UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 040-08502
COGEMA MINING, INC.	)	License No. SUA-1341
(Irigaray & Christensen Ranch Facilities)	)	May 5, 2009

COGEMA'S ANSWER OPPOSING POWDER RIVER BASIN RESOURCE COUNCIL REQUEST FOR HEARING

James A. Glasgow
Alvin H. Gutterman
Stephen J. Burdick

Morgan, Lewis & Bockius LLP

Counsel for COGEMA Mining, Inc.

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h), COGEMA Mining, Inc. ("COGEMA" or "Applicant"), hereby files its Answer to the Request for Hearing ("Petition") filed on April 10, 2009 by the Powder River Basin Resource Council ("Petitioner"). The Petition responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") "Notice of License Renewal Request and Opportunity to Request a Hearing," published in the *Federal Register* on February 9, 2009 (74 Fed. Reg. 6436) ("Hearing Notice") concerning COGEMA's application to renew Source Material License SUA-1341 ("Application") for the Irigaray and Christensen Ranch Facilities in Johnson and Campbell Counties, Wyoming ("Facilities").

To be admitted as a party to this proceeding, the Petitioner must demonstrate standing and submit at least one admissible contention.[1] The Petitioner has done neither. As discussed in Section III below, the Petitioner has not demonstrated standing. Additionally, as discussed in

[1] *See* 10 C.F.R. § 2.309(a).

Section IV below, the Petitioner has not submitted any admissible contentions. Therefore, pursuant to 10 C.F.R. § 2.309, the Petition should be denied in its entirety.

II. BACKGROUND

COGEMA has a 10 C.F.R. Part 40 materials license to operate the Irigaray and Christensen Ranch in situ leach ("ISL") mining facilities in Johnson and Campbell Counties, Wyoming.[2] The original license dates from August 1978, and ownership has passed through various companies over the past 30 years.[3] On March 29, 2001, the license status changed from operating to decommissioning and restoration.[4] In April 2007, however, COGEMA requested that the NRC amend the license from decommissioning status to operational status.[5] The NRC approved this amendment in September 2008.[6] COGEMA has not yet recommenced production activities.

On May 30, 2008, COGEMA submitted its Application to the NRC to renew Source Material License SUA-1341 for the Facilities.[7] The Application consists of a single document addressing both technical and environmental topics, as the NRC Staff recommends in Regulatory Guide 3.46, which provides guidance for ISL applications.[8] The NRC accepted the Application

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[2] Briefly, ISL mining involves the injection of an oxygen-enriched solution, or "lixiviant," into wells drilled into the ore. The solution captures uranium as it flows through the ore, and the uranium is then removed from the solution via ion exchange. *See generally Crow Butte Res., Inc.* (License Renewal for the In Situ Leach Facility, Crawford, Neb.), LBP-08-24, 68 NRC __, slip op. at 4 (Nov. 21, 2008).

[3] *See* Application at 1-1 to 1-2.

[4] Safety Evaluation Report, License No. SUA-1341, COGEMA Mining, Inc., Irigaray and Christensen Ranch Facilities at 2 (Sept. 29, 2008) ("2008 SER").

[5] Application at 1-2.

[6] *See generally* 2008 SER.

[7] Hearing Notice, 74 Fed. Reg. at 6436.

[8] *See* Regulatory Guide 3.46, Standard Format and Content of License Applications, Including Environmental Reports, for In Situ Uranium Solution Mining, at vi (June 1982) ("In view of the nature of an in situ uranium solution mining operation, where the major consideration of both an applicant's submittal and the staff's review is the assessment of environmental impacts of the proposed activity, it appears reasonable that an application and environmental report for an in situ uranium solution mining license should consist of a single document . . . containing the information discussed herein.").

for docketing on December 29, 2008, and published the Hearing Notice on February 9, 2009.[9] The Hearing Notice stated that any person whose interest may be affected by the proposed license renewal and desires to participate as a party in an NRC adjudicatory proceeding must file a request for hearing by April 10, 2009.[10] The Petitioner filed the instant Petition on that date.

As a threshold matter, the Presiding Officer can dismiss the Petitioner because its representative has failed to file a Notice of Appearance and, as a result, there is no evidence that the individual who signed the Petition is authorized to represent the Petitioner, contrary to 10 C.F.R. § 2.314(b). The Petitioner bears the burden of demonstrating "that it has authorized the particular representative" appearing in the proceeding.[11] An attorney's Notice of Appearance can meet this requirement,[12] but no attorney has submitted a Notice of Appearance on behalf of the Petitioner.

III. THE PETITIONER HAS NOT DEMONSTRATED STANDING

A. Applicable Legal Standards and NRC Precedent

The NRC regulations require that a petitioner provide certain basic information to support its claim of standing.[13] This required information includes: (1) the nature of the petitioner's right under the Atomic Energy Act of 1954, as amended ("AEA"), to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the

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[9] Hearing Notice, 74 Fed. Reg. at 6436.

[10] *Id*. at 6437. In addition, the Hearing Notice imposed procedures for access to sensitive unclassified non-safeguards information ("SUNSI") and safeguards information ("SGI") for purposes of contention preparation. *Id*. at 6438-39. However, no one requested access to such information within the deadline set forth in the Hearing Notice.

[11] *Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990).

[12] *See N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, slip op. at 8 (2008).

[13] *See* 10 C.F.R. § 2.309(d)(l).

proceeding on its interest.[14] In Part 40 materials license proceedings like this one, the NRC has not applied a presumption of standing based on proximity to a facility that has received an NRC materials license.[15]

Thus, in this proceeding, the Petitioner must demonstrate that it satisfies the elements of standing set forth in 10 C.F.R. § 2.309(d)(l)(ii)-(iv). These concepts, as well as organizational standing, are discussed below.[16]

1. Traditional Standing

The NRC has stated that it generally follows contemporary judicial concepts of standing.[17] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[18] These three criteria are commonly referred to, respectively, as injury-in-fact, causality, and redressability.

First, a petitioner's injury-in-fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking [to participate] be himself among the injured."[19] The injury must be "concrete and particularized," not "conjectural" or "hypothetical."[20] "As a result,

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[14] *See id.* § 2.309(d)(l)(ii)-(iv).

[15] *See, e.g.*, *Hydro Res., Inc*. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 272 n.16 (1998) (citing Informal Hearing Procedures for Materials Licensing Applications, 54 Fed. Reg. 8269 (Feb. 18, 1989)); *Crow Butte*, LBP-08-24, slip op. at 10 ("In cases involving ISL uranium mining . . . the Board's analysis of each petitioner's claim in . . . [the] proceeding must be assessed on a case by case basis.").

[16] The NRC regulations, 10 C.F.R. § 2.309(e), also allow a petitioner to request discretionary intervention in its initial petition. Section 2.309(e) states: "a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated *shall* address the following factors in his/her *initial petition*." (Emphasis added). The Petitioner did not request discretionary standing in its initial Petition in accordance with Section 2.309(e), nor did it address the relevant factors. The Petitioner, therefore, cannot obtain discretionary intervention.

[17] *See, e.g.*, *Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006).

[18] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

[19] *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

[20] *Sequoyah Fuels Corp*. (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 72 (1994).

standing [will] be denied when the threat of injury is too speculative."[21] Additionally, the alleged "injury-in-fact" must lie within "the zone of interests" protected by the statutes governing the proceeding—either the AEA or the National Environmental Policy Act of 1969, as amended ("NEPA").[22] The injury-in-fact, therefore, must generally involve potential radiological or environmental harm.[23]

Second, a petitioner must establish that the injuries alleged are fairly traceable to the proposed action—in this case, the issuance of a renewed license to continue uranium production operations at the Facilities.[24] Although a petitioner is not required to show that the injury flows directly from the challenged action, it must nonetheless show that the "chain of causation is plausible."[25] The relevant inquiry is whether a cognizable interest of a petitioner might be adversely affected by one of the possible outcomes of the proceeding.[26]

Finally, each petitioner is required to show that "its actual or threatened injuries can be cured by some action of the tribunal."[27] In other words, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[28]

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[21] *Id.*

[22] *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 5 (1998), *aff'd sub nom.*, *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

[23] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002).

[24] *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75; *see also* Section IV.A.3, *infra*.

[25] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

[26] *Nuclear Eng'g Co., Inc.* (Sheffield, Ill., Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

[27] *Sequoyah Fuels Corp*. (Gore, Okla. Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

[28] *Sequoyah Fuels*, CLI-94-l2, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

2. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).[29] To intervene in a proceeding in its own right, an organization must allege—just as an individual petitioner must—that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision.[30]

General environmental or public policy interests are insufficient to confer organizational standing. In *Sierra Club v. Morton*, the U.S. Supreme Court held that a "special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country" was insufficient to provide organizational standing to a petitioner.[31] The Court stated that:

> [A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . . [I]f a 'special interest' in this subject were enough to entitle the [petitioner] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived.[32]

Similarly, an organization's assertion "that it has an interest in state and federal environmental laws and in the land, water, air, wildlife, and other natural resources that would be affected" is insufficient to establish standing.[33] Equally insufficient for standing purposes is a

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[29] *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 115 (1995)).

[30] *See Ga. Tech*, CLI-95-12, 42 NRC at 115.

[31] 405 U.S. at 730, 741.

[32] *Id.* at 739; *see also U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363-64 (2004).

