ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1298

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC. and
POWDER RIVER BASIN RESOURCE COUNCIL,
Petitioners,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,
and
STRATA ENERGY, INC.,
Intervenor.

On Petition for Review of an Order by the
United States Nuclear Regulatory Commission

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), respondents United States Nuclear Regulatory Commission and the United States of America submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors, and Amici

Petitioners are Natural Resources Defense Council, Inc. and Powder River Basin Resource Council. Respondents are the United States Nuclear Regulatory Commission and the United States of America. Strata Energy, Inc. has been granted leave to intervene in support of respondents. There are no amici.

(B) Rulings under Review

Petitioners identify the following final order of the Nuclear Regulatory Commission as the ruling under review: *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566 (June 29, 2016) (JA___).

In their petition for review, Petitioners also identify three supporting documents, upon which CLI-16-13 relies, which they also assert are under review: (1) NUREG-1910, Supplement 5, "Environmental Impact Statement for the Ross ISR Project in Crook County, Wyoming" dated February 2014 (as subsequently amended by Errata in April 2014, and August 2014); (2) the Nuclear Regulatory Commission's "Record of Decision for the Ross Uranium *In-Situ* Recovery Project

in Crook County, Wyoming," dated April 24, 2014; and (3) Materials License No. SUA-1601 to Strata Energy, Inc., (April 24 2014).

(C) Related Cases

The case on review was not previously before this Court or any other court. There are no related cases pending in this Court or any other court.

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GLOSSARY

AEA	Atomic Energy Act
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
JA	Joint Appendix
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

JURISDICTIONAL STATEMENT

Petitioners Natural Resources Defense Council, Inc. and Powder River Basin Resource Council seek review of a final order[1] of the Nuclear Regulatory Commission ("NRC" or "Commission")[2] finalizing the issuance of a license to Strata Energy, Inc. (Strata) to operate an *in situ* uranium recovery facility. The Hobbs Act confers jurisdiction upon this Court to review a challenge to a final order in an NRC licensing proceeding so long as the challenge is filed by a "party aggrieved" within 60 days of the order's entry.[3] This Court has jurisdiction over Petitioners' challenge because Petitioners were admitted as parties to the NRC adjudicatory proceeding and timely filed their petition for review after entry of the final order.

STATEMENT OF ISSUES

1. Does the National Environmental Policy Act (NEPA) require NRC to vacate its issuance of a license where information that was not included in its final environmental impact statement (EIS) was adduced during an adjudicatory hearing challenging the license, and where both NRC's Atomic Safety and Licensing

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[1] *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566 (June 29, 2016) ("CLI-16-13").

[2] As used herein, the term "NRC" refers generically to the agency, while the term "Commission" refers specifically to the collegial body that issued the adjudicatory decision under review.

[3] 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A), (b)(1).

Board (Board) and the Commission itself considered the additional information and found that it did not materially affect the underlying conclusions in the EIS?

2. Did the Commission reasonably uphold the Board's conclusions, made after weighing the evidence presented during the adjudicatory hearing, concerning various environmental risks and impacts to groundwater associated with the project?

3. Did the Commission reasonably uphold the exclusion of Petitioners' contention concerning the cumulative impacts of the project at issue where Petitioners failed, as required by NRC procedural regulations, to renew or amend their contention once the NRC staff published its draft EIS?

4. Did the Commission reasonably uphold the exclusion of Petitioners' late-filed contention concerning the alleged segmentation of NRC's environmental analysis, where the basis for their contention was apparent at the time of license application submission and where, in any event, at the time the final EIS was published the license applicant had not yet sought authorization for the additional facilities Petitioners asserted should have been included within scope of the project and the impacts of these facilities were already considered as part of the EIS's cumulative impacts analysis?

STATUTES AND REGULATIONS

The text of pertinent statutes and regulations is set forth in a separate addendum filed contemporaneously with this brief.

STATEMENT OF THE CASE

This petition for review concerns the issuance of a license to Strata to possess and use uranium source and byproduct materials in connection with an *in situ* uranium recovery facility in Crook County, Wyoming. The NRC staff issued the license for this facility in April of 2014, after completion of over three years of technical and environmental review. As required by NEPA and NRC implementing regulations, before issuing the license the NRC staff prepared a draft EIS for public comment, a final EIS after considering all comments received, and a Record of Decision documenting the alternatives considered and measures taken to avoid or minimize environmental harm.

The NRC staff's issuance of the license in April 2014 preceded the completion of an adjudicatory hearing before the Board, held pursuant to the Atomic Energy Act (AEA), in which the Petitioners had been admitted as parties and submitted multiple contentions challenging the NRC's compliance with NEPA. NRC regulations expressly provide that the staff is to issue certain types of licenses (including the one presently at issue) once it has completed its technical

and environmental review and determined the application complies with all applicable requirements, notwithstanding the pendency of an adjudicatory hearing.

Petitioners' contentions at issue in the hearing, held in the fall of 2014, related to whether the staff's EIS had properly assessed the impacts associated with various risks to groundwater, both during and after operations at the site. Petitioners had also proffered two contentions—which were either dismissed prior to the hearing or never admitted for failure to comply with NRC rules of procedure—alleging that the EIS had improperly defined the scope of the project or failed to analyze the cumulative impacts of other *in situ* recovery sites that Strata had been planning to develop in the same area.

In January 2015, the Board issued a decision resolving all contentions in favor of Strata and the NRC staff, although it modified one condition to Strata's license as a result of the hearing. Further, the Board placed additional information presented by the staff at the hearing into the environmental record, as that information had not been provided in the final EIS itself. The Board found that the additional information adduced at the hearing did not materially affect the staff's underlying conclusions in the final EIS.

Petitioners petitioned for review to the Commission, challenging the Board's decision on the merits; the rejection or dismissal of its other contentions prior to the hearing; and the Board's decision to "augment" the environmental record rather

than vacate and remand the issuance of the license back to the staff. The Commission denied the petition for review on the grounds that the Board's decisions on the merits were reasonable and supported by the record; that the Board had properly construed and applied NRC rules of procedure when dismissing or rejecting contentions prior to the hearing; and that the Board's augmentation of the environmental record was consistent with Commission practice and NEPA, given its finding that the additional information did not materially affect the staff's conclusions in the EIS and further supported issuance of the license. One member of the Commission issued a dissenting opinion with respect to the augmentation of the environmental record through the hearing process.

STATEMENT OF FACTS

I. Factual and regulatory background concerning *in situ* uranium recovery facilities.

A. *In situ* uranium recovery and relevant NRC regulations.

In situ uranium recovery is accomplished through the injection of an oxidizing solution called a "lixiviant" into layers of permeable uranium-bearing sandstone (referred to as the "ore zone" or "mined aquifer").[4] The lixiviant

[4] *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project) LBP-15-3, slip op. at 2-3 (JA___), 81 NRC 65 (2015) ("LBP-15-3").

oxidizes and dissolves the uranium, and the resulting uranium-rich solution is pumped back towards the surface via recovery wells. During this process, a series of monitoring wells screen for both horizontal and vertical "excursions" of lixiviant (i.e., the unplanned movement of injection fluids beyond the perimeter of the wellfield, or into an overlying or underlying aquifer).[5]

The AEA authorizes NRC to issue licenses to qualified applicants for the receipt, possession, and use of byproduct and source materials resulting from the removal of uranium ore from its place in nature.[6] NRC regulations in 10 C.F.R. Part 40, Appendix A, contain standards relating to recovery operations and the disposition of the resulting waste that a license application for such activity must satisfy.

Of specific note here, Criterion 5 of Appendix A addresses and incorporates U.S. Environmental Protection Agency (EPA) groundwater protection standards that apply to *in situ* uranium recovery operations. Licensees must establish restoration goals for various hazardous constituents and restore groundwater at the site, not to exceed regulatory limits specified in Criterion 5B(5). The first

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[5] *Id*. (JA___); *see also* NUREG-1910, Supplement 5, *Environmental Impact Statement for the Ross ISR Project in Crook County, Wyoming* (Feb. 2014), at xix (JA___) ("Final EIS").

[6] 42 U.S.C. § 2092. "Byproduct material" and "source material" are defined in the Atomic Energy Act and 10 C.F.R. § 40.4.

restoration option for any given constituent is the background level of that constituent (i.e., the established level present prior to operations). Alternatively, a licensee can restore a given constituent to the value listed in Table 5C of Appendix A. If a licensee cannot meet either of these standards for a particular constituent after restoration efforts, it may submit a request for a license amendment to establish an "alternate concentration limit." The Commission may establish such a site-specific limit if it finds that the limit is "as low as reasonably achievable, after considering practicable corrective actions, and that the constituent will not pose a substantial present or potential hazard to human health or the environment[.]"[7] The Commission considers nineteen codified factors when it approves an alternate concentration limit.[8]

Additionally, NRC regulations implementing NEPA relevant to *in situ* recovery operations are found in 10 C.F.R. Part 51.[9] These regulations require

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[7] 10 C.F.R. Part 40, Appendix A, Criteria 5B(6).

