[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 OF AMERICA AND
NUCLEAR REGULATORY COMMISSION,

Respondents.

PETITION FOR REVIEW OF FINAL ORDER OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION

INITIAL REPLY BRIEF FOR PETITIONERS NATURAL RESOURCES DEFENSE COUNCIL, INC. AND POWDER RIVER BASIN RESOURCE COUNCIL

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GLOSSARY

AEA	Atomic Energy Act
Board	Atomic Safety and Licensing Board
Commission	Nuclear Regulatory Commission
Councils	Natural Resources Defense Council and Powder River Basin Resource Council
NEPA	National Environmental Policy Act
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION AND SUMMARY OF ARGUMENT

Mischaracterizing both the applicable legal framework and Councils' arguments, the Nuclear Regulatory Commission ("Commission") claims it may license private companies like Stata Energy, Inc. ("Strata") to highly pollute groundwater with uranium and other toxins *before* the agency fully and fairly considers the environmental ramifications of such a license. This authorize-first approach does not violate National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*., the Commission contends, because it is sanctioned by Commission rulings and several Circuit Court precedents deeming deficiencies in agency environmental reviews too minor to warrant vacatur. Commission Brief ("Comm.Br.") at 20-29.

The Commission is mistaken. Its adjudicatory rulings cannot trump governing statutes, and, as we will explain, none of its cited cases support its argument. Rather, neither the Commission, Intervenor, nor Amicus cite a *single* court ruling where, as here, an agency was permitted to make a decision with highly adverse environmental impacts, and then only *afterwards* purport to consider directly relevant pollution data that had been ignored when the decision was made.

Indeed, if this approach to decision-making is permissible under NEPA and the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011, *et seq.*, the agency cannot

explain what purpose is served by either the NEPA review process, or the AEA hearing process. The Court should not sanction the Commission's effort to turn these steps Congress specifically mandated to improve agency decision-making into a make-work exercise. *See Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n,* 449 F.2d 1109, 1117-18, 1127 (D.C. Cir. 1971).

The Commission also cannot evade its NEPA obligations by mischaracterizing the NRC Staff's 2014 License to Strata as "provisional." Comm.Br. at 23. The Material License issued in April, 2014 was a *final* license authorizing Strata to proceed with the Ross Project, which it has been doing since the License issued. *See* Apr. 24, 2014 Nuclear Materials License ("Strata License")(JA _).[1]

Nor can the Commission avoid this problem by mischaracterizing this Petition as turning on whether an agency decision must be *vacated* when NEPA's dictates have not been followed, Comm.Br. at 20 – a *remedy* question distinct from the Commission's compliance with NEPA, which the Court can address with an

[1] *See also* Peninsula Energy, Inc., Lance Projects Wyoming USA (summarizing "Lance Projects" underway) (available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjL5e7J5_7RAhXFSSYKHV3SAwIQFggaMAA&url=http%3A%2F%2Fwww.pel.net.au%2Fprojects%2F&usg=AFQjCNGnUapERTvLi-OSRix3lDlmVvG8Dg&sig2=VwHHQhshIYMIXm_H7-U0Fw&bvm=bv.146094739,bs.1,d.eWE (last visited Feb. 7, 2017).

appropriate combination of a remand and/or vacatur. *See, e.g., Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993).

That leaves the Commission with its bald claim that any error here was harmless because the Board, and Commission, reasonably concluded the uranium pollution data Staff neglected to consider before granting the Strata License would not have changed the outcome. Comm.Br. at 33-37. As we will explain, once again the Commission mischaracterizes the Record, but its argument is also based on the same false premise adopted by the Board and Commission below – *i.e.*, that the impacts on the mined aquifer will be small *regardless* of uranium pollution levels because the groundwater was designated an "exempt aquifer," and Commission regulations ostensibly require Strata to achieve restoration goals. *Id.* at 44-46. However, as the Board itself found in admitting Councils' contention, these regulatory fiats are no substitute for the agency's *disclosure* and consideration of the degree to which the Ross Project is likely to contaminate groundwater.

In short, if the Commission's approach to NEPA is permissible, agencies would be free to ignore *any* environmental impacts information in the NEPA process, and later claim "no harm no foul" because any later divulged information would not have changed the agency's mind. This Court should continue to reject such efforts to undermine NEPA and basic administrative law principles. *See, e.g.*,

Calvert Cliffs, 449 F.2d at 1117-18; *Gerber v. Norton*, 294 F.3d 173, 183-84 (D.C. Cir. 2002).

The Commission similarly fails to demonstrate it appropriately affirmed the remainder of the Board's rulings under review. As below, the Commission repeatedly claims to have *considered* evidence and arguments, when a review of the Record demonstrates to the contrary. Thus, neither the Board, nor the Commission, ever actually *considered* (a) highly relevant uranium pollution data from other ISL mining sites; (b) excursions from other sites where the operator had failed to fill boreholes despite precisely similar "incentives" to those the Commission relies on here; or (c) the implications of the evidence showing the mined aquifer is not confined.