[33] *Int'l Uranium (USA) Corp*. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251-52 (2001).

petitioner's mere academic interest in a proceeding,[34] in presenting "sound science" to a licensing board,[35] in disseminating information on nuclear non-proliferation,[36] in environmental and consumer protection,[37] in promoting compliance with federal and state laws and regulations,[38] and in promoting the "development of sound energy policy."[39]

To invoke representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability, or by demonstrating geographic proximity in cases where the presumption applies); (2) identify that member by name and address; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[40] Indeed, the Commission has held that "[t]he failure both to identify the member(s) [that the petitioners] purport to represent and to provide proof of authorization therefore precludes [the petitioners] from qualifying as intervenors."[41]

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[34] *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-74, 16 NRC 981, 983-84 (1982).

[35] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 176, *aff'd*, CLI-98-13, 48 NRC 26 (1998).

[36] *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5-6 (1994).

[37] *See Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 411-12 (2007) (finding that petitioner's interest in promoting the "economic use of energy, including nuclear energy, and to promote the public interest, environmental protection, and consumer protection" was insufficient to provide standing).

[38] *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-02-3, 55 NRC 35, 46-47 (2002).

[39] *Edlow Int'l Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976); *see also Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59 (1992) (finding that petitioner's institutional interest in disseminating information "regarding the need for future energy sources in California" is insufficient for standing purposes).

[40] *Consumers Energy Co.*, CLI-07-18, 65 NRC at 408-10; *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *see also Gen. Pub. Util. Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

[41] *Consumers Energy Co.*, CLI-07-18, 65 NRC at 410.

B. The Petitioner Has Not Demonstrated Standing To Intervene

1. The Petitioner Has Not Demonstrated Organizational Standing

In order to demonstrate that it is entitled to standing, an organization must show a "discrete institutional injury to itself . . . ."[42] The Petitioner is a nonprofit organization based in Sheridan, Wyoming with 1,000 members.[43] According to the Petitioner, it has "a long-standing history of advocacy working to protect people and places in the Powder River Basin . . . [and] in the past few years . . . it has been active in uranium issues in the Powder River Basin."[44] The Petitioner claims that its following interests will be adversely affected if the license renewal is granted: (1) breathing clean air, (2) drinking clean water that is vital to homes and businesses of its members, (3) protecting the natural ecology, including wildlife and vegetation, of the region from unnecessary and potentially detrimental impacts, and (4) having energy development near homes and communities where its members live, work, and/or recreate.[45]

Such generalized concerns are insufficient to show standing. For example, in the recent *Consumers Energy* decision, various environmental organizations asserted organizational standing based on interests "under their organizational mission statements" to, among other things, "promote the public interest, environmental protection, and consumer protection."[46] The Commission denied organization standing to the petitioners because these interests were "broad interests shared with many others and too general to constitute a protected interest" under the AEA or NEPA.[47] The Commission further observed:

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[42] *White Mesa*, CLI-01-21, 54 NRC at 252.

[43] Petition at 2.

[44] *Id*.

[45] *Id*. at 3.

[46] CLI-07-18, 65 NRC at 411.

[47] *Id*. (citation omitted).

> In essence, the Environmental Petitioners seek to play the role of a "private attorney general" – a role that AEA Section 189 – which grants a hearing right to those with an "interest" in the proceeding – does not contemplate. Neither Environmental Petitioner has shown any risk of "discrete institutional injury to itself, other than the general environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing."[48]

The Powder River Basin Resource Council relies upon essentially the same claims as the environmental petitioners in *Consumers Energy*, and it lacks organizational standing for the same reasons. The Petitioner has failed to show that it is entitled to organizational standing because it has failed to demonstrate a "discrete institutional injury to itself."[49] Because the Petitioner does not provide any support for its generalized claims, the Presiding Officer should deny it organizational standing.[50]

2. The Petitioner Has Not Demonstrated Representational Standing

To demonstrate representational standing, the Petitioner was required to identify one member by name and address that has authorized it to represent him or her, and show that the member is entitled to standing in the proceeding on his or her own. The Petitioner does not appear to seek representational standing,[51] so it cannot establish standing on this theory. The Petitioner did not identify any individual members, let alone submit an affidavit showing that it has been authorized to represent one or more of its members.[52] Moreover, the Petitioner has not shown that any of its members would be entitled to standing as individuals in this proceeding. Therefore, the Petitioner is not entitled to representational standing.

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48 *Id*. (citations omitted).

49 *Id*.

50 *See id*.

51 *See* Petition at 2-3.

52 The Petitioner cannot remediate its failure to submit an authorization affidavit by filing one with its reply. *Entergy Nuclear Operations, Inc*. (Palisades Nuclear Plant), CLI-08-19, 68 NRC __, slip op. at 9-12 (finding that authorization affidavits for representational standing cannot be filed with the reply, they must be filed with the initial petition to intervene).

Because the Petitioner has failed to establish standing, the Petition must be denied in its entirety under 10 C.F.R. § 2.309(a).

IV. THE PETITIONER HAS NOT PROFFERED AN ADMISSIBLE CONTENTION

A. Applicable Legal Standards and Relevant NRC Precedent

As explained above, to intervene in an NRC licensing proceeding, a petitioner must submit at least one admissible contention. Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." In addition, that section specifies that each contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[53]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[54] The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.[55] The Commission has stated that it "should not have to expend resources

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[53] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—is only applicable in proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the admissibility of the Petitioner's proposed contentions in this proceeding.

[54] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[55] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 26 (2001).

to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[56]

This results in rules on contention admissibility that are "strict by design."[57] The rules were further "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[58] Thus, failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[59]

The legal standards governing each of the six pertinent criteria from 10 C.F.R. § 2.309(f)(1) are discussed below.

1. Petitioners Must Specifically State the Issue of Law or Fact to Be Raised

A petitioner must provide "a specific statement of the issue of law or fact to be raised or controverted."[60] The petitioner must "articulate at the outset the specific issues [it] wish[es] to litigate as a prerequisite to gaining formal admission as [a party]."[61] Namely, an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[62] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[63]

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[56] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

[57] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

[58] *Id.* The Commission has also stated that its practice does not permit "notice pleading." *N. Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

[59] *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[60] 10 C.F.R. § 2.309(f)(1)(i).

[61] *Oconee*, CLI-99-11, 49 NRC at 338.

[62] *Millstone*, CLI-01-24, 54 NRC at 359-60.

[63] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Oconee*, CLI-99-11, 49 NRC at 337-39).

2. Petitioners Must Briefly Explain the Basis for the Contention

A petitioner must provide "a brief explanation of the basis for the contention."[64] This includes "sufficient foundation" to "warrant further exploration."[65] The petitioner's explanation serves to define the scope of a contention, as "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases."[66] Licensing boards, however, must determine the admissibility of the contention itself, not the admissibility of individual "bases."[67]

As the Commission has observed, "[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of [the] proceeding."[68] In other words, "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[69]

3. Contentions Must Be Within the Scope of the Proceeding

A petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding."[70] The scope of the proceeding is defined by the Commission's notice of opportunity for a hearing.[71] Moreover, contentions are necessarily limited to issues that are

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[64] 10 C.F.R. § 2.309(f)(1)(ii); *see* 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).

[65] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 428 (1990) (citation omitted).

[66] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom.*, *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991).

[67] *See La. Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) ("licensing boards generally are to litigate 'contentions' rather than 'bases'") (citation omitted).

[68] *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39, 41 (1998).

[69] *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

[70] 10 C.F.R. § 2.309(f)(1)(iii).

[71] *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

germane to the specific application pending before the board.[72] Any contention that falls outside the specified scope of the proceeding must be rejected.[73]

The scope of this license renewal proceeding is limited to the issue identified in the Hearing Notice, which is "COGEMA's proposal to *continue* uranium production operations at its facilities in Johnson and Campbell Counties, Wyoming."[74] For environmental issues, "the supplement to an applicant's environmental report may be limited to incorporating by reference, updating or supplementing the information previously submitted to reflect any significant environmental change."[75] Thus, this proceeding is limited to consideration of any "significant environmental change" that would be caused by the continued operation of the Facilities, as opposed to the environmental impacts of current operations.[76] Environmental contentions that do not allege a significant change that is new or different from impacts previously considered are therefore outside the scope of this proceeding.[77]

For all issues, the limited nature of this license renewal review under Part 40 is in some respects analogous to the renewal of an operating reactor license under Part 54. The "first principle" of operating reactor license renewal is that the existing regulatory process is adequate to provide reasonable assurance of safety, so reviews of license renewal applications are

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72 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998).

73 *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

74 74 Fed. Reg. at 6437 (emphasis added).

75 10 C.F.R. § 51.60(a).

76 *See id*.