[8] *Id.* Because it involves a license amendment, a request to establish an alternate concentration limit would also be accompanied by additional NEPA review and be subject to an opportunity for a hearing under the AEA. *See also* LBP-15-13 at 56-58 (JA___) (discussing alternate concentration limit requirements).

[9] Petitioners assert (Br. 7) that the Council on Environmental Quality regulations in 40 C.F.R. Part 1501 are binding on all federal agencies. However, these regulations are not binding on NRC except to the extent they have been expressly adopted in 10 C.F.R. Part 51. LBP-15-3 at 12 (JA___) (citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989)); *see also* 10 C.F.R.

NRC to prepare an EIS prior to the "issuance of a license to possess and use source material for uranium milling."[10] To assist in the NRC staff's preparation of an EIS, an applicant for a license to possess and use source material for uranium milling must submit an "Environmental Report" with its application that includes certain information such as anticipated impacts of the project, adverse unavoidable environmental effects, and proposed alternatives.[11] The NRC staff then prepares a draft EIS, which is circulated for public comment;[12] a final EIS responding to comments received;[13] and a Record of Decision identifying alternatives considered and discussing any practicable measures taken to avoid or minimize environmental harm.[14] Consistent with NEPA, NRC regulations also require the staff to prepare a supplemental EIS when a proposed action has not yet been taken but there are either substantial changes that are relevant to environmental concerns or there is

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§ 51.10(a). They are, however, entitled to "substantial deference." *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006).

[10] 10 C.F.R. § 51.20(b)(8).

[11] *See id.* §§ 40.31(f), 51.60(b)(1)(ii), 51.45.

[12] *Id.* §§ 51.80, 51.70-51.74 (prescribing contents and procedure for distribution of a draft EIS).

[13] *Id.* § 51.91

[14] *Id.* §§ 51.102, 51.103.

"new and significant circumstances or information" bearing on the proposed action or its impacts.[15]

B. Statutory and regulatory requirements relating to hearings.

Section 189a. of the AEA provides that in any NRC proceeding for the "granting, suspending, revoking, or amending" of a license, the Commission must grant a hearing "upon the request of any person whose interest may be affected by the proceeding."[16] NRC procedural regulations prescribe the timing and contents of such hearing requests; namely, that such a request must demonstrate the petitioner's standing and proffer at least one admissible "contention" that sets forth with particularly the issue(s) the petitioner seeks to raise.[17] Contentions must be based on documents or other information available at the time the petition is filed, and environmental issues arising under NEPA must be based (at least initially) on the license applicant's Environmental Report.[18]

Once the NRC staff publishes a draft or final EIS, the NRC permits petitioners to "migrate" any already-admitted contentions to successive environmental analyses when the information that is the subject of the contention

[15] *Id.* § 51.92(a).

[16] 42 U.S.C. § 2239(a).

[17] *See* 10 C.F.R. § 2.309.

[18] *Id.* § 2.309(f)(2).

remains substantially the same.[19] NRC regulations also require that petitioners timely file new or amended contentions where the information in the draft or final EIS differs materially from information that was previously provided, should they want to continue to pursue those contentions.[20]

II. Strata's license application and admissibility of Petitioners' contentions.

On January 4, 2011, Strata submitted a license application to NRC requesting a source and byproduct materials license to construct and operate an *in situ* uranium recovery and processing facility in Crook County, Wyoming.[21] Strata's proposed operation, called the "Ross Project," consists of approximately 1,400-2,200 injection and recovery wells occupying 1,721 acres of land in the northern half of a larger area known as the Lance District.[22]

After NRC announced receipt of the application and the opportunity to request a hearing, Petitioners here were admitted as intervenors in an adjudicatory

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[19] *See* CLI-16-13 at 5 n.17 (JA___) (discussing this "migration tenet" in NRC adjudicatory practice).

[20] 10 C.F.R. §§ 2.309(f)(2), 2.309(c) (standards for contentions filed after the initial deadline).

[21] Strata Energy, Inc., Ross In Situ Recovery Uranium Project, Crook County, WY; Notice of Materials License Application, Opportunity To Request a Hearing and To Petition for Leave To Intervene, and Commission Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation, 76 Fed. Reg. 41,308, 41,309 (July 13, 2011).

[22] CLI-16-13 at 3 (JA___); *see also* Final EIS at 2-2, 2-3 (JA___).

proceeding and initially permitted to raise four environmental contentions before the Board.[23] In Contention 1, Petitioners asserted that Strata's application failed to adequately characterize the "baseline" (i.e., existing) groundwater quality at the proposed site; in Contention 2, Petitioners asserted that the application failed to evaluate the environmental impacts that would occur if Strata were unable to restore groundwater to the first two standard limits in Criterion 5B(5) and instead implemented an alternate concentration limit; in Contention 3, Petitioners asserted that the application failed to include sufficient information to demonstrate Strata's ability to prevent the migration of mining fluids into adjacent groundwater; and in Contention 4/5A, Petitioners asserted the application failed to adequately assess the cumulative impacts that would result from Strata's plans to develop expansion facilities in the Lance District after approval of the Ross Project.[24]

When the NRC staff issued its draft EIS[25] in March 2013, the Board "migrated" Contentions 1-3 as challenges to the draft EIS, since the information in

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[23] *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, slip op. at 1-2 (JA___), 75 NRC 164 (2012) ("LBP-12-3").

[24] *Id.* at Appendix A (JA___); CLI-16-13 at 4 (JA___).

[25] Throughout this NRC licensing proceeding, the relevant draft and final EIS documents are referred to as the draft and final "supplemental" environmental impact statements because they supplement with site-specific information the Generic EIS that the agency has prepared for *in situ* recovery actions. Given that issues concerning "supplementation" of the final EIS for the Ross project are at issue in this petition for review and to avoid unnecessary confusion, this brief

that document relevant to those contentions was substantially the same as that contained in Strata's Environmental Report.[26] However, Contention 4/5A was not similarly migrated because the Board determined that information in the draft EIS differed significantly from the information in the Environmental Report. Instead, the Board ruled that, under NRC's rules of procedure, Petitioners were required to submit a new or amended contention if they wanted to continue to pursue their cumulative impacts contention.[27] Petitioners did not do so.

At the same time, Petitioners sought admission of a new contention, Contention 6, in which they asserted that the draft EIS should have considered the eventual development of the entire Lance District as the proposed federal action, rather than the smaller Ross Project described in the submitted application.[28] The Board declined to admit the contention on the grounds that (1) Petitioners had not demonstrated that plans to develop these yet-to-be-proposed facilities were sufficiently advanced or interconnected to warrant an enlarging of the scope of the project as proposed; and (2) the contention was impermissibly late under NRC

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refers to these documents simply as the final or draft "EIS" and not as the final or draft "supplemental EIS."

[26] *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-13-10, slip op. at 32 (JA___), 78 NRC 117 (2013) ("LBP-13-10"); CLI-16-13 at 5 (JA___).

[27] LBP-13-10 at 19-22 (JA___).

[28] *Id.* at 22-23 (JA___).

rules of procedure since Petitioners had all the necessary information to file such a contention when Strata initially filed its application in 2011.[29]

III. Issuance of license, ensuing adjudicatory hearing, and Commission review.

On March 11, 2014, the NRC staff announced publication of the final EIS for the Ross Project.[30] Shortly thereafter, the staff published the required Record of Decision[31] and issued the license to Strata, as permitted by NRC regulations.[32]

The evidentiary hearing on the Petitioners' three remaining contentions took place in the fall of 2014, and in January 2015 the Board issued a decision ruling in favor of the NRC staff and Strata.[33] With respect to Contention 2—whether the final EIS sufficiently considered the extent of environmental impacts should groundwater at the site eventually be restored to an "alternate concentration

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[29] *Id.* at 23 (JA___).

[30] Proposed Ross Project in Crook County Wyoming for In-Situ Leach Uranium Milling Facilities, 79 Fed. Reg. 13,683 (Mar. 11, 2014). After publication of the final EIS, Contentions 1 to 3 were again "migrated" as contentions against the final EIS. The Board again declined to migrate Contention 4/5A, which was later dismissed, and a new proposed "Contention 7" (which reiterated the previously rejected claim of Contention 6 regarding project scope) was deemed inadmissible. *See* CLI-16-13 at 7, 17 (JA___).

[31] Ross Record of Decision for the Proposed Ross Uranium In-Situ Recovery (ISR) Project in Crook County, Wyoming (April 24, 2014) (JA___).

[32] NRC Staff's Notice of License Issuance (April 25, 2014) (JA___) (citing 10 C.F.R. § 2.1202(a)).

