UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No.: 40-9091-MLA
STRATA ENERGY, INC.	)	Date: August 19, 2013
(Ross In Situ Uranium Recovery Facility)	)	

STRATA ENERGY, INC.'S RESPONSE TO NATURAL RESOURCE 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

I. INTRODUCTION AND BACKGROUND

Strata Energy, Inc. (Strata), by its undersigned counsel of record, hereby submits this Response to the Natural Resource Defense Council's and Powder River Basin Resource Council's (hereinafter the "Petitioners") Motion for Leave to Request Partial Reconsideration of the Board's Memorandum and Order of July 26, 2013, or Alternatively, to File Amended Contention (hereinafter the "Motion") regarding Strata's United States Nuclear Regulatory Commission (NRC) license application for a combined source and 11e.(2) byproduct material license to construct and operate an in situ leach uranium recovery (ISR) facility in Crook County near the town of Oshoto in the State of Wyoming (the "Ross ISR Project"). As will be discussed below, the Licensing Board should deny the Petitioners' Motion.

On July 26, 2013, the Licensing Board issued a Memorandum and Order (LBP-13-10)[1] in which it ruled upon the Petitioners' May 6, 2013, motion to admit several new or amended Contentions based on NRC Staff's draft supplemental environmental impact statement (DSEIS) for the Ross ISR project. In one portion of LBP-13-10, the Licensing Board refused to admit revised Contention 4/5 and left intact the original Contention, which was admitted solely based on Strata's NRC license application, including specifically its site-specific environmental report (ER) and supporting data and analyses, on cumulative impacts.[2] On August 5, 2013, Petitioners filed a motion requesting that the Licensing Board reconsider its ruling on Contention 4/5 regarding potential cumulative impacts from the Ross ISR project.[3] On August 8, 2013 and without objection, Strata submitted and received approval of a motion requesting an extension to file its response to Petitioners' Motion until August 19, 2013. By this Response and for the reasons discussed below, Strata respectfully requests that the Licensing Board deny Petitioners' Motion for failure to adequately satisfy NRC requirements for motions for reconsideration or amended contentions.

II. LEGAL STANDARD OF REVIEW

Under Commission legal precedent and policy statements, motions for reconsideration may not be filed except upon leave of the Board/Presiding Officer and must show "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 invalid." 10 CFR § 2.323(e). These standards for reconsideration are to be strictly applied and such motions should not be granted

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[1] *Strata Energy, Inc.*, (Ross In Situ Uranium Recovery Project), LBP-13-10, __ NRC __, __ (July 26, 2013) (slip op. at 19-22).
[2] *See Strata Energy, Inc.*, (Ross In Situ Uranium Recovery Project), LBP-12-3, 75 NRC 164 (2012).
[3] 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 (May 6, 2013).

lightly. *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006); *see also* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (January 14, 2004) (motions for reconsideration should be considered "only where manifest injustice would occur in the absence of reconsideration"). A motion for reconsideration may only succeed if it presents "decisive new information"[4] or points to "an overlooked controlling decision or principle of law, or a factual clarification."[5]

Further, with respect to Petitioners' Motion for the Licensing Board to alternatively consider re-submission of Contention 4/5 as an amended contention, a petitioner may file an amended contention based on documents admitted into the administrative record after submission of an applicant's license/license amendment/license renewal application or after NRC publishes a relevant document such as a final SER or DSEIS/FSEIS. *See* 10 CFR § 2.309(f)(2). NRC's standards for admitting new or amended contentions based upon documents such as the SER or DSEIS/FSEIS are found at 10 CFR Part 2.309(f)(2) which, in turn, refers back to 10 CFR Part 2.309(c)(2)(i-iii) standards for admission:

> "(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 CFR § 2.309(c)(2)(i-iii).

Each of these requirements must be satisfied for a new or amended contention to be admitted.

Further, the Licensing Board has decided that, notwithstanding that an intervenor's contentions

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[4] *La. Energy Servs, L.P.,* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).
[5] *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 n.6, *quoting Dominion Nuclear Conn, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

are based on NRC Staff's DEIS (or DSEIS), the intervenor still bears the responsibility of demonstrating that the contention(s) merit admission. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000). In other words, the intervenors carry the burden of showing that any late-filed contentions are admissible. *See Amergen Energy Company, LLC,* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

III. ARGUMENT

For the reasons set forth below, Petitioners' Motion should be denied for failure to satisfy NRC requirements for reconsideration or for filing an amended contention.

