UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	Docket No. 40-9091-MLA
	)	
STRATA ENERGY, INC.,	)	
	)	ASLBP No. 12-915-01-MLA-BD01
(Ross In Situ Recovery Uranium Project)	)	June 17, 2013

NATURAL RESOURCES DEFENSE COUNCIL'S & POWDER RIVER BASIN RESOURCE COUNCIL'S COMBINED REPLY IN SUPPORT OF MOTION TO RESUBMIT CONTENTIONS & ADMIT ONE NEW CONTENTION IN RESPONSE TO STAFF'S SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

On May 6, 2013, pursuant to 10 C.F.R. § 2.309 and the April 12, 2013 Scheduling Order, Intervenors Natural Resources Defense Council (NRDC) and Powder River Basin Resource Council (PRBRC) filed a motion to resubmit admitted Contentions, and to admit one new Contention, regarding the Draft Supplemental Environmental Impact Statement (DSEIS) for Strata Energy's proposed Ross Project in-situ leach (ISL) uranium mine, issued by Nuclear Regulatory Commission Staff (NRC or the Staff) on March 21, 2013.

Contentions 1-A, 2-A, 3-A, and 4/5 are filed to assert NRC carried forward the inadequacies of Strata's Environmental Report (ER) in the DSEIS, which Intervenors had properly challenged in the first instance, as per NRC rules. Thus, the grounds for Intervenors' request for a hearing on the merits of the claims – already admitted once in this proceeding – remain unchanged. By contrast, new Contention 6 – the failure to properly define the major federal action to be analyzed pursuant to the dictates of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4323 *et seq*., and applicable regulations – raises an issue that has concretely arisen with issuance of the DSEIS. Our May 6 motion sets forth the bases for the admission of

these Contentions, in light of the Atomic Safety & Licensing Board's (ASLB, or the Board) prior admission of Contentions in this proceeding (directed at the ER), the applicable statutory and regulatory framework, and two supporting declarations setting forth relevant facts. Second Declaration of Dr. Richard Abitz (2d Abitz Decl.); Declaration of Christopher Paine (Paine Decl.).

Rather than engage the substance of Intervenors' submission, Applicant Strata Energy, Inc. (Strata) and NRC Staff (Staff) devote most of their opposition briefs to procedural hurdles they claim (erroneously) Intervenors have failed to surmount. Thus, they assert, variously, Intervenors' arguments are too similar to those previously made, or are too dissimilar; are being presented too early, or too late; or can only be made against Strata but not NRC, or vice-versa – whatever argument that, as to a particular issue, will result in the dismissal of Intervenors' admitted Contentions. *See* NRC Staff Response to Motion (Staff Resp.) (June 3, 2013); Strata Energy, Inc. Response to Motion (Strata Resp.) (June 3, 2013).

This will not do. Intervenors have taken every possible precaution to insure that their Contentions concerning the adequacy of environmental analysis conducted for the large-scale uranium mining Strata seeks a federal license to undertake are presented and preserved at appropriate junctures of this proceeding. To disallow Intervenors' resubmitted Contentions because they are not based on new information – when the entire point of their submission is the DSEIS contains the *same flaws as the ER* – would fly in the face of the entire *raison-d'être* of the agency's adjudicatory process, not to mention be contrary to NEPA.

Similarly, to preclude admission of Intervenors' new Contention – *i.e.*, that the agency must consider the *full scope* of the actual uranium mining planned by Strata as the proposed action – on the grounds that the issue should have been raised earlier, when neither the ER nor

any other document has concretely disclosed this scope, and, indeed, the ER did not even consider this full scope *as a cumulative impact*, would violate this basic principle of NEPA and run counter to established NRC interpretations of its NEPA obligations. Precluding the new Contention would also reward an Applicant – and the agency – for engaging in a shell game designed to hide from the public the very nature of the project the NEPA process is designed to ensure is subject to appropriate public review. In sum, the resubmitted Contentions and Intervenors' new Contention meet the criteria for admission and the Board should grant Intervenors' motion in full.

ARGUMENT

I. THE AMENDED CONTENTIONS SHOULD BE ADMITTED.

Strata and Staff argue Intervenors should not be permitted to amend previously admitted Contentions because (a) there is no new and materially different information supporting the amendments; (b) the amendments are untimely; (c) the Board should instead revisit issues it already decided in admitting the original Contentions; and (d) each Contention is individually flawed in other ways. None of these arguments has merit.

A. Intervenors May Amend Their Contentions To Direct Previously Admitted Issues To The DSEIS.

NRC regulations require that if an intervenor-applicant maintains that an Applicant's ER is flawed, it must at that time file a motion to intervene and raise applicable Contentions. 10 C.F.R. § 2.309(f). This includes contentions concerning compliance with NEPA. *Id.* § 2.309(f)(2). Complying with these requirements, on October 27, 2011, Intervenors filed their Petition to Intervene and Contentions over Strata's ER, which led to the admission of

Contentions 1 through 4/5. *See* LBP-12-3, "Memorandum and Order, Ruling on Standing and Contention Admissibility" (Feb. 10, 2012).

According to Staff, "[i]n some circumstances a licensing board may construe an admitted contention contesting the ER as a challenge to the subsequently issued [DSEIS] without need for the intervenors to file a new or amended contention" if the issues are the same in both documents, but otherwise "the intervenor may need to amend the admitted contention or file a new contention against" the DSEIS. Staff Resp. at 6. It is precisely in light of these principles that Intervenors, out of an abundance of caution, filed their Amended Contentions here, which are intended to direct their previously admitted Contentions, which focused on the ER, to the DSEIS. To the extent the issues are the same, Staff acknowledges that an amendment was not necessary, and thus there should not even be a dispute. To the extent the issues have been framed differently from the ER, where, for example, the DSEIS sets forth new information – the first such information relevant to the adequacy of the NEPA process – now is the appropriate juncture for amending contentions.

