

United States of America

## Nuclear Regulatory Commission

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## ATOMIC SAFETY AND LICENSING BOARD PANEL

## PREHEARING CONFERENCE

IN THE MATTER OF DOCKET NO: 40-9091-MLA  
STRATA ENERGY, INC ASLBP No. 12-915-01-MLA-BD01  
(Ross In Situ Recovery Uranium Project)

Tuesday,

December 20, 2011

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Rockville, Maryland

The prehearing conference commenced in Room T-3B45 of Two White Flint North, Rockville Pike, Rockville, Maryland, at 9:00 a.m.

## BEFORE:

G. Paul Bollwerk, III , Chair

Dr. Richard F. Cole, Administrative Judge

Dr. Kenneth L. Mossman, Administrative Judge

1 APPEARANCES:

2 On Behalf of Natural Resource Defense Council:

3 Geoffrey H. Fettus, Esq., Senior Project Attorney

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9 On Behalf of Powder River Basin Resource Council:

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15 On Behalf of Strata Energy, Inc.

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1 APPEARANCES:

2 On behalf of the Nuclear Regulatory Commission:

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1 P-R-O-C-E-D-I-N-G-S

2 9:00 a.m.

3 JUDGE BOLLWERK: Good morning. Today we are here to conduct a  
4 prehearing conference and oral argument in a proceeding under Part 40 of Title  
5 10 of the Code of Federal Regulations, also referred to as the CFR. In accord  
6 with a licensing board order, issued on December 8th, 2011, this prehearing  
7 conference is being convened in response to a October 27th, 2011 intervention  
8 petition, submitted by two groups, specifically, the Natural Resources Defense  
9 Council and the Powder River Basin Resource Council. These petitioners jointly  
10 seek a hearing to challenge the adequacy of certain aspects of the application  
11 submitted by Strata Energy, Incorporated, on December 31st, 2010, and January  
12 4th, 2011, requesting issuance of a combined source and Section 11(e).2,  
13 byproduct materials license that would authorize the construction and operation  
14 of the proposed Ross In Situ Recovery Uranium Project in Crook County, Wyoming.

15 Joint petitioners' October 27th hearing request was submitted in  
16 accord with the agency's July 7th, 2011 Hearing Opportunity Notice, which was  
17 published on July 13th, 2011, in Volume 76 of the Federal Register, at Page  
18 41,308. On October 31st, 2011, their petition was referred by the Office of  
19 the Secretary to the Atomic Safety and Licensing Board panel's chief  
20 administrative judge, who, on November 2nd, appointed the three members of this  
21 Atomic Safety and Licensing Board to rule on joint petitioners' hearing  
22 request.

23 With respect to our conduct to the adjudicatory process relating to  
24 joint petitioners' October 27th submission, we are three independent  
25 administrative judges appointed by the Commission as licensing board panel

1 members and designated to serve on this licensing board to preside over any  
2 hearing regarding contested matters raised concerning the Strata application.  
3 The panel's administrative judges do not work for or with the NRC staff  
4 relative to the staff's license application review. Rather, we are charged  
5 with deciding whether the issues proffered by those requesting a hearing, such  
6 as joint petitioners, are admissible and for those issues, we find litigable,  
7 making the determination regarding their substantive validity in terms of the  
8 grant, conditioning or denial of the requested license. Our decisions on  
9 hearing matters generally are subject to review, first by the Commission, as  
10 the agency's supreme tribunal and then by the federal courts, including in  
11 appropriate instances, the United States Supreme Court.

12 Relative to the specific matters before us today in this prehearing  
13 conference, both Strata and the NRC staff contested the standing to intervene  
14 or legal interest of the two groups that submitted the October 27th request  
15 challenging the Strata application.

16 In addition, applicant, Strata Energy has questioned the  
17 admissibility of all five of joint petitioners proffered issue statements while  
18 the NRC staff has contested the validity of three of the five contentions,  
19 maintaining that if joint petitioners are found to have standing, two of their  
20 contentions are admissible in part.

21 The participants will have an opportunity to make all presentations  
22 regarding these contested matters during this prehearing conference. Before we  
23 begin the hearing and the participants' argument, I'd like to take a few  
24 moments to introduce the board members and have the participants identify  
25 themselves for the record, as well as provide some information regarding

1 several administrative matters relating to today's session.

2 With respect to the board's members, to my right is Judge Richard  
3 Cole. Dr. Cole is an environmental engineer and a full time member of the  
4 Atomic Safety Licensing Board Panel. To my left is Judge Kenneth Mossman. Dr.  
5 Mossman, a health physicist and a professor at Arizona State University, is a  
6 part time member of the panel. My name is Paul Bollwerk. I am an attorney, a  
7 full time panel member, and the chair of this licensing board.

8 At this point, we'd like to have counsel for the various participants  
9 identify themselves for the record. Why don't we start with the joint  
10 petitioners then move to the applicant, and finally, to the NRC staff.

11 MR. FETTUS: Thank you and good morning, your honor. I'm Geoffrey  
12 Fettus. I'm the attorney for Natural Resources Defense Council in this matter.  
13 I'm joined at the table by Andres Restrepo, also with me at the Natural  
14 Resources Defense Council and I don't know if she's on the phone line, but if  
15 she could identify herself, is Shannon Anderson, an attorney with Powder River  
16 Basin Resources Council.

17 JUDGE BOLLWERK: All right.

18 MS. ANDERSON: Hi, Geoff and board. I am on the phone.

19 JUDGE BOLLWERK: All right. We're glad you could join us this  
20 morning. All right. The applicant, please.

21 MR. PUGSLEY: Good morning, your honor. This is Christopher  
22 Pugsley, Thompson and Pugsley, Counsel to Strata Energy, and with me is my co-  
23 council, Anthony Thompson, as well with Thompson and Pugsley, and Benjamin  
24 Schiffer, WWC Engineering, Strata's licensing team leader.

25 JUDGE BOLLWERK: All right. Thank you. And the NRC staff.

1 MS. MARSH: Good morning, I'm Molly Marsh for the staff. With me  
2 is Co-counsel Carrie Safford. Also with us is John Saxton, who is the project  
3 manager for the Strata license in the NRC's Office of Federal and State, FSME -  
4 - can never remember what it stands for.

5 JUDGE BOLLWERK: The acronym means something; they all do, just a  
6 question of what. All right. He's certainly welcome to come to the table. He  
7 doesn't have to be back in the shadows there; it's up to you all. However you  
8 want to do it. Whatever you're comfortable with. All right, thank you all.

9 I would note that while we were conducting this proceeding from the  
10 licensing board panel's hearing room, at NRC Headquarters, in Rockville,  
11 Maryland, with counsel for petitioner, Powder River Basin Resource Council  
12 participating via teleconference from Wyoming. For the benefit of those living  
13 in the vicinity of the proposed Ross facility, this conference is also  
14 available for live viewing via a web streaming feed. The Universal Resource  
15 Locator, or URL for which can be found in the public meeting notice for this  
16 conference on the NRC public website, at [www.nrc.gov](http://www.nrc.gov).

17 In addition, that web stream feed is being recorded and archived  
18 and will be available for viewing for 90 days under the same Universal Resource  
19 Locator, or URL.

20 As my previous comments indicated, during today's conference, we  
21 will only be entertaining presentations from the participants. Nonetheless, if  
22 the hearing is convened in this matter, at some point in the future, in accord  
23 with Section 2.315(a) of the CFR Title 10, the board may issue a notice that,  
24 among other things, may indicate that members of the public will be afforded an  
25 opportunity to provide as appropriate oral limited appearance statements

1 setting forth their views concerning any contested matters relative to the  
2 proposed Ross Facility.

3                 In that issuance or subsequent notice, the board will outline the  
4 times and places, and conditions of participation relative to any opportunity  
5 for oral limited appearance statements. In the interim, as the board noted in  
6 its December 8th issuance in this case, any member of the public can submit a  
7 written limited appearance statement providing his or her views regarding the  
8 issues in this proceeding. Those written statements can be sent at any time by  
9 regular mail to the Office of the Secretary, U.S. Nuclear Regulatory  
10 Commission, Washington, D.C., 20555-001, attention, Rulemakings and  
11 Adjudication Staff, or by email to Hearing docket, all one word, at nrc.gov.

12                 A copy of the statement also should be provided to me as the chair  
13 of the Atomic Safety and Licensing Board, by sending it by regular mail to my  
14 attention, at the Atomic Safety and Licensing Board Panel, Mail Stop T-3F23,  
15 U.S Nuclear Regulatory Commission, Washington, D.C., 20555-001, or by email to  
16 Paul.Bollwerk@nrc.gov., and again, this submission information is provided in  
17 this board's December 8th issuance, which is available in the electronic  
18 hearing docket, on the agency's website, at www.nrc.gov.

19                 With respect to the order of presentation by the participants in  
20 this prehearing conference, in our December 13th order, we outlined a schedule  
21 that affords an opportunity for the participants to address the contested  
22 matters of standing and contention admissibility now before the board. In that  
23 regard, we requested before, starting on the issues for which joint petitioners  
24 have been afforded an opportunity for additional argument and rebuttal. Their  
25 counsel should indicate how much of the joint petitioners' total time

1 allocation for that issue he or she wishes to reserve for a rebuttal.

2                 For the end of the allocated argument time for each of the  
3 participants, the board will be providing counsel with notice of the need to  
4 finish his or her presentation. In making their own arguments, the  
5 participants should bear in mind we've read your pleadings and as such, they  
6 should focus their presentations on the critical points in controversy, as  
7 those emerged as a result of the various participant filings over the last few  
8 months, and of course they do not then need use all the time allocated for  
9 discussing any particular matter if they don't see the need to.

10               Finally, at some juncture we'd like to have a brief discussion  
11 regarding some of the administrative details involved in this proceeding. In  
12 relative to administrative matters, I would note that this is my cell phone,  
13 which I have turned off. I'm sticking it in my pocket and I won't be turning  
14 it on again until we are in recess. I would request that everyone else do the  
15 same thing with his or her cell phone, or at least put it on vibrate, but if  
16 you do have your phone on vibrate and it goes off while we're in session, and  
17 you wish to answer it, you need to leave the hearing room before you have your  
18 conversation. We appreciate everyone abiding by this protocol at any time the  
19 prehearing conference is in session. Unless the petitioners have anything at  
20 this point they need to bring it to the board's attention.

21               Before beginning the joint petitioners' presentation regarding  
22 their standing intervene, I'd like to raise a question relative to some  
23 information that was submitted via the agency's E-filing system on Friday  
24 afternoon of last week, and this is in regarded to some evidentiary material or  
25 exhibit as it was called, that was provided by counsel for the applicant, and I

1 know their letter to us indicated you might have some objections and I wasn't  
2 sure what the nature of those objections were.

3 MR. FETTUS: Well, the objections are, your honor, we're going to  
4 talk about that exhibit today. We didn't see it until Friday afternoon and we  
5 will want to talk about how that exhibit could be interpreted today, which we  
6 can do in the course of argument.

7 JUDGE BOLLWERK: Okay. All right then. All right. We're good  
8 then. Thank you. All right then. At this point, unless either the party or  
9 the board members have anything, we can begin our conversation. Then you are -  
10 - you have the first argument on standing.

11 MR. FETTUS: Thank you, your honor. Good morning and may it please  
12 the court, we deeply appreciate the time you've allotted to day and what you've  
13 clearly already invested in this matter in just these brief two months and I  
14 will do you the deep courtesy of presuming you actually have read all the  
15 pleadings. So, I will do my utmost to be extremely concise and not use all of  
16 the wonderful time allotted. So, please, if you feel confident in making sure  
17 I get to the right place, quickly interrupt me and we will be done with this,  
18 hopefully this morning, rather than long into the afternoon.

19 JUDGE BOLLWERK: All right. If it works for you all.

20 MR. FETTUS: I plan to reserve 15 minutes for rebuttal and I'll  
21 probably do that with each of the half hour portions and hopefully I can be  
22 quick and concise, and we can move through this much more quickly.

23 JUDGE BOLLWERK: All right. If that changes, just let us know.

24 MR. FETTUS: Yes, sir. Petitioners have alleged facts that are  
25 sufficient for standing. I don't need to recite the standard for this board.

1 You know well that you must accept all the allegations as true, and you must  
2 construe in favor of the petitioner, and to evaluate that standing, really what  
3 you need to look at is are there any serious questions in terms of whether or  
4 not there's an actual, meaningful challenge. And we would suggest to you that  
5 the list of harms that we've provided in terms of land and water resources,  
6 traffic, dust, and light pollution, and property value declined due to the  
7 siting of this facility as well as the reasonably foreseeable expansion of this  
8 facility certainly meets NRC's records with standards. These are reasonable  
9 concerns that are sufficient to have these contentions admissible. We did this  
10 through the member of two organizations, both Powder River Basin and the  
11 National Resources Defense Council, Ms. Pam Viviano. We are requesting both  
12 representational and organizational standing, but we certainly understand,  
13 especially from the guidance in the Dewey-Burdock proceeding, that we must show  
14 the representational standing first.

15 The applicant and staff were denied stand here due to the  
16 underlying hydrogeology. This claim is not dispositive. I would submit to  
17 you, and hope the pleading showed that, Ms. Viviano, but this is the most  
18 crucial point. Ms. Viviano has demonstrated standing, even if this board finds  
19 that there's currently no specific hydrogeologic connection between the  
20 proposed project and her wells. That's the project as it stands right now and  
21 her wells where they sit right now.

22 First, traffic and dust. The NRC claimed there was no detailed  
23 evidence, but to be honest, your honor, this was merely fly specking a  
24 rancher's affidavit, who's within seven and 10 miles of the facility, who uses  
25 all of these unpaved roads, and you'll see when you look at the map that was

1 supplied by the applicant last Friday afternoon, that her only way to access I-  
2 90, which is to the south, is directly via the road that it abuts the project.  
3 These are all on unpaved roads.

4 Ms. Viviano, as well as any other member of that community, uses  
5 all of those roads and her residence and her property to the southeast are both  
6 in close proximity to this facility, within 10 miles and all of these roads are  
7 heavily used. More important, as these roads are heavily used by this  
8 potential project, the NRC staff has even acknowledged that it's reasonably  
9 foreseeable that this project will expand, not only taking in uranium from  
10 other facilities that they've even talked about doing. They will also expand  
11 by, essentially, what we refer to internally as the hop-scotching, which you  
12 can see in our exhibit, Attachment 2 of our reply brief, and you can actually  
13 see this is specifically found at the Peninsula Energy website, and you can see  
14 the potential expansion that NRC staff talks about, as reasonably foreseeable  
15 for the last project.

16 Next, property values.

17 JUDGE BOLLWERK: Let me stop you right there and go back to it in a  
18 second. I mean the applicants point seems to be that most of the traffic here  
19 is going to come from the south. So, we're really not talking about  
20 necessarily traffic being generated going past her property. Is that correct?  
21 You're really talking about her travel past their property.

22 MR. FETTUS: Past her residence and most of the traffic, even  
23 granted that most of the traffic, by the way, is certainly not all. Most of  
24 the traffic, even if it were, it certainly comes by her property to the  
25 southeast that she's at regularly, as well as some from her residents in the

1 northeast, but all of these roads, she has to get to I-90, via the road that  
2 literally abuts the site. Whenever she goes to the west, which is common,  
3 there just -- this is eastern Wyoming. There aren't a heck of a lot of roads  
4 out there and some of them that are around there are all unpaved. The  
5 applicant has also stated that they will make a firm effort, and we certainly  
6 believe them, that they will work to keep the dust down. That's true, however  
7 if you look at the Wind Rose Data that they provide as well on their Friday,  
8 there is significant wind that comes from the south, which will blow up to the  
9 north towards her property. There's also significant wind that comes from the  
10 northwest; it blows down towards her southeast property. All of these blow  
11 across the roads that she will be using. So, that addresses the dust issue.  
12 The traffic issue, we would literally suggest, your honor, just on that issue  
13 alone, she has standing and with close proximity to such industrial facility.

14 JUDGE COLE: Isn't it also true there are not a lot of people  
15 there?

16 MR. FETTUS: Generally, yeah. The population is substantially less  
17 than Rockville and she uses these roads, and ranchers use these roads, and they  
18 have driven on them for years, and I'm not sure -- there is less population  
19 there certain than anywhere east of the Mississippi for wide expansions. That  
20 said, your honor, there is also substantially more dust that's going to be  
21 kicked up. The size and scale of this industrial facility we think is actually  
22 imbedded in our contentions. That's one of the issues of the segmented nature  
23 of this project right now and we have, we think, a good basis for that with  
24 what we've seen has happened with Smith Ranch.

25 The potential size of this facility, your honor, could be

1 significant, especially if they use the processing facility to take uranium  
2 from other sites as well, and so the truck traffic could be substantially  
3 increased from what's already going to be a substantial uptake in traffic and  
4 use of these roads that Ms. Viviano shares.

5 JUDGE BOLLWERK: I mean there is another route to the south, which  
6 is through Hulett via state roads I guess 112, 224, and 14 to I-90 --

7 MR. FETTUS: Let me get there.

8 JUDGE BOLLWERK: Oh sure, I'm sorry. I mean how are we supposed to  
9 make a judgment about how often to use that route versus the other route, which  
10 is more to the west, but on more what would seem to be less improved roads?

11 MR. FETTUS: Well, your honor, we're happy to supplement the way  
12 she uses those roads, but we honestly didn't think it was necessary to detail  
13 her daily use when she uses all of these roads, and we thought that was  
14 relatively evident just by being a rancher and there not being that many roads  
15 around here and that much in terms of what is actually necessary to actually  
16 demonstrate standing.

17 I mean imagine if we were to get into for federal court standing,  
18 the actual apt of finding out how often somebody uses a road when they clearly  
19 live in an area, they clearly use these roads relatively regularly, all of  
20 them, because there aren't that many roads and as Judge Cole said, there aren't  
21 that many people out there that if she's going to visit anybody, she's usually  
22 got to go to the east, to the north, to the less to the south, to get any  
23 business done, because her house is not going to have a convenience store right  
24 next to it. So, I would hope that you would take on her simple allegation  
25 alone that you'd have to take as true that she uses these roads and that she

1 has a legitimate concern on traffic alone.

2           Turning to the light pollution issue, your honor, Strata and the  
3 NRC staff focused on the visibility of the buildings and ignored the impacts of  
4 the project's lights, that they will have on her scenic interests and as Judge  
5 Cole just noted, there aren't that many people out there. So, you don't have a  
6 lot of light pollution at night. We have no showing that there will be light  
7 pollution at night, especially if the project reasonably, foreseeably expands.

8           So, turning to the property value, again, Strata and the NRC claim  
9 no external evidence, but the board has to accept these reasonable allegations  
10 as true. And one thing I'd like to remind the board here, this is a rancher  
11 within 10 to seven miles of a facility of an industry that has a long history  
12 of significant impacts in terms of waste water ponds, deep well injection,  
13 failure to restore ground water quality, significant uptake in terms of  
14 traffic, dust, and local impacts on the community. They made no showing that  
15 there won't be a decline in property values and you have to accept those  
16 allegations as true. And there's long support for this contention, as we noted  
17 in our reply pleadings, excuse me, as well as in our opening submission on the  
18 27th.

19           Turning to the issue of inner-aquifer contamination, we actually  
20 want to discuss that briefly. Even without these concerns, putting those  
21 concerns that we noted to the side that we think, and without question, grants  
22 standing. We think the hydrogeologic problems also provide standing and also  
23 provide a basis for reasonable concern. Strata and the NRC both cited the  
24 impermeable shale, the impermeable Pierre shale. We showed you on our reply  
25 filing the degree in which it's riddled and pot marked with oil and gas wells

1 that permeate that shale and with that question, there's connectivity between  
2 the aquifers. We think that alone, the hundreds of abandoned oil and gas wells  
3 that exist in and around the project, that penetrate the Inyan Kara group to a  
4 depth of six to seven thousand feet below the ground surface, down into the  
5 minnelusa formation, show and demonstrate the connectivity. Strata staff  
6 doesn't acknowledge these bore holes in their pleadings and provide no evidence  
7 they've been properly plugged and abandoned. The NRC staff says that Strata  
8 will make a commitment to do that, but for the purposes of standing, that's not  
9 relevant.

10           And important as the potential inner-aquifer contamination from  
11 these connected aquifers could mean the cumulative impacts that could result  
12 from this, from the expansion of the project, which the NRC staff acknowledges  
13 as reasonable foreseeable, is we think especially evident in our Attachment 1  
14 of our filing from the 15th.

15           And again, if you look at the attachment, this is the project site  
16 and these are the oil wells and abandoned oil and gas wells. These are just  
17 what's in the Wyoming records. These are the ones that penetrated the Pierre  
18 Shale. We didn't even put all of them on, because we couldn't have. It just  
19 would have been a mass of red. So, we literally just put the ones on that  
20 penetrated the Pierre Shale, that demonstrates the connectivity between the  
21 aquifers.

22           And finally, and I'll leave the hydrogeologic discussion with this.  
23 We're not going to be making specific arguments that we think necessarily that  
24 Ms. Viviano's wells are going to be contaminated. We don't know that, but we  
25 don't have to show that with the amount of mathematical certainty. We need to

1 show that it's merely plausible and in the exhibit forwarded by the applicant  
2 on Friday afternoon, they show a cross section where they talk about the  
3 regional ground water flow is westward and they do a cutout, and they do a  
4 cutout right in the middle. They don't do a cutout of the regional ground  
5 water cross section to Ms. Viviano's well to the southeast, and they don't do a  
6 cutout to Ms. Viviano's well to the northeast. They do a cutout -- and we  
7 would suggest to you, your honor, is that such a decision is a matter for the  
8 merits and not a matter for standing, and it goes to the facts of whether or  
9 not her well will actually be contaminated. We don't know that.

10           We do know that there's connectivity between aquifer and the  
11 aquifers where the applicants will be mining, and we think that's all we need  
12 to show, especially in the light of Dewey-Burdock. And also in Crow Butte, at  
13 68 NRC and 708 and 709, the petitioners demonstrated some level of  
14 interconnection between aquifers is plausible and we would suggest to you, your  
15 honor, that's what we've done here, and if you have any more questions, I'm  
16 happy to answer them, otherwise I'll save the rest of my time for rebuttal.

17           JUDGE BOLLWERK: So, you're saying that you don't necessarily agree  
18 prevailing ground water flow to the east or west?

19           MR. FETTUS: We think that -- well, the prevailing ground water  
20 flow, your honor, we're not going to challenge, is east or west. Whether or  
21 not it's specifically the case in all points under the ground, we certainly  
22 would contest that. We don't know and that's a matter for the merits, but more  
23 important, we certainly shun connectivity between the aquifers that were not  
24 acknowledged, simply by the oil and gas wells alone, and if you take into  
25 consideration the reasonable, foreseeable expansion of this project as well as

1       the cumulative impacts that are imbedded in our contentions as well, in terms  
2       of potential for oil and gas recovery in this region, that could go. If you  
3       were to actually find that Ms. Viviano did not have standing, disregarding the  
4       traffic, the dust, the light pollution, the visual aesthetic impacts, and  
5       simply find on the hydrogeologic, she will not have an opportunity to intervene  
6       later and the horse will be out of the barn door as far as the expansion of  
7       this facility, because it will all go through either license amendment or at  
8       best EAs, environmental assessments.

9                     JUDGE BOLLWERK: I take it you do agree that at least from the  
10      prospective standing of what we need, we have to be concerned about is not  
11      where the other breaches in the shale may be, but what's going on under Ms.  
12      Viviano's property and that's what -- for standing purposes, once she's in then  
13      obviously then it may be a different matter in terms of the substance of the  
14      impacts of that sort of all that activity we talked about, but in terms of  
15      standing, all we have to worry about is Ms. Viviano's property. That's  
16      correct?

17                    MR. FETTUS: As far as the hydrogeologic connection, we would  
18      suggest that the you have to worry about the aquifers that she's connected to,  
19      whether or not we're ever going to be able to prove or see if her wells will  
20      actually be contaminated is actually not the standing question before the  
21      court. The issue is whether or not she's reasonably concerned and could have  
22      redressability by this court in terms of either license conditions, improvement  
23      of the ER, a whole host of matters.

24                    JUDGE COLE: Most of these places where the oil and gas flows exist  
25      are considerably to the west of Ms. Viviano's property. Is that correct?

1                   MR. FETTUS: I would actually twirl a little bit with the  
2 considerably to the west, where you can actually see there's some red up here  
3 that are within a couple of miles, within a few miles of her property, how that  
4 will alone expand, we don't know, your honor; and that's part of the cumulative  
5 impacts analyst that needs to be done as part of the ER in any subsequent SEIS.

6                   JUDGE BOLLWERK: One other question about the economic property  
7 values question that you raised. Under NRC precedent based to the Houston  
8 Power and Light Case, and others, the Allen's Creek case, and you'll have 582.  
9 The basic premise is that property values or economic values can't provide a  
10 basis for standing for Atomic Energy Act matters, only for NEPA matters in  
11 which the asserted economic harm will, or may be occasioned by the impact, that  
12 the federal action under consideration would or might have upon the  
13 environment. And again, I take it your basis for the economic or property  
14 value concerns is as you expressed, is basically there's a lot of things going  
15 on in this area and that's simply the things that are not good for property  
16 values. Is that your basic argument?

17                  MR. FETTUS: That's part of the argument, your honor. She's  
18 entitled to make these assertions of this nature at this pleading stage. We  
19 think case law makes it clear. The board needs to accept the allegations as  
20 true, and Strata and the NRC staff could not provide in evidence that they  
21 aren't true, and let alone the reasonably foreseeable possibilities. This is a  
22 reasonable concern to have. It stands to reason that uranium mine facility  
23 that injects chemicals into the adjacent aquifer and releases radioactive  
24 materials from those rocks, and as well as the larger industrial scale of this  
25 operation could very well depress real estate values in the neighboring area.

1 And again, I remind the court of the relatively contentious history of the  
2 industry as well. That is not Ms. Viviano's fault, but it is her reasonable  
3 concern. This one suffices to what we think is the requisite bar for standing.

4 JUDGE BOLLWERK: Let me ask you a sort of follow up question on  
5 terms of the implications of the Allen's Creek case. If we were to find  
6 standing here based only off property values, would that mean that the only  
7 thing that we could be litigating here is the NEPA issues, not the Atomic  
8 Energy Act issues as you framed them?

9 MR. FETTUS: We left room in our pleadings, your honor, to frame  
10 the Atomic Energy Act issues as you saw in our hopefully, carefully constructed  
11 contentions to raise those issues, should we feel the need to at some point,  
12 but, your honor, if you look at our five contentions, these are a NEPA -- this  
13 is a NEPA case. All five contentions are bound up in the adequacy of the ER  
14 and the adequacy of any subsequent SEIS. So, we did not raise safety  
15 contentions per se, at least not as of yet. We reserve the right to do so,  
16 pending any SEIS and things that may arise in the course of litigating the  
17 actual contentions, but, your honor, as you're well aware, these are five NEPA  
18 pleadings and we wouldn't think we would be barred from raising anything  
19 appropriately later, pending your acceptance of any well filed contention, but  
20 at this point, we perceive litigating these five crafted contentions and going  
21 from there.

22 JUDGE BOLLWERK: Let me ask you one question about the cumulative  
23 impacts that you've discussed. As I understand the cumulative impact we're  
24 talking about, and you can clarify this if I'm not correct, basically we're  
25 looking at a quarter that sort of runs with the Ross property somewhat to the

1 north, down to the south. It doesn't, again, this quarter doesn't extend up  
2 toward her property, certainly to where she lives, up to the northeast and it  
3 doesn't appear to be -- it goes by, but does not extend over to the property,  
4 over to the east more a little bit, I guess a little to the south. In terms of  
5 cumulative impacts, how will we assess that? It looks like there's a quarter  
6 here, but it's not really getting any closer to her. In fact, it runs away  
7 from her property.

8 MR. FETTUS: Well, first, your honor, we would suggest to you that  
9 when it goes to the north or to the south, it does get closer to her respective  
10 properties and we would urge you to look at both of her properties. It does  
11 actually get closer to both of her properties when it moves either north or  
12 south. But cumulative impacts doesn't just entail the tremendous expansion of  
13 uranium mining. It also will entail the other attractive resources, oil, gas,  
14 and anything else that could potentially go on there and as our map on our  
15 reply from the 15th shows oil and gas gets actually quite close to her property  
16 in the north and we don't know what's coming. That's part of the issue of  
17 what's supposed to be analyzed in an adequate cumulative impacts analysis.

18 JUDGE COLE: Is that area still active in the oil and gas  
19 development?

20 MR. FETTUS: Your honor, I don't know any part of Wyoming that's  
21 not somewhat active in oil and gas development. We do know that oil and gas  
22 wells get drilled with some regularity. Sometimes they get walked away from,  
23 because it doesn't look like they're going to play out and the other times they  
24 get used. Again, your honor, that would be flyspecking a declaration to a  
25 degree that we don't really see necessary, and the issue of whether or not the

1 cumulative impacts are going to expand is really an issue for the merits we  
2 think of Contention 5.

3 JUDGE COLE: All right. I've seen several maps of the area that  
4 seem to be just covered with drill holes, that most of it referred to as capped  
5 and abandoned, and I just wondered with the number of oil and gas wells showing  
6 on the maps that I saw, is there any place left to drill holes?

7 MR. FETTUS: Your honor, 10 years ago no one would have thought  
8 that we could have been hydrofracking shale in Pennsylvania and New York.  
9 That's a matter for the merits.

10 JUDGE COLE: Okay, thank you.

11 JUDGE BOLLWERK: Judge Mossman, do you have anything?

12 JUDGE MOSSMAN: A question on the use of roads. Does Mrs. Viviano  
13 have any concerns currently about dust and road use prior to the initiation of  
14 the mining process?

15 MR. FETTUS: Well, she certainly has. I would have to let her  
16 speak for herself and then again, we're happy to supplement in whatever way the  
17 court would see appropriate, but I would imagine she's had issues because of  
18 past industrial activity, causing reasonable concern for this potential  
19 substantially larger industrial activity. As Judge Cole just noted, there are  
20 oil and gas wells that dock the region that means there have been people going  
21 around drilling and doing some work, whether or not that has informed her  
22 opinion. Again, we didn't think it necessary for a standing declaration to go  
23 into her whole history.

24 JUDGE MOSSMAN: Well, my concern is this. Is there a threshold  
25 that's met? In other words, for example, is she at a point now, Mrs. Viviano

1 doesn't have a concern, but when we start the mining operation she does have a  
2 concern.

3 MR. FETTUS: Correct.

4 JUDGE MOSSMAN: At what point is there a threshold? Is there a  
5 bright line that's been crossed? You can make the same argument about the  
6 visual impacts. There is nothing going on currently that is a light source  
7 that would be problematic, but once the mining operations begin, there are  
8 going to be light sources and now there might be concerns. And again, is there  
9 a threshold that is going to be met here?

10 MR. FETTUS: Well actually, your honor, thank you for pointing that  
11 out. I believe the threshold is actually the opportunity for a hearing. This  
12 is her opportunity. If she doesn't intervene now, she won't get to intervene  
13 later, so right now these items of dust, traffic, light pollution, et cetera  
14 that will have a meaningful impact on her may not be evident because they  
15 haven't happened yet. But if she doesn't intervene now, then she won't be able  
16 to intervene later. This is her -- by law, this is the -- this is how the  
17 agency sets this up. If she doesn't step in the door now, she cannot meet the  
18 test later. She will be a late filed applicant or petitioner for intervention.  
19 So, we think actually the meaningful test is where we're sitting today.

20 JUDGE BOLLWERK: All right. Anything further from other of the  
21 board member at this point? All right, let's turn then to the applicant.  
22 Thank you, sir.

23 MR. PUGSLEY: Your honors, may it please the court, Christopher  
24 Pugsley for Strata Energy, just for organizational purposes in accord with the  
25 board's December 13th, order, I'd like to note for the record that my co-

1       counsel, Anthony Thompson, will address the issue of standing today and I will  
2       be addressing each of the petitioner's five contentions and I'd like to turn it  
3       over to my co-council.

4                   MR. THOMPSON: Thank you, Chris. May it please the board, without  
5       going through all of the discussion of the legal basis for standing; it is not  
6       a mere technicality. It is an essential element in determining whether there  
7       is a legitimate rule and then adjudicatory proceeding for a potential  
8       intervener. And without going through all of the aspects of standing, the key  
9       one from our perspective is there has to be a causal nexus between the proposed  
10      action, that is the license application, and the positive injury to establish  
11      injury, in fact, with Ms. Viviano.

