June 3, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S AND POWDER RIVER BASIN RESOURCE COUNCIL'S JOINT MOTION TO RESUBMIT CONTENTIONS AND ADMIT ONE NEW CONTENTION IN RESPONSE TO STAFF'S SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

The Staff of the U.S. Nuclear Regulatory Commission (NRC Staff) responds to the Natural Resources Defense Council (NRDC) and Powder River Basin Resource Council's (PRBRC) (collectively Joint Intervenors or Intervenors) Motion to Resubmit Contentions and Admit One New Contention in Response to Staff's Supplemental Draft Environmental Impact Statement (DSEIS). For the reasons set forth below, the Board should deny the Joint Intervenors' Motion.

BACKGROUND

I. The Application

On January 4, 2011, Strata Energy, Inc. (Strata or the Applicant) submitted an application for a combined NRC source and 11e.(2) byproduct material license.[1] As detailed in the Staff's Response to Joint Petitioners' initial hearing request, Strata's license would involve

[1] Letter from Strata Energy, Inc. Submitting Combined Source and 11e.(2) Byproduct Material License Application Requesting Authorization to Construct and Operate Proposed Ross In Situ Leach Uranium Recovery Project Site (Jan. 4, 2011) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML110120055). The Application's supporting documentation can be found in ADAMS by searching under Docket No. 04009091.

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

Since the time Strata submitted its ER in 2011, it has provided additional information relevant to the Staff's NEPA review. In March 2012, Strata submitted responses to the Staff's requests for additional information (RAIs) pertaining to the ER.[3] In April 2012, Strata submitted responses to the Staff's RAIs pertaining to the Technical Report (TR).[4] Strata's supplemental information is publicly available through ADAMS, except in a relatively few instances in which the information is sensitive or otherwise protected from disclosure.

II. The Staff's NEPA Review

In accordance with NEPA and the NRC's NEPA implementation regulations in 10 C.F.R. Part 51, the Staff is preparing a supplemental environmental impact statement (SEIS) in connection with Strata's application. The EIS is a supplemental EIS because the Staff's analysis draws from, and adds to, the analysis in NUREG-1910, "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (GEIS). The GEIS assesses the environmental impacts of ISR operations both generally and on a regional basis, with specific sections focusing on the Nebraska-North Dakota-Wyoming Uranium Milling Region and the

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

[3] Letter from Mal James, Strata Energy, Inc., to John Saxton, NRC (Mar. 30, 2012) (ADAMS Accession No. ML121030406).

[4] Letter from Ralph Knode, Strata Energy, Inc., to John Saxton, NRC (Apr. 6, 2012) (ADAMS Accession No. ML121020347).

Wyoming East Uranium Milling Region, which include regional features where Strata's facility would be located.

On March 21, 2013, the Staff issued a draft SEIS (DSEIS) for public comment.[5] The DSEIS addresses environmental impacts from construction of the Ross facility and ISR operations at the site, as well as impacts from the restoration of aquifers used during ISR operations and decommissioning of the site. The DSEIS largely follows the standard format for NRC environmental impact statements and includes ten chapters addressing topics such as alternatives to the proposed action (Chapter 2), a description of the affected environment (Chapter 3), environmental impacts from the proposed action and alternatives and mitigation measures (Chapter 4), cumulative impacts (Chapter 5), and environmental measures and monitoring (Chapter 6). The Staff prepared the DSEIS in cooperation with the U.S. Bureau of Land Management (BLM), which manages public lands open to mineral entry on which the Applicant has filed mining claims. While preparing the DSEIS the Staff also consulted with numerous other federal and state agencies, including the National Park Service, the U.S. Fish and Wildlife Service, the Advisory Council on Historic Preservation, and the Wyoming Department of Environmental Quality.

III. The Board's Initial Ruling on Contentions

In their initial joint hearing request, the Intervenors proffered five contentions, characterized by the Board as "environmental/NEPA" contentions.[6] The Board admitted four contentions, as reformulated by the Board in its February 10, 2012 order.[7] The contentions admitted by the Board challenge the application's characterization of baseline groundwater quality (Environmental Contention 1); its analysis of environmental impacts that will occur if the

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

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

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

Applicant cannot restore groundwater to primary or secondary limits (Environmental Contention 2); the adequacy of the hydrological information used to demonstrate the Applicant's ability to contain groundwater fluid migration (Environmental Contention 3); and the adequacy of the application's assessment of cumulative impacts of the proposed action and the planned Lance District expansion projects (Environmental Contention 4/5A).[8]

IV. The New Contentions

In their contentions challenging the DSEIS, the Intervenors seek to amend their admitted contentions to apply to the Staff's DSEIS, to some extent expanding the issues raised in those contentions, and to add a new environmental contention.[9] Contentions 1-A through 4/5-A address the same issues as the contentions previously admitted in this hearing: baseline groundwater quality, restoration of groundwater quality, fluid migration, and cumulative impacts. Motion at 1. Contention 6 raises the new claim that the DSEIS improperly segments the scope of the proposed federal action, which leads to a failure to consider the environmental impacts of, and appropriate alternatives to, the Applicant's actual proposed project. Motion at 1-2, 18-19.

