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
	)	
(Ross In Situ Recovery Uranium Project)	)	May 7, 2014

NATURAL RESOURCES DEFENSE COUNCIL'S &
POWDER RIVER BASIN RESOURCE COUNCIL'S
REPLY IN SUPPORT OF MOTION TO MIGRATE OR AMEND CONTENTIONS, AND TO ADMIT NEW CONTENTIONS

INTRODUCTION

On March 31, 2014, pursuant to 10 C.F.R. § 2.309 and the Board's Scheduling Order, Intervenors Natural Resources Defense Council and Powder River Basin Resource Council (collectively Joint Intervenors) submitted "migrated" and amended contentions regarding the Final Supplemental Environmental Impact Statement (FSEIS) for Strata Energy's (SEI) proposed Ross Project in-situ leach (ISL) uranium mine. *See* Joint Intervenors' Mot. To Migrate or Amend Contentions And To Submit New Contentions (Int. Mot.) (Mar. 31, 2014). They also submitted two new contentions. *Id.* at 32-44. Joint Intervenors requested their pending contentions either migrate to the FSEIS, or be amended, and their new contentions be admitted, in light of the Atomic Safety & Licensing Board's (ASLB, or the Board) prior admission of Contentions in this proceeding (directed at the ER and the DSEIS), the applicable statutory and regulatory framework, and supporting declarations setting forth relevant facts. Joint Third Decl. of Dr. Richard Abitz and First Decl. of Dr. Lance Larson (Abitz/Larson Decl.); Second Decl. of Christopher Paine (2d Paine Decl.).

NRC Staff concurs that at least two of Joint Intervenors' contentions may migrate to the FSEIS. NRC Staff Resp. to Joint Intervenors' Mot. (Staff Resp.) (Apr. 14, 2014) at 12, 20

(stating Contentions 1 and 3 may migrate). However, Staff urges rejection of Joint Intervenors' remaining contentions, including the new contentions, *id.* at 15-16, 23-33, and SEI argues that all of Joint Intervenors' contentions should be dismissed, and this proceeding closed. SEI Resp. to Joint Intervenors' Mot. (SEI Resp.) (Apr. 23, 2014) at 6-30.

Staff and SEI's arguments on the migrated or amended contentions are either too late, or too early, to be considered by the Board now. Many arguments ask that the Board *reconsider* earlier rulings that led to the admission of Joint Intervenors' admitted contentions. *See, e.g.*, SEI Resp. at 7 (arguing that Contention 1 was admitted based on a "mistaken legal conclusion" and asking the Board to reach a different conclusion now). However, it is plainly too late to reargue those lost legal issues here. *See, e.g.*, *Sherley v. Sebelius*, 689 F.3d 776, 780-81 (D.C. Cir. 2012) ("The purpose of the law-of-the-case doctrine is to ensure that the same issue presented a second time in the same case in the same court should lead to the same result.") (citation omitted); *In re Hydro Resources, Inc.*, 62 N.R.C. 77, 87 (2005) (stating the doctrine is "a common law rule applicable to NRC adjudicative proceedings").

Other arguments claim the FSEIS resolves aspects of Joint Intervenors' contentions, and on that basis, Staff and SEI seek to preclude their migration. *See, e.g.*, Staff Resp. at 15-16 (claiming information provided in the FSEIS resolves Contention 2). However, as another Board recently ruled in the *Powertech USA, Inc.* proceeding, the proper procedural vehicle to assert that a migrated contention has been *resolved* is a summary disposition motion, not a response to a motion to migrate or amend contentions. *In re Powertech USA, Inc.* (*Powertech USA, Inc.*), LBP-14-15 (Apr. 28, 2014), at 10 & n.45. Accordingly, since the summary disposition period on these contentions has not yet begun, arguments involving the merits of the contentions are too early.

Staff and SEI's remaining arguments on the amended or migrated contentions similarly lack merit. The FSEIS does not resolve contention 2, concerning the failure to prepare a bounding analysis on the likely extent of remaining post-restoration groundwater contamination (Staff Resp. at 15-16), by providing a few samples from *other* sites, especially given the flaws in that other data. Nor is contention 4 – on cumulative impacts – either untimely, or unsupported (*id.* at 23-24; SEI Resp. at 19-20), in light of Joint Intervenors' arguments showing the FSEIS's cumulative impacts analysis remains patently deficient. Again, as this Board has already noted, if SEI or Staff maintain contention 4 is resolved, they must address the matter in a summary disposition motion. *See* July 26, 2013 Mem. and Order, LBP-13-10, at 22 (discussing need for "additional motions" to address this contention) .

As regards Joint Intervenors' new contention on the scope of the major federal action under review – contention 5 – Staff and SEI's arguments further highlight the admissibility of this contention. Their wild claims that NEPA can in no manner *require* the NRC to conduct its environmental review based on the full scope of the actual project, but rather that the agency *must* simply accept the applicant's submission regarding the project scope, irrespective of contrary evidence (Staff Resp. at 25-27; SEI Resp. at 22-25), is impossible to reconcile with either NEPA or basic administrative law principles. Indeed, under Staff and SEI's view of the law, Joint Intervenors would have no contention even if Staff were serially considering *ten accepted permit applications* from SEI, each concerning the mining of one-tenth of the overall mining planned for the Lance District, because the applicant controls the scope of each proposed administrative action. Such an approach would render NEPA's *mandate* that connected, cumulative or similar actions be considered in a *single* EIS, 40 C.F.R. § 1508.25(a), unenforceable.

