NATURAL RESOURCES DEFENSE COUNCIL'S & POWDER RIVER BASIN RESOURCE COUNCIL'S PETITION FOR REVIEW

EXHIBIT 7

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-BD01
	)	
(Ross In Situ Recovery Uranium Project)	)	May 6, 2013

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

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309, and Scheduling Order dated April 12, 2013, Intervenors Natural Resources Defense Council (NRDC) and Powder River Basin Resource Council (PRBRC) hereby move for the admission of updated and amended contentions regarding the Draft Supplemental Environmental Impact Statement (DSEIS) for Strata Energy's proposed Ross Project in-situ leach (ISL)[1] uranium mine issued by Nuclear Regulatory Commission Staff (NRC or the Staff) on March 21, 2013.

NRDC and PRBRC respectfully submit these updates to previously admitted contentions (*i.e.*, Contentions 1-A, 2-A, 3-A, and 4-A), and one new contention. The amended contentions simply assert that the DSEIS fails to address previously-identified inadequacies contained in the applicant's Environmental Report and that NRC Staff failed to adequately address those inadequacies in its DSEIS. The new contention concerns the failure to properly define the major federal action at issue in this DSEIS in light of the now concrete plans and schedule for Strata

[1] In situ leach (ISL) is also referred to as in situ recovery (ISR). For the purposes of this motion, the terms are used synonymously.

Energy's "Lance District Development," and therefore the failure to consider the full scope of the proposed uranium recovery and processing activities at issue.

While recognizing NRC regulations may not require NRDC and PRBRC to resubmit our contentions, we file these resubmitted contentions as all our objections that applied to the ER now apply to the DSEIS. We present them now out of an abundance of caution to preclude any subsequent assertion by the Staff, the Applicant or a reviewing tribunal that Petitioners have not pursued their rights as secured by the U.S. Constitution, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4323 *et seq.*, or regulations promulgated by the Council on Environmental Quality ("CEQ") or NRC. As to this category of contentions, Petitioners raise them at this juncture in order to preserve these issues for further litigation and to create a complete record. These contentions are denoted with an "A" (i.e., Contention 2-A supplements NRDC-PRBRC-2 with arguments under NEPA).

II. BACKGROUND

A. Procedural Background

On October 27, 2011 and pursuant to 10 C.F.R. § 2.309 and the Nuclear Regulatory Commission's (NRC, or Commission) Federal Register notice published at 76 Fed. Reg. 41,308 (July 13, 2011), Petitioners NRDC and PRBRC submitted a Petition to Intervene and Request for a Hearing in the above-captioned matter. To safeguard their and their members' environmental, aesthetic, health-based and economic interests, Petitioners articulated five contentions in their Petition. These contentions address various deficiencies in Strata Energy, Inc.'s (Strata) source materials license application for the proposed Ross In Situ Recovery (ISR) Uranium Project in Crook County, Wyoming.

Following briefing on standing and the admissibility of each contention, the Atomic Safety & Licensing Board (ASLB, or the Board) conducted a day-long hearing on these matters on December 20, 2011. On February 10, 2012, the Board issued LBP-12-3, "Memorandum and Order, Ruling on Standing and Contention Admissibility." This 53-page opinion held that Petitioners had established standing[2] and admitted two of their five contentions in whole while admitting the remaining three in part. *See* LBP-12-3 at 1–2, 18–25, 28, 32, 36, 37, and 39–40. On February 21, both Strata and NRC Staff (or Appellants) filed appeals of LBP-12-3 and argued Joint Petitioners had not demonstrated standing to challenge Strata's application for a license for an in situ uranium recovery project in Crook County, Wyoming. Strata also asked the Commission to eliminate two contentions from the proceeding, should it decline to reverse the Board's standing determination. NRDC and PRBRC opposed both appeals. On May 11, 2012 the Commissioners issued CLI-12-12 and affirmed the Board's standing determination and declined to consider Strata's remaining claims. *See* CLI-12-12 at 1-2.

On March 21, 2013, Staff issued the Draft Supplemental Environmental Impact Statement for the Ross ISR Project (DSEIS). Comments on the DSEIS are due on May 13, 2013 and amended or new contentions on the DSEIS are due this day. *See* Order of Apr. 12, 2013.

