UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-13-10

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Richard F. Cole
Dr. Kenneth L. Mossman

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)	July 26, 2013

MEMORANDUM AND ORDER
(Ruling on Motion to Resubmit Contentions
and to Admit a New Contention)

Previously, in a February 2012 ruling, this Licensing Board admitted four contentions submitted by Joint Intervenors[1] challenging certain National Environmental Policy Act of 1969 (NEPA)-related/environmental aspects of the pending request of Strata Energy, Inc., (SEI) for a 10 C.F.R. Part 40 license authorizing SEI to possess and use the nuclear source material that would be generated by its operation of an in situ uranium recovery (ISR) facility on the Ross ISR Uranium Project site.[2] See LBP-12-3, 75 NRC 164, 210, aff'd in part and review declined,

[1] Joint Intervenors are public interest groups the Natural Resources Defense Council (NRDC) and the Powder River Basin Resource Council.

[2] Not unexpectedly, contentions regarding matters associated with how the NEPA-related aspects of the agency's licensing review process are being carried out often are referred to as "environmental" contentions. While recognizing that, if properly framed, a matter associated with the environment (e.g., disposal of radiologically contaminated waste water) can be the foundational support for a contention (e.g., groundwater contamination from radiologically contaminated waste water) that raises concerns regarding what would generally be considered a "safety" issue under the Atomic Energy Act (AEA), cf. LBP-12-3, 75 NRC at 192 (rejecting attempt to "bootstrap" NEPA-related contentions into AEA safety contentions

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CLI-12-12, 75 NRC 603 (2012) (affirming standing ruling and declining review as to contention admissibility rulings). Some thirteen months later, the Nuclear Regulatory Commission (NRC) staff issued its draft of a supplement to the agency's generic environmental impact statement (EIS) on ISR facilities providing the staff's preliminary NEPA-mandated assessment of the SEI license application. See Letter from Emily Monteith, NRC Staff Counsel, to Licensing Board at 1 (Mar. 21, 2013); see also Office of Federal and State Materials and Environmental Management Programs, NRC, [Draft EIS] for the Ross ISR Project in Crook County, Wyoming; Supplement to the Generic [EIS] for In-Situ Leach Uranium Milling Facilities, NUREG-1910 (supp. 5 Mar. 2013) (ADAMS Accession No. ML13078A036) [hereinafter DSEIS]. Thereafter, Joint Intervenors filed a motion seeking to (1) "resubmit" their four pending environmental contentions in light of the staff's draft supplemental EIS (DSEIS); and (2) admit an additional NEPA-related contention. See [Joint Intervenors'] Motion to Resubmit Contentions & Admit One New Contention in Response to Staff's [DSEIS] (May 6, 2013) at 1–2 [hereinafter Joint Intervenors Motion]. SEI and the staff oppose the motion on both counts. [SEI] Response to [Joint Intervenors'] New and Amended Contentions on [DSEIS] (June 3, 2013) at 1 [hereinafter SEI Response]; NRC Staff's Response to [Joint Intervenors'] Motion to Resubmit Contentions and Admit One New Contention in Response to Staff's [DSEIS] (June 3, 2013) at 1 [hereinafter Staff Response].

For the reasons stated herein, we grant Joint Intervenors' motion to "resubmit" as to three of their four admitted contentions and deny their request to admit a new contention.

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[2](...continued)
by asserting failure to fulfill NEPA responsibilities violates AEA), in this instance, when referring to Joint Intervenors' contentions, we will use the terms "NEPA-related" and "environmental" interchangeably.

I. BACKGROUND

Because a detailed exposition of the regulatory and procedural background of this proceeding can be found in the Board's decision admitting Joint Intervenors' four NEPA-related contentions, see LBP-12-3, 75 NRC at 174–76, we pick up the narrative thread here by noting that in its April 2012 initial scheduling order, the Board outlined the process whereby, in accordance with 10 C.F.R. § 2.309(c),[3] Joint Intervenors could seek to amend those contentions or submit new issue statements to reflect developments in this proceeding. See Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (Apr. 10, 2012) at 4 (unpublished) [hereinafter Initial Scheduling Order]. One such development recognized in that issuance was the staff's release of its DSEIS for the proposed Ross ISR facility.[4] See id. App. A, at 1. With the release of that staff document in late March 2013, after jointly seeking and gaining an extension of the filing deadlines for motions for new/amended contentions and the associated responses set forth in the Board's previous scheduling orders, see Licensing Board Memorandum and Order (Revised General Schedule) (Apr. 12, 2013) at 1–3 (unpublished) [hereinafter Revised General Schedule], the parties filed several pleadings consistent with the revised schedule. These consisted of the previously referenced motion from

[3] This proceeding was instituted before changes to various provisions of 10 C.F.R. Part 2, including section 2.309(c), became effective in September 2012. See Amendments to Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562, 46,562 (Aug. 3, 2012). Nonetheless, as the Board advised the parties, in the absence of a Board order continuing some aspect of the proceeding under the prior rules, the September 2012 Part 2 revisions are applicable in this proceeding. See Licensing Board Memorandum and Order (Requesting Scheduling Input) (Aug. 7, 2012) at 1–3 (unpublished); see also Licensing Board Memorandum and Order (Recent Part 2 Changes and General Schedule Revisions) (Aug. 21, 2012) at 1–3 (unpublished).

[4] Another was the staff's issuance of its safety evaluation report (SER) for the proposed Ross ISR facility, see Initial Scheduling Order App. A, at 1, which occurred in late February 2013, see Letter from Emily Monteith, NRC Staff Counsel, to Licensing Board at 1 (Mar. 4, 2013), but which did not engender any new/amended contention filing from Joint Intervenors.

Joint Intervenors seeking to "resubmit" their four admitted NEPA-related contentions and have a new environmental contention admitted for litigation and the SEI and staff responses opposing those requests, along with a reply from Joint Intervenors to the SEI and staff answers, see [Joint Intervenors'] Reply in Support of Motion to Resubmit Contentions & Admit One New Contention in Response to Staff's [DSEIS] (June 17, 2013) [hereinafter Joint Intervenors Reply].

II. ANALYSIS

A. Standards Governing the Admission of New/Amended Contentions

The ability of a petitioner or intervenor to have a contention accepted into a proceeding for further litigation, whether as part of its initial hearing petition or thereafter, rests upon whether the submitter can satisfy the twin precepts of timeliness and admissibility. Section 2.309 of the agency's Rules of Practice, which sets forth the standards governing contention admission, speaks to both of these elements. Below, we outline how each of these factors plays a role in the admission of a post-initial hearing petition, i.e., a new or amended, contention.

1. "Good Cause" for the Submission of New/Amended Contentions

Under section 2.309(c)(1), after the section 2.309(b) deadline has passed for submitting an initial hearing petition with one or more accompanying contentions, a petitioner/intervenor that wishes either to (1) amend an already submitted or admitted contention; or (2) gain the admission of a new contention must file a motion for leave to file such a new or amended contention. Further, under section 2.309(c)(1), the timing of the submission of a new/amended contention comes into play to the extent that consideration of whether a new/amended contention can be admitted/adopted is dependent on whether, regardless of the issue statement's substantive sufficiency, a presiding officer can conclude that the

petitioner/intervenor has demonstated "good cause" for its post-initial hearing petition deadline filing, based on the following three factors:

> (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.

