[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

FINAL OPENING BRIEF FOR PETITIONERS NATURAL RESOURCES DEFENSE COUNCIL, INC. AND POWDER RIVER BASIN RESOURCE COUNCIL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES AND RULE 26.1 DISCLOSURE

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1), counsel for Petitioners certifies as follows:

1. Parties, Intervenors, and Amici Curiae

The parties to this Petition for Review are petitioners Natural Resources Defense Council, Inc. ("NRDC") and Powder River Basin Resource Council ("PRBRC"), on behalf of their members, and respondents United States Nuclear Regulatory Commission ("NRC") and the United States of America. Strata Energy, Inc. has intervened. There are no Amici.

RULE 26.1 DISCLOSURE STATEMENT

Petitioners NRDC and PRBRC are non-profit environmental advocacy organizations. They have no parent corporations and issue no stock or shares.

2. Rulings Under Review

Petitioners seek review of the Nuclear Regulatory Commission's ("Commission") June 29, 2016 Memorandum and Order in *In the Matter of Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), Docket No. 40-9091, CLI-16-13 (June 29, 2016), which in turn affirmed several decisions of the Atomic Safety Licensing Board – *In the Matter of Strata Energy, Inc.* (Ross ISR Uranium Project), LBP-15-13 (Jan. 23, 2015); *In the Matter of Strata Energy, Inc.*, LBP-13-

10 (July 26, 2013); *In the Matter of Strata Energy, Inc.*, Mem. Order of Aug. 27, 2013; *In the Matter of Strata Energy, Inc.*, Mem. Order of May 23, 2014.

Petitioners also seek review of the Commission's February, 2014 Final Supplemental Environmental Impact Statement ("SEIS") for the project, as amended; the April 24, 2014 Record of Decision for the project; and the April 24, 2014 Materials License No. SUA-1601, Docket No. 040-09091.

3. Related Cases

Petitioners are not aware of any related cases.

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GLOSSARY

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
Strata	Strata Energy, Inc.

STATEMENT OF JURISDICTION

Natural Resources Defense Council, Inc. and Powder River Basin Resource Council (hereafter "Councils") challenge the Nuclear Regulatory Commission's ("Commission") June 29, 2016 Memorandum and Order denying – over the partial dissent of one Commissioner – their petition for review of several decisions of the Atomic Safety and Licensing Board ("Board"). *In the Matter of Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13 (June 29, 2016) (JA_105). Those decisions, in turn, denied Councils' challenges to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, review conducted for Strata Energy, Inc.'s ("Strata") "Ross Project," an In Situ Leach uranium mining operation in Crook County, Wyoming. Councils also challenge the Commission's 2014 Final Supplemental Environmental Impact Statement ("SEIS") and Record of Decision for the Ross Project, as well as the Commission's April 24, 2014 License (No. SUA-1601)(JA _531).

The Commission's decisions are reviewable under 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), 5 U.S.C. § 702, and Federal Appellate Rule 15. This Petition was timely presented on August 24, 2016. *See* 28 U.S.C. § 2344.

STATEMENT OF ISSUES

1. Whether the Commission erred in allowing the Board to consider uranium pollution data after the License had issued, and thereby "supplement" the Final SEIS, when that data was necessary for the decision whether to grant the Ross Project License.

2. Whether the Commission erred in concluding the Final SEIS disclosed the Ross Project's virtually certain adverse impacts to groundwater beyond project boundaries.

3. Whether the Commission erred in concluding the Final SEIS disclosed the Ross Project's virtually certain adverse impacts on groundwater.

4. Whether the Commission erred in refusing to allow Councils to pursue their "contentions" that the SEIS failed to disclose the full scope of, and cumulative impacts from, the entire uranium mining project Strata Energy, Inc. plans for the larger Lance District within which the Ross Project is located.

STATUTES AND REGULATIONS

The pertinent provisions of the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, and implementing regulations, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, and pertinent implementing regulations, are set forth in the Addendum ("Add.").

STATEMENT OF THE CASE

Across the United States, groundwater serves as a vital resource for drinking water, agricultural use, and other purposes. Particularly given population growth, drought conditions, and other constraints, protecting existing groundwater supplies, especially in the arid West, will be increasingly critical to protect the environment, economic well-being, and the quality of life. *See* JTI001-R at 65-69 (Testimony of Dr. Lance Larson)(JA_722-726).

The Lance District in northeastern Wyoming is within in a semi-arid region where evaporation exceeds annual rainfall. Ross Project Envt'l. Rep. (Dec. 2010) at 3-86. More than fifty wells for domestic use and other purposes are located in the vicinity. *Id.* at 3-124 (JA_420). Protecting groundwater in and near this area is therefore an important concern.

Against this backdrop, in January, 2011 Strata Energy, Inc. ("Strata"), applied for a license to deliberately contaminate groundwater in the Lance District by engaging in In Situ Leach ("ISL") uranium mining. *See id.* at 1-49, 3-36 (map)(JA_416). In that environmentally degrading process, an oxidizing solution (called a lixiviant), which mobilizes uranium and other heavy metals, is injected into the mined aquifer bearing uranium deposits within a sandstone formation. Once the metals have been oxidized off the rock and the groundwater is contaminated with

uranium (along with the lixiviant), the operator pumps out the "pregnant" solution. *See In the Matter of Strata Energy, Inc.*, No. 40-9091, LBP 15-3, 81 N.R.C. 65, ¶2.1 ("*Hearing Dec.*")(ASLB Jan. 23, 2015)(JA_280); *see also In the Matter of Strata Energy, Inc.*, CLI-16-13 (June 29, 2016)(hereafter *Comm'n Order*") (JA_105) at 2-3. After operations are complete, regulations require the operator to restore impacted groundwater to contamination levels ultimately approved by the Commission. *Hearing Dec.* ¶¶4.66-4.68 (JA_339).[1]

Concerned with traffic, dust, noise, light, and surface water contamination, but chiefly because Strata's Environmental Report failed to reveal the project would highly pollute groundwater within the mined aquifer and risked contaminating surrounding areas, the Councils intervened in the license proceeding to pursue environmental "contentions."[2] At an October, 2014 evidentiary hearing, Councils demonstrated, *inter alia*, the Final SEIS failed to disclose either the risks that pollution will migrate to surrounding groundwater (contention three), or the fact that

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1 As discussed *infra*, Commission regulations refer to restoring groundwater to pre-mining contamination levels, but the Board found that far higher levels of contamination are "a foreseeable consequence of" ISL mining." *Id.* ¶4.81.

2 *In the Matter of Strata Energy, Inc.*, No. 40-4091, LBP 12-3, 75 N.R.C. 164 (ASLB Feb. 10, 2012)("*Bd._Intervention_ Dec.*") (JA_158); *Mem. Order*, LBP 13-10, 78 N.R.C. 117 (ASLB July 26, 2013) ("*Bd._Draft_ SEIS_Dec.*")(JA_215); *Mem. Order* (ASLB Aug. 27, 2013) ("*Bd._Reconsid._Dec.*") (JA_251); *Mem. Order* (ASLB May 23, 2014) ("*Bd._Final_ SEIS_Dec.*") (JA_258).

Strata's ISL mining will turn the mined aquifer into a permanently toxic environment (contention two). Six months before the hearing, in April, 2014, the Commission granted Strata the requested License. Apr. 24, 2014 Nuclear Materials License ("Strata License") (JA _531).

In January, 2015, the Board resolved all contentions in Strata and the Commission Staff's favor. *Hearing Dec.* (JA_280).[3] With regard to contention two, the Board agreed that "important" disclosures concerning ultimate contamination of the mined aquifer had not been disclosed in the Final SEIS. *Id.* ¶4.89. However, the Board claimed the Commission's Staff testimony during the evidentiary hearing "supplement[ed]" the Final EIS, and thus the error was cured. *Id*.

On appeal to the Commission, Councils challenged both the Board's ruling on the admitted contentions, and the Board's earlier refusal to admit contentions concerning Strata's plans for ISL mining throughout the Lance District. *See* Pet. For Review of ASLB Decision (Feb. 17, 2015).

With Commissioner Baran dissenting in part, the Commission affirmed the Board. *Comm'n Order* (JA_105). As regards the "important" disclosures the Board found missing from the Final SEIS, the Commission ruled the "Board's hearing,

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3 Licensing and NEPA documents are prepared by Commission Staff, who then defend their sufficiency in the adjudicatory process. 10 C.F.R. § 2.1202.

hearing record, and subsequent decision . . . augment the environmental record of decision" for the License, even though the License had been issued *months before* the hearing and Board decision. *Id.* at 38-39 (JA_142). Commissioner Baran dissented, explaining that amending the NEPA analysis long after the License issued "conflicts with a core requirement of NEPA – that the decisionmaker consider all environmental impacts of an action *before* making a decision." *Id.,* Comm'r Baran Dissent at 2 (JA_155).

The Commission also affirmed the Board's other rationales for resolving contentions two and three in Strata and Commission Staff's favor, as well as the Board's earlier rulings regarding Strata's larger plans for ISL mining in the Lance District. *Id.*, at 34-48 (JA_138-152).

STATEMENT OF FACTS

A. Statutory And Regulatory Framework

1. The National Environmental Policy Act

NEPA's "twin aims" are to force every agency "to consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). As this Court recently reiterated, "[u]nder NEPA, an agency must 'consider every significant

aspect of the environmental impact of a proposed action,'" and then "'inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" *Public Emps. for Envtl Responsibility v. Hopper ("PEER")*, 827 F.3d 1077, 1081-82 (D.C. Cir. 2016) (quoting *Balt. Gas & Elec. Co.*, 462 U.S. at 97).