B. Legal Standards

Consistent with provisions in 10 C.F.R. § 2.309(f)(2), a timely new or amended contention must be based on information that previously was unavailable, arise from information that is materially different from previous information, and be filed in a timely fashion. 10 C.F.R.

[2] NRDC's and PRBRC's standing was confirmed in this Board's Order of February 2012 and the Commission's Order of May 2012. See LBP-12-3, "Memorandum and Order, Ruling on Standing and Contention Admissibility" at 1–2, 18–25; and CLI-12-12. As such, pursuant to 10 C.F.R. § 2.309(c)(4), NRDC and PRBRC are not required to address standing in this filing.

§ 2.309(f)(2)(i)-(iii). In addition to Section 2.309(f)(2) or (c)(1)'s standards, a new or amended contention must also satisfy the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

NRC regulations dictate that contentions arising pursuant to the National Environmental Policy Act (NEPA) must initially be "based on the applicant's environmental report [ER]." 10 C.F.R. § 2.309(f)(2). If admitted, those contentions may be amended, or new contentions proffered, as long as "there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." *Id.* In the April 12, 2013 Order, the Board set a schedule that new or amended contentions that are properly based on significantly new data or conclusions in the DSEIS will be considered timely if filed on or before May 6, 2013. We file one new contention this day and update our existing, admitted contentions to apply to the Staff's DSEIS.

III. CONTENTIONS

Pursuant to 10 C.F.R. § 2.309, Petitioners offer updates to the previously admitted contentions. Each contention challenges the sufficiency of the DSEIS under NRC regulations, as specified therein, as well as its compliance with NEPA.

The law of admissibility for this proceeding is well established. "[I]n passing on the admissibility of a contention. . . 'it is not the function of a licensing board to reach the merits of [the] contention.'" *Sierra Club v. NRC.*, 862 F.2d 222, 226 (9th Cir. 1988) (quoting *Carolina Power and Light Co.*, 23 N.R.C. 525, 541 (1986)). Instead, the Board evaluates the admissibility of contentions in a manner similar to a federal court's review of claims in a well-pled complaint:

> The relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated; whether it improperly invokes the hearing process by raising non-justiciable issues, such as the propriety of statutory requirements or agency regulations; and whether it raises issues that are appropriate for litigation in the particular proceeding.

Sierra Club, 862 F.2d at 228 (citing *Tex. Utils. Elec. Co.*, 25 N.R.C. 912, 930 (1987) and *Phila. Elec. Co.*, 8 A.E.C. 13, 20–21 (1974)); *see also* LBP-12-3 at 25 and *Crow Butte Res.*, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 at *11, 14 (May 18, 2009) (holding that the applicant's "arguments go to the merits" and that "[w]hether the [petitioner] has proved its claim is not the issue at the contention pleading stage").

Pursuant to 10 C.F.R. § 2.309(f)(2), Petitioners styled their original NEPA contentions as against the ER. S*ee id.* ("On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report."). Because an applicant's ER generally serves as the basis for the Commission's eventual DSEIS, Petitioners raised NEPA considerations at that time in order to preserve any objections if flaws found in the ER also appear in the Draft SEIS. And in fact, those flaws have appeared in the DSEIS, and thus today we submit updates to our previously admitted contentions. In addition, the DSEIS reveals a new concern for which we submit a new Contention.

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

CONTENTION: The DSEIS fails to comply with 10 C.F.R. §§ 51.45, 51.70 and 71, 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

2012) (rejecting agency's refusal to consider the hydrological connectivity between groundwater and surface water).

The DSEIS attempts to address this concern by asserting that the Applicant will be required to "install a ring of monitoring wells around each wellfield" to "allow monitoring of the SM and DM aquifers as well as the OZ aquifer around their perimeters." DSEIS at 4-36, lines 15-18. However, as with the groundwater quality issue more generally, *see supra* at 7-10, the agency cannot avoid studying vital environmental concerns related to a project by promising to collect data on the matter *later*. *Id (citing State of Idaho,* 35 F.3d at 596 (promise to address potential impacts in the future is "no substitute for an overarching examination of environmental problems at the time the [original] decision is made"). Rather, the data must be collected and included in the DEIS to inform the decision to be made.

