UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	Docket No. 40-9091-MLA
	)	
STRATA ENERGY, INC.,	)	ASLBP No. 12-915-01-MLA
	)	
(Ross In Situ Recovery Uranium Project)	)	June 13, 2014

NATURAL RESOURCES DEFENSE COUNCIL'S & POWDER RIVER BASIN RESOURCE COUNCIL'S MOTION FOR SUMMARY DISPOSITION ON ENVIRONMENTAL CONTENTION 1

Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Geoffrey H. Fettus, Senior Attorney
Natural Resources Defense Council, Inc.
1152 15th St., NW, Suite 300
Washington, D.C. 20005
Tel: (202) 289-6868/Fax: (202) 289-1060
Email: gfettus@nrdc.org

Counsel for NRDC

Shannon Anderson, Staff Attorney
Powder River Basin Resource Council
934 N. Main St.
Sheridan, WY 82801
Tel: (307) 672-5809/Fax: (307) 672-5800
Email: sanderson@powderriverbasin.org

Counsel for Powder River Basin Resource Council

TABLE OF CONTENTS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	Docket No. 40-9091-MLA
	)	
STRATA ENERGY, INC.,	)	ASLBP No. 12-915-01-MLA
	)	
(Ross In Situ Recovery Uranium Project)	)	June 13, 2014

NATURAL RESOURCES DEFENSE COUNCIL'S & POWDER RIVER BASIN RESOURCE COUNCIL'S MOTION FOR SUMMARY DISPOSITION ON ENVIRONMENTAL CONTENTION 1

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205, and the Board's June 2, 2014 Scheduling Order, Intervenors Natural Resources Defense Council and Powder River Basin Resource Council (Joint Intervenors) hereby move for summary disposition on Environmental Contention 1: "The FSEIS fails to adequately characterize baseline (i.e., original or pre-mining) groundwater quality." Throughout this proceeding over the Ross Project in-situ leach (ISL)[1] uranium mining operation, Joint Intervenors have maintained the National Environmental Quality Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and implementing regulations, as well as Nuclear Regulatory Commission (NRC or Commission) regulations and guidance, *mandate* the agency properly characterize and establish baseline groundwater quality within the NEPA and licensing processes, rather than attempting to do so only *after* the NEPA review is completed and the license has been issued. For their part, the Nuclear Regulatory Commission Staff (NRC Staff) and Strata Energy, Inc. (SEI or Strata) have consistently maintained that, as a matter of law, no such

[1] In situ leach (ISL) is also referred to as in situ recovery (ISR), and the terms are used synonymously here.

obligations exist, and, in fact, there is a *prohibition* on the collection of such data prior to SEI obtaining a license for this project.

Accordingly, as the Board recently noted in migrating this contention to the Final Supplemental Environmental Impact Statement (FSEIS), contention 1 raises a purely legal issue suitable for resolution on summary disposition. *See* Licensing Board Memorandum (Ruling on Motion to Migrate/Amend Existing Contentions) (May 23, 2014) (hereinafter "FSEIS Order") at 6. Because, as explained below, and consistent with several rulings by this and at least one other Board, as a matter of law, NEPA, as well as relevant NRC regulations and guidance, *requires* an appropriate characterization of baseline groundwater quality *before* the agency makes the decision upon which the NEPA review is based, Joint Intervenors are entitled to summary disposition on contention 1. The Record of Decision (ROD) and recently issued license for the Ross ISL uranium mining operation should therefore be vacated and remanded to the agency to fulfill this fundamental requirement. *See, e.g., Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 165 (2010).

BACKGROUND

A. Procedural Background

On October 27, 2011 Joint Intervenors petitioned to intervene and requested a hearing in this matter, presenting several contentions concerning SEI's Environmental Report (ER), prepared for the proposed Ross ISL uranium project in Crook County, Wyoming. Contention 1, as originally formulated, claimed the ER lacked an adequate description of the present baseline (i.e. original or premining) groundwater quality. Strata and Staff objected to Contention 1 on the grounds the applicable regulations – in particular 10 C.F.R. § 40.32(e) – prohibit the collection of baseline water quality information before issuance of the license over which the NEPA review is being conducted.