Finally, as for new contention 6 – concerning the scoping process for the FSEIS and the Inspector General's Report – Staff and SEI are off the mark in contending an official Report of the NRC's own Inspector General (IG) is irrelevant to this proceeding. Staff Resp. at 27-33; SEI Resp. at 27-29. Given that federal courts routinely rely on such reports, *e.g.*, *Leboeuf, Lamb, Greene & Macrae, L.L.P. v. Abraham*, 347 F.3d 315, 319 (D.C. Cir. 2003) (relying on NRC Inspector General Report), the Board should certainly rely on the IG Report here, which shows that Staff has not prepared the FSEIS in accordance with NEPA's dictates.

Moreover, contrary to Staff and SEI's arguments, this contention is timely because it is tied to the FSEIS. Staff's heads-I-win, tails-you-lose approach in arguing that, on the one hand, it "*might*" have addressed these concerns had they been raised earlier, Staff Resp. at 28, while, on the other hand, the IG Report is irrelevant because Staff made it clear at the time that it believed the IG was wrong, *id.* at 31, merely crystallizes Staff's effort to avoid review of its basic NEPA obligations at all costs, and should not be sanctioned by the Board.

ARGUMENT

A. The Board Should Either Allow Contentions 1-4 To Migrate To The FSEIS, Or Accept Joint Intervenors' Amended Contentions 1-4.

As Joint Intervenors have explained, they have submitted contentions 1-4 as *both* migrated and amended contentions out of an abundance of caution. While Joint Intervenors have demonstrated that the FSEIS carries forward the same deficiencies as the DSEIS (in which case migration is appropriate), for some contentions, the FSEIS contains new information, which may require an amended contention. Int. Mot. at 5-6. As to two contentions (one and three), NRC Staff acknowledges they migrate because the FSEIS does not change the Staff's analysis from

the DSEIS. Staff Resp. at 12, 20. As explained below, SEI's contrary arguments do not withstand scrutiny.

As for contention 2, both Staff and SEI similarly err in claiming this contention either has no basis, or has now been resolved. Finally, Staff and SEI should also not be permitted to exclude contention 4, concerning cumulative impacts.

1. Even Staff Recognizes Contentions 1 and 3 Migrate to the FSEIS, And Staff and SEI's Efforts to Relitigate the Admissibility of These Contentions Cannot Change That Outcome.

As Staff explains, as to contention 1, because "the FSEIS does not present substantially different information or analyses than was presented in the DSEIS," the contention should migrate to the FSEIS. Staff Resp. at 12. Similarly, as regards contention 3 "Staff does not challenge admitting Contention 3 as a migrated contention against the FSEIS," because it recognizes that "the FSEIS incorporates the DSEIS's analysis regarding fluid migration," *id.* at 21 – the matter at issue in contention 3.

The Board need go no further to find these two contentions migrate to the FSEIS. Indeed, the Board's recent ruling in the *Powertech USA, Inc.* proceeding suggests contentions *necessarily* migrate until such time as a party seeks their dismissal through summary disposition. *Powertech USA, Inc.*, LBP-14-15 at 10 & n.45. Accordingly, the Board need not concern itself with Staff and SEI's additional arguments as to contentions 1 and 3.[1] However, those arguments have no merit in any event.

[1] Staff argues contentions cannot migrate if the FSEIS is not *in para materia* with the DSEIS. Staff Resp. at 7. As the Board in *Powertech* explained, however, those are arguments for summary disposition, not an objection to migrating the contentions. *Powertech USA, Inc.*, LBP-14-15, at 21.

a. Contention 1

As regards contention 1, Staff first argues the FSEIS clarifies the distinction between the water quality information that will be collected before the license is issued ("pre-licensing"), and that which will be collected post-license, but before operations begin ("post-licensing, pre-operational"). Staff Resp. at 11-12. However, as Staff recognizes, this distinction is irrelevant to Intervenors' admitted contention, because it merely addresses the timing of additional information gathering *post*-license (and thus *post*-NEPA review). Since the gravamen of contention 1 concerns the failure to collect adequate groundwater quality information to *inform* the NEPA process, NRC Staff's assurance that further data will be collected before operations begin (*but after the NEPA and licensing process are complete*) is irrelevant.

Second, both Staff and SEI seek to relitigate the Board's ruling that Intervenors have presented an admissible contention regarding whether Staff has collected and presented the necessary baseline water quality information. In particular, Staff and SEI argue there is no obligation to collect this data before the license was issued. Staff Resp. at 13; SEI Resp. at 7-13 (arguing that the contention was admitted based on a "mistaken legal conclusion").

But this is the precise argument the Board has already *twice* rejected. In admitting contention 1 originally against the Environmental Report, the Board rejected the argument that such information cannot, and need not, be collected before a license is issued. Feb. 10, 2012 Mem. and Order (LBP-12-13) at 30-32. Subsequently, in allowing contention 1 to migrate to the DSEIS, the Board rejected the argument that the water quality data at issue "is not required to be provided at this time," explaining that "the central analytical deficiency alleged by Joint Intervenors' environmental contention 1 applies with equal force to the DSEIS." July 26, 2013 Mem. and Order (LBP 13-10) at 13. Regardless, the argument goes to the merits of the

contention, which may not be raised at this time, *Powertech USA, Inc.*, LBP-14-15, at 10 & n.45 (migrated contention can only be resolved on summary disposition), and is in any event the law of the case here. *E.g., Sherley*, 689 F.3d at 780-81.