LEGAL STANDARDS

I. General Requirements for Contentions

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

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

[8] *Id.*

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

> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ;
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> (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

II. Standards for New and Amended Contentions

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

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

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

A. Contentions Must Be Based on New and Materially Different Information

In the context of a DSEIS, a contention cannot be admitted unless it rests on data or conclusions that "differ significantly" from those in the applicant's ER.[11] A new NEPA contention is not an occasion to raise additional arguments that could have been raised on the ER.[12]

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

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

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

In some circumstances, a licensing board may construe an admitted contention contesting the ER as a challenge to the subsequently issued environmental document without need for the intervenors to file a new or amended contention. This "migration tenet" applies "only so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention."[13] If it is not, the intervenor may need to amend the admitted contention or file a new contention against the Staff's environmental document.[14]

B. Contentions Must Be Filed Promptly After Supporting Information Becomes Available

The Staff's NEPA document does not provide the only opportunity for an intervenor to submit a new contention in a hearing. To the contrary, an Intervenor must submit a contention whenever other information becomes available that raises an issue for the hearing. The Intervenor must submit its new contention "in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(c)(2)(iii). In this particular hearing, the Board has issued two scheduling orders addressing the timeliness of contentions.[15] Under these orders, the Intervenors must submit contentions within 30 days after relevant information becomes available to them. The exception is the DSEIS, which the Intervenors were given until May 6, 2013 to challenge.[16] For information that was publicly available before the DSEIS was issued, the 30-day deadline applies. *Id.*

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

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[13] *So. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008).

[14] *Id.* at 64 (citing 10 C.F.R. § 2.309(f)(2) (2008); *McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

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

[16] Licensing Board Memorandum and Order (Revised General Schedule) (Apr. 12, 2013) at Appendix A.

view.[17] The Board must reject a contention that rests on an incomplete or inaccurate reading of the DSEIS.[18] Further, when challenging a DSEIS, the intervenor must do more than allege generally that there are deficiencies in the document. In order to demonstrate a genuine, material dispute with the DSEIS for a particular facility, the intervenor must address the specific analysis in the document and explain how that analysis is incorrect.[19]

III. NEPA Considerations

When preparing a DSEIS, the Staff takes a "hard look" at the environmental impacts of the proposed action.[20] The hard look standard does not, however, require that the Staff address every conceivable environmental impact in the DSEIS.[21] For example, the Staff need not discuss remote and highly speculative consequences.[22] To the contrary, a "hard look" under NEPA requires only that the Staff provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]"[23]

NRC precedent likewise delimits the scope of the Staff's NEPA review. As the Commission has explained, "NEPA does not call for certainty or precision, but an *estimate* of

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

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

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

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

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

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

[23] *Trout Unlimited*, 509 F.2d at 1283.

anticipated (not unduly speculative) impacts."[24] The proper inquiry under the "hard look" standard is not whether an effect is "theoretically possible," but whether it is "reasonably probable that the situation will obtain."[25]

DISCUSSION

At the outset, the Staff notes that the amended contentions assert that the DSEIS violates numerous regulations that either do not apply to the Staff's environmental review or are not set forth with specificity in the bases of the contentions. *See* Motion at 5, 10, 13, 15, and 19. For example, 10 C.F.R. § 51.45 pertains to the *Applicant's* ER, and does not impose requirements on the Staff. Section 51.70 prescribes general requirements for the Staff's environmental document, but the Intervenors do not provide any supporting information that alleges that the Staff has failed to comply with any portion of 10 C.F.R. § 51.70.

I. Contention 1-A Is Inadmissible

Environmental Contention 1-A:

> The DSEIS fails to adequately characterize baseline (*i.e.*, original or pre-mining) groundwater quality. The DSEIS fails to comply with 10 C.F.R. §§ 51.45, 51.70 and 71, 10 C.F.R. Part 40, Appendix A, and NEPA because it lacks an adequate description of the present baseline (*i.e.*, original or pre-mining) groundwater quality and fails to demonstrate that groundwater samples were collected in a scientifically defensible manner, using proper sampling methodologies. The DSEIS's departure from NRC guidance serves as additional evidence of these regulatory violations. NRC, NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications, §§ 2.7.1, 2.7.3, 2.7.4 (2003).

Joint Intervenors note that the resubmitted contention is the same as Contention 1 as admitted by the Board, except with respect to the addition of references to 10 C.F.R. §§ 51.70 and 71. Motion at 6 n.3. The Intervenors rely upon the original declarations of Drs. Moran, Sass, and Abitz, and a newly filed second declaration from Dr. Abitz ("2d Abitz Decl."). *Id.* at 6.

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

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

The Staff opposes the admission of Contention 1-A for failure to meet the Commission's contention admissibility and timeliness standards.

As an initial matter, Joint Intervenors point to the requirements in 10 C.F.R. Part 40, Appendix A, to provide complete baseline data to ensure that the concentrations of hazardous constituents do not exceed the Commission approved background concentration of the constituents in groundwater. Motion at 8-9. These requirements, however, are incurred by the Applicant as a prerequisite to issuance of its license, and are not imposed on the Staff. Simply put, the Staff's DSEIS cannot fail to comply with 10 C.F.R. Part 40, Appendix A, as alleged by Contention 1-A.

At a more fundamental level, Contention 1-A is premised on an incorrect understanding of the purpose and scope of information regarding baseline groundwater quality in the Staff's NEPA review. There is no requirement in NRC regulations or under NEPA generally that the Staff postpone its NEPA review until after the Applicant develops and produces its Criterion 7 preoperational monitoring program baseline data.[26] As the Commission has recently stated, "NEPA requires a 'hard look' at the environmental effects of the planned action and reasonable alternatives to that action, *using the best information available at the time the assessment is performed*."[27] In addition, "NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts,"[28] and "while there will always be more data that

[26] Part 40, Appendix A, Criterion 7 establishes two monitoring programs. The first program consists of a preoperational monitoring program, which is used to provide baseline data on the milling site and its environs. The second program consists of an operational monitoring program to measure or evaluate compliance with applicable standards and regulations; to evaluate performance of control systems and procedures; to evaluate environmental impacts of operation; and to detect potential long-term effects. Baseline data for detection monitoring programs will be established for a specific wellfield as it is established, and will be reviewed by NRC staff in the future.

