April 14, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
STRATA ENERGY INC.	)	Docket No. 40-9091-MLA
	)	
(Ross *In Situ* Uranium Recovery Site)	)	ASLBP No. 12-915-01-MLA
	)	

NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S AND 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

The Staff of the U.S. Nuclear Regulatory Commission (NRC Staff) responds to the Natural Resources Defense Council's (NRDC) and Powder River Basin Resource Council's (PRBRC) (collectively Joint Intervenors or Intervenors) Joint Motion to Migrate or Amend Contentions, and to Admit New Contentions in Response to Staff's Final Supplemental Draft [sic] Environmental Impact Statement (FSEIS). For the reasons set forth below, the Board should dismiss two of the Joint Intervenors' previously admitted contentions and deny the two new contentions challenging the FSEIS.

BACKGROUND

I. The Application

On January 4, 2011, Strata Energy, Inc. (Strata or the Applicant) submitted an application for a combined NRC source and 11e.(2) byproduct material license.[1] As detailed in

[1] Letter from Strata Energy, Inc. Submitting Combined Source and 11e.(2) Byproduct Material License Application Requesting Authorization to Construct and Operate Proposed Ross In Situ Leach Uranium Recovery Project Site (Jan. 4, 2011) (Agencywide Documents Access and Management System

the Staff's Response to Joint Petitioners' initial hearing request, Strata's license would involve the construction and operation of an *in situ* uranium recovery and processing facility (ISR) in Crook County, Wyoming.[2] In support of its application for an NRC license, Strata submitted a Technical Report (TR) and an Environmental Report (ER) addressing its proposed facility's impact on the environment. The ER, which is required by NRC regulations in 10 C.F.R. Part 51, helps inform the Staff's independent review of a license application and thereby helps the Staff meet the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq*.[3]

II. The Staff's NEPA Review

In accordance with NEPA and the NRC's NEPA implementing regulations in 10 C.F.R. Part 51, the Staff has prepared a supplemental environmental impact statement (SEIS) in connection with Strata's application. The SEIS tiers from and supplements the analysis in NUREG-1910, "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (GEIS). The GEIS assesses the environmental impacts of ISR operations both generally and on a regional basis, with specific sections focusing on the Nebraska-North Dakota-Wyoming Uranium Milling Region and the Wyoming East Uranium Milling Region, which include regional features where Strata's facility would be located.

(ADAMS) Accession No. ML110120055). The Application's supporting documentation can be found in ADAMS by searching under Docket No. 04009091.

[2] *See* NRC Staff Response to Petition to Intervene and Request for Hearing by the Natural Resources Defense Council & Powder River Basin Resource Defense Council (Dec. 5, 2011), at 1-2.

[3] Subsequent to Strata's submission of its ER in 2011, Strata provided additional information relevant to the Staff's NEPA review. In March 2012, Strata submitted responses to the Staff's requests for additional information (RAIs) pertaining to the ER. Letter from Mal James, Strata Energy, Inc., to John Saxton, NRC (Mar. 30, 2012) (ADAMS Accession No. ML121030406). Strata's supplemental information is publicly available through ADAMS, except in a relatively few instances in which the information is sensitive or otherwise protected from disclosure.

On March 21, 2013, the Staff issued a draft SEIS (DSEIS) for public comment.[4] The DSEIS addressed environmental impacts related to the construction of the Ross facility and ISR operations at the site, as well as impacts from the restoration of aquifers used during ISR operations and decommissioning of the site. The Staff prepared the DSEIS in cooperation with the U.S. Bureau of Land Management (BLM), which manages public lands open to mineral entry on which the Applicant has filed mining claims.

On February 28, 2014, the Staff issued the FSEIS for the Ross Project.[5] The FSEIS updates the information in the DSEIS and the Staff's analysis of environmental impacts. The FSEIS also adds a new Appendix B, which presents public comments on the DSEIS and the Staff's responses to the comments.

III. The Board's Ruling on Prior Contentions

In their initial joint hearing request, the Intervenors proffered five contentions, characterized by the Board as "environmental/NEPA" contentions.[6] The Board admitted four contentions, as reformulated by the Board in its February 10, 2012 order.[7] The contentions admitted by the Board challenged the application's characterization of baseline groundwater quality (Environmental Contention 1); its analysis of environmental impacts that will occur if the Applicant cannot restore groundwater to primary or secondary limits (Environmental Contention 2); the adequacy of the hydrological information used to demonstrate the Applicant's ability to contain groundwater fluid migration (Environmental Contention 3); and the adequacy of the application's assessment of cumulative impacts of the proposed action and the planned Lance

[4] *Supplemental Environmental Impact Statement for the Ross In-Situ Uranium Recovery Project in Crook County, Wyoming*, 78 Fed. Reg. 19,330 (Mar. 29, 2013).

[5] *Final Supplemental Environmental Impact Statement; Issuance—Proposed Ross Project in Crook County Wyoming for In-Situ Leach Uranium Milling Facilities*, 79 Fed. Reg. 13,683 (Mar. 11, 2014). The FSEIS is Supplement 5 to NUREG-1910 (ADAMS Accession No. ML14056A096).

[6] *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-12-3, 75 NRC 164, 192 (2012).

[7] *Id.* at 210 & Appendix A.

District expansion projects (Environmental Contention 4/5A).[8] After the Staff issued the DSEIS in March 2013, the Intervenors sought to amend their admitted contentions to apply to the Staff's DSEIS and to add a new environmental contention.[9] Resubmitted Contentions 1 through 4/5 addressed the same issues as the contentions previously admitted in this hearing—baseline groundwater quality, restoration of groundwater quality, fluid migration, and cumulative impacts—while new Contention 5 raised the new claim that the DSEIS improperly segmented the scope of the proposed federal action, which led to a failure to consider the environmental impacts of, and appropriate alternatives to, the Applicant's actual proposed project.

In its July 26, 2013 order, the Board admitted "resubmitted" Contentions 1 through 3, finding that these contentions challenged information in the DSEIS that was sufficiently similar to information in Strata's ER.[10] In so doing, the Board found that the contentions migrated from the ER to the DSEIS.[11] The Board declined to migrate admitted Contention 4/5A to the DSEIS, leaving it admitted as against the ER, and rejected the Intervenors' remaining contention.[12]

IV. The New Contentions

In their contentions challenging the FSEIS, the Intervenors seek to migrate their admitted contentions to the Staff's FSEIS or, in the alternative, to amend their admitted contentions to apply to the FSEIS.[13] The Intervenors also seek admission of two new

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[8] *Id.*

[9] Natural Resources Defense Council's & Powder River Basin Resource Council's Joint Motion to Resubmit Contentions & Admit One New Contention in Response to Staff's Supplemental Draft Environmental Impact Statement (May 6, 2013), at 1.

[10] *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-13-10, 78 NRC 117, 135-41 (2013).

[11] *See id.* at 151.