Contention 3A meets the legal standards described in 10 C.F.R. § 2.309(f)(1). The Board should affirm this updated contention so that Petitioners may argue the merits of their claim that Strata's ER and Staff's DSEIS fails to adequately address the risks of fluid migration.

Environmental Contention 4/5A-A: The DSEIS fails to adequately assess cumulative impacts of the proposed action and the planned Lance District expansion project.

CONTENTION: The DSEIS violates 10 C.F.R. § 51.45, 51.70, 51.71 and 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 the proposed ISL uranium mining operations planned in the Lance District expansion project.[10]

A. Bases and Supporting Evidence, and the Board's Admission of Contention 4/5A.

This admitted contention is supported by the original declaration of Dr. Moran, particularly ¶¶ 7-8, 59-63, 69, 76-78, 96-98. It is further supported by a second declaration from Dr. Abitz filed this day 2d Abitz Decl. ¶¶ 38-43, and by the Declaration of Christopher E. Paine, filed this day as well. The declarations explain the bases for the Contention that the applicant and NRC staff have failed to consider the cumulative effects on the environment, including on groundwater quantity, associated with the full scope of ISL uranium mining anticipated to occur in the foreseeable future in the Lance District.

Our Petition to Intervene explained the legal requirements associated with considering cumulative effects and need not be repeated here. *See* Petition to Intervene at 25, 27-28. The Staff agreed that Petitioners had submitted an admissible contention regarding cumulative impacts associated with groundwater quantity, LBP-12-3 at 38, and the Board admitted that aspect of this Contention, citing the "specific criticisms of SEI's water use and restoration analysis" in the ER, *id.* at 37, which "presents a material dispute with SEI's application that is within the scope of this license proceeding." *Id.* at 38; *see also id.* at 43.

As for other cumulative impacts, the Board also admitted that portion of the original Contention 5 that raised cumulative impacts more generally, rejecting the applicant and Staff's argument that cumulative impacts need not be considered. *Id.* at 40. In particular, the Board

[10] The resubmitted contention is the precise contention admitted by this board in LBP-12-3 on February 10, 2012. The only difference is resubmission with the regulatory cite of 10 CFR §§ 51.70 and 51.71 as it applies to the staff's NEPA responsibilities regarding the DSEIS.

admitted that portion of this Contention concerning the planned expansion of SEI's Lance District ISL program, noting that the ER indicates that "additional facilities would likely operate as satellites of the Ross facility and would utilize the same CCP that SEI proposes to construct for the Ross project." *Id.* at 42. As for the applicant's statement that the expansion poses no greater impacts because the "impacts will be distributed proportionately throughout the region of influence," *id.* at 42, even the Staff – as well as the Board – agreed that the contention was admissible "with regard to the lack of specificity about SEI's planned satellite facilities, and the potential impact resulting from the Ross facility's CPP being used for SEI's additional facilities and possible use of third parties." *Id.* The Board similarly admitted the Contention as to cumulative effects of groundwater quality. *Id.* at 43; *See also* 40 C.F.R. § 1502.22(a) ("If 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."); *see also*, 10 C.F.R. 51.71(d) ("The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered.").

B. The DSEIS's Failure to Resolve Contention 4/5A, Necessitating Contention 4/5A-

The DEIS does not adequately address cumulative impacts. Although the existence of a broader ISR program is recognized, DSEIS at 5-1-3-50, the impacts of this larger program are not analyzed in a manner that allows a consideration of the on-the-ground impacts associated with various impacted aspects of the environment.

For example, with respect to groundwater quantity – an issue the cumulative effects of which the Board has already admitted into this proceeding – the DSEIS contains *one paragraph* summarily stating that the cumulative impacts will be "SMALL," and that any such effects will

be "essentially restored within 24 years after the issuance of the NRC license to the Applicant." *Id.* at 5-25, line 31. However, there is no meaningful quantitative analysis of the projected cumulative consumptive uses of groundwater from uranium mining and other resources extraction activities that draw on the Lance and Fox Hills aquifers, and no *explanation* provided of how restoration will occur, or what it means to characterize the impacts as "small." 2d Abitz Decl. ¶¶ 38-43.