On February 10, 2012, the Board admitted Contention 1 against the ER, explaining the applicant and Staff are "*incorrect* in their . . . assertion that 10 C.F.R. § 40.32(e) prohibit[s] the applicant from gathering complete information on baseline water quality." LBP 12-3, 75 NRC 164, 193 (2012) (emphasis added) (citations omitted). To the contrary, because the applicable regulations *permit* the collection of such data, and the data is plainly critical to a meaningful analysis of the environmental impacts associated with the project, the Board concluded Joint Intervenors' contention 1 was admissible. *Id.* at 192-95. Subsequently, the Board migrated this contention to the DSEIS, explaining that since Staff and SEI continued to assert the information "'is not required to be provided at this time and does not yet exist,'" "the central deficiency alleged by Joint Intervenors' environmental contention 1 with regard to the SEI ER applies with equal force to the DSEIS." LBP 13-10 at 11-13 (2013).

On February 28, 2014, Staff made the Final SEIS publicly available. Like the DSEIS (and the ER), the FSEIS does not disclose or analyze baseline groundwater quality. Rather, the FSEIS states that SEI will construct ground-water wells and obtain water-quality samples in order to establish baseline water quality data only *after* the NEPA process is completed, and the license has issued.[2]

---

[2] Nuclear Reg. Comm'n, Envtl Impact Statement for the Ross ISR Project in Crook County, Wyoming, Suppl. To the Gen. Envtl Impact Statement for In-Situ Leach Uranium Milling Facilities, Final Report, at 2-25 (Feb. 2014) (hereinafter "FSEIS").

Accordingly, in its May 23, 2014 ruling, the Board migrated this contention to the FSEIS. FSEIS Order at 4-7. Noting Staff and SEI's continuing argument that they are "not required (and perhaps [are] even precluded under section 40.32(e) from seeking) to establish a baseline water quality for the Ross facility until after any grant of a Part 40 license to SEI," *id.* at 5, the Board had "no difficulty in concluding this contention regarding pre-mining groundwater quality should migrate as an FSEIS-related contention." *Id.* at 6. Thus, the Board brought forward to the FSEIS Joint Intervenor's contention 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' . . . .

Id. at 5; *see also id.* (there is "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").

The Board further indicated the issues raised by this contention are "suited to a dispositive motion . . . ." *Id.* at 6.

B. Applicable Legal Standards

1. Standards For Summary Disposition

The Commission encourages Boards to use the summary disposition process where the opponent of a contention fails to establish a genuine issue exists, so evidentiary hearing time is not unnecessarily devoted to such issues. *See* Statement of Policy on

Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 457 (1981). The summary disposition procedures "provide in reality as well as in theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues . . . ." *Hous. Lighting & Power Co.*, ALAB-590, 11 N.R.C. 542, 550 (1980).

Because this is a subpart L proceeding, summary disposition is governed by 10 C.F.R. § 2.1205, which provides the Board will apply the standards set forth in subpart G in considering such a request. *Id.* § 2.1205(c). Subpart G, in turn, contains 10 C.F.R. § 2.710, which provides the Board "shall render the decision sought if the [record shows] there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." *Id.* § 2.710(d)(2).

As the Commission has explained, under this standard "the moving party bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact." *In re Pac. Gas & Elec. Co.*, LBP-08-7, 67 NRC 361, 371 (2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once this burden has been satisfied, "the nonmoving party cannot rest on the mere allegations or denials of a pleading," but rather must identify "specific facts showing that there is a genuine issue for trial." 477 U.S. at 324; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

2. The National Environmental Policy Act

Our Nation's "basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), NEPA's purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* at § 1500.1(c). NEPA's "twin aims" are to force every agency "to consider *every significant aspect of the environmental impact of a proposed action*," and to "inform the public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (emphasis added). Under NEPA, federal agencies are required to prepare an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(C).

The Council on Environmental Quality (CEQ) has issued regulations governing the preparation of an EIS which are binding on all agencies, 40 C.F.R. § 1500.3, including the NRC. *See, e.g., Brodsky v. NRC*, 704 F.3d 113, 120 n.3 (2d Cir. 2013). These regulations require an EIS to describe, *inter alia*, (a) "the environment of the area(s) to be affected" by the project, 40 C.F.R. § 1502.15, (b) "the environmental impacts of the alternatives including the proposed action," *id.* § 1502.16 – which includes the "effects on air and water and other natural systems, including ecosystems," *id.* § 1508.8(b) – and (c) "any adverse environmental effects which cannot be avoided should the proposal be implemented," *id.* at § 1502.16. The regulations also mandate where there is data "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, *the agency shall include the information in the environmental impact statement*." 40 C.F.R. § 1502.22(a) (emphasis added).