12                  So demonstrating a causal nexus requires a plausible pathway to  
13       establish a realistic threat of a direct injury in fact. With respect to the  
14       allegations on ground water, we believe the pleadings are deficient in  
15       identifying a flow pattern by which contaminates could reach Ms. Viviano's  
16       properties. The Viviano declaration does not state which aquifer she draws her  
17       water from. The Viviano declaration and expert affidavits do not allege any  
18       pathway by which contaminates can travel specifically to her two properties.  
19       There is a lot of discussion by her experts about potential drill holes and  
20       inter-connection, but there is no attempt by the experts to link any of their  
21       conclusions or evidence to either of her two properties.

22                  The regional ground water flow goes away from the Viviano  
23       properties down-gradient, water goes downhill towards the Ross site. So, the  
24       Viviano properties are up-gradient with respect to the regional ground water  
25       flow and ISR operations in a small portion of the regional aquifer cannot

1 reverse the regional ground water flow. The Lower Lance and Fox Hills  
2 Formations are not present at the Viviano properties. If we look at Exhibit A,  
3 that's on the board over there, there is a cross-section below the map, which  
4 shows that the Lower Lance and Fox Hill formations, which are the oar zone  
5 formations for the Strata recovery efforts, do not reach her property. In  
6 other words, they're not present at her property.

7           Indeed, there is no inter-connection between the Lower Lance and  
8 Fox Hills Formations and the Inyan Kara from which we think she draws her  
9 water. The Inyan Kara as demonstrated again by the cross-section on Exhibit A,  
10 is 4,300 feet below the oar zone, the Lower Lance and Fox Hills Formation, and  
11 separated by the Pierre Shale and Graneros Group, which are well understood  
12 shale-confining units.

13           With respect to the oil and gas issues, the focus of their  
14 pleading, intervenor's pleading, was on a uranium exploration in and around the  
15 area of the proposed site and not on oil and gas and this comes out in their  
16 reply brief and we think it is beyond the scope of our response. However, as  
17 Judge Cole noted, they got this information from the Wyoming Oil and Gas  
18 Conservation Commission website, but the Commission in Wyoming regulates  
19 drilling of holes for oil and gas and it has stringent requirements for  
20 plugging and abandoning -- and abandon here is a term of art. It doesn't mean  
21 you leave it. It means you get a dry hole, you have to plug it and you abandon  
22 it, or you get a well that operates and when it no longer is producing oil, you  
23 plug it and abandon it. So, each one of these are plugged and abandoned. And  
24 the Commission's rules and requirements for drilling oil and gas wells are  
25 designed to stop any inter-connection between aquifers that those wells pass

1 through or those holes pass through.

2 So, as far as we're concerned -- and the oil and gas wells, we  
3 think, they brought up outside the scope of their initial pleading. However,  
4 those wells are all plugged and abandoned or operating and there is no evidence  
5 at all from that website that they cite that any of these have caused inter-  
6 connection -- caused any kind of complications because of inter-connections  
7 between operators.

8 JUDGE COLE: How do they plug the wells?

9 MR. THOMPSON: Well, they plug them with cement and I can't give  
10 you the exact numbers, but they go down -- if it's a successful well, they go  
11 down. They're double cased down to maybe 500 feet and they plug them with  
12 cement and they are very stringent requirements. We could supplement the  
13 record if you would like some information on that. I don't personally -- I  
14 can't tell you exactly what they do.

15 JUDGE COLE: You were referring to Exhibit A earlier.

16 MR. THOMPSON: Yes, Your honor, I was referring to Exhibit A.

17 JUDGE COLE: That's the exhibit one that you transmitted to us a  
18 few days ago?

19 MR. THOMPSON: Yes, exactly. Exhibit A is Exhibit 1. Exhibit 2 is  
20 Exhibit B.

21 JUDGE COLE: Okay, thank you.

22 MR. THOMPSON: For the same reasons that we say that Ms. Viviano's  
23 wells are not going to be able to -- are not going to be impacted by ground  
24 water flow because it is away from her, is -- the same theory addresses the  
25 question of draw-down. Her aquifer from which she gets those -- gets her

1 water, apparently, the Inyan Kara, is as we said, 4,300 feet below the Ross  
2 site with the 4,300 feet of shale between our aquifer, which does not reach her  
3 site. So, we don't think there's any way that they'll be a draw-down issue  
4 and, in fact, I believe that our ER and TR show that there is very little draw-  
5 down, even within the Fox and Lower Lance aquifers. With respect to the  
6 standing related to surface water, we need to switch the -- to go to, I guess  
7 it's Exhibit B.

8 JUDGE COLE: Which is Exhibit 2 that you submitted a couple of days  
9 ago.

10 MR. THOMPSON: It's Exhibit 2. Right. The pleadings don't  
11 identify any flow path, any plausible flow path for surface water to get from  
12 this site, for example, in the event of a heavy rainfall and a flood or  
13 something, to Ms. Viviano's property. The flow path to the north of the Little  
14 Missouri goes straight north and, as you can see in the upper right hand corner  
15 of Exhibit B, Ms. Viviano's northeast property where she lives is to the  
16 northeast of that flow path and to the south, which is shown I think as Viviano  
17 site Number 2 in the lower, sort of right-hand corner to the southeast, that's  
18 in a totally different drainage. That's in the Belle Fourche drainage, which  
19 goes east. So, there isn't really any way for surface water to reach either of  
20 Ms. Viviano's properties from the Ross site. Okay, it's a physical  
21 impossibility essentially.

22 And I would like to point out, particularly with respect to where  
23 she lives; she is on a drainage divide. As I understand it from technical  
24 people, that by definition that means she cannot be downstream of anybody when  
25 she is on a drainage divide.

1           With respect to the standing as to traffic and dust, we don't  
2 believe they have shown there is any -- there's really no allegation of actual  
3 harm. We need to change the -- Ms. Viviano's properties are too far from  
4 Strata's proposed transport route, which on Exhibit C is marked in the yellow  
5 going from the Ross site in green south towards the interstate.

6           JUDGE BOLLWERK: Let me stop you one second. Mr. Welkie, I don't  
7 know if there's a way -- what the best way to do this is in terms of the camera  
8 or using the actual Exhibits that are in the DDMS. There we go.

9           MR. THOMPSON: Okay. Is that easier? That's fine. As you can see  
10 from this exhibit, she is 14.8 miles to the north of the site, northeast of the  
11 site, and her southeast property is about 10.1 miles. From the proposed  
12 primary access road, the only road that Strata has proposed to use which is the  
13 one marked in yellow going north to south down towards the interstate and  
14 Moorcroft. The properties, Ms. Viviano's properties are not downwind if you  
15 raise that -- if you raise it up. I'm sorry, scroll, scroll down. Okay. If  
16 you see the Wind Rose down there, the predominant wind direction, and we're  
17 talking about an area folks that is windy; Wyoming is very windy, is from south  
18 to north and from south southeast to north northwest. And her properties are  
19 southeast, which are completely out of the wind direction and to the northeast,  
20 which the wind goes directly to the north, the primary wind. So she's not  
21 downwind of the Ross property or the road, which would allegedly generate the  
22 dust.

23           Now the reply brief's claim of Ms. Viviano using the Strata road to  
24 get to Moorcroft is really not credible, because if you look at the exhibit --  
25 can you put that back on the screen for me? If you look at her northeast

1 residence, to get to the Strata site from her house, she will have to drive 22  
2 miles of unimproved road generating dust as she goes to get to the Strata site,  
3 then to get on a better road, but still an unimproved road from the Strata site  
4 to Moorcroft. Why would she do that when, as you can see up to the right, she  
5 will go 7.5 miles on an unimproved road and then take a paved state highway  
6 south to the interstate and Moorcroft? That is -- the idea that she would  
7 drive by the Strata site is simply not credible.

8 With respect to the miscellaneous light pollution and property  
9 devaluation, we don't believe they have pled any -- or demonstrated or even  
10 alleged any injury. In fact, the court has already mentioned the question  
11 about whether economic allegations in and of themselves are adequate. She has  
12 no -- not alleged any real harm from the light pollution and we might point out  
13 again from Exhibit C, if you look at the profiles at the top with respect to  
14 the northeast property and the profile down towards the lower right with  
15 respect to the southeast property, you will see that -- well, she cannot see  
16 the site from either of those properties. The horizon intervenes. So, the  
17 light source, you know, there may be some light that is going to shine up, but  
18 she claims right now, as I recall, that she has clear skies. Yet, Hulett,  
19 which I think as Judge Bollwerk noted, is 7.5 miles away and it is a small town  
20 of 500 inhabitants that includes residences, commercial and industrial  
21 facilities, and clearly will be a more significant light source than one  
22 industrial building that is way below their line of sight. And if they can see  
23 the sky now with Hulett 7.5 miles away, we don't believe they have demonstrated  
24 there is any potential harm.

25 So, just to sum it up, we don't believe there is any communication

1 between our project or formations and the Viviano properties due to naturally-  
2 occurring physical conditions, which the proposed Ross project cannot and will  
3 not significantly modify. The Viviano properties are up-gradient. The ground  
4 water flows away. The surface water cannot flow uphill to either of her  
5 properties. They're too far from Strata to support a traffic or dust concern  
6 and the properties have no line of sight to the Ross project and there's a more  
7 significant light source considerably closer and yet they claim that they have  
8 clear skies currently. That concludes my presentation, Your honor. I'd be  
9 happy to answer any questions.

10 JUDGE BOLLWERK: A couple of things. In terms of the dust and the  
11 traffic, I mean, if her property were across the road from your facility, your  
12 proposed facility, obviously we wouldn't be having this argument. I mean, they  
13 clearly -- the ER makes it very clear there's going to be dust raised that  
14 doesn't exist now -- you're going to try make attempts to accommodate it or  
15 mitigate it, but nonetheless, there is going to be additional dust.

16 MR. THOMPSON: Yes.

17 JUDGE BOLLWERK: There's a lot of different additional traffic,  
18 particularly going to the south. I guess her assertion is that while she  
19 doesn't live across the road, that she does drive by there on some occasions  
20 and it's unclear exactly how often that happens, but she asserts that she does.  
21 I mean, how many times does she have to do it? Isn't once enough?

22 MR. THOMPSON: Well, I mean, when she drives by she is going to  
23 generate dust, too. I mean, everybody on an unimproved road in the state of  
24 Wyoming, of which there are many, is generating dust every time they drive down  
25 the road.

1           JUDGE BOLLWERK: But the point is that you're going to be -- you  
2 clearly are going to be generating dust. Your ER says you're going to.

3           MR. THOMPSON: Yeah.

4           JUDGE BOLLWERK: There's no question.

5           MR. THOMPSON: Yes. We don't argue that.

6           JUDGE BOLLWERK: Right. So, why isn't that an impact if she's  
7 driving by your facility while it's being constructed?

8           MR. THOMPSON: Well, why isn't that an impact if she's driving by  
9 our facility? Well, first of all, we don't think it's credible that she's  
10 going to be driving by there. Why would she go through 22 miles of bad road  
11 when she can go seven miles and then drive on a state-paved highway? That  
12 doesn't make any sense, but...

13           JUDGE BOLLWERK: Well, people do what they do. There's nothing  
14 that precludes her from doing that.

15           MR. THOMPSON: No, it doesn't preclude her, but a lot of people are  
16 going to drive down that road. A lot of people drive down that road right now,  
17 people that are hauling cattle, people that are hauling oil, heating oil and  
18 things, and so if she drives by there she may be getting dust from people who  
19 don't have anything to do with our project.

20           JUDGE BOLLWERK: But she is going to be getting dust from your  
21 project, which the ER says is going to raise dust. I mean, we don't generally  
22 -- that is going toward the merits in terms of how much and where it comes  
23 from.

24           MR. THOMPSON: Well, okay, but she doesn't allege what the harm to  
25 her is going to be from dust. I mean, if there's harm from dust in Wyoming on

1 unpaved roads, I guess everybody in the state is at risk.

2 JUDGE BOLLWERK: Well, I guess if there wasn't any harm then  
3 there'd be no reason to mitigate and you already said you are going to  
4 mitigate, so somebody thinks there's harm here. There's no question about the  
5 dust that you're raising is being mitigating and someone thinks it has an  
6 impact and needs to be mitigated.

7 MR. THOMPSON: Well, we are going to increase the traffic on the  
8 road and so we have agreed with the county that we will do things to lessen any  
9 impact. We agree that that's what we said.

10 JUDGE BOLLWERK: All right. In terms of her concerns about her  
11 property values, obviously any time a new industrial facility comes to an area  
12 it's going to have some effect on property values, some good, some bad. Why  
13 isn't her assertion sufficient? I mean, it is going to -- there is a potential  
14 some folks are going to be concerned about pollution to the air notwithstanding  
15 what you've said. Why isn't that sufficient to establish your standing in this  
16 instance?

17 MR. THOMPSON: Well, there has. I mean, just a bald assertion that  
18 economic values are going to be depressed, I mean, without any basis whatsoever  
19 for -- I mean, that's just a conclusory statement as far as I'm concerned.  
20 There is nothing that indicates that all these oil wells out there have lowered  
21 property value or that the saw mill in Hulett has lowered property values. I  
22 mean, all she does is make a bald-faced statement it's going to hurt the  
23 economic value of my property and I, you know, if she has some evidence of  
24 that, or even some plausible theory as to why it might do that, that might be  
25 different, but she doesn't.

1                   JUDGE BOLLWERK: And I know the intervenor's counsel, or  
2 petitioner's counsel, excuse me, made the point that I guess the cross-section  
3 that you had on the first diagram, can you bring that up Mr. Welkie? I guess  
4 Exhibit A. There was -- a little bit further down. That regional flow, that  
5 geologic cross-section really doesn't cover her property. What's your response  
6 to that argument?

7                   MR. THOMPSON: That's silly. Her property, the northeast region  
8 that is on the western edge of the Black Hills uplift. Okay? The geology  
9 doesn't change north to south. The slope is from the western edge of the Black  
10 Hills uplift down toward the center of the Powder River Basin. So, the  
11 regional flow from her property in the southeast and from her property in the  
12 northeast and beyond that to the north is to the west into the basin.

13                  JUDGE BOLLWERK: What about the assertion that the cumulative  
14 impacts here are going to have some potential to create -- going to expand  
15 these impacts that are relative to the Ross facility and, in fact, cause issues  
16 for her, enough to give her standing.

17                  MR. THOMPSON: Well, I don't know how you can get standing on a  
18 license application that hasn't been filed or noticed for potential hearing. I  
19 mean, we're at -- I'm sorry, but a standing on a proceeding that doesn't exist  
20 in this point in time. And the statement that she will be foreclosed is  
21 incorrect, because every satellite, if they go forward with these various  
22 satellites that they have talked about -- and that's going to depend on market  
23 conditions and a variety of things, but if they go forward with those, every  
24 one of those will be a license amendment, which NRC will notice and she will  
25 have an opportunity to attempt to intervene.

1                   JUDGE BOLLWERK: But I think her concern, again, is that she needs  
2 to get in at the beginning because she doesn't want to have to deal -- once the  
3 "get your nose under the door" as it is, then in theory she's going to have a  
4 harder time each time getting in and getting these impacts properly assessed,  
5 because once the first ones happen, then the other ones will kind of just fall  
6 down the road.

7                   MR. THOMPSON: Well, I mean, she's got -- she's got to show an  
8 impact, right? And so, yeah, she'll have a problem down the road if she can't  
9 show any adverse impacts from the initial licensing action, but the -- yeah,  
10 no, again, my point is that cumulative impacts of license applications that  
11 have not been filed or noticed for a hearing is beyond the scope of the notice  
12 for this hearing published in the federal register. And I don't know how you  
13 can use cumulative impacts for a non-existent application and a non-existent  
14 proceeding to justify standing in the current proceeding.

15                  JUDGE BOLLWERK: All right. Any other questions the board members  
16 have at this point? All right. Thank you, sir.

17                  MR. THOMPSON: Thank you.

18                  JUDGE BOLLWERK: Let's turn to the staff then.

19                  MS. MARSH: Good morning. I'm going to go ahead and start with the  
20 burden argument that the petitioners are making here and refocus where the  
21 burden lies to prove -- or to demonstrate standing. Where there's no obvious  
22 potential for harm, it's the petitioner's burden to show a specific and  
23 plausible means of how the challenged action may harm him or her.

24                  Petitioners have argued several impacts of Mrs. Viviano, but, your  
25 honor, they haven't shown either an actual injury or plausible means by which

1 that injury could occur. The petitioners argue in their reply that the board  
2 must accept as true all material allegations of the petition and construe the  
3 petition in favor of the petitioner and that it's the applicants and the  
4 staff's burden to provide outside evidence to disprove the standing declarant  
5 of alleged injuries. They cite the Georgia Tech case for their interpretation  
6 of who holds the burden, but in the Georgia Tech case the facts dispute that  
7 the board deferred to the petitioners on involve not the science used to  
8 establish harm, but rather the representations made by the standing declarant  
9 regarding when he'd become a member of the organization petition to intervene  
10 on his behalf.

11           While the petitioners don't have to prove an injury will definitely  
12 occur at this stage, they must put forth enough support to allow the board to  
13 determine that an injury is plausible and that there's a plausible pathway  
14 between the proposed action and the petitioner's alleged injury. And, of  
15 course, the injury must be within the zone of interest of the EAEA or NEPA.

16           I'll start with the ground water argument. First, it's only in the  
17 reply brief that the petitioners state that Ms. Viviano's wells draw from the  
18 Inyan Kara aquifer. The petition -- the original petition seemed to indicate  
19 that her wells were in the Fox Hills and Lance aquifers and the new argument is  
20 that oil and gas wells in the Lance District will serve as a pathway between  
21 the Fox Hills and the Lance aquifers above the Pierre Shale and the Inyan Kara  
22 for below the Pierre Shale, which Ms. Viviano draws water from.

23           As we stated in our petition, the petitioner's experts never  
24 address how Ms. Viviano's ground water could be affected by the Ross project.  
25 The petitioner's experts spent a lot of time talking about bore holes and wells

1       in the upper aquifers, but never addressed the possibility of oil and gas wells  
2       creating a pathway between the project and Ms. Viviano's wells. In fact, the  
3       experts never even mentioned the Inyan Kara aquifer in their declarations.  
4       That tends to give us the impression that their experts didn't see that there  
5       was any connectivity between the upper aquifers and the Inyan Kara, and the  
6       fact that the original petition cited draw-down of Ms. Viviano's wells from  
7       Strata's use of water at the Ross site also tends to indicate that the experts  
8       didn't see the connections. The only water being used by Ross -- by the Ross  
9       site will be in the upper Fox Hills and Lance aquifers.

10           I'm not going to go into the technical details. I think the Strata  
11       went into the technical details of the difference between the -- well, I'm not  
12       sure they really mentioned -- there is a difference between a bore hole and a  
13       well and the petitioner seems to use both terms interchangeably. The wells are  
14       cased and sealed as Strata mentioned, but the bore holes -- we have  
15       acknowledged that the bore holes could potentially cause some cross-migration,  
16       but that's not what we're talking about here going through the Pierre Shale,  
17       we're talking about wells that are cased. So, with the -- their ground water  
18       argument, they haven't demonstrated a plausible pathway between the Ross site  
19       and Ms. Viviano's wells. Moving on to the argument about traffic and dust --

20           JUDGE COLE: Before you make that point, you mentioned two aquifers  
21       and the drinking water supply, the Inyan Kara and the Fox Hills. Do we know  
22       with certainty what aquifer her wells are in? Billed in? What's her source of  
23       water?

24           MS. MARSH: Judging by the -- I'm only going off the reply brief  
25       that says that she is in the Inyan Kara aquifer. I don't know that for

1 certain. I believe that the maps that Strata has provided show that she is in  
2 the Inyan Kara well.

3 JUDGE COLE: Okay, thank you.

4 MS. MARSH: As to the traffic and dust argument, the petitioners  
5 don't explain what the injury is that Ms. Viviano will suffer just by driving  
6 through the dust or seeing some more traffic. Where the harm is not obvious,  
7 the petitioner bears the burden of demonstrating harm. The cases of the  
8 petitioner's cite for injuries from dust are not really comparable to the  
9 situation here. For instance, in the Sierra Club, the U.S. Army Corps of  
10 Engineers, on Page 4 of the reply, that case involved an area that the lower  
11 court had called a "unique environment" that have been used for hunting, bird  
12 watching, fishing, there were endangered species there, and the increased dust,  
13 light and noise were among the harms that were listed and there was a power  
14 plant that was within a mile and, in some cases, adjacent to that property and  
15 the dust and light could be seen from this unique environment and while the  
16 unique environment was used specifically for aesthetic enjoyment and  
17 recreation, and the increase in dust, noise and light impacted the plaintiff's  
18 aesthetic enjoyment of the area, not to mention that it impacted the animals  
19 that were living on the site, which in turn affected the plaintiffs. And  
20 that's a very different situation than what we have here where Ms. Viviano is  
21 driving on unimproved roads that have always been unimproved just to get to and  
22 from her house. The difference isn't just one of degree, but it's a different  
23 type entirely. There are also some -- where the dust is impacting a residence,  
24 for instance, it's generally -- the sites are very close together and the dust  
25 is getting all over the house, all over the vegetation, so the vegetation can't

1 be used, things like that. Those are the harms that NEPA case law seems to  
2 recognize, not -- I haven't seen any NEPA case law that would recognize just  
3 driving through some dust. So, with the traffic and dust argument, the  
4 petitioners haven't demonstrated an injury, in fact, that's within the zone of  
5 interest with NEPA.

6 JUDGE BOLLWERK: So as I understand your argument then, the  
7 mitigation measures that are being used here are not there to protect other  
8 people driving on the road? You're not trying to mitigate the dust to have any  
9 impact on those that use the road, but only folks, I don't know, that live near  
10 there or have a residence or if it has nothing to do with the other drivers on  
11 the road?

12 MS. MARSH: Well, I'm not exactly sure what the -- what Strata's  
13 purpose for mitigation is. I mean, I can understand that dust -- having too  
14 much dust can be annoying, or it can make it more difficult to see when you're  
15 driving down the road, but I don't know that that rises to a harm that's  
16 recognized by NEPA.

17 JUDGE BOLLWERK: So if those mitigation measures were there that  
18 wouldn't concern the staff at all?

19 MS. MARSH: Well the staff doesn't require those mitigation  
20 measures; it will look at those when it does its NEPA review and presumably  
21 that will lessen any --

22 JUDGE BOLLWERK: Okay, I, you know -- I just got done with the  
23 AREVA case and there seemed to be a lot of concern about dust there, and the  
24 staff seemed very concerned that those mitigation measures were in place.

25 MS. MARSH: I'm sorry. I'm not familiar with the --

1                   JUDGE BOLLWERK: Well, I mean, it's pretty standard that at any  
2 industrial construction site, you're going to have mitigation measure in place  
3 for dust. And often, they're a matter of state regulation, but nonetheless the  
4 staff generally concerned that those are kept in place and are followed because  
5 it increases the impacts from the construction of the facility in terms of  
6 wherever the dust is going, which is generally considered to be not a positive  
7 thing. Now, I guess they argued on a hearing here is that we don't really --  
8 this dust control has nothing to do with drivers on the road. It only has to  
9 do with those living in the area or, you know, they have to be recreating at a  
10 site near the area. In AREVA, there was a park service facility across the  
11 road but nothing to do with the folks driving up and down the road.

12                  MS. MARSH: Well, that might be the case that they are making the  
13 roads better for other drivers, but that doesn't -- it's -- in this case, to  
14 show standing, it's the petitioner's burden to show what the harm is, and to  
15 show that the harm is cognizable under NEPA. And I just don't think that  
16 they've -- they just haven't demonstrated the harm or shown that it's the type  
17 of harm that we see in these other NEPA cases involving dust and traffic.

18                  JUDGE BOLLWERK: Well, I mean, I have to say, when you look at the  
19 radiation side of the house, and again, we're not looking at that here,  
20 generally you don't have to show some kind of -- I mean, if you're within an  
21 area of the facility that potentially could get exposed to radiation, you have  
22 standing. We don't look at the amount. We're not here, I mean, trying to  
23 assess how much dust is bad for a driver, but nonetheless it's clear that dust  
24 is something that's not wanted. So how's this different?

25                  MS. MARSH: Well, it's for the petitioners to tell us what the harm

1 is here. I mean, it's -- the dust might not be wanted, but what is the  
2 environmental or health harm here from driving through dust occasionally?

3 JUDGE BOLLWERK: Okay. Go ahead, sorry.

4 MS. MARSH: All right. And the light pollution argument is very  
5 similar. It's the -- again, it's the petitioners' burden to show how this  
6 light is going to affect Ms. Viviano. It's not obvious that from 10 miles  
7 away, she's going to be affected at her residence. And for example, the  
8 LaFlamme case that the petitioners cited in their original petition, that  
9 addressed visual impacts. It involved the hydroelectric project. That case  
10 would result in the loss of 4,000 feet of sight and sound of cascading water,  
11 ponds, pools, waterfalls, and result in the loss of aesthetic and recreational  
12 quality of the area. Those impacts had never been addressed because FERC  
13 didn't prepare an EA or an EIS. And again, that's the type of harm that's  
14 being recognized by NEPA. Just the petitioners putting out there that there  
15 are these lights 10 miles away doesn't demonstrate what the harm is to Ms.  
16 Viviano. And STRATA has done the sort of analysis that the petitioners should  
17 have done, and it showed that Ms. Viviano won't be affected by the lights at  
18 the site because the project isn't within her line of sight or close enough to  
19 really create ambient light that will affect here. So, again, the allegation  
20 about light pollution is not an injury in fact that establishes standing.

21 JUDGE MOSSMAN: If I could interrupt, you're not restricting harm  
22 to physical harm. Am I correct? Is it broader than that?

23 MS. MARSH: NEPA recognizes aesthetic harm, yes.

24 JUDGE MOSSMAN: So psychological harms, things of that nature. I  
25 mean, I guess what I'm asking is the scope of the definition of harm. What do

1 we mean by that?

2 MS. MARSH: Well, I mean, I agree with the assertion that the  
3 petitioners make that aesthetic harm is recognized under NEPA, but the types of  
4 harms that all the NEPA case law discusses when it comes to aesthetics is  
5 generally where there is some enjoyment of the environment and that's being  
6 harmed by a new industrial site. That's the general example in the cases that  
7 have been cited. And they've lost -- the person has lost the enjoyment of the  
8 land due to visual impacts.

9 As explained in our reply or in our response, an economic harm by  
10 itself is not within the zone of interest protected by the AEA or NEPA. It's  
11 recognized as a collateral harm where a petitioner has also demonstrated a  
12 radiological or environmental harm, not just where living near an NRC licensed  
13 facility might be unattractive to a buyer. This is well settled by the  
14 Commission. In addition to the cases cited by the petitioner on Page 4 of  
15 their reply, at least two Commission cases holding that a purely economic harm  
16 isn't cognizable by the AEA or NEPA had been upheld by the circuit courts.  
17 There's the Rancho Seco case CLI 90-22 that was upheld by the 9th Circuit. And  
18 there's Quivira Mining Company CLI 98-11 that was upheld by the D.C. Circuit.  
19 Here the petitioners haven't demonstrated a plausible environmental or  
20 radiological harm, so the alleged economic harm is not enough to establish  
21 standing by itself. If the NRC recognized the alleged harm that property loses  
22 value because of the proximity to a nuclear site is unattractive to buyers,  
23 there would be no proximity plus standard.

24 And finally, on to the cumulative impacts argument that the  
25 petitioners make. This is an entirely new argument in the reply brief. But in

1 any case, Ms. Viviano's standing must be based on the proposed action at issue  
2 here. The potential for Ms. Viviano to be harmed by a future project is not  
3 ripe for adjudication and, more importantly, that potential harm would not be  
4 redressed by any actions taken by the board in this case. Even if this license  
5 were denied, Strata could apply for a new license for a new facility. If the  
6 Ross site license is granted, any license amendments to expand the site would  
7 carry the opportunity for a hearing as we've heard earlier.

8 JUDGE BOLLWERK: So she cannot -- I mean, her -- let's assume that  
9 her concern was solely about the cumulative impact. She was just afraid that  
10 once the camel got its nose under the tent, that things were going to go on  
11 from there and there would be a huge problem, and she felt she wanted to raise  
12 that now and make sure it was considered, which, in fact, the staff has  
13 indicated that it needs to be considered. That can't be a basis for her  
14 standing?

15 MS. MARSH: Well, I'm not -- I don't see how the denying this  
16 license would redress her harm for the future.

17 JUDGE BOLLWERK: Well, under NEPA, she simply wants it addressed.  
18 Whether, you know, whether the license is denied may be a different matter.  
19 But NEPA is a procedural statute that requires that things be discussed. And  
20 she wants that discussed.

21 MS. MARSH: Yes, but she must show that there is some environmental  
22 or radiological harm to her at this point. And if she can't do that for the  
23 current site, which is in the Lance District in the Fox Hills and Lance  
24 aquifers and the same geological set up as all these other projects, she's not  
25 going to be able to show the standing for these other projects either.

1                   JUDGE BOLLWERK: Well, this isn't -- doesn't appear to be the case  
2 here, but just hypothetically, if the next project was going to be right next  
3 to her ranch, could she raise it then? In other words, we've got this project  
4 here, but oh, by the way, the next one's going to be right next to where I  
5 live. I need to get in now to talk about cumulative harm or I'm not going to  
6 be able to because then the harm is already occurred.

7                   MS. MARSH: I would say that she would need to wait until the  
8 opportunity for hearing for the new site came about. If it were proposed as  
9 part of this action, she could certainly be -- could certainly get standing by  
10 arguing a harm for that.

11                  JUDGE BOLLWERK: Well, when you say proposed, I mean, here -- as  
12 the staff has pointed out, I believe, the applicant has made it clear that  
13 they're looking to extend these additional sites on this corridor that they  
14 marked out. All I'm saying is if that corridor went across from her property  
15 rather than down to the south, wouldn't she have, at least facially, a pretty  
16 good argument?

17                  MS. MARSH: But we don't have the -- I mean, it's in this -- we  
18 agree that it's an admissible contention, but that doesn't necessarily equate  
19 to having demonstrated standing just like the opposite doesn't hold true. But  
20 we don't -- I mean, at this point, we don't have the details of where any of  
21 these -- if any of these proposed actions will in fact take place or what the  
22 details of those proposed sites might be. We'd be -- I mean, we'd really be  
23 working at hypotheticals about where these sites might be and when or if they  
24 would ever actually be done. The staff has said that we believe that the new -  
25 - an expansion is reasonably foreseeable, but we haven't said that they are

1 definitely going to happen, so we would just be hypothetically arguing about  
2 things that might not even happen. And I don't have anything more.

3 JUDGE BOLLWERK: All right. Any questions from either of the board  
4 members at this point or the staff? All right, thank you very much. Let's  
5 turn back then to the petitioners and for your reply. And just to the  
6 administrative matter, we'll be taking a break after we're done with this  
7 argument and before we go onto the contentions.

8 MR. FETTUS: Thank you, your honor. And I'll be very concise, and  
9 I have a number of things to hit here, but I'll be very quick. And I'll try  
10 and go in backwards order, what we just touched on with NRC counsel. In our  
11 standing discussion -- well, first, I want to start with there are no new  
12 arguments in our reply brief. Everything that we raised in our reply was well  
13 evident in our opening brief and even the issue of oil and gas wells were  
14 mentioned by our experts and also in our opening brief, we talked about  
15 cumulative impacts and extracted resources in our Contention Number 5. And  
16 that's -- that is our fundamental NEPA contention found in Contention 5 is  
17 about cumulative impacts. So there is nothing new to be found in what we filed  
18 in our reply in response.

19 Turning directly to the issue of cumulative -- turning to the issue  
20 of cumulative impacts as far as standing goes, your honors, it goes both to  
21 merits and to the standing issue. Strata's failure to analyze the cumulative  
22 impacts of the project in conjunction with other industrial activities, like  
23 oil and gas drilling, and the expanded uranium mine is clearly reasonably  
24 foreseeable here -- goes to standing because of the specific injuries that we  
25 discussed: traffic, dust, light pollution, property value and the prospect of

1 aquifer contamination, which, again, nothing you heard in the responses here  
2 did away with the connectivity argument. There's an assertion that Wyoming Oil  
3 and Gas has strict requirements for well capping. That's true. I'm sure they  
4 do. But again, there's been no showing that any possible connectivity between  
5 the aquifers has been done away with. That's an issue for the merits. And,  
6 again, we shouldn't be arguing the merits here. We're arguing standing and  
7 admissibility.

