

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)	)	September 26, 2014

**NATURAL RESOURCES DEFENSE COUNCIL’S &  
POWDER RIVER BASIN RESOURCE COUNCIL’S  
OPPOSITION TO MOTIONS IN LIMINE**

Mischaracterizing Joint Intervenors’ submissions, Licensee Strata Energy, Inc. (SEI or Strata) has filed “motions in limine” requesting the Board to “strike from the administrative record references . . . to URL websites” in Dr. Lance Larson’s testimony, and to disallow reliance on additional .pdfs generated from the Storymaps at the evidentiary hearing, as provided in the Board’s September 10, 2014 Order. *See* SEI Motions in Limine (“SEI Mot.”) (Sept. 23, 2014). Additionally, Staff has filed an answer to Joint Intervenors’ Motion for Clarification and Response to Strata’s motions in limine regarding admissibility of the story map applications. (Staff Answer”)(Sept. 24, 2014). Staff’s Answer exceeds the reach of SEI’s motions, stating it “opposes the Intervenors’ request, through their motion for clarification, to admit the story map applications and any PDF screenshots generated from the applications into evidence.” Staff Answer at 3. SEI’s motion should be denied and Staff’s Answer has no merit, for the reasons described below.

## BACKGROUND

On August 25, 2014 Joint Intervenors submitted their direct testimonies, including the testimony of Dr. Lance Larson. In his testimony Dr. Larson explained he had prepared two Storymaps, available on the internet, utilizing NRC' own data and showing highly relevant water quality data from two other ISL sites. Dr. Larson provided the URLs for those storymaps, and several pages of them were reproduced in his testimony. Although the Board's July 25, 2014 Order setting forth directives in advance of the hearing provided that any objections to the submission of pre-trial materials must be filed within seven days of the submission, neither SEI nor Staff objected to Dr. Larson's testimony or the references to the URLs.

On September 10, 2014 the Board issued an Order directing Joint Intervenors to correct several aspects of their filings. Of relevance here, the Board explained Joint Intervenors could not make exhibits of websites, as they had with JTI005, without also submitting .pdf exhibits of the materials relied upon. Sept. 10, 2014 Order at 2. The Board further directed that if such .pdfs are submitted, the testimonies should be updated to refer to such materials. *Id.* Importantly, the Board neither authorized nor directed any other changes to the testimonies.

On September 16, 2014 Joint Intervenors refiled the relevant exhibits in compliance with the Board's Order. These filings included .pdfs containing all of the NRC spreadsheets that are contained in the NRC websites to which Joint Intervenors had referred, and a sample of .pdfs representing pages from the Storymaps on which Dr. Larson relies and presents in the body of his testimony. Joint Intervenors also updated the testimonies to include the citations to and reliance on the .pdfs without otherwise

altering the previously submitted testimonies. The same day Joint Intervenors filed a Motion for Clarification seeking the Board's permission to also rely on the applications containing the entire Storymaps. Joint Int. Mot. for Clarification (Sept. 16, 2014).

On September 19, 2014 the Board addressed Joint Intervenors' motion by explaining that while it would not accept the websites into evidence, at the hearing Joint Intervenors may rely on additional .pdfs generated from the websites if certain criteria are satisfied. Sept. 19, 2014 Order at 5, 6.

On September 23, 2014, SEI filed motions in limine seeking to strike the references to the URLs contained in Joint Intervenors' revised testimonies, and to bar Joint Intervenors from generating any additional .pdfs from the Storymaps at the hearing. SEI Mot. at 4, 5.

On September 24, 2014, the Board filed an order directing the parties to respond prior to noon Eastern Time on Friday, September 26, 2014 and stating the Board may entertain oral arguments from the parties regarding this motion prior to making a determination about the admission of the evidentiary material at issue. September 24 Order at 4.

That same day, Staff filed a response "in favor of Strata's motion in limine and object[ing] to the admission of the use of the story map applications during the course of the evidentiary hearing and any admission of the story map applications into evidence, including the introduction of new exhibits based on the manipulation of the story map applications during the course of the hearing." Staff Resp. at 2. Consistent with the Board's September 24 Order, Joint Intervenors file a brief response today.

## DISCUSSION

Joint Intervenors' have made every effort in refileing the testimonies to comply with the Board's September 10, 2014 Order. Thus, they have filed all the spreadsheets from the NRC databases as .pdfs (JTI005A-R, 1-356), and have also filed all the Storymap pages directly discussed by Dr. Larson in his testimony as .pdfs (JTI005B-R, 1-36). Finally, they have added references to those specific .pdf exhibits to the relevant testimonies.

In carrying out the Board's Order, however, Joint Intervenors did not remove all *references* to the Storymaps, which would have required a major reworking of the testimonies to explain the use and relevance of the .pdfs found in JTI005A, B-R. And as is patently clear, reworking the refiled testimonies would have inevitably raised objections of prejudice and late filing. Rather, Joint Intervenors simply *added* the appropriate references to the appropriate .pdfs.

