UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	Docket No. 40-9091-MLA
	)	
STRATA ENERGY, INC.,	)	
	)	ASLBP No. 12-915-01-MLA-BD01
(Ross In Situ Recovery Uranium Project)	)	March 31, 2013

NATURAL RESOURCES DEFENSE COUNCIL'S &
POWDER RIVER BASIN RESOURCE COUNCIL'S
JOINT MOTION TO MIGRATE OR AMEND CONTENTIONS,
AND TO ADMIT NEW CONTENTIONS IN RESPONSE TO STAFF'S
FINAL SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309, and the Board's Scheduling Order dated November 6, 2013, Intervenors Natural Resources Defense Council (NRDC) and Powder River Basin Resource Council (PRBRC) hereby set forth "migrated" or amended contentions regarding the Final Supplemental Environmental Impact Statement (FSEIS) for Strata Energy's (SEI or Strata) proposed Ross Project in-situ leach (ISL)[1] uranium mine issued by Nuclear Regulatory Commission Staff (NRC or the Staff) on February 28, 2014. NRDC and PRBRC respectfully request that each of their existing contentions be migrated, and, alternatively submit amended contentions as to each prior admitted contentions. We file these contentions in the alternative out of an abundance of caution, in light of the Board's instructions that it is incumbent upon Intervenors to submit contentions in multiple forms in the absence of any certainty regarding whether the Board will deem them appropriate as "migrated," or rather will only accept them as

[1] In situ leach (ISL) is also referred to as in situ recovery (ISR). For the purposes of this filing, the terms are used synonymously.

amended contentions.[2] NRDC and PRBRC also submit two new environmental contentions based on the issuance of the Final SEIS, one concerning the failure to properly define the major federal action at issue in this FSEIS, and a second concerning the failure to lawfully scope the appropriate confines of the project under review.

I. BACKGROUND

A. Procedural Background

On October 27, 2011 and pursuant to 10 C.F.R. § 2.309 and the Nuclear Regulatory Commission's (NRC, or Commission) Federal Register notice published at 76 Fed. Reg. 41,308 (July 13, 2011), Petitioners NRDC and PRBRC submitted a Petition to Intervene and Request for a Hearing in the above-captioned matter. NRDC and PRBRC presented several contentions addressing deficiencies in Strata Energy, Inc.'s (Strata) source materials license application for the proposed Ross ISR Uranium Project in Crook County, Wyoming.

On February 10, 2012, the Board held that Petitioners had established standing[3] and admitted two of their five contentions in whole while admitting the remaining three in part. *See* LBP-12-3, at 1–2, 18–25, 28, 32, 36, 37, and 39–40. On May 11, 2012 the Commission affirmed the Board's standing determination. *See* CLI-12-12.

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[2] *See* LPB-13-10 at 22 n.15 ("if there is any question about whether an admitted contention merits a new/amended contention motion relative to the staff's environmental document, the best approach seemingly would be to make a filing that treats the contention as if it were a new/amended, or perhaps most prudently, argues in the alternative"); *see also* Aug. 27, 2013 Order Denying Reconsideration at 6 n.4 (admonishing that "if any question exists, [the] best approach would be to argue in the alternative regarding post-environmental statement migration or amendment of admitted environmental contention").

[3] NRDC's and PRBRC's standing was confirmed in this Board's Order of February 2012 and the Commission's Order of May 2012. *See* LBP-12-3, "Memorandum and Order, Ruling on Standing and Contention Admissibility" at 1–2, 18–25; and CLI-12-12. As such, pursuant to 10 C.F.R. § 2.309(c)(4), NRDC and PRBRC are not required to address standing in this filing.

On March 21, 2013, Staff issued the Draft Supplemental Environmental Impact Statement for the Ross ISR Project (DSEIS), and on May 6, 2013, NRDC and PRBRC submitted a motion to migrate their admitted contentions to the DSEIS, and submitted one new contention. On July 26, 2013, the Board held that the originally admitted contentions 1, 2, and 3 were properly raised and would migrate to challenges to the DSEIS. LPB-13-10 at 11-19. However, as regards contention 4, which concerned the consideration of the cumulative impacts of the Ross Project in combination with the planned expansion of uranium mining operations in the immediate vicinity of the project site, the Board determined that the cumulative impacts section of the DSEIS disqualified the contention for migration, and required submission of a new or amended contention focusing on the DSEIS's cumulative impacts discussion. *Id.* at 19-22.

Finally, the Board also denied admission of Intervenors' new contention, which concerned the limitation of the "proposed action" considered in the SEIS to the Ross Project, rather than encompassing the entire project, which includes surrounding mine sites that will be served by the Ross Project's central processing facility. As to that contention, the Board concluded that Intervenors had not presented sufficient evidence showing that a genuine dispute exists regarding whether the Ross Project will have independent utility, and that Intervenors' argument concerning the other elements necessary to prevail on this contention were not timely. *Id.* at 22-32.

On August 5, 2013, NRDC and PRBRC filed a motion for reconsideration concerning the cumulative impacts contention, urging that the Board either accept the contention as migrated to the DSEIS, or alternatively consider it to be an amended contention. On August 27, 2013 the Board denied the motion, on the grounds that Intervenors had failed to explicate precisely how the contention satisfied each of the 10 C.F.R. § 2.309(c) "good cause" factors, and failed as well

to explicate how each of the separate 10 C.F.R. § 2.309(f)(1) admissibility factors was satisfied. Aug. 27, 2013 Order at 4-6. As regards Intervenors' arguments that it was apparent that the contention satisfied all of these factors, the Board explained that in light of Intervenors' "legal and technical resources," it was incumbent upon them to fully explicate how each factor is satisfied, and, having failed to do so, the Board would not allow the contention to be admitted. *Id.*

On February 28, 2014, the Board made the FSEIS publicly available, and pursuant to the Board's schedule, new or amended contentions based on the FSEIS are due this date.[4]

B. Legal Standards

Under 10 C.F.R. § 2.309(f)(1), any contention – including a new or amended contention, *see id.* § 2.309(c)(4) – must satisfactorily address six criteria:

(i) include "a specific statement of the issue of law or fact to be raised";

(ii) provide "a brief explanation of the basis for the contention";

(iii) explain how "the issue raised in the contention is within the scope of the proceeding";

(iv) explain how "the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding";

(v) provide "a concise statement of the alleged facts or expert opinions which support the . . . position on the issue and on which the petitioner intends to rely at hearing . . ."; and

(vi) include "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

Where a contention is submitted after the initiation of a proceeding, the submitter must also satisfy the "good cause" criteria of 10 C.F.R. 2.309(c), showing that:

[4] Per the parties' request, in a March 4, 2014 Order the Board directed that any pleading raising new or amended contentions should be submitted in a single pleading in which "the discussion in support of any individual new/amended contention shall not exceed ten pages." Mar. 4, 2014 Order at 2.

(i) "the information upon which the filing is based was not previously available";

(ii) "the information upon which the filing is based is materially different from information previously available"; and

(iii) "the information has been submitted in a timely fashion based on the availability of the subsequent information."

NRC regulations dictate that contentions arising pursuant to the National Environmental Policy Act (NEPA) must initially be "based on the applicant's environmental report [ER]." 10 C.F.R. § 2.309(f)(2). If admitted, those contentions may be amended, or new contentions proffered, as long as "there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." *Id*.

II. CONTENTIONS

As explained in the Board's July 26, 2013 Memorandum and Order, NEPA-related contentions admitted over an applicant's ER may "transmute into challenges to the staff's NEPA statement," where the statement "adopt[s] the ER-associated information/analysis that was challenged as inadequate or, alternatively, maintains the same omission that was alleged to be in the ER . . . ." LPB 13-10 at 7. Under this "migration tenet," a contention will automatically be "amended" to "substitute the staff's environmental review impact statement information/analysis (relative to a contention of adequacy) or lack of information/analysis (relative to a contention of omission)" without any new or amended contention filing. *Id.* at 8. However, "if the information in the staff's NEPA statement is sufficiently different," then the earlier contention is not eligible for migration and an amended or new contention is necessary. *Id.* at 9. Accordingly, the Board held that "if any question exists" as to whether a contention migrates, petitioner should" argue in the alternative that the contention either migrates or for admission of an amended contention. We

therefore do so below, addressing each of the admissibility and good cause factors separately for each contention, as also directed by the Board. Aug. 27, 2013 Order at 4-6.

Whichever form of contention is appropriate, the ultimate admissibility standards remain the same. "[I]n passing on the admissibility of a contention. . . 'it is not the function of a licensing board to reach the merits of [the] contention.'" *Sierra Club v. NRC.*, 862 F.2d 222, 226 (9th Cir. 1988) (quoting *Carolina Power and Light Co.*, 23 N.R.C. 525, 541 (1986)). Instead, the Board evaluates the admissibility of contentions in a manner similar to a federal court's review of claims in a well-pled complaint:

> The relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated; whether it improperly invokes the hearing process by raising non-justiciable issues, such as the propriety of statutory requirements or agency regulations; and whether it raises issues that are appropriate for litigation in the particular proceeding.

Sierra Club, 862 F.2d at 228 (citing *Tex. Utils. Elec. Co.*, 25 N.R.C. 912, 930 (1987) and *Phila. Elec. Co.*, 8 A.E.C. 13, 20–21 (1974)); *see also* LBP-12-3 at 25 and *Crow Butte Res.*, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 at *11, 14 (May 18, 2009) (holding that the applicant's "arguments go to the merits" and that "[w]hether the [petitioner] has proved its claim is not the issue at the contention pleading stage").

