UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	August 27, 2013

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration of LBP-13-10 Ruling Regarding Environmental Contention 4/5A or, Alternatively, to Admit Amended Contention)

Pending before the Licensing Board is an August 5, 2013 motion filed by Joint Intervenors[1] requesting that, in the first instance, the Board reconsider its recent ruling in LBP-13-10, 78 NRC __ (July 26, 2013), with respect to their admitted environmental contention 4/5A, which concerns the adequacy of the National Environmental Policy Act (NEPA)-related analysis being provided regarding the cumulative impacts of the development and operation of other potential in situ recovery (ISR) sites by applicant Strata Energy, Inc., (SEI) in the vicinity of the SEI Ross ISR site that is the subject of this proceeding. See [Joint 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 (Aug. 5, 2013) [hereinafter Reconsideration/Amendment Motion]. Specifically, Joint Intervenors ask that the Board reconsider its determination not to permit the "resubmission" (i.e., migration) of that

[1] Joint Intervenors are the Natural Resources Defense Council and the Powder River Basin Resource Council.

contention so as to frame a challenge to the cumulative impacts analysis in the Nuclear Regulatory Commission (NRC) staff's draft supplemental environmental impact statement (DSEIS) rather than that in the SEI environmental report (ER), which is the focus of this contention as originally admitted. See id. at 4–8. Alternatively, in their motion, Joint Intervenors ask that the Board, in accordance with the provisions of 10 C.F.R. § 2.309(c), permit them to amend this contention so as to frame a challenge to the staff's DSEIS cumulative impacts analysis. See id. at 8–10. SEI and the staff oppose both of these requests.

For the reasons set forth below, we deny Joint Intervenors' motion for reconsideration/to amend.

I. BACKGROUND

A description of the circumstances leading up to the issuance of LBP-13-10 can be found in the background discussion included in that decision. See LBP-13-10, 78 NRC at __ (slip op. at 3–4). With that July 26 decision, the Board granted Joint Intervenors' request to "resubmit" three of their four admitted environmental contentions, namely contentions 1, 2, and 3, and denied their request to admit a new environmental contention 6. See id. at __ (slip op. at 32-33), App. A. Further, regarding Joint Intervenors' fourth admitted issue statement, environmental contention 4/5A challenging the adequacy of the SEI ER's analysis of the cumulative impacts on groundwater quality and quantity associated with the operation of several other potential SEI ISR facilities in the Lance District, of which the Ross ISR site is one portion, the Board found that this contention did not meet the criteria for migration from an ER-based concern to a challenge footed in the adequacy of the staff's DSEIS. See id. at __–__, __ (slip op. at 19-22, 32). Specifically, the Board concluded that

> the DSEIS discussion of the cumulative impacts of groundwater quantity and quality differs substantially from the SEI ER

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

Id. at __ (slip op. at 21) (footnote omitted).

On August 5, Joint Intervenors filed the previously referenced motion seeking, in the alternative, (1) reconsideration of the Board's determination not to allow environmental contention 4/5A to migrate so as to become a challenge to the adequacy of the cumulative impacts analysis in the staff's DSEIS; or (2) to amend environmental contention 4/5A to provide for such a challenge. See Reconsideration/Amendment Motion at 1. SEI and the staff have filed pleadings opposing both these requests. See [SEI's] Response to [Joint 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 (Aug. 19, 2013) at 1; NRC Staff Response to [Joint 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 (Aug. 15, 2013) at 1.

II. ANALYSIS

As outlined in 10 C.F.R. § 2.323(e), a reconsideration request like Joint Intervenors' can be granted 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 invalid." Recognizing the applicability of this standard, Joint Intervenors assert that the "compelling circumstances . . . which could not have reasonably been anticipated" associated with the Board's LBP-13-10 ruling regarding environmental contention 4/5A are that

the result that attained regarding environmental contentions 1, 2, and 3 — i.e., that the Board agreed that those contentions would be allowed to migrate from SEI ER-based challenges to staff DSEIS-based issue statements — was not found to be appropriate for environmental contention 4/5A. And in this regard, while indicating that they disagree with the Board's determination that, in contrast to the other three contentions, "the differences between the cumulative impacts discussion in the DSEIS and the ER make [environmental contention 4/5A] ineligible for migration," Joint Intervenors declare that the focus of their reconsideration request is actually on "the Board's next step." Reconsideration/Admission Motion at 5. Joint Intervenors maintain that "having found [environmental contention 4/5A] 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 [c]ontention" because it meets the "good cause" requirements of 10 C.F.R. § 2.309(c). Id. at 5–6. If the Board had done so, Joint Intervenors claim that "it would have taken no further analysis for the Board to have concluded that [c]ontention 4/5A satisfies the 10 C.F.R. § 2.309(c) criteria," thereby resulting in the contention's admission as a challenge to the staff's DSEIS cumulative impacts analysis. Id. at 6. Moreover, Joint Intervenors assert this was a result they "could not reasonably have anticipated" so as to support Board reconsideration and a determination to "consider [Joint Intervenors'] [c]ontention 4/5A as submitted on May 6, 2013 as an Amended Contention." Id. at 7–8.

