

June 13, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket No. 40-9091-MLA
STRATA ENERGY, INC.)
) ASLBP No. 12-915-01-MLA-BD01
(Ross In Situ Recovery Uranium Project))

NRC STAFF'S MOTION FOR SUMMARY
DISPOSITION OF CONTENTION 4/5A

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205 and the Atomic Safety and Licensing Board's (Board's) Order Granting Requests to Revise Dispositive Motion Briefing Schedule; Revised General Schedule, dated June 2, 2014 (Revised General Scheduling Order), the staff of the U.S. Nuclear Regulatory Commission (Staff) files this motion for summary disposition of Natural Resources Defense Council's (NRDC) and Powder River Basin Resource Council's (PRBRC) (collectively Joint Intervenors or Intervenors) Contention 4/5A, as admitted by the Board. Attached to this motion is a separate Statement of Material Facts (Staff Attachment 1), to which the Staff contends there is no genuine issue to be heard.

Summary disposition is warranted on the grounds that there exists no genuine issue of material fact relevant to the contention, and, under applicable regulations, the Staff is entitled to a decision as a matter of law. Specifically, Contention 4/5A is a challenge to Strata Energy, Inc.'s (Strata's or the Applicant's) Environmental Report (ER), and the ER has been superseded by the Staff's Draft Supplemental Environmental Impact Statement (DSEIS) and Final Supplemental Environmental Impact Statement (FSEIS). Included in the DSEIS and FSEIS are discussions that were omitted in the ER and were the focus of Contention 4/5A, and there are no admitted contentions based on those discussions in the DSEIS and FSEIS. The Staff is

therefore entitled to summary disposition as a matter of law, and the Board should dismiss Contention 4/5A.

BACKGROUND

On January 4, 2011, Strata submitted an application for a combined NRC source and 11e.(2) byproduct material license.¹ As detailed in the Staff's Response to Joint Petitioners' initial hearing request, Strata's license would involve the construction and operation of an *in situ* uranium recovery and processing facility (ISR) in Crook County, Wyoming.² Along with its application for an NRC license, Strata submitted a Technical Report (TR) supporting its application and an Environmental Report (ER) addressing its proposed facility's impact on the environment. The ER, which is required by NRC regulations in 10 C.F.R. Part 51, helps inform the Staff's independent review of a license application and thereby helps the Staff meet the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*³

On October 27, 2011 the Intervenors filed a petition to intervene and request for a hearing wherein they proffered five contentions, characterized by the Board as "environmental/NEPA" contentions.⁴ The Board admitted four contentions, as reformulated by

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

² See NRC Staff Response to Petition to Intervene and Request for Hearing by the Natural Resources Defense Council & Powder River Basin Resource Council at 1-2 (Dec. 5, 2011).

³ Subsequent to Strata's submission of its ER in 2011, Strata provided additional information relevant to the Staff's NEPA review. In March 2012, Strata submitted responses to the Staff's requests for additional information (RAIs) pertaining to the ER. Letter from Mal James, Strata Energy, Inc., to John Saxton, NRC (Mar. 30, 2012) (ADAMS Accession No. ML121030406).

⁴ Petition to Intervene and Request for Hearing by the Natural Resources Defense Council & Powder River Basin Resource Council (Oct. 27, 2011) (Intervention Petition); *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-12-3, 75 NRC 164, 192 (2012).

the Board in its February 10, 2012 order.⁵ The contentions admitted by the Board challenged the application's characterization of baseline groundwater quality (Environmental Contention 1); its analysis of environmental impacts that will occur if the Applicant cannot restore groundwater to primary or secondary limits (Environmental Contention 2); the adequacy of the hydrological information used to demonstrate the Applicant's ability to contain groundwater fluid migration (Environmental Contention 3); and the adequacy of the application's assessment of cumulative impacts of the proposed action and the planned Lance District expansion projects (Environmental Contention 4/5A).⁶

On March 21, 2013, the Staff issued a DSEIS for public comment.⁷ The DSEIS addressed environmental impacts related to the construction of the Ross facility and ISR operations at the site, as well as impacts from the restoration of aquifers used during ISR operations and decommissioning of the site. After issuance of the DSEIS, the Intervenors sought to amend their admitted contentions to apply to the Staff's DSEIS and to add two new environmental contentions.⁸ Resubmitted Contentions 1 through 4/5A addressed the same issues as the contentions previously admitted in this hearing – baseline groundwater quality, restoration of groundwater quality, fluid migration, and cumulative impacts – while new Contention 5 raised the new claim that the DSEIS improperly segmented the scope of the proposed federal action, which led to a failure to consider the environmental impacts of, and appropriate alternatives to, the Applicant's actual proposed project.