A. NRDC AND PRBRC REQUEST THAT THEIR ADMITTED CONTENTIONS BE MIGRATED TO THE FSEIS.

At present NRDC and PRBRC have 4 contentions admitted into this proceeding, Environmental Contentions 1-3, which have been admitted as challenges to the DSEIS, and Environmental Contention 4/5A, which was admitted against the Environmental Report. *See* LBP-13-10, Appendix A. For the foregoing reasons, NRDC and PRBRC maintain that each of

these Contentions is eligible to migrate to the FSEIS, and respectfully request that the Board deem each of them to be so migrated.

Migrated Environmental Contention 1: The FSEIS fails to adequately characterize baseline (*i.e.*, original or pre-mining) groundwater quality.

CONTENTION: The FSEIS fails to comply with 10 C.F.R. §§ 51.90-95, 10 C.F.R. Part 40, Appendix A, and NEPA because it lacks an adequate description of the present baseline (*i.e.*, original or pre-mining) groundwater quality and fails to demonstrate that groundwater samples were collected in a scientifically defensible manner, using proper sampling methodologies. The FSEIS's departure from NRC guidance serves as additional evidence of these regulatory violations. NRC, NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications, §§ 2.7.1, 2.7.3, 2.7.4 (2003).[5]

Bases and Supporting Evidence for Migrated Contention 1

This contention is supported by the original declarations of Drs. Moran, Sass, and Abitz (particularly Moran Decl. at ¶¶ 36–56, Sass Decl. at ¶¶ 8–15, 22–23, and Abitz Decl. at ¶¶ 15–27), as well as the second declaration from Dr. Abitz filed June 3, 2013. *See* Second Declaration of Dr. Richard Abitz ("2d Abitz Decl."), ¶¶ 6-23. It is further supported by the combined third declaration from Dr. Abitz and first declaration from Dr. Lance Larson, attached hereto. Abitz/Larson Decl. ¶¶ 8-30. This new declaration reiterates the concerns in the prior declarations, explaining both that obtaining baseline water quality data is necessary to properly

[5] The migrated contention is the precise contention admitted by this board in LBP-13-10 on July 26, 2013. The only difference is resubmission with the regulatory cite of 10 CFR § 51.90-95 as it applies to the staff's NEPA responsibilities regarding an FSEIS. We include Part 51.92, which concerns a Supplemental FEIS in light of Staff's characterization of the document as a "Supplemental" FEIS, although as explained below the FSEIS does not satisfy the criteria in that Part. *See infra* at 40.

evaluate environmental impacts in the SEIS, and that collecting this data later risks allowing the further deterioration of the baseline as a result of activities that may occur in the area in the meantime. *Id.*

The Petition to Intervene explained the requirements that must be satisfied for the Applicant to adequately consider the environmental impacts associated with groundwater quality, and inasmuch as this is a migrated contention need not be repeated here. *See* Petition to Intervene at 10-12. The Board originally admitted Contention 1 against the ER, explaining that the applicant and Staff are "*incorrect* in their assertion that 10 C.F.R. § 40.32(e) prohibit[s] the applicant from gathering complete information on baseline water quality." LPB12-3 at 28 (emphasis added). To the contrary, the Board concluded that because the applicable regulations *permit* the collection of such data, and the data is plainly critical to a meaningful analysis of the environmental impacts associated with the project, Intervenors had framed an admissible contention. Subsequently, the Board admitted this same contention against the DSEIS, explaining that since Staff and Strata Energy, Inc. ("SEI") continued to assert that "the data required by Appendix A 'is not required to be provided at this time and does not yet exist,'" "the central deficiency alleged by Joint Intervenors' environmental contention 1 with regard to the SEI ER applies with equal force to the DSEIS." LPB 13-10 at 11-13.

As to this contention, the FSEIS adopts the DSEIS-associated information and/or analysis that was challenged as inadequate in the DSEIS. It contains the same omission as the DSEIS (and the ER) by failing to collect the requisite information on baseline water quality, and instead continuing to claim that such data collection is not required and only need be collected in a "post-licensing, pre-operational" phase just before the mining commences, long after the issuance of any EIS and not subject to public review. *See* Abitz/Larson Decl. ¶¶ 8-30. As Drs.

Abitz and Larson discuss, while the FSEIS may have changed the terminology from "baseline" to "post-licensing pre-operational" testing, the substance of the analysis remains the same. *Id.* ¶¶ 8-10. The FSEIS carries forward the DSEIS's failure to include environmental analysis of water testing sufficient to determine baseline, or pre-licensing, water quality. *Id*. As opposed to requiring additional water testing sufficient to establish scientifically defensible baseline values as Intervenors' technical experts have explained is possible, the NRC simply allows Strata to establish such a baseline at a later date – after NEPA is complete and the public's participation opportunities are concluded. As discussed in Intervenors' previous pleadings and comments on the DSEIS, and as highlighted by Drs. Abitz and Lance, this analysis failure prevents the agency from considering environmental impacts related to changes in water quality that are anticipated to occur by mining operations – the very impacts that are perhaps the most paramount to consider in a NEPA document for a uranium recovery project. Accordingly, because the information in the FSEIS is not sufficiently different to warrant an amended contention 1, NRDC and PRBRC respectfully request that the Board migrate this contention 1 to the FSEIS.

Migrated Environmental Contention 2: The FSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits.
CONTENTION: The FSEIS fails to meet the requirements of 10 C.F.R. §§ 51.90-95 and NEPA because it fails to evaluate the virtual certainty that the applicant will be unable to restore groundwater to primary or secondary limits in that the FSEIS does not provide and evaluate information regarding the reasonable range of hazardous constituent concentration values that

are likely to be applicable if the applicant is required to implement an Alternative Concentration Limit (ACL) in accordance with 10 C.F.R. Part 40, App. A, Criterion 5B(5)(c).[6]

Bases and Supporting Evidence for Migrated Contention 2

This admitted contention is supported by the original declarations of Drs. Moran and Abitz (particularly Moran Decl. at ¶¶ 66–67, 70–75 and Abitz Decl. at ¶¶ 28–29), as well as a second declaration from Dr. Abitz filed June 3, 3013. 2d Abitz Decl. ¶¶ 24-29. It is further supported by the combined third declaration from Dr. Abitz and first declaration from Dr. Lance Larson, attached hereto. Abitz/Larson Decl. ¶¶ 31-47. This new declaration reiterates the concerns in the prior declarations, explaining that NRC staff has neither substantiated its claim that impacts on groundwater quality will ultimately be small, nor has it provided analysis that demonstrates how it arrives at or even quantify such a determination. *Id.*

The Petition to Intervene explained the requirements that must be satisfied for the Applicant to adequately consider the environmental impacts associated with groundwater quality, and inasmuch as this is a migrated contention need not be repeated here. See Petition to Intervene at 10-12. The Board originally admitted Contention 2 against the ER, finding that NEPA and NRC implementing regulations require an analysis of "irreversible and irretrievable commitments of resources which would be involved in the proposed action." LBP-12-3 at 33 (internal quotation omitted). In the context of ISR uranium mining, NEPA regulations necessarily implicate groundwater; thus, the Board rightly observed that "unless the baseline can be restored, there will be an 'irreversible and irretrievable' commitment of a resource the parameters of which must, under NEPA and agency regulations, be outlined in the applicant's

[6] The migrated contention is the precise contention admitted by this board in LBP-13-10 on July 26, 2013. The only difference is resubmission with the regulatory cite of 10 CFR 51.90-95 as it applies to the staff's NEPA responsibilities regarding an FSEIS.

ER." *Id*. Grappling with the implications of Contention 2, the Board reasoned that any environmental analysis of the impacts resulting from an "alternative concentration limit" (ACL) would necessitate

> … some determination about what that ACL would be. But, as SEI and the staff assert, given the differences that exist among well fields, it likely cannot be known at this juncture exactly what alternative concentration will be deemed necessary to protect human health and the environment under the nineteen factors of Appendix A, Criterion 5B(6). Joint Petitioners, on the other hand, suggest that the magnitude of the endeavor could be narrowed to a range of possible ACLs based on the historical experience of other ISL/ISR sites. What this essentially calls for is a bounding analysis, something that is not unheard of in the context of NEPA analyses and does not seem untoward in this instance, given the importance of NEPA as a mechanism for providing information regarding the parameters of "irreversible and irretrievable" resource commitments. As such, we do not consider this concern a reason for precluding this contention's admission.

Id. at 34 (citations omitted). Finally, cognizant of the fact that at some distant future date Petitioners might have an opportunity to challenge the sufficiency of a specific, proposed ACL that is instituted after a failed attempt at restoring contaminated groundwater, the Board found "the ability of any interested person to obtain an AEA hearing at that point would not provide the relief Joint Petitioners *should be able to obtain now*, consistent with NEPA, *i.e*., a public explanation of the impacts of being unable to restore the mined aquifer to primary or secondary baseline and, instead, having to use an ACL, as that alternate limitation might be implemented per a reasonable bounding analysis." *Id*. at 35 (emphasis added). Accordingly, the Board concluded that Petitioners had framed an admissible contention.

