

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

In the Matter of

STRATA ENERGY, INC.

(Ross *In Situ* Uranium Recovery Project)

Docket No. 40-9091-MLA

**CLI-12-12**

**MEMORANDUM AND ORDER**

The NRC Staff and Strata Energy, Inc. (Strata) have appealed the Atomic Safety and Licensing Board's recent decision granting a hearing to the Natural Resources Defense Council and the Powder River Basin Resource Defense Council (together, Joint Petitioners).<sup>1</sup> The two appellants argue that Joint Petitioners have not demonstrated standing in this proceeding on Strata's application for a license for an *in situ* uranium recovery project in Crook County, Wyoming.<sup>2</sup> Strata also asks us to eliminate two contentions from the proceeding, should we decline to reverse the Board's standing determination. For the reasons stated below, we affirm

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<sup>1</sup> LBP-12-3, 75 NRC \_\_ (Feb. 10, 2012) (slip op.).

<sup>2</sup> See NRC Staff's Notice of Appeal of LBP-12-3, Licensing Board's Order of February 10, 2012, and Accompanying Brief (Feb. 21, 2012) (Staff Appeal); Applicant Strata Energy's Notice of Appeal of LBP-12-3 (Feb. 21, 2012) (Strata Notice of Appeal); Brief of Applicant Strata Energy, Inc. in Support of its Appeal from LBP-12-3 (Feb. 21, 2012) (Strata Appeal Brief).

the Board's standing determination. We decline, however, to consider Strata's remaining claims.

## I. BACKGROUND

This proceeding concerns Strata's January 4, 2011, application for a combined source and byproduct materials license for its proposed Ross *in situ* recovery (ISR) operation in Crook County. Following a notice of opportunity to request a hearing,<sup>3</sup> Joint Petitioners timely filed an intervention petition and request for hearing.<sup>4</sup>

The Board granted the hearing, and admitted four contentions.<sup>5</sup> The Board found that both organizations had demonstrated representational standing based on the affidavit of Ms. Pamela Viviano, who is a member of both organizations.<sup>6</sup> Although Ms. Viviano claimed that the proposed Ross ISR operation could harm her in several respects, the Board, construing the petition in favor of Joint Petitioners, based its standing finding on two potential harms: traffic-generated dust, and light pollution.<sup>7</sup>

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<sup>3</sup> See Strata Energy, Inc., Ross Uranium Recovery Project, Crook County, WY; Notice of Materials License Application, Opportunity to Request a Hearing and to Petition for Leave to Intervene, and Commission Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation, 76 Fed. Reg. 41,308 (July 13, 2011).

<sup>4</sup> *Petition to Intervene and Request for Hearing by the Natural Resources Defense Council & Powder River Basin Resource Council* (Oct. 27, 2011). See also *Declaration of Pamela Viviano* (Oct. 21, 2011), appended to petition (Viviano Declaration).

<sup>5</sup> See LBP-12-3, 75 NRC at \_\_ (slip op. at 9-25).

<sup>6</sup> The Board also rejected Joint Petitioners' claim of organizational standing, finding that the assertions made by both organizations "are 'of the sort [that] repeatedly have [been] found insufficient for organizational standing.'" *Id.* at \_\_ (slip op. at 8) (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001); *Cogema Mining, Inc.* (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 191 (2009)).

<sup>7</sup> *Id.* at \_\_ (slip op. at 21, 23) (citing, in both locations, *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

After finding standing for Joint Petitioners, the Board admitted four contentions for hearing.<sup>8</sup> The Staff filed a timely appeal, challenging the Board's standing determinations. Strata also challenges the Board's ruling on standing, as well as the admission of Environmental Contentions 1 and 2.<sup>9</sup> Joint Petitioners oppose both appeals.<sup>10</sup>

## II. DISCUSSION

### A. Standard of Review

Section 2.311(d)(1) provides for appeals as of right on the question whether an intervention petition should have been "wholly denied."<sup>11</sup> The appeals of the Board's finding of standing are, therefore, properly before us because if the Board's finding of standing is in error, the Joint Petitioners are not entitled to a hearing at all.