[33] LBP-15-3 at 1-2 (JA___).

limit"—the Board found that the information in the final EIS, as augmented by information adduced during the adjudicatory hearing,[34] adequately identified the potential impacts and supported the staff's determination in the final EIS that such impacts would be "small."[35]

On Contention 3—whether the final EIS adequately assessed impacts associated with failure to prevent the excursion of fluids during operations—the Board found, *inter alia*, that License Condition 10.12 (requiring that Strata attempt to locate and fill historic boreholes before commencing operations) supported the predictive assessment of "small" impact.[36] However, based on the evidence

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[34] Under the Commission's longstanding "augmentation" practice, "to the extent that any environmental findings by the Presiding Officer (or the Commission) differ from those in the [final EIS], the [final EIS] is deemed modified by the decision." *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 53 (2001). While the Board used the term "supplement" when referring to merger of the final EIS and adjudicatory record in this fashion (*see, e.g.,* LBP-15-3 at 69 n.49, 77 n.58, 83 (JA___)), the Commission used terms such as "modify" or "augment" so as not to confuse this process with formal EIS supplementation. We use the same language here.

[35] LBP-15-3 at 83 (JA___). "Small" as used here is a standardized term in NRC's NEPA practice, referring to "environmental effects [that] are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource." *See id.* at 15-16 (citing Final EIS at xx-xxi) (JA___).

[36] *Id.* at 92-96 (JA___).

adduced during the hearing, the Board also ordered that the license condition be revised to include additional boreholes in a larger surrounding area.[37]

Petitioners submitted a petition for review to the Commission, challenging both the Board's decision on the merits with respect to Contentions 1 through 3, as well as its interlocutory decisions dismissing Contentions 4/5A and 6 concerning cumulative impacts and project scope.[38] The Commission denied review, affirming, *inter alia*, the Board's determination that it could augment the environmental record based on additional evidence adduced during the adjudicatory hearing.[39] In so doing, the Commission specifically concluded that the additional evidence did not materially affect the NRC staff's overall evaluation of the impacts on groundwater attributable to licensed activities, and that the environmental record, as modified by the hearing record, supported the issuance of the license.[40]

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[37] *Id.* at 96-98 (JA___). The Board also ruled in favor of the NRC staff and Strata with respect to Contention 1, which the Commission upheld in CLI-16-13, though Petitioners have not sought review of that determination here.

[38] CLI-16-13 at 1-2 (JA___).

[39] *Id.* at 38-39 (JA___). Commissioner Baran filed a dissenting opinion on this point, articulating concern over this practice and declaring that he would have ordered the staff to affirmatively decide, in light of the newly acquired information, whether to reaffirm, modify, condition, or revoke the already-issued license rather than rely on the augmentation of the environmental record. (JA___).

[40] *Id* at 39 (JA__).

The Commission also declined to disturb the Board's consideration and weighing of evidence with respect to environmental impacts associated with excursions from boreholes and the impacts to the mined aquifer should Strata eventually implement an alternate concentration limit.[41] And concerning the Board's decision not to admit certain contentions prior to the hearing, the Commission found that the Board had properly construed and applied NRC regulations governing the timeliness and admissibility of such contentions.[42]

STANDARD OF REVIEW

This Court's review is governed by the familiar standards of the Administrative Procedure Act, permitting this Court to set aside an agency order only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[43] Overall, the Court's task in reviewing the NRC's compliance with NEPA is to ensure the agency has taken the requisite "hard look"

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[41] *Id.* at 41-43, 48 (JA___).

[42] *Id.* at 14-18 (JA___). Following the Commission's decision, the staff performed the administrative task of updating the Record of Decision to reflect the outcome of the Board and Commission decisions. The updated record does not provide additional substantive analysis; it merely reflects the result of the adjudicatory determination and augmentation of the environmental record. *Compare* NRC Staff's Record of Decision (Apr. 24, 2014) (JA___) *with* NRC Staff's Updated Record of Decision (Sep. 28, 2016) (JA___).

[43] 5 U.S.C. § 706(2)(A); *Blue Ridge Envtl. Def. League (BREDL) v. NRC*, 716 F.3d 183, 195 (D.C. Cir. 2013).

at the environmental effects of a proposed action, setting aside the agency's substantive findings only where it has committed a clear error of judgment.[44] Concerning the resolution of issues of fact that require a high level of technical expertise, such as NRC "technical judgments and predictions," this court must defer to the agency's weighing of the evidence as long as its decisionmaking is informed and rational.[45]

SUMMARY OF ARGUMENT

Petitioners' arguments ignore the breadth and depth of the NRC staff's analysis in its final EIS and the careful consideration by the Board and the Commission of the additional information adduced during the evidentiary hearing. The record amply demonstrates that the agency has acted consistently with NEPA's "hard look" requirement.

With respect to Petitioners' challenge to the augmentation of the environmental record, Petitioners erroneously claim that the Board and Commission are confined to only the four corners of an EIS when it evaluates, in the context of a full evidentiary hearing provided by the AEA, the staff's overall

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[44] *BREDL*, 716 F.3d at 195; *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (courts do not "flyspeck" an agency's environmental analysis looking for minor deficiencies).

[45] *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989); *BREDL*, 716 F.3d at 195 (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

environmental analysis performed under NEPA. In doing so, Petitioners conflate their rights, and the agency's obligations, under each statute. Their arguments, if accepted, would not only impose additional procedural obligations on the NRC not set forth in NEPA, but would be inconsistent with precedent from this Circuit and others permitting an agency to consider information adduced through an agency-level hearing. NRC's augmentation of the evidentiary hearing is not *post hoc* decisionmaking; it allowed the highest ranking officials in the agency to consider whether the additional information adduced during the hearing in any way changed the staff's environmental conclusions and decision to issue a license. The agency has spoken to the issue raised by Petitioners, and their disagreement with the Commission's conclusion does not provide a basis for vacatur of the license.

Petitioners' various complaints concerning the agency's assessment of risks and impacts associated with groundwater likewise fall short of providing a basis to question the agency's considered technical judgment. The Board reasonably determined (and the Commission reasonably upheld the Board's judgment) that the conditions of the license, which the Board *strengthened* as a consequence of the evidentiary hearing, provided a sufficient basis upon which to assess the likely impacts associated with boreholes. Additionally, contrary to Petitioners' assertions, the agency did not deem the impacts to the mined aquifer insignificant solely on the fact that the aquifer is not a source of drinking water; it reasonably

considered this fact, along with others, in making its assessment. And while Petitioners allege throughout that the agency has ignored consideration of their evidence, the record instead demonstrates reasonable acceptance of the staff's supported findings to the contrary, with which Petitioners simply disagree.

Finally, concerning the exclusion of their contentions concerning cumulative impacts and the scope of the analysis in the final EIS, Petitioners fail to provide a basis to question the agency's application of its contention admissibility requirements. Petitioners failed to timely renew or amend their arguments concerning cumulative impacts as required by NRC procedure. And even though Petitioners had full opportunity to raise their contention regarding project scope at the outset of the proceeding, they chose not to do so. In any event, the Board and the Commission reasonably determined that the latter contention was inadmissible because Petitioners had not proffered any genuine issue for adjudication concerning whether the final EIS should be expanded to include additional facilities, not yet proposed to the NRC, that were already considered within the agency's cumulative impacts analysis.

ARGUMENT

I. NEPA does not require automatic vacatur of a licensing decision where an agency considers information adduced during an adjudicatory hearing and incorporates that information into the environmental record.

Petitioners' assertion that the Board and Commission were *obligated* under NEPA to vacate the NRC staff's licensing decision based on additional information adduced during the adjudicatory hearing process is incorrect as a matter of law. Vacatur is not required where, as a result of its adjudicatory hearing process, the agency determines that the environmental record, as augmented, has not materially changed and continues to support issuance of the license. Accordingly, the appropriate inquiry for this Court on review is whether the agency's decision not to vacate the issuance of the license—based on the Board and Commission's determinations that the adduced information did not materially affect the staff's underlying conclusions—was arbitrary and capricious. And Petitioners have failed to meet this heavy burden.

A. NRC procedural regulations implementing the AEA explicitly permit the issuance of a license prior to the resolution of an adjudicatory hearing.

We begin by providing a roadmap of the statutory and regulatory bases for NRC adjudicatory proceedings and their relationship to the issuance of licenses of the type at issue in this case. Section 189a. of the AEA creates hearing

opportunities for persons with an interest in NRC licensing proceedings.[46] As this Court has previously found, other than requiring that the Commission grant a hearing upon the request of an adversely affected person, the AEA is otherwise silent on the conduct of such hearings.[47] Critically, NEPA does not itself provide any right to a hearing on environmental matters associated with an NRC licensing action.[48] Rather, NRC regulations permit individuals to submit environmental contentions arising under NEPA through the hearing process created by Section 189a.[49] But the manner in which such NEPA contentions are to be heard are a creature of NRC regulations governing adjudications.

The adjudicatory proceeding at issue in this case was conducted under "Subpart L" of 10 C.F.R. Part 2, which is the default hearing procedure for most NRC licensing proceedings.[50] Subpart L explicitly authorizes the NRC staff to issue immediately effective approvals or denials for certain types of license

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[46] 42 U.S.C. § 2239(a). ("In any proceeding . . . for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding").