10 C.F.R. § 2.309(c)(1)(i)–(iii).

While these first two "good cause" factors relate to the nature of the information that is being employed as the basis for the new/amended contention, the third concerns the timeliness of the submission of that information in support of a request to admit the new/amended contention. This factor involves the question whether the new/amended contention and the associated information that is the basis for the contention, even if newly available and materially different from any information that was previously available, nonetheless were seasonably submitted. And, in contrast to section 2.309(b)'s provisions relating to an initial hearing petition, see 10 C.F.R. § 2.309(b) (defining the timeliness of an initial hearing petition in different situations as being filed between twenty and sixty days after certain specified events), section 2.309(c)(1)(iii) does not stipulate what is considered "timely." As it turns out, the degree to which the new/amended contention and its otherwise newly available and materially different supporting information will be considered timely submitted is, as in this case, generally defined by the presiding officer as a specific period following the "triggering event" that makes the not previously available/materially different information available so as to be the basis for the new/amended contention.[5] See Revised General Schedule at 1 (noting filing time for

[5] As is made clear in the discussion in the statement of considerations supporting the September 2012 Part 2 rule change, see 77 Fed. Reg. at 46,571–72, the time for submitting a new/amended contention motion based on information that would be newly available, materially

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new/amended contentions initially set at thirty days after triggering event, such as issuance of DSEIS); see also Licensing Board Memorandum and Order (Initial Prehearing Order) (Nov. 3, 2011) at 4 n.3 (unpublished) (to be considered timely, motions seeking admission of new/amended contentions should be filed within thirty days of the date upon which the information that is the basis of the motion becomes available).

2. Admissibility of New/Amended Contentions

As is the case with a contention submitted in support of an initial hearing petition, under section 2.309(c)(4) a new or amended contention generally must meet the six admissibility factors specified in section 2.309(f)(1), which in relevant part require that for each contention the submitter:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted, . . . ;
> (ii) Provide a brief explanation of the basis for the contention;
> (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 finding the NRC must make to support the action that is involved in the proceeding;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing . . . ;
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact . . . .

10 C.F.R. § 2.309(f)(1)(i)–(vi); see also LBP-12-3, 75 NRC at 190–91.

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different, and otherwise timely submitted given the information's availability can be extended if the extension request is based on "good cause," as that term is defined in 10 C.F.R. § 2.307, or the presiding officer approves the parties' stipulation of a different filing time. In this instance, the parties jointly sought and obtained an extension of the Board's general schedule deadline for filing new/amended contention motions and the associated responsive pleadings relative to the staff's DSEIS. See Revised General Schedule at 2–3.

3. Application of the "Migration" Tenet

Although a motion addressing the section 2.309(c)(1) and (f)(1) factors described in sections II.A.1 and .2 above generally must be submitted to permit the admission of a new/amended contention, there is a recognized exception for licensing proceedings in the case of NEPA-related contentions. Such contentions initially are based on the environmental report (ER) submitted by the applicant to fulfill its NEPA-related responsibilities under 10 C.F.R. Part 51 to provide the staff with information and analysis that will inform the staff's NEPA review. See 10 C.F.R. § 2.309(f)(2). And if the staff in preparing its NEPA impact statement does indeed adopt the ER-associated information/analysis that was challenged as inadequate, or, alternatively, maintains the same omission that was alleged to be in the ER,[6] it has been acknowledged that the issues those ER-based admitted contentions raise can essentially transmute into challenges to the staff's NEPA statement.[7] See Private Fuel Storage, LLC

[6] It has been recognized that the issues framed in contentions challenging an application generally encompass two categories, i.e., those that allege an informational or analytical omission from the application and those that allege that the information/analysis in the application is inadequate (as opposed to missing). See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-08, 56 NRC 373, 382–83 (2002) ("There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application."); see also Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-09, 78 NRC __, __–__ (slip op. at 11–12) (July 22, 2013) (providing general discussion about contentions of omission and contentions of adequacy).

[7] Consistent with the general principle that, because the primary responsibility to address and comply with AEA safety-related requirements resides with a license applicant, so that the application, not the staff's application review, is the focus of any safety-related contentions, see The Curators of the University of Missouri (TRUMP-S Project), CLI-95-8, 41 NRC 386, 396 (1995); TRUMP-S Project, CLI-95-1, 41 NRC 71, 121–22 (1995), issuance of the staff's SER generally would not trigger this migration tenet. Rather, if anything in the staff's SER is considered as impacting an admitted license application-based safety contention or creating a new safety concern, as a general rule that matter would need to be raised, relative to an admitted safety contention, in the context of the merits disposition of the already admitted safety contention or, in the case of a new issue (and presuming such a staff safety review-triggered

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(Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001); see also La. Energy Servs., LP (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998). Somewhat ironically, however, this migration tenet reflects a situation that, strictly speaking, is in juxtaposition to what is contemplated as necessary under the "not previously available" and "materially different" provisos of section 2.309(c)(1)(i)–(ii) governing new/amended contention admission. This is because the invocation of this tenet has the effect of automatically "amending" the contention to substitute the staff's environmental review impact statement information/analysis (relative to a contention of adequacy) or lack of information/analysis (relative to a contention of omission) as the foundational support for the contention without filing a new/amended contention motion addressing either the section 2.309(c)(1) or (f)(1) factors.[8] This tenet is applicable, however, only if the information in the staff's post-ER NEPA statement is "sufficiently similar to the information in the ER," i.e., essentially in pari materia with the ER information/analysis, or lack of information/analysis, that is the focus of the contention.[9] See S.

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contention is admissible), as a wholly new safety contention.

[8] The "migration tenet" serves a useful administrative efficiency purpose in that it dispenses with the need for (1) the applicant/staff to file a dismissal/dispositive motion, with the accompanying party filings and Board decision, so as to have the admitted contention declared moot; and (2) the intervenor to file a new/amended contention, with the accompanying briefing and Board decision, so as to have the wording of the previously admitted contention changed to reflect that the issue statement's focus is now the staff's environmental document rather than the applicant's ER.

[9] The critique of the impact of a staff environmental document on an already-admitted ER-based environmental contention usually goes to whether (1) a contention of omission can migrate or has been cured, to the degree that purported missing information/analysis has been provided so that a summary disposition/dismissal motion may be appropriate for the admitted contention and a new contention is necessary to challenge the fresh information/analysis; or (2) a contention of adequacy can migrate or, because of information/analysis changes, can be sustained as a new/amended contention. Nonetheless, it also is possible that the staff's environmental document might contain no information/analysis on a matter that was addressed in the ER and was the subject of an admitted contention of adequacy challenging the ER

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Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63–64 (2008); see also Dewey-Burdock, LBP-13-09, 78 NRC at __–__ (slip op. at 10–11); Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC __, __ (slip op. at 29) (Nov. 9, 2012); Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 NRC 19, 26 (2011).

On the other hand, post-ER an intervenor would need to file a motion to amend an already-admitted contention or to admit a new contention if the information in the staff's NEPA statement is sufficiently different from the information in the ER that supported the original contention's admission. See Vogtle, LBP-08-2, 67 NRC at 63–64. And a new/amended contention regarding portions of the staff's post-ER NEPA statement that differ from the ER also must meet the "good cause" and contention admissibility standards of section 2.309(c)(1) and (f)(1) to be admitted. See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002) ("While a contention contesting an applicant's [ER] generally may be viewed as a challenge to the NRC Staff's subsequent draft EIS, new claims must be raised in a new or amended contention."); Vogtle, LBP-08-2, 67 NRC at 64 (explaining that, if the portion of the ER that an admitted contention challenges is not sufficiently similar to the [draft EIS], "an intervenor attempting to litigate an issue based on expressed concerns about the [draft EIS] may need to amend the admitted contention or, if the information in the [draft EIS] is sufficiently different from that in the ER that supported the contention's admission, submit a new contention").