However, we observe that a portion of Strata's request for review is not ordinarily appealable now. Strata's request that we review the admissibility of two out of four admitted contentions would not resolve the question whether the petition should have been "wholly denied." As is apparent from the wording of section 2.311(d)(1), the Commission discourages "piecemeal" appeals. It is well-settled in Commission case law that an applicant may file an interlocutory appeal of board orders admitting contentions, but only if the appeal challenges the

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<sup>8</sup> See *id.* at \_\_\_ (slip op. at 28, 32, 35-36, 37). Environmental Contention 1 asserts that the application fails to adequately characterize baseline groundwater quality. Environmental Contention 2 asserts that the application fails to analyze the environmental impacts that will occur if Strata cannot restore groundwater to baseline quality or drinking water quality standards. Environmental Contention 3 asserts that the application fails to include adequate hydrological information to demonstrate Strata's ability to contain groundwater fluid migration. Finally, Environmental Contention 4/5A asserts that the application fails to assess adequately cumulative impacts of this proposed action and the planned Lance District expansion project (a project to operate additional *in situ* recovery facilities surrounding the Ross site).

<sup>9</sup> See Strata Appeal Brief at 12-24.

<sup>10</sup> See *Natural Resources Defense Council's and Powder River Basin Resource Council's Opposition to Appeals by Strata Energy, Inc. and NRC Staff of the Atomic Safety & Licensing Board's Ruling in LBP-12-3* (Mar. 2, 2012) (Joint Petitioners' Answer).

<sup>11</sup> 10 C.F.R. § 2.311(a)(1) & (2); (d)(1).

admissibility of all admitted contentions.<sup>12</sup> We have on occasion considered whether to exercise “pendent” jurisdiction of otherwise non-appealable issues, such as where those issues are “inextricably intertwined” with a related legal question properly before us, or where consideration of the issues together has the potential to resolve the entire litigation.<sup>13</sup> Here, however, the two contentions that Strata challenges, which deal with Strata’s baseline groundwater quality characterization and groundwater restoration, are not related to the standing issue that is properly before us. Furthermore, because we decline to disturb the Board’s standing determination, Strata’s challenge to two out of four admitted contentions does not have the potential to resolve this case in its entirety. For these reasons, we decline to take pendent jurisdiction of these contention admissibility determinations, to avoid encouraging “interlocutory appeals ‘riding on the coattails’ of appealable issues.”<sup>14</sup>

Strata’s challenge to the two contentions also would not satisfy our traditional standards for discretionary interlocutory review of contention admissibility rulings.<sup>15</sup> Strata’s appeal brief asserts that the Board’s admission of the two contentions was incorrect, but this alone does not

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<sup>12</sup> *Pa’ina Hawaii, LLC* (Material License Application), CLI-06-13, 63 NRC 508, 509 (2006). Similarly, we normally do not allow an intervenor to challenge the Board’s rejection of contentions where the Board has granted a hearing on any contention. See, e.g., *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-16, 71 NRC 486, 491 (2010); *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465-67 (2004).

<sup>13</sup> See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-27, 68 NRC 655 (2008) (considering a board ruling denying a waiver request where that request was “inextricably intertwined” with a board decision to wholly deny the same petitioner’s request for hearing). Compare *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 19 (2001) (declining to take review of board rulings that were not “inextricably linked” to appealable issues, and the resolution of which did not have the potential to dispose of the entire litigation).

<sup>14</sup> *Sequoyah Fuels*, CLI-01-2, 53 NRC at 20 (citing *Swint v. Chambers County Comm’n*, 514 U.S. 35, 49-50 (1995)).