Subsequently, the Board migrated this contention against the DSEIS, explaining that while the DSEIS "does, in a general way, address the issue" of concern, it:

> is apparent, however, that the DSEIS does not, as the ER did not, address the matter that is the crux of the concern engendered in admitting contention 2, i.e., given that reasonably foreseeable environmental impacts are to be outlined in an agency's NEPA statement and that an ACL realistically may be necessary at the time of facility

> decommissioning, within a reasonable range, what is that ACL likely to look like and what are the associated environmental impacts associated with such an ACL.

LPB 13-10 at 15. However, the Board slightly refined the contention by adding the final phrase: "in that the DSEIS does not provide and evaluate information regarding the reasonable range of hazardous constituent concentration values that are likely to be applicable if the applicant is required to implement an Alternative Concentration Limit (ACL) in accordance with 10 C.F.R. Part 40, App. A, Criterion 5B(5)(c)." *Id.* at 16.

As to this contention, the FSEIS adopts the DSEIS-associated information and/or analysis that was challenged as inadequate in the DSEIS. Abitz/Larson Decl. ¶¶ 31-47. It contains the same omission as the DSEIS (and the ER) by not providing and evaluating information regarding the reasonable range of hazardous constituent concentration values that are likely to be applicable if the applicant is required to implement an Alternative Concentration Limit (ACL) in accordance with 10 C.F.R. Part 40, App. A, Criterion 5B(5)(c). *Id*. ¶¶ 45-47. As Drs. Abitz and Larson explain, while the FSEIS contains some added analysis of other projects, which NRC claims demonstrates the ability of uranium mining operations to restore aquifers, this new information does not address the fundamental flaw of the EIS, as identified by Intervenors' Contention 2: that no ISL uranium project has restored *all* constituents to pre-mining baseline conditions and that Strata is likely to repeat that fate here. *Id*. at ¶¶ 31-44. Importantly, a discussion of selected restoration results at other ISL wellfields in other locations in the FSEIS – which Drs. Abitz and Larson clearly refute as evidence of successful restoration – does not remedy the DSEIS's failure to discuss impacts of ACLs at *this* mine site, which is the heart of Contention 2. *Id*. at ¶¶ 46-47. Accordingly, because the information in the FSEIS is not

sufficiently different to warrant an amended contention 2, NRDC and PRBRC respectfully request that the Board migrate this contention 2 to the FSEIS.

Migrated Environmental Contention 3: The FSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.

CONTENTION: The FSEIS fails to assess the likelihood and impacts of fluid migration to the adjacent groundwater, as required by 10 C.F.R. §§ 51.90-95 and NEPA, and as discussed in NUREG-1569 § 2.7, in that

> 1. The FSEIS fails to analyze sufficiently the potential for and impacts associated with fluid migration associated with unplugged exploratory boreholes, including the adequacy of the applicant's plans to mitigate possible borehole-related migration impacts by monitoring wellfields surrounding the boreholes and/or plugging the boreholes.
>
> 2. There was insufficient information for the NRC staff to make an informed fluid migration impact assessment given that the applicant's six monitor-well clusters and the 24-hour pump tests at four of these clusters provided insufficient hydrological information to demonstrate satisfactory groundwater control during planned high-yield industrial well operations.[7]

Bases and Supporting Evidence for Migrated Contention 3

This admitted contention is supported by the original declarations of Drs. Moran, Sass, and Abitz (particularly Moran Decl. at ¶¶ 14-31; Sass Decl. ¶¶ 8-15 and 24-26, and Abitz Decl. at ¶¶ 7-15), as well as a second declaration from Dr. Abitz filed June 3, 2013. 2d Abitz Decl. ¶¶ 30-37. It is further supported by the combined third declaration from Dr. Abitz and first declaration from Dr. Lance Larson, attached hereto. Abitz/Larson Decl. ¶¶ 45-59. This new declaration reiterates the concerns in the prior declarations, explaining NRC staff has failed to

[7] The migrated contention is the precise contention admitted by this board in LBP-13-10 on July 26, 2013. The only difference is resubmission with the regulatory cite of 10 CFR 51.90-95 as it applies to the staff's NEPA responsibilities regarding an FSEIS.

demonstrate that SEI can contain fluid migration that may pollute the environment as a result of the project. *Id.*

The Petition to Intervene explained the requirements that must be satisfied for the Applicant to adequately consider the environmental impacts associated with groundwater quality, and inasmuch as this is a migrated contention need not be repeated here. *See* Petition to Intervene at 19-20. The Board originally admitted Contention 3 against the ER, explaining that "[t]he declarations of Drs. Moran, Sass, and Abitz contain detailed discussions regarding boreholes and aquifer isolation in the immediate vicinity of the Ross facility that raise questions about the groundwater hydrology associated with the site as detailed in the SEI application sufficient to establish a material issue of fact." LBP-12-3 at 36. Subsequently, the Board migrated this contention to the DSEIS, explaining that "the DSEIS discussion of boreholes and SEI pump tests makes it apparent that the thrust of Joint Intervenors' claim regarding this alleged deficiency remains intact so as to maintain this aspect of this contention." LPB 13-10 at 17. However, the Board slightly refined the contentions by adding the numbered paragraphs. *Id.* at 18.

As to this contention, the FSEIS adopts the DSEIS-associated information and/or analysis challenged as inadequate in the DSEIS. It contains the same omission as the DSEIS (and the ER) by failing to analyze the impacts associated with unplugged exploratory boreholes, and to adequately address the potential for fluid migration. Abitz/Larson Decl. ¶¶ 54-63. Like the DSEIS, the FSEIS relies upon the Applicant's promise to plug abandoned wells it is able to locate in the well field area prior to ISL operations. *Compare* DSEIS at 3-38 *to* FSEIS at 3-37. However, like the DSEIS before it, there is no analysis of whether the Applicant can locate all of the abandoned wells present in the area, let alone properly plug them in a manner to prevent fluid

migration. Indeed, efforts to date in plugging the abandoned wells have been less than effective. *See* FSEIS at 2-48; DSEIS at 2-44 ("As of October 2010, the Applicant has located 759 of the 1682 holes thought to exist from Nubeth exploration activity and has plugged 55 of them.")[8] Accordingly, because the information in the FSEIS is not sufficiently different to warrant an amended contention 3, NRDC and PRBRC respectfully request that the Board migrate this contention 3 to the FSEIS.

Migrated Environmental Contention 4: The FSEIS fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project.

CONTENTION: The FSEIS violates 10 C.F.R. §§ 51.90-95 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA because it fails to consider adequately cumulative impacts, including impacts on water quantity, that may result from the proposed ISL uranium mining operations planned in the Lance District expansion project.[9]

Bases and Supporting Evidence for Migrated Contention 4

This admitted contention is supported by the original declaration of Dr. Moran (particularly ¶¶ 7-8, 59-63, 69, 76-78, 96-98), as well as the declaration from Dr. Abitz filed June 3, 2013. 2d Abitz Decl. ¶¶ 38-43. It is further supported by the combined third declaration from Dr. Abitz and first declaration from Dr. Larson, attached hereto. Abitz/Larson Decl. ¶¶ 64-68. This new declaration reiterates the concerns in the prior declarations, explaining the FSEIS fails

[8] While the FSEIS (and the DSEIS before it) use 1,682 as the number of wells to be located and plugged, previous information from Strata estimated upwards of 5,000 abandoned wells in the area. Neither the FSEIS (nor the DSEIS before it) reconcile this difference. Abitz/Larson Decl. ¶ 56.

[9] The migrated contention is the precise contention admitted by this board in LBP-13-10 on July 26, 2013. The only difference is resubmission with the regulatory cite of 10 CFR 51.90-95 as it applies to the staff's NEPA responsibilities regarding an FSEIS.

to consider the cumulative effects on the environment, including on groundwater quality and quantity, associated with the full scope of ISL uranium mining anticipated to occur in the foreseeable future in the Lance District.

The Petition to Intervene explained the requirements that must be satisfied for the Applicant to adequately consider the environmental impacts associated with groundwater quality, and inasmuch as this is a migrated contention need not be repeated here. *See* Petition to Intervene at 25, 27-28. The Board originally admitted contention 4 against the ER, noting "additional facilities would likely operate as satellites of the Ross facility and would utilize the same CCP that SEI proposes to construct for the Ross project," but that the requisite impacts analysis of those activities was missing. LPB 12-3 at 38-42.

Upon issuance of the DSEIS, NRDC and PRBRC sought to migrate this contention to that document, explaining that while the existence of a broader ISR program is recognized in the DSEIS, the *impacts* of this larger program are not analyzed in a manner that allows a consideration of the on-the-ground impacts associated with various impacted aspects of the environment. However, the Board concluded that this contention was not eligible to be migrated because "the DSEIS discussion of the cumulative impacts of groundwater quantity and quality differs substantially from the SEI ER approach . . . ." LPB 13-10 at 21. Subsequently, the Board denied Intervenors' motion seeking admission of this issue as an amended contention. *Id*. at 22. Accordingly, at present NRDC and PRBRC's original cumulative impacts contentions against the ER remains pending at this time. *Id.*

Intervenors recognize that, in light of the Board's earlier rulings, it is unlikely to permit this contention to migrate to the FSEIS. However, out of abundance of caution, as well as to preserve this issue for further review, NRDC and PRBRC respectfully submit that the FSEIS

adopts the ER and DSEIS-associated information and/or analysis that was previously challenged as inadequate. It contains the same omission as the DSEIS (and the ER) by failing to meaningfully analyze the cumulative impacts on groundwater quality or quantity associated with the full scope of ISL uranium mining anticipated to occur in the foreseeable future in the Lance District. Abitz/Larson Decl. ¶¶ 64-68. Accordingly, because the information in the FSEIS is not sufficiently different to warrant an amended contention 4/5A, NRDC and PRBRC respectfully request that the Board migrate this contention 4/5A to the FSEIS.