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information/analysis. In such an instance, an intervenor challenge to the adequacy of an ER's information/analysis seemingly would, for all practical purposes, envelop a challenge based on the total of lack of such information/analysis (assuming the challenge was not that the information/analysis should not be in ER), thereby permitting a contention of adequacy to migrate into a contention of omission.

B. Post-DSEIS Litigability of Joint Intervenors' "Resubmitted" Contentions

With respect to the four ER-based contentions that were admitted by the Board in ruling on their initial hearing petition, Joint Intervenors have filed a motion that "resubmits" these contentions as purportedly litigable post-DSEIS issue statements. Further, Joint Intervenors have proffered these previously admitted contentions with essentially the same language that was found admissible, with two exceptions: Everywhere the term "application" was used in the admitted contention, they have substituted the term "DSEIS," thereby referencing the staff's draft supplemental EIS, and they have added citations to 10 C.F.R. §§ 51.70, 51.71, to reflect that fact that these contentions now challenge the staff's DSEIS rather than the SEI ER.[10] See Joint Intervenors Motion at 6 n.3, 10 n.7, 13 n.9, 16 n.10. Joint Intervenors also have filed additional expert statements -- the declarations of Dr. Richard Abitz and Christopher E. Paine -- that they assert support these "resubmitted" contentions. See id. at 6, 10, 13, 16; see also id. unnumbered attach. 1 (Second Declaration of Dr. Richard Abitz on Behalf of [Joint Intervenors] (May 6, 2013)) [hereinafter Abitz Declaration]; id. unnumbered attach. 2 (Declaration of Christopher E. Paine on Behalf of [Joint Intervenors] in Support of Contentions 4/5A and 6 (May 6, 2013)) [hereinafter Paine Declaration].

Joint Intervenors refer to these four contentions as being "amended." Id. at 1. Nonetheless, in connection with these issue statements Joint Intervenors make no mention of the "good cause" provisions of section 2.309(c)(1) or the section 2.309(f)(1) admissibility standards that are applicable to all new or amended contentions. It thus seems apparent that for these four contentions they are seeking to employ, albeit without specifically invoking it by

[10] Although Joint Intervenors' proposed "resubmitted" contentions retained their admitted contention's references to 10 C.F.R. § 51.45, which describes the requirements applicable to an ER, that citation is no longer relevant in an instance when an admitted ER-related contention migrates to a challenge to the staff's DSEIS. Accordingly, that citation will be removed from any of the contentions we conclude are subject to the migration tenent.

name, the "migration tenet" discussed in section II.A.3 above. Of course, as the section II.A.3 discussion makes clear, and as Joint Intervenors themselves acknowledge, see id. at 2, in such instances it is not necessary to file a motion seeking to amend the contention. On the other hand, there is nothing in the agency's rules of practice that precludes an intervenor from submitting a motion that attempts to invoke that tenet, which Joint Intervenors seemingly have done here, or a board from considering that precept's application in response to such a motion, which we do now.[11]

1. Environmental Contention 1:[12] The DSEIS fails to adequately characterize baseline (i.e., original or pre-mining) groundwater quality.

CONTENTION: The DSEIS fails to comply with 10 C.F.R. §§ 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).

DISCUSSION: Joint Intervenors Motion at 5–9; SEI Response at 8–11; Staff Response at 8–14; Joint Intervenors Reply at 8–12.

RULING: In the context of admitting this contention, the Board found unpersuasive SEI's and the staff's arguments that, under 10 C.F.R. § 51.45, SEI was not required (and

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[11] Although the Board did not establish a filing schedule for such a "resubmission" motion, which, unlike a section 2.309(c) new/amended contention request, is not specifically contemplated under the agency's procedural rules, we have no difficulty in concluding that, having been submitted within the Board-established time frame for new/amended contention motions regarding the staff's DSEIS, Joint Intervenors' "resubmission" motion was timely.

[12] Because of an apparent concern about preserving litigation issues, see Joint Intervenors Motion at 2, Joint Intervenors have renumbered their four resubmitted contentions by giving each the additional alpha designator "A." Because the question before us is whether these contentions are suitable for migration and renumbering these contentions would, in our estimation, have no impact on any future appellate issues that might be raised regarding their litigability, we see no reason to change the previous numbering system.

perhaps was even precluded under section 40.32(e) from seeking) to establish a baseline water quality for the Ross facility site until after any grant of a Part 40 license to SEI. Moreover, given this and the information provided in support of Joint Intervenors' contention regarding the adequacy of SEI's showing in its ER concerning such a baseline, the Board concluded there was a genuine dispute about a material issue concerning whether SEI in its ER had in fact provided the staff with sufficient information concerning facility baseline water quality so as to allow the staff to provide an adequate NEPA assessment of the impacts of facility operation on water quality. See LBP-12-3, 75 NRC at 195. In seeking to "resubmit" this contention, Joint Intervenors declare that in its DSEIS the staff has simply carried this problem forward by utilizing SEI information that does not meet the 10 C.F.R. Part 40, App. A, Criterion 5B(5)(a) and Criterion 7 standards on "background" groundwater constituents and "complete baseline data" for an ISR site, as those are to be implemented pursuant to the staff's NUREG-1569 guidance to applicants to provide "[r]easonably comprehensive" water sampling data shown to be "collected by acceptable sampling procedures," Office of Nuclear Material Safety and Safeguards, NRC, Standard Review Plan for In Situ Leach Uranium Extraction License Applications, NUREG-1569, at 2-24 (June 2003) [hereinafter NUREG-1569], so as to furnish the baseline water quality data needed for an adequate staff NEPA analysis. Further, according to Joint Intervenors, it still is apparent from the DSEIS that SEI and the staff intend to postpone collecting the information that possibly could meet these Part 40, Appendix A standards (using methods that might satisfy the staff's NUREG-1569 guidance) until after a license is issued to SEI, which Joint Intervenors assert is too late to satisfy the staff's NEPA responsibilities. See Joint Intervenors Motion at 7, 8–9. For its part the staff, while noting that its DSEIS does contain "baseline" water quality data, states that the data required by Appendix A "is not required to be

provided at this time and does not yet exist," Staff Response at 10, a conclusion with which SEI appears to agree, see SEI Response at 10–11.

Under the circumstances, we find that the central analytical deficiency alleged by Joint Intervenors' environmental contention 1 with regard to the SEI ER applies with equal force to the DSEIS. As a consequence, the migration tenet applies and this contention, as specified in Appendix A to this issuance with the substituted references to the DSEIS, moves forward as an admitted post-DSEIS issue statement.[13]

2. Environmental Contention 2: The DSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits.

CONTENTION: The DSEIS fails to meet the requirements of 10 C.F.R. §§ 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.

DISCUSSION: Joint Intervenors Motion at 10–12; SEI Response at 11–15; Staff Response at 14–18; Joint Intervenors Reply at 12–15.