Finally, the Commission's defenses of the Board's refusal to allow Councils to pursue their cumulative impacts and project scope contentions do not withstand scrutiny. Comm.Br. at 48-55. Like the Board, the Commission fails to explain what was missing from Councils' cumulative impacts contention, seeking to improperly wield the Commission's "strict by design" contention admissibility requirements as a shield against review. *Id.* at 48-51.

As for the project scope contention, the Commission inaccurately portrays the Board's ruling as resting on timeliness, while also adopting the Board's

premise that the contention could only succeed if Strata had another "application[ ] for the Lance District" pending, *id.* at 51-53, which is simply not a prerequisite to a NEPA segmentation claim. Moreover, the Commission notably ignores the rich irony of its assertion, in the ruling under review, that Strata's concrete *application* to expand the Ross Project is irrelevant because it occurred too late in the adjudicatory process, *Comm'n_Order* at 15, n.72 (JA), given its heady legal argument that the Commission is, in fact, *free to first consider new information during that process* – and on that basis the Board was entitled to first consider critical environmental impacts long after Staff had already issued the Strata license and the project had begun.

ARGUMENT

I. THE COMMISSION VIOLATED NEPA BY FAILING TO CONSIDER, BEFORE GRANTING THE STRATA LICENSE, THE HIGH LEVELS OF URANIUM THAT WILL REMAIN IN GROUNDWATER AFTER THE ROSS PROJECT IS COMPLETED.

As Commissioner Baran explained, the Staff's decision to grant the Strata License without first considering critical uranium pollution data must be re-evaluated because the Staff failed to conduct "an adequate environmental analysis *at the time* it decided whether the issue the license." *Comm'n_ Order*, Comm'r Baran Dissent at 3 (JA_)(emphasis added)). None of the Commission's arguments demonstrates otherwise.

A. The Commission's Dismissal Of The Data On The Grounds That It Was "Not Material Enough" To Bear On The Licensing Decision Cannot Withstand Scrutiny.

The Commission argues it was free to "augment[ ]" the environmental review of the Ross Project, Commn.Br. at 14, because the additional information was not "significant enough" to warrant a remand and further NEPA review. *Id.* at 31. Thus, before explaining the defects in the Commission's legal argument, it is critical to set the record straight regarding the factual record before the Commission, which shows that, in fact, the missing information was highly relevant to the Strata licensing decision.

As Councils have explained, they submitted substantial evidence concerning extremely high levels of uranium contamination remaining at other ISL mining sites after Commission-mandated site restoration efforts were completed – the same restoration efforts required at the conclusion of the Ross Project. *See* Opening Brief ("Opening.Br.") at 45-46. Thus, for example, at Christensen Ranch, post-restoration levels of uranium have been detected at more than 2,000 times baseline levels, in concentrations more than *500 times higher* than EPA's safe drinking water standards. *See* Councils' Proposed Findings of Fact ¶ 172 (JA)(citing JTI005B-R2 at 14 (JA)); *see also, e.g.*, Direct Testimony of Dr. Lance Larson, at 39- 42 (JTI003-R) (summarizing post-restoration uranium

contamination levels at Christensen Ranch) (JA). Indeed, while the safe drinking water standard for uranium is .03 milligrams/liter, Councils' expert Dr. Larson showed that, after restoration efforts were complete, at one ISL mine unit average uranium levels remained at 3.042 milligrams/liter, roughly a *hundred times* above safe drinking water standards. *Compare* EPA Safe Drinking Standard (40 C.F.R. § 141.66(e)) *with* Larson Direct Test. at 15 (Aug. 25, 2014) (JA); *see also* Larson Rebuttal Test. at 6-7 (JA).

The Board, and then Commission, sanctioned Staff's refusal to consider this and other contamination data from similar ISL mining sites on the grounds that final restoration approval had not been granted at those sites, and thus ostensibly on the unfounded premise that conditions there *might* improve. *Hearing Dec.* ¶¶ 4.98-4.100 (JA); *Comm'n_Order* at 34-35 (JA); *see also* Comm.Br. at 45. However, neither Staff, the Board, nor the full Commission ever even tried to explain why conditions might improve *after the company had completed its restoration program*. Accordingly, this issue must be remanded to the Commission to consider – for the first time – whether these extremely high levels of contamination warrant any change in the Strata licensing decision. *PPL*

Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir.2005) (agency must "'respond meaningfully' to objections raised by a party") (citations omitted).[2]

Moreover, even with regard to the more limited data the Staff *itself* submitted to Board, and the Board purported to consider – which showed that where Staff had *approved final restoration* (at Smith Ranch-Highland), uranium contamination levels remained as high as *71 times* higher than background levels, Hearing Dec. ¶4.76 (JA) – the Commission never actually defends the Board's approach to "augment" the Final SEIS with this information, without requiring any further action or consideration. The Commission instead offers two arguments that seek to mislead the Court rather than actually respond to this issue.

