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. Craig M. White

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)	May 23, 2014

MEMORANDUM AND ORDER
(Ruling on Motion to Migrate/Amend Existing Contentions
and Admit New Contentions Regarding Final Supplement
to Generic Environmental Impact Statement)

On February 28, 2014, the Nuclear Regulatory Commission (NRC) staff issued the final supplement to the agency's generic environmental impact statement (EIS) on in situ recovery (ISR) projects intended to provide the staff's National Environmental Policy Act (NEPA)-mandated assessment of the license application of Strata Energy, Inc., (SEI) to possess and use nuclear source and section 11(e).2 byproduct material in the context of SEI's operation of its proposed Ross ISR Uranium Project site. See Office of Federal and State Materials and Environmental Management Programs, NRC, [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 Feb. 2014) (ADAMS Accession No. ML14056A096) [hereinafter FSEIS]. Now pending with the Licensing Board is Joint Intervenors'[1] March 31 motion seeking to (1) migrate or amend the four already-admitted contentions in this proceeding

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

so as to carry them forward in light of the staff's final supplement to the ISR generic EIS; and (2) admit two new contentions based on the staff's final supplement to the generic EIS. See [Joint Intervenors] Joint Motion to Migrate or Amend Contentions and to Admit New Contentions in Response to Staff's Final Supplemental Draft [EIS] (Mar. 31, 2014) [hereinafter Joint Intervenors Motion]. In filings dated April 14 and 23, respectively, the staff and SEI have responded to this submission. Given the basis for their admission, the staff does not challenge the migration of two of the existing contentions but does argue for the dismissal of the other two existing contentions and the two new contentions, while SEI asserts that neither of the new contentions meet the Part 2 admissibility requirements nor should the four existing contentions be allowed to migrate or be amended so as to be subject to further litigation in this proceeding. See NRC Staff Response to [Joint Intervenors'] Joint Motion to Migrate or Amend Contentions, and to Admit New Contentions in Response to Staff's Final Supplemental Draft [EIS] (Apr. 14, 2014) at 1 [hereinafter Staff Response]; Applicant [SEI's] Response to [Joint Intervenors] New and Amended Contentions on [FSEIS] (Apr. 23, 2014) at 1 [hereinafter SEI Response].

For the reasons set forth herein, we will (1) allow Joint Intervenors' existing environmental contentions 1, 2, and 3 to proceed for further litigation as FSEIS-related contentions, but will allow their currently-admitted environmental contention 4/5A to proceed only as an environmental report (ER)-related contention; and (2) dismiss their two new contentions as failing to fulfill the "good cause" requirement of 10 C.F.R. § 2.309(c).

I. BACKGROUND

The previous history of this proceeding is set forth in some detail in the Board's respective February 2012 and July 2013 rulings on Joint Intervenors' October 2011 initial hearing petition, see LBP-12-3, 75 NRC 164, 210, aff'd in part and review declined, CLI-12-12,

75 NRC 603 (2012) (affirming standing ruling and declining review as to contention admissibility rulings), and their May 2013 motion to have their four admitted contentions continue forward for litigation given the staff's March 2013 draft supplement to the agency's generic ISR EIS and to admit a new contention, LBP-13-10, 78 NRC 117, 129 (2013), reconsideration denied, Memorandum and Order (Denying Motion for Reconsideration of LBP-13-10 Ruling Regarding Environmental Contention 4/5A or, Alternatively, to Admit Amended Contention) (Aug. 27, 2013) (unpublished). As such, we take up where we left off with our July 2013 decision in which we determined that (1) three of Joint Intervenors' admitted contentions, i.e., environmental contentions 1, 2 and 3, that concern adequate baseline groundwater quality characterization, appropriate environmental impacts analysis of a failure to restore groundwater to primary or secondary limits, and groundwater fluid migration containment, had properly migrated to become challenges to the staff's DSEIS; (2) previously admitted environmental contention 4/5A, concerning cumulative impacts associated with the planned Lance District expansion project, had not migrated as a challenge to the staff's DSEIS and thus remained as contesting the SEI ER only; and (3) new environmental contention 6, concerning a purported staff failure to define properly the scope of the proposed major federal action given Lance District expansion project, was not admissible. See LBP-13-10, 78 NRC at 135–50. As was the case with the DSEIS, however, the Board's general schedule acknowledged that Joint Intervenors could file a motion seeking the admission of new/amended contentions relative to the issuance of the staff's FSEIS and established a schedule for such a filing. See, e.g., Licensing Board Memorandum and Order (Revised General Schedule) (Nov. 6, 2013) app. A, at 1 (unpublished). Joint Intervenors' pending motion, which hues to that schedule, was followed by responsive filings from the staff