RULING: In initially considering this challenge to the SEI ER, the Board noted that the point of contention was not whether SEI would be unable to restore groundwater quality to primary or secondary limits following the conclusion of operations at the Ross facility, but whether such a happenstance would be a nonspeculative "'irreversible and irretrievable commitment[] of resources'" such that the ER needed to provide an impacts analysis of such an occurrence. LBP-12-3, 75 NRC at 196 (quoting 10 C.F.R. § 51.45(b)(5)); see NEPA § 102(2)(C)(v), 42 U.S.C. § 4332(2)(C)(v). The Board concluded that, based on their showing

[13] In its response to Joint Intervenors' motion, SEI indicated that if this contention advances for further litigation, it intends to file a dispositive motion. See SEI Response at 11 n.5. The parties are reminded that such a motion (or motions) and any responsive filings should comply with the Board-specified administrative directives and schedule governing summary disposition motions. See Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (Apr. 10, 2012) at 5–7 (unpublished); Revised General Schedule App. A, at 1.

relative to the section 2.309(f)(1) admissibility factors, Joint Intervenors had established a genuine dispute on a material issue concerning the need for such an analysis so as to merit the admission of environmental contention 2. Moreover, in doing so, the Board addressed several arguments proffered by SEI and the staff as to why such an analysis, which Joint Intervenors' claimed would require consideration of the impacts associated with utilizing a 10 C.F.R. Part 50, App. A, Criterion 5B(5)(c) alternate concentration limit (ACL), was not a viable possibility as a legal or technical matter. These included the assertion that an ACL could not be accurately generated until the post-operational decommissioning process, a claim that the Board noted did not account for the possible creation of a bounding analysis based on the historical experience at other ISR sites. See id. at 197.

In "resubmitting" this contention, Joint Intervenors maintain that nothing in the DSEIS constitutes a substantive change relative to the deficiency that environmental contention 2 identified as existing in the ER. The staff, however, points to the following DSEIS discussion as addressing the purported lack of an analysis of the impacts of a failure by SEI to restore groundwater quality to primary or secondary limits:

> The GEIS noted that water quality in the [ore zone (OZ)] aquifer would be degraded during ISR operations (NRC, 2009). A licensee would be required, by its [Wyoming Department of Environmental Quality] 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 [supplemental EIS (SEIS)] Section 2.1.1.1, the NRC would require that the aquifer meet the U.S. Environmental Protection Agency (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).

Staff Response at 17 (quoting DSEIS at 4-32 (emphasis in original)). This, according to the staff, is the impacts analysis that Joint Intervenors' environmental contention 2 claimed was missing from the ER. As such, the staff asserts, it is the adequacy of this assessment that Joint Intervenors must contest, requiring that they show a genuine material dispute with this analysis in accord with the section 2.309(f)(1)(vi).

It is true that this statement in the DSEIS does, in a general way, address the issue of the environmental impact if SEI cannot restore groundwater to primary or secondary limits. It also is apparent, however, that the DSEIS does not, as the ER did not, address the matter that is the crux of the concern engendered in admitted environmental contention 2, i.e., given that reasonably foreseeable environmental impacts are to be outlined in an agency's NEPA statement and that an ACL realistically may be necessary at the time of facility decommissioning, within a reasonable range, what is that ACL likely to look like and what are the associated environmental impacts associated with such an ACL. As a consequence, because we consider this matter as admitted relative to the SEI ER to still be at issue relative to the staff's DSEIS, we find the migration tenet is applicable so as to allow this contention to move forward in this litigation post-DSEIS.

Nonetheless, given (1) Joint Intervenors' recognition that the claim posited by this contention is that the "DSEIS require[s] a bounding analysis and explanation of the environmental impacts that result from the eventual adoption of an ACL rather than primary or secondary groundwater standards," Joint Intervenors Motion at 12; and (2) the Commission's admonition that, in appropriate circumstances, a board should endeavor to define the scope of a contention in light of the foundational support that leads to its admission, see Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009) (observing that to define scope of admitted contention properly, board should have specified which bases were

admitted); see also Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) ("The reach of a contention necessarily hinges upon its terms coupled with its stated bases."), aff'd sub nom. Mass. v. NRC, 924 F.2d 311 (D.C. Cir. 1991), we conclude the terms of environmental contention 2 can be outlined here with more specificity as follows:

> Environmental Contention 2: The DSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits.
>
> CONTENTION: The DSEIS fails to meet the requirements of 10 C.F.R. §§ 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 in that the DSEIS does not provide and evaluate information regarding the reasonable range of hazardous constituent concentration values that are likely to be applicable if the applicant is required to implement an Alternative Concentration Limit (ACL) in accordance with 10 C.F.R. Part 40, App. A, Criterion 5B(5)(c).

Thus, as set forth above and in Appendix A to this issuance, this contention, as clarified, will move forward as an admitted post-DSEIS issue statement.

> 3. Environmental Contention 3: The DSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.
>
> CONTENTION: The DSEIS fails to assess the likelihood and impacts of fluid migration to the adjacent groundwater, as required by 10 C.F.R. §§ 51.70, 51.71 and NEPA, and as discussed in NUREG-1569 § 2.7.
>
> DISCUSSION: Joint Intervenors Motion at 13–15; SEI Response at 15–18; Staff Response at 18–22; Joint Intervenors Reply at 15–18.

RULING: In admitting a portion of environmental contention 3 as originally proffered by Joint Intervenors, the Board concluded that a sufficient showing had been made regarding their particular claims about the adequacy of the ER discussion concerning "boreholes and aquifer isolation in the immediate vicinity of the Ross facility." LBP-12-3, 75 NRC at 199. And in doing so, we referred to several portions of the supporting declarations of Drs. Moran, Sass, and Abitz

regarding the implications of numerous purportedly unplugged boreholes and the results of SEI pumping tests relative to an assessment of the fluid migration impacts that might attain from operation of the Ross facility. See id. at 199. In seeking to "resubmit" this contention, Joint Intervenors assert that, as is made evident by the declaration of Dr. Abitz supporting their motion, the DSEIS discussion of boreholes and SEI pump tests makes it apparent that the thrust of Joint Intervenors' claim regarding this alleged deficiency remains intact so as to maintain this aspect of this contention. See Joint Intervenors Motion at 14.

We agree and, in accord with the migration tenet, will move the contention forward for post-DSEIS litigation on that basis.[14] Further, given (1) Joint Intervenors' recognition that this contention originally was intended to reflect their "precise concern" about the "risks of fluid migration due to the thousands of drillholes in the area," id., as well as the fact that the focus of Dr. Abitz's technical disagreements with the DSEIS concerns boreholes and the SEI pump tests, see Abitz Declaration at 16–17; and (2) the Commission's direction to provide contention

[14] In various instances relative to this and the other three contentions that are the subject of Joint Intervenors' resubmittal motion, SEI makes the argument that the staff's SER and/or one or more of SEI's post-hearing petition contention admission licensing review submissions to the staff, whether in response to a staff request for additional information (RAI) or otherwise, have the consequence of rendering the resubmitted contention moot or untimely under section 2.309(c)(1). See SEI Response at 9–10, 12–13, 15–16, 19–20. Expressing no view on whether it is possible for an SER to moot an environmental contention, to the degree this SEI argument is footed in NEPA-related RAIs, assertions of contention mootness or untimeliness based on such documents generally should be raised prior to the issuance of a staff environmental document (like the DSEIS here). Such a timely filed motion would be based on the SER or applicant information having become available and having mooted or otherwise enervated the admitted environmental contention as it alleges an omission/analysis deficiency relative to the ER so as to require the filing of a new/amended contention that has not been properly proffered. In the absence of such a motion filed prior to the staff environmental document, the staff SER or such applicant information generally would become relevant as impacting an admitted environmental contention only to the degree the SER or applicant information is actually utilized as part of a subsequent staff environmental document. Moreover, the timeliness of a new/amended contention motion relating to that information seemingly would be determined based on the availability of the staff's environmental document, rather than the SER or the applicant's information, as the filing "trigger" for the motion.

