

August 7, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION TO STRIKE PORTIONS OF  
THE REBUTTAL STATEMENT OF LINSEY MCLEAN

INTRODUCTION

In accordance with 10 C.F.R. §§ 2.319, 2.323, 2.337 and 2.1204, the staff of the U.S. Nuclear Regulatory Commission (Staff) files this motion to strike portions of Consolidated Intervenor's Exhibit INT-071, the Rebuttal Statement of Linsey McLean.<sup>1</sup> As discussed below, with the exception of one sentence, Ms. McLean's Rebuttal Statement goes beyond the scope of permissible rebuttal testimony as set forth in the Board's Order dated July 24, 2015.<sup>2</sup> Therefore, except for that sentence, Ms. McLean's statement should be stricken as impermissible additional rebuttal testimony.

BACKGROUND

Pursuant to Board orders in this proceeding, the parties submitted their initial testimony and exhibits on May 8, 2015, and rebuttal testimony and exhibits on June 8, 2015.<sup>3</sup> On July 23,

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<sup>1</sup> As required by 10 C.F.R. § 2.323(b), counsel for the NRC Staff consulted with the other parties regarding this motion. Counsel for Crow Butte Resources (CBR) stated that CBR supports the Staff's motion. Counsel for Consolidated Intervenor's (CI) stated that CI take no position on the Staff's motion. Counsel for the Oglala Sioux Tribe (OST) did not respond to Staff Counsel's consultation request.

<sup>2</sup> Order (Granting NRC Staff's Motion to Submit Revised Rebuttal Testimony and New Exhibit and Providing All Other Parties with an Opportunity for Rebuttal Testimony and to Propose Additional Questions in Camera) (July 24, 2015) (unpublished) ("July 24 Order").

2015, the Staff filed a motion requesting leave to file revised rebuttal testimony and a new exhibit.<sup>4</sup> The new exhibit, NRC-092, consisted of an errata sheet containing a revision to Section 2.4.1 of the Staff's Environmental Assessment (EA). In the Staff's July 23 Motion, the Staff explained the errata as follows:

Specifically, page 12 of the EA states, "Land application after wet weather events will not be utilized by CBR since it is not included in the current NPDES permit No. NE0130613 from the State of Nebraska." CBR's NPDES permit states, however, that "[l]and application . . . shall only be permitted during and immediately after wet weather events."<sup>5</sup> Consequently, the Staff has issued an Errata to the EA to correct the relevant portion of the statement on page 12 of the EA to read as follows: "Land application except during and immediately after wet weather events will not be utilized by CBR . . . ."<sup>6</sup>

As further explained in the Staff's July 23 Motion, to correct the inaccuracy in its rebuttal testimony, the Staff revised response A.12.3 of its rebuttal testimony by striking the first sentence of the paragraph and the first two words of the following sentence, as indicated below:

~~Moreover, Dr. McLean has not established that a pathway exists by which the land application of treated process wastewater under dry conditions will cause the significant adverse impacts to human beings and wildlife that she describes (land application after wet weather events is not allowed under CBR's NDEQ permit) (Ex. NRC 010 at 12). In fact, Dr. McLean identifies other pathways by which the heavy metals she discusses have been known to cause impacts to the environment, including impacts from uranium acting in concert with calcium ions generated by ISR mining generally "as well as in runoff waters of the Rocky Mountains over old uranium open pit mines" (Ex. INT-048 at 10) and "legal dumping" of arsenic "into commercial fertilizers from mining and ore smelting waste since 1976" (Ex. INT-048 at 14).~~

This was the only substantive change to the Staff's rebuttal testimony arising from the errata.

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<sup>3</sup> Order (Setting Schedule through Evidentiary Hearing and Providing Case Management Information) (March 25, 2015) ("March 25 Order") (unpublished); Order (Granting in Part Unopposed Motion by the Oglala Sioux Tribe for a One-Week Extension of Time of Certain Filing Deadlines) (May 1, 2015) (unpublished); Order (Extending Time for Filing of Answering Statements & Testimony) (May 22, 2015) (unpublished).

<sup>4</sup> NRC Staff Motion to File Revised Rebuttal Testimony and New Exhibit (July 23, 2015) ("Staff's July 23 Motion").

<sup>5</sup> Ex. CBR-043 at 3.

<sup>6</sup> Staff's July 23 Motion at 2.

On July 24, 2015, the Board granted the Staff's July 23 Motion and offered the other parties an opportunity to submit "further rebuttal testimony or exhibits related solely to the NRC Staff's revised rebuttal testimony and new exhibit that is the subject of [the Staff's July 23 Motion]." <sup>7</sup> On July 31, 2015, Consolidated Intervenors filed the Rebuttal Statement of Linsey McLean (Exhibit INT-071). <sup>8</sup>

### DISCUSSION

In a hearing conducted under 10 C.F.R. Part 2, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted," and "[i]mmaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable." <sup>9</sup> Thus, "the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of a written presentation . . . that is irrelevant, immaterial, unreliable, duplicative or cumulative" <sup>10</sup> and may "[r]estric[t] irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments." <sup>11</sup> Furthermore, rebuttal testimony may only address matters which the party could not have raised earlier; it may not raise matters for the first time that reasonably should have been—but were not—raised in the party's case-in-chief. <sup>12</sup>

Finally, and most importantly, the Board's July 24 Order limits the scope of rebuttal testimony in this instance to "further rebuttal testimony or exhibits related *solely to the NRC Staff's revised rebuttal testimony and new exhibit that is the subject of [the Staff's July 23*

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<sup>7</sup> July 24 Order at 1-2.