Agencies comply with this mandate by preparing an Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C)(Add. 157). Among other issues, an EIS must analyze the "environmental impact of the proposed action" and reasonable alternatives. *Id.*

2. Implementing Regulatory Scheme

a. The Council On Environmental Quality Regulations Implementing NEPA

The Council on Environmental Quality ("CEQ") regulations governing preparation of an EIS are binding on all agencies. 40 C.F.R. § 1500.3 (Add. 162); *Brodsky v. NRC*, 704 F.3d 113, 120 n.3 (2d Cir. 2013). These regulations require an EIS to describe, *inter alia*, (a) "the environment of the area(s) to be affected" by the project, 40 C.F.R. § 1502.15, (b) and "the environmental impacts of the alternatives including the proposed action." *Id.* § 1502.16 (Add. 172). Environmental impacts, also called "effects," include "ecological" effects "such as the effects on natural resources and on the components, structures, and functioning of affected

ecosystems." *Id.* § 1508.8(b); *see also id.* (effects include the "effects on air and water and other natural systems, including ecosystems"). Effects also include "any adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* at § 1502.16 (Add. 172).

The CEQ regulations also require agencies to ensure "the proposal which is the subject of an environmental impact statement is properly defined," addressing "proposals which are related to each other closely enough to be, in effect, a single course of action . . . in a single impact statement." 40 C.F.R. § 1502.4(a) (Add. 169). An EIS must also consider cumulative impacts, "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7 (Add. 187).

Finally, NEPA requires that an agency consider environmental impacts and alternatives *before* taking action. *Id.* § 1500.1(b) (Add. 162). Thus, the CEQ regulations mandate that "[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." *Id.* § 1502.2 (g) (Add. 169).[4]

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4 *See also id.* § 1502.1 (An EIS "shall be used by federal officials [to] *make decisions*) (emphasis added)(Add. 165); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that NEPA requires "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.").

b. The Commission's NEPA Implementing Regulations

The NEPA review for a nuclear materials license begins with an applicant's Environmental Report, 10 C.F.R. § 40.31(f) and § 51.60, which forms the basis for Staff's subsequent Draft EIS, *id.* § 51.71, followed by the Final EIS. *Id.* § 51.90 (Add. 98-108).

The Environmental Report, Draft, and Final EIS for a nuclear material license must contain the information specified in 10 C.F.R. § 51.45, including, *inter alia*, "a description of the environment affected," *id.* § 51.45(b), and "[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* § 51.45(b)(2)(Add. 86); *see also* 10 C.F.R. pt. 51, Subpt. A, App. A, § 6. The Final EIS must also meaningfully respond to comments. *Id.* § 51.91 (Add. 107).

Finally, as with the CEQ regulations, the Commission's NEPA regulations require that "[t]he final environmental impact statement, together with any comments and any supplement . . . *be considered in [ ] the Commission's decisionmaking process*." 10 C.F.R. § 51.94 (emphasis added)(Add. 109).

c. The Commission's Hearing Regulations

Pursuant to the Atomic Energy Act, an operator must obtain a license from the Commission to handle nuclear materials, including byproduct material 42 U.S.C. §§ 2111, 2113; *see also* 10 C.F.R. Part 40. In order to challenge the adequacy of such an application, a prospective intervenor files a petition to intervene and request for a hearing, and sets forth "contentions" identifying, *inter alia*, the specific issues to be raised and the reasons those issues are material to the agency's decision-making. 10 C.F.R. § 2.309(f) (Add. 32). An applicant need not *prove* the contentions at the admissibility stage, but rather must only identify material facts in dispute. *E.g.*, *Blue Ridge Envtl. Defense League v. NRC*, 716 F.3d 183, 187 (D.C. Cir. 2013). Once admitted, an intervenor – now a party to the proceeding – litigates the merits of the contention at an evidentiary hearing before an Atomic Safety Licensing Board. *See generally* 10 C.F.R. § 2.310 and subpt. L. The Board's ruling may be appealed to the full Commission. *Id.* §§ 2.1212, 2.341.

For compliance with NEPA, contentions must be timely presented in connection with the license applicant's Environmental Report, 10 C.F.R. § 2.309(f)(2) (Add. 32), and a contention first presented later is only timely if based on "materially different information" not previously available. *Id*. § 2.309(c) (Add. 30).

B. Factual And Procedural Background

1. In Situ Leach Uranium Mining

ISL mining is used to recover uranium from low-grade ores or deposits not economically recoverable by conventional uranium mining and milling techniques. As noted, it requires the injection of chemicals – including an oxidant such as hydrogen peroxide and a complexing agent such as sodium bicarbonate – and groundwater (together called the "lixiviant") into an ore zone through an injection well. This lixiviant mobilizes the uranium ore into the groundwater, which is then pumped back to the surface through a recovery well and processed. *See* Generic EIS for In-Situ Leach Uranium Milling Facilities (NUREG-1910, May 2009) at xxvi ("Generic EIS")(Rec._No._608-09)(JA_403).[5]

Because the process involves deliberately polluting groundwater, the Commission requires several measures intended to ameliorate the risks to the mined aquifer and adjacent groundwater.

First, the operator must seek to address the risks of contaminant migration to adjacent groundwater (called "excursions"), which are inevitable at these operations, and are caused by, *inter alia*, "[i]mproperly abandoned exploration drill holes." *Id.* at 2-18; *see also id.* at 2-47 ("Historical information for several facilities

5 Rec._No. references indicate the Commission's Record Number provided in its October 11, 2016 Certified Record Index.

indicates that excursions occur at ISL operations."). This requires filling boreholes and groundwater testing to ensure the aquifer is adequately confined – *i.e.*, overlain by an impervious confining geological unit limiting transmission of the water beyond the aquifer. *Id.* at 2-18 to 2-20. The groundwater testing includes both testing before operations begin to confirm aquifer confinement, and "excursion monitor" testing during and after operations, using monitoring wells outside the production area and closer to the project boundaries, in order to attempt to detect and address excursions. *See, e.g.,* Strata License at ¶¶ 11.3, 11.5 (JA_542).

Second, once mining is complete the operator must endeavor to reduce the contamination levels in the deliberately polluted groundwater. Thus, pursuant to Commission regulations,[6] at the completion of the project the concentrations of hazardous constituents at the "point of compliance" (defined as the "site specific location in the uppermost aquifer where the ground-water protection standard must be met") must not exceed:

6 As the Board recognized, these regulations were developed for conventional uranium mining facilities, but have since been applied to ISL mining. *Hearing Dec.* ¶4.16 n.15.

(a) The Commission approved background concentration of that constituent in the ground water;

(b) The respective value given in the table in paragraph 5C if the constituent is listed in the table and if the background level of the constituent is below the value listed; or

(c) An alternate concentration limit established by the Commission.[7]

10 C.F.R. pt. 40, App. A, Criteria 5.5(B)(5)(Add. 127). However, as the Board recognized, setting alternative limits that permit the mined aquifer to remain permanently polluted has been shown by field measurements to be inevitable at ISL mining sites. *Hearing Dec.* ¶4.81 (JA_347).

2. Strata's Source And Byproduct Materials License And Environmental Report

In 2009, the Commission prepared a "Generic" EIS for ISL mining in 4 states, including Wyoming (JA_398), and has since issued individual "Supplemental" EISs for specific ISL mining projects. In January, 2011 Strata Energy Inc. submitted a License application and accompanying Environmental Report for the Ross Project – describing fifteen to twenty-five groups of wells, called "wellfield modules," collectively containing between 1,400 and 2,200 injection and recovery wells, with surrounding monitoring wells. Final SEIS at 2-9 (JA_464).

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7 These limits are required to be "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." 10 C.F.R. pt. 40, app. A, Criteria 5B(6), 5B(5)(c) (Add. 127).

As the Board recognized, a major concern for the Ross Project is the existence of approximately 1,500 historic boreholes drilled during prior exploration efforts in the region. *Hearing Dec.* ¶4.127 (JA_375) ("The presence of some 1500 pre-existing boreholes within the Ross permit area undoubtedly presents a daunting challenge both in assessing and mitigating the potential environmental impacts of the drill holes."). Strata claimed that natural conditions and monitoring will minimize the risks of excursions, and that "all exploration drill holes that can be located within the perimeter monitor well ring" would be properly remediated. Envtl. Rep. at 4-58 and 4-59 (JA_429).

3. Councils' Petition To Intervene

After satisfying itself of Councils' standing, *Bd._Intervention_Dec.*at 5-17 (JA_162), the Board granted Councils' intervention and admitted several contentions that remain at issue.

First, particularly because the Ross Project site is riddled with historic exploratory boreholes, the Board admitted Councils' contention regarding whether the Environmental Report had adequately addressed the risks of contaminant excursions. *Id.* at 35-37. The Board found Councils had presented evidence "regarding boreholes and aquifer isolation in the immediate vicinity of the Ross

facility that raise questions about the groundwater hydrology associated with the site." *Id.* at 36.