⁵ *Id.* at 210 & Appendix A.

⁶ *Id.*

⁷ *Supplemental Environmental Impact Statement for the Ross In-Situ Uranium Recovery Project in Crook County, Wyoming*, 78 Fed. Reg. 19,330 (Mar. 29, 2013).

⁸ Natural Resources Defense Council's & Powder River Basin Resource Council's Joint Motion to Resubmit Contentions & Admit One New Contention in Response to Staff's Supplemental Draft Environmental Impact Statement, at 1 (May 6, 2013).

On July 26, 2013, the Board admitted “resubmitted” Contentions 1 through 3, finding that these contentions challenged information in the DSEIS that was sufficiently similar to information in Strata ER.⁹ In so doing, the Board found that the contentions “migrated” from the ER to the DSEIS.¹⁰ The Board declined to migrate admitted Contention 4/5A to the DSEIS, leaving it admitted as against the ER, and rejected the Intervenor’s remaining contention.¹¹

On February 28, 2014, the Staff issued the FSEIS for the Ross Project.¹² The FSEIS updated the information in the DSEIS and the Staff’s analysis of environmental impacts. The FSEIS also added a new Appendix B, which presented public comments on the DSEIS and the Staff’s responses to the comments. On March 31, 2014 the Intervenor filed a motion wherein the Intervenor sought to migrate their admitted contentions to the Staff’s FSEIS or, in the alternative, to amend their admitted contentions to apply to the FSEIS.¹³ The Intervenor also sought admission of two new environmental contentions. On May 23, 2014, the Board issued an order allowing Contentions 1 and 3 to migrate from the DSEIS to the FSEIS, transforming the contentions into FSEIS-related contentions.¹⁴ The Board also admitted Contention 2 as an amended contention challenging the FSEIS.¹⁵ The Board declined to migrate admitted

⁹ *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-13-10, 78 NRC __, __ (2013).

¹⁰ *Id.* at __ (slip op. at 13, 15, 17).

¹¹ *Id.* at __ (slip op. at 20).

¹² *Final Supplemental Environmental Impact Statement; Issuance – Proposed Ross Project in Crook County Wyoming for In-Situ Leach Uranium Milling Facilities*, 79 Fed. Reg. 13,683 (Mar. 11, 2014). The FSEIS is Supplement 5 to NUREG-1910 (ADAMS Accession No. ML14056A096).

¹³ Natural Resources Defense Council’s & Powder River Basin Resource Council’s Joint Motion to Migrate or Amend Contentions, and to Admit New Contentions in Response to Staff’s Final Supplemental Environmental Impact Statement, at 1 (Mar. 31, 2014) (“Motion”).

¹⁴ Order (Ruling on Motion to Migrate/Amend Existing Contentions and Admit New Contentions Regarding Final Supplement to Generic Environmental Impact Statement) (May 23, 2014) (unpublished) (FSEIS Order) (ADAMS Accession No. ML14143A184).

¹⁵ *Id.* at 2.

Contention 4/5A to the FSEIS or to admit it as an amended contention, thereby leaving it admitted as against the ER. Finally, the Board rejected the Intervenors' two new contentions.¹⁶

DISCUSSION

1. Legal Standards

This hearing is being conducted under the procedures in Subpart L of 10 C.F.R. Part 2. The standards for summary disposition under Subpart L are the same as those in Subpart G, *Rules for Formal Adjudications*.¹⁷ A party is entitled to summary disposition as to all or any part of the matters involved in the proceeding "if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that 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."¹⁸

The movant bears the initial burden of showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials that accompany its dispositive motion.¹⁹ The moving party need not, however, submit affidavits with its motion.²⁰ If the opposing party fails to counter each adequately supported material fact with its own statement of material facts in dispute and

¹⁶ *Id.*

¹⁷ 10 C.F.R. § 2.1205(c) ("In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part").

¹⁸ 10 C.F.R. § 2.710(d)(2).

¹⁹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999).