[27] *NextEra Energy Seabrook, LLC* (Seabrook Station Unit 1), CLI-12-05, 75 NRC 301, 341 (2012) (emphasis in original).

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

could be gathered, agencies must have some discretion to draw the line and move forward with decisionmaking."[29]

As Joint Intervenors recognize on page 7 of their Motion, the DSEIS does in fact contain and evaluate "baseline water quality" data, provided by the Applicant in its ER, which was "the best information available" to the Staff at the time that the assessments for the DSEIS were performed.[30] This information is described in sections 2.1.1, 2.1.2, 3.5, 4.5, 5.7, and 6.3 of the DSEIS. The DSEIS does not and cannot include a description of the Commission approved background concentrations and restoration target values for the various constituents in the groundwater that the Intervenors and Dr. Abitz also refer to as "baseline water quality" data[31]—*i.e.*, the data required by 10 C.F.R. Part 40, Appendix A—because this information is not required to be provided at this time and does not yet exist.

Further, Joint Intervenors have not provided sufficient information to show that such a level of precision is required for the Staff to meet its obligation, under NEPA, to take a "hard look" at the environmental effects of the planned action.[32] The relevant issue is no longer whether the ER provides sufficient information for the Staff to prepare the DSEIS, but whether the DSEIS's description itself is adequate for the purposes of arriving at a decision under NEPA. The DSEIS's conclusion regarding the potential impacts to groundwater quality in the ore zone *assumes* that the Applicant will be unable to restore groundwater to primary or secondary limits

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

[30] *Seabrook* CLI-12-05, 75 NRC at 341.

[31] Dr. Abitz appears to erroneously conflate the baseline water quality information used in the DSEIS with the "post-licensing, pre-operational baseline" that has not yet been developed by the Applicant as part of its Appendix A requirements. *See* 2d Abitz Decl. at 7 ¶ 15. Joint Intervenors in their Motion likewise appear to conflate these two sets of data in their Motion. *Compare* Motion at 7 ("in the DSEIS the Staff adopts the review of *baseline water quality* found in the ER") (emphasis added) *with* Motion at 9 (stating that it is currently planned that *baseline water quality data* will be collected after NRC makes a final decision on the license) (emphasis added).

[32] *Seabrook*, CLI-12-05, 75 NRC at 342.

and concludes that they would nevertheless be "SMALL." *See* DSEIS at 4-36, 4-37. While Joint Intervenors allege that the DSEIS's description of baseline groundwater quality is inadequate for lacking information on Part 40, Appendix A water quality information and for other reasons, *see* Motion at 7-9, 2d Abitz Decl. at 2-13 ¶¶ 6-23, they have not specified how this description is inadequate to support the DSEIS's conclusion with its built-in conservative assumption that groundwater *will not* be restored to baseline water quality levels. Therefore, the Intervenors' dispute with the DSEIS is not on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Finally, Joint Intervenors, through Dr. Abitz, claim that water quality data is not presented for all existing monitoring wells, citing to the DSEIS's "No-Action Alternative" assessment of impacts on geology and soils from preconstruction and current activities. *See* 2d Abitz Decl. at 4 ¶ 9 (citing DSEIS at 4-23). However, this claim is incorrect. In its ER, the Applicant provided ground water monitoring data from 22 cluster wells (which consist of six well locations times four aquifer zones, less two wells that were always dry) (ER Tables 3.4-31; 3.4-34; 3.4-37; 3.4-40) and 29 water supply wells (ER Table 3.4-44).[33] Therefore, Joint Intervenors' claim that the DSEIS's conclusions are based on incomplete data also does not establish a genuine dispute on a material issue of fact or law, and should be rejected.[34]

In addition to failing to establish a genuine dispute with the DSEIS, Joint Intervenors advance several new bases and arguments that impermissibly raise assertions that they could have, but failed to, raise earlier in this proceeding. First, Joint Intervenors introduce a new argument that "[g]eneral NEPA principles also dictate that baseline water quality data be collected *before* NRC makes a final decision on the license, not afterwards, as currently

[33] Ross ISR Project USNRC License Application, Crook County, Wyoming—Environmental Report (ADAMS Accession No. ML110130342).

[34] *Cf. Georgia Institute of Technology*, LBP-95-6, 41 NRC at 300 (rejecting a contention based on a mistaken reading of the Safety Analysis Report).

planned." Motion at 9 (emphasis in original). In support of this proposition, the Intervenors state that "CEQ regulations implementing NEPA's mandates require that where there is information that 'is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, *the agency shall include the information in the environmental impact statement*,'" citing 40 C.F.R. § 1502.22(a). Motion at 9 (emphasis in original).

As the Intervenors aver that Contention 1-A is essentially identical to Contention 1, and that the DSEIS is essentially identical to the ER, these arguments should have been raised in the initial stage of this proceeding. They are not based on new and significant information that was not previously available to the Intervenors. *See* Motion at 1, 7; 2d Abitz Decl. at 2 ¶ 4-5. In addition, Joint Intervenors fail to provide support for the premise that "general NEPA principles" dictate that baseline water quality data—data required by 10 C.F.R. Part 40 Appendix A—be collected before the NRC issues the license. *See* Motion at 9. As the Commission has recently recognized, "the NRC, as an independent regulatory agency, 'is not bound by those portions of CEQ's NEPA regulations' that, *like section 1502.22*, 'have a substantive impact on the way in which the Commission performs its regulatory functions.'"[35] Therefore, 40 C.F.R. § 1502.22 imposes no affirmative requirements on the Staff, and cannot support an argument that the Staff has failed to include information in its DSEIS that it was required by law to include. Moreover, as described above, the DSEIS includes sufficient baseline groundwater quality information to provide the NRC with a comprehensive description of the affected environment adequate to arrive at a "reasoned choice among alternatives"[36]—therefore, there is no "missing information"

[35] *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443-44 (2011) (emphasis added) (holding that licensing board erred in its reformulation of an admitted contention to the extent that it would make 40 C.F.R. § 1502.22 binding on the NRC) (internal citations omitted).