<sup>15</sup> The appropriate mechanism to challenge individual contention admissibility determinations following a ruling on an initial petition is a request for interlocutory review under our rules at 10 C.F.R. § 2.341(f)(2).

justify immediate review. Our rules provide for interlocutory review where the ruling threatens the petitioner with “immediate and serious irreparable harm,” or has a “pervasive and unusual” effect on the “basic structure of the proceeding.”<sup>16</sup> Routine contention admissibility determinations, accordingly, are not generally appropriate for interlocutory review.<sup>17</sup> Because Strata has not addressed how these contention determinations constitute “immediate and serious irreparable harm” or a “pervasive and unusual” effect on the proceeding, we do not take review of them now.

With respect to the standing question, we afford the Board’s ruling on standing “substantial deference.”<sup>18</sup> That is, we will defer to the Board’s rulings on standing absent an error of law or abuse of discretion.<sup>19</sup> Here, we find that neither Strata nor the Staff has overcome this hurdle.

## **B. Standing**

The Staff and Strata challenge Joint Petitioners’ demonstration of standing based on traffic-generated dust. Ms. Viviano, in her Declaration, claimed that the project would lead to increased traffic on her road, creating impacts from dust at her home:

[A] potential negative impact from this site would be the increase in traffic on our road during the construction of the site and the operational phase. These roads

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<sup>16</sup> 10 C.F.R. § 2.341(f)(2).

<sup>17</sup> See, e.g., *South Texas Project Nuclear Operating Co.*, CLI-10-16, 71 NRC at 491; *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 137 (2009); *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005).

<sup>18</sup> *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009); *Sequoyah Fuels*, CLI-01-2, 53 NRC at 14; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999).

<sup>19</sup> *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004) (citing *White Mesa*, CLI-01-21, 54 NRC at 252; *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998)). See also *Sequoyah Fuels*, CLI-01-2, 53 NRC at 14; *Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC at 324.

are dirt and gravel, and any traffic results in a dust problem. The increased traffic would cause a health hazard to us and to all those with homes along these roads.<sup>20</sup>

Ms. Viviano states that her residence is located about ten miles to the northeast of the Ross site, along New Haven Road (also known in part as County Road 164 and in part as County Road 105).<sup>21</sup> New Haven Road runs east to west at her residence, and turns generally south toward the Ross ISR site, which also abuts New Haven Road.<sup>22</sup> From the Ross ISR site, New Haven Road continues south for three miles where it merges with D Road (CR 68), which extends south eighteen miles to Interstate 90.<sup>23</sup>

Considering this declaration along with statements in the Environmental Report, the Board found plausible Ms. Viviano's claim that vehicles travelling to the Ross site will increase traffic on the gravel road abutting her property, which in turn will cause a "dust problem."<sup>24</sup> Strata's Environmental Report describes the "primary access" to the site as being from I-90 to the south and north along D Road and New Haven Road (that is, a route that would not pass Ms. Viviano's residence).<sup>25</sup> The Environmental Report also acknowledges that the Ross ISR site "can also be accessed" driving west then south along New Haven Road.<sup>26</sup> Elsewhere in the Environmental Report, Strata states that traffic increase on affected roads is estimated to be up to 400 passenger vehicles and twenty-four trucks per day during construction, and

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<sup>20</sup> Viviano Declaration ¶ 10.

<sup>21</sup> LBP-12-3, 75 NRC at \_\_\_ (slip op. at 21 & n.23); Viviano Declaration ¶ 1.

<sup>22</sup> LBP-12-3, 75 NRC at \_\_\_ (slip op. at 21 & n.23).

<sup>23</sup> See Strata Energy, Ross ISR Project USNRC License Application Environmental Report, § 3.2.1, at 3-26 (Environmental Report) § 3.2.1, at 3-26 (ADAMS accession nos. ML110130342, ML110130346, ML110130344, ML110130348) (Environmental Report).

<sup>24</sup> See LBP-12-3, 75 NRC at \_\_\_ (slip op. at 18-22).

<sup>25</sup> See Environmental Report, § 3.2.1, at 3-26.