B. ALTERNATIVELY, NRDC AND PRBRC SEEK ADMISSION OF AMENDED CONTENTIONS CONCERNING THE MATTERS RAISED IN THEIR ADMITTED CONTENTIONS.

In the event the Board concludes the information in the FSEIS is sufficiently different from the earlier documents on which contention admissibility was based, then NRDC and PRBRC's earlier contentions will not be eligible for migration and amended contentions are necessary. In light of that possibility, NRDC and PRBRC next present amended contentions for each of their admitted contentions, which need to be considered in the event the Board finds them ineligible for migration. The content of the amended contentions are precisely the same as the migrated contention, but they are followed by an explanation of the individualized bases for admission for each contention.

1. Admissibility Factors Common To All Amended Contentions

Several of the 10 C.F.R. § 2.309(f)(1) factors apply to all the amended contentions, and the "good cause" criteria of 10 C.F.R. 2.309(c) are also the same for all the amended contentions. We therefore address those common elements first.[10]

[10] We include a separate discussion of each of admissibility factor out of abundance of caution, in light of the Board's admonition, in denying our motion for reconsideration on Contention 4, that it is

The following explanation and statement of reasons apply to all the amended contentions and addresses factors (iii) and (iv) of 10 C.F.R. § 2.309(f)(1):

(iii) The explanation of how the issues raised in the contentions are within the scope of the proceeding is as follows:

This is a proceeding for a materials license to permit SEI to undertake an ISL uranium mining operation, and issues concerning the adequacy of Staff's NEPA analysis concerning the licensed activities are within the scope of the proceeding. Because the issues raised in all the amended contentions concerns that adequacy of the NEPA analysis, the issues raised are all within the scope of the proceeding.

(iv) The reasons the issues raised in the contention are material to the findings the NRC must make to support the action that is involved in the proceeding is as follows:

The action involved in the proceeding is the decision whether to grant the ISL uranium mining license to SEI. To support that license decision, NRC must make findings based on an environmental analysis that complies with NEPA and the NRC's regulations. Because the issue raised in this contention concerns the adequacy of that NEPA analysis, it is material to the findings that must be made.

The contentions also all meets each of the "good cause" criteria of 10 C.F.R. 2.309(c), as follows:

(i) The information upon which the contentions are based was not previously available because the contentions are based on the FSEIS, which is sufficiently different from the earlier documents as to warrant amended (rather than migrated) contentions. As the Board has explained, it is issuance of the Staff's environmental documents – not interim documents such as

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incumbent upon Petitioners to address *each* factor. Aug. 27, 2013 Mem. and Order at 6 (discussing purported failure to address the six admissibility factors).

responses to Requests for Additional Information (RAI) – that is the "trigger" for an amended contention. LPB 13-10 at 17 n.14.

(ii) The information upon which the contentions are based is materially different from information previously available because of the discussion provided in the FSEIS, which is sufficiently different from the earlier documents as to warrant amended (rather than migrated) contentions.

(iii) The contentions have been submitted in a timely fashion based on the availability of the subsequent information because they are based on the FSEIS and are submitted within the deadline for amended FSEIS contentions.

2. Amended Contentions

Amended Environmental Contention 1: The FSEIS fails to adequately characterize baseline (*i.e.*, original or pre-mining) groundwater quality.

AMENDED CONTENTION: The FSEIS fails to comply with 10 C.F.R. §§ 51.90-95, 10 C.F.R. Part 40, Appendix A, and NEPA because it lacks an adequate description of the present baseline (*i.e.*, original or pre-mining) groundwater quality and fails to demonstrate that groundwater samples were collected in a scientifically defensible manner, using proper sampling methodologies. The FSEIS's departure from NRC guidance serves as additional evidence of these regulatory violations. NRC, NUREG-1569, *Standard Review Plan for In Situ Leach Uranium Extraction License Applications*, §§ 2.7.1, 2.7.3, 2.7.4 (2003).

BASES AND SUPPORTING EVIDENCE FOR AMENDED CONTENTION 1

The FSEIS provides that only after SEI receives its license – and the NEPA process is thus complete – will it construct ground-water wells and obtain water-quality samples in order to establish baseline water quality data. FSEIS at 2-25. As discussed in the attached declaration

from Drs. Abitz and Larson, this failure to establish baseline values in the FSEIS is a fundamental violation of NEPA, particularly given the poor track record of ISL mining to return contamination levels to baseline values. Abitz/Larson Decl. ¶¶ 8-14.

The FSEIS (at 2-11 – 2-12) also assumes the restoration from Nubeth mining was successful and complete and fails to address the lack of pre-industrial (pre-Nubeth) baseline water quality. *Id.* ¶¶ 22-24 (where Drs. Abitz and Larson note, the Nubeth wells used to collect water-quality samples were contaminated by the injection of the lixiviant prior to sample collection and there is no pre-industrial 'baseline' for the Nubeth ISR test project. Despite the fact that the pre-industrial 'baseline' reported by Nuclear Dynamics (1978) is not representative of pre-industrial conditions and is biased to high values, restoration at this test site was unsuccessful (see ¶33 of their declaration)). The FSEIS also assumes there are "background" values available from work already done by Nubeth or Strata. *Id.* ¶ 10. The FSEIS simply presents a range of values for water quality and no consistent, thoroughly supported technical picture of a "baseline" for the project. Further, making it almost beside the point, Staff makes it clear no "baseline" will be developed from the initial measurements it does take and no data obtained from this work has meaning until after the license has been issued. Indeed, the text box on 2-25 of the FSEIS explicitly states "[these] post-licensing, pre-operational data, after some statistical analysis, are the values to which excursion-detection and/or aquifer-restoration monitoring are compared." Thus, Intervenors' fundamental concern with the validity and usefulness of the pre-industrial baseline water quality aspect of the analysis (indeed, that it even can be done) remains unchanged through each successive stage of this proceeding. *Id.* ¶ 8-30.

Rather than explain how this approach complies with NEPA, in the FSEIS Staff defends this approach by claiming it is permitted by NRC regulations, and averring that "[i]t is outside

the scope of this SEIS to evaluate the NRC's regulations regarding aquifer restoration and provide an analysis to demonstrate that the regulations are sound." FSEIS at B-98.

But that is precisely what *is* in fact required. Multiple authorities mandate that an application include an adequate assessment of baseline water quality prior to licensing. 10 C.F.R. § 40.32(e) requires a pre-license evaluation of "any appropriate conditions to protect environmental values," which, in the case of ISL uranium mining, necessarily entails an analysis of existing water quality. Similarly, 10 C.F.R. § 51.45(b) and 71 requires a "description of the environmental effects of the proposed action;" and neither Staff nor Strata can plausibly claim that "the affected environment" does not encompass the groundwater in its current qualitative state. Criterion 5B(5)(a) of 10 C.F.R. Part 40, Appendix A specifies that "the concentration of a hazardous constituent must not exceed . . . [t]he Commission approved background concentration of that constituent in the ground water," a determination that necessitates an initial, adequate characterization of baseline water quality. Drs. Abitz and Larson provide just such a valid statistical method for establishing baseline prior to licensing and for a draft NEPA review. Abitz/Larson Decl. ¶¶ 25-29. As another ASLB has explained, Criterion 7 of Appendix A requires an applicant to provide "complete baseline data on a milling site and its environs." *See Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility* [*Dewey-Burdock*], Docket No. 40-9075-MLA at 63–64 (Aug. 5, 2010). Finally, NUREG-1569 discusses in several sections the need for "reasonably comprehensive" data shown to have been "collected by acceptable sampling procedures." NUREG-1569 §§ 2.7.3; *accord id.* at §§ 2.7.3, 2.7.4; *see also* Abitz/Larson Decl. ¶¶ 25-29 and 2d Abitz Decl. ¶¶ 6-23.

General NEPA principles also dictate that baseline water quality data be collected *before* NRC makes a final decision on the license, not afterwards, as currently planned. Indeed, the

CEQ regulations implementing NEPA's mandates require that where there is information that "is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, *the agency shall include the information in the environmental impact statement*." 40 C.F.R. § 1502.22(a) (emphasis added). Thus, as reviewing courts have explained, "an agency is required to engage in reasonable research *to supply missing information* about negative impacts that a project may produce." *Ocean Mammal Inst. v. Cohen*, No. 98-CV-160, 1998 WL 2017631, at *5 (D. Haw. Mar. 9, 1998) (emphasis added); *see also id.* (federal agencies "have an affirmative duty under NEPA and its implementing regulations to undertake research in order to prepare a comprehensive EIS that federal government officials can use to make a reasoned decision"); *State of Idaho By and Through Idaho Pub. Util. Commn v. ICC*, 35 F.3d 585, 596 (D.C. Cir. 1994).