77 *See also Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) ("At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the [ER or EIS]. Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances.") (citations and quotations omitted).

generally limited to issues that are unique to the period of extended operation.[78] One board has explained the analogy between license renewal under Part 54 and Part 40 as follows:

> Much like the situation in a reactor operating license proceeding in which issues litigated in the earlier construction permit proceeding cannot be revisited absent changed circumstances, a license renewal proceeding [under Part 40] cannot be used to relitigate issues from the initial licensing proceeding absent some material change in circumstances affecting the original determinations."[79]

The Staff's guidance for reviewing applications for renewed ISL mining licenses similarly specifies a limited review. The Standard Review Plan [("SRP")] for In Situ Leach Uranium Extraction License Applications, NUREG-1569, Appendix A, "Guidance for Reviewing Historical Aspects of Site Performance for License Renewals and Amendments" summarizes eleven specific items that the Staff must review.[80] The guidance specifies that if:

> the staff concludes that the site has been operated so as to protect health and safety and the environment and that no *unreviewed* safety-related concerns have been identified, then only those changes proposed by the license renewal or amendment application should be reviewed using the appropriate sections of this standard review plan. *Aspects of the facility and its operations that have not changed since the last license renewal or amendment should not be reexamined*.[81]

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[78] *See* Final Rule, Nuclear Power Plant License Renewal, 60 Fed. Reg. 22,461, 22,464 (May 8, 1995).

[79] *Hydro Res., Inc.* (Crownpoint, New Mexico), LBP-03-27, 58 NRC 408, 416 (2003). Although the *Hydro Resources* decision rejected the admissibility of certain issues that had been raised in litigation during the original licensing proceeding, *see id*., the petitioner in the renewal proceeding had not been a party to the original proceeding. *Id*. at 410-11. Similarly here, although no entity, including the Petitioner, sought to intervene in any previous proceeding on the instant license, issues that were resolved during the Staff's review of the original license, its amendments, and its previous renewal should not be litigable now.

[80] These eleven items are: (1) NRC inspection reports and license performance reports; (2) amendments and changes to operating practices or procedures; (3) license violations identified during inspections; (4) excursions, incident investigations, or root cause analyses; (5) exceedances of any regulatory standard or license condition pertaining to radiation exposure, contamination, or release limits; (6) exceedances of any non-radiation contaminant exposure or release limits; (7) updates or changes to site characterization information; (8) environmental effects of site operations; (9) updates and changes to factors that may cause reconsideration of [environmental] alternatives; (10) updates and changes to the environmental costs and benefits; (11) the results and effectiveness of any mitigation proposed and implemented in the original license. NUREG-1569 at A-1.

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

Thus, the scope of this proceeding is generally limited to changes in the operation of the Facilities that have not been reviewed in previous licensing proceedings.[82]

In addition to the limited scope of license renewal reviews, a contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[83] A contention that raises a matter that is, or is about to become, the subject of a rulemaking, is also outside the scope of this proceeding.[84] This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.[85]

Furthermore, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected by the board as outside the scope of the proceeding.[86] Accordingly, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[87]

Finally, challenges to the NRC Staff's safety review are outside the scope of this proceeding because "[t]he adequacy of the applicant's license application, not the NRC staff's

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[82] The narrow scope of this proceeding also serves to avoid significant prejudice to the Applicant. In making considerable investments in the Facilities over time, COGEMA has relied upon prior NRC determinations with respect to foreign ownership, site suitability, the generic impacts of uranium mining, and other matters. The NRC reached these determinations in the course of various licensing actions over some 30 years. To reopen all of these established determinations now, in the context of a narrow request to continue existing activities, would prejudice COGEMA and produce significant and unnecessary uncertainty in the domestic and international uranium mining industry.

[83] *See* 10 C.F.R. § 2.335(a).

[84] *See Oconee*, CLI-99-11, 49 NRC at 345 (citing *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

[85] *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

[86] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 65 NRC 41, 57-58 (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

[87] *See Peach Bottom*, ALAB-216, 8 AEC at 20-21.

safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [content of the] SER are not cognizable in a proceeding."[88]

4. Contentions Must Raise a Material Issue

A petitioner must 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."[89] To issue this renewed license under Part 40, the NRC must make the following four findings: (1) that the application is for a purpose authorized by the AEA; (2) that the applicant is qualified by reason of training and experience to use the source material for the purpose requested in such a manner as to protect health and minimize danger to property; (3) that the proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property; (4) the issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.[90] The remaining provisions of 10 C.F.R. § 40.32 do not apply to this uranium mining license.[91]

The Petitioner attempts to rely upon 10 C.F.R. § 40.9 to establish materiality.[92] This regulation requires information in the Application to be "complete and accurate in all *material* respects."[93] However, an alleged violation of this regulation, standing alone, is not material to the required findings in this proceeding. To issue the renewed license, the NRC is not required

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[88] Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. at 2202 (citations omitted). Although the adequacy of the NRC Staff's environmental review may be within the scope of this proceeding, a petitioner is initially required to base its environmental contentions on the applicant's environmental report. *See* 10 C.F.R. § 2.309(f)(2).

[89] 10 C.F.R. § 2.309(f)(1)(iv).

[90] *See* 10 C.F.R. § 40.32(a)-(d); *see also* 2008 SER at 1.

[91] *See* 2008 SER at 1.

[92] Petition at 5.

[93] 10 C.F.R. § 40.9 (emphasis added).

to make an explicit finding that the Application is complete and accurate. To show materiality, an allegation that the Application is incomplete or inaccurate must also allege and properly support the further claim that the missing or inaccurate information is material; *i.e.*, that it is essential to one of the required findings in Section 40.32.

As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[94] In this regard, each contention must be one that, if proven, would entitle the petitioner to relief.[95] Additionally, contentions alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.[96]

5. Contentions Must Be Supported by Adequate Factual Information or Expert Opinion

A petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately and failure to do so requires a board to reject the contention.[97] The petitioner's obligation in this regard has been described as follows:

> [A]n intervention petitioner has 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. Stated otherwise, neither Section 189a. of the Act nor Section [2.309] of the Rules of Practice permits the filing

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[94] *Oconee*, CLI-99-11, 49 NRC at 333-34 (citing Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172).

[95] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 n.10 (2002).

[96] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004).

[97] *See* 10 C.F.R. § 2.309(f)(1)(v); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996).

> of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.[98]

Where a petitioner neglects to provide the requisite support for its contentions, a board may not make assumptions of fact that favor the petitioner or supply information that is lacking.[99] The petitioner must explain the significance of any factual information upon which it relies.[100]

With respect to factual information or expert opinion proffered in support of a contention, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[101] Any supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to board scrutiny, "both for what it does and does not show."[102] A board will examine documents to confirm that they support the proposed contentions.[103] A petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[104] Moreover, vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.[105] The mere incorporation of massive documents by reference is similarly unacceptable.[106]

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98 *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added).

99 *See Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

100 *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003).

101 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

102 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

103 *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

104 *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995).

105 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

106 *Id.*; *see also Tenn. Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

In addition, "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 because it deprives the board of the ability to make the necessary, reflective assessment of the opinion" as it is alleged to provide a basis for the contention.[107] Conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert.[108] In short, a contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[109]

6. Contentions Must Raise a Genuine Dispute of Material Law or Fact

With regard to the requirement that a petitioner "provide sufficient information to show . . . a genuine dispute . . . with the applicant . . . on a material issue of law or fact,"[110] the Commission has stated that the petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[111] If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is to "explain why the application is

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[107] *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

[108] *See USEC*, CLI-06-10, 63 NRC at 472.

[109] *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)).

[110] 10 C.F.R. § 2.309(f)(1)(vi).

[111] Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Millstone*, CLI-01-24, 54 NRC at 358.

deficient."[112] A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.[113]

Similarly, a petitioner's oversight or mathematical error does not raise a genuine issue. For example, if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine issue.[114] Further, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.[115]

B. <u>The Petitioner's Proposed Contentions Are Inadmissible</u>

Applying the legal standards summarized above, each of the Petitioner's 12 proposed contentions is deficient. As a general matter, none of the Petitioner's contentions reference any of the six pleading criteria in Section 2.309(f)(1), despite the Petitioner's burden to meet each of those criteria with respect to each of their proposed contentions. Nor are these criteria met. As a result, the Petition should be denied for failure to proffer an admissible contention in accordance with 10 C.F.R. § 2.309(a).

1. Contention 1 – Completeness of the License Renewal Application

This contention announces that the Application "is incomplete in several respects," and then provides a list of such topics. Absent from this contention are any explanation of why the Petitioner's desired additional information is required for NRC to make the requisite findings under 10 C.F.R. § 40.38 or any references to documents (other than the Application), facts or

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[112] Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 156.

[113] *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

[114] *See Millstone*, LBP-04-15, 60 NRC at 95-96; *Crow Butte*, LBP-08-24, slip op. at 67.

[115] *See Turkey Point*, LBP-90-16, 31 NRC at 521 & n.12.

expert opinion. Instead, the Petitioner simply assumes the materiality of its demands by relying upon 10 C.F.R. § 40.9,[116] and provides only bare assertions and speculation. As a result, this contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(ii), (iv), and (v).

This contention is also outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The Petitioner does not explain how any of the alleged "incomplete" items relate to a *significant change* to the environmental impacts of the Facilities during operation under the renewed license, as distinct from impacts under the current term of operations.[117] The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

As to the specific topics the Petitioner identifies, this contention does not satisfy the requirements for contentions of omission. NRC precedent states that, to be material, contentions alleging an omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.[118] The NRC regulations regarding admissibility of contentions state that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief."[119] The Petitioner has not explained why the alleged omissions are required by law, has not specifically identified what information is missing, and has not provided any supporting reasons for its belief that there are omissions. NRC precedent also holds that if a

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[116] *Compare* Petition at 5 *with* Section IV.A.4, above.

[117] *See* Petition at 3-5.

[118] *Millstone*, LBP-04-15, 60 NRC at 89.

