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)	)	August 5, 2013

NATURAL RESOURCES DEFENSE COUNCIL'S & POWDER RIVER BASIN RESOURCE COUNCIL'S MOTION FOR LEAVE TO REQUEST PARTIAL RECONSIDERATION OF THE BOARD'S MEMORANDUM AND ORDER OF JULY 26, 2013, OR ALTERNATIVELY, TO FILE AMENDED CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a) and (e), Intervenors Natural Resources Defense Council and Powder River Basin Resource Council ("Intervenors") hereby timely move for reconsideration of one aspect of the Atomic Safety and Licensing Board ("Board") July 26, 2013 Memorandum and Order[1] concerning Intervenors' May 6, 2013 Motion To Resubmit Contentions.[2] The Board denied Intervenors' request to resubmit Contention 4/5-A on the grounds that, with respect to cumulative impacts, the DSEIS was sufficiently different from ER to require an Amended Contention, but declined to consider the resubmitted Contention as an Amended Contention. Order at 20-22.

Intervenors respectfully request the Board reconsider whether to admit the updated Contention 4/5-A submitted on May 6, 2013 as an Amended Contention. Alternatively, they submit this Contention as an Amended Contention at this time. Counsel for NRC Staff and for Strata Energy, Inc. ("Strata") represent that the other parties oppose this request.

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1 Licensing Board Order (July 26, 2013) ("Order").

2 Intervenors Motion to Resubmit Contentions & Admit One New Contention in Response to Staff's Supplemental DSEIS (May 6, 2013) ("Int. Mot.")

BACKGROUND

On May 6, 2013 Intervenors timely filed a motion to resubmit their previously admitted contentions against the ER, by redirecting them to the DSEIS. Int. Mot.[3] Contention 4/5A concerns the DSEIS's consideration of cumulative impacts. *Id.* at 15-18.

As to that issue, in a February 19, 2012 Memorandum and Order, the Board admitted Intervenors' Contention that the ER "fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project."[4] In so doing the Board agreed Intervenors had submitted an admissible Contention that it was insufficient for the ER to simply identify the potential expansion of the project and state that any such expansion "'would result in essentially the same potential impacts analyzed in this ER for the Proposed Action.'" *Id.* at 42 (quoting ER at 2-23); *see also id.* at 43.

On March 21, 2013, Staff issued the DSEIS for the Ross ISR Project. Section 5 of the DSEIS is entitled "Cumulative Impacts," but merely includes a description of some of the satellite areas that are reasonably likely to be developed, and other activities in the area. DSEIS at 5-1 to 5-51.[5]

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[3] Intervenors also moved for admission of a new Contention (Contention 6). *Id.* at 19-23. The Board denied that request principally on timeliness grounds, despite recognizing that the discussion of cumulative impacts contained *for the first time* in the DSEIS "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." Order at 30, n.17. Intervenors disagree with the Board's ruling on this point, and intend to pursue this issue on appeal at the appropriate juncture. However, neither the motion for admission of Contention 6, nor the Board's recasting of Contentions 2 and 3 – with which Intervenors also disagree – are at issue here.

[4] Licensing Board Order of Feb. 10, 2012, Appendix A.

[5] Of course, it is far more than "reasonably foreseeable," 40 C.F.R. § 1508.7, that Strata will develop the satellite areas as part of this project, but the certainty of that development does not bear on the nature of the cumulative impacts analysis required – only on whether development in all of these areas should be considered in a single project statement, which Staff refuses to do here.

As regards the cumulative impacts analysis itself, the DSEIS's discussion of impacts on groundwater quantity is limited to *11 lines of text*, most of which simply state that the impacts will be "SMALL." *Id.* at 5-25, L25:35. The discussion of groundwater quality impacts is slightly more expansive, but similarly conclusory and uninformative. *Id.* at 5-25 to 5-27.

On May 6, 2013, Intervenors filed their motion to resubmit contentions, including their cumulative impacts contention. Int. Mot. at 15-18. As to that Contention, Intervenors explained the cursory cumulative impacts discussion in the DSEIS had not addressed the concerns they had already raised – and the Board had *already admitted into the proceeding vis-a-vis the ER* – regarding the overall impacts that the *entire scope* of activities planned in this area would have on, *inter alia*, groundwater quantity and quality. *Id.*; *see also* 2d Declaration of Dr. Richard Abitz ¶¶ 38-43.

