August 15, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| STRATA ENERGY INC. | ) | Docket No. 40-9091-MLA |
| | ) | |
| (Ross *In Situ* Uranium Recovery Site) | ) | ASLBP No. 12-915-01-MLA |
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NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S AND 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

The Staff of the U.S. Nuclear Regulatory Commission (NRC Staff) responds to the Natural Resources Defense Council's (NRDC) and Powder River Basin Resource Council's (PRBRC) (collectively Joint Intervenors or 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 (Motion). For the reasons set forth below, the Board should deny the Joint Intervenors' Motion.

## BACKGROUND

This proceeding concerns Strata Energy, Inc.'s (Strata or the Applicant) January 4, 2011 application for a combined NRC source and 11e.(2) byproduct material license.[1] On October 27, 2011, Joint Intervenors petitioned to intervene and proffered five contentions against the

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

Applicant's application documents, including the Applicant's environmental report (ER).[2] The Board admitted four contentions, as reformulated by the Board in its February 10, 2012 order, including Contention 4/5A.[3] Contention 4/5A alleged that the application "fail[ed] to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project."[4] On May 6, 2013, Joint Intervenors filed a motion to resubmit all of their admitted contentions to apply to the Staff's DSEIS and to add a new environmental contention.[5] The Board denied admission of the resubmitted Contention 4/5-A but left in place the original Contention 4/5A challenging the adequacy of the Applicant's ER.[6] On August 5, 2013, Joint Intervenors filed the present motion seeking leave to request partial reconsideration of the Board's denial of Contention 4/5-A, or, in the alternative, file Contention 4/5-A as an amended contention.[7]

## DISCUSSION

### I. Request for Partial Reconsideration of the Board's Denial of Contention 4/5-A

The NRC's rules of practice state that motions for reconsideration may be filed only "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision

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

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

[4] *Id.*

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

[6] *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-13-10, __ NRC __, __ (Jul. 26, 2013) (slip op. at 19-22).

[7] 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 (Aug. 5, 2013) ("Motion").

invalid."[8] The Commission addressed the standard for reconsideration when it revised its hearing procedures in 2004, stating:

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where *manifest injustice* would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be *an extraordinary action* and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.[9]

In subsequent years, the Commission has reiterated that the reconsideration standard is strictly applied, and reconsideration should only be permitted where there exists "decisive new information" or "a fundamental . . . misunderstanding of a key point."[10] In light of this high bar, Joint Intervenors' Motion should be denied because it fails to demonstrate a clear and material error in the Board's decision which could not reasonably have been anticipated, and does not demonstrate that "manifest injustice" would occur in the absence of reconsideration.[11]

Joint Intervenors state that the "fundamental misunderstanding of a key point" upon which the motion is based is the Board's failure to consider Contention 4/5-A as an amended contention. Motion at 6. Specifically, Joint Intervenors suggest that, having found the DSEIS's discussion of cumulative impacts "materially different" from the application's – thus holding that the migration tenet did not apply to Contention 4/5-A – the Board erred in refusing to use that

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[8] 10 C.F.R. § 2.323(e).

[9] Final Rule; Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (emphasis added).

[10] *See Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) (unpublished order) (Jul. 9, 2013), at 3.

[11] Joint Intervenors' Motion also discusses at length their disagreement with the Board's refusal to migrate the original Contention 4/5A to the DSEIS based on the Board's finding that the differences between the cumulative impacts discussions in the DSEIS and the ER make the contention ineligible for migration. Motion at 4-5. However, because Joint Intervenors state that they do not seek the Board's reconsideration on that point, Motion at 5, the NRC Staff does not generally address those arguments in this Response except as they otherwise relate to the Motion's specific arguments for reconsideration and resubmission of Contention 4/5-A.

finding as a basis to either rule that Joint Intervenors were entitled to amend the contention or to find on its own that the new and amended contention standards had been met. Motion at 5-6.

The Board should deny Joint Intervenors' request. The Intervenors' motion does not provide any "decisive new information" or identify a fundamental misunderstanding of key law or fact that could not reasonably have been anticipated.[12] Joint Intervenors claim that they did not "reasonably expect" that they should have addressed the new and amended contention admissibility requirements when resubmitting Contention 4/5-A against the DSEIS. Motion at 6. But their justification for that expectation – that styling Contention 4/5-A as a challenge to the sufficiency of the DSEIS's cumulative impacts analysis, as they did against the ER in their original cumulative impacts analysis, was sufficient to preserve their litigation interests – is not a compelling reason for reconsideration.[13] When the Intervenors advanced new arguments based on the DSEIS to support Contention 4/5-A, they implicitly acknowledged the existence of differences between the ER and the DSEIS's discussion of cumulative impacts.[14] The migration tenet, which permits the Board to construe an admitted contention contesting the ER as a challenge to the subsequently issued DSEIS without need for the intervenors to file a new or amended contention, applies "only so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention."[15] Consequently, the degree of difference between the ER and the DSEIS is critical to the application of that tenet, and intervenors that rely upon it as the sole mechanism for carrying forward a contention do so at their own risk.

