

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
STRATA ENERGY INC.)	Docket No. 40-9091-MLA
)	
Ross <i>In Situ</i> Uranium Recovery)	ASLBP No. 12-915-01-MLA
Site))	

NRC STAFF'S NOTICE OF APPEAL OF LBP-12-3, LICENSING BOARD'S ORDER OF
FEBRUARY 10, 2012, AND ACCOMPANYING BRIEF

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February 21, 2012

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1
BACKGROUND	1
ARGUMENT	2
I. General Requirements for a Petitioner to Demonstrate Standing.....	3
II. The Board Erred in Finding Standing Based on Traffic-Associated Dust	4
III. The Board Erred in Finding Standing Based on Light Pollution.....	7
CONCLUSION	11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission</u>	
<i>Calvert Cliffs 3 Nuclear Project, LLC</i> (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911 (2009).....	3
<i>Commonwealth Edison Co.</i> (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90 (2000)	5, 8
<i>Consumers Energy Co.</i> (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).....	3
<i>Ga. Inst. of Tech.</i> (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111 (1995).....	3, 7
<i>Int'l Uranium (USA) Corp.</i> (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247 (2001)	6
<i>PPL Bell Bend LLC</i> (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133 (2010).....	3, 5, 8
<i>Quivira Mining Co.</i> (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1 (1998).....	3
<i>Sequoyah Fuels Corp.</i> (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994).....	3, 5
<u>Atomic Safety and Licensing Board</u>	
<i>Strata Energy, Inc.</i> (Ross <i>In Situ</i> Uranium Recovery Site), LBP-12-3, 75 NRC ____ (Feb. 10, 2012) (slip op.)	<i>passim</i>
<u>REGULATIONS</u>	
10 C.F.R. § 2.309(a)	3
10 C.F.R. § 2.309(d)(1).....	3
10 C.F.R. § 2.311(a)	1
10 C.F.R. § 2.311(d)(1).....	1
<u>STATUTES</u>	
Atomic Energy Act of 1954, 42 U.S.C. § 2011 <i>et seq.</i>	1

FEDERAL REGISTER

Strata Energy, Inc., Ross In Situ Recovery Uranium Project,
Crook County, WY; Notice of Materials License Application,
Opportunity to Request a Hearing and to Petition for Leave to Intervene,
and Commission Order Imposing Procedures for Document
Access to Sensitive Unclassified Non-Safeguards Information for
Contention Preparation, 76 Fed. Reg. 41,308 (July 13, 2011).....2

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BOARD'S ORDER OF FEBRUARY 10, 2012, AND ACCOMPANYING BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and (d)(1),¹ the Staff of the U.S. Nuclear Regulatory Commission (NRC Staff) hereby files its Notice of Appeal, with accompanying brief, of the Memorandum and Order issued by the Atomic Safety and Licensing Board (Board) on February 10, 2012.² In that Order, the Board granted the petition to intervene and request for hearing filed by the Natural Resources Defense Council and Powder River Basin Resource Defense Council (collectively the Joint Petitioners). Because the Joint Petitioners' hearing request and intervention petition should have been wholly denied, the Commission should reverse LBP-12-3 and terminate the proceeding.

BACKGROUND

On January 4, 2011, Strata Energy, Inc. (Applicant) submitted its Application to the NRC for a combined source and Atomic Energy Act (AEA) section 11e.(2) byproduct material license that would authorize it to construct and operate an *in situ* recovery (ISR) uranium recovery and

¹ Under 10 C.F.R. § 2.311(a) and (d)(1), a party other than the petitioner may appeal an order granting a request for hearing and petition to intervene "on the question as to [w]hether the request for hearing or petition to intervene should have been wholly denied."

