

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman  
Gregory B. Jaczko  
Peter B. Lyons  
Kristine L. Svinicki

\_\_\_\_\_)  
TENNESSEE VALLEY AUTHORITY )  
) Docket Nos. 52-014-COL and 52-015-COL  
(Bellefonte Nuclear Power Plant, Units 3 and 4) )  
\_\_\_\_\_)

**CLI-09-03**

**MEMORANDUM AND ORDER**

The Licensing Board has referred to us its ruling admitting two contentions (one safety-related and the other environmental) regarding low-level waste disposal. The Board has also suggested that we consider instituting a “low-level waste confidence” rulemaking proceeding. For the reasons set forth below, we reverse the Board’s admission of both contentions, and decline to accept the Board’s rulemaking suggestion.

**I. BACKGROUND**

This proceeding stems from a combined license application (COLA) filed by the Tennessee Valley Authority (TVA) seeking authorization to construct and operate two new nuclear reactor units (proposed Units 3 and 4) at its Bellefonte facility in Alabama. Three organizations – the Southern Alliance for Clean Energy (SACE), the Blue Ridge Environmental

Defense League (BREDL), and BREDL's Bellefonte Efficiency and Sustainability Team – jointly sought a hearing and the right to intervene.<sup>1</sup>

On September 12, 2008, the Licensing Board issued LBP-08-16 which, among other things, found that SACE and BREDL (together, Intervenors) had demonstrated standing and had submitted four wholly- or partially-admissible contentions.<sup>2</sup> Based on these findings, the Board granted their petition to intervene and request for a hearing.

In proposed contention MISC-F, Intervenors raised the following argument regarding the absence of any explanation in the COLA as to how TVA intended to dispose safely of low-level waste from the two proposed units:

As of June 30, 2008, no facility in the United States will be licensed and able to accept for disposal, Class B, C or Greater-Than-[Class-]C radioactive waste from the Bellefonte nuclear and power reactors. The applicant fails to offer a viable plan for how to dispose of [this] so-called “low-level” radioactive waste generated in the course of operations, closure and post closure of Bellefonte 3 [and] 4.<sup>3</sup>

The Board found this “contention of omission” admissible insofar as it concerns Class B and C waste (though not Greater-Than-Class-C waste).<sup>4</sup> The Board then concluded that the contention raised both safety and environmental issues, and therefore assigned it two separate designations – FSAR-D for the safety issue described above, and NEPA-G for the related

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<sup>1</sup> *Petition for Intervention and Request for Hearing by the Bellefonte Efficiency and Sustainability Team, the Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy* (June 6, 2008) (Petition to Intervene).

<sup>2</sup> *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 68 NRC \_\_\_\_ (Sept. 12, 2008) (slip op. at 1-2). The Board also referred to us its ruling denying the admission of contention NEPA-M, which posits the need to provide an environmental impact assessment of the “carbon footprint” associated with the construction and authorization of the proposed facilities. That referral will be addressed in a separate opinion.

<sup>3</sup> LBP-08-16, 68 NRC at \_\_\_\_ (slip op. at 57).

<sup>4</sup> *Id.*, 68 NRC at \_\_\_\_ (slip op. at 58-59).

environmental issue of whether TVA had assessed the potential environmental impacts of keeping such waste onsite.<sup>5</sup>

The Board admitted Contention FSAR-D on the ground that it was “adequately supported and establishe[d] a genuine material dispute adequate to warrant further inquiry into . . . whether the FSAR [Final Safety Analysis Report] . . . [had] failed to include the necessary information concerning TVA plans for on-site management of Class B and C waste.”<sup>6</sup> Similarly, the Board admitted Contention NEPA-G on the grounds that it was “material . . . and not precluded by Table S-3, 10 C.F.R. § 51.51.”<sup>7</sup> In both rulings, the Board adopted the reasoning of another Board that had recently admitted a similar contention in the *North Anna* combined license (COL) proceeding.<sup>8</sup> Finally, the Board referred its admissibility rulings on these two contentions to the Commission,<sup>9</sup> with the suggestion that, because the low-level waste disposal issue was likely to arise in numerous other COL adjudications, the Commission might wish to consider addressing it in a “low-level waste confidence rulemaking.”<sup>10</sup>

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<sup>5</sup> *Id.*, 68 NRC at \_\_\_\_ (slip op. at 57-59).