focus, see supra p. 15, which we note seems particularly apropos at this advanced stage of the proceeding, we conclude this contention's terms can be outlined here with more specificity as follows:

> Environmental Contention 3: The DSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.
>
> CONTENTION: The DSEIS fails to assess adequately the likelihood and impacts of fluid migration to the adjacent groundwater, as required by 10 C.F.R. §§ 51.70, 51.71 and NEPA, and as discussed in NUREG-1569 § 2.7, in that:
>
> 1. The DSEIS fails to analyze sufficiently the potential for and impacts associated with fluid migration associated with unplugged exploratory boreholes, including the adequacy of applicant's plans to mitigate possible borehole-related migration impacts by monitoring wellfields surrounding the boreholes and/or plugging the boreholes.
>
> 2. There was insufficient information for the NRC staff to make an informed fluid migration impact assessment given that the applicant's six monitor-well clusters and the 24-hour pump tests at four of these clusters provided insufficient hydrological information to demonstrate satisfactory groundwater control during planned high-yield industrial well operations.

Further, in making this designation, which moves this issue statement forward as an admitted post-DSEIS issue statement as set forth above and in Appendix A to this issuance, we note that we do not agree with Joint Intervenors' claim that this contention also encompasses the more general issue of whether the natural hydrological connections between area aquifers pose a risk of fluid migration. To be sure, Dr. Abitz in his second declaration seeks to formulate challenges to the DSEIS based on asserted data gaps in the conceptual and numerical hydrologic models in the SEI application and claims about the complex fluvial stratigraphy of the area. See Abitz Declaration at 18. As our contention admission decision's citations to the relevant portions of the declarations of Drs. Moran, Sass, and Abitz indicated, the supporting information we concluded provided the foundational support for an admissible contention relative to fluid migration impacts concerned boreholes and the results of SEI pumping tests. See LBP-12-3, 75 NRC at 199. At the same time, as we indicated in reviewing that contention's

admissibility, we found insufficient to support this contention those portions of the declarations of Drs. Moran, Sass, and Abitz that sought to challenge the adequacy of the ER's analysis of site geology/seismology. See id. at 198. Dr. Abitz's data/modeling/stratigraphy concerns appear to be an attempt to revive these matters based on the DSEIS, which would require that they be proffered in the context of a new/amended contention supported by a showing that addresses the section 2.309(c) "good cause" and section 2.309(f)(1) admissibility requirements. Because Joint Intervenors have made no such showing, we need not give this more expansive claim further consideration in the context of this contention.

4. Environmental Contention 4/5A: The DSEIS fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project.

CONTENTION: The DSEIS violates 10 C.F.R. §§ 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.

DISCUSSION: Joint Intervenors Motion at 15–18; SEI Response at 19–20; Staff Response at 22–25; Joint Intervenors Reply at 18–20.

RULING: We admitted this issue statement combining Joint Intervenors' environmental contentions 4 and 5A insofar as they claimed that the SEI ER lacked a sufficient analysis of the cumulative impacts associated with the potential operation of several ISR facilities in the Lance District, of which the Ross facility site is but one portion. In doing so, the Board did not explicitly limit the scope of the cumulative impacts analysis at issue. But the Board did expressly denote groundwater quantity and quality as the matters for which adequate information had been submitted to support this contention's admission. See LBP-12-3, 75 NRC at 200, 203–04. In now seeking to "resubmit" this contention, from among the more than a dozen subject matter areas discussed in the staff's DSEIS section 5 cumulative impacts analysis, see DSEIS at x–xi,

Joint Intervenors, as well as Dr. Abitz as the supporting declarant, specifically reference only groundwater quantity and quality as the cumulative impact matters that continue to be inadequately analyzed. See Joint Intervenors Motion at 17–18; Abitz Declaration at 20–22. Consequently, in light of the Commission's direction to provide contention focus, see supra p. 15, if we were to find that this contention should pass through for further litigation via the migration tenet, we would limit its scope to groundwater quantity and quality cumulative impacts only.

As it turns out, however, we do not need to impose this limitation on this contention as "resubmitted" by Joint Intervenors because we conclude that the migration tenet is not applicable, given that the substantive basis of the cumulative impacts analysis asserted to be inadequate in the ER differs significantly from that provided in the DSEIS so that a new or amended contention would be required to frame an admissible contention. As we noted in our decision admitting this contention,

> With respect to the scope of SEI's Lance District expansion, SEI states in its ER that it intends to construct and operate additional ISR facilities in the Lance District expansion surrounding the Ross site. See 1 [SEI, ER, Ross ISR Project [NRC] License Application, Crook County, Wyoming at 1-19 to -20, 2-23 (Dec. 2010) (ADAMS Accession No. ML110130342) [hereinafter ER]]. SEI indicates that these additional facilities would likely operate as satellites of the Ross facility and would utilize the same CPP that SEI proposes to construct for the Ross project. See id. at 2-23. And with respect to cumulative impacts, SEI states:
>
> > Absent any site-specific features that could preclude development of these other sites (e.g., historical and cultural resources), ISR operations at additional sites likely will result in essentially the same potential impacts analyzed in this ER for the Proposed Action. Development of these sites may act to produce cumulative effects by increasing or prolonging the impacts analyzed for the Proposed Action, but the impacts will be distributed proportionately throughout the region of influence

> and therefore are not expected to significantly increase the severity of any impact.
>
> Id.

LBP-12-3, 75 NRC at 203. Joint Intervenors claimed then that, in light of their own showing regarding this contention, SEI's reliance on this cumulative impacts discussion simply framed a "disagreement over the degree and quality of cumulative impact analysis required in [SEI]'s ER" that should be settled in litigating the merits of its contention, [Joint Intervenors'] Reply to Responses by [SEI] and the NRC Staff to Petition to Intervene and Request for Hearing (Dec. 15, 2011) at 27, a criticism they reiterate relative to the groundwater cumulative impacts analysis that is now in the staff's DSEIS, see Joint Intervenors Reply at 19–20. But, as the staff suggests, based as it is on an analysis of (1) anticipated groundwater quantity restoration in light of uranium recovery operations in the Lance District; and (2) post-Lance District ISR groundwater quality based on conditions asserted to have existed following restoration of the earlier Nubeth Joint Venture ISR exploratory project that operated within the Ross facility site during the 1970s and 1980s, see DSEIS at 5-22 to -27, the DSEIS discussion of the cumulative impacts of groundwater quantity and quality differs substantially from the SEI ER approach, a differentiation that is further evidenced by Joint Intervenors' attempt to challenge the propriety of the staff's use of qualitative labeling -- i.e., SMALL, MEDIUM, and LARGE -- to characterize those impacts, see Joint Intervenors Motion at 17–18; Joint Intervenors Reply at 19–20.

As a consequence, the migration tenet is not applicable for this contention, so that a showing, even in the alternative,[15] regarding the section 2.309(f)(1) admissibility factors (as well

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[15] As was noted above, see supra section II.A.3, an admitted ER-based environmental contention's sponsor is not required to "resubmit" or otherwise make a filing regarding such a contention following issuance of the staff's environmental document if the contention properly is subject to the migration tenet. Nonetheless, if there is any question about whether that tenet is applicable, in the absence of a timely analysis of the section 2.309(c)(1) and (f)(1)

(continued...)

as the section 2.309(c) "good cause" factors) was needed to provide the foundation for a new or amended contention contesting the adequacy of the staff's DSEIS showing regarding cumulative groundwater quantity and quality impacts.