[119] 10 C.F.R. § 2.309(f)(1)(vi).

petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine dispute.[120]

In addition, as specifically explained below, none of the Petitioner's alleged omissions presents an admissible contention. The Petitioner demands:

(1) "a complete description of local hydrogeology, including groundwater flow direction and speed, confining layers, porosity, fractures, and fissures"[121]

- This claim provides no facts or expert opinion to support the claim that the Application is inadequate. Instead, the Petitioner ignores Sections 2.6 and 2.7 of the Application and seeks to shift *its* initial pleading burden to COGEMA, contrary to 10 C.F.R. § 2.309(f)(1).[122]

(2) "a complete disclosure of COGEMA's compliance history, including documentation of past spills, underground excursions, and evaporation pond liner leaks"[123]

- There is no requirement for a "complete disclosure" of compliance history in a license renewal application, which is focused on the activities that will be conducted under the requested license renewal.[124] COGEMA provides prompt reports on any significant spills and leaks, and during its onsite inspections the NRC reviews the detailed records of all leaks and spills of licensed material or process chemicals maintained by the licensee.[125] This "omission" is therefore immaterial.

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[120] *See, e.g.*, *Crow Butte*, LBP-08-24, slip op. at 67.

[121] Petition at 3.

[122] *Id.* at 3 n.1. While these sections incorporate information from earlier applications, this practice is allowed by 10 C.F.R. § 51.60(a).

[123] Petition at 3.

[124] *See* 10 C.F.R. § 51.45(b)(1). Additionally, this information is already on the NRC docket.

[125] *See* Application at 3-25.

(3) full documentation of "the amount of groundwater, including Class I groundwater supplies, that will be consumed during mining operations and wellfield restoration activities"[126]

- Section 7.2.3.1 of the Application provides estimates of how much groundwater will be consumed by mining and restoration. The Petition fails to identify this information, does not dispute this information, and does not provide support for why any additional information is required or material.

(4) "a description of the baseline (e.g., pre-mining) groundwater quality"[127]

- Section 5.8.2.1 addresses regional groundwater monitoring, including historical results and the proposed program for future operations.[128] Section 5.8.2.2 addresses mine unit groundwater monitoring, also including historical results and plans for future wellfields.[129] Table 5.23 provides a listing of historical regional groundwater monitoring results and Table 5.24 lists the groundwater monitoring program.[130] The Petition fails to identify this information, does not dispute this information, and does not provide support for why any additional information is required or material.[131]

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[126] Petition at 3.

[127] *Id.* at 4.

[128] Application at 5-61.

[129] *Id.* at 5-61 to 5-72. Consistent with the Application, the baseline data for new mine wellfields will be provided in wellfield data packages submitted to the WDEQ for approval prior to wellfield development.

[130] *Id.* at 5-63 to 5-69.

[131] The Petitioner also fails to recognize the legal obligations already imposed on COGEMA by its materials license. For example, SUA-1341 License Condition 10.3 states: "The licensee shall establish pre-operational baseline water quality data for all production units. Baseline water quality sampling shall provide representative pre-mining ground water quality data and restoration criteria as described in the approved license application." Thus, COGEMA is already obligated to provide the information claimed to be omitted by the Petitioner. But that information does not need to be provided in the Application; instead, the information must be provided before well operation.

(5) "the likelihood of returning water to pre-mining conditions"[132]

- There is no requirement for COGEMA to speculate as to what may happen in the future. Section 6.1.1 of the Application provides COGEMA's restoration goals and explains that if the primary goal for restoration cannot be achieved, "then restoration will meet an alternate standard approved by the NRC, consistent with the requirements of Criterion 5B(5) of Appendix A to 10 CFR Part 40."[133] The Petitioner has not explained why any additional information is necessary or material. Additionally, to the extent the Petitioner is seeking information different than what is found in Criterion 5B(5) of Appendix A to 10 C.F.R. Part 40, this is an impermissible challenge to the regulations, contrary to 10 C.F.R. § 2.335.

(6) "the effectiveness of evaporation ponds as a waste disposal method given climatic conditions and amounts of waste water"[134]

- The Petitioner has identified no requirement to provide the "effectiveness" of evaporation ponds. Section 4.2 of the Application discusses the existing and planned evaporation ponds. The combination of evaporation ponds and two existing deep disposal wells already has been demonstrated to be an effective means of waste water disposal. The Petitioner has not disputed this information, thus failing to provide adequate support for the contention and to demonstrate a genuine dispute.

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[132] Petition at 4.

[133] Application at 6-1 (October 2008 Update). This position is supported by the existing materials license. *See* Materials License No. SUA-1341, Section 10.16. Additionally, the NRC recently recognized that the standards in Criterion 5B are appropriate for groundwater restoration at ISL facilities. *See* RIS 2009-05, Uranium Recovery Policy Regarding: (1) the Process for Scheduling Licensing Reviews of Applications for New Uranium Recovery Facilities and (2) the Restoration of Groundwater at Licensed Uranium In Situ Recovery Facilities, at 3 (Apr. 29, 2009).

[134] Petition at 4.

(7) "whether the permit for the deep disposal wells will be amended or re-issued prior to use or disclose whether regulatory requirements have changed since the permit was issued in 1992"[135]

- This demand is entirely unclear. The Petitioner does not explain whether they believe that "regulatory requirements have changed," what the nature of such changes might be, or why it believes that the existing permits might need to be amended. Without such an explanation, the Petitioner fails to establish why such an omission is material, and fails to raise a genuine dispute.

(8) "disclose and analyze impacts to wildlife and livestock habitat that will occur during mining operations and after surface reclamation"[136]

- Impacts on wildlife and livestock are discussed throughout the Application,[137] and Appendix C provides a detailed study of wildlife at the site. Ecological impacts are discussed in Section 7.2.4. The Petitioner fails to identify and explain its dispute with any specific information in the Application, and does not provide support for why any additional information is required or material.

(9) "results and analysis from recent wildlife surveys and . . . whether additional wildlife surveys will be conducted prior to installation of new well fields"[138]

- See response to item (8), above. Additionally, Appendix C explains that wildlife monitoring has been reinstated. These surveys cover the entire permit area and are not tied to specific wellfields.

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[135] *Id.*

[136] *Id.*

[137] *See* Section IV.B.7, below.

[138] Petition at 4-5.

(10) "an analysis of whether the Pathfinder Mines Corporation Shirley Basin tailings facility will be available throughout the lifetime of COGEMA's facilities for byproduct waste disposal"[139]

- The Petitioner identifies no legal requirement for providing this information and demonstrating a disposal arrangement for the life of the project. This topic is, however, already addressed by a license condition, which states:

> The licensee shall dispose of 11e.(2) byproduct material, including evaporation pond residues, from the Irigaray and Christensen Ranch Satellite facilities at a site licensed by the NRC or an NRC Agreement State to receive 11e.(2) byproduct material. The licensee shall identify the disposal facility to the NRC in writing. The licensee's approved waste disposal agreement must be maintained onsite. In the event the agreement expires or is terminated, the licensee shall notify the NRC in writing, in accordance with License Condition 9.2, within 7 days after the date of expiration or termination. A new agreement shall be submitted for NRC approval within 90 days after expiration or termination, or the licensee will be prohibited from further lixiviant injection. If the licensee is not able to secure this agreement, then the licensee must increase the surety to include disposal at a commercial 11e.(2) disposal facility.[140]

This license condition already imposes strict requirements on COGEMA prohibiting operation unless a disposal facility is available. The Petitioner has not explained why anything else is required, thus failing to provide adequate support for this contention and to demonstrate a genuine dispute.

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[139] *Id*. at 5.

[140] Materials License No. SUA-1341, Section 9.7.

(11) "whether operating permit OP-254 for the dryer facility will be modified to comply with current air quality regulations"[141]

- The Petitioner fails to identify any requirement to provide this information. COGEMA, of course, cannot operate the dryer facility unless it has a valid operating permit. Additionally, this claim ignores Section 10.0 of the Application, which states that "[a]ll other required permits for the project were obtained prior to commencement of activities." The table in Section 10.0 lists OP-254 as one of those existing permits. Moreover, OP-254 does not have an expiration date. COGEMA is unaware, and the Petitioner has not identified, any changes to the applicable regulations that would affect the permit. Thus, once again, the Petitioner has not provided adequate support for the contention and has not demonstrated a genuine dispute.

(12) "whether new air quality monitoring stations will be added."[142]

- This final demand simply ignores the Application. Section 5.8.1 of the Application provides an Airborne Effluent and Environmental Monitoring Program to be used during operation of the facilities, including Tables 5.21 and 5.22, which provide detailed information on the monitoring stations.[143] This monitoring program is identical to the program approved in the past and was re-activated upon approval of the amendment to the license to return to an

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[141] Petition at 5.

[142] *Id*.

[143] Application at 5-58 to 5-60.

operational status. The Petitioner has not claimed that this information is deficient or shown why other information is required.[144]

The Petitioner's desire for a map of air quality monitoring stations again ignores information that is already provided in the Application. Figure 5.5 of the Application shows the location of the air quality monitoring stations.[145] Additionally, Tables 5.21 and 5.22 list all of the monitoring stations, including their locations.[146] Because the Application already provides the information sought by the Petitioner, this argument does not create a genuine dispute of a material fact.