8 Second, regarding whether or not this question is right, as your  
9 honor showed with the questions that you just posed, if Ms. Viviano doesn't get  
10 her foot in the door now, at this initial proceeding, the horse is out of the  
11 barn door, because the subsequent related activities will simply tier back to  
12 this ER, this SEIS, and respectfully, the generic EIS that we challenged in  
13 Contention 5 of our initial pleading. The NRC rules require this early  
14 intervention to seriously challenge any sort of activity. So we're simply  
15 doing precisely what the rules require here.

16 I'd also like to add in that regarding the actual particularized  
17 injury that she needs to show, there's several things that I want to bring to  
18 your attention. First, particulate matter, which exists in dust, is a non-  
19 threshold pollutant, meaning any exposure to it is harmful. And Mr. Thompson  
20 dismissed it with simply asserting, well, anybody driving down the road is  
21 going to have some sort of problem in Wyoming because it's a dusty place. I  
22 don't imagine he would seriously contend that this would not substantially  
23 increase the traffic, increase the road usage, especially as the project  
24 expands and if they expand the uranium production to include also other  
25 facilities, shipping trucks there to the processing plant as well as the

1 cumulative impacts we may or may not discover that have to do with other  
2 extractive resources. So, it's not necessary to demonstrate any preexisting  
3 health condition that will be exacerbated by an increase in particulate matter  
4 since any increase in particulate matter, which is dust, can impose a health  
5 risk.

6 Second, the Wind Rose Data -- I'm going to try and quickly on a  
7 number of major things. Well, let me actually -- one more thing on health.  
8 Uranium production facilities, including ISL facilities, have historically  
9 emitted radon gas, thorium, radium-226, and other radioactive decay products as  
10 airborne releases. We don't really know whether or not there are going to be  
11 impacts from this because we haven't any ER that would address these, and we  
12 certainly haven't seen an SEIS that would address these issues. These risks  
13 actually come closer to her properties and will increase quantitatively as the  
14 operation expands. Again, bound up in our Contention 5 is a precise look at  
15 all of these things. And we attacked the GEIS in numerous comments, again,  
16 this is an issue for the merits, but it goes to show how much standing is  
17 necessary at this point. When we criticized the GEIS, one of our criticisms  
18 had to do with the failure to examine wastewater issues. And we understand  
19 that this is an issue that we may want to raise when we get to the merits. We  
20 don't know yet. Again, we need to be able to get to the merits to do it. And  
21 if we don't follow the NRC's rules now, we won't be able to get there.

22 So, turning to a couple brief things, the Wind Rose Data, we don't  
23 know -- this was -- we can see here, your honors --

24 JUDGE BOLLWERK: Do you want us to put the Wind Rose back up? We  
25 can certainly do that.

1 MR. FETTUS: Yeah, that would be great.

2 JUDGE BOLLWERK: All right.

3 MR. FETTUS: We didn't have time to actually look at this Wind Rose  
4 Data. This is from the supplemental report in February 2011. We don't know  
5 the dates. We don't know if this is averaged over a year. Wind Roses can be  
6 different year by year, month by month, different seasons. Again, Wind Rose  
7 Data is -- this is simply a picture in time that we have no explanation for.

8 JUDGE BOLLWERK: There is a little notation up in the corner, says  
9 1/5/2010 to 1/12/2011. Does that answer that?

10 MR. FETTUS: We have a year's worth of data, right.

11 JUDGE BOLLWERK: It looks that way, yes.

12 MR. FETTUS: Hour 18 to hour 12. We have a year's worth of data  
13 average. We don't know what it's like in different seasons. We don't know  
14 what it's like in different months. Wind Rose Data, for example, in another  
15 proceeding that I'm involved in, we're using Wind Rose Data and we're being  
16 very careful to make sure that we show all of our presumptions with Wind Rose  
17 Data and show all of the potential ways in which the wind could spread at  
18 various times. We don't have that here. We just have an average for a year.  
19 So, again, we would respectfully suggest that you need to take all of her  
20 allegations as true and move from that point forward.

21 Let me see. Regarding --

22 JUDGE MOSSMAN: Could I go back to your statement that you made  
23 that any amount of particulate matter is coupled to health risk? What's the  
24 basis for that?

25 MR. FETTUS: That's just basic EPA data. The numbers demonstrate

1 that. And we're happy to supplement that, but again, that's not an issue that  
2 we feel like we need to litigate here. And we think that's a merits issue  
3 going down the road into the cumulative impacts in Contention 5.

4 JUDGE MOSSMAN: Well, I don't know that it's strictly a merits  
5 issue. I mean, if just for a hypothetical, there's a threshold, and it could  
6 be demonstrated that exposure's below the threshold, then it becomes a  
7 plausibility question. And that goes to the heart of the admissibility of the  
8 contention. So it's not strictly a merits question. It goes to the heart of  
9 what is the philosophical basis for making a statement -- or a scientific basis  
10 for making a statement as to whether the threshold exists or does not exist.

11 MR. FETTUS: I understand, your honor. The issue here that would  
12 be the problem for doing that kind of divination for standing would be it would  
13 entail a year's worth of data of how often Ms. Viviano uses various roads  
14 versus how often trucks are going to come by versus -- I mean, it would be an  
15 impossible exercise to understand for standing admissibility question, I think,  
16 before your court. And we wouldn't ask you to shoulder that burden. We simply  
17 think the standing requirements are clearly met by Ms. Viviano's clear and  
18 unqualified use of the roads, use of all of the roads reasonably around the  
19 facility, and the substantial impact that the use of those roads are going to  
20 have on her and her local community.

21 JUDGE BOLLWERK: I take it that your basic point is something is  
22 going to change that wasn't there before, and she is going to have to go  
23 through that change, be impacted by it in some way.

24 MR. FETTUS: Correct.

25 JUDGE BOLLWERK: All right.

1                   MR. FETTUS: Regarding the -- I'm done unless the court has any  
2 more. I can touch on other issues, but I think we've covered it relatively  
3 well.

4                   JUDGE BOLLWERK: Let me come back one second to the economic  
5 question. The staff's point, I think, was that in order to show an economic  
6 harm, you have to show that the -- as the case law suggested that the -- one of  
7 the environmental impacts you're concerned about is whether there's going to  
8 cause that economic harm. Am I putting words in your mouth? Or is that  
9 essentially it?

10                  MS. MARSH: That's right. There has to be an environmental or  
11 radiological harm that causes the economic.

12                  JUDGE BOLLWERK: Right. And so -- and here, since we've been  
13 talking basically about environmental harms, what is the particular  
14 environmental harm that is going to cause diminution of economic value here?

15                  MR. FETTUS: The entire basis of our allegations, your honor, about  
16 the loss of financial injury or about the financial injury have to do with the  
17 possibility of traffic, dust, light, aesthetic injury, and aquifer  
18 contamination to her aquifer. The rule that financial injury must be linked to  
19 an environmental -- to the environmental injury doesn't mean that the  
20 environmental injury in question would necessarily on its own rights suffice  
21 for standing. Otherwise, there would be no need to show the financial injury  
22 since it would be entirely duplicative and would add nothing to the standing  
23 inquiry. But here, Ms. Viviano has alleged that there's a foreseeable  
24 possibility that her property values will decline. And again, we don't know  
25 what's going to happen. It's simply a foreseeable possibility with large

1       uranium production facilities that it could decline as a result of STRATA's  
2       projects environmental impacts -- the potential contamination of the aquifer,  
3       the light pollution, the increased traffic and dust. We think the causal nexus  
4       that NRC staff asks for but doesn't find is clearly evident.

5                     JUDGE BOLLWERK: So, if there -- well, all right. Are you saying  
6       that economic injury is really -- I mean --

7                     MR. FETTUS: They have to be linked, your honor. We think they're  
8       clearly linked.

9                     JUDGE BOLLWERK: But if -- but you can't assert that the concerns  
10      that someone has about all these different environmental impacts in the  
11      vicinity of by property, even though it may not directly impact my property,  
12      nonetheless will impact my property values?

13                    MR. FETTUS: Absolutely. I mean, there is a proximity requirement.  
14      The NRC staff cited Sequoia, I think on Page 6. And the proximity argument  
15      here -- there is not a nuclear power plant where sort of you have standing  
16      within 15 miles just as a matter of course. We don't' have that here within  
17      materials licensing cases. And petitioners acknowledge that. We are, however,  
18      within 10 miles with two properties of a major industrial facility. And that  
19      proximity and regular use of all of the associated and attended areas around  
20      this area and a reasonable or foreseeable expanding area, as well as a failure  
21      to analyze the cumulative impacts of everything else that could or might not  
22      happen in this area, certainly provide that causal nexus of location. We're  
23      very close here. Eastern Wyoming, 10 miles is not very far to drive. It's not  
24      like a 10-mile Rockville to D.C. trip. It's a very different -- driving in the  
25      West, for those of you that have lived there, it's a very different thing. So,

1 we think the causal nexus in proximity clearly reflects Ms. Viviano's standing.

2 JUDGE BOLLWERK: All right. Any other questions from either of the  
3 board members at this point? No. All right. Thank you very much then for  
4 your arguments on standing. We appreciate it. Why don't we go ahead and at  
5 this point, I've got 10:30. Why don't we go ahead and take a 10-minute break  
6 and we'll reconvene at that point. Thank you very much. We'll start with the  
7 first contention then.

8 (Whereupon, a short recess was taken)

9 JUDGE BOLLWERK: All right, let's go back on the record, please.  
10 All right, we're back from a brief break and we're ready to -- we finished our  
11 argument on standing. And we are about ready to start the argument on the  
12 first contention. Contention 1 reads briefly, "The application fails to  
13 adequately characterize baseline, i.e. original or pre-mining groundwater  
14 quality." And I will then turn to the petitioners.

15 MR. FETTUS: Thank you, your honor. And again, I'll be trying to  
16 be very brief and reserve 15 minutes for rebuttal if necessary. Your honor,  
17 and this is the failure to characterize baseline and our basic contention is  
18 Strata fails to demonstrate the groundwater samples were collected in a  
19 scientifically permissible manner using proper sampling methodologies. And the  
20 environmental reports departure from NRC guidance serves as additional evidence  
21 that there was regulatory violation.

22 Strata argues that 10 CFR 4032 (e) does not require baseline water  
23 quality assessment at the licensing stage but actually bars any such assessment  
24 prior to the Wellfield development. The NRC staff for its part argued the  
25 Criterion 5(B)(5)(a) required no pre-license characterization of the baseline

1 water quality but offered no support or citation for this claim at this point.

2 We find this response at 16 and 17.

3                 Staff furthered argued that NUREG-1569, and NUREG, for the court  
4 reporter, is N-U-R-E-G hyphen 1569, standards for baseline water quality and  
5 assessments are not requirements and that they're -- and that the acceptability  
6 of programs proposed in applications are instead determined by NRC staff on a  
7 case by case basis during the individual licensing review. Both fundamentally  
8 come down to an assertion that the authorities the petitioners have cited, 10  
9 CFR 51.45 and Criterions 5 and 7 -- Criterion 5 and 7 of 10 CFR Part 40,  
10 Appendix A, do not require the kind of technical advocacy that we assert the  
11 regulations require. And we attached the technical conclusions that we made by  
12 our experts. This, your honor, pretty simply, is an issue for the merits. At  
13 this stage, we only need to provide a concise statement of the alleged facts or  
14 expert opinions which support our position on the issue and on which we intend  
15 to rely at hearing. And there on 10 CFR 2.309 (f) (1) (v).

16                 Petitioners have offered more than enough factual allegations and expert  
17 testimony to uphold the standard. The Dewey Burdock opinion of last year is  
18 instructive in this. If you look at Page 64, there you have Oglala Sioux  
19 petitioners raising substantial questions as to the legal and technical  
20 adequacy of the baseline water quality characterization. And we have done so  
21 similarly.

22                 There's a genuine dispute between staff and Strata on one hand, and  
23 the petitioners on the other as to whether the ER met the legal and technical  
24 requirements for characterizing baseline water quality. And if I could go on,  
25 your honor, just not to say yes, this contention is admissible just as it is, I

1 would also add this is precisely the kind of area where regardless of whether  
2 it goes to litigation, that there's a potential issue for some sort of legal or  
3 technical settlement where the experts on both sides, or all three sides  
4 really, agreeing on what could be a possible way of characterizing baseline  
5 water quality. This sets a precedent for other ISL sites on how they should  
6 characterize it.

7                   Fundamentally, your honors, we believe that they average with  
8 weight the characterization of that baseline water quality to make the water  
9 look worse than it is by where they show the samples and where they sample.  
10 They disagree with that. They say they don't. That is an issue for the  
11 merits. This is an area where if there were a technical agreement, that would  
12 be great. Whether or not that's possible in this issue is unclear, but we  
13 certainly have the right and opportunity to litigate this issue. And it's an  
14 admissible contention. And I'm done unless you have any questions.

15                  JUDGE BOLLWERK: I do have one, actually. Given the -- well,  
16 you're calling it Dewey Burdock. I guess I refer to it as Powertech when we're  
17 talking about --

18                  MR. FETTUS: Sure, I'm sorry, your honor.

19                  JUDGE BOLLWERK: No, you're -- one or the other works. I just want  
20 to make sure we're on the same page.

21                  MR. FETTUS: Thank you.

22                  JUDGE BOLLWERK: And you mentioned the slip opinion, and I guess  
23 the Page is actually 63 and 64. It talks about -- is this really a legal  
24 contention as opposed to a strictly factual contention or is there a legal  
25 dispute between the parties as to what the regulations require? I mean, I

1 recognize that the Powertech or Dewey Burdock board seemed to resolve that  
2 legal issue, but couldn't one look at it as simply saying there's a legal  
3 matter here that needs to be resolved?

4 MR. FETTUS: I think that's a fair question, your honor, in that it  
5 is the legal issue that the Powertech judge for the Dewey Burdock court  
6 resolved was that 4032 (e) explicitly -- the last sentence of 4032 (e)  
7 explicitly preempts pre-construction monitoring and testing to establish  
8 background information from the prohibition on commencement of construction.  
9 The court said we believe that such reconstruction monitoring includes adequate  
10 assessments of baseline water quality, and then they support that  
11 interpretation by noting Criterion 7 of Appendix A, which, by the way, we were  
12 careful to do so as well, having read this carefully.

13 Respectfully, your honor, this is both a factual dispute between  
14 the parties on what actually constitutes a -- and this actually goes to the  
15 heart of the merits question here. It's a factual dispute as to what the  
16 actual picture of baseline water quality is for the area. And it's not just  
17 the rough project. It's actually the expanded project, or perhaps a template  
18 for how one's going to set it for any expanded project. So that, we would  
19 suggest to you, your honor, is definitively a factual dispute on what is the  
20 actual composite picture. And then there is obviously overlaid on top of that  
21 a legal dispute which is how much information do the regulations require. And  
22 we were very careful to subscribe precisely to the language and the Dewey  
23 Burdock Powertech decision.

24 JUDGE BOLLWERK: And so, one could look at this then as saying in  
25 legal or technical -- well, legal or technical or factual -- technical/factual

1 contentions we treat slightly differently, but, one, you look at this  
2 contention as saying that the legal dispute needs to be resolved first. And  
3 then, in theory, if joint petitioners are successful, then obviously the  
4 application is going to be deficient because there is no baseline set, and  
5 therefore they each move to the next step which is -- right, and we need to  
6 decide how that baseline is to be set. On the other hand, if it's that and the  
7 applicant were to prevail, then in theory the contention is resolved.

8 MR. FETTUS: Correct.

9 JUDGE BOLLWERK: Okay.

10 MR. FETTUS: I understand your question correctly. And we would  
11 also suggest that if you look to the declarations posed by our experts, there's  
12 a path forward on the technical issue of how a baseline should be set. There  
13 is a path forward to commence discussions. From there, we don't know.

14 JUDGE BOLLWERK: All right. Any questions at this point for the  
15 petitioners? All right, let me turn then to the applicant.

16 MR. PUGSLEY: Thank you, your honor. With respect to contention  
17 one, prior to getting into the substance of this contention, we'd like to note  
18 that as a matter of law the inquiry into contention admissibility is a separate  
19 inquiry from that of standing and that the arguments made in the contention  
20 section of a petitioner's brief is what should be focused on in terms of  
21 determining whether or not it is admissible. So, hypothetically, if something  
22 was raised in standing but not raised in contentions, or vice versa, it should  
23 not be considered the other way around.

24 With that said, I think that the -- we'd like to start with the  
25 petitioner's mention of 10 CFR Part 4032 (b). I know Judge Cole has heard this

1 argument ad nauseam in the Powertech case recently last year, however, I think  
2 it's important for us to lay out the ground work for the applicability of that  
3 regulation in this proceeding given new developments in Commission regulations.  
4 Part 4032 (b), as stated earlier by Mr. Fettus, is a regulation that imparts  
5 upon a licensed applicant the limitations of site-specific activity that may be  
6 conducted for a given project. So, for example, there are items that you are  
7 permitted to do when composing a license application that includes assessing  
8 groundwater to a certain extent. And there are items or tasks that you cannot  
9 engage in until a license is issued by the NRC staff.

10           The position levied by the staff prior to the most recent  
11 construction rule approved by the Commission was that the list of activities  
12 that were not permitted to be engaged in until a license was issued included  
13 the installation of what is called in industry a Wellfield package. Wellfield  
14 packages is comprised of the set of -- and when I say "a set," all of the  
15 injection and recovery or production wells, however you wish to refer to them,  
16 as well as a complete monitor well network or system that is designed to serve  
17 as an early warning for a potential that is referred to as an "excursion" in  
18 the industry, which is the detection of constituents from the recovery zone  
19 where the injection and recovery wells are to a monitor.

20           That position was further clarified and not modified in the  
21 Commission's most recent construction rule as cited in our brief on Page 20.  
22 This rule laid out specific examples of items that were not considered to be  
23 construction, and these items do not include the installation of a complete  
24 Wellfield package. This position, both prior to the rule and during the  
25 Powertech hearing and after the rule was finalized, is presumably embodied in

1 NRC staff's NUREG-1569 entitled "Standard Review Plan for In Situ Uranium  
2 Recovery Facilities." We're in chapter two of that guidance, entitled "Site  
3 Characterization," as discussed on pages 18 to 20 of our brief, lays out the  
4 limitations on the type of water quality data that may be gathered from the  
5 site prior to the issuance of a NRC license.

6 Chapter five, on the other hand, which is entitled "Operations," is  
7 the staff's listing basically of the items that you will be required to engage,  
8 to gather and the tasks you may engage in after issuance of that license. The  
9 problem here is the fundamental basis of this contention is there's an  
10 inadequate definition of what we refer to as baseline water quality. Baseline  
11 water quality is specifically referred to in 10 CFR Part 40, Appendix A,  
12 Criterion 5(B)(5) as one of the primary goals of groundwater restoration, which  
13 is known as baseline or a maximum contaminant level, whichever is higher.

14 However, in order to properly have what is referred to as baseline,  
15 you must -- prior to determining what that range is or that number may be --  
16 you must have installed the entire Wellfield package because the -- to ask an  
17 in situ recovery license applicant, to properly determine what is baseline  
18 prior to the installation of that Wellfield package is to ask the impossible  
19 according to the regulation because it is -- there is a virtual certainty that  
20 that number will change after the Wellfield package -- the entire Wellfield  
21 package and monitor well network are installed.

22 Thus, we find that the petitioners' arguments regarding the  
23 application of Part 4032(b) here, as well as the interpretation levied by the  
24 board in Powertech does not properly apply the regulation as it currently  
25 stands.

1           The second point is going specifically to what -- to the reliance  
2 on Criterion 5 by the petitioners. The reason this is in error is because of  
3 what was just said, that if you want to have baseline as contemplated by that  
4 Criterion in Appendix A of Part 40, if you want to have baseline that gives you  
5 that number, that allows you to properly detect excursions at monitor wells at  
6 your site in a specific Wellfield -- not on a project, at a specific Wellfield  
7 -- you have to know what baseline is. And the regulation of Part 4032 (b) does  
8 not allow us to get there at this stage of the proceeding.

9           We believe there is no dispute of law here because the commission's  
10 new construction rule has laid that to rest. And it is currently Strata's  
11 position that based on federal register notice issued memorializing the final  
12 rule as well as the response to comments still prohibits Strata from installing  
13 a full Wellfield package at its site. Hence, we would run afoul of the  
14 regulation. As is explicitly said in its provisions, it can serve as grounds  
15 for denial of your license. That is something this company is not prepared to  
16 run the risk of.

17           The next point, your honors, is with respect to Mr. Fettus'  
18 reference to deviations from NRC guidance. I think we, as well as NRC staff  
19 counsel has alluded to, the curators of the Missouri case, which, if I may  
20 quote you, I would quote, "A licensee is free either to rely on NUREGs and  
21 regulatory guides or to take alternative approaches to meet legal requirements  
22 as long as those approaches have the approval of the Commission or NRC staff,"  
23 i.e. if the Commission has approved the approach in either a policy statement,  
24 a -- what is referred to as a regulatory issue summary or RIS, or any other  
25 interpretation, then we are free to do so. However, it is also permissible to

1 deviate from the guidance in the instant case, if we did at all, if because NRC  
2 staff can review and approve the approach that was taken by the applicant,  
3 hence the phrase "guidance is just that." It's guidance.

4 Another point regards the petitioners' reliance on 10 CFR Part  
5 51.45. I -- Judge Cole, again, has heard this in the Powertech case, that Part  
6 51.45 of NRC's Part 51 regulations, which, by the way, it is not NEPA that the  
7 Commission complies with; it is the Commission's interpretation of NEPA in Part  
8 51 because it is an independent regulatory agency. Part 51.45 does not have  
9 any prescriptive requirements for, in this case, defining baseline in an  
10 adequate manner. It merely states that you have to address the issue. And  
11 because of what was just discussed previously regarding Part 4032 (b), in order  
12 to rest a legal challenge on Part 51.45, you have to properly understand what  
13 is permitted under Part 4032 (e). So, as you can see, there is an inextricable  
14 link between those two regulations here.

15 Another point that goes directly to the heart of the matter of Part  
16 51.45 and is that Strata's license application specifically addresses the areas  
17 that are deemed to be deficient. And I'll give you a few examples if I may.  
18 Historic boreholes, as they are referred to, are directly referenced in the  
19 petitioners' contention, in their pleading, and we have addressed that at the  
20 technical report, Pages 5-83, 5-87 and associated addenda. We've cited to  
21 these things in our pleadings. The pre-operational program is laid out, how  
22 water quality was assessed, what was done, and what the results were, including  
23 data analyses and conclusions.

24 The last point, if I may, your honors, is to bring up a point that  
25 is not often made with respect to admissible contentions, and that is prior to

1 the 10 CFR 2.309 requirements for admissible contentions being used in  
2 materials license proceedings such as the instant case, the standard that was  
3 referenced in -- and an example is when International Uranium Corporation was  
4 going through a series of license amendments for what was referred to as  
5 alternate feed processing -- the standard was is the issue to be litigated,  
6 i.e. hear a contention -- germane to the proceeding. It's Strata's position  
7 that in order for a contention to be germane to the proceeding, you have the  
8 first have had some actual harm and have it linked to the sole affiant, in this  
9 case, Pam Viviano. Nowhere could Strata find in the pleadings offered by  
10 petitioners that there was an attempt to link the substance of their contention  
11 to Ms. Viviano herself. There was no allegation that the alleged inadequate  
12 characterization of a quote, unquote "baseline" was going to have any resulting  
13 potential impact to Ms. Viviano. To open the floodgates to a broad base  
14 inquiry on the substance of a contention when there is no link to a potential  
15 impact flies in the face of every review requirement associated with NRC's  
16 jurisdiction under the Atomic Energy Act. The reason the regulations are there  
17 and the reason Part 51 exists is to require a review of potential impacts.  
18 Well, if you -- in this proceeding, we're talking about impacts to whom? And  
19 it was impacts to Ms. Viviano because she is the entity, the person -- pardon  
20 me -- who has requested representation by the Natural Resources Defense Council  
21 and the Powder River Basin and Resource Council.

22 Thus, we respectfully submit to the board that this is an issue  
23 that should be evaluated and looked at when determining the adequacy of the  
24 pleading offered by counsel for the petitioners. And with that said, I am open  
25 to your questions.

1 JUDGE COLE: Paul, go ahead.

2 JUDGE BOLLWERK: Please feel free.

3 JUDGE COLE: I think everyone generally agrees that obtaining  
4 baseline quality information is a necessary part of the process if you're going  
5 to sometime later determine what was the impact of this -- what is the quality  
6 of the water after we're finished mining. We try to clean it up and how close  
7 do we get back to the baseline. Unless we have the baseline, you can't do  
8 that. Now, the problem is, as you pointed out and was pointed out by several  
9 other people, any time you try to get the baseline, you have to dig into the  
10 area. And the technique that you use to do that changes what's there. So, the  
11 question is how do we get a satisfactory baseline quality? And I don't know  
12 how to do that right now. But I think it has to be done.

13 JUDGE BOLLWERK: Is this like quantum physics? Once you measure  
14 something, you change it? I don't know.

15 MR. PUGSLEY: Judge Cole, if I may offer a couple of answers to  
16 your questions.

17 JUDGE COLE: Okay.

18 MR. PUGSLEY: The first is, without question, Strata agrees with  
19 you that baseline is an essential element of an In Situ recovery operation.  
20 And the reason is because -- for two reasons. We reference in our pleadings  
21 two values, so to speak. They're not necessarily hard and fast numbers. They  
22 are in essence ranges -- are called RTVs, or restoration target values, and  
23 UCLs, or upper control limits. The RTVs are relevant to ground water  
24 restoration baseline because they provide the operator, in this case Strata,  
25 with, as you said, the threshold you need to reach to satisfy Criterion 5(B) (5)

1 requirement for restoration to baseline or NCL, whichever's higher, or an  
2 alternate concentration limit.

3                 The UCLs are relevant to baseline because, as stated earlier, the  
4 monitor wells are designed, and it is said -- run throughout all NRC staff's  
5 reviews -- serve as an early warning mechanism for a potential excursion of  
6 fluids from the recovery area out without baseline, you are correct. We cannot  
7 determine what -- whether an excursion may or may not potentially be occurring.  
8 But the point here is in order to get to that value, in order to get to that  
9 range, we have to put in the entire Wellfield package, and we are not permitted  
10 to do so. And it would be irresponsible on the part of Strata to run afoul of  
11 that regulation because it's not that -- it's not like enforcement proceedings  
12 where if you get a violation, they can enforce against you but you don't stop  
13 operating. You can still operate. You pay the fine. You go into mediation.  
14 You do whatever's necessary. We're talking about denial of the license in its  
15 entirety here.

16                 And you know -- and I will say this. And I'm not going to speak  
17 for the other In Situ recovery licensees and applicants that myself and Mr.  
18 Thompson represent, but I will speak for Strata when I saw that if we were  
19 permitted to put in the entire Wellfield package prior to getting a license,  
20 we'd do it. It's to our benefit to do so because of just what you said, Judge  
21 Cole, that we can get that number in advance. But even the State of Wyoming's  
22 Department of Environmental Quality -- I don't remember if it was two or three  
23 years ago -- had an exchange of correspondence with NRC staff where they were  
24 saying they wanted a full Wellfield package to be put in prior to issuing a  
25 Wyoming State permit to monitor. NRC staff -- and I'll sum it up in one word -

1 - they said, "No. You can't do it because of that regulation." And because it  
2 stated earlier, the Commission's new construction rule did not modify the  
3 staff's position on Wellfield packages that was previously interpreted and what  
4 we discussed during Powertech. That rule has rather clarified the fact that we  
5 cannot cross that line lest we lose our ability to work in the future.

6 JUDGE COLE: I understand your position.

7 MR. PUGSLEY: Thank you, sir.

8 JUDGE BOLLWERK: Dr. Mossman, go ahead.

9 JUDGE MOSSMAN: In terms of the definition of baseline, are we  
10 referring to an array of baseline values in the field, or are we looking at  
11 averages of baselines for a subpopulation of wells in the field? Or are we  
12 looking at a grand average baseline for all of the wells in the field? Could  
13 you clarify what it is that we mean in a spatial sense?

14 MR. PUGSLEY: Certainly. Certainly, your honor. First of all, let  
15 me make a broad statement that when determining baseline in general, it is on a  
16 Wellfield by Wellfield basis. It is not a project-wide baseline because every  
17 ore area -- every -- pardon my language -- every area where you have identified  
18 ore at a site is different. And you have to understand what the constituents  
19 of concern are, A, within the ore recovery zone; B, at the monitor well network  
20 so that you can properly determine when an excursion occurs or you can have  
21 early warning of the excursion; and C, on a regional basis because that is what  
22 you are required to do to understand the area.

23 Now, with respect to your question about averaging, the point  
24 raised by Mr. Fettus about we can somehow skew baseline quality by the way we  
25 average things -- that issue was litigated in the Hyrdro Resources case, was --

1 Mr. Fettus was the counsel on -- or for a certain period of time. And as you  
2 are assuredly well familiar with the length of that case, the issue of  
3 groundwater quality including the methodology by which baseline is done via  
4 averaging was not dismissed but disagreed with by the licensing board, the  
5 Commission and -- I beg your pardon. I can't remember if that specific issue  
6 was litigate in the United State Court of Appeals, the 10th Circuit, but that  
7 case went all the way up to the Supreme Court, and cert was denied. Thus, the  
8 argument that we are somehow skewing baseline with an averaging method has  
9 already been ruled upon by the Commission as well as the federal courts.

10 Now, with respect to averaging in general, the answer is that there  
11 is averaging done, but the way of looking at parameters for constituents and  
12 these -- and mind you, sir, the types of constituents that are present within  
13 an ore zone or a monitor well network range from radionucleides, uranium,  
14 radium, whatever it may be, hazardous constituents: selenium, lead, whatever,  
15 and also ones that are not -- that don't have NCLs promulgated by EPA, ones  
16 that are not hazardous constituents. So what it is, it is a range of  
17 constituent-specific baseline values that we need to have to determine  
18 restoration goals, RTVs.

19 Now, with that said, it is important to note that this is not one  
20 of those areas where you sample the wells in an entire Wellfield package and  
21 you get the same number for selenium here. You get the same number for  
22 selenium here. Typically, your baseline -- and this goes to restoration as  
23 well -- your baseline ends up being a range of values where 40 percent of them,  
24 50 percent of them are above, slightly above; 50 percent of them are slightly  
25 below. What you end up having is you end up having a round number average or

1 range average that you can say this is my benchmark or, as NRC staff would say,  
2 this is my goal, my goal, my primary goal. We do not disagree with  
3 petitioners' reference to a primary goal of baseline or NCL, whichever's  
4 higher. And we understand the fact that they conceded that we are entitled to  
5 site-specific alternate concentration limits.

6                 However, in order for the -- not only the substance but the spirit  
7 of the criterion to be satisfied in accord with NRC's statutory mission of  
8 adequately protecting public health and safety, we have to have that range,  
9 that value. And we don't have that now. And we don't -- we concede that. We  
10 don't have it.

11                 JUDGE BOLLWERK: I had a couple questions. I had characterized the  
12 contention potentially as a legal contention with potential then to move on to  
13 other things once that legal issue was resolved. You have any comments on  
14 that?

15                 MR. PUGSLEY: Well, your honor, I think that the legal dispute, if  
16 there was one, has been resolved by the Commission's instruction. And  
17 basically while we could be talking about a dispute of law between the  
18 petitioner and the applicant, what we're talking about here is NRC regulation.  
19 And to say that there is -- that we can sit here and dispute what we can and  
20 cannot do is a pointless dispute because it's laid out in NRC's regulations and  
21 the final construction.

22                 In our view, there is no dispute because -- but then again, your  
23 honor, let's not try -- let's not project a broader range of inquiry here for  
24 purposes of this contention in terms of what we can and cannot do prior to  
25 getting a license. For the purposes of this contention, we are talking about

1 baseline water quality. Baseline has referred to in Criterion 5(B)(5). And in  
2 Strata's opinion, that legal dispute will settle with the Commission's final  
3 instruction.

4 JUDGE BOLLWERK: Okay, we'll hear something from the joint  
5 petitioner about that when we get to their reply, but I take it one of your  
6 points here is the Powertech, the Dewey Burdock case was decided before the  
7 change in the rule and very recently I know, so --

8 MR. PUGSLEY: Yes, sir, it was. If I may, the final rule for the  
9 construction rule was -- the proposal rule came out --

10 JUDGE BOLLWERK: Back in September, October, something like that.

11 MR. PUGSLEY: Yeah, it was something -- yes, sir. The proposal  
12 rule was in July of last year. And the final rule was more recently this year.

