

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS**

January 1, 2008 – June 30, 2008

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PREFACE

This is the sixty-seventh volume of issuances (1–508) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2008, to June 30, 2008.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members, conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission (AEC) first established Licensing Boards in 1962 and the Panel in 1967.

Between 1969 and 1990, the AEC authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which were drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred from the AEC to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represented the final level in the administrative adjudicatory process to which parties could appeal. Parties, however, were permitted to seek discretionary Commission review of certain board rulings. The Commission also could decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. Since then, the Commission itself reviews Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. 29 & 403 (1991).

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Issuances are referred to as follows: Commission—CLI, Atomic Safety and Licensing Boards—LBP, Administrative Law Judges—ALJ, Directors' Decisions—DD, and Decisions on Petitions for Rulemaking—DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Gregory B. Jaczko
Peter B. Lyons

In the Matter of

Docket No. 72-26-ISFSI

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Power Plant
Independent Spent Fuel Storage
Installation)**

January 15, 2008

CONTENTIONS, LATE-FILED

Before a petition to admit a late-filed contention can be granted, the five factors set out in the Commission's procedural rules must be balanced. The first factor — whether good cause exists to excuse the late-filing of the contention — is the most important factor. If "good cause" is not shown, a petitioner "must make a 'compelling' showing" on the four remaining factors. In this analysis, factors three and five — the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record and the extent to which this participation will broaden the issues or delay the proceeding — are to be given more weight than factors two and four — the availability of other means for protecting the petitioner's interest and the extent to which this interest will be represented by existing parties.

CONTENTIONS, LATE-FILED

CONTENTIONS, ADMISSIBILITY

Even if late-filing criteria are satisfied, proposed contentions must still meet the Commission's admissibility standards.

CONTENTIONS, ADMISSIBILITY

A contention shall not be admitted if the Commission's admissibility requirements are not satisfied or if the contention, even if proven, would not entitle the petitioner to relief. This strict contention pleading rule is designed to focus the hearing process on genuine disputes susceptible of resolution, puts the other parties on notice of the specific grievances at issue, and restricts participation to "those able to proffer at least some minimal factual and legal foundation in support of their contentions."

NATIONAL ENVIRONMENTAL POLICY ACT

FREEDOM OF INFORMATION ACT

The link between the National Environmental Policy Act (NEPA) and the Freedom of Information Act (FOIA) is spelled out in section 102(2)(C) of NEPA: copies of environmental impact statements "shall be made available to the President, the Council on Environmental Quality and to the public as provided in [FOIA] section 552 of Title 5." This includes information underlying environmental impact statements (or environmental assessments). But information that must be considered as part of the NEPA decisionmaking process may be withheld from public disclosure pursuant to FOIA exemptions.

DISCLOSURE, CLASSIFIED AND SAFEGUARDS INFORMATION

TERRORISM

The NRC has a statutory obligation to protect national security information. Hearings on the essentially limitless range of conceivable (albeit highly unlikely) terrorist scenarios could not be conducted in a meaningful way without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance. Such information — disclosure of which is prohibited by law — would lie at the center of any adjudicatory inquiry into the probability and success of various terrorist scenarios, and NEPA does not contemplate such adjudications.

NATIONAL ENVIRONMENTAL POLICY ACT

NATIONAL INFRASTRUCTURE PROTECTION PLAN

While the Commission certainly agrees that in implementing its security program the NRC should take account of the National Infrastructure Protection Plan (NIPP), to which the NRC is a signatory, the Commission does not agree that

the NRC must demonstrate compliance with the NIPP in its NEPA evaluation. The NIPP is concerned with security issues, not environmental quality standards and requirements — and it is environmental quality standards and requirements that 10 C.F.R. § 51.71(d) obliges the environmental analysis to address, not security issues.

MEMORANDUM AND ORDER

Last February, we issued an order scheduling further proceedings in this adjudication on a license application for an independent spent fuel storage installation (ISFSI) at the site of the Diablo Canyon nuclear power reactor in California.¹ Our order directed the NRC Staff to prepare a revised environmental assessment. We asked the Staff to address “the likelihood of a terrorist attack at the Diablo Canyon ISFSI site and the potential consequences of such an attack.”² The Staff’s draft revised environmental assessment supplement³ prompted San Luis Obispo Mothers for Peace (SLOMFP) to request a hearing and to file five proposed contentions.⁴ Both the Pacific Gas and Electric Company (PG&E)⁵ and the NRC Staff⁶ opposed all five proposed contentions as inadmissible. SLOMFP replied with counterarguments to PG&E’s and the Staff’s positions.⁷

Before we acted on SLOMFP’s contentions, the NRC Staff issued its final supplemental environmental assessment, which took into account public com-

¹ CLI-07-11, 65 NRC 148 (2007).

² *Id.* at 149.

³ Supplement to the Environmental Assessment and Draft Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation, 72 Fed. Reg. 30,398 (May 31, 2007) (Draft EA Supplement).

⁴ San Luis Obispo Mothers for Peace’s Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement (June 28, 2007) (SLOMFP Petition), with attachment: Thompson, Gordon R., Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: The Case of a Proposed Spent Fuel Storage Installation at the Diablo Canyon Site (June 27, 2007) (Thompson Report).

⁵ Pacific Gas and Electric Company’s Response to Proposed Contentions (July 9, 2007) (PG&E Response).

⁶ NRC Staff’s Answer to Contentions Submitted by San Luis Obispo Mothers for Peace (July 13, 2007) (Staff Response).

⁷ San Luis Obispo Mothers for Peace’s Reply to PG&E’s and NRC Staff’s Oppositions to SLOMFP’s Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement (July 18, 2007) (SLOMFP Reply).

ments.⁸ The Commission directed the parties to file pleadings addressing the effects, if any, of the Staff's final environmental supplement on this adjudication.⁹ SLOMFP responded that its proposed contentions remained valid.¹⁰ PG&E¹¹ and the NRC Staff¹² again opposed SLOMFP's contentions, and SLOMFP filed a reply.¹³ Today, we decide that limited portions of two SLOMFP contentions (Contentions 1(b) and 2) are admissible, and that the remainder are not.

I. BACKGROUND

In *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007), the United States Court of Appeals for the Ninth Circuit held that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" in this licensing proceeding was unreasonable under the National Environmental Policy Act (NEPA). The Ninth Circuit remanded the "NEPA-terrorism" question to the Commission for "further proceedings consistent with this opinion."¹⁴ Today's consideration of SLOMFP's five proposed NEPA-terrorism contentions depends solely on the Ninth Circuit's remand in this particular proceeding and is limited to this proceeding. As indicated in a series of decisions earlier this year, we respectfully disagree with the Ninth

⁸ Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (Aug. 2007) (Final EA Supplement), available as ADAMS Accession No. ML072400303.

⁹ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Spent Fuel Storage Installation), unpublished Order (Sept. 11, 2007) (Supplementary Pleadings Order), available as ADAMS Accession No. ML072540093.

¹⁰ San Luis Obispo Mothers for Peace's Response to NRC Staff's Supplement to the Environmental Assessment and Finding of No Significant Impact for the Diablo Canyon Independent Spent Fuel Storage Installation (Oct. 1, 2007) (SLOMFP Petition II), with attachment: Thompson, Gordon R., Declaration by Dr. Gordon R. Thompson Regarding the NRC Staff's August 2007 Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) (Oct. 1, 2007) (Thompson Report II).

¹¹ Pacific Gas and Electric Company's Response to Commission Order and San Luis Obispo Mothers for Peace Filing on the Final Environmental Assessment Supplement (October 11, 2007) (PG&E Response II).

¹² NRC Staff's Response to San Luis Obispo Mothers for Peace's Response to Commission Order and Supplement to Final Environmental Assessment (Oct. 11, 2007) (Staff Response II).

¹³ San Luis Obispo Mothers for Peace's Reply to PG&E and NRC Staff's Responses to SLOMFP Response to Commission Order (Oct. 12, 2007) (SLOMFP Reply II).

¹⁴ 449 F.3d at 1035.

Circuit's view that NEPA demands a terrorism inquiry,¹⁵ and are litigating the issue in other Circuits.¹⁶

As we noted in our February scheduling order, “[t]he Ninth Circuit explicitly left to our discretion the precise manner in which we undertake a NEPA-terrorism review on remand, with respect to both our consideration of the merits and the procedures we choose to apply.”¹⁷ With respect to procedural rules, all of the parties to this proceeding agree that we should apply our pre-2004 Part 2 procedural rules, since the proceeding began prior to the applicability of our new Part 2 regulations.¹⁸ As a result, all references in this decision are to our former Part 2 rules. Also, as PG&E notes, in its original incarnation this proceeding was held under the special hybrid proceedings in Part 2, Subpart K. Subpart K applies where invoked by a party,¹⁹ and both PG&E and the NRC Staff invoked Subpart K originally.²⁰ PG&E requests that, if contentions are admitted in this remanded proceeding, Subpart K again be used.²¹ In view of our decision today, we grant PG&E's renewed request and will apply Subpart K to this proceeding.

II. DISCUSSION AND ANALYSIS

A. Application of Late-Filed Contention Standards

Our late-filed contention standards, pre-2004 rules, were set out in 10 C.F.R. § 2.714(a)(1). Before a petition to admit a late-filed contention can be granted, the following five factors must be balanced:

- (i) Good cause, if any, for failure to file on time.

¹⁵ See CLI-07-11, 65 NRC at 149 n.5; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 140-41 (2007); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 145 (2007).

¹⁶ *Ohngo Gaudadeh Devia v. NRC*, Nos. 05-1419, 05-1420, & 06-1087 (D.C. Cir.) (currently held in abeyance); *New Jersey Department of Environmental Protection v. NRC*, No. 07-02271 (3d Cir.).

¹⁷ CLI-07-11, 65 NRC at 149. The Court said: “Our identification of the inadequacies in the agency’s NEPA analysis should not be construed as constraining the NRC’s consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis. There remain open to the agency a wide variety of actions it may take on remand, consistent with its statutory and regulatory requirements.” 449 F.3d at 1035.

¹⁸ See SLOMFP Petition at 1 n.1; PG&E Response at 2 n.6; Staff Response at 1 n.1. In 2004, we altered Part 2 in significant respects.

¹⁹ See 10 C.F.R. § 2.1101.

²⁰ See LBP-02-25, 56 NRC 467, 471 (2002).

²¹ PG&E Response at 2 n.6.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The first factor — whether good cause exists to excuse the late-filing of the contention — is the most important factor.²² If “good cause” is not shown, a petitioner “must make a ‘compelling’ showing” on the four remaining factors.²³ In this analysis, factors three and five are to be given more weight than factors two and four.²⁴ Even if the late-filed contention criteria are satisfied, proposed contentions still must meet the admissibility standards contained in 10 C.F.R. § 2.714(b)(2), an inquiry we undertake below.

SLOMFP argues that all of its proposed contentions meet our late-filed contention criteria. We agree. First, SLOMFP's proposed contentions plainly satisfy the most heavily weighted factor, good cause. SLOMFP filed its new contentions within 30 days after issuance of the NRC Staff's draft supplemental environmental assessment — the NRC's first attempt to analyze the NEPA-terrorism issue and, therefore, SLOMFP's first opportunity to raise contentions on the adequacy of this assessment — and SLOMFP timely filed its second set of pleadings as directed in our Supplementary Pleadings Order. Second, this proceeding is SLOMFP's only means to achieve its interest related to its claim that the NRC failed to comply with NEPA on the NEPA-terrorism issue in connection with the Diablo Canyon ISFSI. Third, SLOMFP is assisted by experienced counsel, with expert assistance, so its participation may reasonably be expected to contribute to the development of a sound record. Finally, while SLOMFP's participation will delay the proceeding, the real source of the delay is our (now-overturned) decision against addressing the NEPA-terrorism issue when this proceeding first began over 5 years ago, so this factor should not count against SLOMFP's request to file late-filed contentions.

²² See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986), citing *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 483 (2001), *review declined*, CLI-02-3, 55 NRC 155, 156 n.9 (2002).

²³ *Braidwood Nuclear Power Station*, CLI-86-8, 23 NRC at 244.

²⁴ *Id.* at 245.

PG&E argues that two of SLOMFP's contentions, Contentions 3 and 5, do not meet the late-filed contention criteria. The NRC Staff agrees with PG&E on the second of these, Contention 5.

In Contention 3, described further below, SLOMFP asserts that the supplemental environmental assessment "fails to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment" in violation of NEPA and Council on Environmental Quality (CEQ) regulations.²⁵ PG&E maintains that the balancing of the late-filed contention criteria weighs against admitting this contention because, lacking expertise in threat assessment, SLOMFP is unlikely to assist in the development of a meaningful record. Also, PG&E says, litigating this contention would broaden the scope of the proceeding beyond NEPA issues into other issues, like NRC security requirements and ISFSI dry cask design, which the Petitioners can address through other means such as by participating in rulemakings. PG&E concludes by suggesting that SLOMFP's information can be appropriately considered a "comment," and thus part of the Staff's normal NEPA process.²⁶ SLOMFP disputes PG&E's statement that it lacks expertise in threat assessment, referring to its witness's qualifications as an expert on nuclear risk assessment.²⁷

SLOMFP reiterates that it has good cause, unchallenged by PG&E, for submitting this contention based on the newly available supplemental environmental assessment. We agree that SLOMFP's showing of good cause is sufficient and justifies its late-filed contention on "credible scenarios" because the contention is directed at the NRC Staff's very recent NEPA-terrorism analysis. PG&E's arguments do not outweigh SLOMFP's good cause showing.

In Contention 5, also described further below, SLOMFP maintains that the environmental assessment "fails to comply with NEPA because it does not consider the significant cumulative impacts of the proposed ISFSI in relation to the impacts of the existing high-density pool storage system for spent fuel at the Diablo Canyon nuclear plant."²⁸ PG&E and the NRC Staff argue that this contention is untimely and does not satisfy the late-filed contention admissibility criteria. They point out that SLOMFP raised issues related to the spent fuel pool early on in the proceeding and that this proposed contention was rejected as inadmissible.²⁹ Moreover, PG&E and the NRC Staff assert that SLOMFP's interests regarding the spent fuel pool can be protected through other means,

²⁵ SLOMFP Petition at 12.

²⁶ PG&E Response at 17-18, 23.

²⁷ SLOMFP Reply at 22, citing Declaration of Dr. Gordon R. Thompson in Support of San Luis Obispo Mothers for Peace's (SLOMFP's) Contentions Regarding the Diablo Canyon Environmental Assessment Supplement, ¶¶ 4-11 (attached to SLOMFP Petition).

²⁸ SLOMFP Petition at 15.

²⁹ See PG&E Response at 21, citing LBP-02-23, 56 NRC 413, 450-51 (2002).

namely the NRC's ongoing regulatory oversight of the Diablo Canyon power plant.

Again, though, we cannot fairly reject as too late a SLOMFP contention directed at the adequacy of a brand new NRC Staff NEPA-terrorism analysis in the particular circumstances of this case. PG&E's (and NRC Staff's) arguments on other "late-filed" factors (such as alternate means to protect SLOMFP's interests) do not overcome SLOMFP's strong showing of good cause.

B. Contention Admissibility Standards

Under our pre-2004 rules:

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.³⁰

A contention shall not be admitted if these requirements are not satisfied³¹ or if the contention, even if proven, would not entitle the petitioner to relief.³² This strict contention pleading rule is designed to focus the hearing process on genuine disputes susceptible of resolution, puts the other parties on notice of the specific grievances at issue, and restricts participation to "those able to proffer at least some minimal factual and legal foundation in support of their contentions."³³

³⁰ 10 C.F.R. § 2.714(b)(2).

³¹ 10 C.F.R. § 2.714(d)(2)(i).

³² 10 C.F.R. § 2.714(d)(2)(ii).

³³ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

C. Proposed Contentions

SLOMFP proposed five contentions in its original pleading, and made no changes to these contentions in its response to the Commission’s Supplementary Pleadings Order, arguing that the NRC Staff made no significant changes in the final supplementary environmental assessment compared to the draft version, and that the final version provided no satisfactory explanation for the alleged deficiencies in the draft supplemental environmental assessment. SLOMFP’s view that the Staff’s analysis lacks detail, or disclosure of detail, pervades SLOMFP’s contentions. The Staff’s response is that it has provided the level of detail that it can, given national security concerns, and PG&E echoes this response. As the Ninth Circuit acknowledged,³⁴ the Supreme Court’s decision in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981), makes it clear that protecting national security information overrides ordinary NEPA disclosure requirements, and this consideration factors heavily in our decision today.

Our inability to disclose information based on the confidentiality of that information does not mean, however, that the NRC Staff (and the Commission, on review) has not performed the evaluation the Ninth Circuit directed, consistent with *Weinberger* — it simply means that certain information cannot be made public for security reasons. Below we find some portions of SLOMFP’s contentions admissible and some not. We use *Weinberger* as our guidepost in evaluating what can and cannot be litigated in further adjudicatory proceedings.

1. Contention 1: Failure To Define Terms, Explain Methodology, or Identify Scientific Sources

SLOMFP argues that the NRC Staff’s supplemental environmental assessment violates NEPA, NRC regulations, and CEQ regulations because the supplemental environmental assessment “fail[s] to define its terms, explain its methodology, or identify its scientific sources.”³⁵ After an introductory description of the bases for its position, SLOMFP divides Contention 1 into subsections — 1(a) and 1(b). SLOMFP’s focus in 1(a) is on the Staff’s alleged failure to properly define the terms or describe the methodology it used in preparing its supplemental environmental assessment. In 1(b) SLOMFP focuses on the Staff’s failure, in its opinion, to properly identify the documentary support underpinning its analysis.

³⁴ *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1034-35.

³⁵ SLOMFP Petition at 3.

a. Terms and Methodology

SLOMFP complains in Contention 1(a) that the draft environmental assessment does not adequately explain terms or methodology.³⁶ Apart from falling back on its information security concerns, the NRC Staff's general position is that the contention lacks both specificity regarding alleged inadequacies in the supplemental environmental assessment and support for a different viewpoint, and should be rejected based upon the requirements of 10 C.F.R. § 2.714(b)(2)(iii) for failure "to identify a genuine dispute on a material issue of law or fact within the scope of the proceeding."³⁷ PG&E argues that the contention fails to establish any specific factual dispute with respect to either the likelihood or the consequences of a terrorist attack and should be rejected based on 10 C.F.R. § 2.714(d)(2)(ii).³⁸

SLOMFP goes into considerable detail regarding the bases for this contention, designating eight separate, but somewhat overlapping, points:

- i. SLOMFP maintains that the supplemental environmental assessment "fails to provide a clear description of the NRC's process for identifying plausible or credible attack scenarios and assessing their consequences to determine whether they are significant."³⁹
- ii. SLOMFP argues that the supplemental environmental assessment provides "no explanation of what the NRC means by the word 'plausible.'"⁴⁰
- iii. SLOMFP's argues that the supplemental environmental assessment provides no "description of the criteria used by the NRC to distinguish between scenarios that are 'plausible' and those that are 'remote and speculative.'"⁴¹
- iv. SLOMFP argues that the supplemental environmental assessment "fails to demonstrate that the NRC considered the wider scope of scenarios required by NEPA" compared to the narrower scope of scenarios required under the Atomic Energy Act (AEA) "reasonable protection" standard or the Design Basis Threat (DBT) "rule's standard of requiring defense 'against which a private security force can reasonably be expected to defend.'"⁴²
- v. SLOMFP argues that the supplemental environmental assessment provides a poor description of the process used in what SLOMFP refers to as the

³⁶ Contention 1, subsection (a), SLOMFP Petition at 5-9.

³⁷ Staff Response at 9.

³⁸ PG&E Response at 8.

³⁹ Contention 1, paragraph (a)(i), SLOMFP Petition at 5.

⁴⁰ Contention 1, paragraph (a)(ii), SLOMFP Petition at 5.

⁴¹ Contention 1, paragraph (a)(iii), SLOMFP Petition at 6.

⁴² Contention 1, paragraph (a)(iv), SLOMFP Petition at 6-7, citing 72 Fed. Reg. 12,705, 12,713 (Mar. 19, 2007).

NRC's 2002 threat scenario analysis, raising many questions that it does not answer.⁴³

- vi. SLOMFP argues that the supplemental environmental assessment fails to explain how the AEA-based generic security assessments that led to the Staff's conclusion that no additional security measures were required for ISFSIs have "any relevance to a NEPA determination of whether environmental impacts are significant."⁴⁴
- vii. SLOMFP argues that the supplemental environmental assessment fails to explain how the NRC's determination that the assumptions in the "generic security assessments were 'representative' or 'conservative' in relation to the Diablo Canyon facility . . . factored into a NEPA analysis."⁴⁵
- viii. SLOMFP argues that the supplemental environmental assessment "fails to provide any analysis of the radiological impacts of threat scenarios, including any *documented* estimate of the radiation dose arising from release of radioactive material."⁴⁶

SLOMFP's arguments fail to justify admitting Contention 1(a). In our view, for example, the context of the Staff's use of the term "plausible" is consistent with the word's ordinary usage and with NEPA; because the Staff's usage is clear, no separate additional definition is required. The qualitative description of the criteria for distinguishing between the terms "plausible" and "remote and speculative" provided by the Staff is also clear enough — and consistent with information security constraints and the *Weinberger* decision. Additionally, the NRC Staff has provided a sufficient description of its scenario identification process and the significance of associated consequences — again within the constraints of information security requirements and consistent with the *Weinberger* decision. And, contrary to SLOMFP's argument, the supplemental environmental assessment expressly discusses the Staff's analysis of dosage — again, to the extent permitted given the requirement to protect sensitive information.

SLOMFP's points regarding the distinction between AEA analysis and NEPA analysis bear further discussion. SLOMFP argues that the standards for AEA-derived security requirements and NEPA environmental evaluations differ. *See,*

⁴³ Contention 1, paragraph (a)(v), SLOMFP Petition at 7-8, citing the Draft EA Supplement at 6. With respect to the "unanswered" questions, the Staff indicates that "[m]ost of this information was omitted because it is designated as Safeguards Information or SUNSI [Sensitive Unclassified Non-safeguards Information] or Classified Information . . . [and] the Staff's NEPA obligation does not allow discussion of sensitive security information in environmental documents that the Staff is required to protect from public disclosure." (Staff Response at 15.)

⁴⁴ Contention 1, paragraph (a)(vi), SLOMFP Petition at 8.

⁴⁵ Contention 1, paragraph (a)(vii), SLOMFP Petition at 8.

⁴⁶ Contention 1, paragraph (a)(viii), SLOMFP Petition at 8-9 (emphasis added).

e.g., Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 741 (3d Cir. 1989). According to SLOMFP, the AEA-derived design basis threat rule focuses on the licensee's ability to defend against threats that the NRC believes it is reasonable or feasible for a licensee to defend against,⁴⁷ while NEPA looks at whether the threat is foreseeable, independent of the licensee's ability to defend against it. SLOMFP points to a CEQ rule, 40 C.F.R. § 1502.22(b)(3),⁴⁸ calling on agencies to include "a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment" where "'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."⁴⁹ To counter SLOMFP's argument, the Staff maintains that it provided the specifics it could (without disclosing Safeguards Information, SUNSI, or Classified Information) to show how it applied existing analyses to its NEPA analysis.

In addition, the Staff makes a number of other points regarding SLOMFP's claims that the supplemental environmental assessment does not describe any analysis for the purpose of complying with NEPA and poorly describes any such analyses. The Staff notes that the supplemental environmental assessment expressly describes the review of prior ISFSI security assessments and the additional analyses of potential consequences, including consideration of site-specific conditions at the Diablo Canyon ISFSI, for purposes of conducting the supplemental review of consequences of terrorism under NEPA.⁵⁰ Moreover, the supplemental assessment's acknowledged review of prior AEA-based security assessments for pertinent information on the effects of terrorist attacks as one part of the assessment does not show that a NEPA assessment was not performed or that it is inadequate. Indeed, the Commission clearly expected the NRC Staff to use existing information, as appropriate, when it stated:

To the extent practicable, we expect the NRC Staff to base its revised environmental analysis on information already available in agency records, and consider in particular the Commission's DBT for power plant sites and other information on the

⁴⁷ SLOMFP Reply at 14, citing Final Rule, Design Basis Threat, 72 Fed. Reg. 12,705, 12,713 (Mar. 19, 2007).

⁴⁸ SLOMFP Petition at 7.

⁴⁹ 40 C.F.R. § 1502.22(b). Of course, the applicability of the CEQ's regulations to our activities is not without limitation. While the Commission's "policy [is] to take account of the regulations of the [CEQ] voluntarily" (10 C.F.R. § 51.10(a)), this policy is tempered by the Commission's overriding "responsibility as an independent regulatory agency for protecting the radiological health and safety of the public" as the Commission conducts its licensing and associated regulatory functions (10 C.F.R. § 51.10(b)).

⁵⁰ Staff Response at 13.

ISFSI design, mitigative, and security arrangements bearing on likely consequences, consistent with the requirements of NEPA, the Ninth Circuit's decision, and the regulations for the protection of sensitive and safeguards information.⁵¹

There is no genuine dispute that NEPA and AEA legal requirements are not the same; the 2003 environmental assessment and the final supplemental environmental assessment were prepared to meet the NRC's obligations under NEPA, and NEPA requirements must be satisfied. SLOMFP's desire for greater detail or a technical discussion of differences between AEA and NEPA requirements does not show either that the supplemental assessment is insufficient for NEPA purposes or establishes a concrete, specific, and genuine issue of material fact or law to warrant admission of the contention.

b. Scientific Source Document Identification

In its original petition, SLOMFP argued that the only sources listed in the draft environmental assessment consist “of three documents that are irrelevant and invalid in light of the U.S. Court of Appeals decision in *San Luis Obispo Mothers for Peace v. NRC*: the 2003 license amendment application, the original 2003 [environmental assessment], and the license itself.”⁵² SLOMFP pointed to places in the environmental assessment where the Staff's phrasing made it clear that the Staff also consulted sources other than these three documents.⁵³ Under NEPA, SLOMFP argued, the public is entitled to identification of these sources and any other technical data the Staff relied on in reaching its conclusions.

SLOMFP argued that the NRC Staff's failure to provide a complete list of the references underlying the conclusions the Staff presents in its supplemental environmental assessment means that the Staff's decision to stop short of preparing a full environmental impact statement is unjustified, and, by extension, that the finding of no significant impact is unsupported. SLOMFP cites judicial

⁵¹ CLI-07-11, 65 NRC at 150 (footnote omitted). SLOMFP refers to standards considered in the promulgation of the NRC's Design Basis Threat Rule, but this reference does not show a concrete and specific failing in the analysis contained in the supplemental environmental assessment, which included consideration of threat scenarios considered to be plausible. For example, the Staff notes that it looked at “a large aircraft impact similar in magnitude to the attacks of September 11, 2001.” NRC Staff Response at 13. SLOMFP offers nothing concrete to show that this is not true.

⁵² SLOMFP Petition at 9.

⁵³ See *id.* at 9-10, where SLOMFP quotes extensively from the environmental assessment to highlight apparent documentary references not included in the environmental assessment's list of references.

precedent,⁵⁴ as well as an NRC regulation, 10 C.F.R. § 51.30(a)(2),⁵⁵ and a CEQ regulation, 40 C.F.R. § 1502.24,⁵⁶ to support its argument that the NRC Staff must provide source documents underlying its environmental assessment.

The NRC Staff's position on the alleged failure to reference the sources of scientific data used in the supplemental environmental assessment is that sensitive security information must be protected from public disclosure.⁵⁷ Indeed, the need to withhold information because of its sensitive security nature is an overarching theme in the Staff's briefs. SLOMFP's reply is that "the Staff does not explain what is sensitive about information concerning the title, date, a general description of the content of a sensitive security document, or identification of the [Freedom of Information Act (FOIA)] exemption under which the NRC claims the right to withhold the content of the document."⁵⁸

Now that the Staff has issued a final environmental assessment, with additional references and sources listed, SLOMFP acknowledges the improvement but argues that the list is still "insufficient to comply with NEPA" because it is "concededly incomplete," because the Staff provides no justification for withholding identification of documents based on their sensitivity, and because no justification is evident.⁵⁹ According to the SLOMFP, the final environmental assessment "should provide a complete list of its sources and references, including records of the consultations with law enforcement agencies which are identified as important sources of information in the appendix" to the finalized supplement.⁶⁰ Moreover, to the extent that any documents relied on in rejecting any contentions are nonpublic, SLOMFP requests access to these documents, under appropriate protective measures, to evaluate the Commission's basis for rejecting the contentions.⁶¹ SLOMFP also seeks access to safeguards and classified documents to the extent necessary to evaluate the final supplemental environmental assessment's conclusions.⁶²

⁵⁴ SLOMFP Petition at 4, citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998), and *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1300-31 (9th Cir. 2003).

⁵⁵ "An environmental assessment shall identify the proposed action and include: . . . [a] list of agencies and persons consulted, and identification of sources used." 10 C.F.R. § 51.30(a)(2).

⁵⁶ "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix." 40 C.F.R. § 1502.24.

⁵⁷ NRC Staff Response at 6-8.

⁵⁸ SLOMFP Reply at 16.

⁵⁹ SLOMFP Petition II at 2.

⁶⁰ *Id.* at 2-3.

⁶¹ *Id.* at 3.

⁶² *Id.*

PG&E disagrees with SLOMFP's position that the list of references remains insufficient, arguing that SLOMFP's complaint about the lack of references is "clearly moot" based upon the listing of sources provided in the final supplemental environmental assessment.⁶³ Like PG&E, the NRC Staff argues that it cured the omission of reference documents in the draft supplemental environmental assessment by adding to the list of references in the final version.⁶⁴ The Staff states that it did not include certain types of documents that it "submits . . . need not be referenced," namely, "[p]ublicly available reference documents that provide background and technical information on matters such as health physics and dose modeling . . . because they provide widely known information regarding the manner in which radioactive doses are calculated and health impacts [are] evaluated."⁶⁵

The link between NEPA and FOIA is spelled out in section 102(2)(C) of NEPA: copies of environmental impact statements "shall be made available to the President, the Council on Environmental Quality and to the public as provided in [FOIA] section 552 of Title 5."⁶⁶ We understand this to include information underlying environmental impact statements (or environmental assessments). As the Supreme Court said in *Weinberger*, "§ 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure of any NEPA documents, in whole or in part, *under the authority of an FOIA exemption.*"⁶⁷ "NEPA provides . . . that any information kept from the public under the exemptions in . . . FOIA . . . need not be disclosed."⁶⁸ FOIA exemption 1, for example, permits withholding classified information and FOIA exemption 3 supports withholding safeguards material.⁶⁹ So-called "SUNSI" material,⁷⁰ official use only (nonpublic), or general information like the title, date, or a general summary or description of the contents of an otherwise classified or exempt document,⁷¹ may or may not qualify under a FOIA exemption, depending

⁶³ PG&E Response II at 3.

⁶⁴ Staff includes a further six documents in Attachment 1 to Staff Response II, entitled Addendum to References Listed in the NRC Staff's Supplement to the Environmental Assessment and Final Finding of No Significant Impact for the Diablo Canyon Independent Fuel Storage Installation.

⁶⁵ Staff Response II at 3-4.

⁶⁶ 42 U.S.C. § 4332(2)(C).

⁶⁷ *Weinberger*, 454 U.S. at 143 (emphasis added). See also *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 420 (2d Cir. 1989).

⁶⁸ *Hudson River Sloop Clearwater*, 891 F.2d at 420, citing *Weinberger* at 202-03.

⁶⁹ See 5 U.S.C. § 552(b)(1), (b)(3); 42 U.S.C. § 2167.

⁷⁰ "SUNSI" is an NRC term referring to sensitive unclassified nonsafeguards information.

⁷¹ If the existence of a document is classified, such that disclosure of the title and a description of the contents would also be classified, then, as in *Weinberger* where the environmental impact

(Continued)

upon the specifics of the information. “Ordinarily,” when access to documents is disputed in FOIA litigation, “the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption.”⁷² This process commonly requires what is referred to as a “*Vaughn*” index.⁷³ Where a *Vaughn* index is required, it must be sufficiently detailed to support *de novo* assessment of the validity of the claimed exemption should the matter go to court.⁷⁴

In our initial scheduling order, we recognized that “it may prove necessary to withhold some facts underlying the Staff’s findings and conclusions.”⁷⁵ The expanded list of references that the Staff provided in the finalized environmental assessment supplement has been augmented by the additional references identified in the addendum to the Staff’s pleading. But, as SLOMFP notes, there are indications that the Staff’s list of references is still incomplete. While the unlisted documents may be general background references — as the Staff suggests⁷⁶ — the Staff has identified no applicable FOIA exemption(s) to justify excluding any documents from the reference list. Nor is it clear whether any withheld documents, even if they include safeguards information or classified national security information, might be redacted, with portions released.

We direct the Staff to prepare a complete list of the documents on which it relied in preparing its environmental assessment, together with a *Vaughn* index (or its equivalent) for any document for which the Staff claims a FOIA exemption, to be filed within 14 days of the date of this decision. Releasable documents (or releasable portions of documents), if any, should be turned over to the other parties at that time. The other parties may respond to the NRC Staff’s *Vaughn* index (or detailed affidavit) within 7 calendar days. We will permit SLOMFP to dispute the NRC Staff’s exemption claims based on the index and public record.

statement was classified because the very presence or absence of nuclear weapons was classified, FOIA Exemption 1 would apply and even limited information, such as the title of the document, could be withheld. *See Weinberger*, 454 U.S. at 144-46.

⁷² *Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004), citing *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991).

⁷³ *See Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973).

⁷⁴ *Lion Raisins Inc.*, 354 F.3d at 1082.

⁷⁵ CLI-07-11, 65 NRC at 150.

⁷⁶ The Staff asserts that “[p]ublicly available reference documents that provide background and technical information on matters such as health physics and dose modeling were not included because they provide widely known information regarding the manner in which radioactive doses are calculated and health impacts evaluated. The Staff submits that these types of documents need not be referenced.” Staff Response II at 3-4. The Staff’s assertion has merit, provided that the reference documents the Staff is talking about are not agency records within FOIA and are instead, for example, textbooks or personal records.

Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents.⁷⁷

We thus admit Contention 1(b) to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for its withholding decisions.

2. Contention 2: Reliance on Hidden and Unjustified Assumptions

SLOMFP infers from the supplemental environmental assessment⁷⁸ that the NRC Staff appears to have made the “absurd” choice to exclude a range of threat scenarios and consequences from its analysis based on the assumption that the environmental effects of a given hypothetical scenario are insignificant unless the potential consequences include early fatalities.⁷⁹ This, SLOMFP argues, is a “hidden and unjustified” assumption that “violates NEPA by ‘impairing the agency’s consideration of the adverse environmental effects of a proposed project.’”⁸⁰

Moreover, according to SLOMFP, this “hidden and unjustified” assumption ignores consequences like increased cancers and illnesses that are routinely considered in the NRC’s environmental impact statements. It also ignores land contamination, which would be, in SLOMFP’s expert’s view, the “dominant effect” of an accident or attack at an ISFSI, making a large land area uninhabitable and causing significant economic and social harm.⁸¹

According to SLOMFP, another “hidden” and perhaps “unjustified” assumption that the supplemental environmental assessment makes is that the environmental effects of an attack could be mitigated by certain unspecified emergency planning measures. SLOMFP complains that these emergency planning measures are not identified in the supplemental environmental assessment and also are not discussed in the license application, making it impossible to evaluate their effectiveness.

PG&E argues that this proposed contention fails to identify any assumptions in the NRC Staff’s analysis that are either misleading or unjustified and that the two factual issues that SLOMFP does identify — Staff’s alleged exclusion of consequences other than early fatalities and Staff’s alleged assumption that potential consequences are mitigated via unspecified emergency planning upgrades — are not well supported and do not raise admissible issues. The Staff, for its

⁷⁷ 454 U.S. at 143.