The Commission's own implementing regulations for the environmental review process impose similar requirements. Thus, the NRC's regulations require an EIS to "describe the environment to be affected by the proposed action," 10 C.F.R. Pt. 51, Subpt. A, App. A, § 6, and, more specifically, delineate certain data collection efforts required by a project proponent. As relevant here, those regulations require an applicant must provide "*complete baseline data* on a milling site and its environs" prior to construction and operation of the facility. *Id.* Pt. 40, App. A, Criterion 7 (emphasis added).

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. On or about February 28, 2014 NRC Staff issued the Final Supplemental EIS (FSEIS) for the Ross ISR Project in Crook County, Wyoming. *See* 79 Fed. Reg. 13,683 (2014); *see also* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1910/s5/ (link to FSEIS).

2. On April 24, 2014, NRC Staff issued a Record of Decision (ROD) on the Ross ISR Project, deciding it would issue the license. *See* ML14112A447.

3. On April 25, 2014 NRC Staff issued the license for the Ross ISR Project. *See* ML14069A335.

4. Neither NRC Staff nor SEI collected the empirical data necessary to establish baseline water quality levels associated with the Ross IRS Project before the NEPA process was completed, and before making the final decision to issue the license on which the NEPA process was based. *See* Joint Intervenors' Mar. 31, 2014 Motion To Migrate or Amend Contentions, Declaration of Dr. Abitz and Larson (Abitz/Larson Decl.") ¶¶ 8-10 (copy attached as Exhibit 1 for the Board's convenience); *see also* Joint Intervenors' May 6, 2013 Motion to Resubmit Contentions, Declaration of Dr. Richard Abitz ("Abitz Decl.") ¶¶ 6-23 (copy attached as Exhibit 2 for the Board's convenience).

5. The FSEIS does not consider such baseline water quality levels, but rather states the necessary water quality data will be collected *after* the license is issued. *See* FSEIS at 2-25. In particular, the FSEIS states as follows:

> Condition No. 11.3 of the Draft Source and Byproduct Materials License would require the applicant to install a monitoring-well ring around the perimeter of each wellfield as well as monitoring wells in the underlying and overlying aquifers (NRC, 2014b); this monitoring-well ring would be used to detect horizontal and vertical excursions of uranium recovery solutions during uranium-recovery operation (see SEIS Section 2.1.1.2) (Strata, 2011b). Prior to commencing ISR operations, these wells would allow sampling and analysis of ground water – in this SEIS, this type of monitoring is called "post-licensing, pre-operational." The resulting post-licensing, pre-operational concentration-based levels *would be used to calculate, using robust statistical procedures, groundwater protection standards called the Ross Project's upper control limits (UCLs)*. These post-licensing, pre-operational values and the calculated UCLs would be established for each separate uranium-recovery unit (these will be specified in the Source and Byproduct Materials License).

Id. (emphasis added); *see also* FSEIS at 3-37- 3-44 ("Affected Environment" section of FSEIS, which fails to establish baseline water quality in the affected area).

ARGUMENT

The resolution of contention 1 turns on one disputed legal proposition and two undisputed facts. The legal question is whether the NRC is required to collect robust baseline water quality information, and establish baseline water quality levels, during the NEPA process and before issuance of an ISR license. While Joint Intervenors maintain NEPA and relevant regulations and guidance impose such an obligation, Staff and SEI claim no such obligation exists.

Once that legal issue is resolved, contention 1 itself should be resolved, because, while the NEPA process is now complete and the license has been issued, the NRC does not dispute that is has *neither* (a) collected the groundwater quality information necessary to establish baselines, *nor* (b) set such baselines.

A. Baseline Water Quality Data Was Required To Be Collected, And Baselines Established, During The NEPA Process And Before Issuance Of The Ross ISR License.

As noted, NEPA and the binding CEQ regulations require an EIS to meaningfully analyze the baseline environmental conditions in the area to be impacted by the project under review, 40 C.F.R. § 1502.15, in order to comprehensively analyze both "the environmental impacts of the alternatives including the proposed action," as well as the "adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* at § 1502.16; *see also* 10 C.F.R. Pt. 51, Subpt. A, App. A, § 6. To fulfill NEPA's mandates, therefore, baseline water quality information must be collected *as part of the NEPA and licensing process*, not after they are complete.