This is inadequate. An agency may not rely on "conclusory or unsupported suppositions," *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1186-87 (D.C. Cir. 2004), and it is insufficient to simply *assert* that an effect will be resolved at some point in the future. Moreover, courts have frequently rejected agency's use of conclusory labels like "small" and "moderate" to characterize impacts, where the agency does not explain the basis for these labels. *E.g. Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 201 (D.D.C. 2008); *Sierra Club. v. Mainella*, 459 F. Supp. 2d 76, 100-01 (D.D.C. 2006).

The cumulative impacts analysis associated with groundwater quality is similarly lacking. DSEIS at 5-25 to 5-26. For this and other impact areas, the cumulative impacts analysis, like the ER, fails to consider the cumulative impacts associated with the more extensive "Lance District Development" that the DSEIS acknowledges is "scheduled" for the area (*Id* Figure 2.6 at 2-8 and t 5-3 to 5-5.) surrounding the "Ross Project." Thus, while the DSEIS recognizes there are "four satellite areas within the Lance District that the NRC staff identifies as reasonably foreseeable," *id.* at 5-3-5, as in the ER the DSEIS fails to consider the cumulative impacts associated with this much larger project. *See* Declaration of Christopher Paine ("Paine Decl.") ¶¶ 23-56.

New Environmental Contention Number 6: NRC has failed to properly define the scope of the proposed major federal action here, which encompasses a much larger project in the same

geographic area, as revealed in the DSEIS and in documents drafted by Strata's Australian parent company, Peninsula Energy, Ltd.

CONTENTION: The DSEIS violates 10 C.F.R. §§ 51.70 and 71, 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 (ISR) activities in the Lance District.

Basis and Discussion:

NEPA requires that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated *in a single impact statement*." 40 C.F.R. §1502.4(a). Proposals meet the standard for a single course of action where they "have similarities that provide a basis for evaluating their environmental consequences together, *such as common timing or geography*." 40 C.F.R. §1508.25(a) (emphasis added). Thus, as the Supreme Court has explained, "when several proposals for . . . actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together" in a single NEPA document. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976).

Here, as has now become evident via a recent review of documents from the Applicant's Australian corporate parent (Peninsula Energy), the "proposed action" over which NRC is conducting this NEPA review is simply one part of a much larger project in the same geographic area. *See* Declaration of Christopher Paine ("Paine Decl.") ¶¶ 23-53. Accordingly, the applicant must prepare an ER, and NEPA review must be completed, on the *entire project*.

In particular, as detailed in the Paine Declaration, in preparing comments on the DSEIS over the past several weeks, Petitioners discovered a series of public statements by Peninsula Energy which reveal the actual scope of the project to be much larger than the scope considered in the DSEIS (and the ER). *Id.* ¶ 23. In these documents Peninsula Energy has repeatedly stated that, contrary to what is analyzed in the ER and DSEIS, it will develop the entire "Lance Project," not just the sub-component called the "Ross Project." *Id.* ¶¶ 23-53.

The declaration summarizes a large number of those documents, but to highlight just a few here, as recently as March, 2013, Peninsula Energy explained that it will develop "the Ross, Kendrick and Barber Production Units feeding a Central Processing Plant with a capacity of 750klbs per annum with the sequential inclusion of the Kendrick and Barber Production Units ramping up over several years to 2.2mlbs per annum steady-state production." Paine Decl. ¶ 34 (*citing* http://www.pel.net.au/images/peninsul---singaefehu.pdf). Indeed, the document makes it clear that the *reason* the applicant has proposed something considerably smaller than its entire proposed project is precisely to avoid a full and complete analysis of the environmental impacts associated with the project as a whole. Thus, the company states:

> All new project area permitting is designed so they are contiguous with the Ross permit area and are deemed amendments to the Ross SML (once issued) rather than standalone applications. *This strategy will significantly reduce the permitting process and timing*.

Id. at 4 (emphasis added). In other words, the company is telling the public, and its shareholders, that *the whole project will be developed*, while it is only analyzing a small portion in the DSEIS. Indeed, the Central Processing Plant (CPP) to be developed under the "Ross Project" may not even constitute an economically viable investment without the revenue assumptions based on exploiting these additional "production units."

This most recent announcement is consistent with a host of statements by Peninsula Energy referring to the development of the much broader "Lance Project." *Id.* ¶¶ 23-53; *see also, e.g., id.* ¶ 35 (discussing production "assumed to be permitted for development at Kendrick and Barber and to follow Ross into production at 12 month intervals feeding the CPP"); *id.* ¶ 23 ("the proposed Ross ISR site . . . forms *a part of the total project area* . . .") (emphasis added).