Second, the Board admitted Councils' contention regarding the pollution that will remain in the mined aquifer. *Id.* at 32-25. As noted, *see supra* at 11-12, Commission regulations provide the Commission may set "[a]lternate concentration limit[s]" authorizing an operator to leave the mined aquifer polluted. 10 C.F.R. Pt. 40, app. A, Criteria 5B(5)(c), 5B(6), 5C (Add. 127). Because *all* ISL mining sites have required such alternative limits, the Board agreed that the NEPA process requires "a public explanation of the impacts of being unable to restore the mined aquifer to primary or secondary baseline" standards. *Bd._Intervention_Dec.* at 35 (JA_192). In reaching this conclusion, the Board rejected Staff and Strata's arguments that such disclosures are unnecessary or too speculative because Strata will need to obtain a separate license amendment to obtain alternative concentration limits. *Id.* at 34-35.

Third, the Board admitted Councils' contention concerning the cumulative impacts of all of Strata's planned activities in the Lance District, which included the Ross Project and several expansions into other areas. As the Board explained, "given the size of the Lance District expansion relative to the Ross permit area . . .

and the possible use of the Ross CPP [Central Processing Plant] in connection with that expansion, the potential for cumulative impacts seems apparent." *Id.* at 43.[8]

4. The Board's Ruling On Councils' Draft SEIS Contentions[9]

Because the Draft SEIS did not resolve Council's concerns regarding excursion risks and residual contamination levels, the Board allowed those contentions to be redirected against the Draft SEIS. *Bd._Draft_ SEIS_Dec.* at 13-19 (JA_227). The Board refused, however, to allow Councils to pursue contentions concerning scope of Strata's ISL mining plans.

First, Councils argued the "proposed action" for review under NEPA should encompass Strata's larger ISL mining plans. The Board recognized the "strong likelihood" of this larger project, but rejected the contention on the grounds that Councils had not proven the Ross Project lacks "independent utility," allowing segmented NEPA review. *Id.* at 29-30 (JA_243).

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8 The Board also resolved several other contentions no longer at issue, and the Commission rejected appeals challenging Councils' standing. *In the Matter of Strata Energy, Inc.*, CLI-12-12, 75 N.R.C. 603 (2012).

9 In addition to submitting contentions on the Draft SEIS, Councils submitted extensive comments directly to Staff pursuant to NEPA, including the brief and expert declarations submitted in support of their contentions. *See* Councils' May 13, 2013 Comments (JA_). The Staff was thereby obliged to respond to Councils' concerns *in the Final SEIS*. 40 C.F.R. §§ 1502.9(b), 1503.4 (add. 170-71, 176).

Second, Councils argued the Draft SEIS, like the Environmental Report, failed to adequately address the cumulative impacts of Strata's Lance District ISL mining plans. Because the Draft SEIS had added new language on cumulative impacts, Councils explained why that discussion remained deficient. *See* Int. Mot. On Draft SEIS at 15-18 (May 6, 2013) (JA_636).

The Board rejected this contention on the grounds that Councils had not properly invoked each specific contention admissibility requirement, such as explaining which new facts demonstrated the contention fell within the scope of the proceeding and which facts showed there was "good cause" for not presented the contention earlier. *Bd._Draft_SEIS_Dec.* at 19-22 (JA_233). The Board rejected Councils' request for reconsideration. *Bd._Reconsid._Dec.* at 4-5 (JA_254).

5. The Commission's Record Of Decision And License For The Ross Project, And Subsequent Evidentiary Hearing And Rulings On Councils' Remaining Contentions

Two months after issuing the Final SEIS in February, 2014, Staff issued the NEPA Record of Decision and License for the Ross Project. Apr. 2014 Record of Decision (JA_526); Apr. 2014 License (JA_531).[10]

10 As regards unfilled boreholes, License Condition 10.12 provided that Strata "will *attempt* to locate and abandon all historic drill holes located within the perimeter well ring for the Wellfield." *Id.* at 9 (emphasis added)(JA_539).

Six months later, in October, 2014, the Board held the evidentiary hearing on the Councils' remaining contentions, and in January, 2015 issued its final ruling.[11]

The Board provided lip service to Staff and Strata's evidentiary burden, which requires they demonstrate, by a preponderance of the evidence, the Final SEIS complied with NEPA. *Hearing Dec.* ¶3.8 (JA_299). According to the Board, they met that burden:

1. With respect to contaminating the mined aquifer (contention 2), given the Board's finding that alternative concentration limits permitting the groundwater to remain permanently polluted are "a foreseeable consequence of" ISL mining," *id.* ¶4.8, the Board considered whether the Final SEIS adequately disclosed the likely residual pollution that would be permitted at the Ross Project site. As the Board noted, the Final SEIS "included a one page discussion of" some of the contamination levels that had been permitted at three other ISL sites. *Hearing Dec.* ¶4.72 (citing Final SEIS at 4-46). However, the Final SEIS did not accurately disclose any of the final uranium concentrations in groundwater. *Hearing Dec.* ¶4.73 ("No values were given concerning uranium concentrations"); *see also id.* ¶4.74-75.

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11 Shortly after the Record of Decision and License issued, the Board decided Councils were entitled to direct their admitted contentions against the Final SEIS, but continued to refuse admission of the project scope and cumulative impacts contentions. *Bd._ Final_SEIS_Dec.* at 4-16 (JA_261-273).

The Board recognized that, "[g]iven that IS[L] mining is intended to liberate uranium from a mineral deposit," the post-restoration uranium levels are "an *important* aspect of" the disclosures required under NEPA. *Id.* ¶4.89 (emphasis added). Rather than find the Final EIS deficient on these grounds, however, the Board looked at additional information submitted directly to the Board – *months* after issuance of the Final SEIS, and License – in the form of Staff's Prefiled testimony. *Id.* ¶¶4.76, 4.89 (citing Staff's testimony (NRC001)) (Aug. 25, 2014) at 33).

Rejecting Councils' arguments that the Board could not consider this *post-hoc* information, the Board determined that the "post-restoration uranium concentration levels reported in the staff's prefiled testimony *supplements the [Final] SEIS so as to cure any defect*" regarding this critical omission from the Final SEIS. *Hearing Dec.* ¶4.89 (emphasis added).

The Board also rejected each of the Councils' arguments, supported by expert testimony,[12] explaining deficiencies even in Staff's *post-hoc* uranium concentration disclosures, and their inapplicability to the Ross Project. *Hearing Dec.* ¶4.4.80-4.98.

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12 The Councils relied on expert testimony from Drs. Richard Abitz and Lance Larson in support of their contentions. *See* JTI003-R (Dr. Larson Testimony); JTI0052-R (Larson Rebuttal Testimony); JTI001-R (Dr. Abitz Testimony); JTI051-R (Dr. Abitz Rebuttal); JTI 002, 004 (Curriculum Vitaes)(JA_776; 785).

Based on all these concerns, Councils challenged the Final SEIS finding that the Ross Project's adverse impacts on the mined aquifer would be "SMALL." *Id.* ¶¶4.105-4.107 (all caps in original). While recognizing Staff's approach "suggest[s] 'a resolution by definition approach,'" *id.* ¶4.107 n.62, the Board concluded the finding was accurate because the groundwater will not be a source of drinking water, and the Commission will be required to protect against risks to health or the environment in approving, at some indeterminate future date, the inevitable alternative concentration limits Strata will request in order to be permitted to permanently pollute the mined aquifer. *Id.* ¶¶4.105-4.107 (JA_363-365).[13]

2. As regards the risks of excursions (contention 3), the Board rejected each of Councils' arguments:

a. The Board recognized that the more than fifteen hundred historic boreholes in the project area "undoubtedly present[ ] a daunting challenge both in assessing and mitigating the potential environmental impacts of the drill holes." *Id.* ¶4.127 (JA_375). Explaining Staff had "overly discounted" the need to properly

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13 Under regulations implementing the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*, an aquifer can be deemed "exempt" from protection on the grounds that it is not currently used as a drinking water source and contains "minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible." 40 C.F.R. § 146.4. Strata obtained this exemption for the "OZ [Ore Zone] aquifer" at Ross Project site. *See* SEI034 (JA_682).

plug these holes, the Board explained that it is "not apparent," if the boreholes are not adequately filled, the excursion detection system – whereby operations must temporarily cease if an excursion parameter is triggered at a monitoring well – would be "adequate to support the staff's FSEIS finding of SMALL long-term impacts outside the OZ [Ore Zone] exempted area." *Id.* ¶4.127.

The Board deemed "not without significance" the Councils' argument that, in light of these concerns, the fact that the License only requires Strata to "'*attempt*' to "detect and abandon properly the myriad drill holes on the Ross Project site," is not sufficient to "support adequately the staff's SMALL impact finding." *Id.*(citing License Condition 10.12 (JA_375-376)). Nonetheless, the Board concluded that both Strata and Staff have the necessary "incentive" to ensure these boreholes are adequately filled, and excursions do not occur.[14] In other words, the Board

14 *See Id.* ¶4.128 n.66 ("[T]he staff has an additional incentive here, i.e., in the face of extensive prior drilling intrusions into the Ross site, to *fully support* its predicative finding of SMALL long-term impacts from fluid migration, the staff necessarily must ensure that SEI's LC [License Condition] -required 'attempt' to locate and abandon all drill holes within the monitoring well ring embodies a level of effort that maximizes the potential for eliminating excursions, particularly vertical excursions . . . that would reach into the SM or DM aquifers.")(emphasis added).

determined that the risks from these boreholes would be small because Staff, in the Final SEIS, said they would be small.[15]

b. With regard to communication between aquifers, which would lead to excursions, Councils presented expert testimony demonstrating such communication. Dr. Abitz Test. (JTI001) at 49-52 (JA_736-740). In addition, Staff conceded the testing incorporated into the NEPA process was "not designed or intended to demonstrate confinement throughout the entire Ross licensed area," but rather that such testing which would occur long after the License issued. *Hearing Dec.* ¶¶4.136, 4.144. Nonetheless, the Board found the Final SEIS conclusion of SMALL impacts from excursions adequately supported.