<sup>6</sup> *Id.*, 68 NRC at \_\_\_\_ (slip op. at 58-59).

<sup>7</sup> *Id.*, 68 NRC at \_\_\_\_ (slip op. at 59).

<sup>8</sup> *Id.*, 68 NRC at \_\_\_\_ (slip op. at 58-59), citing *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC \_\_\_\_, \_\_\_\_-\_\_\_\_ (Aug. 15, 2008) (slip op. at 21-30) (*North Anna*). However, the Board in *North Anna* excluded the environmental portion of the contention on the ground that it had already been resolved in North Anna’s early site permit proceeding. *North Anna*, LBP-08-15, 68 NRC at \_\_\_\_-\_\_\_\_ (slip op. at 32-38).

<sup>9</sup> LBP-08-16, 68 NRC at \_\_\_\_, \_\_\_\_ (slip op. at 57, 60).

<sup>10</sup> *Id.*, 68 NRC at \_\_\_\_ (slip op. at 59-60). The *North Anna* Board made the same suggestion. *North Anna*, LBP-08-15, 68 NRC at \_\_\_\_ n.155 (slip op. at 38 n.155).

As the Board initially observed, Intervenors' low-level waste contentions are "footed in the recent closure of the Barnwell . . . low-level waste disposal facility to all waste other than that from" the Atlantic Compact states (Connecticut, New Jersey, and South Carolina).<sup>11</sup> Because the Bellefonte facility is in Alabama, this closure would preclude TVA from disposing its low-level waste at Barnwell and would force TVA to store that waste onsite instead – at least until another low-level waste disposal facility agrees to accept such waste from Alabama nuclear facilities.<sup>12</sup>

## II. DISCUSSION

Traditionally, we have accepted Board certifications or referrals.<sup>13</sup> However, our rules provide that we will review referred rulings only if the referral "raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding."<sup>14</sup> As discussed below, the Board's referred rulings, and its recommendation that the Commission initiate rulemaking, fail to satisfy this test.

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<sup>11</sup> LBP-08-16, 68 NRC at \_\_\_\_ (slip op. at 57).

<sup>12</sup> See COLA, Part 3, Environmental Report (Rev. 1), § 3.5.3 ("Solid Radioactive Waste Management System"), p. 3.5-10 (Oct. 10, 2008) (ML083100442) ("The packaged [solid] waste is stored in the auxiliary and radwaste buildings until it is shipped off-site to a licensed disposal facility"). See also Transcript of Atomic Safety and Licensing Board Initial Prehearing Conference at 197 (July 30, 2008) (Tr.) (Mr. Franz, TVA's counsel: "As we clearly state in Section 3.5.3 of our Environmental Report, we don't plan to dispose of waste on-site. Instead, we plan to store it temporarily and then ship it offsite for disposal.").

<sup>13</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005).

<sup>14</sup> 10 C.F.R. § 2.341(f)(1). See 10 C.F.R. § 2.323(f) (the presiding officer may refer a ruling to the Commission if, in the judgment of the presiding officer, "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense").

### A. The Board's Contention Admissibility Rulings

Routine rulings on contention admissibility “are usually not occasions to exercise our authority to step into ongoing Licensing Board proceedings and undertake interlocutory review[.]”<sup>15</sup> We do, however, have authority to review Board rulings *sua sponte*, in the exercise of our inherent supervisory authority over NRC adjudications,<sup>16</sup> regardless of whether we accept the referral. Absent the instant referral, we might well have declined to exercise that authority here. But with the issue already before us, we consider the Board's rulings, and reverse the admission of both contentions.

#### 1. Contention FSAR-D

The *only* regulatory ground on which Intervenors based Contention FSAR-D was Part 61 of our regulations,<sup>17</sup> which concerns land disposal of radioactive waste.<sup>18</sup> The Board expressly, and correctly, rejected this argument. Part 61 is inapplicable here because it applies only to

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<sup>15</sup> *LES*, CLI-05-21, 62 NRC at 539, citing *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004).

<sup>16</sup> See, e.g., *Clinton*, CLI-04-31, 60 NRC at 466; *Safety Light Corp.* (Bloomsburg Site Decontamination and Site Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992) (“Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself”). See also *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC 1, 7 n.1 (1994); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991), *reconsid'n denied*, CLI-92-6, 35 NRC 86 (1992).