The DSEIS similarly acknowledges this explicit and broader scope, including:

* the "Ross Amendment," whereby the project is to be expanded to the north and west to increase the operating life of the project by supplying additional yellowcake. DSEIS at 5-3 ("As uranium production from early wellfields within the Ross Project area begins to diminish . . . additional wellfields in the Ross Amendment Area could be brought into production");

* the "Kendrick Satellite Area," which will be contiguous with the Ross Project, and by operating simultaneously will "allow the Applicant to increase its production of yellowcake to approximately 680,000 kg/yr." *Id.;*

* the "Richards Satellite Area," which is contiguous to the Kendrick area, will have "uranium-rich solutions . . . piped to the Rodd Projects' CPP for uranium recovery." *Id.* at 5-5; and

* the "remote IX-only plant" at the "Berber satellite area," whereby "the pregnant, uranium-rich solutions brought to the surface at the Berber satellite area would be treated by IX to yield uranium-loaded resins, which would then be trucked to the Ross Project's CPP for further processing." *Id.*

In light of the actual scope of the project, the applicant must prepare an ER – and then a DSEIS must be prepared – that considers the *entire* major federal action at issue. *E.g. Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 13 (D.D.C. 1998) ("[i]f agency actions are similar in that they share common timing or geography, such actions should also be addressed in the *same environmental document* so as to assess adequately their combined impacts") (emphasis added).

That review must consider the environmental impacts of the entire project. It must also consider reasonable alternatives to that entire project – including, *e.g.*, alternatives whereby something *less* than the entire proposed Lance District ISL mining would occur.[11]

By failing to consider the overall project, the applicant and NRC are unlawfully segmenting the project into smaller parts. *E.g. Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) ("close interdependence" between two aspects of a project warrant review in a single EIS); *Florida Wildlife v. U.S. Army Corps of Engrs.*, 401 F. Supp. 2d 1298, 1318 (S.D. Fla. 2005) (first phase of a project "that was never intended to stand alone" may not be artificially segmented from the larger project that is "conceptualized as an integrated whole, progressing in phases"). Accordingly, the Board should admit this new Contention that the Staff and Applicant have unlawfully segmented this project, and must consider preparing an ER – and then a DSEIS – that considers the *entire* major federal action it intends to undertake in this area.

The Contention Complies With 10 C.F.R. § 2.309

Contention No. 6 complies with 10 C.F.R. § 2.309, which requires Petitioners submitting a new contention to demonstrate that: (a) the information on "which the filing is based was not previously available," (b) the new information is "materially different from the information previously available," and (3) the filing is timely submitted based on "the availability of the subsequent information." 10 C.F.R. § 2.309(c).

[11] The alternatives analysis that will be required for the entire project distinguishes Contention 6 from Contention 4/5A-A concerning cumulative impacts. Thus, even assuming *arguendo* that the full scope of the environmental impacts associated with the entire project can properly considered as part of a cumulative impacts analysis, restricting the scope of the proposed project would constrain the scope of alternatives to exclude, *inter alia*, developing something less than the entire project.

Here, the applicant and NRC Staff have presented the much smaller Ross Project as the proposed action. It was not until reviewing Peninsula Energy materials, and the DSEIS, in recent weeks that Petitioners came to appreciate that the connection between the Ross Project and the applicant's much broader plans for ISL mining in this same geographic area is sufficiently close to warrant consideration in a single EIS. Paine Decl. ¶¶ 22-56; *see also id.* ¶¶ 4-12 (discussing the smaller scope of the project at issue in this proceeding). Thus, since Contention No. 6 is based on materially different information that was not previously available, the Contention is timely.

CONCLUSION

For the foregoing reasons, the Petitioners have demonstrated that their updated contentions and new contention are admissible, and they are entitled to a hearing on these contentions.

Respectfully submitted,

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Date: May 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Joint Motion To Resubmit Contentions & Admit One New Contention In Response To Staff's Supplemental Draft Environmental Impact Statement* and accompanying attachments in the above-captioned proceeding were served via the Electronic Information Exchange (EIE) on the 6th day of May 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Shannon Anderson (electronic signature)

Date: May 6, 2013