The Petitioner's desire for a monitoring plan for particulate matter at the Christensen Ranch facility also ignores the explanation in the Application for why particulate matter is monitored at Irigaray, but not at Christensen Ranch. For example, Section 4.1 of the Application explains: "Because the Christensen Ranch satellite plant is strictly an ion exchange (IX) facility and will have no precipitation of uranium, the only significant radioactive airborne effluent will be Radon-222 gas."[147] Particulate monitoring is necessary at Irigaray due to the

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[144] Additionally, COGEMA recently submitted its 2008 Annual Effluent and Monitoring Report. 2008 Annual Effluent and Monitoring Report (Feb. 2009), *available at* ADAMS Accession No. ML090910574. Section 4.5.1 of this report explains that "[e]nvironmental monitoring of radon was restarted in the fourth quarter of 2008 with the change of the NRC license to operational status." It is clear from this statement that the monitoring stations are active and ready to be used. *See Catawba*, ALAB-687, 16 NRC at 468 ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question.").

[145] Figure 5.5, Irigaray and Christensen Ranch Environmental Monitoring Station Locations (May 2, 2008), *available at* ADAMS Accession No. ML081850709.

[146] Application at 5-59 to 5-60.

[147] *Id.* at 4-1.

yellowcake drying/packaging circuit of the process facility.[148] Christensen Ranch does not have a similar processing facility that could result in radioactive particulate emissions, because all processes at Christensen Ranch are wet in nature. The Petitioner has not disputed this information and has provided no justification for its claim that particulate monitoring is necessary at Christensen Ranch.

2. Contention 2 – Foreign Ownership

This contention alleges that "the NRC may not issue a license to a corporation that is 'owned controlled or dominated by an alien, a foreign corporation, or a foreign government."[149] According to the Petitioner, this issue is "critically important . . . in light of the Congressional mandate that nuclear material be regulated 'in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.'"[150]

This contention misinterprets the single regulation and single statutory provision that it cites. Neither 42 U.S.C. § 2133(d), nor 10 C.F.R. § 40.38(a), apply to this proceeding. The contention is therefore outside the scope of this proceeding, immaterial, unsupported by facts or expert opinion, and fails to raise a genuine dispute on a material issue of law or fact.

The Petitioner cites Section 103(d) of the AEA, 42 U.S.C. § 2133(d), but fails to recognize that this Section of the AEA is applicable only to licensees of "utilization facilities" and "production facilities."[151] Uranium mines, including ISL mines, are neither.[152]

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[148] *Id.* at 4-2.

[149] Petition at 6 (citing "40 [sic] CFR § 40.38(a)").

[150] *Id*. (citing "U.S.C. § 2133(d) [sic]").

[151] 42 U.S.C. § 2133(a).

[152] *Id*. § 2014(v), (cc) (defining "production facility" and "utilization facility"). Regarding the term "production facility," the Tenth Circuit Court of Appeals found that the term references the manufacture of special nuclear material not the extraction of source material like uranium. *Barnson v. United States*, 816 F.2d 549, 554 (1987)

By citing and discussing Section 103(d) of the AEA, the Petitioner has identified the statutory basis for the Commission's longstanding distinction between foreign ownership, control or domination ("FOCD") of (1) "utilization facilities" (power reactors and research reactors) as well as "production facilities" (reactors devoted to producing plutonium and facilities for the reprocessing of spent or "used" reactor fuel), which are licensed under Parts 50 and 52; and (2) facilities, such as ISL uranium mines (licensed under 10 C.F.R. Part 40), nuclear fuel fabrication facilities and uranium enrichment facilities (both licensed under 10 C.F.R. Part 70); and uranium hexafluoride conversion facilities (licensed under 10 C.F.R. Part 40). NRC licensees of utilization and production facilities, as listed under (1) above, are subject to the AEA's prohibition, of direct foreign ownership as well as foreign "influence control or domination." In marked contrast, facilities that are not "production" or "utilization" facilities, as listed in (2) above, are not subject to Section 103's prohibition on FOCD.[153] Therefore, the AEA does not prohibit FOCD of holders of source material licenses, including licenses to operate ISL uranium mines.

Congress did not prohibit FOCD of other types of facilities licensed by the NRC, including ISL uranium mines. Instead of applying the FOCD prohibition to licensees of facilities other than production or utilization facilities, Congress limited the NRC's consideration of any foreign ownership or control of such facilities to the AEA's required finding, for all licenses, that issuance of the license would not be "inimical to the common defense and security." The Petitioner has not raised the issue of inimicality.

("Nowhere in the [Atomic Energy] Act are the terms 'produce' or 'production' used in the mining context. Those terms are used only in conjunction with post-extraction aspects of the nuclear power industry."). The NRC's "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999) also plainly states that it is applicable only to licensees of "production" and "utilization facilities."

[153] 42 U.S.C. § 2133(a).

The Petitioner's reliance on 10 C.F.R. § 40.38 similarly overlooks the fact that this provision applies solely to the United States Enrichment Corporation ("USEC").[154] As used in Section 40.38, "Corporation" is a defined term:

> Corporation means the United States Enrichment Corporation (USEC), or its successor, a Corporation that is authorized by statute to lease the gaseous diffusion enrichment plants in Paducah, Kentucky, and Piketon, Ohio, from the Department of Energy, or any person authorized to operate one or both of the gaseous diffusion plants, or other facilities, pursuant to a plan for the privatization of USEC that is approved by the President.[155]

Therefore, Section 40.38 does not apply to this proceeding and does not support the Petitioner's contention. Moreover, the NRC's repeated issuance of Part 40 and Part 70 licenses to U.S. companies, including AREVA NP, that are indirectly owned by French, British, and other foreign entities confirm that the Commission does not bar indirect foreign ownership of such licenses.[156]

Consequently, the Petitioner's argument that the Applicant does not meet applicable qualification requirements, because of its indirect foreign ownership, is an impermissible collateral attack on the AEA and the NRC's rules, and is contrary to the Commission's long-

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[154] In *Crow Butte*, the board found that the definition of "Corporation" in Section 40.38 is ambiguous. *Crow Butte Res.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC __, slip op. at 121 (Apr. 29, 2008). However, the same board later acknowledged that the term does not apply to ISL mining. *See Crow Butte Res.* (License Amendment for the North Trend Expansion Project), LBP-09-01, 69 NRC __, slip op. at 20 n.71 (Jan. 27, 2009).

[155] 10 C.F.R. § 40.4; *see also* Final Rule, USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6664, 6665 (Feb. 12, 1997) (explaining that 10 C.F.R. § 40.38 implements provisions of the USEC Privatization Act, Pub. L. 104-134, addressing Congressional concerns about the "maintenance of a reliable and economical domestic source of enrichment services").

[156] For example, AREVA NP Inc., a U.S. company that is controlled by AREVA NC S.A., holds an NRC license for its nuclear fuel fabrication facility at Richland, Washington. On April 24, 2009, the NRC granted a 40-year license renewal for the Richland facility. NRC News Release 2009-076. During the 1980s, the fuel fabrication facility at Richland was owned by a U.S. subsidiary of Siemens Corporation, a German corporation. Recently, the Commission issued a license to Louisiana Energy Services ("LES"), allowing it to construct and operate a gas centrifuge uranium enrichment plant at a site near Hobbs, New Mexico. LES, a U.S. entity, is indirectly owned by British, Dutch, and German entities. *LES* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 379-80 (1996), *rev'd on other grounds*, CLI-97-15, 46 NRC 294 (1997).

standing practice and 10 C.F.R. § 2.335. Thus, this aspect of the contention is outside scope, immaterial, and fails to raise a genuine dispute on a material issue of law or fact. The Petitioner also provides no facts or expert opinion to support this contention. It is therefore inadmissible.

3. Contention 3 – Impacts of Groundwater Consumption

This contention alleges that "COGEMA operations will consume vast amounts of groundwater" which allegedly will have negative impacts on groundwater used by residents "for domestic and stock purposes."[157] The Petitioner does not reference any specific information in the Application, and provides no further information or supporting bases for this contention. Nor does the Petitioner further address the required pleading standards under 10 C.F.R. § 2.309(f)(1). As explained below, this contention is inadmissible.

This contention is vague, speculative, and utterly lacking in support. Section 7.2.3.1 of the Application provides estimates of how much groundwater will be consumed by mining operations and restoration, and explains that the impacts of such withdrawal are mitigated "by the withdrawal of groundwater over the extended period of approximately twenty five years."[158] The Application further explains that such consumptive uses are ultimately temporary.[159] The Petitioner's characterization of the amount of water as "vast" is of no consequence.[160] Neither is its bare assertion that the use of this water will have "negative impacts on local and regional groundwater supplies," as this statement does not specifically dispute the discussion of such impacts throughout Section 7.2.3 of the Application.[161] The contention is therefore inadmissible because it lacks adequate basis, is unsupported by facts or expert opinion, and fails to raise a

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[157] Petition at 6.

[158] Application at 7-4.

[159] *Id*.

[160] Petition at 6.

[161] *Id*.

genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(ii), (iv), (v), and (vi).