NRC regulations also embody these requirements. The Appendix to 10 C.F.R. Part 40 contains several "Criteria" which must be satisfied in connection with a source material license like the one sought by SEI here. 10 C.F.R. Pt. 40, App. A. Among the "Technical Criteria" that must be satisfied, the Appendix requires a groundwater "monitoring program must be conducted to provide *complete baseline data on a milling site and its environs*." *Id.*, Criterion 7 (emphasis added). Moreover, Criterion 5 requires the establishment of background concentration limits for groundwater that may not be exceeded. *Id.*, Criterion 5B(5)(a) ("[a]t the point of compliance, the concentration of a hazardous constituent must not exceed . . . [t]he Commission approved *background concentration* of that constituent in the ground water") (emphasis added). As with

NEPA, these regulations presume these steps will be taken in order to *inform* the agency's decision-making, rather than after a license has issued.

Finally, in 2003 the Commission issued an extensive Report further setting forth the requirements for consideration of license applications such as the one at issue here. *See NRC, Standard Review Plan for In Situ Leach Uranium Extraction License Applications, Final Report*, NUREG-1569 (June 2003) ("NUREG Report"). This Report is binding on NRC Staff. *Id.* at xv (explaining that the Report sets forth "guidance on what is to be reviewed, the basis for the review, how the staff review *is to be accomplished*, what the staff will find acceptable in a demonstration of compliance with the regulations, and the conclusions that are sought regarding the applicable sections in Title 10 of the U.S. Code of Federal Regulations") (emphasis added); *see, e.g., Chiron Corp. v. NTSB*, 198 F.3d 935, 943-44 (D.C. Cir. 1999) (guidance binding on an agency where agency intends to be bound).

The Report explains that, in preparing an EIS on an ISL mining application, "[a]reas of potential environmental impact that are investigated include water availability and quality," and that to conduct such an investigation "it is necessary for NRC to establish background conditions for the affected area," which "may require collection of data over a larger geographic area than the licensed area, as well as collection of data in technical . . . areas that are beyond the traditional scope of radiation safety assessments." NUREG Report, Summary at 9. In particular, the Report explains, the "[c]haracterization of the hydrology at in situ leach uranium extraction facilities must be sufficient to establish *potential effects* of in situ leach operations on the adjacent surface-water and ground-water resources." *Id.* § 2.7.1 at 2-20 (emphasis added). To evaluate these potential effects, the NUREG Report requires that the Commission, *inter alia*:

> *include an "[a]ssessment of available ground-water resources and ground-water quality within the proposed permit boundaries and adjacent properties, including quantitative description of the chemical and radiological characteristics of the ground water and potential changes in water quality caused by operations," *id.* § 2.7.1(4), at 2-21;
>
> *insure that "sufficient data have been collected and that the data support the applicant's hydrologic conceptual model for ground-water flow within and around the permit boundary," *id.* § 2.7.2(3), at 2-22;
>
> * "[v]erify that a sufficient number of baseline ground-water samples are collected to provide meaningful statistics, that samples are spaced in time sufficiently to capture temporal variations, and that the chemical constituents and water quality parameters evaluated are sufficient to establish pre-operational water quality," *id.* § 2.7.2(4), at 2-22;
>
> * collect "[r]easonably comprehensive chemical and radiochemical analyses of water samples, obtained within and at locations away from the mineralized zone(s) [in order] to determine pre-operational baseline conditions," *id.* § 2.7.3(4), at 2-24;
>
> * determine "[b]aseline water quality . . . for the mineralized and surrounding aquifers," including "water quality parameters that are expected to increase in concentration as a result of *in situ* leach activities and are of concern to the water use of the aquifer," *id.;*
>
> * collect "[a]t least four sets of samples, spaced sufficiently in time to indicate seasonal variability . . . and analyze[ ] for each listed constituent for determining baseline water quality conditions." *Id.*

Thus, because the NUREG Report – as well as NEPA and the implementing regulations issued by both CEQ and NRC itself – mandate that comprehensive baseline water quality information be collected in order to evaluate the "potential effects," *id.* § 2.7.1, of the Ross ISR project on groundwater, NRC and Strata were required to collect this data, and to establish appropriate water quality baselines, *before* the NEPA process was completed and the license was issued. Staff and SEI's arguments that these steps were not required – or that they can be completed after the license is issued - do not withstand scrutiny.