Moreover, Drs. Abitz and Larson demonstrate the FSEIS's allowance for post-licensing / pre-operational monitoring biases sample concentrations towards higher baseline values. Abitz/Larson Decl. ¶¶ 15-21. Specifically, they note the FSEIS fails to explain how the Applicant and/or the terms of its NRC License will prevent such "post-licensing, pre-operational baseline" water quality measurements from being contaminated by the combined effects, prior to sampling, of drilling, casing, well development and testing of hundreds to thousands of injection and recovery wells. *Id*. ¶ 15. They go on to note the FSEIS is silent on the mechanical and chemical effects associated with previous and ongoing exploratory drilling to delineate the boundaries of the economically recoverable uranium resources in the Lance District, nor does the FSEIS address how, in the course of simultaneously constructing, operating, and "restoring" numerous individual wellfields in sequence over many years, the Applicant and the License terms will avoid the obvious pitfall of operational wellfields degrading the "post-licensing, pre-

operational" water quality baselines in subsequent adjacent monitoring wells targeting the same aquifers. *Id*. Pointing to the statistically flawed baseline values reported for the Kingsville Dome ISR operations in Texas (TWC 1988; TWC 1990), Drs. Abitz and Larson note this flawed methodology will have the effect of creating a cascading deterioration in nominal "baseline" water quality measurements from wellfield to wellfield in the course of building-out the "Ross Project," and pursuing adjacent "Lance District Development." *Id*.

Accordingly, Amended Contention 1 meets the legal standards described in 10 C.F.R. § 2.309(f)(1).

Amended Environmental Contention 2: The FSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits.

AMENDED CONTENTION: The FSEIS fails to meet the requirements of 10 C.F.R. §§ 51.90-95 and NEPA because it fails to evaluate the virtual certainty that the applicant will be unable to restore groundwater to primary or secondary limits in that the FSEIS does not provide and evaluate information regarding the reasonable range of hazardous constituent concentration values that are likely to be applicable if the applicant is required to implement an Alternative Concentration Limit (ACL) in accordance with 10 C.F.R. Part 40, App. A, Criterion 5B(5)(c).

BASES AND SUPPORTING EVIDENCE FOR AMENDED CONTENTION 2

Although in the FSEIS the Staff does not dispute that no pilot or full-scale ISL mining operation has ever restored contaminated groundwater to baseline values, the FSEIS only provides a general description of aquifer restoration techniques, without at all demonstrating the techniques will be successful in this instance, or discussing a reasonable range of contamination likely to remain in the inevitable event an ACL is established and finally, what environmental and public

health impacts will ultimately result. Abitz/Larson Decl. ¶¶ 31-47. As discussed in the supporting technical declaration, it is well established that no pilot-scale or full-scale ISL mining operation has restored groundwater to baseline values, even erroneously poor baseline values that are biased by high oxidation of the ore zone during drilling and well development, invalid sampling protocols, and improper statistical manipulation of analytical results. *Id*. Given overwhelming scientific evidence of the failure of the ISL industry to restore groundwater to pre-mining water-quality standards, NRC should be analyzing the actual likelihood of restoring groundwater to true baseline conditions and the long term impacts of such restoration failure, and not simply accepting Strata's position that restoration to baseline values is possible because of the Nubeth project "*demonstration of successful ground-water restoration and site reclamation*." Id. ¶¶ 42-47; and *see also* FSEIS at 2-12. Indeed, the Nubeth site was not restored and the proper presentation of all available data from the site supports Intevenors' contention. Abitz/Larson at ¶¶ 32-33.

Further, analysis of historical ISL restoration results cited by NRC Staff as examples of "successful" restoration efforts where "improvement in water quality within the exempted aquifer as a result of aquifer restoration activities" – specifically Crow Butte Wellfield 1, Smith Ranch-Highland A Wellfield, and Irigarary Mine Units 1-9 – demonstrate, in fact, the failure of efforts to restore and the resulting contaminated groundwater. FSEIS at 4-41. *See* Abitz/Larson ¶¶ 34-41. In discussing Crow Butte, NRC states that uranium concentrations remained 18% above baseline concentrations, which Drs. Abitz and Larson note is incorrect according to Crow Butte Resources' own record. Id at ¶ 35. According to Crow Butte Resources, post-restoration uranium concentrations were nearly 18.8 <u>times</u> higher than baseline, not 18% percent above baseline. Drs. Abitz and Larson note the difference is significant. They state: "[i]n perspective,

a car going 18% over a 55 MPH speed limit would be driving roughly 65 MPH. A car going 18.8 times 55 MPH, would be driving roughly 1,034 MPH. Also of note, average arsenic concentrations went from being non-detectable to exceeding the USEPA MCL (10 ppb)." *Id.*

As a further matter, Drs. Abitz and Larson demonstrate the two examples from unsuccessful restoration efforts at the Irigary ISL project indicate the difficulty of predicting the amount of pore volumes required for adequate restoration of uranium in the groundwater. *Id*. at ¶45. They explain NRC Staff provides no analysis of these matters, other than an arbitrary restoration time frame or pore volume estimate based solely on inadequate industry efforts.

In sum, the FSEIS does not substantially differ from the ER or the DSEIS in its treatment of the underlying matters in Contention 2. The restoration process, which relies heavily on the generic analysis of restoration processes described in the Generic EIS, is described in the DSEIS at Section 2.1.1.3, which transferred to the FSEIS at Section 2.1.1.3. In contrast to this lack of a searching review, Drs. Moran, Abitz and Larson have all provided specific historical and technical evidence demonstrating why Strata is unlikely to achieve primary (baseline water quality) or secondary (EPA-issued safe drinking water levels) restoration standards during decommissioning. *See* Moran Decl. at ¶¶ 66–67, 70–75; Abitz Decl. at ¶¶ 28–29, filed with the original petition; *see also* 2d Abitz. Decl. ¶¶ 24-29, filed in May 2013; and see Abitz/Larson at ¶¶ 31-47, filed this day. Neither Strata nor the NRC Staff have provided any evidence suggesting the Ross Project will not cause significant aquifer degradation, even if Strata complies with an NRC-provided ACL. In short, the starting and finishing lines for measuring the degradation of water quality as a result of the project are not disclosed.[11]

[11] As this Board is aware, in reality, ISL mining operations have yet to achieve either primary or secondary groundwater restoration standards, but have thus far always required the Commission (or the relevant Agreement State) to establish an alternative (that is, more lenient) restoration standard. As

Accordingly, amended contention 2 meets the legal standards described in 10 C.F.R. § 2.309(f)(1).

Amended Environmental Contention 3: The FSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.

AMENDED CONTENTION: The FSEIS fails to assess the likelihood and impacts of fluid migration to the adjacent groundwater, as required by10 C.F.R. §§ 51.90-95 and NEPA, and as discussed in NUREG-1569 § 2.7, in that

1. The FSEIS fails to analyze sufficiently the potential for and impacts associated with fluid migration associated with unplugged exploratory boreholes, including the adequacy of applicant's plans to mitigate possible borehole-related migration impacts by monitoring wellfields surrounding the boreholes and/or plugging the boreholes.

2. There was insufficient information for the NRC staff to make an informed fluid migration impact assessment given that the applicant's six monitor-well clusters and the 24-hour pump tests at four of these clusters provided insufficient hydrological information to demonstrate satisfactory groundwater control during planned high-yield industrial well operations.

BASES AND SUPPORTING EVIDENCE FOR AMENDED CONTENTION 3

The FSEIS fails to sufficiently describe and analyze information about boreholes and aquifer isolation, which continues to raise substantial risks of fluid migration during and after mining operations. Abitz/Larson Decl. ¶¶ 48-63. Petitioners have noted there are over 5,000 exploratory boreholes in the area that may serve as fluid migration pathways, and the FSEIS itself recognizes that there are at least 1,483 known Nubeth exploratory holes. FSEIS at B-85.

Petitioners' experts attest, all the available information indicates operators of the proposed Strata ISL mining facility will be no more likely to achieve primary or secondary groundwater restoration standards during decommissioning than any of their predecessors, unless the bar is set very low, by employing "pre-operational" Target Restoration Values that are established post-licensing, postdrilling, and post-casing and pressure-testing of each individual wellfield and possibly even each individual "wellfield module."

The FSEIS also recognizes that "[i]mproperly abandoned drillholes, overly penetrating drillholes, or lack of well integrity could result in the mixing of industrial-use ground water from the OZ aquifer with the chloride-dominated ground water of the DM aquifer or the stock-water quality of the overlying SM aquifer." FSEIS at 4-34.

The FSEIS claims this is not of concern because SEI will find and fill these holes. FSEIS at 3-37 (stating that SEI "will attempt to locate and properly abandon all historical drillholes located within the ring of perimeter-monitoring wells in each wellfield prior to conducting tests for the respective "hydrologic-test data package"). However, the FSEIS also states that as of "May 9, 2013, 625 Nubeth exploratory drillholes have been located and 86 have been plugged by Strata." FSEIS at B-85. The FSEIS fails to discuss the ramifications of leaving hundreds of these holes unfilled as operations get underway. Abitz/Larson Decl. ¶¶ 54-56.

In the FSEIS, Staff explains that the testing done to insure protection against fluid migration *failed* – in fully one-third of the tests conducted: "pumping of the OZ aquifer showed a possible response in the DM aquifer (Strata, 2011a)." FSEIS at 4-42. The FSEIS further states that, "NRC staff has determined that these responses were correctly interpreted by the Applicant as communication between the OZ and DM through *improperly plugged drillholes* from previous exploration programs that have not yet been properly abandoned." *Id.* (emphasis added).

This remains one of the precise concerns raised in the admitted contention – the risks of fluid migration due to the thousands of drillholes in the area. *See* Pet. to Intervene at 21-22. The information in the FSEIS only serves to heighten that concern, for several reasons. First, while the applicant earlier estimated there were approximately 5,000 of these holes, *see* Moran Decl. ¶ 22 (citing information available on Strata's own website), the FSEIS lowers that number to 1,483, without explanation as to why more than 3,000 holes apparently are of no concern.