² Memorandum and Order (Ruling on Standing and Contention Admissibility), LBP-12-3, 75 NRC ____ (Feb. 10, 2012) (slip op.) (LBP-12-3 or Order).

processing facility in Crook County, Wyoming.³ A notice of opportunity to request a hearing or to petition to intervene regarding this Application was published in the *Federal Register* on July 13, 2011.⁴ On October 27, 2011, the Joint Petitioners timely filed a petition to intervene, requesting a hearing.⁵ The Applicant and Staff filed their responses to this petition on December 5, 2011.⁶ The Joint Petitioners filed a reply to both responses on December 15, 2011.⁷ On December 20, 2011, oral argument was held in Rockville, Maryland.⁸

The Board issued its decision on February 10, 2012. The Board ruled that the Joint Petitioners failed to establish standing based on aquifer/surface water contamination, property value decline, and cumulative impacts, but that they did establish standing based on traffic-associated dust and light pollution.⁹ In addition, the Board admitted four contentions.¹⁰

ARGUMENT

The Board committed several errors in its decision to find standing based on traffic-associated dust, as well as based on light pollution. The Joint Petitioners' intervention petition and hearing request should, instead, have been wholly denied due to a lack of standing.

³ Letter from Anthony Simpson, Chief Operating Officer, Strata Energy, Inc., to Keith McConnell, Deputy Dir., Decommissioning and Uranium Recovery Licensing Directorate, Div. of Waste Mgmt. and Env'tl. Prot., NRC Office of Fed. and State Materials and Env'tl. Mgmt. Programs (Jan. 4, 2011) (ADAMS Accession No. ML110120055).

⁴ Strata Energy, Inc., Ross In Situ Recovery Uranium Project, Crook County, WY; Notice of Materials License Application, Opportunity to Request a Hearing and to Petition for Leave to Intervene, and Commission Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation, 76 Fed. Reg. 41,308 (July 13, 2011).

⁵ Petition to Intervene and Request for Hearing by the Natural Resources Defense Council & Powder River Basin Resource Council (Oct. 27, 2011).

⁶ Applicant Strata Energy, Inc.'s Response to Natural Resource Defense Council and Powder River Basin Resource Council Request for a Hearing and Petition to Intervene (Dec. 5, 2011); NRC Staff Response to Petition to Intervene and Request for Hearing by the Natural Resources Defense Council & Powder River Basin Resource Defense Council (Dec. 5, 2011).

⁷ Natural Resources Defense Council's & Powder River Basin Resource Council's Reply to Responses by Strata Energy, Inc. and the NRC Staff to Petition to Intervene and Request for Hearing (Dec. 15, 2011).

⁸ Transcript of Prehearing Conference (Dec. 20, 2011) (ADAMS Accession No. ML12009A094).

⁹ Order at 11, 15, 17, 24-25.

¹⁰ See *id.* at 28, 32, 36-37, 39 (admitting Contention 1; Contention 2; part of Contention 3; and part of Contention 4 and part of Contention 5, which were combined into one contention).

I. General Requirements for a Petitioner to Demonstrate Standing

To intervene in a Commission proceeding, a person or organization must demonstrate standing.¹¹ In making that demonstration, the petitioner must address the factors of 10 C.F.R. § 2.309(d)(1). Under Commission case law, to establish standing, a petitioner must allege a “concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.”¹² An organization may establish standing only if it demonstrates an injury to its organizational interests (organizational standing); or if it shows that at least one of its identified members has standing to participate and “has authorized the organization to represent his or her interests” (representational standing).¹³

Regardless of whether the petitioner is an individual or organization, the alleged injury must be actual or threatened, but cannot be “conjectural” or “hypothetical;” nor can the threat of injury be “too speculative.”¹⁴ The injury must also lie within the “zone of interests” protected by the statutes governing the proceeding.¹⁵ In order to establish that an injury is fairly traceable to the challenged action, the petitioner must show that there is a “plausible” chain of causation between the injury and the challenged action.¹⁶ Even though the petition should be construed in favor of the petitioner,¹⁷ the petitioner has the burden of alleging facts sufficient to establish standing;¹⁸ the Commission “require[s] fact-specific standing allegations, not conclusory assertions.”¹⁹

¹¹ 10 C.F.R. § 2.309(a).