⁷⁸ SLOMFP Petition at 10-12, referring to the Draft EA Supplement at 6-7.

⁷⁹ SLOMFP Petition at 11.

⁸⁰ *Id.*, citing *South Louisiana Environmental Council v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir. 1980) and referencing also similar cases from the Tenth and Fourth Circuits.

⁸¹ SLOMFP Petition at 11-12, citing Thompson Report at 17, 35.

part, denies that the assumptions underlying its analysis are ‘‘hidden’’ or ‘‘unjustified,’’ asserting that the assumptions are explained throughout the supplemental environmental assessment, and that the Staff addressed ‘‘the potential for early fatalities’ as an additional consideration combined with other factors to determine the need for additional security measures at the facility, not to rule out other threat scenarios that cause other types of impacts.’’⁸²

We find Contention 2 admissible to the extent we discuss below. The Staff correctly points out that the assessment mentions early fatalities only in the context of the consideration of the need for additional security measures and that the assessment goes on to provide dose estimates and other findings in support of its determination. However, SLOMFP stresses that while the environmental assessment emphasizes low potential radiation doses to humans from a hypothetical terrorist attack, it appears to be silent on the possibility of land contamination — a possibility SLOMFP’s expert considers significant and serious. We cannot say, under the standards applicable at this stage, that SLOMFP’s concern that the environmental assessment ignores environmental effects on the surrounding land is unworthy of further inquiry. Nor do we reject at the threshold SLOMFP’s request to litigate its claim that the NRC Staff has not considered nonfatal health effects (e.g., latent cancers) from a hypothetical terrorist attack. The environmental assessment appears to be silent on that point as well. The Staff may be able to easily explain how such issues were addressed by reference to source documents, including the 2003 environmental assessment, or how such issues are bounded and were implicitly addressed by the very low dose estimates and other considerations, but we believe further inquiry is appropriate.

Insofar as Contention 2 reiterates Contention 1(b)’s concern about the lack of supporting information and deficient explanations, we deny the contention as duplicative. We intend to address those grievances in the context of Contention 1(b). We also deny the portion of Contention 2 alleging a lack of clarity about the role of emergency planning in mitigating harm. The environmental assessment says merely that ‘‘[i]n some situations, emergency planning and response actions could provide an additional measure of protection.’’⁸³ As we see it, there is no reason to convene an NRC hearing to debate that self-evident, and unexceptionable, proposition.

3. Contention 3: Failure To Consider Credible Threat Scenarios with Significant Environmental Impacts

SLOMFP argues that the NRC’s supplemental environmental assessment fails

⁸² Staff Response at 19, citing Draft EA Supplement at 6.

⁸³ Final EA Supplement at 7.

to satisfy the CEQ's NEPA regulations (40 C.F.R. § 1502.22(b)(3)), which require the NRC "to consider low-probability environmental impacts with catastrophic consequences, if those impacts are reasonably foreseeable," because it apparently only considers scenarios where the dry storage casks sustain minimal damage.⁸⁴ SLOMFP infers that the Staff only considered "minimal damage" scenarios from the Staff's assumption that minimal releases of radioactive material will occur. But SLOMFP argues that scenarios with much larger releases of radiation are also "plausible" and should have been considered.

As an example of scenarios the NRC allegedly failed to consider, SLOMFP references scenarios discussed in its expert witness's report,⁸⁵ where the penetrating device is accompanied by an incendiary component that ignites the zirconium cladding of the spent fuel inside the storage cask, causing a much larger release of radioactive material than posited in the scenarios where the casks sustain minimal damage. According to SLOMFP's expert, such a release could contaminate up to 7,500 square kilometers of land, rendering it uninhabitable and causing cancers and other health problems as well as significant economic and social damage.⁸⁶

SLOMFP argues that the Staff should prepare a full environmental impact statement to remedy its (allegedly) NEPA-violating failure to analyze the impacts of a wide range of scenarios.⁸⁷ SLOMFP maintains that this environmental impact statement should be available in both a public version that summarizes the scenarios and their effects and in a restricted, detailed version that is available to those with interest and clearance to receive the information.⁸⁸

PG&E disputes the applicability of 40 C.F.R. § 1502.22(b)(3)⁸⁹ based upon the NRC's conclusion that there were no foreseeable adverse effects from reasonably foreseeable scenarios.⁹⁰ By its terms, section 1502.22 applies only "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects. . . ." According to PG&E, we should accept Staff's apparent assessment that the example SLOMFP's witness gives as a scenario that should have been considered (described above, where a small number of attackers render a large area uninhabitable) was not reasonably foreseeable. Assessing this scenario requires a presumption, according to PG&E, that the attack will be successful. PG&E argues that neither NEPA, nor the Ninth Circuit's remand, requires litigation of a matter that cannot be addressed conclusively.

⁸⁴ SLOMFP Petition at 12-13.

⁸⁵ *Id.* at 13, citing Thompson Report at 33-37.

⁸⁶ SLOMFP Petition at 13-14, citing Thompson Report at 17, 37.

⁸⁷ SLOMFP Petition at 14, citing Thompson Report at 34-36.

⁸⁸ SLOMFP Petition at 14.

⁸⁹ PG&E Response at 13.

⁹⁰ *Id.*

The NRC Staff denies that it failed to consider credible threat scenarios with significant environmental impacts. The Staff states that it cannot publicly disclose the details of its analysis of particular threat scenarios. According to the Staff, SLOMFP's contention is without foundation and should not be admitted. SLOMFP, in reply, reiterates that the supplemental environmental report should identify the assessments it relied on, the FOIA exemptions that it claims, and its reasons for invoking a FOIA exemption. The sensitive nature of security assessments may provide a reason for holding a closed hearing, SLOMFP maintains, but not for dismissing the contention outright.

We agree with PG&E and the NRC Staff.⁹¹ The NRC Staff's supplemental environmental assessment explains that the Staff considered "[p]lausible threat scenarios . . . includ[ing] a large aircraft impact similar in magnitude to the attacks of September 11, 2001, and ground assaults using expanded adversary characteristics consistent with the design basis threat for radiological sabotage for nuclear power plants."⁹² This approach, grounded in the NRC Staff's access to classified threat assessment information,⁹³ is reasonable on its face. We do not understand the Ninth Circuit's remand decision — which expressly recognized NRC security concerns and suggested the possibility of a "limited proceeding"⁹⁴ — to require a contested adjudicatory inquiry into the credibility of various hypothetical terrorist attacks against the Diablo Canyon ISFSI.

Adjudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity. And hearings on such claims could not be conducted in a meaningful way without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance. Such information — disclosure of which is prohibited by law — would lie at the center of any adjudicatory inquiry into the probability and success of various terrorist scenarios.

The Supreme Court's controlling *Weinberger* decision makes clear that NEPA does not contemplate such adjudications: "'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.'" ⁹⁵ The NRC has a statutory

⁹¹ Insofar as Contention 3 reiterates SLOMFP's complaint about a lack of support documents, we intend to address that point under the rubric of Contention 1(b).

⁹² Final EA Supplement at 7.

⁹³ *Id.* at 4-7.

⁹⁴ 449 F.3d at 1034-35.

⁹⁵ *Weinberger*, 454 U.S. at 146-47, quoting *Totten v. United States*, 92 U.S. 105, 107 (1876). See also *Tenet v. Doe*, 544 U.S. 1, 8 (2005); *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953).

obligation to protect national security information.⁹⁶ We have never disclosed such information in NEPA-based proceedings, notwithstanding the theoretical possibility, raised by SLOMFP, of security clearances and closed-door hearings. *Weinberger* and other “state secrets” cases indicate that no such disclosure is warranted.⁹⁷ In practical terms, this leaves the matter of threat assessment under NEPA in the hands of the NRC, without judicial oversight or agency hearings. But that is exactly the result *Weinberger* calls for.⁹⁸

4. Contention 4: Failure To Address National Infrastructure Protection Plan (NIPP)

SLOMFP argues that the supplemental environmental assessment does not comply with NEPA and NRC regulations because it does not address consistency with the NIPP,⁹⁹ to which the NRC is a signatory. In SLOMFP’s view, the environmental assessment should have identified the NIPP or its officials as “resources or individuals” consulted under 10 C.F.R. § 51.30(a)(2).¹⁰⁰ According to SLOMFP, the environmental assessment should have addressed “homeland security strategy, the principles of protective deterrence, [and] the opportunities that the NIPP has identified for incorporating protective features into the design of infrastructure elements.”¹⁰¹ In the opinion of SLOMFP’s expert, protective measures of the types identified in NIPP could significantly reduce the likelihood of a successful attack, “detering” attacks by changing potential attacker’s cost-benefit calculations rather than deterring based upon the ability to counterattack.¹⁰²

⁹⁶ See, e.g., AEA § 141, 42 U.S.C. § 2161 (2000) (Commission is required to control information in “a manner to assure the common defense and security”), AEA § 147, 42 U.S.C. § 2167 (2000) (requiring the Commission to take actions “to prohibit the unauthorized disclosure” of information including security measures).

⁹⁷ The “state secrets” privilege is absolute. See *United States v. Reynolds*, 345 U.S. at 11.

⁹⁸ Our decision not to adjudicate SLOMFP’s “hypothetical terrorist scenarios” claim does not equate to ignoring SLOMFP’s concerns. As *Weinberger* makes clear, an inability to adjudicate or publicize NEPA information does not justify an agency’s failure to perform a NEPA analysis. See *Weinberger*, 454 U.S. at 146. Here, the NRC Staff presumably considered SLOMFP’s concerns as part of the comment process on the draft environmental assessment, and as a check upon the reasonableness of the NRC Staff’s approach, we ourselves ultimately will review the range of terrorist events considered by the Staff.

⁹⁹ National Infrastructure Protection Plan of 2006, available at http://www.dhs.gov/xprevprot/programs/editorial_0827.shtm.

¹⁰⁰ SLOMFP Petition at 14. The regulation provides:

- (a) An environmental assessment shall identify the proposed action and include: . . .
- (2) A list of agencies and persons consulted, and identification of sources used.

10 C.F.R. § 51.30(a).

¹⁰¹ SLOMFP Petition at 14.

¹⁰² *Id.* at 15, citing Thompson Report at 11-12.

PG&E argues that this contention is not admissible. NIPP imposes no regulatory or legal requirements on the NRC, PG&E argues, so the proposed contention does not state a claim for which SLOMFP is entitled to relief. PG&E maintains that even if NIPP were applicable, the supplemental environmental assessment appears to have addressed the basic physical protection principles of NIPP, through security measures and cask design requirements and mitigation, so SLOMFP has failed to demonstrate a genuine, litigable issue.

The Staff's position is that this contention is outside the scope of the proceeding, that NEPA does not require a demonstration of compliance with NIPP, and that SLOMFP's contention is unsupported and inadmissible.

In reply, SLOMFP argues that it is well established that NEPA obligates federal agencies to evaluate all of the environmental effects of their actions, not only those regulated under their own statutes, citing a Ninth Circuit case to support this proposition.¹⁰³ SLOMFP points to the NRC's own regulations, specifically 10 C.F.R. § 51.71(d), which requires an environmental impact statement to give "[d]ue consideration" to "compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection."¹⁰⁴ Relying on the NRC's commitment as a signatory to the NIPP, SLOMFP argues that the supplemental environmental assessment should address the NIPP. Moreover, SLOMFP's expert witness questions whether the storage casks, designed to withstand natural forces, can protect against weapons available to terrorist groups.¹⁰⁵

We do not admit this contention. While we certainly agree that in implementing its security program the NRC should take account of the NIPP, to which it is a signatory,¹⁰⁶ we do not agree that the NRC must demonstrate compliance with the NIPP in its NEPA evaluation. The NIPP is concerned with security issues, not environmental quality standards and requirements — and it is environmental quality standards and requirements that 10 C.F.R. § 51.71(d) obliges the environmental analysis to address, not security issues. As a result, SLOMFP's "NIPP" contention is therefore outside the scope of this NEPA-based remand proceeding.

¹⁰³ SLOMFP Reply at 23, citing *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005).

¹⁰⁴ 10 C.F.R. § 51.71(d).

¹⁰⁵ SLOMFP Reply at 24, citing Thompson Report at 34.

¹⁰⁶ See Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Homeland Security Regarding Consultation Concerning Potential Vulnerabilities of the Location of Proposed New Utilization Facilities, 72 Fed. Reg. 9959 (Mar. 6, 2007).

5. *Contention 5: Failure To Consider Vulnerability of ISFSI in Relation to the Entire Diablo Canyon Spent Fuel Storage Complex*

SLOMFP argues that the environmental assessment does not comply with NEPA because it does not consider the cumulative impact of storing spent fuel at the site in two locations, the ISFSI and the existing spent fuel pool, rather than in one location. SLOMFP's theory appears to be that adding the ISFSI increases the terrorism threat to the spent fuel pool, causing a cumulative impact that exceeds the impact that would be attributable to the ISFSI in isolation. In other words, according to SLOMFP, adding the ISFSI makes the entire Diablo Canyon site a more attractive target for terrorists, and the NRC should have analyzed this cumulative effect. SLOMFP argues that the environmental assessment should consider alternatives for mitigating this cumulative effect, for example, by allocating spent fuel storage between the ISFSI and the spent fuel pool in a fashion that reduces the density of storage in the spent fuel pool.¹⁰⁷

PG&E dismisses this contention as “a clear attempt to bootstrap the previously licensed wet storage at Diablo Canyon into this licensing proceeding related to dry storage at the ISFSI.”¹⁰⁸ As such, PG&E argues, the contention is outside the scope of the remanded proceeding.

With respect to the cumulative impact aspect of SLOMFP's proposed contention, PG&E argues that “[c]umulative impact reviews can focus on aggregate impacts of multiple actions, where the environmental impacts are apparent — either qualitatively or quantitatively — and are reasonably certain.”¹⁰⁹ According to PG&E, SLOMFP's described cumulative “impact” is really cumulative “risk,” a concept that does not apply because risk has a probability component and “[p]robabilities do not aggregate.”¹¹⁰ As a result, SLOMFP's arguments do not, in PG&E's view, raise a cumulative impact issue under NEPA. PG&E adds that to the extent SLOMFP seeks an analysis of the “cumulative consequences of a simultaneous assault on the ISFSI and the wet storage pools at Diablo Canyon, they have provided no basis for an assertion that such a scenario is plausible.”¹¹¹ Again, there is no issue within the scope of this proceeding, from PG&E's perspective.

From the Staff's perspective, it already considered the cumulative impacts of the facility in the original environmental assessment for the facility, although without considering terrorism.¹¹² Nonetheless, because of the Staff's determina-

¹⁰⁷ SLOMFP Petition at 16.

¹⁰⁸ PG&E Response at 20.

¹⁰⁹ *Id.* at 22.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 23.

¹¹² Staff Response at 23.

tion that a terrorist attack on the ISFSI will cause no significant impact, the Staff observes that the original assessment of cumulative impacts did not change.

We agree with PG&E and the NRC Staff that SLOMFP's Contention 5 is outside the scope of this proceeding, which is limited to the analysis of the NEPA-terrorism consequences of licensing the ISFSI, and in any event is inadequately supported. SLOMFP has provided no factual or even logical support for its view that licensing the ISFSI truly might have a "cumulative impact" — that is, a sum "greater than its parts."¹¹³ The expert testimony SLOMFP discusses in connection with this contention relates to the independent consequences of an attack on the spent fuel pool only.¹¹⁴ If anything, placing the spent fuel in two separate locations (one a hardened dry cask ISFSI) on the Diablo Canyon site, rather than in one place seemingly would reduce the terrorism risk, not enhance it. In any event, examining the terrorism risk facing the spent fuel pool as an independent facility is not part of this proceeding to license a dry storage ISFSI. We see no basis for expanding this proceeding to include testimony and arguments on the spent fuel pool.

D. Summary

We admit Contentions 1(b) and 2 consistent with and to the extent and as limited in our discussion above. We do not admit Contentions 1(a), 3, 4, and 5.

III. PROCEDURAL SCHEDULE

As a result of the remand filing schedule in this proceeding and the need for further proceedings, our previously stated "goal" of resolving this adjudication by February 26, 2008,¹¹⁵ must be modified slightly. At the time we set this goal, PG&E indicated that it would not be using the facility for storage until the summer

¹¹³ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 57-58 (2001). As noted above, SLOMFP requests that we hear arguments for *use* of the ISFSI to reduce the density in the spent fuel pool, which has been authorized separately. SLOMFP Petition at 16. Indeed, SLOMFP itself has acknowledged reduced environmental consequences of terrorism against dry storage as compared to wet storage, declaring that "[t]he potential consequences of an attack on a pool are considerably more severe than the consequences of an attack on a dry storage facility." Supplemental Request for Hearing and Petition To Intervene by San Luis Obispo Mothers for Peace, [et al.] (July 18, 2002) (Supplemental Petition) at 38.

¹¹⁴ "[A] conventional accident or attack on a Diablo Canyon spent fuel pool that causes the water level in the pool to fall below the top of the fuel-storage racks would cause a large atmospheric release of the cesium-137 in the pool . . . , causing widespread land contamination and adverse health and economic effects." SLOMFP Petition at 16, citing Thompson Report at 17.

¹¹⁵ CLI-07-11, 65 NRC at 151.

of 2008,¹¹⁶ a date that we understand may not be firm, rendering any short delay in our ultimate decision not prejudicial to any party. We remain committed to a prompt resolution of this proceeding.

Pursuant to our ruling that Subpart K¹¹⁷ applies in this proceeding, and pursuant to 10 C.F.R. § 2.1109(b), we set a tentative schedule for the Commission's further consideration of Contention 1(b), for discovery, and for an ultimate Subpart K "oral argument"-type hearing on Contention 2 (as limited in this decision):

1. The NRC Staff shall file with the Commission a complete list of the documents it relied on in the preparation of its environmental assessment (Reference Document List), together with a *Vaughn* index (or its equivalent) for any documents for which the Staff claims a FOIA exemption, with the Commission (and with the presiding officer designated pursuant to paragraph 5, below), and make available to the other parties any documents (or portions thereof) not covered by a FOIA exemption, within 14 days of the date of this decision;
2. The other parties shall respond to the Staff's Reference Document List and *Vaughn* index filing within 7 days of the Staff's filing;
3. Discovery will begin on the date of this decision and will conclude no later than 45 days after the date of this decision;¹¹⁸
4. Discovery, including interrogatories, requests for admissions, and requests for production of documents, will be governed by the general provisions contained in 10 C.F.R. § 2.740 *et seq.*, except that oral depositions will be permitted only upon a showing of compelling need and with appropriate security precautions;
5. The Chief Administrative Judge of our Atomic Safety and Licensing Board Panel shall designate an administrative judge to sit as presiding

¹¹⁶ *Id.* at 149 n.4.

¹¹⁷ For a description of our Subpart K process, see *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001).

¹¹⁸ It is premature, however, to consider discovery on the adequacy of the justification for withholding source documents under FOIA. A relatively detailed index or affidavit should provide a sufficient basis for a decision as to the bases for withholding enumerated source documents. See *Miscavige v. Internal Revenue Service*, 2 F.3d 366, 368 (11th Cir. 1993) (affidavits sufficient to establish that records were exempt); *SafeCard Services v. Securities and Exchange Commission*, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991) (affirming decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); *Pollard v. Federal Bureau of Investigation*, 705 F.2d 1151, 1154-55 (9th Cir. 1983) (affirming decision to deny deposition concerning the content of withheld documents where content was precisely what defendant maintained was exempt from disclosure).

officer¹¹⁹ to keep discovery on schedule, if necessary by setting schedules, and by resolving promptly any discovery disputes, including privilege, materiality, and burdensomeness controversies;

6. Any late-filed contentions must be filed within 14 days after disclosure of new information warranting such contentions, with responses to such contentions due 7 days thereafter;
7. The parties' detailed written summaries of facts, data, and arguments and written supporting information, conforming to the requirements of 10 C.F.R. § 2.1113, shall be submitted to the Commission no later than 75 days after the date of this decision;
8. The Subpart K oral argument will be heard by the Commission, absent a further determination, on a date to be determined, but no sooner than 90 days after the date of this decision (*see* 10 C.F.R. § 2.1113); and
9. After the oral argument, the Commission will issue a prompt decision directing further proceedings, upholding the supplemental environmental assessment, modifying it based on the adjudicatory record, or requiring an environmental impact statement.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of January 2008.

¹¹⁹ *See generally* 10 C.F.R. §§ 2.717, 2.718.

Commissioner Gregory B. Jaczko Respectfully Dissenting in Part

I concur on the majority of this Order but respectfully dissent from the majority's decision to deny the admission of Contention 3. At this stage in the proceeding, the Commission is simply deciding contention admissibility, a role usually left to the licensing boards. The standards for determining contention admissibility are straightforward. The Commission is not being asked to determine the outcome of the proceeding, but rather to allow the adjudicatory process to proceed.

Contention 3 alleges a "failure to consider credible threat scenarios with significant environmental impacts." I do not find the Staff's arguments against admitting this contention to be compelling. The argument can be reduced to claiming that the intervenor cannot possibly develop an admissible contention without gaining access to sensitive information, and since the agency has no intention of providing that information, the intervenor will never have the foundation for an admissible contention. This is a circular and weak argument in my view.

There does not appear to be anything in the Environmental Assessment or in the Staff's briefs to indicate that the Staff did consider the scenarios outlined by the petitioner, which is the basis for the contention. The Staff had the opportunity to address this contention directly since it was filed as a comment to the draft EA. The Staff could have done so on the record and in an unclassified manner. If Staff had then incorporated that response into the final EA, this contention would have been moot. Because Staff did not address it, I do not believe we have fulfilled our NEPA obligations. I believe the contention, therefore, meets our contention admissibility standards and should be admitted to the proceeding.

In addition, the Staff's understanding appears to be that it is required, and has the right, to withhold all sensitive information with no further public explanation on the Staff's part. The agency has established and convened closed proceedings in the past, however, and could do so again if that became necessary to ensure we are meeting our responsibilities under NEPA, while at the same time safeguarding sensitive information from public disclosure.

Thus, I disagree with the decision of the majority to deny the admission of Contention 3.

Commissioner Peter B. Lyons Respectfully Dissenting in Part

I agree with the majority of the Commission with respect to the disposition of all but one of the contentions proposed by San Luis Obispo Mothers for Peace (SLOMPF). I write separately to voice my dissent to the admission of SLOMPF Contention 2, “Reliance on hidden and unjustified assumptions.” Contention 2 does not meet the regulatory requirements for contention admissibility and should have been rejected. *See* 10 C.F.R. § 2.714(d)(2) (petitioner must show genuine dispute of material fact or law).

Contention 2 asserts that the EA Supplement violates NEPA in that it “appears to assume” that impacts of an attack would be insignificant if they do not result in early fatalities and that the Staff “appears to have used early fatalities as a criterion” to screen out scenarios that cause other impacts. *See* SLOMPF Contentions at 11. SLOMPF states that “this assumption is not completely clear but can be inferred” from the EA Supplement.

Contention 2 should have been rejected for failing to demonstrate a material dispute of law or fact. In response to comments, the Staff states that “the EA Supplement did not consider early fatalities as a measure of environmental impact.” *See* Final EA Supplement at A-6. The majority itself recognizes that the EA Supplement mentions early fatalities only in the context of additional security measures. Therefore, the very premise of the contention is incorrect.

Further, as the majority states, the EA Supplement provides dose estimates and other findings in support of its determination. The EA Supplement stresses low potential doses from attack. In this regard, it states: “the dose to the nearest affected resident, from even the most plausible threat scenarios . . . would be likely well below 5 rem.” *Id.* at 7. In addition, it states: “In many scenarios, the hypothetical dose to an individual in the affected population could be substantially less than 5 rem, or none at all.” *Id.* Moreover, the EA Supplement provides a discussion of the Staff’s evaluation:

For the EA Supplement, the Staff performed a dose assessment that used a source term derived from the security assessment work, which was based on a hypothetical release resulting from a terrorist attack. The Staff also assumed national average meteorological conditions in making an initial estimate of the dose at the location of the nearest resident. Then, the Staff applied Diablo Canyon site-specific dispersion parameters, to generate a dose estimate to the nearest resident that was more representative of the actual conditions at the site. That revised dose estimate was used by the Staff in assessing environmental impact.

Id. at A-6.

Regarding dispersion of radioactive material, the EA Supplement states that if there is a breach, “most of the radioactive material released would be in solid form, locally deposited in the immediate area of the ISFSI.” *Id.* For the small

fraction that would be in the form of fine particulate or gases, and thus able to be transported offsite, the atmospheric dispersion factors for the site would result in “greater dilution” than that used in the generic analysis. *Id.* at 6, A-6. This reduces the projected dose consequences by a factor of 10 to 100. *Id.* at 7. Thus, the projected dose consequences at Diablo Canyon, with consideration of the site-specific meteorology, is described as from 500 mrem to 0.50 mrem.¹²⁰ The assessment continued, however: “Use of a site-specific source term [amount of radioactive material released] for the Diablo Canyon spent fuel would reduce this projected dose even further.” *Id.* Thus, as I mentioned above, the EA Supplement states: “Based on these considerations, the dose to the nearest affected resident, from even the most severe plausible threat scenarios . . . would likely be well below 5 rem.” *Id.* It could be “substantially less than 5 rem, or none at all.” *Id.*¹²¹

An environmental assessment is expected to provide a brief discussion. 10 C.F.R. § 51.30(a)(1). Its purpose is to determine whether an action has a “significant impact,” thus informing the decision whether the preparation of an EIS and detailed assessment of impacts is required. See *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1009 (9th Cir. 2006). In determining whether there is no significant impact, the government does not need to show “that there is *no* risk of injury, but only that the risk is not significant.” *Anderson v. Evans*, 314 F.3d 1006, 1018 (9th Cir. 2002).

The EA Supplement expressly finds “no” significant environmental impact, which implicitly embraces any significant environmental effect. For instance, the EA Supplement concludes that “a terrorist attack that would result in a significant release of radiation affecting the public is not reasonably expected to

¹²⁰To put this into perspective, the findings of no significant radiological impacts from routine operation observed that there is a “100 mrem estimated annual dose received from naturally occurring terrestrial and cosmic radiation in the vicinity” of the plant. Final EA Supplement at 3. The average annual dose in the United States, with considerable variation, has been estimated to be around 300 mrem. See *Nuclear Information and Resource Service v. NRC*, 457 F.3d 941, 946 (9th Cir. 2006). The NRC’s occupational dose limits for adults includes as one dose limit “[t]he total effective dose equivalent to 5 rems.” 10 C.F.R. § 20.1201(a)(1).

¹²¹The EA Supplement also explains, in summarizing the consideration of potential impacts in the Environmental Assessment (October 24, 2003), that “[f]or hypothetical accidents, the calculated dose to an individual at the nearest site boundary was found to be well below the 5-rem limit for accidents set forth in 10 C.F.R. § 72.106(b) and in the U.S. Environmental Protection Agency’s protective action guidelines.” Final Supplement at 2. The NRC’s regulations establish an accident dose limit of 5 rem to any individual located on or beyond the nearest boundary of the controlled area of an ISFSI. 10 C.F.R. § 72.106(a)(1). The accident dose limit of 5 rem was derived from the protective actions recommended by EPA for projected doses to populations for planning purposes. See Final Rule 10 CFR Part 72: “Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuels Storage Installation,” 1980 45 Fed. Reg. 74,693, 74,697. Thus, the EA Supplement’s dose projections complement the findings of the EA regarding offsite consequences, with its similar dose projection of “well below the 5 rem limit for accidents.”

occur,” and finds that “design features and mitigative security measures will provide high assurance that substantial environmental impacts will be avoided and thereby reduced to a nonsignificant risk level.” Final EA Supplement at 8. Land contamination and latent fatalities are not discussed, but SLOMFP’s reliance on a reference to a potential for early fatalities in one part of the terrorism review is not sufficient to show a genuine and material issue regarding that omission, particularly in the context of the description of the dose assessment and other factors in support of the EA Supplement’s findings and conclusions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of

Docket No. 50-293-LR

**ENTERGY NUCLEAR GENERATION
COMPANY and ENERGENCY NUCLEAR
OPERATIONS, INC.
(Pilgrim Nuclear Power Station)**

January 15, 2008

APPEALS, INTERLOCUTORY

SUMMARY DISPOSITION

A ruling granting summary disposition on a single contention, where other contentions are still pending in an adjudication, is not a “final” decision, and is not susceptible to Commission review.

APPEALS, INTERLOCUTORY

SUMMARY DISPOSITION

The provision expressly permitting immediate review of a “partial initial decision” is an exception to the Commission’s established policy of disfavoring interlocutory appeals. *See* 10 C.F.R. § 2.341(b)(1). *See* Final Rule: “Procedures for Direct Commission Review of Decisions of Presiding Officers,” 56 Fed. Reg. 29,403 (July 27, 1991). The rule making partial initial decisions immediately appealable codified the Commission’s longstanding practice of considering a Board order appealable where it “disposes of . . . a major segment of the case or terminates a party’s right to participate.” *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-

75 (1983), quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

MEMORANDUM AND ORDER

Today we deny the request of Intervenor Pilgrim Watch for interlocutory review of the Atomic Safety and Licensing Board's summary disposition of one of two contentions admitted in this proceeding.¹ In the disputed order, the Board granted the Applicant's motion for summary disposition of Pilgrim Watch's contention on the adequacy of the Applicant's analysis of severe accident mitigation alternatives (SAMAs) prepared in connection with the license renewal application for the Pilgrim Nuclear Power Station. Because we find that Pilgrim Watch has demonstrated no grounds for interlocutory review, its appeal must await the Board's final decision.

I. BACKGROUND

On January 25, 2006, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy) applied to renew the operating license for the Pilgrim Nuclear Power Station for an additional 20 years.

Pilgrim Watch petitioned to intervene in the proceeding. On October 16, 2006, the Board granted Pilgrim Watch's hearing request and admitted two of its proposed contentions.² Pilgrim Watch's Contention 3 reads, as admitted by the Board:

Applicant's SAMA analysis for the Pilgrim plant is deficient in that input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns are incorrect, resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives, such that further analysis is called for.³

In May 2007, Entergy filed a Motion for Summary Disposition of Pilgrim Watch Contention 3.⁴ Entergy's motion claimed that it had performed further analysis that showed that changes in the input data for the three factors listed

¹Memorandum and Order (Ruling on Motion To Dismiss Petitioners' Contention 3 Regarding Severe Accident Mitigation Alternatives), LBP-07-13, 66 NRC 131 (2007).

²LBP-06-23, 64 NRC 257 (2006).

³LBP-06-23, 64 NRC at 341.

⁴Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (May 17, 2007) (Motion for Summary Disposition).

in Contention 3 would have a negligible effect on the outcome of the SAMA cost/benefit analysis. A majority of the Board agreed that Entergy's calculations demonstrated that no genuine issue of material fact pertaining to the relative costs and benefits of SAMAs remained in dispute, and the majority granted summary disposition.

One judge, however, dissented on the ground that the majority had improperly *weighed* evidence rather than using the proper summary disposition standard that no genuine issue of material fact remains in dispute.⁵ That judge also argued that the majority had incorrectly narrowed the admitted contention, primarily by eliminating any challenge to the specific computer code that Entergy used to perform its SAMA computations.⁶

On appeal, Pilgrim Watch echoes the dissenting judge's argument that the Board applied the wrong standard for granting summary disposition. Pilgrim Watch argues that the Board essentially would have required Pilgrim Watch to provide its own calculations to "disprove" Entergy's analysis.⁷ But Pilgrim Watch maintains that the Board should not, at the summary disposition stage, try to "'untangle the expert affidavits' and decide 'which experts are more correct.'"⁸ Further, Pilgrim Watch puts forth arguments regarding the proper scope of Contention 3, which, it says, comprised deficiencies in Entergy's computer model, not merely the inputs that that particular model demanded.⁹

II. DISCUSSION

We do not reach the question of whether the Board correctly or incorrectly granted summary disposition on Contention 3, because we find Pilgrim Watch's appeal to be an inappropriate request for interlocutory review, not, as Pilgrim Watch appears to assume, a petition for review of a final decision.

The Commission disfavors review of interlocutory Board orders, which would result in unnecessary "piecemeal interference with ongoing Licensing Board

⁵ LBP-07-13, 66 NRC at 156.

⁶ *Id.* at 160-62.

⁷ See Pilgrim Watch Brief on Appeal of LBP-07-13 Memorandum and Order (Ruling of [*sic*] Motion To Discuss [*sic*] Petitioner's Contention 3 Regarding Severe Accident Mitigation Alternatives) (Nov. 13, 2007) (Appeal) at 19.

⁸ Appeal at 8, citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 80 (2005) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001).

⁹ Appeal at 8-16.

proceedings.”¹⁰ The current proceeding is ongoing, with one contention still pending.¹¹ Our rules of procedure allow a party to pursue interlocutory appeal only where the ruling “affects the basic structure of the proceeding in a pervasive or unusual manner,” or where the ruling threatens the party adversely affected by it with “immediate, serious, and irreparable harm” that could not be alleviated through a petition for review of the Board’s final decision.”¹²

Pilgrim Watch’s appeal brief did not even address the two grounds stated in our regulations for interlocutory review, let alone try to meet them. Instead, it argued that the Board’s ruling on Contention 3 was final as to that contention, and that the ruling was erroneous for the reasons given in the dissenting judge’s opinion.¹³

As an initial matter, the ruling on Contention 3 is not a “final” decision. Our rules of procedure allow petitions for review after a full or partial initial decision, which are considered “final” decisions.¹⁴ The ruling below is neither of these. A partial initial decision is one rendered following an evidentiary hearing on one or more contentions, but that does not dispose of the entire matter. The provision expressly permitting immediate review of a “partial initial decision” is an exception to the Commission’s established policy of disfavoring interlocutory

¹⁰ We have expressed this view previously in this very proceeding. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007); *see, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125-26 (2006); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004).

¹¹ See LBP-07-12, 66 NRC 113 (denying Entergy’s Motion for Summary Disposition on Pilgrim Watch Contention 1 on aging management of pipes and buried tanks), *reconsideration denied*, Memorandum and Order (unpublished) (November 14, 2007).

¹² 10 C.F.R. § 2.341(f)(2). In addition to the two situations in which our rules permit a party to seek review of an interlocutory Board order, the Commission may review a Board ruling pursuant to the inherent supervisory powers it exercises over agency adjudications. *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1 (2007) (review taken where significant issue may affect multiple pending or imminent licensing proceedings, and listing other examples of appropriate issues for *sua sponte* review (*see id.* at 4-5 nn.11-19)); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 20-21 (2006) (novel questions of potentially broad application). We see no compelling reason to exercise that inherent power here.

¹³ Appeal at 4.

¹⁴ *See* 10 C.F.R. § 2.341(b)(1). *See* Final Rule: “Procedures for Direct Commission Review of Decisions of Presiding Officers,” 56 Fed. Reg. 29,403 (July 27, 1991). The rule making partial initial decisions immediately appealable codified the Commission’s longstanding practice of considering a Board order appealable where it “disposes of . . . a major segment of the case or terminates a party’s right to participate.” *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983), quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

appeals. A grant of summary disposition does not fall within this codified exception.

Because the Board's order is interlocutory, Pilgrim Watch must do more than claim that the Board erred. The mere potential for legal error does not justify *interlocutory* review — the party seeking review must show grounds for interlocutory review under 10 C.F.R. § 2.341(f)(2).¹⁵ This brings us to our next point: that the rejection of a particular contention on summary disposition does not warrant interlocutory Commission review under the two grounds stated in our rules.