[36] *See* Motion at 9 (quoting 40 C.F.R. § 1502.22(a)).

that must be supplied, as the data already in the DSEIS is sufficient to meet the Staff's NEPA obligations.[37]

Second, Dr. Abitz, in his newly filed declaration, has supplemented Contention 1-A with new arguments that are untimely. These arguments are not supported by new or materially different information, and they impermissibly raise assertions that the Intervenors could have, but failed to, raise earlier in this proceeding. For example, Dr. Abitz raises concerns about the sequential establishment of water quality baselines concurrent with mining operations without pointing to new or materially different information in the DSEIS that could support the admission of a new argument on this point. *See, e.g.*, 2d Abitz Decl. at 5 ¶ 11; 8-9 ¶ 19. Additionally, Dr. Abitz's reliance in paragraph 17 on an analysis conducted in a Texas ISR case (a different Texas ISR from the one discussed in his original declaration, *see* Abitz Decl. at 8 ¶ 21) to support his argument is based upon information that was previously available to the Intervenors prior to the issuance of the DSEIS. Such supplementary information and arguments are untimely and not admissible at this stage in the proceeding.

Finally, Dr. Abitz states that "2011 data [on water quality] are not provided in the DSEIS and, until they are provided, it is my finding that these data are insufficient to establish representative water quality in the regional baseline wells." 2d Abitz Decl. at 8 ¶ 18; *see also* 2d Abitz Decl. at 3-4 ¶¶ 8-10 (discussing absence of 2011 water quality data). Notwithstanding the supportability of Dr. Abitz's conclusion regarding data he has not reviewed, the Staff notes that the 2011 data referenced in the DSEIS has in fact been publicly available since February 7, 2013, and was provided to Joint Intervenors in the Staff's monthly hearing file update on March

[37] *See id.* (quoting *Ocean Mammal Inst. v. Cohen*, No. 98-CV-160, 1998 WL 2017631, at *5 (D. Haw. Mar. 9, 1998)).

4, 2013.[38] If the Intervenors disagreed with the sufficiency of this data, they needed to file a contention within 30 days of its public availability.[39]

II. Contention 2-A Is Inadmissible

Environmental Contention 2-A:

> The DSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits. The DSEIS fails to meet the requirements of 10 C.F.R. §§ 51.45, 51.70, 51.71 and NEPA because it fails to evaluate the virtual certainty that the applicant will be unable to restore groundwater to primary or secondary limits.

As with Contention 1-A, Joint Intervenors note that the resubmitted contention is the same as the one admitted by the Board in its February 10, 2012 order and memorandum admitting the Intervenors' contentions, with the exception of the addition of references to 10 C.F.R. §§ 51.70 and 71. Motion at 10 n.7. The Intervenors rely upon the original declarations of Drs. Moran, Sass, and Abitz, and the 2d Abitz Decl., for support. *Id.* at 10.

As Joint Intervenors emphasize in their Motion, the Board admitted Contention 2 on the basis of an underlying assumption that Strata might not be able to restore groundwater to pre-mining baseline quality or to drinking water quality standards, necessitating that the Applicant obtain an alternate concentration limit (ACL). Motion at 10-11.[40] The Board determined that NEPA required "a public explanation of the impacts of being unable to restore the mined aquifer to primary or secondary baseline and, instead, having to use an ACL, as that alternate limitation might be implemented per a reasonable bounding analysis."[41]

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[38] *See* Ross ISR Project, Technical Report Revision Index Table - January 2013 (Jan. 18, 2013) (ADAMS Accession No. ML13037A474).

[39] *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Nov. 3, 2011) at 4 n.3; Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (Apr. 10, 2012) at 4.

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

[41] *Id.* at 197.

Amended Contention 2-A does not meet the requirements for contention admissibility because it fails to identify and contest the portions of the DSEIS that address the environmental impacts on groundwater quality of the proposed Ross project, including the impacts that may occur should the Applicant be unable to restore groundwater to primary or secondary limits, requiring a Commission-approved ACL.

The nearest that Joint Intervenors come to directly addressing the Staff's analysis in the DSEIS is a single paragraph in their Motion that states that "[t]he [original and newly filed] declarations explain that the applicant and NRC staff have neither substantiated their claim that impacts on groundwater quality will ultimately be small, nor have they provided analysis that demonstrates how they arrive at or even quantify such a determination," referring to the DSEIS at 4-37, which concludes that the impacts to water quality in a subset of affected aquifers—the confined aquifers above and below the ore zone—would be SMALL. Motion at 10. Despite this statement, the support to which the Intervenors allude does not exist, rendering the Intervenors' statement unsupported and conclusory. To be admissible, a contention must do more than allege generally that there are deficiencies in the document. In order to demonstrate a genuine, material dispute with the DSEIS for a particular facility, the Intervenors must address the specific analysis in the DSEIS and explain how that analysis is incorrect.[42] "[N]either mere speculation nor bare or conclusory assertions . . . alleging that a matter should be considered will suffice to allow the admission of a proffered contention."[43]

Further, the declarations filed with the Intervenors' initial petition do not refer to or discuss any aspect of the DSEIS because they were filed before the DSEIS was issued. Therefore, by their very nature, they cannot explain how the *Staff* has failed to "substantiate[its]

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

[43] *So. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007).

claim that impacts on groundwater quality will ultimately be small," nor can they provide support for the Intervenors' claim that the *DSEIS* does not contain analyses or data supporting the SMALL finding. *See* Motion at 10; *see generally* Moran Decl., Sass Decl., and Abitz Decl.