First, the Commission focuses on the *low* end of the range of contamination detected at other sites, where the Board itself found errors in the Staff's calculations. Comm.Br. at 35. However, while the Board found that correcting that error did not "materially affect" the impacts analysis in the Final SEIS (since it reflected contamination levels lower than those that had been disclosed),

[2] Although Staff had argued that even post-restoration, uranium levels should decrease over time due to "natural attenuation," the Board, reviewing available data, concluded the role of natural attenuation "remain[s] unclear," and that "it may take decades of monitoring to resolve with any certainty the question of natural attenuation's effectiveness . . . ." *Hearing_Dec.* ¶ 4.104 and n.60 (JA). As discussed below, Staff's other principal basis for dismissing this data was that the contamination levels are irrelevant to an exempt aquifer, which is also legally and factually incorrect. *See infra* at 18-20.

Bd.Dec.¶4.96 (JA), this discussion has no bearing on the *high end* of the uranium concentration levels to which the Commission granted final approval at Smith Ranch-Highland, which was also not disclosed in the Final SEIS.

Second, the Commission relies on a statement in the final Commission decision under review, stating that this additional, highly relevant uranium contamination data "'did not change, in any material respect, the Staff's ultimate determination that the impacts would be 'small.'" Comm'n.Br. at 36-37 (quoting *Comm'n_Order* at 39). This statement suggests that, somewhere in the Record, the *Staff* made a determination that the impacts of the Ross Project on groundwater would be small even if residual uranium contamination levels remain elevated by more than 70 times baseline levels.

However, since the issue was never in fact remanded to the Staff, *it never made any such determination*. To the contrary, the *Staff's* position – reflected in its brief to the Board – has always been that the Final SEIS contained all the information necessary to issue the Strata License, and thus the additional uranium contamination data first disclosed during the hearing *is irrelevant* to the Licensing decision. *See* Staff Response to Councils' Final SEIS Contentions (Apr. 14, 2014)

at 14-20 (JA)(arguing Councils' Contention should be dismissed because the Final SEIS contained all the information required by NEPA).[3]

Accordingly, the Commission's argument that the uranium contamination information presented to the Board – but not considered by the Staff before issuing the License – was necessarily immaterial to Staff's decision does not withstand scrutiny.

B. The Commission's Efforts To Mischaracterize The Bases For Councils' Arguments Should Also Be Rejected.

Presumably recognizing its quandary, the Commission offers several additional arguments that either mischaracterize the premise of Councils' arguments or are irrelevant to the narrow question here.

First, the Commission claims Councils are asserting the AEA and NEPA require a hearing on environmental contentions. Commn.Br. at 21. This is a red herring.

Councils' argument does not turn on whether NEPA issues are aired through the AEA hearing process. Rather, it turns on whether the Commission, having

[3] Moreover, contrary to the Commission's suggestion, *Comm'n_Order* at 39 (JA), the Board's modification of one of Strata's license conditions was not in response to this additional data. That revised license condition concerned the risks of contaminant migration *beyond* the confined aquifer, not the inevitable contamination the Ross Project would cause to the aquifer itself. *See also* Strata Br. at 27.

elected to resolve NEPA issues through the hearing process, may thereby subvert NEPA by issuing licenses without *first* considering environmental impacts as NEPA requires. Thus, regardless of the process, it is meaningless if, at its conclusion, it has no bearing on the agency's decision-making.

Second, the Commission relies on its regulation authorizing immediate issuance of a license before the conclusion of a hearing. Commn.Br. 21-22 (citing 10 C.F.R. § 2.1202(a)). Whatever the merits of that regulation,[4] however, it cannot

