UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	March 26, 2015

REPLY OF NATURAL RESOURCES DEFENSE COUNCIL & POWDER RIVER BASIN RESOURCE COUNCIL IN SUPPORT OF PETITION FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD'S JANUARY 23, 2015 INITIAL DECISION DENYING ENVIRONMENTAL CONTENTIONS 1 THROUGH 3, AND INTERLOCUTORY DECISIONS DENYING ENVIRONMENTAL CONTENTIONS 4/5A AND 6/7

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NRC Staff and Strata Energy, Inc. (hereafter Staff/SEI) oppose the Petition for Review on the grounds that Intervenors challenge factual determinations, and the NRC should defer to the Board on every point raised.[1] To the contrary, Intervenors have raised principally *legal* issues that Staff/SEI largely ignore and the Petition should be granted.

1. *As to Contention 1*, Staff/SEI argue because the regulatory scheme authorizes the establishment of Commission Approved Background (CAB) water quality levels *post-license*, there is no basis for Intervenors' argument that the FSEIS "baseline" fails to comply with NEPA. Staff Opp. 11; SEI Opp. 9. This legal non-sequitur is wrong.

The legal question here is not whether CAB must be established pre-license, but whether the existence of this post-license scheme somehow obviates NEPA's "hard look" requirements.[2] It does not. Regardless of post-license activities, NEPA requires Staff to demonstrate the baseline data collected *pre-license* was based on "high quality" data and "accurate scientific analysis."[3] Given the concessions that inaccurate data was collected, *id.* (citing transcripts), Staff failed to meet this burden. *See also* SEI Opp. 14 (asserting that, *post-license*, data will "allow NRC Staff to understand the" actual baseline at the site).

Staff/SEI also offer no substantive defense to the Board's recharacterization of the legal question to be whether *Intervenors* had demonstrated a "facially deficient" baseline, rather than considering whether *Staff* had demonstrated the baseline complies with NEPA.[4] Instead, they

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[1] Staff Ans. to Joint Int. Pet. (Mar. 16, 2015) (Staff Opp.); SEI Opp. To Pet. (Mar. 16 2015) (SEI Opp.). In light of the draconian space constraints prescribed by NRC regulations, whereby Intervenors are afforded only five pages to respond to almost fifty pages, it is impossible to respond to all of the points raised by Staff/SEI. Nonetheless, Intervenors stand by all of the arguments presented in their Petition, and waive no argument.

[2] *In Re Hydro Resources, Inc.*, 63 N.R.C. 1 (2006), is thus inapposite because that decision had nothing to do with NEPA's requirements, but rather only whether establishing CAB post-license complied with the AEA.

[3] *See* Pet. for Review (Pet.) (Feb. 17, 2015) at 10.

[4] Indeed, Staff doubles down on the Board's improper burden-shifting, claiming the pertinent question is whether the Board erred in determining that "NEPA could be satisfied with less information on baseline groundwater quality than was sought by intervenors." Staff Opp. 12. Since the Board rejected the only defense offered against more data collection – *i.e.*, SEI's argument that it was *prohibited* from more sampling due to the

essentially argue NEPA does not apply here *because* of the post-license process. Staff Opp. 11; SEI Opp. 9.[5] Accordingly, they have no response to Intervenors' demonstration that the number of wells used, their locations, and the manner in which the data was collected failed to provide meaningful baseline data. *See* Int. Pet. 12-14. While they *claim* the Board affirmatively found that the data collected provided a meaningful baseline, they never actually address the specific points made in the Petition, which showed that the Board never directly addressed that question.

2. *As regards Contention 2*, while Staff claims NRC precedent permitted the Board to "amend" the NEPA analysis, Staff Opp. 16, none of the precedents cited involved NEPA "amendments" made *after the underlying license was granted*. Rather, in each case the underlying agency decision had yet to be made, and thus any amendments to the NEPA document could still be meaningfully considered in the NRC's ultimate permit decision-making. *Compare, e.g., Indian Point*, CLI-15-6, slip op. at 62 (Mar. 9, 2015) (discussing authority to amend NEPA document during the relicensing adjudicatory process) *with Indian Point License Ren. Appl. Sched.* (showing Indian Point relicensing decision not yet made).[6] Given that NEPA's entire *raison de'tre* is to consider essential information "before decisions are made," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), the Board's approach here – where the NEPA analysis was amended *after the underlying license had already been issued* – cannot be sustained.