[12] *Id.*

[13] 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 (Mar. 31, 2014) ("Motion"), at 1.

environmental contentions, one of which mirrors a contention that the Board rejected.[14] Contentions 1 through 4 address the same general issues as the contentions previously admitted in this hearing: baseline groundwater quality (Contention 1), restoration of groundwater quality (Contention 2), fluid migration (Contention 3), and cumulative impacts (Contention 4). *See* Motion at 17-15, 19-31. New Contention 5 claims that the FSEIS improperly segments the scope of the proposed federal action, which leads to a failure to consider the environmental impacts of, and appropriate alternatives to, the Applicant's planned activities in the entire Lance District. Motion at 33. New Contention 6 claims that the Staff has improperly framed the FSEIS as a supplemental EIS, rather than as a standalone EIS that tiers from a generic EIS, which led to a failure to engage in a scoping process for the FSEIS. Motion at 39-40.

LEGAL STANDARDS

I. General Requirements for Contentions

A contention cannot be admitted in an NRC proceeding unless it meets the criteria in 10 C.F.R. § 2.309(f)(1). This subpart requires that each contention:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that 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;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ;
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> (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

[14] *See Strata Energy, Inc.*, LBP-13-10, 78 NRC at 144-50.

II. Standards for New and Amended Contentions

Although contentions must typically be filed at the same time as the initial hearing request, a person may later file new or amended contentions based on subsequently released documents, such as the NRC Staff's draft or final NEPA document. 10 C.F.R. § 2.309(f)(2). Such a contention cannot be admitted, however, unless it meets the following additional requirements in 10 C.F.R. § 2.309(c)(2):

> (i) The information upon which the filing is based was not previously available;
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> (ii) The information upon which the filing is based is materially different from information previously available; and
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> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The intervenor has the burden of demonstrating that any new or amended contention meets the standards in 10 C.F.R. § 2.309.[15]

A new NEPA contention is not an occasion to raise additional arguments that could have been raised on the ER.[16] Furthermore, the Staff's NEPA document does not provide the only opportunity for an intervenor to submit a new contention in a hearing. To the contrary, an intervenor must submit a contention whenever other information becomes available that raises an issue for the hearing. The intervenor must submit its new contention "in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(c)(2)(iii). In this particular hearing, the Board has issued scheduling orders addressing the timeliness of

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[15] *Amergen Energy Company, LL*C (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

[16] *Id. See also Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1049 (1983) (Commission expects that the filing of an environmental concern based on the applicant's Environmental Report will not be deferred simply because the Staff may subsequently provide a different analysis in its DEIS); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (no good cause for late filing where DEIS contained no new information relevant to contention).

contentions.[17] Under these orders, the Intervenors must submit contentions within 30 days after relevant information becomes available to them.

III. Precedent Relevant to the Board's Review of the FSEIS Contentions

The following principles are relevant to whether the Intervenors have met their burden of showing their contentions should be admitted.

A. Previously Admitted Contentions Do Not "Migrate" to a Final EIS Unless the Challenged Analysis Is Essentially the Same As In the Draft EIS

Under the "migration tenet," a Board may construe an admitted contention challenging the applicant's Environmental Report as presenting a similar challenge to the Staff's DSEIS.[18] Under this tenet, an admitted contention challenging the DSEIS may also migrate to the FSEIS.[19] The migration tenet does not apply, however, unless the information in the FSEIS is *in para materia* with the information that is the focus of the contention challenging the DSEIS.[20] If it is, the Board may decide that the contention migrates from the DSEIS to the FSEIS even if the intervenor does not amend its contention or file a new contention. If it is not, the Board must independently review whether the intervenor satisfies all requirements for a late-filed contention.[21]

B. Contentions Must Address All Relevant Information In the Record

When submitting a contention, an intervenor must read all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing

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[17] Memorandum and Order (Initial Prehearing Order) (Nov. 3, 2011) ("Nov. 3, 2011 Order"), at 4 n.3; Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (Apr. 10, 2012) ("Apr. 10, 2012 Order"), at 4.

[18] *Nuclear Innovation N. Am. LLC* (South Texas Project Units 3 and 4), LBP-12-5, 75 NRC 227, 232 n.17 (2012).

[19] *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 76 NRC 742, 767-68 (2012).

[20] *Id.*

[21] *Id.*

view.[22] The Board must reject a contention that rests on an incomplete or inaccurate reading of an EIS.[23] Furthermore, when challenging an EIS, the intervenor must do more than allege generally that there are deficiencies in the document. In order to demonstrate a genuine, material dispute with the EIS for a particular facility, the intervenor must address the specific analysis in the document and explain how it is incorrect.[24]

C. The Staff's NEPA Review Has a Defined Scope

When preparing an EIS, the Staff must take a hard look at the environmental impacts of the proposed action.[25] This standard is, however, subject to a "rule of reason." Under NEPA's rule of reason, the Staff need not address every environmental effect that could potentially result from the proposed action.[26] Rather, the Staff need only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]"[27]

NRC jurisprudence follows federal Circuit Court precedent in limiting the scope of the Staff's NEPA review. "NEPA . . . does not call for certainty or precision, but an *estimate* of

[22] *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

[23] *Cf. Georgia Institute of Technology*, (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on a mistaken reading of the Safety Analysis Report).

[24] *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) ("An expert opinion that merely states a conclusion (*e.g.,* the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate").

[25] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[26] *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

[27] *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980).

anticipated (not unduly speculative) impacts."[28] The proper inquiry is not whether an effect is "theoretically possible," but whether it is "reasonably probable that the situation will obtain."[29]

When discussing impacts in certain resource areas, the EIS may take into account environmental mitigation measures proposed by the applicant or identified by the Staff. The EIS need not contain "a complete mitigation plan," however, nor does it need to include "a detailed explanation of specific [mitigation] measures which will be employed."[30] In fact, a mitigation plan "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."[31] The EIS need only discuss mitigation measures "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[32]

D. The Staff Need Not Recirculate an EIS for Comment Unless There Are Changes That Cause Effects Which Are Significantly Different From Those Already Studied

The NRC's regulations explain when the Staff must prepare a supplement to either a draft or final EIS. The Staff must prepare a supplement when:

> (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
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> (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

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[28] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

[29] *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 49 (1978).

[30] *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426-27 (2006).

[31] *Id.*

[32] *Id.*; *see also Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC 254, 265 (2011) (explaining that NEPA does not "demand the presence of a fully developed [mitigation] plan" or a "detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action").

10 C.F.R. § 51.72(a) (draft EIS); 10 C.F.R. § 51.92(a) (final EIS).[33] If the Staff prepares an EIS supplement for either of these reasons, it must also circulate the supplement for public comment. 10 C.F.R. § 51.72(c); 10 C.F.R. § 51.73; 10 C.F.R. § 51.92(f)(1).