[4] The regulation is not at issue here, but, in fact, it is not at all clear the Commission was permitted to issue the Strata License before the hearing process was completed. *See Sholly v. NRC*, 651 F.2d 780 (D.C. Cir. 1980), *superseded by statute*, Pub. Law. No. 97-415 (1983) (interpreting AEA to require a hearing before issuing a license); *see also* S. Rep. No. 97-113 (1981) at 14 (explaining that in *Sholly* the Court ruled the Commission "may not issue a license amendment . . . prior to holding a hearing requested"). Indeed, as Amicus explains, *see* Amicus Br. at 9-10, Congress amended the Atomic Energy Act in response to *Sholly* to provide narrowly that, as to nuclear power plant license amendments in particular, the Commission may grant a license "*in advance of* the holding and completion of any required hearing." 42 U.S.C. § 2239(a)(2)(A) (emphasis added). Given that limited amendment, the Commission should not be granting other licenses, prior to a hearing, for decisions that do not risk the "unnecessary disruption or delay in the operation of a nuclear power plant," S. Rep. No. 97-113 at 14, that motivated the amendment. *See, e.g., Rothe Dev., Inc. v. U.S. Dept. of Def.*, 836 F.3d 57, 69 (D.C. Cir. 2016) (When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citations omitted). The Section 2239(a)(2)(A) amendment also disposes of Amicus's hyperbole that a ruling for Councils will delay action at nuclear power plants, Amicus Br. at 21-23, since the amendment explicitly permits decisions as to *those plants* prior to completing an adjudication.

trump NEPA's mandate that important environmental information be considered *before* decisions are made. *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir.1994) ("regulations cannot trump the plain language of statutes"); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. _, 133 S. Ct. 1326, 1334 (2013) ("It is a basic tenet that regulations, in order to be valid, must be consistent with the statute under which they are promulgated") (citation and internal quotation marks omitted).[5]

Third, the Commission argues there was no error here because the Staff's issuance of the License was "essentially provisional in nature," suggesting it was the later Board decision, or even the Commission's final ruling, that constituted the final decision now under review. Comm.Br. at 23. However, there was nothing "provisional," or temporary, about the Strata License issued in April, 2014; rather

[5] Apparently recognizing the difficulty of squaring its position here with the requirement – under the Council on Environmental Quality's regulations setting forth NEPA's mandates – that an EIS must be completed to *inform* agency decision-making, the Commission argues it is not bound by those regulations. Commn.Br. at 7 n.9. The Commission is mistaken, but in any event, this requirement is also embodied in the Commission's *own* NEPA implementing regulations, which the Commission does not suggest it is free to disregard. *See* 10 C.F.R. § 51.94 (requiring "[t]he final environmental impact statement, together with any comments and any supplement . . . *be considered in [ ] the Commission's decisionmaking process*.") (emphasis added)(Add. 109).

it allowed Strata to proceed with the project immediately, which it has done. *See supra* at 2, n.1.[6]

Fourth, the Commission claims its approach contains appropriate "safeguards," including that, in issuing a License before a hearing the Staff must explain "why it believes the license application satisfies all legal requirements . . . ." Commn.Br. at 22-23. But such an explanation is surely irrelevant here, given the Board's subsequent finding that, in fact, the Final SEIS had *not* satisfied NEPA – even though Councils' arguments and evidence had been submitted directly to Staff during the NEPA process. *See* Councils' May 13, 2013 Comments (JA).[7]

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[6] The Commission also notes Staff issued a *post-hoc* "updated Record of Decision," but even the Commission recognizes this was a purely "administrative task," devoid of any "additional substantive analysis." Comm'n.Br. at 16 n.42.

[7] Indeed, ironically, the Commission proclaims, "[o]bviously, if the staff agreed with the validity of any pending contentions concerning the legal sufficiency of a license application," it would take remedial action. Commn.Br. at 23. This Petition concerns a situation where, it turns out, the staff was *wrong* in its conclusion that Councils' contention concerning uranium contamination level disclosures had no validity, and yet, under the Commission's ruling, Staff is never asked even to consider whether that error impacts its decision-making.

Further, the availability of a "stay" on the effectiveness of a license decision is also not a meaningful safeguard here. Commn.Br. at 23-24. It makes no sense to suggest a party to a licensing hearing essentially forfeits its admitted contentions unless it can meet the high hurdles of a preliminary injunction. *Cf. Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 758 F.3d 296, 322 (D.C. Cir. 2014) (rejecting argument that a claim is moot unless a party seeks expedited review).

Finally, the Commission's brief once again seeks to mislead in claiming the Court is being asked to decide whether a nuclear materials license must be *vacated* whenever a NEPA violation is discerned. *E.g.*, Commn.Br. at 20. This of course conflates the threshold question of the legal violation with the appropriate remedy.

To be sure, in Councils' view vacatur is the appropriate remedy here, in order to "ensure an objective evaluation free of the previous taint" of the Staff's licensing decision, made in violation of NEPA. *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000). However, Councils recognize the Court has other options, including, *inter alia*, remanding for supplemental NEPA review while the Strata License remains in place. *See, e.g., Allied-Signal, Inc.*, 988 F.2d at 150); *Heartland Reg'l Medical Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009).

Accordingly, the Commission offers no substantial argument in support of its crabbed view of the agency's fundamental obligations under NEPA.

C. None Of The Commission's Precedents Support Its Approach To NEPA Compliance.

While the Commission also relies on several precedents, Comm.Br. at 27-29, none of the cases cited involved facts like those here.