¹² *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (internal quotation marks and citation omitted).

¹³ *Ga. Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

¹⁴ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (internal quotation marks and citation omitted).

¹⁵ *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 6 (1998).

¹⁶ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

¹⁷ *Georgia Tech*, CLI-95-12, 42 NRC at 115.

¹⁸ *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

¹⁹ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 410 (2007).

II. The Board Erred in Finding Standing Based on Traffic-Associated Dust.

The Board erred in concluding that the Joint Petitioners (two organizations) established standing based on injury to Ms. Viviano (a member of both organizations) due to traffic-associated dust because the Board committed legal errors (1) by not properly applying the case law that affirmatively requires the petitioner to provide facts sufficient to establish standing; and (2) by misapplying the Commission case law that indicates that the petition should be construed in favor of the petitioner. In its Order, the Board concluded that the Joint Petitioners showed standing based on injury to Ms. Viviano due to the “dust problem” caused by increased traffic on New Haven Road, a dirt “road that eventually goes past Ms. Viviano’s residence.”²⁰ The Board supported this conclusion with the following reasoning:

[D]espite the fact that the ER makes no mention of any traffic increase to the northeast via the dirt New Haven Road, the road that eventually goes past Ms. Viviano’s residence . . . , we cannot say that it is implausible that the proposed Ross facility will generate some increase in traffic via this northeast route in the form of trucks or workers’ passenger vehicles. This, in combination with Ms. Viviano’s unrebutted averment that ‘any traffic results in a dust problem’ on the road abutting her property and the Commission’s admonition to ‘construe the petition in favor of the petitioner,’ . . . is, in our view, sufficient to establish the injury and causation elements necessary to afford Ms. Viviano standing relative to this dust impact claim.²¹

The Board committed legal error by not properly applying the Commission case law that affirmatively requires the petitioner to set forth facts sufficient to establish standing. The Board concluded that the Joint Petitioners established standing based on traffic-associated dust because “we cannot say that it is implausible” that there could be a traffic increase on New Haven Road northeast by Ms. Viviano’s residence. In contrast, it is well-established in Commission case law that the petitioner bears the burden of alleging facts sufficient to establish

²⁰ Order at 21 (internal quotation marks omitted). In its analysis of whether the Joint Petitioners established standing based on traffic-associated dust, the Board correctly suggested that a “descriptive shortcoming” prevents the Joint Petitioners from having standing based on any injury to Ms. Viviano caused by her driving near the facility because her “only affidavit makes no mention of her driving in the vicinity of the facility, or of any harm from such an activity.” *Id.* at 19-20 (footnote omitted).

²¹ *Id.* at 21-22.

standing²²—i.e., the petitioner must provide facts sufficient to show that a non-hypothetical, particularized injury could be plausibly caused by the challenged action.²³

The facts pled by the Joint Petitioners in this case do not affirmatively demonstrate that the challenged project could plausibly cause a non-hypothetical injury to Ms. Viviano due to traffic-associated dust. The Joint Petitioners established by declaration or affidavit only the following facts with regard to traffic-associated dust:

Another 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 are dirt and gravel, and any traffic results in a dust problem. The increased traffic would cause a health hazard to us²⁴

As evident in this short paragraph quoted from Ms. Viviano's declaration, the Joint Petitioners did not plead facts necessary to demonstrate a plausible chain of causation and a non-hypothetical injury to Ms. Viviano. The Joint Petitioners did not show that Ms. Viviano uses any part of the route that the Applicant plans to use to access the proposed project area; the Applicant plans to approach the project area from the south by taking the interstate to Highway 51 and then driving north on Bertha Road, D Road, and New Haven Road (all the while remaining south of Ms. Viviano's residence and west of her investment property).²⁵ The Joint Petitioners also did not provide facts showing that traffic will increase on roads and portions of roads that are not part of the Applicant's planned route and that are located nearby Ms. Viviano's residence. As acknowledged by the Board, "the ER makes no mention of any traffic increase to the northeast via the dirt New Haven Road;"²⁶ the ER anticipates a traffic increase only on the roads in the proposed project area's immediate vicinity and south of the project area

²² See, e.g., *Bell Bend*, CLI-10-7, 71 NRC at 139; *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 98 (2000).