In outlining their reasoning why reconsideration is merited in this instance, Joint Intervenors have also highlighted a "clear and material error" in their understanding of what is required for the admission of a new or amended contention that ultimately is fatal to their claim that Board reconsideration is appropriate. Even assuming Joint Intervenors are correct that the circumstances surrounding their revised environmental contention 4/5A would have been

sufficient to meet the "good cause" requirements of section 2.309(c)(1),[2] that alone is not enough to establish their issue statement's admissibility as an amended or new contention. As the Board pointed out quite clearly in its July 26 decision, the inapplicability of the migration tenet to the environmental contention 4/5A required a showing by Joint Intervenors "regarding the section 2.309(f)(1) admissibility factors (as well as the section 2.309(c) 'good cause' factors) . . . 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." LBP-13-10, 78 NRC at __ (slip op. at 21–22); see also id. at __ (slip op. at 6) (citing 10 C.F.R. § 2.309(c)(4)); 10 C.F.R. § 2.309(f)(2). Yet, nowhere in their original "resubmission" motion or, indeed, in their subsequent reconsideration motion have Joint Intervenors made any attempt to carry what is clearly their burden to establish that each of the section 2.309(f)(1) factors would be met relative to their claim that the staff's DSEIS cumulative impacts analysis is deficient so as to warrant the admission of an amended contention. We thus see no basis for reconsidering our LBP-13-10 ruling regarding the resubmission/migration of Joint Intervenors' environmental contention 4/5A.[3]

As to Joint Intervenors' alternative proposal that their unsuccessful "resubmitted" contention request now be considered a request to admit an amended contention, this suffers

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[2] This would presume, for instance, that the Board's finding that the migration tenet did not apply because the staff's DSEIS cumulative impacts analysis differed "significantly" from the SEI ER's approach, see LBP-13-10, 78 NRC at __ (slip op. at 21), is (as Joint Intervenors appear to assume, see Reconsideration/Amendment Motion at 5–6) the functional equivalent of the "materially" different standard of 10 C.F.R. § 2.309(c)(1)(ii).

[3] Of course, from Joint Intervenors' perspective, this determination likewise may "'clearly exalt form over substance.'" Reconsideration/Amendment Motion at 6 (quoting U.S. Army (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27, 29 (2004)). Nonetheless, particularly in the face of the legal and technical resources that apparently are available to Joint Intervenors, we see no reason for the Board to generate an analysis of each of the six section 2.309(f)(1) contention admissibility factors on its own, essentially out of whole cloth.

from the same deficiency that plagues their reconsideration motion. Even assuming Joint Intervenors can establish the requisite "good cause" under section 2.309(c)(1),[4] Joint Intervenors have made no showing that they have met their burden regarding the six admissibility factors in section 2.309(f)(1). We thus see no ground for admitting their post-DSEIS revised version of environmental contention 4/5A as an amended contention.

Consequently, Joint Intervenors' August 5 motion for reconsideration of our ruling in LBP-13-10 regarding environmental contention 4/5A or, alternatively, for the admission of an amended contention is denied.

Finally, with regard to the schedule for filing any dispositive motions concerning environmental contention 4/5A, the parties should submit such motions and responses in accord with the general schedule provisions that apply to environmental contentions 1, 2, and 3. See Licensing Board Memorandum and Order (Regarding Requested Extension of Time for

[4] We note, however, that particularly suspect in this regard is Joint Intervenors' assertion that "good cause" exists for such a request under section 2.309(c)(1)(i) because the information "not previously available" was "the fact that the Board would not permit [c]ontention 4/5A to simply migrate from the ER to the DEIS." Reconsideration/Amendment Motion at 8–9; see LBP-13-10, 78 NRC at __ & n.15 (slip op. at 21–22 & n.15) (noting that if any question exists, best approach would be to argue in the alternative regarding post-environmental statement migration or amendment of admitted environmental contention).

Filing Summary Disposition Motions; Revised General Schedule) (Aug. 16, 2013) at 4–5, App. A at 1 (unpublished).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Kenneth L. Mossman
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 27, 2013

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 **MEMORANDUM AND ORDER (Denying Motion for Reconsideration of LBP-13-10 Ruling Regarding Environmental Contention 4/5A or, alternatively, to Admit Amended Contention)** have been served upon the following persons by Electronic Information Exchange.

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STRATA ENERGY, INC., Ross In Situ Recovery Uranium Project, Docket No. 40-9091-MLA
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[Original signed by Herald M. Speiser]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of August, 2013