Review based on a “pervasive or unusual” effect on the “basic structure of a proceeding” litigation is granted only in extraordinary circumstances.¹⁶ The Commission has repeatedly found the simple denial of admission of a contention does not present this type of situation.¹⁷ A former Atomic Safety and Licensing Appeal Board also found that the grant of summary disposition for lack of a material issue did not have a “pervasive or unusual” effect on the litigation.¹⁸ Similarly, the broadening of issues for hearing caused by the Board's admission of a contention that the applicant opposes does not constitute a “pervasive and unusual effect on the litigation.”¹⁹

In addition, we do not see any potential for the Board's ruling to cause Pilgrim Watch “immediate, serious, and irreparable harm.” To be “irreparable,” the harm must be of a kind that cannot be reversed on appeal, as when the challenged

¹⁵ See, e.g., *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001) (A mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-8, 47 NRC 307, 320 & n.4 (1998).

¹⁶ See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 & n.15 (2002) (Commission undertook interlocutory review of a petition that questioned “the very structure” of the two-step licensing process announced for a proposed mixed oxide fuel fabrication facility); *Safety Light Corp.* (Bloomsgburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1994) (Board's order consolidating an informal Subpart L proceeding with a formal Subpart G proceeding affected the “basic structure” of the proceeding in a “pervasive and unusual manner”).

¹⁷ See, e.g., *Seabrook*, ALAB-731, 17 NRC at 1075 (Board grant of summary disposition on finding no material fact issue did not affect the structure of the proceeding in a pervasive and unusual manner). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001) (Board's refusal to admit late-filed contentions did not have a “pervasive and unusual effect” on the litigation); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000) (Board's refusal to admit late-filed contention did not have a “pervasive and unusual effect” on the litigation).

¹⁸ *Seabrook*, ALAB-731, 17 NRC at 1075.

¹⁹ See *Haddam Neck*, CLI-01-25, 54 NRC at 374 (increased litigation burden of one contention, where other contentions were pending in proceeding, did not have pervasive effect on the structure of the litigation); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) (same).

order would reveal safeguards or privileged information to persons not authorized to review it.²⁰ We fail to see any irreparable harm that could befall Pilgrim Watch from waiting to raise its concerns later.

Therefore, we hold that Pilgrim Watch's appeal must wait until the Board has reached its final decision in this case. For the foregoing reasons, the request is denied.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of January 2008.

²⁰ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) (concerning the potential release of safeguards information); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (privileged information). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002) (inquiry into internal financial affairs of an Indian Tribe was itself the harm threatened by contested Board order, necessitating immediate Commission review).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

Docket No. PAPO-00
(ASLBP No. 04-829-01-PAPO)
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

January 4, 2008

In the pre-license application phase of the High-Level Waste Proceeding, the Pre-License Application Presiding Officer (PAPO) Board earlier denied the State of Nevada's motion to strike the Department of Energy's certification that it had made all its documentary material available on the Licensing Support Network (LSN) and the Board now sets forth its full reasoning for denying the motion.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, PRODUCTION OF DOCUMENTARY MATERIAL)

The duty to produce "all documentary material . . . generated by, or at the direction of, or acquired by, a potential party" pursuant to 10 C.F.R. § 2.1003(a)(1) applies to extant documentary material and does not require that the potential party delay its initial certification until all documentary material that it intends to rely on is finished and complete.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, PRODUCTION OF DOCUMENTARY MATERIAL)

The language, structure, and history of Subpart J regulations demonstrate that the duty to produce documentary material pursuant to 10 C.F.R. § 2.1003(a)(1) applies to extant documentary material. The regulations speak predominately in the past tense and refer to documents currently in existence.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, PRODUCTION OF DOCUMENTARY MATERIAL)

The duty to supplement the initial document production with “material created after the time of . . . initial certification” imposed by 10 C.F.R. § 2.1003(e), demonstrates that the initial certification is limited to extant documentary material because this regulation would be superfluous if all documentary material needed to be finished and produced at the time of the initial certification.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, MOTION PRACTICE)

Answers to a motion to strike are limited to legal or factual issues raised by the motion, and new issues should be raised in a separate motion.

MEMORANDUM

(Setting Forth Full Reasoning for Denying Nevada’s Motion To Strike)

Before the Pre-License Application Presiding Officer (PAPO) Board is the motion of the State of Nevada (Nevada) (1) to strike the October 19, 2007 certification by the United States Department of Energy (DOE) that DOE made all of its documentary material available on the Licensing Support Network (LSN), and (2) to suspend the obligation of other potential parties to make their documentary material available within 90 days thereafter.¹ The Board heard oral argument on the Motion on December 5, 2007, and issued a short order denying the motion on December 12, 2007.² That order stated that we would be issuing

¹ Motion To Strike DOE’s October 19, 2007 LSN Recertification and To Suspend Certification Obligations of Others Until DOE Validly Recertifies (Oct. 29, 2007) [Motion]. The Motion was dated October 29, 2007, but Nevada experienced difficulties in filing it on the NRC Electronic Information Exchange and thus the Motion was not served until October 30, 2007.

² Order (Denying Motion To Strike) (Dec. 12, 2007) (unpublished) [Order].

a memorandum, more fully articulating our ruling on the Motion, in due course. Order at 2. This Memorandum provides our fuller analysis of the issues.

I. BACKGROUND

This proceeding concerns the pre-license application phase of DOE's planned application for an authorization to construct a geologic repository for disposal of high-level radioactive waste (HLW) at Yucca Mountain, Nevada. As its name implies, the "pre-license application phase" is a period of time prior to the date when DOE submits its application. This phase is established and governed by the Nuclear Regulatory Commission (NRC) regulations in 10 C.F.R. Part 2, Subpart J.

We discussed the regulatory structure of the pre-license application phase at some length in our August 31, 2004 decision, LBP-04-20, 60 NRC 300 (2004) (granting Nevada's July 12, 2004 motion to strike an earlier DOE certification) and we need not repeat that discussion here. Suffice it to say, the regulations require that DOE make all of its documentary material available on the LSN, and to so certify to the PAPO Board, at least 6 months before DOE files its application to construct the HLW geologic repository at Yucca Mountain. *See* 10 C.F.R. §§ 2.1003(a), 2.1009(b), 2.1012(a). DOE's production of documentary material and certification triggers the duty of other potential parties, including Nevada, to make their documentary material available 90 days thereafter. 10 C.F.R. § 2.1003(a).

In accordance with this scheme, on October 19, 2007, DOE submitted a certification by Mr. Dong Kim, the LSN Project Manager, DOE Office of Civilian Radioactive Waste Management (OCRWM) and the "official responsible for administration of [DOE's] responsibility to provide electronic files of documentary material."³ Mr. Kim stated that "to the best of my knowledge, DOE has identified and made electronically available the documentary material specified in 10 C.F.R. § 2.1003 in existence as of a reasonable processing date prior to this certification." DOE Certification, Attachment. On October 29, 2007, Nevada filed its Motion To Strike. *See supra* note 1. On November 9, 2007, DOE filed its response, urging that the Motion be denied.⁴ Three other potential parties submitted answers to the Motion. The Nuclear Energy Institute (NEI) filed a response opposing the Motion.⁵ The Nevada Nuclear Waste Task Force (NNWTF) filed a response

³ The [DOE's] Certification of Compliance (Oct. 19, 2007), Attachment, Certification of Availability of Documentary Material [DOE Certification, Attachment].

⁴ The [DOE's] Response to the State of Nevada's [Motion] (Nov. 9, 2007) [DOE Response].

⁵ Answer of the Nuclear Energy Institute Opposing the State of Nevada's [Motion] (Nov. 8, 2007) [NEI Response].

supporting the Motion.⁶ The NRC Staff filed a response taking no position as to whether the DOE Certification met the relevant standards, but instead proffering the Staff's views on several legal issues.⁷ On December 5, 2007, the PAPO Board heard oral argument on the Motion.

II. POSITIONS OF THE PARTICIPANTS

The “crux of Nevada’s complaint” is that DOE’s document production “is incomplete because [DOE has not provided] key documents [that] are in development or not yet prepared.” Motion at 17. Nevada argues that DOE’s document production is “premature” because it omitted “numerous critical, core technical documents and modeling basis information necessary for licensing and for formulating contentions.” *Id.* at 1. This, Nevada asserts, violates 10 C.F.R. § 2.1003(a)(1), which requires that DOE, in its initial certification, “‘make available . . . all documentary material . . . generated by or at the direction of, or acquired by [DOE].’” *Id.* at 2 (quoting 10 C.F.R. § 2.1003(a)(1)). Nevada states that “[a] principal purpose of the LSN is to provide parties a full and fair *six months’ access* to all of DOE’s core technical documents and modeling basis Documentary Material that it intends to cite and rely on in the licensing proceeding *before* DOE tenders its LA [license application] to NRC — the ‘Six-Month Rule.’” *Id.* at 4 (emphasis in original). The purpose of this Six-Month Rule, insists Nevada, is to provide participants with the “opportunity to frame focused and meaningful contentions.” Motion at 8 (quoting 69 Fed. Reg. 32,836, 32,843 (June 14, 2004)). Nevada quotes from several DOE documents that state that DOE’s documentation in support of the application must be “essentially complete,” when DOE submits its initial certification and must remain “frozen” for the next 6 months. *Id.* at 10-11.

Proceeding from that proposition, Nevada identifies a number of “unfinished key documents,” and “core technical documents and modeling basis information” that DOE “knows it will cite or rely on” but that DOE is still working on and did not include in its initial document production and certification. *Id.* at 18-20. The Total System Performance Assessment for the License Application (TSPA-LA),⁸ which is to be a critical component of DOE’s license application, is

⁶ Statement in Support of the State of Nevada’s [Motion] (Nov. 7, 2007) [NNWTF Response].

⁷ NRC Staff Answer to Nevada Motion To Strike [DOE] Licensing Support Network Certification (Nov. 9, 2007) [Staff Response].

⁸ A DOE draft “technical guidance” document describes the TSPA-LA as follows: “‘There will be a single total system performance assessment (TSPA) developed and documented in accordance with applicable procedures, as part of the technical basis for the LA. The TSPA will be developed

(Continued)

one of Nevada's prime examples of an unfinished document that DOE failed to produce on October 19, 2007. *Id.* at 22. Nevada cites DOE "document schedules" to show that DOE's completion date for the TSPA-LA is not until sometime in 2008. *Id.* at 21-22. Likewise, Nevada complains that DOE has not finished or provided its Preclosure Safety Analysis (PSA),⁹ which is a required component of the license application. *Id.* at 25-27. Nevada asserts that there are numerous other important documents that DOE has not finished and thus not provided, such as certain documents associated with key technical issues (KTIs), *id.* at 27-28, analysis model reports (AMRs), *id.* at 22, 28-30, a probabilistic volcanic hazard analysis (PVHA) report, *id.* at 30-33, and a DOE "vulnerability assessment" (VA).¹⁰ *Id.* at 34-37. It is Nevada's position that these documents must be finished and produced in DOE's initial document production and certification.

Nevada relies primarily on two regulatory excerpts to support its legal position. First, Nevada focuses on 10 C.F.R. § 2.1003(a)(1), which specifies that DOE, like all potential parties, must produce "all" of its documentary material. Motion at 9. Second, Nevada points to the definition of documentary material at 10 C.F.R. § 2.1001, noting that it includes any information upon which a party, potential party, or interested governmental participant "intends to rely." Tr. at 1228-29, 1239. Nevada asserts that the word "intends" reflects future actions and means that, at the moment of initial certification, DOE must have completed and must produce all of the documentary material it intends to rely on in the licensing proceeding. *See id.* at 1229, 1246; *see also id.* at 1261.

Turning to the regulations that require DOE and all other potential parties to supplement and to update their documentary material productions after their initial certifications, Nevada maintains that supplementation does not refer to documentary material that DOE intends to rely on, but instead applies mainly to such things as postcertification e-mails and other types of documentary material that may "crop up" after initial certification. *See id.* at 1229-32.

With regard to extant documentary material, Nevada states it is "[c]onceding[,] for the sake of argument[,] that DOE has made available all Documentary Material 'in existence as of a reasonable cutoff date' before certification." Motion at 18 n.4.

to be a defensible case that provides reasonable expectation that postclosure performance standards will be developed to be a defensible case that provides reasonable expectation that postclosure performance standards are met, considering the use of best available science and necessary simplifying assumptions needed to obtain acceptance by the NRC. The TSPA is expected to reflect a combination of some models and parameters that represent a reasonably expected behavior of the system and other models and parameters that . . . are more conservative." Motion at 12 (quoting Motion Exhibit 11 at 9).

⁹ DOE's Safety Analysis Report, which is a required part of its license application, must include a preclosure safety analysis. 10 C.F.R. § 63.21(c)(5).

¹⁰ The VA appears to be part of a plan by DOE for its "timely discovery and resolution of issues relating to the core technical and modeling basis supporting submittal of an LA to NRC." *Id.* at 36 (quoting Motion Exhibit 48 at 2).

Nevada does not assert that DOE has failed to produce any documentary material that is currently in existence. Tr. at 1222-24.

DOE opposes Nevada's Motion, asserting that DOE has fully complied with the regulatory requirements. DOE recounts that it has "implemented procedures to identify potential documentary material," has "implemented training on those procedures," and has "completed everything required by the Orders of this Board" including the review of 10 million e-mails on the DOE backup tapes, manual reviews of each document subject to a privilege claim, the production of redacted versions of certain privileged documents, and the production of privilege logs for other privileged documents. DOE Response at 1. DOE indicates that it has produced approximately 3.5 million documents on the LSN, consisting of more than 30 million pages. *Id.* DOE points out that "Nevada does not take issue with the sufficiency of DOE's production of existing documents, but complains instead about the absence of documents that do not yet exist in final form." *Id.* at 3. DOE rejects Nevada's new and "novel formulation for DOE's initial certification," i.e., that DOE must produce all "core technical documents and modeling basis Documentary Material," arguing that those terms are undefined and do not appear in Subpart J. *Id.* at 4. DOE states:

The practical reality is that DOE's LSN collection contains numerous documents intended to be cited or relied on in the LA as well as extensive underlying calculations, data, and other material on which those documents are based. The limited amount of remaining material will promptly be made available on the LSN when completed, and Nevada and all other potential participants will have an ample opportunity to review it.

Id. at 5.

DOE argues that the "LSN regulations impose no requirement that DOE complete a particular document or amount of work before its initial certification," *id.* at 5, and that the plain language of the regulations defeat the Motion. *Id.* at 8. DOE notes that 10 C.F.R. § 2.1003(a)(1) mandates that potential parties produce all documentary material "generated by or . . . acquired by" them, and that use of these past-tense verbs shows that the duty applies only to existing documentary material. *Id.* Likewise, says DOE, the duty to produce graphic-oriented material under 10 C.F.R. § 2.1003(a)(2) is stated in the past tense, referring to materials that "have been printed," thus it applies only to documents in existence at the date of certification. *Id.* at 9.

DOE also asserts that the overall structure of the regulations defeats the Motion because "[i]f the Commission intended that DOE must complete all its reliance material six months before submitting the LA, it is inconceivable that the Commission would have omitted such an important and unprecedented requirement and left its existence to inference, interpolation and guesswork."

Id. at 11. DOE claims that Nevada’s position that all key documents must be complete, and the DOE documentary material production “frozen” for 6 months, is inconsistent with the regulations imposing the duty to “continue to supplement” documentary material after the initial certification (per 10 C.F.R. § 2.1003(e)), and the duty to “update” the certification when the LA is submitted (per 10 C.F.R. § 2.1009(b)). *Id.* at 11-13.

Turning to the regulatory history of these rules, DOE points to the absence of any mention of Nevada’s current position and asserts that “[i]t defies reason that the Commission would have been silent all those years about a requirement for DOE to complete its supporting material before initial certification if that were its intent.” *Id.* at 15. To the contrary, DOE notes, the Commission acknowledged that the “‘development of the license application and supporting material is an ongoing process,’” *id.* (quoting 66 Fed. Reg. 29,453, 29,459 (May 31, 2001)), and stated that “‘[d]ocumentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation.’” *Id.* at 16 (quoting 66 Fed. Reg. at 29,460). Again, in 2003, the Commission noted that “‘it is reasonable to expect that additional material will be created after the initial compliance period.’” *Id.* at 17 (quoting 68 Fed. Reg. 66,372, 66,375 (Nov. 26, 2003)) (emphasis omitted). As a consequence, DOE points out that in 2004 NRC issued 10 C.F.R. § 2.1003(e), *see id.* at 17-18, which states that each potential party “shall continue to supplement its documentary material made available to other participants via the LSN with *any additional material created after* the time of its initial certification.” DOE Response at 12-13, 17 (emphasis added); *see also* 10 C.F.R. § 2.1003(e).

DOE then turns to its “documents to be completed,” arguing that DOE is following a “controlled process to develop its scientific, engineering and other technical work to support its application” and that the “documents DOE has yet to complete are those that logically are completed at the end of that development process.” DOE Response at 25. With regard to AMRs, DOE asserts that the LA is expected to cite approximately 150 AMRs and that all but three of them are already complete and available on the LSN. *Id.* As to the TSPA, DOE notes that it has made 150 gigabytes worth of information relating to the TSPA available on the LSN. *Id.* at 26. DOE responds to other specifics of Nevada’s complaint (e.g., the absence of certain KTI documents, the PVHA, and VA) by arguing either (a) that earlier versions of the documents have been provided on the LSN and/or (b) that the documents are not legally required to be generated at all, much less required to be finalized and included in the initial certification. *Id.* at 26-28.

For its part, the Staff “offers no position” on whether the DOE Certification satisfies the regulatory requirements, but instead “offers its views on 10 C.F.R. Part 2, Subpart J, requirements and the standards to be applied regarding the DOE initial certification.” Staff Response at 5-6. The Staff asserts that Nevada’s position — that DOE’s initial production of documentary material “should include

all core technical documents and modeling basis information that will comprise DOE's actual LA" and that the "Subpart J, supplementation requirements do not allow DOE to defer completion of many key technical documents until after its initial certification" — is "not correct." *Id.* at 6. Likewise, the NRC Staff rejects the notion that supporting documentary material must be "frozen" at the time of initial certification. *Id.* at 7 n.15 ("To the extent Nevada implies (by quoting DOE statements) that information to be included in the LA must be frozen at the time of initial certification . . . it is clear that the regulations contemplate that DOE will generate or acquire additional documentary material after its certification"). The Staff asserts that the regulations reflect a balance between producing the documentary material early enough to give potential parties adequate time to review them, and yet not producing them so early that potential parties would waste time and money reviewing a significant number of documents that may later become irrelevant or obsolete. *Id.* at 7. The Staff agrees with DOE that "development of the DOE license application and supporting materials 'is an ongoing process'" and the Commission acknowledged that DOE would continue to produce (and make available) additional documentary material after DOE's initial certification. *Id.* (citation omitted). The Staff asserts:

In order to strike the DOE certification, the Board must find that the DOE document collection is materially or substantially incomplete (*i.e.*, it fails to include a significant number of "created" documents, or information to be provided at the time of the LA will be materially or substantially different, such that a purpose of the LSN rule — a meaningful opportunity to draft focused contentions — would be defeated). This inquiry, however, should recognize that DOE may produce additional information at the time of the LA submission.

Id. at 10. The Staff believes that this determination should be based on the "totality of the circumstances." *Id.*

NEI generally agrees with the position of DOE. It points to the use of the past tense in the regulations (e.g., "generated" and "acquired") and to the existence of the duty to supplement as recognition that the initial production applies only to extant documents, and that additional documents will be generated after the initial certification. *See* NEI Response at 3-4. NEI responds to Nevada's concerns (that, if key documents are not finished and produced until after the initial certification, potential parties will not have sufficient time to develop and file contentions) with the observation that (a) extra time will be provided to potential parties by the fact that NRC will take an additional 3 to 6 months (after the application is filed) to review and to docket the application, and (b) "late contentions may always be filed for good cause [citing 10 C.F.R. § 2.309(c)]." *Id.* at 4.

Meanwhile, NNWTF takes an entirely new tack. Rather than addressing the crux of Nevada's argument, NNWTF complains about the indexing of documents

on the LSN, arguing that DOE's documentary material is "incomplete and inappropriately indexed on the LSN site." NNWTF Response at 1. NNWTF asserts that there are a number of new documents that are "impossible to find on the LSN, using the title or author" search method. *Id.* at 2. NNWTF notes that "DOE, . . . in their haste to certify the collection at this time, just dumped abbreviated notations into the LSN," and asserts "any document not accessible by title or the name of the author should be considered missing [from the LSN]." *Id.*

III. ANALYSIS

Nevada's Motion presents us with a legal issue: whether the duty to produce "all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party" pursuant to 10 C.F.R. § 2.1003(a)(1), is violated if a potential party has not finalized, and produced, all of the core technical documentary material that it intends to rely on in the proceeding. As the following analysis shows, the language, structure, and history of the Subpart J regulations lead us to conclude that the answer is no, and that the duty to produce documentary material only applies to extant documents. The regulations specifically contemplate that additional documentary material will be created, finished, and made available to other parties after a party's initial document production and certification. Thus, we concluded in our December 12, 2007 Order denying the motion, and reiterate here, that Nevada's legal position is unsound.

At the outset, we note that the key facts are not in dispute. First, Nevada makes no claim that DOE has failed to make available all of DOE's *extant* documentary material.¹¹ Indeed, Nevada concedes that DOE has made available all documentary material "'in existence as of a reasonable cutoff date' before certification." Motion at 18 n.4. Instead, Nevada is complaining about the unavailability of documentary material that does not yet exist, i.e., "numerous critical core technical documents and modeling basis information" that are still in development and are not yet completed. *Id.* at 1. Second, it is not disputed that DOE has made available a massive amount of documentary material — 3.5 million documents, amounting to over 30 million pages, including redacted versions of some privileged documents and privilege logs for hundreds of others. Third, there is no dispute that DOE has *not* produced a number of important documents that are still in development. These include the TSPA-LA and PSA, both of which appear to be large, complex, and of critical importance to DOE's

¹¹ Even the NNWTF does not argue that extant documentary material is missing from the LSN, merely that DOE's titles and dates for the documentary material make it difficult to locate.

license application. Fourth, there is no dispute that DOE has “knowingly” certified without completing all of its documentary material. DOE has taken its legal position — that completion of all documentary material is not required — openly and in apparent good faith.

A. Language and Structure of the Regulation

As the Commission stated in this proceeding, the proper interpretation of a regulation begins with:

the language and structure of the provision itself. Further, the entirety of the provision must be given effect. Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.

CLI-06-5, 63 NRC 143, 154 (2006) (internal quotation marks and citation omitted).

Accordingly, we focus on the actual language of the key Subpart J regulations. The duty to produce documentary material is stated as follows:

Subject to the exclusions in § 2.1005 and paragraphs (b), (c), and (e) of this section, DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository, the NRC shall make available no later than thirty days after the DOE certification of compliance under § 2.1009(b), and each other potential party, interested governmental participant or party shall make available no later than ninety days after the DOE certification of compliance under § 2.1009(b) —

(1) An electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party.

10 C.F.R. § 2.1003(a).

Several points can be gleaned from the plain language of the regulation. First, the duty to produce applies to “documentary material.” Thus, the definition of this term is important. Second, the duty applies to a *subset* of documentary material: “all documentary material . . . generated by . . . or acquired by” the potential party. DOE emphasizes this provision, and its use of the past tense. DOE Response at 8. Regardless of the tense, this clause conveys that possession or control of the documentary material is a prerequisite of the duty to produce it. Third, the introductory clause to the regulation makes clear that there are several important exclusions to the duty to produce. The exclusions include “preliminary

drafts,” “basic licensing documents generated by DOE,” 10 C.F.R. § 2.1003(b); and “any additional material created after the time of . . . initial certification,” 10 C.F.R. § 2.1003(e). Fourth, the duty to produce applies to all potential parties, not just to DOE.

Next, we turn to the definition of “documentary material.”

Documentary material means:

(1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or cite in support of its position in the proceeding . . . ;

(2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party’s position; and

(3) All reports and studies, prepared by or on behalf of the potential party . . . including all related “circulated drafts,” . . . regardless of whether they will be relied upon and/or cited.

10 C.F.R. § 2.1001.

The first category of this tripartite definition refers to information on which the potential party “intends to rely” when the license application proceeding commences. Nevada focuses heavily on this provision — claiming that its use of the word “intends” means that, at the moment of its initial document production and certification, DOE must have finalized and included all of the core technical documentary material it intends to rely on in the licensing proceeding. Tr. at 1225, 1229, 1239. The second and third categories of the definition of documentary material, however, use the past tense, referring to information “developed” or “prepared” by the potential party and to drafts that have been “circulated.”

The foregoing regulatory provisions lead the Board to conclude that the duty to produce documentary material applies only to documents and information in existence at the time when the initial certification occurs, and do not impose a requirement that DOE, or any other party, must delay certification until all documentary material that it intends to rely on is finished and complete. Those provisions speak predominately in the past tense, referring to documents that have been generated, acquired, developed, or prepared. They refer to documents in the possession or control of the potential party, i.e., currently in existence. The regulations contemplate that additional documentary material will be “created after” the initial certification and that incomplete documents and drafts (except for circulated drafts), simply do not constitute “documentary material” and thus there is no duty to produce them. Meanwhile, nothing in the plain language of the regulations conforms with Nevada’s position — that DOE, or any other potential party, must finish and complete all documentary material it plans to rely on before it can certify.

Nevada’s heavy reliance on the future-tense word “intends,” standing alone,

cannot sustain the weight of Nevada’s position — that DOE must have completed all of the core technical documents it plans to rely upon before it can certify. First, the use of “intends,” in this context, is simply the natural result of the fact that the “reliance” in question will necessarily occur in the future, when DOE submits the license application. There is no good reason to construe it as a broad mandate that all core technical documents that DOE intends to rely on must be finished and frozen 6 months prior to the license application. We do not think that the Commission would have articulated such a fundamental requirement in such an obscure and incidental way. Like Congress, the Commission is not to be assumed to “hide elephants in mouseholes.” *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001)).

Second, Nevada’s interpretation of the word “intends” leads to unreasonable results. If, as Nevada argues, DOE must have completed all of the documents it plans to rely upon before it can certify, then “what’s sauce for the goose is sauce for the gander,” Tr. at 1281, and the same rule applies to all other potential parties when they submit their initial certifications. Under this approach, all other potential parties must have finished all of the core technical documents they intend to rely upon in the proceeding on a date that is outside of their control and imposed on them by DOE’s schedule — 90 days after DOE’s initial certification. As Nevada agrees, 10 C.F.R. § 2.1003(a)(1) applies equally to all potential parties. Tr. at 1323-24. But Nevada’s construction imposes unfair burdens and limits on other potential parties because it would be unreasonable to expect that they must finish and freeze their core technical documents 90 days after a date chosen by someone else (i.e., DOE’s certification date).

Our conclusion — that the duty to produce documentary material only applies to documentary material in existence (with a reasonable lag time) at the moment of certification — is supported by the entire regulatory structure. First, as stated, the regulations require a potential party to “continue to *supplement* its documentary material . . . with any additional material *created after the time of its initial certification.*” 10 C.F.R. § 2.1003(e) (emphasis added). We focused on this provision, and others, in our 2004 ruling, repeatedly stating (although not directly holding) that the duty to produce documentary material applied to “extant” documents. LBP-04-20, 60 NRC at 325-26. Similarly, 10 C.F.R. § 2.1009(b) calls upon DOE to “*update* this certification at the time DOE submits the license application,” and 10 C.F.R. § 2.1012(a) reiterates that the license application must be “accompanied by an *updated* certification.” 10 C.F.R. §§ 2.1009(b), 2.1012(a) (emphasis added). These provisions would be essentially superfluous

if, as Nevada would have it, DOE is obliged to finish, produce, and freeze all of its core technical documentary material at its initial certification.¹²

B. Regulatory History

Although the structure and language of the regulations are plain enough, the regulatory history of 10 C.F.R. § 2.1003 and the associated provisions clearly confirm our construction of the regulation. These regulations were the product of a 1988-89 negotiated rulemaking involving DOE, Nevada, and other potential parties, 54 Fed. Reg. 14,925, 14,925-26 (Apr. 14, 1989), and have been amended several times since then. Yet Nevada has provided us with no statement by the Commission, Nevada, or any other commenter, to the effect that all core technical documentary material that each party intends to cite or rely upon must be finished and available on the LSN when it makes its initial certification. To the contrary, as DOE points out, *see* DOE Response at 15, the Commission expressly acknowledged that the “development of the DOE license application and supporting materials is an ongoing process,” 66 Fed. Reg. at 29,459, and added provisions allowing and requiring DOE and others to supplement their documentary material with “material . . . created after the initial [certification] period.” 69 Fed. Reg. at 32,843. If Nevada’s position were correct, we would have expected it, and others, to have raised a great hue and cry when the Commission made these statements. None is cited by Nevada. In short, the regulatory history supports our judgment that Subpart J does not prohibit certification until all “reliance” documentary material is completed.

C. Practical Consequences

Nevada predicts dire consequences if its position is not accepted.

[I]f 10 C.F.R. Part 2 and the LSN are to have any serious role as “pre-License Application discovery supplanting the traditional post-LA discovery,” then the foregoing documents [TSPA-LA, PSA, etc.] need to be complete and available to Nevada, the NRC, and the other parties a “full and fair six months” before DOE files its LA.

Motion at 37. And again:

The Board’s mission is to ensure compliance by all the parties with their pre-

¹²In addition, we find no legal or regulatory support for Nevada’s assertion that the duty to produce all documentary material DOE intends to rely on applies only to “core technical documents and modeling basis documentary material.”

LA obligations to make all their Documentary Material publicly available. The cornerstone of the parties' obligations, and of the Board's charter, is the Six-Month Rule. If DOE's interpretation were credited, and if DOE could certify its LSN as complete without regard to the character and content of the documents certified (i.e., be permitted to "certify whatever it happened to have complete at the moment"), the letter and intent of the Six-Month Rule would be eviscerated. While DOE will predictably accumulate subsequent Documentary Material and will supplement its initial certification, a DOE certification update "at LA" containing the "core technical documents and modeling basis documents to support the LA" would by definition render the entire concept of pre-LA discovery a sham.

Motion at 43-44 (emphasis omitted).

We disagree. First, this Board's "mission" is to resolve disputes by interpreting and applying the regulations as they are written. The preceding legal analysis shows that there is no regulatory requirement that DOE finish all documentary material it will rely on, much less, all "core technical documents and modeling basis documents" it will rely on, when it submits its initial certification. Indeed, the regulations demonstrate a contrary result.

Second, 10 C.F.R. Part 2 establishes a regulatory regime that accommodates the filing of contentions at numerous stages in the HLW proceeding (not just at the outset), and belies Nevada's dire predictions. Under the regulations, DOE must make all of its extant documentary material available at least 6 months prior to the tendering of its license application. 10 C.F.R. § 2.1003(a). Any documentary material that DOE creates (e.g., finishes) after its initial certification must be made available in its monthly supplements. 10 C.F.R. § 2.1003(e); Revised Second Case Management Order (July 6, 2007) at 21 (unpublished). In addition, DOE must update its document production when it submits its license application. 10 C.F.R. § 2.1009(b). Even after DOE tenders the license application, it must continue to supplement its documentary material, and discovery will continue for approximately 2 more years.¹³

As long as DOE continues to create, generate, and make available new and material documentary material, Nevada and other potential participants will have the opportunity to file timely new and amended contentions in the HLW proceeding, pursuant to 42 U.S.C. § 2239(a)(1)(A). Certainly, the initial 6-month period between DOE's initial certification and license application provides an "opportunity to frame focused and meaningful contentions" at the initial juncture, 30 days after NRC docket the license application. *See* 10 C.F.R. § 2.309(b)(2).

¹³ *See* 10 C.F.R. §§ 2.1018, 2.1019 and 10 C.F.R. Part 2, Appendix D. The Commission also noted, in the context of "additional material . . . created after the initial [certification]" the "Atomic Safety and Licensing Board can always direct that additional discovery or discovery supplementation must take place." 69 Fed. Reg. at 32,843.

But it is not the only opportunity, and the regulations make clear that, under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline. *See* 10 C.F.R. § 2.309(f)(2) & (c).

D. NNWTF's New Issue

NNWTF raises a completely new issue, unrelated to Nevada's Motion. The Motion complains about DOE's failure to include unfinished core technical documents in its production of documentary material. NNWTF ignores this point and instead asserts that DOE's document collection "does not meet searchability standards," Tr. at 1254, because the documents are "inappropriately indexed" and they are "impossible to find on the LSN, using the title or author" search method. NNWTF Response at 1-2. It is NNWTF's position that "any document not accessible by title or the name of the author should be considered missing." *Id.* at 2.

The regulations do not specify whether DOE had any right to reply or respond to NNWTF's new issue.¹⁴ In any event, DOE did not respond or request leave to respond. Instead, at the oral argument, DOE objected to NNWTF's complaint, on the grounds that "the [T]ask [F]orce did not file any motion to strike on the basis of header coding" and "[i]t's not part of Nevada's motion." Tr. at 1255. (For its part, Nevada had already conceded this point. *See id.* at 1222-24.) Nevertheless, the Board allowed NNWTF to continue its oral presentation so that we could consider the issue. *Id.* at 1256.

As an initial matter, the Board agrees that it is problematic for a potential party to raise an entirely new complaint in its answer to another party's motion. Answers should focus (pro or con) on the issues raised by the movant, and should not raise totally new grounds for relief. Even so, it is certainly possible that an answer will raise new facts or arguments (related to the originally asserted grounds for relief) that neither the moving party nor the opposing party raised or considered. In such cases, the movant and/or opponents would do well to request leave to respond to such new facts or arguments. In this case, NNWTF should have filed its own motion to strike, based on its apparent assertion that DOE's document production failed to comply with 10 C.F.R. §§ 2.1003(a) and 2.1009 because it was inadequately indexed and failed to meet "searchability standards." The parties could have then briefed the factual and legal issues involved in such a motion. Likewise, DOE, if it thought NNWTF's point significant, could have

¹⁴Section 2.323(c) states that a *moving party* has no right to reply. Section 2.710(a) states that the party opposing a *motion for summary disposition* may respond in writing to new facts and arguments presented in any statement filed in support of the motion. Neither is directly on point here.

filed a motion for leave to respond to NNWTF's response that raised new facts and arguments.

Stepping beyond the procedural defect in NNWTF's position, we turn to the "merits" of its position. We agree that DOE's document production involves a number of cases where parts of the bibliographic headers seem to be meaningless numbers or letters. *See* Tr. at 1294-95. These documents are, however, searchable via full-text search. In addition, NNWTF failed to give us any indication as to the proportion of DOE's 3.5 million LSN documents that suffer from defective headers.

When questioned, DOE stated that it had investigated the headers challenged by NNWTF (i.e., those associated with the draft geologic repository supplementary environmental impact statement) and found that they involved a group of approximately 800 documents. *Id.* at 1292. DOE said that it has already updated and corrected the headers for those 800 documents. *Id.* at 1293. In response to further questioning, DOE stated that it had been "updating" the headers on its LSN document production regularly since 2004 and mentioned the figure of 160,000 documents. *Id.* at 1293-94. This is a significant number. Nevertheless, we do not know how many of these header changes were made after the DOE Certification on October 19, 2007, or to what extent these header problems rendered the documentary material unretrievable, as opposed to being simply somewhat more difficult to locate (e.g., via full-text search). Nor are the regulations clear as to whether "header searchability" is a prerequisite of certification under 10 C.F.R. § 2.1009.

Given its slim factual and legal foundation, the Board concludes that the NNWTF Response does not provide sufficient basis, either independently or in connection with Nevada's motion, to strike the DOE Certification. "Perfection is not required" in the document production, LBP-04-20, 60 NRC at 313, and in the context of DOE's 3.5 million documents, we cannot say, without a great deal more information, that the header problems mentioned by NNWTF warrant striking DOE's effort.