Given Staff's acknowledgment of these governing standards, there is no reason to at all credit the *contradictory* argument put forward elsewhere in Staff's brief – and throughout Strata's brief – that the Amended Contentions may only be admitted if Intervenors demonstrate that the DSEIS contains new and significant information not previously available in the ER. *E.g.* Staff Resp. at 12 (because "Contention 1-A is essentially identical to Contention 1, and [alleges] that the DSEIS is essentially identical to the ER" with respect to the issue raised, "these argument should have been raised in the initial stage of the proceeding"); Strata Resp. at 8 ("Regardless of whether Contention 1 was previously admitted, Contention 1-A does not demonstrate that any new or materially significant information is available upon which the

contention can be admitted"). The point of the Amended Contentions is simply to bring forward the Contentions made against the ER and apply them to the DSEIS. Accordingly, to the extent that is all they do, by definition there is no new information that alters the dispute between the parties; rather, it is the very *lack* of additional information, analysis, or consideration in the DSEIS which gives rise to the Amendments.[1]

Precisely because the problem remains unaddressed and fundamental disputes remain, the Intervenor must be permitted to carry it forward to the DSEIS, and the Final SEIS if the flaws remain. Only under such an approach can the Contention process serve the function of both timely apprising the Applicant and NRC of an intervenors' concerns, while also allowing meaningful public participation in the adjudicatory and NEPA processes. Accordingly, Strata and Staff's arguments against the admissibility of the admitted Contentions that concern the similarities between the DSEIS and the ER have no merit; rather, in light of those similarities, and the fact that the Contentions have already been admitted *vis-a-vis* the ER, the Board should allow them to be carried forward to the DSEIS.

[1] A hypothetical example applying Staff and Strata's approach demonstrates the fallacy of their logic and the perverse incentives it would create. Imagine a uranium mine in a tectonically unstable environment prone to frequent earthquakes, where the ER fails to meaningfully analyze the risks associated with this instability. A Board admits a carefully supported contention premised on this flaw, and the DSEIS subsequently issued contains the same dearth of analysis, albeit in slightly altered language. Under Strata's and Staff's view, the contention cannot be carried forward to the DSEIS, because there is no new or material information on this issue disclosed there. Thus, the contention is denied, and the intervenor loses the opportunity to challenge this inadequacy, even though it is carried forward to the Final EIS and never addressed. This would render NEPA meaningless and ensure no party could (or would bother to) file a contention against the ER, thus effectively barring any Intervenor from any proceeding as she would have missed the initial opportunity to file. Such perverse results contradict basic administrative and NEPA law. *Tesoro Alaska Petroleum Co. v. F.E.R.C.*, 234 F.3d 1286, 1293 (D.C. Cir. 2000) ("Agencies may not use shell games to elude review").

B. The Amended Contentions Are Timely

Strata and Staff argue that Intervenors were on notice as to issues raised in the Amended Contentions more than 30 days before the motion, and thus that the Amended Contentions are untimely. *E.g.* Strata Resp. at 9; Staff Resp. at 9, 13 and 20. This argument is flawed.

First, again, the point of the resubmitted Contentions was simply to bring forward the admitted Contentions as to the ER and to direct them at the DSEIS. Thus, as regards the subject matter of the Contentions, Intervenors presented them in their *October 2011 Petition.* Whether the issue remained in some later document – be it the Safety Evaluation Report (SER), a Request for Additional Information (RAI) or otherwise – does not bear on the fact that Intervenors had already raised the issue *at the earliest possible point*, in their original motion and then timely addressed the contentions to the DSEIS when the fundamental disputes remained.

Second, to the extent the Amended Contentions address the inadequacy of the DSEIS under NEPA, information disclosed in other documents between the ER and the DSEIS by definition did not apprise Intervenors of the deficiencies of the DSEIS, because these were not NEPA documents.[2] Indeed, even as regards to the ER, Staff made this very point in arguing against Intervenors' Contention concerning cumulative impacts, claiming it was premature because the ER itself is not a NEPA document and thus was not required to address cumulative impacts. *See* Staff Opp. To Motion to Intervene at 29-31, Dec. 5, 2011. Further, if Intervenors had raised the inadequacy of data or analysis in a RAI response and noted that it failed to cure

[2] Appropriate as support for both resubmission of admitted contentions and new Contention 6, it is established NRC law that "[w]hen a new contention is filed challenging 'new data or conclusions' in the NRC's environmental documents, the timeliness of the new contention is determined based on whether it was filed promptly after the NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available. *See*, *In The Matter Of Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear OperatingServices, LLC*, (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 N.R.C. 720, 739 (2010).

the inadequacy of the initial contention, Strata and Staff surely could have responded intervenors' claims were premature and not ripe as the documents were not NEPA documents.

Since the DSEIS is the first NEPA document issued, Intervenors' NEPA arguments regarding the adequacy of the DSEIS, and particularly the agency's lack of compliance with NEPA requirements, did not become ripe until the DSEIS was issued. *See*, *Calvert Cliffs*, 72 N.R.C. at 739. Staff and Strata can claim no surprise as to the issues in dispute.[3]

C. This Is Not An Appropriate Juncture To Revisit Issues of Contention Admissibility That Have Already Been Decided

Strata re-hashes previously made – and rejected – arguments by objecting to these Amended Contentions on the precise grounds the Board already *rejected* in granting the Contentions against the ER. *E.g.* Strata Resp. at 11, 13-14. Thus, for example, as regards whether baseline water quality data must be collected *before* a uranium mining license is issued, Strata "reiterates its previous arguments that the Licensing Board cannot require a license applicant . . . to gather more baseline water quality data than is permitted by NRC regulations." *Id.* at 10.[4] These arguments were already *rejected* by the Board and this is not an appropriate

[3] Finally, and perhaps most importantly, as discussed below in the context of the challenges to the specific Contentions, *see infra* at 8-20 the documents Strata cites do not support its position that amended contentions should have been raised after the issuance of the RAIs and the SER. Accordingly, these documents raise no timeliness issues under any set of circumstances.

[4] Strata's Response is comprised of arguments rejected by the ASLB's Ruling on Contention Admissibility. *Cf.*, Strata Resp. at 10 (rearguing ASLB cannot require an applicant to gather more baseline groundwater quality data than is permitted by 10 C.F.R. § 40.32(e)) with LBP-12-3 at 29–30 (rejecting Strata's arguments the water quality information desired by Intervenors would require drilling in violation of NRC's regulations); Strata Resp. at 12–14 (rearguing its previous documents have provided reasonable assurances of an adequate groundwater restoration program and because of the regulatory structure, it cannot forecast ACL parameters) with LBP-12-3 at 33 (stating that Strata's characterization is "flawed," as an agency-approved ACL would not result in non-compliance with NRC regulations); Strata Resp. at 15–17 (rearguing its previously submitted documents detail proposed procedures to identify and plug abandoned drill holes) with LBP-12-3 at 36–37 (rejecting Strata's claim as to the inadequacy of the Contention due to the declarations of the Intervenors' experts "regarding boreholes and aquifer isolation"); Strata Resp. at 19 (arguing its previous responses and submitted

juncture for reconsideration. Indeed, having been resolved they are the "law of the case" and not subject to revision. *See*, *Sherley v. Sebelius*, 689 F.3d 776, 780-81 (D.C. Cir. 2012) ("The purpose of the law-of-the-case doctrine is to ensure that "the same issue presented a second time in the same case in the same court should lead to the same result.""") (*quoting LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996))) (original emphasis); *see also*, *In re Hydro Resources, Inc.*, 62 N.R.C. 77, 87 (2005) (stating the doctrine is "a common law rule applicable to NRC adjudicative proceedings. . . . To the extent that [a party is] unable to distinguish their current challenges from those that were previously rejected . . . the law of the case doctrine will militate strongly in favor of adhering to those decisions."). As opposed to rehashing arguments, Strata must await the next stage of the proceeding.[5]

D. None Of The Other Arguments Against The Resubmission Of The Admitted Contentions Has Merit

1. Contention 1-A

Contention 1-A concerns the Staff's failure to collect, and subject to a thorough "hard look" analysis, the relevant baseline water quality data for the entire project. Int. Mot. at 6-10. The Board admitted this Contention, and since the DSEIS adheres to the same position as the ER that this data need not be collected and analyzed in the manner required under NEPA, Intervenors direct the Contention to the DSEIS.