Second, while the FSEIS states that the applicant will properly plug *all* these holes, there is no information provided to demonstrate either that the applicant will be able to identify all the holes, or that it will be able to fill them in a manner that insures they do not continue to contribute to fluid migration. Abitz/Larson Decl. ¶ 56.

The FSEIS also does not address Petitioners' more fundamental concern that the hydrological connections between the aquifers in the area pose a serious risk of fluid migration. *Id*. 48-53. While Staff claims the failed fluid migration tests are due to exploratory wells that will be plugged, the FSEIS contains no information demonstrating that the failure was not due to the hydrological connectivity that exists irrespective of these wells. *Cf. Center for Biological Diversity v. BLM*, 698 F.3d 1101 (9th Cir. 2012) (rejecting agency's refusal to consider the hydrological connectivity between groundwater and surface water).

The FSEIS attempts to address this concern by asserting that the Applicant will be required to "install a ring of monitoring wells around each wellfield" to "allow monitoring of the SM and DM aquifers as well as the OZ aquifer around their perimeters." FSEIS at 4-42. However, as with the groundwater quality issue more generally, *see supra* at 7-10, the agency cannot avoid studying vital environmental concerns related to a project by promising to collect data on the matter *later*. *Id. (citing State of Idaho,* 35 F.3d at 596 (promise to address potential impacts in the future is "no substitute for an overarching examination of environmental problems at the time the [original] decision is made"). Rather, the data must be collected and included in the DEIS to inform the decision to be made.

Further, as Drs. Abitz and Larson explain, NRC's FSEIS provides insufficient and potentially inaccurate information to make an informed analysis of fluid migration. Abitz/Larson Decl. ¶¶ 54-63. Specifically, they note the complexity of the stratigraphy coupled with thousands

of unplugged boreholes, established mixing between the SM and OZ zones, and the high-yield industrial wells requires many more test wells over the 1,866 acres and much longer pump test intervals to obtain the needed hydrologic data to assess the control of mining fluids during ISR operations. *Id*. at 62. Drs. Abitz and Larson note the FSEIS is silent on these complexities and provides no convincing hydrologic data to support SEI's contention that mining fluids will be controlled to prevent groundwater pollution. *Id*.

Accordingly, amended contention 3 meets the legal standards described in 10 C.F.R. § 2.309(f)(1).

Amended Environmental Contention 4: The FSEIS fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project.

AMENDED CONTENTION: The FSEIS violates 10 C.F.R. §§ 51.90-95 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA because it fails to consider adequately cumulative impacts, including impacts on water quantity, that may result from the proposed ISL uranium mining operations planned in the Lance District expansion project.

BASES AND SUPPORTING EVIDENCE FOR AMENDED CONTENTION 4

As noted, *see supra at* 16-17, Petitioners recognize the Board has not admitted the cumulative impacts contention against the DSEIS on the grounds it was not eligible for migration given the differences between the DSEIS and the ER. Petitioners respectfully urge the Board at this time permit Petitioners to submit an amended contention addressing cumulative impacts deficiencies.

With respect to groundwater quantity – an issue the cumulative effects of which the Board has previously admitted into this proceeding – the FSEIS contains *one paragraph* summarily stating that the cumulative impacts will be "SMALL," and that any such effects will be "essentially recovered within 24 years after" the license is issued. FSEIS at 5-27. However, there is no meaningful quantitative analysis of the projected cumulative consumptive uses of groundwater from uranium mining and other resource extraction activities that draw on the Lance and Fox Hills aquifers, and no *explanation* provided of how restoration will occur, or what it means to characterize the impacts as "small." Abitz/Larson Decl. ¶¶ 64-68.

This is inadequate. An agency may not rely on "conclusory or unsupported suppositions," *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1186-87 (D.C. Cir. 2004), and it is insufficient to simply *assert* that an effect will be resolved at some point in the future. Moreover, courts have frequently rejected an agency's use of conclusory labels like "small" and "moderate" to characterize impacts, where the agency does not explain the basis for these labels. *E.g. Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 201 (D.D.C. 2008); *Sierra Club. v. Mainella*, 459 F. Supp. 2d 76, 100-01 (D.D.C. 2006).

The cumulative impacts analysis associated with groundwater quality is similarly lacking. FSEIS at 5-27 to 5-30. For this and other impact areas, the cumulative impacts analysis, like the ER, fails to consider the cumulative impacts associated with the more extensive "Lance District Development" the DSEIS acknowledges is "scheduled" for the area surrounding the "Ross Project." Thus, while the FSEIS recognizes there are "four satellite areas within the Lance District that the NRC staff has identified as reasonably foreseeable," *id.* at 5-5, the FSEIS fails to consider the cumulative impacts associated with this much larger project. Abitz/Larson Decl. ¶¶ 64-68. Drs. Abitz and Larson note there is no analysis of cumulative water quality impacts,

aside from selected information from the Nubeth pilot-scale ISR operation, and particularly no analysis of the prospective parts of the entire Ross project or even the greater Lance District project. *Id*. ¶ 67. Indeed, what the FSEIS does examine is essentially limited to the OZ aquifer in the Ross Area, due to the proposed confining layers (FSEIS; p.5-22, lines 44-46). Drs. Abitz and Larson state this conflicts with scientific data and NRC statements that horizontal and vertical excursions of mining fluids occur at all ISR operations, and that the vertical excursions were traced to thinning of the confining layer in the complex fluvial stratigraphy and improperly abandoned exploration bore holes (DSEIS, p. 4-32, lines 41-43; FSEIS at 4-34). *Id*. ¶ 67. They conclude the layers are not confining due to complex fluvial stratigraphy (Strata 2011b; Addendum 2.6-C), hundreds (if not thousands) unplugged boreholes (Strata 2011b; Addendum 2.6-B), alternative interpretations of pump tests, and water quality analyses that demonstrate mixing between SM and OZ (see figure below paragraph 60).

Indeed, the proposed Lance District ISL mines are technically and economically integrated, geographically contiguous, and mutually interdependent in such a manner that the Ross Project should not be treated as a standalone project for NEPA analysis. Accordingly, Accordingly, amended contention 4 meets the legal standards described in 10 C.F.R. § 2.309(f)(1).

C. NRDC AND PRBRC ALSO SEEK ADMISSION OF TWO NEW CONTENTIONS

1. Admissibility Factors Common To Both New Contentions

Several of the 10 C.F.R. § 2.309(f)(1) factors apply to both of the new contentions, and we therefore address those common elements first.[12] In particular, the following explanation and statement of reasons apply to both new contentions and address factors (iii) and (iv) of 10 C.F.R. § 2.309(f)(1):

> (iii) The explanation of how the issues raised in the contentions are within the scope of the proceeding is as follows:

This is a proceeding for a materials license to permit SEI to undertake an ISL uranium mining operation, and issues concerning the adequacy of Staff's NEPA analysis concerning the licensed activities are within the scope of the proceeding. Because the issue raised in the two new contentions concern that adequacy of the NEPA analysis, the issues raised are within the scope of the proceeding.

> (iv) The reasons the issues raised in the contention are material to the findings the NRC must make to support the action that is involved in the proceeding is as follows:

The action involved in the proceeding is the decision whether to grant the ISL uranium mining license to EI. To support that license decision, NRC must make findings based on an environmental analysis that complies with NEPA and the NRC's regulations. Because the issues raised in the two new contentions concern the adequacy of that NEPA analysis, they are material to the findings that must be made.

2. New Contentions

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[12] We include a separate discussion of each of admissibility factor for the reasons previously noted. *See infra* at 18-19.

FSEIS Contention 5[13]: The FSEIS fails to properly define the scope of the proposed major federal action here, which encompasses a much larger project in the same geographic area.

CONTENTION: The FSEIS violates 10 C.F.R. §§ 51.90-95 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA, because it fails to consider the environmental impacts of, and appropriate alternatives to, the applicant's actual proposed project, and instead improperly segments the project by framing the Proposed Action under review as only a small part of the Applicant's planned and scheduled In Situ Recovery (ISL) activities in the Lance District.

BASES AND SUPPORTING EVIDENCE FOR FSEIS CONTENTION 5:

When Petitioners presented this contention in connection with the DSEIS, the Board recognized the relationship between the issues raised here and the cumulative impacts contention. LPB 13-10 at 23-24. The Board also acknowledged that, in light of the Staff's *own* recognition that the entire planned project in the Lance District must be considered as "cumulative impacts," the mere fact SEI has only has applied for a license for the Ross site "is hardly definitive in resolving" whether the project has been improperly segmented into smaller projects. *Id.* at 25-26.

However, the Board denied admission of the contention.

First, inasmuch as the contention relied on whether the Ross project is sufficiently "connected" to the other planned ISL activities in the Lance District, the Board rejected as unsupported Petitioners' claim the Ross Project may not be economically viable without additional project areas. *Id.* at 28. Moreover, while the Board recognized Petitioners had

[13] We number the first new Contentions "FSEIS Contention 5" on the grounds the first four FSEIS Contentions will either be (a) the migrated contentions in section II A above, (b) the amended contentions in section II B above, or (c) some combination thereof.

adequately supported their "premise that there is a *strong likelihood that PET/SEI intend that eventually all the Lance District ISR sites will be licensed and operating*," the Board concluded this evidence was not sufficient to show Ross itself lacks sufficient "independent utility" so as to permit separate NEPA review. *Id.* at 29-30 (emphasis added).