and SEI, noted previously, and Joint Intervenors' reply to those staff and SEI responses,[2] see [Joint Intervenors'] Reply in Support of Motion to Migrate or Amend Contentions, and to Admit New Contentions (May 7, 2014) [hereinafter Joint Intervenors Reply].

II. ANALYSIS

A. Standards Governing the Admission of New/Amended Contentions

We will not repeat the extensive discussion we provided in our July 2013 decision regarding the standards that apply to the admission of new/amended contentions or the migration of existing contentions from contentions challenging an applicant's ER, to contentions contesting a DSEIS, to contentions disputing the FSEIS. See LBP-13-10, 78 NRC at 130–34. Suffice it to say that we will again apply these standards to Joint Intervenors' post-FSEIS contentions.

B. Post-FSEIS Litigability of Joint Intervenors' Admitted Contentions

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

> CONTENTION: The FSEIS fails to comply with 10 C.F.R. §§ 51.90-94, 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

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[2] Acting on the unopposed requests of Joint Intervenors and SEI, the Board did grant a ten-day extension to SEI to file its response to Joint Intervenors' motion and a seven-day extension to Joint Intervenors to file their reply to the SEI and staff responses. See Licensing Board Memorandum and Order ((Granting Motion for Extension of Time to File Responses/Reply to Pending New/Amended Contentions Motion and Setting Schedule/Parameters for Parties to Provide Proposed Revised General Schedule) (Apr. 14, 2014) at 4 (unpublished). Given the existing general schedule, these extensions had the potential to delay the evidentiary hearing slated to begin in late September 2014, but with the issuance of this decision on this date that schedule for the hearing remains on track. See Licensing Board Memorandum and Order (Revised General Schedule) (May 23, 2014) app. A, at 2 (unpublished); see also Licensing Board Memorandum and Order (Regarding General Schedule and Site Visits/Limited Appearance Session/Evidentiary Hearing) (May 9, 2014) at 2–3 (unpublished).

> demonstrate that groundwater samples were collected in a scientifically defensible manner, using proper sampling methodologies. The FSEIS'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 7–9, 19–23; Staff Response at 11–14; SEI Response at 6–13; Joint Intervenors Reply at 6–9.

RULING: As we noted in our July 2013 DSEIS-related contentions order, in the context of admitting this contention, the Board (1) found sufficiently open to question SEI's and the staff's arguments that, under 10 C.F.R. § 51.45, SEI was not required (and 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; and (2) given the information provided in support of Joint Intervenors' contention regarding the adequacy of SEI's showing in its ER concerning such a baseline, there was a genuine dispute about the material issue of 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-13-10, 78 NRC at 135–36. Additionally, we found that the central analytical deficiency alleged by Joint Intervenors' environmental contention 1 with regard to the SEI ER, i.e., that SEI and the staff improperly intend to postpone until after licensing collecting the information that could 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,'" applied with equal force to the DSEIS analysis. See id. at 136 (quoting 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)). As a consequence, we concluded the migration tenet applied and allowed the contention to proceed as an admitted post-DSEIS issue statement. See id. Joint Intervenors now assert that, notwithstanding a staff terminology change from "baseline" to "post-licensing pre-operational testing," this contention should now migrate into an FSEIS-related contention for essentially the same reasons. The staff does not object to this issue statement's migration as an FSEIS-related contention, albeit continuing to champion the staff's previous objections to the contention, see Staff Response at 11, while SEI maintains that the contention should be dismissed as based on a "mistaken legal conclusion that NRC regulations permit the gathering of detailed wellfield and monitor well quality data prior to issuance of an [ISR facility] license," SEI Response at 7.