Under this standard, the Staff need not prepare an EIS supplement every time it obtains new information that has some bearing on the proposed action.[34] Rather, the Staff must prepare a supplement "only [in response to] those changes that cause effects which are significantly different from those already studied."[35] The changes must present a "seriously different picture of the environmental impact of the proposed project" and affect "the quality of the human environment in a significant manner or to a significant extent not already considered."[36]

DISCUSSION

At the outset, the Staff notes that the amended contentions assert that the FSEIS violates numerous regulations that either do not apply to the Staff's environmental review or are not set forth with specificity in the bases of the contentions. *See generally* Motion at 7-42. For example, 10 C.F.R. § 51.45 pertains to the *Applicant's* ER, and does not impose requirements on the Staff. Section 51.70 prescribes general requirements for the Staff's environmental document, but the Intervenors do not provide any supporting information that alleges that the Staff has failed to comply with any portion of 10 C.F.R. § 51.70.

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[33] For a final EIS, this rule applies only if the proposed action has not yet been taken. 10 C.F.R. § 51.92(a).

[34] *See Hydro Resources, Inc*. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (explaining that an EIS supplement is not required "every time new information comes to light").

[35] *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001).

[36] *Hydro Resources*, CLI-99-22, 50 NRC at 14.

I. Contention 1 Is Admissible in Part as a Migrated Contention

Contention 1:

> The FSEIS fails to adequately characterize baseline (*i.e.*, original or pre-mining) groundwater quality. 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).[37]

Joint Intervenors state that the FSEIS contains the same omission as the DSEIS and the ER, as it "fail[s] to collect the requisite information on baseline water quality, and instead continu[es] to claim that such data collection is not required and only need be collected in a 'post-licensing, preoperational' phase just before the mining commences, long after the issuance of any EIS and not subject to public review." Motion at 8. They further state that the analysis remains the same, and claim that 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.*

In the FSEIS, the Staff expands on the DSEIS's discussion of baseline groundwater conditions. For example, the FSEIS clarifies the terms used to describe the two different sets of "baseline" water quality information that Strata is required to provide to the NRC—pre-licensing, site-characterization information, and post-licensing, pre-operational information.[38] FSEIS at

[37] Joint Intervenors note that the resubmitted contention is the same as Contention 1 as admitted by the Board on July 26, 2013, except with respect to the substitution of a reference to 10 C.F.R. §§ 51.90-95 in place of references to 51.70 and 71. Motion at 7 n.5. The Intervenors rely upon the previously filed declarations of Drs. Moran, Sass, and Abitz and a third declaration from Dr. Abitz and, newly, Dr. Lance Larson ("3d Abitz/Larson Decl."). *Id.*

[38] Joint Intervenors allege that the FSEIS has "systematically removed" references to the term "baseline," thereby introducing "regulatory confusion." 3d Abitz/Larson Decl. at ¶ 8. In support of this claim, the Intervenors refer to a paragraph in the DSEIS that defines "pre-licensing baseline" information as the water quality information that an applicant must gather and provide to the NRC before a license is issued. The Intervenors compare this paragraph with a text box in the FSEIS that defines "post-licensing, pre-operational" data as the information that an applicant must gather to prior to uranium recovery operations, which becomes the values to which excursion detection and aquifer restoration monitoring are compared,

2-25. In Sections 2.1.1.1, 2.1.1.2, 4.5.1.2, and 6.3.2, the Staff has clarified the requirements relating to the collection of post-licensing, pre-operational water quality information, and in Sections 2.1.1.1 and 4.5.1.3, expanded the discussion on groundwater protection standards found in 10 C.F.R. Part 40, Appendix A, Criterion 5B(5). The Staff also included a new Appendix B1, which provides a detailed discussion of alternate concentration limits (ACLs). In addition, in Section 3.5.3.3. and Appendix C of the FSEIS, the Staff provides all of the pre-licensing, site-characterization water quality information collected by Strata, as requested by the Intervenors in the previous declaration of Dr. Abitz. *See, e.g.*, 2d Abitz Decl. at ¶ 8. Finally, in a number of comment responses, the Staff addresses arguments that the Intervenors previously raised concerning baseline water quality conditions.[39]

That said, the Staff does not challenge the admission of Contention 1 as a migrated contention, insofar as the Board has already admitted this contention as a migrated contention against the DSEIS and the FSEIS does not present substantially different information or analyses than was presented in the DSEIS.[40] In acknowledging that Contention 1 meets this Board's criteria for a migrated contention, however, the Staff nevertheless maintains its

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in accordance with 10 C.F.R. Part 40, Appendix A, Criteria 5B(5) and 7. *Id.* However, in attempting to set up this argument, the Intervenors ignore the portion of the new FSEIS text box that addresses the use of the clarified term "pre-licensing, site characterization," which corresponds with the DSEIS description referenced by the Intervenors. *See* FSEIS at 2-25. This is not the first time Joint Intervenors have confused these two different sets of "baseline" water quality information. *See, e.g.*, NRC Staff Response to [Joint Intervenors'] Joint Motion to Resubmit Contentions and Admit One New Contention in Response to Staff's [DSEIS] (Jun. 3, 2013), at 10 n.31; *see also* 3d Abitz/Larson Decl. at ¶ 18 (claiming, mistakenly, that the Staff has switched from using pre-licensing, site characterization values (in the DSEIS) to post-licensing, pre-operational values (in the FSEIS) to establish "baseline" water quality). It is in part for that reason that the FSEIS clarifies and standardizes the use of these terms. *See* FSEIS Appendix B, Section B.5.9.5 (Response to Comments RP024-133, RP024-135, and RP024-338). Furthermore, the term "post-licensing, pre-operational" was in fact used throughout the DSEIS, as referenced in the Intervenors' own pleadings. *See, e.g.*, 2d Abitz Decl. at ¶¶ 13-17.

[39] *See, e.g.*, FSEIS Appendix B, Section B.5.15.1 (Response to Comments RP003-001, RP004-001, RP016-003, and RP029-001) and Section B.5.15.2.3 (Responses to Comments RP032-018, RP032-019, RP032-031, RP032-020, RP032-036, RP032-041).

[40] *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 135-36 (where NRC Staff, in preparing its NEPA document, "maintains the same omission that was alleged to be in the ER," the issues raised in ER-based admitted contention can "essentially transmute into challenges to the staff's NEPA statement.")

objections to the admissibility of Contention 1 as described in its previous responses to Joint Intervenors' submission of Contention 1 against the ER and the DSEIS. For example, the Staff notes that the Intervenors continue to argue that the Staff is improperly allowing Strata to defer the collection of data required under Criterion 5B(5) in Appendix A of 10 C.F.R. Part 40 until it obtains a license. But neither Criterion 5B(5), nor Criterion 7, which the Intervenors also cite, governs the Staff's preparation of the FSEIS. These are safety criteria that the Applicant must meet. Simply put, the Staff's DSEIS cannot fail to comply with 10 C.F.R. Part 40, Appendix A, as alleged by Contention 1.[41] Should the Board migrate Contention 1 to the FSEIS, it should clarify that neither 10 C.F.R. Part 40, nor Appendix A to that Part, provides a basis for an environmental contention against the FSEIS.