Because such a showing is lacking, this contention (as it is set forth in Appendix A to this decision) remains as originally admitted, see LBP-12-3, 75 NRC at 212, with its focus on the adequacy of the SEI ER. And in that regard, to what degree this contention's pre-DSEIS concern regarding the ER can now be amended to center on the DSEIS, or, in the absence of such an amendment, remains relevant or material to the environmental portion of this proceeding so as to be a litigable post-DSEIS issue statement are matters that the parties may wish to address in the context of additional motions submitted in accord with the proceeding's existing general schedule or as otherwise might be appropriate in light of this ruling.

C. Admissibility of Joint Intervenors' New Contention

> 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.
>
> CONTENTION: The DSEIS violates 10 C.F.R. §§ 51.70 and 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

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[15](...continued)
new/amended contention precepts by the contention's sponsor, a board is not obligated to determine whether those new/amended contention requirements could have been met relative to the "migrated" environmental contention. See Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-68 (1985). Accordingly, a contention's sponsor may choose not to make any submission regarding an admitted ER-based environmental contention it believes properly will migrate and can simply await an applicant or staff filing challenging the contention's continued viability in light of the staff's environmental document. But if there is any question about whether an admitted contention merits a new/amended contention motion relative to the staff's environmental document, the best approach seemingly would be to make a filing that treats the contention as if it were new/amended or, perhaps most prudently, argues in the alternative. In this instance, however, no argument was made regarding the applicability of the section 2.309(c)(1), (f)(1) new/amended contention standards to any of the resubmitted contentions.

> 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 In Situ Recovery (ISR) activities in the Lance District.

DISCUSSION: Joint Intervenors Motion at 18–23; SEI Response at 20–23; Staff Response at 25–27; Joint Intervenors Reply at 20–30.

RULING: Inadmissible, in that this contention and its foundational support (1) do not present a genuine dispute on a material issue of law or fact so as to warrant the admission of this contention; or (2) lack the requisite good cause as based on previously available information that was not submitted in a timely fashion given that information's previous availability. See 10 C.F.R. §§ 2.309(c)(1)(i), (iii), (f)(1)(vi).

In support of their new contention, Joint Intervenors primarily rely on NRC and Council on Environmental Quality (CEQ) regulations implementing NEPA along with the United States Supreme Court's decision in Kleppe v. Sierra Club, 427 U.S. 390 (1976). Specifically, Joint Intervenors highlight a CEQ regulatory provision, 40 C.F.R. § 1502.4(a), that provides agencies must "make sure the proposal which is the subject of an [EIS] is properly defined" and directs agencies to use the parameters laid out in 40 C.F.R. § 1508.25 when defining the scope of the EIS. Additionally, section 1502.4(a) states that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." Id. Citing this regulation and Kleppe, which discusses the scope of an EIS in the context of regional coal-mining projects, Joint Intervenors argue that because the Ross site is just one part of a potentially larger ISR mining expanse, namely the Lance District, in which other areas have been identified by SEI for future development and use, the larger district must be fully assessed within the DSEIS. Joint Intervenors thus assert that the DSEIS must be totally revamped and reissued as a comprehensive EIS that analyzes the Lance District in its entirety. See Joint Intervenors Motion at 19.

Relative to this new contention, the Board notes initially that within its fifty-page cumulative impacts section, the DSEIS considers the cumulative impacts of the Lance District and the other potential ISR sites therein.[16] See DSEIS at 5-1 to -51. The staff thus has recognized, at least to some degree, the potential impacts of these other sites, in conjunction with the Ross site, if SEI applies for and receives NRC licenses and subsequently operates ISR facilities at these additional locations within Lance District area. Moreover, the cumulative impacts associated with these sites is the subject of previously admitted environmental contention 4/5A, discussed in section II.B.4 above. Therefore, to the extent Joint Intervenors are concerned that the cumulative impacts of the other potential ISR mining areas within the Lance District have not been properly considered in this proceeding, this is an issue they already have placed before the Board, albeit, as we also noted in section II.B.4 above, at this point only in the context of a challenge to the SEI ER.

That being said, we also observe that to the degree Joint Intervenors focus on the nature of the "proposal" before the agency as supposedly providing a basis for admitting this new contention, the CEQ regulations and, more specifically, the Kleppe case are not necessarily supportive of their position here. In Kleppe, the Supreme Court explained that under NEPA § 102(2)(C), 42 U.S.C. § 2332(2)(C), which requires that an agency create an EIS, "the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a proposal for federal action.'" Kleppe, 427 U.S. at 405–06 (quoting Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 320 (1975)). The Court then emphasized that an EIS should be

[16] The other sites are the Ross Amendment Area 1, which would expand the existing Ross site to the north and west, and the Kendrick, Richards, and Barber Satellite Amendment areas, which are located essentially in a contiguous line to the south of the Ross site. See DSEIS at 2-3 to -4, 5-3, 5-5.

issued to include other related actions only when those related actions have been formally proposed and are pending before the relevant agency, and noted that NEPA "does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." Id. at 410 & n.20; see id. at 410 ("[W]hen 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." (emphasis added)). So too, in its McGuire decision, the Commission recognized this precept concerning the scope of the EIS regarding related actions by stating that "to bring NEPA into play, a possible future action must at least constitute a 'proposal' pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering (i.e., nexus)." Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002).

For their part, SEI and the staff focus on the "ripeness" element of this analysis. In this regard, SEI argues that Joint Intervenors' assertion that the staff's NEPA statement associated with the Ross site licensing process must encompass the entire Lance District "fails to account for the manner in which NRC regulates its licensees and evaluates proposed license/license amendment/license renewal applications." SEI Response at 21. According to SEI, the applicant is required to propose a particular licensing action, which, in this instance, is the licensing of the Ross ISR site. That "proposal," in turn, becomes the subject of the agency's licensing review process, assuming it is within the agency's regulatory jurisdiction, and so defines the scope of the licensing proceeding for the purpose of that process, including the agency's NEPA review. Consequently, as SEI has applied for an NRC license for the Ross ISR site, that site must be the focus of the staff's NEPA analysis. Id. at 22–23.

SEI is correct that a licensing strategy whereby an applicant seeks initial ISR licensing authorization to mine a particular area on which a central processing plant (CPP) is located, followed thereafter by additional license amendments to cover ISR activities on contiguous or nearby areas, has been employed previously under the agency's ISR facility licensing regime. See Crow Butte Resources, Inc. (Marsland Expansion Area), LBP-13-6, 77 NRC __, __, __ (slip op. at 2, 3) (May 10, 2013). Nonetheless, particularly in light of the staff's determination to analyze the cumulative impacts associated with the Lance District, the ability of an ISR facility applicant to proceed with its "proposal" in this manner as an administrative matter is hardly definitive in resolving the question raised by Joint Intervenors in positing environmental contention 6.