Finally, the contention is also outside the scope of this proceeding because it fails to allege a significant environmental *change* that would be caused by the *continued* operation of the Facilities, as opposed to activities that are authorized under the existing license, contrary to 10 C.F.R. § 51.60(a) and the Hearing Notice. The contention fails to challenge any proposed changes, in the Application, to the rate or manner in which the ultimately temporary consumption of groundwater is to take place. The contention, therefore, is also subject to dismissal under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

4. Contention 4 – Impacts on Ground and Surface Water Quality

This contention alleges that "COGEMA will negatively impact ground and surface water quality."[162] The Petitioner states that mining activities "may" endanger the Wasatch aquifer, and identifies various contaminants.[163]

This contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention alleges that certain impacts to groundwater and surface water from the operation of the Facilities are unaddressed in the Application. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to groundwater and surface water impacts, as distinct from impacts under the current term of operations.[164] The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

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[162] *Id.*

[163] *Id.*

[164] *See id.*

The Petitioner has also failed to demonstrate that this contention is material to the NRC's required findings in this proceeding because it has identified no regulations or statutes that are alleged to be violated. The Petitioner vaguely asserts that mining activities "may" endanger certain water resources.[165] It does not, however, identify what statutory or regulatory requirements would be violated or why the NRC will be unable to make the required findings in 10 C.F.R. § 40.32.

The Petitioner's claim that the mining activities "may" endanger certain water resources[166] is completely speculative, as the Petitioner does not even allege that significant environmental impacts *will* result from the Facilities, nor does it explain how or why the concentration of the various identified contaminants can or will exceed any regulatory limits. Aside from the speculative nature of its allegations, the Petitioner fails to present *any* facts or expert opinion to substantiate its conjecture about the Facilities' possible health and safety effects or environmental impacts on groundwater or surface water. As a result, this contention is unsupported by facts or expert opinion, contrary to 10 C.F.R. § 2.309(f)(1)(v).

COGEMA, however, has presented its evaluation of the impacts of continued mining operations on groundwater and surface water resources.[167] The Application provides detailed information on COGEMA's ground and surface water monitoring program, including data from monitored stock wells in the immediate area, with no indication of impacts that might "endanger" such resources.[168] The Petitioner does not recognize this information in the Application, and provides no explanation, through facts or expert opinion, of why or how

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[165] *Id*.

[166] *Id*.

[167] *See* Application Section 7.2.3.

[168] *See id*. Section 5.8.2; *see also id*. Tables 5.23 (showing groundwater monitoring results) and 5.25 (showing surface water monitoring results).

COGEMA's Application is incorrect or insufficient. The contention therefore fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

5. Contention 5 – Impact of Hydrogen Sulfide

This contention alleges that "COGEMA may inject hydrogen sulfide (H_2S) to clean-up some of the heavy metals mobilized during mining operations. H_2S is a highly toxic substance and injection into the aquifer may produce health and safety impacts."[169]

This contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention alleges that hydrogen sulfide "may produce health and safety impacts."[170] The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to such impacts, as distinct from impacts under the current term of operations.[171] The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

The Petitioner has also failed to demonstrate that this contention is material to the NRC's required findings in this proceeding because, although the contention names certain statutes, it fails to explain how or why COGEMA's Application is deficient under those statutes. The Petitioner states that the Application must "disclose what amounts of H_2S will be injected" and "how the injected H_2S will be removed after operations," apparently in order to comply with unspecified provisions of NEPA, "hazardous waste law," and the Environmental Planning and Community Right-to-Know Act.[172] It does not, however, identify what provisions of these

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[169] Petition at 7 (footnote omitted).

[170] *Id*.

[171] *Id*.

[172] *Id*. at 7 & n.3.

statutes require this precise information to be included in COGEMA's Application, or identify any information that should have been provided in the Application but was not.[173]

The Petitioner's claim that hydrogen sulfide "*may* produce health and safety impacts"[174] is completely speculative, as the Petitioner does not even allege that the use of hydrogen sulfide in aquifer restoration will produce health or safety impacts. The Petitioner also fails to present facts or expert opinions to substantiate its speculation about the possible health and safety effects of the use of hydrogen sulfide at the Facilities.

COGEMA and the NRC, however, have considered the potential risks and benefits of using hydrogen sulfide in the restoration process, and COGEMA has implemented a program to address potential safety risks. As the Application explains:

> When using hydrogen sulfide gas as well as any other sulfur-based reductants that could result in some release of hydrogen sulfide gas, COGEMA will institute proper safety precautions. In April 1991, a hydrogen sulfide safety program was submitted to the WDEQ [Wyoming Department of Environmental Quality] and NRC, and was approved by the NRC through license condition.[175]

The Petitioner fails to explain why it believes that the existing, approved hydrogen sulfide safety program is inadequate to protect health and safety. Indeed, it does not even acknowledge that such a program exists.[176] It has failed to meet its "ironclad obligation to examine the publicly available documentary material" and explain why, considering the

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[173] Nor does Petitioner explain why the license condition associated with the Facilities' NRC- and WDEQ-approved hydrogen sulfide program is insufficient under these statutes. *See* Application at 6-7.

[174] Petition at 7 (emphasis added).

[175] Application at 6-7.

[176] The Petitioner also fails to explain why, after 18 years, it is now an appropriate time to challenge this existing program.

available information, it believes that the Application is insufficient.[177] Thus, it does not raise a genuine dispute on a material issue of law or fact.

6. Contention 6 – Financial Assurance

This contention asserts that "COGEMA underestimates the length of operations, including restoration and reclamation activities. This allows them [sic] to underestimate the financial assurance calculation and also allows them [sic] to underestimate environmental impacts . . . . The application needs to be amended to fully reflect past experiences with restoration . . . ."[178]

This contention is outside the scope of the proceeding and immaterial because it addresses an issue that is separately subject to periodic evaluation by the NRC, outside of this license renewal proceeding. The adequacy of COGEMA's surety bond is subject to annual review under 10 C.F.R. Part 40, Appendix A, which states: "The licensees's surety mechanism will be reviewed annually by the Commission to assure, that sufficient funds would be available for completion of the reclamation plan if the work had to be performed by an independent contractor."[179] Thus, COGEMA's surety for the Facilities is not reviewed every ten years in this license renewal proceeding, but every year, in an entirely separate regulatory process.[180] The NRC completed its most recent review on February 24, 2009, and concluded that COGEMA had provided adequate justification for the current surety amount of $9,714,299.[181] The NRC

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[177] *Duke*, ALAB-687, 16 NRC at 468.

[178] Petition at 7.

[179] 10 C.F.R. Part 40, App. A, Criterion 9.

[180] *See also* NUREG-1569 at A-1 (identifying specific areas of review for license renewal and amendment applications, and omitting the adequacy of financial surety arrangements).

[181] Letter from K. McConnell to T. Hardgrove, COGEMA Mining, Inc., Irigaray and Christensen Ranch Project, Campbell and Johnson Counties, Wyoming, Source Materials License SUA-1341, Amendment No. 14 – Annual Surety Estimate Adjustment (TAC N. J00578) (Feb. 24, 2009), *available at* ADAMS Accession No. ML090210506.

approved a license condition requiring COGEMA to maintain a surety for that amount.[182] The Petitioner's challenge to that determination is outside the scope of this proceeding and immaterial, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

The Petitioner's allegation that COGEMA underestimates the time that restoration activities will take is completely unsupported. The Petitioner alleges, that "based on past experience, it is *unlikely* that 'Restoration of each mine unit is designed to be accomplished within a two to three year period . . . .'"[183] It is clear from this statement that the Petitioner is engaging in speculation, and Petitioner offers no further explanation or support. The contention pleading rules, however, require rejection of this type of "vague, unparticularized contention."[184] The Petitioner's claim that "past experience" suggests a longer restoration time than COGEMA's estimates is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(ii), (v), and (vi).[185]

7. Contention 7 – Impacts on Wildlife Population (Sage-Grouse)

This contention alleges that "COGEMA's operations will negatively impact wildlife populations, which present unique recreational opportunities for PRBRC members, other local residents, and visitors to the area."[186] For the reasons discussed below, this contention is inadmissible.

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[182] *Id*., Encl. at 4. As explained above, simply because a topic, such as surety, is described in the Application does not bring the adequacy of that topic within the scope of this proceeding.

[183] Petition at 7 (quoting Application at 6-8) (emphasis added).

[184] *Duke Power Co.*, ALAB-687, 16 NRC at 468; *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170-171 (explaining that the pleading rules "preclude a contention from being admitted where an intervenor has no facts to support its position and . . . contemplates using discovery . . . as a fishing expedition.").

[185] Petitioner's related allegation that COGEMA's allegedly underestimated restoration time also "allows them [sic] to underestimate environmental impacts" is similarly vague and unsupported, and therefore fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(ii), (v), and (vi).

[186] Petition at 7.

The Petition argues that "the application lacks a substantive discussion about possible sage-grouse impacts. Mining activities, including fencing, surface disturbing activities, use of overhead power lines, increased truck traffic and noise, evaporation ponds (and resulting spread of west nile virus), and habitat fragmentation caused by additional access roads, will negatively impact wildlife species including the greater sage-grouse."[187] This allegation ignores information in the application regarding wildlife, including substantial information regarding sage-grouse.

The wildlife at the site is discussed throughout the Application. For example, Section 2.8.1 of the Application describes the terrestrial ecology at the site, including discussion of sage-grouse. This section appropriately describes the sage-grouse as a species with "some recreational value." This section also discusses wildlife surveys at the site, including monitoring of sage-grouse leks, and concludes that "[t]he accumulated data showed no impacts attributable to the mine operations." Additionally, Section 7.2.4 of the Application describes the ecological impacts at the site, but accurately does not list impacts to sage-grouse, because the existing monitoring data do not support any negative impacts to sage-grouse from operations. The NRC regulations for renewal of a materials license only require information to be updated or supplemented if there is a "significant environmental change."[188] The Petition does not identify any such changes for sage-grouse or other wildlife, and therefore is outside the scope of this proceeding.