In addition, with the resubmission of this Contention, Joint Intervenors again attempt to expand the scope of the original contention with new bases and arguments that are not based upon new or materially different information and that impermissibly raise assertions that they could have, but failed to, raise earlier in this proceeding. "An amended NEPA contention is not an occasion to raise additional arguments that could have been raised previously."[42] The Staff opposes the addition of these new bases for failure to meet the Commission's contention admissibility and timeliness standards. For example, Joint Intervenors, through Drs. Abitz and Larson, offer a new claim that the NRC impermissibly allows applicants to obtain post-licensing, pre-operational baseline data within a "disturbed" zone, and introduce a comparison of the NRC's regulations to CERCLA and RCRA. 3d Abitz/Larson Decl. at ¶¶ 11-12. Not only is such an argument a direct challenge to 10 C.F.R. Part 40, Appendix A, and therefore outside the

[41] In any event, Criterion 5B(5) does not prescribe baseline information that an Applicant must obtain, but preoperational monitoring data a licensee must obtain in specific wellfields.

[42] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 (2002).

scope of this proceeding,[43] it is not based upon new and significant information that was not previously available to the Intervenors. As the Intervenors aver that Contention 1 is essentially identical to the previously admitted versions of Contention 1, and that the FSEIS is essentially identical to the ER and the DSEIS, *see* Motion at 8-9, 3d Abitz/Larson Decl. at ¶ 5, at these arguments should have been raised earlier in this proceeding.

II. Contention 2 Is Inadmissible as a Migrated or Amended Contention

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. 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).[44]

The Intervenors argue that the Staff has not substantiated its claim in the FSEIS that impacts on ground water quality will ultimately be small, nor has the Staff provided an analysis that demonstrates how it arrives at or quantifies that determination. Motion at 10. The Intervenors claim that the FSEIS fails in the same respect as the DSEIS by neglecting to provide and evaluate information regarding the "reasonable range" of hazardous constituent concentration values referred to in the Board's formulation of the admitted contention. *Id.* at 12. Finally, while acknowledging that "the FSEIS contains some added analysis of other projects," Joint Intervenors argue that this information does not address "the fundamental flaw of the EIS

[43] 10 C.F.R. § 2.335(a); *see also Exelon Gen. Co.* (Limerick Generating Station), LBP-13-1, 75 NRC 57, 63 (2013) ("Generally, NRC regulations may not be challenged in any NRC adjudicatory proceeding.")

[44] As with Contention 1, Joint Intervenors note that the resubmitted contention is the same as Contention 2 as admitted by the Board in its July 26, 2013 order, except with respect to the substitution of a reference to 10 C.F.R. §§ 51.90-95 in place of references to 51.70 and 71. Motion at 10 n.6. The Intervenors rely upon the previously filed declarations of Drs. Moran and the newly filed declaration of Drs. Abitz and Larson. *Id.*

[. . .] 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.* (emphasis in original).

The Board initially admitted Contention 2 on the basis of an underlying assumption that Strata might not be able to restore groundwater to pre-mining baseline quality or to drinking water quality standards, necessitating that the Applicant obtain an alternate concentration limit (ACL). Motion at 10-11.[45] The Board determined that NEPA required "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."[46] When the Board migrated Contention 2 to the DSEIS, it found that although the DSEIS did address the environmental impacts that might result should an ACL be necessary for the Ross Project, it did not address the crux of the contention, i.e., since an ACL may realistically be necessary, "within a reasonable range," what is the potential ACL likely to look like and might be the associated impacts.[47] Therefore, the remaining issue admitted as to Contention 2 is the narrow question of whether the Staff provided and evaluated information "regarding the reasonable range of hazardous constituent concentration values that are likely to be applicable if the applicant is required to implement an ACL." Because the FSEIS provides this information and accounts for it in its conclusions regarding the environmental impacts that may occur as a result of the proposed Ross Project, Contention 2 is not eligible for migration to the FSEIS.

In its description of the potential environmental impacts on groundwater resulting from the proposed Ross Project, the FSEIS includes a new discussion of historic approvals of aquifer

[45] *See Strata Energy, Inc.*, LBP-12-3, 75 NRC at 197-98.

[46] *Id.* at 197.

[47] *Strata Energy, Inc.*, LBP-13-10, 75 NRC at 138.

restoration activities by the NRC. Section 4.5.1.3 of the FSEIS describes three facilities[48] that received NRC's approval for aquifer restoration activities and the groundwater quality parameters in those wellfields for which the NRC approved restoration. FSEIS at 4-46. These descriptions are intended to provide examples of hazardous constituent concentration values that the NRC found to be protective of human health and the environment.

In each case, the FSEIS notes that the facility was able to restore the majority of groundwater constituents to either post-licensing, pre-operational baseline values or to an approved secondary value consisting of levels equivalent to either Wyoming's Class I Domestic Use standards or the Environmental Protection Agency's (EPA's) drinking water maximum contaminant levels (MCLs). *Id.* at 4-48. For constituents exceeding the post-licensing, pre-operational baseline values, the FSEIS describes exceedances ranging from 6 to 680 percent above those values. *Id.* at 4-46. As the Joint Intervenors point out, the FSEIS inaccurately characterizes Crow Butte Wellfield 1's final concentration value for uranium as "18 percent above post-licensing, pre-operational concentrations." Motion at 24-25; 3d Abitz/Larson Decl. at ¶ 35. In fact, the final concentration value for uranium was *18 times* the baseline value. *See* Affidavit of Dr. Kathryn Johnson at ¶ 4 ("Johnson Decl.")[49]; Motion at 24-25; 3d Abitz/Larson Decl. at ¶ 35. (Had the drafting error not been committed, the FSEIS would have documented exceedances ranging from approximately 6 to 1800 percent above post-licensing, pre-operational values.) Nevertheless, as the FSEIS notes, the essential matter is that the NRC approved wellfield restoration for all of these facilities based on this range of reported values, including the values corrected by Dr. Johnson in her affidavit, and in so doing found these values to be protective of human health and the environment. *See* FSEIS at 4-46 ("NRC has

[48] The FSEIS notes that a fourth, Cogema Mining Company's Christensen Ranch Mine Units 2-6, has requested approval of restoration from the NRC. FSEIS at 4-46.