[47] *NRDC v. NRC*, 823 F.3d 641, 652 (D.C. Cir. 2016) ("[T]he AEA itself nowhere describes the content of a hearing or prescribes the manner in which this hearing is to be run") (quoting *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990)).

[48] *Union of Concerned Scientists*, 920 F.2d at 56.

[49] 10 C.F.R. § 2.309(f)(2).

[50] LBP-15-3 at 8 (JA___).

applications once it has completed its review, notwithstanding the pendency of an adjudicatory hearing.[51] This authorization recognizes the distinction between the NRC staff's review of license applications (including the environmental review that must precede an adjudicatory hearing) and the decisionmaking authority of the presiding officer over particular matters in controversy in an NRC adjudication.[52]

In delegating authority to the NRC staff to issue certain licenses prior to resolution of an adjudicatory proceeding, the Commission has also included numerous safeguards. First, the NRC staff is required to notify and explain to the presiding officer and all parties to the adjudicatory proceeding why, in its view, issuing the license would not imperil public health and safety or the common defense and security.[53] That is, the NRC staff must explain why it believes the license application satisfies all legal requirements, notwithstanding any still-

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[51] *See* 10 C.F.R. § 2.1202(a). The ability of the staff to issue immediately effective decisions prior to a hearing excludes, among other things, applications to construct and/or operate nuclear power plants or to issue amendments to such facilities that involve significant hazards considerations. *See id.*

[52] *See* 10 C.F.R. § 2.103(a) (stating that the staff "will issue a license" once it is determined an application complies with all NRC legal requirements); *id.* § 2.332(d) (hearings on environmental issues associated with a staff EIS may not commence before issuance of the final EIS); *id.* § 51.104(a)(1) (precluding the NRC staff from taking a position on matters at issue in a hearing arising under NEPA until the final EIS is completed); *id.* § 2.340(e)(1) (presiding officer to make findings of fact and conclusions of law on matters put into controversy in adjudicatory proceeding).

[53] 10 C.F.R. § 2.1202(a).

pending contentions to the contrary. Obviously, if the staff *agreed* with the validity of any pending contentions concerning the legal sufficiency of a license application, the staff could not issue the license at all, much less pursuant to this authority.

Second, the issuance of the license prior to the completion of a hearing in no way moots the matters that remain in controversy. The presiding officer may (as the Board did in this case[54]) order the alteration of a license as a result of its findings of fact or conclusions of law following a contested evidentiary hearing.[55] In this regard, a license issued pursuant to section 2.1202(a) before conclusion of a Subpart L proceeding is essentially *provisional* in nature, as it can be modified (or even revoked) to address safety or environmental concerns that are substantiated during the hearing process.

Lastly, Subpart L also permits persons who believe they will be harmed by NRC staff's issuance of a license to apply for a stay of its effectiveness.[56] Notably,

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[54] *See supra* note 37 and accompanying text.

[55] 10 C.F.R. § 2.340(e)(2) (Commission or NRC staff shall "issue, deny, or appropriately condition" a license in accordance with the decision).

[56] The standards considered in a request for a stay effectively mirror those for a party seeking injunctive relief: (1) whether the requestor will be irreparably injured unless a stay is granted; (2) whether the requestor has made a strong showing that it is likely to prevail on the merits on the matter involved in the underlying hearing; (3) whether the granting of the stay would harm other participants; and (4) where the public interest lies. *Id*. § 2.1213(d)(1)-(4).

Petitioners in this case did not seek a stay under this provision after the staff issued the license to Strata prior to the start of the hearing.[57]

B. NRC complies with the letter and spirit of NEPA where it adheres to the statute's procedural mandates when issuing a license and augments the environmental record based on additional information developed through the adjudicatory process.

Petitioners do not challenge the NRC staff's authority under the AEA to issue a license prior to completion of an adjudicatory hearing.[58] Rather, Petitioners assert that NEPA compels, as a matter of law, vacatur of a license whenever the eventual adjudicatory hearing results in the inclusion of new information in the environmental record, regardless of its materiality. This assertion is flawed and, if accepted, would not only create an entitlement to a hearing under NEPA, but would also supplant the existing procedures the agency provides under the AEA—

[57] LBP-15-3 at 7 n.3 (JA___).

[58] Such a challenge would fail under familiar *Chevron* principles, given the AEA's silence on the issue of when a hearing must be held and the agency's reasonable interpretation of the statute's hearing requirement (including its creation of procedural safeguards to prevent harm to public health and safety and the environment during the pendency of a hearing). *See, e.g.*, *NRDC v. NRC*, 823 F.3d at 649 ("Because the AEA itself nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run, we must defer to the operating procedures adopted by the agency.") (quotation marks and citations omitted).

precisely the additional NEPA procedure, not imposed by or included within the statute, that the Supreme Court has disavowed.[59]

NEPA itself neither creates any rights to a hearing nor mandates that an agency alter its existing hearing procedures or adopt any particular type of decisionmaking structure when exercising its substantive authority.[60] This principle applies with full force here. Although the Commission's "final order" in an AEA licensing proceeding is what triggers this Court's jurisdiction to review the matter, the "major federal action" necessitating the preparation of an EIS and compliance with NEPA is NRC's decision to issue a license,[61] which begins with the staff's exercise of delegated authority to issue it (prior and subject to the adjudicatory hearing). Before issuing a license in the first instance, the NRC staff must (and in this case, did) comply with all procedural mandates imposed by NEPA and the NRC's implementing regulations. Prior to issuing the license to

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[59] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976) (only procedural requirements imposed by NEPA are those stated in the plain language of the Act)).

[60] *NRDC v. NRC*, 823 F.3d at 652 (quoting *Balt. Gas*, 462 U.S. at 100); *Union of Concerned Scientists*, 920 F.2d at 56; *see also Beyond Nuclear v. NRC*, 704 F.3d 12, 18 (1st Cir. 2013) ("NEPA does not, by its own terms or its intent, alter the Commission's hearing procedures[.]").

[61] 42 U.S.C. § 4332(C); Final EIS at 1-1 (JA___) ("Based upon Strata's application, the NRC's Federal action is the decision to either grant or deny a license.").

Strata on April 24, 2014, the NRC staff (1) determined the proposed action was one that necessitated an EIS; (2) published a draft EIS for public comment, analyzing the potential environmental impacts from the construction, operation, aquifer restoration, and decommissioning of the proposed project, followed by a final EIS after considering and responding to the 1,120 comments received; and (3) published a Record of Decision documenting the alternatives considered and measures taken to avoid or minimize environmental harm.[62]

Viewed against this backdrop, Petitioners' primary argument—that the NRC's practice fundamentally violates NEPA because it enables *post-hoc* environmental decisionmaking (Br. 30-33)—is misguided. If accepted, it would mean that the NRC staff could no longer issue a license in the first instance (even after performing *all* requisite NEPA procedure) unless it were certain all environmental contentions in the ensuing adjudicatory proceeding (which are conducted pursuant to the AEA, not NEPA) would be resolved in its favor on all fronts with no augmentation of the staff's findings. Such a construction would essentially create *de facto* NEPA hearing rights, inhibiting the staff from issuing a license it could otherwise issue in favor of additional procedures (i.e., adjudicatory

[62] Final EIS at 1-5, 1-6 (JA___); Ross Record of Decision for the Proposed Ross Uranium In-Situ Recovery (ISR) Project in Crook County, Wyoming (April 24, 2014) (JA___).

review of the EIS prior to taking the proposed action) that NEPA simply does not impose.

Such a construction of NEPA would also be inconsistent with this Court's precedent (unacknowledged by Petitioners) permitting an agency to incorporate information from a hearing record into its environmental analysis, even if that information was not presented within the four corners of an EIS. For example, in *Swinomish Tribal Community v. FERC*,[63] this Court found that an agency's consideration of the environmental impacts from raising the height of a dam "was not limited to the [final EIS] alone" and that the agency could permissibly consider, when issuing its final order, additional testimony and exhibits introduced during *sixty-seven* days of hearings that post-dated the issuance of the final EIS.[64]

Importantly, this Court has applied this principle where, as here, a license has been issued *prior to* the final order of an agency hearing. In *Friends of the River v. FERC*,[65] this Court considered whether to vacate and remand a license after concluding the agency had only provided a sufficient analysis of a reasonable alternative in its final order in the licensing proceeding rather than in the EIS itself. This Court grappled with whether NEPA compelled a remand in such

[63] 627 F.2d 499 (D.C. Cir. 1980).

[64] *Id.* at 511-12.