In *Swinomish Tribal Cmty v. FERC*, 627 F.2d 499 (D.C. Cir. 1980), the agency considered whether to *grant a license* to allow the raising of a dam for a hydroelectric project. Thus, when the agency was evaluating the project's NEPA

review, it was doing so in the context of deciding *whether to allow the project to proceed*, and thus whether the necessary environmental information was available to inform *its* decision-making. *Id.* at 504-05.

Here, by contrast, the NRC's *decision* to grant the Strata License was made by NRC Staff in 2014, and inarguably did not consider the uranium contamination information the Board found missing from the Final SEIS. Contrary to the Commission's claim, Comm.Br. at 27, *Swinomish* is thus simply irrelevant.[8]

The Commission's reliance on *Friends of the River v. FERC*, 720 F.2d 93 (D.C. Cir. 1983), is similarly misplaced. *See* Comm'n. Br. at 27-28. In that case, as in *Swinomish*, the Court considered whether the agency had adequately considered issues *before it decided* to authorize the project to proceed. 720 F.2d at 97 ("FERC issued an order and opinion granting [the] license"). Although the Court found that in making its initial decision the agency had failed to adequately consider a certain

[8] To be sure, in *Swinomish* Petitioners argued the NEPA process was flawed because the agency had considered environmental impacts information during the hearing process, which came after the EIS was completed. *Id.* at 511-512. The Court rejected this argument, finding the Commission appropriately made its decision based on the Final EIS as well as the "subsequent testimony and exhibits introduced" at the hearing. *Id.* at 511. However, again, the critical distinction between that ruling and this situation is that there the agency considered the information *before the licensing decision was made*, whereas in this case the Board, and then Commission, first considered the uranium contamination data long *after* the licensing decision.

alternative, the Court concluded the agency had cured that error by fully and fairly considering the alternative during the rehearing process. *Id.*

Once again, in this Petition, by contrast, the Board and Commission were not deciding *whether* to grant the Strata License – a decision that had been made in 2014 – but rather were reviewing the adequacy of a decision already made. Having decided that certain environmental impacts information was not considered in the Final SEIS, the Board simply could not – as in *Friends of the River* – cure that defect by evaluating the information itself. *Id.* at 106 (explaining NEPA "inhibits *post hoc* rationalizations of inadequate environmental decision-making").

Decisions from other Circuits get the agency no farther. Comm'n.Br. at 29. *Ecology Action v. Atomic Energy Comm'n*, 492 F.2d 998 (2d Cir. 1974), concerned the *timing* for judicial review, with the court emphasizing petitioners could later pursue *all* "the issues here presented on review of a final order granting a permit . . . ." *Id.* at 1002. It was in that context the Court noted the alleged NEPA defect, even if proven, did not confer the court with interlocutory jurisdiction. *Id.* at 1001-02. This Petition, by contrast, comes *after* the final order, and concerns the Commission's authority to make its licensing decision long before it has considered important environmental impacts. Nothing in *Ecology Action* supports such an approach.

Similarly, in *Porter Cnty. Chapter of Izaak Walton League of America Inc. v. Atomic Energy Comm'n*, 533 F.2d 1011 (7th Cir. 1976), where the Court found the Board's "independent evaluation" of the issue redressed any purported NEPA defect, the Board was *deciding* whether to grant the license, not *reviewing* a licensing decision already made. Thus, as in the Commission's other inapposite cases, the record showed the relevant decision-maker had considered the necessary data in granting the license under review. That simply has not occurred in this case.[9]

* * *

The Strata License, and supporting NEPA review, should therefore be vacated and/or remanded to the agency to make the Strata Licensing decision based on a full evaluation of the project's environmental impacts on groundwater.

[9] Similarly, in *Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975), while the "information stipulated to by the parties" came after the EIS issued, Comm'n.Br. at 29, it (like the information in all the Commission's inapposite cases) was considered by the decision-maker *before the decision was made*. 524 F.2d at 1295 (explaining the relevant information was "explicitly weighed by the Commission *prior* to the decision under attack")(emphasis added); *see also New England Coal. on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (cited by Commission (at 29, n.70), but also involving NEPA deficiency addressed in a hearing that occurred *before* "granting the construction permit" at issue).

II. THE COMMISSION'S RELIANCE ON THE AQUIFER EXEMPTION AND RESTORATION APPROVAL PROCESS TO DISCOUNT ENVIRONMENTAL IMPACTS ON GROUNDWATER VIOLATES NEPA.

As Councils have explained, both the Board and the Commission relied centrally on the fact that the Ross Project aquifer is exempt from use as a drinking water source in order to find that groundwater impacts would remain "SMALL" irrespective of the extensive uranium contamination data missing from the Final SEIS. Opening.Br. at 46-50. The Commission's circular reasoning on this issue in its brief mirrors the Board's circular reasoning below.