* * *

For reasons discussed *infra*, and with Commissioner Baran dissenting in part, the Commission affirmed the Board. *Comm'n Order*. This Petition followed.[16]

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15 The Board ignored Councils' evidence of other sites where boreholes remained unfilled, and excursions occurred, despite similar "incentives." *E.g.* Dr. Abitz Test. (JTI0001R) at 47 (JA_734). Because the Board remained concerned the License did not require Strata to fill boreholes beyond the perimeter well ring, however, the Board modified License Condition 10.12 to require filling of certain of these boreholes. *Hearing Dec.* ¶¶4.129 - 4.131.

16 There have been a number of further developments related to Strata's ISL mining in the Lance District since the Board and Commission's rulings – including, *inter alia*, Strata requesting its first of several anticipated project expansions (*see Comm'n Order* at 4 n.13); Strata requesting an Amendment to

SUMMARY OF ARGUMENT

In affirming the Board's decision, the Commission violated several NEPA and the Administrative Procedure Act mandates, requiring vacatur of the Strata License and a remand of the Strata Final SEIS and Record of Decision for the agency to meaningfully consider the adverse environmental impacts of the Ross Project.

First, the Board was not permitted to "supplement" the Final SEIS – long after the licensing decision the Final SEIS was required to inform had already been made – with critical information concerning the extent to which the Ross Project will permanently contaminate groundwater with uranium. Rather, NEPA necessitates the requisite "environmental information [be] available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R. §1500.1(b)(Add. 162) (emphasis added). The Commission also erred in finding the Final SEIS's conclusion that the Ross Project's adverse impacts on the mined aquifer would be SMALL was supported by the record.

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weaken the very License Condition the Board had strengthened to address the borehole issue (*see Comm'n Order* at 8 n.31); and, most recently, the Commission issuing, in September, 2016, a revised "Record of Decision" for the April 24, 2014 Strata Source Materials License. Rec._No._766. Certainly, if the Court elects to consider any of these *post-hoc* developments here, it should consider all of them.

Second, the Commission erred in affirming the Board's conclusion that the Ross Project posed little risk to surrounding groundwater. The Board concluded Strata would fill hundreds of boreholes (which will otherwise allow pollution to migrate beyond the mined aquifer) because doing so is necessary to ensure the Final SEIS's predictions are accurate. This reasoning inappropriately transformed NEPA's *predictive* requirement of anticipating prospective impacts into a purported *prescriptive* requirement for future compliance that does not in fact exist. The Commission erred in affirming this reasoning, as well in affirming the Board's rejection of Council's evidence showing the mined aquifer is not in fact confined.

Finally, Councils were entitled to pursue their contentions regarding Strata's concrete plans to engage in environmentally destructive ISL mining throughout the Lance District. The Commission erred in allowing the Board to reject Councils' cumulative impacts contention on the grounds that Councils had not restated each contention admissibility factor.

The Commission similarly erred in rejecting Councils' project scope contention. Councils presented more than enough evidence to create a factual dispute about Strata's overall ISL mining project plans in the Lance District, and the mere fact that Strata made a strategic decision to segment the project into smaller

pieces was not enough to resolve that dispute against Councils prior to the evidentiary hearing.

STANDING

Councils have Article III standing in light of the risks the Ross Project poses to their missions and members. *E.g.*, *Sierra Club & La. Envtl. Action Network v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014). Councils are environmental advocacy organizations whose missions including addressing the environmental risks posed by ISL mining, and who have members in Wyoming. Declaration of Wilma Tope, ¶¶3-7 (JA_560); Declaration of Linda Lopez, ¶¶4-6 (JA_558). As the Commission recognized, Pamela Viviano – a member of both Councils – has concrete interests adversely affected by the Ross Project. *See* Declaration of Pamela Viviano (JA _563); *see also* Supplemental Declaration of Pamela Viviano (JA _567). Accordingly, Councils have Article III standing. *Sierra Club*, 755 F.3d at 973 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)); *see also Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013).[17]

17 Ms. Viviano's concerns include the impact of the project in contaminating ground and surface water, degrading air quality, and causing light pollution, all of which threatens her aesthetic and economic interests, including the

ARGUMENT

In considering NEPA claims, an Atomic Safety and Licensing Board is charged with determining whether the license applicant and Staff have met their burden to demonstrate, by a preponderance of the evidence, that the agency's Final EIS complies with NEPA. *See Hearing Dec.* ¶3.8 (JA_299); 10 C.F.R. § 2.325 ("Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof."). This Court, in turn, reviews the Commission's decision upholding the Board's rulings under the Administrative Procedure Act, which requires a "thorough, probing, in-depth review," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), to determine whether the Commission "has considered the relevant factors and articulated a rational connection between the facts found and the choice made," including "set[ting] forth its reasons for decision," and "respond(ing) meaningfully to objections raised by a party." *Shieldalloy Metallurgical Corp. v. NRC*, 768 F.3d 1205, 1208 (D.C. Cir. 2014). As Councils' contentions arise under NEPA, the Court must also be satisfied the Commission took a "hard look at [the] environmental consequences of" the Ross Project. *PEER*, 827 F.3d at 1082 (alteration in original) (citations omitted).

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value of her homes in the area. *See* Viviano Declarations. The Board found standing based on Ms. Viviano's concerns with air and light pollution, and the Commission affirmed based on air pollution concern arising from increased traffic. *See Intervention Dec.*at 5-17 (JA_162); 75 N.R.C. 603 (2012).

Applying these review standards here, the Commission's decision, and the underlying Supplemental EIS and License, must be vacated.

I. ONCE THE BOARD DETERMINED THE FINAL SEIS WAS MISSING NECESSARY INFORMATION, IT WAS REQUIRED TO REMAND TO STAFF FOR FURTHER CONSIDERATION.

A. The Board's Ruling That The Final SEIS Was Deficient, And The Board And Commission's Reliance On "Supplementation" To Cure That Error.

A primary concern with ISL uranium mining is that, at each of the sites the Commission has deemed "restored," the Commission has authorized alternative concentration limits allowing residual pollution to remain at levels far above what they were before mining began. Agreeing that the NEPA process must include "a public explanation of the impacts of being unable to restore the mined aquifer," *Intervention Dec.* at 35 (JA_192), and particularly given that alternative concentration limits "realistically may be necessary at the time of facility decommissioning," the Board found the Final SEIS must address "within a reasonable range, what [are those alternative concentration limits] likely to look like and what are the associated environmental impacts associated" with those limits. *Bd._Draft_SEIS_Dec.* at 15 (JA_229).

In the Final SEIS, Staff included *some* of this information: a single page of the Final SEIS summarized some of the approved restoration discussions for three other

restored ISL mining areas – (a) Crow Butte Wellfield 1, (b) Smith Ranch-Highland A Wellfield, and (c) Irigary Mine Units 1-9. Final SEIS at 4-46 (JA _493). However, the Final SEIS did not disclose the high levels of residual *uranium* that had been permitted.

In light of these and other concerns, the Board admitted an amended contention against the Final SEIS challenging this analysis, explaining that Councils' experts had raised material issues concerning whether the Final SEIS complied with NEPA. *Bd._Final_ SEIS_Dec.* at 8-10 (JA_265-267).[18]

In its final ruling, the Board continued to agree that the disclosures contained *in the Final SEIS were insufficient*, finding that "including information about the post-restoration concentration levels of uranium is an important aspect of" the NEPA analysis. *Hearing Dec.* ¶4.89 (JA_351). However, over Councils' objections, the Board purported to "supplement[ ]" the Final SEIS with information on uranium levels supplied by Staff *as part of the evidentiary hearing*. *Id.* ("the post-restoration

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18 One of Councils' concerns was, for the only site where any uranium information was provided, the Final SEIS listed a post-restoration level for uranium (at Crow Butte) of "18 percent above post-licensing, pre-operational concentrations," Final SEIS at 4-46 (JA _493), when, in fact, the approval was for levels 18 *times* above, *or 1800%*. *See* Councils' Mar. 31, 2014 Final SEIS Contentions at 24-25. Staff responded to this concern by issuing a Final SEIS "errata" correcting this error. *See* JA_522 **(**SEIS Errata).

uranium concentration levels reported in the staff's prefiled testimony supplements the [Final] SEIS so as to cure any defect in that regard"); *see also* ¶¶4.108, 5.2 (finding Staff met their burden regarding Contention 2 in light of the "bounding analysis provided in section 4.5.1.3 of the FSEIS, *as supplemented in the record before this Board*") (emphasis added).[19]

On appeal to the Commission, Councils continued to argue that where necessary information is missing from an EIS, a reviewing body must vacate and "remand to the agency to reconsider its decision in light of accurate information." *See* Pet. For Review (Feb. 17, 2015) at 14 (*citing, e.g., New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)). The Commission rejected this argument, finding that it was appropriate for the Board to supplement the Final SEIS by considering "*the additional information considered at the hearing and in the staff's pre-filed testimony*," in order to determine whether "the environmental impacts of the proposed licensing action were appropriately identified." *Comm'n Order* at 38-39

19 Councils' objections were rooted in the NEPA and Administrative Procedure Act requirements that the agency's Licensing decision be defended based on the information publicly disclosed in the Final SEIS, which meant the SEIS could not be "supplemented" long after the License was issued. *See* Councils' Proposed Findings of Fact at 9-10 (Nov. 3, 2014) (JA_796-797). Rejecting that limitation, the Board claimed that despite issuance of the License, the "agency's NEPA record of decision remains open, and is subject to adjudicatory supplementation relative to matters associated with any pending admitted NEPA contention." *Hearing Dec.* ¶4.89 n.49 (JA_352).