<sup>17</sup> 10 C.F.R. pt. 61.

<sup>18</sup> Petition to Intervene at 65-69; *Reply of the Blue Ridge Environmental Defense [sic] League, its Chapter Bellefonte Efficiency And Sustainability Team and the Southern Alliance for Clean Energy to the NRC Staff Answer to Petition for Intervention and the Applicant's Answer Opposing Petition to Intervene, both dated July 1, 2008* (July 8, 2008), at 26-30 (Intervenors Reply); Tr. at 194-210. Intervenors argue that “extended on site [sic] storage becomes de facto onsite disposal.” Petition to Intervene at 67.

land disposal facilities that *receive* waste from others, not to onsite facilities such as Bellefonte's where the licensee intends to *store* its own low-level radioactive waste.<sup>19</sup>

But then the Board concluded, without elaboration, that the Intervenor's safety contention was nonetheless sufficiently supported "to warrant further inquiry into the safety-related matter of whether the TVA FSAR [Final Safety Analysis Report] has failed to include necessary information concerning TVA plans for on-site management of Class B and C waste."<sup>20</sup> In support, the Board simply cited a multifaceted discussion of a similar contention in the *North Anna* decision, *supra*.<sup>21</sup> The *North Anna* Board had rejected the same Part 61 argument, but had admitted the intervenor's low-level waste contention on other grounds.<sup>22</sup> We cannot tell from the *Bellefonte* decision which of the remaining grounds the *Bellefonte* Board was relying upon.

Although the *Bellefonte* Board was free to view Intervenor's support for Contention FSAR-D in the light most favorable to Intervenor, the Board was not free to ignore the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).<sup>23</sup> Because Intervenor failed even to raise any of the grounds on which the *Bellefonte* Board relied in admitting the contention, Intervenor's performance failed to satisfy the admissibility requirements. The Board

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<sup>19</sup> 10 C.F.R. § 61.1(a). See also *North Anna*, LBP-08-15, 68 NRC at \_\_\_\_ (slip op. at 26).

<sup>20</sup> LBP-08-16, 68 NRC at \_\_\_\_ (slip op. at 58-59).

<sup>21</sup> *Id.*, citing *North Anna*, LBP-08-15, 68 NRC at \_\_\_\_ (slip op. at 23-30).

<sup>22</sup> *North Anna*, LBP-08-15, 68 NRC at \_\_\_\_ (slip op. at 26).

<sup>23</sup> See, e.g., *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

should therefore have found Contention FSAR-D inadmissible, and its failure to do so constitutes reversible error.<sup>24</sup>

## 2. Contention NEPA-G

Intervenors argued that the COLA improperly failed to consider the environmental consequences of on-site storage of Class-B and -C waste.<sup>25</sup> TVA and the Staff responded that

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<sup>24</sup> Separately, the *Bellefonte* Board was free to decide this issue on a theory different from those argued by the litigants, *but only if* it explained the specific basis of its ruling and gave the litigants a chance to present arguments (and, where appropriate, evidence) regarding the Board's new theory. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 55-56 (1978), quoting *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975). This the *Bellefonte* Board did not do.

Nor is it at all clear that the bases for the *North Anna* Board's ruling (on which the *Bellefonte* Board relied) are universally applicable to the *Bellefonte* case. For instance, the *North Anna* Board relied on language in both the applicant's Final Safety Analysis Report and its Design Control Document – two documents that are application-specific (rather than generic) in nature. *North Anna*, 68 NRC at \_\_\_ (slip op. at 28-29). Moreover, North Anna's radwaste building contains sufficient storage "space for a six-month volume of packaged waste" (*North Anna*, 68 NRC at \_\_\_ (slip op. at 28), quoting Design Control Document § 11.4.1), while Bellefonte's designed storage capacity is sufficient to store two years' worth of Class-B and -C radwaste (Tr. at 197-98, 202). Finally, the *North Anna* Board points specifically to the applicant's acknowledgment that, absent an off-site low-level radioactive waste land disposal facility, the applicant "may need to construct additional waste storage capacity, develop an overall site waste management plan, or both." *North Anna*, 68 NRC at \_\_\_ (slip op. at 29). TVA, by contrast, made no such acknowledgment. See TVA Answer at 68-72; Tr. at 196-204.