13 JUDGE BOLLWERK: All right, and the Powertech case, a little older  
14 than that.

15 MR. PUGSLEY: Yes, yes, sir.

16 JUDGE BOLLWERK: In terms of the question or the point you made  
17 about germaneness, you're talking about germaneness relative to Sub Part L, the  
18 old Sub Part L rule. Is that correct?

19 MR. PUGSLEY: Yes, sir. That was the --

20 JUDGE BOLLWERK: Not the aspects provision of 2.714 that used to be  
21 there where you had to show an aspect first and then you went to the contention  
22 for admissibility.

23 MR. PUGSLEY: Yes, sir. That's correct.

24 JUDGE BOLLWERK: All right. As someone who had something to do  
25 with putting that word in that rule, I always envisioned it as sort of being

1 like if you wanted to talk about the moon is green cheese, then that's not  
2 germane. You're going a little bit further than that. You're basically saying  
3 your standing and the contentions that you can litigate have to be directly  
4 tied together. I'm not sure that I'm aware of that proposition ever being  
5 accepted by the board.

6 MR. PUGSLEY: I understand what you say, sir, but let me say that  
7 the argument STRATA presents with regard to using the term "germane" is  
8 directly in accord with NRC's review responsibilities to assess the potential  
9 for impacts. In this case, we're talking -- I mean, we just got done talking  
10 about standing to find out whether a particular person has alleged an injury in  
11 fact. So really, the scope of the inquiry here is the potential impacts that  
12 person -- and because if not, your honor, then we are talking about the moon as  
13 green cheese because we're talking about a opening floodgates to just are there  
14 any impacts at all. And that's not what we're here to litigate.

15 JUDGE BOLLWERK: Well, in theory, if someone had established their  
16 standing and they have some concerns about the environmental impact statement  
17 or the environmental report in terms of the impacts it discussed, even if that  
18 doesn't have a direct impact on them, you know, the Devil's Tower -- I mean, I  
19 don't know that she ever goes to Devil's Tower. I have no idea. But if she  
20 wants to talk about the light impact of Devil's Tower relative to the NEPA  
21 statement, in theory, if she can establish her standing and make an admissible  
22 contention out of it, she can do that.

23 MR. PUGSLEY: Well, I respectfully disagree, your honor. I  
24 understand your point, but I -- we -- Strata believes that this is -- that the  
25 lack of a connection between the parties seeking to intervene and the proposed

1 action is important to the inquiry of germane -- germaneness, so that is our  
2 position.

3 JUDGE BOLLWERK: Okay. Thank you.

4 MR. PUGSLEY: Thank you, sir.

5 JUDGE BOLLWERK: Anything that the two board members have at this  
6 point? All right, let's turn then to the staff. Thank you, sir.

7 MR. PUGSLEY: Thank you.

8 MS. SAFFORD: Good morning.

9 JUDGE BOLLWERK: Morning.

10 MS. SAFFORD: We've heard a number of issues raised and already  
11 discussed, so from staff's perspective, I'm going to run through the highlights  
12 of our position. And then I welcome any questions and clarifying questions  
13 that you might have.

14 We heard earlier from the petitioner that the contention states  
15 that the application fails to provide adequate description of the present  
16 baseline groundwater quality. The staff positions that the petitioners have  
17 failed to support that assertion and that they have failed to support their  
18 assertion that the application fails to demonstrate the groundwater samples  
19 were collected in a scientifically defensible manner, using proper sampling  
20 methodologies. The staff's position is that the petitioners have failed to  
21 properly link their assertions with a violation of applicable regulations and  
22 requirement of the application.

23 With respect to the baseline water quality, petitioners claim that  
24 the applicant should include the baseline water quality data prior to the  
25 beginning of any significant industrial activities. What's lacking in

1 petitioners' contention, however, is the link to the specific applicable  
2 regulation or even guidance to support this assertion that the applicant would  
3 need to provide historical data in order to provide what petitioners allege is  
4 a true baseline.

5 Petitioners have not provided sufficient information to support  
6 their argument that NUREG-1569, specifically sections 2.7.1 Sub 4 and 2.7.3 Sub  
7 4 are not satisfied. Those sections specify that an applicant provide --  
8 excuse me -- assessments of available groundwater resources and groundwater  
9 quality, including quantitative descriptions of chemical and radiological  
10 characteristics of the groundwater and potential changes in groundwater quality  
11 caused by operations, as well as, quote, "reasonably comprehensive chemical and  
12 radiochemical analysis of water samples." Again, as I stated previously,  
13 petitioners assert a new standard, what they call a true baseline. The  
14 definition for such standard is not consistent with the current regulatory  
15 requirements and guidance.

16 With respect to the pre-construction issue in 10 CFR 4032 (e),  
17 staff does not take issue with the current definition, which, I think to  
18 clarify, became effective September 15th of this year, for what constitutes  
19 instruction, and nor does staff take issue with the applicability of Criterion  
20 7 for providing preoperational baseline groundwater data. In fact, this  
21 information that's provided is used by staff as a general site characterization  
22 tool for purposes of NEPA as well as to confirm the proposed conceptual hydro  
23 geological model of the aquifer. The preoperational data is a general look at  
24 the effect of the environment consistent with NEPA.

25 The second part of Criterion 7, the operational monitoring program,

1 as well as Criterion 7A, the ground water monitoring around ponds and tailings  
2 and impoundments are not applicable to staff's pre licensing review but rather  
3 are used once operations have commenced.

4           With respect to the matter in which groundwater samples were  
5 collected and whether they were done in a scientifically defensible manner  
6 using proper sampling techniques, the petitioners have similarly failed to  
7 point to specific regulatory requirements that the applicant has failed to  
8 satisfy. For example, the petitioners' claim that the data provided in the  
9 application was not analyzed in a meaningful, statistical manner. However,  
10 it's not clear from either the hearing request or the reply brief what  
11 information specifically is not provided in a statistically meaningful manner.  
12 In fact, staff will be able to use the information that was provided in the  
13 application to independently verify the applicants' conceptual model and  
14 analysis. And the supporting guidance in NUREG-1569 states that applicants  
15 should document individual sampling results in order for NRC staff to evaluate  
16 the quality of the data and to establish that the data are consistent with the  
17 applicants' conceptual model. That criteria has been met, therefore there is  
18 no issue data provided in the application.

19           Finally, petitioners raised a number of other issues in their  
20 hearing requests such as whether there's sufficient detail regarding the ore  
21 zone, the presence of abandoned ore holes. Like the issues raised earlier,  
22 petitioners seem to be challenging applicants' data  
23 collection methodologies, asserting that they would prefer that the data be  
24 presented in a different manner or asserting that, in their opinion, the data  
25 could be collected and presented differently but because the petitioners have

1 not provided an explanation as to the regulatory requirements, how they've not  
2 been met, and how the application has failed to satisfy the specific  
3 requirements, Contention 1 must not be admitted.

4 JUDGE BOLLWERK: All right. Questions? Right. I have the --do you  
5 I think I heard it but now let me just clarify and make sure, do you view  
6 again, the Powertech case was decided then the rule was adopted. Did the rule  
7 -- and your feeling is that the rule was clarified or if there was any  
8 ambiguity before the Powertech case it no longer exists?

9 MS. SAFFORD: Yes.

10 JUDGE BOLLWERK: So your position is the same as the applicants',  
11 in that regard?

12 MS. SAFFORD: Yes.

13 JUDGE BOLLWERK: All right. This is a question perhaps I should  
14 have asked the applicant first I take it as I'm hearing, the technical  
15 matter, there is no way to get this baseline without going to the extent to  
16 which you say you basically have to build out the facility. Is that correct?  
17 No way, no how; it can't be done any other way.

18 MR. PUGSLEY: That is Strata's position.

19 MR. THOMPSON: Chapter 5 versus chapter 2.

20 MR. PUGSLEY: Yes, sir. That's our position.

21 JUDGE BOLLWERK: All right. And does the staff agree with that,  
22 that there is no other way to baseline other than to build a facility?

23 MS. SAFFORD: Yes, that's correct.

24 JUDGE BOLLWERK: All right. Any points you have, Judge Cole? All  
25 right. You've heard this argument before; I just want to make sure.

1           JUDGE COLE: I'm still worried about when you go build a facility,  
2 you mess up what's down there. You're not going to get a pristine result.

3           JUDGE BOLLWERK: Quantum physics is a wonderful thing. I won't go  
4 into it.

5           All right. I had talked briefly with the intervener and the  
6 applicant about the question whether this is a legal contention versus a --  
7 with the potential to then morph into something else. Do you have any position  
8 on that, in terms of -- I mean, the standards for admitting a legal contention  
9 are different than a strict factual contention.

10          MS. SAFFORD: I don't necessarily see a legal issue here. I think  
11 the regulations are clear. I think the supporting guidance is helpful and I  
12 don't see a legal issue.

13          JUDGE BOLLWERK: All right. So you think that basically this has  
14 been resolved, notwithstanding the Power Board's decision?

15          MS. SAFFORD: Yes.

16          JUDGE BOLLWERK: All right. And then, the applicant made a  
17 germaneness argument; do you have anything you want to say about that?

18          MS. SAFFORD: Staff is not aware of any requirement that standing  
19 be necessary tied to the subject of the contentions, as the applicant was  
20 asserting, if I am understanding correctly what he was saying. There is no  
21 precedent for that.

22          JUDGE BOLLWERK: All right.

23          CHRIS PUGSLEY: Okay, may I clarify? The position of Strata  
24 is not that the standing allegations are -- what we're saying is deficient in  
25 the pleadings is not that standing is directly tied to the admissibility of the

1 contention. What we are saying is the pleadings are deficient on their face  
2 because there is no attempt by petitioners or their experts to link the  
3 substance of their contention to their affiant. Who is making -- they are  
4 making claims of baseline was inadequately characterized. Well that's fine but  
5 how does that directly impact the person who's seeking representation? That's  
6 our claim.

7 JUDGE BOLLWERK: All right. Anything you want to say about that?

8 MS. SAFFORD: Just again, that's not a position that staff agrees  
9 with.

10 JUDGE BOLLWERK: Okay. Appreciate that. Thank you. All right.  
11 Dr. Cole? All right, then let's go back to the joint petitioners then.

12 MR. FETTUS: Let me go back to the germaneness argument, your  
13 honor, and we find this remarkable and it would turn standing inquiry on its  
14 head. The NRC responsibilities under NEPA are far broader than any specific  
15 impacts to Ms. Viviano and there is no requirement for one-to-one  
16 correspondence between the petitioners' contention data with respect to harms  
17 to Ms. Viviano. We certainly noted several harms in terms of the connectivity  
18 of the aquifers that could create that causal nexus, but that said, Ms. Viviano  
19 has an obvious stake in an adequate -- in an adequate SEIS and an inadequate  
20 ER. And that requirement of compliance with NEPA and that adequately considers  
21 not only the analysis but also the mitigation alternatives is clearly evident  
22 here. And we don't think you need to go any farther than that on the issue.

23 Turning to a couple of things: We're at something of a loss in  
24 terms of this response here, in that we don't think the preconstruction rule  
25 clarifies and ends this discussion at all because what would you have the

1 petitioners do in order to get an accurate baseline characterization rather  
2 than file a contention here? And instead of suggesting a path forward, Strata  
3 simply denies the admissibility of the contention and thus the petitioners  
4 would be in the position of never being able to raise it. And the legal and  
5 technical issues that go along with setting the background are substantial.  
6 And I would actually submit to you that the response you've heard thus far is  
7 the de facto admission from Strata that they don't have a full characterization  
8 of existing ground water. And you have a conflicting opinion with Dewey  
9 Burdock that says you need -- and Judge Cole was clearly a part of that process  
10 -- you need to have that picture so we know what we're looking at in terms of  
11 restoration. It's just a necessity.

12 So I would suggest to you that dismissing this contention at this  
13 stage would be not only improper in terms of the position that it would put the  
14 petitioners in, in terms of realistically being part of setting an accurate  
15 baseline scenario, it would also simply go -- run entirely afoul of 51.45's  
16 requirement that an analysis of the environmental impacts of irretrievable  
17 commitment of resources and potential adverse effects, which you have to have  
18 baseline to understand that, we have to have that at the time the application  
19 is submitted. We don't think we have that here. Without an adequate  
20 characterization of baseline, any such impact analysis or additional mitigation  
21 measures down the road is essentially meaningless.

22 Also, to the extent that the NRC staff flyspecks and says, well, we  
23 don't agree with the way their experts have characterized this or the way their  
24 experts have suggested that bore holes and cross contamination of aquifers  
25 might not be a problem. We don't think it's a problem. That is an issue

1 precisely, your honor, for the merits on setting background. That has no place  
2 in the admissibility of discussion here, and we think that we've far exceeded  
3 any standard of the strict by design NRC rules in order to place an admissible  
4 contention.

5 I would just remind this court, and it needs no real reminding,  
6 that when these Sub Part L proceedings were adopted long ago and discovery was  
7 done away with within the functioning of these proceedings, it was done away  
8 with because there were intervention petitions being filed with hundreds of  
9 contentions and cases were being created via discovery and cross examination.  
10 That's clearly not what's been done here. This is a carefully crafted  
11 contention on baseline water quality that goes to something that was at the  
12 heart of what Judge Cole was well aware is a significant dispute and problem  
13 and it was well supported by three expert witnesses.

14 With that, I'll answer any more questions and I hope this dispenses  
15 with the issue.

16 JUDGE BOLLWERK: Good. Let me see if I understand. By baseline,  
17 you're not not restricting that to a pristine environment, right? Or

18 MR. FETTUS: Correct. We don't know -- well, we think the  
19 environment there could be potentially significant affected by what happened  
20 with the Nubeth drilling. We don't know. Again, the oil and gas drilling,  
21 there's a whole host of issues that Judge Cole, to his probably great  
22 misfortune, is well aware of that we can try and create a composite picture of  
23 what's underground. It's a very complicated thing that we actually agree. I  
24 agree with Mr. Pugsley that looking at one well set, you're going to probably  
25 going to get very different data from another well set that may not be that far

1 away. But the question is how we create and look at that data and how we  
2 interpret that data to create that composite picture to then set that baseline  
3 requirement and then set those restoration requirements.

4 And that, to me, is a set of significant that, to me nothing  
5 could more define a set of factual inquiries and disputes and potential for  
6 either resolution or requirements on how that's going to go forward.

7 JUDGE BOLLWERK: You mentioned you didn't think the construction  
8 permit rule or the -- I'm sorry the preconstruction rule didn't clarify -- I  
9 mean, are you saying that it didn't address this? Or are you saying that it's  
10 still up in the air?

11 MR. FETTUS: I think it does away with the requirements under 4032  
12 and certainly under 51.45. Those requirements are still good law.

13 JUDGE BOLLWERK: Right. So you're basically saying you didn't  
14 address this issue?

15 MR. FETTUS: I would --

16 JUDGE BOLLWERK: There was a situation before Powertech. Now the  
17 rule comes out. Now, how have things changed, in your opinion? That's what  
18 I'm asking for.

19 MR. FETTUS: I think it was Powertech's position that it can do no  
20 more than put in an absolute complete Wellfield set. I think we have a  
21 difficult position that we put in front of you, your honors, but we think that  
22 there's substantially more that could be done to create a composite picture of  
23 baseline and short of putting in a whole Wellfield package that gets their  
24 license denied. There's no reason why they couldn't present as part of any  
25 sort of package going forward, here's how we would propose to do it in the

1 process and having that be part of the litigation. That's certainly -- that's  
2 certainly possible but let's actually go back to NEPA, which is the heart of  
3 this concern again. This requires a description of the effective environment,  
4 which necessarily includes an inscription baseline water quality. I know you'd  
5 all agree with that. It also requires an analysis of no action alternatives,  
6 which is premised on the status quo of where we are. We don't know where the  
7 status quo is and the preconstruction rule doesn't address that issue of what -  
8 - it doesn't say you don't know or you don't get to know what the status quo  
9 is, which would put petitioners in a position of never being able to actually  
10 understand the composite picture of baseline going forward. Which, as far as  
11 our NEPA rights, we have to -- we must present those to you now and be parties  
12 to a licensing proceeding or we don't get to present them in any meaningful way  
13 later.

14 JUDGE BOLLWERK: You looked like you wanted to say something. No?

15 Obviously if a rule, notwithstanding your concern about NEPA, if a  
16 rule passed by the Commission says that we shall do X, Y or Z, we have to do X,  
17 Y or Z because that's the Commission's rule. And if it violates NEPA that may  
18 be a different issue and that may be something that has to be raised in the  
19 courts. Again, I just want to make sure that I understand, you're saying that  
20 the construction permit rule, in fact, does not address this. It leaves it  
21 open.

22 MR. FETTUS: Well, it doesn't dispose of your statutory NEPA  
23 obligations, certainly not. And it also doesn't in any way run contrary to  
24 establishing what's a meaningful baseline. It says there are limits on what  
25 you can do and how much you can put in. Strata has a basis to be concerned

1 that they don't want to exceed something that the Commission said, don't do  
2 this. That doesn't mean, though, that they should turn and then say, but  
3 there's no admissible contention here. To the contrary, we think this is  
4 precisely an area where there's reasonable dispute on how to present that  
5 composite picture of what's underground. And this is precisely where the board  
6 should allow for litigation and hopefully there will be a resolution that  
7 addresses what Strata feels are their obligation under the rules as well as  
8 hopefully the NRC's obligations to the statute.

9 JUDGE BOLLWERK: Can the board make a ruling that abrogates the  
10 rule of the rule really requires something? Can we say, don't follow that rule  
11 because it violates NEPA?

12 MR. FETTUS: You could. I think you're under -- I think, I mean,  
13 you could. I mean, sure you could

14 JUDGE BOLLWERK: You could. Well, right. But that's not going to  
15 survive the --

16 MR. FETTUS: But respectfully, your honor, I think you can  
17 harmonize the two. I think there can be a definitive requirement for Strata to  
18 have to come up with a way to present that composite picture and staff to make  
19 them present that composite picture that complies with both, the  
20 preconstruction licensing rule as well as Criterion 7 and their NEPA  
21 obligations. You're -- the only obligation I see for the board, your honor,  
22 that makes this relatively straightforward for you, is that you're under an  
23 obligation to harmonize rules where you see potential conflict. And I think  
24 this is an opportunity for you to do so.

25 JUDGE BOLLWERK: All right. Thank you. Any the questions anybody

1 has? Okay.

2 It's about 11:30. We have a choice here. We could either take a  
3 lunch break now and avoid the rush to the cafeteria or we can proceed on. I  
4 don't know if the board has a preference, or? No. Let me ask the party. What  
5 would you prefer to do? Do you want to take a lunch break now and get back, or  
6 would you prefer to proceed on?

7 MS. SAFFORD: I'm flexible either way.

8 JUDGE BOLLWERK: Anybody?

9 MR. PUGSLEY: I think we ought to take it now so we can avoid the  
10 rush. So we can get right back to the arguments.

11 JUDGE BOLLWERK: All right. Want to take an hour, then? Come back  
12 at 12:30?

13 MR. FETTUS: Forty five minutes?

14 JUDGE BOLLWERK: If that's acceptable to the parties, because  
15 you're the ones eating lunch.

16 MALE SPEAKER: All right, an hour.

17 MR. PUGSLEY: What are we, negotiating here?

18 (laughter)

19 JUDGE BOLLWERK: No, we're not. I just -- harmonized.

20 MR. PUGSLEY: We're harmonizing (inaudible)?

21 JUDGE BOLLWERK: All right now it's going to be a little less than  
22 an hour. Should we say 12:30? Does that work for everybody?

23 MR. PUGSLEY: Your honor, before we recess Strata would like to  
24 respectfully request at the conclusion of all argument that the board be  
25 willing to entertain a procedural matter?

1           JUDGE BOLLWERK: All right. It would be on the oral argument on  
2 the contention.

3           MR. FETTUS: In ancillary matter.

4           JUDGE BOLLWERK: Okay. All right. All right, so we'll come back  
5 at 12:30, then.

6           (Whereupon, the foregoing matter went off the record for lunch at 11:30  
7 a.m. and went back on the record at 12:30 p.m.)

8           JUDGE BOLLWERK: It's about 12:30 and we're back from our lunchtime  
9 break and ready to proceed with the argument on the balance of the contentions.  
10 I'll just check in with what the parties have at this point? Ready? Oh, yes,  
11 sir.

12          MR. FETTUS: I have one issue, Your honor.

13          JUDGE BOLLWERK: Yes, sir.

14          MR. FETTUS: That was a clarification on what Mr. Pugsley asked at  
15 the close of the last session? Let me just make sure you asked for a motion  
16 there, or a --

17          MR. PUGSLEY: Well it's related to a potential motion but to  
18 understand the board's view on the procedure

19          JUDGE BOLLWERK: Okay.

20          MR. PUGSLEY: That's all.

21          MR. FETTUS: You just asked for clarification --

22          MR. PUGSLEY: That's correct. And in the event that the  
23 clarification does not meet what is anticipated then you may request -- offer a  
24 motion.

25          MR. FETTUS: I understand. All right, thank you.

1                   JUDGE BOLLWERK: I've got some procedural things to take care of at  
2 the end; we'll do it as part of that process.

3                   MR. PUGSLEY: Thank you, sir.

4                   MR. FETTUS: Thank you, your honor.

5                   JUDGE BOLLWERK: All right, we're on Contention 2 now and the  
6 contention reads, "The application fails to analyze the environmental impacts  
7 that will occur if Strata cannot restore groundwater to primary or secondary  
8 limits." I turn then to the petitioners.

9                   MR. FETTUS: Contention 2. Thank you, your honor. Strata's  
10 application falls short of the requirements of 10 CFR 51.45 in NEPA. It fails  
11 to evaluate the reasonable likelihood that Strata would be unable to restore  
12 groundwater to primary or secondary limits. And I don't need to walk your  
13 honors through because again, albeit courtesy of knowing it, it's been obvious  
14 from the questions today that you clearly have read the briefs thoroughly, and  
15 Strata has also noted that they acknowledge that we acknowledge there are  
16 essentially three standards that could be applicable to groundwater  
17 restoration. And that is, restoration of the baseline, restoration to EPL's  
18 maximum contaminant limits under the Safe Drinking Water Act or third,  
19 restoration to an alternative concentration limit that the staff sets at some  
20 later date.

21                   Strata claimed that 51.45 does not require that the ER or the  
22 environmental report to assess potential impacts of failure due to complete  
23 well restoration in accordance with Criterion 5(B)(5) requirements. And Strata  
24 argued that the Nubeth projects, NRC approved restoration limits, demonstrates  
25 that Strata, too, is going to comply with the proper regulations for ground

1 water restoration.

2 Your honor, Strata basically misunderstands the complaint here.  
3 The crux of Contention 2 is not compliance or lack of compliance with Criterion  
4 5(B)(5) in the Regs 10 CFR 40, Appendix A 5(B)(5) that's where it's referring  
5 but rather, the need for analysis of impacts that result from the project, even  
6 presuming compliance. NEPA always presumes that the agency action in question  
7 or in the case of 51.45, the applications of those actions is lawful. The  
8 entire purpose of the statute is to ensure that agencies and those acting with  
9 their approval, i.e. through license or permit, do not take such lawful actions  
10 without first considering the environmental impacts of those actions. Thus,  
11 even if the NRC approves an ACL, and Strata meets that limit, an aquifer will  
12 have been degraded.

13 As petitioners' experts explained, this is a reasonably foreseeable  
14 possibility. In Section 51.45, we require Strata to analyze the environmental  
15 effects. More importantly, we certainly will require our staff to analyze the  
16 environmental effects under a supplemental departmental impact statement.

17 Staff's claim is also not correct. Doctors Moran and Abitz both  
18 provide specific historical and technical evidence demonstrating why Strata is  
19 unlikely to achieve primary or secondary restoration standards during the  
20 decommission, and why it's almost, your honor, respectfully, a virtual  
21 certainty that ACLs, or at least some parameters, will be arrived at.

22 Neither Strata nor NRC staff have provided evidence suggesting that  
23 the Ross project will not cause aquifer degradation and even if Strata complies  
24 with NRC provided ACL, this contention meets the requirements of 2.309(f)(1)  
25 and thus should be omitted. I'm happy to take any questions.

1                   JUDGE BOLLWERK: Any questions from Judges Cole or Mossman? Okay,  
2 I have a question, then. I mean, the assertion is that the impact to be  
3 assessed and what would occur under a staff establishment -- staff established  
4 -- excuse me -- alternative concentration level with the ACL.

5                   MR. FETTUS: Correct.

6                   JUDGE BOLLWERK: But how you assess this of the staff setting the  
7 ACL? In other words, you ask the staff to set the ACL now, but they're -- I  
8 expect they're going to tell us they can't do that?

9                   MR. FETTUS: No, your honor. They certainly can't and that's one  
10 of the problems we've faced petitioners in these things, where basically, the  
11 petitioners are being asked to, say, what are the groundwater restoration  
12 implications here? NEPA certainly has a statutory responsibility, or obligates  
13 the agency with the statutory responsibility, to look at those irretrievable  
14 impacts or even significant environmental impacts. We would respectfully  
15 suggest that with every ISL site there have been significant aquifer impacts.  
16 Thus, it's a reasonably foreseeable exercise in its NEPA requirements that  
17 staff look at that and, under 51.45, in ER, which is essentially analogue to  
18 the staff's SEIS obligations that the applicant look at that. They have failed  
19 to do so.

20                  This is not about whether Strata complies with an ACL. We don't  
21 even know what that ACL is going to be. We have ample evidence in history that  
22 that's what's going to happen.

23                  JUDGE COLE: But how are they going to estimate the impact of  
24 something they don't know?

25                  MR. FETTUS: They can certainly estimate the impact, looking

1 historically at what some of those impacts could be.

2 JUDGE COLE: At other mines.

3 MR. FETTUS: At other mines. That's right. And, as well as,  
4 actually, your honor, this actually was in Contention 1 a little bit, knowing  
5 hopefully with a better sense of what background will be, you'll have a better  
6 sense of what the implication is going to be if there's a departure similar to  
7 other mines, a departure from that. What will that be? And, your honor, we  
8 certainly suggest that NEPA envelopes such analysis and potential mitigation  
9 measures.

10 KENNETH MOSS: What would -- on the point of making the comparison  
11 with other mines, what would be the criteria that you think are important in  
12 establishing comparability? Do you follow what my question is? In other words

13 MR. FETTUS: Partially, your honor. I may ask for more  
14 clarification if I start to answer it and I wander.

15 JUDGE MOSSMAN: What I'm saying is that I have mine A and mine B or  
16 I have remainder region A, region B and I'm trying to establish that these are  
17 comparable for the purposes of applying some other metric. What do you think  
18 ought to be the criteria for establishing a comparability between the two  
19 sites?

20 MR. FETTUS: Well first, your honor, I think I would get pretty  
21 deeply into the merits but if I can answer your question succinctly, I'd say  
22 certainly we'd be happy to concede that every mine site is going to be  
23 different in nature and geology and morphology and groundwater quality, to  
24 begin with. There's a whole host of factors that are going to make everything  
25 an apples and oranges comparison. But what I would respectfully suggest is, in

1 all of those apples to oranges comparisons, as far as we can tell the  
2 historical record shows that there's been significant degradation at all of  
3 those mine sites; and ACLs, whether the state's proven or the NRC have been  
4 resorted to for a number parameters in different mines in different ways.

5 That said, that's precisely the kind of analysis that NEPA requires  
6 in terms of what are the potential impacts going to be and what are the  
7 potential mitigation measures going to be? I think they would all have to be,  
8 at some level, especially when you get into the question of mitigation  
9 measures, site specific. Because site A will be different from site B in some  
10 ways and some mitigation measures might work for site A won't work for site B,  
11 or vice versa. But that's a question for the merits down the road, not whether  
12 this is a properly pled contention in terms of -- where interveners have a very  
13 different road and why we structured this contention the way we did, in  
14 contrast to some past contentions that have been put before the board is, we  
15 acknowledge that an ACL is within the capacity of the NRC to set. What hasn't  
16 happened, and what hasn't happened at the early stage, at the commencement of  
17 the application is an analysis of what it means to set such an ACL. And  
18 historically, the NRC, which they failed to do in their generic EIS to do a  
19 composite, thorough and fully quantitative look at what happened at mine site  
20 after mine site after mine site and make some set of comparisons as to what the  
21 impacts have been at ISL sites throughout the country and then, what the  
22 potential mitigation measures could or would be at -- and then certainly  
23 applying it to this particular site.

24 This is something that doesn't exist within the ER now. It doesn't  
25 exist within the staff's EIS, which hasn't been done, but we have to file our -

1 - any contention based on NEPA by the NRC's own rules, we have to file that  
2 contention now. And we're respectfully certain we've done so here.

3 JUDGE BOLLWERK: And based on your whatever knowledge you have of  
4 what's happened at other mine sites, what sort of thing do you think they're  
5 going to suggest that needs to be done or needs -- I meant what other types of  
6 impacts are you're looking at? You've obviously thought about this.

7 MR. FETTUS: We have, we do. And there are several things. First,  
8 just looking at the actual well sites, we would -- and, your honor, what I  
9 would suggest would be very instructive, if you want to look at our comments on  
10 the generic environmental impact statement for some ideas of the kinds of  
11 information we think need be presented via the staff in terms of more composite  
12 picture of what's happening. We think there's been significant radium  
13 contamination, radium. We have queries about the precise nature of the  
14 reasonable range of what ACLs historically have been.

15 This is a -- the reasonable range issue is maybe one of the more  
16 important things to consider in that this is a common NEPA practice when  
17 dealing with future uncertainty. What's been done previously? What have been  
18 the reasonable range of ACLs? Meaning, did Texas do them dramatically  
19 different than Wyoming? And why? And what's the basis for that? That is  
20 precisely what should be analyzed in ER and then in subsequent SEIS, especially  
21 with respect to a form of industrial practice that we would submit to you is  
22 with virtual certainty. We'll have some measure of aquifer degradation.

23 JUDGE BOLLWERK: Right. Anything that any of the other board  
24 members have at this point? Okay. Thank you, sir. Return to the applicant.

25 MR. PUGSLEY: Okay, thank you, your honor. As you may or may not

1 have noticed from reading the pleadings, Contentions 1 through 3 are almost  
2 inextricably linked to each other with respect to their substance, so you may,  
3 during this argument from Strata, see that there are references back to  
4 statements made in the Contention 1 discussion.

5           First, it is rather confusing to Strata after reading the  
6 statements and pleadings regarding failure to restore to primary or secondary  
7 standards, and then to hear the petitioners say that they're not referring to  
8 the failure to restore to have an ACL because they're really, in light of the  
9 fact of Criterion 5(B) (5)'s wording, there are really only two standards.  
10 There's baseline or an ACL, whichever is higher, or an alternate concentration  
11 limit. So in order to properly address this argument, we must first look to  
12 the failure to comply with Criterion 5(B) (5) which Strata has committed to in  
13 its environmental report.

14           Essentially, the Northeast Nuclear Energy Company case cited by  
15 Strata speaks to this and basically, when, and I quote, when talking about  
16 petitioner it was stated that quote:

17           "He provides no further explanation or documentation for that  
18 statement and no other supporting claims that would establish a pattern and  
19 practice of past conduct by the applicant, sufficient to warrant a conclusion  
20 that the applicant will violate the Commission's regulations in the future, in  
21 this case, license amendment is granted. Absent such support, we'll not  
22 presume a licensee will violate the regulations." So, as stated before,  
23 because it's unclear what the scope of this contention is, we would have been  
24 remiss to not raise that point here now.

25           Secondly, with respect to restoration itself, we must return to the

1 4032(e) argument, because in order to understand restoration at all, you have  
2 to understand what the baseline is. You have to have that data set. You have  
3 to have the analysis. And you have to have the values for each constituent of  
4 concern within a given Wellfield in a modern well network to probably detect  
5 excursions because you have to monitor for excursions during restoration per  
6 the Commission's regulations.

7           Further, with respect to this being an issue with regards to ACLs,  
8 the point made earlier is directly on point, Judge Cole's question which was,  
9 how can we possibly assess the impacts of something we don't even know at this  
10 time? This hearing, this proceeding is intended to stay within the four  
11 corners of Strata's license application as detailed in the Federal Register  
12 Notice of this past July. That license application by Commission rule is  
13 required to commit to restore to either baseline or an ACL, whichever is  
14 higher. The alternate concentration limit is a separate standard in Criterion  
15 5(B)(5) that, like the arguments previously on cumulative impacts, that each  
16 satellite facility will be subject to a license amendment, an environmental  
17 report, and an environmental assessment or supplemental EIS as well as a notice  
18 of an opportunity for hearing. Every ACL application before the Commission is  
19 a licensed amendment request which is subject to the exact same requirements as  
20 a future satellite.