IV. CONCLUSION

As we stated in our December 12, 2007 Order, we conclude that Nevada's Motion To Strike DOE's October 19, 2007 certification must be denied because the Subpart J regulations recognize that potential parties, such as DOE, will continue to develop, prepare, and finalize additional documentary material, and to supplement their document production, after the date of initial certification. There is no requirement that DOE, or any other potential party, finalize and freeze all documentary material before it can certify. The duty to produce documents

applies to documentary material in existence (with a reasonable lag time) on the date of certification.¹⁵

Any appeal from the December 12, 2007 Order, as supplemented by this Memorandum, should be filed within 10 days of service hereof. *See* 10 C.F.R. § 2.1015.

THE PRE-LICENSE APPLICATION
PRESIDING OFFICER BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Alex S. Karlin
ADMINISTRATIVE JUDGE

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 4, 2008

¹⁵ We note, however, that the denial of the Motion is without prejudice to the opportunity to timely file another motion to strike DOE's initial certification if new facts become available.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James F. Jackson

In the Matter of

Docket No. 52-011-ESP
(ASLBP No. 07-850-01-ESP-BD01)

**SOUTHERN NUCLEAR OPERATING
COMPANY**

**(Early Site Permit for Vogtle
ESP Site)**

January 15, 2008

In this 10 C.F.R. Part 52 proceeding regarding the application of Southern Nuclear Operating Company (SNC) for an early site permit (ESP) for an additional two reactors at the Vogtle Electric Generating Plant site, ruling on an SNC motion seeking summary disposition regarding environmental contention (EC) 1.2, Environmental Report (ER) Fails To Identify and Consider Cooling System Impacts on Aquatic Resources, the Licensing Board (1) grants the motion as to that portion of the contention challenging the SNC ER as omitting a discussion of the amount of facility chemical discharges, finding that this assertion was subject to dismissal as moot in light of the discussion in the NRC Staff's draft environmental impact statement (DEIS); and (2) denies the motion as to those portions of the contention challenging the adequacy of the ER/DEIS discussions of baseline aquatic data, impingement and entrainment impacts, and thermal discharges, concluding that SNC has failed to demonstrate there are no material factual disputes concerning genuine issues with regard to those portions of the contention.

RULES OF PRACTICE: SUMMARY DISPOSITION (STANDARDS)

For proceedings that are being conducted pursuant to the “informal” hearing procedures of 10 C.F.R. Part 2, Subpart L, summary disposition motions are to be resolved in accord with the standards for dispositive motions for “formal” hearings, as set forth in Part 2, Subpart G. *See* 10 C.F.R. § 2.1205(c). Summary disposition may be entered with respect to any matter (or all matters) in a proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” *See* 10 C.F.R. §§ 2.710(d)(2), 2.1205(c).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

The party proffering the summary disposition motion bears the burden of making the requisite showing by providing “a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” 10 C.F.R. § 2.710(a). A party opposing the motion must counter any adequately supported material facts provided by the movant with its own “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard,” with the recognition that, to the degree the responsive statement fails to contravene the material facts proffered by the movant, the movant’s facts “will be considered to be admitted.” *Id.*

RULES OF PRACTICE: DISMISSAL OF CONTENTION (MOOTNESS)

Commission precedent recognizes that for contentions (or portions of contentions) challenging an application as having omitted a required item (or items), post-contention admission events, such as issuance of a Staff DEIS, can render the contention subject to dismissal as moot, *see Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; SUPPORTING INFORMATION OR EXPERT OPINION)

When filed with an intervention petition, an environmental contention and its associated bases quite properly address an applicant’s ER, rather than the then

still-being-developed Staff DEIS, *see* 10 C.F.R. § 2.309(f)(2) (contentions must be based on documents/information available when hearing petition to be filed).

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; NEED FOR NEW OR AMENDED CONTENTION)

A Board may consider environmental contentions contesting an applicant's ER as challenges to the agency's subsequent DEIS so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention's admission, submit a new contention. *See* 10 C.F.R. § 2.309(f)(2); *see also McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

RULES OF PRACTICE: CONTENTIONS (NEED FOR NEW OR AMENDED CONTENTION; MODES OF FORMULATION; OMISSION OR INADEQUACY); SUMMARY DISPOSITION (DISPUTE REGARDING NEED FOR NEW OR AMENDED CONTENTION)

In the context of a summary disposition motion, the question about the need to amend or file a new contention becomes relevant when there is a dispute about whether an admitted issue statement (or a relevant portion of such an issue statement) is a contention of omission — i.e., a contention challenging a portion of the application, because it fails in toto to address a required subject matter — or a contention of inadequacy — i.e., one that asserts the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 171-72 (2001) (dividing all contentions into “a challenge to the application's adequacy based on the validity of the information that is in the application; a challenge to the application's adequacy based on its alleged omission of relevant information; or some combination of these two challenges”); *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006).

RULES OF PRACTICE: CONTENTIONS (NEED FOR NEW OR AMENDED CONTENTION); DISMISSAL OF CONTENTION (MOOTNESS)

If intervenors have not sought to amend an environmental contention as admitted, to the degree the contention is one of omission, it is subject to dismissal in connection with those aspects for which it is appropriately established the Staff DEIS provides any purported missing analysis or discussion.

RULES OF PRACTICE: SUMMARY DISPOSITION (SUFFICIENCY OF SUPPORTING EVIDENCE)

The argument that information provided in support of an intervenor's response to a summary disposition motion should not be considered because the information is outside the scope of the intervenor's admitted contention, if true, can be a meritorious assertion.

RULES OF PRACTICE: MOTIONS TO STRIKE; REPLY BRIEFS ON ANSWERS TO MOTIONS

A motion to strike is an inappropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention, as the Board can consider and resolve the issue without such a motion and without "striking" anything. Instead, the issue should have been raised in a reply pleading, for which permission to file should have been sought from the Board before the replies were due. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 (unpublished); *see also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer granted).

RULES OF PRACTICE: REPLY BRIEFS ON ANSWERS TO MOTIONS

While the current procedural rule governing summary disposition in formal agency adjudications under Part 2, Subpart G (as did its pre-2004 predecessor) clearly discourages the filing of replies to summary disposition responses, *see* 10 C.F.R. § 2.710(a) (2007) (following response by opposing party, no further supporting statements or responses will be entertained); *id.* § 2.749(a) (2003) (same); *but see id.* § 2.1205(b) (2007) (making no mention of replies relative to summary disposition in Part 2, Subpart L proceedings), given the ability of responding parties to interpose additional "factual" information by way of affidavits and

other submissions, as well as the potential that exists under such a motion for a merits disposition of a contention (or portion of a contention), a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable Board discretionary decision permitting the filing. *Compare* 10 C.F.R. § 2.309(h)(2) (petitioner given opportunity to file reply to applicant/staff answers to hearing requests); *id.* § 2.323(c) (permission to file reply to response to motion may be granted in compelling circumstances, such as when moving party could not reasonably anticipate response arguments).

RULES OF PRACTICE: SUMMARY DISPOSITION (SCOPE OF CONTENTION)

While a movant’s discussion of a matter in its summary disposition motion does aid the Board in understanding whether the issue is within the scope of the contention, at least to the degree it suggests the parties had notice of the matter, such a discussion does not necessarily establish that the matter is within the scope of a contention given that the movant’s discussion may also be outside the scope of the contention. Nonetheless, if a movant discusses a matter in its statement of undisputed facts, it would not be untoward for the Board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement. *See* 10 C.F.R. § 2.710(a) (“All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party”).

RULES OF PRACTICE: SUMMARY DISPOSITION (EXPERT OPINION)

Summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained. *See MOX*, LBP-05-4, 61 NRC at 80-81.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; NEED FOR NEW OR AMENDED CONTENTION)

In the face of a Staff DEIS or final environmental impact statement that includes additional probative information the Staff believes is relevant to the subject matter of an admitted contention initially footed in an applicant’s ER, an intervenor would be wise to amend its contention (or submit a new contention) to reflect any relevant changes or additions, thereby avoiding any question

about whether this additional information falls outside the scope of the admitted contention so as to preclude it from consideration as support for the contention. *See* 10 C.F.R. § 2.309(f)(2).

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS)

In accord with 10 C.F.R. § 2.309(f)(1), the support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity so as “to put the other parties on notice as to what issues they will have to defend against or oppose.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988).

**MEMORANDUM AND ORDER
(Ruling on Dispositive Motion and Associated Motions To Strike
Regarding Environmental Contention 1.2)**

Before the Licensing Board in this 10 C.F.R. Part 52 proceeding regarding the application of Southern Nuclear Operating Company (SNC) for an early site permit (ESP) for two new units at the site of its existing two-unit Vogtle Electric Generating Plant (VEGP) is an SNC motion requesting summary disposition be entered in its favor relative to Joint Intervenors environmental contention (EC) 1.2.¹ This issue statement concerns the identification and consideration of direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources. The NRC Staff supports the SNC dispositive motion, while Joint Intervenors oppose the request. Additionally, both the Staff and SNC have filed motions to strike portions of the Joint Intervenors response to the SNC motion or, in SNC’s case, alternatively to file a reply to the Joint Intervenors response, which Joint Intervenors oppose.

For the reasons set forth below, we deny the SNC motion for summary disposition on EC 1.2, as well as the associated SNC and Staff motions to strike portions of the Joint Intervenors response to the SNC dispositive motion.

¹ Joint Intervenors include the Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women’s Action for New Directions, and Blue Ridge Environmental Defense League.

I. BACKGROUND

As part of its August 2006 ESP application, SNC was required to include a “complete environmental report,” or ER, addressing various issues pertaining to the National Environmental Policy Act of 1969 (NEPA).² In challenging the SNC ESP application, Joint Intervenors posited seven contentions raising concerns about various aspects of the SNC ER, including EC 1.2, ER Fails To Identify and Consider Cooling System Impacts on Aquatic Resources.

In pertinent part, EC 1.2 alleged that the ER had failed to “identify and consider direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources.” Petition for Intervention (Dec. 11, 2007) at 10 [hereinafter Intervention Petition]. The Board found that the Joint Intervenors submission, particularly the supporting affidavit of then-Clemson University Adjunct Faculty Member Dr. Shawn Paul Young, “provides sufficient factual support for the admission of this contention.” LBP-07-3, 65 NRC 237, 258 (2007). The Board thus admitted the contention as follows:

[EC] 1.2 — ER FAILS TO IDENTIFY AND CONSIDER COOLING SYSTEM IMPACTS ON AQUATIC RESOURCES

CONTENTION: The ER fails to identify and consider direct, indirect, and cumulative impingement/entrainment and chemical and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources.

Id. at 280.

Following the admission of this contention (as well as issue statement EC 1.3, which is the subject of another SNC dispositive motion that we likewise address today, *see* LBP-08-3, 67 NRC 85 (2008)), the Staff provided and has periodically supplemented the hearing file for this proceeding established in accord with 10 C.F.R. § 2.1203, and the parties have made the mandatory disclosures required

² *See* 10 C.F.R. § 52.17(a)(2) (“A complete environmental report as required by 10 CFR 51.45 and 51.50 must be included in the application, provided, however, that such environmental report must focus on the environmental effects of construction and operation of a reactor, or reactors, which have characteristics that fall within the postulated site parameters and provided further that the report need not include an assessment of the benefits (for example, need for power) of the proposed action, but must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed”). Although a recent change in the agency’s rules governing ESPs has moved the substance of section 52.17(a)(2) to section 51.50(b), *see* 72 Fed. Reg. 49,351, 49,512, 49,523 (Aug. 28, 2007), because the SNC ESP application was docketed well before the September 27, 2007 effective date of this revision, *see* 71 *id.* 60,195, 60,195 (Oct. 16, 2006), in the absence of a request by SNC to apply the new rule’s provisions governing application content, *see* 72 *id.* at 49,522 (revised 10 C.F.R. § 52.17(a)), section 52.17(a)(2) as quoted above is applicable in this proceeding.

by section 2.336 relative to this contention.³ *See* Tr. at 199-207, 256-58. In establishing an initial schedule for this proceeding based on the planned Staff issuance of both the draft and final environmental impact statements (DEIS and FEIS) and its safety evaluation report (SER), the Board provided an opportunity for the filing of new or amended contentions relating to either of these documents, as well as for filing for summary disposition regarding any admitted contention or new/amended contention. *See* Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 3-5 & App. A (unpublished) [hereinafter Initial Scheduling Order].

Subsequently, the Staff issued its SER (albeit with open items) and its DEIS on August 30 and September 10, respectively. *See* Office of New Reactors (NRO), U.S. Nuclear Regulatory Commission (NRC), Safety Evaluation of the [ESP] Application in the Matter of [SNC], for the Vogtle [ESP] Site (Aug. 2007); 1 NRO, NRC, [DEIS] for an [ESP] at the [VEGP] Site, NUREG-1872 (Sept. 2007) [hereinafter DEIS]. Although the Board had established a time frame within which to do so, *see* Initial Scheduling Order, App. A, at 1, Joint Intervenors did not submit any new or amended contentions relative to either of these documents. Thereafter, in accordance with the terms of the Board's initial schedule, *id.*, on October 17, 2007, SNC filed a motion, accompanied by a statement of material facts purportedly not at issue, requesting that summary disposition be entered in its favor in connection with EC 1.2. *See* [SNC] Motion for Summary Disposition on Intervenors' [EC] 1.2 (Cooling System Impacts on Aquatic Resources) (Oct. 17, 2007) [hereinafter SNC 1.2 Dispositive Motion]; [SNC] Statement of Undisputed Facts in Support of Applicant's Motion for Summary Disposition of Intervenors' [EC] 1.2 (Cooling System Impacts on Aquatic Resources) (Oct. 17, 2007) [hereinafter SNC 1.2 Statement of Undisputed Facts]. Thereafter, on October 30, the Staff filed a response, with a supporting affidavit, endorsing the SNC summary disposition motion.⁴ *See* NRC Staff Answer to [SNC] Motion for

³In accordance with an April 3, 2007 Board memorandum and order issued in response to a March 23, 2007 joint motion from the parties, the parties have agreed, among other things, (1) that they need not identify draft versions of any document, data compilation, correspondence, or other tangible thing that must be disclosed; and (2) to waive the obligation to provide a privilege log required by 10 C.F.R. § 2.336(a)(3), (b)(5). *See* Licensing Board Memorandum and Order (Ruling Regarding Joint Motion on Mandatory Disclosures and Scheduling Prehearing Conference) (Apr. 3, 2007) at 2-4 (unpublished); *see also* Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 2 (discussing privilege log production waiver and disclosure of electronically stored information (ESI)) (unpublished).

⁴The Staff's answer was filed a day late; however, following the Staff's submission of an unopposed motion to belatedly file its answer, the Board accepted the Staff's answer. *See* NRC Staff's Unopposed Motion To File Answer to Southern's Motion for Summary Disposition of EC 1.2 Out of Time (Nov. 1, 2007); Licensing Board Order (Granting NRC Staff Unopposed Motion To Accept Answer Out of Time) (Nov. 2, 2007) (unpublished).

Summary Disposition of [EC] 1.2 (Oct. 30, 2007) [hereinafter Staff 1.2 Answer]. This was followed on November 13 by the Joint Intervenors answer to the SNC dispositive motion, which included a statement of purported material facts at issue and supporting affidavits, asserting that summary disposition was inappropriate in this instance. *See* Joint Intervenors Answer Opposing [SNC's] Motion for Summary Disposition of [EC 1.2] (Nov. 13, 2007) [hereinafter Joint Intervenors 1.2 Answer].

Thereafter, on November 21 and 23, respectively, the Staff and SNC submitted motions requesting that portions of the Joint Intervenors November 13, 2007 answer to the SNC October 17, 2007 motion requesting summary disposition of EC 1.2 be stricken as outside the scope of the admitted contention. *See* NRC Staff's Motion To Strike Portions of Joint Intervenors' Answer Opposing Summary Disposition of EC 1.2 (Nov. 21, 2007) [hereinafter Staff 1.2 Motion To Strike]; [SNC's] Motion To Strike Portions of, or in the Alternative for Leave To Reply to, Intervenors' Answer to Motion for Summary Disposition of EC 1.2 (Nov. 23, 2007) [hereinafter SNC 1.2 Motion To Strike]. Alternatively, pursuant to 10 C.F.R. § 2.323(c), SNC requested that it be given the opportunity to file a reply to the Joint Intervenors answer. *See* SNC 1.2 Motion To Strike at 1, 5. In a responsive filing dated November 30, 2007, the Staff indicated that it supported the SNC motion to strike. *See* NRC Staff's Answer to Southern's Motion To Strike or in the Alternative to Reply to Joint Intervenors' Answer to Motion for Summary Disposition of EC 1.2 (Nov. 30, 2007). Joint Intervenors filed a response opposing both motions to strike on December 6, 2007.⁵ *See* Intervenors' Answer in Response to SNC and NRC Staff Motions To Strike Portions of Intervenors' Answer to Motion for Summary Disposition of EC 1.2 (Dec. 6, 2007) [hereinafter Joint Intervenors Response to 1.2 Motions To Strike].

II. ANALYSIS

A. Summary Disposition Standards

For proceedings such as this one that are being conducted pursuant to the "informal" hearing procedures of 10 C.F.R. Part 2, Subpart L, *see* LBP-07-3, 65 NRC at 274, summary disposition motions are to be resolved in accord with the standards for dispositive motions for "formal" hearings, as set forth in Part

⁵ After missing the December 3, 2007 deadline to answer the SNC and Staff motions to strike, *see* 10 C.F.R. § 2.323(c), Joint Intervenors petitioned the Board for a 3-day extension of time in which to respond, which the Board granted. *See* Joint Intervenors' Unopposed Motion for Extension of Time To File Answers to NRC Staff's Motion To Strike and SNC Motions To Strike and To Supplement Record (Dec. 4, 2007); Licensing Board Order (Granting Extension of Time) (Dec. 5, 2007) at 2 (unpublished).

2, Subpart G, *see* 10 C.F.R. § 2.1205(c). In that regard, 10 C.F.R. § 2.710(d)(2) provides that summary disposition may be entered with respect to any matter (or all matters) in a proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.”

The party proffering the motion bears the burden of making the requisite showing by providing “a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” *Id.* § 2.710(a). On the other hand, a party opposing the motion must counter any adequately supported material facts provided by the movant with its own “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard,” with the recognition that, to the degree the responsive statement fails to contravene the material facts proffered by the movant, the movant’s facts “will be considered to be admitted.” *Id.*

Before applying these standards, however, in light of (1) Commission precedent recognizing that for contentions (or portions of contentions) challenging an application as having omitted a required item (or items), post-contention admission events, such as issuance of a Staff DEIS, can render the contention subject to dismissal as moot, *see Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002); and (2) SNC and Staff insistence that this contention should be resolved consistent with this precedent, *see* SNC 1.2 Dispositive Motion at 17-18; Staff 1.2 Answer at 12, we consider whether EC 1.2 (or any portion of that issue statement) properly is subject to disposition on this basis.

B. Environmental Contention 1.2 — Contention of Omission or Contention of Inadequacy

While the Joint Intervenors admitted contention and its associated bases quite properly addressed the SNC ER, rather than the then still-being-developed Staff DEIS, *see* 10 C.F.R. § 2.309(f)(2) (contentions must be based on documents/information available when hearing petition to be filed), as SNC notes, “the Board may consider environmental contentions made against an applicant’s ER as challenges to an agency’s subsequent DEIS.” SNC 1.2 Dispositive Motion at 4 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) (approving a Board decision to treat an intervenor’s contentions addressing the ER as challenges to the FEIS)); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (discussing such a substitution with the superseding DEIS), *petition for review denied*, CLI-04-4, 59 NRC 31, 40-41 (2004). This is appropriate, however, only so long as the DEIS analysis or discussion at issue is

essentially *in para materia* with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention's admission, submit a new contention.⁶ See 10 C.F.R. § 2.309(f)(2); see also *McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

In the context of a summary disposition motion, this question about the need to amend or file a new contention becomes relevant when there is a dispute, as there is here, see *infra* pp. 64-65, about whether an admitted issue statement (or a relevant portion of such an issue statement) is a contention of omission — i.e., a contention challenging a portion of the application, such as the ER, because it fails in toto to address a required subject matter — rather than a contention of inadequacy — i.e., one that asserts the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect. See *Private Fuel Storage*, LBP-01-23, 54 NRC at 171-72 (dividing all contentions into “a challenge to the application’s adequacy based on the validity of the information that is in the application; a challenge to the application’s adequacy based on its alleged omission of relevant information; or some combination of these two challenges”); see also *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006). In *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286 (2004), in connection with intervenor contentions of omission charging that an application was missing certain design information, the Licensing Board rejected as improper an intervenor attempt to use those same contentions, once the information had been provided in a subsequent applicant filing, to then challenge the quality of the additional applicant information, and thereby interpose disputed material factual issues. Rather, according to the *MOX* Licensing Board, the contentions should have been amended. See *id.* at 292-93. Since they were not, the *MOX* Board concluded that a dispositive motion seeking dismissal of the contentions as moot was appropriate. See *id.* at 293.

In this instance, because Joint Intervenors have not sought to amend EC 1.2 as admitted, to the degree the contention is one of omission, it is subject to dismissal in connection with those aspects for which it is appropriately established the Staff DEIS provides any purported missing analysis or discussion. Here, an evaluation of EC 1.2 in this regard is made somewhat more complicated by the fact that the Board did not, in admitting the contention, explicitly state whether EC 1.2,

⁶In establishing the schedule for possible summary disposition motions regarding the Joint Intervenors admitted contentions following the release of the Staff DEIS (as well as the FEIS), the Board recognized the potential need to amend or file new contentions prior to the submission of dispositive motions. See Initial Scheduling Order, App. A, at 1-2.

or any portion of EC 1.2, was a “contention of omission.” Nonetheless, in asserting summary disposition is appropriate, SNC and the Staff contend EC 1.2 is a contention of omission, while Joint Intervenors argue that, with the exception of chemical analysis issues, it is not. *See* SNC 1.2 Dispositive Motion at 17-18; Staff 1.2 Answer at 12; Joint Intervenors 1.2 Answer at 19-20.

In reaching a determination about whether this contention is properly classified as one of omission or inadequacy, we note initially that the text of EC 1.2, both as originally proposed by Joint Intervenors (i.e., the SNC ER “fails to identify and consider direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources”) and as subsequently admitted by the Board (i.e., the SNC ER “fails to identify and consider direct, indirect, and cumulative impingement/entrainment and chemical and thermal effluent discharge impacts”), does not denominate it definitively as either. Therefore, it is necessary to examine the arguments and bases put forward by Joint Intervenors for each of the contention’s four aspects: baseline information, impingement/entrainment, thermal impacts, and chemical impacts.

Most of the claims in the Joint Intervenors original petition addressing baseline issues allege that necessary information has been omitted, though Joint Intervenors also posited arguments that the missing information should be of a certain quality (for instance, based on site-specific information) and criticized the data presented. *See* Declaration of Shawn Paul Young, Ph.D. (Dec. 7, 2006) at 7 [hereinafter 2006 Young Declaration]. While the Board ultimately rejected the Joint Intervenors baseline assertions associated with EC 1.1, it allowed some discussion of baseline information to be included within EC 1.2 and, in doing so, outlined the parameters of the baseline EC 1.2 discussion as “the adequacy of the baseline information provided by SNC relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities,” LBP-07-3, 65 NRC at 259. Thus the baseline information portion of EC 1.2 will be treated as an inadequacy contention.

For the entrainment/impingement and thermal impacts portions of the issue statement, in their initial petition Joint Intervenors asserted that the calculations regarding impacts made by SNC were inaccurate and used incorrect assumptions. *See, e.g.*, Intervention Petition at 10, 12; 2006 Young Declaration at 6, 8. These portions of the contention thus are inadequacy arguments as well.

Finally, the Joint Intervenors argument concerning chemical impacts was that certain information, particularly the quantity and toxicity of all chemical discharges, should have been included in the ER. *See* Intervention Petition at 12. As Joint Intervenors acknowledge, this is a contention of omission. *See* Joint Intervenors 1.2 Answer at 19.

We thus conclude that, with the exception of the portion of the contention relating to chemical discharges, EC 1.2 is a contention of inadequacy rather than one of omission.

C. SNC and Staff Motions To Strike

In addition to resolving the question of the status of EC 1.2 as a contention of omission or inadequacy, prior to assessing the merits of the SNC motion relative to the summary disposition standards in section II.A, above, we also find it appropriate to address the procedural validity of the SNC and Staff motions to strike portions of the Joint Intervenors summary disposition answer. A major premise of both those motions is that, in filing their response, Joint Intervenors sought improperly to expand the scope of the admitted contention without amending their issue statement.⁷ *See* Staff 1.2 Motion To Strike at 1; SNC 1.2 Motion To Strike at 1.

To be sure, the argument that information provided in support of an intervenor's response to a dispositive motion should not be considered because the information is outside the scope of the intervenor's admitted contention, if true, can be a meritorious assertion. Whether a motion to strike is the appropriate procedural vehicle for raising such a claim relative to a dispositive motion response is, however, a different question.

Rule 12(f) of the Federal Rules of Civil Procedure does provide for the submission of a motion to strike, upon which the court can act to order "stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." There is no explicit mention of such a motion in the agency's rules of practice, but assuming there need not be, *see* 10 C.F.R. § 2.323(b), in the context of a summary disposition motion we do not consider a "motion to strike" to be the appropriate vehicle for raising the argument posited by both SNC and the Staff here. As Joint Intervenors correctly recognized in a related filing in this proceeding, *see* Intervenors' Answer Opposing NRC Staff and SNC Motions To Strike Portions of Intervenors' Answer to Motion Opposing Summary Disposition of [EC] 1.3 (Dec. 6, 2007) at 2-3 [hereafter Joint Intervenors Response to 1.3 Motions To Strike], the issue of the scope of EC 1.2 is a matter that the Board can consider and resolve without such a motion and without "striking" anything. Consequently, the Staff and SNC arguments made in their motions to strike should have been framed in reply pleadings, for which permission to file should

⁷SNC asks that the following five areas of discussion be stricken from the Joint Intervenors responsive brief and supporting affidavits: (1) the use and the contents of cited Academy of Natural Sciences reports, (2) a DEIS-referenced site visit by the Staff regarding screen basket cleaning, (3) larval fish mobility, (4) methodologies for estimating the Savannah River's minimum flow rate, and (5) the cumulative impacts of withdrawals associated with facilities other than Vogtle's existing units. *See* SNC 1.2 Motion To Strike at 2-3. In a request similar to that associated with SNC area 4, the Staff asks that we strike the portions of the Joint Intervenors answer discussing Savannah River Drought Level 4 flow conditions and which gauge along the river should be used for measuring river flow. *See* Staff 1.2 Motion To Strike at 4.

have been sought from the Board 3 business days before the replies were due.⁸ See Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 (unpublished); see also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer granted).

Both the Staff and SNC motions to strike (and the associated SNC request for leave to file a reply) are thus denied. Nonetheless, without regard to the Staff and SNC motions to strike (and as it would have done even if the motions had not been filed), in reviewing the SNC dispositive motion the Board will consider whether the information the parties provided as a basis for granting or denying the SNC summary disposition request is within the scope of EC 1.2 as admitted and is adequate to support their position regarding resolution of the motion.⁹

⁸ Of course, in accord with the procedures we have established in this case, a reply would have been due within 7 days after the submission of the Joint Intervenors summary disposition motion response rather than the 10 days generally provided for a motion. Compare Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 n.4 (unpublished) with 10 C.F.R. § 2.323(a). If SNC and the Staff needed additional time for their replies, however, the appropriate mechanism for obtaining that relief would have been a time extension motion, perhaps filed in conjunction with their request for leave to file a reply.

We also think it worth observing that while the current procedural rule governing summary disposition in formal agency adjudications under Part 2, Subpart G (as did its pre-2004 predecessor) clearly discourages the filing of replies to summary disposition responses, see 10 C.F.R. § 2.710(a) (2007) (following response by opposing party, no further supporting statements or responses will be entertained); *id.* § 2.749(a) (2003) (same); but see *id.* § 2.1205(b) (2007) (making no mention of replies relative to summary disposition in Part 2, Subpart L proceedings), given the ability of responding parties to interpose additional “factual” information by way of affidavits and other submissions, as well as the potential that exists under such a motion for a merits disposition of a contention (or portion of a contention), a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable Board discretionary decision permitting the filing. Compare 10 C.F.R. § 2.309(h)(2) (petitioner given opportunity to file reply to applicant/staff answers to hearing requests); *id.* § 2.323(c) (permission to file reply to response to motion may be granted in compelling circumstances, such as when moving party could not reasonably anticipate response arguments).

⁹ In this regard, Joint Intervenors argue that if an issue was first raised by the movant in a summary disposition motion, discussion of that issue in a response should not be stricken. See Joint Intervenors Response to 1.2 Motion To Strike at 3. While a movant’s discussion of a matter in its summary disposition motion does aid the Board in understanding whether the issue is within the scope of the contention, at least to the degree it suggests the parties had notice of the matter, such a discussion does not necessarily establish that the matter is within the scope of a contention given that the movant’s discussion may also be outside the scope of the contention. Nonetheless, if a movant discusses a matter in its statement of undisputed facts, it would not be untoward for the Board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such

(Continued)

D. Analysis of Summary Disposition Request

With these precepts in mind, we turn to the substance of the SNC motion, considering whether SNC has shown that there exists no genuine issue as to any material fact in connection with each of the four subject areas specified above, as well as the arguments proffered both in support of, and in opposition to, the SNC dispositive motion relative to the proper scope of the admitted contention. In doing so, in each instance we look first at the initial intervention request submitted by Joint Intervenors and the Board's contention admission decision, followed by the parties' arguments regarding summary disposition for that portion of the contention.

1. Baseline Aquatic Data for Vogtle Site

a. Joint Intervenors Intervention Petition

In support of issue statement EC 1.1, which also concerned proposed facility impacts on Savannah River fishery resources, in their intervention request Joint Intervenors alleged that to evaluate the impacts of the cooling system for the proposed facilities, the baseline information in the ER should have included more data regarding the habitats and life histories of particular species and that, without such information, the ER was deficient. *See* Intervention Petition at 9. Joint Intervenors argued the ER does not "identify the current aquatic species assemblage or the presence or absence of threatened, endangered, or rare species in the project area," and "contains no data concerning upstream and downstream migration of anadromous [(i.e., moving from the sea to rivers to breed)] and diadromous [(i.e., migrating between salt and freshwater)] species in this section of the Savannah River or their habitat utilization within the project area." *Id.* at 8. Their expert, Dr. Shawn Young, alleged in support of the petition that the ER analysis lacked "a comprehensive discussion of all of the species likely to inhabit this reach of the Savannah River at different times of the year." 2006 Young Declaration at 7. To cure these defects, Joint Intervenors argued that "field studies or data that assesses site-specific and species-specific factors" are needed. Intervention Petition at 9.

b. Board Contention Admissibility Discussion

The Board rejected the Joint Intervenors related issue statement EC1.1 that

a statement. *See* 10 C.F.R. § 2.710(a) ("All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party").

alleged the aquatic baseline for the Vogtle ESPER was wholly insufficient, finding that Joint Intervenors did not provide information to support such an allegation. *See* LBP-07-3, 65 NRC at 256. Noting that the Joint Petitioners counsel had told the Board “‘there is sufficient information about the river in general’” in the ER and thus had asserted only that otherwise-required site-specific information was missing, *id.* at 257 (quoting Tr. at 18), the Board concluded that “‘it appears uncontested that the Applicant has adequately described the *general* aquatic resources of the Savannah River, including the river’s important species and their habitats,” *id.* at 256 (emphasis added). Additionally, rejecting the Joint Intervenors assertion that specific studies of the Vogtle site and rivershed were needed, the Board provided the following observation regarding the nature of the required baseline data:

Joint Petitioners have not demonstrated with any references — nor are we aware of any — that suggest site-specific studies are generally required. Rather, the appropriate scope of the baseline for a project is a functional concept: an applicant must provide enough information and in sufficient detail to allow for an evaluation of important impacts.

Id. at 257.

The Board, however, then went on to conclude that the EC 1.2 allegations of baseline deficiencies concerning the ER discussion assessing impingement, entrainment, and thermal impacts, as supported by the 2006 Young Declaration, could be litigated as part of issue statement EC 1.2. *See id.* at 258. In doing so, the Board indicated that adjudication regarding the merits of EC 1.2 thus could “‘include the question of the adequacy of the baseline information provided by SNC relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities.” *Id.* at 259.

c. SNC Summary Disposition Motion

In its motion, which is supported by a statement that sets forth twenty-four purported undisputed material factual statements, SNC argues that all the data needed to create a baseline are included in the DEIS and that Joint Intervenors are requesting “‘additional, original studies’” not required by NEPA. *See* SNC 1.2 Dispositive Motion at 8. SNC declares that “‘a fundamental principle of NEPA is that an agency is not required to generate new data in order to satisfy its obligation to take a ‘hard look’ at the environmental consequences of a proposed action.” *Id.* at 10. For all other information Joint Intervenors claim the ER lacks, SNC asserts that “‘the DEIS addresses the very information alleged to be lacking.” *Id.* at 17. SNC further characterizes the whole of EC 1.2 as a contention of omission

for which the information has now been supplied, so that the data provided in the DEIS makes the contention moot. *Id.* at 18.

d. Staff Answer

Supported by the joint affidavit of NRC Senior Hydrologist Dr. Christopher B. Cook and Battelle Pacific Northwest National Laboratory Senior Research Scientist Rebekah H. Krieg, in its response to the SNC dispositive motion the Staff argues that the DEIS now includes, as requested by Joint Intervenor, “a comprehensive discussion of all the aquatic species likely to occur in the Savannah River at different times of the year,” thereby rendering moot the portion of the contention addressing the adequacy of the aquatic baseline information provided. Staff 1.2 Answer at 4. In support of this assertion, the Staff references the environmental standard review plan (ESRP), which formalizes the Staff’s review criteria used to establish what would constitute an adequate NEPA analysis.¹⁰ Noting that the ESRP calls for an identification of “important” species in the area of the proposed facilities,¹¹ the Staff points to specific parts of the DEIS that it asserts do this, declaring that “Table 2-7 of the DEIS lists, by phylogenetic order, all known native, resident, diadromous, marine and upland species of fish of the Middle Savannah River. Using the methodology given in the [ESRP] Section 2.4.2, the NRC Staff determined which species listed in DEIS Table 2-7 are ‘important’” Staff 1.2 Answer at 5-6 (citations omitted). The Staff concludes that this table and the accompanying discussion constitute a comprehensive discussion of all of the Savannah River’s fish species. *See id.* at 6.

e. Joint Intervenor Answer

Joint Intervenor, who provide a statement of genuine material facts in dispute supported by the affidavits of Dr. Young, now a Purdue University Visiting Assistant Professor of Fisheries Biology, and environmental consultant Barry W.

¹⁰ Office of Nuclear Reactor Regulation, NRC, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555 (Oct. 1999) [hereinafter ESRP]. Although a standard review plan sets forth the criteria that the Staff uses to evaluate whether an application conforms to the agency’s regulations, it nonetheless is considered nonbinding on the Staff, *see, e.g.*, 10 C.F.R. § 50.34(h)(3), and on a Licensing Board.

¹¹ *See, e.g.*, ESRP at 4.3.2-1. The Staff’s ESRP defines “important species” as endangered or threatened species (as defined either federally or by the state where the proposed facility is located) or proposed for such a listing in the *Federal Register*, commercially or recreationally valuable species, “[s]pecies that are essential to the maintenance and survival of species that are rare and commercially or recreationally valuable,” “[s]pecies that are critical to the structure and function of the local terrestrial ecosystem,” or “[s]pecies that may serve as biological indicators to monitor the effects of the facilities on the terrestrial environment.” *Id.* at 2.4.2-7 (Table 2.4.2-1).