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documents have detailed cumulative impacts and any necessary efforts to address them) with LBP-12-3 at 43 (rejecting the asserted sufficiency of Strata's analysis of cumulative impacts as a matter for merits and admitting a contention as to whether Strata has duly considered all of the proposed action's cumulative environmental impacts).

[5] Indeed, elsewhere Strata itself appears to recognize this limitation, asserting that it reserves the right to file a dispositive motion on these issues. Strata Resp. at 11, n.5.

First, Strata's effort to distract the Board from this fact by referring to *other* documents where it reiterated its position that collection of this data is not necessary or provided other information is unavailing. Strata Resp. at 9. Intervenors' Contention concerning this failure of *Strata's* analysis has already been admitted, *see* LBP-12-3 at 36, and since there is no dispute the meaningful baseline water quality data to inform NEPA "hard look" analysis was neither collected nor included in any supplemental document, the documents Strata cites are irrelevant. Nevertheless, it is only with the issuance of the DSEIS that *Staff* has, for the first time, carried this deficiency forward and applied it to its own decision-making document. It is for that reason the Amended Contention did not become timely until the DSEIS was issued.[6]

Second, Staff's argument that Intervenors may not present a Contention regarding the requirement to collect adequate baseline water quality data against the DSEIS because the relevant requirements are imposed on Strata, not on Staff should be rejected. Staff Resp. at 9. This misapprehends Staff's NEPA obligations. NEPA requires each *agency,* in considering a proposal for a major federal action, either to collect all the information necessary to make a reasoned choice among alternatives, or, at bare minimum, to explain the reason that information was not collected. *See* Pet. Mot. at 9.[7] Thus, where, as here, collection of baseline data is

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[6] There was no reason for Intervenors to reassert this Contention when the SER was issued, as Strata contends. Strata Resp. at 9-10. The SER did not state that baseline water quality data would be collected, or address the issue at all. *See* SER at 87-88. Moreover, the SER itself is not a NEPA document, and thus there was no reason for Intervenors to carry forward their Contention regarding the need for baseline water quality in order for Staff to "prepare its own environmental impact statement," LPB 12-13 at 36 – which was the basis for the admitted Contention – until Staff issued its NEPA document. *See*, *Calvert Cliffs*, 72 N.R.C. at 739.

[7] *See Ocean Mammal Inst. v. Cohen*, No. 98-CV-160, 1998 WL 2017631, at *5 (D. Haw. Mar. 9, 1998) ("An agency is required to engage in reasonable research *to supply missing information* about negative impacts that a project may produce.") (emphasis added); *see also id.* (federal agencies "have an affirmative duty under NEPA and its implementing regulations to undertake research in order to prepare a comprehensive EIS that federal government officials can use to make a reasoned decision"); *State of Idaho By and Through Idaho Pub. Util. Commn v. ICC*, 35 F.3d 585, 596 (D.C. Cir. 1994) (promise to

necessary to properly analyze the environmental impacts associated with the proposed uranium mining project, it must be collected – which is why the Board already admitted this Contention. LBP 12-3 at 28-31.[8] Certainly, another party – such as the applicant – can collect that data, but it is the agency's duty under NEPA to analyze it. However, here, where the applicant failed to collect the right data that would allow such analysis, NRC had an independent duty under NEPA to include the missing information and analyze it in the DSEIS. *See* 40 C.F.R. §1502.22; Pet. Mot. at 9. The failures of the applicant do not excuse the NRC's obligations under NEPA.[9] NRC Staff "bears the ultimate burden of demonstrating that environmental issues have been adequately considered." *Louisiana Energy Services*, *L.P*. (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77, 89 (1998).

Staff further contends that it is too late for Intervenors to point to NEPA's requirements to collect necessary information in an EIS. Staff Resp. at 11-12. *But that is the central premise of this Contention as originally admitted by the Board*, LPB 12-13 at 31 (explaining admitted contention concerns the data necessary for "*staff to prepare its own environmental impact statement*") (emphasis added), and in any event contradicts the Contention admissibility process to suggest that an Intervenor is required to provide *all* arguments and citations in support of its Contentions at the *outset* of the proceeding. *Sierra Club v. NRC.*, 862 F.2d 222, 228 (9th Cir.

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address potential impacts in the future is "no substitute for an overarching examination of environmental problems at the time the [original] decision is made").

[8] As discussed below, Staff is not free to disregard this mandatory CEQ requirement. *See infra* at 11

[9] Staff's claim that the missing information is not relevant because it assumes Strata will not be able to restore groundwater quality, Staff Resp. at 10-11, misses the point. NEPA requires that an agency apprise itself of environmental impacts, and if Staff refuses to even establish meaningful baseline water quality standards before permitting Strata to engage in what Staff itself admits will be a degradation of water quality, it is acting with blinders on in just the manner NEPA prohibits.

1988) (at the admissibility stage, the only "relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated" and "raises issues that are appropriate for litigation in the particular proceeding").

Third**,** Staff's suggestion that it is not in any event bound by the CEQ regulations on this issue, Staff Resp. at 12, is also without merit. *See, e.g. Brodsky v. NRC*, 704 F.3d 113, 120, n.3 (2d Cir. 2013) ("The weight of authority . . . holds CEQ regulations binding on federal agencies," including NRC); *Piedmont Env. Council v. FERC*, 558 F.3d 304, 318 (4th Cir. 2009) (granting relief due to independent agency's failure to comply with CEQ regulations). NRC, like all other federal agencies, must carry out NEPA's mandates, including those further explicated in the CEQ regulations. *E.g. San Luis Obispo Mother for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) (applying CEQ regulation to NRC).