21           So thus, at that time, when making an application for an ACL, if  
22 that is the case, Strata will be required to provide an environmental report  
23 that addresses the potential impacts associated with compliance with the  
24 proposed ACL, which we have not mentioned yet and I think it's worth noting.  
25 And this goes to the point -- to the question regarding similarities between

1 historic mine sites and the Strata facility. Alternate concentration limits is  
2 a site specific, constituent specific, risk based standard that, in order to be  
3 approved by NRC staff, because we -- Strata would have to propose the standard  
4 in order for that to happen. It has to be deemed adequately protective of  
5 human health and safety. That is the Commission's mission under the Atomic  
6 Energy Act.

7 Now, with respect to having comparisons at historic mine sites,  
8 that falls short of the mark here because it's not just that every -- and this  
9 is the reason why there are site specific assessments required for each In Situ  
10 project, is that the variations between constituents of concern, their levels  
11 and their presence, is not a site specific -- a site by site inquiry. It's a  
12 Wellfield by Wellfield inquiry. Everyone is different. And you have to you  
13 have to make judgments based on a complete baseline water quality dataset to  
14 determine, for example, what you're monitoring parameters are at -- your UCLs  
15 at a monitor well ring because you want the ones that are the most mobile;  
16 because if you monitor for ones that are less mobile than other constituents,  
17 you don't have that early warning system in place. And that falls short of  
18 adequate protection of public health and safety.

19 Or -- excuse me -- with respect to NEPA and Part 51.45  
20 requirements, some general statements need to be made here for -- and I  
21 apologize -- before I get to that, there's one other point that needs to be  
22 made here and it applies to this contention as well as it did to contention 1.  
23 There was a statement made by petitioners and it applies here as well because  
24 we're talking about assessing a standard that is not yet known, just like we  
25 don't yet know baseline, is that you're put in a position where you won't be

1 able to litigate the issue later when you have that dataset.

2               Two points on this, your honors: First, this issue was litigated  
3 in phase one of the Hydro Researchers, Inc. litigation where there was an  
4 assertion that the petitioners or interveners, Section 189, I believe, Atomic  
5 Energy Act hearing rights would be abrogated if they were not permitted to  
6 challenge these -- based on the process of In Situ facilities be able to  
7 challenge in this scenario that is referenced by petitioners. The Commission  
8 found that that was not the case and that you -- this is the way these projects  
9 are developed. This is the way that the Commission's regulations are set up.  
10 So if there is an issue with this the way 4032 (e) is interpreted as applied  
11 to In Situ facilities in terms of gathering this data, then your beef is with  
12 the Commission, not in it is not a proper forum here to be discussing that  
13 issue.

14               Turning back to NEPA Part 51.45 issue: First of all, let me make  
15 plain, a license applicant is not required to comply with NEPA. That is not  
16 what the applicant is required to do. And the second point is there is a big  
17 difference between what is required under NEPA and what is required to get a  
18 license at NRC, from both a safety/technical perspective, as well as an  
19 environmental perspective. If we are indeed talking about challenges under  
20 NEPA here, then it's Strata's position that what is in the ER, the  
21 environmental report currently is more than satisfactory to satisfy any  
22 requirements that could be posited under Part 51.45.

23               The next point regards the -- excuse me -- again, the issue of a  
24 link to Ms. Viviano, the sole affiant, which is, instead of using the term  
25 germane, the best way to put this is you've heard in our standing arguments,

1 did we rested our case on a physical impossibility for groundwater to  
2 contaminate wells located in Ms. Viviano's properties, as Mr. Thompson alluded  
3 to. That is very relevant to this contention, as well as to Contentions 1 and  
4 which is if there is a physical impossibility for the water to reach her  
5 properties, then assume worst case scenario of a massive excursion during  
6 operations, vertically, downward from the Lance and Fox Hills formations to the  
7 Inyan Kara formation. Assume, arguendo, that occurs, the recovery fluids from  
8 the project site still can't get to her properties. And that is why we made  
9 the argument in Contention 1 that there must be some link. You cannot have a  
10 genuine issue of material fact for a contention if it's not genuine because  
11 there can be no impact based on that.

12           And to return very quickly to the comparison between historic sites  
13 and the current site, the -- there's an attempt to say that there is a virtual  
14 certainty that we will -- that Strata would not be able to restore to baseline  
15 or ACL, whichever is higher. From the evidence we have on the record, the  
16 Nubeth R&D project did not have an ACL and unless there's evidence to the  
17 contrary, there shows that there is evidence that restoration can be achieved  
18 based on that data cited in Strata's brief. So we would also offer that to you  
19 on the record to support our assertion that this does not pass the admissible  
20 contention requirements.

21           Finally, it is important -- it is important to note here for the --  
22 and I apologize for jumping back to the 4032 (e) argument; I'm sure you're all  
23 sick and tired of listening to this, but the easiest way to address any  
24 concerns or questions that this board may have, over how 4032 (e) applies to  
25 the facility, is to simply take NUREG-1569, read chapter two entitled "Site

1 Characterization", and then read chapter five entitled "Operations". That lays  
2 out what is -- what can and cannot be done prior to the issuance of a license.  
3 That should, in Strata's opinion, may be the argument on this point. And I  
4 welcome your questions.

5 JUDGE BOLLWERK: Thank you. Dr. Cole, anything? No? A couple  
6 things. The Hydro case that you cited, I looked back in your answer and also  
7 the staff's. I didn't see that one cited there, at least not for that  
8 proposition. Can you give me the citation?

9 MR. PUGSLEY: Your honor, I do not have that citation with me but  
10 I'm happy to supplement at your discretion.

11 JUDGE BOLLWERK: Okay. I mean, I think Hydro was cited probably  
12 one of the two briefs but I don't remember -- I mean, not with respect to  
13 Contention 2 I didn't see it anyway, so...

14 All right. The -- well, I mean, their point is that it is possible  
15 to look at all these sites, come up with a general history of how this has  
16 happened and then simply apply it here and put into the environment impact  
17 statement and say, look at here's what's happened in the past; here's what's  
18 likely to happen here. That's the assessment if we have to apply an ACL.  
19 Again, I take it you obviously don't agree with that.

20 MR. PUGSLEY: Well, yes your honor I do not agree with that for a  
21 number of reasons. First, as stated earlier, these water quality data for  
22 establishing baseline -- establishing baseline and then later on determine  
23 whether an ACL is warranted is more than site specific, it is Wellfield  
24 specific, so you not only will have tremendous variation between, say, property  
25 operated by company A versus a property operated by Strata, but you will have

1 variation Wellfield to Wellfield at the Ross site, so historical operations and  
2 in addition, historical operations are in different regions of the country,  
3 which is why the generic environmental impact statement, NUREG-1910 was split  
4 into four regions, because they're in different areas of the country, so if you  
5 take that large uncertainty, it is unreliable to take that approach.

6                 The second thing is, if you would like to turn to some history, if  
7 we're talking about potential impacts here, I refer you to the NRC staff's  
8 report, cited by Strata, to the Commission upon request of the Commission  
9 stating that based on evidence in existence, there has never been a  
10 contamination of an adjacent non-exempt aquifer from in Situ Recovery  
11 Facilities otherwise classified by EPA safe drinking water act as a USDW on  
12 underground source of drinking water.

13                 Now, to that point, you also must take into account, and you may  
14 have wondered why we put a discussion of the safe drinking water in our brief  
15 for this very reason, that the default presumption for an aquifer where you  
16 recover uranium is that it is exempt under the safe drinking water act as a  
17 USDW and the definition of that is it cannot now nor ever in the future serve  
18 as a source of drinking water. So what we're basically saying to you here is  
19 using historical data to determine whether somehow in the future at a time we  
20 don't know, an ACL would be applied, is A, not within the scope of the  
21 Commission's requirements, and B, would serve no purpose other than mere  
22 speculation and let me emphasize, your honor, that again, an ACL requires a  
23 license amendment. That is the time that Strata would be required and then we  
24 would agree with petitioners, that we must address the potential impacts  
25 associated with establishment of that ACL and in the event that we would have

1 to do that, we plan to do so.

2 JUDGE MOSSMAN: Are you saying that historical data has no  
3 predictive value?

4 MR. PUGSLEY: I'm not saying that at all, your honor, I'm saying  
5 that you cannot use historical data in this particular instance to determine  
6 whether a specific Wellfield at a specific site is even going to require an ACL  
7 in the future. It is far too speculative to determine that because you don't  
8 know which constituents you're dealing with. Historical data could show in  
9 certain Wellfields in certain properties, a certain constituent needed an ACL.  
10 Well that may not be the case at a number of the other Wellfields. It is  
11 impossible to determine what -- because an ACL is constituent specific, it is  
12 impossible to use historical data to determine what one, two, three, five  
13 constituents at Ross Wellfield A would require and yet again, even -- you may  
14 want -- I mean you could use historical information to help support the fact  
15 that an ACL is adequately protective of public health and safety, as the  
16 staff's report has shows to the Commission, but at this point in the game, the  
17 time to evaluate those impacts and to determine whether historical data has any  
18 relevance is when we would apply for an ACL.

19 JUDGE MOSSMAN: It just seems like you've answered in the positive.  
20 It doesn't -- it isn't predictive in any way. I mean, it can't be used in any  
21 way to project what a future state or outcome is going to look like.

22 MR. PUGSLEY: I apologize, your honor, what I mean is that  
23 historical data from other sites and other Wellfields cannot be used to predict  
24 an ACL for a Wellfield at a Strata site. I'm sorry, what I had said was  
25 historical data is supportive at this time only to the extent that it says the

1       Commission's regulations as set up a baseline on MCL, whichever is higher or an  
2       ACL, has indeed proven to be adequately protective because of -- based on the  
3       staff's report to the Commission that I just read. I apologize for the  
4       confusion.

5                   JUDGE BOLLWERK: Although again, the petitioner's point to the fact  
6       that, I mean, there's history out there that none of these have ever -- I mean,  
7       it's never gotten back to the level that it's always required an ACL or  
8       something beyond what the initial, the primary and the secondary standards are  
9       and that has impacts, doesn't it?

10          MR. PUGSLEY: Well, the statements made the by the petitioners --  
11       first of all, the statements made by the petitioners in their brief simply say,  
12       "It's never been done." There are no -- there are no references to say every  
13       single Wellfield ever operated by an In Situ operator has not been restored to  
14       baseline or an MCL. That's false. That is not the case and besides that,  
15       again, even assume -- let's assume again, hypothetically, that petitioners were  
16       correct, that the Wellfields have never been restored to baseline or MCL. It's  
17       irrelevant, because the regulations specifically state that we are entitled to  
18       an ACL if we need it. It's been conceded by the petitioners and because it's a  
19       Commission regulation, it is by definition adequately protective of public  
20       health and safety.

21                   JUDGE BOLLWERK: Right, any other questions anybody have? Dr.  
22       Mossman is looking pretty pensive.

23                   JUDGE MOSSMAN: No, no, I'm just --

24                   PAULL BOLLWERK: Okay, all right. Let's turn to the staff then.

25                   MS. SAFFORD: Good afternoon, your honors. As we've heard here

1 today, this contention basically raises two issues. First, that the applicant  
2 will not restore groundwater to primary or secondary limits, as per Criteria  
3 5(B)(5) and second, that the application fails to analyze the environmental  
4 impacts that will occur, according to petitioners, if Strata cannot restore  
5 groundwater to the primary and secondary limits.

6 What we have here is a contention that improperly attempts to  
7 challenge a future asked by alleging a foregone conclusion that the applicant  
8 will act contrary to a regulatory requirement at some point in the future, and  
9 in fact tied to NEPA, the NEPA impacts analysis is not intended to encompass  
10 presumed violations of regulatory requirements as the petitioners suggest.

11 Also, as has been discussed here previously, the applicant is bound  
12 to demonstrate that the water restoration requirements in Part 40 Appendix A  
13 criterion 5(B)(5) have been met. In 5(B)(5) sets forth three ways in which an  
14 applicant may meet these regulatory requirements as we have discussed: the  
15 primary or the secondary limit or an ACL. Petitioners are claiming that  
16 setting an ACL automatically equals a significant degradation of the aquifer  
17 and by making such an assertion, they are making a direct attack on the  
18 requirement itself, not on Strata's analysis.

19 The petitioners supporting declarations also provide, again, broad  
20 sweeping comparisons to other In Situ uranium recovery facilities, whom  
21 petitioners contend fail to meet the primary or secondary limits, but they fail  
22 to definitively link these sites to the application under consideration here.  
23 Moreover, the petitioners fail to definitively explain why a failure to restore  
24 groundwater by using an ACL is not acceptable, when in fact that is a  
25 regulatory option. In other words, the petitioners have completely ignored the

1 third option, the ACL standard.

2 Petitioners claim that an ACL would necessarily, and I quote,  
3 "Necessarily be less protective than either primary or secondary standards and  
4 would cause a permanent degradation of the aquifer" and as I said earlier, this  
5 amounts to an attack on NRC regulations that cannot be permitted here. The  
6 petitioners are taking issue with the sufficiency of the alternative  
7 concentration limits to adequately protect water standards. Use of an ACL is  
8 an accepted practice; it's an option in criterion 5(B)(5) and 5(B)(6).

9 In fact, the language -- when you read the language of criterion  
10 5(B)(6), regarding the standards to met for an ACL, it imposes stringent  
11 requirements, such as requiring licensees to meet limits that are as low as  
12 reasonably achievable; and moreover, the ACL will only be set if the  
13 Commission, after finding the proposed limit is as low reasonably achievable  
14 will not pose a substantial present or potential hazard to human health or the  
15 environment, as long as the alternative concentration limit is not exceeded;  
16 and that's citing the language of criterion 5(B)(6).

17 Criterion 5(B)(6) also goes on to list numerous factors that the  
18 Commission must consider when evaluating the present or potential hazard  
19 finding. By focusing solely on the primary or secondary restoration standards,  
20 the petitioners have failed to address the strict criteria of an ACL.

21 And finally, if the petitioners do not agree with the ability of  
22 the NRC to set an ACL, there are other regulatory channels by which they may  
23 raise a challenge. However, this is not the appropriate forum.

24 And to touch a bit on the conversation earlier, whether or not this  
25 type of analysis is appropriate to NEPA, the staff would like to point out that

1 the proposed action includes restoring the groundwater to either levels one,  
2 two or three: the primary, secondary, or an ACL. Restoring to the alternative  
3 concentration limit is not a quote, "Recently foreseeable action." It's part  
4 of the proposed action itself and NEPA requires us to look at the impacts of  
5 the proposed action, restoring to limits one, two or three and we do this and  
6 strata does this in the ER by simply stating that strata or the applicant will  
7 restore to levels that meet NRC standards and by meeting NRC standards, results  
8 in a small impact by virtue of satisfying criterion 5(B)(5), regardless of  
9 whether a primary, a secondary or an ACL limit is used.

10 JUDGE BOLLWERK: Do you agree with the applicant's statement that  
11 assessing where an ACL is set there's a new licensing amendment, a new hearing  
12 right?

13 MS. SAFFORD: Yes.

14 JUDGE BOLLWERK: So that's the process that the staff follows and  
15 the applicant follows.

16 MS. SAFFORD: In general, yes, it's a license amendment.

17 JUDGE BOLLWERK: In general, would there be a license amendment?

18 MS. SAFFORD: It's my understanding is there would be instances  
19 where you'd have a verification process, where the data would be submitted and  
20 staff would verify the proposal.

21 JUDGE COLE: So, basically the applicant proposes the ALC and the  
22 staff studies that and approves or disapproves on that?

23 MS. SAFFORD: Yes.

24 JUDGE MOSSMAN: But, by definition, the ACL is less restrictive  
25 than the primary or secondary standard? Is it also true that it's less

1 protective of the public health and the environment?

2 MS. SAFFORD: I would disagree and I think when you look at the  
3 language in 5(B) (6) itself, and -- one second here -- where one of the criteria  
4 and the things that we need to look at when we look at an ACL is whether or not  
5 it will pose a substantial present or potential hazard to human health or the  
6 environment and I would conclude that if there were a potential -- or a  
7 substantial present or potential hazard to human health or the environment then  
8 the ACL would not be accepted.

9 JUDGE MOSSMAN: Okay, so it's not necessarily true that it may or  
10 may not be protective of the health or environment. Is that my understanding?

11 MS. SAFFORD: I'm sorry, could you say that one more time please?

12 JUDGE MOSSMAN: Well, what I'm trying to do is couple the  
13 measurement of the contaminant against -- for with the public health and  
14 environmental impact and the primary and secondary standards are set so that  
15 they are protective of the environment and public health, but the ACL, by  
16 virtue of being less restrictive in my view, may or may not be still protective  
17 of the public health and I wanted to get your view on that and what you're  
18 saying is that you wouldn't approve of the ACL if it was not protective. Is  
19 that what I understand?

20 MS. SAFFORD: That's correct.

21 JUDGE MOSSMAN: I'm sorry if I'm convoluted.

22 MS. SAFFORD: No, no, I think I understand what you're saying. It  
23 has to be protective of human health, public health and the environment.  
24 That's the criteria against which we be judged.

25 JUDGE COLE: Okay, I just -- I mean, that's -- the ACL, in every

1 instance, exceeds the primary or secondary standards that were originally  
2 proposed, so they do have certain isotopes or concentrations of materials that  
3 exceed the previous standards, primary and secondary, but they don't exceed it  
4 so much that it then does not still maintain protection of the public health  
5 and safety. Is that correct?

6 MS. SAFFORD: Yes, that's my understanding, yes.

7 JUDGE BOLLWERK: Anything further you want to add?

8 MR. FETTUS: May I, please? Your honor, I strongly object to  
9 Strata answering the Strata answering the NRC.

10 JUDGE BOLLWERK: I'm sorry?

11 MR. FETTUS: I strongly object to Strata answering for the NRC in  
12 this instance.

13 MS. SAFFORD: I have nothing further to add.

14 JUDGE BOLLWERK: Thank you. Let me go back, well let me go back to  
15 two things here. I'm trying to understand, in what instance would a license  
16 amendment be required and what instance wouldn't a license amendment be  
17 required, because in theory you're asking -- you're setting a standard, or a  
18 request of the applicant, why would you or why wouldn't you? What's the  
19 difference, because the applicant here has said quite plainly they expect to  
20 have to file a license amendment request?

21 MS. SAFFORD: As I understand it, at a minimum it would be a  
22 license condition that would be placed in the license and thus enforceable and  
23 in a standard and a requirement that the licensee would have to meet.

24 JUDGE BOLLWERK: But the condition being they have to come to the  
25 staff and request an ACL. What's the condition set?

1 MS. SAFFORD: I don't have a license condition --

2 JUDGE BOLLWERK: Well, okay then -- I mean -- all right --

3 MS. SAFFORD: I need reference, I'm --

4 JUDGE BOLLWERK: I mean, the criteria certainly indicates they're  
5 going to have to do that, I guess you could have a license condition that  
6 requires them to do the same thing if they can't meet the primary or secondary  
7 standards, but the real question is what's that standard going to be and what  
8 opportunity does anyone have to say, "boo" about whether it is or isn't  
9 correct?

10 MS. SAFFORD: Whether there's a possibility for interveners or  
11 petitioners to raise an issue with whether or not they agree with the ACL that  
12 is set for the project?

13 JUDGE BOLLWERK: Correct, and normally hearing rights come from  
14 some kind of licensing -- license amendment request or some kind of change in  
15 the license. You all don't see that as a license amendment then there are no  
16 hearing rights accrued to it?

17 MS. SAFFORD: In general, staff's practice -- current practice is  
18 to review these on a case by case basis and whether or not they are handled  
19 strictly through a license condition or under the amendment process. And I'm  
20 sorry, I'm not sure if that really addresses your --

21 JUDGE BOLLWERK: Not really, because again, all the condition says  
22 that you shall set the -- you shall come in and ask for an ACL if you can't  
23 make the primary or secondary standards, but it doesn't still say what that ACL  
24 is going to be or whether anybody has a opportunity to say anything about it.

25 MS. SAFFORD: I think the bottom line for purposes of our looking

1 at an ACL is that it's not an action or determination that an applicant can  
2 make unilaterally. If you look at the language of 5(B)(6), it's something the  
3 Commission needs to make this determination and staff, through review of the  
4 data that's provided, will follow these criteria to ensure that the human  
5 health and the environment are protected.

6 JUDGE BOLLWERK: Okay, that's --

7 MS. SAFFORD: So it's not without review --

8 JUDGE BOLLWERK: Each license review process is just like that, but  
9 some have, you know, there are hearing rights that accrue to some of them and  
10 some are less clear, I guess that's why I'm all trying to do is get a  
11 clarification as to what the applicant told us a hearing request would be  
12 appropriate here because there would be a licensing amendment and I'm hearing  
13 from you that maybe that's not the case. And if it isn't, when do the  
14 interveners get an opportunity to say anything about an ACL under your current  
15 practice or do they?

16 MS. SAFFORD: Well, I think, you know, referring back to a  
17 statement that the applicant made, if they would so choose to file a license  
18 amendment for this, it's certainly something that staff would review in that  
19 process, which would give rise to hearing rights.

20 JUDGE BOLLWERK: Right, except if -- from what I just heard you  
21 say, they would -- if they didn't want anybody to say anything about this they  
22 would do well not to file a license amendment request and the staff may well  
23 process it that way. That doesn't leave the interveners much they can do about  
24 that.

25 MS. SAFFORD: Under the current process, that's correct. It

1 doesn't negate the fact that the standard is still the protection of human  
2 health and the environment. That standard will always be there --

3 JUDGE BOLLWERK: Correct --

4 MS. SAFFORD: -- regardless of whether --

5 JUDGE BOLLWERK: I would hope so, but the question is what -- does  
6 anybody else have an opportunity, besides whatever interaction there is between  
7 the applicant and the staff, to say anything about that -- about whether the  
8 standard will be met by the ACL? Is it a normal licensing action? Let me go  
9 back to the applicant for one second, here. Given what you just heard, what do  
10 you think? Are you going to have to file a license amendment here or not?

11 MR. PUGSLEY: Yes.

12 JUDGE BOLLWERK: Yes.

13 MR. PUGSLEY: Every example of an ACL that I am familiar with in  
14 the 11 years that I have been practicing law and I'm sure in the 30 some odd  
15 years that Mr. (unintelligible) has been doing this has required a license  
16 amendment and had an opportunity for a hearing.

17 And just an additional point that, it is obvious to the applicant  
18 that a license condition will address the requirement to comply with criterion  
19 5(B)(5), but as NRC staff alluded to in their discussion, there is a long list  
20 of requirements that must be satisfied in order for an ACL to be issued.  
21 Strata can think of no conceivable circumstance where the level of detail and  
22 analysis and data gathering and restoration reports, because if it is to be  
23 determined as low as reasonably achievable, that showing necessitates that we  
24 demonstrate that we've done everything humanly possible to get to baseline or  
25 the MCL, whichever is higher. So, I do not believe Strata can conceive of a

1 circumstance where it would not A, not be a license amendment and B, not give  
2 rise to a potential hearing.

3 JUDGE BOLLWERK: Was it --

4 MR. PUGSLEY: I apologize, judge.

5 JUDGE BOLLWERK: No, no go ahead.

6 MR. PUGSLEY: I'm also familiar with, and I apologize I do not have  
7 the citation in front of me, but I'm also aware of a requirement in NRC's  
8 hearing -- in NRC's hearing regulations that even if a proposed action is not  
9 noticed in the federal register, there is still a window within which someone  
10 can request a hearing on a proposed action, as well as the fact that you can --  
11 there are 2206 petitions available to interveners who would seek to challenge a  
12 decision by NRC staff on a given item, so it is not as if the regulatory window  
13 is shut to someone who has a problem with it, it's just that -- but to get back  
14 to the original point, cannot see a circumstance where there would not be a  
15 hearing opportunity.

16 JUDGE BOLLWERK: All right, let me go back to the staff one second,  
17 see if you have anything further you want to say on this subject in light of  
18 what we just heard from the applicant.

19 MS. SAFFORD: I have nothing further to add, your honor.

20 JUDGE BOLLWERK: All right. I haven't forgotten about you, we're  
21 going to get back to you in a second, I know you -- I can see you're ready, but  
22 not quite yet; I've just a couple more questions. The interveners point here  
23 is that there is a history here, in terms of ACLs and the way they've been  
24 administered and the results they have where you could get some sense of what  
25 the impact of having an ACL is going to be. The applicant makes the point

1 that, no, that really can't happen because either so site specific that it's  
2 just basically an improbability or a mere possibility to come up with any  
3 information that would give you any historical significance and allow you to  
4 asses those then." Do you have anything -- I'd like to hear your comments on  
5 that.

6 MS. SAFFORD: I would agree that to rely upon historical data as  
7 setting a comparison -- the bar for comparison between a project under review  
8 and the historical outcomes of other projects, could result, particularly in  
9 this instant where you're talking about specific constituents and specific  
10 Wellfields, specific locations, could run the risk of being an apples to  
11 oranges type of comparison, where it wouldn't be indicative or predictive of  
12 what would happen at the instant facility or the facility under review at the  
13 time.

14 JUDGE BOLLWERK: Okay. Any other questions to this point for the  
15 staff or the applicant from either member? All right, let's turn -- let's go  
16 back to the joint petitioners and see what they have.

17 MR. FETTUS: I'll try to be very brief again. Your honor, we don't  
18 know how many times we have to say it. We're not alleging violation or even  
19 presuming violation; on the contrary, we're presuming regulatory compliance,  
20 the statute requires it, but we're also presuming that NEPA analysis requires  
21 analysis and an analysis of mitigation opportunities for this accepted practice  
22 of setting ACLs. This contingent is not about challenging the NRC's regulatory  
23 discretion; I mean, read the opening brief and the reply brief. It's about the  
24 prospective failure to analyze in the SEIS the environmental consequences of  
25 resorting to ACLs. The use the ACLs is a reasonably foreseeable consequence of

1 granting this license and therefore has to be analyzed in the ER and the SEIS  
2 and if this analysis is not performed by Strata in the ER, which we don't think  
3 it was, it has to be performed by the staff in their own analysis.

4           What is clear is that NEPA requires such a reasonably foreseeable  
5 analysis to be done. Turning to some specific issues that I just heard, the  
6 NRC's approval of an ACL does actually -- it is a departure from more  
7 protective standards and it does guarantee a significant environmental impact.  
8 For example, ISL mines are currently located in ranching country or the mining  
9 country, continuous or adjacent to oil and gas wells, again with cumulative  
10 impacts for that analysis and the concentration of selenium in groundwater can  
11 be an issue that could be affecting livestock, depending on how their disposal  
12 practices go. Again, maybe different from one mine to another. We're not  
13 going to get into the merits here on this issue. We just think this is a  
14 properly pled contention. There are numerous occurrences of issues that have  
15 been raised from ISL mines and numerous occurrences of ACLs, we think that  
16 needs to be analyzed. It's as simple as that.

17           JUDGE MOSSMAN: Moving from the primary or secondary standard to  
18 the ACL, you said if I remember your word correctly, is a significant  
19 environmental impact. That, to me, is a merit question, but you are using it  
20 in the context of something other than that.

21           MR. FETTUS: Fair enough, your honor. The question before the  
22 board, in terms of the admissibility of this contention, is are the NEPA and  
23 NRC rule obligations such that this issue needs to be reflected in the Strata's  
24 ER and in the staff's supplemental EIS. That's the question before you. We  
25 think it's a reasonably foreseeable thing and we don't think that's a stretch

1       in any way to argue that ISL recovery sites resort to ACLs. They make the  
2       assertion that based on the NRC staff's paper, which was in July 2009 paper,  
3       it's about an 11 page paper that the NRC staff has found no contamination of  
4       adjacent aquifers, such that it would endanger public health, but  
5       unfortunately, that short paper where the staff reaches that conclusion at a  
6       site and we also, by the way, cite and criticize extensively in our criticisms  
7       of the generic environmental impact statement, as far -- as far as we're aware,  
8       the NRC has never done a thorough review of what the adjacent aquifers impacts  
9       could be or even the existing aquifers, even the ones that receive the aquifer  
10      exemptions.

11           So the question before it -- those are all merit questions and  
12       that's something that I think we need to deal with when we deal with Contention  
13       2 and Contention 5 in litigation on the merits, not here, not now.

14           JUDGE BOLLWERK: All right, just let me go back to the discussion I  
15       had with the staff and the applicant about the -- a license amendment and  
16       hearing rights. If in fact this were -- if an ACL did require a license  
17       amendment would that take care of your concerns in terms of your ability to  
18       raise questions about the environmental impacts at that point?

19           MR. FETTUS: No.

20           JUDGE BOLLWERK: Why not?

21           MR. FETTUS: Because it's not done as early as possible as NEPA  
22       requires and these are concerns that have to be done before the NRC approves  
23       this license. Either go forward in its current state, go forward with  
24       additional conditions or be denied and this is something that needs to be  
25       analyzed now.

1                   JUDGE BOLLWERK: I guess I'm not understanding, I mean, if the ACL  
2 has to be -- either has to be primary, secondary or the ACL, being the standard  
3 they have to meet and when the ACL's set, there's an opportunity to say that's  
4 the wrong standard and the environmental impacts of the standard that is  
5 imposed has to be assessed. Why isn't that adequate?

6                   MR. FETTUS: There's a thorough analysis of ACLs in the  
7 supplemental environmental impact statement that addresses what happened in  
8 many other mines, that addresses a reasonable range of alternatives, a  
9 reasonable -- which include everything from license denial to additional  
10 conditions, that address how -- that address more extensively than what's  
11 currently there in the Regs, or at least as what's there currently that exist  
12 in the Regs or what's going to need to be done for such a departure, then  
13 that's a different story, but right now we don't have that --

14                  JUDGE COLE: And all this is done before they get their license?

15                  MR. FETTUS: Correct. We don't need to make them select their ACL.  
16 NEPA prohibits an ex post facto analysis. We don't need to have a specific  
17 number because again -- and I'd be happy to stipulate with Mr. Pugsley we  
18 don't know what the numbers are going to be for a particular area, because we  
19 don't have baseline yet and we also don't have what the restorations are going  
20 to be at various well sites, but NEPA prohibits an ex post facto, simply just  
21 saying we'll analyze it later, when we think it's at best, or at minimum,  
22 reasonably foreseeable that there will be ACLs resorted to, so we want to see  
23 the analysis done prior --

24                  JUDGE COLE: Based on data --

25                  MR. FETTUS: -- select their numbers. They at least have to be

1 analyzing the range of what those numbers are likely to be and the range of  
2 what those impacts will or will not be.

3 JUDGE COLE: Based on what happens in all the other places?

4 MR. FETTUS: Correct.

5 JUDGE COLE: I understand, thank you.

6 JUDGE BOLLWERK: All right.

7 MR. FETTUS: Your honors?

8 JUDGE BOLLWERK: Yes?

9 MR. FETTUS: Can we take a two minute break?

10 JUDGE BOLLWERK: Sure, no problem.

11 MR. FETTUS: Before we start our next one?

12 JUDGE BOLLWERK: Yes. Any problems with that?

13 MALE SPEAKER: Nope.

14 JUDGE BOLLWERK: All right, are we done with this argument then?

15 MR. FETTUS: Yes, your honor.

16 JUDGE BOLLWERK: And anybody else have anything else?

17 MS. SAFFORD: No --

18 JUDGE BOLLWERK: All right, then let's go ahead -- if you don't  
19 mind, we'll take a two minute break and be right back.

20 (Whereupon, a short recess was taken)

21 JUDGE BOLLWERK: We'll go back on the record please.

22 MS. SAFFORD: If I could just clarify one point and staff is not  
23 back yet from the break, but I did ask to clarify on the issue of the license  
24 conditions with an ACL and what was clarified for me during the break is that  
25 at least the past three ISR licenses that have been issued included a license

1 condition that essentially stated -- and again, I apologize I don't have the  
2 language in front of me, but that if the licensee chooses to employ an ACL then  
3 a license amendment would then be required.

4 JUDGE BOLLWERK: Okay.

5 MS. SAFFORD: And I'm happy to provide additional information if  
6 you prefer.

7 JUDGE BOLLWERK: Anybody want to comment on that? No, all right.

8 MS. SAFFORD: Thank you.

9 JUDGE BOLLWERK: Anything then on Contention 2, I take it your  
10 break had nothing to do with Contention 2.

11 MR. FETTUS: Right.

12 JUDGE BOLLWERK: Okay.

13 MR. FETTUS: And we're all happier your honor.

14 JUDGE BOLLWERK: All right. All right, all right then at this  
15 point we're ready then to move on to Contention 3, the application fails to  
16 include adequate hydrogeological information to demonstrate Strata's ability to  
17 contain fluid migrations. I turn it over to the petitioner.