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[12] *See* 10 C.F.R. § 2.323(e).

[13] The Staff notes that such an argument, if adopted, could potentially justify reconsideration of any admitted contentions based on insufficient analyses that have been refused admission against the Staff's review documents by the Commission or licensing boards.

[14] *See* May 6, 2013 Motion at 15-18 (raising, *inter alia*, new arguments concerning the DSEIS's analysis of the cumulative impacts of the Strata Ross project on groundwater quantity and quality).

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

Indeed, in the principal decision addressing the migration tenet, the licensing board recognized that an intervenor may need to amend the admitted contention or file a new contention against the Staff's environmental document.[16] Further, as the Commission has emphasized, reconsideration is not the appropriate vehicle for rearguing facts and rationales that *should have been* argued earlier.[17] Nothing in the present motion suggests that the Intervenors could not have argued for the admission of Contention 4/5-A as an amended contention, nor that it was unreasonable to expect that making such an alternative argument may have been necessary in this case. The Intervenors' claim that they could not reasonably have anticipated that the Board would deny Contention 4/5-A is, therefore, likewise unpersuasive. *See* Motion at 7.

In addition, Joint Intervenors state that the Staff is precluded from arguing that the Board lacked authority to consider on its own whether Contention 4/5-A could be admitted under the new and amended contention standards. Joint Intervenors argue that advancing such an argument would contradict the Staff's previously expressed position that the original contention, as plead against the Applicant's ER, was premature because an ER is not required to contain a cumulative impacts analysis. Motion at 7. Therefore, Joint Intervenors assert, the Staff must have considered Contention 4/5-A as a new contention "since there should have been no ER Contention to update." Motion at 7-8. This line of reasoning misunderstands the hearing process and disregards the Staff's actual position in response to the Intervenors' motion to resubmit Contention 4/5-A. Regardless of the Staff's position concerning the Intervenors' original cumulative impacts contention, the original Contention 4/5A challenging the Applicant's

[16] *Vogtle ESP Site*, LBP-08-2, at 64 (citing 10 C.F.R. § 2.309(f)(2) (2008); *Duke Energy Corp*. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)).

[17] *See* 69 Fed. Reg. at 2207.

ER was admitted by the Board and must be treated as an admitted contention.[18] Acknowledging this, the Staff addressed the 10 C.F.R. § 2.309(f)(1) contention admissibility standards as if resubmitted Contention 4/5-A had been filed as an amended version of already-admitted Contention 4/5A.[19] In any event, the burden belonged to the Intervenors to demonstrate that their contention met the requirements for admissibility. Even if there is some question as to the Board's authority to treat a contention as amended in the absence of any discussion by the contention's proponent of the 10 C.F.R. § 2.309(f)(1) standards, it was not a "clear and material error" for the Board to have declined to do so.[20]

Finally, while Joint Intervenors argue that the Board's denial of their request for reconsideration would "severely prejudice Intervenors' fundamental right to pursue its NEPA Contentions," Motion at 10, it does not follow that a denial of this request would result in manifest injustice.[21] Joint Intervenors availed themselves of the Staff's environmental scoping

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[18] *See Strata Energy, Inc.*, LBP-12-3, 75 NRC at 210 & App. A (admitting original Contention 4/5A against the Applicant's ER).

[19] NRC Staff Response to Natural Resources Defense Council's and Powder River Basin Resource Council's Joint Motion to Resubmit Contentions and Admit One New Contention in Response to Staff's Supplemental Draft Environmental Impact Statement (Jun. 3, 2013) ("Staff Response"), at 22-25. The Staff did not challenge the timeliness of Contention 4/5-A in its response.

[20] *See* 10 C.F.R. § 2.323(e). Moreover, neither case relied upon by Joint Intervenors to support their argument that the Board should relax the new and amended contention standards for Contention 4/5-A pertains to the 10 C.F.R. § 2.309 pleading requirements. *See U.S. Army* (Jefferson Proving Ground Site), LBP-04-1, 59 NRC 27, 29 (2004) (prior demonstration of standing in license amendment proceeding carried forward to new license amendment proceeding covering "same ultimate matter" of proposed disposition of depleted uranium munitions on site); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848 (1984) (finding no basis for error in licensing board's decision to hold hearings on environmental contentions prior to issuance of EIS). In contrast to the standards implicated in those cases, the Commission has explicitly stated that the contention admissibility rules are "strict by design," and failure to comply with any of these requirements is grounds for a contention's dismissal. *See, e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)); *see also* 69 Fed. Reg. at 2221.

[21] 69 Fed. Reg. at 2207. While Joint Intervenors claim a "fundamental right" to pursue this contention, it is well established that "there is no automatic right to adjudicatory resolution of environmental or safety questions associated with an operating license application." *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360 (1985) (citing *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976)). Although the Appeal Board's statement

and comment process. The Staff received approximately 1,000 comments on the DSEIS, including over 100 comments from Joint Intervenors. When the Staff issues the Final SEIS, Joint Intervenors will have an additional opportunity to submit new and amended contentions.[22] In addition, in contrast to the Intervenors' assertions, the denial of Contention 4/5-A has not prejudiced the Intervenors' ability to pursue the other three environmental contentions admitted against the DSEIS. Therefore, the Board should deny Joint Intervenors' motion for leave to request partial reconsideration of its July 26, 2013 order.