The applicant and staff opposed the motion.[6] As to the cumulative impacts Contention, Staff argued that the DSEIS cures the issues raised in the original Contention. Staff Opp. at 23-24. Strata argued that its responses to Requests for Additional Information cured the same issues, and thus that Intervenors' request was not timely. Strata Opp. at 19-20.

In its July 26, 2013 ruling the Board permitted Intervenors to update – or "migrate" – several of their ER Contentions to direct them to the DSEIS, but ruled that migration was not permissible for the cumulative impacts Contention. Order at 19-22. As to that Contention, the Board concluded that the discussion in the DSEIS "differs substantially" from the ER, and thus the Contention could not be migrated to the DSEIS. *Id.* at 21. As evidence for this difference, the Board relied on Intervenors' argument that the conclusory labels used in the DSEIS

[6] Staff Response to Intervenors Motion (June 3, 2013) ("Staff Opp.") ; Strata Response to Intervenors Motion.(June 3, 2013) ("Strata Opp.").

cumulative impacts analysis were insufficient, an argument that had not been made against the ER, which had not contained these conclusory labels. *Id.*

Although the Board thus concluded the Contention could not be migrated precisely because the DSEIS analysis was "materially different" from that in the ER – the precise standard that would make the Contention eligible for admission as an Amended Contention, 10 C.F.R. § 2.309(c) – the Board declined to consider whether the "updated" cumulative impacts contention could be admitted as an "amended" contention. Instead, the Board left Intervenors' original cumulative impacts contention against the ER intact, and left open the question of "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 . . . ." *Id.* at 22.[7]

ARGUMENT

A. The Board Should Reconsider Whether To Treat Intervenors' Submission Of Contention 4/5-A As An Amended Contention.

The Board will consider a request for reconsideration where a movant demonstrates "compelling circumstances . . . which could not have reasonably been anticipated." 10 C.F.R. § 2.323(e); *see also La. Energy Servc., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 622 (Dec. 8, 2004) (reconsideration appropriate where movant demonstrates "a fundamental . . . misunderstanding of a key point"). Intervenors respectfully submit they meet this standard.

Intervenors' motion to resubmit Contention 4/5-A was reasonably based on the understanding that because both their original Contention and their Updated Contention

[7] The Board went on to suggest that "the parties may wish to address [these matters] 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." *Id.* As discussed below, Intervenors respectfully submit that granting this motion is the appropriate approach to address the Board's ruling on this point.

concerned the inadequacy of the ER's – and then the DSEIS's – consideration of cumulative impacts, an updated rather than an amended Contention was appropriate. Indeed, the Board agreed with that view with respect to other Contentions, finding, for example, that although Staff had purported to address Contention 2 in the DSEIS, and did so in a "general way," "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 . . . ." Order at 15. This is the same concern embodied in updated Contention 4/5-A.

Indeed, this is not a situation where the original contention was one of omission, and the new contention became a challenge to the sufficiency of Staff's analysis. Rather, the Board admitted the original cumulative impacts contention on the grounds that Intervenors had sufficiently alleged the ER's discussion of cumulative impacts was deficient. Feb. 10, 2012 Order at 43 (noting "dispute as to the sufficiency of the SEI's cumulative impacts analysis . . ."). The updated contention makes precisely the same allegation with respect to the DSEIS, as the Intervenors maintain the deficiency was the same, albeit delivered this time in the DSEIS.

The Board has disagreed, concluding the differences between the cumulative impacts discussion in the DSEIS and the ER make the contention ineligible for migration. While Intervenors respectfully disagree with that judgment, they do not seek the Board's reconsideration on that point.

It is the Board's next step on which Intervenors seek reconsideration. In particular, having found the Contention ineligible for migration precisely because the DSEIS contained new, "materially different" information than the ER, the Board should have applied the standards that govern such an outcome – *i.e.*¸ whether Intervenors are entitled to *amend* this Contention because (i) the information upon which the filing is based "was not previously available"; (ii) the

information "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). Instead, the Board ruled that "such a showing is lacking," Order at 22, without considering the application of these factors, suggesting that it had no authority to do so because Intervenors had not formally submitted an Amended Contention on the cumulative impacts issue. *Id.* at 22, n.15.