18 GEOFRREY FETTUS: Thank you, your honor. Strata's application  
19 fails to advise information regarding hydrogeological setting of the area to  
20 fulfill the requirements of 10 CFR 51.45 Appendix A, Criteria 4E, 5G2 and E5.  
21 Again, in the interest of conciseness and in sparing you time, this again, we  
22 think is an issue with the merits, I think we have a properly pled contention.  
23 Strata and the NRC argue thorough review of the hydrogeology, they decided it  
24 not necessary and then I think you probably don't need to hear in their  
25 response that they had limitations on how we're going to be able to know until

1 such time as they can complete Wellfield package.

2 They also assert that even if possible pathways exist, the fact is  
3 irrelevant because the applicant's -- this is the staff's statement. Staff  
4 also asserts that even if there are possible pathways exist this fact is  
5 irrelevant because of the applicant's commitment in the application to seal all  
6 bore holes prior to operation.

7 The excuse between the Strata and the NRC staff on one hand and  
8 petitioners and/or experts on the other hand, regarding the ER's inadequate  
9 treatment of fluid migration goes to the merits, not its admissibility. The  
10 board should find that the petitioners have identified an issue that's within  
11 the scope of proceeding and material to the finding of the NRC and whether they  
12 make license amendments, whether they make license conditions or even deny the  
13 application.

14 The petitioners have raised a genuine dispute regarding the  
15 adequacy of the hydrogeological information that's provided in the ER to ensure  
16 the confinement of extraction fluids. We support our assertions with a DPL  
17 expert testimony of doctors Moran, Sass and Abitz. The board should find that  
18 this contention is admissible under 2.309F1.

19 The staff's assurance that all the bore holes and as we showed,  
20 looked to our reply and activity from the various aquifers are all going to the  
21 sealed is a promise. That's good and hopefully that will come out as part of a  
22 license condition at the end of the road, but that doesn't mean there doesn't  
23 need to be a full analysis of all past, present and future potential fluid  
24 migration -- and this, by the way your honor, is a contention that,  
25 respectfully, we think is assumed in really what's going to be a significantly

1 ER or SEIS that would -- that we're hoping will eventually come out down the  
2 road, again.

3 JUDGE BOLLWERK: All right. Any questions at this point? As I'm  
4 understanding it correctly, it looks to me as if the contentions similar to  
5 this one were admitted in both the Powertech and Crow Butte One cases, is that  
6 correct?

7 MR. FETTUS: Correct, your honor. Again, the --

8 JUDGE BOLLWERK: How's your contention the same or different than  
9 the -- measures factual, obviously --

10 MR. FETTUS: Sure, sure and we especially crafted them to make sure  
11 that we took full notice of what was done in the Dewey Burdock decision to make  
12 sure that whatever we were requesting was precisely went in line with what the  
13 ASLB decided should be an admissible contention and therefore, we think that is  
14 a proper pathway for us to make sure that there's proper NEPA analysis as this  
15 goes down the road.

16 JUDGE BOLLWERK: All right, any questions, does anyone have one?  
17 All right, at this point, let's turn then to the applicant. Thanks.

18 MR. PUGSLEY: Thank you, your honor. With respect to Contention 3,  
19 it is Strata's estimation that it is remarkably similar to Contention 1, so  
20 initially we refer you to our argument from Contention 1 with the following  
21 additions. First, Mr. Fettus is indeed correct that are we going to, once  
22 again, return to the Part 4032(e) issue, because of the similarity of  
23 Contention 3 to Contention 1. If you're talking about properly understanding  
24 the potential for fluid migration as well as the necessary measures you would  
25 have to take on a Wellfield by Wellfield basis, you have to have an entire

1 Wellfield package in with the data, with the complete data set. If you don't  
2 have that, you can't determine baseline and then you won't know if fluid is  
3 migrating or not because baseline is, as stated earlier, that threshold by  
4 which we determine what a UCL is for a monitor well so that you can find out  
5 whether fluid is indeed migrating.

6 Without having done a full Wellfield package we do not understand  
7 the complete subsurface hydrology and geochemistry of a given ore or recovery  
8 zone and again, the issue associated with is it -- do we have to do all up  
9 front now or we won't be able to assess these things later and again, I do  
10 apologize, I do not have the citations of that hydro resources case, however, I  
11 would like to note for the record that that case was only raised today because  
12 the idea of being put in a predicament of not being able to litigate it after  
13 the license was only just raised today and in the event that you find that case  
14 is positive on this issue, we are happy to supplement with that case.

15 A few specifics, with respect to the argument on part 51.45, let me  
16 reemphasize again to hang your hat on NEPA for purposes of whether an  
17 environmental report is adequate is not appropriate here. You hang your hat on  
18 Part 51, which is the Commission's interpretation and implementation of NEPA's  
19 procedural requirements. That is it and as we've stated repeatedly, Part 51.45  
20 does not have restrictive requirements for what is required to file an  
21 environmental report.

22 Again, what is required for NEPA is vastly different from what is  
23 required for a license at NRC. Once again, there are allegations regarding  
24 pump tests, with respect given Wellfields and this is a good opportunity to,  
25 again, give you some information regarding why post license issuance activities

1 are so critical to an ISR facility. There have been allegations in this  
2 proceeding that there are hundreds upon thousands of boreholes, stored  
3 boreholes in and around the sites. Pump tests are a commonly used tool, post  
4 license issuance, because a pump tests dealing with those -- with boreholes  
5 will not yield any results prior to issuance of a license -- prior to the  
6 issuance of a full Wellfield package. Pump tests are used by licensees to  
7 measure whether there indeed exists an unknown stored borehole or well that is  
8 in a Wellfield that potentially could cause issues with -- what we refer to as  
9 Wellfield balance, which is directly to the heart of potential fluid migration  
10 and standard operating procedure for a licensee is to plug and abandon those  
11 boreholes or wells in accordance with state engineer office requirements, in  
12 this case Wyoming. So references to pump tests here, that -- they need to be  
13 put in the proper light and I hope that provides you with that information.

14 There are also allegations of deviations from guidance, once again  
15 we refer you back to the curators of Missouri case that allows deviations from  
16 guidance in the event that NRC staff approves, but in the case of the deviation  
17 from guidance, we cannot tread beyond the requirements of part 4032(e) and the  
18 reason is because NRC requires, according to the case, the Commission's or NRC  
19 staff's approval and because the regulation says you can't do it, they won't  
20 approve it. It is typical for an In Situ site to have hundreds of thousands of  
21 boreholes, your honors and again, I refer you to the staff's report to the  
22 Commission. Petitioners criticisms aside, the conclusion was there have been  
23 no impacts to adjacent non-exempt underground sources of drinking water from In  
24 Situ recovery -- uranium recovery operations.

25 Finally, there is a reference to criterion four and five in

1 Appendix A that specifically deal with what we call surface impoundments. Now,  
2 one thing that's important to note, your honors, is that Appendix A of Part 40  
3 was originally written for conventional milling facilities and it is Strata's  
4 position that currently Appendix A is -- Appendix A is applied as appropriate  
5 to In Situ recovery facilities and hence, criterion 5(B)(5)'s application, for  
6 example. When discussing surface impoundments in these criteria, it is  
7 Strata's position that the surface impoundments they are referring to are what  
8 are commonly referred to as tailings impoundment. These are for disposal of  
9 11(e).2 byproduct material at a conventional milling or heap leech milling  
10 facility. The Commission's interpretation of criterion two of Appendix A,  
11 which deals with the alleged proliferation of the 11(e).2 disposal sites states  
12 specifically that on-site disposal of 11(e).2 byproduct material, i.e. what  
13 would be referred to as tailings, is prohibited at an In Situ site, so there  
14 are no surface disposal impoundments -- tailings impoundments at ISR  
15 facilities, so reliance on these criterion here are misplaced.

16 Finally, to distinguish Powertech from this -- the instant example,  
17 your honors, first, as stated earlier, the construction rule was finalized  
18 after Powertech's decision was rendered and after Crow Butte as well, so it is  
19 the position of Strata that change in rule is stated earlier changes -- should  
20 change the board's view of 4032(e)'s applicability specifically to this  
21 contention.

22 Secondly, in terms of fluid migration, I refer you back again to  
23 the physical impossibility of fluid migration to the Viviano properties and  
24 note that it Powertech it was specifically alleged that the recovery operations  
25 to be conducted by the license applicant, were going to occur in the same

1 formation/aquifer as that aquifer from which the interveners drew their water.  
2 This is a different case here, your honors, we have 4,300 feet of separation  
3 between our recovery zone aquifer, which is not present at Ms. Viviano's  
4 properties and the Inyan Kara which is the aquifer allegedly from which she  
5 draws her water. That is important to note.

6           In addition, even if you're talking about, and I may be told this  
7 is going to the merits but it is worth noting, that subsurface geology and  
8 naturally occurring tendencies such as pressure, are relevant to determining a  
9 plausible pathway and as we are linking that to direct impacts of Ms. Viviano  
10 for this contention. We have separation, we have different aquifers, the  
11 factual circumstances here are vastly different from those of Powertech and I  
12 welcome your questions.

13           JUDGE BOLLWERK: All right, questions from the board on that, Judge  
14 Cole?

15           JUDGE COLE: Yeah. You had proposed evaporation ponds at the  
16 facility in this case, correct?

17           MR. PUGSLEY: Yes.

18           JUDGE COLE: And what is in those evaporation ponds?

19           MR. PUGSLEY: Typically, your honor, it's fluid. It is what would  
20 be referred to as during operations as a production bleed which is water, and  
21 during restoration depending on what the process requires, it would be referred  
22 to as restoration fluid. Now, once again, your honor, it is important to note  
23 that both tailings which are solid material, slime material generated at a  
24 conventional mill, and fluids can be called 11(e).2 by-product material, but  
25 not all, but we're talking about tailings impoundments. Fluid is not tailings.

1 When the Mill Tailings Act was passed in 1978, we were talking about tailings,  
2 and we know that because in the legislative history, one of the reasons why  
3 Congress wanted to pass the statute in the first place was because folks out  
4 west were using the solid tailings material from conventional mill operations  
5 for building foundations for homes and other types of things, and they were  
6 concerned about the potential radiological impacts. We're not talking -- we  
7 are not in any way in the application or at any time in the future proposing  
8 disposal of 11(e).2, solid 11(e).2 tailings on-site, one, because it's not  
9 within the scope of our application, and two, because the Commission wouldn't  
10 allow it.

11           And then -- thank you. The other point is that with respect to  
12 evaporation ponds, Judge Cole, the -- once the water, the fluid, is evaporated  
13 from that pond, we do not just simply take a bulldozer, throw a bunch of dirt  
14 on it and cover it up. We are required to dig up the liner and the resulting  
15 materials there because we are required in licensed termination to have  
16 demonstrated that the site can be returned for unrestricted use. This is not  
17 like a conventional mill facility that gets turned over to the Department of  
18 Energy for long-term surveillance and monitoring.

19           JUDGE COLE: These are traditionally double lined?

20           MR. PUGSLEY: Yes, Judge Cole, they are double lined with leak  
21 detection systems.

22           JUDGE COLE: Yeah, for in between the two liners.

23           MR. PUGSLEY: That is correct.

24           JUDGE COLE: All right, thank you.

25           MR. PUGSLEY: Yes, sir.

1                   JUDGE BOLLWERK: All right, Judge Mossman, do you have anything?  
2 Anything else? All right, let's go to the staff now. Thank you.

3                   MR. PUGSLEY: Thank you.

4                   MS. SAFFORD: Based on the discussion that we've had already this  
5 afternoon on similar issues, I'm going to limit my comments to just a few  
6 comments and then I will take any questions. A couple points I wanted to hit  
7 upon is that petitioners, experts, mainly the supporting declaration of Dr.  
8 Sass stated there's not sufficient information in the application to determine  
9 the proper placement of the injection and recovery wells for the amount of ore  
10 present, concentration data interrelation of the ore deposits to other  
11 locations in the ore body.

12                  Staff concludes that this contention is misguided and that the NRC  
13 doesn't regulate the specific placement of injection recovery wells within the  
14 licensed area, but rather they evaluate the processes that an applicant  
15 proposes and establishes -- and we establish bounds that ensure that operations  
16 can be conducted in the manner that's protective: again, back to the protection  
17 of human health and safety and the environment standard.

18                  And I wanted to also point out that the information that was  
19 provided in the application is sufficient for staff to analyze and characterize  
20 the impact for the proposed project area consistent with the applicable  
21 requirements.

22                  In addition, the detailed and specific information that's sought by  
23 Dr. Sass cannot be obtained prior to licensing as we go back to the  
24 conversation with 4032 for the definition of instruction.

25                  Just a few more points. We agree as well that the Criteria 4E and

1 5G2 are not at issue here as they are specific to surface compound  
2 impoundments.

3           And finally, the petitioners have challenged the adequacy of  
4 Strata's pump tests to confirm or deny the connection of the aquifers. In  
5 particular, Dr. Moran concluded that the pump tests performed by applicant did  
6 not sufficiently stress the aquifer to determine whether leakage occurs.  
7 NUREG-1569 section 2.7.3 sub 3 however, states that any number of commonly used  
8 aquifer pumping tests may be used to estimate the aquifer hydraulic properties.  
9 Dr. Moran's testimony contains general statements, but fails to identify the  
10 specific dispute with the application, nor does he provide further detail on  
11 what additional pump tests are necessary to meet NRC requirements.

12           In addition, the information provided in the applicant's  
13 (unintelligible) groundwater flow model provides additional data that, when  
14 taken into consideration with the pumping test data, provides information  
15 consistent with the guidance in NUREG-1569.

16           JUDGE COLE: With respect to monitoring wells, what is the staff's  
17 position on that? Do they approve the location and what -- which chemicals are  
18 monitored in monitoring wells situations?

19           MS. SAFFORD: In the monitoring wells, yes.

20           JUDGE COLE: You determine what they're looking for in the  
21 monitoring wells?

22           MS. SAFFORD: With respect to what constituents are being --

23           JUDGE COLE: Right.

24           MS. SAFFORD: -- monitored? Yes.

25           JUDGE COLE: And how many constituents do they commonly monitor in

1 a monitoring well? Do they try to get it down to one or two that are  
2 indicative of water being leaked out?

3 MS. SAFFORD: It really depends, as being explained that there's  
4 about 26 different factors that can be monitored for baseline.

5 JUDGE COLE: Twenty-six different chemicals?

6 MS. SAFFORD: Yes, sir.

7 JUDGE COLE: And how many do they traditionally use? I mean, if  
8 you've got one particular component that's a characteristic of what's being  
9 circulated and it's indicative of a leak, you would use one. I would think  
10 that they use more than one, but maybe they don't need it if they've got the  
11 right component. Does the staff get involved in that?

12 MS. SAFFORD: For excursions? Are you addressing for excursions?  
13 What's monitored for an excursion?

14 JUDGE COLE: Yes.

15 MS. SAFFORD: Yes. Three different components.

16 JUDGE COLE: Okay, but --

17 MS. SAFFORD: Does that --

18 JUDGE COLE: It's about three or it might be three different  
19 components and depending upon where you are and what you're --

20 MS. SAFFORD: Okay, in general it's three, yes.

21 JUDGE COLE: Okay, all right.

22 MS. SAFFORD: Sometimes additional parameters can be identified as  
23 well, but in general, three.

24 JUDGE COLE: Okay, thank you.

25 MS. SAFFORD: Three.

1                   JUDGE MOSSMAN: Do you monitor all wells or just a sample of wells?  
2 And if you do sampling, briefly, what's the basis for how you select -- or is  
3 it random? Is it simply random, is it a non-random process?

4                   MS. SAFFORD: All wells are monitored.

5                   JUDGE MOSSMAN: All wells are monitored, thank you.

6                   JUDGE BOLLWERK: The applicant indicated it felt the reason that  
7 this case is not infinite power technically because of the adoption of the  
8 preconstruction rule. Anything the staff wants to say in that regard?  
9 Obviously Powertech admitting attention like this as I indicated previously as  
10 well as Crow Butte.

11                  MS. SAFFORD: I think that the construction rule, the 4032 is  
12 applicable here and that it does provide a distinction based on the timing and  
13 the ability of an applicant to -- or the inability of an applicant to engage in  
14 certain activities that constitute construction.

15                  JUDGE BOLLWERK: All right, anything further out of the board  
16 member staff? No? All right, let me go turn back to the petitioner. Let me  
17 step back and clarify one maybe semi-factual issue. There's been a lot of  
18 question about what aquifer is over Ms. -- under Ms. Viviano's property. Do  
19 you want to say anything about that? Because we've heard there's some question  
20 about it. Do you --

21                  MR. FETTUS: We tried to clarify that as well. We think it's the  
22 Inyan Kara.

23                  JUDGE BOLLWERK: Inyan Kara, all right. All right, thank you.

24                  MR. FETTUS: Your honor, turning to Contention 3, first -- moving  
25 back to Contention 3. Our interpretation of 4032(e) and its relationship with

1 the -- and also NEPA responsibilities that go to the staff and 51.45  
2 responsibilities that go to the applicant. You have us on the record on that.  
3 We have a very different understanding of what's required by their statutory  
4 obligations to collect the data, to collect the analysis, to do the impacts  
5 analysis and then just as importantly to do the mitigation analysis as well.  
6 So we don't need to belabor that and I hope the record is clear on that and  
7 that goes for all of the contentions.

8           With respect directly to Contention 3, we just spent the last 15  
9 minutes again really talking about the merits. Petitioners experts discussed  
10 the many boreholes that exist between the aquifers which is more than enough at  
11 the pleadings level to raise a material dispute of fact necessary to the  
12 sustained contention. We've also discussed how the data that Strata itself  
13 provided -- this was in our experts' reports -- shows an unusually similar  
14 chemical composition between the aquifers that otherwise appear to be separate.  
15 What that means, again, we don't know yet, but it certainly raises questions of  
16 fluid vibration and the material dispute of fact. Strata and staff may  
17 disagree, but petitioners have clearly shown that there's a genuine dispute of  
18 material fact of law that's sufficient to articulate a material and admissible  
19 contention.

20           As Dewey Burdock opinion explained and we don't think that's  
21 changed at all by the preconstruction licensee. Any discussion of the relevant  
22 strengths and weaknesses of each side's testimony goes to the merits of not  
23 meeting admissibility. Do you have anything further?

24           JUDGE BOLLWERK: All right, anything, Judge Cole? No? All right.  
25 I don't either. Two things before we move on to Contention 4. One is let me -

1 - I want to step back for a millisecond back to Contention 2 and ask the staff  
2 one other question. You indicated I guess when you clarified the question  
3 about this license condition that in the last three or four cases, because the  
4 amendment license condition had been opposed. Is there -- and recognizing it's  
5 early in the review now for this particular application, is there anything  
6 about this application that suggests that we not have a similar license  
7 condition?

8 MS. SAFORD: Nothing, no. Nothing.

9 JUDGE BOLLWERK: Nothing? All right. If anybody wants to say  
10 anything about that response?

11 MR. FETTUS: Your honor, it still doesn't get to what -- I mean, it  
12 still misses the point of what our contention is which is that their needs to  
13 be impacts analysis and mitigation analysis, and has to look at the no action  
14 alternatives. We presume, because we're required by law to presume compliance  
15 with an ACL; so the fact that one may be proposed in the future for virtual  
16 certainty is neither here nor there.

17 JUDGE BOLLWERK: All right, thank you. Well, okay, did you want to  
18 say something? But he gets the last word, that's my only --

19 MR. PUGSLEY: He's more than welcome. I just wanted to note for  
20 the record that you were referring, judge, to the three most recent licenses  
21 and these license conditions. If I may also refer you to Cameco's license for  
22 Smith Ranch which a recent public meeting was held to discuss their proposal to  
23 file an application requesting an alternate concentration limit. It was  
24 discussed at that meeting and this was a license that was issued a long time  
25 ago. And we understood then for that license that we had to file a license

1 amendment application for an alternate concentration limit and again, as stated  
2 earlier, we have no reason to suspect that would not trigger an opportunity for  
3 a hearing. So you have both current examples and past examples of where this  
4 would be true.

5 JUDGE BOLLWERK: All right, anything the staff wants to say in that  
6 regard? Anything further, sir? I think your point is that it makes no  
7 difference. Well, at this point, I was going to take a break, but let me see  
8 if people took a short break, what the party -- anyone need to take a break at  
9 this point or should we press on?

10 MALE SPEAKER: Let's keep -- I'm ready whenever you are.

11 MALE SPEAKER: That's fine.

12 MS. SAFFORD: 3:15, number 26. One more; we can do one more.

13 JUDGE BOLLWERK: All right, why don't we go ahead and do one right  
14 now then. That's a good reason. All right, then we'll take a -- it's about  
15 five 'til, so why don't we take until five after? How's that?

16 MS. SAFFORD: Oh, no, no. I was saying we could do one more  
17 contention.

18 JUDGE BOLLWERK: Oh, one more. Ah, I'm sorry. I misunderstood.

19 MS. SAFFORD: As long as you take a break before 5:00, we'll --

20 JUDGE BOLLWERK: Got it, all right, between 4:00 and 5:00 then.

21 All right, let's continue.

22 MALE SPEAKER: Well, no -- Molly gets the floor.

23 JUDGE BOLLWERK: No problem. We want everything -- we don't want  
24 any issues here. Okay, Contention four. The application fails to adequately  
25 document negative impacts on groundwater quantity. I have to make sure I get

1 the word "quantity" in here; Judge Cole has corrected me a couple times. I  
2 keep saying "quality," but it's "quantity." So let's turn to the petitioners  
3 then.

4 MR. FETTUS: Strata's application violates 10 CFR 51.45 in NEPA by  
5 failing to properly analyze the project's impacts on groundwater quantity.  
6 With supported Contention 4 with the declaration of Dr. Moran. Turning to the  
7 responses, Strata argued the merits again, stating 51.45 does not prescribe  
8 requirements for the ER to contain the level of detail of potential groundwater  
9 consumption described by the council's experts. The NRC staff by contrast  
10 admits that while it does not entirely agree with Contention 4. it believes,  
11 quote, "that the contention is admissible and marked," end quote, and accepts  
12 Strata will likely develop more uranium recovery sites within the Lance  
13 District and that future ISR projects are, quote, "reasonably foreseeable."

14 Putting aside the merits review, there's insufficient data to  
15 engage in such a comparison. Dr. Moran described in his declaration the ER's  
16 flawed analysis of groundwater quantity impacts and has insufficient  
17 information on groundwater consumption. It's just simply not -- sufficient  
18 information is not presented. He explained the application fails to analyze  
19 how much of the water will be used by the Ross operation in the long-term.  
20 Instead, the ER offers only several partial and conflicting estimates of  
21 groundwater consumption, and this is the first place we also get into the  
22 impacts as well.

23 Those questions, your honor, as I would respectfully submit to you,  
24 could all be decided at the merit stage and are premature at this juncture. To  
25 fully address that, the NRC must make the additional efforts to obtain more

1 information on the reasonably foreseeable groundwater quantity impacts for the  
2 entire Lance project. Again, this was a similar contention to that lodged  
3 between Burdock that was accepted by the board and we submit that it should be  
4 done so here today.

5 And the issue, just to round it out, for those of you that have had  
6 the pleasure, as I have, of living in the west, let's go back to Mark Twain:  
7 "Whiskey's for drinking and water's for fighting." And the amount of water  
8 that gets used is fundamental to any meaningful NEPA analysis that ever gets  
9 done, for any project, whatever they're extracting from the source. And I  
10 would just submit to you, we've raised a serious question by a qualified expert  
11 and it's something that we need to explore at the merit space. I'd be happy to  
12 take your questions.

13 JUDGE BOLLWERK: Okay, anything from either Judge Cole or Judge  
14 Mossman?

15 JUDGE COLE: No, I think I understand your position.

16 JUDGE BOLLWERK: And again, this is a similar contention that was  
17 admitted in the Powertech or the Dewey Burdock case, tribal contention Number  
18 4, I believe.

19 MR. FETTUS: Correct, your honor.

20 JUDGE BOLLWERK: Anything different about this that you want to  
21 point out to us in terms of what was admitted there or basically the same?

22 MR. FETTUS: No, your honor.

23 JUDGE BOLLWERK: All right. At this point then, let's turn to the  
24 applicant.

25 MR. PUGSLEY: Thank you, your honor. With respect to Contention 4

1 while we deal with groundwater quantity -- and I have the same problem; I was  
2 saying "quality," it's even typed up on my paper as "quality."

3 JUDGE BOLLWERK: You need Judge Cole to keep you on the straight  
4 and narrow.

5 MR. PUGSLEY: Many of the arguments respect -- with respect to this  
6 contention are similar to those for contentions 1 through 3 with the following  
7 additions. First is, once again, the petitioners have said that we have  
8 violated NEPA. We cannot violate NEPA; a license applicant cannot violate  
9 NEPA. It's a procedural statute assigned to govern agency action and not the  
10 license applicant's action.

11 Secondly, the issues associated with assessing groundwater quantity  
12 or what we have referred to previously as drawdown or consumptive use is again  
13 subject to the requirements of Part 4032(e). We cannot know the full value --  
14 I apologize -- we cannot know the full extent to which we would use groundwater  
15 both during operations, during three phases of operation: operations,  
16 operations and concurrent restoration and then finally, restoration. We cannot  
17 know that at this time. It is, again, to ask the impossible, so we once again  
18 refer you back to our arguments on Part 4032(e).

19 We also on that light distinguish Powertech and Crow Butte one from  
20 this proceeding for the reasons noted in Contention 3. We're dealing with  
21 totally different factual circumstances because the aquifer in which Strata  
22 will be recovering uranium in during operations and will be restoring post-  
23 operations is not present at Ms. Viviano's site, nor does she allege that she  
24 draws water from that particular aquifer.

25 In addition, Strata's environmental report on this subject is quite

1 extensive. Strata was the first, at least to our knowledge, the first  
2 applicant in the recent set of license applicants for ISR facilities to submit  
3 a complete digitized regional groundwater model that showed both groundwater  
4 quality in a speculative manner as well as quantity. So we believe that we  
5 have not violated Part 51.45, A, because it does not have prescriptive  
6 requirements for this, and B, because we have indeed provided the requisite  
7 information necessary for NRC staff to conduct its evaluation.

8 Strata takes issue with the assertion that we argue the merits by  
9 saying that Part 51.45 does not have restrictive requirements. We are  
10 referring to the requirements for an environmental report, not for a  
11 supplemental environmental impact statement. The environmental report by  
12 definition is submitted prior to the issuance of a license. We cannot satisfy  
13 what petitioners' experts are asking for due to 4032(e). So by definition we  
14 would violate, according to petitioners' theory, we would violate Part 51.45 in  
15 every instance so that there would never be -- all you would have to do to have  
16 an admissible contention is say they violate Part 51.45, and that's the end of  
17 the inquiry.

18 Additionally, again, there's discussion of deviation from guidance.  
19 Again, we refer you to the Curators of Missouri case cited previously. And  
20 once again, we refer you to the fact that there is no link, again, between the  
21 petitioners' affiant and potential harm from the lack of analysis of  
22 groundwater quantity. Indeed, Strata's analysis showed that there would even  
23 be minimal if not negligible groundwater quantity impacts in the aquifer in  
24 which recovery's occurring in its environmental report which is a good 4,300  
25 feet above and also not present at Ms. Viviano's properties. And I welcome

1 your questions.

2 JUDGE BOLLWERK: Thank you. Dr. Cole.

3 JUDGE COLE: You indicated you couldn't provide some numbers with  
4 respect to quantity because you're not at that stage yet. I don't understand  
5 that. It seems to me that you've got some standard procedures that you're  
6 going to use. You know how much water you're going to be -- a range of water  
7 you're going to be using and circulating. Most of your water is reused and  
8 you've got some water use and you've got other facilities that have records of  
9 water consumption. You can at least make some pretty decent estimates of the  
10 water consumption, the consumptive use of water you're going to -- that's going  
11 to take place.

12 MR. PUGSLEY: Well, Judge Cole, may I --

13 JUDGE COLE: Have you provided that? Is it your point you had or  
14 no?

15 MR. PUGSLEY: May I -- if I may answer your question --

16 JUDGE COLE: Sure.

17 MR. PUGSLEY: -- in two parts. First is, the statement I made, and  
18 I apologize if there was some confusion, is that we are not in a position to  
19 provide the conclusive end of product Wellfield development numbers on  
20 consumption. That's what I was saying. But to answer the second part of your  
21 question, it is our position we did it, what you have suggested. We have  
22 chapters four through six of the environmental report as well as chapter two of  
23 the environmental report dealing with cumulative effects; we have indeed  
24 addressed these issues in our environmental report. So we do not violate Part  
25 51.45, because in order to say we violated, you would have to say we did not

1 address the issue and we did.

2 JUDGE COLE: Okay, thank you.

3 JUDGE BOLLWERK: All right, nothing from the -- all right, let's  
4 turn to the staff then and I should note that I actually suggested maybe the  
5 staff wanted to go first on this one because you had said before you made  
6 contention in part -- I forgot to do that, but what why don't we hear from you  
7 if the applicant has anything further they want to say about the staff's  
8 argument, we'll certainly allow you that opportunity. It's probably a little  
9 bit easier that way.

10 MALE SPEAKER: Thank you.

11 JUDGE BOLLWERK: All right.

12 MS. MARSH: Okay, thank you. As stated in our response, the staff  
13 agrees that the cumulative impacts portion of this contention is admissible.  
14 The staff is going to look at cumulative impacts of the proposed Ross project  
15 with future ISR projects in the area with or without the admission of this  
16 contention. As well, the staff believes that the cumulative impacts portion is  
17 admissible, admission of the contention isn't necessary to ensure that the  
18 staff does address cumulative impacts in its SEIS. But because petitioners are  
19 required to raise their environmental contentions on the applicant's ER, now is  
20 the time to raise this concern. When the contention challenging the ER is  
21 admitted, the staff can then request additional information from the applicant  
22 and then while it's developing its EIS, if EIS addresses the concerns alleged  
23 in the contention, the original contention becomes moot and the intervener must  
24 raise a new contention if it claims that the EIS doesn't accurately or  
25 completely address the contention. So the staff sees this as a contention of

1 omission essentially. The information -- the cumulative impact information  
2 doesn't appear in the application, but the staff will get the information from  
3 Strata and other sources and will analyze potential cumulative impacts in its  
4 SEIS for the Ross project.

5 Aside from the cumulative impacts argument, the petitioners contend  
6 that the application contains conflicting estimates of the quantity of water  
7 that will be used for the project, but different numbers don't necessarily  
8 equal conflicting numbers. The numbers address water use during operation and  
9 restoration and necessarily are different. The petitioners don't clearly  
10 explain why the different numbers they cite in the application conflict with  
11 each other. While they state that Strata underestimates the quantity of water  
12 it will use, the petitioners rely on other ISR sites, history rather than  
13 pointing out a specific deficiency in Strata's manner of calculating the  
14 numbers.

15 And also as stated in our response, the petitioners' experts  
16 challenge Strata's use of computer models, but they don't specifically address  
17 what errors occurred in Strata's modeling. Rather, they seem to argue against  
18 computer modeling in general. So with these other arguments, the staff does  
19 not believe the petitioners have established a genuine dispute with the  
20 application.

21 JUDGE BOLLWERK: All right, any questions? And I would also --  
22 well, let me ask first, anything further you want to say about what the staff  
23 has said?

24 MR. PUGSLEY: Yes, if I may, your honor.

25 JUDGE BOLLWERK: All right.

1                   MR. PUGSLEY: And then I'll keep the focus narrow to the cumulative  
2 impacts argument which unlike the standing Mr. Thompson, unlike the standing  
3 wasn't mentioned until today, this was specifically mentioned. We do disagree  
4 with the staff on the -- them saying that this is admissible in part for the  
5 following reasons.

6                   First is we're talking about -- at this stage of the game alleging  
7 a deficiency in Strata's environmental report. Their -- while we do recognize  
8 the fact that petitioners do state that at multiple locations that they will  
9 amend their contentions to reflect the SEIS that comes out, at this stage of  
10 the game, we're talking about deficiencies in an environmental report. We are  
11 not required by regulation to address cumulative impacts in our environmental  
12 report. The staff is required to address cumulative impacts in their Part 51  
13 document, in this case, a supplemental environmental impact statement.