Moreover, for all the reasons Intervenors have already put forward, NRC plainly *is required*, under NEPA, to collect and analyze baseline water quality information *as part of the NEPA process*, to inform the agency's decision-making. *E.g., Idaho, By and Through Idaho Pub. Util. Comm'n v. ICC*, 35 F.3d 585, 596 (D.C. Cir. 1994); *Ocean Mammal Inst. v. Cohen*, No. 98-CV-160, 1998 WL 2017631, at *5 (D. Haw. Mar. 9, 1998); 40 C.F.R. § 1502.22 (requiring agency to obtain and include in the NEPA review process *all* "information relevant to reasonable foreseeable significant adverse impacts," unless "the overall costs of obtaining it are exorbitant or the means to obtain it are not known").[2]

Accordingly, SEI's extended argument that the Commission's regulatory framework prohibits – rather than requires – the collection of baseline water quality data before a license issues, SEI Resp. at 7-13, is a red herring, for Intervenors are presenting *NEPA contentions* concerning the information that must be collected to inform the NEPA process.[3] Because, as noted, *NEPA* requires this data collection, the NRC's regulatory framework is not at issue –

[2] *See also, e.g., Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 532 (9th Cir. 1997) ("NEPA imposes a duty on federal agencies to gather information and do independent research when missing information is important, significant, or essential to a reasoned choice among alternatives.") (citations omitted); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1135 n.16 (D. Haw. 2000) (same).

[3] Thus, SEI is certainly correct that "Intervenors like to refer to 'general NEPA principles,'" SEI Resp. at 11, because it is precisely *those principles that are at issue here* – and it is SEI, and Staff's, refusal to abide by those principles which has led to a fundamentally flawed NEPA process.

although, as the Board has already found, nothing in that framework precluded collection of this data before NRC issued the license.[4]

Finally, Staff's argument that Intervenors are seeking to expand their contention by comparing NRC's post-licensing groundwater quality plan with that which is required under RCRA and CERCLA, Staff Resp. at 13 (citing Abitz/Larson Decl. ¶¶ 11-12), is yet another red herring. Joint Intervenors are not seeking to expand their contention to challenge the adequacy of the planned post-licensing data collection effort.

Rather, the reference to examples of appropriate data collection, as undertaken under RCRA and CERCLA, as compared to the post-license water quality data collection plan here, simply helps demonstrate why it is critical, both to comply with NEPA and with basic scientific principles, that the baseline water quality data be collected *before SEI is permitted to do any work at the site*. Otherwise, as the Abitz/Larson Declaration explains, since SEI will be permitted to conduct its post-license baseline water quality data collection in the disturbed zone, the data collection will be inevitably compromised by the other site activities, and will not actually collect true baseline data. Abitz/Larson Decl. ¶¶ 11-12. This simply further supports Intervenors' contention 1 that the FSEIS fails to contain the required baseline data necessary for

[4] As Intervenors have also previously explained, SEI's argument that the CEQ regulations implementing NEPA do not apply to the NRC, SEI Resp. at 11-12, has no merit. *See, e.g., Brodsky v. NRC*, 704 F.3d 113, 120 n.3 (2d Cir. 2013) ("The weight of authority . . . holds CEQ regulations binding on federal agencies," including NRC)(citations omitted); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 318 (4th Cir. 2009) (granting relief due to independent agency's failure to comply with CEQ regulations). NRC, like all other federal agencies, must carry out NEPA's mandates, including those further explicated in the CEQ regulations. *E.g., San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) (applying CEQ regulation to NRC).

the NRC staff to carry out the required NEPA analysis related to the water quality of the proposed mining site.[5]

For these and other reasons discussed in Joint Intervenors' motion, the Board should migrate or amend contention 1 to apply to the FSEIS.

b. Contention 3

As for contention 3, while acknowledging the contention should migrate to the FSEIS, Staff argues that the FSEIS addresses the potential for fluid migration from unplugged boreholes. Staff Resp. at 21 (citing FSEIS at 4-41-42). However, Staff does not – because it cannot – dispute the FSEIS illogically assumes most, if not all, of these boreholes will be filled, and the cited pages do not at all discuss the likely results if, in fact, most boreholes remain unfilled, and in some cases unlocated.

[5] The Board should also not be distracted by SEI's claims of "inaccuracies" in the Abitz/Larson declaration. *See* SEI Resp. at 12-13. In Paragraph 19 Abitz/Larson simply point out that the 2011 water quality data was not in the DSEIS, which Strata does not dispute, and the key point – which SEI also does not dispute – is that the new information was not used to help establish a baseline. *See* SEI Resp. at 13 (the new information was "not provided to establish 'baseline' water quality").