This conclusion respectfully embodies a fundamental misunderstanding of a key point that warrants reconsideration. Contrary to the Board's assumption, the Board certainly *could* have considered updated Contention 4/5-A as an Amended Contention. Indeed, since the Board had already ruled the information in the DSEIS was materially different from the ER, and the Contention had been timely submitted, *it would have taken no further analysis for the Board to have concluded that Contention 4/5A satisfies the 10 C.F.R. § 2.309(c) criteria*.[8]

As a Board explained in another context, "to require anything further of Petitioner at this date would clearly exalt form over substance." *In the Matter of U.S. Army* (Jefferson Proving Ground Site), LBP-04-01,59 N.R.C. 27, 2004 WL 569945 (Jan 7, 2004). Here, it would plainly exalt form over substance to refuse to consider the updated Contention 4/5-A as an Amended Contention when, by the Board's own ruling Intervenors plainly meet the criteria for an amendment, simply because the motion contained no formal alternative argument for amendment – an alternative that, again, Intervenors did not reasonably expect was necessary in light of the fact that both the original cumulative impacts contention and the updated one directed at the DSEIS concerned the insufficiency of analysis. *Cf. In the Matter of Phil. Elec. Co.* (Limerick

[8] To be sure, Strata had made a *different* argument that the Contention was untimely because Intervenors should have raised it as to various RAIs. Exelon Opp. at 19-20. However, the Board rejected that argument as to all of the Contentions, and thus it has no relevance here. Order at 17 n.14.

Generating Station, Units 1 and 2), 20 N.R.C. 848, 1984 WL 49858 (Sept. 26, 1984) ("'[i]t is always within the discretion of . . . an agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it") (quoting *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970)). Accordingly, Intervenors respectfully seek reconsideration on this point.

The Board's reliance on the cumulative impacts contention as a basis to reject Intervenors' motion to add a new contention on the scope of the project here, Order at 24, also supports reconsideration. Although the Board suggested that Intervenors' concerns about the project scope "already have [been] placed before the Board" in the cumulative impacts contention," *id.*, absent the relief sought in this motion it remains unclear how Intervenors will be permitted to advance that concern, since at present there is no admitted DSEIS Contention on either the project scope or the cumulative impacts of the entire project Strata intends to undertake in this area.

Moreover, Intervenors could not reasonably have anticipated this result. While, as noted, Staff and Strata argued against the motion, including arguing that the Section 2.309(c) factors were not satisfied (for reasons the Board has already rejected), *neither argued that the Board lacked authority to even consider whether the Contention could be admitted under Section 2.309(c)*. Indeed, such an argument would have been contrary to the Staff's position as to this Contention when directed at the ER, as at that time Staff took the position that the Contention was premature on the grounds that no cumulative impacts analysis is required for an ER. Staff Opp. to Motion to Intervene at 29-31, Dec. 5, 2011. Thus, since Staff contends that there was no basis to admit a cumulative impacts contention as to the ER, its position would have to be that

Intervenors' Contention 4/5-A was, by definition, a new Contention, since there should have been no ER Contention to update.[9]

Accordingly, since the first time this issue arose was in the Board's ruling, Intervenors could not have reasonably anticipated the situation they now face, with no admitted cumulative impacts contention as to the DSEIS. Intervenors therefore respectfully request that the Board reconsider this discrete aspect of its ruling and consider NRDC's Contention 4/5-A as submitted on May 6, 2013 as an Amended Contention.[10]

B. Alternatively, the Board Should Permit Intervenors to Submit Contention 4/5-A As an Amended Contention at This Time.

In the event the Board declines to permit reconsideration, in the alternative Intervenors hereby move to resubmit Contention 4/5-A at this time. They do not seek to alter the Contention or bases as presented in their May 6, 2013 submission, which are hereby incorporated by reference herein. *See* Int. Mot. at 14-18; *see also* Intervenors' Reply at 18-20 (June 17, 2013).