Fourth, as regards the lack of water quality data for all wells, Staff quarrels with Dr. Abitz over his statement that data are not presented for the 51 monitoring wells, as data are in the ER for Strata's 22 cluster wells (2 dry out of 24) and 29 water supply wells. Staff Resp. at 11 (citing to 2d Abitz Decl., ¶ 9). The precise nature of this minor quarrel in a much larger dispute is beside the point – Staff must meet the "hard look" requirements of NEPA and all parties will have an opportunity to present their full case on the merits.[10] [11]

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[10] *See LES*, 47 N.R.C. at 89, Staff "bears the ultimate burden of demonstrating that environmental issues have been adequately considered;" *see also Sierra Club v. NRC.*, 862 F.2d 222, 226 (9th Cir. 1988) (quoting *Carolina Power and Light Co.*, 23 N.R.C. 525, 541 (1986)) ("[I]n passing on the admissibility of a contention. . . 'it is not the function of a licensing board to reach the merits of [the] contention.'")

[11] Further, the basis for the quarrel over data is found in lines 15-18 on p. 4-23 of the DEIS: "As of August 2011, the Applicant had drilled and then plugged approximately 612 holes it installed during site characterization, geotechnical investigation, and ore-zone delineation; an additional 51 wells were also drilled and are now used as pre-licensing site-characterization ground-water monitoring wells." The quoted text does not refer to the existing, private 29 water supply wells but states "…an *additional* 51 wells were also drilled and are now used as pre-licensing site-characterization ground-water monitoring

Fifth, Staff's other concerns with matters raised in the Second Abitz declaration are also without merit. Staff Resp. at 13-14. The DSEIS seeks to defend the failure to collect pre-licensing baseline water quality data by asserting that data will be collected prior to operations - *after* the completion of the NEPA process – that can be used to set upper-control limits and restoration. DSEIS at 2-24. The Abitz declaration responds to that assertion by pointing out that this approach will not insure that the data collected at that late stage is not tainted by contamination due to mining on adjacent wellfields. 2d Abitz Decl ¶ 11. This assertion does not modify the Contention, as originally admitted or as amended, that NEPA mandates that appropriate baseline water quality data be collected and subjected to a NEPA "hard look" before the agency makes its final decision.[12]

2. Contention 2-A

Contention 2 asserts that the ER did not meaningfully analyze the environmental impacts that will occur if the quality of the groundwater cannot be restored. The Board admitted the Contention as to the ER, explaining that this obligation could be satisfied with, as one example, a significant effort at a "bounding analysis" considering historical experience of groundwater

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wells." The 29 private water supply wells are listed in Table 3.4-44 of the DEIS, but there is an absence of information in that table on the aquifer horizon captured by the well and Dr. Abitz has questioned the correlation of the water-quality results from the private wells to the aquifer zones (SA, SM, OZ, DM) in Strata's 6 regional cluster wells. In any event, the fact of the dispute supports Intervenors' Contention and it is a matter for the merits.

[12] With respect to the availability of water-quality data, Staff Resp. at 13-14 and Dr. Abitz's concern the 2011 water-quality data from Strata's 6 regional cluster wells were not analyzed in the DSEIS, Staff states that data were provided to NRDC in the hearing file update on March 4, 2013, contemporaneous with the issuance of the DSEIS. In that filing, the 2011 water-quality results are reported for the SM and DM aquifer horizons, but not for the SA and OZ horizons. Neither is there any infirmity in Dr. Abitz referring to another ISL operation to give an example of why the existing approach to baseline water quality for this license is flawed. Staff Resp. at 13. Again, both matters are beside the point at this juncture. The Contention and its admissibility remain unchanged, and parties will be permitted to provide evidence they garner in support or opposition to the Contentions at the merits stage.

quality degradation at other ISL sites, and therefore Intervenors submitted an admissible Contention concerning the lack of this analysis in the ER. LPB 12-13 at 334-35. Contention 2-A directs this same Contention to the DSEIS, where the same flaws remain.

Strata's arguments concerning documents issued since the ER are the same as those presented regarding Contention 1-A, and warrant the same result. *See supra* at 7-8*, Sebelius*, 689 F.3d at 781and *In re Hydro Resources, Inc.*, 62 N.R.C. at 87 (2005). As opposed to rehashing arguments, Strata must await the next stage of the proceeding. Since Contention 2 was admitted there was no basis for Intervenors to resubmit their Contention against Strata's analysis when Strata carried its deficient approach through to additional documents including the RAIs, and nevertheless it is only with the issuance of the DSEIS that *Staff* has, for the first time, failed to meaningfully address this critical issue and therefore failed to comply with NEPA.

Also like Contention 1-A, there was no reason for Intervenors to reassert this Contention when the Safety Evaluation Report ("SER") was issued, as Strata contends, Strata Resp. at 12, because the SER simply stated that Staff is confident that Strata will adequately restore groundwater quality. SER at 297-98. Again, since the SER was not a NEPA document, there was no basis after its issuance for Intervenors to re-assert their contention that NEPA requires Staff to meaningfully analyze the consequences of a lack of adequate groundwater quality restoration.

Strata's claim that Contention 2-A is a premature attack on whether the Alternative Concentration Limit (ACL) for the site will be adequate, Strata Resp. at 14, is also off the mark, as the same argument was previously rejected by the Board. LPB12-13 at 35 ("the ability . . . to obtain an AEA hearing at that point would not provide the relief" sought now, "i.e. a public

explanation of the impacts of being unable to restore the mined aquifer to primary or secondary baseline. . . .").

Staff's claims Amended Contention 2-A fails to explain the basis for the Contention also fail. Staff Resp. at 15. The Contention is the same as that admitted for the ER – that the DSEIS fails to meaningfully explain the consequences of failing to restore the groundwater aquifer. Staff asserts that it satisfied this obligation by characterizing the impacts of such a result as "SMALL." Staff Resp. at 15. However, the point of the Amended Contention is that such a conclusory label does not satisfy Staff's NEPA obligations, and fundamental obligations under the Administrative Procedure Act, 5 U.S.C. § 706, to explain the basis for its conclusions. *See* 40 C.F.R. § 1502.24. Since the DSEIS is so conclusory on this issue and lacks the analysis necessary for a "hard look" under NEPA, there is simply nothing more Intervenors could assert at this stage and this issue is a matter for the merits**.**

The DSEIS discussion of the creation of an ACL if groundwater restoration cannot be achieved does not resolve this concern. Staff Resp. at 17. Rather, that is the same grounds the Board rejected in admitting this Contention *vis-a-vis* the ER. LPB 12-13 at 34. Thus, Staff is simply seeking to reargue an issue not open to reconsideration at this time. *See supra* at 7-8.