[49] The Staff submits Dr. Kathryn Johnson's affidavit as an attachment hereto to respond to the drafting error in the FSEIS and its implications. Dr. Johnson concludes in her affidavit that the error identified by the Intervenors does not affect the Staff's analysis or conclusions in the FSEIS. Johnson Decl. at ¶ 10.

approved aquifer restoration in Crow Butte Wellfield 1 (NRC, 2003c), Smith Ranch-Highland A-Wellfield (NRC, 2004a), and Irigaray Mine Units 1-9 (NRC, 2006).”). Therefore, the historical ranges of concentration values described in the FSEIS, as corrected by Dr. Johnson’s affidavit, provide an idea of what a range of possible ACLs for the Ross Project might look like, and accordingly are representative of the impacts that might result should Strata be unable to restore the Ross wellfields to post-licensing, pre-operational values.[50]

Arguing in the alternative that Contention 2 should be admitted as an amended contention, Joint Intervenors address the new information provided in the FSEIS and conclude that the historical information concerning ISR restoration efforts are not indicative of successful restoration. 3d Abitz/Larson Decl. at ¶ 34. The Intervenors contend that the NRC Staff’s conclusions at the time of restoration approval for these facilities was flawed, arguing, for example, that the NRC did not provide risk or dose calculations to support their conclusion, in 2003, that restoration values in Crow Butte Wellfield 1 were protective of human health and the environment. *Id.* at ¶ 35. They assert that the Staff’s FSEIS should have gone further, by discussing post-restoration constituent concentrations for Smith Ranch-Highland Wellfield-A and an analysis of pore volume numbers for Irigaray Mine Units 1-9. *Id.* at ¶ 36, ¶ 45. They also appear to argue that the methodology used to establish the restoration values for Irigaray Mine Units 1-9 was deceptive or flawed. *Id.* at ¶¶ 37-40. The Intervenors state that these circumstances support their contention that the Staff has not “addressed the almost certain impact to groundwater resources when alternative concentration limits are set after restoration fails.” 3d Abitz/Larson Decl. at ¶ 41.

[50] *See Strata Energy, Inc.*, LBP-12-3, 75 NRC at 197 (“Joint Petitioners . . . 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.”).

As the Commission has stated, "NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts;"[51] "while there will always be more data that could be gathered, agencies must have some discretion to draw the line and move forward with decisionmaking."[52] To attempt to satisfy the Intervenors' demands for even more analysis, even to the point of questioning the NRC's prior technical assessments supporting the agency's approval of restoration for these sites, would go far beyond what NEPA and the Board has required. As requested by the Intervenors, the Staff provided and analyzed information on a range of hazardous constituent concentration values presented by historic ISR projects at the time of restoration approval. As a result of the Staff's review of this information, the FSEIS is able to conclude that most of those constituents were returned to concentrations below either post-licensing, pre-operational concentrations or Class I Domestic Use standards. For the few constituents that exceeded these standards, the concentrations did not change the class of use and did not represent a potential impact to the groundwater outside the aquifer-exemption boundary. FSEIS at 4-48.

The FSEIS analyzes the potential impacts to groundwater quality in the ore zone and surrounding aquifers from ISR operations. FSEIS at 4-37. The FSEIS states that a licensee would be required by its WDEQ Permit to Mine and by its source and byproduct materials license to conduct aquifer-restoration activities to restore the ore zone aquifer to post-licensing, pre-operational conditions, if possible. If the aquifer could not be returned to that condition, the NRC would require that the aquifer meet EPA MCLs as provided in 10 C.F.R. Part 40, Appendix A, *or ACLs as approved by the NRC*. The FSEIS concludes that, *for these reasons*, the potential impacts to water quality of the exempted aquifer as a result of ISR operations is expected to be "SMALL" and temporary. *Id.* Once again, for the purposes of determining the

[51] *Louisiana Energy Services*, CLI-05-20, 62 NRC at 536 (emphasis in original).

[52] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010).

potential effects of the Ross Project, the Staff *assumed* that Strata will be unable to restore groundwater to primary or secondary limits, and concluded that such impacts would nevertheless be "SMALL." *Id.* Therefore, because the FSEIS accounts for this possibility and in addition describes, based upon historical experience, what the range of hazardous constituent values for a Ross Project ACL may look like, the Staff's FSEIS resolves the matter that the Board considered to be the crux of the concern engendered in Contention 2.

The remainder of the arguments made by Joint Intervenors are not material to, or within the scope of, the issues presented by Contention 2. As noted above, the Intervenors' contention is *premised on the assumption that an ACL would be required*.[53] Furthermore, as noted previously, the Board has limited the scope of Contention 2 to the narrow question of whether the Staff has described and analyzed a reasonable range of hazards constituent concentration values that are likely to be applicable should the Applicant require an ACL.[54] Therefore, the arguments in the Motion and the 3d Abitz/Larson Declaration concerning the Applicant's proposed restoration process, restoration timeframe, aquifer restoration criteria, aquifer restoration techniques, and the likelihood that Strata will fail to restore ISL-contaminated groundwater to baseline values and will instead require an ACL, do not amount to support for a genuine dispute with the FSEIS's finding that water quality impacts would be SMALL even with an ACL.

In addition, Joint Intervenors' claim that "[n]either Strata nor the NRC Staff have provided any evidence suggesting that the Ross Project will not cause significant aquifer degradation, even if Strata complies with an NRC-provided ACL," Motion at 25, is not properly within the scope of the admitted contention. In admitting Contention 2 against the ER, the Board expressly stated that "[Contention 2] is not a vehicle for Joint Petitioners to seek to establish that

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[53] *See Strata Energy, Inc.*, LBP-12-3, 75 NRC at 197.

[54] *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 137-38.

a satisfactory ACL cannot be adopted or that [Strata] will be unable to comply with any ACL that might be instituted . . . ."[55] For these reasons, Contention 2 is inadmissible for failure to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

III. Contention 3 is Admissible in Part as a Migrated Contention

> Contention 3:
>
> 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.

Motion at 13. The Board previously migrated this contention to the DSEIS based on the similar discussion of exploratory boreholes and pump tests in both the ER and DSEIS.[56] Joint Intervenors contend that the FSEIS "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." Motion at 14. Joint Intervenors continue to argue that, "[l]ike 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" and that "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." Motion at 14-15.

[55] *Strata Energy, Inc.*, LBP-12-3, 75 NRC at 198 n.31.

[56] *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 139.

Recognizing that the FSEIS incorporates the DSEIS's analysis regarding fluid migration, the Staff does not challenge admitting Contention 3 as a migrated contention against the FSEIS. The Staff nevertheless maintains its previously filed objections to the admissibility of Contention 3 against the DSEIS.[57] For example, the Staff notes that Joint Intervenors continue to argue that the FSEIS dismisses unplugged boreholes because the Applicant will find and fill these holes and that "[t]he FSEIS fails to discuss the ramifications of leaving hundreds of these holes unfilled as operations get underway." Motion at 27. To be clear, the FSEIS does not "rely" on the Applicant plugging all exploratory boreholes. The FSEIS merely notes the existence of holes within the Ross Project and acknowledges that "[b]reaches to the integrity of the confining unit from historical exploration and delineation drillholes will be minimized by the Applicant's locating and abandoning the drillholes within the wellfields." FSEIS at 4-42.[58] The Staff's analysis does not end, however, as the FSEIS evaluates the potential for fluid migration in the event an excursion was to occur. *See, e.g.*, FSEIS at 4-41–42. The Staff did not attribute the hypothetical excursion to an improperly abandoned borehole or hydrogeological connectivity, as both scenarios are possible.