14                  Secondly, back to -- and goes directly to cumulative impacts, is  
15 that not only is looking at cumulative impacts as stated in earlier arguments  
16 improper for this proceeding, but it's also far too large of a scope to be  
17 dealing with here if you're talking about groundwater quantity, okay? The  
18 reason, as stated before, an ISR project is not -- or ISR projects are not  
19 project by project; they are Wellfield by Wellfield. At this stage of the  
20 game, Strata doesn't even know where every single Wellfield is going to be. It  
21 is nothing more than an estimation. And take that, and take that to the next  
22 step and say that we don't have the conclusive data set to understand this.  
23 However, our groundwater model, regional groundwater model, used a range of  
24 values and a mean number for what we call production bleed. And every single  
25 production bleed, the reason that every application says, "Production bleed at

1       this project site could range from, say hypothetically .5 percent to three  
2       percent," is every Wellfield will have a different bleed rate requirement  
3       because every Wellfield is different in terms of maintaining balance in the  
4       Wellfield and preventing excursions. So the best that we can do given the  
5       regulatory constraints that we have is what was put in our environmental  
6       report, and that is why we believe the cumulative impacts part is not  
7       admissible. And that's all we have.

8                  JUDGE BOLLWERK: All right, I'm going to go really out of order  
9       here. Does the staff want to say anything about what you just heard? I  
10      haven't forgotten about the petitioners over here; you're last obviously. All  
11      right.

12                 MS. MARSH: No, I think we've made ourselves pretty clear in the  
13      response.

14                 JUDGE BOLLWERK: Okay, all right. This contention was admitted --  
15      a contention very similar to this was admitted in the Powertech case. Anything  
16      you want to say about why this case is different from that one or that one is  
17      simply wrong?

18                 MS. MARSH: I'm not familiar with exactly what was contained in the  
19      petition in Powertech. Each case is going to be a little bit different with  
20      what information was contained in the application, what information was  
21      contained in the experts' opinions that went with the petition.

22                 JUDGE BOLLWERK: All right, but the bottom line is the cumulative  
23      impacts here as far as you're concerned are admissible.

24                 MS. MARSH: Yes, we see it as a contention of omission.

25                 JUDGE BOLLWERK: All right. All right, anything out of the other

1 board members now? All right, let me turn to the petitioners then.

2 MR. FETTUS: Your honor, NEPA is all that good faith assessment of  
3 regionally foreseeable impacts. By definition, we don't know yet to what's  
4 going to happen with a high degree of certainty, but that's what NEPA is for.  
5 It's the look before you leap statute. And regarding the applicant not being  
6 required to comply with NEPA, I don't know how many times I need to say it.  
7 The NRC rules require the logic of NEPA contentions now, phrased as objections  
8 to the scope and content of the applicant's ER. If the applicant's view right  
9 now were to prevail on cumulative impacts as opposed to the staff or our  
10 position, petitioners or interveners would never have an opportunity to raise  
11 questions on cumulative impacts because, again, we couldn't know thus directly  
12 about the statutory requirements of NEPA.

13 Every Wellfield is certainly different, but that's what an  
14 environmental analysis is for, and the strict language of 51.45 tracked  
15 precisely with the language of NEPA in terms of impact of proposed action on  
16 the environment, any, quote, "adverse environmental effects," and quote, "the  
17 relationship between local short-term uses and the man's environment, the  
18 maintenance and enhancement of long-term productivity," and quote, and "any  
19 irreversible and irretrievable commitment of resources." Again, ask any  
20 westerner if they think that means water; they'll tell you yes.

21 So to the extent the Ross project's going to deplete groundwater  
22 resources or even have a significant impact for a short period or for a long  
23 period, these are issues that fall within the regulatory mandates as well as  
24 within the statutory obligations that sit upon the agency. And the specific  
25 litigation of that goes to the merits, not to the admissibility of the

1 contention. I think that's clear. Do you have any more questions? All right.

2 JUDGE BOLLWERK: All right, then. Judge Mossman, you're looking  
3 for something, you --

4 JUDGE MOSSMAN: No, no, no, I'm fine. I was sitting in --

5 JUDGE BOLLWERK: Okay, all right. All right, then I think we're  
6 concluded with this contention. Let me ask before we take the break, one  
7 question about the hydro resources case that's been talked about here, the  
8 citation -- I haven't heard anybody yet give it to us. My question would be if  
9 they provide us with the citation, do you have anything further you want to say  
10 about it?

11 MR. FETTUS: I'd like -- the case was so long. Mr. Pugsley was  
12 correct. And there were bifurcations and some of the objections have to do  
13 with the bifurcations. I think the -- and there were certainly the different  
14 rulings, sub-rulings, issues that got taken out. I think the easiest way to do  
15 it is literally a citation with no interpretation, just the citation of what  
16 they want you to read --

17 JUDGE BOLLWERK: Okay.

18 MR. FETTUS: -- and that's fine. As long as there's no  
19 interpretation, you do the interpretation, that's fine by me.

20 JUDGE BOLLWERK: Right.

21 MR. PUGSLEY: Well, the only other way to do this is to have the  
22 board direct Strata to file a supplement with the case and the interpretation  
23 and entitle petitioners to a response.

24 JUDGE BOLLWERK: Well, at this point, I'd simply take the citation,  
25 but I, you know --

1           MR. PUGSLEY: Well, your honor, we are searching for it.

2           JUDGE BOLLWERK: Okay. I'm not trying to start another round of  
3 briefing here, but on the other hand, if there's -- anything substantive is  
4 said, then obviously you all are going to have a chance to respond, so.

5           MR. FETTUS: That's all I wanted to make sure and I wanted to  
6 actually thank -- just reduce the burden on the board.

7           JUDGE BOLLWERK: Right, I'm not interested in hearing more  
8 argument; I really just want the citation; that's my point, but I don't want to  
9 --

10          MR. PUGSLEY: And we appreciate that, your honor, because as Mr.  
11 Fettus said, the case is indeed voluminous. I mean, I have half a conference  
12 room devoted to the hearing file alone --

13          JUDGE BOLLWERK: Right.

14          MR. PUGSLEY: -- but that's why we have to cite to a specific on  
15 point part of that, the multiple decisions.

16          JUDGE BOLLWERK: All right, well, if by the end of today, we do  
17 have some of the -- we have the volume sitting around here, but obviously we  
18 are doing other things, maybe you can just send us a letter with -- as a  
19 citation if you want us to look at it.

20          MR. PUGSLEY: Certainly. Certainly.

21          MALE SPEAKER: Send it to everybody.

22          JUDGE BOLLWERK: Oh, yes, (unintelligible) file, absolutely. Don't  
23 just send it to me; no, you're absolutely right.

24          MR. PUGSLEY: Yes, sir.

25          JUDGE BOLLWERK: All right, okie doke. All right, all right. At

1 this point, it's about a little after quarter after 2:00, so why don't we take  
2 a break. Let's take it -- let's say 2:30. That should work out and that gives  
3 everybody an opportunity, and then we'll be in the home stretch here I think in  
4 terms of Contention 5 and whatever other items we need to deal with. So we'll  
5 take a break until 2:30.

6 (Whereupon, a short recess was taken)

7 JUDGE BOLLWERK: All right, if we could go back on the record,  
8 please. All right, we've had our afternoon break and we're in the home stretch  
9 here with Contention 5, which is the last of the five contentions that were  
10 proffered by the petitioners. This one has multiple parts to it, so we'll go  
11 ahead and get started and see which ones you want to talk about. I suspect  
12 it's all of them, so.

13 MR. FETTUS: Again, Your honor, I'll try and make sure we do the  
14 courtesy of being brief. Our fifth contention was essentially a NEPA  
15 contention in several parts.

16 JUDGE BOLLWERK: I'm sorry, let me read it. I apologize. Just for  
17 the record -- it'd be -- "The application fails to adequately assess cumulative  
18 impacts of the proposed action in conjunction with other industrial activities  
19 in the area and fails to evaluate adverse environmental effects resulting from  
20 an insufficient decommissioning bond and the disposal of 11(e).2 byproduct  
21 material. It also does not properly consider impacts to visual resources at the  
22 nearby Devil's Tower national monument and improperly tiers to NRC's flawed  
23 DEIS for ISL uranium mining." Okay.

24 MR. FETTUS: Thank you, your honor. Once again, in their  
25 responses, Strata argues the merits. Strata asserts, in section 2.2 of its ER

1 provides a sufficient analysis of cumulative impact to fulfill its regulatory  
2 requirements. We discussed this in the previous contention. The disagreement  
3 over the degree and quality of the cumulative impacts analysis, which now I  
4 understand Strata seems to think is not even fitting for its ER and therefore  
5 petitioners would never have an opportunity to lodge a cumulative impacts  
6 analysis concern because if we don't lodge it at this stage of the proceeding,  
7 we don't get to lodge it later.

8 Strata's response to cumulative impacts associated with any  
9 potential future Strata satellites will be addressed in the environmental  
10 reports associated with each such satellite. It gives credence to Dr. Moran's  
11 testimony in support of our petition. And Strata's application carves up the  
12 potential impacts into pieces, preventing the public and regulators from  
13 realistically looking at the long term cumulative impacts. I would remind the  
14 court that the NRC staff has deemed that our contention on cumulative impacts  
15 is admissible and that it's reasonably foreseeable. Granted, this is just a  
16 narrow portion of what they accept, but they accept it.

17 The NRC goes on to state that petitioners set forth an issue that  
18 is material to the staff's determination in this proceeding, and has supported  
19 the issue by citing specific portions of the application that lack information  
20 to the NRC's evaluation citing -- the NRC's evaluation of the environmental  
21 impacts of the proposed action. We're aware that the applicants are not bound  
22 by the -- as we've discussed at length today, what is clear is that if we don't  
23 lodge a cumulative impacts analysis now, we will not have a meaningful  
24 opportunity to lodge it later in subsequent ERs. And, again, as you note in  
25 our reply brief, where we talked about the Smith Ranch history, that was not to

1 attack because we would have no basis to nor would we waste the court's time  
2 doing such a thing. It's not to attack those each individual instances, it's  
3 merely to demonstrate that once this train goes out of the station, the  
4 likelihood of being able to address at the beginning the fundamental  
5 requirements of NEPA that you analyze the reasonably foreseeable impacts of the  
6 entire project, the train will have left the station. But that's cumulative  
7 impacts.

8           Turning to financial assurance: The petitioners are aware that the  
9 applicants must propose financial assurance instruments and that the Commission  
10 will review and update those instruments annually according to site-specific  
11 circumstances. That's clear in our brief. And we of course can't know the  
12 exact amount of the bond until such time as it's actually set. However, Strata  
13 and the staff disregard our main point, regardless of whether Strata's  
14 methodology of calculating this bond complies with the substantive requirements  
15 of Criterion 9. Section 51.45 requires Strata to evaluate the environmental  
16 impacts and negative effects that will result if the bond is insufficient.  
17 This is a well-founded concern supported not only by Dr. Moran's testimony as  
18 we noted but also by EPA. There's a long history of inadequate bonding at ISL  
19 sites. This is precisely what NEPA is for and precisely what the Commission's  
20 adoption under 10 CFR 51.45 is the precursor to the staff's supplemental AIS.  
21 This is precisely what it's for.

22           Turning to 11(e).2: Strata claims the petitioners have not shown  
23 that 11(e).2 byproduct material may not -- that byproduct material disposal --  
24 or, I'm sorry. That disposal of byproduct material may not be feasible. And  
25 there's no evidence that negative impacts from disposal are reasonably likely.

1 Petitioners in Strata disagree here on the proper interpretation of 51.45's  
2 analytical mandate, as well as on the likelihood of safe and effective  
3 disposal. We know that there's only a couple of options available for 11(e).2.  
4 Getting to those options is often fraught with complications. This  
5 disagreement is a genuine dispute of material law and fact, and should be  
6 litigated at the merits, not here.

7 Strata asserts no specific regulation specifically requires -- no  
8 specific NRC regulation specifically requires them to assess the potential for  
9 visual and aesthetic impacts on the Devils Tower monument. Respectfully, your  
10 honor, agencies -- as we said in our reply brief, agencies don't issue  
11 regulations in a microscopic scale. We can see that the NRC regulations don't  
12 say that you must look at Devils Tower monument when doing this. Instead, the  
13 Commission drafted 51.45 and Congress enacted NEPA to encompass environmental  
14 impacts broadly speaking. And we respectfully suggest that looking at the  
15 visual and aesthetic impacts on the first national monument decided by Teddy  
16 Roosevelt certainly would be encompassed by that statutory mandate. For its  
17 part, the NRC staff simply asserts that it disagrees with the petitioners,  
18 claiming Strata's ER adequately addresses the visual impacts. This is an issue  
19 for the merits, your honor, and not an issue for the admissibility for this  
20 aspect of the contention.

21 Finally, I think we get to the heart of this contention, along with  
22 cumulative impacts, and that is -- again, we'll start with -- again, we'll have  
23 to belabor this issue in oral argument. We hope we didn't have to, but we do  
24 not disagree. The site-specific NEPA documents may genuinely tier to a valid,  
25 generic, or programmatic BIS; at no point are we attacking the actual action of

1 tiering to a document. Rather, we have numerous substantive objections to the  
2 NRC's generic EIS for ISL uranium mining, which we believe fall far below the  
3 standards established by NEPA. We documented that to you in the numerous  
4 incorporated comments on the GEIS that we submitted to you. Rather than burden  
5 the ward with such a litany, the petitioners incorporated them by reference in  
6 contention five and asserted that Strata's ER does not satisfy 51.45 by relying  
7 on the document that is inadequate under NEPA. We also cited extensively where  
8 Strata relied on that what we think is an inadequate Generic Environmental  
9 Impact Statement.

10           We fully acknowledge that any direct challenge to the GEIS -- by  
11 the way, the GEIS is the G-E-I-S. Sorry, I refer to it as that. It just pops  
12 out. That any direct challenge to the GEIS is unripe until the Commission  
13 incorporates that document into a subsequent Environmental Impact Statement.  
14 What is ripe, however, is petitioner's claim that Strata's ER is invalid under  
15 section -- under section 51.45, having laid its foundation in a document that  
16 cannot withstand legal and technical scrutiny. That is an issue for the  
17 merits.

18           Again, if you have questions about whether or not we're actually  
19 challenging the concept of tiering, we're not. We're challenging the actual  
20 tiering to this document that is all. And we provided extensive support as to  
21 why we are challenging the tiering to this document.

22           Furthermore, it's critical, your honors, that we lodge this  
23 challenge at this time to preserve any objections that we have. As is likely  
24 foreseeable, the Commission tiers an eventual SEIS to the flawed GEIS. If we  
25 don't raise it at this time, we're barred from raising it later. And I'd be

1 happy to take your questions.

2 JUDGE BOLLWERK: Particularly see if Judge Cole or Judge Mossman  
3 has anything first. No? All right, I have several. In terms of the  
4 insufficient decommissioning bond, quite often a couple of the differences  
5 where the Powertech or other cases had contentions that were admitted, this is  
6 an instance where the contentions, at least as I could assess it, in Powertech  
7 and Crow Butte 2 that were like this contention were not admitted. Why is  
8 yours different? Or is it the same and you're simply trying once more -- one  
9 more time?

10 MR. FETTUS: We would not waste the board's time with trying  
11 something that had failed before. This is very different. The contention that  
12 was not admitted on financial assurance, I'd have to turn and look at the Dewey  
13 Burdock decision, which I do have before me. I'll discuss that in one moment.  
14 I think it's in the '60s.

15 JUDGE BOLLWERK: Contention 5. Try five.

16 MR. FETTUS: Five. Correct. 69. Now, we carefully made sure that  
17 we did not put the board through litigating the same issue again. In fact,  
18 your honor, we took account of what was precisely done in Powertech and made  
19 sure that we articulated to stay within the constructs of what we want to do in  
20 this proceeding, which is NEPA -- which is a set of NEPA contentions. And we  
21 would first suggest to you, one, we don't think Strata is -- we don't think  
22 it's likely right now that what we saw in the ER would satisfy meaningful  
23 analysis for a decommissioned bond and what needs to be covered. And certainly  
24 we don't know it's going to happen SEIS yet. We don't presume here, first,  
25 that Strata's willfully going to violate regulations. In fact, we presume the

1 contrary. We presume they will comply with the regulations. But what we do  
2 want to show is that we suggest what we see here in the ER, that their data is  
3 flawed. We have provided evidence that on the basis of what they've laid out  
4 for calculating decommissioning body ignores important considerations and  
5 suggest that the bond will not be large enough. This has certainly happened in  
6 previous ISL sites. EPA raised the same sets of concerns. We think this is  
7 enough to meet the standards of admissibility. The NEPA contention, under  
8 51.45 and any additional contention that may need to be done for the SEIS. So  
9 it's very different than what was -- the contention in Dewey Burdock had to do  
10 with the Oglala Sioux pointing out that the restoration times may be longer  
11 than anticipated, which we pointed out, and the financial surety calculations  
12 do not reflect the longer restoration time. The board -- these are issues that  
13 we want to see analyzed in any NEPA document.

14                 The board specifically determined that they identified no specific  
15 inadequacies in Powertech's application. More importantly, the board said  
16 there are no specific regulations that would have required Powertech to include  
17 more information than was already included. Your honor, we're not actually  
18 looking directly at that kind of situation. The difference between our case is  
19 that petitioner Dewey Burdock challenged the methodology for computing its  
20 decommissioning bond. We don't challenge the methodology here. Rather, we  
21 argue they must consider the reasonably foreseeable impact in the highly  
22 possible event that the bond is not sizable enough. It's in entirely different  
23 legal standard. We're not going to the actual Regs of what they need to do  
24 when they put out their bond.

25                 JUDGE BOLLWERK: All right. You have anything you want to say

1 about the Crow Butte case? Crow Butte 2 that was consolidated miscellaneous  
2 contention L?

3 MR. FETTUS: Are you asking me?

4 JUDGE BOLLWERK: Yes.

5 MR. FETTUS: Can you repeat the question?

6 JUDGE BOLLWERK: Sure. It's -- there was a contention at least  
7 similar, like in Powertech, in the Crow Butte 2 case: consolidated petitioners  
8 miscellaneous contention L. I'm not sure if you're familiar with that one or  
9 not.

10 MR. FETTUS: No, I'm not familiar with that.

11 JUDGE BOLLWERK: All right.

12 MR. FETTUS: With that actual contention or how they structured it  
13 -- or, the same as ours.

14 JUDGE BOLLWERK: Okay. In terms of the disposal of the 11(e).2  
15 byproduct material, is your request for an analysis really a request to look at  
16 the impacts of onsite storage? Is that really the other option that's out  
17 here? That's available?

18 MR. FETTUS: Actually, it's -- that's potentially what could be  
19 raised here, yes, is onsite storage of this for a significant period of time.  
20 For a time that extends far beyond -- which, again, we presume would be lawful.  
21 That the NRC would be regulating at such time. But it might not be what Strata  
22 intends to have happen or it might not be what the NRC intends to have happen,  
23 but it happens nonetheless. And there's a long history of radioactive waste in  
24 this country not being able to be moved or disposed of according to the best  
25 laid plans.

1                   JUDGE BOLLWERK: All right. And I heard something -- someone say  
2 this morning -- earlier today actually, this afternoon, about some prohibition  
3 on onsite storage. Somebody will need to go back to that, because I thought  
4 the staff was pretty clear in its -- I believe it was the staff's brief that  
5 talked about disposal onsite was an alternative. But someone here also  
6 mentioned 11(e).2 material couldn't be disposed of onsite, so I'm sort of --

7                   MR. FETTUS: Well, right now, your honor, there are only a handful  
8 of disposal sites available. The number of ISL lines and other activities that  
9 generate low level waste are, as far as we can tell, expanding. Competition  
10 for those sites may be increasing. And again, this is precisely what NEPA is  
11 for. Strata must consider this possibility and address it under 51.45, as must  
12 the staff, the reasonably foreseeable impacts that would result if it's  
13 difficult, if not, you know, impossible to dispose of things at a time line or  
14 in a way that they see fit.

15                  JUDGE BOLLWERK: All right, and in terms of visual impacts at  
16 Devils Tower. I mean, visual impacts are obviously something that I've seen as  
17 a concern in NRC cases before. I mentioned the AREVA case before. We actually  
18 in the Eagle Rock case, one of the concerns was the national park facility  
19 across the road and the affects of the lights on that national park facility,  
20 so clearly does come up. So the basis on which you're trying to have this  
21 contention considered is a statement, if I understand it, in Ms. Viviano's  
22 affidavit about her concern about lights at her property. How does that relate  
23 to lights at -- the effect of lights at this property?

24                  MR. FETTUS: The effects of light at the applicant's property or is  
25 the effects of lights at her property?

1                   JUDGE BOLLWERK: The -- well, as I understand it, looking back at  
2 the pleading that you filed, you mention the fact that Devils Tower -- that Ms.  
3 Viviano had raised concerns about light pollution and that that was the basis  
4 for the -- your concerns about Devils Tower. I don't think I saw anything else  
5 that sort of raised that, so I'm wondering what other information you have that  
6 might suggest there is a possibility of light pollution at Devils Tower, other  
7 than Ms. Viviano's concern about her property.

8                   MR. FETTUS: We -- her properties, plural -- we don't necessarily  
9 go into where we think the potential light pollution problems could come at  
10 Devils Tower. We suggest that the general aesthetic impacts of another major  
11 and potentially expanding ISL site near a major national monument raises  
12 significant impacts analysis concerns that should be taken -- it should be  
13 taken into account in any Environmental Impact Statement. That, we think,  
14 should go without saying since the proximity to a national monument by this  
15 facility and by this reasonably foreseeably expanding facility. With respect  
16 to Ms. Viviano, she raised her own concerns about lights and expansive  
17 industrial facility, but that's as far as it went.

18                   JUDGE BOLLWERK: All right. And with respect to the cumulative  
19 impacts you're assessing in this contention, adding that -- the question of  
20 industrial activities, to which you all already raised in Contention 4, which  
21 dealt with basically -- with the quantity of water. So, this is --

22                   MR. FETTUS: Right, this is a much -- we're happy to say, your  
23 honor, this is a potentially much larger contention or it could be very narrow.  
24 It depends on what analysis we see from the staff in the SEIS and what we find  
25 in our own investigations into understanding what the cumulative impacts could

1 be to this area. But part of the cumulative impacts relates back to all of the  
2 impacts that we find inherent in the flawed ER, and that goes from the scale of  
3 the industrial operation that we think is a segmented presentation, to all the  
4 potential -- whether it's traffic, groundwater contamination, water  
5 contamination, dust, air, a whole host of things.

6 JUDGE BOLLWERK: And that's --

7 MR. FETTUS: Failure to look at other extracted resources. That  
8 was in our original contention.

9 JUDGE BOLLWERK: And that's with respect to any other industrial  
10 activity, such as oil, gas drilling or anything else that might be --

11 MR. FETTUS: Right, that's directly from our contention. Thank  
12 you, Your honor.

13 JUDGE BOLLWERK: All right. All right, any questions? No. From  
14 the board members? All right, let's go to the other -- let me see between the  
15 applicant and the staff again. You all had said this was admissible in part.  
16 Any preference as to who goes first? I'll leave it up to you all.

17 MR. PUGSLEY: In order -- Your honor, in order to avoid the jumping  
18 back and forth we had before, we have no objection to the staff leading off.

19 JUDGE BOLLWERK: Thank you.

20 MS. MARSH: Okay. I don't have a whole lot to add to the  
21 cumulative impact contention here. That's much different from the Contention  
22 4. But we'll just say that in our response, the staff did agree that the  
23 cumulative impacts coming from future expansion of the ISR -- of ISR in the  
24 Lance District would be admissible. As we said before, we see this as a  
25 contention of omission. The information doesn't exist in the application.

1 We'll -- the staff will get the information from Strata, any other source it  
2 needs to, and then we'll do the analysis at SEIS. At that point, if the staff  
3 addresses the contention, that the contention will be moot and the petitioners  
4 would have to raise another contention.

5 JUDGE BOLLWERK: Just so it's clear, you are -- you do or do not  
6 agree with the other industrial activities portion of this contention? Are you  
7 limiting it simply to the Lance project area?

8 MS. MARSH: Yeah, the future -- Strata's future expansion. There's  
9 no -- the petitioners point out that there's no information in the application  
10 about those -- the expansions. When it comes to the past activities in the  
11 area, the petitioners -- in Contention 5, they don't point to any parts of the  
12 application that are deficient with respect to the past and present activities  
13 in the area and those go more to establishing the site characterization as it  
14 is now, anyway. But the staff agrees with the future expansion portion of this  
15 part of the contention.

16 JUDGE BOLLWERK: And why do you think, for instance, that oil and  
17 gas activities in the area are outside the scope of the contention or shouldn't  
18 be considered?

19 MS. MARSH: I don't know that they're outside the scope.

20 JUDGE BOLLWERK: Probably a bad -- why they shouldn't be considered  
21 and why they shouldn't be part of the contention. Put it that way.

22 MS. MARSH: Well I think the applicant does address oil and gas in  
23 the application, and the petitioners haven't really addressed where the  
24 deficiencies are in that. But when it comes to the ISR expansion, that  
25 information is entirely lacking.

1           JUDGE BOLLWERK: All right.

2           MS. MARSH: Moving onto the decommissioning bond section. The  
3 petitioners argue that the application needs to include an explanation of the  
4 environmental impacts of the potential failure of a decommissioned bond. It's  
5 not clear to the staff what environmental harm the petitioners allege would  
6 occur, but NEPA would only have required analysis of these events if what they  
7 -- the events are reasonably foreseeable. And to get to an environmental  
8 impact here, we first have to have the decommissioning bond be insufficient and  
9 then, second, if the bond is insufficient Strata would have to be -- would be  
10 failing to restore the site as it's required to do. And these things are not  
11 reasonably foreseeable.

12           NRC's regulations require both a sufficient financial -- both  
13 sufficient financial assurance and, regardless of the financial instruments,  
14 the regulations require decommissioning and restoration. As stated in our  
15 response, the contention assumes a violation of NRC requirements. The  
16 petitioner must make some particularized demonstration that there's a  
17 reasonable basis to believe that the applicant will act contrary to the  
18 requirements.

19           The petitioners don't challenge the methodology strategies to  
20 calculate its bond, but rather assert that Strata can't accurately estimate the  
21 bond because it is a proponent of the action. Petitioners fail to cite any  
22 portions of the application or explain specifically where they believe the  
23 deficiencies in the calculations lie. Rather, they speculate without a basis  
24 that Strata failed to consider the difficulty in restoring the site and are  
25 underestimating it. So in this portion of Contention 5, they failed to

1 demonstrate -- they failed to support this part of the contention. They  
2 haven't provided sufficient information to show a genuine dispute with the  
3 applicant here.

4 JUDGE BOLLWERK: They felt that they distinguished the Powertech  
5 case, where a contention like this was dismissed. What is your position on  
6 that?

7 MS. MARSH: Well, I -- now that after reading the reply and hearing  
8 the argument, I see that they think it -- I believe in Powertech, the argument  
9 was more about having -- was more about a complete financial plan being  
10 submitted with the application, instead of prior to operations, which is what  
11 the regulations require. And I believe in this case they're arguing that NEPA  
12 requires, regardless of when we get the financial plan, we need to look at the  
13 environmental impacts of the decommissioning bond failing. But as we've said,  
14 we don't see -- NEPA would only require that if it's reasonably foreseeable and  
15 they haven't demonstrated that the environmental impacts are reasonably  
16 foreseeable.

17 And moving on to the 11(e).2 disposal. We have a similar issue  
18 with that. The argument is that the environmental report must contain analysis  
19 of the lack of a disposal site for 11(e).2. But the petitioners have failed to  
20 demonstrate that there's a -- that's a reasonably foreseeable possibility, that  
21 there won't be a disposal site available. Strata lists four potential sites in  
22 its application. The petitioners simply state that there might not be a site  
23 available, but they don't provide any factual or experts for that assertion.  
24 The staff isn't aware of any potential lack of 11(e).2 disposal in the near  
25 future, either. And with this, they haven't -- the petitioners haven't

1 provided sufficient information to show a genuine dispute with the applicant on  
2 this issue.

3 JUDGE BOLLWERK: Is onsite disposal an option? I'm still confused.  
4 I'm not -- I believe the staff's brief said that, if I remember correctly, but  
5 --

6 MS. MARSH: No, it wouldn't be an option at an ISR facility.

7 JUDGE BOLLWERK: Did the applicant brief said that -- somebody's  
8 brief said it, but I'm --

9 MR. PUGSLEY: We did.

10 JUDGE BOLLWERK: You did? Okay. I'm sorry. I apologize, I've  
11 been attributing it to the wrong person. And -- well, we'll get to you in a  
12 minute. All right, I'm sorry. Go ahead.

13 MS. MARSH: Moving onto the visual impact at Devils Tower. The  
14 contention really just says that Strata must assess the visual impacts of the  
15 Ross site on Devils Tower. Strata's application says that you can't see the  
16 Ross site from Devils Tower, and the petitioners haven't given -- haven't  
17 provided any support to dispute that. The only support provided in the  
18 petition is the map of Ms. Viviano's property. So here we don't see that the  
19 petitioners have raised genuine dispute with the application.

20 And finally, the petitioners argue that the environmental reporting  
21 properly tiers to and relies on the eyes on the GEIS. The petitioners  
22 acknowledge that a direct challenge to the GEIS is unripe until the sites is  
23 finished and the staff agrees. The GEIS and sites will constitute the agency's  
24 environmental analysis. But the petitioners claim that a challenge to the  
25 environmental report is right. And that is true, now would be the time to

1 challenge the environmental report, but as with any other contention, the  
2 challenge must raise specific and a concrete dispute with the environmental  
3 report and rely on experts or other factual support. Otherwise, the applicant  
4 is being asked to defend the agency's generic finding rather than its own  
5 application.

6 JUDGE BOLLWERK: And so your -- would you distinguish this from the  
7 situation with Part 51 where the GEIS has actually been adopted into  
8 regulations, in terms of the ability to contest it?

9 MS. MARSH: Yes, it is different. This is not a rule. But they  
10 can challenge it but they have to -- we're still in the specific licensing  
11 proceeding. So the challenge to the GEIS must come through the application in  
12 some way. And the petitioners here, they cite portions of the environmental  
13 report that cite to the GEIS, but they don't explain how that will result in  
14 inadequate environmental analysis by the staff going forward.

15 And as we discussed in our response, the petitioners bear the  
16 burden of specifically raising a dispute with the applications. Not the  
17 court's job to sift through the pleading and exhibits to form an admissible  
18 contention. But even when you do look at the exhibits and the citations  
19 provided by the petitioners, you don't find a genuine dispute with this  
20 application. The sections of the GEIS cited by the petitioners are in the  
21 introduction in the alternatives section of the ER and those sections mostly  
22 cite the GEIS for general background information rather than environmental  
23 conclusion.

24 For example, the first cite in the environmental report on Page 110  
25 says, "Based on Strata's analysis and a review of the ISR GEIS, it appears that

1 the proposed actions, or body, closely resembles where body's assessed  
2 previously by the NRC." In the GEIS, the petitioners don't claim that Strata's  
3 conclusion was faulty here. They've retained experts to analyze the  
4 application. If they believe that the ore body description in the GEIS is not  
5 similar to the ore body at the raw site and that therefore Strata's analysis of  
6 the ore body is faulty, they should have raised that challenge in the petition  
7 while that information is before them.

8 Other portions of the environmental report cite the sections of the  
9 GEIS that discuss ISR techniques and testing techniques commonly used in the  
10 industry. The petitioners' experts could have challenged those here if they  
11 believed that those analyses are inadequate or inapplicable.

12 Other references the petitioners include are to the alternatives  
13 sections of the environmental report, including the sites to the GEIS for its  
14 description of conventional uranium mining and the GEIS itself says that  
15 additional alternatives will be addressed in site-specific EISs because those -  
16 - the alternatives analyses are necessarily site-specific.

17 Furthermore, the challenges to the final GEIS the petitioners  
18 attached to their petition in exhibit three closely follow the other  
19 contentions that they raise here. For example, their comments -- this is just  
20 looking at the comments on the final GEIS -- challenges sufficiency of  
21 financial and decommissioning plans, cumulative impact and the failure to  
22 restore groundwater baseline. Other challenges contained in exhibit three are  
23 to other final SEISs for ISR projects that are not the subject of this  
24 proceeding, unless the staff concludes that the petitioners' challenge to the  
25 GEIS has failed to raise a material dispute with this application and has

1 failed to provide the expert support for their contention.

2 JUDGE BOLLWERK: So your basic point is, unlike the license renewal  
3 cases with Appendix B, they could have come in and done this if they had done  
4 it properly, but they haven't done it properly.