Finally, Staff argues Intervenors seek to expand the scope of the Contention. Staff Resp. at 18. Not so. The original Contention admitted by the Board concerned the fact the ER "fails to evaluate the virtual certainty that SEI will be unable to restore groundwater quality." LPB, App. A. Contention 2-A directs that Contention to the DSEIS, which similarly fails to contain such an

evaluation. The Second Abitz declaration simply explains the deficiencies of the DSEIS in this regard. 2d Abitz Decl. ¶¶ 24-29.[13]

3. Contention 3-A

Contention 3, as admitted, asserts the ER failed to adequately address the risks of fluid migration. LPB 12-13, App. A. Contention 3-A directs that Contention to the DSEIS, which contains the same deficiencies. Strata argues Contention 3-A is not timely because the final Ross SER reflects a commitment "to identify and properly plug and abandon historic wells in the area of influence prior to conducting appropriate aquifer testing to ensure no fluid migration." Strata Resp. at 15. However, again, since the SER was not a NEPA document Intervenors had no reason to assert that the any inadequacy in the SER constituted a NEPA violation.

In any event, the statement in the SER does not resolve the Contention first presented against the ER, and now directed to the DSEIS, because it does not explain how that commitment will be satisfied. Thus, with respect to the change in the number of identified site drill holes (Strata Resp. at 16; *see also* Staff Resp. at 19, n.48) again, the issue raised in Contention 3, and carried forward in Contention 3-A is not resolved because Strata itself – as well as its corporate parent – asserts that there are, in fact approximately 5,000 boreholes, while the DSEIS assumes a much lower number.[14]

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[13] Staff claims the issues raised by the Second Abitz Declaration are not relevant because the Board's admission of this Contention was "premised on the assumption that an ACL would be required." Staff Resp. at 18. This is incorrect. The Contention was admitted on the ground that, irrespective of a future ACL, NEPA requires that Staff consider and disclose the degradation in water quality that is virtually certain to occur as a result of this project.

[14] *Compare* DSEIS at 4-36 (discussing 1,682 holes) *with* Strata Energy website (http://www.stratawyo.com/ross-isr-project/lance-isr-projects) ("NuBeth JV drilled more than 5,000 exploration and development holes") (last visited June 6, 2013); Peninsula Energy Ltd. website (http://www.pel.net.au/projects/lance_project__wyoming_usa.phtml) ("NuBeth JV drilled more than 5,000 exploration and development holes" as part of this project) (last visited June 6, 2013).

As for the ability to identify and plug abandoned drill holes, the TR Addendum 2.6-E and Draft License Condition 10.12 does not satisfactorily address the issue, as Strata claims, Strata Resp. at 17, because the DSEIS, like the ER, TR and SER before it, does not explain *how* Strata will identify and plug the abandoned drill holes. In fact, if anything, the DSEIS confirms Intervenors' concerns because it says that Strata has only located 759 wells and has only plugged 55. DSEIS at 2-44. As Intervenors' motion explains, there is no analysis in the DSEIS about how Strata will fulfill this *draft* license condition commitment and in turn, minimize the risk of fluid migration. Therefore, Intervenors' concerns about the risk of fluid migration from abandoned and improperly plugged wells are as relevant now as they were at the time of their original motion to intervene. Moreover, the DSEIS confirms the lack of NEPA analysis on the subject; Staff's statements in the DEIS the license condition will address any problems is conclusory, without sufficient basis, and does not satisfy NEPA's "hard look" requirements.

Similarly, as regards the hydrological connection between aquifers, the Ross SER and Final Draft License, and TR RAI 13 Response, do not address these issues, as Strata asserts. Strata Resp. at 17. In RAI 13 Strata simply represented that "[e]very effort will be made to address the important issues concerning hydraulic conductivity calculations." RAI 13 at 57. Similarly the SER simply stated that "staff finds that the applicant will be able to control the migration of production fluids in the subsurface." SER at 78. None of these documents attempted to resolve the concern raised in this Contention that there remains a serious risk of fluid migration and a need for attendant NEPA "hard look" analysis.

Staff also asserts the Contention is resolved because the DSEIS does not conclude "there will be no fluid migration." Staff Resp. at 19. However, Staff does not cite where in the DSEIS this fundamental and troubling environmental impact is acknowledged and analyzed. In fact, the

DSEIS, like the ER, presumes that (a) the only source of fluid migration is the boreholes and (b) they will all be plugged. DSEIS at 4-36 ("The Applicant proposes to actively locate and plug *all* exploration drillholes prior to beginning wellfield operation.") (emphasis added). Accordingly, this issue is not resolved as Staff suggests.

Intervenors' concern regarding other aspects of connectivity beyond the boreholes is also not resolved as Staff suggests. Staff Resp. at 19. *Center for Biological Diversity v. BLM* stands for the proposition that an agency must *explain* the basis for the conclusion that there is no hydrological connection between groundwater and surface water, because, "in most areas, the surface and ground-water systems are intimately linked." 698 F.3d 1101, 1122 (9th Cir. 2012). Thus, here, the DSEIS is deficient in failing to grapple with this issue. Staff also errs in arguing Intervenors may only raise this issue if they *demonstrate* these connections, Staff Resp. at 20, for once again such an approach would turn the adjudicatory and NEPA processes on their head, since at the Contention admissibility stage "[w]hether the [petitioner] has proved its claim is not the issue." *Crow Butte Res.,* (in Situ Leach Facility, Crawford, Nebraska)*,* CLI-09-9, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 at *11, 14 (May 18, 2009).[15]

Finally, contrary to Staff's timeliness argument, Staff Resp. at 20, the issue of connectivity beyond the boreholes is subsumed within the original Contention Intervenors raised and the Board admitted. It is well-established Intervenors need not provide all evidence and arguments in support of their Contentions at the admissibility stage. Indeed, had this particular issue been raised in the Contentions on the ER, Staff would have undoubtedly said it was

[15] Even as to a NEPA claim more generally, a plaintiff need not show the environmental impact to pursue its claim, since that is the entire purpose of the sought after NEPA review. Rather, a plaintiff's burden is simply to bring forward enough evidence to show that there "may" be an environmental impact in a particular area, a minimum burden Intervenors amply meet here. *E.g. Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002).

premature because it may be resolved in the DSEIS and NEPA obligations only attach through the DSEIS. *See* Staff Resp. to Mot. To Int. at 29 (arguing contention regarding cumulative impacts is premature).[16]

4. Contention 4-A and 5-A

Strata contends Contentions 4-A and 5-A concerning cumulative impacts are untimely because cumulative impacts were analyzed in ER RAI CI-1(B). Strata Resp. at 19. However, Intervenors' Contention cumulative impacts were not adequately considered by *Strata* has already been admitted, *see* LBP-12-3 at 43, and thus there would be no reason for Intervenors to amend their Contention as to Strata's analysis. Indeed, this argument is impossible to reconcile with Staff's argument that cumulative impacts analysis is only required in NEPA documents. NRC Staff Resp. to Pet. Mot. To Int. at 29, (Dec. 5, 2011).