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[187] *Id*. at 7-8. The Petitioner's failed attempt to draw a connection between evaporation ponds at the Facilities and West Nile virus, and further apparent failed attempt to draw a connection between this virus and any impacts on sage-grouse both illustrate Petitioner's consistent approach of providing only bare allegations with no supporting facts or expert opinion. Indeed, the Petitioner's speculation is not supported by its own references. *See* Memorandum from Tom Christiansen and Joe Bohne, Wyoming Game and Fish Department, to Terry Cleveland and John Emmerich (Jan. 29, 2008), Encl. at 3 ("it is not understood how other stressors (e.g., West Nile virus . . .) will cumulatively impact sage-grouse over longer time periods") (cited in Petition at 8 n.4).

[188] 10 C.F.R. § 51.60(a).

Appendix C of the Application also provides a detailed study of wildlife at the site.[189] This study was completed just a few months prior to submission of the Application, and therefore provides very current information. The study provides extensive information on wildlife at the site, including much information on sage-grouse, and goes well beyond the legal requirements for providing this information. Furthermore, as allowed by 10 C.F.R. § 51.60(a), Section 2.8.1 of the Application references Appendix D9 of the Christensen Ranch amendment to the permit application. The Petitioner's failure to dispute any of this information in the Application does not support admission of this contention, because there is no genuine dispute.[190]

Moreover, the information in the Application actually demonstrates minimal impacts to the sage-grouse. For example, Figure 3 in the wildlife study in Appendix C of the Application generally shows an increase in the cumulative peak male counts at sage-grouse leks, thus demonstrating no significant impacts.[191] The Petitioner has not even challenged this information, and therefore has not provided adequate factual information to dispute the Application.[192]

Additionally, the NRC recently discussed the impacts on sage-grouse during the license amendment to resume operational status at the site. In its environmental assessment ("EA") for the amendment, the NRC stated:

> Since Sage Grouse has not been identified by the FWS as an endangered, threatened, or candidate species, COGEMA's latest Threatened and Endangered Species Report did not discuss potential Sage Grouse habitat or strutting grounds. However, NRC staff has reviewed Sage-Grouse Habitat Management Guidelines

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189 Irigaray and Christensen Ranch 2007 Wildlife Monitoring (Mar. 2008).

190 *See, e.g.*, *Comanche Peak*, LBP-92-37, 36 NRC at 384 (holding that a contention that does not directly controvert a position taken by the applicant is subject to dismissal); *Millstone*, LBP-04-15, 60 NRC at 95-96.

191 Application, Appendix C, at 9. The Application notes that the dip in the male counts during 2000-2002 is attributable to only sporadic monitoring of the leks. *Id.* at 8.

192 *See, e.g.*, *Fansteel*, CLI-03-13, 58 NRC at 203.

> dated July 24, 2007 and the Northeast Wyoming Sage-Grouse Conservation Plan dated August 15, 2006. NRC staff is aware that Sage-Grouse habitat has become a concern throughout Wyoming. Consequently, NRC staff will request that if evidence of Sage Grouse or its strutting grounds is found at the site, COGEMA will consult with the FWS or the BLM for possible mitigative measure that may be taken to avoid negative impacts.[193]

Thereafter, the NRC added a new license condition to COGEMA's materials license to require monitoring of sage-grouse. Specifically, License Condition 9.13 states: "Sage Grouse leks at the Irigaray and Christensen Ranch sites shall be monitored on an annual basis. The licensee shall consult with the Fish and Wildlife Service or the Bureau of Land Management for mitigative measures to reduce potential impacts."[194] This license condition already provides for sufficient controls for a species that the NRC acknowledges is not an endangered, threatened, or candidate species.[195] The Petitioner has not acknowledged this license condition and has not explained why it is insufficient to protect sage-grouse at the site.

The Petition also asserts that "recent scientific studies have shown that one of the leading causes for this decline [of sage-grouse populations in the Powder River Basin] is mineral development."[196] As the title and content of the Petitioner's reference make clear, this study addresses impacts of oil and gas development, not ISL uranium mining, so it does not contradict any information in the Application.[197] The Petitioner attempts to draw a connection between this

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[193] 2008 EA at 15.

[194] Materials License No. SUA-1341, Amendment No. 13, Section 9.13 (Sept. 30, 2008).

[195] The Petition also states that sage-grouse is a "Special Status Species." Petition at 8. But the Petitioner does not explain how any additional mitigation is necessary, especially given License Condition 9.13.

[196] Petition at 8 (citing "Memorandum from Tom Christiansen and Joe Bohne, Wyoming Game and Fish Department, to Terry Cleveland and John Emmerich (Jan. 29, 2008), with attached report *Using the Best Available Science to Coordinate Conservation Actions that Benefit Greater Sage-Grouse Across States Affected by Oil & Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)*").

[197] *See Private Fuel Storage, L.L.C.*, LBP-98-7, 47 NRC at 181 ("the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention").

study and this proceeding, but only through argument of counsel, not through fact or expert opinion.[198] As a result, the contention remains unsupported.[199] More importantly, the Petitioner fails to explain, with any specificity, why the cited study directly contradicts the information on impacts to wildlife in general—or impacts to sage-grouse in particular—contained or referenced in the Application or previous EAs and license conditions and summarized above.[200] As a result, the contention remains unsupported by facts or expert opinion and fails to raise a genuine dispute.

The Petition concludes by stating that the Facilities are located within the "Central Flyways" and that a criminal prosecution took place in connection with a uranium mill in Colorado.[201] As a result, "the application must analyze impacts to migratory birds."[202] The Application, however, already evaluates ecological impacts and did not identify any impacts to migratory birds.[203] The Petitioner fails to recognize or explain its dispute with this information. This aspect of the contention, therefore, also is unsupported by facts or expert opinion and fails to raise a genuine dispute.

Finally, this contention is also outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), because it fails to allege a significant environmental *change* that would be caused by the *continued* operation of the Facilities. Specifically, the Petitioner alleges that the

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198 Petition at 8 n.4.

199 *See, e.g.*, *Palo Verde*, CLI-91-12, 34 NRC at 155 (holding that, where a petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is lacking); *Ga. Tech.*, LBP-95-6, 41 NRC at 300 (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

200 *See, e.g.*, *USEC, Inc.*, CLI-06-10, 63 NRC at 472 (requiring expert opinion evidence to be supported by a "reasoned basis or explanation" supporting an alleged deficiency in an application).

201 Petition at 8-9.

202 *Id*. at 8.

203 Application at 7-6.

Application "lacks a substantive discussion about possible sage-grouse impacts."[204] The contention does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to the impacts of the Facilities on the sage-grouse or its habitat, as distinct from any impacts during the current term of operations.[205] The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

In summary, this contention is not admissible because it seeks information that is outside the scope of this renewal proceeding, it does not show how its arguments are material, it provides inadequate justification, and it ignores information already provided in the Application, thus failing to present a genuine dispute of a material issue of fact or law.

8. Contention 8 – Impacts on Local and Regional Air Quality

This contention states that the Facilities "will negatively impact local and regional air quality" by producing "substantial amounts of fugitive dust."[206] The Petitioner alleges that COGEMA fails to consider certain mitigation measures for such impacts.[207]

First, this contention is outside the scope of this proceeding because it fails to allege a significant environmental *change* that would be caused by the *continued* operation of the Facilities, as opposed to activities that are authorized under the existing license. The Petitioner does *not* allege that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to the potential impacts for fugitive dust or to the impacts of such dust on the environment. Nor does it carry its burden of explaining how such a significant change to

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[204] Petition at 7.

[205] *See generally id.* at 7-9. In particular, the Petitioner does not explain what new "fencing, surface disturbing activities . . . increased truck traffic and noise . . . [or] additional access roads" it expects to be authorized or take place under the renewed license.

[206] *Id*. at 9.

[207] *Id*.

impacts could take place. The contention, therefore, is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

Second, the Petitioner has failed to demonstrate the materiality of this contention because it does not explain the link between the alleged omission of mitigation measures for the alleged "substantial amounts of fugitive dust" and the protection of the public health and safety or the environment.[208] Instead, the contention merely assumes that such a link exists.

Third, this contention is unsupported by facts or expert opinion. As a licensing board recently explained, "[g]eneral statements that a matter ought to be considered without an explanation of how the application is deficient or how it should be changed are insufficient to support a contention."[209] The Petitioner purports to dispute statements in the Application characterizing the air quality impacts as "minimal," but it provides no facts or expert opinions to suggest the contrary.[210] Thus, the Petitioner fails to carry its burden of establishing that the amount of dust identified or that the failure to implement the Petitioner's desired mitigation measures will result in any significant environmental impact.[211]

Fourth, this contention ignores the Application. Although the Petitioner quotes selectively from the Application, it fails to challenge the analysis therein. The Application explains that the 89.5 tons per year value is a worst case estimate considering current operational experience.[212] Even at this level, calculated fugitive dust levels will be far below the most restrictive National Ambient Air Quality Standard. Further, if fugitive dust levels present a problem, COGEMA will mitigate impacts by "applying dust control measures (only water to

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[208] *Millstone*, LBP-04-15, 60 NRC at 89.