Similarly, the EPA letter on which SEI relies to claim that the groundwater in the recovery zone exceeds the MCL for uranium and radium-226, SEI Resp. at 13, is unavailing, since EPA can issue an aquifer exemption even where these contaminants do not exceed MCL. As noted in EPA's letter issuing the aquifer exemption, EPA simply considers whether the aquifer is currently used as a drinking water source and if commercial minerals are present. Letter from Derrith Watchman-Moore, EPA, to Kevin Frederick, WDEQ (May 15, 2013), *accessible at* ML13144A108. Regardless, whether or not EPA granted an aquifer exemption is immaterial to the NRC's obligations under NEPA to properly disclose baseline water conditions as part of a meaningful NEPA analysis of current conditions and foreseeable impacts from ISL operations. Joint Intervenors' contention is not that the project may or may not pose risks to drinking water, but rather that because of a lack of data, considered through the NEPA process, it is impossible to analyze the likely environmental effects to groundwater from the project.

Indeed, while it is apparent that the analysis would likely be different if even *half* of the approximately 1,500 holes remain unfilled – *i.e.*, 750 well holes – the FSEIS does not at all address that possibility and the ramifications for fluid migration risks.

Similarly unavailing is Staff's argument that its planned monitoring program will adequately address any fluid migration concerns. Staff Resp. at 21-22. Again, the Board has twice rejected this argument, finding that such post-operational monitoring is no substitute for "an informed fluid migration impact assessment" *as part of the NEPA process*. LBP -13-10 at 18; LBP-12-13 at 36. Again, having failed to collect the data NEPA requires, the FSEIS is fundamentally flawed.

Staff also argues that Abitz and Larson's explanation regarding the work necessary to assess these risks is an effort to inappropriately expand this contention. Staff Resp. at 22 (citing Int. Mot. at 28-29). Staff is mistaken. This discussion merely reinforces the basis for the existing contention, explaining why the FSEIS's discussion of fluid migration risks is inadequate under NEPA. Abitz/Larson Decl. ¶¶ 54-63. In short, the FSEIS, like the DSEIS and ER, fail to disclose the necessary information to assess the risks and impacts of fluid migration to the adjacent groundwater, and Intervenors' supporting declaration further supports that conclusion.

SEI's spurious claim that "Contention 3 is rife with inaccurate statements and misguided conclusions," SEI Resp. at 18, should also be rejected. Indeed, as a threshold matter it is impossible to reconcile SEI's strident allegations with Staff's acknowledgment that this contention should migrate to the FSEIS. The allegations are in any event mistaken.

Most importantly, SEI's argument about the number of boreholes that exist only serves to highlight Staff's failure to take the required "hard look" at this issue in the NEPA process, for several reasons. First, the number of unfilled boreholes keeps changing, without any explanation

as to the data on which these estimates are derived. Originally SEI estimated 5,000 boreholes. *See* Int. Mot. at 27. Then the DSEIS stated that there were 1,682 such holes. *E.g.*, DSEIS at 2-48; *id.* at 4-42. Now SEI claims there are only 1,483. SEI Resp. at 19. Yet, nowhere – especially in its NEPA document – has Staff disclosed the bases for these wildly shrinking estimates, which have an obvious and significant bearing on this contention, as the number has now magically shrunk by over 50% from the original 5,000 boreholes identified by Strata.

Second, the number of these boreholes that have been "discovered" has also changed without explanation. Staff previously stated that SEI had located 759 of these holes. *E.g.*, DSEIS at 2-48; *id.* at 4-42. Now SEI claims to have located only 625. SEI Resp. at 19. This discrepancy underscores NRC's failure to analyze the means, and their effectiveness, of locating the remaining abandoned boreholes *prior* to ISL operations in its NEPA document. And even more fundamentally, given the substantial risk that many of these boreholes will never be located and filled, NRC has also failed to analyze the foreseeable environmental impacts that would result from SEI's inability to locate and fill them.

Finally, while *slightly* more boreholes may be filled at this time (*compare* FSEIS at 2-48 (55 boreholes) *with* SEI Resp. at 19 (86 boreholes)), the fact remains that even using SEI's own *lowest* number of these boreholes (1483), to date *less than 6% of them have been filled* (86/1483). Accordingly, again, Staff must, to comport with NEPA, analyze and disclose the fluid migration risks associated with leaving more than a thousand (perhaps many more) boreholes unfilled.[6]

[6] SEI also curiously claims a discussion of groundwater geochemistry has no relation to "Strata's ability to contain fluid migration." SEI Resp. at 18 n.9. Of course, uranium transport in the subsurface is *dictated* by localized subsurface geochemical conditions, and thus the two are integrally related. Moreover, while SEI cites NUREG-1569 for the proposition that it

The second component of contention 3, as admitted by this Board, is that the NRC's NEPA document contains "insufficient information for the NRC staff to make an informed fluid migration impact assessment" because the applicant's pre-license monitoring program "provided insufficient hydrological information to demonstrate satisfactory groundwater control during planned high-yield industrial well operations." LBP 13-10, Appendix A at 1. Here, Drs. Lance and Abitz provided sufficient support for this contention to migrate, or be amended, to the FSEIS. Abitz/Larson Decl. ¶¶ 54-63; *see also* Int. Mot. at 28-29. In their responses, neither Staff nor SEI refute these claims.

Therefore, for these and other reasons discussed in Joint Intervenors' motion, the Board should migrate or amend all of contention 3 to apply to the FSEIS.

2. The FSEIS Does Not Resolve Contention 2

Staff and SEI argue the FSEIS resolves contention 2, concerning the failure to analyze the environmental impacts that will occur if SEI cannot restore groundwater to primary or secondary limits and instead must rely upon Alternative Concentration Limits (ACLs). Staff Resp. at 15-16; SEI Resp. at 14-17. These arguments are mistaken.