Thus, although the Commission argues the Board found the impacts would be small because the contamination was not likely to be "clearly noticeable" or "destabilizing," Comm.Br. at 46, the Board made it clear it reached this conclusion because "the [ore zone] aquifer is *permanently exempted* as a drinking water source, and there have been no reported instances of an excursion from an ISR facility negatively impacting drinking water . . . ." *See Hearing_Dec.* ¶¶ 4.107 (JA). Indeed, the Commission has no meaningful rejoinder to Councils' presentation of Staff's own witness, who explained, in no uncertain terms, that,

because the aquifer is exempt, the impacts on it will always be SMALL unless it risks moving beyond the aquifer itself. *See* Opening.Br. at 44-45 and n.27.[10]

Rather, the Commission – reiterating the Board's other rationale – argues that this Staff testimony is defensible because the site restoration and inevitable Alternative Concentration Limit ("ACL") process, which will occur at the end of the Ross Project, will ensure that the aquifer is remediated to contamination levels that will necessarily be small. Comm.Br. at 46 n.115.

Yet this reasoning is also entirely circular, contradicting the Board's finding – in allowing Councils to pursue their aquifer contamination contention – that the ACL process did *not* obviate the need to examine the likely impacts of the Ross Project on the mined aquifer. *See Bd._Intervention_Dec.* at 35 (JA). In short, if, as the Board found, *Staff* could not assume the impacts on the aquifer would be small because of the site restoration process, the Board – and Commission – plainly cannot rely on that process to make that same assumption. Indeed, otherwise there would have been no need for the "bounding analysis" the Board deemed necessary to satisfy Staff's obligations under NEPA. *Id.* at 34 (JA).

[10] Of course, the Ross Project excursion risks are also not small, *see infra* at 20-24, but the relevant point here is that Staff inappropriately relied on that issue to evaluate the contamination of the mined aquifer itself.

III. THE COMMISSION HAS NOT DEMONSTRATED ADEQUATE CONSIDERATION OF OFF-SITE CONTAMINATION RISKS.

Councils' opening brief explained the Board, and then the Commission, erred in affirming Staff's conclusion that the risks of excursions from the Ross Project were small, given the 1,500 historic boreholes on the site, and Councils' evidence showing continued contaminant migration. Opening.Br. at 38-42. The Commission's responses to these arguments do not demonstrate otherwise.

A. The Commission Fails To Show How Other License Conditions Will Prevent Contaminant Migration From Unfilled Boreholes.

The Board found the risks of contaminant migration from unfilled boreholes SMALL on the premise that Staff would make sure they are filled in order "to fully support its *predictive finding* of SMALL long-term impacts . . . ." *Hearing_Dec.* ¶¶ 4.128 n.66 (JA)(emphasis added). Recognizing this reasoning makes no sense, the Commission argues a "fair reading" of the ruling shows this was not the Board's only rationale. Comm.Br. at 39-42. However, the Commission's other rationales are similarly infirm.

Once again, Councils' central concern here is the fact that the Strata License does not actually *require* Strata to fill these boreholes, but rather simply requires the company "attempt" to do so. *See* License Condition 10.12 (JA). None of the other License Conditions the Commission points to address this concern.

Indeed, Councils provided concrete evidence that just such a weak license condition proved insufficient at another ISL mining facility. *See* Opening.Br. at 39 (providing citations). The Commission has no response to this evidence other than referring to it as "an *entirely different in situ* recovery site," Comm.Br. at 40 (emphasis in original) – as if calling it *different* somehow makes it irrelevant.

Moreover, in the context of expanding the area where Strata must attempt to fill boreholes, the Board itself explained that it is unclear how, *absent filling these holes*, the "standard excursion detection and recovery condition would have been adequate to support the staff's FSEIS finding of SMALL long-term impacts outside the OZ exempted area." *Hearing_Dec.* ¶4.127 (JA).[11] Accordingly, neither the Board, nor the Commission, has explained how the Staff reasonably concluded that the impacts of the Ross Project from excursions would be SMALL, given that Strata is not *required* to fill the boreholes on the site.[12]

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[11] The Commission's reliance on the Board's expansion of the area where Strata must "attempt" to fill boreholes to claim this issue was adequately resolved is misplaced. Comm. Br. at 40 n.98. Merely expanding the area where Strata must "attempt" to fill these holes does not address the problem of whether they will, in fact, be filled – and the environmental consequences should they remain unfilled.