In addition, Dr. Abitz's new declaration does not provide any support for the Intervenors' assertion that the DSEIS does not "substantiate" the claim that groundwater quality impacts are SMALL or that the DSEIS lacks analyses to reach that conclusion. *See* Motion at 10. The second Abitz Declaration contains six paragraphs under the heading of Contention 2, none of which address the Staff's conclusions related to the environmental impacts of the possibility that Strata might not restore the mined aquifer to primary or secondary baseline water quality conditions. *See* 2d Abitz Decl. at 13-16, ¶¶ 24-29. Further, the few references made to the DSEIS in the second Abitz Declaration under the Contention 2 heading are concerned with matters irrelevant to the contention, including estimates for aquifer restoration timeframes, 2d Abitz Decl. at 13 ¶ 24, 14 ¶ 25; designation of the contours of the ore zone aquifer, 2d Abitz Decl. at 14 ¶ 25; information used by Strata in its decision to develop the Ross project at the location described in the DSEIS, 2d Abitz Decl. at 15-16 ¶ 27;[44] and the general purpose of aquifer restoration, 2d Abitz Decl. at 16 ¶ 28. Nowhere does Dr. Abitz challenge, or even reference, the portions of the DSEIS discussing the potential impacts to water quality from the proposed Ross Project.

The DSEIS in fact contains a discussion of the environmental impacts of the proposed Ross Project on groundwater quality in Chapter 4, "Environmental Impacts and Mitigation Measures." The Staff provides the following analysis on page 4-32 of the DSEIS:

[44] Dr. Abitz cites the DSEIS at 2-11, line 43, for the proposition that the Staff in its DSEIS has "simply accept[ed] Strata's position that restoration to baseline values is possible because of the Nubeth project [stet] 'demonstration of successful ground-water restoration and site reclamation.'" However, the referenced portion of the DSEIS does not stand for that proposition. The quoted statement is part of a list of information used by the Applicant in its decision to develop the Ross Project at the location described in the DSEIS, and which the Staff included in a general description of the proposed project. Nowhere in that section does the Staff make any determination on groundwater restoration.

> The GEIS noted that water quality in the OZ aquifer would be degraded during ISR operations (NRC, 2009). A licensee would be required, by its WDEQ Permit to Mine and would be by its NRC license, to initiate aquifer-restoration activities to restore the OZ aquifer to preoperational conditions, if possible. *If the aquifer cannot be returned to post-licensing, pre-operational conditions described in SEIS Section 2.1.1.1*, the NRC would require that the aquifer meet the [EPA] maximum contaminant levels (MCLs) provided in 10 CFR Part 40, Appendix A, Table 5C *or Alternate Concentration Limits (ACLs), as approved by NRC* (10 CFR Part 40; NRC, 2009b). For these reasons, the NRC determined in the GEIS that potential impacts to water quality of the uranium-bearing aquifer (i.e., ore zone, production zone or unit, or mineralized zone) as a result of ISR operations would be expected to be SMALL and temporary (NRC, 2009).

DSEIS at 4-32 (emphasis added). As indicated by the italicized portions of the provision, the Staff took into account the possibility that Strata would require an ACL in its description of the environmental effects of the proposed project on groundwater quality. The DSEIS here refers to the GEIS's analyses and conclusions regarding the potential impacts to water quality in the ore zone, and the GEIS finds that the restoration of water quality to "alternate concentration limits approved by the NRC" would have a SMALL and temporary environmental impact. *See* GEIS at 4.2-22. Consequently, the GEIS's analysis and significance finding, and by incorporation that of the Staff's DSEIS, inherently adopt a bounding analysis that encompasses *any* ACL that is "approved by the NRC." Because the DSEIS contains an evaluation that *assumes* that Strata will be unable to restore groundwater to primary or secondary limits, and because that evaluation assesses the environmental impacts of that situation and concludes that they would nevertheless be "SMALL," the Staff's DSEIS provides the relief that the Board suggested that Joint Intervenors were entitled to in admitting Contention 2. *See* DSEIS at 4-36 and 4-37. Because the Joint Intervenors have not challenged this analysis and conclusion reached in the DSEIS, they have not raised an adequately supported, genuine dispute with the Staff on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

The remainder of the arguments made by Joint Intervenors in their Motion and by Dr. Abitz in his second declaration are not material to the issues presented by Contention 2-A. As

noted above, the Board's ruling is *premised on the assumption that an ACL would be required*.[45] Therefore, the arguments in the Motion and the 2d Abitz Declaration concerning the Applicant's proposed restoration process, aquifer restoration criteria, aquifer restoration techniques, and the likelihood that Strata will fail to restore ISL-contaminated groundwater to baseline values and will instead require an ACL, do not amount to support for a genuine dispute with the DSEIS's finding that water quality impacts would be "SMALL" even with an ACL. In addition, Joint Intervenors' claim that "[n]either Strata nor the NRC Staff have provided any evidence suggesting that the Ross Project will not cause significant aquifer degradation, even if Strata complies with an NRC-provided ACL," Motion at 12, is not properly within the scope of the admitted contention. In admitting Contention 2, the Board expressly stated that "[Contention 2] is not a vehicle for Joint Petitioners to seek to establish that a satisfactory ACL cannot be adopted or that [Strata] will be unable to comply with any ACL that might be instituted . . . ."[46] For these reasons, Contention 2-A is inadmissible for failure to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

III. Contention 3-A Is Inadmissible

Environmental Contention 3-A:

> The DSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration. The DSEIS fails to assess the likelihood and impacts of fluid migration to the adjacent groundwater, as required by 10 C.F.R. §§ 51.45, 51.70, 51.71, and NEPA, and as discussed in NUREG-1569 § 2.7.