Sulkin, argue relative to the baseline aquatic information matter that the DEIS has only a “general list of fish species” and is missing information key to assessing adequately the new units’ impacts upon the fish in the vicinity of the VEGP. Joint Intervenor Answer at 11. In his affidavit supporting the Joint Intervenor response, Dr. Young states that Table 2-7 of the DEIS, rather than being a comprehensive discussion of the Savannah River’s aquatic environment, “omits detailed fish species’ life history stage information” and that such information “is of paramount importance in determining current and future impacts.” Affidavit of Shawn Paul Young, Ph.D. (Nov. 13, 2007) at 3, 4 [hereinafter 2007 Young Affidavit].

Dr. Young also argues that Academy of Natural Sciences, Philadelphia (ANSP) studies used in the DEIS should not be relied upon to assess impacts because the studies (1) did not include some necessary information such as fish early life history stages, migration timing, distribution patterns, or population numbers; (2) utilized a “sampling protocol [that] is grossly insufficient to supply information needed to draw appropriate conclusions regarding the impact of the proposed Units 3 and 4 on fish species”; and (3) “were not intended or designed to be a systematic evaluation of the impacts of Plant Vogtle [Units 1 and 2], as they are being used in the DEIS.” *Id.* at 5-7.

f. Board Ruling

Given our determination in section II.B, above, that this portion of EC 1.2 is not a contention of omission, the issue before us now is whether there is a dispute as to any material fact relative to this item as it challenges the adequacy of the ER/DEIS baseline information for cooling system impacts. *See* 10 C.F.R. § 2.710(d)(2). We conclude that, through Dr. Young’s affidavit submitted in support of their motion,¹² Joint Intervenor have shown there is a dispute regarding genuine issues of material fact relating to baseline information for cooling system impacts. Thus, summary disposition is not appropriate.

One example of such disputed facts is the adequacy of the species’ descriptions in the DEIS. While the Staff and SNC contend that the species information provided in the DEIS contains enough information and in sufficient detail to allow for an evaluation of cooling system impacts, *see* Staff 1.2 Answer at 6, SNC 1.2 Dispositive Motion at 7-8, the Joint Intervenor expert makes specific allegations about information missing from the descriptions, *see* 2007 Young Affidavit at 3.

¹² Bearing in mind that summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained, *see MOX*, LBP-05-4, 61 NRC at 80-81, in this instance we find that the parties’ affidants and the information they provide are sufficient to establish disputed material facts as to this and two of the other three subject areas encompassed by EC 1.2, as we outline in more detail below.

We find these assertions sufficient to establish there is a genuine factual dispute about the material issue of the kind and detail of species information that should be in the ER/EIS such that the matter cannot be resolved on summary disposition.

Other genuine disputes as to material facts also are extant, including the adequacy of previous monitoring and studies as they relate to the current impacts of Plant Vogtle Units 1 and 2. As was noted in section II.D.1.e, above, Joint Intervenors make supported allegations regarding the adequacy of the ANSP studies in the DEIS, which are used extensively to assess the current aquatic population near the site and the impacts that Plant Vogtle Units 1 and 2 have had on that population. *See* 2007 Young Affidavit at 5-8.

Nor are we dissuaded from concluding these ANSP reports properly establish such disputes by the fact the reports were neither referenced in the admitted contention nor the information supplied to provide a basis supporting of the contention. To be sure, their status of newly introduced materials raises the question whether they can be relied upon as support for the Joint Intervenors challenge to the SNC summary disposition request absent an amended or new contention.¹³ In our estimation, however, the Joint Intervenors current assertions regarding the ANSP reports are part of the larger argument, made in Dr. Young's 2006 affidavit provided as part of the basis for EC 1.2, that the information utilized in the ER regarding Units 1 and 2 impacts, as outlined in the 1985 VEGP operating license-related FEIS, is inadequate and that new, properly conducted studies are needed. In Dr. Young's original affidavit, he argued the SNC ER lacked appropriate data to support its conclusion that Units 1 and 2 have had insignificant impacts upon aquatic species. *See* 2006 Young Declaration at 4. Based upon this alleged deficiency, Dr. Young asserted that "a study of entrainment and impingement associated with the existing intake structure is necessary to determine the cumulative withdrawal effects." *Id.* The Joint Intervenors

¹³In general, in the face of a Staff DEIS or FEIS that includes additional probative information the Staff believes is relevant to the subject matter of an admitted contention initially footed in an applicant's ER, an intervenor would be wise to amend its contention (or submit a new contention) to reflect any relevant changes or additions, thereby avoiding any question about whether this additional information falls outside the scope of the admitted contention so as to preclude it from consideration as support for the contention. *See* 10 C.F.R. § 2.309(f)(2). By doing so, they avoid the fate of the intervenors in the *Seabrook* proceeding who asserted that a contention concerning "the prevention of the accumulation of mollusks, other aquatic organisms, and debris in cooling systems" allowed them to make arguments regarding "microbiologically-induced corrosion." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 95 (1988). In that instance, the Appeal Board concluded they could not, noting that while the language of the contention mentioned neither blockage nor corrosion of the cooling system, the contention's heading ("Blockage of Coolant Flow to Safety-Related Systems and Components by Buildup of Biological Organisms") and its assigned basis, which relied solely on a May 1982 *Federal Register* notice about cooling system blockages, clearly showed that the contention "was intended to embrace only cooling system blockage." *Id.* at 97.

criticisms of the ANSP reports are a relatively straightforward elaboration of this argument, as Joint Intervenors continue to assert that insufficient information has been provided with which accurately to assess the impacts of the existing or new units.

In accord with 10 C.F.R. § 2.309(f)(1), the support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity so as “to put the other parties on notice as to what issues they will have to defend against or oppose.” *Seabrook*, ALAB-899, 28 NRC at 97. Certainly, Dr. Young’s affidavit put SNC and the Staff on notice that Joint Intervenors found such “baseline” data insufficient. Moreover, the Board specifically noted that litigation regarding the merits of EC 1.2 may “involve the question of the adequacy of the baseline information provided by SNC relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities.” LBP-07-3, 65 NRC at 257. We thus find the Joint Intervenors reliance on the ANSP reports as a basis for establishing the existence of material factual disputes is not violative of the scope of EC 1.2.

Having concluded the SNC attempt to establish there is no genuine material factual dispute regarding the adequacy of the baseline aquatic information to support the conclusions in the ER/DEIS has been forestalled by the information presented by Joint Intervenors, we deny the SNC summary disposition request relative to this item.

2. *Impingement and Entrainment*

a. Joint Intervenors Initial Petition

As set forth in the Joint Petitioners initial petition, EC 1.2 also alleged that the SNC ER did not adequately consider the direct, indirect, and cumulative impacts upon aquatic organisms of entrainment (i.e., when aquatic organisms are carried into the cooling system) and impingement (i.e., when aquatic organisms collide with cooling system components). *See* Intervention Petition at 10. Although SNC in its ER concluded that such impacts will be minor, *see* [SNC] [ESP] Application for the [VEGP], Part 3, [ER] at 5.3-3, 5.3-4 (rev. 1 Nov. 13, 2006) (ADAMS Accession No. ML063210565) [hereinafter ER], Joint Intervenors challenged this assertion, claiming that (1) not enough information was provided to come to any conclusion regarding impacts; and (2) the assumptions used in the applicant analysis were faulty.

More specifically with regard to the first concern, Joint Intervenors argued that the ER lacked enough information about the site’s current species, particularly those with a high probability of entrainment, to assess whether entrainment and impingement present a danger to these species. *See* 2006 Young Declaration at

3. Joint Intervenors also asserted that the current units have never been properly monitored, with SNC instead choosing to rely upon a 1985 study to support the conclusion that the impacts of the new units will be minor, which Dr. Young called “unwarranted,” and “improper and misleading.” *Id.* at 4. To make up for these informational deficits, Dr. Young called for “a study of entrainment and impingement associated with the existing intake structure . . . to determine the cumulative withdrawal effects.” *Id.*

As to the latter claim, Joint Intervenors found fault with a number of assumptions used in the ER analysis. For instance, Dr. Young argued “[t]he assumption of a uniformly distributed drift community is invalid.” *Id.* at 4. Dr. Young was particularly critical of the assumptions about water levels made in the ER’s analysis, arguing the analyses should have used a lower minimum guaranteed river flow level and a higher maximum percentage for how much of the river is withdrawn by Units 1 and 2. *See id.* at 6.

b. Board Contention Admissibility Discussion

The Board admitted the entrainment/ impingement aspects of the contention, along with those relating to thermal and chemical impacts. In doing so, the Board concluding that “[f]or each of the asserted deficiencies concerning the ER impact discussion regarding the intake/discharge structure for the two new proposed facilities — impingement/entrainment, chemical discharges, and thermal discharges, including cumulative impacts from these items associated with the existing Vogtle facilities — ” Dr. Young’s affidavit provided sufficient support. LBP-07-3, 65 NRC at 258.

c. SNC Motion for Summary Disposition

In support of its request for summary disposition of EC 1.2, SNC argues that the DEIS identifies and considers direct, indirect, and cumulative impingement/entrainment impacts. *See* SNC 1.2 Dispositive Motion at 13. In this regard, SNC specifically points to the Staff’s analysis of the proposed facilities’ intake structure design and scrutiny of the existing facilities’ intake screens, the Staff’s discussion of SNC’s ongoing obligation to report any unusual environmental events, and the Staff’s examination of “the percentage of water withdrawn, the planned low through-screen intake velocity, the design of the closed-cycle cooling system, the typically high fecundity of most species inhabiting rivers, the existence of multiple spawning sites within the river basin and the high natural mortality rates of eggs and larvae.” *Id.* at 14-15. SNC argues that the many existing studies, including many field studies, used to prepare the DEIS

in conjunction with the analysis of those studies done by the Staff constitute the “hard look” required in an EIS. *Id.* at 13-16.

d. Staff Answer

In its response to the SNC motion, the Staff also argues that the Joint Intervenors concerns have all been addressed in the DEIS in that “the DEIS analyzes the potential impacts of impingement/entrainment on the above-cited species (including, for all of the species, any life history phases of particular susceptibility to impingement/entrainment impacts, such as egg and larval).” Staff 1.2 Answer at 6. The Staff further asserts that the Joint Intervenors concerns regarding a uniformly distributed drift community assumption have been addressed and any alleged deficiency cured because “the DEIS considers the appropriateness of the assumption of a uniformly distributed drift community,” and found that it was a conservative assumption. *Id.* at 7. As to water levels, the Staff notes that the DEIS includes a full analysis of impingement and entrainment at the minimally measurable river level. *Id.* at 13.

e. Joint Intervenors Answer

Joint Intervenors declare there are still a number of material facts as to which there is a genuine issue. These include whether the DEIS was incorrect in assuming the distribution of fish eggs and larval fish is uniform, or “mistakenly assumes greater mobility of fish eggs and larval fish,” either of which would mean the DEIS underestimated the impacts from entrainment. Joint Intervenors 1.2 Answer at 11, 13. In his supporting affidavit, Dr. Young dismisses the SNC entrainment/impingement assessment efforts and the Staff’s site visit to assess those efforts that are discussed in the DEIS as insufficient. According to Dr. Young, the evidence gained from screened baskets several times a year “is a grossly inadequate method for analyzing impingement/entrainment from water withdrawal” while the Staff’s single site observation was “insufficient to make a definitive conclusion regarding impacts from entrainment.” 2007 Young Affidavit at 6.

Joint Intervenors also argue that a number of material facts remain in dispute regarding the Savannah River’s water level, including whether the Staff used the correct minimum low flow in the DEIS, *id.* at 15-16, and whether the cumulative impacts water withdrawal analysis in the DEIS should have included, in addition to the existing Vogtle units, withdrawals by nearby sites and by current and known future sites upstream, *see* Joint Intervenors 1.2 Answer at 15-16, 18; *see also* Affidavit of Barry W. Sulkin at 4-6, 10-11 (Nov. 9, 2007).

f. Board Ruling

This portion of EC 1.2 having likewise been found not to be a contention of omission, *see supra* section II.B, it is apparent that material factual disputes still exist regarding the adequacy of the ER/DEIS assessment of aquatic organism impingement and entrainment, making a grant of summary disposition improper at this time. *See* 10 C.F.R. § 2.710(d)(2). For instance, while the Staff and SNC argue that the assumption of a uniformly distributed drift community is a conservatism, the Joint Intervenors expert Young declares there exists a potential for larger impacts than those shown by a model using a uniformly distributed drift assumption. *Compare* SNC 1.2 Dispositive Motion at 16 n.2 *and* Staff 1.2 Answer at 7 *with* 2007 Young Affidavit at 9. Additionally, we find the Joint Intervenors discussions regarding larval fish mobility and screen basket cleanings and the NRC Staff's visit regarding those cleanings information that reflects existing material factual disputes. While this is post-ER information, we do not think it falls outside the ambit of this portion of EC 1.2 given Joint Intervenors devoted a considerable portion in their original, ER-related pleadings discussing larval fish mobility. *See* 2006 Young Declaration at 5. That discussion, which certainly provided SNC and the Staff with sufficient notice of this argument, marks these matters both as within the boundaries of the original contention and bases and relevant to the Board's ongoing consideration of these issues.

For the entrainment (as well as the thermal impacts) portion of the contention, there also exists a clear dispute between the parties about whether the existing impact analyses were based upon the correct minimum river levels so as to estimate properly the maximum percentage of the river withdrawn by the proposed units. Based on the information provided in Mr. Sulkin's supporting affidavit, Joint Intervenors argue the minimum low flow used in the DEIS, Drought Level 3 or 3800 cubic feet per second (cfs), is not the true minimum flow and that the thermal impacts and entrainment analyses should be redone utilizing the Thurmond Dam's Drought Level 4 conditions and the minimum flow Jackson, South Carolina gauge, which is lower than the Thurmond Dam's Drought Level 3.¹⁴ *See* Joint Intervenors 1.2 Answer at 15-16. Moreover, the fact that this analysis was not part of the information provided by Dr. Young in support of the original contention does not necessarily make it irrelevant. In his 2006 affidavit, Dr. Young calculated a maximum percentage of the river withdrawn by the proposed units using an assumption of 3828 cfs, based on the worst 7-day

¹⁴The Board notes that as of Tuesday, October 23, 2007, the minimum daily discharge from Lake Thurmond was reduced from 3800 cfs to 3600 cfs. *See* Army Corps of Engineers (<http://water.sas.usace.army.mil/cf/KavaPlot/KPlot.cfm?project=Thurmond>) (last visited on Jan. 14, 2008).

flow over a 10-year period (the 7Q10 flow identified in the ER),¹⁵ rather than the ER's assumption of 5800 cfs. *See* 2006 Young Declaration at 6. This calculation was provided, however, in the context of Dr. Young's larger argument that low water levels increase species' vulnerability to entrainment and "[t]he ER does not calculate normal and worst case scenarios based upon species composition in the river channel at different flows." *Id.* Accordingly, with SNC and the Staff having had notice that arguments regarding the Savannah River's minimum water levels and the maximum percentage withdrawn from the river would be raised, we consider this argument regarding Drought Level 4 to be within the ambit of the 2006 concern proffered in support of EC 1.2 that water level "worst case scenarios" have not been calculated properly.¹⁶

Another portion of the Joint Intervenors 2007 argument regarding water levels will not be considered further by the Board, however. In their answer opposing summary disposition, Joint Intervenors claim:

[The DEIS] does not take into account significant withdrawals in the immediate vicinity of Plant Vogtle, such as the D-Area Powerhouse and the Savannah River Site. It also does not take into account any withdrawals upstream of Plant Vogtle, such as the Urguhart Station, the Augusta Canal, the International Paper Mill at Augusta, or the City of Augusta. The DEIS does not take into account known future increases of withdrawals upstream from the Stevens Creek reservoir, which has recently applied to quadruple it[s] withdrawal.

Joint Intervenors 1.2 Answer at 18-19 (citations omitted). In contrast, in the Joint Intervenors original petition, as well as Dr. Young's supporting materials, the discussion of cumulative withdrawals includes only the existing Vogtle units. *See* Intervention Petition at 12-13 ("Thus, the ER fails to provide a meaningful basis to evaluate *the cumulative impacts of the new and existing intake structures on aquatic species*" (emphasis added)); 2006 Young Declaration at 4. Consequently, in their existing issue statement EC 1.2 and its supporting bases (which they

¹⁵ In light of the region's current drought, if the FEIS were issued today, the 7Q10 would be significantly lower. *See id.*

¹⁶ In this regard, we note it is clear from the 2006 Young Declaration that issues around minimum flows and the maximum percentage withdrawn would be some of the Joint Intervenors primary arguments. SNC and the Staff should not have been surprised by their inclusion in the Joint Intervenors answer, even if Joint Intervenors have updated the exact reasons why they believe that minimum flows have been miscalculated. We also note that in its statement of material facts not at issue, SNC uses the Staff's Drought Level 3 calculations as support for its summary disposition motion, referring to Drought Level 3 as utilized in the DEIS as "the maximum measurable drought." *See* SNC 1.2 Statement of Undisputed Facts at 3. This raises the concern whether, if Joint Intervenors are barred from questioning whether Drought Level 3 is indeed the "maximum measurable drought," would they also be barred from disputing a statement that, if undisputed, will be admitted as fact. *See supra* note 9.

choose not to amend), Joint Intervenors have failed to provide the other parties with notice that the issue of the impacts of cumulative withdrawals was intended to include anything other than the existing and proposed Vogtle units.¹⁷ Given, as we have previously recognized, *see supra* section II.D.1.f, that a purpose of the bases of a contention are “to put the other parties on notice as to what issues they will have to defend against or oppose,” *Seabrook*, ALAB-899, 28 NRC at 97, Joint Intervenors current argument that the DEIS must consider the cumulative impacts of water withdrawals by other facilities on the Savannah River (particularly as reflected in the last paragraph on page 18, continuing onto page 19, of Joint Intervenors answer and paragraphs 23 and 24 of the Sulkin affidavit) is outside the scope of EC 1.2 and will not be considered further by the Board.

3. *Thermal Pollution*

a. *Joint Intervenors Petition*

In their initial petition, Joint Intervenors argued that the ER lacked adequate information regarding both the probable attributes of the new units’ thermal plume and their likely effects upon the site’s species. *See* Intervention Petition at 13.

Regarding analysis of the plant’s plume, Dr. Young asserted that the thermal plume for the existing Vogtle facilities had never been measured and that the plumes from the existing plant may combine with the new plume, “resulting in an increased volume of the river affected by the thermal discharge.” 2006 Young Declaration at 7. Dr. Young also alleged relative to the effect of the plume upon the site’s ecology that there was no analysis of the plume or other thermal effects when water levels are low. *See id.* at 8. He further claimed that there are no data regarding thermal tolerances and species’ varying tolerances by life history stage and maintained that the ER only included discussions of fish that will not be affected much by the plume, rather than those that could be vulnerable, like larval and juvenile American shad. *See id.* at 7-8. Finally, Joint Intervenors declared that the cumulative thermal effects of all of the Vogtle units were inadequately analyzed. *See* Intervention Petition at 12-13.

¹⁷The only reference made to other facilities in either the intervention petition or the 2006 Young declaration relates to discharges: “the ER does not evaluate cumulative impacts from the new effluent discharge combined with the existing discharge and other sources of pollution in the area.” Intervention Petition at 13. What these other sources might be is never explained, and the sentences that follow only discuss “the existing discharge” and “the existing thermal plume.” *Id.* This is certainly not enough to give SNC and the Staff notice that Joint Intervenors meant anything other than the existing Vogtle units when discussing cumulative impacts and water withdrawals.

b. Board Contention Admissibility Discussion

Along with the entrainment/impingement and chemical impacts aspects of the contention, the Board admitted the Joint Intervenors thermal impacts concern, concluding that “[f]or each of the asserted deficiencies concerning the ER impact discussion regarding the intake/discharge structure for the two new proposed facilities — impingement/entrainment, chemical discharges, and thermal discharges, including cumulative impacts from these items associated with the existing Vogtle facilities —” Dr. Young’s affidavit provided sufficient support. LBP-07-3, 65 NRC at 258.

c. SNC Motion for Summary Disposition

SNC argues in its dispositive motion that the DEIS includes the analysis of thermal impacts required under NEPA. According to SNC, in the DEIS the Staff assumed conservative river conditions and determined the maximum size of the thermal plume. *See* SNC 1.2 Dispositive Motion at 19. According to SNC, “these efforts to assess conditions under maximum withdrawals, maximum temperatures and maximum droughts constitute the appropriate ‘worst-case’ analysis alleged to be missing, including analysis of 7Q10 flow conditions.” *Id.* at 19. In the alternative, SNC argues that “NEPA does not require a strictly worst case analysis.” *Id.* at 19 n.4. SNC also claims that the Staff adequately studied cumulative thermal impacts in the DEIS, asserting:

[T]he DEIS includes a discussion of NRC Staff’s thermal impact assessment using the CORMIX model to estimate the size and temperature of the thermal plume from the existing Units 1 and 2 as well as the proposed Units 3 and 4. The DEIS quantifies the size of the thermal plume, and based on their assessment of the size of the plume, the Staff concludes that “thermal impacts to aquatic ecosystems” would be minor. This includes impacts to American shad, which are specifically addressed as part of the aquatic ecosystem in section 2.7.2.1. The DEIS quantifies the maximum size of a thermal plume under worst case conditions.

Id. at 21-22.

d. Staff Answer

Citing the accompanying joint affidavit of Dr. Christopher King and Rebekah Krieg as support, the Staff declares that the DEIS includes an adequate analysis both of the proposed units and of the proposed and existing units cumulatively, making the thermal allegations in EC 1.2 moot. *See* Staff 1.2 Answer at 11; *see also* Joint Affidavit of Christopher B. Cook and Rebekah H. Krieg (Oct. 29, 2007) at 17-18. According to the Staff, it conducted an overly conservative analysis of

cumulative impacts in the DEIS, combining as one the new plume and the thermal plumes from the existing Vogtle units, as well as studying them separately. *See* Staff 1.2 Answer at 11. The Staff also declares that it studied the ability of fish to avoid the plume and the potential population impact, or lack thereof, to those organisms that cannot avoid the plume, like ichthyoplankton. *See id.*

In sum, the Staff claims that the thermal impacts conclusions in the DEIS, based on “calculations of the modeled plume size, duration, temperature and temperature differential (for different river flow levels and temperatures of the river at different times of the year),” are well founded such that “the DEIS cures the alleged deficiencies in the ER concerning the potential impacts of the thermal plume.” *Id.*

e. Joint Intervenors Answer

In their answer to the summary disposition motion, Joint Intervenors argue that material factual disputes remain regarding thermal impacts. As with the entrainment and impingement analyses, Joint Intervenors contend the Staff should have used lower minimal river flow numbers and higher VEGP maximum withdrawals, and thus a higher percentage of the river withdrawn into the cooling system. *See* Joint Intervenors Answer at 14-18. They also assert, as was noted above, *see supra* section II.D.2.e, that a uniformly distributed drift assumption is incorrect so that the impacts may be significantly higher. *See* Joint Intervenors Answer at 14.

f. Board Ruling

Relative to this portion of EC 1.2 that questions the adequacy of the information provided in the ER/DEIS regarding thermal pollution, *see supra* section II.B, a number of material factual disputes remain with regard to the potential thermal impacts of the proposed units’ cooling system upon aquatic organisms, making summary disposition inappropriate for this aspect of EC 1.2 as well. As was noted in section II.D.2.f, above, these disputes include what water levels should be used in models that estimate the size and impact of the thermal plume and whether the Staff is correct in assuming a uniformly distributed drift community in the DEIS analysis, both of which the Board also has found to be within the scope of the contention. This portion of the contention thus will be subject to further merits consideration by the Board.

4. Chemical Pollution

a. Joint Intervenors Petition

Joint Intervenors declared in their initial petition that in reaching the conclusion that impacts from the plant's chemical discharges would be minor, the ER failed to "disclose whether chemical constituents in the liquid effluent will be discharged at harmful levels." Intervention Petition at 12. Pointing to the chart in the ER that listed the possible water treatment chemicals with the disclaimer that "this list is representative, not definitive," ER at 3.6-5 (Table 3.6-1 & n.1)), Joint Intervenors asserted the chart revealed only some of the constituents and did not provide the amounts of the chemicals involved. *See* Intervention Petition at 11-12. Joint Intervenors also argued that, as with thermal discharges, cumulative impacts of the new chemical discharges combined with those from existing discharges and other sources of pollution were not adequately considered, stating "[t]he ER does not disclose field monitoring data from the existing discharge structure [and] [t]here is no evaluation of the acute or chronic toxicity of the existing discharge." *Id.* at 13.

b. Board Contention Admissibility Discussion

Admitting the Joint Intervenors chemical impacts concern along with the entrainment/impingement and thermal impacts aspects of the contention, the Board concluded that "[f]or each of the asserted deficiencies concerning the ER impact discussion regarding the intake/discharge structure for the two new proposed facilities — impingement/entrainment, chemical discharges, and thermal discharges, including cumulative impacts from these items associated with the existing Vogtle facilities —" Dr. Young's affidavit provided sufficient support. LBP-07-3, 65 NRC at 258.

c. SNC Motion for Summary Disposition

SNC argues in its motion that the Joint Intervenors claims regarding the absence of information about chemical discharges are moot because "Table 5-4 of the DEIS provides a detailed list of the water treatment chemicals, their use, the concentration that is anticipated to be discharged from Units 3 and 4 and the toxicity data from the Material Safety Data Sheets for each of those chemicals." SNC 1.2 Dispositive Motion at 23. SNC also maintains that "the DEIS does evaluate the cumulative impacts of acute or chronic toxicity of the existing discharge." *Id.*

d. Staff Answer

Like SNC, the Staff points to Table 5-4 of the DEIS, arguing that, using the chart's new information, the Staff evaluated the impacts from the discharges and provided an analysis that effectively addresses the Joint Intervenors complaint. The Staff concludes that "the Staff's DEIS has now addressed whether chemical discharge effluents would be discharged at harmful levels," so that the Joint Intervenors allegation of an omission is now moot. Staff 1.2 Answer at 9-10.

e. Joint Intervenors Answer

Joint Intervenors acknowledge this portion of the contention is now moot, admitting that "[t]he claim that the impact of chemicals on aquatic life was not properly addressed in the ER has subsequently been addressed in the DEIS." Joint Intervenors 1.2 Answer at 19.

f. Board Ruling

As Joint Intervenors have conceded, relative to the purported omission that is at issue in this portion of EC 1.2, *see supra* section II.B, the DEIS has addressed the contention's allegation that "[t]he ER fails to identify and consider direct, indirect, and cumulative . . . chemical . . . effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources." LBP-07-3, 65 NRC at 280. In contrast to the chemical discharge information provided in the ER, which was a simple and not necessarily comprehensive list of chemicals, the DEIS provides the concentration of each chemical at the discharge point, with a comparison of those concentrations to the concentrations that would be lethal for 50% of a sample population. *See* DEIS at 5-28 (Table 5-4).

The portion of EC 1.2 addressing chemical discharges thus is dismissed as moot.

III. CONCLUSION

Because we have concluded that, in the circumstances here, the November 21, 2007 motion by the Staff to strike portions of the Joint Intervenors 1.2 answer and the November 23, 2007 motion by SNC to strike portions of the Joint Intervenors 1.2 answer or, in the alternative, to file a reply were improvidently submitted, we decline to provide further substantive consideration to either.

With regard to the SNC October 17, 2007 summary disposition request, we conclude that, as a contention claiming a material omission in the ER that has now been addressed in the DEIS, the portion of EC 1.2 concerning chemical discharges

should be dismissed as moot. Further, with the exception of the matter of the cumulative impacts of water withdrawals by other facilities on the Savannah River that is outside the scope of the admitted contention, we find relative to the other portions of the EC 1.2 regarding baseline information, impingement/entrainment, and thermal impacts that SNC has failed to establish that there are no disputes of material fact relating to genuine issues, and so deny the SNC motion for summary disposition with regard to those aspects of the contention.¹⁸

For the foregoing reasons, it is this 15th day of January 2008, ORDERED, that:

1. The October 17, 2007 motion of Applicant SNC for summary disposition regarding Joint Intervenors issue statement EC 1.2 is *granted* as to that portion of the contention regarding chemical discharge impacts, which is dismissed as moot, and is *denied* as to the other aspects of the contention, consistent with the Board's ruling on the scope of the contention as it relates to the matter of the cumulative impacts of water withdrawals by other facilities on the Savannah River that is outlined in section II.D.2.f of this decision.

2. The November 21, 2007 NRC Staff motion to strike portions of the Joint Intervenors EC 1.2 answer to the SNC summary disposition motion and the November 23, 2007 motion by SNC to strike portions of the Joint Intervenors EC 1.2 answer to its dispositive motion or, in the alternative, to file a reply to that answer are *denied*.

3. Consistent with this opinion, EC 1.2 is *revised* to read as follows:

EC 1.2 — ER FAILS TO IDENTIFY AND ADEQUATELY CONSIDER
COOLING SYSTEM IMPACTS ON AQUATIC RESOURCES

CONTENTION: The ER fails to identify and adequately consider direct, indirect, and cumulative impingement/entrainment and thermal effluent discharge

¹⁸The current general schedule for this proceeding provides another opportunity for the submission of amended or new contentions and summary disposition motions following the issuance of the Staff's final EIS, currently scheduled for early July 2008. See Initial Scheduling Order, App. A, at 1-2. The Board assumes that any party decisions to amend or file new contentions or to submit another dispositive motion will be informed by this ruling.

impacts of the proposed cooling system intake and discharge structures on aquatic resources.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁹

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

James F. Jackson (by E. Roy Hawkens)
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 15, 2008

¹⁹Copies of this Memorandum and Order were sent this date by the agency's e-filing system to counsel for (1) Applicant SNC; (2) the Joint Intervenors; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James F. Jackson

In the Matter of

Docket No. 52-011-ESP
(ASLBP No. 07-850-01-ESP-BD01)

**SOUTHERN NUCLEAR OPERATING
COMPANY**

**(Early Site Permit for Vogtle
ESP Site)**

January 15, 2008

In this 10 C.F.R. Part 52 proceeding regarding the application of Southern Nuclear Operating Company (SNC) for an early site permit (ESP) for an additional two reactors at the Vogtle Electric Generating Plant site, ruling on an SNC motion seeking summary disposition regarding environmental contention (EC) 1.3, Environmental Report (ER) Dry Cooling System Alternatives Discussion Fails To Address Aquatic Species Impacts, the Licensing Board denies the motion, concluding that SNC failed to demonstrate there are no material factual disputes concerning genuine issues regarding the matter of the adequacy of the analysis of the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources that is the focus of the contention.

RULES OF PRACTICE: SUMMARY DISPOSITION (STANDARDS)

For proceedings that are being conducted pursuant to the “informal” hearing procedures of 10 C.F.R. Part 2, Subpart L, summary disposition motions are to be resolved in accord with the standards for dispositive motions for “formal”

hearings, as set forth in Part 2, Subpart G. *See* 10 C.F.R. § 2.1205(c). Summary disposition may be entered with respect to any matter (or all matters) in a proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” *See* 10 C.F.R. §§ 2.710(d)(2), 2.1205(c).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

The party proffering the summary disposition motion bears the burden of making the requisite showing by providing “a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” 10 C.F.R. § 2.710(a). A party opposing the motion must counter any adequately supported material facts provided by the movant with its own “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard,” with the recognition that, to the degree the responsive statement fails to contravene the material facts proffered by the movant, the movant’s facts “will be considered to be admitted.” *Id.*

RULES OF PRACTICE: DISMISSAL OF CONTENTION (MOOTNESS)

Commission precedent recognizes that for contentions (or portions of contentions) challenging an application as having omitted a required item (or items), post-contention admission events, such as issuance of a Staff draft environmental impact statement (DEIS), can render the contention subject to dismissal as moot, *see Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; SUPPORTING INFORMATION OR EXPERT OPINION)

When filed with an intervention petition, an environmental contention and its associated bases quite properly address an applicant’s ER, rather than the then still-being-developed Staff DEIS, *see* 10 C.F.R. § 2.309(f)(2) (contentions must be based on documents/information available when hearing petition to be filed).

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; NEED FOR NEW OR AMENDED CONTENTION)

A Board may consider environmental contentions contesting an applicant's ER as challenges to the agency's subsequent DEIS so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention's admission, submit a new contention. *See* 10 C.F.R. § 2.309(f)(2); *see also McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

RULES OF PRACTICE: CONTENTIONS (NEED FOR NEW OR AMENDED CONTENTION; MODES OF FORMULATION; OMISSION OR INADEQUACY); SUMMARY DISPOSITION (DISPUTE REGARDING NEED FOR NEW OR AMENDED CONTENTION)

In the context of a summary disposition motion, the question about the need to amend or file a new contention becomes relevant when there is a dispute about whether an admitted issue statement (or a relevant portion of such an issue statement) is a contention of omission — i.e., a contention challenging a portion of the application, because it fails in toto to address a required subject matter — or a contention of inadequacy — i.e., one that asserts the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 171-72 (2001) (dividing all contentions into “a challenge to the application's adequacy based on the validity of the information that is in the application; a challenge to the application's adequacy based on its alleged omission of relevant information; or some combination of these two challenges”); *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006).

RULES OF PRACTICE: CONTENTIONS (NEED FOR NEW OR AMENDED CONTENTION); DISMISSAL OF CONTENTION (MOOTNESS)

If intervenors have not sought to amend an environmental contention as admitted, to the degree the contention is one of omission, it is subject to dismissal

in connection with those aspects for which it is appropriately established the Staff DEIS provides any purported missing analysis or discussion.

RULES OF PRACTICE: SUMMARY DISPOSITION (SUFFICIENCY OF SUPPORTING EVIDENCE)

The argument that information provided in support of an intervenor's response to a summary disposition motion should not be considered because the information is outside the scope of the intervenor's admitted contention, if true, can be a meritorious assertion.

RULES OF PRACTICE: MOTIONS TO STRIKE; REPLY BRIEFS ON ANSWERS TO MOTIONS

A motion to strike is an inappropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention, as the Board can consider and resolve the issue without such a motion and without "striking" anything. Instead, the issue should have been raised in a reply pleading, for which permission to file should have been sought from the Board before the replies were due. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 (unpublished); *see also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer granted).

RULES OF PRACTICE: REPLY BRIEFS ON ANSWERS TO MOTIONS

While the current procedural rule governing summary disposition in formal agency adjudications under Part 2, Subpart G (as did its pre-2004 predecessor) clearly discourages the filing of replies to summary disposition responses, *see* 10 C.F.R. § 2.710(a) (2007) (following response by opposing party, no further supporting statements or responses will be entertained); *id.* § 2.749(a) (2003) (same); *but see id.* § 2.1205(b) (2007) (making no mention of replies relative to summary disposition in Part 2, Subpart L proceedings), given the ability of responding parties to interpose additional "factual" information by way of affidavits and other submissions, as well as the potential that exists under such a motion for a merits disposition of a contention (or portion of a contention), a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable Board discretionary decision permitting the filing. *Compare* 10 C.F.R. § 2.309(h)(2) (petitioner given opportunity to file reply

to applicant/staff answers to hearing requests); *id.* § 2.323(c) (permission to file reply to response to motion may be granted in compelling circumstances, such as when moving party could not reasonably anticipate response arguments).