As was the case with the DSEIS-related contention, we have no difficulty in concluding this contention regarding pre-mining groundwater quality should migrate as an FSEIS-related contention and thus do not need to consider the need for a contention amendment to accomplish this transition. Certainly, SEI's (and the staff's) arguments regarding the legal merits of the contention do not suggest a different result and, in fact, are better suited to a dispositive motion, which up to this point SEI has declined to file.[3] Similarly, the staff's concerns about the applicability of 10 C.F.R. Part 40 or its Appendix A to this environmental contention or whether references in the affidavit proffered by Joint Intervenors in support of this contention to Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) practices and requirements relative to post-licensing, pre-operation baseline data within a disturbed zone are an improper attempt to

[3] Of course, up to this point, SEI did not have an operative license authorizing construction activities at the Ross facility, which it now has. See Letter from Christopher C. Hair, NRC Staff Counsel, to Licensing Board at 1–2 (Apr. 25, 2014) (NRC Staff Notice of License Issuance).

expand the scope of this contention are matters we think likewise should be pretermitted to the subsequent merits-associated consideration of the contention, whether via summary disposition or an evidentiary hearing.

Thus, as set forth in Appendix A to this issuance,[4] this contention will move forward pursuant to the migration tenet as an admitted post-FSEIS issue statement, thereby ameliorating the need to address Joint Intervenors' amendment arguments.

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

CONTENTION: The FSEIS fails to meet the requirements of 10 C.F.R. §§ 51.90-94 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 FSEIS 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).

DISCUSSION: Joint Intervenors Motion at 9–13, 23–26; Staff Response at 14–20; SEI Response at 13–17; Joint Intervenors Reply at 12–15.

RULING: In its initial determination admitting this contention relative 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). In concluding that Joint Intervenors had

[4] As proposed by Joint Intervenors, this contention made reference to 10 C.F.R. § 51.95, which, being applicable to production and utilization facilities such as power reactors, is not applicable to the Ross ISR facility. As a consequence, we have removed that reference from this and Joint Intervenors' other proposed post-FSEIS contentions.

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, 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. In particular was 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 reasonable bounding analysis" based on the historical experience at other ISR sites. LBP-12-3, 75 NRC at 197. Thereafter, in its July 2013 ruling regarding migration of this contention post-DSEIS, the Board found that, notwithstanding some staff discussion in the DSEIS that generally addressed the issue of the environmental impact if SEI cannot restore groundwater to primary or secondary limits, it was apparent that the DSEIS likewise did not address "the matter that is the crux of the concern engendered in admitted environmental contention 2, i.e., . . . what is that ACL likely to look like and what are the [] environmental impacts associated with such an ACL." LBP-13-10, 78 NRC at 138. We thus concluded that environmental contention 2 would migrate, although we took steps to clarify its scope. See id. at 138–39.

With regard to the FSEIS, Joint Intervenors assert that this contention should either migrate or, based on the information provided in support of their motion, move forward as an amended contention. While SEI once again proffers various legal arguments as to why this contention should not have been admitted initially, the staff asserts that neither the migration nor the amendment outcome is appropriate because the staff has included in the FSEIS (at 4-46) an extended discussion of three historical aquifer restoration activities that received NRC approval, including examples of hazardous constituent concentration values that the

agency found protective of human health and the environment. According to the staff, these historical concentration value ranges provide "an idea of what a range of possible ACLs for the Ross Project might look like, and accordingly are representative of the impacts that might result should Strata be unable to restore the Ross wellfields to post-licensing, pre-operational values." Staff Response at 17 (footnote omitted).