A. Petitioners' Motion Should Be Denied for Failure to Adequately Satisfy NRC Requirements for Motions for Reconsideration

Initially, Petitioners' allege that the Board should have considered Contention 4/5 as an amended contention on its own and that this failure to do so results in "a fundamental…misunderstanding of a key point" upon which reconsideration is justified. Petitioners' Motion at 6. Petitioners allege that the Board should have considered that the inapplicability of the migration tenet presented sufficient grounds for determining that Contention 4/5 should be considered as an amended contention or that it could be resubmitted as an amended contention. Petitioners' Motion at 5-6. This argument is insufficient to warrant reconsideration.

Petitioners' Motion fails to account for the fact that the differences between Strata's cumulative impact discussions and analyses in its ER and NRC Staff's DSEIS is an important component of espousing or not applying the migration tenet in these proceedings.[6] This factor

[6] It is important to note that Petitioners, by their own pleadings, recognized that there were differences between the Strata ER and NRC Staff DSEIS discussions of cumulative impacts by presenting different

was instrumental in the Board's LBP-13-10 determination to reject the Contention and Petitioners have failed to proffer any "decisive new information" or to identify any fundamental misunderstanding of key law or fact that could not reasonably have been anticipated.[7] Petitioners' claim that neither Strata nor NRC Staff argued that "the Board lacked the authority to even consider whether the Contention could be admitted under Section 2.309(c)." Petitioners' Motion at 7 (emphasis in original). In its June 3, 2013 pleadings, both Strata and NRC Staff addressed relevant NRC requirements for new or amended contentions and, as stated above, Petitioners' have the burden for advancing their arguments in the proper context under Commission legal precedent and the Licensing Board should not be required to re-create the administrative record to fit within the ambit of Petitioners' incorrectly framed argument. This cannot be considered a "clear and material error," because Petitioners' have failed to show express or implied authority in the Licensing Board to actually treat the Contention as amended, especially in light of the Board's decision not to do so.[8]

Petitioners' also claim that they would be "severely prejudice[d]" if the Board were to deny reconsideration, because it would prevent them from filing NEPA-Part 51-based contentions on the DSEIS in this proceeding. This claim does not constitute any form of "manifest injustice" upon which reconsideration can be based. As stated above, Petitioners'

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arguments related to potential cumulative impacts on groundwater quantity and quality. *See* Petitioners' May 6, 2013 Motion at 15-18.

[7] The migration tenet is designed to transform initially admitted contentions into contentions that mirror analyses from both the applicant and NRC Staff documents. Unlike other Contentions admitted in LBP-13-10, cumulative impacts analyses are deemed to be different from analyses eligible for the tenet. Thus, this filed contention should have reflected this factor and, since it did not, it should be rejected. *Compare So. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008).

[8] Petitioners also have not offered any argument or evidence demonstrating that they could not have presented Contention 4/5 as an amended contention prior to the filing of their May 6, 2013 pleading. The Commission has indicated in its 2004 Policy Statement that Motions for Reconsideration cannot serve as a fail-safe for contentions that should have been properly argued prior to the filing of such Motions. *See* 69 Fed. Reg. at 2007.

were afforded an opportunity to file on this DSEIS-related issue and failed to appropriately argue for its admittance. Then, Petitioners submitted a lengthy document to NRC, including its May 6, 2013, pleading as an attachment, encompassing approximately one hundred (100) public comments on the DSEIS. Additionally, and a factor curiously omitted by Petitioners, they will be afforded another opportunity to plead this Contention on the final supplemental environmental impact statement (FSEIS) when it is issued. Further, Petitioners' concerns regarding the alleged lack of a "meaningful analysis" are unfounded, as they retain the option of fully litigating three (3) already-admitted Contentions (1-3) on a variety of issues. Thus, to state that their NEPA concerns would not be "preserve[d]," completely mischaracterizes the status and future process in this proceeding; therefore, Petitioners' Motion should be rejected.

Lastly, Petitioners' Motion fails because it does not address the Board's ruling not to migrate Contention 4/5 based on the cumulative impact discussions in Strata's ER versus those in the DSEIS. In LBP-13-10, the Board specifically stated that Contention 4/5 was ineligible for migration:

> "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."