(JA_142)(emphasis added). The Commission also found that there was no error because the new information would not have changed the Staff's decision to issue the License. *Id.* at 39.

As noted, Commissioner Baran dissented, explaining it violated NEPA to purport to "supplement" the Final SEIS long after the License had issued, for "the adjudicatory decision or proceedings cannot supplement the NEPA environmental document or Record of Decision after the fact because the licensing action has already been taken in reliance on the NEPA analysis." *Comm'n Order*, Comm'r Baran dissent at 3 (JA _156). As he explained, "[b]ecause the Board found a deficiency in the NEPA analysis, the agency did not have an adequate environmental analysis at the time it decided whether to issue the license [and thus the Staff's] decision to issue the license was not informed by an adequate NEPA analysis." *Id.*

B. The Commission Erred In Affirming The Board's Resolution Of This Issue Rather Than Requiring A Remand To The Agency.

1. The NEPA Review May Not Be Supplemented Long After The Underlying Decision Has Been Made.

The Commission erred in allowing the Board to "supplement" the analysis in the Final SEIS long after the License issued. As this Court has often explained, a reviewing court may not uphold an agency's decision based on "'post hoc rationalizations.'" *United States Sugar Corporation v. EPA*, 830 F.3d 579, 647

(D.C. Cir. 2016) (citations omitted). Rather, as the Court recently reiterated, "the focal point for judicial review should be the administrative record *already in existence*, not some new record made initially in the reviewing court." *Friedman v. FAA*, 841 F.3d 537, 545 (D.C. Cir. Nov. 15, 2016) (emphasis added) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985)); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 599 (D.C. Cir. 2007) (same).

As Commissioner Baran recognized, these principles have particularly important implications in the NEPA process, for, as the Supreme Court has explained, the entire *raison d'être* of NEPA is to force agencies to consider and disclose environmental impacts "*before* decisions are made," 40 C.F.R. §1500.1(b) (emphasis added), so "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349. Thus, as the Commission's own regulations recognize, the final SEIS is required "to be considered" in making the licensing decision, 10 C.F.R. 51.94 – which obviously cannot occur if relevant disclosures are not made until long after a license issues. *E.g., Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) ("NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment," and thus "the

appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options.").

This Court's recent decision in *PEER*, which concerned a NEPA challenge to an offshore wind farm, is instructive. 827 F.3d 1077. In response to plaintiffs' argument that the EIS failed to consider certain "geophysical data" necessary to evaluate the wind farm's environmental impacts, the agency claimed the EIS was adequate because it had required compiling additional surveys, which had been collected subsequently. *Id.* at 1082-83.

This Court rejected that approach, explaining "there is no evidence the Bureau relied on any additional surveys *in its impact statement*, and NEPA does not allow agencies to slice and dice proposals in this way." *Id.* at 1083 (emphasis added). Similarly, here, NEPA does not allow the Board to "supplement" the NEPA review long after the decision to issue the Strata License had been made. *See also, e.g., Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n,* 449 F.2d 1109, 1117-18 (D.C. Cir. 1971) (emphasizing the Atomic Energy Commission – the precursor to the Nuclear Regulatory Commission – must consider NEPA documents in its decision-making). Thus, contrary to the Board's assumption, the "NEPA record of *decision,*" closed when the *decision* was made to grant the License, and could only

have "remain[ed] open" for further "supplementation" had the licensing decision come *after* the Board's ruling. *See Hearing Dec.* ¶ 4.89 n.49 (emphasis added).

In short, by upholding the Board's decision on this point, the Commission allowed the Board to turn the NEPA process on its head. *See Metcalf v. Daley*, 214 F.3d 1135, 1143-44 (9th Cir. 2000); *Peterson*, 717 F.2d at 1415 (NEPA "requires federal agencies to evaluate the environmental consequences of their actions *prior* to commitment to any actions [and] an EIS must be prepared *before* the action is taken") (emphasis added); *Cf. Ctr. For Biological Diversity v. U.S. BLM*, 698 F.3d 1101, 1124 (9th Cir. 2012).

2. The Commission's Other Bases For Affirming The Board's "Supplementation" Of The NEPA Process Have No Merit.

Seeking to further defend this departure from Administrative Procedure Act and NEPA first principles, the Commission also ruled the Board's approach was appropriate because the data missing from the Final SEIS would not have changed the outcome. *See Comm'n Order* at 39 (claiming that the additional disclosures "did not change, in any material respect, the Staff's ultimate determination that impacts to groundwater . . . would be SMALL."). This justification fails both legally and factually.

As a legal matter, a plaintiff need not demonstrate that, had additional necessary information been disclosed the outcome would have been different.

Rather, the argument itself fails to come to terms with the purpose of NEPA, which is not to dictate outcomes but to ensure the public and agency have all necessary information *before* the agency makes its decision. *See supra at* 31; *Cf. Gerber v. Norton*, 294 F.3d 173, 183-84 (D.C. Cir. 2002) (rejecting the argument that legal violation was harmless error because the agency "would not have changed its decision" in any event).[20]

Thus, for example, had the uranium levels been properly disclosed in the NEPA process, the public would have had an opportunity to weigh in on how these pollution levels might bear on the adverse environmental impacts of the project, further informing the agency's decision making on the license. *See* 40 C.F.R. § 1503.1 (public comment requirements)(Add. 175-76); *PEER*, 827 F.3d at 1082 ("The principal way the government *informs the public* of its decisionmaking process is by publishing environmental impact statements,") (emphasis added). By

20 The Commission also improperly conflated this issue with the Board's separate determination to modify one of the license conditions. *Comm'n Order* at 39 (JA_143). That modification is entirely irrelevant to whether the Board, and Commission, could uphold the NEPA review conducted on the license based on information disclosed long after the license issued.

supplying important information *only after* the License had issued this important NEPA purpose was thwarted.[21]

In any event, as a factual matter, the Commission also erred in summarily concluding the missing information was insignificant. The facts first elicited during the evidentiary hearing process demonstrated that at one prior ISL mining site – Smith Ranch Highlands – the Commission had ultimately approved residual uranium contamination levels that were at least *71 times the background levels*, suggesting that the Ross Project mined aquifer might end up similarly contaminated at the conclusion of the restoration process. *See Hearing Dec.* ¶4.76 (JA_344). There is simply no basis for presuming this level of residual contamination would necessarily have been irrelevant to the licensing decision.

Moreover, Councils demonstrated that even the levels finally disclosed during the evidentiary hearing did not accurately portray contamination levels at Smith Ranch Highlands. *See* Council's Proposed Findings of Fact at ¶¶175-82 (JA_803).

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21 Indeed, it bears emphasizing in this regard that even the "one-page discussion," *Hearing Dec.* ¶4.72, that was included in the Final SEIS (at 4-46 (JA_493)) had not been included in the Draft, and thus the public had no opportunity to weigh in on the information provided as to *any* residual contaminants, including uranium. Accordingly, Staff could not fulfill its obligation to consider and respond to comments on those disclosures. 10 C.F.R. § 51.91 (Add. 107) (requiring agencies to respond to comments in Final EIS).

The Commission erred in rejecting this evidence for various reasons,[22] but the salient point here is that these were issues Staff *was required to consider, in the NEPA process, before it made its licensing decision*. Having the Board – and then the Commission – consider new data, and resolve challenges to that data, as part of an adjudication long after the License had been issued and the relevant decision made was simply a make-work exercise. *Calvert Cliffs' Coord. Comm.*, 449 F.2d at 1127 (rejecting the Atomic Energy Commission's position that "the mere drafting and filing of papers is enough to satisfy NEPA," and thus that "[w]hatever environmental damage the reports and statements may reveal," "nothing will be done with them").[23]

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22 For example, the Commission affirmed the Board's conclusion that Councils' data was not relevant because it had been collected before final restoration approval at other sites (*Comm'n Order* at 34-35), when in fact it was collected a year *after* restoration efforts were completed. *See* Larson Test. (JTI005A-R2) at 14-18 (JA_704).

23 Indeed, the Commission's approach here is on all fours with the position advanced by its predecessor agency, the Atomic Energy Commission, in *Calvert Cliffs*. 449 F.2d 1109, where the agency argued that so long as it prepared the paperwork required by NEPA, it was in compliance with the statute, regardless of the role an EIS played (or did not play) in the agency's decision-making. Rejecting that "crabbed interpretation of NEPA [as] a mockery of the Act," this Court explained that NEPA requires "more than the physical act of passing certain folders and papers," but, rather that "the environmental factors, as compiled in the [EIS] be *considered* through the agency review process." *Id.* at 1118 (emphasis in original); *see also id.* at 1127.