[12] The Commission also relies on the License Condition requiring operations be suspended if excursions occur, Comm. Br. at 41, but, of course, that condition is meaningless unless and until the excursions are actually detected. Given the Board recognized that "the behavior of uranium during transport in

B. The Commission Cannot Explain Away The Board's Contradictory Approach To Interpreting The Groundwater Data.

There is no dispute the Final SEIS's disclosure of original/baseline groundwater quality in the mined aquifer was based on a haphazard and limited set of monitoring wells that, in their Contention One (no longer at issue), Councils claimed was insufficient to characterize groundwater in the manner NEPA requires. *See Hearing_Dec.* ¶ 4.22 n.19 (JA) (noting limiting factors in well locations, including, e.g. "proximity to existing drilling data" and "landowner considerations"). There is also no dispute the Board rejected this contention on the ground that, "in the absence of some evidence of actual bias," *id.* ¶ 4.22, it was appropriate to *assume* that averaging samples over a limited number of wells provided reliable data on site conditions. *Id.* ¶¶ 4.32-34 (finding the averaging of limited data sufficient, without accounting for characteristics "of the individual wells prior to grouping them and calculating an average . . . .").

However, as Councils have explained, Opening.Br. at 40-42 – and the Commission has failed to rebut, Comm.Br. at 42-44 – this rationale, affirmed by

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groundwater is not yet well understood" (*Hearing_Dec*. ¶ 4.144), for example, excursions of uranium might well not be detected, since Strata is *not monitoring for uranium excursions in the monitoring wells*. *See* License Condition 11.4 (listing excursion parameters); *see also Hearing_Dec.* ¶ 4.142 (JA) (discussing this issue).

the Commission, *Comm'n Order* at 25, is impossible to reconcile with the Board's rejection of Councils' evidence showing the mined aquifer is not confined.

The Board did not dispute that, if accepted, Councils' evidence showed communication between the aquifers (and thus that the mined aquifer is not confined), based on averaging the results of certain constituents found in Strata's own groundwater samples. *Hearing_Dec.* ¶ 4.141 (JA). Rather, flatly contrary to its approach in resolving Contention One, the Board found that averaging the samples was insufficient, and the data could be explained away, based *on the unique characteristics of individual wells*. *Id.*

The Commission seeks to reconcile this inconsistency by mischaracterizing Councils' evidence concerning aquifer communication as resting on sampling results from one anomalous well. Comm.Br. at 43-44. That is not accurate. Dr. Abitz's expert opinion concerning aquifer communication was based on data from numerous wells. *See* Abitz Direct Test. at 50 (JA). Thus, the Board and Commission's refusal to come to terms with that data on the grounds that "the composition of the groundwater in the OZ aquifer may vary considerably" depending on the location of the monitoring wells, *Hearing_Dec.* ¶ 4.141 (JA), is simply impossible to reconcile with its earlier finding that the groundwater baseline had been meaningfully explored without any consideration to such well-

specific variations – warranting a remand. *See, e.g. Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (agency analysis that is "internally inconsistent and inadequately explained . . . [is] arbitrary and capricious"); *Nat'l Labor Relations Bd. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 800 (1990).

IV. THE COMMISSION FAILS TO DEMONSTRATE THE BOARD APPROPRIATELY REJECTED COUNCILS' REMAINING CONTENTIONS WITHOUT A HEARING.

A. Councils Were Entitled To Pursue Their Project Scope Contention.

Seeking to avoid the substance of Councils' segmentation contention over the full scope of Strata's ISL mining plans, the Commission erroneously claims the Board dismissed this Contention as untimely. Comm.Br. at 51-52. To the contrary, the Board made clear that, while it found one aspect of this contention untimely, "Intervenors may have been justified in failing previously to lodge a new segmentation contention based on the interdependence of the Ross ISR site and other Lance District ISR sites as 'connected' actions . . . ." *Draft SEIS Dec.* at 30-31 (JA).

Indeed, Councils were entitled to take at face value Strata's claim, in its Environmental Report, that its concrete development plans remained limited to the Ross Project, and further expansions were too uncertain to require full environmental review at that time. And when, in response to the Draft SEIS,

Councils discovered that, in fact, Strata *had* concrete plans to develop the entire Lance District, the contention was timely at that time. *See* Declaration of Christopher Paine, ¶¶ 23-56 (detailing those plans); *see also*, *e.g. supra* at 2, n.1 (detailing the "Lance Projects").

The Commission also cannot successfully defend the Board's ruling on the grounds that "there were no actual applications for other Lance District facilities pending " when the contention was filed. *Id.* at 53. In the face of evidence – which the Board was required to accept at the contention admissibility stage – showing Strata had *deliberately* segmented the project and fully intended to develop the entire Lance District, the lack of such an application could not have been dispositive.