<sup>25</sup> Petition to Intervene at 67 (the entirety of Intervenors' argument):

The issue of radioactive waste management is barely addressed in TVA's COL application. A short section (3.5) of the Environment Report on page 3.5-1 simply describes the generation of radioactive waste during operations and states that the systems are:

designed to minimize releases from reactor operations to values as low as reasonably achievable (ALARA). These systems are designed and maintained to meet the requirements of 10 CFR Part 20 and 10 CFR 50, Appendix I.

(continued . . .)

the Intervenor's argument constituted a collateral attack on a Commission regulation – 10 C.F.R. § 51.51(b), Table S-3.<sup>26</sup> TVA further asserted that its COLA adequately addressed the issue of low-level radioactive waste management.<sup>27</sup> And the Staff further argued that Intervenor's had not shown that the contention was material to the proceeding, nor had they provided expert opinion or references to support their position.<sup>28</sup>

The Board provided minimal explanation for its decision to admit Contention NEPA-G, stating merely that “for the reasons suggested by the *North Anna* COL Board, . . . this issue [is] material to this proceeding and not precluded by Table S-3, 10 C.F.R. § 51.51.”<sup>29</sup> But here, the referenced portion of the *North Anna* decision is much shorter, and the cited rationale is obvious.

Specifically, the *North Anna* Board had reasoned that (i) a COLA's Environmental Report must address the environmental costs of managing low-level wastes, (ii) the analysis must be based on Table S-3,<sup>30</sup> (iii) Table S-3 “may be supplemented by a discussion of the

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The COLA provides little in terms of the ongoing on-site management and potential environmental impact at the reactor site of keeping so-called “low-level” waste from operations on the site of generation.

<sup>26</sup> *Applicant's Answer Opposing Petition to Intervene* (July 1, 2008), at 69 (TVA Answer); *NRC Staff Answer To “Petition For Intervention And Request For Hearing By The Bellefonte Efficiency And Sustainability Team, The Blue Ridge Environmental Defense League And The Southern Alliance For Clean Energy”* (July 1, 2008), at 71 (NRC Staff Answer); Tr. 199 (TVA), 204-25 (NRC Staff).

<sup>27</sup> TVA Answer at 69 n.308.

<sup>28</sup> NRC Staff Answer at 71.

<sup>29</sup> LBP-08-16, 68 NRC at \_\_\_ (slip op. at 59), citing *North Anna*, 68 NRC at \_\_\_ (slip op. at 25-26).

<sup>30</sup> Table S-3 assumes that solid, low-level waste from reactors will be disposed of through shallow land burial, and concludes that this kind of disposal will not result in the release of any “significant effluent to the environment.” 10 C.F.R. § 51.51(b), Table S-3.

environmental significance of the data set forth in the table as weighed in the analysis for the proposed facility,”<sup>31</sup> (iv) the table “does not include health effects from the effluents described in the table,”<sup>32</sup> (v) the health effects “may be the subject of litigation in individual licensing proceedings,”<sup>33</sup> and (vi) “the increased need for interim storage of [low-level radioactive waste] because of the closure of the Barnwell facility implicates the health of plant employees, an issue that Table S-3 does not resolve.”<sup>34</sup>

But the *Bellefonte* Board’s adoption of this rationale from *North Anna* suffers from a flaw. As the NRC Staff and TVA pointed out to the Board,<sup>35</sup> and as the Intervenors themselves conceded,<sup>36</sup> Contention NEPA-G constitutes a collateral attack upon Table S-3. Absent a waiver, parties are prohibited from collaterally attacking our regulations in an adjudication.<sup>37</sup> Intervenors did not seek such a waiver. Therefore, under our rules, the Board should not have admitted the contention.<sup>38</sup>

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<sup>31</sup> *North Anna*, 68 NRC at \_\_\_ (slip op. at 25), citing 10 C.F.R. § 51.51(a).

<sup>32</sup> *Id.*, 68 NRC at \_\_\_ (slip op. at 25), citing 10 C.F.R. § 51.51(b), n.1 to Table S-3. See also Final Rule, Licensing and Regulatory Policy and Procedures for Environmental Protection: Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management, 44 Fed. Reg. 45,362, 45,364 & nn.5, 6 (Aug. 2, 1979).

<sup>33</sup> *North Anna*, 68 NRC at \_\_\_ (slip op. at 25), citing 10 C.F.R. § 51.51(b), n.1 to Table S-3.