RULES OF PRACTICE: SUMMARY DISPOSITION (SCOPE OF CONTENTION)

While a movant’s discussion of a matter in its summary disposition motion does aid the Board in understanding whether the issue is within the scope of the contention, at least to the degree it suggests the parties had notice of the matter, such a discussion does not necessarily establish that the matter is within the scope of a contention given that the movant’s discussion may also be outside the scope of the contention. Nonetheless, if a movant discusses a matter in its statement of undisputed facts, it would not be untoward for the Board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement. *See* 10 C.F.R. § 2.710(a) (“All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party”).

RULES OF PRACTICE: SUMMARY DISPOSITION (EXPERT OPINION)

Summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained. *See MOX*, LBP-05-4, 61 NRC at 80-81.

MEMORANDUM AND ORDER

(Ruling on Dispositive Motion and Associated Motions To Strike and To Supplement the Record Regarding Environmental Contention 1.3)

Before the Licensing Board in this 10 C.F.R. Part 52 proceeding regarding the application of Southern Nuclear Operating Company (SNC) for an early site permit (ESP) for two new units at the site of its existing two-unit Vogtle Electric Generating Plant (VEGP) is an SNC motion requesting summary disposition be entered in its favor relative to Joint Intervenors Environmental Contention (EC)

1.3.¹ This issue statement concerns the consideration of dry cooling as a design alternative to the wet cooling tower system proposed in the ESP. The NRC Staff supports the SNC dispositive motion, while Joint Intervenors oppose the request. Additionally, both the Staff and SNC have filed motions to strike portions of the Joint Intervenors response to the SNC motion or, in SNC's case, to file a reply to the Joint Intervenors response, which Joint Intervenors oppose. SNC also has lodged an unopposed motion to supplement the record relative to several matters raised in the Joint Intervenors answer to its dispositive motion.

For the reasons set forth below, we grant the SNC record supplementation motion but deny the SNC motion for summary disposition on EC 1.3, as well as the associated SNC and Staff motions to strike portions of Joint Intervenors response to the SNC dispositive motion.

I. BACKGROUND

As part of its August 2006 ESP application, SNC was required to include a "complete environmental report," or ER, addressing various issues pertaining to the National Environmental Policy Act of 1969 (NEPA).² In challenging the SNC ESP application, Joint Intervenors posited seven contentions raising concerns about various aspects of the SNC ER, including EC 1.3, ER Alternatives Discussion Fails To Address Aquatic Species Impacts.

As originally framed, EC 1.3 dealt with both the ER discussion of the no-action alternative, as well as the ER's consideration of the use of a dry cooling system as an alternative to the proposed Savannah River-based wet cooling tower system. *See* Petition for Intervention (Dec. 11, 2006) at 14-15 [hereinafter Intervention Petition]. In admitting the contention, the Board found that the no-action alternative aspect of the contention was inadmissible because it both failed

¹ The Joint Intervenors include the Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League.

² *See* 10 C.F.R. § 52.17(a)(2) ("A complete environmental report as required by 10 CFR 51.45 and 51.50 must be included in the application, provided, however, that such environmental report must focus on the environmental effects of construction and operation of a reactor, or reactors, which have characteristics that fall within the postulated site parameters and provided further that the report need not include an assessment of the benefits (for example, need for power) of the proposed action, but must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed"). Although a recent change in the agency's rules governing ESPs has moved the substance of section 52.17(a)(2) to section 51.50(b), *see* 72 Fed. Reg. 49,351, 49,512, 49,523 (Aug. 28, 2007), because the SNC ESP application was docketed well before the September 27, 2007 effective date of this revision, *see* 71 *id.* 60,195, 60,195 (Oct. 16, 2006), in the absence of a request by SNC to apply the new rule's provisions governing application content, *see* 72 *id.* at 49,522 (revised 10 C.F.R. § 52.17(a)), section 52.17(a)(2) as quoted above is applicable in this proceeding.

to address any specific deficiencies in the ER discussion of that alternative and to indicate why more information was needed to enhance that discussion in light of various Commission statements endorsing no-action alternative discussions that are brief and/or incorporate by reference other ER section discussions of a project's adverse consequences. *See* LBP-07-3, 65 NRC 237, 259-60 (2007). Relative to the dry cooling system discussion, the Board found that case law established SNC was justified in relying in its alternatives discussion on an extensive Environmental Protection Agency (EPA) analysis of dry cooling as a cooling system alternative in which EPA rejected dry cooling as the best available cooling system technology (or as a national minimum requirement) because its environmental benefits did not offset its costs, regional disparities, and energy efficiency losses. *See id.* at 260.

The Board also concluded, however, that SNC had not accounted sufficiently for EPA's additional observation that the use of a dry cooling system may nonetheless be appropriate in instances in which there is limited cooling water available or when the water body used for cooling had "extremely sensitive biological resources (e.g., endangered species, specially protected areas)." *Id.* (quoting 66 Fed. Reg. 65,256, 65,282 (Dec. 18, 2001)). Given that Joint Intervenors had provided examples of at least two species present in the Savannah River in the vicinity of the Vogtle facility that seemed to fit within the delineated parameters of the EPA's "extremely sensitive biological resources" designation, i.e., the shortnose sturgeon, a federally listed endangered species, and the robust redhorse, which until 1997 was thought to be extinct, the Board admitted the contention as a challenge limited to the need for an additional discussion of dry cooling as an appropriate alternative cooling system when sensitive species are present. *See id.* at 260-61. As admitted by the Board, the contention thus provides:

EC 1.3 — ER DRY COOLING SYSTEM ALTERNATIVES DISCUSSION FAILS TO ADDRESS AQUATIC SPECIES IMPACTS

CONTENTION: The ER fails to satisfy 10 C.F.R. § 51.45(b)(3) because its analysis of the dry cooling alternative is inadequate to address the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources.

Id. at 280.

Following the admission of this contention (as well as issue statement EC 1.2, which has been the subject of a separate SNC dispositive motion that we likewise address today, *see* LBP-08-2, 67 NRC 54 (2008), the Staff provided and has periodically supplemented the hearing file for this proceeding established in accord with 10 C.F.R. § 2.1203, and the parties have made the mandatory

disclosures required by section 2.336 relative to this contention.³ *See* Tr. at 199-207, 256-58. In establishing an initial schedule for this proceeding based on the planned Staff issuance of both the draft and final environmental impact statements (DEIS and FEIS) and its safety evaluation report (SER), the Board provided an opportunity for the filing of new or amended contentions relating to either of these documents, as well as for filing for summary disposition regarding any admitted contention or new/amended contention. *See* Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 3-5 & App. A (unpublished) [hereinafter Initial Scheduling Order].

Subsequently, the Staff issued its SER (albeit with open items) and its DEIS on August 30 and September 10, respectively. *See* Office of New Reactors (NRO), U.S. Nuclear Regulatory Commission (NRC), Safety Evaluation of the [ESP] Application in the Matter of [SNC], for the Vogtle [ESP] Site (Aug. 2007); 1 NRO, NRC, [DEIS] for an [ESP] at the [VEGP] Site, NUREG-1872 (Sept. 2007) [hereinafter DEIS]. Although the Board had established a time frame within which to do so, *see* Initial Scheduling Order, App. A, at 1, Joint Intervenors did not submit any new or amended contentions relative to either of these documents. Thereafter, in accordance with the terms of the Board's initial schedule, *id.*, on October 17, 2007, SNC filed a motion, accompanied by a statement of material facts purportedly not at issue and supporting affidavits, requesting that summary disposition be entered in its favor in connection with EC 1.3. *See* [SNC] Motion for Summary Disposition on Intervenors' Contention EC 1.3 (Oct. 17, 2007) [hereinafter SNC 1.3 Dispositive Motion]; [SNC] Statement of Undisputed Facts in Support of Applicant's Motion for Summary Disposition of Intervenor[s] [EC] 1.3 (Oct. 17, 2007) [hereinafter SNC 1.3 Statement of Undisputed Facts]. Also in accordance with the Board's initial schedule, on October 29, the Staff filed a response endorsing the SNC summary disposition motion. *See* NRC Staff Answer to [SNC] Motion for Summary Disposition of [EC 1.3] (Oct. 29, 2007) [hereinafter Staff 1.3 Answer]. This was followed on November 13 by the Joint Intervenors answer to the SNC motion, which included a statement of purported material facts at issue and a supporting affidavit, asserting that summary disposition was inappropriate in this instance. *See* Joint Intervenors' Answer Opposing [SNC] Motion To Dismiss as Moot, or in the Alternative, for Summary Disposition of

³In accordance with an April 3, 2007 Board memorandum and order issued in response to a March 23, 2007 joint motion from the parties, the parties have agreed, among other things, (1) that they need not identify draft versions of any document, data compilation, correspondence, or other tangible thing that must be disclosed; and (2) to waive the obligation to provide a privilege log required by 10 C.F.R. § 2.336(a)(3), (b)(5). *See* Licensing Board Memorandum and Order (Ruling Regarding Joint Motion on Mandatory Disclosures and Scheduling Prehearing Conference) (Apr. 3, 2007) at 2-4 (unpublished); *see also* Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 2 (discussing privilege log production waiver and disclosure of electronically stored information (ESI)) (unpublished).

Joint Intervenor[s'] Contention 1.3 (Nov. 7, 2007) [hereinafter Joint Intervenor's 1.3 Answer].

Thereafter, on November 21 and 23, 2007, respectively, the Staff and SNC submitted motions requesting that portions of the Joint Intervenor's November 13, 2007 answer to the SNC October 17, 2007 motion requesting summary disposition of EC 1.3 and the accompanying affidavit be stricken as outside the scope of admitted issue statement EC 1.3. *See* NRC Staff's Motion To Strike Portions of Joint Intervenor's Answer Opposing Summary Disposition of EC 1.3 (Nov. 21, 2007) [hereinafter Staff 1.3 Motion To Strike]; [SNC] Motion To Strike or in the Alternative for Leave To Reply to Joint Intervenor's Answer Opposing [SNC's] Motion for Summary Disposition of [EC] 1.3 (Nov. 23, 2007) [hereinafter SNC 1.3 Motion To Strike]. Alternatively, pursuant to 10 C.F.R. § 2.323(c), SNC requested that it be given the opportunity to file a reply to the Joint Intervenor's answer. *See* SNC 1.3 Motion To Strike at 2, 10. Additionally, on that same date SNC submitted a motion seeking to supplement the record relative to its dispositive motion. *See* [SNC] Motion To Supplement the Record Regarding [SNC] Motion for Summary Disposition of [EC 1.3] (Nov. 23, 2007) [hereinafter SNC 1.3 Motion To Supplement]. In responsive filings dated November 30, 2007, the Staff indicated that it supported the SNC November 23 motion to strike and did not oppose the SNC November 23 motion to supplement. *See* NRC Staff's Answer to Southern's Motion To Strike or in the Alternative to Reply to Joint Intervenor's Answer to Motion for Summary Disposition of EC 1.3 (Nov. 30, 2007); NRC Staff's Answer to Southern's Motion To Supplement the Record Regarding Southern's Motion for Summary Disposition of EC 1.3 (Nov. 30, 2007). On December 5, 2007, Joint Intervenor's filed a response to the SNC motion to supplement consenting to the proposed record supplementation and, a day later, submitted a response opposing both the Staff and SNC motions to strike.⁴ *See* Intervenor's Answer to SNC's Motion To Supplement the Record Regarding SNC's Motion for Summary Disposition of EC 1.3 (Dec. 5, 2007) at 1; Intervenor's Answer in Response to SNC and NRC Staff Motions To Strike Portions of Intervenor's Answer to Motion for Summary Disposition of EC 1.3 (Dec. 6, 2007) [hereinafter Joint Intervenor's Response to 1.3 Motions to Strike].

⁴ After missing the December 3, 2007 deadline to answer the SNC and Staff motions to strike, *see* 10 C.F.R. § 2.323(c), Joint Intervenor's petitioned the Board for a 3-day extension of time in which to respond, which the Board granted. *See* Joint Intervenor's Unopposed Motion for Extension of Time To File Answers to NRC Staff's Motion To Strike and SNC Motions To Strike and To Supplement Record (Dec. 4, 2007); Licensing Board Order (Granting Extension of Time) (Dec. 5, 2007) at 2 (unpublished).

II. ANALYSIS

A. Summary Disposition Standards

For proceedings such as this one that are being conducted pursuant to the “informal” hearing procedures of 10 C.F.R. Part 2, Subpart L, *see* LBP-07-3, 65 NRC at 274, summary disposition motions are to be resolved in accord with the standards for dispositive motions for “formal” hearings, as set forth in Part 2, Subpart G, *see* 10 C.F.R. § 2.1205(c). In that regard, 10 C.F.R. § 2.710(d)(2) provides that summary disposition may be entered with respect to any matter (or all matters) in a proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.”

The party proffering the motion bears the burden of making the requisite showing by providing “a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” *Id.* § 2.710(a). On the other hand, a party opposing the motion must counter any adequately supported material facts provided by the movant with its own “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard,” with the recognition that, to the degree the responsive statement fails to contravene any adequately supported material facts proffered by the movant, the movant’s facts “will be considered to be admitted.” *Id.*

Before applying these standards, however, in light of (1) Commission precedent recognizing that for contentions (or portions of contentions) challenging an application as having omitted a required item (or items), post-contention admission events, such as issuance of a Staff DEIS, can render the contention subject to dismissal as moot, *see Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)*, CLI-02-28, 56 NRC 373, 383 (2002); and (2) SNC and Staff insistence that this contention should be resolved consistent with this precedent, *see* SNC 1.3 Dispositive Motion at 11-12; Staff 1.3 Answer at 4-5, we consider whether EC 1.3 (or any portion of that issue statement) properly is subject to disposition on this basis.

B. Environmental Contention 1.3 — Contention of Omission or Contention of Inadequacy

While the Joint Intervenors admitted contention and associated bases quite properly addressed the SNC ER, rather than the Staff DEIS, *see* 10 C.F.R. § 2.309(f)(2) (contentions must be based on documents/information available when hearing petition to be filed), as SNC notes in a related filing in this

proceeding, “the Board may consider environmental contentions made against an applicant’s ER as challenges to an agency’s subsequent DEIS.” [SNC] Motion for Summary Disposition of Intervenor’s [EC] 1.2 (Cooling System Impacts on Aquatic Resources) at 4 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) (approving a Board decision to treat an intervenor’s contentions addressing the ER as challenges to the FEIS)); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (discussing such a substitution with the superseding DEIS), *petition for review denied*, CLI-04-4, 59 NRC 31, 40-41 (2004). This is appropriate, however, only so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention’s admission, submit a new contention.⁵ *See* 10 C.F.R. § 2.309(f)(2); *see also McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

In the context of a summary disposition motion, this question about the need to amend or file a new contention becomes relevant when there is a dispute, as there is here, *see infra* page 96, about whether an admitted issue statement (or a relevant portion of such an issue statement) is a contention of omission — i.e., a contention challenging a portion of the application, such as the ER, because it fails in toto to address a required subject matter — rather than a contention of inadequacy — i.e., one that asserts the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect. *See Private Fuel Storage*, LBP-01-23, 54 NRC at 171-72 (dividing all contentions into “a challenge to the application’s adequacy based on the validity of the information that is in the application; a challenge to the application’s adequacy based on its alleged omission of relevant information; or some combination of these two challenges”); *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006). In *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286 (2004), in connection with intervenor contentions of omission charging that an application was missing certain design information, the Licensing Board rejected as improper an intervenor attempt to use those same contentions, once the information had been provided in a subsequent applicant filing, to then challenge the quality of the additional

⁵ In establishing the schedule for possible summary disposition motions regarding the Joint Intervenor’s admitted contentions following the release of the Staff DEIS (as well as the FEIS), the Board recognized the potential need to amend or file new contentions prior to the submission of dispositive motions. *See* Initial Scheduling Order, App. A, at 1-2.

applicant information, and thereby interpose disputed material factual issues. Rather, according to the *MOX* Licensing Board, the contentions should have been amended. *See id.* at 292-93. Since they were not, the *MOX* Board concluded that a dispositive motion seeking dismissal of the contentions as moot was appropriate. *See id.* at 293.

In this instance, because Joint Intervenors have not sought to amend EC 1.3 as admitted, to the degree the contention is one of omission, it is subject to dismissal if it is appropriately established that the Staff DEIS provides any purported missing analysis or discussion. Here, an evaluation of EC 1.3 in this regard is made somewhat more complicated by the fact that the Board did not, in admitting the contention, explicitly state whether EC 1.3 was a “contention of omission.” For their part, in asserting summary disposition is appropriate, SNC and the Staff contend EC 1.3 is a contention of omission, while Joint Intervenors argue it is not. *See* SNC 1.3 Dispositive Motion at 11-12; Staff 1.3 Answer at 4-5; Joint Intervenors 1.3 Answer at 2, 15-16.

In reaching a determination about whether this contention is properly classified as one of omission or inadequacy, we note initially that the text of EC 1.3, which declares that the SNC ER “fails to satisfy 10 C.F.R. § 51.45(b)(3) because its analysis of the dry cooling alternative is *inadequate* to address the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources” (emphasis added), and the Board’s description of the contention as one “concerning the need for an additional discussion of dry cooling as an alternative cooling system,” LBP-07-3, 65 NRC at 261, 280, certainly suggest it is one aimed at “inadequacy” rather than “omission.” Moreover, as Joint Intervenors point out, “there was already information in the record regarding dry-cooling alternatives,” Joint Intervenors 1.3 Answer at 15, specifically ER section 9.4.1.1, *see* [SNC] [ESP] Application for the [VEGP], Part 3, [ER] at 9.4-2 (rev. 1 Nov. 13, 2006) (ADAMS Accession No. ML063210565) [hereinafter ER].

Given these expositions of the issue statement’s objective, we conclude that EC 1.3 is, in fact, a contention of inadequacy rather than one of omission.

C. SNC and Staff Motions To Strike

In addition to resolving the question of the status of EC 1.3 as a contention of omission or inadequacy, prior to assessing the merits of the SNC motion relative to the summary disposition standards in section II.A, above, we also find it appropriate to address the procedural validity of the SNC and Staff motions to strike portions of the Joint Intervenors summary disposition answer. A major premise of both those motions is the assertion that, in claiming in their response that the DEIS discussion of a hybrid wet/dry system should be expanded, Joint Intervenors sought improperly to expand the scope of the admitted contention

without amending their issue statement.⁶ *See* Staff 1.3 Motion To Strike at 3-4; SNC 1.3 Motion To Strike at 2-5. Additionally, SNC contends that parts of the affidavit of Powers Engineering principal Bill Powers submitted in support of the Joint Intervenors response should be dismissed to the extent he (1) challenges the discussion in the affidavit of SNC Principal Engineer James W. Cutchens provided in support of the SNC dispositive motion regarding purported adverse construction and land use impacts of a dry cooling system on the VEGP site; and (2) asserts that a dry cooling system would not require significant changes to the AP1000 standard turbine building design. *See* SNC 1.3 Motion To Strike at 7-9.

To be sure, arguments that information provided in support of an intervenor's response to a dispositive motion should not be considered because the information either is outside the scope of the intervenor's admitted contention or lacks an adequately supported factual basis, if true, can be meritorious assertions. Whether a motion to strike is the appropriate procedural vehicle for raising such a claim relative to a dispositive motion response is, however, a different question.

Rule 12(f) of the Federal Rules of Civil Procedure does provide for the submission of a motion to strike, upon which the court can act to order "stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." There is no explicit mention of such a motion in the agency's rules of practice, but assuming there need not be, *see* 10 C.F.R. § 2.323(b), in the context of a summary disposition motion we do not consider a "motion to strike" to be the appropriate vehicle for raising the argument posited by both SNC and the Staff here. As Joint Intervenors correctly recognized, *see* Intervenors' Answer in Response to SNC and NRC Staff Motions To Strike Portions of Intervenors' Answer to Motion for Summary Disposition of [EC] 1.3 (Dec. 6, 2007) at 2-3 [hereinafter Joint Intervenors Response to 1.3 Motions To Strike], the issues of the scope of EC 1.3 and the adequacy of the materials provided in support of a summary disposition response are matters the Board can consider and resolve without such a motion and without "striking" anything. Consequently, the Staff and SNC arguments made in the motions to strike should have been framed in reply pleadings, for which timely permission to file should have been sought from the Board 3 business days before the replies were due.⁷ *See* Licensing

⁶In its motion, SNC also asks that those portions of the Joint Intervenors response challenging the adequacy of the DEIS analysis of dry cooling be stricken because EC 1.3 is a contention of omission, *see* SNC 1.3 Motion To Strike at 5-6, a characterization we addressed in section II.B, above.

⁷Of course, in accord with the procedures we have established in this case, a reply would have been due within 7 days after the submission of the Joint Intervenors summary disposition motion response rather than the 10 days generally provided for a motion. *Compare* Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 n.4 (unpublished) *with* 10 C.F.R. § 2.323(a). If SNC and the Staff needed additional time for their replies, however, the appropriate mechanism for

(Continued)

Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 (unpublished); *see also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer granted).

Both the Staff and SNC motions to strike (and the associated SNC request for leave to file a reply) are thus denied. Nonetheless, without regard to the Staff and SNC motions to strike (and as it would have done even if the motions had not been filed), in reviewing the SNC dispositive motion the Board will consider whether the information the parties provided as a basis for granting or denying the SNC summary disposition request is within the scope of EC 1.3 as admitted and is adequate to support their position regarding resolution of the motion.⁸

D. Analysis of Summary Disposition Request

With these precepts in mind, we turn to the substance of the SNC motion, considering whether SNC has shown that there exists no genuine issue as to any

obtaining that relief would have been a time extension motion, perhaps filed in conjunction with their request for leave to file a reply.

We also think it worth observing that while the current procedural rule governing summary disposition in formal agency adjudications under Part 2, Subpart G (as did its pre-2004 predecessor) clearly discourages the filing of replies to summary disposition responses, *see* 10 C.F.R. § 2.710(a) (2007) (following response by opposing party, no further supporting statements or responses will be entertained); *id.* § 2.749(a) (2003) (same); *but see id.* § 2.1205(b) (2007) (making no mention of replies relative to summary disposition in Part 2, Subpart L proceedings), given the ability of responding parties to interpose additional “factual” information by way of affidavits and other submissions, as well as the potential that exists under such a motion for a merits disposition of a contention (or portion of a contention), a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable Board discretionary decision permitting the filing. *Compare* 10 C.F.R. § 2.309(h)(2) (petitioner given opportunity to file reply to applicant/staff answers to hearing requests); *id.* § 2.323(c) (permission to file reply to response to motion may be granted in compelling circumstances, such as when moving party could not reasonably anticipate response arguments).

⁸In this regard, Joint Interveners also argue that if an issue was first raised by the movant in a summary disposition motion, discussion of that issue in a response should not be stricken. *See* Joint Interveners Response to 1.3 Motion To Strike at 2. While a movant’s discussion of a matter in its summary disposition motion does aid the Board in understanding whether the issue is within the scope of the contention, at least to the degree it suggests the parties had notice of the matter, such a discussion does not necessarily establish that the matter is within the scope of a contention given that the movant’s discussion may also be outside the scope of the contention. Nonetheless, if a movant discusses a matter in its statement of undisputed facts, it would not be untoward for the Board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement. *See* 10 C.F.R. § 2.710(a) (“All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party”).

material fact in connection with EC 1.3, as well as the relevance of the arguments proffered both in support of, and in opposition to, the SNC dispositive motion regarding the proper scope of the admitted contention.

1. SNC Position

In support of its dispositive motion, SNC submits twenty-seven purported undisputed material factual statements, supported by affidavits from SNC Environmental Project Manager Thomas C. Moorer and SNC Principal Engineer James W. Cutchens, to demonstrate there has been adequate environmental consideration of dry cooling to merit the entry of summary disposition in its favor with respect to EC 1.3. *See* SNC Undisputed Facts Statement; Affidavit of Thomas C. Moorer (Oct. 17, 2007); Affidavit of James W. Cutchens (Oct. 15, 2007). In this regard, in addition to asserting that the status of EC 1.3 as a contention of omission mandates summary disposition in light of the Staff's DEIS, *see* SNC 1.3 Dispositive Motion at 10-12, an argument we declined to accept in section II.B, above, SNC also argues that dry cooling is not a feasible alternative for the VEGP site, thereby removing the need for any detailed NEPA evaluation of that system.

According to SNC, it has selected the Westinghouse AP1000 standardized design as the conceptual design for its two additional potential units on the Vogtle site. This design includes a closed-loop cooling system with a traditional turbine steam surface condenser and a wet evaporative cooling tower that uses cooling water as the heat transfer medium. During this process, exhaust steam from the condenser creates backpressure on the turbines, which affects their efficiency and operability. *See id.* at 13, 14. A dry cooling system also generates backpressure, although in that system backpressure is a function of the difference between the temperature of the outside air and the temperature of the steam condensing inside the metal-finned tube bundles that form each of the air-cooled condenser (ACC) units that serve as the system's heat transfer mechanism. *See id.* at 14. SNC asserts that the backpressure associated with a dry cooling system generally is higher than that from a wet cooling arrangement. *See id.* at 14-15.

SNC maintains using dry cooling in Georgia's hot, humid summers would result in both average and upper-limit backpressures well outside the acceptable range for the 1193-megawatt (MW) triple-pressure turbines SNC proposes be used, requiring that electrical output be reduced by approximately 10%. *See id.* at 14-18. Further, according to SNC, to achieve backpressures in an acceptable range for using dry cooling would require extensive and costly design changes. *See id.* at 17. Moreover, SNC asserts using dry cooling would result in substantial land use impacts associated with constructing more than 300 cooling modules, including removing a large number of additional trees and possibly a pond, as well as add costs in excess of \$700 million. *See id.* at 18-19. Finally, SNC contends that using dry cooling would be contrary to the NRC's policy to strongly encourage

standardization for the next generation of nuclear power plants, including, to the extent practicable, balance of plant systems such as a cooling system. *See id.* at 19-20. As a consequence, SNC declares any further discussion of dry cooling is unnecessary in light of the NEPA rule of reason that does not require an extended analysis of alternatives that are technically incompatible with, as well as more economically and environmentally costly than, the proposed project.

2. Staff Position

Although relying principally on the argument that EC 1.3 is a contention of omission, the Staff declines to endorse the SNC argument that the Commission's policy encouraging standardization obviates the need for any NEPA alternatives discussion of the dry cooling option. *See* Staff 1.3 Answer at 8 n.10. Additionally, while asserting that the detailed technical information provided by SNC in support of its motion is immaterial because the DEIS discussion renders EC 1.3 moot, the Staff also declares that this information further establishes the disadvantages of dry cooling. *See id.* at 5-8.

3. Joint Intervenors Position

In responding to the SNC and Staff filings, Joint Intervenors provide a statement of genuine issues of material fact in dispute, along with the supporting affidavit of Bill Powers, in which they contest a number of the factual statements provided by SNC. Besides contending that EC 1.3 is not a contention of omission, *see* Joint Intervenors 1.3 Answer at 15-16, an assertion with which we agree, *see* section II.B, above, Joint Intervenors also maintain the analyses of dry cooling in the ER and the DEIS are inadequate because each provides no more than "generalizations" about the cost or efficiencies of dry cooling as an alternative, *see* Joint Intervenors 1.3 Answer at 16-17. Moreover, according to Joint Intervenors, the SNC listing of material facts not in dispute is "riddled with flawed assumptions, misstatements of fact, and policy misinterpretation." *Id.* at 13.

In this regard, based on Mr. Powers' affidavit, Joint Intervenors contest the SNC suggestion that only lower backpressure turbines can be used, instead declaring that simpler and less expensive high backpressure turbines can be utilized. *See id.* at 5. They also point to statements by Mr. Powers declaring that the standardized AP1000 design is compatible with either a wet or dry cooling system and could be accommodated without an entire rework of the AP1000. *Id.* at 5, 10. Further, relying on Mr. Powers' supporting affidavit, Joint Intervenors contend that the flawed evaluation of the only viable dry cooling system proffered by SNC will result in an ACC design oversized by 100 units or more. *See id.* at 9-10. Additionally, they assert that the SNC claim that an ACC design needed to

permit effective and efficient operation of the additional Vogtle units is academic fails to account for current dry cooling systems at operating natural gas and coal-fired electrical generating facilities in Texas, Wyoming, and South Africa. *See id.* at 9, 14. Finally, Joint Intervenors contend SNC's assertion that use of a dry cooling system for the AP1000 runs contrary to the Commission's COL design standardization policy is incorrect because a facility's cooling system falls outside the scope of standardization as described by the NRC. *See id.* at 3-4.

4. Board Ruling

Regarding this contention of inadequacy, *see supra* section II.B, after reviewing the information provided by the parties in their summary disposition-related filings, including the various supporting affidavits,⁹ relative to the ER/DEIS consideration of the feasibility of dry cooling as a viable alternative to wet cooling and the impact of the proposed facilities' cooling systems on extremely sensitive biological resources, we find that the presentations of the supporting technical affiants of SNC and Joint Intervenors engender a myriad of disputed material factual issues. These include the type of turbines that can be used; the adequacy of current dry cooling system design for use in facilities like the proposed Vogtle plants; the impact of the climate in the vicinity of the VEGP on the efficacy of wet and dry system cooling; and the potential financial, environmental, and/or performance impacts upon facility design, construction, and/or operation of using a dry rather than a wet cooling system. We thus conclude that, at this juncture, disputes over a number of material facts exist such that entering summary disposition in favor of SNC regarding EC 1.3 would be inappropriate.

Moreover, contrary to SNC's suggestion, we are unable to conclude that the general Commission policy of encouraging standardization relative to the new round of COL applications precludes further litigation regarding Joint Intervenors NEPA-based issue statement EC 1.3. Initially, we note that the AP1000 design certification document referenced by SNC in its motion to supplement the record, *see* SNC 1.3 Motion To Supplement at 2,¹⁰ declares that "[t]he circulating water system and cooling tower are subject to site specific modification or optimiza-

⁹ Bearing in mind that summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained, *see MOX*, LBP-05-4, 61 NRC at 80-81, in this instance we find that the parties' affiants and the information they provide are sufficient to establish disputed material facts as we outline below.

¹⁰ As we noted in section I, above, at the same time SNC submitted its motion to strike relating to the Joint Intervenors answer to its dispositive motion, it filed an unopposed request to submit additional materials supplementing the record regarding its motion on the subject of the Texas natural gas-fired electrical generation facility that currently is using a dry cooling system and the scope of the AP1000 standard design document relative to cooling system design. We grant that motion and include those materials as part of the record before us relating to the SNC summary disposition motion.

tion” and “[t]he Combined License applicant will determine the final system configuration.” Westinghouse Electric Company LLC, AP1000 Design Control Document at 10.4-12 (rev. 15 2005) (ADAMS Accession No. ML053460410). Also, as the Staff quite properly recognizes, “the NRC’s policy of standardization of site specific systems does not conflict with its duty under NEPA to consider reasonable alternatives, including cooling system design alternatives that have the potential to mitigate adverse environmental impacts.” Staff 1.3 Answer at 8 n.10. As the Staff also points out, *see id.*, in its existing draft policy statement regarding the conduct of new reactor proceedings, the Commission itself states that it “encourages [COL] applicants to standardize the balance of their plants insofar as is practicable.” 72 Fed. Reg. 32,139, 32,142 (June 11, 2007). In this instance, this exhortation to utilize practicality in employing a standardized design, as well as the NEPA standard of reasonableness relative to the consideration of alternatives and the AP1000 design document, provide confluent bases for further consideration of this contention.

Having determined that litigation regarding EC 1.3 will proceed, we also note that one aspect of the Joint Intervenors claims in response to the SNC motion cannot be pursued further relative to this contention. In several instances, in addressing the viability of dry cooling as a counterpoint to wet cooling, Joint Intervenors made reference to the utility of a wet/dry hybrid system as a potential alternative. *See* Joint Intervenors 1.3 Answer at 7, 11-12. As a review of the Joint Intervenors original contention and its supporting bases makes clear, *see* Intervention Petition at 14-15 (only referencing and quoting ER discussion regarding dry cooling), their concern was with the adequacy of the ER discussion of dry cooling as a reasonable alternative, not the adequacy of the separate discussion in the SNC ER of a hybrid wet/dry cooling system as a alternative to a wet system, *see* ER at 9.4-2 to -3; *see also* DEIS at 9-26. Further, in admitting this contention, the Board narrowed the scope of any inquiry by declaring that the contention addresses the adequacy of the analysis regarding “the appropriateness of a dry cooling system *given the presence of extremely sensitive biological resources.*” LBP-07-3, 65 NRC at 280 (emphasis added). Accordingly, assuming EC 1.3 goes to an evidentiary hearing, Joint Intervenors will be free to present arguments and evidence regarding the merits of dry cooling and the impact of a wet cooling system upon “extremely sensitive biological resources,”¹¹ but any

¹¹ In this regard, the outcome of any adjudication regarding EC 1.3 seemingly bears a relationship to the adjudication regarding EC 1.2. The Board’s eventual findings relative to EC 1.2 regarding cooling system impacts, including “the adequacy of the baseline information provided by [the agency’s environmental statement] relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities,” LBP-07-3, 65 NRC at 259, may have a direct bearing upon its evaluation of whether, given these species’ presence, the agency’s NEPA discussion of dry cooling is adequate.

attempt to introduce into this litigation the subject of the viability of a hybrid wet/dry cooling system as a NEPA alternative is precluded as outside the scope of that contention as admitted.

III. CONCLUSION

Because we have concluded that, in the circumstances here, the November 21, 2007 motion by the Staff to strike portions of the Joint Intervenors 1.3 answer and the November 23, 2007 motion by SNC to strike portions of the Joint Intervenors 1.3 answer or, in the alternative, to file a reply were improvidently submitted, we decline to provide further substantive consideration to either.

With regard to the SNC October 17, 2007 summary disposition request, as supplemented by the material submitted in conjunction with its November 23, 2007 motion, we conclude that, with the exception of the matter of hybrid dry/wet cooling systems that is outside the scope of the admitted contention, the resolution of EC 1.3 continues to entail disputes of material fact relating to genuine issues, and so deny the SNC motion for summary disposition with regard to that contention.¹²

For the foregoing reasons, it is, this 15th day of January 2008, ORDERED that:

1. The unopposed November 23, 2007 SNC motion to supplement the record regarding its October 17, 2007 summary disposition motion is *granted*.
2. The October 17, 2007 motion of Applicant SNC for summary disposition regarding Joint Intervenors issue statement EC 1.3 is *denied*, consistent with the Board's ruling on the scope of the contention as it relates to the matter of hybrid dry/wet cooling systems that is outlined in section II.D.4 of this decision.
3. The November 21, 2007 NRC Staff motion to strike portions of the Joint Intervenors EC 1.3 answer to the SNC summary disposition motion and the November 23, 2007 motion by SNC to strike portions of the Joint Intervenors EC 1.3

¹²The current general schedule for this proceeding provides another opportunity for the submission of amended or new contentions and dispositive motions following the issuance of the Staff's final EIS, currently scheduled for early July 2008. *See* Initial Scheduling Order, App. A, at 1-2. The Board assumes that any party decisions to amend or file new contentions or to submit another dispositive motion will be informed by this ruling.

answer to its dispositive motion or, in the alternative, to file a reply to that answer are *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD¹³

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

James F. Jackson (by E. Roy Hawkens)
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 15, 2008

¹³Copies of this Memorandum and Order were sent this date by the agency's e-filing system to counsel for (1) Applicant SNC; (2) the Joint Intervenors; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Paul B. Abramson
Dr. Richard F. Cole

In the Matter of

Docket No. 40-8838-MLA
(ASLBP No. 00-776-04-MLA)

U.S. ARMY
(Jefferson Proving Ground Site)

February 28, 2008

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INITIAL DECISION

Before this Board is an application of the Department of the Army (Licensee) for the approval of an alternate schedule under 10 C.F.R. § 40.42(g)(2) for the submission of a decommissioning plan for its Jefferson Proving Ground (JPG) site located in Madison, Indiana, on which there is currently amassed a quantity of depleted uranium (DU) munitions.¹ The alternate schedule would provide the Licensee with a period of 5 years, concluding at the end of 2011, for the completion of a characterization of the JPG site, a condition precedent to the approval by the NRC Staff of a submitted decommissioning plan.