Joint Intervenors also continue to argue that the FSEIS improperly relies on the Applicant's monitoring program in its alleged dismissal of potential impacts from hydrogeological connectivity. However, the FSEIS's discussion of monitoring wells merely acknowledges their ability to detect excursions so that they can be quickly remedied. The Staff relied on simulations of excursions performed by Strata and determined that vertical or horizontal excursions would result in temporary impacts to groundwater quality. FSEIS at 4-41–43. If issued, the NRC license will require an early warning system and mitigation in the event of an excursion and

[57] *See* NRC Staff Response to [Joint Intervenors'] Joint Motion to Resubmit Contentions and Admit One New Contention in Response to Staff's [DSEIS] (June 3, 2013), at 18-22.

[58] The Staff notes that Joint Intervenors continue to dispute the number of boreholes at the project site. The Staff properly based its FSEIS evaluation on the number of boreholes reported in the Applicant's Technical Report.

could require withdrawal and treatment of contaminated groundwater.[59] Notwithstanding the Applicant's monitoring system and early warning system, the Staff evaluated the impacts from excursions as discussed *supra*.

Finally, the Staff notes that Joint Intervenors improperly attempt to expand the scope of Contention 3 by arguing that more test wells and longer pump test intervals are required to assess the potential for impacts from of fluid migration during ISR operations. Motion at 28-29. Joint Intervenors claim that "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.* This new aspect of Contention 3 was not submitted as part of the original contention against the ER or migrated contention against the DSEIS. Further, Joint Intervenors are silent as to how this new argument satisfies the "good cause" criteria of 10 C.F.R. § 2.309(c). The Staff notes that this claim could have been filed based on information on test wells contained in the DSEIS. Because the FSEIS does not materially differ in this regard, the Staff opposes the admission of Contention 3 against the FSEIS.

[59] *See* Draft Materials License SUA-1601, Ross Project in Crook County, Wyoming (ADAMS Accession No. ML14069A335), Condition 11.5.

IV. Contention 4 is Inadmissible as a Migrated or Amended Contention

Contention 4:

> 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.

Motion at 15. The Board previously denied Joint Intervenors' request to migrate this contention to the DSEIS because did not meet the criteria for migration.[60] Here, Contention 4 is similarly deficient because—like the DSEIS—the FSEIS provides the cumulative impacts analysis that the Intervenors contended was missing in the original contention.[61] Joint Intervenors offer no additional information as to why the Board should migrate Contention 4 to the DSEIS despite declining to do so for the DSEIS. Accordingly, the Board should deny Joint Intervenors' request to migrate Contention 4 to the FSEIS.

The Staff also opposes Contention 4 as an amended contention. After publication of the DSEIS, the Board declined to admit this contention as an amended contention because the Intervenors had failed to address the contention admissibility criteria in 10 C.F.R. § 2.309(f)(1).[62] Here, although the Intervenors address the contention admissibility factors, the Intervenors fail to establish how the amended contention meets the "good cause" criteria in 10 C.F.R. § 2.309(c). The information Joint Intervenors seek to challenge was previously available in the DSEIS, and the FSEIS does not materially differ from this information. Accordingly, the Board should dismiss Contention 4 as an amended contention.

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[60] *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 141-44; *see also* Order (Denying Motion for Reconsideration of LBP-13-10 Ruling Regarding Environmental Contention 4/5A or, Alternatively, to Admit Amended Contention) (Aug. 27, 2013) (unpublished), at 2.

[61] The FSEIS identifies the reasonably foreseeable mining operations in the Lance District in pages 5-5 through 5-6. The cumulative impacts associated with these projects are analyzed for each resource area throughout Chapter 5 of the FSEIS.

[62] *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 144.

Even if the Board finds that the Intervenors have established "good cause" for submitting Contention 4 as an amended contention, the Staff nevertheless maintains its previously filed objections to the admissibility of Contention 4 against the DSEIS.[63] For example, the Staff notes that the Intervenors continue to argue that the FSEIS lacks a discussion about the projected cumulative consumptive uses of groundwater from uranium mining and other resource extraction activities that draw on the Lance and Fox Hills aquifers. The Staff notes that the FSEIS qualitatively evaluates drawdown in the Lance and Fox Hills Formations, provides consumption rates, and considers recharge rates and mitigation measures in order to determine that the environmental impact would be "SMALL." FSEIS at 5-24–25.

Further, Joint Intervenors continue to argue that the cumulative impacts analysis fails to consider the cumulative impacts associated with the more extensive "Lance District Development." Motion at 30. The Staff discusses cumulative impacts to groundwater quality on pages 5-27 through 5-30 of the FSEIS. These pages explain that the cumulative impacts to groundwater quality would only occur in the case of excursions. Because excursions from the Ross Project are unlikely, and would be remedied, and because the dissolved metals would precipitate, the cumulative impacts would be "SMALL." FSEIS at 5-29. Further, the FSEIS explains that groundwater quality impacts from the Ross Project would be unlikely to reach far enough to have a cumulative groundwater quality impact with impacts from the reasonably foreseeable Land District ISR Projects. FSEIS at 5-30.

Based on the above, Joint Intervenors fail to identify a genuine dispute on a material issue in the cumulative impacts analysis contained in the FSEIS. 10 C.F.R. §§ 2.309(f)(1)(i),(iv). Accordingly, Contention 4 is inadmissible as a migrated or amended contention.

[63] *See* NRC Staff Response to [Joint Intervenors'] Joint Motion to Resubmit Contentions and Admit One New Contention in Response to Staff's [DSEIS] (June 3, 2013), at 22-25.

V. Contention 5 is Inadmissible as a New Contention

New Contention 5:

> 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.

Motion at 33. At the DSEIS stage, the Board dismissed an identical contention filed by Joint Intervenors.[64] Specifically, the Board held that the Intervenors had not provided sufficient supporting information as to whether the Ross facility "lacks any independent utility in the absence of the completion of the other Lance District ISR sites."[65] Further, the Board ruled that the Intervenors' arguments that other Lance District ISR sites were "cumulative" and "similar" elements of the Staff's scoping analysis were untimely.[66]

Here, Joint Intervenors again offer this contention along with additional support that the Ross Project is a "connected" action and lacks any independent utility. However, the Staff notes that the supporting information offered by the Joint Intervenors contains many of the same conclusory assertions the Board previously rejected. For example, Joint Intervenors question the commercial operating life of the Ross Project without the "planned influx of additional uranium-bearing lixiviant and resins" from other facilities in the Lance District. Motion at 34. As the Board has previously noted, "denoting aspects of the Ross facility . . . that will permit economic and operational efficiency . . . is not the same as showing that the Ross ISR facility itself lacks any 'independent utility.'"[67] Furthermore, the Board noted that Joint Intervenors'

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[64] *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 144 (holding that the contention [Contention 6] failed to meet the requirements of 10 C.F.R. §§ 2.309(c)(1)(i), (iii), & (f)(1)(vi)).

[65] *Id.* at 149.