In any event, by its very terms the RAI did not address the cumulative impacts of the project. *See* ER RAI Cl-1(B). Thus, in this RAI Staff did not ask Strata to analyze cumulative impacts; rather it asked Strata to identify activities that might give rise to impacts that *Staff* would then analyze in the SEIS. *Id.* at 19 (asking Strata to provide information about planned activities that is needed "to assess cumulative impacts on environmental resources . . . ."). Accordingly, the RAI does not in fact endeavor to discuss in detail or otherwise analyze the cumulative impacts associated with these activities, but simply outlines further activities that may occur in this area. *Id.* at 22. Moreover, it was only with the issuance of the DSEIS that *Staff* has, for the first time, carried this deficiency forward and applied it to its own decision-making

[16] With respect to the planned monitoring program, Staff misapprehends Intervenors' Contention in claiming Intervenors assert Staff should have "[i]gnor[ed] the monitoring wells" in their analysis. Staff Resp. at 21-22. The issue is whether addressing the issue post-licensing is a meaningful *substitute* for addressing it now.

document. It is for that reason that the Amended Contention concerning this issue did not become timely until the DSEIS was issued.

Staff's claim this Contention has been resolved because of the cumulative impacts analysis contained in the DSEIS is mistaken. Staff Resp. at 22-23. As Intervenors' explained, the analysis is deficient because Staff simply put conclusory labels on the impacts involved, an approach courts have repeatedly found inadequate under NEPA. Pet. Mot. at 18. Simply *defining* the labels does not solve this problem, as Staff asserts, Staff Resp. at 23, as they were similarly defined in the cited cases. *Compare, e.g., Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 30 (D.D.C. 2010) (rejecting Park Service use of conclusory, but defined, impacts terms to evaluate environmental impacts) *with* DSEIS at 5-15 (providing conclusory definitions to impact terms). Rather, what is required is an *analysis* of the impacts, beyond the "defined" labels, which is missing here. *See also, Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 101 (D.D.C. 2006) (similarly rejecting use of conclusorily defined terms to describe impacts).

As for whether a calculation of the cumulative drawdown of groundwater is necessary, Staff Resp. at 24, the DSEIS admits "[t]he Staff did not *calculate* the cumulative drawdown" of groundwater," but claims the agency reasonably concluded the impacts will be "SMALL" based on a "qualitative evaluat[ion]." *Id.* at 24 (emphasis added). However, the problem, again, is Staff neither explains how it concluded the impacts will be small, nor why it found no quantitative analysis necessary. Staff's rejoinder *Intervenors* failed to "provide support" for why a different conclusion should be reached, *id.*, once again puts the cart before the horse, since the purpose of the NEPA analysis is for the *agency* to analyze the impacts. *See LES*, 47 N.R.C. at 89 (Staff "bears the ultimate burden of demonstrating that environmental issues have been adequately considered."); *see also, e.g.*, *Sierra Club v. U.S. Dept. of Agric.*, 777 F.Supp.2d 44, 65 (D.D.C.

2011) ("NEPA not only explicitly gives all federal agencies the authority to consider environmental impacts, it compels them to do so").

Finally, Staff claims the DSEIS adequately considers cumulative impacts on groundwater quality of the entire Lance District project. Staff Resp. at 24. That statement cannot be reconciled with the fact Strata itself told Staff in its RAI that only later, when it seeks an amendment to include satellite projects will "[a] much more *detailed analysis*" of impacts associated with those satellites be provided. RAI CL-1(B) at 22 (emphasis added). Thus, based on the limited information Staff has thus far collected – as a result of its refusal to collect baseline water quality and other deficiencies contained in the earlier Contentions – Staff is only able to offer the conclusory assertion that the impacts will be "SMALL," without the requisite data or analysis.

II. THE NEW CONTENTION SHOULD BE ADMITTED.

Intervenors timely submitted new Contention 6 concerning Staff's failure to properly define the scope of the major federal action at issue in this project. Pet. Mot. at 29. Intervenors explained that the description of the overall project set forth in the DSEIS, combined with recent announcements by Strata and its corporate parent, reveal the proposed project covered by the DSEIS is, in fact, a sub-part of a much larger project that will take place in the same geographic area. *Id.* at 19-23. Strata's and Staff's claims that this Contention is untimely (Strata Resp. at 21; Staff Resp. at 25-26) conflict with established law and are off the mark in any case, particularly in the law Staff offers as support and in the proposition Strata's license application must define the parameters of Staff's review (*Id*. at 22; *Id*. at 26, respectively).

A. Contention 6 Is Timely

Strata and Staff ignore established NRC law:

> [W]hen a new contention is filed challenging "new data or conclusions" in the NRC's environmental documents, the timeliness of the new contention is determined based on whether it was filed promptly after the NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available.

See Calvert Cliffs 72 N.R.C. at 739 (2010). The panel in *Calvert Cliffs* further clarified, "[t]he intervenor must show that (1) the new data or conclusions in the NRC Staff NEPA document differ significantly from those in the ER, and (2) the new contention was submitted promptly after the NRC Staff NEPA document was issued to the public. If these requirements are met, the new contention is timely even if it is based on information that predates the NRC Staff NEPA document." *Id*.

Contention 6 should be admitted as Intervenors demonstrated the information in the DSEIS differed substantially from that in the ER and timely submitted its new contention in response to the DSEIS. *See* Paine Decl. at ¶¶ 13-19. To be sure, prior documents had identified uranium mining may occur in locations other than the Ross Project covered by the DSEIS. Indeed, that is the basis for Intervenors' cumulative impacts Contention already admitted by the Board – that NEPA requires a meaningful analysis of the cumulative impacts associated with each of these mining projects. But coupled with new information that came to light in preparation for comments on the truncated scope of the DSEIS, wherein Peninsula Energy stated it will develop the entire "Lance Project," *Id*. at ¶¶ 23-53, the actual scope of the project is much larger than the scope considered in the DSEIS (and the ER), *Id*. at ¶ 23, and thus Petitioners timely filed their motion on Staff's failure to properly define the scope of the major federal action.

In contrast to this reality, in every document to date, including the DSEIS and in their responses to Contention 6, both Strata and Staff contend the Ross Project is somehow *independent* of these other projects, and thus it is appropriate to separately consider the environmental impacts of, and alternatives to, the Ross Project alone. The recent documents discussed in Intervenors' Motion, taken together with the text of the DSEIS, reveal that, in fact, *they are all part of the same project*. Given that Strata and Staff contend they are entirely separate for NEPA purposes, there was no reason Intervenors would have been obligated to raise this issue earlier. Again, to reach another conclusion would be to reward Staff and Strata for a shell game whereby once the public understood the full scope of the project, it would be too late to challenge it.