The Commission also suggested residual contamination levels in the mined aquifer were irrelevant because the aquifer is exempt from use as a drinking water source. *Comm'n Order* at 36 (JA _140) (stating the fact that the aquifer is exempt "support[s] the [Final] SEIS's conclusion that *any* elevated hazardous constituent levels left at the Ross Project site following restoration would have a small overall environmental impact.") (emphasis added). However, as discussed further below, *see infra* at 46-49, that proposition is impossible to reconcile with the Commission's regulatory scheme, which purports to require that an ISL mine operation endeavor to *restore* the mined aquifer, precisely because of the adverse environmental impacts engendered by an ISL mining operation. Having recognized the importance of aquifer restoration, the Commission cannot *ignore* the efficacy of those restoration efforts on the grounds that the aquifer is not a drinking water source.

Accordingly, as Commissioner Baran concluded, the Final SEIS and accompanying License should be remanded for the Staff to consider this additional information in the NEPA process.[24]

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24 As noted, *see supra* at 22 n.16, the Commission recently issued a new "Record of Decision" for the April 24, 2014 Strata Source Materials License. Over Councils' objection, the Commission included this new document, which purports to incorporate by reference additional information considered in the adjudicatory process, to the Certified Record Index. Rec._No._766. If the Court agrees the Commission erred in allowing the Board to supplement the NEPA review long after the License had issued, this new Record of Decision also must be irrelevant here.

II. THE FINAL SEIS DID NOT ADEQUATELY DISCLOSE THE RISKS OF OFF-SITE GROUNDWATER CONTAMINATION FROM THE ROSS PROJECT.

A. The Commission Erred In Affirming The Board's Conclusion That Unfilled Boreholes Do Not Risk Contaminant Migration.

The Board found that while filling the 1,500 boreholes within the Ross Project site "presents a daunting challenge," the Final SEIS's conclusion of SMALL impacts from excursions simply assumes the effort will be successful. *Hearing Dec.* ¶4.127. As noted, however, in the face of Councils' arguments that the License requirement for Strata to merely "attempt" to fill these holes (*see* License at 10.12 (JA_539)) was insufficient to ensure this vital task is successful, the Board concluded that Staff had sufficient "incentives" to make sure these boreholes are filled in order to ensure *the accuracy of the Final SEIS in predicting small impacts*. *Hearing Dec.* ¶4.128 n.66 (JA_378) (claiming Staff has an "incentive" to ensure that Strata's "'attempt' to locate and abandon all drill holes" is successful in order to "fully support its predictive finding if SMALL long-term impacts from fluid migration," despite the "extensive prior drilling intrusions into the Ross site").

Once again, this logic flips NEPA on its head. An EIS does not set an environmental impact standard that an agency must look *back at* and follow as a project moves forward, but a *forward look* at the likely environmental impacts *anticipated* from a major federal action. *E.g., Del. Riverkeeper Network v. FERC*,

753 F.3d 1304, 1310 (D.C. Cir. 2014) (reiterating that "'NEPA itself does not mandate particular results,'" but rather requires agencies to analyze the anticipated, *prospective* "environmental impact of their proposals and actions")(citations omitted).

Here, consistent with this straightforward understanding of long established NEPA requirements, Councils presented evidence showing that, at another ISL mining site, a company with similar "incentives" left numerous boreholes unfilled in violation of its permit. Dr. Abitz Test. (JTI0001R) at 47 (JA_734); Inspection Report (JTI026) at 8 (Rec._No. 559)(JA_750); Dr. Larson Test. (JTI1003-R) at 51-53 (JA_717). However, rather than explain why that outcome is not similarly likely here, or, more to the point, analyze the prospective environmental impacts, the Board *ignored this data altogether*.

Moreover, when Councils raised this issue before the Commission, the agency rejected the argument on the erroneous grounds that the Board had "considered the contrary evidence," *Comm'n Order* at 43 (JA_147), when in fact the Board had ignored this evidence. Accordingly, the Court should remand for Staff to reconsider the risks these unfilled boreholes may pose for groundwater. *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") (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C.Cir.2001)).

B. The Commission Erred In Affirming The Board's Inconsistent Interpretation Of Groundwater Monitoring Data.

As noted, the Board agreed with Councils that aquifer confinement is vital to ensuring the environmental impacts of the project beyond the mined aquifer remain minimal. *Hearing Dec.* ¶4.127 (JA_375). However, the Board's rationale for rejecting Councils' evidence that the aquifer is not confined flatly contradicted another of its findings, and the Commission's affirmance of that approach was in error. *Comm'n Order* at 43-45 (JA_147).

Councils' expert Dr. Abitz demonstrated communication between the aquifers (thereby showing the mined aquifer is not in fact confined) by plotting sodium and sulfate concentrations in sampling wells and showing the data demonstrates such communication. Dr. Abitz Test. (JTI001) at 49-51 (JA_736-739); *see Hearing Dec.* ¶4.139. The Board rejected this interpretation of the data on the grounds that the "composition of the groundwater in the [mined] aquifer may vary considerably depending on the nature of the minerals with which the groundwater is in contact." *Id.* ¶4.141. In other words, rather than accept Dr. Abitz's results, if representative of the site, would show an unconfined aquifer, the Board accepted

Staff's argument that the variability in the specific samples can *explain away* the results.

This assumption – that individual wells do not necessarily provide results that can be averaged to learn about overall groundwater conditions – is impossible to reconcile with the Board's resolution of Councils' baseline water quality contention. There, the Board found that Strata's haphazard set of monitoring wells were sufficient to provide representative baseline data, and on that basis rejected Councils' arguments that it was inappropriate to *average* water quality samples without considering anomalies that might exist in individual wells. *Hearing Dec.* ¶¶4.32-4.34 (JA_320-322)(rejecting Council expert's argument that Staff must consider whether "the data variance of each well demonstrates that the wells can be combined into a single population for statistical calculations" before averaging them, on the grounds that there is "no NEPA or [Commission] requirement that the agency" do more than "average[e] the sampling data").[25]

The Board cannot have it both ways, however. If, as the Board found in contention one, averaging well monitoring data across the site gives a meaningful

25 Although the Board and Commission also erred in rejecting Councils' baseline water quality contention (contention one), Councils are not pursuing that error separately here.

picture of groundwater conditions, it could not then *ignore* Dr. Abitz's analysis of that data on the grounds that the results are somehow *inaccurate*.

The Commission purported to resolve this inconsistency by downplaying the need for accurate *baseline* data, suggesting variability between wells simply shows groundwater characterization "could be painted with a finer brush," but "does not show that more data is necessary to characterize the site and evaluate the environmental impacts of the proposed project." *Comm'n Order* at 45 (JA_149). However, again, having relied on the sufficiency of the monitoring well data to characterize the site, it was arbitrary and capricious to at the same time reject data from those same wells which showed communication between the aquifers on the grounds of well-specific anomalies. *E.g. Air Transport Ass'n of Am. v. Dept. of Transp.*, 119 F.3d 38, 43 (D.C. Cir. 1997) (D.C. Cir. 1997) (rejecting as arbitrary and capricious an agency's "internally inconsistent" decision-making).[26]

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26 The Commission claimed the Board was simply resolving "two competing technical opinions" on interpreting the sodium and sulfate concentrations, *Comm'n Order* at 45, but that ignores the two *contradictory* technical opinions Staff offered to rebut Councils' arguments that (a) additional baseline data is necessary (where Staff argued the monitoring wells uniformly collected representative data) and (b) there is aquifer communication (where Staff discounted overall well monitoring data based on individual well anomalies).

III. THE AGENCY'S CONCLUSION THAT THE PROJECT IS NOT LIKELY TO HAVE ANY SIGNIFICANT ADVERSE IMPACTS ON THE MINED AQUIFER IS NOT SUPPORTED BY THE RECORD.

The Final SEIS concluded the environmental impacts of Strata's Ross Project on the mined aquifer would likely be SMALL, *i.e.*, "not detectable or [ ] so minor that they will neither destabilize nor noticeably alter any important attribute of the resource considered." Final SEIS at xx (JA_445). Councils demonstrated that, in light of the high levels of pollution the Commission has permitted to permanently remain in the mined aquifer at other ISL mining sites, Staff had not met its burden to demonstrate that SMALL impacts on the mined aquifer are likely here. Neither the Board's rejection of Councils' arguments, nor the Commission's affirmance of the Board's conclusions, withstand scrutiny.

A. The Agency Did Not Adequately Consider The Risks The Ross ISL Mining Project Poses To The Mined Aquifer.

As noted, the Board ruled that because "reasonably foreseeable environmental impacts are to be outlined in an agency's NEPA statement and that [alternative concentration limits] realistically may be necessary at the time of facility decommissioning," the NEPA review must disclose, "within a reasonable range, what [those limits are] likely to look like and what are the associated environmental impacts associated with such" limits. *Bd._Draft_SEIS_ Dec.* at 15 (JA_229); *Bd._Final_ SEIS _Dec.* at 10 (JA_267) (the NEPA review must "evaluate

information regarding the reasonable range of hazardous constituent concentration values that are likely to" remain in groundwater at the conclusion of the Ross Project). In purported response, the Final SEIS contains a single page disclosing *some* of the restoration values for three other ISL mining sites - Crow Butte Wellfield 1; Smith Ranch-Highland A-Wellfield; and Irigary Mine Units 1-9. Final SEIS at 4-46 (JA_493). This single page does not comply with the Commission's basic Administrative Procedure Act and NEPA obligations for several reasons.