[65] 720 F.2d 93 (D.C. Cir. 1983).

circumstances even though it was clear that by the time the proceeding had concluded the agency had sufficiently considered the matter and incorporated its findings into a publicly accessible final order.[66] The Court ultimately held that FERC's final order post-dating the EIS, when "*read in conjunction with the EIS*," adequately advised the public of FERC's reasoning and the information on which it rested.[67] Because "the EIS is not an end in itself but rather a means toward the goal of better decisionmaking," the Court found the agency's actions complied with NEPA.[68]

The NRC's practice of augmentation lies squarely within the practice approved by the Court long ago in *Swinomish Tribal Community* and *Friends of the River*. Since then, the Commission has consistently held that in NRC adjudicatory proceedings concerning the sufficiency of an EIS, the final EIS is effectively complemented and modified by the adjudicatory record, Board decision, and any Commission decision that results from the adjudicatory proceeding.[69]

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[66] *Id.* at 106.

[67] *Id.* (citing *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)) (emphasis added; internal quotation marks omitted).

[68] *Id.*

[69] *See, e.g., Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 61 (2012) ("In an NRC adjudicatory proceeding, the adjudicatory record, Board decision, and any Commission decision become

And the practice of NRC and its predecessor of augmenting the environmental record through the adjudicatory process has repeatedly survived challenge under NEPA. For example, the Second Circuit held that a deficiency in a final EIS prepared by the Atomic Energy Commission did not compel reversal of the licensing decision where the "issue has been opened for full consideration in an agency hearing."[70] The Seventh Circuit similarly declined to remand an order of the Atomic Energy Commission on NEPA grounds based on alleged deficiencies in a final EIS in light of the "the independent evaluation given these considerations by [the Board] . . . following publication[.]"[71] And this Court has explained that it was not a departure from either the "letter or spirit" of NEPA to deem information stipulated to by the parties in a proceeding before the Board, after a final environmental impact statement had been issued, to be part of the environmental record.[72]

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effectively part of the environmental review document[.]"); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 731 (2005); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 53 (2001).

[70] *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974); *see also New England Coal. on Nuclear Pollution v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978) (citing *Aberdeen & Rockfish R.R. Co. v. SCRAP,* 422 U.S. 289, 320 (1975)).

[71] *Porter Cnty. Chapter of Izaak Walton League of America Inc., v. AEC*, 533 F.2d 1011, 1019 (7th Cir. 1976).

[72] *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975).

Petitioners rely on case law (Br. 30-31) from outside the NEPA context suggesting that a *court* cannot rely on information that post-dates the agency's decisionmaking to justify action previously taken.[73] But their reliance on these cases, as well as *Public Employees for Environmental Responsibility v. Hopper* (Br. 32), which involves an agency's failure to conduct *at all* certain necessary environmental inquiries to support its federal action,[74] is clearly misplaced. Unlike judicial challenges to already completed agency action, the hearing mechanism provided by the AEA represents the *consummation* of the agency's licensing process (which is otherwise provisional until the adjudication is complete), based on the findings of fact and conclusions of law that emerge during the adjudication. Thus, where an agency-level hearing has taken place that accounts for additional information adduced through the adjudicatory process, a remand "is not needed to aid in the agenc[y's] own environmental decision making process," and, notwithstanding Petitioners' arguments, the Court is "not left to rely on *post hoc*

[73] *See, e.g., U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 647, 650 (D.C. Cir. 2016); *Friedman v. FAA*, 841 F.3d 537, 545 (D.C. Cir. 2016).

[74] 827 F.3d 1077, 1082-83 (D.C. Cir. 2016).

rationalizations."[75] In these circumstances, the agency has already spoken directly to the issue.[76]

And, of course, were the presiding officer over an adjudication (i.e., the Board or, on appeal, the Commission) to determine that information obtained during the adjudicatory hearing was significant enough to present a materially different picture of the environmental landscape than what had already been considered, remand or formal supplementation of the EIS to consider impacts not previously considered would have been appropriate. NRC regulations contemplate

[75] *Friends of the River*, 720 F.2d at 106-07 (quoting *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1114 (alterations omitted), and distinguishing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

[76] In this regard, Petitioners' reliance on *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1127, for the proposition that "mere drafting and filing of papers" is not enough to satisfy NEPA, is inapposite. In that case, this Court admonished the Atomic Energy Commission (the NRC's predecessor) for adopting procedures that permitted the agency to *ignore* environmental reports and statements it had prepared when those documents were not contested in an adjudicatory proceeding. *Id.* at 1117. Such is clearly not the case here, where the agency not only prepared a substantial assessment of the environmental impacts of the proposed action after extensive public outreach but also considered the environmental contentions raised by the Petitioners and even modified the conditions of the license as a consequence of the adjudication.

such action,[77] and the Commission also articulated precisely this expectation when denying review of the Board's decision in this case.[78]

Finally, Petitioners assert (Br. 34-35) that the augmentation process is fundamentally flawed because it has deprived the public of the opportunity to comment on additional information adduced during the adjudicatory hearing and incorporated into the environmental record. But this conclusion is incompatible with the case law cited above permitting NRC and other federal agencies to augment the environmental record through the adjudicatory process. And in *Citizens for Safe Power*, this Court rejected the same argument as that advanced by Petitioners here, characterizing the likelihood of increased public input in light of augmented information to be "overdrawn and speculative."[79] In any event, as set

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[77] *See* 10 C.F.R. § 2.340(e)(2)(i) (initial decision of presiding officer may require staff to "deny or appropriately condition" license); *id.* § 51.92(a), (c) (concerning supplementation of final EIS).

[78] CLI-16-13 at 38-39 (JA___) ("Our adjudicatory proceedings . . . contemplate that a Board or the Commission may appropriately modify, condition, or revoke a license, if required by the circumstances of a particular proceeding. . . . [W]e agree . . . that remanding, or staying, the license would have been appropriate had the Board determined that the Staff's analysis did not adequately consider the environmental consequences of this licensing action[.]").

[79] 524 F.2d at 1294 n.5. The Commission has likewise explained why, contrary to Petitioners' suggestion, augmentation through the hearing process does not constitute an "end run" around NEPA's public engagement requirement. Specifically, it has recognized that, as a practical matter, the development of an issue through the hearing process allows for "additional and a more rigorous public scrutiny of the [environmental record] than does the usual 'circulation for

forth in the next section, the Board and Commission reasonably determined, after review of a fully developed record, that the additional information did not materially change the staff's assessment of the relevant impacts. Under these circumstances, there is simply no reason to assume that additional public participation on this issue would yield a meaningfully different result.

C. The Commission reasonably determined that the additional information acquired during the adjudicatory proceeding was not material enough to warrant remand or a formal supplement.

Agencies are not required to supplement an already-published EIS every time new information comes to light.[80] Rather, agencies must apply a "rule of reason" and determine, based on the value of new information acquired, whether the federal action may have significant environmental impacts that were not already considered.[81] Whether information rises to this level is a matter for the agency to determine in the first instance, and this Court must defer to the informed discretion of that agency where such a determination requires a high level of

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comment'" because an intervenor is afforded "months to marshal its evidence for hearing, ha[s] the opportunity to respond to the Staff's and [the licensee]'s evidence, and ha[s] the benefit of extensive Board questions to party witnesses." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-6 at 62, 81 NRC 340, 388 (2015).

[80] *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989).

[81] *Id.; see also BREDL*, 716 F.3d at 188-89.

technical expertise.[82] Although the rules concerning supplementation apply when new information becomes apparent prior to the undertaking of a major federal action, they provide a useful framework by which to measure the Commission's actions here.

The additional information missing from the four corners of the final EIS at issue pertained to the levels of post-restoration uranium concentrations that had been previously approved at two other sites, which was used to assist in presenting a reasonable range of possible alternate concentration limits for the Ross site.[83] As previously noted, Petitioners asserted in Contention 2 that the final EIS did not sufficiently analyze the impacts that would result in such a scenario. Prior to publication of the final EIS, the NRC staff had posited that it would be speculative to provide quantitative estimates of future alternate concentration limits at the site, given the variables and factors involved in their approval, but the Board agreed with Petitioners that the staff could at least provide a bounding analysis that would "outline . . . within a reasonable range" possible alternate concentration limits based on historical experience.[84] Thus, in the final EIS, the NRC staff included

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[82] *Union of Concerned Scientists*, 920 F.2d at 55; *BREDL*, 716 F.3d at 196-97 (citing *Marsh,* 490 U.S. at 377).

[83] *See* CLI-16-13 at 29-30 (JA__).

[84] LBP-12-3 at 34 (JA___); LBP-13-10 at 15 (JA___).

information discussing levels of various groundwater constituents at three previously restored sites, including uranium concentration levels at one of these three.[85] In testimony submitted as part of the hearing, the staff provided the uranium concentration levels at the other two sites.[86] It is the omission of these two data points from the EIS (and subsequent augmentation of the record with this information) that Petitioners claim renders the staff's NEPA process deficient.