However, as explained in the attached Paine Declaration, the proposed Lance District ISL mines are technically and economically integrated, geographically contiguous, and mutually interdependent in a manner that deprives the Ross Project of separable "independent utility" as a standalone project for NEPA analysis. *See Second Declaration of Christopher E. Paine,* March 31, 2014, ¶¶ 23-74 (hereinafter "Paine Decl. II ¶"). Specifically, in light of the FSEIS's suggestion "… the life of the [CPP] facility would be extended to 14 years or more," (FSEIS at xviii) Mr. Paine properly queries "[w]hat is the commercial operating 'life' of the 'Ross' CPP facility without the planned influx of additional uranium-bearing lixiviant and resins from "amendment areas" and "satellite facilities," in the event the NRC declines to license such expansion?" Paine Decl. II ¶¶ 49-52. He notes Figure 2.6 shows the Ross Project "Operation" phase is projected to last only 4 years; however, the publicly available information from Strata shows that the processing facility is expected to last many years beyond what NRC has examined in the FSEIS. Mr. Paine continues, "If the 'Ross Project' is truly a viable standalone ISL project with 'independent utility,' does it stand to reason that SEI/Peninsula Energy Ltd. would invest tens of millions of dollars to construct and operate a large ISL facility, only to shut it down and decommission it after 4-5 years?" *Id.*

Second, as regards whether the Ross project and the additional planned activities in the Lance District have "cumulative" or "similar" impacts so as to require a single EIS under 40 C.F.R. 1508.25(a), the Board determined Petitioners had failed to show good cause for not

raising those issues in connection with the ER, and thus failed to meet the 10 C.F.R. 2.309(c)(1) timing factors.

As detailed in the attached Paine Declaration, it is evident the Ross Project and the larger planned Lance District activities have both "cumulative" and "similar" impacts so as to require a single EIS and good cause for admission of the contention at this time – on the basis of substantial new information – is shown here. As regards the "cumulative impacts" prong, as the Board recognized in its earlier ruling, that part of the test considers whether certain activities, "when viewed with other proposed actions have cumulatively significant impacts" and thus should be considered together in a single EIS. LPB 13-10 at 27 (quoting 40 C.F.R. 1508.25(a)(2)). Here, it is evident the overall scope of planned activities in the Lance District will have cumulatively significant impacts. As demonstrated in the Paine and Abitz/Larson Declarations, a much larger watershed, viewshed and area of groundwater will be affected. See Abitz/Larson Decl. ¶¶ 64-68, Paine II Decl. ¶¶ 25-32.

Indeed, since the closure of the public comment period on the DSEIS, Strata has continued to publicly disclose information regarding proposed mining activities and this environmentally significant information is not reflected in the scope of the Proposed Action subjected to detailed environmental consideration in the FSEIS. On May 24, 2013, Peninsula Energy Limited provided a "Lance Project Development Update" stating, under the heading "Pre-Production Drilling Program," "[t]welve monitoring well clusters, comprising a total of 47 holes, have been completed in the Kendrick area and will be used for base line studies of the regional water quality."[14] The Executive Summary of the FSEIS says the Kendrick area is outside the scope of the Proposed Action. FSEIS at xviii. Yet, publicly available information

[14] Paine II Decl. ¶¶ 26; *see* http://www.pel.net.au/images/peninsul---ahbue.pdf.

shows that it is part of the Lance District and is currently in a "pre-production drilling program." Paine II Decl. ¶¶ 26. And as shown in "Figure 1: Lance Projects Pre-Production Drilling Location," the Kendrick "Amendment" Area (in light blue) surrounds the Ross "Permit" Area (green border) on three sides and dwarfs it in size, but it is not included within the scope of the FSEIS "Proposed Action." *Id*. ¶¶ 27-28. Based on this information, the Kendrick project and other proposed mining areas in the Lance District are reasonably foreseeable actions connected to the Ross Project and particularly its processing facility.

Finally, as for the "similar" impacts test, which asks whether the actions being considered for inclusion in a single EIS "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography," LBP 13-10 at 27 (quoting 40 C.F.R. 1508.25(a)(3)), that test is also satisfied here, given the company's plans are to immediately expand the same precise mining into contiguous areas of the Ross Site. Indeed, illustrating similarities with respect to both timing and geography, Peninsula Energy Limited presented a schedule for its planned "Capital Expenditures by Production Phase," showing a planned build-out of two additional "production units" within only 30 months of completing the "Ross Production Unit."[15] Paine II Decl. ¶ 29. This same presentation noted on another slide the "Lance Development Model" is a "3 stage development ramping up over 4 years" that is "building a 2.2mlbs per year ISR operation, inclusive of: [an] ion exchange facility; centralized resin stripping, drying, and packaging plant at Ross (CPP); Remote ion exchange facility at Barber trucking resin to CPP." *Id*. Further, Mr. Paine presents Peninsula Energy Ltd.'s plans to "commence ISR production at Lance Projects, Wyoming in 2014 building to 2.2 mlbs U308 per annum over 3.5 - 4 years (plant capacity 3 mlbs per annum)." *Id*. ¶ 73. In contrast, the annual

[15] August 7, 2013 "Company Presentation to Diggers and Dealers Conference: ASX's Next uranium Producer," http://www.pel.net.au/images/peninsul---aiwohxiyae.pdf.

production of the "Ross Project" analyzed in the NRC Staff's DSEIS/FSEIS is only 0.75 mlbs per annum. As Mr. Paine's declaration illustrates, within 3.5 - 4 years of issuing the Ross Project license, the output of the CPP is slated to triple, utilizing uranium feed material from outside the scope of the Ross Project EIS. This large increase in U308 output, and the expanded well field production areas needed to feed it, is sufficiently close in time and space that the environmental impacts of all the activities and facilities required to achieve it must be considered in a single EIS. *Id*.

In light of the actual scope of the project, Staff must prepare an EIS that considers the *entire* major federal action at issue. *E.g. Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 13 (D.D.C. 1998) ("[i]f agency actions are similar in that they share common timing or geography, such actions should also be addressed in the *same environmental document* so as to assess adequately their combined impacts") (emphasis added). That review must consider the environmental impacts of the entire project. It must also consider reasonable alternatives to that entire project – including, *e.g.*, alternatives whereby something *less* than the entire proposed Lance District ISL mining would occur.[16]

By failing to consider the overall project, the applicant and NRC are unlawfully segmenting the project into smaller parts. *E.g. Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) ("close interdependence" between two aspects of a project warrant review in a single EIS); *Florida Wildlife v. U.S. Army Corps of Engrs.*, 401 F. Supp. 2d 1298, 1318 (S.D. Fla. 2005) (first

[16] The alternatives analysis that will be required for the entire project distinguishes this FSEIS Contention 5 from the contention concerning cumulative impacts. Thus, even assuming *arguendo* that the full scope of the environmental impacts associated with the entire project were properly considered as part of a cumulative impacts analysis, restricting the scope of the proposed project would constrain the scope of alternatives to exclude, *inter alia*, developing something less than the entire project. *See* 40 C.F.R. 1508.25(a)(3) (directing that an agency "may wish to analyze" similar actions in a single EIS, but that "*[i]t should do so* when the best way to assess adequately the combined impacts of similar actions *or reasonable alternatives* to such actions is to treat them in a single impact statement") (emphasis added).

phase of a project "that was never intended to stand alone" may not be artificially segmented from the larger project that is "conceptualized as an integrated whole, progressing in phases").

Accordingly, the Board should admit this new contention that the Staff and Applicant have unlawfully segmented this project, and that the FSEIS is therefore violates NEPA.

FSEIS Contention 5 Complies With 10 C.F.R. § 2.309.

As noted, to satisfy 10 C.F.R. § 2.309(c), any new contention must be accompanied by an explanation demonstrating that (a) the information on "which the filing is based was not previously available," (b) the new information is "materially different from the information previously available," and (3) the filing is timely submitted based on "the availability of the subsequent information." 10 C.F.R. § 2.309(c).

As explained in the Paine II Declaration, since the closure of the public comment period on the DSEIS, there were several disclosures regarding the Applicant's proposed mining activities, and this environmentally significant information is not reflected in the scope of the Proposed Action and subjected to detailed environmental consideration in the FSEIS. Paine II Decl. ¶¶ 23-71. And thus, that information upon which this contention is based was not previously available. Additionally, this information is materially different than what was previously available because it demonstrates with precise clarity Peninsula's temporally, geographically and financially integrated plans for uranium recovery over the entirety of the Lance District. A 2014 Peninsula presentation to the "Mines and Money" Conference in Hong Kong states the company is "constructing a 2.3 mlbs per annum ISR operation in 2 stages" with

an "initial mine life [of] 22 years and a "potential 70+ years of mine life."[17] Paine II Decl. ¶¶ 33-39. The Ross Project FSEIS, by contrast, contains no similar bounding estimate of "mine life" and includes vague and unsubstantiated estimates for the life of the "Ross Project's CPP," ranging from 4.5 years (Fig. 2.6 bar chart "operation" line for Ross Project) to "approximately 14 years from the time that all regulatory approvals are in place" (Fig. 2.6 footnote) to "14 years or more." FSEIS at 2-8. For all the reasons outlined in Paine Declaration II, these are new statements from the parent company of the applicant (thus, "not previously available") and, as those statements make perfectly clear the plans for mining the entirety of the Lance District, this information is "materially different from the information previously available."