Instead, consistent with the "nexus" component of the Commission's McGuire analysis, with this contention Joint Intervenors assert that, regardless of its existing cumulative impacts analysis, the DSEIS, in the words of environmental contention 6, "improperly segments" the project so that the staff fails to meet its NEPA obligation to prepare a comprehensive SEIS that encompasses all the individual ISR sites that SEI has indicated could be developed within the overall Lance District area. As their support for this improper segmentation claim, Joint Intervenors provide a declaration prepared by Christopher Paine, NRDC Senior Policy Advisor, wherein Mr. Paine principally discusses various press releases from SEI's corporate parent, Peninsula Energy, Ltd., (PEL) that reference the Lance District and the company's plans for its use. According to Joint Intervenors, these indicate that the Ross ISR site is merely one component of the multi-part, interconnected Lance District project, the entirety of which is slated for ISR development. See Joint Intervenors Motion at 19–20; Paine Declaration at unnumbered pp. 14–28.

In assessing this improper segmentation claim as it seeks to provide the grounds for a litigable contention, we look to 40 C.F.R. § 1508.25(a), the CEQ regulation that outlines the scope or range of actions that should be considered in an EIS and which NRC's Part 51 regulations recognize should be used in implementing NEPA section 102(2), see 10 C.F.R. § 51.14(b). Under section 1508.25(a), three types of actions are to be considered in looking to the scope of an EIS: connected, cumulative, and similar. Further, to determine whether actions are "connected" such that they "should" be discussed in the same EIS, section 1508.25(a)(1) indicates that an agency is to consider whether the actions (1) "automatically trigger" other actions that may require an EIS; (2) "[c]annot or will not proceed unless other actions are taken previously or simultaneously"; or (3) "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(i)–(iii). "Cumulative" actions, on the other hand, are those that "when viewed with other proposed actions have cumulatively significant impacts" so that they "should" be discussed in the same EIS. Id. § 1508(a)(2). And finally "similar" actions are those that, "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental impacts together, such as common timing or geography," so that the agency "may wish to analyze them together." Id. § 1508(a)(3).

With respect to whether the Ross ISR site and the other Lance District ISR sites are "connected" proposals per section 1508.25(a)(2), in this instance the relevant criterion appears to be whether, in accord with paragraph (iii), the requisite "interdependence" exists among the various actions at issue. See Joint Intervenors Motion at 22. And in making this determination, courts generally have looked to see whether the first action (in this instance, the Ross ISR facility) has "independent utility," Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985); see also McGuire, CLI-02-14, 55 NRC at 297 ("[W]hen developing an EIS, an agency must consider

the impact of other proposed projects 'only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.'") (quoting Webb v. Gorsuch, 699 F.2d 157, 161 (4th Cir. 1983))). Moreover, in seeking to demonstrate such interdependence between the Ross ISR site and the potential development of the other ISR sites in the Lance District to the degree necessary to obtain the admission of environmental contention 6, Joint Intervenors have offered various indicia of support.

One is their statement, made without any referenced support, that "the [CPP] to be developed under the 'Ross Project' may not even constitute an economically viable investment without the revenue assumptions based on exploiting these additional 'production units.'" Id. at 20. While recognizing that a board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, see Ariz. Pub. Serv. Co. (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155 (1991), it is also the case that neither mere speculation nor bare or conclusory assertions, even by an expert, will suffice to allow the admission of a proffered contention, see Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). Given that Joint Intervenors have provided nothing concrete to support the central premise of this statement that the Ross CPP "may" not be economically viable without licensing/operating the other proposed ISR facilities in the Lance District, we find this assertion to be wholly inadequate to support the admission of this contention.

Another is Joint Intervenors' reference to the fact that, as the DSEIS and, indeed, the ER acknowledge, see DSEIS at 2-13; 1 ER at 1-4, the CPP for the Ross facility is planned to have "four times the capacity justified by proven reserves" on the Ross ISR site, thereby allowing loaded ion exchange resins from the other potential Lance District ISR sites to be brought to the Ross facility for processing. Joint Intervenors Reply at 26. But denoting aspects of the Ross facility licensing proposal that will permit economic and operational efficiency if SEI successfully

carries out its apparent plan to have other Lance District ISR sites licensed is not the same as showing that the Ross ISR facility itself lacks any "independent utility" such that its licensing and operation would not go forward absent the licensing and operation of the other Lance District ISR sites.

Also provided as support are numerous references to the fact that SEI's apparent strategy will be to move forward in the near term with licensing the other ISR projects within the Lance District. See Joint Intervenors Motion at 21; Joint Intervenors Reply at 26 n.20. Joint Intervenors highlight in this regard a PEL press release statement indicating that employing a stratagem whereby, once the Ross ISR site is licensed, the contiguous Lance District ISR sites will be licensed via amendments to the Ross license is a strategy that "'will significantly reduce the permitting process and timing.'" Joint Intervenors Motion at 20 (quoting Press Release, PEL Definitive Feasibility and Expanded Economic Studies Confirm the Viability of the Lance ISR Projects (Dec. 21, 2011), http://www.pel.net.au/images/peninsul---singaefehu.pdf). In addition, within Mr. Paine's supporting declaration are various statements suggesting that the apparent SEI plan eventually to license all the potential ISR sites in the Lance District is "economically-driven," including his reference to a November 2012 PEL press release stating that the schedule under which the staff provided SEI with a draft license for the Ross facility is consistent with the "'project economics'" and evidences the fact that the planned expansion "is highly likely to occur." Paine Declaration at unnumbered pp. 24–25 (emphasis in original) (quoting Press Release, PEL, Peninsula Receives Draft Source Material License (Nov. 8, 2012), http://www.pel.net.au/images/peninsul---aimohgaeto.pdf). While these assertions all support the premise that there is a strong likelihood that PET/SEI intend that eventually all the Lance District ISR sites will be licensed and operating, they are not the same as showing, as would be pertinent to the question of whether the Ross ISR facility is a "connected" action as defined in

section 1508.25(a)(2), that the Ross facility lacks any independent utility in the absence of the completion of the other Lance District ISR sites.

Consequently, as to whether the "connected" action aspect of section 1508.25(a)(2) supports this improper segmentation contention's admissibility, because Joint Intervenors have failed to meet the contention admissibility requirement of 10 C.F.R. § 2.309(f)(1)(vi) by not providing sufficient supporting information to show that a genuine dispute exists on the material issue of whether the Ross ISR facility is an interdependent part of the larger Lance District project, we cannot admit their improper segmentation contention on that basis.

As to the "cumulative" and "similar" elements of the section 1508.25(a) scoping analysis, of which only the latter is even mentioned by Joint Intervenors, albeit without elaboration, see Joint Intervenors Motion at 19, to whatever degree they might be a more fruitful source of support for this contention so as to meet the section 2.309(f)(1) admissibility criteria,[17] they nonetheless face a significant barrier under section 2.309(c)(1)(i), (iii), to the degree those criteria require that the information supporting the new contention was not previously available and that the contention was timely submitted based on the availability of the "not previously available" supporting information. Putting aside whether Joint Intervenors may have been justified in failing previously to lodge a new segmentation contention based on the

[17] For instance, the fact that the staff previously supported the need for a cumulative impacts analysis, see LBP-12-3, 75 NRC at 200, 203, which it now has provided in the DSEIS regarding the other Lance District ISR sites, at least suggests that, consistent with section 1508.25(a)(2)(ii), there are "cumulative actions" that might need full NEPA consideration in the same impact statement. Further, while the courts have recognized that the permissive "may" language of section 1508.25(a)(2)(iii) affords an agency more discretion in making a choice about whether a single EIS is the "best way" to assess "similar" actions, Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 1001 (9th Cir. 2004), the geographic proximity of the Ross ISR site to the other Lance District ISR sites and the apparent timing of the future licensing actions for these other ISR sites vis á vis the Ross ISR site seemingly would be relevant in determining whether they are "similar" actions under that provision so as to merit consideration in a single impact statement.

interdependence of the Ross ISR site and other Lance District ISR sites as "connected" actions, from the information provided in the SEI ER regarding the other potential Lance District ISR sites, see 1 ER at 2-8 to -9, 2-14, 2-23, as well the information in the various PEL press releases dating back to October 2010 that are cited by Mr. Paine in his declaration accompanying Joint Intervenors' June 2013 motion,[18] it is clear that by the time of the filing of their October 2011 hearing petition or perhaps shortly thereafter, Joint Intervenors could have sought to raise the question of whether, in accord with section 1508.25(a)(2)–(3), the Ross ISR site and the other Lance District ISR sites did constitute "cumulative" or "similar" actions such that a single SEIS addressing all potential Lance District ISR sites was appropriate. Having failed to do so at that time, we are unable to conclude that, under the section 2.309(c)(1)(i), (iii) criteria, good cause exists for their current motion seeking to interpose such a new segmentation issue now.