[66] *See id.* (citing 10 C.F.R. §§ 2.309(c)(1)(i),(iii)).

[67] *Id.* at 148.

assertions "support the premise that there is a strong likelihood [the Applicants] intend that eventually all the Lance District ISR sites will be licensed and operating, they are not the same as showing . . . whether the Ross ISR facility is a 'connected' action."[68] Because Joint Intervenors have not adequately supported their claim in Contention 5, the Board should dismiss this contention. 10 C.F.R. § 2.309(f)(1)(i).

The Staff notes that Joint Intervenors continue to argue that the "cumulative" and "similar" elements of the other Lance District ISR sites require a cumulative EIS for all Lance District ISR sites. In support, Intervenors cite generally to "substantial new information" and reference a May 24, 2013 "Lance Project Development Update" published by the Applicant. Motion at 35. Joint Intervenors also reference "several disclosures regarding the Applicant's proposed mining activities" since the publication of the DSEIS. Motion at 38.

First, the Staff notes that all but one of the Applicant's disclosures referenced by Joint Intervenors occurred in 2013. The Commission and this Board have issued clear statements on when a contention must be filed in order to be considered timely. Specifically, "the 'trigger point' for timely submission of new or amended contentions is when new information becomes available."[69] Indeed, the NRC's rules of procedure "require the filing of contentions *as early as possible* after the information becomes available."[70] In addition, the Board's scheduling orders specify that, to be considered timely, motions for the admission of new or amended contentions "must be filed within thirty days of the date upon which the information that is the basis of the motion becomes available to the Joint Intervenors [.]"[71] Accordingly, the Staff notes that the 30-day period for filing new contentions on the Applicant's 2013 disclosures has expired.

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[68] *Id.* at 148-49.

[69] *Pacific Gas & Elec. Co.*, LBP-12-13, 75 NRC at 789 (quoting *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant), LBP-11-33, 74 NRC 675, 686-87 (2011)).

[70] *Id.* (emphasis added).

[71] Nov. 3, 2011 Order at 4 (referring to Nov. 3, 2011 Order at 4 n.3).

The one timely reference made by Joint Intervenors involves the Applicant's presentation on March 27, 2014, to the "Mines and Money" Conference in Hong Kong, stating that 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." 2d Paine Decl. at ¶ 33. However, as before, Joint Intervenors have not established that this information is materially different from the previously available information on this issue. The Applicant's future plans within the Lance District that may involve coordination with the Ross Project are not new. Moreover, the fact that future ISR projects in the Lance District may impact the life of the Ross Project as a commercial endeavor does not establish that the Ross Project lacks any independent utility. Accordingly, the Board should dismiss New Contention 5.

VI. Contention 6 Is Inadmissible as a New Contention

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

Motion at 39-40. In support of Contention 6, the Intervenors assert that the NRC did not engage in a scoping process for the Strata Ross FSEIS as a result of the NRC's classification of the FSEIS as a supplement to the GEIS for ISRs, rather than as a standalone EIS that tiers from the ISR GEIS. Motion at 40-41. Joint Intervenors contend that this approach violates NEPA and relevant regulations, specifically 10 C.F.R. §§ 51.26 through 10 C.F.R. § 51.29 and 40 C.F.R. § 1502.9(c)(2). Motion at 40-42. The Intervenors provide additional support for this contention in the declaration of Mr. Paine. *See* 2d Paine Decl. at 1-10. New Contention 6 should be denied because it is untimely and it does not meet all of the criteria for an admissible contention under 10 C.F.R. § 2.309(f)(1).

The Commission and this Board have issued clear statements on when a contention must be filed in order to be considered timely. Specifically, "the 'trigger point' for timely submission of new or amended contentions is when new information becomes available."[72] Indeed, the NRC's rules of procedure "require the filing of contentions *as early as possible* after the information becomes available."[73] Even more to the point, the Board's scheduling orders specify that, to be considered timely, motions for the admission of new or amended contentions "must be filed within thirty days of the date upon which the information that is the basis of the motion becomes available to the Joint Intervenors [.]"[74] The "trigger point" is not, as the Intervenors contend, limited to the issuance of the Staff's environmental document. *See* Motion at 43; *see also infra* note 89.

Joint Intervenors write that the "key new element to this contention is the NRC IG Report," which they acknowledge was issued in August 2013. *Id.* They state that this report "for the first time provided Intervenors with evidence to present a substantial question on this issue to the Board." Motion at 43.[75] By the Intervenors' own admission, therefore, this contention should have been brought, at the very latest, within 30 days of the issuance of that report to the public on August 20, 2013. The Staff notes that had this contention been brought in a timely manner, it would have afforded the Staff the opportunity to address any Board ruling on the matter before finalizing the FSEIS.

Moreover, the Intervenors have not established the second element of a timely contention, that the information underlying Contention 6 is materially different from information

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[72] *Pacific Gas & Elec. Co.*, LBP-12-13, 75 NRC at 789 (quoting *Florida Power & Light Co.*, LBP-11-33, 74 NRC at 686-87).

[73] *Id.* (emphasis added).

[74] Nov. 3, 2011 Order at 4 (referring to Nov. 3, 2011 Order at 4 n.3) (emphasis added).

[75] The IG Report referred to is the Office of Inspector General's Report OIG-13-A-20, *Audit of NRC's Compliance With 10 FR Part 51 Relative to Environmental Impact Statements*, dated August 20, 2013 (ADAMS Accession No. ML13232A192) ("IG Report"). *See* Motion at 41 n.18.

previously available. The "evidence" for this contention is not, as the Intervenors claim, the IG's conclusion—rather, it is the information underlying the IG's conclusion, all of which was publicly available at the time that the DSEIS was issued, if not before. In support of its findings, the IG report refers to several NRC and CEQ regulations, all of which were in effect at the time of the initial hearing request. The report also refers to an article by a former general counsel of the CEQ, which was published in 1989 and is readily available on the Internet.[76] Finally, the report examines statements concerning scoping in published notices of intent to prepare EISs for six new ISR applications, including the Ross Project, and statements associated with publication of the ISR GEIS.[77] All of these notices were published before the initial hearing request, with the Ross Project the latest, published on November 16, 2011.[78] The GEIS was published in May 2009.[79] In any event, however, the Intervenors were placed on notice that the Staff intended to prepare a *supplement* to the GEIS when it issued the DSEIS for comment on March 21, 2013.

The Commission has made clear, when discussing what constitutes new and materially different information for the purposes of 10 C.F.R. § 2.309(f)(2), that Intervenors cannot simply point to "documents merely summarizing earlier documents or *compiling pre-existing, publicly available information into a single source* . . . [as doing so] . . . do[es] not render 'new' the summarized or compiled information."[80] Although Joint Intervenors contend that the significance of the report arises from its nature as an "official statement from an office within the agency concerning the appropriate way the regulatory scheme should be interpreted," Motion at 43, the Intervenors have provided no explanation as to why they themselves could not have

[76] IG Report at 20.