²⁰ 10 C.F.R. § 2.1205 does not mention affidavits. The NRC's summary disposition rule for formal adjudications in Subpart G of Part 2 states that "[a]ny party to a proceeding may move, *with or without supporting affidavits*, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.710(a) (emphasis added).

supporting materials, the movant's facts will be deemed admitted.²¹ "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."²² Also, "[o]nly disputes over facts that might affect the outcome' of a proceeding would preclude summary disposition."²³ Where a contention presents essentially a legal issue, summary disposition may be "the appropriate vehicle for resolution" of the contention.²⁴

In addition, the Commission will reject attempts to add new arguments in an answer to a summary disposition motion that could have been raised earlier.²⁵ In *Pilgrim*, the new arguments were rejected because they were not fairly encompassed by the contention as originally pled and admitted and because the intervenor did not attempt to amend the contention to add the new arguments.²⁶

Where a contention alleges that information is missing from an application but the applicant later provides the information through RAI responses, the contention becomes moot, and the Board should grant summary disposition on those grounds.²⁷ Even if an intervenor challenges the validity of the new information, this will not defeat the motion for summary disposition.²⁸ If the intervenor seeks to challenge the applicant's new information, it must file a

²¹ *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102-03. See also 10 C.F.R. § 2.710(b) ("[A] party opposing the motion may not rest upon the mere allegations or denials of his answer," but rather, "must set forth specific facts showing that there is a genuine issue of fact").

²² *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

²³ *Pilgrim*, CLI-10-11, 71 NRC at 297 (quoting *Liberty Lobby*, 477 U.S. at 248).

²⁴ *U.S. Dept. of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC 580, 591 n.65 (2009).

²⁵ See *Pilgrim*, CLI-10-11, 71 NRC at 308-310.

²⁶ *Id.* at 310.

²⁷ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 60 NRC 134, 182 (2005).

²⁸ *Private Fuel Storage*, LBP-99-23, at 493.

new or amended contention.²⁹ The new or amended contention must be timely filed and meet the NRC's contention admissibility standards.³⁰

2. Discussion

As explained below, the Board should resolve Contention 4/5A in favor of the Staff because it involves a challenge to the ER, and the ER has been superseded by the Staff's DSEIS and FSEIS. The DSEIS and FSEIS contains the analyses that the Intervenors had claimed were missing in the original contention, and there are currently no admitted contentions challenging those analyses.³¹

To determine whether there is a genuine issue of material fact, it is important to determine what issues are in dispute. Under NRC practice, the issues in dispute are

²⁹ *Id.*

³⁰ 10 C.F.R. § 2.309(c)(1), (f)(1), and (f)(2). Although summary disposition is typically applied to contentions of omission, neither NRC rules nor Commission precedent forecloses a Board from granting summary disposition on a contention of adequacy. To the contrary, the Board has suggested that summary disposition is appropriate where the applicant subsequently addresses an alleged inadequacy in its application that is the basis for the contention. See *Oyster Creek*, LBP-06-16, 63 NRC at 742 n.7 (“AmerGen’s commitment to perform periodic [ultrasonic testing] measurements would have mooted the ‘omission’ component of the contention, but not necessarily the ‘substantive’ component (unless AmerGen committed to perform [ultrasonic testing] measurements consistent with the contention’s prescribed frequency).”). In other words, the contention of adequacy *would have been subject to summary disposition* if the applicant committed to performing the specified measurements.

³¹ Additionally, summary disposition is warranted because it will expedite the hearing. The resolution of Contention 4/5A at this stage will expedite the hearing. See 10 C.F.R. § 2.710(d)(1) (stating that the Board need not consider a summary disposition motion “unless its resolution will serve to expedite the proceeding if the motion is granted”). Litigating this contention would require the parties to spend additional time addressing the requirements of license applications – the relevance of which has been superseded by issuance of the DSEIS and FSEIS – as opposed to discussing the Staff’s licensing documents that are pertinent the current stage of the licensing process. The parties would spend additional time addressing these issues in the evidentiary hearing and in their proposed findings of fact and law. The evidentiary hearing would likely take longer, and the Board’s decision on the merits of the contentions might take longer to prepare. In brief, resolving Contention 4/5A now will help expedite resolution of the hearing.

determined by the scope of the admitted contention.³² The scope of a contention is defined both by its terms and its bases.³³

An Applicant is required to submit an ER with its application to assist the Staff in its environmental review.³⁴ This information is used by the Staff in the development of its environmental licensing documents to meet the requirements of the National Environmental Policy Act (NEPA).³⁵