<sup>26</sup> *Id.* at 3-26 to 3-27.

approximately 120 passenger vehicles and sixteen trucks per day during operations.<sup>27</sup> The Board observed that the New Haven Road “eventually goes past Ms. Viviano’s residence before heading to the southeast (as County Road 105) toward the town of Hulett.”<sup>28</sup> In view of all this information, the Board determined that it was not “implausible” that the proposed Ross facility would generate increased traffic along the road adjacent to Ms. Viviano’s residence, in the form of trucks or workers’ passenger vehicles.<sup>29</sup> The Board found that this determination, in combination with Ms. Viviano’s unrebutted statement that “any traffic results in a dust problem” on the road abutting her property, was sufficient to establish the injury and causation elements necessary to afford Ms. Viviano standing relative to the dust impacts claim.<sup>30</sup>

On appeal, the Staff argues, in essence, that the Board improperly shifted the burden from Joint Petitioners by failing to require sufficient facts (in particular, a plausible chain of causation and a “non-hypothetical injury”) to establish standing.<sup>31</sup> We do not find that the Board reversed the burden here. On the contrary, the Board looked, as it should, to traditional

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<sup>27</sup> *Id.* § 4.2.1.1, at 4-18 (construction impacts), § 4.2.1.2, at 4-20 (operations). The Environmental Report explains that by “400 passenger vehicles per day,” for example, it means 200 vehicles making a round trip. See *id.* at 4-18. The Environmental Report also states that this traffic (particularly truck traffic) is likely to generate fugitive dust, and identifies several dust mitigation measures that will be implemented. LBP-12-3, 75 NRC at \_\_\_ (slip op. at 20-21) (citing Environmental Report, § 4.6.1, at 4-89 to 4-90, 4-93; § 5.9, at 5-58 to 5-59, § 5.10, at 5-60 to 5-61).

<sup>28</sup> LBP-12-3, 75 NRC at \_\_\_ (slip op. at 21) (citation omitted). The Board confirmed that the New Haven Road is in fact a “dirt and gravel road.” *Id.* at \_\_\_ (slip op. at 21 n.22) (referencing, and taking judicial notice of, the 2011-12 American Automobile Association Wyoming/Colorado road map).

<sup>29</sup> *Id.* at \_\_\_ (slip op. at 21).

<sup>30</sup> *Id.* at \_\_\_ (slip op. at 21-22).

<sup>31</sup> Staff Appeal at 4.

concepts of injury, causation, and redressability to determine whether Joint Petitioners had demonstrated standing.<sup>32</sup>

Both appellants maintain that Joint Petitioners provided insufficient support for the claim that the project will increase traffic on the road passing Ms. Viviano's home. The Staff argues that Joint Petitioners did not substantiate their claim that the Ross ISR project could cause an increase of traffic on roads that are not part of Strata's "planned route" and that are located nearby Ms. Viviano's residence. The Staff argues that "the Applicant's planned route" does not go past Ms. Viviano's property, but proceeds north from Interstate 90 along D Road (County Road 68) and New Haven Road.<sup>33</sup> Similarly, both the Staff and Strata argue that because the Environmental Report makes no mention of increased traffic on the part of New Haven Road that runs by Ms. Viviano's residence, the Board erred in finding it "plausible" that the traffic on that stretch of road could increase.<sup>34</sup>

We are not convinced by the appellants' arguments that statements in the Environmental Report foreclose the possibility that Ms. Viviano plausibly could suffer adverse impacts from the project. With respect to the argument that the Environmental Report identifies the route heading north from I-90 as the "primary access" to the site, the Board found nothing to prevent Strata's

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<sup>32</sup> See LBP-12-3, 75 NRC at \_\_\_ (slip op. at 10). The Board suggests in a footnote to its decision that it might be more efficient to simply create a "proximity presumption" for standing similar to the one the Commission uses to determine standing in reactor cases. See LBP-12-3, 75 NRC at \_\_\_ (slip op. at 24 n.27). But as the Board notes, the 50-mile proximity zone we use for standing in reactor proceedings corresponds roughly to the emergency planning zone for ingestion pathways. There is no similar zone for materials cases, and, therefore, no similar boundary that suggests itself for the use as boundary for presumptive standing. We agree with the Board that determining standing in our materials licensing proceedings may sometimes necessitate the complicated "parsing" of asserted harms. Nevertheless, we do not see a sound basis for departing from our current practice of basing standing on the circumstances specific to the particular license application.