²³ See, e.g., *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72, 75.

²⁴ Viviano Decl. at ¶ 10.

²⁵ See Environmental Report (ER), § 3.2.1, at 3-26 (outlining the Applicant's planned route); ER, Figure 3.2-1, at 3-36 (showing the roads on the Applicant's planned route on a map); Applicant Ex. 3 (depicting the location of Ms. Viviano's residence and investment property relative to the Applicant's planned route).

²⁶ Order at 21.

along the Applicant's planned route.²⁷ Additionally, the Joint Petitioners did not set forth any facts regarding how Ms. Viviano will be impacted by traffic-associated dust; for instance, no facts were pled regarding the type of "health hazard" or nature of the dust-related injury that allegedly threatens Ms. Viviano. Nor do the Joint Petitioners provide any facts addressing why the alleged injury is plausible in light of the Applicant's planned dust mitigation measures.²⁸

Without pleading any of these facts, the Joint Petitioners have not satisfied their burden to establish standing. The Joint Petitioners have pled only that Ms. Viviano owns two properties located ten miles northeast and seven miles southeast of the proposed project area, a conclusory assertion that the proposed project will result in "the increase of traffic on our road," and a vague and conclusory assertion that "any traffic results in a dust problem [and t]he increased traffic would cause a health hazard" to Ms. Viviano.²⁹ Moreover, based on the facts pled, Ms. Viviano's residence is more than ten miles from the Applicant's planned route.³⁰ Here, without additional facts, the Applicant's planned route, which is ten miles from Ms. Viviano's residence and goes in the opposite direction of her residence (south toward the interstate, instead of northeast toward her residence), renders the threat of direct injury to Ms. Viviano from traffic-associated dust unrealistic and implausible. Therefore, the Joint Petitioners have failed to plead facts sufficient to establish standing on this basis, and the Board committed legal error by granting standing despite the Joint Petitioners' failure to satisfy this burden.

²⁷ See ER at 4-18 (describing the anticipated traffic increase and referring to "affected roads" and "affected portions of D Road and the New Haven Road"); ER, Figure 3.2-2, at 3-37 (displaying the locations of the Applicant's traffic study counters).

²⁸ See *id.* at 4-19, 4-127, 5-13 to 5-15, 5-53 (describing the Applicant's planned dust mitigation measures, which include water treatment). Thus, this case bears a compelling resemblance to a case in which the Commission concluded that the wet sludge nature of feed material "render[ed the petitioner's] dust concerns implausible," as there was no "realistic threat . . . of direct injury" caused by blowing dust from the feed material given the feed material's wet sludge nature. *Int'l Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-01-21, 54 NRC 247, 253 (2001) (internal quotation marks and citations omitted).

²⁹ Viviano Decl. at ¶¶ 1, 10, 12.

³⁰ Applicant Ex. 3.

In addition, the Board committed legal error by applying an overbroad interpretation of the Commission case law that indicates that the petition should be construed in favor of the petitioner. Even though the Commission has stated that, in the evaluation of standing, the petition should be construed in favor of the petitioner,³¹ this case law does not instruct licensing boards to overlook compelling factual shortcomings in the record, like those previously discussed in this section, or to assume facts that simply have not been pled by the petitioner. In its Order, the Board assumed a significant fact not pled by the Joint Petitioners in order to find standing: that it is plausible that “trucks or workers’ passenger vehicles” will travel on “New Haven Road, the road that eventually goes past Ms. Viviano’s residence,” going to or from the project area.³² However, the Joint Petitioners did not present any facts whatsoever to support this assertion. Nonetheless, the Board found that the Joint Petitioners established standing based on traffic-associated dust because of the Board’s unsupported factual finding and “the Commission’s admonition to ‘construe the petition in favor of the petitioner.’”³³ Consequently, the Board erred in finding that the Joint Petitioners had standing based on traffic-associated dust.