First, it is evident that the agency did not actually *consider* this evidence in purporting to conclude that the environmental impacts on the mined aquifer would be SMALL. To the contrary, as discussed next, *see infra* at 46-49, the agency's position is that the aquifer exemption itself means that, by definition, the impacts *are insignificant*, regardless of their magnitude.

Indeed, at Councils urging under the rules of the proceeding, the Board pressed Commission Staff on this point at the evidentiary hearing, asking whether it is "correct that you are saying that [the] aquifer *outside* the exempt aquifer [*is] the standard* for deciding whether the impact is small, medium or large," and thus that "*[i]t isn't really what concentration in the exempt aquifer is*, it is how the concentration in the exempt aquifer will affect water just outside the boundaries" that is relevant for assessing groundwater impacts. Evid. Hr'g. Transcr. at 559-561

(JA_790-793) (emphasis added). Staff's response was "*Yes. That is correct*." *Id.* at 561 (emphasis added). However, to have simply identified an issue, without at all *considering* it in decision-making, it the height of arbitrary and capricious agency decision-making. *E.g., Gerber,* 294 F.3d at 185 (simply "(s)tating that a factor was considered' – or found – "'is not a substitute for considering' or finding it") (quoting *Getty v. Fed. Savings & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986)).[27]

Second, as discussed above, *see supra* at 30-33, much of the data the agency relied on in this "analysis" came long after the licensing decision had been made, and thus, chronologically, could not have supported the agency's decision-making on the license.

Finally, Councils brought forward overwhelming evidence of contamination remaining at *other* ISL mining sites where the restoration program has been completed, none of which was considered before the licensing decision here was made. *See* Council's Proposed Findings of Fact ¶¶165-87 (JA_800-808). The Board

27 Underscoring this point, the Board asked, "Does this mean that if the NRC were to approve an ACL [Alternative Concentration Limit] thousands of times above EPA Safe Drinking Water Act Standards for uranium, the impacts could still be small?" Staff responded in pertinent part: "…So, if the ACL were, you know, let's say, you know, at a ridiculously large number then, in all likelihood, it would not – you could not demonstrate that it would be protective of the human health and the environment at that boundary of the exempted aquifer. So, the – you know, the ACL can't just be any number. It has to be a number that meets that, you know, very important criteria that is protective of – at the – at the boundary of the exempted aquifer." Transcr. at 559-60 (JA_791-792).

and Commission dismissed all this data on the grounds that final restoration approval had not been granted at those sites. *Hearing Dec*. ¶¶ 4.98-4.100)(JA_358); *Comm'n Order* at 34-35 (JA_138).

However, given that restoration efforts were completed at those sites, the fact that these sites remain so contaminated is plainly relevant to the likely results at the Ross Project, and neither the Board nor Commission suggested otherwise. Once again, simply *promising* that the agency will ensure the mined aquifer is properly remediated is meaningless, where the agency both claims that the impacts will be small regardless of aquifer contamination, and refuses to consider the contamination that exists post-restoration at other sites. *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) ("Unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned")(citations omitted); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132-33 (D.C. Cir. 2007) (under the arbitrary and capricious standard, courts "require more than a result; [courts] need the agency's reasoning for that result")(citations omitted).

B. The Final SEIS Must Disclose The Likely Adverse Impacts On The Mined Aquifer Regardless Of Its Designation As Exempt From Use As Drinking Water.

As explained *supra*, Councils demonstrated Staff had not met its burden to demonstrate that the Final SEIS accurately concluded the impacts on groundwater

would be SMALL. However, in the face of Councils' underlying evidence, as to which the Board essentially agreed,[28] the Board ratified the Final SEIS's conclusion that the impacts will nonetheless be small *on the grounds that the aquifer is exempt*. *Hearing Dec.* ¶4.104 n.61 (finding that it is "not apparent" that it matters whether uranium levels decrease in the mined aquifer in light of its "exempted status"); *id.* ¶4.107 (concluding that the fact that the mined "aquifer is permanently exempted as a drinking water source" supports the Final SEIS finding of small impacts). This approach also violates NEPA.

As a threshold matter, it misapprehends the import of an aquifer "exemption," which does not remotely suggest the aquifer is already polluted, but rather simply means that it is not *currently* a source of drinking water, and will not become one because it contains recoverable minerals. *See* 40 C.F.R. § 146.4 (exempting an aquifer that is not currently used as a drinking water source and containing "minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible"). Indeed, as the U.S. Environmental Protection Agency

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28 *See Hearing Dec.* ¶4.101 n.58 ("finding that "the agency's experience indicates that an ACL is a foreseeable consequence of IS[L] mining, the environmental impacts of which seemingly should be addressed at the earliest realistic opportunity using relevant historical information"); *see also id.* ¶4.104 (recognizing that "it may require decades of monitoring to resolve with any certainty the question of" whether uranium levels will naturally decrease).

has emphasized, the fact that an aquifer is "exempt" does not reflect the actual quality of the water, which should be left, post-remediation, "*in no worse condition than pre-IS[L] operational status*." *See* 80 Fed. Reg. 4156, 4,171 (Jan. 26, 2015) (emphasis added).

More importantly, the Final SEIS's approach effectively ignores the most critical environmental impact of the project, which is intended to pollute the mined aquifer. NEPA and its implementing regulations require disclosure of the adverse impacts of a project on, *inter alia*, air and water and other natural systems, including ecosystems, 40 C.F.R. § 1508.8(b) (Add. 187) – and including "adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* § 1502.16 (Add. 172); *see also id* § 1508.14 (defining "environment" covered by NEPA to include "the natural and physical environment")(Add. 188); 10 C.F.R. § 51.45(b)(1)(Add. 86-87) (Commission NEPA regulation similarly requiring discussion of the "impact of the proposed action on the environment"). Thus, there can be no legitimate dispute that the Final SEIS must disclose the impacts arising from the significant contamination guaranteed to remain in the mined aquifer.[29]

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29 It is also no defense to simply claim the subsequent restoration approval process will ensure minimal adverse impacts – particularly considering both the contamination that has been approved at other sites, *see supra* at 45, and the

Thus, the Board's approach was logically inconsistent: if the aquifer exemption makes adverse impacts on the mined aquifer irrelevant, then it need not have been considered at all under NEPA, and the Final SEIS discussion of the mined aquifer, including the data from other sites required by the Board, would have been unnecessary (as would the Commission's entire regulatory scheme requiring restoration attempts) – positions the Commission has never advanced. On the other hand, if, in fact, NEPA requires a robust examination of the likely environmental impacts of the Ross Project on the mined aquifer (which it does), then the Board had no grounds to allow the Final SEIS to dismiss those impacts on the basis of the aquifer exemption.

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separate NEPA obligation to *demonstrate* that purported mitigation measures will in fact be effective. *See, e.g., McDonnell Douglas Corp. v. U.S. Dep't. of the Air Force*, 375 F.3d 1182, 1186-87 (D.C. Cir. 2004) (emphasizing that an agency may not rely on "conclusory or unsupported suppositions" regarding mitigation); *S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ("essential component of a reasonably complete mitigation discussion is an assessment of whether the propose mitigation measures can be effective"); *see also Del. Riverkeeper Network*, 753 F.3d at 1310 ("[r]easonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA labeling any and all discussion of future environmental effects as 'crystal ball inquiry'")(alterations in original)(citations omitted); *cf.* 10 C.F.R. 51.71(d) n.3 ("Compliance with [Clean Water Act standards] is not a substitute for, and does not negate the requirement for [the Commission] to weigh all environmental effects of the proposed action, including the degradation, if any, of water quality, and to consider alternatives to the proposed action that are available for reducing adverse effects").

The Commission's conclusory ratification of the Board's approach was thus arbitrary and capricious, warranting a remand. *Comm'n Order* at 36-37 (finding that "these factors" – the aquifer exemption and the potential for a challenge to the restoration limits – "support the FSEIS's conclusion that any elevated hazardous constituent levels left at the Ross Site following restoration would have a small overall environmental impact").[30]

IV. THE COMMISSION ERRED IN BARRING COUNCILS FROM PURSUING THEIR CONTENTIONS CONCERNING THE SCOPE OF THE PROJECT AND ITS CUMULATIVE IMPACTS.

A. Councils Were Entitled To Pursue Their Cumulative Impacts Contention.

As explained, *see supra* at 9-10, a prospective intervenor may pursue a contention against an Environmental Report by providing, *inter alia*, (a) "a specific statement of the issue of law or fact to be raised," (b) an explanation as to how "the issue raised . . . is within the scope of the proceeding," and (c) "sufficient information to show that a genuine dispute exists . . . ." 10 C.F.R. § 2.309(f)(1) (Add. 32). Although an issue not raised against the Environmental Report is generally waived, there is "good cause" for filing such a contention later when a subsequent

30 The Commission suggested these were only "two [of the] factors" supporting the Board's conclusion, but the only other "factor" the Commission identified was the license amendment requiring an improved effort to fill boreholes, *Comm. Order* at 36-37 (JA_140-141) – which relates to likely contamination *beyond* the aquifer, and has no relevance here.

Draft or Final EIS contains information "materially different from information previously available." 10 C.F.R. § 2.309(c) (Add. 30-31); *id.* § 2.309(f)(2).