[77] *Id.* at 22.

[78] *Id.*

[79] NUREG-1910, *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities* (May 2009).

[80] *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 344 (2011) (emphasis added).

arrived at the same conclusion by examining the existing regulations and the ongoing practice of the NRC staff concerning issuance of supplemental EISs for ISRs, including the issuance of a DSEIS for this project. Instead, they assert without further explanation that without the IG report, the Board would simply have deferred to the Staff's view on the matter. Motion at 43. Claiming that a contention is not a contention until it is pre-packaged by another entity, even an "office within the agency," is not a sufficient showing for the purposes of the Commission's timeliness standards. As the Commission has explained, a "petitioner or intervenor [cannot] delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention. To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on 'information . . . *not previously available*.'"[81] Rather, Intervenors have an "ironclad obligation" to diligently search the public record with sufficient care to discover any information that could serve as the foundation for a specific contention.[82] "By participating in [NRC] proceedings, intervenors accept the obligation of uncovering relevant, publicly available information."[83] In short, merely because the IG has expressed views on a matter bearing on this licensing action does not mean that the Intervenors are absolved of their "ironclad obligation" to discover and provide the Board with the relevant information in a timely manner.

Finally, Joint Intervenors' claim that Contention 6 only became ripe after issuance of the FSEIS because they "had hoped NRC would bring itself into compliance with NEPA" after

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[81] *Northern States Power Co*. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010) (internal citations omitted).

[82] *See, e.g.*, *Shaw Areva MOX Serv., LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009) (citing *Duke Energy Corp.*, CLI-02-28, 56 NRC at 386 ("Hearing petitioners have an 'ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention"') (quoting *Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)).

[83] *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 686 n.30 (2012) (citing *Duke Power Co.*, CLI-83-19, 17 NRC at 1048).

issuance of the IG report, *see* Motion at 43, is not supported by the report itself or by Commission precedent. Contained within the report, in an appendix, is a response from the NRC's Executive Director of Operations in which the Staff makes clear that it disagrees with the IG's conclusions.[84] In its response, the Staff repeatedly expresses disagreement with the IG's findings that the NRC's current practices concerning supplemental EISs for ISRs do not fully comply with the regulations.[85] Over several pages, the Staff challenges the legal basis for the IG's conclusions, stating that the NEPA documents for ISRs are "correctly characterized as supplements," and that the practice of "tiering" from a generic EIS is not incompatible with the use of a supplemental EIS.[86] While noting as a general matter that the NRC Staff will consider the IG's recommendations "as part of the agency's continuous improvement efforts" in the area of public outreach,[87] with respect to the report's specific findings regarding the use of supplemental EISs for ISRs, the Staff states only that the "NEPA [Executive Steering Committee] will consider, as appropriate, options to address the OIG recommendations *such as those suggesting that the staff should estimate when it will periodically review the ISR GEIS for updating*."[88] In light of these statements, there was no basis for the Intervenors to assume that the NRC Staff would adopt a position regarding the format and scoping process for the Strata Ross FSEIS that was contrary to the views stated in its response to the IG report in August 2013.[89]

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[84] *See* IG Report at 35-43.

[85] *Id.* at 35.

[86] *Id.* at 40.

[87] *Id.* at 36.

[88] *Id.* at 41 (emphasis added).

[89] Joint Intervenors also claim, as an argument for waiting until the FSEIS was issued to file this contention, that this Board has stated that the timeliness of NEPA-related new or amended contentions based upon newly available information would use the staff's environmental document, rather than the Applicant's environmental information—or, as the Intervenors have inferred, any other information—as the trigger for the filing. Motion at 43 (quoting *Strata Energy, Inc.*, LBP-13-10, 75 NRC at 140 n.14).

Finally, notwithstanding Contention 6's lack of timeliness, the Intervenors' assertions that the Staff did not engage in a scoping process for the FSEIS are incorrect. *See* Motion at 40, 41. The Staff did in fact conduct scoping for the Ross Project, and its efforts are documented in the DSEIS and the FSEIS in Sections 1.4.1 and 1.4.2. In those sections, the Staff describes the scoping activities conducted to define the scope of the GEIS and any future supplements to the GEIS, including this one. DSEIS at 1-3–1-4; FSEIS at 1-5. The Staff notes that for the Ross Project SEIS, in addition to the scoping activities conducted by NRC during preparation of the GEIS, the NRC published ads, soliciting scoping comments on the Ross Project SEIS, in four local newspapers. DSEIS at 1-4; FSEIS at 1-5. The Staff received 19 scoping comment letters containing a total of 53 individual comments, including comments from the Joint Intervenors. DSEIS at 1-4; FSEIS at 1-5. In addition, the Staff held additional meetings with Federal, State, and local agencies and authorities, as well as meetings with public interest groups, including the PRBRC, to gather additional site-specific information to assist the NRC's environmental review. DSEIS at 1-5; FSEIS at 1-5.

The Staff acknowledges that the Intervenors can most likely establish, by virtue of the IG report, that a genuine dispute exists as to the appropriate characterization of the FSEIS as a supplement to the GEIS and the Staff's consequent reliance in part on the GEIS's scoping efforts to stand in for aspects of the Ross Project scoping process. Nevertheless, because they do not address the adequacy of the scoping activities actually conducted for this project and documented in both the DSEIS and FSEIS, nor do they attempt to suggest how this dispute is material to the Staff's environmental conclusions, they have not satisfied their burden to show

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However, this argument misunderstands the Board's meaning. In the referenced footnote, the Board explains that information in the Staff's SER or obtained from the Applicant via RAI or other method would only become relevant to an environmental contention in the event that it is used in the Staff's environmental document. Therefore, the time to file a contention *on that information* is after the Staff's environmental document—here, the DSEIS or FSEIS—is issued. *See Strata Energy, Inc.*, LBP-13-10, 75 NRC at 140 n.14. Placed in context, the Board's discussion does not provide a basis for the Intervenors to argue that only after the FSEIS was issued did Contention 6 become ripe.

that all of the criteria in 10 C.F.R. § 2.309(f)(1) have been met. Most essentially, however, even if this contention readily met every requirement for contention admissibility, the Intervenors have not demonstrated that it is also timely, as they are required to do pursuant to 10 C.F.R. § 2.309(c)(i)-(iii). Because these requirements are conjunctive, the Intervenors must show that *all three* conditions exist. In point of fact, however, the Intervenors have not shown that Contention 6 meets *any* of the three criteria in 10 C.F.R. § 2.309(c). Therefore, Contention 6 must be dismissed.

CONCLUSION

For the foregoing reasons, the Board should dismiss two of the Joint Intervenors' previously admitted contentions and deny the two new contentions challenging the FSEIS.

Respectfully submitted,

/Signed (electronically) by EM/
Emily Monteith
Christopher C. Hair
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of April, 2014.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO 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" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 14th day of April, 2014.

/Signed (electronically) by/

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Date of Signature: April 14, 2014