In sum, relative to NEPA and the relevant CEQ regulations and case law interpreting that environmental enactment so as to require that a comprehensive EIS be issued when actions are "connected," Joint Intervenors have failed to present a showing supporting environmental contention 6 sufficient to create a genuine dispute about the material issue of whether the Ross ISR facility and the other potential ISR facilities in the Lance District are

[18] We note that Joint Intervenors, indicating they discovered the various PEL press releases in preparing to comment on the truncated scope of the staff's DSEIS, maintain that, given the SEI and staff "shell game" of asserting that the Ross ISR facility and the other Lance District ISR sites are entirely separate for NEPA purposes, they had no reason to seek such information until it was too late to challenge the project's scope. Joint Intervenors Reply at 22. Given that SEI disclosed in its application that PEL was its parent, see 1 ER at 1-7, and, as we referenced above, provided information outlining its intent to develop multiple ISR sites within the Lance District, we fail to see how Joint Intervenors then lacked the basic ingredients needed to seek the foundational information required to frame and adequately support a segmentation contention in the context of challenging the SEI ER, which clearly did not provide the breadth of information Joint Intervenors now assert needs to be compiled to generate a comprehensive SEIS encompassing the entire Lance District.

interdependent such that a comprehensive SEIS encompassing the Lance District is now required in the context of licensing the Ross ISR facility. See 10 C.F.R. § 2.309(f)(1)(vi). Further, on the question of whether the Ross ISR facility licensing proceeding and the potential licensing of the other Lance District ISR sites are "cumulative" or "similar" actions under the applicable CEQ guidance and associated caselaw so as to mandate a single SEIS now, Joint Intervenors likewise have failed to show that, under the standards in section 2.309(c)(1)(i), (iii), good cause exists for their post-hearing petition environmental contention 6. Thus, having failed to meet either the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1) or the "good cause" provision of section 2.309(c)(1), this contention must be rejected.[19]

III. CONCLUSION

In considering Joint Intervenors' May 6, 2013 request that "resubmitted" versions of their four already-admitted NEPA-related contentions referencing the staff's DSEIS be accepted for further litigation in this proceeding, based on the application of the "migration" tenet applicable to environmental contentions that are footed in an applicant's ER, the Board (1) approves Joint Intervenors' request as to environmental contentions 1, 2, and 3, as set forth in Appendix A to this decision; and (2) denies their request as to environmental contention 4/5A, thereby leaving intact the previously admitted contention (also set forth in Appendix A) as it references the applicant's ER. Further, finding that new environmental contention 6 also proffered with Joint

[19] Although SEI holds out the promise that "interested stakeholders will have ample opportunity to file challenges to . . . potential future project sites if and when [SEI] submits a license amendment application to the NRC for its review," SEI Response at 23 (footnote omitted), given the apparent staff practice relative to such amendments of attempting to fulfill its NEPA responsibilities in the context of an environmental assessment rather than an SEIS, see Licensing Board Order (Initial Prehearing Conference and Scheduling Order), Crow Butte Resources, Inc. (Marsland Expansion Area), Docket No. 40-8943-MLA-2 (June 14, 2013), at 5 n.3 (unpublished), the degree to which the types of impacts Joint Intervenors are concerned about here will, in the first instance, be the subject of future consideration remains to be seen.

Intervenors' May 6 submission fails to meet either the "good cause" or admissibility requirements of 10 C.F.R. § 2.309(c)(1)(I), (iii), (f)(1)(vi), we deny Joint Intervenors' request to admit that new contention for litigation in this proceeding.

For the foregoing reasons, it is this twenty-sixth day of July 2013, ORDERED, that:

1. As Joint Intervenors' May 6, 2013 motion seeks to resubmit Environmental Contentions 1, 2, and 3, the motion is granted in that those three contentions, as set forth in Appendix A to this issuance, are accepted for further litigation.

2. As Joint Intervenors' May 6, 2013 motion seeks to resubmit Environmental Contention 4/5A, the motion is denied.

3. As Joint Intervenors' May 6, 3013 motion seeks the admission of new Environmental Contention 6, the motion is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
G. Paul Bollwerk, III, Chair
ADMINISTRATIVE JUDGE

/RA/
Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/
Kenneth L. Mossman
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 26, 2013

APPENDIX A

ADMITTED CONTENTIONS

1. Environmental Contention 1: The DSEIS fails to adequately characterize baseline (i.e., original or pre-mining) groundwater quality.

   CONTENTION: The DSEIS fails to comply with 10 C.F.R. §§ 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).

2. Environmental Contention 2: The DSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits.

   CONTENTION: The DSEIS fails to meet the requirements of 10 C.F.R. §§ 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 in that the DSEIS does not provide and evaluate information regarding the reasonable range of hazardous constituent concentration values that are likely to be applicable if the applicant is required to implement an Alternative Concentration Limit (ACL) in accordance with 10 C.F.R. Part 40, App. A, Criterion 5B(5)(c).

3. Environmental Contention 3: The DSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.

   CONTENTION: The DSEIS fails to assess adequately the likelihood and impacts of fluid migration to the adjacent groundwater, as required by NEPA, and as discussed in NUREG-1569 § 2.7, in that:

   1. The DSEIS fails to analyze sufficiently the potential for and impacts associated with fluid migration associated with unplugged exploratory boreholes, including the adequacy of applicant's plans to mitigate possible borehole-related migration impacts by monitoring wellfields surrounding the boreholes and/or plugging the boreholes.

   2. There was insufficient information for the NRC staff to make an informed fluid migration impact assessment given that the applicant's six monitor-well clusters and the 24-hour pump tests at four of these clusters provided insufficient hydrological information to demonstrate satisfactory groundwater control during planned high-yield industrial well operations.

4. Environmental Contention 4/5A: The application fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project.

CONTENTION: The application violates 10 C.F.R. § 51.45, 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 SEI's proposed ISL uranium mining operations planned in the Lance District expansion project.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Strata Energy, Inc.	)	Docket No. 40-9091-MLA
(Ross In Situ Recovery Uranium Project)	)	
	)	
(Materials License Application)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Motion to Resubmit Contentions and to Admit a New Contention)** have been served upon the following persons by Electronic Information Exchange.

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MEMORANDUM AND ORDER (Ruling on Motion to Resubmit Contentions and to Admit a New Contention)

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[Original signed by Brian Newell]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of July, 2013