Finally, this submission is timely based on the additional information because this is the first document NRC Staff has issued since the DSEIS. As the Board has explained, as regards NEPA contentions, "the timeliness of the new/amended contention motion relating to [newly available] information seemingly would be determined based on the availability of the staff's environmental document, rather than the SER or the applicant's information" – or, presumably, any other information – as the filing "trigger" for the motion. LPB 13-10 at 17 n.14. Thus, since the new contention is submitted in a timely manner after issuance of the FSEIS, Petitioners meet this timeliness factor here as well.

FSEIS Contention 6: The FSEIS is improperly framed as a Supplemental EIS, rather than a separate EIS tiered from the Generic EIS for In-Situ Leach Uranium Milling Facilities.

CONTENTION: The FSEIS violates 10 C.F.R. Part 51 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA, because the NRC Staff

[17] http://www.pel.net.au/images/peninsul---aingoequei.pdf. Slide 15 of 67.

process for development of the document improperly treated the analysis as a Supplemental EIS, rather than preparing an EIS, which would have required a scoping process to properly delineate the scope of the action at issue.

BASES AND SUPPORTING EVIDENCE FOR FSEIS CONTENTION 6

Under CEQ and NRC NEPA regulations, when an agency prepares an EIS, the initial step of the process is to engage in appropriate "scoping" to define the nature of the project under review. 40 C.F.R. 1501.7. Thus, CEQ regulations provide that "[t]here shall be an early and open process for determining the s*cope of issues to be addressed* and for identifying the significant issues related to a proposed action," including (a) "a notice of intent in the Federal Register" inviting comment from, *e.g.*, "interested persons (including those who might not be in accord with the action on environmental grounds); (b) a determination of "the scope" of the project to be addressed; and (c) "scoping meeting or meetings." *Id.* Similarly, NRC regulations require NRC to engage in scoping to "[d]efine the proposed action which is to be the subject of the statement" and the "scope of the statement," and at the conclusion of the scoping process to "prepare a concise summary of the determinations and conclusions reached, including the significant issues identified. 10 C.F.R. § 51.29

NRC did not engage in a scoping process for the FSEIS. Rather, NRC has proceeded on the premise that it is preparing a *Supplement* to the Generic EIS for In-Situ Leach Uranium Mining Facilities, and because scoping is not generally conducted for *supplemental* NEPA reviews, NRC did not follow these vital public participation steps. *See* 40 C.F.R. 1502.9(c)(4) (stating that scoping is not necessary for a supplement).

This violates NEPA, and both CEQ and NRC regulations. As explained in detail in a recently issued IG Report from the NRC Office of Inspector General,[18] with regard to in-situ uranium mining projects, NRC issued its Generic EIS, and then issues "supplemental" EIS's, without scoping, as has occurred here. *Id.* at 20. By contrast, the IG Report explains, when the agency is preparing an EIS for renewal of a reactor operating license, it conducts full scoping in "tiering" from the Generic EIS on those facilities, preparing site-specific EISs that follow all of NEPA's dictates. *Id.* at 18-20; *see also*, Paine Declaration II ¶¶ 3-22.

As the IG Report further explains, NRC is proceeding in this manner "because of *incorrect understanding of the regulations related to scoping for EISs that tier off of a generic EIS*." *Id.* at 24 (emphasis added). In particular, by inappropriately calling the document a "supplement" to the GEIS, NRC has failed to undertake the required scoping process. *Id.*

Further compounding this fundamental NEPA violation, as the IG Report further explains, in the GEIS itself NRC took the opposite approach, claiming – in response to comments – that it would engage in a meaningful scoping process for each individual license, and that the GEIS itself did not also constitute the scoping process for later EISs. *Id.* at 24 ("NRC did not give public notice that the public scoping for the generic EIS would serve as the scoping process for later EISs"). Accordingly, Petitioners contend the FSEIS violates NEPA and applicable regulations because the necessary scoping process was not followed. *Id.* at 25 ("NRC is not in compliance with its regulations for scoping in 10 CFR 51.26-29. Public comment at an early stage in the environmental review enables NRC to determine the scope of the issues to be

[18] *AUDIT REPORT: Audit of NRC's Compliance With 10 CFR Part 51 Relative to Environmental Impact Statements*, OIG-13-A-20, August 20, 2013, at 20-26, found online at http://pbadupws.nrc.gov/docs/ML1323/ML13232A192.pdf.

addressed in the EIS, as required by the regulations. By not seeking broad public comment, NRC may not fully develop the scope of the issues to be addressed in the EIS").[19]

Moreover, it is apparent the FSEIS does not qualify as a "supplement" to the GEIS as provided by the applicable regulations. 10 C.F.R. 51.92; 40 C.F.R. 1502.9(c)(2). Those regulations allow for a supplement to an earlier EIS where either: "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* The NRC Staff does not even endeavor to make either showing in the FSEIS. Instead, the FSEIS simply states that it "supplements" the Final EIS, without at all explaining how either of the two regulatory criteria for a "supplement" are satisfied. FSEIS at 1-1.

Indeed, the FSEIS itself notes the agency "tiers an SEIS from the GEIS by incorporating applicable GEIS discussions by reference and adopting relevant GEIS environmental impact conclusions." *Id.* at 1-3. However, as noted, to the extent the FSEIS is "tiered" from the GEIS, *the agency was required to engage in a full scoping process,* as such a tiered document is not excused from scoping like a supplemental EIS.

Accordingly, since the FSEIS is not actually a "supplement" to the GEIS, full scoping was required and Intervenors have presented an admissible contention on this issue.

FSEIS Contention 6 Complies With 10 C.F.R. § 2.309

This contention also satisfies each of the 10 C.F.R. § 2.309(c) "good cause" factors, in light of the timing of the availability of the information on which the contentions is based.

[19] Of course, Intervenors believe if appropriate scoping had been conducted the NRC would have included the full scope of the planned Lance District activities within the scope of the EIS, but this not the central matter at issue in this contention. Rather, the issue is NRC has failed to even follow the requisite process necessary to define the project scope.

As regards factor (i) – how the information on "which the filing is based was not previously available" – the key new element to this contention is the NRC IG Report, issued in August, 2013, after Intervenors submitted, and even after the Board had ruled upon, DSEIS contentions. That report – issued by NRC's own Inspector General – details the manner in which the process leading to this "FSEIS" fundamentally failed to comply with NEPA, and thus for the first time provided Intervenors with evidence to present a substantial question on this issue to the Board.

As to how the IG Report is "materially different from the information previously available" (factor ii), it represents – for the first time – and official statement from an office within the agency concerning the appropriate way the regulatory scheme should be interpreted. Without the IG Report, the Board would simply have deferred to the NRC Staff claims that preparing a "supplement" to the GEIS is an appropriate way to proceed. With the IG Report, NRDC now has a substantial basis to present a disputed question as to whether that approach is in fact permissible.

Finally, as regards the timeliness of the contention in light of "the availability of the subsequent information" (factor iii), once again, as the Board has explained, as regards NEPA contentions, "the timeliness of the new/amended contention motion relating to [newly available] information seemingly would be determined based on the availability of the staff's environmental document, rather than the SER or the applicant's information" – or, presumably, any other information – as the filing "trigger" for the motion. LPB 13-10 at 17 n.14. In light of the IG Report, Intervenors had hoped NRC would bring itself into compliance with NEPA and the applicable regulatory scheme by actually conducting the scoping process that the IG Report details is required. It was not until the FSEIS was issued – with no further explication as to how

the document actually qualifies as a "supplement" – that this contention became ripe to present to the Board. Accordingly, because it has been presented within the deadline for contentions to the FSEIS, this final 2.309(c) factor is satisfied here as well.[20]

CONCLUSION

For the foregoing reasons, Intervenors have demonstrated their migrated or amended contentions and new contentions are admissible, and they are entitled to a hearing on these contentions.

Respectfully submitted,

s/ (electronically signed)
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

/s/ Geoffrey H. Fettus
Geoffrey H. Fettus, Senior Attorney
Natural Resources Defense Council, Inc.
1152 15th St., NW, Suite 300
Washington, D.C. 20005
Tel: (202) 289-6868/Fax: (202) 289-1060
Email: gfettus@nrdc.org
Counsel for NRDC

/s/ Shannon Anderson
Shannon Anderson, Staff Attorney
Powder River Basin Resource Council
934 N. Main St.
Sheridan, WY 82801
Tel: (307) 672-5809/Fax: (307) 672-5800
Email: sanderson@powderriverbasin.org
Counsel for Powder River Basin Resource Council

Date: March 31, 2014

[20] Intervenors note that they long ago raised issues before the agency concerning the proper scope of the environmental review process. *See* PRBRC comments on the DSEIS at 2 note 2 (discussing that "[f]rom a legal standpoint, NRC's use of the word 'supplemental' appears to be misplaced." PRBRC Comments filed May 13, 2013; http://pbadupws.nrc.gov/docs/ML1313/ML13137A021.pdf. Thus, NRC cannot legitimately claim this issue is somehow being raised too late in the administrative process. However, as we have explained, it is issuance of the IG Report that has for the first time elevated this issue from an evidentiary standpoint so as to make it appropriate to raise as a contention to be adjudicated in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Joint Motion To Migrate Or Amend Contentions, and To Admit New Contentions In Response To Staff's Final Supplemental Draft Environmental Impact Statement* and accompanying attachments in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 31st day of March 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Geoffrey H. Fettus (electronic signature)

Date: March 31, 2014