"construction rule," *see* I.D. 26 n.17, and never made an affirmative finding that the data collected meaningfully characterized the site, its resolution of Contention 1 was in error. And while Staff recognizes the Board's approach conflicts with 10 C.F.R. 51.71(d) n.3, Staff errs in asserting Intervenors may not rely on this regulation, *see* Staff Opp. 24-25, as a new *authority*, rather than a new *argument*, may be presented at any time. *See, e.g., United States v. Rapone*, 131 F.3d 188, 196 (D.C. Cir. 1997) (explaining a party may at any time "offer[ ] new legal authority for a position that he repeatedly advanced" below).

[5] While Staff erroneously asserts Intervenors do not challenge the Board's consideration of the CEQ regulations, Staff Opp. 10, in fact the Board's refusal to apply those regulations is central to the Petition, *e.g.* Pet. 12-14, for those regulations do not permit, *inter alia*, the failure to apply "best practices," which the Board specifically sanctioned. I.D. 4.22. The Board also disregarded controlling case law demonstrating that the NRC may not disregard these regulations. *See* Pet. 3 n.3.

[6] Available at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html .

With respect to the SEIS's reliance on Crow-Butte for the bounding analysis, Staff's only rejoinder to the Board's mistaken reliance on a transport model for that site is to claim the Board did not in fact rely on such a model and simply reported Staffs' testimony. Staff Opp.17-18. However, the Board *expressly relied* on such a model to support Staff's claim that its approach at Crow Butte was "scientific," I.D. 4.84, and such an error cannot be sustained. *See, e.g, S. C. Elec. & Gas*, CLI-10-1, 2010 WL 87736, *3 (2010) (reversing Board decision where "[t]he Board's finding seems to hinge on [an] inaccurate determination").[7]

Similarly, as regards Smith-Ranch-Highlands mine unit A, Staff does not rebut Intervenors' showing that the Board erred by assuming the samples on which Dr. Larson relied were collected while restoration was ongoing. Staff Opp. 18. The Board found the mine unit A data irrelevant on the grounds that restoration was not complete, when in fact the NRC groundwater data Dr. Larson presented was collected during stability monitoring (post-restoration) and was thus directly relevant to the bounding analysis. *See* Pet. 17-18.

Staff also has no rejoinder to the argument that the Board erred in relying on the exempt aquifer, and the post-license restoration, as bases to affirm the Staff's conclusion that the impacts of any future ACL at the site would be SMALL. Staff Opp. 18-19. Both factors were expressly incorporated into the Board's conclusion, I.D. 4.107. *See In the Matter of Philadelphia Electric Co.*, 22 N.R.C. 681, 713 (Oct. 22, 1985) (reversing Board where the "reasons given by the Board majority . . .do not withstand scrutiny"). For these reasons, the Board erred in upholding the FSEIS conclusion that the long-term adverse impacts from the project will be SMALL.[8]

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[7] SEI mischaracterizes Intervenors' argument to be that a transport model should have been included in the FSEIS, SEI Opp. 15, when in fact Intervenors argue the Board's misapprehension regarding what occurred at Crow Butte demonstrates the Board erred in upholding Staff's reliance on this site for its bounding analysis.

[8] For its part SEI itself stresses that the "aquifer is exempted, in perpetuity, as a current or future source of public drinking water," SEI 13, irrespective of the quality of the water, suggesting this fact somehow lessens the NEPA obligation to accurately confront the degree to which this project will degrade the aquifer. SEI also errs in suggesting that previous sites have been meaningfully restored. SEI 13-14 (arguing ACLs have not been required for

3. *As for Contention 3*, Staff/SEI fail to refute the Board error ignoring the unfilled boreholes and corresponding impacts at a similar site in Texas. Staff Opp. 20; SEI Opp. 17 nn.18 and 19. Once again, it was not *Intervenors'* burden to show that similar violations *will* occur here, Staff Opp. 20, but rather Staff/SEI's burden to explain why the Board could rely on "incentives" to insure filling the Ross boreholes, when such incentives were apparently insufficient at the Texas site. The failure to even recognize this evidence requires reversal, or at minimum a remand. *S.C. Elec. & Gas Co.*, 2010 WL 87736, *13 (remanding where "the Board did not articulate a basis for its conclusion").[9]

As regards aquifer confinement, Staff offers no substantive defense of the Board's dismissal of Dr. Abitz's evidence showing aquifer communication. Staff Opp. 21-22. Again, while the Board claimed Dr. Abitz's conclusions were "little more than speculation," I.D. 1.141, Staff's alternative explanation (adopted by the Board) cannot be reconciled with the resolution of Contention 1, *see* Pet. at 23, and the Staff does not show otherwise.[10]