II. Request to File Contention 4/5-A as Amended Contention

As an alternative to reconsideration, Joint Intervenors also move now to resubmit Contention 4/5-A as an amended contention. Motion at 8.

According to the NRC's rules of practice, an amended contention cannot be admitted unless it meets both the 10 C.F.R. § 2.309(f)(1) contention admissibility standards and the 10 C.F.R. § 2.309(c)(2) new and amended contention standards.[23] The latter standards require the intervenor to demonstrate that:

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

The intervenor must carry its burden of demonstrating that any late-filed contention meets all of the applicable standards in 10 C.F.R. § 2.309.[24]

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was made in the context of a reactor operating license proceeding, it follows that the same is true in the present case as the intervention process and pleading requirements are analogous for operating license and materials license proceedings.

[22] *See* Licensing Board Memorandum and Order (Revised General Schedule) (Apr. 12, 2013), at App. A.

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

[24] *Id.*

The Staff did not challenge the timeliness of Contention 4/5-A when it was originally submitted as a challenge to the DSEIS.[25] Now, however, Joint Intervenors have not shown that they are entitled, once again, to submit Contention 4/5-A as an amended contention against the DSEIS. The Intervenors rely on the Board's ruling that significant differences existed between the DSEIS's and ER's discussion of cumulative impacts as support for their claim that the present filing is timely and is based on previously unavailable and materially different information. Motion at 8-9 (citing 10 C.F.R. § 2.309(c)(i)-(iii)); *see also* Motion at 10. However, these differences were manifest at the time that the Staff issued the DSEIS, and should have been raised at the time that Joint Intervenors filed their resubmitted and new contentions against that document.[26] The Board's subsequent recognition of these differences did not toll the deadline for timely filings on the DSEIS and should not serve as a basis for a proverbial "second bite at the apple."

Joint Intervenors also state that "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," information which the Intervenors claim only became available to them when the Board issued its ruling on July 26. Motion at 9. This argument does not suffice to satisfy the criteria of 10 C.F.R. § 2.309(c), however, because the potential for the Board to deny a proffered contention is neither new nor materially different information from that available to the Intervenors at the time of their submission of Contention 4/5-A. Proponents of contentions must meet strict contention admissibility standards, and as a result, the potential for denial of a proffered contention always exists. These standards are not "formalistic," as suggested by the Intervenors – the Commission has repeatedly emphasized that the contention

[25] *See* Staff Response at 22-25.

[26] *See id.*

admissibility rules are "strict by design," and failure to comply with any of these requirements is grounds for a contention's dismissal.[27]

Even if the Board were to find that the present motion satisfies the 10 C.F.R. § 2.309(c) criteria for new and amended contentions, the Intervenors have not attempted to show that Contention 4/5-A meets the 10 C.F.R. § 2.309(f)(1) standards for contention admissibility. Joint Intervenors state that the bases for the amended contention are incorporated by reference from their May 6, 2013 motion. Motion at 8. However, as the Staff noted in its June 3 response to the Intervenors' motion, Contention 4/5-A did not raise a genuine dispute on a material issue with the cumulative impacts discussion in the DSEIS.[28]

The Intervenors' challenge to the Staff's groundwater quality evaluation was limited to a single point – that the DSEIS did not consider the cumulative impacts caused by Strata's reasonably foreseeable Lance District ISR projects. May 6, 2013 Motion at 18. In fact, the Staff does discuss cumulative impacts to groundwater quality on pages 5-22 through 5-27 of the DSEIS. These pages explain that cumulative impacts to groundwater quality would only occur in the case of Ross Project excursions, and because Ross Project excursions would be unlikely, would be remedied, and because the dissolved metals would precipitate, the cumulative impacts would be "SMALL." On page 5-27, the DSEIS explains that groundwater quality impacts from the Ross Project would be unlikely to reach far enough to have a cumulative groundwater quality impact with impacts from the reasonably foreseeable Lance District ISR projects. Therefore, because Contention 4/5-A did not demonstrate the existence of a genuine dispute with the DSEIS, it has also not met the requirements of 10 C.F.R. § 2.309(f)(1).

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[27] 69 Fed. Reg. at 2221; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004); *Private Fuel Storage, LLC.* (Independent Spent Fuel Storage Installation). CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

[28] Staff Response at 22-25.

## CONCLUSION

For the foregoing reasons, the Board should reject Joint Intervenors' motion in full.

Respectfully submitted,

***/Signed (electronically) by EM/***
Emily Monteith
Counsel for NRC Staff

Dated at Rockville, Maryland
This 15th day of August, 2013.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL'S AND POWDER RIVER BASIN RESOURCE COUNCIL'S 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 have been served via the Electronic Information Exchange (EIE) this 15th day of August, 2013.

**/Signed (electronically) by/**

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