First and foremost, Staff and SEI have argued the NRC regulatory scheme does not *permit* collection of comprehensive baseline water quality information prior to the issuance of a license. Rather, they assert such efforts are prohibited by 10 C.F.R. § 40.32(e), which prohibits "commencement of construction" prior to a license, claiming "construction" would be necessary in order to collect this data. *See, e.g.*, SEI Response to Hearing Petition (Dec. 5, 2011) at 45.

This argument is mistaken. As defined in NRC's regulations, "construction," *excludes* "[s]ite exploration, including necessary borings to determine foundation conditions or *other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values*." 10 C.F.R. § 40.4 (emphasis added). Indeed, when these regulations were imposed in 2011, the Commission's regulatory preamble specifically explained that this exception covers any "monitoring wells that are only intended to be used to collect background data or perform background aquifer testing." 76 Fed. Reg. 56,951, 56,956 (Sept. 15, 2011). Accordingly, SEI and NRC Staff cannot avoid the collection of appropriate water quality data, and establishment of appropriate baselines, on the grounds that such efforts are "construction" activities that are not permitted before issuance of the license.[3]

[3] While "commencement of construction" does cover activities with a "reasonable nexus to [r]adiological health and safety," 10 C.F.R. § 40.4, there is no reason that a meaningful baseline water quality data collection effort would implicate this standard.

SEI and Staff's argument that this information could not be collected as part of the NEPA process, and instead that it must be collected after the license is issued, also directly contradicts the Commission's explanation, in the same regulatory preamble, regarding the relationship between an applicant's permissible activities before a license is issued – including "monitoring to establish background information," 10 C.F.R. § 40.4 – and Staff's NEPA responsibilities. *Id.* at 56,952. In commenting on the proposed definitions, several groups argued that it would violate NEPA to allow such on-the-ground activities to occur prior to completion of the NEPA process, because these pre-construction activities *themselves* might either have environmental impacts (which should be considered before they occur) or might foreclose alternatives. *Id.*

The Commission *rejected* these arguments, concluding that it has no regulatory authority over "site preparation activities, which are private actions" that are "not subject to its regulatory authority." *Id.* Certainly, the Commission cannot, on the one hand, succeed in *avoiding* NEPA review on the impacts of conducting baseline groundwater testing efforts on the grounds that these activities do not constitute "federal actions" necessitating NEPA review in themselves, while at the same time allowing SEI to avoid actually *conducting* that water quality testing until after the NEPA process is complete on the contradictory ground that these information-gathering activities *are* part and parcel of the federal action – thereby avoiding any consideration of the results of that monitoring effort in the NEPA process and before issuance of a license.

For all of these reasons, both this Board and the Board considering a similar ISL license – Powertech (USA), Inc. – have consistently *rejected* the argument that collection of baseline water quality data is prohibited by 10 C.F.R. § 40.32(e). As the Powertech

Board first explained, the "preconstruction monitoring" expressly permitted under 10 C.F.R. § 40.4, "*includes adequate assessments of baseline water quality*." *Dewey-Burdock*, LBP-10-16, 72 N.R.C. 361, 424 (2010) (emphasis added); *see also Dewey-Burdock*, LBP-13-09 (ruling on DSEIS contentions) at 20 (admitting contention against DSEIS on grounds that it "fails to include a proper analysis of the required baselines with respect to groundwater quality"); *accord Dewey-Burdock*, LBP-14-5 (2014) (ruling on FSEIS contentions), App. A ("The FSEIS fails to include necessary information for adequate determination of baseline ground water quality").

Similarly, in originally admitting contention 1 here against the ER, this Board explained that while "[b]oth SEI and the staff assert that the only way to gain the type of information needed to establish a groundwater baseline" would be to conduct activities prohibited by 10 C.F.R. § 40.32(e), they are mistaken. LBP-12-3, 75 N.R.C. at 194; *see also id.* at 193-95 (interpreting the regulations to permit the data collection necessary to provide a "description of the existing water quality baseline."). Similarly, in migrating this contention to the DSEIS, this Board explained that given Staff and SEI's argument that such information "'is not required to be provided at this time and does not yet exist,'" "the central deficiency alleged by Joint Intervenors' environmental contention 1 with regard to the SEI ER applies with equal force to the DSEIS." LBP 13-10 at 12-13; *see also* FSEIS Order at 6 (rejecting SEI's argument that applicable regulations do not "permit the gathering of detailed wellfield and monitor well quality data prior to issuance of an (ISR facility) license," and explaining that "SEI's (and the staff's) arguments regarding the legal merits of the contention do not suggest a different result" than they did as to the DSEIS).

