request, albeit noting the staff-proffered suggestion that notwithstanding the Board’s concerns about the usefulness of such motions, they should be filed with the understanding that the Board could defer ruling on any motions until the time of the initial decision, as was done previously in the Crow Butte ISR license renewal case. See Tr. at 98–99, 157–58; see also Licensing Board Memorandum and Order (Revised General Schedule) (Feb. 11, 2016) at 8 & n.11 (unpublished). While the Board acknowledges CBR’s and the staff’s concern about having to prepare rebuttal testimony that might become irrelevant if the Board were to determine that OST direct testimony should be stricken, from the Board’s perspective having both the parties’ prefiled and rebuttal testimony before it in making any decision to rule on, or defer ruling on, in limine motions may be helpful.²

Accordingly, the revised general schedule included in Appendix A to this order implements this alternative in limine motion filing schedule by reducing slightly the time for submitting prefiled rebuttal testimony and supporting exhibits, while increasing slightly the time for the party submission of, and any Board ruling on, one round of in limine motions and

² In this regard, the Board requests that the party submitting an in limine motion indicate in the motion what portions of its prefiled testimony/exhibits address any prefiled evidentiary material for which exclusion is sought.

responses, which will now would cover both prefiled direct and rebuttal testimony and supporting exhibits.

3. Evidentiary Hearing Schedule

In an effort to mitigate the prospect of inclement weather affecting the hearing schedule, during the prehearing conference the Board explored the possibility of moving the evidentiary hearing forward one or two weeks from its currently scheduled dates. Because of scheduling conflicts identified by OST and the staff, this will not be possible. Consequently, the evidentiary hearing will remain as currently scheduled from Tuesday, October 30, through Thursday, November 1, 2018, in the Crawford/Chadron, Nebraska area. See Tr. at 161–64.

4. Site Visit

During the January 2016 prehearing conference, CBR indicated that if requested by the Board, it would support a site visit. See Tr. at 122. At the May 2018 conference, when asked about a visit to the MEA and the CBR central processing facility, which is located about a half-hour's drive to the northwest of the MEA, CBR again expressed a willingness to support such a visit. See Tr. at 166. CBR also indicated, however, that the need to obtain permission from the private landowner to go on to the MEA, the rugged terrain, and the potential need to use four-wheel drive vehicles might cause some issues accessing the MEA, which is essentially an undeveloped tract of land. See Tr. at 165–71.

Under the circumstances,³ the Board requests that CBR arrange for a site visit to its central processing facility on Monday, October 29, 2018, that can be attended by the Licensing

³ During the May 16 conference, CBR indicated its belief that “most” of those involved in this proceeding had been on an ISR facility site visit during the various other licensing board ISR application cases that have been conducted over the past decade. See Tr. at 168, 172. We would note, however, that one member of this Board has not been on such a visit previously and that, based on their experience in other proceedings, the other two Board members believe such a visit to the Crow Butte central processing facility would provide this member with a better understanding of ISR operations that will materially benefit his consideration of this case.

Board members, the Board's law clerks, and party representatives. Later this summer, after a formal notice of hearing has been issued regarding the evidentiary hearing, the Board will seek further logistical details from CBR regarding the site visit.

5. Oral Limited Appearance Session

At the May 16 prehearing conference, the Licensing Board again raised the issue of conducting a 10 C.F.R. § 2.315(a) oral limited appearance session in the Crawford/Chadron area. While CBR questioned the utility of such a session, no party objected to the Board conducting a session. See Tr. at 174–75. Consequently, the Board plans to hold an oral limited appearance session on the afternoon of Sunday, October 28, 2018, in the Crawford/Chadron area. Details regarding the location, time, and administrative process for that session will be included in the hearing notice issued later this summer.

And in that regard, the Board and the parties also discussed the possibility of receiving audio (in addition to written) limited appearance statements from interested members of the public. As we noted, the Board has no objection to the submission of such audio statements via, for instance, hard media (i.e., compact disc) or as an e-mail attachment. But we will need to establish some technical requirements for the submission of such statements (e.g., file format, file size) as well as protocols for the timing of such submissions, which ideally should be available to the Board members sometime before the evidentiary hearing. We noted as well that to preserve any audio statements for the record, they will be transcribed (at the agency's expense) so the statements can be placed in the docket of this proceeding along with any written limited appearance statements and the transcript of the oral limited appearance session. See Tr. at 175–80.

6. Miscellaneous Items

Toward the close of the prehearing conference, the Board also noted that, absent a request from one or more of the parties, the order issued at the parties' behest on January 26, 2018, forestalling a change in the timing of the submission of mandatory document disclosure updates from monthly to bi-weekly would remain in effect for the balance of this proceeding's discovery period. See Tr. at 184–85; see also Licensing Board Memorandum and Order (Granting Joint Unopposed Motion to Retain Current Monthly Disclosure Update Schedule) (Jan. 26, 2018) (unpublished).

Finally, once again the Board raised with the parties the possibility of settlement, including the appointment of a settlement judge. See Tr. at 185–88.