In their motions in limine, SEI does not object to the *discussion* of the Storymaps. Rather, the objection is more narrowly directed at the references to the URLs themselves, which SEI asks the Board to strike at this time. The Board should deny the request for two reasons.

*First*, contrary to SEI's mischaracterization, by including the URLs in Dr. Larson's testimony Joint Intervenors are not making the websites "part of the evidentiary record." SEI Mot. at 2. To be sure, when the revised testimony was refiled per the Board's September 10 Order, Joint Intervenors also submitted a motion for clarification asking the Court to make the websites exhibits. However, the Board denied that request

for the reasons explained in its Order, requiring any exhibits that become part of the record to be .pdfs. Order of Sept. 19, 2014.<sup>1</sup>

Accordingly, the URLs themselves in Dr. Larson's direct testimony are not exhibits, or part of the evidentiary record, but rather simply inform the Court of materials Dr. Larson relied on to form his expert opinion. Since it is well-accepted that an expert may rely on facts not in evidence in forming his or her opinions, there is no infirmity in the reference to the websites contained in Dr. Larson's testimonies, nor in their use in his testimony as long as the visualization he presents can be captured in a .pdf. *See* Fed. Rule of Evidence 703; *see also, e.g., United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) ("Under Rule 703, experts can testify to opinions based on inadmissible evidence, including hearsay, if experts in the field reasonably rely on such evidence in forming their opinions."); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 181-182 (4th Cir. 2010) (upholding expert's opinion based on spreadsheets prepared by litigants and counsel). Once again, in Joint Intervenors' view it would have contravened the Board's directives for Joint Intervenors to have reworked the testimonies to remove references to the websites, the information from which is integral to Dr. Larson's testimonies.

*Second*, Joint Intervenors do not believe the Board intended to entertain this kind of motion at this late stage. Evidentiary objections were due within seven days of submissions. July 25, 2014 Order at 3. Yet, here SEI and Staff are objecting – almost *thirty days later* – to portions of testimonies submitted to the Board on August 25, 2014, and as to which SEI and Staff raised no objection at that time. Moreover, even as to

---

<sup>1</sup> If at the hearing the Board deems it appropriate for Joint Intervenors to submit a revised exhibit list without reference to the story maps links in JTI005-R, we have no objection to that and would be happy to do so if that clarifies that JTI005-R is comprised of JTI005A-R (the NRC spreadsheets) and JTI005B-R (the .pdf screen shots of the story maps).

those objections, the Board's Order provides that the objecting party is to provide notice of which "materials will be the subject of an authenticity and/or admissibility objection at the evidentiary hearing," *id.* – not to seek relief in advance of the hearing, as SEI and Staff have done here.

Finally, as regards SEI's and Staff's objection to the portion of the Board's September 19, 2014 Order providing a mechanism for Joint Intervenors to rely on additional .pdfs generated from the Storymaps at the evidentiary hearing if it should be necessary or relevant in light of the Board's examination, SEI's and Staff's concerns are premature. In the event SEI or Staff objects to a particular additional exhibit, it may raise those concerns at the hearing, as Joint Intervenors will be entitled to do should SEI or Staff seek admission of additional exhibits at that time. Indeed, Dr. Larson's testimony explains in detail how the JTI005B-R .pdfs were generated from NRC's own data and he will be available at the hearing to address any questions the Board may have on their authenticity or the depiction of NRC's own data in the .pdfs. There is no reason the Board needs to decide *in advance* whether such materials are admissible, and SEI and Staff provide no basis for the Board doing so at this time.

As regards Staff's concern with its opportunity to cross-check the *accuracy* of any additional .pdfs that may be generated at the hearing, it bears noting again that Staff has not raised any concerns with the .pdfs that Joint Intervenors have already submitted based on the Storymaps, and Joint Intervenors are confident that the Board will be satisfied with the accuracy of any additional .pdfs from the Storymaps that may be generated. However, Joint Intervenors also have no objection to affording Staff (and SEI) seven days from the submission of such additional .pdfs to raise any such objection. Since, in

fact, Dr. Larson will not be changing the underlying data, as Staff intimates, no such objections will be lodged. However, to the extent Staff (and SEI) seek additional time to ‘confirm’ the accuracy of such .pdfs, this approach would fully address that concern.

### CONCLUSION

For the foregoing reasons, Joint Intervenors respectfully request that the Board deny SEI’s motion.

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](mailto:hcrystal@meyerglitz.com)

/s/ Geoffrey H. Fettus  
Geoffrey H. Fettus, Senior Project  
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](mailto:gfettus@nrdc.org)

*Counsel for NRDC*

Date: September 26, 2014

/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](mailto:sanderson@powderriverbasin.org)

*Counsel for Powder River Basin Resource  
Council*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Natural Resources Defense Council's & Powder River Basin Resource Council's Opposition To Motions In Limine* in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 26<sup>th</sup> day of September 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Geoffrey H. Fettus (electronic signature)

Date: September 26, 2014