<sup>34</sup> *Id.*, 68 NRC at \_\_\_ (slip op. at 25).

<sup>35</sup> NRC Staff Answer at 71; TVA Answer at 69.

<sup>36</sup> Intervenors Reply at 26 n.13.

<sup>37</sup> 10 C.F.R. § 2.335(a), (b).

<sup>38</sup> Even had Intervenors sought a waiver, they would not have qualified for one. We do not grant waivers where the circumstances on which the waiver’s proponent relies are common to “a large class of applicants or facilities.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 596, 597 (1988). See also *Dominion Nuclear* (continued . . .)

**B. The Board's Suggestion that We Initiate a "Low-Level Waste Confidence" Rulemaking Proceeding**

In addition to referring to us its rulings on Contentions FSAR-D and NEPA-G, the Board also suggested that we consider a "low-level waste confidence" rulemaking, related to the management and disposal of low-level radioactive waste, and, in particular, those issues that, according to the Board, "are likely to arise in multiple cases." As an example, the Board cited the question of whether facilities for the land disposal of Class B and C waste are likely to become available before the reactors that are the subject of pending COL applications are expected to begin operation (provided that pending COLAs be approved).<sup>39</sup> We decline the Board's suggestion.

A "waste confidence" rulemaking is not the appropriate instrument for resolving low-level radioactive waste issues, particularly issues of disposal. This agency has acknowledged that the future availability of disposal capacity for low-level radioactive waste remains highly uncertain. In comments to the General Accounting Office (now the Government Accountability Office) (GAO) on a draft GAO report concerning low-level radioactive waste disposal activities, the Executive Director for Operations noted that the current system for low-level radioactive

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*Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005). Here, Bellefonte shares the same circumstances (lack of a disposal facility for Class B and C waste) with 89 other nuclear power plants in 27 of the 31 states hosting such plants. See generally NRC News Release 08-103, NRC Updates Guidance to Licensees for Extended Storage of Low-Level Radioactive Waste (May 29, 2008), at 1 (ML081500171). As a result, the Bellefonte site now finds itself in the company of all but eight of the nation's 65 nuclear power plant sites.

<sup>39</sup> LBP-08-16, 68 NRC at \_\_\_, (slip op. at 60).

waste disposal “is not generally considered reliable (i.e., generators do not have good assurance that disposal will be available to them over the next 5 to 10 years).”<sup>40</sup>

GAO has raised several alternatives for dealing with disposal of Class B and C waste. The ultimate resolution of issues concerning disposal may require changes to existing statutory mechanisms for siting low-level waste disposal facilities.<sup>41</sup> To the extent that the disposal issue requires statutory changes if it is to be addressed successfully, the rulemaking recommended by the Board would not serve the purpose of resolving low-level waste disposal issues.

The questions of the safety and environmental impacts of onsite low-level waste *storage* are, in our view, largely site- and design-specific, and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions.<sup>42</sup> Indeed, a “low-level waste confidence” rule would not, if it followed the pattern set by the high-level waste confidence rule, alter any requirements to consider in the

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<sup>40</sup> “Comments on Draft GAO-04-604, ‘Low-Level Radioactive Waste: Disposal Availability Adequate in Short Term, but Oversight Needed to Identify Any Future Shortfalls,’” at 2 (undated) (ML041260357), appended to letter from Luis A. Reyes to Ms. Robin M. Nazzaro (May 25, 2004) (ML041260340). See *also* SECY-08-0124, Annual Review of the Need for Rulemaking and/or Regulatory Guidance on Low-Level Radioactive Waste Storage (Aug. 29, 2008), at 2 (ML0819705030); “Strategic Assessment of the U.S. Nuclear Regulatory Commission’s Low-Level Radioactive Waste Regulatory Program” (Strategic Assessment) at 6 (ML071350350), appended to SECY-07-0180, Strategic Assessment of Low-Level Radioactive Waste Regulatory Program (Oct. 17, 2007) (ML0713502990).

<sup>41</sup> See Strategic Assessment at 5.