Accompanying the application was a Field Sampling Plan (FSP) that set forth the activities that the Licensee proposed to undertake in conducting the site characterization. The FSP’s adequacy to accomplish its intended purpose has been challenged by a local organization, Save the Valley, Inc. (Intervenor). Upon due consideration of the evidence submitted in support of, and in opposition to, that challenge, and for the reasons set forth below, we conclude that the FSP adequately supports the issuance of the requested alternate schedule.

¹ NRC Staff Exh. 13, License No. SUB-1435, Amendment No. 13 (Apr. 26, 2006).

I. BACKGROUND

Beginning in 1984, the Department of the Army (Licensee) conducted, under the auspices of an NRC materials license (SUB-1435), accuracy testing of depleted uranium (DU) tank penetration rounds at its Jefferson Proving Ground (JPG) site located in Madison, Indiana.² In 1994, the Licensee permanently ceased the testing, whereupon it was required by regulation to notify the NRC in writing of that development and, within 12 months thereof, to submit the required decommissioning plan.³

It was not, however, until 1999, some 5 years after cessation of testing, that a decommissioning plan was presented to the Staff and became the subject of a Notice of Opportunity for Hearing.⁴ In response to that notice, Save the Valley, Inc. (Intervenor), an organization with members residing in the immediate vicinity of the JPG site, sought a hearing.⁵ On a determination that the Intervenor fulfilled the requirements of the then provisions of Subpart L of the Rules of Practice, the Presiding Officer granted the hearing request in March 2000.⁶ In accord with the Licensee's unopposed request that "further proceedings be held in abeyance pending the outcome of its anticipated further interaction with the NRC Staff with regard to [that] plan," the proceeding was placed in a state of suspension.⁷

Well over a year later and with the proceeding remaining in a state of suspension, the Licensee submitted to the Staff an entirely new plan in June 2001, which it denominated its "final decommissioning/license termination plan."⁸ The Staff determined that this newly furnished and superseding licensing and termination plan needed site-specific sampling and modeling before it could be accepted for full review.⁹ The Licensee concluded, however, that obtaining such information would pose a safety threat to the Licensee and contractor personnel because of the presence onsite of unexploded ordnance.¹⁰

Accordingly, in mid-2003 the Licensee withdrew the license termination plan and put before the Staff a proposal that it be granted a license amendment that would create a 5-year, possession-only license (POLA) that would be renewable

² LBP-05-9, 61 NRC 218, 218 (2005).

³ See 10 C.F.R. § 40.42(d).

⁴ 64 Fed. Reg. 70,294 (Dec. 16, 1999).

⁵ [STV Request for Hearing] (Jan. 13, 2000).

⁶ See LBP-00-9, 51 NRC 159 (2000). Prior to the revision of the Rules of Practice in 2004, Subpart L proceedings were assigned to a single Presiding Officer rather than to a three-member Licensing Board.

⁷ *Id.* at 161.

⁸ LBP-05-9, 61 NRC at 219.

⁹ *Id.* at 220.

¹⁰ *Ibid.*

until such time as it became possible to perform the required site characterization safely. On October 28, 2003, the Staff published a *Federal Register* notice that indicated that it was considering the POLA request and provided an opportunity to seek a hearing on it.¹¹ After consultation with the parties, the Presiding Officer entered an order on December 10, 2003, dismissing the proceeding on the license termination plan, without prejudice to the Intervenor (then Petitioner) seeking to revive it should the decommissioning of the site once again receive active NRC consideration at the Licensee's behest.¹² A month later, on January 7, 2004, the Intervenor's timely hearing request regarding the proposed POLA was granted, along with that party's unopposed motion to hold further proceedings in abeyance pending the completion of the Staff's technical review of the POLA.¹³

Thus, by the beginning of 2005, there had yet to be a single filing by any party addressing what disposition was to be made of the amassed DU munitions on the JPG site.¹⁴ On March 31, 2005, the Presiding Officer sent a memorandum to the Commission, noting that the proceeding had dragged on for many years:

[S]ome 11 years have now elapsed since the Licensee terminated testing activities on its JPG site that left behind an accumulation of DU munitions. Perhaps more to the point, this past March 23 was the fifth anniversary of the grant of the hearing request of Petitioner. . . . Over the course of the past 5 1/2 years, the Staff has been favored with one proposed decommissioning plan; then a second one that was so deficient as submitted that the Staff would not commence a technical review of it; and, lastly, a proposal that the Licensee be granted a POLA, to be renewable until such time, if ever, that the Licensee should conclude that a site characterization can be safely accomplished. Close to 18 months have elapsed since the POLA proposal was accepted for technical review. Nonetheless, not only has the Staff not completed its technical review and issued the required [Environmental Assessment] and [Safety Evaluation Report], but also, we are now informed that it is unable to provide at this time any estimate as to when that might be accomplished. This is said to be because of its endeavor to obtain information from the Licensee that is deemed necessary to complete the review but has not as yet been produced.¹⁵

The Presiding Officer stated that such a collection of delays “appears to us both to work an injustice upon the Petitioner and its members and to be inconsistent with

¹¹ See 68 Fed. Reg. 61,471 (Oct. 28, 2003).

¹² See LBP-03-28, 58 NRC 437 (2003).

¹³ See Memorandum and Order (Granting Hearing Request and Motion To Hold Further Proceedings in Abeyance) (Jan. 7, 2004) (unpublished).

¹⁴ LBP-05-9, 61 NRC at 219.

¹⁵ *Id.* at 221-22.

the Commission's expectation — indeed insistence — that NRC adjudicatory proceedings move forward to conclusion with reasonable expedition.”¹⁶

On June 20, 2005, the Commission responded to the Board's March 31, 2005 memorandum, acknowledging Intervenor's then 5-year wait for a hearing and finding that “[t]his situation hinders public participation, leaves public safety issues unresolved, and thwarts this agency's goal of expeditious adjudication.”¹⁷ Accordingly, the Commission “order[ed] the Staff and the Licensee to report directly to the Commission on what steps [we]re being taken to resolve this matter.”¹⁸

On July 7, 2005, the Licensee reported that it was now prepared to assume the safety risks associated with site characterization and thus was abandoning the POLA proposal and seeking instead an alternate schedule amendment allowing “‘one 5 year period for the execution of appropriate site characterization, with the Licensee presenting the NRC a definitive license termination plan at the end of that period.’”¹⁹ As previously noted, *supra* page 106, the application for the alternate schedule was accompanied by an FSP under which the site characterization would be conducted.

The Staff then discontinued review of the 2003 POLA proposal in view of the submission of the “‘superseding license amendment for an alternate schedule.’”²⁰ The Staff intended to begin instead a new adjudication and accordingly, on June 27, 2005, published in the *Federal Register* a new notice of opportunity to request a hearing (regarding the alternate schedule request for submittal of a decommissioning plan).²¹ On September 12, 2005, the Presiding Officer rejected this approach and, instead, reinstated the conditionally dismissed prior proceeding concerning the decommissioning of the JPG site because “‘the decommissioning of the JPG site [had] once again receive[d] active NRC consideration at the Licensee's request.’”²² On October 26, 2005, the Commission affirmed the Presiding Officer's decision to reinstate the earlier proceeding, and ordered that Petitioner's standing “‘shall be considered already established.’”²³ The Commission also instructed that the remainder of the adjudication be conducted by a

¹⁶ *Id.* at 223.

¹⁷ CLI-05-13, 61 NRC 356, 357 (2005).

¹⁸ *Ibid.*

¹⁹ *See* LBP-05-25, 62 NRC 435, 438 (2005) (citation omitted).

²⁰ *Ibid.* (citation omitted). The Licensee then filed a motion seeking to dismiss the POLA proceeding on the ground of mootness. *Ibid.* The Board dismissed the POLA proceeding in November 2005. *See* LBP-05-30, 62 NRC 733, 731 (2005).

²¹ *See* 70 Fed. Reg. 36,964 (June 27, 2005).

²² LBP-05-25, 62 NRC at 440. The Board held the ruling in abeyance pending the Commission's ruling. *Id.* at 441.

²³ CLI-05-23, 62 NRC 546, 550 (2005).

three-member Licensing Board under the informal hearing procedures of the now-revised Subpart L.²⁴

A month later, Intervenor timely filed its petition to intervene and request for hearing addressed to the alternate schedule proposal, in which it advanced a number of contentions challenging the adequacy of the FSP to accomplish its intended purpose.²⁵ In response, the Licensee asserted that all of the proposed contentions were outside the scope of the alternate schedule proposal;²⁶ for its part, the Staff acknowledged that at least one contention was admissible.²⁷

The newly established three-member Licensing Board found that the Intervenor had one admissible contention under 10 C.F.R. § 2.309(f)(1).²⁸ The admitted contention, designated as Contention B-1, stated: “ ‘As filed, the FSP is not properly designed to obtain all of the verifiable data required for reliable dose modeling and accurate assessment of the effects on exposure pathways of meteorological, geological, hydrological, animal, and human features specific to the JPG site and its surrounding area.’ ”²⁹ Because the Intervenor proffered an admissible contention, the Board granted its request for hearing on the Licensee’s proposed alternate schedule.³⁰

The Board also granted the Intervenor’s “ ‘contemporaneous and unopposed motion to defer a hearing in the matter to await the completion of the NRC Staff’s technical review of the Licensee’s alternate schedule proposal,’ ” and noted that it would allow the Intervenor a period to amend its hearing request to reflect the results of the Staff’s review, if necessary.³¹ The Staff filed its Environmental Assessment, which concluded that the proposed licensing action would have no significant impact on human health and the environment.³² Then, on April 27, 2006, the Staff made available to the Board and parties its Safety Evaluation Report, together with the notification that, on the basis of its finding in that report of no undue risk from radiation to the public health and safety being posed by the alternate schedule proposal, it had issued the requested license amendment.³³

Accordingly, the Board reinstated the proceeding on May 1, 2006, and provided the Intervenor with an opportunity to amend its contention or to file new

²⁴ *Id.* at 548-50 (discussing how the changes to Subpart L would impact the present Intervenor in any future hearings).

²⁵ Petition To Intervene and Request for Hearing of Save the Valley, Inc. (Nov. 23, 2005).

²⁶ *See* LBP-06-6, 63 NRC 167, 176-78 (2006).

²⁷ *See id.* at 179-81.

²⁸ *Id.* at 186.

²⁹ *Id.* at 183.

³⁰ *Id.* at 186.

³¹ *Id.* at 186-87.

³² *See* 71 Fed. Reg. 13,435 (Mar. 15, 2006).

³³ *See* NRC Staff Exh. 12, NRC Staff Notification of License Amendment Issuance (Apr. 27, 2006).

contentions, as deemed necessary, in accordance with the contention filing and admissibility requirements of 10 C.F.R. § 2.309(c), (f)(2).³⁴ Pursuant to that order, on May 31, 2006, the Intervenor timely filed a motion for leave to withdraw, to amend, and/or supplement contentions³⁵ and, in a separate document, set forth the nine contentions and supporting bases it would have included in the evidentiary hearing.³⁶ In its response, the Licensee insisted that the Intervenor's new contentions were inadmissible but conceded that the Intervenor's motion to supplement Contention B-1 bases (m) and (q) should be granted.³⁷ The Staff maintained that of the Intervenor's newly proffered contentions, one was admissible, but that the Board should deny the Intervenor's request to clarify and to supplement selected bases for Contention B-1.³⁸ The Intervenor filed a timely reply, reasserting the admissibility of its new contentions and amended bases for Contention B-1.³⁹

After a prehearing conference in which the parties grappled with the FSP's evolutionary nature,⁴⁰ the Board on July 26, 2006, determined that it would be fruitful to suspend the proceeding and to allow the Intervenor and the Licensee (and the Staff, if it so chose) a period of consultation in which to attempt jointly to work out their concerns regarding the FSP.⁴¹

Following several months of negotiations, on November 9, 2006, the parties advised the Board that they were at an impasse, with the result that "[a]ll matters remain[ed] unresolved and the parties' respective positions remain[ed] unchanged."⁴² Given this report, the Board turned to addressing the admissibility of the Intervenor's new and amended contentions that were submitted in its May 31, 2006 motion to amend.

In a December 20, 2006 order, the Board denied the Intervenor's new and amended contentions, finding them inadmissible "except to the extent addressed to the adequacy of the Licensee's proposed site characterization activities."⁴³ In the order, the Board further defined the scope of the proceeding as follows:

³⁴ Licensing Board Order (Scheduling Further Proceedings) (May 1, 2006) at 3, 5 (unpublished).

³⁵ See Motion for Leave To Withdraw, Amend, and Supplement Contentions of Save the Valley, Inc. (May 31, 2006).

³⁶ See Final Contentions of Save the Valley, Inc. (May 31, 2006).

³⁷ Army's Response to the Motion for Leave To Withdraw, Amend, and Supplement Contentions of Save the Valley, Inc. Filed Herein on May 31, 2006 (June 19, 2006) at 3-7.

³⁸ See NRC Staff Response to Motion for Leave To Withdraw, Amend and Supplement Contentions by Save the Valley, Inc. (June 20, 2006) at 1, 5-6.

³⁹ See Reply in Support of Motion for Leave To Withdraw, Amend and Supplement Contentions of Save the Valley, Inc. (June 30, 2006).

⁴⁰ See, e.g., Tr. (July 19, 2006) at 16-18, 26-28.

⁴¹ See Licensing Board Order (Deferring Evidentiary Hearing) (July 26, 2006) at 1-3 (unpublished).

⁴² Second Joint Status Report on Settlement Negotiations (Nov. 9, 2006) at 2.

⁴³ LBP-06-27, 64 NRC 438, 440 (2006).

[W]hat the Licensee is here seeking is simply a 5-year period in which to characterize the JPG site, with the expectation that at the end of such time it will submit to the NRC Staff a viable decommissioning plan. During those 5 years it will be permitted *only* to conduct site characterization activities; no decommissioning operations may begin until such time as the Licensee submits, and the Staff approves, a decommissioning plan. . . . [T]he scope of this proceeding is limited to whether the Licensee’s proposal for characterizing the JPG site during the alternate schedule period — i.e., the next five years — is: (1) “necessary to the effective conduct of decommissioning operations”; (2) will “present[] no undue risk from radiation to the public health and safety”; and (3) “is otherwise in the public interest.” 10 C.F.R. § 40.42(g)(2).⁴⁴

The Intervenor’s previously admitted Contention B-1 remained viable because it was within the scope of the proceeding as so defined — i.e., the adequacy of the FSP was directly related to the Licensee’s ability to characterize adequately the site.⁴⁵ The Board held under advisement the acceptability for litigation of the various bases in support of Contention B-1, providing the Licensee and the Staff an opportunity to object upon the Intervenor’s submission of its prefiled testimony.⁴⁶

On February 23, 2007, the Intervenor submitted a motion to admit an additional contention, denominated Contention B-2.⁴⁷ Both the Licensee and the Staff filed a timely response to this motion, maintaining that this new contention, together with its supporting bases, was inadmissible because it was directed to the implementation of the FSP rather than the adequacy of the FSP and was therefore outside the scope of the proceeding.⁴⁸ The Board denied the Intervenor’s motion on May 1, 2007, finding Contention B-2 inadmissible as a challenge to the implementation of the FSP; however, to the extent that it challenged the adequacy of the FSP, the Board found Contention B-2 “subsumed within the context of admitted Contention B-1.”⁴⁹ The Board added, “[t]hat being so, the information (including data) cited in support of inadmissible Contention B-2 may be relied upon by Intervenor in the evidentiary hearing to be held on already-admitted Contention B-1 — which, once again, challenges the adequacy of the FSP to accomplish its intended site characterization purpose.”⁵⁰

The parties filed both initial and response testimony in preparation for the

⁴⁴ *Id.* at 447-48.

⁴⁵ *Id.* at 448.

⁴⁶ *Id.* at 447.

⁴⁷ *See* LBP-07-7, 65 NRC 507, 511 (2007).

⁴⁸ *Ibid.*

⁴⁹ *Id.* at 513.

⁵⁰ *Id.* at 514.

hearing.⁵¹ Dr. Diane S. Henshel, Mr. Charles H. Norris, and Mr. James M. Pastorick appeared as witnesses for the Intervenor; Mr. Dale Condra, Dr. Thomas McLaughlin, Mr. Jon M. Peckenpaugh, Dr. A. Christianne Ridge, and Mr. Adam L. Schwartzman appeared as witnesses for the Staff; and Mr. Harold W. Anagnostopoulos, Mr. Michael L. Barta, Mr. Paul D. Cloud, Mr. Todd D. Eaby, Mr. Joseph N. Skibinski, and Mr. Stephen M. Snyder appeared as witnesses for the Licensee. The parties also submitted proposed questions for the Board, in its discretion, to ask the parties' witnesses at the evidentiary hearing in order to clarify and to address any questions potentially raised by the prefiled testimony.⁵²

On October 22, 2007, the Board held the evidentiary hearing in Madison, Indiana. Prior to its commencement, the Board heard oral argument regarding the legal standards to be applied to the Army's alternate schedule application.⁵³ Given the number of witnesses and the varied technical issues, the Board divided the witnesses for the evidentiary hearing into the following topical panels: (1) Panel 1: Biota and Air Sampling; (2) Panel 2: Karst Geology (Well Locations, FTA Study, EI Study, unexploded ordnance (UXO) Issues); and (3) Panel 3: Soil, Water, and Sediment Sampling and Sample Analysis Methods.⁵⁴ After the conclusion of the hearing, the parties submitted proposed findings of fact and conclusions of law and their respective replies.⁵⁵

⁵¹ See Initial Statement of Position of Intervenor Save the Valley, Inc. (July 13, 2007); Reply of Intervenor Save the Valley, Inc. (Sept. 18, 2007); Surreply of Intervenor Save the Valley, Inc. (Oct. 2, 2007); NRC Staff Initial Statement of Position on Contention B-1 (Aug. 17, 2007); NRC Staff Reply and Sur-Rebuttal (Sept. 25, 2007); Army's Initial Statement of Position on Save the Valley Contention B-1 (Aug. 17, 2007); Prefiled Written Reply and Sur-Rebuttal Testimony of Joseph N. Skibinski in Response to Prefiled Rebuttal Testimonies of Intervenors of Save the Valley, Inc. (Sept. 24, 2007).

⁵² See Proposed Questions of Intervenor Save the Valley, Inc. for the Board To Consider Propounding to Staff and Army Witnesses (Oct. 9, 2007); NRC Staff Proposed Questions for Evidentiary Hearing (Oct. 9, 2007); U.S. Army's Proposed Questions (Oct. 9, 2007). These questions, originally filed under seal with the Board, will be made public in a separate issuance today in accordance with 10 C.F.R. § 2.1207(a)(3)(iii).

⁵³ Tr. at 79. Specifically, the parties were asked to address: (1) "[W]hat is it as a matter of law that the Army must accomplish under its alternate schedule?" and (2) "[A]ssuming that the Army is required at the end of the five years to have a site characterization that will support in full measure a decommissioning plan, precisely then what must again in the context of commission regulations, the site characterization include?" *Id.* at 81.

⁵⁴ Licensing Board Order (Oct. 11, 2007) at 2 (unpublished); see also Tr. at 132-33, 221-22, 282.

⁵⁵ NRC Staff Proposed Findings of Fact and Conclusions of Law, and Order in the Form of an Initial Decision (Dec. 7, 2007); U.S. Army's Proposed Findings of Fact and Conclusions of Law, and Order in the Form of an Initial Decision (Dec. 7, 2007); Proposed Findings of Fact, Conclusions of Law, and Initial Decision of Intervenor Save the Valley (Dec. 7, 2007) [STV Proposed Findings].

II. STANDARDS FOR THIS PROCEEDING

A. Legal Standard for This Alternate Schedule

As provided in 10 C.F.R. § 40.42(g)(2), an alternate schedule for the submittal of a decommissioning plan should be approved if it (1) is necessary to the effective conduct of decommissioning operations; (2) presents no undue risk from radiation; and (3) is otherwise in the public interest. The Licensee requested this alternate schedule in order to conduct a site characterization project as outlined in its FSP.⁵⁶

It is evident upon analysis that, for the JPG alternate schedule application to meet the section 40.42(g)(2) criteria, its FSP, or foreseeable modifications thereof, must be reasonably likely to generate the site characterization information needed to support a decommissioning plan to be submitted by 2011. The terms of the alternate schedule license amendment granted to the Licensee tie its issuance directly to the submission of a decommissioning plan by the end of 2011 or earlier.⁵⁷ For its part, that decommissioning plan must include an adequate site characterization.⁵⁸ In that regard, the Licensee already failed to include adequate site characterization information when it submitted a decommissioning plan in 2001;⁵⁹ now the Licensee has applied for 5 additional years in order to generate that needed information.⁶⁰

As noted above, approval of this alternate schedule request hinges, *inter alia*, upon a demonstration that prosecution of the alternative schedule as proposed by the Licensee is necessary to the effective conduct of decommissioning operations. Such necessity is clearly lacking, however, unless there is reasonable assurance that the FSP will generate in the allotted 5-year period the site characterization information needed to undergird the decommissioning plan. If such reasonable assurance is lacking, the 10 C.F.R. § 40.42(g)(2) criteria perforce are not met.⁶¹

Additional considerations of history and context support tying together the Licensee's plan for site characterization in the alternate schedule and the eventual site characterization standards of the decommissioning regulations. In determining the scope of the present inquiry, it is appropriate to take into account the extended delay in the submission of a viable decommissioning plan for this site, in that, as

⁵⁶ See NRC Staff Exh. 14, Field Sampling Plan (FSP) (May 25, 2005) at Cover Letter and FSP 1-1.

⁵⁷ See License No. SUB-1435, Amendment No. 13 (Apr. 26, 2006).

⁵⁸ 10 C.F.R. § 42.40(g)(4)(i).

⁵⁹ See CLI-05-13, 61 NRC at 357.

⁶⁰ See NRC Staff Exh. 14, FSP at 1-1.

⁶¹ See also LBP-07-7, 65 NRC at 513 (characterizing the contention as “whether what the Licensee informed the NRC Staff it proposed to do by way of site characterization is, in fact, adequate to accomplish the granted amendment’s objective, or whether it must be otherwise modified or conditioned by the Board”).

the Commission has observed, such delay “hinders public participation, leaves public safety issues unresolved, and thwarts this agency’s goal of expeditious adjudication.”⁶² Given that history, the issuance of this license amendment would scarcely have been “in the public interest” or “necessary to the effective conduct of decommissioning operations,” if, 5 years from now, and 17 years after site activity ceased, the site characterization is found to be *not* adequate to support an acceptable decommissioning plan.⁶³

For its part, the Staff’s insistence that it is currently irrelevant whether the Field Sampling Plan, or a reasonable modification of it, will provide enough information for a decommissioning plan’s site characterization in 2011,⁶⁴ ignores this context and the Licensee’s long-overdue decommissioning obligation. Decommissioning plans are not one-size-fits-all; context should be considered and indeed might be dispositive.⁶⁵

B. Standards for Site Characterization

Relative to the crafting of an adequate decommissioning plan, this agency regulates a relatively narrow area of concern. The decommissioning plan for this restricted release site will be judged exclusively upon whether it will lead to the following results: residual radioactivity levels as low as is reasonably achievable (ALARA) and offsite human beings receiving a total effective dose equivalent from the site below 25 mrem.⁶⁶ There are no requirements for the decommissioning plan regarding chemical toxicity, the general harm that unexploded ordnance might pose, or even ecological contamination, except as these issues affect radioactivity levels and exposure to humans.⁶⁷

The site characterization information, too, needs only to address possible human exposures to radioactivity.⁶⁸ This adjudication then does not, as we have previously noted, “encompass the entire JPG DU site decommissioning

⁶² CLI-05-13, 61 NRC at 357.

⁶³ NRC regulations require that a licensee submit a decommissioning plan within 12 months of permanent cessation of its authorized activity. 10 C.F.R. § 40.42(d).

⁶⁴ See Tr. at 88 (Roth).

⁶⁵ See, e.g., *FMRI, Inc. [formerly Fansteel, Inc.]* (Muskogee, Oklahoma Facility), LBP-04-8, 59 NRC 266, 275 (2004) (holding that, despite the lack of compliance with various agency NUREGs, a decommissioning plan was lawful because it acknowledged the fiscal realities of the licensee’s bankruptcy and was consistent with “the mandate that the plan be completed as soon as practicable and adequately protect the health and safety of workers and the public”).

⁶⁶ See 10 C.F.R. § 20.1403.

⁶⁷ *Ibid.*

⁶⁸ See, e.g., LBP-06-27, 64 NRC at 451 (holding that “section 40.42(g)(2) makes clear that, in its review of that proposal, the only health-related concern the Staff must evaluate is whether the alternate schedule will ‘present[] . . . undue risk from radiation to the public health and safety’”).

process.”⁶⁹ For instance, it does not encompass arguments about whether the decommissioning plan environmental impact statement or environmental assessment would require additional ecological information; any discussion regarding the sufficiency of that as of yet unwritten document belongs in a future National Environmental Policy Act (NEPA) challenge to the decommissioning plan’s environmental impact statement or environmental assessment, not in this narrow challenge to the alternative schedule.

For a licensee to provide sufficient assurance that the exposure to offsite persons is below 25 mrem, its decommissioning plan should identify and quantify all of the radioactive contamination’s significant pathways to humans. This is the primary purpose of the site characterization and provides the Board with its key standard. A site characterization plan should “provide sufficient information to allow the NRC to determine the extent and range of expected radioactive contamination.”⁷⁰

Other regulations and associated NUREG guidance repeat this standard. NRC regulations require that the decommissioning plan include “a description of the conditions of the site or separate building or outdoor area sufficient to evaluate the acceptability of the plan.”⁷¹ Acceptance of the plan is based upon its conformity to the 25-mrem standard.⁷² NUREG-1700, a guidance document for evaluating nuclear power reactor decommissioning plans, states that “[s]ite characterization information is provided to determine the extent and range of radioactive contamination on site, including . . . residues, soils, and surface and ground water.”⁷³ This guidance document counsels that a site characterization should be evaluated upon its completeness, use of sufficiently sensitive instruments, and proper quality assurance procedures.⁷⁴ The more specific indicators of completeness used in the document apply, however, only to reactors and thus not to the water, biota, and air testing controversies at the JPG site.⁷⁵ NUREG-1757 specifically provides guidance for restricted release sites like JPG, and states that a decommissioning plan for such a site should “characterize the location and extent of radiological

⁶⁹ *Id.* at 448.

⁷⁰ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 377 (2005).

⁷¹ 10 C.F.R. § 42.40(g)(4)(i).

⁷² *Id.* § 42.40(g)(4).

⁷³ NUREG-1700, “Standard Review Plan for Evaluating Nuclear Power Reactor License Termination Plans,” Rev. 1, at 8 (Apr. 2003). The Commission has endorsed the use of this standard review plan in evaluating site characterization plans, writing that “[w]ith respect to an adequate site characterization, it seems reasonable to interpret the regulation as requiring [decommissioning plan] submissions to contain the type of information discussed in the NUREG-1700 acceptance criteria.” *Yankee Nuclear Power Station*, CLI-05-15, 61 NRC at 377.

⁷⁴ *See* NUREG-1700 at 9.

⁷⁵ *Id.* at 8-10.

contamination . . . identify the land use, exposure pathways, institutional controls, and critical group for the dose analysis.”⁷⁶

Overall, then, a site characterization must include “sufficient information” so that it can effectively track pathways for significant offsite contamination and estimate the quantity of those pathways.⁷⁷ What constitutes “sufficient information,” however, depends, “to a large extent, on site-specific conditions,”⁷⁸ and the broad guidance in these NUREGs does not provide us with any more specific markers.

C. Standards for the Field Sampling Plan

While it is useful to discuss the standards applied to the site characterization information, this proceeding is concerned with the adequacy of the Licensee’s *plan* to gather that site characterization information, the FSP. There is, of course, no finite limit to the number and variety of procedures that the Licensee might undertake in the course of its site characterization activities. The adequacy of the FSP therefore cannot be regarded as dependent upon whether it embraces every test and exploration that might conceivably provide some information pertaining to the potential impact of the DU munitions upon the radiological health and safety of the public. Rather, as in any other inquiry of this nature, a rule of reason must be applied. Most specifically, what we are called upon to decide here is whether, as formulated, the FSP provides reasonable assurance that it will accomplish its intended objective. Stated otherwise, does the record establish that, in the absence of the taking of measures not embraced by the FSP, such reasonable assurance is lacking?

In evaluating the Intervenor’s claims of inadequacy, it must also be recognized that an iterative process is central to the FSP. That is to say, the FSP does not, as it could not, set forth all of the measures that will have to be taken in the course of the site characterization activities. Rather, as a matter of virtual certainty, the procedures that are initially performed will suggest the need for additional tests and explorations. For that reason, in the final analysis the question before us is whether the Intervenor has identified measures essential to the success of this enterprise that the Licensee is not reasonably likely to pursue at any point during the course of the overall inquiry.

Finally, it is important to keep in mind that, when ultimately passing judgment upon whatever decommissioning plan the Licensee might present for its approval, this agency will be focusing exclusively upon whether that plan meets the

⁷⁶ NUREG-1757, “Consolidated Decommissioning Guidance,” Vol. 1, Rev. 2 (2006) at 7-5.

⁷⁷ See *Yankee Nuclear Power Station*, CLI-05-15, 61 NRC at 377.

⁷⁸ *Ibid.*

existing regulatory standards for the protection of the radiological health and safety of the public. Given that the site characterization has no purpose beyond providing support for the decommissioning plan, its sufficiency must be assessed accordingly.

III. DISCUSSION OF THE FIELD SAMPLING PLAN

We now turn to consider the elements of the FSP and the respects in which the Intervenor maintained that the FSP will not provide the information needed to provide a site characterization sufficient to support a decommissioning plan for the JPG site, as well as the Licensee and the Staff's responses to those arguments.

A. Biota Sampling

1. *The FSP, Completed Actions, and Current Plans Regarding Biota Sampling*

The biota sampling component of the FSP was designed in response to the Staff's request for information as to whether humans could be exposed to radiation from DU on the JPG site through consumption of animals hunted near the site.⁷⁹ For this purpose, the Licensee selected deer tissue for its biota sampling because deer are the most commonly hunted animals in the area.⁸⁰ The Licensee recognized that biota other than deer might be involved in the "uptake and subsequent movement of DU through the . . . food web," and provided that "sampling of biota other than deer also may occur."⁸¹ The Licensee further explained, however, that such sampling would occur only if DU was found to be present in the deer tissue samples.⁸²

The Licensee completed its deer sampling activities in early 2006; they were conducted according to the terms of the FSP.⁸³ The Licensee collected 10 deer from the DU Impact Area, 10 from nearby hunting areas, and 10 from background locations (areas the Licensee considered likely not to be exposed to DU) in late

⁷⁹NRC Staff Exh. 14, FSP at 6-24.

⁸⁰*Ibid.*

⁸¹*Ibid.*

⁸²*Id.* at 6-24 to 6-25; Army Exh. 2, Pre-Filed Testimony of Army Witness Michael L. Barta (Aug. 17, 2007) at 5 [Barta Direct].

⁸³*See* Army Exh. 11-A, Deer Tissue Sampling Results (Aug. 2006) at 2-1 to 2-3, 3-1.

2005 and early 2006.⁸⁴ From these collections, it obtained kidney, bone, liver, and muscle tissue for examination.⁸⁵

The specific collection locations for the deer samples were said to be based on a variety of factors including exposure areas (e.g., where exposure would be the greatest), accessibility (e.g., available roads and paths), and safety (e.g., concerning the potential presence of unexploded ordnance).⁸⁶ The Licensee used bait to attract the deer to the collection areas to make harvesting them easier.⁸⁷

In an August 2006 report, the Licensee compiled the results of the deer sampling study and compared them with historical deer tissue samples taken in the 1980s and 1990s.⁸⁸ The Licensee concluded that the study showed that DU was not present in the deer tissue samples, and thus neither additional verification deer sampling nor the sampling of biota other than deer was currently necessary.⁸⁹ For its part, although finding the Licensee's conclusion reasonable, the Staff emphasized that the Staff might nonetheless require additional deer sampling or sampling of other biota in the future to ensure that humans in the vicinity of the JPG site were not at risk of exposure to radiation above NRC regulatory thresholds.⁹⁰

2. The Intervenor's Assertions Regarding Biota Sampling

The Intervenor's first criticism of the FSP's biota sampling program related to its exclusion of all other biota besides deer.⁹¹ The debate regarding which biota should be sampled centered upon the purpose of biota sampling, and involved a factual dispute regarding what animals humans consume and in what quantities. The Intervenor asserted that the biota sampling component of the FSP should have focused on species lower on the food chain than deer, and have included at least

⁸⁴ *Id.* at 2-1 to 2-3; *see also* NRC Staff Exh. 14, FSP at 6-25 to 6-26; NRC Staff Exh. 15, Field Sampling Plan Addendum excluding Appendix B (Nov. 2005) at 2-1 to 2-2.

⁸⁵ Army Exh. 11-A, Deer Tissue Sampling Results at 2-3, 3-1; *see also* NRC Staff Exh. 14, FSP at 6-27 to 6-28.

⁸⁶ *See* NRC Staff Exh. 14, FSP at 6-25 to 6-27; *see also* Army Exh. 11-A, Deer Tissue Sampling Results at 2-1 (indicating that locations were chosen based on ease of harvesting and potential exposure of deer to DU).

⁸⁷ *See* Army Exh. 11-A, Deer Tissue Sampling Results at 2-1; *see also* NRC Staff Exh. 14, FSP at 6-28.

⁸⁸ Army Exh. 11-A, Deer Tissue Sampling Results at 4-1.

⁸⁹ Army Exh. 2, Barta Direct at 5; Army Exh. 11-A, Deer Tissue Sampling Results at 5-1.

⁹⁰ *See* NRC Staff Exh. 5, Prefiled Testimony of Dale Condra (Aug. 17, 2007) at 4 [Condra Direct]; NRC Staff Exh. 6, Prefiled Sur-rebuttal Testimony of Thomas McLaughlin (Aug. 17, 2007) at 2 [McLaughlin Sur-rebuttal].

⁹¹ Save the Valley (STV) Exh. 2, Prefiled Direct Testimony and Exhibits of Diane S. Henshel, Ph.D. (July 20, 2007) at 12-13 [Henshel Direct].

one each of an airborne, aquatic, and soil-based species.⁹² Its expert witness on biota sampling, Henshel, testified that the additional biota needed to be included in the study in order to (1) determine the exposure to all species at the JPG site, including humans; and (2) account for the “uptake and bioaccumulation of DU by the various biota” up the food chain in order to construct a “meaningful fate and transport model” for the movement of DU.⁹³

The asserted need for additional biota sampling to determine radiation exposure to the environment, not just exposure to humans, was primarily based on the Intervenor’s insistence that the FSP should generate the information necessary to support an environmental impact statement accompanying the Licensee’s Decommissioning Plan at the end of the 5-year alternate schedule period.⁹⁴ Additionally, the Intervenor maintained that further biota sampling was necessary because humans hunted and consumed other animals besides deer found on or near the JPG site, such as turkey, squirrels, mollusks, and crayfish, and could thus be exposed through such consumption.⁹⁵

The Intervenor’s second criticism of the biota sampling component of the FSP concerned the methodology of the deer sampling. It would have it that the study was poorly designed and executed, and therefore produced unreliable results that, in turn, gave the Licensee false assurance that no need existed to conduct further sampling of deer or other plants and animals.⁹⁶ According to Henshel, specific weaknesses in the study included that there was not enough distinction between DU-exposed deer and deer from background locations, the study’s small sample size, and inconsistencies regarding the time of year the deer were collected and the types of data recorded.⁹⁷ Henshel also maintained that baiting deer to lure them to the collection area might have had an impact on the measure of uranium detected in the samples because the amount of DU can be affected by the animal’s recent diet, further making the results unreliable.⁹⁸

The Intervenor’s third criticism of the biota sampling component of the FSP was one that ran throughout its criticisms of the FSP in general: the Licensee’s method of measuring radiation from the samples was not advanced enough to distinguish between background levels of radiation from naturally occurring uranium already in the environment and the presence of DU, thus rendering

⁹² STV Exh. 2, Henshel Direct at 12-13.