III. The Board Erred in Finding Standing Based on Light Pollution.

The Board erred in concluding that the Joint Petitioners established standing based on injury to Ms. Viviano due to light pollution from the proposed facility. In this regard, the Board committed the same legal errors as it did with respect to traffic-associated dust: (1) the Board did not properly apply the case law that affirmatively requires the petitioner to provide facts sufficient to establish standing; and (2) the Board applied an overbroad interpretation of Commission case law that indicates that the petition should be construed in favor of the petitioner.

³¹ *Georgia Tech*, CLI-95-12, 42 NRC at 115.

³² Order at 21.

³³ *See id.* (citation omitted).

The Board found that the Joint Petitioners established standing based on harm to Ms. Viviano caused by light pollution from the proposed project because, even though the Joint Petitioners did not refute that the “facility is not visible from Ms. Viviano’s property . . . , as anyone knows who has ever seen a search light sweeping the night sky, light pollution can still be observed from a source that is out of the line of sight.”³⁴ The Board supported its finding of standing based on light pollution citing “(1) the [Applicant’s] ER’s acknowledgement that this facility located in the relatively flat and unpopulated confines of eastern Wyoming will have a visual impact that includes night illumination; and (2) the Commission’s admonition to ‘construe the petition in favor of the petitioner.’”³⁵

The Board committed legal error by not properly applying the case law that affirmatively requires the petitioner to allege facts sufficient to establish standing. As previously explained, it is well-established in Commission case law that the petitioner bears the burden of providing facts sufficient to show standing.³⁶ However, the Joint Petitioners in this case did not plead sufficient facts to demonstrate that an actual or threatened injury to Ms. Viviano could plausibly be caused by light pollution from the proposed project. The only facts that the Joint Petitioners established by declaration or affidavit regarding this issue were that “[t]he Ross site is directly 10 miles southwest of [Ms. Viviano’s] property, and lights from [the site] operating on a 24 hour schedule could interfere with the clear views of the night skies that [she] now enjoy[s].”³⁷

The Joint Petitioners failed to plead the facts necessary to show a concrete and particularized injury to Ms. Viviano and a plausible causation from the proposed project. As acknowledged by the Board, the Joint Petitioners did not provide any factual support to suggest

³⁴ Order at 23. The Board correctly acknowledged that “Ms. Viviano’s affidavit makes no mention of light pollution relative to her investment property.” *Id.* at 22 n.25.

³⁵ *Id.* at 23.

³⁶ See, e.g., *Bell Bend*, CLI-10-7, 71 NRC at 139; *Zion*, CLI-00-05, 51 NRC at 98.

³⁷ Viviano Decl. at ¶ 11.

that Ms. Viviano would be able to see the proposed project from her residence.³⁸ The Joint Petitioners did not allege any facts whatsoever to suggest that even if Ms. Viviano is unable to view the facility directly, she will nonetheless be injured by light released by the proposed project at night. The Joint Petitioners also failed to provide facts addressing how Ms. Viviano will be injured when the Applicant applies its proposed mitigation measures, which include minimizing the amount of nighttime drilling, directing lights away from nearby residences during any nighttime operations, and restricting the proximity of operating drill rigs to nearby residences at night.³⁹ Additionally, as the Board notes, the Joint Petitioners did not provide any “particulars about the light emissions from either Hulett to the east or the Ross industrial facility to the west.”⁴⁰ In this regard, the Joint Petitions could have addressed how Ms. Viviano’s view of the night sky is currently affected by Hulett, a town of 400 people located closer to her residence than the proposed project is.⁴¹

The Board’s discussion of the Joint Petitioners’ property-value-decline standing claim provides sound guidance regarding the types of facts that the Joint Petitioners could have pled to assert standing based on light pollution. Before concluding that the Joint Petitioners did not establish standing based on a decline in the value of Ms. Viviano’s properties, the Board explained that the Joint Petitioners could have presented objective evidence demonstrating economic loss by showing that “the value of property at a comparable distance from another ISR facility had dropped from what it was prior to the submission of a license application . . . or