[209] *Crow Butte*, LBP-08-24, slip op. at 69.

[210] Petition at 9 n.6.

[211] *See Sys. Energy Res., Inc.*, CLI-05-4, 61 NRC at 13.

[212] Application at 7-2.

date) to the access roads."[213] The Petitioner fails to recognize or explain its dispute with this information. Thus, the Petitioner has failed to "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[214] There is no genuine dispute.

For the foregoing reasons, this contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

9. Contention 9 – Release of Radioactive Materials into the Air

This contention alleges that the Application "does not indicate the extent" of releases of radioactive materials into the air, "nor does it contain an analysis of public health impacts."[215] This contention is inadmissible.

First, this contention is outside the scope of this proceeding because it fails to allege a significant environmental *change* that would be caused by the *continued* operation of the Facilities, as opposed to activities that are authorized under the existing license. The contention does not identify or challenge any proposed changes, in the Application, to proposed airborne releases of radioactivity, nor does it allege or explain why the public health impacts of such releases will be significantly different during the proposed period of extended operation. The contention, therefore, is subject to dismissal under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

Second, the Petitioner has failed to demonstrate the materiality of this contention because it does not explain the link between the alleged omission and the protection of the public health

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[213] *Id*. at 7-3.

[214] Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Millstone*, CLI-01-24, 54 NRC at 358; *Catawba*, ALAB-687, 16 NRC at 468; *Crow Butte*, LBP-08-24, slip op. at 67 (holding that if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine issue).

[215] Petition at 10.

and safety or the environment.[216] Instead, the contention merely asserts such a link in a completely conclusory fashion.

Third, this contention is unsupported by facts or expert opinion. As a licensing board recently explained, "[g]eneral statements that a matter ought to be considered without an explanation of how the application is deficient or how it should be changed are insufficient to support a contention."[217] The Petitioner identifies statements in the Application regarding the release of radon gas, but provides no additional facts or expert opinion to establish even the potential for undisclosed public health and safety impacts, much less that the allegedly omitted information represents a significant environmental impact.[218]

Fourth, this contention ignores the Application, which contains an extensive description of the "extent" of any releases of radioactive material into the air. Application Section 5.7.1.1 describes the control techniques used to limit radioactive gaseous and airborne particulate emissions. Section 5.7.3 describes the Facilities' airborne radiation monitoring program and provides the results of airborne uranium monitoring and Radon daughter surveys. Section 5.7.4 provides COGEMA's internal exposure calculations, in accordance with 10 C.F.R. § 20.1204. Section 5.8.1 describes COGEMA's airborne effluent and environmental monitoring programs. There is no information suggesting that airborne radioactive releases will exceed regulatory limits or significantly impact the environment. The Petitioner does not recognize or explain its

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[216] *Millstone*, LBP-04-15, 60 NRC at 89.

[217] *Crow Butte*, LBP-08-24, slip op. at 69.

[218] *See Sys. Energy Res., Inc.*, CLI-05-4, 61 NRC at 13.

dispute with the information in the Application. Thus, Petitioner's contention of omission ignores information provided in the Application, thus failing to raise a genuine dispute.[219]

For the foregoing reasons, this contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

10. Contention 10 – Underestimation of Financial Cost of Restoration and Environmental Cleanup

This contention alleges that "COGEMA underestimates the financial cost of restoration and environmental clean-up," and that the "$9.5 million" bond estimate "leaves the public at risk – both financially and environmentally."[220]

This contention raises no new allegations or claims beyond those asserted in Contention 6. It is therefore inadmissible for the same reasons set forth in COGEMA's response to that contention above.

11. Contention 11 – Compliance with NEPA

This contention alleges that the Application does not comply with NEPA and claims that the NRC must prepare an environmental impact statement ("EIS") for the license renewal.[221] In support, the contention lists various topics for which there allegedly is no "complete impacts analysis" in the Application, and cites certain Council on Environmental Quality regulations governing the process for preparation and publication of NEPA analyses by federal agencies.[222]

Although this contention demands the preparation of an EIS, it cites no legal authority for this demand. On the contrary, there is no requirement that an EIS be prepared for this license

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[219] *See Catawba*, ALAB-687, 16 NRC at 468; *Crow Butte*, LBP-08-24, slip op. at 67 (holding that if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine issue).

[220] Petition at 10.

[221] *Id*.

[222] *Id*.

renewal.[223] To the extent this contention is predicated on such demands, it is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(ii), (iv), and (vi).

As to the items in the Application that, according to the Petitioner, are not addressed with a "complete impacts analysis," this contention does not satisfy the requirements for contentions of omission. NRC precedent states that, to be material, contentions alleging an omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.[224] Not only has the Petitioner not demonstrated a significant link between the various claimed omissions and the protection of the health and safety of the public or the environment, it has not identified *any* link.

The NRC regulations regarding admissibility of contentions state that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief."[225] The Petitioner has not explained why the alleged omissions are required by law, has not specifically identified what information is missing, and has not provided any supporting reasons for its belief that there are omissions.

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[223] *See* 10 C.F.R. §§ 51.20 (identifying specific major NRC actions requiring an EIS, and omitting uranium mining licenses under Part 40); 51.21 (providing for an EA in this proceeding). The Staff, of course, may ultimately determine, through its EA, that an EIS is required. *See* 10 C.F.R. § 51.14 (defining "Environmental Assessment" as a public document intended to analyze whether a finding of no significant impact is appropriate or an EIS is required). In the recent license amendment to resume operations at the Facilities, the Staff found that there would be no significant impact. Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment Request to Revert to Operating Status from Restoration and Decommissioning Status, COGEMA Mining Inc., Christensen and Irigaray Ranch Facilities, Johnson and Campbell Counties, WY, 73 Fed. Reg. 53,052 (Sept. 12, 2008). Thus, the Petitioner's apparent assumption that an EIS will be required is baseless.

[224] *Millstone*, LBP-04-15, 60 NRC at 89.

[225] 10 C.F.R. § 2.309(f)(1)(vi).

If a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine issue.[226] In many cases, the Petitioner alleges omission of information that is either in the text of the Application or is found in another document that is incorporated by reference. In particular, the Petitioner fails to explain, with reference to facts or expert opinion, what it believes is missing from COGEMA's discussion of: (1) groundwater and surface water impacts in Section 7.2.3 of the Application; (2) air quality impacts in Section 7.2.1; (3) mitigation measures for fugitive dust in Section 4.1.2; (4) land use impacts in Section 7.2.2; or (5) ecological impacts in Section 7.2.4.[227] Based on the failure to satisfy the standard for contentions of omission, this contention is unsupported and fails to raise a genuine dispute and should be rejected under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

12. Contention 12 – Legally Enforceable Mitigation Measures

This contention alleges that "[i]f a license is granted in this matter, the NRC must require legally enforceable mitigation measures to minimize impacts to surface, air, and water resources."[228] The contention does not identify what specific impacts the Petitioner seeks to mitigate, nor what mitigation measures the Petitioner seeks to impose.

This contention is exceptionally vague and therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(ii), (v), and (vi).[229] To the extent this contention seeks to impose "measures" to

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[226] *See, e.g.*, *Crow Butte*, LBP-08-24, slip op. at 67.

[227] Petition at 10.

[228] *Id*. at 11.

[229] *See*, *e.g.*, *Duke Power Co.*, ALAB-687, 16 NRC at 468; *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170-171 (explaining that the pleading rules "preclude a contention from being admitted where an intervenor has no facts to support its position and . . . contemplates using discovery . . . as a fishing expedition"); *Crow Butte*, LBP-08-24, slip op. at 69 ("General statements that a matter ought to be considered . . . are insufficient to support a contention.").

address matters raised in other contentions in this Petition, such measures are unwarranted for the reasons set forth in COGEMA's response to those contentions.

V. CONCLUSION

For the foregoing reasons, the Petitioner has not demonstrated standing and has submitted no admissible contentions. Accordingly, the Petition must be denied.

Respectfully submitted,

Signed (electronically) by Stephen J. Burdick
James A. Glasgow
Alvin H. Gutterman
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

Counsel for COGEMA Mining, Inc.

Dated in Washington, D.C.
this 5th day of May 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 040-08502
COGEMA MINING, INC.	)	License No. SUA-1341
(Irigaray & Christensen Ranch Facilities)	)	May 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2009 a copy of "COGEMA's Answer Opposing Powder River Basin Resource Council Request for Hearing" was served by the Electronic Information Exchange on the following recipients:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Catherine Marco
Brett Klukan
E-mail: Catherine.Marco@nrc.gov;
Brett.Klukan@nrc.gov

Shannon Anderson
Representative of the Powder River Basin Resource Council
934 N. Main St.,
Sheridan, WY 82801
E-mail: sanderson@powderriverbasin.org

Thomas J. Ballanco
Counsel for the Oglala Delegation of the Great Sioux Nation Treaty Council
945 Taraval Ave. #186
San Francisco, CA 94116
E-mail: HarmonicEngineering1@mac.com

David Frankel
Counsel for the Oglala Delegation of the Great Sioux Nation Treaty Council
P.O. Box 3014
Pine Ridge, SD 57770
E-mail: arm.legal@gmail.com

Signed (electronically) by Stephen J. Burdick
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

Counsel for COGEMA Mining, Inc.