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need not use uranium as an excursion parameter, SEI Resp. at 18, that document states that "[t]he choice of excursion indicators is based on *lixiviant content and ground-water geochemistry*" NUREG-1569 at 5-40 – and thus, if NRC has concluded that uranium should not be an excursion parameter, it was incumbent upon Staff to at least explain, in the FSEIS, the *site-specific conditions* that led to this conclusion, rather than ignoring this issue altogether. Indeed, the Science Advisory Board has specifically identified uranium as an appropriate excursion parameter. *See* Letter from Office of the Admin., Sci. Advisory Bd., to Lisa P. Jackson, Admin., U.S. EPA, EPA-SAB-12-005, at B-3 (Feb. 17, 2012) *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDQQFjAA&url=http%3A%2F%2Fyosemite.epa.gov%2Fsab%2Fsabproduct.nsf%2F964968D9229863A0852579A7006EC71A%2F%24File%2FEPA-SAB-12-005-unsigned.pdf&ei=Fe5nU6OLKeXfsAS3lYDYAw&usg=AFQjCNEjISHdK2xwNlNCvuGQCLPYOw2ZIw&sig2=Np3UZsOFJi9tw2V2yjkLzA&bvm=bv.65788261,d.cWc

Staff's principal argument on contention 2 is that the FSEIS resolves this contention because it includes information about restoration activities at three other sites, and any further information would be speculative. Staff Resp. at 16-17. Staff misses the thrust of contention 2 as admitted by the Board, first as to the ER then as to the DSEIS.

As the Board explained in originally admitting contention 2, the level of water quality restoration that will be achieved is not unduly speculative, because Staff – relying on historical experiences at other sites – can prepare a "bounding analysis" that delineates the "range of possible ACLs" that are likely. LBP 12-3 at 34. Similarly, as the Board explained in migrating the contention to the DSEIS, the "crux of the concern" in this contention is what the "ACL is likely to look like and what are the associated environmental impacts associated with such an ACL." LBP-13-10 at 15. Thus, the DSEIS contention, as reframed by the Board, concerns the failure of the DSEIS to provide a "reasonable range of hazardous constituent concentration values that are likely" to be permitted at the site. *Id.* at 16. The contention addresses a NEPA violation because the EIS "fails to evaluate the virtual certainty that the applicant will be unable to restore groundwater to primary or secondary limits . . ." *Id*. at Appendix A at 1.

The FSEIS, like the DSEIS before it, contains neither such a reasonable range of concentration values, nor any kind of bounding analysis whatsoever. Rather, the FSEIS simply provides some examples of information from other sites, without any analysis as to how that relates to likely outcomes at this particular site.[7]

[7] With respect to the examples provided, Staff acknowledges that the FSEIS relied on a grossly understated value for Crow Butte Wellfield, stating the final uranium concentration value was only 18% higher than baseline when in fact it was *18 times* higher than the baseline. Staff Resp. at 16. Such an error would have seriously undermined a bounding analysis that relied on the lower number, and thus would have required Staff to recalculate such an analysis –

While Joint Intervenors' experts explain the serious limitations of the "example" sites relied on in the FSEIS (*see* Abitz/Larson Decl. ¶¶ 31-47), Staff claims that any such issues amount to "speculative impacts" as to which NEPA does not require further inquiry. Staff Resp. at 18. Staff is mistaken.

Contention 2 requires that Staff use meaningful data and examples to assess the likely outcome at this site. To the extent the data on which Staff relies is flawed, it does not serve as an adequate basis on which to assess future conditions here. Thus, the serious issues raised concerning Staff's reliance on these other sites – which Staff does not dispute – are further reasons this contention lies against the FSEIS.

For their part, SEI opposes the migration or amendment of contention 2 principally by rearguing issues the Board has already rejected, and otherwise mischaracterizing this contention and its bases. SEI Resp. at 13-16. As a threshold matter, SEI errs by repeatedly claiming the contention seeks to force "an ISR *license applicant*" to conduct the requisite analysis. *Id.* at 14 and 15 (emphasis in original). Intervenors' contentions – directed now at the FSEIS – seek to force *Staff* to comply with fundamental NEPA obligations, which, as the Board has already found, require a meaningful analysis of the likely outcomes *vis-a-vis* water quality post-restoration. *See* LBP-13-10, Appendix A at 1 (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).")

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but since the FSEIS contains *no such analysis*, Staff's "errata" correcting this error does not in any manner resolve the concern animating this contention.

SEI's remaining arguments, *id.* at 14-16, rehash previously rejected claims concerning whether the analysis sought is necessary or appropriate, given that an ACL will not be required for some years, and whether Intervenors are seeking an ACL at this time. *Id.* As the Board has explained, *see supra* at 12, the bounding analysis sought is perfectly appropriate – and necessary – to comply with NEPA, and is entirely separate from the process to create an ACL.

Finally, once again SEI's claims that Intervenors' experts have made "incorrect" statements is off the mark. The FSEIS, at page 2-35, states as follows:

> The applicant has proposed a ground-water restoration schedule that is benchmarked to production schedules and waste-water disposal capacity, and it estimates that aquifer restoration for each wellfield *would take approximately eight months* (SEI, 2011b)(emphasis added).