5 MS. MARSH: They're not foreclosed from challenging the GEIS, but  
6 they need to somehow --

7 JUDGE BOLLWERK: Tie the GEIS into the application?

8 MS. MARSH: And show what the deficiency would be in this case.

9 JUDGE BOLLWERK: All right. Relative to their reliance on the GEIS  
10 and why it isn't appropriate.

11 MS. MARSH: Right.

12 JUDGE BOLLWERK: All right. In terms of the Devils Tower monument  
13 issue, and the visual resources and the impact, I mean, how can one assess how  
14 far away one needs to be to have a visual impact? I mean, isn't that somewhat  
15 subjective to begin with?

16 MS. MARSH: Well it is, but Strata has done in its application -- I  
17 mean, the staff will have to look at this of course and evaluate it, but Strata  
18 has said in its application that you can't see the Ross site from the hiking  
19 paths and the visitor center at Devils Tower, and the petitioners haven't shown  
20 anything to disprove that or even to dispute that. So, I mean, it's not really  
21 whether what -- at what distance you can see something, they've said that you  
22 can't see it.

23 JUDGE BOLLWERK: All right.

24 JUDGE MOSSMAN: Well, but there is an objective way to deal with  
25 it. I mean, you know, the curvature of the Earth and the horizon and all of

1 that. I mean, you can make measurements and determine if the Devils Tower is  
2 beyond the horizon. That would mean you can't see it.

3 MS. MARSH: I suppose so, yes. But I'm not -- they'll have to --  
4 the applicant will have to explain the visual --

5 JUDGE MOSSMAN: No, I'm just -- hold on. Yeah, I'm just saying  
6 that there is some objective way of looking at it. That you don't have to rely  
7 on any kind of subjectivity that -- whatever. That's all I'm saying.

8 JUDGE BOLLWERK: All right. Anything else from the Board for the  
9 staff? All right, let's turn to the applicant then.

10 MR. PUGSLEY: Thank you, your honors. With respect to contention  
11 five, first with respect to cumulative impacts, we certainly refer the board to  
12 our arguments on contention four, with respect to alleging a NEPA violation  
13 against the applicant is misguided. NEPA does not apply to the license  
14 applicant.

15 Secondly, again, future expansions, et cetera, are handled in site-  
16 specific license amendment applications and I can -- I do not believe there  
17 would be a dispute from NRC staff council that that would be subject to intense  
18 scrutiny in a license amendment and another opportunity for a hearing. And  
19 once again, we reflect back to our argument that there is no link between the  
20 petitioners' affiant and potential impacts associated with cumulative impacts.

21 Moving to financial assurance: several points, first, to directly  
22 address the Powertech case. We disagree with an assertion that the Powertech  
23 case is different in terms of its analysis and final conclusion with respect to  
24 this case for the following reasons.

25 First, it's been conceded already that the methodology for making

1 the calculations in our restoration action plan, which is the format mandated  
2 by the Commission in the Hydro Resources case. The methodology is what is  
3 being approved at this time by the staff, what is being reviewed. Because as  
4 the Powertech case states, I quote, "The tribe argues that Powertech's  
5 estimates should be higher than what it was, but does not account for the fact  
6 that these estimates are not final and will need to be updated before the  
7 license is issued." So, in terms of that aspect of the challenge, it is like  
8 Powertech.

9 If you then turn to the assertions made by petitioners that it is  
10 not like Powertech and that they are talking about the potential environmental  
11 impacts associated with a presumption that the financial assurance cost  
12 estimates would be inadequate, this falls short of the requirements for three  
13 reasons.

14 First, the Commission has safeguards in criterion nine of Appendix A  
15 that require annual updates to the financial assurance cost estimates. That  
16 presumes that the bond will be maintained as adequate. So to adopt a  
17 presumption that it will not be adequate is beyond scope here. The second  
18 point is financial assurance has one purpose and one purpose only, and that is  
19 to guarantee that the commitments and the requirements -- the commitments made  
20 by Strata in its license application and the -- either approval and endorsement  
21 of those commitments or the license conditions added by NRC to its license, the  
22 presumption is that that financial assurance amount is there to conduct those  
23 tasks.

24 We, as Strata, analyze the potential environmental impacts of every  
25 aspect of this project site in our license application, per NUREG-1748,

1 Environmental Report Guidance. Thus, by implication, inadequate financial  
2 assurance cost estimate is enough evidence to show that we had analyzed the  
3 potential environmental impacts associated with this project, because in order  
4 to come to the cost estimate, you have to assume that we are engaging in all  
5 the activities we're required to do to minimize or eliminate potential  
6 environmental impacts.

7 We do concur with the staff on their arguments on financial  
8 assurance and need not go into them any further. With respect -- except with  
9 one additional point. The statement by petitioners that EPA has registered  
10 complaints regarding inadequate bonding at facilities of this nature, I have  
11 two response to that.

12 One is there is no evidence in the record that a current financial  
13 assurance cost estimate has been deemed inadequate for a currently licensed or  
14 operated facility. Now, if you're talking about a facility that is licensed  
15 but not operating, you can't base any conclusions on that to this time. You  
16 cannot say that the financial assurance cost estimate in the license  
17 application that was approved is inadequate because it is most likely  
18 incorrect, because you have a good two to three, and in these cases four, years  
19 in between original submission of the application, including those estimates,  
20 and issuance of the license. Plus, you have at least six to nine months before  
21 you would flip the switch on the facility, which, as the Commission stated, is  
22 when the financial assurance arrangement and the revised calculations need to  
23 be implemented. So you're talking a good five to seven years in between  
24 calculating those numbers and criterion nine requires annual updates. So, to  
25 make a statement that they're inadequate is incorrect.

1           Secondly, with specific respect to EPA, EPA has no jurisdiction  
2 over financial assurance issued and approved -- reviewed and approved at NRC.  
3 NRC is deemed the expert lead technical agency for Atomic Energy Act materials,  
4 which includes its accompanying financial assurance cost estimates. Statements  
5 by EPA stating that these bonds -- the bonds or financial assurance cost  
6 estimates are inadequate are irrelevant in this proceeding.

7           Moving to 11(e).2 disposal: Just to address your question, Judge  
8 Bollwerk, yes we did that state that criterion two of Appendix A commissions  
9 interpretation currently is that onsite disposal of 11(e).2 byproduct material  
10 is not allowed, not permitted, and institute recovery facilities at this time.  
11 However, Strata does say in its brief that in the event, the unlikely event,  
12 that there were no disposal capacity available, a site-specific -- a licensee  
13 would be permitted to petition the Commission for an exemption from that  
14 prohibition and to engage in onsite disposal. But at this time, that is not  
15 reasonably foreseeable.

16           The next point on this issue is that there is more than adequate  
17 disposal capacity available for 11(e).2 in this country. And Strata takes  
18 issue with the statement by petitioners that it is -- that is fraught with  
19 complications getting 11(e).2 material to these sites for final disposal.  
20 Indeed, we have several operating -- excuse me -- operating institute recovery  
21 facilities, not only in NRC directly regulated non-agreement states, such as  
22 Wyoming, but we also have many operating facilities in the state of Texas,  
23 which is an agreement state. But the requirement to dispose of 11(e).2 at a  
24 properly permitted and licensed 11(e).2 facility holds true for them as well.

25           And the final point on that is there's a failure to account for the

1 very limited amount of 11(e).2 material in the form of what would be sent off  
2 site to a facility, the limited amount that is generated by these operations.  
3 And we have seen no evidence on the record of difficulties by licensees,  
4 current licensees, to obtain disposal -- to obtain available disposal capacity.

5 Finally on this point, Your Honors, there is a requirement that is  
6 standard practice for NRC staff to put in a license, and Strata anticipates no  
7 different, that if we do not have a disposal agreement in place with a licensed  
8 11(e).2 disposal facility, we are not permitted to start operations period.  
9 So, in the event that the license is granted and we do not have a disposal  
10 agreement in place, we cannot operate.

11 Moving to visual impacts: again, we concur with NRC staff's views  
12 on this issue. We also add the following. The line of sight analysis provided  
13 to you in exhibit C of our -- in our standing argument shows the line of sight  
14 analysis performed by Strata and as discussed in visual impact analysis. And  
15 we rest on that on our conclusion that you cannot see the site from the tower,  
16 and that's where we -- and essentially because the affiant in this case is not  
17 -- is actually not having her potential line of sight impeded by Devils Tower,  
18 or from Devils Tower, she is in the line of sight of Devils Tower to the raw  
19 sight. So that almost stands itself on its head.

20 Last issue is GEIS tiering. Several points on this, your honors.  
21 First, this is -- the statement by petitioners that they do not contend -- they  
22 do not challenge the 10 CFR part 51 Appendix A approach to tiering, but that  
23 they challenge the tiering to this GEIS. Well, does that not, by implication,  
24 state that they are challenging the Commission approved process of tiering?  
25 Because essentially they are saying, "The GEIS is inadequate and you can't tier

1 from it." However, the GEIS is there. It went through a rigorous scoping --  
2 and when I say, "Rigorous scoping," we were talking anywhere between four and  
3 six public meetings in different regions of the country, including Wyoming,  
4 Nebraska, New Mexico, et cetera. It had an extensive public comment period and  
5 we understand that Mr. Fettus' group registered those comments and attached  
6 them to his pleading. We are aware of the detailed responses to comments that  
7 are in the GEIS, which is the process that NRC uses to create what is, as  
8 simply put, a programmatic assessment of the institute recovery process, a look  
9 at past operations and forward looking in terms of how it would provide  
10 guidance to NRC staff when conducting their site-specific analysis.

11                 However, in no way -- and this was noted in a lot of correspondence  
12 in the GEIS review time period. It in no way obviates a complete site-specific  
13 assessment of every single proposed either new operating facility, or new  
14 license, or a license amendment for a satellite facility. So, what we see  
15 here, your honors, is actually a thinly veiled attempt by petitioners to state  
16 that they're not challenging the adequacy of Part 51 Appendix A's tiering  
17 process. Where, however, we see that it is. And under section 2.35A of the  
18 Commission's rules for hearings, a collateral attack on that is not permissible  
19 in this proceeding. And I welcome your questions.

20                 JUDGE BOLLWERK: With respect to the last point that you made with  
21 GEIS, are you taking a different approach than what the staff was, which was  
22 basically saying you can challenge -- well, within the context of an individual  
23 licensing proceeding, you can say that the GEIS, while it might have been  
24 relied on by the -- in the ER, was not appropriately relied on because  
25 something was wrong or some difference between that and the GEIS. Are you

1 saying something different?

2 MR. PUGSLEY: Well, we're not disagreeing with the staff's  
3 position, but we're saying something different as well. We're basically saying  
4 that the statement that we're merely just challenging the GEIS through this is  
5 not the entirety of the petitioners' argument, and that we are addressing the  
6 potential for a collateral attack on the Commission's regulations regarding  
7 tiering. But if we feel that that would complete and round out the argument in  
8 response to Contention 5-E.

9 JUDGE BOLLWERK: All right. Anybody else have any questions? No?

10 All right. Thank you, sir.

11 MR. PUGSLEY: Thank you.

12 JUDGE BOLLWERK: We'll go to the petitioner's side.

13 MR. FETTUS: I don't want to belabor the point. Do you have any  
14 additional questions to -- if you -- or if you in any way have suspicions that  
15 we're challenging the actual practice of tiering, please ask now, because it is  
16 our -- we are not doing a thinly veiled attempt at anything. We're doing quite  
17 an open attempt at challenging the reliance on the GEIS. What we object to is  
18 this ER's reliance on that GEIS and any subsequent SEIS that might rely on the  
19 GEIS. We discussed in comments and we incorporated those comments by reference  
20 how flawed we think the GEIS is and where we think it's flawed. And this is  
21 not a collateral attack. My co-counsel beside me suggested I put a proposition  
22 to you that there will be no -- what if the GEIS consisted of one single  
23 chapter that essentially said, "There are no negative environmental impacts,"  
24 and the ER tiered to that? Well, would the Board consider Strata to have  
25 fulfilled its obligations under 51.45? Clearly not. We're simply arguing that

1 they have done a less extreme version of that.

2           Going specifically to what counsel for Strata talked about with the  
3 GEIS and its rigorous scoping and its extensive public comment and its detailed  
4 responses to comments; respectfully, those all go to the merits and I have a  
5 very different view, as well as fellow counsel have a very different view as to  
6 the -- whether or not the scope was rigorous, whether or not the -- and more  
7 importantly, whether or not the responses to public comments were detailed. We  
8 have a very different view. Again, that's all an issue for the merits.

9           If you don't have any further questions on the GEIS tiering, I'll  
10 turn specifically to the last of the cumulative impacts and then leave you  
11 there. The cumulative impacts here aren't just within -- are not just in  
12 regard to reasonably foreseeable industrial activities that may happen  
13 respectively, but relate to activities that have already occurred. Namely, the  
14 Nubeth project, which included thousands of bore holes, many unplugged or  
15 improperly plugged or in a condition we don't actually know, and the potential  
16 groundwater degradation. The Ross project will pile impacts on top of those  
17 projects, on top of those impacts that have already been caused Nubeth. And an  
18 analysis of that has to happen now, and the ER has failed to engage that issue.

19           And as for future activities, we think Strata simply misstates the  
20 law. Where a commission is held, a cumulative impacts review -- and this is  
21 the HRI cite that I have -- a -- quote, "A cumulative impacts review examines  
22 the impact on the environment which results from the incremental impacts of the  
23 action when added to other past, present and reasonably foreseeable future  
24 actions." And that's HRI 53 NRC 31 at 60. That's a 2001 decision. They're  
25 quoting 40 CFR 1508.7.

1           The expansion of ISL mining in this area is not only reasonably  
2 foreseeable but it's already been announced and extensively planned. They  
3 can't kick the can down the road now and claim that they'll consider cumulative  
4 impacts during later proceedings. And even if that were not a requirement that  
5 they consider these impacts now, which it is under, we think, both NRC and CEQ  
6 regulations, which they're bound to follow. We understand there's a  
7 disagreement whether or not they're bound by CEQ regulations. I would  
8 respectfully suggest that the NRC is bound CEQ regulations and cannot expressly  
9 violate them. But, even so --

10           JUDGE BOLLWERK: That's the telecom doing that, I think.

11           MR. FETTUS: Is that the telecom?

12           JUDGE BOLLWERK: Can you -- Ms. Anderson's not there anymore,  
13 right?

14           MR. FETTUS: Right, she's gone.

15           JUDGE BOLLWERK: Okay, why don't you just go ahead and hang it up  
16 then. Sorry.

17           MR. FETTUS: As history shows, this ER will likely tier back to any  
18 future environmental reports with satellite operations, expansions, et cetera,  
19 will tier back to the current ER and subsequently with GEIS in future projects  
20 and issue EAs or findings of no significant impact, or maybe even invoke a  
21 categorical exclusion. This is all on our reply brief. But in any event, if  
22 we don't raise the cumulative impacts analysis now, we won't have an  
23 opportunity to raise it later in any meaningful way.

24           Also like to note -- I believe this may have been cited in our  
25 opening brief, but if not -- can you see if that was cited within our opening

1 brief? If we have any additional questions, we're happy to supplement them for  
2 you. The one thing I want to note, on the issue of financial assurance, once  
3 again, what we've done was structure contention very differently than what was  
4 done in Dewey Burdock, precisely because of Dewey Burdock and because that  
5 contention was not admitted, we've structured a contention that specifically  
6 addresses the NEPA obligations for the staff or the ER obligations for the  
7 applicant to look at even if you do comply with precisely what the NRC wants  
8 you're going to have a potential for -- this is something adequately supported  
9 in our opening petition -- doing many more -- doing many more pore volumes than  
10 you needed to do and that's happened at ISL sites repeatedly. If there's been  
11 excursions that were not foreseen and if there's been significant expansion of  
12 that site and potential problems that may come along with that.

13 Again, the fact that there is an annual surety review while it's  
14 some comfort, doesn't do away with the NEPA obligations to review what's  
15 happened previously and review what those potential impacts could be if there  
16 are much more than the initially calculated number of pore volumes and the  
17 initial calculated amount of money that needed to be set aside. Okay?

18 JUDGE BOLLWERK: Very good. Let me just see if there's any  
19 questions. All right, did you have something you wanted to --

20 MR. FETTUS: No.

21 JUDGE BOLLWERK: Looking for something, okay, we're good there.  
22 All right. Let me go back -- just one question briefly for the staff, places  
23 something that we've heard several times about the lack of the ER is not  
24 required to contain certain things, I mean, doesn't the staff's standard review  
25 plan of the documents that you put out to get guidance to licensees, aren't

1       they fairly detailed in terms of what they need to include in their  
2       environmental reports?

3                  MS. MARSH: Yes, they are fairly detailed.

4                  JUDGE BOLLWERK: Is this to suggest some kind of a gap in those  
5        documents or are we -- given their repeated assertion they don't have to do  
6        this?

7                  MS. MARSH: Which -- are you talking about the decommissioning body  
8        or the --

9                  JUDGE BOLLWERK: We've heard several different instances where  
10       there was no requirement that they -- you know, the regulation itself doesn't  
11       require it, I'm assuming though that the staff guidance, they generally follow  
12       that in terms of what needs to be under the standard review plan or other  
13       guidance documents about what needs to be in their environmental reports.  
14       Cumulative impacts is an example, I guess.

15                 MS. MARSH: Well, cumulative impacts is listed --

16                 JUDGE BOLLWERK: Okay.

17                 MS. MARSH: In the NUREG.

18                 JUDGE BOLLWERK: All right.

19                 MS. MARSH: I mean, the guidance can't possibly list everything -

20                 JUDGE BOLLWERK: Right.

21                 MS. MARSH: That's going to be applicable to every site, but we  
22       just sort of -- I mean, you go back to what the NEPA require and --

23                 JUDGE BOLLWERK: Right.

24                 MS. MARSH: NEPA requires a look at reasonably foreseeable impacts  
25       and in this case, it was our argument that the failure of decommissioning pond,

1 the lack of 11(e).2 disposal, those things aren't reasonably foreseeable and  
2 that's -- at least in this case, there might be some -- at some point in the  
3 future these things might become reasonably foreseeable --

4 JUDGE BOLLWERK: Okay.

5 MS. MARSH: For other cases.

6 JUDGE BOLLWERK: All right. You want to bring something up, go  
7 ahead.

8 MR. PUGSLEY: Just briefly, your honor, if we're talking about Part  
9 4155, requirements for an environmental report, it links directly to NUREG-1748  
10 which is environmental report guidance. Again, it's guidance and as counsel  
11 for the staff stated very clearly that every site is different and the point is  
12 the reason that 51.45 does have prescriptive requirements is because every site  
13 is different. The reason that environmental report is filed, the only reason,  
14 is to assist the staff's review of a proposed action. The SEIS is designed to  
15 evaluate the proposed action, including that environmental report, so we would  
16 say that that is the reason why Part 51.45 would seem vague and yes, we --  
17 Strata followed NUREG-1748 for its environmental report. That's really all we  
18 can say about it.

19 JUDGE BOLLWERK: Thanks. Anything else the staff wants to say on  
20 this subject? Nope. Anything for the intervener?

21 MR. FETTUS: I think we've been pretty clear on this. We think the  
22 statute is very clear in its -- whether it's the NEPA obligations that go to  
23 the staff or 51.45 -- and the guidance that adopt those NEPA obligations in  
24 toto, which include cumulative impacts and when you have discrepancies, just as  
25 your honor pointed out, there's a delta between what's guidance and what's

1 actually been provided. I think that's prima facie evidence of a material  
2 dispute.

3 JUDGE BOLLWERK: All right. Thank you sir. Any other? All right,  
4 let's then take care of a couple of procedural matters. I think this brings  
5 our -- the argument portion of the prehearing conference to a conclusion. In  
6 terms of the HRI -- I'm sorry, the Hydro Resources citation you were going to  
7 provide us, by when do you think you can do that?

8 MR. PUGSLEY: No later than the end of the week.

9 JUDGE BOLLWERK: Okay. Close of business on Friday?

10 MR. PUGSLEY: Yes, sir. Actually it'll probably be close of  
11 business on Thursday --

12 JUDGE BOLLWERK: That's fine.

13 MR. PUGSLEY: -- because my wife and children have other plans.

14 JUDGE BOLLWERK: That's -- the end of the week's okay.

15 JUDGE COLE: That's for you.

16 JUDGE BOLLWERK: So we should expect that by the end of the week,  
17 then. It's always good that we know when something is -- or should be coming.  
18 I have a couple matters I need to raise, but you've had a procedural matter you  
19 wanted to talk about, so why don't we go --

20 MR. PUGSLEY: Certainly. I appreciate the opportunity, your honor.  
21 As you heard in the -- in Strata's argument today, we have noted on several  
22 occasions that there were -- and on some occasions we haven't pointed to them,  
23 but there have been several arguments raised or statements made on issues that  
24 we believe are outside the scope of the initial petition intervene as well as  
25 the responses filed by NRC staff and Strata and as you know very well, that

1 those can serve as grounds for a motion to strike information from a particular  
2 pleading.

3                 The reason that we wanted to raise this here, your honors, is that  
4 we are well aware that the Commission's requirements would require that motion  
5 to be filed within 10 days of the issuance or the filing of the document that  
6 precipitates that, however, because we have had oral argument and traditionally  
7 oral argument has a hearing transcript, that the motion to strike for certain  
8 items would directly apply to statements made at oral argument. So what we  
9 would request is that instead of filing two separate motions to strike, that we  
10 be permitted to file one complete motion to strike after the hearing transcript  
11 has been issued for correction.

12                 JUDGE BOLLWERK: Let me ask you a different question. Do you feel  
13 that every place that you've identified all -- during the oral argument, you've  
14 identified the places where you believe that the arguments that were made were  
15 outside the scope?

16                 MR. PUGSLEY: Yes, sir. I can't say all of them, but definitely  
17 some.

18                 JUDGE BOLLWERK: I guess my feeling is if you feel that you've  
19 identified them then I'm not sure that anything else needs to be filed, but  
20 obviously you can file whatever motion you think is appropriate. In terms of -  
21 - well, 10 days from the reply brief would have been --

22                 MR. PUGSLEY: Is this coming Sunday.

23                 JUDGE BOLLWERK: Sunday, right, then that would be Tuesday because  
24 of the federal holiday. I guess my feeling is, if you intend to file anything,  
25 it needs to be here by next Wednesday, a week from Wednesday.

1                   MR. PUGSLEY: Okay. I just wanted to make sure I understood the  
2 procedure.

3                   JUDGE BOLLWERK: I don't -- I really don't think it's necessary at  
4 this point, I mean if you made the argument and we heard the words, you know,  
5 outside the scope then that's something we need to pay attention to.

6                   MR. PUGSLEY: I understand your opinion, your honor, and we'll take  
7 that under advisement, whether we deem it appropriate to file.

8                   JUDGE BOLLWERK: Let me hear what the petitioners have to say.

9                   MR. FETTUS: Your honor, if I can't do the calculation out in my  
10 head of how I'd get to respond to this as well, but I'm going to be --

11                  JUDGE BOLLWERK: I believe it's 10 days.

12                  MR. FETTUS: Believe it's 10 days.

13                  JUDGE BOLLWERK: 10 days for motion, 10 days for an answer, if I'm  
14 recalling correctly.

15                  MR. FETTUS: Which would be the 27th, right?

16                  JUDGE BOLLWERK: We can -- let's see. Hold on, one second.

17                  MR. FETTUS: Which would be the 27th, I'd have to be filing -- I'm  
18 not back from a long scheduled vacation until the 4th or something like that.

19                  JUDGE BOLLWERK: Hold on one second.

20                  MR. FETTUS: So, again, the -- and this is all new to me.

21                  MR. PUGSLEY: I concur with Mr. Fettus that part of the reason that  
22 we had asked for leave to file a motion after the transcript came out is we are  
23 well aware of -- you know, we were trying to schedule oral argument, Mr. Fettus  
24 had several commitments in the very early part of January that we're not going  
25 to not allow him to participate in a hearing of this nature. We certainly do

1 not want to put any party in the position where they cannot have adequate time  
2 to file an appropriate response to anything we file, but you know it is  
3 possible, Judge Bollwerk, based on your statements, that if you believe that we  
4 made the references here that we may not have to file some things, certainly --

5 JUDGE BOLLWERK: I think you've preserved your record in terms of  
6 things you felt that were inappropriate or outside the scope given what was  
7 originally put into their petition, so if -- I believe if you've covered those  
8 things I don't know that it's necessary we have another motion. But I will  
9 simply say that if you're going to file another motion, it's Thursday to  
10 Thursday -- 10 days, that would be Monday, Tuesday. Let's stick with the  
11 Wednesday date I said, sir. When would you like to reply to that in terms of  
12 your schedule?

13 MR. FETTUS: I have a disastrous January, your honor, in terms of  
14 when I return which was -- we had to negotiate with Molly on the appropriate  
15 time. I would have to look at my calendar, your honor.

16 JUDGE BOLLWERK: Right, let's do it this way. Why don't you think  
17 about whether you need to file a motion? If you think you do need to do so,  
18 and it's going to be filed by next Wednesday, why don't you talk to the  
19 petitioners counsel and find out what a good date for a reply is for him?

20 MR. PUGSLEY: Well, I as counsel for Strata am willing to commit  
21 that by close of business tomorrow we will provide notification to all counsel  
22 whether or not we intend to file.

23 JUDGE BOLLWERK: All right. And then we'll work out a date if that  
24 happens. But again, I think under the circumstances, I'm not sure that it's  
25 necessary, but again, that would be up to you, obviously.

1           MR. PUGSLEY: I appreciate it.

2           JUDGE BOLLWERK: All right. In terms of the scheduling matters  
3 that the board had relative to scheduling and discovery, and again, there's  
4 some contingencies here, but if the joint petitioners are found to have  
5 standing and one or more of their contentions are admitted, in setting the  
6 section 2.332(d) schedule, the board would need to make an assessment about  
7 future filing dates and evidentiary based on the status of the staff's review  
8 schedule. Obviously that's an important driver. The most recent license  
9 review schedule for this proceeding posted on the NRC's website indicates the  
10 staff safety evaluation report, or SER, will be issued in final in June of 2013  
11 with a supplemental environmental impact or SEIS to be issued in draft in  
12 December of 2012 and a final form in October 2013. Just a couple questions  
13 regarding the staff's review schedule at this point. Do you think it's still  
14 accurate?

15           MS. MARSH: Yes, as far as we know, those are the accurate dates.

16           JUDGE BOLLWERK: I think it was updated with -- back at the end of  
17 November, so I'm assuming that --

18           MS. MARSH: Yes, it was recently updated.

19           JUDGE BOLLWERK: Okay, all right. Does the staff contemplate  
20 issuing a draft SER? It wasn't on the schedule. I don't know if that's --

21           MS. MARSH: No, they won't.

22           JUDGE BOLLWERK: No, all right. There was a question in the  
23 Powertech case, the -- on the slip opinion on Page 78, about the requirement  
24 for a mandatory hearing. Now I have to admit when I went back and read that, I  
25 didn't remember that, but it's there. Does staff have any position on whether

1 a mandatory hearing is required for an ISR?

2 MS. MARSH: I am not familiar with anything that would require a  
3 mandatory hearing for an ISR, no.

4 JUDGE BOLLWERK: All right, anything the applicant or the  
5 intervener want to say in that respect? Although I have to admit the  
6 petitioners don't really have a lot to do in a mandatory hearing, but you're  
7 probably supposed to stay out of that actually, so.

8 MR. PUGSLEY: If -- your honor, if you're referring to a mandatory  
9 hearing in -- under the guise of, say, a design certification document or a CLL  
10 approval, that type of mandatory hearing, is that what we're talking about?

11 JUDGE BOLLWERK: I don't know. Look, the Powertech -- beginning  
12 Page 78, it says a mandatory hearing may be required. I'm just raising the  
13 question. Does either of the parties have anything they want to say about  
14 that?

15 MR. PUGSLEY: It's my interpretation, your honor, that in materials  
16 licensing proceedings, those are not required.

17 JUDGE BOLLWERK: All right, anything the staff says -- wants to say  
18 further all that?

19 MS. MARSH: I mean, I think the only mandatory hearings required at  
20 the NRC are for the new reactor.

21 JUDGE BOLLWERK: Okay, right. Well, I mean, at the AREVA case, for  
22 instance, we had one before --

23 MS. MARSH: Oh, I'm sorry, yes --

24 JUDGE BOLLWERK: -- for the -- well, for uranium enrichment  
25 facilities, but other than those, that was my -- I will leave it at that then.

1 One thing I want to -- oh, I just wanted an inquiry of the staff. I know that  
2 foreign ownership has recently been a major concern in some cases; it was in  
3 the AREVA case, for instance. I recognize that there was no contention in this  
4 case about foreign ownership; is that something you'll be looking at as part of  
5 your license review? Because there is an Australian company here that's the --  
6 if you want to take a second to --

7 MS. MARSH: As part of the safety review, the staff does look at  
8 corporate ownership. It's not part of the environmental review.

9 JUDGE BOLLWERK: Right, but it would be part of the license review  
10 here.

11 MS. MARSH: There would be some evaluation.

12 JUDGE BOLLWERK: All right, okay. All right, let me just --  
13 anything further you want to say on that subject? No? All right. Consistent  
14 with the existing provisions of section 2.309(i), it's the board endeavor, I  
15 mean, will be endeavoring to issue a decision on the matters of standing and  
16 contentions, admissibility by the end of January 2012. That's what the  
17 regulation indicates, that we're supposed to issue something or tell the  
18 Commission why we cannot. And we will either do that or tell the Commission  
19 why we cannot.

20 If the hearing is granted, the parties should be aware that the  
21 board is likely to convene a prehearing conference, requiring future scheduling  
22 fairly promptly, probably sometime in February 2012, just to make you aware of  
23 that.

24 Also assuming a hearing is granted, the participants should be  
25 aware the general discovery provisions under 2.336 including the need for the

1 NRC staff to provide a hearing file will be activated regardless of whether  
2 there's any board order or party discovery request. Also relative to general  
3 discovery, the participants may wish to discuss whether they want to prepare  
4 and produce privilege logs or waive such logs. There's always a question about  
5 that in terms of a discovery under -- in these proceedings.

6 All right, at this point, let me see if there's any questions that  
7 any of the parties have about anything we've talked about, any other issues.  
8 No? All right. Then on behalf of the board, I would like to thank all of you  
9 for your preparation for today, your arguments that you've made, your -- the  
10 pleadings that preceded those. This case raises a number of different, very  
11 interesting issues. You've presented them well, your positions on them, and we  
12 do very much appreciate the time and effort you put into them, especially this  
13 close to a holiday season with other things going on to brief this very  
14 thoroughly and let us know your positions and the -- I think you've all  
15 represented your clients very well, and the board very much appreciates that.

16 I would like to thank our IT specialists, Andy Welkie, Mack  
17 Cutchin, and Joe Deucher for their help today in putting this proceeding  
18 together. Obviously IT is always an important part of this, I think  
19 particularly with the webstreaming today. While we weren't out in Wyoming, I'm  
20 hoping some folks there took advantage of it to see what was going on. I know  
21 the weather up out there being what it is, I'm certainly glad we weren't trying  
22 to travel across the Midwest this week; that probably would not have been the  
23 most -- we probably would have been spending time in a very -- yeah,  
24 interesting places. But I think the webstreaming does, and certainly in  
25 instances like this, provide a reasonable alternative, so I'm hoping that was

utilized by the folks out in Wyoming who were interested.

Also like to thank the board's law clerk, Jim Maltese, for all his work in the case as well as Karen Valloch of the panel's administrative staff who've helped us bring this all together. And of course, our -- we -- actually becoming more and more important all the time, our contractors from AVAYA, our webstreaming contractors, and the real-time court reporting service for their efforts as well in putting this all together. So we appreciate their efforts as well. Anything other the other two judges want to say?

9 All right, well, at this point, your arguments and briefs stand  
10 submitted. We have our January 2012 date that we have to look at from the end  
11 of it for getting back to you or telling the Commission why we can't do that.  
12 Again, on behalf of the board, thank you all for your efforts. And I hope you  
13 all have a good holiday season. Thank you very much.

14 (Whereupon, at 3:39 p.m. the above-entitled matter was concluded.)

E-N-D-P-R-O-F-P-R-O-C-D-E-E-D-I-N-G-S

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
Strata Energy, Inc. ) Docket No. 40-9091-MLA  
(Ross In Situ Recovery Uranium Project) )  
(Materials License Application) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OFFICIAL TRANSCRIPTS OF THE LICENSING BOARD PREHEARING CONFERENCE ON DECEMBER 20, 2011, have been served upon the following persons by Electronic Information Exchange.

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