Observing again that SEI's arguments are best consigned to a dispositive motion, we further find that the extended nature of the staff's historical discussion is the type of additional new analysis that renders the migration tenet inapposite, so as to require a timely contention amendment. But unlike their previous filing regarding the staff's DSEIS, Joint Intervenors have made at least some attempt to justify this contention's continuation relative to the standards in section 2.309(f)(1) in light of the additional staff analysis.

Given our previous section 2.309(f)(1) findings regarding this contention, the critical element at this post-FSEIS juncture is whether, in light of the staff's further analysis, Joint Intervenors have provided (1) "alleged facts or expert opinions which support [Joint Intervenors'] position on the issue," 10 C.F.R. § 2.309(f)(1)(v); and (2) "sufficient information to show that a genuine dispute exists with the [staff] on a material issue of law or fact," id. § 2.309(f)(1)(vi). In this instance, Joint Intervenors' supporting declarants, Drs. Arbitz and Larson, have proffered a number of concerns regarding the additional information provided in the staff's FSEIS. Of particular relevance in this context, however, are the specific questions they have raised about each of the staff's purportedly representative historical aquifer restoration activities, including contesting (1) the lack of any quantitative analysis of the impacts of (a) the increased radium-226 and uranium concentrations at the Crow Butte facility, and (b) the increased uranium and heavy metal concentrations at the Smith Ranch-Highland facility; and (2) relative to the nine wellfields involved at the Irigaray facility, the use of a composite average "baseline" and

restoration uranium concentration to derive a post-restoration uranium concentration that is substantially lower than the individual wellfield average post-restoration uranium concentrations as calculated using the initial average "baseline" concentrations for each individual wellfield, a data set that more accurately reflects the reality of post-restoration groundwater impacts. See Joint Intervenors Motion unnumbered attach. 2, at 21–26 (Joint Third Declaration of Dr. Richard Abitz and First Declaration of Dr. Lance Larson on Behalf of [Joint Intervenors] (Mar. 31, 2014)) [hereinafter Abitz/Larson Declaration]. Given these declarations, we have no problem in concluding that the section 2.309(f)(1)(v), (vi) factors are met so as to merit the admission of an amended environmental contention 2 to specify a challenge to the staff's FSEIS.

In admitting this amended contention, we again emphasize, as the contention's wording indicates, that its focus is whether the FSEIS properly "provide[s] and evaluate[s] 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)." As such, "this contention is not a vehicle for Joint Intervenors to seek to establish that a satisfactory ACL cannot be adopted or that SEI will be unable to comply with any ACL that might be instituted, matters that would be the subject for any future license amendment proceeding if the use of an ACL is, in fact, proposed by SEI." LBP-12-3, 75 NRC at 198 n.31.

> 3. Environmental Contention 3: The FSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.
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> CONTENTION: The FSEIS fails to assess [adequately] the likelihood and impacts of fluid migration to the adjacent groundwater, as required by 10 C.F.R. §§ 51.90-94 and NEPA, and as discussed in NUREG-1569 § 2.7, in that:
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> 1. The FSEIS 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.

DISCUSSION: Joint Intervenors Motion at 13–15, 26–29; Staff Response at 20–22; SEI Response at 17–19; Joint Intervenors Reply at 9–12.