The Intervenors argue that Contention 3-A is necessary because the DSEIS does not resolve their concern regarding the risk of fluid migration raised in Contention 3. Motion at 14. Contention 3-A argues that the DSEIS inadequately describes exploratory boreholes in the project area, fails to demonstrate that all boreholes will be plugged, and fails to account for

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

[46] *Id.* at 198 n.31.

potential hydrological connections between the aquifers in the area regardless of the boreholes. The marked difference between the ER and the DSEIS on the issue of fluid migration precludes the Intervenors from simply carrying forward the original contention; rather, they must amend their contention to challenge the DSEIS.[47] The amended contention fails to meet the contention admissibility requirements. Specifically, Contention 3-A must be dismissed because it does not raise a genuine dispute on a material issue of fact. 10 C.F.R. § 2.309(f)(1)(iv) and(vi).

First, the Intervenors assert that "testing done to insure protection against fluid migration failed" and showed a possible response between the ore zone (OZ) aquifer and the deep monitoring zone (DM) aquifer. Motion at 14. The Intervenors mischaracterize the intent of the testing done by the Applicant. The Applicant was not required in its ER to ensure that there is no connectivity between the OZ and its surrounding aquifers. Rather, the point of an ER is to characterize the aquifers and describe the environment. Accordingly, the DSEIS evaluates the potential environmental effects of the proposed project—it does not require an applicant to demonstrate its ability to contain fluid migration and it is not premised on a conclusion that there will be no fluid migration. The Applicant determined that boreholes create connectivity between the aquifers, the Staff agreed with that assessment, and the Intervenors also agree—there is no dispute on this point.[48]

Next, the Intervenors contend that there are hydrological connections between the aquifers that are not caused by boreholes. Motion at 14. But the Intervenors do not provide adequate factual support for this assertion. The Intervenors cite a Ninth Circuit Court of Appeals case, which found as a factual matter that there was a hydrological connection

[47] *See Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 767-68 (2012).

[48] The Intervenors dispute the number of boreholes at the project site but do not cite a source for their estimate of 5,000 boreholes, either in the subject pleading and declaration or in the initial hearing request. The Staff properly based its DSEIS evaluation on the number of boreholes reported in the TR. DSEIS at 4-36.

between shallow groundwater and surface water at the site at issue in that case.[49] But there is no explanation for how the factual determination in that case has any bearing on the case at hand. In addition, Dr. Abitz cites a summary of the GEIS contained in the DSEIS, which generically discusses the potential for hydrological connectivity between aquifers at ISR projects. 2d Abitz Decl. at 18 ¶ 33, citing DSEIS at 4-32. Dr. Abitz also cites data contained in the TR, which shows that there is communication between the aquifers. 2d Abitz Decl. at 18-20 ¶¶ 34-37. That data does not, however, demonstrate that there is communication due to hydrological connection rather than unplugged boreholes. Moreover, as Dr. Abitz states, that data was in the TR, so to the extent that Intervenors are relying on it to posit new theories for hydrological connections, their arguments are untimely.

After conducting its evaluation, the Staff agrees with the Applicant's determination that the connectivity between the aquifers is due to unplugged boreholes. The Staff did not find evidence that the aquifers at the Ross site are hydrologically connected, and the Intervenors have not provided sufficient evidence to demonstrate that there is a genuine dispute with that finding.[50]

Furthermore, regardless of the disagreement about hydrological connectivity, the DSEIS addresses the Intervenors' "fundamental concern that irrespective of these holes, the hydrological connections between the aquifers in the area pose a serious risk of fluid migration." Motion at 14. The Staff evaluated the environmental effects of Strata's operations in the event that an excursion were to occur, *i.e.* if there were connectivity. DSEIS at 4-35 to 4-37. The Staff did not attribute the hypothetical excursion to an improperly abandoned borehole or hydrogeological connectivity. Thus, the Intervenors' factual dispute is immaterial to the

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[49] *See* Motion at 14-15 (citing *Center for Biological Diversity v. BLM*, 698 F.3d 1101 (9th Cir. 2012)).

[50] *See* hydrogeology discussions in the Safety Evaluation Report for the Strata Energy, Inc. Ross ISR Project, Crook County, Wyoming, Materials License No. SUA-1601(ADAMS Accession No. ML13059A475) (February 2013), at §§ 2.4.3.3, 2.4.3.4, 2.4.4, 3.1.3.3, 5.7.8.3.1, 5.7.8.4.

environmental conclusion. *See* 10 C.F.R. § 2.309(f)(1)(iv). The environmental impacts of connectivity between aquifers have been evaluated.

The Intervenors also find fault with the Staff's explanation of the Applicant's monitoring program, which would detect an excursion and call for rapid remediation.[51] The Intervenors claim that the Staff cannot rely on the monitoring program because the Staff is addressing a potential impact in the future rather than at the EIS stage. Motion at 15. But the Intervenor again mischaracterizes the Staff's evaluation. The purpose of the monitoring wells is not just to collect data, but also to detect excursions so that they can be quickly remedied. The Staff relied on simulations of excursions performed by Strata and determined that vertical or horizontal excursions would result in temporary impacts to groundwater quality. DSEIS at 4-36 to 4-37. The DSEIS details which constituents of the groundwater would be affected. DSEIS at 4-37. If issued, the NRC license will require an early warning system, and mitigation in the event of an excursion could require withdrawal and treatment of contaminated groundwater.[52] The Staff determined that:

> The potential impacts of the operation of the Proposed Action to ground-water quality in the confined aquifers above and below the ore zone would, therefore, be SMALL. The short-term potential impacts of lixiviant excursions from uranium-recovery operation to the OZ aquifer outside the exempted area would be SMALL to MODERATE. Detection of excursions through the network of monitoring wells, followed by the Applicant's pumping of ground water to recover the excursion would reduce long-term potential impacts to the OZ aquifer outside the exempted portion to SMALL.