³⁸ See Order at 23. Particularly problematic in supporting a finding of standing is the fact that the Applicant’s viewshed analysis determined that four or less of the residences located within two miles of the proposed project area would be able to see the tallest buildings at the site, and showed that the facility would not be visible from many locations further than two miles away from the project area. See ER at 4-107; see also ER, Figure 3.9-3, at 3-359 (showing the results of the viewshed analysis by depicting on a map the areas from which the proposed facility would be visible). Ms. Viviano’s residence is located ten miles from the proposed project area, and her investment property is located seven miles from the proposed project area. Viviano Decl. at ¶¶ 1, 12.

³⁹ See *id.* at 5-58 (describing the Applicant’s planned mitigation measures).

⁴⁰ Order at 23-24 n.26.

⁴¹ See *id.* at 23 n.26 (identifying the distance between Hulett and her residence as being eight miles).

by providing the declaration of a local realtor . . . who furnishes an independent assessment of the property's value before and after the licensing action."⁴² Similarly, the Joint Petitioners could have demonstrated that light emissions from another ISR facility can be viewed at a comparable distance during nighttime operations. Such a demonstration might have provided a plausible causal link between the proposed project and Ms. Viviano's asserted injury.

The Joint Petitioners have pled only that Ms. Viviano's residence is located ten miles northeast of the proposed project area, the night sky visible from her residence is "free of any lights," and the conclusory and speculative assertion that the proposed project's operations "could interfere with [her] clear views of the night skies."⁴³ These allegations do not include facts sufficient to show a non-hypothetical, particularized harm to Ms. Viviano fairly traceable to the proposed project. The Board thus committed legal error by concluding that the Joint Petitioners had standing based on light pollution, since the Joint Petitioners had not alleged facts sufficient to meet the elements of standing.

Furthermore, the Board committed legal error by applying an overbroad interpretation of Commission case law instructing that the petition should be construed in favor of the petitioner. As previously explained, construing the petition in favor of the petitioner does not mean finding standing despite significant factual shortcomings, like those described in this section, or assuming facts not pled by the petitioner in order to find standing. The Board assumed several facts not pled by the Joint Petitioners to support its finding of standing based on light pollution. Specifically, the Board assumed that the proposed project would emit light during nighttime operations in a manner analogous to a "search light sweeping the night sky,"⁴⁴ even though the Joint Petitioners did not present any support for this analogy. In addition, the Board assumed that any "night illumination" caused by the proposed project would affect Ms. Viviano because

⁴² *Id.* at 16.

⁴³ See Viviano Decl. at ¶ 11.

⁴⁴ See Order at 23.

the area surrounding the projected area is “relatively flat and unpopulated,”⁴⁵ even though the Applicant’s viewshed analysis demonstrated that the proposed facility would not be visible from a significant portion of the surrounding area.⁴⁶ Based on these factual findings, which were not substantiated by the Joint Petitioners, and the “Commission’s admonition to ‘construe the petition in favor of the petitioner,’” the Board concluded that the Joint Petitioners established standing based on light pollution.⁴⁷ By doing so, the Board misapplied the Commission’s case law and thereby committed legal errors. Because the Board erred in granting standing to the Joint Petitioners based on traffic-associated dust, as well as based on light pollution, the Joint Petitioner’s petition to intervene should have been wholly denied.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission reverse the decision of the Board and deny the Joint Petitioners’ petition to intervene and request for hearing.

Respectfully submitted,

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⁴⁵ See *id.*

⁴⁶ See ER, Figure 3.9-3, at 3-359.

⁴⁷ Order at 23 (citation omitted).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S NOTICE OF APPEAL OF LBP-12-3, LICENSING BOARD'S ORDER OF FEBRUARY 10, 2012, AND ACCOMPANYING BRIEF" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 21st day of February, 2012:

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