<sup>33</sup> Staff Appeal at 5. See also Strata Appeal Brief at 8.

<sup>34</sup> Staff Appeal at 5; Strata Appeal Brief at 7.



employees and contractors from taking the route from the northeast.<sup>35</sup> And, as Joint Petitioners observe: “Strata employees and contractors will almost certainly live nearby and in the surrounding towns, and there is no evidence or reason to suggest that they would not use the same local roads that Ms. Viviano uses, particularly New Haven Road.”<sup>36</sup> The Board’s conclusion in this regard does not constitute an error or abuse of discretion.

Strata’s argument that the Board unreasonably concluded that Strata’s employees or contractors would choose to use an “unimproved” dirt road going past Ms. Viviano’s residence is similarly unpersuasive.<sup>37</sup> According to the Environmental Report, D Road, after the first three miles, and New Haven Road are also gravel-surfaced on the route from I-90.<sup>38</sup> The Board’s conclusion that some vehicles may choose one dirt road over another does not, on its face, appear so unlikely as to constitute an error of law or abuse of discretion.

In sum, the Environmental Report acknowledges that the route past Ms. Viviano’s residence is one means of access to the site, and that the project will generate an increase in vehicular traffic. We do not see anything in the Staff’s or Strata’s arguments to render “implausible” the Board’s determination that some of the traffic would use that route.<sup>39</sup>

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<sup>35</sup> LBP-12-3, 75 NRC at \_\_\_ (slip op. at 21). In a related argument, the Staff claims that the Joint Petitioners “did not show that Ms. Viviano uses any part of the route that the Applicant plans to use.” Staff Appeal at 5. This argument fails because the Board expressly rejected, and did not base its finding of standing upon, Joint Petitioners’ argument that Ms. Viviano will be affected by the traffic while she is driving. LBP-12-3, 75 NRC at \_\_\_ (slip op. at 19).

<sup>36</sup> Joint Petitioners’ Answer at 5.

<sup>37</sup> Strata Appeal Brief at 7-8.

<sup>38</sup> See Environmental Report, § 4.2.1, at 4-14; § 5.2.2, at 5-16.

<sup>39</sup> The Staff argues that the Board’s reasoning on this point constitutes an “overbroad interpretation” of our case law directing that an intervention petition should be construed in favor of the petitioner. Staff Appeal at 7. See generally *Georgia Tech*, CLI-95-12, 42 NRC at 115. While we agree that a board should not supply new information not otherwise present in the adjudicatory record in order to cure deficiencies in a petition, we do not find that the Board did so in the circumstances presented here. Cf. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC at \_\_\_ (Oct. 12, 2011) (slip op. at 13 & (continued . . .))

We reach a similar conclusion with regard to the Board's determination that increased traffic could, in turn, create a "dust problem," as claimed by Ms. Viviano. First, as the Board observed, the Environmental Report describes mitigation measures – such as speed limits for Strata employees and contractors traveling to and from the facility – that can be taken to reduce traffic-generated dust on the local roads leading to the project.<sup>40</sup> Next, neither the Staff nor Strata disputes that traffic along the stretch of road past Ms. Viviano's residence would generate dust.<sup>41</sup> Further, we do not find compelling the Staff's claim that Strata's onsite dust mitigation measures would prevent dust from the project from affecting Ms. Viviano's residence.<sup>42</sup> Even assuming the efficacy of those measures, it is unclear how they would bear on traffic-generated dust *offsite*. The Board did not base standing on fugitive dust from the project site itself.<sup>43</sup>

The appellants next argue, in essence, that Joint Petitioners did not show that Ms. Viviano's exposure to dust alone constitutes a potential "injury." The Staff claims that Joint Petitioners did not articulate how Ms. Viviano will be impacted by traffic-associated dust, or the nature of a dust-related injury.<sup>44</sup> Similarly, Strata argues that Ms. Viviano did not substantiate her claim that the dust raised by the potential increase in traffic would constitute a "health

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n. 49). Rather, the Board drew conclusions based on information provided in the record. We do not find this sort of reasoning improper.