As admitted by the Board, Contention 4/5A challenges the ER's evaluation of cumulative impacts, including the impacts on water quality, that may result from the Applicant's proposed operations in the Lance District expansion project. The Intervenors contended that the ER "fail[ed] to analyze how much water will be used by the Ross Project operations in the long term and instead only offers several partial and conflicting estimates of possible groundwater consumption."³⁶ The Intervenors additionally contend that the ER does not consider the "full cumulative scope of the Ross-Lance project" because the foreseeable impacts of future proposed developments of additional satellite facilities are not analyzed.³⁷

Since the original admission of Contention 4/5A against the ER, Contention 4/5A has been mooted by both the Staff's DSEIS and FSEIS. Both the DSEIS and FSEIS contain the analyses that the Intervenors contended were missing from the ER. Both the DSEIS and FSEIS contain a discussion of aquifer restoration, wherein the Staff assumed, for the purposes of the environmental analysis, that Strata would use the same techniques for its satellite sites.³⁸ The

³² See *Pilgrim*, CLI-10-11, 71 NRC at 297.

³³ *Id.*

³⁴ 10 C.F.R. § 51.45.

³⁵ See Standard Review Plan for In Situ Leach Uranium Extraction License Applications, NUREG-1569 at 1 (2003).

³⁶ Intervention Petition at 25.

³⁷ *Id.* at 28.

DSEIS and FSEIS also contain a qualitative evaluation of the drawdown in the Lance and Fox Hills Formations, consumption rates, and consideration of recharge rates and mitigation, resulting in a determination that the environmental impact would be “SMALL.”³⁹ The DSEIS and FSEIS provide an evaluation of the cumulative impacts of the more extensive “Lance District Development,” finding that cumulative impacts to groundwater quality would only occur in the case of excursions.⁴⁰ Because excursions from the Ross Project are unlikely, and would be remedied, and because the dissolved metals would precipitate, the Staff determined that the cumulative impacts of reasonably foreseeable developments on groundwater quality would be “SMALL.”⁴¹ Finally, the DSEIS and FSEIS contain an explanation that groundwater quality impacts from the Ross Project would be unlikely to reach far enough to have a cumulative groundwater quality impact with impacts from the reasonably foreseeable Lance District ISR projects.⁴²

Further, there are no admitted contentions challenging the Staff’s cumulative effects of groundwater quality and quantity analyses in the DSEIS and FSEIS. While the Intervenors sought to migrate Contention 4/5A to both the DSEIS and FSEIS, the Board refused, acknowledging the addition of the above-mentioned analyses. The Board stated “the DSEIS discussion of the cumulative impacts of groundwater quantity and quality differs substantially from the SEI ER As a consequence, the migration tenet is not applicable for this

³⁸ NUREG-1910, Supp. 5, Draft Report for Comment, Environmental Impact Statement for the Ross ISR Project in Crook County, Wyoming; Supplemental to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities, at 2-32 to 2-34 (Mar. 2013) (ADAMS Accession No. ML13078A036); NUREG-1910, Supp. 5, [EIS] for the Ross ISR Project in Crook County, Wyoming; Supplement to the Generic [EIS] for *In-Situ* Leach Uranium Mining Facilities, at 2-34 to 2-37 (Feb. 2014) (ADAMS Accession No. ML14056A096).

³⁹ DSEIS at 5-23 to 5-25; FSEIS at 5-24 to 5-25.

⁴⁰ DSEIS at 5-22 to 5-27; FSEIS at 5-29.

⁴¹ *Id.*

⁴² DSEIS at 5-27; FSEIS at 5-30.

contention.”⁴³ As such, the only challenge to the cumulative effects analysis of groundwater quality and quantity is to the Applicant’s ER, and not to the Staff’s DSEIS or FSEIS. Therefore, Contention 4/5A has been mooted by the Staff’s issuance of the DSEIS and FSEIS and should be dismissed in its entirety.

CONCLUSION

For the reasons stated above, there are no material facts in dispute, and the Staff is entitled to summary disposition as a matter of law. Contention 4/5A should be dismissed in its entirety.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 13th day of June 2014

⁴³ LBP-13-10, 78 NRC at __ (slip op. at 21). See also FSEIS Order at 13.