LBP-13-10 slip op. at 20.

B. Petitioners' Motion Should Be Denied for Failure to Adequately Satisfy NRC Requirements for Amended Contentions

Petitioners' Motion to file Contention 4/5 on the DSEIS as an "amended contention" also should be denied for failure to adequately satisfy NRC requirements for such contentions. First and foremost, Petitioners' Motion to submit Contention 4/5 as an amended contention is not timely. While it does not question the timeliness of Petitioners' pleading this Contention as

admissible on May 6, 2013, Strata now challenges its timeliness. The fundamental premise for late-filed contentions is that such contentions are based on new or previously unavailable and materially different information. *See* 10 CFR § 2.309(c)(i-iii). Petitioners have made no attempt to demonstrate that this information (i.e., the difference between the analyses of cumulative impacts in Strata's ER and NRC Staff's in the DSEIS) was not readily available on May 6, 2013. The failure here is not the lack of availability of this information, but rather it is the Petitioners' inability to properly plead their Contention 4/5's challenge to the DSEIS. Indeed, it is logical to conclude that, because LBP-13-10 is based on information that was available well before the time that Petitioners' May 6, 2013, was filed,[9] the information was readily available when the DSEIS was issued and, thus, cannot result in a timely amended contention request.

The Board's denial of Petitioners' pleading requesting that Contention 4/5 against the DSEIS be admitted is not new and materially different information. As stated above, the grounds (information) upon which the Board concluded that Contention 4/5 was inadmissible was first made available upon issuance of the DSEIS (March 20, 2013) and not when LBP-13-10 was issued. Petitioners' claims that a ruling against their argument would espouse a "formalistic result" is inconsistent with the Commission's consistent endorsement of applying its rules on contention admissibility as "strict by design." *See* 69 Fed. Reg. at 2,221. Thus, Petitioners attempt to argue results that would be inconsistent with existing and explicit Commission policy should not serve as grounds to grant Petitioners' Motion.

Strata also reiterates its arguments from its June 3, 2013 pleading regarding Petitioners' continued failure to address the RAI answers provided by Strata regarding potential cumulative impacts to groundwater quality and the manner in which they were evaluated and

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[9] Indeed, Petitioners were granted an extension of the regular thirty (30) day time limit for filing new and amended contentions. Thus, Petitioners had more than enough time to file on May 6, 2013 in accord with the Commission's requirements and should not be allowed an additional opportunity to do so.

discussed in the DSEIS. ER RAI CI-1(B) specifically discusses the potential for cumulative impacts from other uranium recovery (including Lance District satellites) or resource-producing projects on groundwater quality. This RAI response specifically addresses measures to be taken by Strata to address historic drill holes and how activities, such as well plugging and groundwater restoration, will serve to minimize potential cumulative impacts. Further, ER RAI CI-1(B) also provides a potential schedule for, and brief description of, each potential future satellite. The mitigation measures associated with these potential satellite facilities and the potential cumulative impacts therefrom are described in this RAI response and Strata's ER Section 5.4.2.1.2., each of which was submitted well before the DSEIS's issuance. These points and the entirety of Strata's NRC license application are evaluated and discussed in detail in the DSEIS,[10] as well as in the FSEIS when it is issued). Thus, Petitioners also have failed to satisfy NRC requirements for admissible contentions due to a lack of showing of a genuine dispute with the DSEIS.

[10] *See* DSEIS at 5-22-5-27.

IV. CONCLUSION

For the reasons discussed above, Strata respectfully requests that Petitioners' Motion has failed to adequately satisfy NRC requirements for reconsideration or for amended contentions and, thus, should be denied.

Respectfully submitted,

/Signed (electronically) by/
Christopher S. Pugsley, Esq.

Dated: August 19, 2013

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Pugsley, PLLC
1225 19th Street, NW
Suite 300
Washington, DC 20036
COUNSEL TO STRATA

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **"STRATA ENERGY, INC.'S RESPONSE TO NATURAL RESOURCE 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 19th day of August, 2013, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.

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Dated: August 19, 2013

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Pugsley, PLLC
1225 19th Street, NW
Suite 300
Washington, DC 20036
COUNSEL TO STRATA ENERGY, INC.