Petitioners' arguments elevate form over substance and ignore the agency's thorough consideration of this issue. The Board considered in great detail arguments from Petitioners that the data provided and resulting bounding analysis were inaccurate or incomplete.[87] And while in evaluating the Petitioners' claims the Board did determine that the floor of the staff's bounding analysis was too low (such that it needed to be changed), it did not take issue with the ceiling, i.e, the highest uranium concentration level that the staff supplied.[88] It was for this reason

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[85] Final EIS at 4-46 (JA___). As noted by Petitioners (Br. 28 n.18) the final EIS in its original form mistakenly stated an increase of "18 percent" for post-restoration uranium levels at the Crow Butte site, instead of "18 times," which was promptly corrected in an errata stating the error did not affect the staff's ultimate conclusion of "small" impacts. The Board similarly recognized the error "to be without substance[.]" LBP-15-3 at 65-66 n.48 (JA___).

[86] CLI-16-13 at 31 n.152 (JA___).

[87] LBP-15-3 at 65-77 (JA___).

[88] *Id.* at 73-74 (JA___).

that the Board determined that augmentation of the environmental record, though necessary to paint a complete picture of environmental impacts, did not "materially affect" the impacts analysis provided in the final EIS.[89]

This conclusion was eminently reasonable, particularly given the difficulties in predicting any alternate concentration limits that might ultimately be adopted for the site. Indeed, in its review the Commission observed that the staff's bounding analysis could provide "only a general idea of the range of possible future alternate concentration limits for the Ross Project" (particularly given that the sites used in the bounding analysis had all been approved under less stringent criteria than in use today), and that the staff's discussion in the final EIS had provided a "conservative basis" for predicting their likely range in light of the "relative success of past restorations"[90] And recognizing the conservative assumptions that the staff employed, the Commission expressly found that the Board's modification of the environmental record "did not change, in any material aspect, the Staff's

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[89] *Id.* at 74 (JA___). Additionally, contrary to Petitioners' assertion that the Board "ignored" its evidence relating to restoration at sites other than those used in the staff's bounding analysis, the Board considered such evidence but ultimately agreed with the staff's decision not to include those sites because the staff reasonably did not consider those sites to be analogous to the Ross Project or provide beneficial data. *Id.* at 75-77 (JA___). Petitioners' assertion merely reflects a disagreement in technical judgment and by no means renders the Board's conclusions invalid.

[90] CLI-16-13 at 29-31 (JA___).

ultimate determination" that the impacts would be "small," and indeed, "support[ed] the issuance of a license to Strata."[91] That is, even the two data points missing from the four corners of the final EIS regarding post-restoration uranium concentration did not, in the judgment of either the Board or the Commission, materially affect the document's underlying conclusion. Particularly given that the discussion of alternate uranium concentration levels represented only one aspect of the agency's comprehensive assessment of the environmental impacts of the project and that these impacts were, in the end, fully disclosed and evaluated, Petitioners have offered no basis to disturb the Board's or Commission's thorough consideration and exercise of technical judgment with respect to this issue.

II. The Commission reasonably determined that the Board's conclusions associated with environmental risks to groundwater were supported by the record.

Petitioners claim to identify multiple deficiencies in the Board's findings on the merits of their admitted contentions. However, the record of this proceeding demonstrates that these alleged deficiencies—whether errors of judgment, failure to consider contrary evidence, or unreasonable reliance on a presumption that NRC requirements will be followed—are simply disagreements with how the Board (and, ultimately, Commission) weighed the evidence presented at the hearing

[91] *Id.* at 39 (JA___).

concerning the staff's predictive assessment of the Ross Project's likely environmental impacts. As discussed below, this Court should not disturb the agency's thorough and reasoned consideration of these issues, to which it is owed considerable deference.

A. The Board did not ignore Petitioners' evidence relating to risks associated with boreholes.

In Contention 3, Petitioners argued that the final EIS failed to appropriately discuss the likelihood and impacts of fluid migration outside the mined aquifer, with specific focus on impacts associated with unplugged boreholes.[92] In recognition of the risks that unfilled boreholes (referred to in the final EIS as "drillholes") pose in enabling excursions between the mined and surrounding aquifers, NRC imposed conditions on Strata's license requiring that it attempt to locate and properly abandon (i.e., fill) all historic boreholes in each wellfield prior to operations.[93] In its decision, the Board considered in depth the Petitioners' concerns relating to boreholes, ultimately agreeing with the conclusion in the final EIS that "despite the nearly 1500 historic boreholes on the Ross Project site, the

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[92] *Id.* at 40 (JA___).

[93] *See* Final EIS at 3-37, 4-42 (JA___); License SUA-1601, Condition 10.12 (April 24, 2014) (JA___).

environmental impacts associated with fluid migration during facility operation will be small."[94]

Petitioners argue (Br. 38) that the Board's decision on Contention 3 "flips NEPA on its head" because it includes language in one footnote stating that the NRC staff has an "incentive" to support its finding in the EIS that there will be "small" long-term impacts from fluid migration.[95] In Petitioners' view, the decision evidences an improper use of the EIS to *establish* impacts that the agency then strives to achieve, rather than making the required *predictive* judgment on what is, in fact, likely to occur as a result of the federal action.

But a broader appraisal and fair reading of the Board's decision clearly demonstrate a predictive judgement (for which the Board deemed there was "substantial support") that the impacts associated with excursions from boreholes will be "small," not a self-serving benchmark for the NRC staff to achieve.[96] The Board relied on the inclusion of multiple conditions in the license that, in its view, create a clear incentive for *Strata* to sufficiently locate and fill boreholes prior to operations, and provide assurance of detection in the event that Strata's efforts are

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[94] LBP-15-3 at 90-98 (JA___).

[95] *Id.* at 95 n.66 (JA___).

[96] *Id.* at 93-96 (JA___).

not successful.[97] That is, the Board accepted the NRC staff's predictive judgment of "small" environmental consequences because of the manner in which the staff structured the license.[98] And while Petitioners argue (Br. 39) that the Board "ignored . . . altogether" certain evidence it presented at the hearing concerning an *entirely different in situ* recovery site, the Board expressly referenced and summarized Petitioners' evidence while weighing it against that presented by NRC staff and ultimately determined that the "small" finding was justified in light of the conditions built into *this* license.[99]

To the extent Petitioners argue that the Board should not have relied on the presence of these license conditions to support a "small" finding, given the possibility that Strata could fail to abide by them, the Board reasonably rejected

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[97] *See id.* at 94-95 (JA___) (pump tests required by License Condition 10.13 prior to lixiviant injection to help provide assurance regarding success of Strata's efforts to plug boreholes); *id. at* 96 n.68 (JA___) (ongoing monitoring of water levels required by License Condition 11.5 to provide continuing check that aquifers are hydrologically isolated); *id.* at 95-96 n.67 (JA___) (License Condition 11.5 will require shutdown of lixiviant injection if vertical excursion is detected).

[98] The Board ultimately *strengthened* this license condition to encompass more boreholes as a result of the adjudicatory hearing, s*ee id.* at 97-98 (JA___), demonstrating the efficacy of the NRC's adjudicatory process in resolving contested environmental issues and further dispelling the Petitioners' implication that adjudication of such issues after the license has already been issued is a *post-hoc*, rubber-stamp exercise.

[99] *See id.* at 90-91 (citing to testimony of Petitioners' expert witnesses) (JA___); *id.* at 92-95 (JA___).

this argument, relying on Commission precedent that "in the absence of some showing of substantial prior misdeeds, an applicant/licensee will be presumed to follow the agency's regulatory requirements, including the directives in its license."[100] Moreover, the Board placed great weight on the presence of License Condition 11.5, which requires that Strata shut down operations at a wellfield in the event a vertical excursion is detected until it demonstrates to the satisfaction of the NRC staff that the excursion is not attributable to an abandoned borehole.[101]

Upon review, the Commission likewise found that the Board's conclusion was reasonable and supported by the record—that, in spite of Petitioners' arguments to the contrary, these license conditions both requiring Strata to attempt to fill all boreholes, as well as allowing the staff to gauge and enforce that effort, supported the "small" impacts finding in the final EIS.[102] Both the Board and Commission's consideration of this issue is fully consistent with precedent of this Court permitting agencies to rely on reasonable mitigative efforts when assessing the anticipated environmental effects of federal actions.[103] Additionally, this Court

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[100] *Id.* at 93-94 (JA___).

[101] *Id.* at 94 (citing License SUA-1601, Condition 11.5 (April 24, 2014)) (JA___).

[102] CLI-16-13 at 42-43 (JA___).

[103] *See, e.g., Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515-17 (D.C. Cir. 2010) (agency did not violate NEPA's "hard look" requirement by relying on numerous mitigation techniques to be monitored over life of project); *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011) (upholding

has properly recognized that the NRC does not engage in arbitrary or capricious decisionmaking when it assumes its legal requirements will be followed as part of its identification and characterization of environmental impacts.[104] Petitioners have supplied no reason to challenge the legal basis for this presumption or the factual basis for its application here and, as such, their arguments are unavailing.

B. The Board's decision does not contain an inherent contradiction with respect to interpreting groundwater monitoring data.