RULING: In our July 2013 ruling that this hydrology contention properly migrated from one challenging the SEI ER to one contesting the staff's DSEIS, based on our initial contention admission determination that the adequately supported technical dispute was over the risks of fluid migration due to purportedly numerous unplugged boreholes and the alleged inadequacy of SEI's 24-hour pump tests at four of its six monitor-well clusters to provide the staff with sufficient information to make an informed fluid migration impact assessment about whether there would be sufficient groundwater control during SEI's planned well operations, we found that the DSEIS discussion of these subjects was such that Joint Intervenors' adequacy claims remained intact. Further, seeking to abide by the Commission's direction to provide contention focus when appropriate, we incorporated these concerns into the language of the contention to ensure that its admitted scope was clear. See LBP-13-10, 78 NRC at 140–41. Now, looking to the portions of the FSEIS that address the matters of unplugged borehole fluid migration and pump test adequacy, we see no material change that would preclude this issue statement from again migrating so as to frame a challenge to the FSEIS.

While endorsing this migration, we note that the focus of this contention remains the same as when it was admitted, i.e., "the potential for and impacts associated with fluid migration associated with unplugged exploratory boreholes" and whether SEI's "six monitor-well clusters and the 24-hour pump tests at four of these clusters provided insufficient information to demonstrate satisfactory groundwater control during planned high-yield industrial well

operations" so as to provide "insufficient information for the NRC staff to make an informed fluid migration impact assessment." While a proper assessment of these questions will undoubtedly involve some consideration of technical matters that could have broader implications for possible groundwater migration at the Ross facility generally, ultimately the focal point of the matters for litigation under this contention are the unplugged borehole and 24-hour pump test items specified in the contention.

Accordingly, as set forth in Appendix A to this issuance, this contention will move forward as an admitted post-FSEIS issue statement.

> 4. Environmental Contention 4[/5A]:[5] The FEIS fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project.
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> CONTENTION: The application violates 10 C.F.R. § 51.90-94[,] 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.

DISCUSSION: Joint Intervenors Motion at 15–17, 29–31; Staff Response at 23–24; SEI Response at 19–20; Joint Intervenors Reply at 15–16.

RULING: The Board had initially 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. See LBP-12-3, 75 NRC at 200, 203–04. Thereafter, in its July 2013 ruling, the Board concluded that this contention was not eligible to migrate because "the DSEIS discussion of the cumulative impacts of groundwater quantity and quality differs substantially from the SEI ER approach." LBP-13-10, 78 NRC at 142. Additionally, the Board

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[5] Although Joint Intervenors have labeled this issue statement "Environmental Contention 4," to maintain citation continuity we will refer to it as admitted, which was as "Environmental Contention 4/5A."

concluded that the DSEIS-related contention proffered by Joint Intervenors was not eligible for admission as a new or amended contention because they had failed to address the good cause and admissibility factors in section 2.309(c)(1), (f). See id. at 143–44.

Given our July ruling, we again conclude that the migration tenet is not applicable because the staff discussion that caused us to conclude that initially admitted contention was not migrated to the DSEIS is included in the FSEIS, see FSEIS at 5-22 to -30, so that a new or amended contention would be required to frame an admissible contention.

As part of their March 31 pleading, Joint Intervenors likewise have included a motion to amend the contention. To be considered timely under section 2.309(c)(1), motions for the admission of new or amended contentions "should be filed within thirty days of the date upon which the information that is the basis of the motion becomes available to the . . . intervenor." Joint Intervenors alternative request is not timely because the information on which it is based was made available to Joint Intervenors considerably more than thirty days before the motion. In addition to providing as a basis for their contention information about the potential cumulative impacts in the Lance District that was available prior to the DSEIS, Joint Intervenors also use calculations of water consumption from the DSEIS. See Abitz/Larson Declaration at 40–42. This reliance on pre-DSEIS and DSEIS information is clear evidence that the information upon which the contention is based was available considerably more than thirty days before the motion was filed. Nor do Joint Intervenors explain whether any new information was made available after the DSEIS or FSEIS was issued, or why the amended contention was filed after the deadline for submitting new/amended DSEIS-related contentions.

For these reasons, environmental contention 4/5A is not eligible to be migrated or to be admitted as an amended contention. As such, the admitted contention, which is set forth in Appendix A to this decision, continues to reference the SEI ER, which, as we noted in our July

2013 decision, leaves its continuing efficacy in some doubt. See LBP-13-10, 78 NRC at 143–44.