Strata's and Staff's further argument, that the project is defined by the scope presented by the applicant, and there is no NEPA obligation to insure that the agency does consider the full scope of the project, Strata Resp. at 21-22; Staff Resp. at 26-27, flies in the face of common sense and relevant case law. NEPA is a federal agency obligation. Certainly, an agency cannot shirk that obligation by blaming a project applicant for deliberately segmenting a project to avoid an analysis of its entire scope. Rather, where, as here, the actual major federal action is broader than the applicant's proposal, the agency has an *independent* obligation to fully analyze that entire project. *See, e.g., Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999) (finding agency unlawfully segmented consideration of a private applicant's project); *see also Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975) (finding unlawful segmentation for permitting, explaining that "it cannot be denied that the environmental consequences of several strip mining projects extending over twenty years or more within a tract of 30,876.45 acres will be significantly different from those which will accompany Westmoreland's activities on a single tract of 770

acres"). Accordingly, Staff cannot avoid its NEPA responsibilities here by asserting that it may only consider the project as proposed by Strata and has no "jurisdiction" to consider the actual project underway. Strata Resp. at 23.[17]

B. Staff Misapplies Case Law

1. Reliance On *Shaw Areva* Is Misplaced.

Staff avers 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" and relies on *Shaw Areva MOX Serv., LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 N.R.C. 55, 65, n.47 (2009). Staff. Resp. at 25, n.61. The facts and circumstances of the one case Staff cites —*Shaw-Areva*—are distant from those surrounding Intervenors' new Contention 6, and so "peculiar" the Commission took the unusual step of adding a footnote with the following injunction: "[t]he peculiar procedural circumstances and the unusual nature of the equities favoring Intervenors combine to render this decision *sui generis*. As such, it should not be considered precedential." *Shaw Areva*. 69 N.R.C. at 59, n.8. Thus, Staff's argument finds no support in this case.

Further, Staff's citation is not to the substance of the Commission's ruling (which may just as easily be construed to favor the petitioners in the present proceeding) but rather to note 47, reminding Intervenors of their "iron-clad" obligation to "regularly and diligently search publicly available NRC or Applicant documents for information relevant to their Contention

[17] Strata's assertion Intervenors will have "ample opportunity" to challenge future actions at a later time, Strata Resp. at 23, continues the overall shell game. Of course, at no later time will Strata or Staff consider the entire major federal action here, or alternatives to it, and in the event Intervenors raise these issues later Strata – and Staff – will assert they are too late.

7."[18] With respect to observance of this obligation in the instant case, Petitioners note none of the documents issued by Australian parent company Peninsula Energy Limited, and cited as sources of relevant new information on the scope of the Proposed Acton in the Paine Declaration, were included in the mandatory disclosures of this proceeding to date, nor were they "Applicant documents" made available in the NRC docket for this proceeding or elsewhere on the NRC website, as the legal "Applicant" is "Strata Energy, Inc.," a United States-based subsidiary corporation registered in the State of Wyoming. Thus, contrary to the assertions contained in Staff's response, Intervenors had no regulatory obligation to uncover these Peninsula Energy documents sooner than they otherwise did. Since this is a contention filed under NEPA—not the AEA—the relevant documents under NRC rules to which the Intervernors must lodge timely objection are the Applicant's ER, which did not disclose the information contained in the Paine Declaration, and the DSEIS, which *unlike* the ER, contained oblique suggestions of imminent expanded mining activity (Paine Decl. ¶¶13-19)— indications that sparked the web search by Mr. Paine, thus uncovering the archive of Peninsula documents referenced in his declaration that reveal a far larger "Proposed Action" requiring environmental impact analysis than the diminutive "Ross Project" subjected to review in the DSEIS. Intervenors contentions against the DSEIS, including Contention 6, submitted promptly after the NRC Staff NEPA document was issued to the public, were thus timely filed.

[18] Turning to *Duke Energy Corp.*(McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)—cited in n. 47 of *Shaw Areva*– the Commission's finding there supports the primacy of the draft SEIS as the relevant document subject to challenge in the NEPA context, and points out the potential pitfalls of focusing contentions on an Applicant's Responses to RAI's. *See Duke Energy* 56 N.R.C. at 385 ("The Commission sees no point in focusing exclusively on Duke's responses to staff RAIs when the draft SEISs (which already take into account Duke's RAI responses) provide a more recent and often more thorough discussion of relevant issues.").

Further, NRC Staff "bears the ultimate burden of demonstrating that environmental issues have been adequately considered." *LES,* 47 N.R.C. at 89. Intervenors must file their environmental contentions before issuance of the draft EIS "if the contested issue is addressed in the applicant's ER." *Id*. NRC Staff conceded at hearing the environmental impacts of additional mining operations beyond the "Ross Project" were not considered in the ER. Paine Decl. at ¶¶ 10, 11. "To the extent that the FEIS may differ from the ER, an intervenor is provided a second opportunity to file contentions on environmental issues." *Id*. In Contention 6, Intervenors avail themselves of this "second opportunity."

2. Reliance On Kleppe Is Misplaced.

NRC Staff cites *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) for the proposition that "Intervenors' assertion of the EIS's deficiency is contrary to well settled law." Staff Resp. at 26, n. 64. Specifically, the Supreme Court found a cumulative EIS must be prepared only when "when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." *Kleppe*, 427 U.S. at 410. Staff misapprehends the case Intervenors have put forth in support of Contention 6 and, in any event, misapplies the well-established holding of *Kleppe*, which if read in its entirety supports admission of the Contention.

The facts and circumstances of *Kleppe* bear no resemblance to the present case.[19] Petitioners are not seeking an analogous "programmatic environmental impact statement" on uranium mining activities in the Wyoming East Region, which analysis, as Staff well knows, it

[19] Respondents in *Kleppe* alleged the Interior Department engaged in formulating a federal proposal to develop coal resources in the "Northern Great Plains region," and claimed federal officials could not allow further development without first preparing a "comprehensive environmental impact statement" on the DOI's coal leasing program in this region, involving the activities and interests of multiple private companies and public power entities stretching over four states.

has already performed, and Petitioners contentions regarding this document were not admitted and are not at issue here. Indeed, the Court found with respect to the alleged coal leasing program under review in *Kleppe*, "[i]n the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement." *Kleppe* 427 U.S. at 401. In fact, the instant case is even further removed from *Kleppe* than this finding suggests, because the major issue at stake there was whether an appeals court had erred in seeking to ascertain and actively direct the precise point in an agency's deliberative process on a prospective program that it must begin preparing an EIS. No such issue of judicial activism beyond the boundaries sanctioned by NEPA arises here, and the "proposal" at issue is not in the formulation stage, but actually pending before the agency.