Petitioners also assert (Br. 40-42) that the Board's rejection of evidence concerning the confinement of the ore zone was arbitrary and capricious because it reveals an alleged internal inconsistency within the decision. More specifically, Petitioners take umbrage with the Board's rejection of one of their expert witness's interpretation of certain sample well data in one portion of the proceeding, while also ruling in favor of Strata and the NRC staff elsewhere in the proceeding on a matter involving sample well data. But there is no inherent contradiction between these two findings, and certainly not one that would undermine the validity of the Board's ultimate conclusion.

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agency finding of no significant impact where mitigation measures included as part of proposed federal action "sufficiently reduce[d] the impact to a minimum," notwithstanding plaintiff's assertion that measures would fail or agency would ineffectively enforce them).

[104] *See, e.g.*, *New York v. NRC*, 824 F.3d 1012, 1021, 1022-23 (D.C. Cir. 2016).

In Contention 1 (the disposition of which is not at issue), Petitioners challenged the manner in which the final EIS averaged data collected from sampling wells to portray the "baseline" groundwater quality of the site.[105] The total raw sampling data was published in full as an appendix to the final EIS and then summarized into one table reflecting maximum, average, and minimum values of various constituents obtained.[106] Petitioners' expert witness argued that it was improper to average the sampling data collected without utilizing a more rigorous statistical method, but the Board rejected this argument and ultimately took no issue with the manner in which the staff established baseline groundwater quality by averaging *41 pages* of wellfield data.[107]

The alleged contrary finding associated with Contention 3 is the Board's determination that Petitioners' expert witness's interpretation of data collected from *one sampling well* did not present "convincing" evidence of aquifer communication.[108] That is, Petitioners assert that because the Board was willing to accept that data collected from *dozens* of wells could be averaged to sufficiently characterize overall groundwater conditions (notwithstanding the possibility that

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[105] LBP-15-3 at 37-39 (JA___).

[106] Final EIS at 3-38 through 3-40; Appendix C (JA___).

[107] *Id.* at 38-39 (JA___).

[108] *Id.* at 103 (JA___).

an individual well could be non-representative), it should have therefore been willing to extrapolate data from an *individual* well as representative of overall groundwater conditions. As the Commission determined on review, the "contradiction" identified by Petitioners merely reflects a technical disagreement regarding the representative value of the available data, which the Board resolved in favor of the staff.[109] Petitioners' attempt to cast the Board's considered resolution of this disagreement as contradictory, arbitrary and capricious decisionmaking is simply a resurrection of its substantive disagreement with the Board's technical judgments, which should be afforded substantial deference and are fully supported by the record.

C. The Board did not rely exclusively on the mined aquifer's "exempted" status when it reasonably agreed with the staff's conclusion that impacts to the mined aquifer would be "small."

Finally, Petitioners argue (Br. 43-50) that the final EIS failed to adequately disclose impacts to the mined aquifer. In so doing, Petitioners focus on the Board's recognition of the mined aquifer as an "exempted aquifer" to support the staff's finding of "small" impacts—i.e., Petitioners argue that impacts have not been adequately disclosed or considered because they were allegedly deemed to be

[109] CLI-16-13 at 44-45 (JA___). In fact, in finding that the staff provided the better explanation with respect to this issue in Contention 3, the Board also noted that, in its view, Petitioners' expert witness's own interpretation arguably supported the staff's determination. *Id.* at 103-04 n.72 (JA___).

irrelevant.[110] But these arguments rest upon mischaracterizations of the Board's decision.

Before the Board, Petitioners not only disputed the conclusion in the final EIS that groundwater impacts at the site would be "small" but also argued that history and data from other *in situ* recovery sites supported a finding that the impacts would, in fact, be "large," as that term was defined in the EIS (i.e., that they would be "clearly noticeable" and "sufficient to destabilize important attributes" of the resource).[111] The Board agreed with the staff that Petitioners had made no showing that the impacts from employing an alternate concentration limit would rise to such levels.[112] Its statement noting the aquifer's exempted status quoted by Petitioners (Br. 47) was not a declaration that the overall impacts to the mined aquifer would assuredly be "small" because of the exemption, but, rather, a

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[110] As discussed in LBP-15-3 at 64-65 n.47 (JA__) and in the Final EIS at 2-27 (JA___), an "aquifer exemption" is a designation from the relevant authority administering the Underground Injection Control program of the Safe Drinking Water Act (here, the State of Wyoming) allowing what would otherwise be a prohibited injection of fluids into that aquifer, based on a finding that the aquifer "cannot now and will not in the future serve as a source drinking water." *See also* Aquifer Exemption Approval, U.S. EPA Region 8 (May 15, 2013) (JA___). Obtaining an exemption for all or a portion of the mined aquifer is a necessary prerequisite to conduct *in situ* recovery activities. *See* Final EIS at 1-9 (JA___).

[111] *See* LBP-15-3 at 80-81 (JA___).

[112] *Id.* at 81-82 (JA___).

recognition that use of an aquifer that legally cannot serve as a source of drinking water is unlikely to have "clearly noticeable" and "destabilizing" impacts.[113]

And immediately following this statement as to why impacts to the mined aquifer were unlikely to be "large," the Board listed the several *other* factors, beyond the aquifer's "exempted" status, that it relied on when agreeing with the staff's predictive conclusion that the impacts would ultimately be "small." These factors included the lack of any reported instances of excursions at other *in situ* sites negatively impacting drinking water, and the fact that Strata must maintain or restore the aquifer under both State of Wyoming and NRC requirements.[114] Further, in the event restoration is accomplished under NRC regulations via an alternate concentration limit, such a limit would necessarily be based on a finding that no substantial hazard to the public health or environment exists.[115] In affirming the Board's conclusion in this regard as reasonable, the Commission

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[113] *Id.* (JA___).

[114] *Id.* at 82 (JA___).

[115] *Id.* In a similar vein, Petitioners also attribute great significance to an exchange at the evidentiary hearing between the staff and Board that they assert reveals a lack of consideration for the eventual impacts to the exempted aquifer (Br. 44-45, n.27). Petitioners made this exact same argument before the Board, which in its decision acknowledged it was "mindful" of their concerns but that the staff's subsequent attempt to clarify its comment, coupled with the legal safeguards associated with an alternate concentration limit, ultimately validated the staff's approach. *Id.* at 82-83 n.62 (JA___).

cited to these reasons as support for a finding of "small" impacts within the mined aquifer, a decision that was not based solely on the aquifer's exempted status.[116]

Finally, in connection with their arguments concerning effects on the aquifer, Petitioners also take issue (Br. 45) with the timing of the receipt of the information concerning effects, claiming that the agency could not have relied on information obtained after the staff issued the license. This argument fails for the same reasons as their challenge to the Commission's practice of augmenting the environmental record. And while Petitioners assert (Br. 45-46) that the Board and Commission ignored "overwhelming evidence" of contamination at other sites when considering the impacts to the mined aquifer, the Board *did* consider such evidence. It simply reached a different conclusion than Petitioners concerning the probative value of including such sites in its bounding analyses.[117] And, in any event, Petitioners fail entirely to explain, let alone prove, how the allegedly omitted

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[116] CLI-16-13 at 31, 36-37 (JA___). Petitioners' citation (Br. 47) to the Board's statement at ¶ 4.104 n.61 of its decision—wherein it observed that the effects that natural attenuation will have an impact on uranium concentration in the mined aquifer are "not apparent" given its exempted status of the aquifer (JA___)—is similarly unhelpful to Petitioners' contention that the Board based its conclusion solely on the aquifer's exempted status. Indeed, the Board alluded to the exempt status as well as the fact that the aquifer was subject to restoration requirements of Criterion 5B(5). *Id.*

[117] LBP-15-3 at 76-77 (JA___) (noting that restoration efforts at these sites had not been approved).

comparisons that they contend were ignored in any way affect or undermine the conclusions that the agency reached and disclosed.

In short, as with its findings relating to boreholes, the Board's finding concerning the effects on the mined aquifer represents a reasoned, holistic conclusion based on the adjudicatory record, regulatory and license requirements, and presumption of good faith that both the staff and Strata will satisfy those requirements. The Commission affirmed the reasonableness of the decision on these bases, and Petitioners have offered no reason to disturb either the Board's or the Commission's reasoned and fully supported technical judgments in this regard. This Court must defer to the agency's conclusions so long as they were "reasoned and rational," and the record here shows that they were.[118]

III. The Commission reasonably determined that the Board's handling of Petitioners' untimely filed contentions accorded with NRC regulations.

A. The Board reasonably applied NRC procedural regulations when declining to "migrate" Petitioners' contention concerning cumulative impacts.