In this case, the Board recognized the Environmental Report had not analyzed the cumulative impacts of the Ross Project in conjunction with Strata's planned ISL mining expansions, and admitted Councils' contention. *Bd._Intervention_Dec.* at 42-43 (JA_199). Because the Draft SEIS had asserted the impacts of Strata's larger plans for the Lance District would be SMALL without any analysis (*see* Draft SEIS at 5-25 to 5-27), Councils subsequently submitted a cumulative impacts contention against the Draft SEIS, along with a supporting expert declarations. Int. Draft SEIS Contentions (May 6, 2013) (JA_622; JA_646; JA_651).[31]

The Board appeared to recognize there was "good cause" for not earlier challenging this new discussion in the Draft SEIS. *Bd._Draft_SEIS_Dec.* at 21 (JA_235) (the "DSEIS discussion of groundwater quantity and quality *differs substantially* from the" Environmental Report) (emphasis added). Nonetheless,

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31 One of Councils' concerns was that the Draft SEIS failed to support its conclusion of small impacts in light of the cumulative activities occurring in this area. *See, e.g. Sierra Club. v. Mainella*, 459 F. Supp. 2d 76, 100-01 (D.D.C. 2006) (rejecting agency's conclusory use of labels like "small" and "moderate" to characterize impacts, without analyzing the basis for these conclusions); *Delaware Riverkeeper Network*, 753 F.3d at 1313 ("[s]imple conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA")(alteration in original)(citations omitted).

without explaining what was lacking, the Board incongruously found that Councils had *failed* to sufficiently tie their arguments to specific contention admissibility factors.[32]

On appeal, the Commission misapprehended the Board's ruling, claiming Councils had not demonstrated the Board erred in considering the "fact-specific questions of contention admissibility . . . ." *Comm'n Order* at 17-18 (JA_121-122). In fact, however, the Board never *considered* the facts and expert testimony Councils had presented, but simply *claimed* the requisite showing was lacking, without explaining at all what was missing. This is arbitrary and capricious decision-making, requiring reversal. *Gerber,* 294 F.3d at 185; *Calvert Cliffs' Coord. Comm.*, 449 F.2d at 1117; *see also, e.g. Tesoro Alaska Petroleum Co.*, 234 F.2d at 1294 ("Agencies may not use shell games to elude review.").[33]

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32 When Councils sought reconsideration, the Board recognized the "good cause" criteria was satisfied, but continued to maintain that Councils had failed to list each factor showing why the contention was admissible. *Bd._Reconsid _Dec.* at 4-5 (JA_254-255).

33 The Board's approach, which appeared to require Councils to mechanistically invoke each of the contention admissibility factors, also flatly contradicted the Board's approach in admitting *other* contentions. For example, in admitting Final SEIS contentions, the Board explained, "[g]iven our previous section 2.309(f)(1) findings regarding this contention, the critical element at this post-FSEIS juncture is whether, in light of Staff's further analysis," Councils *have provided* (1) "alleged facts or expert opinions which support [Councils'] position on the issue," and (2) "sufficient information to show that a genuine dispute exists with

In short, Councils are entitled to have the Board consider whether, in light of the specific arguments and expert testimony Councils presented, their cumulative impacts contention is admissible.[34]

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

The Board rejected as inadmissible Councils' contention asserting the SEIS should encompass the entire scope of Strata's planned operations in the Lance District on the grounds that Strata's *application* was limited to the Ross Project. *Draft SEIS Dec*. at 27-30 (JA_241). The Commission's affirmance of this ruling, *Comm'n Order*. at 15-16 (JA_119), should also be reversed.[35]

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the [staff] on a material issue of law or fact," not whether Councils also kept repeating which admissibility factor tied to each fact.

34 Because the Draft SEIS was then superseded by the Final SEIS, on remand the Board should consider the merits of Councils' Final SEIS cumulative impacts contention, which similarly contained a detailed presentation, along with expert testimony (Drs. Abitz/Larson Decl. ¶¶64-68) [Rec._No._208], and which the Board refused to consider in light of its earlier ruling. *Bd._Final_ SEIS_Dec.* at 13 (JA_270).

35 The Board rejected aspects of this contention –*i.e.*, whether plans for the entire Lance District were "cumulative" or "similar," requiring consideration in a single EIS – as untimely on the grounds that they should have been raised against the Environmental Report. *Draft SEIS Dec*. at 30-32 (JA_244). Although the *Commission* referred more broadly to whether all aspects of this contention should have been raised earlier, *Comm'n Order* at 14-15, it is apparent from the Commission's immediately following discussion that it understood the Board considered the admissibility merits of Councils' argument that Strata's Lance

It is well established that agencies "may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components . . . ." *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 68 (D.C.Cir.1987). Thus, "connected actions" – *i.e.*, actions "'that are interdependent parts of a larger action and depend on that larger action for their justification,'" must be considered in a single EIS. *Delaware Riverkeeper Network,* 753 F.3d at 1308 (quoting 140 C.F.R. 1508.25(a)(1)(iii)). Among other factors, an agency should consider whether the actions are "occurring in the same general location, such as body of water [or] region," or have "relevant similarities, such as . . . impacts, alternatives, methods of implementation, media, or subject matter." 40 C.F.R. § 1502.4 (Add. 169). Nonetheless, an agency may separately consider a project with "independent utility" – *i.e.*, one that "will serve a significant purpose even if a second related project is not built." *Coal. for Sensible Transp.*, 826 F.2d at 69.

Councils asserted that Strata's overall plans for ISL mining in the Lance District – which will occur in the same area, have the same "methods of implementation," and similar impacts, 40 C.F.R. § 1502.4(c)(2) – constituted "connected actions" warranting a single EIS. Among other evidence, Councils explained the Ross Project Central Processing Plant was intended to service the

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District plans were sufficiently "connected" to warrant a single EIS, rather than dismissing that argument as untimely.

larger Lance District operation, and Strata's parent company had publicly announced the larger development plans. Council's DSEIS Contentions at 19-21 (JA_640-642) and Declaration of Christopher Paine ¶¶ 23-53 (JA_664-679).[36]

Although at the contention admissibility stage Councils were only required to demonstrate a "genuine *dispute*" regarding this issue, *Blue Ridge Envtl. Defense League*, 716 F.3d at 187 (emphasis added) (quoting 10 C.F.R. § 2.309(f)(1)(vi)), the Board refused to admit the contention on the grounds that Councils had not *demonstrated* the Ross Project lacked the independent utility that would permit the NEPA review to proceed independently of Strata's larger ISL mining plans. *Bd._Draft_ SEIS_Dec.* at 24-30 (JA_). To the contrary, Councils had presented ample evidence to permit the opportunity to demonstrate, at the hearing, that the Ross Project lacked sufficient independent utility.

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36 Indeed, that company detailed the segmentation strategy, frankly disclosing that:

> all new project areas are being designed so they are contiguous with the Ross permit area and as such will be deemed to be amendments to the Ross Permit (once issued) rather than standalone applications. This strategy will significantly reduce the permitting process and timing going forward.

Paine Decl. ¶ 36 (JA_671)(quoting Peninsula Energy Limited, "Definitive Feasibility And Expanded Economic Studies Confirm The Viability Of The Lance IS[L] Projects," http://www.pel.net.au/images/peninsul---singaefehu.pdf)(last visited Dec. 16, 2016).

Moreover, a segmentation claim necessarily arises in a context where an agency (or applicant) makes a formal proposal for a *smaller* project, and a challenger demonstrates that, in fact, a *larger* project exists which should be subject to a single NEPA review. Accordingly, the Commission's assertion that Councils' evidence, even if proven, would not be sufficient given that "no concrete proposals to develop additional sites were pending before the agency at that time," *Comm'n Order* at 16 (JA_120), was a *non-sequitur*, for the *question* was whether Strata and Staff had improperly segmented the larger project precisely by only proposing the Ross Project, when in fact that Project is only one part of Strata's larger ISL mining plans in the Lance District. *See, e.g., Del. Riverkeeper Network*, 753 F.3d at 1316 (finding agency improperly segmented pipeline project that was interdependent with other pipeline segments).[37]

37 Moreover, even with regard to *pending* proposals alone, if – as the Commission contends – new evidence may be considered in the adjudicatory process, the Commission would have considered the salient fact that Strata had actually *applied to expand the project* before the Commission's decision. Nonetheless, in contradiction with its approach toward *Staff's* post-license disclosures, *see supra* at 29, the Commission deemed the expansion application irrelevant because it had occurred too recently. *Comm'n Order* at 15 n.72 (JA_119).

Accordingly, Councils were entitled to pursue their project scope contention, which should also be remanded to the Board.[38]

CONCLUSION

For the foregoing reasons, Councils respectfully request the Court grant this Petition for Review, vacate the Final SEIS, Record of Decision, and License for Strata's Ross Project, and remand this matter to the Commission to comply with NEPA's dictates.

Respectfully submitted,

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38 As with the cumulative impacts contention, *see supra* at n.34, the remand should permit Councils to pursue the Contention against the Final SEIS, which the Board declined to admit because it had not been admitted against the Draft SEIS. *Bd._Final_ SEIS_Dec.* at 14-16 (JA_271-73).

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

I hereby certify that the foregoing Final Opening Brief for Petitioners Natural Resources Defense Council, Inc. and Powder River Basin Resource Council contains 12,668 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 24, 2017, undersigned counsel for Petitioners filed the foregoing Final Opening Brief For Petitioners and Addendum 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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