STAFF ATTACHMENT 1

June 13, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket No. 40-9091-MLA
STRATA ENERGY, INC.)
) ASLBP No. 12-915-01-MLA-BD01
(Ross In Situ Recovery Uranium Project))

STATEMENT OF MATERIAL FACTS
ON WHICH NO GENUINE DISPUTE EXISTS

The staff of the U.S. Nuclear Regulatory Commission (Staff) submits, in support of its motion for summary disposition of Contention 4/5A, this statement of material facts, to which the Staff contends that there is no genuine issue to be heard.

1. On February 10, 2012, the Atomic Safety and Licensing Board (Board), issued a Memorandum and Order admitting, in part, Intervenors' Contentions 4 and 5, and combining them into one new Contention 4/5A.¹
2. As admitted by the Board, Contention 4/5A claims that the Environmental Report "fails to adequately assess cumulative impacts of the proposed action," including impacts on water quantity, and the cumulative impacts of the planned Lance District expansion project.²

¹ Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 199-204 (Feb. 10, 2012).

² Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-13-10, 78 NRC __, __ (July 26, 2013) (slip op. App. A at 1-2).

3. On March 21, 2013, the Staff issued its Draft Supplemental Environmental Impact Statement (DSEIS) for the SEI Ross ISR Uranium Project Site.³
4. The DSEIS contained a discussion of aquifer restoration.⁴
5. The DSEIS contained a qualitative evaluation of the impacts of groundwater use, including drawdown in the Lance and Fox Hills Formations.
6. The DSEIS provided a description of consumption rates, recharge rates, and mitigation measures.⁵
7. The DSEIS determined that the environmental impact would be “SMALL.”⁶
8. The DSEIS contained an evaluation of the cumulative impacts caused by the Lance District ISR projects.⁷
9. The DSEIS stated that “cumulative impacts to groundwater quality would only occur in the case of Ross Project excursions, and because Ross Project excursions would be unlikely, would be remedied, and the dissolved metals would precipitate, the cumulative impacts would be ‘SMALL.’”⁸
10. The DSEIS stated that groundwater quality impacts from the Ross Project “would be unlikely to reach far enough to have a cumulative groundwater quality impact with impacts from the reasonably foreseeable Lance District ISR projects.”⁹

³ See NUREG-1910, Supp. 5, [Draft EIS] for the Ross ISR Project in Crook County, Wyoming; Supplement to the Generic [EIS] for *In-Situ* Leach Uranium Mining Facilities, (Mar. 2013) (ADAMS Accession No. ML13078A036).

⁴ *Id.* at 2-32 to 2-34.

⁵ *Id.* at 5-23 to 5-25.

⁶ *Id.*

⁷ *Id.* at 5-22 to 5-27.

⁸ *Id.*

⁹ *Id.* at 5-27.

11. There are no currently admitted contentions that challenge the Staff's cumulative impact analysis in the DSEIS.
12. On February 28, 2014, the Staff issued its Final Supplemental Environmental Impact Statement (FSEIS) for the SEI Ross ISR Uranium Project Site.¹⁰
13. The FSEIS stated "the drawdown in the Lance and Fox Hills Formations, consumption rates, and consideration of recharge rates and mitigation, resulting in a determination that the environmental impact would be 'SMALL.'"¹¹
14. The FSEIS evaluated the cumulative impacts of the more extensive "Lance District Development," finding that cumulative impacts to groundwater quality would only occur in the case of excursions.¹²
15. The FSEIS stated that, because excursions from the Ross Project are unlikely, and would be remedied, and because the dissolved metals would precipitate, the cumulative impacts would be "SMALL."¹³
16. The FSEIS stated that the groundwater quality impacts from the Ross Project would be unlikely to reach far enough to have a cumulative groundwater quality impact with impacts from the reasonably foreseeable Land District ISR Projects.¹⁴
17. There are no currently admitted contentions that challenge the Staff's cumulative impact analysis in the FSEIS.

¹⁰ See NUREG-1910, Supp.5, [EIS] for the Ross ISR Project in Crook County, Wyoming; Supplement to the Generic [EIS] for *In-Situ* Leach Uranium Mining Facilities (Feb. 2014) (ADAMS Accession No. ML14056A096).

¹¹ *Id.* at 5-24 to 5-25.

¹² *Id.* at 5-29.

¹³ *Id.*

¹⁴ *Id.* at 5-30.

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)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 4/5A" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 13th day of June, 2014.

/Signed (electronically) by/

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Date of Signature: June 13, 2014