Intervenors satisfy each of the factors governing the admission of this Contention as to the DSEIS. 10 C.F.R. § 2.309(c); *see also id.* § 2.309(f)(2). First, "[t]he information upon which the filing is based was not previously available," 10 C.F.R. § 2.309(c)(1)(i), because the Board has already ruled that the DSEIS contained a NEPA analysis of cumulative impacts that was materially different from that in the ER. Indeed, if the information was "previously available" in

[9] Of course, had Staff prevailed on that argument – and thus had no cumulative impacts contention been admitted as to the ER – petitioners would have filed a motion to file a new Contention on this issue at this time, and discussed the Section 2.309(c) factors. The Board's ruling here thus penalizes Intervenors for their success in achieving the admission of this Contention at the ER stage – yet another reason reconsideration is appropriate.

[10] Although the Board's Order (at 22 n.15) cited *In the Matter of Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 N.R.C. 461 (Sept. 5, 1985), in support of the decision not to consider whether Intervenors satisfied the Section 2.309(c) factors with regard to Contention 4/5-A, in that case the Appeals Board recognized its "independent discretion" to consider the contention at issue and declined to do so only after making an affirmative finding that there was no justification for the intervenor's "own dereliction" in failing to address the timeliness of the motion. *Id.* There is simply no basis to reach the same conclusion here.

the ER, Intervenors would have been permitted to migrate their ER Contention on cumulative impacts.[11] Moreover, a critical aspect of the information not previously available to Intervenors is the fact that the Board would not permit Contention 4/5-A to simply migrate from the ER to the DSEIS. That information only became available when the Board issued its ruling on July 26, 2013.

Second, "[t]he information upon which the filing is based is materially different from information previously available," 10 C.F.R. § 2.309(c)(1)(ii), since, again, that was the basis for the Board's ruling – *i.e.*, the material difference between the discussion of cumulative impacts in the ER and the DSEIS made the cumulative impacts contention ineligible for migrating from the ER to the DSEIS. Similarly, with respect to whether the Board would accept Contention 4/5-A as an updated contention, the fact that the Contention was ineligible for such consideration was not available to Intervenors until the Board's ruling.

Finally, "[t]he filing has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(c)(1)(iii). To be sure, the DSEIS information was available when the DSEIS was issued, and NRC Staff and Strata are likely to focus on that date – more than 30 days ago – as dispositive of the timeliness of Intervenors' request.

However, again, Intervenors respectfully submit that such a formalistic result would run contrary to the purposes of the adjudicatory process, which they have made every effort to studiously follow here. When Strata issued its ER, Intervenors expended significant time and resources crafting contentions the Board deemed admissible concerning compliance with NEPA. When NRC Staff issued the DSEIS, Intervenors again expended significant time and resources to

[11] As noted, *see supra at* n.8 the Board has already rejected the argument that information contained in RAIs is relevant to this analysis.

preserve their NEPA concerns, filing an extensive, timely motion to direct their existing contentions against the DSEIS.

To now rule that because, in their May 6, 2013 filing, Intervenors did not formally seek amendment of Contention 4/5-A on cumulative impacts, they are entitled to *neither* reconsideration on that aspect of the Board's ruling denying admission of that Contention to the DSEIS *nor* the admission of that Contention at this time, would severely prejudice Intervenors' fundamental right to pursue its NEPA Contentions, including on cumulative impacts. Moreover, the result would create a concrete risk that this massive project will proceed without a meaningful analysis of the environmental impacts involved. The adjudicatory process simply should not be implemented to reach such a counter-intuitive and prejudicial result, and thus Intervenors respectfully urge the Board to, at minimum, find that its own July 26, 2013 ruling contained the new information triggering the requisite 30-day period for Intervenors to submit this Amended Contention, thereby deeming it timely.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Board reconsider whether Contention 4/5-A submitted on May 6, 2013 may be admitted into this proceeding as an Amended Contention, or alternatively accept the Contention at this time.

Respectfully submitted,

s/ (electronically signed)
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Date: August 5, 2013

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing INTERVENORS' MOTION FOR LEAVE TO REQUEST PARTIAL RECONSIDERATION OF THE BOARD'S MEMORANDUM AND ORDER OF JULY 26, 2013, OR ALTERNATIVELY, TO FILE AMENDED CONTENTION in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 5th day of August 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Howard M. Crystal (electronic signature)

Date: August 5, 2013