Similarly, the scope of proposed action under scrutiny in the instant proceeding does not involve multiple companies across multiple states, as in *Kleppe*, but rather the actions of a single company within a defined uranium resource area – the "Lance District" – located within a single state. The Paine Declaration presents an overwhelming body of evidence documenting the existence of a detailed and imminent development plan for the Lance District that is indeed "pending" before the agency, in the form of a proposal to license construction and operation of a Central Processing Plant (CPP) with four times the capacity justified by the proven reserves of the nominal "Ross Project" alone, and an acknowledged license "Amendment Area" strategy designed to steadily increase the feedstock to this facility from "satellite area" operations approved at regular intervals.[20]

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[20] The documentary evidence suggests this "Amendment Area" strategy for expanding the domain of resource exploitation under the proposed license may have been known to Staff. *See* Paine Decl. at ¶¶ 23, 28, 29, 31, 34, 35, 36, 47. In any event, it is apparent Strata is relying on such early expansion for the very economic viability of its proposed action to construct and operate a large Central Processing Facility, thus making prompt access to such Amendment Areas an intrinsic part of its "proposal," whether or not

C. Staff And Strata's Reliance On A Truncated Project Definition Is Misplaced.

Continuing its misplaced reliance on *Kleppe*, Staff asserts the agency "need not consider 'possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.'" Staff Resp. at 26 (citing *Kleppe* 427 U.S. at 410, n.20). By contrast, Petitioners presented substantial evidence of actions "imminent" in NEPA terms, Paine Decl. at ¶34, and expected by the Applicant to occur within months to a few years "at regular intervals." *Id*. ¶35. Staff next observes "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." Staff Resp. at 26.[21] Petitioners note neither Staff nor Strata attempt to refute the substantial evidence in the Paine declaration. Further, Strata's "future actions" are not only "possible" but indeed "highly likely" and even "economically required" in the event the initial "Ross Project" license application is approved, and therefore within the de facto scope of the "proposal" pending before the agency, even if the current de jure expression of this proposal – the Ross Project license application, has a far narrower scope.

Staff continues in this vein and asserts "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." Staff Resp. at 27. However, even the truncated "Proposed Action" as currently defined in the DSEIS "includes the option of the Applicant operating the Ross Project facility beyond the life of the Project's wellfields." This cramped acknowledgement of the Applicant's detailed plans for extended mining of the Lance District would alone appear to trigger a

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the cognizant agency currently chooses to publicly acknowledge this fact and subject such actions to NEPA review.

[21] This dovetails with Strata's argument discussed *supra* at 22-23.

requirement by the agency to analyze the environmental consequences of exercising this "option." Indeed, the DSEIS notes, "The facility could be used to process uranium loaded resins from satellite projects within the Lance District operated by the Applicant …" DSEIS at xviii, line 42. The conditional word "could" here is misplaced and seeks to place the Applicant's planned actions on the same plane as "other offsite uranium recovery projects not operated by the Applicant" that are clearly not part of the currently proposed action, but might become linked to it at some time in the future. *Id*., line 45. In reality, the "Ross project facility" (i.e. the proposed Central Processing Plant ("CPP")) would be used to "process uranium loaded-resins from satellite projects within the Lance District." It is being designed to do so, and makes no sense as an economic investment if confined to processing only the resources of the current "Ross Project" area. In fact, the CPP would be used to process uranium-loaded lixiviant piped directly to the facility from contiguous "Amendment Areas." ("The CPP will house the initial ion exchange (IX) circuit and will see an additional IX circuit installed with the commissioning of the second production unit planned for Kendrick located in close proximity to the CPP." Paine Decl. at ¶35.[22]

[22] Staff (at 26, n.67) further cites a 1979 Licensing Board decision (*Offshore Power Systems* (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-60 (1979) for the proposition NEPA's section 102(2)(C) only requires that an EIS be prepared in conjunction with a specific proposal, which provides the Staff with a "specific action of known dimensions" to evaluate. Again, such a "specific action of known dimensions" – the expanded mining of the Lance District via initial construction of an oversized CPP and exploitation of already defined "Amendment Areas" and "Satellite Areas"—is present in the instant case and neither Staff nor Applicant specifically dispute this fact, but rather appear to dispute the extent to which the dimensions of the expanded mining can be "known" in advance. Since this is an issue common to all NEPA analyses everywhere, it does not constitute an argument to exclude this contention at this stage in the proceeding. For example, Petitioners would argue that the "dimensions" of Strata's proposal for expanded mining of the Lance District are far better known than the cumulative impacts of future projects by other mining companies that the Staff has already agreed must be analyzed in the SEIS. At a minimum, Petitioners have presented sufficient detailed evidence regarding this point to justify resolution of the dispute on the merits.

The Staff response further avers that "single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals." Petitioners have presented sufficient documentary evidence to raise serious doubts whether "single approval of a plan" could in reality result in an "irretrievable" commitment of resources that would effectively "commit the agency to subsequent approvals." Again, the extent to which the Applicant's plans are premised on such an agency commitment, and the extent to which this agency commitment has already been implied or given, are matters for exploration on the merits and examination of witnesses.

In sum, Staff and Strata argue their NEPA obligations are dictated not by the objective environmental realities of the Applicant's planned mining of the Lance District, but by the specific boundaries of the legal instrument submitted to NRC. Petitioners have presented a large body of evidence that indicates the Applicant and Staff have been engaged in a game of "hide-and seek" with the full dimensions of the Applicant's proposal to mine the Lance District. Absent intervention by this Board, this proposal and its attendant environmental consequences will be unveiled piece-by-piece through an already established "amendment area" strategy that carves up the project into numerous and ostensibly "independent" licensing decisions. Thus, Strata will be allowed to employ the "Ross Project" license as the mother-ship for an easily expanded "satellite area" licensing structure to exploit the entire Lance District, while analyzing in advance only the environmental consequences of exploiting the "Ross Project" area, which represents a small fraction of the two additional "production areas" the Applicant clearly intends

to mine within "three years of startup," (Paine Decl. ¶34), and an even smaller fraction of the total area that the company could mine over "14 years or more." DSEIS at xviii, line 47.

CONCLUSION

For the foregoing reasons, the Petitioners have demonstrated that their updated contentions and new contention are admissible, and they are entitled to a hearing on these contentions.

Respectfully submitted,

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Date: June 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 17th day of June 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Geoffrey H. Fettus (electronic signature)

Date: June 17, 2013