C. Admissibility of Joint Intervenors' New Contentions

1. [Environmental Contention 7]:[6] The FSEIS fails to properly define the scope of the proposed major federal action here, which encompasses a much larger project in the same geographic area.

CONTENTION: The FSEIS violates 10 C.F.R. §§ 51.90-94 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA, because it fails to consider the environmental impacts of, and appropriate 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 (ISL) activities in the Lance District.

DISCUSSION: Joint Intervenors Motion at 33–39; Staff Response at 25–27; SEI Response at 20–27; Joint Intervenors Reply at 17–20.

RULING: Inadmissible, in that this contention lacks the requisite good cause for its submission as being 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).

In its July 2013 ruling, the Board declined to admit environmental contention 6, the Intervenors' proposed identical DSEIS-associated new contention regarding improper segmentation of the staff's NEPA analysis relative to the possible SEI ISR activities in the nearby Lance District. See LBP-13-10, 78 NRC at 144. In that order, the Board explained that the staff had recognized in the DSEIS, at least to some degree, the potential impacts of other sites in the Lance District, in conjunction with the Ross site. The Board found, however, that Joint Intervenors improper segmentation claim did not meet the standards for admission of a new contention as either a "connected," "cumulative," or "similar" action under

[6] Although Joint Intervenors number this issue statement "FEIS Contention 5," to maintain a consistent numbering arrangement, we will refer to this contention by the label "Environmental Contention 7" since it is presented as a new contention.

40 C.F.R. § 1508.25(a). The Board concluded initially that the contention did not merit further analysis on the basis that the Ross facility was "connected" to the other Lance District ISR sites pursuant to section 1508.25(a)(1) because Joint Intervenors had failed to provide adequate support under section 2.309(f)(1)(vi) to establish there was a genuine dispute about whether the Ross facility was an interdependent part of any larger Lance District project. See id. at 147–49. Furthermore, on the question of whether the Lance District sites might require NEPA consideration in connection with the Ross facility site as "cumulative" or "similar" under section 1508.25(a)(2)-(3), the Board ruled that Joint Intervenors had failed to meet the timeliness requirements of section 2.309(c)(1)(i), (iii) in that the information potentially supporting their claims was available at the time Joint Intervenors submitted their October 2011 hearing petition, or shortly thereafter. See id. at 149–50. Consequently, the Board declined to admit environmental contention 6.

Against this background, new environmental contention 7, an FSEIS-related version of the previously rejected DSEIS-related environmental contention 6, also is not timely under section 2.309(c).[7] To be considered timely in this proceeding in accordance with section 2.309(c)(iii), a motion for the admission of a new or amended contention "should be filed within thirty days of the date upon which the information that is the basis of the motion becomes available to the . . . intervenor." Licensing Board Order (Initial Prehearing Order) at 4 (Nov. 3, 2011) (citing 10 C.F.R. § 2.309(f)(2), which notes that any motion to admit a new or amended contention must conform to the requirements of section 2.309(c)). Joint Intervenors base all but

[7] Under 10 C.F.R. § 2.309(c), good cause exists for the submission of a new or amended contention after the deadline for filing an initial hearing petition when "(i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information."