DSEIS at 4-37. It was appropriate for the Staff to include the monitoring wells and license conditions in its evaluation because they are detection and mitigation measures that will be implemented if the license is issued.[53] Ignoring the monitoring wells would not provide an

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[51] *See* Draft License Condition 11.5. The Staff issues draft licenses to ISR applicants to ensure that, if a license is granted, they will have a clear understanding of the conditions they must meet. The Staff issued Strata a final draft license on February 28, 2013 (ADAMS Accession No. ML13063A038).

[52] *See* Draft License Condition 11.5.

[53] *Hydro Resources, Inc.* (Albuquerque, NM), CLI-99-22, 50 NRC 3, 17 (1999).

accurate depiction of the environmental impacts of the proposed project. The Intervenors do not assert any disagreement with the DSEIS's conclusions about the environmental impacts that would occur if there were an excursion—the very thing they are concerned about. Thus, Joint Intervenors have not demonstrated the existence of a genuine dispute of material fact, and this amended contention must be dismissed.

IV. Contention 4/5-A Is Inadmissible

Environmental Contention 4/5-A:

> The DSEIS fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project. The DSEIS violates 10 C.F.R. §§ 51.45, 51.70, 51.71 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA because it fails to consider adequately cumulative impacts, including impacts on water quantity, that may result from the proposed ISL uranium mining operations planned in the Lance District expansion project.

Motion at 17. The original admitted contention asserted that the ER was deficient because it lacked an analysis of cumulative impacts caused by future, reasonably foreseeable ISR projects in the Lance District surrounding the Ross project. Now the Intervenors allege deficiencies in the DSEIS's evaluation of cumulative impacts.[54] The DSEIS has cured the original contention because it provides the analysis that the Board held was missing. The marked difference between the ER and the DSEIS on the issue of cumulative impacts precludes the Intervenors from simply carrying forward the original contention on the ER; rather, they must meet the new contention filing requirements.[55] Contention 4/5-A does not meet the contention admissibility standards.

As an initial matter, the Staff notes that while the original admitted contention addressed cumulative impacts to all resource areas, the amended contention only raises concerns about

[54] As noted in the Staff's response to Contention 1-A, the NRC is not bound by those portions of CEQ regulations that have a substantive impact on the way in which the NRC performs its regulatory functions. *See Diablo Canyon*, CLI-11-11, 74 NRC at 443-44.

[55] *See Fermi*, LBP-12-12, 75 NRC at 767-68.

groundwater quantity and quality in the OZ, DM, and shallow monitoring zone (SM) aquifers. The Staff also notes that paragraph 53 of Mr. Paine's declaration refers to thirteen separate sites within the Lance District. Paine at ¶ 53. Those thirteen sites are encompassed by the four larger areas that the Staff evaluated in the DSEIS. DSEIS 5-3 to 5-5.

In Contention 4/5-A, the Intervenors challenge the Staff's use of "SMALL," "MODERATE," and "LARGE" characterizations in the DSEIS cumulative impacts analysis, and they cite two cases to support their assertion that these characterizations are "conclusory or unsupported suppositions."[56] But those cases can be easily distinguished from the case at hand. In one, the agency had not defined what the labels meant,[57] and in the other, the labels assigned to impacts did not match the definitions given elsewhere in the NEPA document.[58] The Intervenors claim that the Staff does not explain "what it means to characterize the impacts as 'small.'" Motion at 18. In short, that is not true. In the DSEIS, the Staff defines these labels as it does in every EIS it issues. *See* DSEIS at 5-14 (defining "SMALL," "MODERATE," and "LARGE" impacts). More importantly, the labels are not the beginning and end of the Staff's analysis of the resource areas. They serve as relatively objective summaries of the impacts, not as the entirety of the analysis of the impacts.[59] This portion of Amended Contention 4/5-A is inadmissible because it fails to raise a genuine dispute that is material to the Staff's findings.

The Intervenors also briefly argue that the Staff did not explain how restoration of the groundwater will occur. Motion at 18. But the Intervenors overlook the Staff's description of

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[56] Motion at 18 (citing *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1186-87 (D.C. Cir. 2004)).

[57] *Sierra Club v. Mainella*, 459 F.Supp. 2d 76, 100-01 (D.D.C. 2006).

[58] *Greater Yellowstone Coal v. Kempthorne*, 577 F. Supp. 2d 183, 201 (D.D.C. 2008).

[59] For example, Joint Intervenors allege that the DSEIS only contains one paragraph about cumulative impacts to groundwater quantity "summarily stating that the cumulative impacts will be 'SMALL.'" Motion at 17. That is exactly right—the paragraph the Intervenors refer to is the summary of the impacts discussion contained on pages 5-22 through 5-25 of the DSEIS. The summary paragraph is not the entirety of the analysis.

aquifer restoration in the DSEIS on pages 2-32 through 2-34. For the purpose of the environmental analysis, the Staff assumed that Strata would use the same techniques for satellite sites.