Pursuant to 10 C.F.R. § 2.332, the general schedule for this proceeding is revised as set forth in Appendix A to this issuance. Any party objections to, or other comments regarding, this memorandum and order shall be filed on or before Tuesday, May 29, 2018. Cf. 10 C.F.R. § 2.329(e).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 21, 2018

APPENDIX A

Dated: 05/21/2018

GENERAL SCHEDULE -- Crow Butte Resources, Inc. (Marsland Expansion Area) Proceeding

Event	National Environmental Policy Act-Related Environmental Contentions	Atomic Energy Act-Associated Safety Contentions
Licensing Board Order on Standing/Admissibility of Contentions	May 10, 2013	May 10, 2013
Mandatory Disclosures and Staff Hearing File Due	Sept. 9, 2013	Sept. 9, 2013
Cultural Resources Portion of NRC Staff's Draft Environmental Assessment (EA) Issued	June 30, 2014	Not Applicable (N/A)
New/Amended Contention Motion Regarding Cultural Resources Portion of Staff EA Due	July 30, 2014	N/A
Summary Disposition Motions re Admitted Contention 1 Due ¹	Aug. 6, 2014	N/A
Responses Supporting Summary Disposition Motions Due ²	Aug. 18, 2014	N/A
Responses Opposing Summary Disposition Motions Due	Sept. 2, 2014	N/A
Licensing Board Ruling on Summary Disposition Motions	Oct. 24, 2014	N/A
Balance of Staff's Draft EA Issued	Dec. 15, 2017	N/A
New/Amended Contention Motion/Migration Declaration Filed	Jan. 16, 2018	N/A

¹ If no new/amended contentions are submitted or no new/amended contentions are admitted/approved, the summary disposition motion/responses schedule for admitted contentions begins seven days from the date motions for new/amended contentions were due or were denied.

² If no responses supporting a summary disposition motion are filed, then responses opposing the motion are due within 20 days of the date of the dispositive motion.

Event	National Environmental Policy Act-Related Environmental Contentions	Atomic Energy Act-Associated Safety Contentions
Answers to New/Amended Contention Motion/Migration Declaration Due	Jan. 30, 2018	N/A
Replies to Answers to New/Amended Contention Motion/Migration Declaration Due	Feb. 6, 2018	N/A
Licensing Board Ruling on New/Amended Contention Admission/Contention Migration Regarding Balance of Staff's Draft EA	Mar. 12, 2018	N/A
Mandatory Disclosure Updates Completed for Admitted New/Amended Contentions Regarding Balance of Staff's Draft EA	Mar. 26, 2018	N/A
Final Staff EA Issued	Apr. 30, 2018	N/A
Final Staff Safety Evaluation Report (SER) Issued		Jan. 31, 2018
Schedule for New/Amended Contentions/Contention Migration Declaration Regarding Final Staff EA and/or SER	Any Environmental/Safety-Related Contentions	
New/Amended Contention Motion/Migration Declaration Due	May 30, 2018	
Answers to New/Amended Contention Motion/Migration Declaration Due	June 13, 2018	
Replies to Answers re New/Amended Contention Motion/Migration Declaration Due	June 20, 2018	
Licensing Board Ruling on New/Amended Contention Admission/Contention Migration	July 20, 2018	
Admitted New/Amended Contention Mandatory Disclosure Updates Completed/Motion to Invoke Subpart N Procedures Due	Aug. 3, 2018	
Evidentiary Hearing Schedule	All Remaining Admitted Contentions	
Position Statements/Prefiled Direct Testimony Due	Aug. 17, 2018	

Event	National Environmental Policy Act-Related Environmental Contentions	Atomic Energy Act-Associated Safety Contentions
Rebuttal Statements/Prefiled Rebuttal Testimony Due	Sept. 5, 2018	
In Limine Motions on Prefiled Direct/Rebuttal Testimony Due	Sept. 11, 2018	
In Limine Motion Responses Due	Sept. 17, 2018	
Licensing Board Ruling on In Limine Motions	Sept. 24, 2018	
Proposed Cross-Examination Questions/Requests for Cross-Examination Due	Oct. 1, 2018	
Responses to Requests for Cross-Examination Due	Oct. 9, 2018	
Licensing Board Ruling on Requests for Cross-Examination	Oct. 16, 2018	
Evidentiary Hearing	Oct. 30-Nov. 1, 2018	
Proposed Findings of Fact/Conclusions of Law Due	Dec. 3, 2018	
Reply Findings of Fact/Conclusions of Law Due	Jan. 4, 2019	
Licensing Board Initial Decision	Feb. 19, 2019	

UNITED STATES OF AMERICA
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In the Matter of)
)
CROW BUTTE RESOURCES, INC.) Docket No. 40-8943-MLA-2
)
In-Situ Leach Uranium Recovery Facility,) ASLBP No. 13-926-01-MLA-BD01
Crawford, Nebraska)
)
(License Amendment –)
Marsland Expansion Area))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (License Amendment Effectiveness Stay Application, In Limine Motions, and Site Visit/ Limited Appearance Session/ Evidentiary Hearing Scheduling)** have been served upon the following persons by Electronic Information Exchange.

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Crow Butte Resources, Inc., Docket No. 40-8943-MLA-2

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[Original signed by Brian Newell]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of May, 2018