one of their renewed claims on information that was available in 2013 disclosures of SEI and SEI's parent company, see Joint Intervenors Motion, unnumbered attach. 1, at 11 (referring to "prior and contemporaneous disclosures to investors by Strata's corporate parent . . . in March 2013" and the "Lance Project Development Update" published on May 24, 2013) (Second Declaration of Christopher E. Paine in Support of [Joint Intervenors'] Joint Motion to Migrate or Amend Contentions, and to Admit New Contentions in Response to the [FSEIS] (Mar. 31, 2014)), none of which was submitted in accordance with the terms of the Board's directive that a new or amended contention must be filed within thirty days of a purported triggering event. The only new information presented by Joint Intervenors in support of their current motion that would meet the thirty-day requirement comes from a March 2014 presentation by Peninsula Energy Limited stating that the company is "constructing a 2.3 [million pounds] per annum ISR operation in 2 stages" with an "initial mine life [of] 22 years and a "potential 70+ years of mine life." Id. at 16. As is the case with the other post-DSEIS information cited by Joint Intervenors relative to the scope and nature of plans for the Ross facility and the Lance District, this information does not differ materially from the information available at the time the DSEIS was issued and Joint Intervenors' essentially identical DSEIS-related contention was submitted, thus contravening the mandate of section 2.309(c)(1)(ii) that "materially different information" must be the basis for a new contention that has the requisite "good cause."[8]

We thus deny Joint Intervenors' request to admit its "new" environmental contention 7.

[8] Also in that regard, we note that the staff stated in Appendix B to its FSEIS that, "[i]f the NRC approves the Ross Project license application, Strata would only be authorized to operate on the Ross Project site, so development of the wider area described by the commenter would not be a direct consequence of licensing the Ross Project," FSEIS app. B, at B-20, a limitation on the geographic scope of the project that further brings into question whether Joint Intervenors' proposed contention is admissible as presenting a genuine dispute on a material issue of law or fact under section 2.309(f)(1)(vi).

2. [Environmental Contention 8]:[9] The FSEIS is improperly framed as a Supplemental EIS, rather than a separate EIS tiered from the Generic EIS for In-Situ Leach Uranium Milling Facilities.

CONTENTION: The FSEIS violates 10 C.F.R. Part 51 and NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations for NEPA, because the NRC Staff process for development of the document improperly treated the analysis as a Supplemental EIS, rather than preparing an EIS, which would have required a scoping process to properly delineate the scope of the action at issue.

DISCUSSION: Joint Intervenors Motion at 39–44; Staff Response at 27–33; SEI Response at 27–30; Joint Intervenors Reply at 20–24.

RULING: Inadmissible, in that this contention does not meet the standards for timely submission of a new contention as set forth in 10 C.F.R. § 2.309(c).

As explained above, a request for the admission of a new contention should be filed within thirty days of the date upon which the information that is the triggering basis of the motion becomes available to the intervenor. Joint Intervenors' new proposed environmental contention 8, which raises a procedural challenge to the staff's action in preparing its FSEIS as a supplement to, rather than as a full EIS tiered off of, the agency's generic ISR EIS, is based principally on information in an NRC Office of the Inspector General (OIG) audit report that was issued in August 2013. See Joint Intervenors Motion at 41 & n.18 (citing NRC OIG, Audit of NRC's Compliance With 10 CFR Part 51 Relative to Environmental Impact Statements, OIG-13-A-20 (Aug. 20, 2013) (ADAMS Accession No. ML13232A192)). Further, according to Joint Intervenors, submitting environmental contention 8 prior to issuance of the OIG report would have been useless because "the Board would simply have deferred to the NRC Staff claims that preparing a 'supplement' to the GEIS is an appropriate way to proceed," while Joint Intervenors' delay in submitting the contention until the staff's issuance of its FSEIS was

[9] Although Joint Intervenors number this issue statement "FEIS Contention 6," to maintain a consistent numbering arrangement, we will refer to this contention by the label "Environmental Contention 8" since it is presented as a new contention.

justified because "Intervenors hoped NRC would bring itself into compliance with NEPA and the applicable regulatory scheme by actually conducting the scoping process that the IG report details is required." Joint Intervenors Motion at 43.