<sup>40</sup> LBP-12-3, 75 NRC at \_\_\_ (slip op. at 20-21) (citing Environmental Report, § 4.6.1, at 4-89 to 4-90, 4-93; § 5.9, at 5-58 to 5-59, § 5.10, at 5-60 to 5-61).

<sup>41</sup> Strata plans to work with Crook County to implement traffic mitigation measures along the primary route—that is, along D Road and New Haven Road from the south. See Environmental Report, § 5.2.2, at 5-14 to 5-16. This plan does not provide conclusive evidence that all Strata's employees and contractors will use that route—although it may go to show that Ms. Viviano's harm is mitigable.

<sup>42</sup> Staff Appeal at 6.

<sup>43</sup> See LBP-12-3, 75 NRC at \_\_\_ (slip op. at 20 n.20).

<sup>44</sup> Staff Appeal at 6.

hazard” to herself.<sup>45</sup> In this regard, we agree with the Staff and Strata that Ms. Viviano’s declaration is somewhat ambiguous. She anticipates an increase in traffic and states that traffic will cause “a dust problem,” and in the next sentence claims (without further description) that the dust presents a “health hazard,” leaving to conjecture whether it is the dust itself, or some presumed health-related consequence of the dust, that is the source of her complaint. Strata, at least, construes her claim of traffic-related injury to be restricted to potential health hazards caused by dust.<sup>46</sup> This distinction received little further discussion in the record, however.<sup>47</sup>

We interpret the Board’s reasoning as finding that the annoyance or nuisance of the potential traffic-generated dust constituted a sufficient harm to support Ms. Viviano’s claim of standing even without a showing of a particular hazard to her health. The Board pointed to Strata’s dust mitigation measures to illustrate that excessive dust generated in the context of this project (including from traffic to and from the site), could present an adverse impact.<sup>48</sup>

Certainly, the potential “harm” necessary to demonstrate standing in our proceedings need not

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<sup>45</sup> Strata Appeal Brief at 8-9.

<sup>46</sup> *Id.* at 9.

<sup>47</sup> The responses of both the Staff and Strata to Ms. Viviano’s standing claim focused primarily on whether or not Ms. Viviano plausibly would be exposed to dust generated by the project or project-related traffic, not whether exposure to dust would be harmful to her if it did occur. See *Applicant Strata’s Response to Natural Resource [sic] Defense Council and Powder River Basin Resource Council Request for a Hearing and Petition to Intervene*, at 41-42 (Dec. 5, 2011); *NRC Staff Response to Petition to Intervene and Natural Resources Defense Council & Powder River Basin Resource Council*, at 11 (Dec. 5, 2012). At oral argument, both Strata and the Staff focused on whether the project would plausibly expose Ms. Viviano to any more dust than that to which she is already exposed by virtue of living in rural Wyoming. Tr. at 28-29, 30-32, 37-40. The Staff appears to acknowledge that a petitioner could base standing upon a demonstration that a project could plausibly cause a significant amount of dust at his home. Tr. at 37-38.

<sup>48</sup> See LBP-12-3, 75 NRC at \_\_\_ (slip op. at 20-21) (pointing to the dust mitigation measures Strata intends to use at the site). See *also* Tr. at 32 (“Judge Bollwerk: Well, I guess if there wasn’t any harm then there’d be no reason to mitigate [dust] and you already said you are going to mitigate, so somebody thinks there’s harm here. There’s no question about the dust that you’re raising . . . and someone thinks it has an impact and needs to be mitigated.”), 39-40, 47-48.

relate to physical or bodily injury.<sup>49</sup> Further, we have held that petitioners are not required to demonstrate their asserted injury with “certainty” at this stage of the proceeding.<sup>50</sup> We do not find that the Board erred in taking at face value the unrebutted statements in Ms. Viviano’s Declaration, in conjunction with the ER and its description of Strata’s intended dust-mitigation measures, in making its determination on injury.