When Petitioners were admitted as parties at the outset of the licensing proceeding, the Board admitted their "Contention 4/5A," in which they asserted that Strata's application failed to adequately assess the cumulative impacts that

[118] *BREDL*, 716 F.3d at 195 (quoting *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009)).

could result from Strata eventually expanding further into the Lance District with additional *in situ* uranium recovery operations.[119] However, when the staff later published its draft EIS in March 2013, it included a much broader discussion of the cumulative impacts of such expansion, and, as such, the Board determined that Petitioners could not simply "migrate" their admitted contention against the application to an identical challenge against the draft EIS.[120] Rather, because there was a substantial difference between the two documents, Petitioners were required to satisfy the NRC's regulations concerning admissibility of a new or amended contention. These regulations (10 C.F.R. § 2.309) allow admitted parties to file new or amended contentions based on a draft or final EIS "if the contention complies with the requirements in paragraph (c) of this section," which in turn states that new or amended contentions filed by a party "must also meet the applicable contention admissibility requirements in paragraph (f)."[121]

Petitioners claim that the Board arbitrarily refused to migrate Contention 4/5A simply because they did not "mechanistically invoke" the contention

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[119] LBP-12-3 at 37, 39-40 (JA___). As discussed *infra*, despite recognizing the possibility for expansion sites at this early juncture, Petitioners did not proffer their proposed contention concerning the proper scope of the project (i.e., the entire Lance District) until over one year later.

[120] LBP-13-10 at 21-22 (JA__). This eventually led to the contention being dismissed as immaterial before the hearing. *See* CLI-16-13 at 17 (JA___).

[121] 10 C.F.R. §§ 2.309(f)(2), 2.309(c)(4).

admissibility factors of section 2.309(f) (Br. 52-53 n.33). But these factors are hardly mechanistic; they are strict by design, and the Commission has expressly stressed the importance of petitioners setting forth contentions with sufficient particularity to ensure focused adjudicatory proceedings.[122] As the Commission stated in its decision, once the draft EIS was published, Petitioners were obligated to demonstrate what genuine dispute concerning cumulative impacts still remained, given the significantly updated analysis provided by the staff.[123] Petitioners were expressly notified of these requirements yet failed to abide by them.[124] Nor did they even attempt to address the 2.309(f) admissibility factors at either of two opportunities contesting the Board's decision.[125] Under these circumstances, the

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[122] *See, e.g., Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 55-56 (2012); *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003) ("NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners"). This Court has upheld Commission dismissal of contentions that fail to adequately satisfy the standards of 10 C.F.R. § 2.309(f). *See, e.g.*, *BREDL*, 716 F.3d 183, 196 (D.C. Cir. 2013).

[123] CLI-16-13 at 17-18 (JA__).

[124] Board Memorandum and Order (Mar. 25, 2013) at 2 (JA___).

[125] *See* Memorandum and Order Denying Motion for Reconsideration of LBP-13-10 Ruling Regarding Environmental Contention 4/5A at 5 (Aug. 27, 2013) (unpublished) (JA___); CLI-16-13 at 17-18 (JA___). Surely if all that were required was a "mechanistic invocation" correlating the new information in the staff's draft EIS to their already-submitted contention challenging the license application, Petitioners could have at least attempted to do so with ease in either of these two opportunities.

Board did not abuse its discretion in declining to consider a contention that facially did not comply with NRC's rules of procedure, and the Commission did not err in upholding the Board's determination in this regard.

B. The Board correctly determined that Petitioners' proposed contention regarding segmentation was untimely under NRC regulations and raised no genuine dispute for adjudication.

Following publication of the draft EIS in March 2013—over a year after being admitted as parties to the proceeding and nearly two years after the NRC had docketed Strata's application—Petitioners for the first time submitted Contention 6, alleging that the true scope of the federal action was larger than what was described in Strata's application. Petitioners asserted that, by considering only the impacts of the Ross Project and not Strata's alleged plans to expand recovery activities throughout the larger Lance District, the draft EIS violated NEPA by improperly segmenting the project.[126] The Board deemed the contention inadmissible on two separate grounds, each of which is amply supported.

The first ground—to which Petitioners make only cursory reference (Br. 53 n.35)—was timeliness. The Board held that it was "clear that by the time of the filing of their October 2011 hearing petition or perhaps shortly thereafter, [Petitioners] could have sought to raise the question of whether . . . a single [EIS]

[126] LBP-13-10 at 22-23 (JA___).

addressing all potential Lance District [*in situ* recovery] sites was appropriate."[127] Thus, the Board deemed Petitioners' contention fatally late under 10 C.F.R. § 2.309(c)(1)(i) and (iii), which provide that new or amended contentions in a licensing proceeding filed after the original deadline published in the *Federal Register* must be based upon information "not previously available" and submitted in a "timely fashion based on the availability of the subsequent information." Petitioners have failed to identify any flaw in the Board's conclusion, or in the Commission's endorsement of its analysis,[128] and for this reason alone, they are not entitled to relief from this Court with respect to its arguments based on Contention 6.

But even if the Court were inclined to consider the substantive aspects of these arguments, Petitioners' arguments fail. In addition to deeming Contention 6 untimely, the Board also analyzed the admissibility of Contention 6 in light of (1) relevant Commission precedent concerning the proper scope of an EIS and

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[127] *Id.* at 31 (JA___); s*ee also* LBP-12-3 at 41 (JA___) (quoting Petitioners' assertion in their original intervention petition that Strata's application "d[id] not consider the full cumulative scope of the Ross-Lance project" because it did not analyze the foreseeable impacts of "additional satellite facilities that [Strata] propose[d] to construct." (JA___).

[128] CLI-16-13 at 14-15 (JA___).

interconnected proposals;[129] (2) the Supreme Court's decision in *Kleppe v. Sierra Club*, cited by Petitioners in support of their claim;[130] and (3) Council of Environmental Quality regulations providing guidance on "connected, cumulative, and similar" actions.[131] Ultimately, the Board concluded that expanding the scope of the EIS to consider the larger Lance District was not required, and Contention 6 was therefore not admissible, because there were no actual applications for other Lance District facilities pending before the agency and Petitioners had not created a "genuine dispute" as to whether the proposed facility possessed its own independent economic utility.[132] The Board further noted that such potential facilities were instead considered in the "cumulative impacts" section of the EIS.[133] Petitioners have demonstrated no factual or legal error with respect to this determination.

Nor did the Board, as Petitioners suggest (Br. 55), improperly construe NRC regulations and weigh the merits at the contention admissibility stage. Rather, the

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[129] LBP-13-10 at 25, 27-28 (JA___) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002)).

[130] *Id.* at 23-24 (JA___) (citing 427 U.S. 390 (1976)).

[131] *Id.* at 27, 30-31 (JA___).

[132] *Id.* at 27-29, 31 (concluding that Petitioners' assertions to the contrary were "wholly inadequate" and "without any referenced support") (JA___).

[133] *Id.* at 24 (JA___).

Board reasonably determined that the Petitioners had failed, in their proposed contention, to identify a genuine dispute as to whether the Ross Project and other satellite facilities that Strata was considering but for which no applications had been submitted were nonetheless so interdependent upon one another that a comprehensive EIS encompassing the larger Lance District was presently required.[134] Again, Petitioners have not demonstrated any error in this conclusion.

Finally, the Commission has not ignored or obscured the possibility that these satellite facilities would cause environmental impacts. Indeed, as the Commission noted in its decision, the staff specifically considered in the final EIS the cumulative impacts from additional foreseeable expansion projects in the Lance District.[135] And the Commission expressly acknowledged that in 2015, subsequent to issuance of the license and the Board's initial decision affirming the

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[134] *Id.* at 31-32 (JA___); CLI-16-13 at 15-16 (citing 10 C.F.R. § 2.309(f)(vi)) (JA___). In this regard, Petitioners' primary reliance on *Del. Riverkeeper Network v. FERC,* 753 F.3d 1304 (D.C. Cir. 2014), to support its segmentation argument, is inapposite. In that case, this Court held that an agency impermissibly segmented NEPA review by treating one pipeline construction project separately from three other projects concerning the same pipeline that were either already under construction or currently pending at the agency for environmental review. *Id.* at 1308. Here, no such progress on any satellite facilities had been made when the final EIS was published.

[135] CLI-16-13 at 6 n.23 (JA___); *see also* Final EIS 5-2 through 5-5; 5-16 (land use); 5-18 to 5-19 (geology and soils); 5-20 to 5-29 (surface and groundwater impacts) (JA___).

approval, Strata had applied for a license amendment seeking to expand its operations in one area.[136] Thus, while the impacts of this (and any other) amendment will have to be considered by the agency, the Board and, ultimately, the Commission did not err in rejecting Petitioners' (belated) assertion that the agency was required to expand the scope of its environmental analysis to consider the impacts of expanded operations for which authorization had not been sought when the analysis was prepared.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

[136] CLI-16-13 at 4 n.13, 16 n.77 (JA___).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(C), I hereby certify:

The foregoing Initial Brief of Federal Respondents complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), the Brief contains 12,820 words, as calculated by the word processing software program with which the Brief was prepared.

The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface in 14-point Times New Roman font using Microsoft Word 2013.

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January 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2017, the undersigned counsel for Respondent U.S. Nuclear Regulatory Commission filed the attached Initial Brief of Federal Respondents with the U.S. Court of Appeals for the District of Columbia Circuit by filing the same with the Court's CM/ECF filing system. That method is calculated to serve:

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