As Joint Intervenors point out, see id. at 42, the regulatory definition outlining the basis for issuing a supplemental EIS is readily available in 40 C.F.R. § 1502.9 and 10 C.F.R. § 51.92. Accordingly, if Joint Intervenors believed that the DSEIS did not meet this definition, they could have filed a new contention at the time the DSEIS was issued. Moreover, as "good cause" bases for delaying such a filing until issuance of the FSEIS, Joint Intervenors' claims regarding possible Board inaction absent an IG report and their "hope" for a staff self-correction are wholly without merit. Consistent with section 2.309(c), and particularly with regard to what is essentially a legal issue like the one framed by this contention, the responsibility of a party that possesses new information that constitutes the basis for a new or amended contention is to bring that information and the issue statement it supports to the Board's attention promptly, regardless of what it believes the Board will or will not do in the face of that information,[10] or what it hopes the staff might or might not do in response to that information.

Thus, Joint Intervenors' claim that its new environmental contention 8 was not "ripe" for submission until issuance of the FSEIS is without substance, so that their contention is not timely under section 2.309(c) and must be dismissed.

[10] We note as well that, carrying Joint Intervenors' argument in this regard to its logical conclusion suggests that, had the NRC OIG not issued its report, Joint Intervenors would have been unable to interpose this legal argument on their own, a result we doubt they would endorse.

III. CONCLUSION

Joint Intervenors' environmental contentions 1, 2, and 3, now reframed as challenges to the staff's FSEIS, will pass through for further litigation, environmental contentions 1 and 3 because of the migration tenet and environmental contention 2 because it qualifies as an amended contention. On the other hand, their environmental contention 4/5A is not eligible for migration or amended, and so remains as an ER-related issue statement only, while their environmental contentions 7 and 8, which have been submitted for admission as new contentions, must be dismissed as lacking the requisite "good cause" under section 2.309(c) for submission after the deadline for filing an initial hearing petition.

For the foregoing reasons, it is this twenty-third day of May 2014, ORDERED, that:

1. As Joint Intervenors' March 31, 2014 motion seeks to migrate Environmental Contentions 1 and 3, and amend Environmental Contention 2, the motion is granted in that those three contentions, as set forth in Appendix A to this issuance, are accepted for further litigation as FSEIS-related contentions.

2. As Joint Intervenors' March 31, 2014 motion seeks to migrate or amend Environmental Contention 4/5A, the motion is denied, and, as set forth in Appendix A to this issuance, that contention remains in this proceeding as an ER-related contention.

3. As Joint Intervenors' March 31, 2014 motion seeks the admission of new Environmental Contentions 7 and 8, the motion is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD

R/A

G. Paul Bollwerk, III, Chair
ADMINISTRATIVE JUDGE

R/A

Richard F. Cole
ADMINISTRATIVE JUDGE

R/A

Craig M. White
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 23, 2014

APPENDIX A

ADMITTED CONTENTIONS

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

   CONTENTION: The FSEIS fails to comply with 10 C.F.R. §§ 51.90-94, 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 FSEIS'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 FSEIS fails to analyze the environmental impacts that will occur if the applicant cannot restore groundwater to primary or secondary limits.

   CONTENTION: The FSEIS fails to meet the requirements of 10 C.F.R. §§ 51.90-94 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 FSEIS 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 FSEIS fails to include adequate hydrological information to demonstrate SEI's ability to contain groundwater fluid migration.

   CONTENTION: The FSEIS fails to assess [adequately] the likelihood and impacts of fluid migration to the adjacent groundwater, as required by 10 C.F.R. §§ 51.90-94 and NEPA, and as discussed in NUREG-1569 § 2.7, in that:

   1. The FSEIS 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 a **MEMORANDUM AND ORDER (Ruling on Motion to Migrate/Amend Existing Contentions and Admit New Contentions Regarding Final Supplement to Generic Environmental Impact Statement)** have been served upon the following persons by Electronic Information Exchange.

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MEMORANDUM AND ORDER (Ruling on Motion to Migrate/Amend Existing Contentions and Admit New Contentions Regarding Final Supplement to Generic Environmental Impact Statement)

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 23rd day of May 2014