In sum, we find that the Board considered the record and reasonably determined that Joint Petitioners articulated sufficient detail as to how the proposed action would affect their representative. As we stated in the *Crow Butte* matter, once it made that determination of plausible injury from the proposed project, the Board “was not required to weigh the evidence to determine whether the harm to the [Joint Petitioners] is beyond doubt.”<sup>51</sup> We find no error or law or abuse of discretion, and defer to the Board’s judgment on Joint Petitioners’ standing on the basis of harm from traffic-generated dust.<sup>52</sup>

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<sup>49</sup> Cf. *Crow Butte Resources* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 544-45 (2009) (upholding standing based on bad odor and discoloration of declarant’s well water); *Private Fuel Storage*, CLI-99-10, 49 NRC at 322-25 (upholding standing where licensing action could harm declarant’s recreational interests in wilderness area). *Accord Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) (aesthetic harms may amount to an injury in fact sufficient for standing); *Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978, 987-88 (8th Cir. 2011) (standing based on diminishment of recreational enjoyment of wildlife area due to, among other factors, an increase in dust due to traffic on adjacent highway).

<sup>50</sup> See *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 74 (1994).

<sup>51</sup> *Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, CLI-09-9, 69 NRC 331, 346 (2009). As to redressability, the Board concluded that Ms. Viviano’s “avertment that the environmental contentions proffered by Joint Petitioners will better position the agency to ‘fully review the possible impacts of [Strata’s] proposed [*in situ* leach] mining and milling project and based on [Joint Petitioners] and their experts’ information, may address concerns and mitigate impacts to our water, land, and other resources,’[] is an assertion that is sufficient to fulfill the redressability of the standing requirement in a case such as this in which environmental/NEPA-related matters are raised by the petitioners.” See LBP-12-3, 75 NRC at \_\_\_ (slip op. at 22 n.24) (quoting Viviano Declaration ¶ 13, and citing *Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)*, LBP-09-16, 70 NRC 227, 242-43, *aff’d*, CLI-09-22, 71 NRC 932 (2009)). We find no error or abuse of discretion in this conclusion.

<sup>52</sup> With respect to Joint Petitioners’ standing based on light pollution, the appellants claim that the Board went too far in its effort to “construe the petition in favor of the petitioner.” However, (continued . . .)

### C. Strata's Request for Oral Argument

Strata additionally requests that we grant oral argument on its appeal.<sup>53</sup> Our rules provide that, at our discretion, we may allow oral argument upon the request of a party made in a petition for review.<sup>54</sup> As grounds for its request, Strata cites “the complexity of the issues argued in this appeal, especially with respect to [its] appeal of the admission of Environmental Contentions 1 and 2, and the potential industry impact of this appeal.”<sup>55</sup>

We generally decline to hold oral argument, however, absent a specific showing that oral argument will assist us in reaching a decision.<sup>56</sup> Because we find that the written record in this appeal is thorough, sets forth the positions of all participants, and, overall, contains sufficient information on which to base today's decision, we deny Strata's request.

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because we have already decided to defer to the Board's finding of standing with respect to traffic-generated dust, we need not reach the question of Joint Petitioners' standing based on light pollution.

<sup>53</sup> Strata Notice of Appeal at 1-2.

<sup>54</sup> 10 C.F.R. § 2.343.

<sup>55</sup> Strata Notice of Appeal at 1-2.

<sup>56</sup> *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC \_\_ (Sept. 27, 2011) (slip op. at 5) (citing *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 251 (2010) (citing, in turn, *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992))).

**III. CONCLUSION**

For the reasons discussed above, we *affirm* the Board's ruling with respect to its finding of standing for Joint Petitioners. We *decline* to exercise our discretion to examine the additional issues raised by Strata's appeal, and we *deny* Strata's request for oral argument.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 11<sup>th</sup> day of May, 2012