Thus, the Abitz/Larson Declaration (at ¶ 32) is correct in explaining the FSEIS's assumption of groundwater restoration for a *full-scale* ISR operation (in eight months) is patently deficient, given the failure to accomplish restoration of *pilot-scale* ISR operations in six months, i.e., 75% of the time period anticipated here. Abitz/Larson Decl. ¶ 32. Similarly, while SEI claims the table in the expert declaration (*id.* ¶ 33) shows "uranium concentrations continued to trend downward," SEI Resp. at 17, that is not accurate – with the exception of Well 19x (which still shows elevated levels compared to average baseline), all of the wells show uranium concentrations elevated post-restoration. Abitz/Larson Decl. ¶ 33.

For these and other reasons discussed in Joint Intervenors' motion, the Board should migrate or amend contention 2 to apply to the FSEIS.

3. The Board Should Admit Contention 4 Against the FSEIS

Staff and SEI argue against migration or admission of an amended contention 4, concerning cumulative impacts, on grounds of timeliness and sufficiency. Again, as a threshold

matter, the *Powertech, Inc.* ruling suggests that this contention – still pending as regards the ER, *see* LBP 13-10 at Appendix A – *automatically* migrates to the FSEIS, and that summary disposition is the appropriate vehicle for Staff and SEI's arguments. LBP-14-15 at 10 & n.45; *see also* LBP 13-10 at 22 (discussing need for "additional motions" to address whether the still-pending cumulative impacts contention is a "litigable post-DSEIS issue"). Therefore, even though the Board did not accept this contention, as applied to the DSEIS, it can be applied to the FSEIS based on the migration principle. Alternatively, since Intervenors have argued that the new information contained in the FSEIS did not remedy the NEPA deficiencies identified against the ER or the DSEIS, and have demonstrated each of the contention admissibility criteria are met, contention 4 should be amended to apply to the FSEIS.

On the merits, neither Staff nor SEI have a response to Intervenors' argument that the FSEIS contains a *single paragraph* stating that cumulative impacts to groundwater quantity will be small, without any analysis of the activities that collectively draw on the Lance and Fox Hill aquifers. Int. Mot. at 30 (citing Abitz/Laron Decl. ¶¶ 64-68). Similarly, as to groundwater quality, Staff and SEI ignore Intervenors' arguments that the FSEIS fails to analyze the reasonably foreseeable groundwater quality impacts associated with development of the entire Lance Project. Int. Mot. at 30-31. Simply stating that the impacts will be "small" is not a substitute for the analysis required by NEPA. *See* Int. Mot. at 30 (citing cases).

For these and other reasons discussed in Joint Intervenors' motion, Joint Intervenors have put forward a sufficient basis for migrating or amending contention 4 to apply to the FSEIS.

B. Joint Intervenors' New Contentions Should Be Admitted Into The Proceeding.

1. Contention 5

Joint Intervenors' contention 5 concerns the scope of the major federal action under review pursuant to NEPA. Int. Mot. at 33-38. Staff acknowledges that Intervenors have submitted new, timely information showing that SEI has concrete plans to develop the entire Lance District. Staff Resp. at 27. Indeed, SEI itself concedes as much, claiming a "right" to limit the scope of its proposed project while, in fact, planning to "develop a commercially viable CPP in stages as economic circumstances warrant." SEI Resp. at 24.[8] However, Staff now claims that SEI's plans to engage in mining throughout the Lance District "*are not new*." Staff Resp. at 27 (emphasis added).

"This explanation deploys the logic of the Queen of Hearts," *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008), claiming on the one hand that Joint Intervenors have failed to demonstrate that the entire Lance District should be included in the scope of environmental review, while at the same time asserting it is *too late* to pursue such a claim because that was always SEI's plan. *See also, e.g., United States v. Baylor*, 97 F.3d 542, 549 n.2 (D.C. Cir. 1996) ("This is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'") (Wald, J., concurring) (citations omitted). Rather, by admitting that NRC was well aware of Strata's plans to develop the entire Lance District, the Staff is admitting the close connections between the Ross Project and the other planned ISL

[8] It bears emphasizing that by acknowledging that development of a "*commercially viable* CPP" will be accomplished "in stages," *id.* (emphasis added), SEI is admitting that the project's utility turns on *additional* stages of the project, and thus that a CPP confined to the Ross Project would lack such independent utility – thus failing the test that must be passed to allow NEPA review to proceed on the Ross Project alone. *See* LBP 13-10 at 24-13. Accordingly SEI's concession further supports admission of this contention.

projects in the immediate vicinity – projects that should be considered in a *single* NEPA document *before* the agency takes any action related to the projects.[9]

Indeed, SEI goes one step further, asserting that NRC is *required* to limit the scope of its NEPA review to the four corners of the permit requested, no matter *how certain* SEI's plans to develop the entire Lance Project have been from day one, and thus Intervenors have no basis for this contention regardless of when it was raised in the adjudicatory process. SEI Resp. at 22. Of course, this approach flatly contradicts NEPA and its implementing regulations, which seek to address the foreseeable environmental impacts, *in the real world*, of activities taken or approved by federal agencies – not simply the constricted "project" that an applicant chooses to *define for agency review*..