Moreover, as noted, Strata submitted just such an application before the final Commission ruling under review. *See Comm'n_Order* at 15 n.72 (JA). Thus, if the Court were to agree with the Commission's assertion – in support of its "augmenting" the NEPA review long after the license issued – that the agency made no final decision until the final Commission ruling in June 2016, the agency

should have considered that pending application even under its view of the prerequisites for a segmentation claim.[13]

Finally, the Commission cannot justify the Board's ruling on the grounds that Councils had not *proven* the Ross Project would have independent utility. Comm.Br. at 53-54. Councils' declarant explained why the project would not be economically viable were it not expanded, *see* Paine Decl. ¶¶ 23-56 (JA), and Councils were entitled to *prove* that claim at the evidentiary hearing, rather than being required to prove it at the contention admissibility stage. *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 187 (D.C. Cir. 2013); *see also* Councils' DSEIS Contentions at 20 ("the 'Ross Project' may not even constitute an economically viable investment without" the project expansions utilizing the Ross Central Processing Plant).[14]

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[13] Strata doubles down on this argument, claiming the Commission is only "reactive" and "strictly limited to" a company's permit application – and thus would have *had no power* to conduct a broader EIS irrespective of the Record. Strata.Br. at 23-24. This merely highlights what the evidence already showed – that Strata *deliberately* segmented the project by only proposing the limited Ross Project, and saving its expansion applications until after the Ross Project had been reviewed and approved.

[14] The Commission's claim that the impacts of the overall "Lance Projects" were adequately aired in the cumulative impacts section of the Final SEIS, Comm. Br. at 54-55, also fails, since a cumulative impacts analysis is certainly no substitute for a review of an entire project. Similarly, the fact that there will be further NEPA review on the Lance District expansions, *id.*, simply

B. The Board Had No Legitimate Reason To Remove The Previously Admitted Cumulative Impacts Contention.

The Board – and even the *Staff* – agreed at the outset of this proceeding that Councils were entitled to pursue their contention that the Environmental Report did not properly consider cumulative impacts. *Bd._Intervention_Dec.* at 42-43 (JA); *see also Staff's Resp. to Motion to Intervene* (Dec. 5, 2011) at 27-28 (JA). The Commission does not meaningfully defend the Board's subsequent decision to remove this contention once the Draft SEIS was issued. Comm.Br. at 49-51. Rather, like the Board, the Commission relies on the "strict by design" nature of the regulations to assert that Councils did not submit the requisite information to direct their contention against the Draft SEIS. *Id.*

However, like the Board, the Commission fails to explain *what was missing*. Indeed, the Commission's reliance (Comm.Br. at 50, n.122) on *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013), is instructive, for in that case this Court affirmed the Commission's decision to reject contentions where petitioners had made general, unsupported allegations rather than "point to any specific shortcoming in the EIS." *Id.*

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highlights the Commission is allowing Strata to segment the NEPA review in order to minimize the adverse environmental impacts of the overall project.

That was *not* the Board and Commission's rationale for rejecting Councils' cumulative impacts contention here – nor could it be, since Councils specifically explained the deficiencies in the Draft SEIS in their brief and supporting declaration.[15] Instead, the Board grounded its decision in Councils' purported failure to *state* that the proffered facts raised an issue that comported with the Commission's contention admissibility regulations. *Bd._Draft_SEIS_Dec.* at 19-22 (JA).

Thus, while the Commission accuses Councils of elevating "form over substance," Comm.Br. at 25, that is precisely what the Board and now the Commission have done with Councils' cumulative impacts contention, ignoring the *substance* of the contention and rejecting it because, they claim, it lacked the proper form. The Court should not sanction this approach to contention admissibility, and thereby allow the Commission to arbitrarily wield its contention admissibility rules to reject legitimate contentions warranting a hearing. *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) ("Any application of the [Commission regulations] to prevent all parties from raising

[15] *See* Councils' DSEIS Contention at 15-18 (JA); Second Declaration of Dr. Richard Abitz, ¶¶ 38-43 (JA); Declaration of Christopher Paine, ¶¶ 23-56 (JA).

material issues which could not be raised prior to release of" an environmental review document "will be subject to judicial review").[16]

CONCLUSION

The Petition for Review should be granted.

Respectfully submitted,

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[16] The Commission's brief once again seeks to mislead in claiming Councils failed to "demonstrate what genuine dispute concerning cumulative impacts still remained," Comm. Br. at 50, since the Board never considered that issue, and, in fact, Councils explained precisely the remaining dispute. *See supra* n. 15.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the foregoing Initial Reply Brief for Petitioners Natural Resources Defense Council, Inc. and Powder River Basin Resource Council contains 6,494 words, excluding the parts of the brief exempted by the Federal Appellate and Circuit Rules.

/s/ Howard M. Crystal
Howard M. Crystal

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2017, undersigned counsel for Petitioners filed the foregoing Initial Reply Brief For Petitioners 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. The following counsel will be served through this filing:

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