Second, Staff has argued NEPA does not require the collection of this data, but simply requires use of "the best information available . . . ." *See, e.g.*, Staff Resp. to DSEIS Contentions (June 3, 2013) at 9. To the contrary, the CEQ regulations require that an agency *obtain* the data necessary to adequately assess environmental impacts. 40 C.F.R. § 1502.22(a). Indeed, the applicable regulation provides that, "[i]f the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement." *Id.* Here, neither Staff nor SEI could reasonably maintain that the information is either not relevant, or too expensive to collect, *since the collection of this data is required by the license itself*. Rather, the only question is whether it must be collected *before* the NEPA and licensing processes are complete.

Accordingly, the courts have required agencies to *collect* necessary information during the NEPA process, and have rejected the argument that an agency has no obligation to collect such data. S*ee, e.g., Ocean Mammal Inst. v. Cohen*, No. 98-CV-160, 1998 WL 2017631, at *5 (D. Haw. Mar. 9, 1998) (finding "an agency is required to engage in reasonable research *to supply missing information*" in preparing an EIS to fulfill its "affirmative duty under NEPA and its implementing regulations to undertake research in order to prepare a comprehensive EIS federal government officials can use to make a reasoned decision"); *Idaho Pub. Util. Comm'n v. ICC*, 35 F.3d 585, 596 (D.C. Cir. 1994); *Or. Envtl Council v. Kunzman*, 817 F.2d 484, 495 (9th Cir. 1987) (NEPA "imposes a duty on federal agencies to gather information and do independent research when missing information is important, significant, or essential to a reasoned choice among alternatives.") (citations omitted); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1135 n.16 (D. Haw. 2000) (same).[4]

To be sure, the fact that comprehensive baseline water quality information must be collected and considered in the NEPA process does not mean SEI was required to establish the *entire* groundwater monitoring network that will be used during operations as part of the NEPA process. To the contrary, as set out in Criteria 5 and 7, the NUREG Report, and Joint Intervenors' declarations, what is necessary is simply a scientifically rigorous data collection effort, and an appropriate methodology to use that data to disclose and consider baseline water quality levels. *See* Abitz Decl. ¶¶ 19-21 (showing how such an effort should be conducted); *supra* at 11 (quoting NUREG Report at 2-20 to 2-24 (setting forth required data collection effort)); *supra* at 9 (quoting 10 C.F.R. Pt. 40, App. A, Criteria 5 and 7). Accordingly, in the event SEI or Staff assert that Joint Intervenors' legal argument, if adopted by the Board, would force SEI to establish its *entire* well monitoring network before the license issues, they will be fundamentally mischaracterizing Joint Intervenors' position.

Finally, as the Board has also previously recognized, considering the Staff's NEPA obligations *in conjunction with* its obligations under the NRC's regulations and

---

[4] Relatedly, SEI has argued that the CEQ regulations do not apply to the NRC, *see, e.g.,* SEI Response to FSEIS Contentions (Apr. 23, 2014) at 12 – evidently recognizing that, if the CEQ regulations are faithfully applied, its position must fail. This argument also must fail, as courts have uniformly ruled independent agencies, including the NRC, are subject to the CEQ requirements. *See, e.g., Brodsky*, 704 F.3d at 120 n.3 (2d Cir. 2013) ("The weight of authority . . . holds CEQ regulations binding on federal agencies," including NRC) (citations omitted); *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 318-19 (4th Cir. 2009) (granting relief due to independent agency's failure to comply with CEQ regulations); *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1032-34 (9th Cir. 2006) (applying CEQ regulation to NRC).

guidance, the obligation to collect comprehensive baseline water quality data *before* issuing a Final EIS or a license becomes even more apparent. Thus, while SEI and Staff do not dispute the obligation to engage in the data collection efforts and establishment of baseline water quality levels extensively detailed in the NUREG Report, their assertion that it is entirely appropriate to collect all this data *later*, after the NEPA and licensing process are complete, makes no sense.