Thus, the NRC cannot avoid its duties under NEPA to consider the true scope of its major federal action by blindly adhering to the four corners of a project proponent's application. Any other result would fatally undermine the NEPA process by allowing the applicant to select the scope of the NEPA document, rather than the agency – which here unlawfully resulted in segmenting the analysis of a larger project into smaller subparts and considering in detail only the first of those parts. *See* 40 C.F.R. § 1508.25(a); *see also supra* at 8 n.4 (explaining that NEPA regulations apply to the NRC).

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[9] Staff's position is nonetheless impossible to reconcile with representations made to the Board at the December 11, 2010 prehearing, where Staff represented that it *did not know* SEI's plans for future development – in an effort to limit Intervenors' standing. *See* Dec. 20, 2011 Prehearing Transcript at 43-44 (MS. MARSH: "…But we don't – I mean, at this point, we don't have the details of where any of these –if any of these proposed actions will in fact take place or what the details of those proposed sites might be."). Staff's efforts to avoid the full scope of the project supports the timeliness of this contention, given the efforts to keep Intervenors from fully appreciating that scope.

In short, even in cases where a company submits an application for a proposed project permit or license, the agency has an *independent obligation* under NEPA to evaluate the scope – not of the applicant's *proposed* project – but rather of the NEPA document analyzing the *actual* scope of the proposed project. *See, e.g.*, 40 C.F.R. § 1506.5 ("The agency shall independently evaluate the information submitted [for a NEPA review] and shall be responsible for its accuracy"); *Barnes v. U.S. Department of Transportation*, 655 F.3d 1124, 1131 (9th Cir. 2011) (agency "required to independently evaluate the information" submitted); *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) ("Agencies may not delegate the responsibility of preparing an EIS to private parties; they must 'independently evaluate the information submitted and shall be responsible for its accuracy.'") (citations omitted). Here, since, as Staff apparently recognizes, the evidence Intervenors have submitted demonstrates that SEI *fully intends to develop the entire Lance District*, an EIS on the entire scope of the project is required.

Staff and SEI's timeliness arguments on this contention are also without merit. The Board determined, in considering this contention against the DSEIS, that the evidence as it existed at that time *did not sufficiently demonstrate* that Staff is required to prepare a single EIS on SEI's plans to extend its uranium recovery operations in the Lance District. LBP 13-10 at 23-30. If the Board determines – as it should – that the evidence presented with Intervenors' FSEIS contentions, in fact, meets the threshold contention admissibility standards, then this will be the *first juncture* where the evidence shows that this contention should be admitted.[10]

[10] If an intervenor presents a contention at one stage of a proceeding, and a Board finds the evidence insufficient to support the contention, it could hardly be untimely to resubmit the contention based on *additional* evidence at the next stage. Rather, the Board should consider

SEI's reliance on disclaimers in various financial documents is also misplaced. SEI Resp. at 25-26. The fact that SEI's future plans may change in light of "market conditions at the time development decisions are made," *id.* at 25, does not distinguish SEI's plans from that of any other company seeking federal approval for its activities. Indeed, Strata's "plans" to develop the Ross Project *itself* are no doubt subject to change in light of changing market conditions – yet, the key point is those plans are sufficiently *definite* so as to warrant environmental review under NEPA. Thus, since SEI's plans to expand the project are equally definite, the fact that those too could potentially change is simply immaterial to Staff's obligation, under NEPA, to analyze the impacts – and alternatives and mitigation measures – associated with the *entire* planned project scope.[11]

Accordingly, the Board should permit contention 5 to be pursued here.

2. Contention 6

Plainly concerned with the merits of contention 6, Staff spends most of its opposition trying to avoid the contention on timeliness grounds. Staff Resp. at 27-32. Those timeliness arguments have no merit, as discussed below, but Staff's cursory arguments against this contention serve to further demonstrate why the Board should admit it into this proceeding. *Id.* at 32-33.

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whether the new evidence, together with the evidence previously submitted, satisfies the contention admissibility requirements.

[11] SEI also erroneously claims that the Paine declaration, in relying on Figure 2.6, ignores the note stating that the figure represents indefinite plans. SEI Resp. at 26 (citing Paine Decl. ¶ 47). The argument ignores the *very next paragraph* of the Paine declaration – ¶ 47 – which explains that, if anything, the note raises more questions than it answers about the scope of the project and Staff's failure to prepare an EIS that encompasses this scope. *Id.* ¶ 47.

Indeed, Staff "acknowledges that the Intervenors can most likely establish, by virtue of the IG report, that a genuine dispute exists" on this contention, *id.* at 32, and the *only* merits argument asserted against its admission is that Intervenors fail to show that proper scoping was not conducted on the Ross ISR mining project. *Id.*

This is inaccurate. The FSEIS states point blank – and in terms consistent with the legally-flawed approach detailed in the IG Report – that "the NRC is not required to conduct a scoping process when a supplement to an EIS is prepared." FSEIS at 1-5. Thus, while NRC may have published notice in single editions of a few local newspapers, *id.*, it failed to follow the most basic steps of the legally required scoping process, which includes, *inter alia*, a Federal Register notice apprising the public *at large* of the scoping opportunity, and, equally important, a *decision* document addressing the "determinations and conclusions" reached upon considering the scoping question. *See* 10 C.F.R. § 52.19. There is no dispute that NRC followed none of these steps, all of which the IG has explained is vital to faithfully following the NEPA process.