<sup>42</sup> While we do not find that Intervenors here proffered an admissible contention, we do not rule out that, in a future COL proceeding, a petitioner could proffer an application-specific contention suitable for litigation on the subject of onsite storage of low-level radioactive waste. As a general matter, we note that power reactor licensees have been safely storing and managing low-level waste onsite for years under NRC oversight, and the Staff has not identified any immediate safety problems or concerns with such storage. Given the existing regulatory scheme, together with current and updated guidance (*see infra*), we do not expect that the consideration of management and storage issues in individual COL proceedings would constitute a significant burden.

adjudicatory proceeding the environmental impacts of waste storage during the term of the license.<sup>43</sup>

Pursuant to 2004 Commission direction, the Staff annually assesses the need for rulemaking or guidance for long-term storage of low-level waste in general.<sup>44</sup> To date, the Staff, and we, consider rulemaking to address long-term storage unnecessary, because the current regulatory framework continues to provide an adequate basis for regulation of stored radioactive material, including low-level waste.<sup>45</sup> However, the Staff has identified a need to review and update implementing guidance (for all affected licensees, including materials and power reactor licensees), and has undertaken a significant effort to do so.<sup>46</sup> That generic effort is ongoing, and we will continue to assess the Staff's recommendations with respect to the necessity of rulemaking in this area, via its annual status reports. In this vein, we note particularly that the Staff has committed to "[r]eport to the Commission in 2009 . . . any concerns and challenges

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<sup>43</sup> Cf. 10 C.F.R. § 51.23 (regarding litigability of the environmental effects of onsite spent fuel storage).

<sup>44</sup> Staff Requirements – SECY-03-0223 – Rulemaking Plan: Assured Isolation Facilities (Jan. 29, 2004) (ML040290568).

<sup>45</sup> See SECY-06-0193, "Annual Review of the Need for Rulemaking and/or Regulatory Guidance on Low-Level Radioactive Waste Storage" (Sept. 6, 2006), at 1-2 (ML061730187).

<sup>46</sup> See SECY-08-0124 at 3 ("staff plans to evaluate the need for additional supplemental guidance in the form of a NUREG"); Strategic Assessment at 5 ("circumstances suggest or require certain actions by the NRC, ranging from updating storage guidance (because many generators may no longer have a disposal option for Class B/C waste beginning in mid-2008), to developing licensing criteria for GTCC [Greater Than Class C] facilities, to developing guidance for LAW [low activity waste] disposal"). With respect to reactor licensees, the Staff recently issued a Regulatory Issue Summary to clarify its current position regarding the long-term, interim storage of low-level radioactive waste at facilities licensed under 10 C.F.R. Part 50. NRC Regulatory Issue Summary 2008-32, "Interim Low Level Radioactive Waste Storage at Reactor Sites" (Dec. 30, 2008) (ML082190768).

associated with the loss of access to disposal at Barnwell that have been identified by licensees, State regulators, inspectors or other stakeholders.”<sup>47</sup>

Commissioner Jaczko’s dissent states that “[t]his is a complicated matter...” We agree. Nevertheless, low-level waste disposal (as both the *Bellefonte* and *North Anna* Boards recognize) is irrelevant to adjudicatory proceedings and may require legislative action, while low-level waste storage is properly part of such proceedings (just as high-level waste storage is under the High-Level Waste Confidence rule), and the agency is already considering annually whether any more guidance or rules on storage are needed.

### III. CONCLUSION

For the reasons set forth above, we *reverse* the Board’s admission of Contentions FSAR-D and NEPA-G, and *decline* to accept the Board’s suggestion that we conduct a “low-level waste confidence” rulemaking proceeding.

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 17th day of February, 2009.

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<sup>47</sup> SECY-08-0124 at 5. The Staff notes that this status report will include a summary of Staff initiatives to address and mitigate identified concerns or challenges. *Id.*

**Commissioner Gregory B. Jaczko, dissenting:**

I offer a separate dissenting opinion because I believe the Commission should have requested briefs from the parties on this issue. This is a complicated matter and one in which I believe the Board was seeking Commission guidance that this Order does not provide. As it currently stands most of the states where new reactor license applicants are hoping to site new reactors do not currently have a path for disposal of Class B and Class C waste. The implications of a lack of disposal options for new and operating reactors raise complex issues. Moreover, a review of the attempts to deal with these complications reveals the agency's clear struggle with the appropriate regulatory approach to this matter. It is precisely because of the complex and potentially recurring nature of this issue that the Board sought Commission guidance, and it is precisely for these same reasons that I believe an ultimate decision would have benefited from the parties' views on this matter.