Staff similarly fails to defend the Board's rejection of Intervenors' uranium mobility evidence. Staff Opp. 22-23. If the issue "is not yet well understood," *id.*, there is no basis to assume uranium will move more slowly than other parameters.[11] Moreover, Staff's argument – like the Board's reasoning – ignores that the salient question is not whether Intervenors proved

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all sites). The only reason that sites prior to 2009 did not use the term ACL was that the NRC permitted restoration to equally unprotective "class of use" standards. *See* I.D. at 60 n.46**.**

[9] SEI claims Intervenors failed to show the unfilled boreholes in Texas "would pose a potential future risk for fluid migration . . . ." SEI Opp. 17 n.18. However, the Board expressly found filling the boreholes at the Ross site necessary to guard against such risks, Int. Pet. 21 (citing I.D. 4.126-27), and thus the question is whether they will be filled here when they were not filled properly at the other site, not what risks were posed by that failure in Texas.

[10] The number of samples, Staff. Opp. 22 (noting 362 samples) is meaningless in the absence of a scientific protocol for data collection, and the Board's adoption of Staff's claim – to defeat Contention 3 – that the groundwater composition "may vary considerably," I.D. 4.141, is irreconcilable with the conclusion in Contention 1 that the FSEIS relied on water quality information that provided a meaningful baseline for the area.

[11] While SEI asserts there will be uranium testing under certain conditions, SEI Opp. 19 n.22, that only occurs after a previously *detected* excursion remains extant more than thirty days, and is thus irrelevant to whether a uranium excursion will be timely detected in the first instance.

that uranium *will* move faster than the other parameters in the groundwater, but whether Staff/SEI adequately demonstrated that it *will not*. They did not.[12]

4. *Regarding the contentions dismissed pre-hearing,* contrary to Staff's claim, Staff Opp. 6-7, the Board did not find Intervenors had failed to show a factual *dispute* regarding the scope of Strata's project; rather the Board explained that while there is a "strong likelihood" the entire Lance district will be mined, Intervenors had not sufficiently "show[ed]" that SEI will do so. LBP13-10 at 29. Given Intervenors' abundant evidence, *see* Paine Decl. (Ex. 8) ¶¶ 23-56, this issue should have proceeded to a hearing.[13]

On the cumulative impacts contention, none of Staff's authorities, Staff. Opp. at 9, concern the amendment of a *previously admitted contention* against an Environmental Report (ER), where there was no dispute Intervenors timely sought admission of the contention against the Draft SEIS (DSEIS), as occurred here. Under these unique circumstances, where the Board concluded the ER contention *no longer applied* to the DSEIS, it was self-evident that the issuance of the DSEIS presented Intervenors' first opportunity to present the contention, and thus the Board's rejection of the contention on the grounds that Intervenors had not justified why it was timely was in error.

Respectfully submitted,

/Signed (electronically) by HC/
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March 26, 2015

[12] Staff similarly offers no substantive defense to the Board's rejection of Intervenor's evidence of excursions at other sites, simply restating the Board's unsustainable conclusions. Staff Opp. 23-24.

[13] While SEI claims the project scope was revealed in the Environmental Report, SEI Opp. 23 n.23, that document did not even remotely indicate what became clear only much later – that SEI would proceed *immediately* with seeking necessary permit amendments to develop the rest of the Lance district, Paine Decl. ¶ 28-53, rather than expanding the project at some distant point in the future. And while SEI claims the Ross project "can operate on its own," SEI Opp. 23, that was also a disputed evidentiary issue that should have proceeded to a hearing. Paine Decl. ¶ 35 (noting SEI's parent corporation document "premised on spreading the capital, fixed-operating, and decommissioning costs of the CPP [Central Processing Plant] 'across multiple production units within Lance....").

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing REPLY OF NATURAL RESOURCES DEFENSE COUNCIL & POWDER RIVER BASIN RESOURCE COUNCIL IN SUPPORT OF PETITION FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD'S JANUARY 23, 2015 INITIAL DECISION DENYING ENVIRONMENTAL CONTENTIONS 1 THROUGH 3, AND INTERLOCUTORY DECISIONS DENYING ENVIRONMENTAL CONTENTIONS 4/5A AND 6/7 in the captioned proceeding was served via the Electronic Information Exchange ("EIE") to the Commission and all other parties on the 26th day of March 2015, which to the best of my knowledge resulted in transmittal of same.

/ (electronically signed)
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