Indeed, had Staff undertaken the proper scoping process, Intervenors would have had an opportunity to raise issues concerning whether the entire Lance District should have been the subject of the EIS, rather than just the Ross Project. It doubly punishes Intervenors for Staff to argue that, on the one hand, issues about the scope of the project were required to be raised at the outset, Staff Resp. at 27, while at the same time claiming that – contrary to the agency's own IG Report – NRC had no obligation to undertake the required scoping *process* to make that critical threshold decision on the basis of appropriate public participation.

Equally important, neither Staff nor SEI address the fundamental problem with the NRC's FSEIS, as identified by the IG report – it is not a "supplemental" EIS at all. Rather, it is a stand-alone project EIS, referencing a broader "generic" analysis prepared by the NRC. Since

different requirements apply to "supplemental" EISs vis-à-vis stand-alone EISs, as distinguished from project-level EISs tiered from programmatic level EISs, this improper characterization is no small flaw. By calling the FSEIS a "supplement" to the GEIS, NRC has tainted the NEPA process, which culminated with the FSEIS (providing a ripe opportunity to bring this contention forward). These NEPA deficiencies are the heart of contention 6 and fully warrant a hearing on the merits of the contention.

Staff and SEI's efforts to diminish the relevance of the IG Report by calling the agency's own Inspector General simply "an office within the agency," Staff Resp. at 29, "not empowered to interpret" agency obligations, SEI Resp. at 28, is also far off the mark. Adjudicatory bodies routinely rely on the impartial reports of an agency's Inspector General. *See, e.g., Leboeuf, Lamb, Greene & Macrae, L.L.P. v. Abraham*, 347 F.3d 315, 319 (D.C. Cir. 2003) (relying on NRC Inspector General Report); *Brook v. Corrado*, 999 F.2d 523, 528 (Fed. Cir. 1993) (arbitrator erred in failing to consider NASA Inspector General's report); *Louisiana v. U.S. Dep't of Health and Human Servs.*, 905 F.2d 877, 880 (5th Cir. 1990) (relying on Inspector General report); *Gross v. United States*, 723 F.2d 609, 612-13 (8th Cir. 1983) (affirming district court reliance on Inspector General report). There is accordingly no basis for the Board to ignore the NRC IG Report here.

Contention 6 is also timely. As Intervenors have explained, the issuance of the IG Report, followed by issuance of the FSEIS – which failed to take any heed of the IG's concerns – is the appropriate "trigger" for this contention. Int. Mot. at 42-44.

Incredibly, as noted, Staff argues that the Board should deem the contention untimely because, had it been raised earlier, Staff would have had "the opportunity" to address these concerns before issuing the FSEIS, Staff Resp. at 28 – while, at the same time, arguing that the

IG Report is *irrelevant* because Staff responded to the Report by "challeng[ing] the legal basis for the IG's conclusions." *Id.* at 31. This merely highlights the timeliness of the contention, in several respects.

First, as Intervenors have noted, they raised concerns about the scoping of the project early on, Int. Mot. at 44 n.20, and thus Staff can hardly claim surprise. Rather, as Intervenors have explained, it was not until the IG Report – and Staff's failure to heed that report in the FSEIS – that the issue rose to the level of a formal contention. Surely, if an Intervenor is required to file a formal contention over any development that might at a *later time* evolve into the evidence necessary to satisfy the contention admissibility requirements, Boards – and parties – would be overwhelmed with contention requests.[12]

Second, Staff ignores that the IG *responded* to Staff's comments – in Appendix E to the Report – explaining why Staff was wrong in urging that the IG was mistaken in its conclusions. Office of the Inspector Gen., U.S. NRC, OIG-13-1A-20 (*Audit Report: Audit of NRC's Compliance with 10 CFR Part 51, Relative to Environmental Impact Statements* App. E) (2013). Again, Staff could have – and certainly *should have* – heeded the IG's Response and undertaken the requisite scoping process at that time, and it was not until Staff elected to simply go forward with issuance of the FSEIS that the contention became ripe.

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[12] Of course, had Intervenors presented this contention over the ER, or the DSEIS, Staff and SEI would have argued that it had no basis. Similarly, if Intervenors had filed the contention right after the IG Report was issued, Staff and SEI would have argued that it was premature, because at that stage it was not clear whether Staff would heed the Report, and the IG's response to Staff's comments. Yet, under Staff and SEI's view, it was incumbent on Intervenors to file, re-file, and *keep* re-filing this contention every time there was *some* basis to argue that proper scoping was not conducted. Again, Staff and SEI seek to turn the contentions process into a black hole through which no contention may ever succeed. The Board should not sanction such a perversion of the adjudicatory process.

Finally, in this respect Staff's – and SEI's – timeliness arguments largely merge with the merits of contention 6. *If* Intervenors have presented an admissible contention regarding the proper scoping for this NEPA process, based on an FSEIS that improperly purports to be a "supplement" to the Generic EIS, then that contention did not become timely until that FSEIS was issued. Accordingly, the contention should be admitted and permitted to proceed to the hearing.

CONCLUSION

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

Respectfully submitted,

s/ (electronically signed)
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Date: May 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Reply in Support of Motion To Migrate Or Amend Contentions, and To Admit New Contentions* and accompanying attachments in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 7th day of May 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Howard M. Crystal (electronic signature)

Date: May 7, 2014