As noted, the purpose of the extensive efforts required in the NUREG Report is to characterize the "potential effects" of the project on ground-water and surface-water. NUREG Report § 2.7.1. *But that is precisely what the NEPA process is for* – to evaluate the potential environmental effects associated with a federally-approved project before a decision is made. Indeed, the fact that NEPA requires the collection of necessary information *before* a decision is made, and that the NEPA process is necessary to *inform* such decision-making, is one of the most basic, bedrock NEPA principles. *E.g., Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (explaining that the CEQ regulations "require federal agencies to integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values") (citations omitted); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that the EIS requirement "ensures that the agency, *in reaching its decision*, will have available, and will carefully consider, *detailed information* concerning significant environmental impacts") (emphasis added).

Only with that data can an agency disclose and consider the environmental impacts of both its proposed action and reasonable alternatives. Accordingly, it is evident that the data collection efforts required under the NUREG Report and the NRC's regulatory scheme must be conducted *as part of the NEPA process,* not after the NEPA process is completed and the license is issued.

B. Although the NEPA Process Is Complete And The License Has Issued, Staff And Strata Have Neither Collected Comprehensive Baseline Water Quality Data Nor Established Water Quality Baselines.

The NRC has issued the final FSEIS and the license to Strata. *See supra* at 7. However, despite completing the NEPA and licensing processes, it is undisputed that the requisite baseline water quality information has not yet been collected, and baseline levels have not been established. As Staff explains in the FSEIS, at some point in the *future* SEI will "install a monitoring-well ring around the perimeter of each wellfield as well as monitoring wells in the underlying and overlying aquifers," which will be used for "sampling and analysis of ground water." FSEIS at 2-25. This *future* "sampling and analysis [will] be used to *calculate, using robust statistical procedures, groundwater protection standards* . . . ." *Id.* (emphasis added).

<u>APPROPRIATE REMEDY</u>

Where, as here, an agency has made a decision without completing the environmental review process mandated by NEPA, the appropriate remedy is to vacate the decision, and remand to the agency for further proceedings. *See, e.g., Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs,* 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005); *Louisiana Energy Services, L.P.,* CLI-98-3, 47 N.R.C. 77, 106-110 (1998) (remanding for consideration of mitigation measures).

Here, the Board should grant summary disposition to Joint Intervenors, vacate the SEI ISR license and FSEIS ROD, and remand to the agency to bring itself into compliance with applicable legal requirements.

CONCLUSION

For the foregoing reasons, Joint Intervenors respectfully request that the Board grant their motion for summary disposition of contention 1.[5]

Respectfully submitted,

s/ (electronically signed)
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

/s/ Geoffrey H. Fettus
Geoffrey H. Fettus, Senior Attorney
Natural Resources Defense Council, Inc.
1152 15th St., NW, Suite 300
Washington, D.C. 20005
Tel: (202) 289-6868/Fax: (202) 289-1060
Email: gfettus@nrdc.org

Counsel for NRDC

/s/ Shannon Anderson
Shannon Anderson, Staff Attorney
Powder River Basin Resource Council
934 N. Main St.
Sheridan, WY 82801
Tel: (307) 672-5809/Fax: (307) 672-5800
Email: sanderson@powderriverbasin.org

Counsel for Powder River Basin Resource Council

Date: June 13, 2014

---

5 While the Board may – and should – grant Summary Disposition on contention 1 to Joint Intervenors at this time, there is no grounds on which the Board could grant Summary Disposition to Staff or SEI on this contention. Even were the Board to conclude that the term "construction" prohibits the data collection efforts Joint Intervenors assert is necessary during the NEPA process, there are two other aspects of contention 1 that would require resolution of factual disputes in the evidentiary hearing.

First, the Board would have to resolve whether the water quality data relied upon in the FSEIS was collected in a "scientifically defensible manner, using proper sampling methodologies," FSEIS Order, App. A at 1, a factual dispute unsuitable for summary disposition. Second, Joint Intervenors have raised concerns as to whether the post-licensing baseline data collection effort required by the license will actually collect baseline data, given the contamination risks associated with collecting baselines in a disturbed area, after operations have commenced, *id.* at 6-7 – another factual issue that will require resolution at the hearing.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	Docket No. 40-9091-MLA
	)	
STRATA ENERGY, INC.,	)	ASLBP No. 12-915-01-MLA
	)	
(Ross In Situ Recovery Uranium Project)	)	June 13, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing INTERVENORS' MOTION FOR SUMMARY DISPOSITION ON ENVIRONMENTAL CONTENTION 1 in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 13th day of June 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Howard M. Crystal (electronic signature)

Date: June 13, 2014