Another element of Contention 4/5-A is the Intervenors' assertion that the DSEIS does not contain a quantitative analysis of the projected cumulative impacts of groundwater use. Motion at 18; 2d Abitz Decl. at 20-22 ¶¶ 39, 41-43. The Staff did not calculate the cumulative drawdown of the OZ aquifer and its surrounding aquifers. It did, however, qualitatively evaluate drawdown in the Lance and Fox Hills Formations, provide consumption rates, and consider recharge rates and mitigation measures in order to determine that the environmental impact would be "SMALL." DSEIS at 5-23 to 5-25. The Intervenors simply state that a cumulative drawdown calculation is necessary, but do not set forth a disagreement with the DSEIS's analysis or provide support for why the DSEIS's analysis is insufficient to comply with NEPA.[60]

The Intervenors' challenge to the Staff's groundwater quality evaluation is limited to one point—that the DSEIS did not consider the cumulative impacts caused by Strata's reasonably foreseeable Lance District ISR projects. Motion at 18. On the contrary, the Staff discusses cumulative impacts to groundwater quality on pages 5-22 through 5-27 of the DSEIS. These pages explain that cumulative impacts to groundwater quality would only occur in the case of Ross Project excursions, and because Ross Project excursions would be unlikely, would be remedied, and because the dissolved metals would precipitate, the cumulative impacts would be "SMALL." On page 5-27, the DSEIS explains that groundwater quality impacts from the Ross Project would be unlikely to reach far enough to have a cumulative groundwater quality impact with impacts from the reasonably foreseeable Lance District ISR projects.

[60] *Louisiana Energy Services*, CLI-05-20, 62 NRC at 536.

Thus, because the Intervenors have not raised a genuine dispute on a material issue in the cumulative impacts discussion in the DSEIS, Contention 4/5-A must be dismissed. 10 C.F.R. § 2.309(f)(1)(iv).

V. New Environmental Contention 6 Is Inadmissible

New Environmental Contention 6:

> NRC has failed to properly define the scope of the proposed major federal action here, which encompasses a much larger project in the same geographic area, as revealed in the DSEIS and in documents drafted by Strata's Australian parent company, Peninsula Energy Ltd. The DSEIS violates 10 C.F.R.§§ 51.70 and 51.71, NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA because it fails to consider the environmental impacts of, and appropriate alternatives to, the applicant's actual proposed project, and instead improperly segments the project by framing the Proposed Action under review as only a small part of the Applicant's planned and scheduled ISR activities in the Lance District.

Motion at 18-19. The Intervenors rely on the declaration of Mr. Paine as a basis for this contention. *Id.* at 19-22. Contention 6 must be denied because it is untimely and it is based on a misapplication of the law.

The Intervenors assert that the NRC must prepare a comprehensive EIS that assesses the environmental impacts of every ISR project that Strata has discussed on its website and in its press releases. *Id.* at 19. Mr. Paine's declaration contains an extensive list of press releases and corporate statements addressing Strata's plans for the Lance District. Most of this information has been public for more than a year, however, and all of it has been public for more than 30 days. Intervenors have an "ironclad obligation" to keep apprised of public information relevant to NRC proceedings.[61] The fact that the Intervenors purportedly did not find the information until recently does not make this contention timely. The Board's scheduling orders require the Intervenors to raise a contention based on newly available information within 30

[61] An intervention petitioner has an ironclad obligation to diligently search the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. *See, e.g.*, *Shaw Areva MOX Serv., LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009).

days of the date the information becomes available to the Intervenors.[62] This contention could have been raised as early as the Intervenors' initial Petition to Intervene in 2011.[63]

Furthermore, setting aside Contention 6's lack of timeliness, the Intervenors' assertion of the EIS's deficiency is contrary to well settled law. Specifically, the Supreme Court has found that a cumulative EIS must be prepared only when "several proposals for actions that will have cumulative or synergistic environmental impact upon a region are *pending concurrently before an agency.*"[64] The Court further stated that agencies need not consider "possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions."[65] The Commission has agreed that to bring NEPA into play, a possible future action must at least constitute a "proposal" pending before the agency, and must in some way be interrelated with the action that the agency is actively considering.[66]

Where an applicant submits a specific proposal—as opposed to an agency acting on its own proposal—the statutory language of NEPA's section 102(2)(C) only requires that an EIS be prepared in conjunction with that specific proposal, which provides the Staff with a "specific action of known dimensions" to evaluate.[67] A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual

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[62] *See, e.g.*, Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (Apr. 10, 2012), at 4.

[63] *See* Paine Decl. at ¶¶ 23-32, citing ten press releases dated before the October 2011 Petition to Intervene.

[64] *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (emphasis added).

[65] *Id.* at 410 n.20.

[66] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 295 (2002).

[67] *See Offshore Power Systems* (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-60 (1979).

proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals.[68]

Here, Strata filed an application for one ISR project, the Ross project. The application contains a specific action with sufficient details for the Staff to evaluate. If the Staff approves the application, Strata will only be authorized to operate on the Ross site. Statements made on Strata's website do not equate to a proposal pending before the NRC and are insufficient for the Staff to undertake a comprehensive environmental review. Even so, the Staff categorized Strata's Lance District plans as reasonably foreseeable and properly considered them in the cumulative impacts analysis in the DSEIS.[69]

In sum, Contention 6 is untimely and asks for relief that is contrary to settled law. Thus, Contention 6 must be dismissed.

CONCLUSION

For the foregoing reasons, the Board should reject the Intervenors' contentions on the DSEIS.

Respectfully submitted,

/Signed (electronically) by MBM/
Molly Barkman Marsh
Emily Monteith
Counsel for NRC Staff

Dated at Rockville, Maryland
This 3rd day of June, 2013.

[68] *See Kleppe*, 427 U.S. at 415 n.26.

[69] *McGuire/Catawba*, CLI-02-14, 55 NRC at 295.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S AND POWDER RIVER BASIN RESOURCE COUNCIL'S JOINT MOTION TO RESUBMIT CONTENTIONS AND ADMIT ONE NEW CONTENTION IN RESPONSE TO STAFF'S SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 3rd day of June, 2013.

/Signed (electronically) by/

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Date of Signature: June 3, 2013