<sup>8</sup> Rebuttal Statement of Linsey McLean (July 31, 2015).

<sup>9</sup> 10 C.F.R. § 2.337(a).

<sup>10</sup> 10 C.F.R. § 2.319(d).

<sup>11</sup> 10 C.F.R. § 2.319(e).

<sup>12</sup> See, e.g., *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 655 (2009) ("Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.").

*Motion*].”<sup>13</sup> Therefore, the Staff understands the statement in the Board’s July 24 Order to mean that other parties could provide further testimony addressing only the errata (Exhibit NRC-092) and the changes made to the Staff’s rebuttal testimony as a result of the errata. As explained below, with the exception of a single sentence, Ms. McLean’s rebuttal statement goes beyond the scope of the Board’s order and should therefore be stricken.

The first section of Ms. McLean’s rebuttal statement purports to address the paragraph in the Staff’s revised rebuttal testimony that the Staff revised as a result of the errata.<sup>14</sup> Ms. McLean’s statement indicates that she is responding to the version of the paragraph from the Staff’s original rebuttal testimony, including the text that was removed when the Staff submitted its revised testimony.<sup>15</sup> But because that text is no longer part of the Staff’s rebuttal testimony, there is no reason for Ms. McLean to address it. Simply put, there is nothing to rebut.

Moreover, rather than addressing the Staff’s errata or the changes in the Staff’s rebuttal testimony, Ms. McLean instead discusses the following topics: the ineffectiveness of dilution prior to land application, the differences in effects between inorganic and organic forms of salts, and the greater toxicity of inorganic metals in ruminants as opposed to humans.<sup>16</sup> After that discussion, Ms. McLean provides nearly a page of references. Ms. McLean does not explain how any of this discussion is relevant to the Staff’s errata or the Staff’s revised rebuttal testimony as it stands *without* the sentence the Staff removed.<sup>17</sup> The only sentence in Ms. McLean’s discussion that falls within the scope of permitted rebuttal is the following statement:

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<sup>13</sup> July 24 Order at 1-2 (emphasis added).

<sup>14</sup> Rebuttal Statement of Linsey McLean at 1-4.

<sup>15</sup> See *id.* at 1 (highlighting original text of Staff’s rebuttal testimony that was removed in the revised version).

<sup>16</sup> *Id.*

<sup>17</sup> In fact, Ms. McLean appears to be, at least in part, simply repeating or reiterating information from her initial testimony (see *id.* at 2 (“As stated in my initial testimony. . . .”)).

Further, land application during wet weather vs dry weather was deemed necessary to prevent further migration of the metals from flooding and runoff, and has nothing to do with the actual toxic bioavailability of the metals, only the spread of their territories.<sup>18</sup>

Therefore, with the exception of the sentence quoted above, the discussion on pages 1-4 of Ms. McLean's rebuttal statement (through the list of references on page 4) should be stricken in its entirety.

The remainder of Ms. McLean's rebuttal statement<sup>19</sup> addresses portions of CBR's and the Staff's rebuttal testimony that have nothing to do with the Staff's errata or the revisions to the Staff's rebuttal testimony. Specifically, Ms. McLean responds in two places to CBR's rebuttal testimony concerning evaporation ponds.<sup>20</sup> She also responds to CBR's rebuttal testimony asserting that Ms. McLean failed to provide site-specific assessment of impacts of land application at the CBR facility.<sup>21</sup> Finally, Ms. McLean responds to the Staff's previously filed rebuttal testimony concerning her claims about effects of selenium on human health and wildlife.<sup>22</sup> The Board's July 24 Order did not grant the parties leave to respond to CBR's rebuttal testimony, nor did it allow any party to respond to portions of the Staff's rebuttal testimony other than the part that was revised because of the errata. Therefore, the discussion on pages 4-9 of Ms. McLean's rebuttal testimony, beginning with the response to CBR's testimony about evaporation pond liners, should be stricken in its entirety.

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<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* at 4-9.

<sup>20</sup> *Id.* at 4-5, 6-7.

<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> *Id.* at 7-9.

CONCLUSION

For these reasons, the NRC Staff respectfully requests that the Board strike Ms. McLean's rebuttal statement as discussed above.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 7th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S MOTION TO STRIKE PORTIONS OF THE REBUTTAL STATEMENT OF LINSEY MCLEAN" in the above captioned proceeding have been served this 7th day of August, 2015, via the NRC's Electronic Information Exchange ("EIE"), and via e-mail to David Frankel and Thomas Ballanco, counsels for Consolidated Intervenors, 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**

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