⁹³ *Ibid.*

⁹⁴ Tr. at 111-12 (Mullett).

⁹⁵ STV Exh. 2, Prefiled Rebuttal Testimony of Diane S. Henshel, Ph.D. (Sept. 18, 2007) at 17-18 [Henshel Rebuttal]; Tr. at 171-74.

⁹⁶ STV Exh. 2, Henshel Direct at 14-15; STV Exh. 2, Henshel Rebuttal at 14-16.

⁹⁷ STV Exh. 2, Henshel Direct at 20-24; STV Exh. 2, Henshel Rebuttal at 14-18.

⁹⁸ STV Exh. 2, Henshel Direct at 14-15.

its results inconclusive.⁹⁹ In addition to the Licensee's current technique of alpha spectroscopy, the Intervenor proposed that more advanced techniques for measuring the presence of U-234 and U-238 be employed.¹⁰⁰ With these more advanced techniques, the Intervenor claimed, the Licensee would be able to detect DU at low levels and thereby generate a more meaningful model of potential radiation exposure to humans and the environment.¹⁰¹

3. *The Licensee's Response Regarding Biota Sampling*

In response to the Intervenor's view regarding the purpose and scope of the biota sampling, the Licensee emphasized that the objective of the FSP in general, and that of the biota sampling plan in particular, was to determine potential radiation exposure to humans exclusively, not to the total environment as well.¹⁰² As stated by the Licensee's witness, Barta, "the focus of this decommissioning process is the protection of human health."¹⁰³ While declaring that NRC regulations do not specifically require the Licensee to conduct biota sampling, Barta nonetheless stressed that it had performed the deer sampling in response to a Staff request for additional information on the effects of human consumption of deer and potential DU exposure.¹⁰⁴

Further, the Licensee maintained that deer were the most hunted and consumed animals present on the JPG site,¹⁰⁵ and that the Intervenor had not presented sufficient evidence of the consumption of other animals to warrant the broadening of the sampling beyond deer.¹⁰⁶ In addition, the Licensee asserted that additional biota sampling was not necessary at this time because the results of the deer sampling conducted in 2005 and 2006 did not indicate that any DU was present in the samples at all; thus, the Licensee concluded, the potential radiation exposure to humans from consumption of deer was well below regulatory limits.¹⁰⁷ Accordingly, the Licensee maintained that the biota sampling plan in the FSP

⁹⁹ STV Exh. 1, Prefiled Rebuttal Testimony of Charles H. Norris, LPG (Sept. 18, 2007) at 40-44 [Norris Rebuttal]; Tr. at 303-05 (Norris). The Intervenor proposed that the Licensee increase the count time and the mass of uranium being analyzed for each sample and use a combination of alpha spectroscopy and inductively coupled plasma mass spectroscopy to get mass concentrations of the various ratios. See Tr. at 304-05 (Norris); Prefiled Direct Testimony and Exhibits of Charles H. Norris, LPG (July 13, 2007) at 78-79 [Norris Direct].

¹⁰⁰ Tr. at 303-05 (Norris).

¹⁰¹ STV Exh. 1, Norris Direct at 74-75; Tr. at 303-05 (Norris).

¹⁰² Army Exh. 2, Barta Direct at 5, 26.

¹⁰³ *Id.* at 10.

¹⁰⁴ *Id.* at 16.

¹⁰⁵ See *id.* at 6.

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.* at 5-6.

was sufficient, meeting the regulatory standards for the grant of a 5-year alternate schedule.

In response to the Intervenor's criticism of its biota sampling methodology, the Licensee would have it that it "carefully designed and carried out [the biota sampling] . . . [and t]he result is that there is sufficient quantity and quality of data to proceed with the necessary decisions in the decommissioning process."¹⁰⁸ In that regard, Barta testified that the additional calculations required by the Intervenor were not necessary and would likely not change the results of the study.¹⁰⁹ In addition, the Licensee took issue with Henshel's criticism of the use of baits and their potential effect on the ability to measure effectively the amount of uranium in the samples. Although Barta agreed that recent diet might affect the presence of DU in deer tissue, he asserted that "very little, if any, bait was used in the fall sampling event when all of the deer from the DU Impact Area were collected," and it was unknown whether the deer that were collected consumed any of the bait.¹¹⁰ He also stated that "[f]oraging on corn for a few days or few weeks would seem unlikely to appreciably affect tissue concentrations of DU."¹¹¹ Accordingly, the Licensee insisted that its testing methodology was sufficient and the results obtained were reliable.¹¹²

The Licensee's witness Skibinski responded to the Intervenor's assertion that the Licensee's use of alpha spectroscopy to measure radiation was insufficient by stating that it was the best cost-effective method available. The Licensee asserted that although alpha spectroscopy was unable to distinguish DU from background radiation in low levels, the additional use of a more expensive and less commercially available method was impractical and unnecessary.¹¹³ Skibinski emphasized that its method was sufficient for the purposes of complying with NRC regulatory dose limits because "the migration of DU can be reliably identified with existing analytical methods (when the level of total uranium exceeds that expected in the natural background)."¹¹⁴ He pointed out that its measurements have all been well below these limits, and further, that the radiation measured in the deer tissue samples had not indicated that DU was present, only that percentages of uranium naturally occurring in the environment were present.¹¹⁵

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.* at 18-25.

¹¹⁰ *Id.* at 20.

¹¹¹ *Ibid.*

¹¹² *Id.* at 7-8, 25-26.

¹¹³ See Army Exh. 3, Prefiled Written Reply and Sur-rebuttal Testimony of Joseph N. Skibinski in Response to Prefiled Rebuttal Testimonies of Intervenor of Save the Valley, Inc. (Sept. 24, 2007) at 4 [Skibinski Sur-rebuttal]; see also Tr. at 301-02 (Anagnostopoulos).

¹¹⁴ Army Exh. 3, Skibinski Sur-rebuttal at 2, 4.

¹¹⁵ *Id.* at 2.

Therefore, the Licensee asserted, its measurement techniques were sufficient to ensure public health and safety because they would have detected the presence of DU distinguishable from naturally occurring background levels of uranium — if it existed.¹¹⁶

4. The NRC Staff's Response Regarding Biota Sampling

In addressing the Intervenor's concerns, the NRC Staff stressed at the outset that the purpose of the FSP was to provide "site specific information relating to the DU at JPG and specifically how the DU could potentially cause a radiological dose that would be detrimental to human health."¹¹⁷ As the Staff saw it, the Intervenor was requesting a "much broader" assessment, one "more akin to an EPA-type ecological risk assessment of the site based on the chemical properties of uranium rather than its radiological hazard."¹¹⁸ In terms of the biota sampling component of the FSP, the Staff considered the Licensee's decision to sample only deer at this time, while possibly not "sufficient for the comprehensive EPA-type ecological assessment of the site proposed by [the Intervenor]," nonetheless "sufficient for the FSP."¹¹⁹

In common with the Licensee, the Staff emphasized that the purpose of the deer sampling program was to determine if there existed a risk to humans of DU radiation exposure from eating deer meat.¹²⁰ Although acknowledging that other animals on the JPG site, e.g. turkey and squirrels, might be consumed, the Staff opined that "[d]eer are the only significant completed pathway with the potential to cause a radiological dose detrimental to the public health."¹²¹ It maintained that other plants and animals were simply not consumed in significant numbers, nor do they provide quantities of meat that would have warranted further testing.¹²² The Staff also found the deer sampling methodology used by the Licensee to be sufficient for the purposes of the Licensee's FSP.¹²³

According to the Staff's witness Condra, the levels of radiation in the JPG deer would contribute little or no radiation to the offsite total effective dose equivalent limits. First, based on its analysis of the data obtained from the deer sampling, the Staff concluded that there was no DU present in the deer tissue. Staff witness

¹¹⁶ *Id.* at 2, 4.

¹¹⁷ NRC Staff Exh. 1, Prefiled Testimony of Thomas McLaughlin (Aug. 17, 2007) at 5 [McLaughlin Direct].

¹¹⁸ *Ibid.*

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.* at 16.

¹²¹ *Id.* at 9.

¹²² *Id.* at 9-10; NRC Staff Exh. 6, McLaughlin Sur-rebuttal at 2.

¹²³ See NRC Staff Exh. 1, McLaughlin Direct at 5, 9-10, 16.

Condra testified that he saw “no evidence that would lead anyone to conclude that DU has been detected in the deer tissue samples.”¹²⁴ Additionally, Staff witness Ridge testified that she had calculated that persons replacing all beef and chicken in their diet with JPG deer tissue containing the “maximum measured concentration of uranium detected in the muscle of deer collected from the site” would, at most, receive the committed effective dose equivalent of 0.27 mrem per year.¹²⁵ Such a dose was “well below the NRC’s decommissioning criteria of [25 mrem] per year.”¹²⁶ From this she concluded that “consumption of meat from deer at JPG is not expected to pose a radiological health risk to humans from DU.”¹²⁷

Given the testimony of its witnesses, the Staff opined that the data from the deer sampling study were “consistent with background levels [of uranium] and do[] not indicate that DU has been detected in the samples that were collected as part of the project.”¹²⁸ It thus concluded that “in the absence of evidence that the total uranium concentrations exceed what is expected in background, there would be no additional benefit or requirement to submit the sample for further analysis or evaluation.”¹²⁹ Should the need arise, however, the Staff noted that it “reserve[d] the option to request the [Licensee] to sample biota or other media in the future.”¹³⁰

With regard to the Licensee’s ability to distinguish between depleted uranium and naturally occurring background uranium with its current instrumentation, the Staff acknowledged that there were limitations in making this distinction at extremely low levels of radiation, but maintained that these limitations were not unique to alpha spectroscopy.¹³¹ Condra, a Staff witness, testified that, after analysis of the samples, one is able to determine if a sample as a whole contains DU or naturally occurring uranium, but not whether the sample’s radiation is partially from DU and partially from naturally occurring uranium, or in what ratios the two occur.¹³² However, in determining that the radiation exposure from deer meat would be at most 0.27 mrem per year (as compared to the 25-mrem per year regulatory limit), Ridge assumed that the measured radiation

¹²⁴ NRC Staff Exh. 5, Condra Direct at 4.

¹²⁵ NRC Staff Exh. 3, Prefiled Testimony of A. Christianne Ridge (Aug. 17, 2007) at 17 [Ridge Direct].

¹²⁶ *Id.* at 18; *see also* Tr. at 288-89 (Ridge).

¹²⁷ NRC Staff Exh. 3, Ridge Direct at 18.

¹²⁸ NRC Staff Exh. 5, Condra Direct at 5.

¹²⁹ *Id.* at 4.

¹³⁰ NRC Staff Exh. 6, McLaughlin Sur-rebuttal at 2.

¹³¹ *See* Tr. at 296-99 (Condra).

¹³² *Id.* at 298-99 (Condra).

was entirely due to the presence of DU.¹³³ Therefore, even with the Licensee's current instrumentation, the Staff concluded that consumption of deer hunted in the vicinity of JPG was "not believed to have a significant effect on human health."¹³⁴

5. Board Findings Regarding Biota Sampling

On our appraisal of the evidence before us, we conclude that the biota sampling component of the FSP is sufficient to meet the 10 C.F.R. § 40.42(g)(2) criteria for a 5-year alternate schedule.

The intended purpose of this component of the FSP was to enable the Licensee to model adequately the potential pathway of DU from the ground at the JPG site to humans via consumption through the food chain. In this regard, it is important to bear in mind that, as previously noted, what is under consideration here is a plan that is continually evolving, and one that the Licensee is implementing in order to create the site characterization that must be included with the Licensee's submission of its decommissioning plan in 2011.

Contrary to the Intervenor's apparent belief, there is no current requirement that the FSP describe the collection of information needed for the decommissioning plan's environmental assessment or environmental impact statement.¹³⁵ Moreover, the FSP need not include any chemical toxicity analysis, as the agency and application's focus is on the potential threat of harm to humans from radiation from the DU projectiles, not any potential threat of harm from DU as a chemical toxin. Accordingly, to the extent they are based on the proposition that the FSP should provide the necessary information to create an environmental report or model the threat of harm from chemical or other nonradiological toxicity, the Intervenor's criticisms must be deemed outside the scope of this proceeding.

For the stated purpose of gathering information to model the potential radiation dose to humans, the Licensee's decision to sample deer exclusively at this time was reasonable given that deer are the most frequently hunted animals in the JPG area and provide by far the largest portion of local meat for human consumption.¹³⁶ Barta testified without contradiction that in an area that includes the DU Impact Area (the Big Oaks National Wildlife Refuge), "approximately 400 to 800 deer

¹³³ NRC Staff Exh. 3, Ridge Direct at 17. As discussed above, the Staff maintained that the measured radiation from the deer tissue samples is at low levels that indicate it is due to the presence of naturally occurring uranium, not DU. NRC Staff Exh. 5, Condra Direct at 5. However, Ridge made the conservative assumption that it was DU to show that measured radiation remains well within the regulatory threshold. See NRC Staff Exh. 3, Ridge Direct at 17.

¹³⁴ NRC Staff Exh. 3, Ridge Direct at 18.

¹³⁵ See 10 C.F.R. § 20.1403; see also *supra* pp. 115.

¹³⁶ See NRC Staff Exh. 1, McLaughlin Direct at 9-10.

are harvested per year,' approximately 50 turkey are harvested per year, and the squirrel harvest is limited by the length of the hunting season.¹³⁷ Although observing that people living near JPG might consume additional animals, such as mollusks and crayfish,¹³⁸ the Intervenor provided insufficient evidence to indicate that any of these animals are consumed, if consumed at all, in quantities approaching that of deer, and thus implicate a risk of exposure to humans beyond that potentially created by consumption of deer meat.¹³⁹ Accordingly, the Board finds that the Licensee reasonably designed the biota sampling component of its FSP to sample deer, especially considering the potential for sampling of additional animals should the results of the other sampling components of the FSP indicate the presence of DU or upon the request of the Staff.

We also find it unlikely that a greater sample size or the sampling of deer that were not lured with bait would have materially altered the study's finding that there was no DU present in the samples. The Licensee's analysis determined this result;¹⁴⁰ the Staff verified it with its own calculations.¹⁴¹ Especially compelling in this regard was Ridge's testimony that she had calculated the yearly radiation dose to humans through consumption of deer meat by assuming (1) a person substitutes all of the beef or chicken regularly consumed in his or her diet with deer meat; (2) the highest level of radiation from uranium recorded in the deer tissue samples is present at the same level in all deer that are consumed; and (3) this level of radiation is attributable totally to DU rather than naturally occurring uranium (although the Licensee disagreed that it is anything but naturally occurring uranium).¹⁴² After making these highly conservative assumptions, Ridge found that the committed effective dose equivalent from consumption of deer meat would be 0.27 mrem per year.¹⁴³ Although there is always room for improvement in any study, there is no reason to believe that a somewhat more refined or broader investigation would

¹³⁷ Army Exh. 2, Barta Direct at 6; *see also* Army Exh. 3, Skibinski Sur-rebuttal at 2.

¹³⁸ *See* Tr. at 171-74.

¹³⁹ Considering that the Licensee has not completed testing of the water, the NRC Staff emphasizes that if the water samples indicate that DU is moving offsite, it will require additional animals (conceivably to include aquatic species) to be tested. NRC Staff Exh. 6, McLaughlin Sur-rebuttal at 2.

¹⁴⁰ *See* Army Exh. 2, Barta Direct at 19-20.

¹⁴¹ *See* NRC Staff Exh. 5, Condra Direct at 4.

¹⁴² NRC Staff Exh. 3, Ridge Direct at 17-18.

¹⁴³ *Ibid.* As discussed above, Ridge testified that the 0.27 mrem per year represents the value for the "committed effective dose equivalent." *Id.* at 18. Although the regulatory limit of 25 mrem per year represents the value for the "total effective dose equivalent," 10 C.F.R. § 20.1403(b), which is defined as the "sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures)," 10 C.F.R. § 20.1003, there is no evidence before the Board of an external dose for this analysis, making the committed effective dose equivalent the sole contribution to the total effective dose equivalent calculation. For the purposes of deer meat consumption, the total effective dose equivalent thus remains well below 25 mrem per year.

have changed the fact that the level of dose calculated, even if it were assumed to be due entirely from the DU projectiles on the JPG site, was far below the limit of 25 mrem per year provided in NRC regulations.

Moreover, given the deer sampling results, there appears to be no necessity to invoke a more expensive (and not necessarily more effective)¹⁴⁴ method of analyzing the deer tissue samples to measure radiation and to distinguish between DU (which is at issue in terms of meeting dose limits) and background levels of naturally occurring uranium (which are not).¹⁴⁵ Even though the levels of uranium were at the lower limits of the Licensee's instrumentation, at these levels it is immaterial whether the results were attributable to DU or naturally occurring uranium. They are simply too small: assuming that all of the radiation measured in the deer tissue samples is attributable to DU, the committed effective dose equivalent for humans consuming deer meat would be 0.27 mrem per year as compared to the NRC-imposed limit of 25 mrem per year.¹⁴⁶ For the purposes of this proceeding, then, where the Licensee must collect the data necessary for its site characterization and ultimately prove to the Staff that the total effective dose equivalent does not exceed 25 mrem, exploring for extremely low levels of radiation that are already lower than this limit was superfluous.¹⁴⁷

¹⁴⁴ See Army Exh. 3, Skibinski Sur-rebuttal at 4. Witnesses for both the NRC Staff and the Licensee testified that, even with the unproven advanced techniques that the Intervenor proposes, it will still be difficult to interpret the relative concentrations of DU and naturally occurring uranium within a single sample. Tr. at 296-97 (Condra), 304-05 (Anagnostopoulos).

¹⁴⁵ See 10 C.F.R. § 20.1403(b) ("The licensee has made provisions for legally enforceable institutional controls that provide reasonable assurance that the [total effective dose equivalent] from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem . . . per year") (emphasis added).

¹⁴⁶ See NRC Staff Exh. 3, Ridge Direct at 17-18.

¹⁴⁷ The Intervenor has also asserted that the FSP measurement methodologies for soil, water, and sediment as well as biota should distinguish between natural and depleted uranium in order to properly characterize the site. Tr. at 294-95 (Norris); see also STV Exh. 1, Norris Direct at 74-75; STV Exh. 1, Norris Rebuttal at 26. In order to do this, the Licensee would have to be able to measure uranium in amounts smaller than its current detection limits, approximately 0.02 pCi/g for biota, 2 pCi/g for sediment, and 1 pCi/L for surface water and groundwater samples. NRC Staff Exh. 14, FSP at A.3-3 Table A.3-1; see also Tr. at 156 (Anagnostopoulos).

Given the technical constraints in attempting to distinguish between natural and depleted uranium discussed above, see also Tr. at 292, 305 (Anagnostopoulos), and the small amounts of any uranium involved, this Board finds that no credible case has been made that distinguishing between natural uranium and DU is needed for any of these materials. Even if the entire uranium amount in samples is assumed to be DU, radiation amounts would remain far below regulatory limits; should they increase 10- or even 50-fold over time, it is very likely they would *still* remain below the regulatory limits. See, e.g., *id.* at 155, 293 (Anagnostopoulos) (stating that the soil, water, and sediment samples taken outside of the DU Impact Area show total uranium concentrations at the detection limit of the alpha spectroscopy method, with total uranium concentrations at background levels).

Further, it is important to note that, in designing the biota sampling component, the Licensee did not foreclose (and the Staff reserved the opportunity to request) the sampling of other animals or plants in the future, should subsequent water and soil sampling — the other major pathways for movement of DU — indicate a need to conduct further biota sampling.¹⁴⁸ As the Licensee acknowledged, if the levels of uranium measured in the samples for soil and water increase above naturally occurring uranium levels, DU is present. In such circumstances, the Licensee would need to conduct additional sampling, possibly to include additional biota sampling, to supplement its DU movement modeling in the site characterization.¹⁴⁹

Given the foregoing, the Board finds that the biota sampling component of the FSP is sufficient to determine the potential dose from radiation to humans derived from consumption of animals, and therefore is sufficient for the purposes of the Licensee's 5-year alternate schedule proposal.

B. Air Sampling

1. *The FSP, Completed Actions, and Current Plans Regarding Air Sampling*

The DU Impact Area is now within the Big Oaks National Wildlife Refuge and, as such, is subject to periodic controlled burns of the area by the U.S. Fish and Wildlife Service.¹⁵⁰ Because DU potentially could be transported in the air through smoke generated during these controlled burns, a contractor for the Licensee (SAIC) provided a memorandum to the Licensee assessing the risk of potential doses of radiation to humans associated with this activity.¹⁵¹

After reviewing the results of prior air sampling conducted at the JPG site between 1984 and 1987, the contractor determined that “[t]here was not any detectable uranium in the samples.”¹⁵² Pointing as well to the outcome of studies concerning similar areas where DU was present and controlled burns were conducted, the contractor concluded that the “risks associated with potential

¹⁴⁸ See Army Exh. 2, Barta Direct at 16; NRC Staff Exh. 6, McLaughlin Sur-rebuttal at 2; NRC Staff Exh. 14, FSP at 6-24.

¹⁴⁹ See NRC Staff Exh. 6, McLaughlin Direct at 2. As previously noted, we have deemed it necessary that the FSP provide enough information for a 2011 decommissioning plan's site characterization; thus any additional sampling necessary to achieve this purpose must be conducted within the 5-year alternate schedule period.

¹⁵⁰ NRC Staff Exh. 31, Memorandum from Corrine Shia, SAIC, to Paul Cloud, JPG BRAC Environmental Coordinator, and Joyce Kuykendall, Radiation Safety Officer, APG (Jan. 13, 2005) at 1 [SAIC Memorandum]; see also NRC Staff Exh. 14, FSP at 4-6 to 4-7 (detailing U.S. Fish and Wildlife responsibilities).

¹⁵¹ NRC Staff Exh. 31, SAIC Memorandum at 1-2.

¹⁵² *Id.* at 2.

transport of DU in the air from controlled burns are negligible.’’¹⁵³ It recommended that the Licensee not include an air sampling program in the FSP ‘‘given the low probability of DU release and transport and the negligible effects on receptors.’’¹⁵⁴ On the basis of this recommendation, the Licensee chose not to include sampling of air at JPG in the FSP provisions.¹⁵⁵

2. *The Intervenor’s Assertions Regarding Air Sampling*

The Intervenor would have it that an air sampling provision should have been included in the FSP. As asserted by Intervenor witness Henshel, ‘‘without air sampling associated with the controlled burns at JPG, the Army cannot say with any assurance what that increased dose or resulting increment to health risk will be.’’¹⁵⁶ In other words, according to the Intervenor, excluding the air pathway has unacceptably limited the information available to the Licensee when modeling the dose pathway for the purposes of showing that its eventual decommissioning plan will be within NRC regulatory dose limits.¹⁵⁷

The Intervenor rejected as outdated the studies relied upon by the Licensee for its decision not to include air sampling.¹⁵⁸ Instead, the Intervenor’s witness Henshel pointed to a 2006 Los Alamos National Laboratories (LANL) study conducted after the date of the memorandum produced by the Licensee’s contractor that addressed controlled burns in areas where DU was present on LANL property.¹⁵⁹ Henshel noted that the LANL study found ‘‘there were significant changes (14% increases on average) in airborne [DU] at the perimeter of the entirety of the LANL property following the prescribed burns.’’¹⁶⁰

Comparing the conditions at LANL with the conditions at JPG, Henshel pointed to the similarities and differences between the two locations. She noted that the burned area and the frequency of the controlled burns were greater at JPG than at LANL, which she declared created the potential for greater amounts and movement of airborne DU at JPG than that measured at LANL.¹⁶¹ She observed

¹⁵³ *Id.* at 4.

¹⁵⁴ *Ibid.*

¹⁵⁵ See NRC Staff Exh. 14, FSP at 4-1, 12-2 (citing NRC Staff Exh. 31, SAIC Memorandum, as the basis for excluding air as a medium for investigation in the FSP).

¹⁵⁶ STV Exh. 2, Henshel Direct at 26-27.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Id.* at 25.

¹⁵⁹ *Ibid.*; see NRC Staff Exh. 41, Jeffrey J. Whicker et al., *From dust to dose: Effects of forest disturbance on increased inhalation exposure*, Science of the Total Environment (2006) [hereinafter LANL Study].

¹⁶⁰ STV Exh. 2, Henshel Direct at 25.

¹⁶¹ Tr. at 195-98 (Henshel).

that the U.S. Fish and Wildlife Service was planning to conduct burns in the fall in order to mimic natural fires that occur in that drier season, and that the agency expected such fall fires would “burn more of the vegetation more thoroughly, including potentially the trench [(where the majority of the DU projectiles are located),¹⁶²] and potentially more of the trees.”¹⁶³ She asserted that these more thorough fires could increase the airborne DU at JPG.¹⁶⁴

Further, Henshel noted that JPG is narrower than LANL. She took this factor to mean that “civilians live very near the boundaries” of JPG, so that likely increases in airborne DU at the boundaries of JPG “could accumulate in these civilians to the point where it could contribute to adverse health conditions.”¹⁶⁵

On the basis of an asserted uncertainty associated with the potential dose to those “who live, work or hunt on or around JPG,”¹⁶⁶ and the Intervenor’s belief regarding the present significance of the LANL study, the Intervenor asserted that the FSP should have included an air sampling component.¹⁶⁷

3. *The Licensee’s Response Regarding Air Sampling*

The Licensee disputed the Intervenor’s assertion that air is a significant pathway for the transport of DU at the JPG site.¹⁶⁸ It also disagreed with the Intervenor’s interpretation of the LANL study, maintaining that the study “does not support the assertion that the air pathway [at JPG] is significant.”¹⁶⁹ To the contrary, according to the Licensee, the study highlights the insignificance of the air pathway at JPG.¹⁷⁰

In support of this assertion, the Licensee’s witness Anagnostopoulos pointed to the differences he deemed to exist between the conditions at LANL and those at JPG. For example, the “dusty, arid environment” at LANL, unlike that at JPG, “optimizes the potential for airborne suspension of DU contaminated dust.”¹⁷¹ Additionally, Anagnostopoulos disputed the Intervenor’s assertion that the burned area at JPG is greater than at LANL.¹⁷² He testified that the burned area at LANL

¹⁶² *Id.* at 207-08 (Henshel); NRC Staff Exh. 13, SER at 1-2.

¹⁶³ Tr. at 207 (Henshel).

¹⁶⁴ *Id.* at 207-08.

¹⁶⁵ STV Exh. 2, Henshel Direct at 26; *see also* Tr. at 198-99 (Henshel).

¹⁶⁶ STV Exh. 2, Henshel Rebuttal at 22.

¹⁶⁷ STV Exh. 2, Henshel Direct at 26-27.

¹⁶⁸ *See* Army Exh. 1, Pre-filed Testimony of Army Witness Harold W. Anagnostopoulos, CHP (Aug. 17, 2007) at 3-4 [Anagnostopoulos].

¹⁶⁹ *Id.* at 4.

¹⁷⁰ *Id.* at 8; *see also* Tr. at 200-01 (Anagnostopoulos).

¹⁷¹ Army Exh. 1, Anagnostopoulos Direct at 8.

¹⁷² *See* Tr. at 221 (Anagnostopoulos).

was 30 million square meters, as compared to the entire DU Impact Area of 8.4 million square meters (a smaller portion of which is selected for a single controlled burn).¹⁷³ Therefore, more dust would be expected to go airborne at LANL.¹⁷⁴ He further maintained that the DU projectiles at LANL were fired at hard targets, resulting in DU aerosol and shrapnel, while at JPG the projectiles were fired at soft targets and remained intact.¹⁷⁵ As a consequence, it would be more likely that DU would be available for air transport at LANL than at JPG.¹⁷⁶ The Licensee's witness Anagnostopoulos also rejected the Intervenor's argument that the risk to humans at JPG was greater because people lived near the boundaries of JPG; instead he asserted that the nearest resident lived over 2 miles away from the DU Impact Area at JPG, and because the airborne concentration of DU decreased as it moved away from the DU source, the risk would be negligible.¹⁷⁷

Moreover, Anagnostopoulos maintained that, even were it to be assumed that the conditions at LANL were comparable to the conditions at JPG, the increased dose to the public from the controlled burns at LANL would be well below the regulatory limits imposed by 10 C.F.R. Part 20.¹⁷⁸ With the view that the LANL study indicates the worst-case scenario for DU exposure through the air, Anagnostopoulos insisted that at its worst, the potential exposure to people living near JPG would be only 0.1 mrem.¹⁷⁹ Anagnostopoulos' conclusion was that the LANL study, actual prior sampling at JPG, and a review of other studies that might be more comparable to JPG, indicated that the air pathway was not significant.¹⁸⁰

4. The NRC Staff's Response Regarding Air Sampling

In common with the Licensee, the Staff insisted that the FSP was sufficient without a dedicated plan for air sampling at JPG. In its view, as expressed by its witness Schwartzman, although "air is a potential exposure pathway to workers and offsite residents," "currently available scientific evidence from

¹⁷³ Army Exh. 1, Anagnostopoulos Direct at 8.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*; see also Tr. at 152 (Cloud).

¹⁷⁶ Army Exh. 1, Anagnostopoulos Direct at 8; Army Exh. 1-A, E-mail dated 01/17/07 from Jeff Whicker, Health Physicist, LANL, to Paul Cloud, RSO, JPG (11:50 a.m.); Tr. at 211-12.

¹⁷⁷ Army Exh. 1, Anagnostopoulos Direct at 11.

¹⁷⁸ *Id.* at 9.

¹⁷⁹ *Id.* at 9-10. The Licensee acknowledged that a value of 14 mrem per year was also calculated, but pointed out that this was based on "occupational workers who occupy the burned areas for 2,000 hours per year." Army Exh. 3, Skibinski Sur-Rebuttal at 6. The Licensee therefore insisted that 14 mrem per year "clearly is not a reasonable assumption for controlled burns of the DU impact area at JPG." *Ibid.*

¹⁸⁰ Army Exh. 1, Anagnostopoulos Direct at 5, 11-12.

studies conducted at both [Aberdeen Proving Ground] and LANL do not support the need for a full-time air sampling program at JPG.’’¹⁸¹

Staff witness Schwartzman testified that the studies reviewed by the Licensee’s contractor in its 2005 memorandum showed that the “risks from the mobilization of DU from fires” contributing to adverse health effects were “extremely small.”¹⁸² Further, with regard to the 2006 LANL study referenced by the Intervenor, Schwartzman characterized the environment at LANL as “a more arid ecosystem compared to both APG and JPG.”¹⁸³ He asserted that the 14% average increase of airborne DU after controlled burns conducted at LANL did not represent an actual dose to an individual but rather amounted to a calculated occupational dose of between 0.1 and 14 mrem per year to workers onsite after conservative assumptions were made.¹⁸⁴ Schwartzman noted that these numbers were comparable to natural background levels.¹⁸⁵

Based on his review of these studies, Schwartzman concluded that “air transport of DU during this license amendment period is not a threat to the public health.”¹⁸⁶ Accordingly, the Staff maintained that the LANL and SAIC-reviewed studies “provide the data necessary to answer the question regarding potential doses to workers and the public at JPG without implementing a full-time, full-scale air sampling program at JPG, which is not necessary at this time.”¹⁸⁷

5. Board Findings Regarding Air Sampling

As discussed above, the purpose of the FSP is to model the pathways of potentially significant radiation doses to the public to produce a meaningful site characterization by the end of the 5-year alternate schedule period in 2011. In this connection, we note again that the Licensee ultimately must be able, with the aid of the site characterization submitted with its decommissioning plan, to establish that it will meet the requirements for restricted release under 10 C.F.R. § 20.1403. Among other things, this will involve a demonstration that the total effective dose equivalent “from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem . . . per year.”¹⁸⁸

¹⁸¹ NRC Staff Exh. 4, Prefiled Testimony of Adam L. Schwartzman (Aug. 17, 2007) at 4 [Schwartzman Direct].

¹⁸² *Id.* at 5.

¹⁸³ *Id.* at 8.

¹⁸⁴ *Id.* at 6-7 (explaining that 0.1 mrem per year estimated for workers from “moderate” controlled burn and 14 mrem per year estimated for workers from “severely burned” site).

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Id.* at 9.

¹⁸⁸ 10 C.F.R. § 20.1403(b).

In this setting, we find that the Licensee's decision not to include air sampling at this time to be reasonable. Contrary to the insistence of the Intervenor that site-specific air sampling at JPG needs to be conducted to assess the movement of DU,¹⁸⁹ the actual air samples taken at JPG in the 1980s, the studies cited by the Licensee's contractor in the 2005 memorandum, and the 2006 LANL study together suffice as bounding estimates for the potential movement of DU at JPG. Having been gathered from areas that, to varying degrees, provide some relevance to conditions at JPG, all three of these sources of information indicate that the potential radiation dose to the public is minimal.¹⁹⁰ As such, they are sufficient, at this time, to render unnecessary a separate air sampling endeavor during the alternate schedule period.

In particular, the LANL study represents a conservative upper bounding estimate of the potential radiation dose to the public at JPG. Not only was a larger area burned at LANL than is selected for a single controlled burn at JPG,¹⁹¹ but the environment at LANL is more arid than that at JPG, and the projectiles at LANL were "introduced through high explosives testing" that resulted in aerosol and shrapnel, unlike the intact projectiles at JPG.¹⁹² These conditions make increases in airborne DU significantly more likely¹⁹³ and are distinct from those prevailing at JPG.

¹⁸⁹ The Intervenor has asserted in its testimony, as described in Part B.2, above, and in the summary of its position in its Proposed Findings of Fact and Conclusions of Law that site-specific testing of the DU at JPG is required to "confirm that the current mobilization of DU in smoke is relatively low." STV Proposed Findings at 68. However, in its proposed Board findings, the Intervenor appears to concede this point (and indicates its agreement with this portion of our decision) when it states, "[T]he Army is not required by NRC regulations or guidance to collect site-specific data for every potential source of DU. The available data suggest that the levels of airborne DU resulting from the controlled burns at [JPG] will be episodic and minimal and that a conservative bounding estimate using generic data should suffice for JPG site characterization purposes." *Id.* at 69.

¹⁹⁰ See NRC Staff Exh. 31, SAIC Memorandum at 2, 4; NRC Staff Exh. 41, LANL Study at 519, 523-24, 528.

¹⁹¹ There is a dispute between the Intervenor and the Licensee as to whether the burn area at LANL is greater than that at JPG, or vice versa. The Intervenor characterized the LANL burn areas as "a relatively small burn compared to the 10,000 acres . . . burned annually . . . at [JPG]." Tr. at 195-96 (Henshel). However, the JPG burn area of 10,000 acres is the total area burned in a single year, not what is actually burned in a single controlled burn event. Further, portions of the JPG DU Impact Area are burned as separate events, which means the relevant burn area for JPG is approximately 2000 acres, not 10,000 acres, as the Intervenor would have it. See Tr. at 201 (Anagnostopoulos), 203-04 (Schwartzman).

¹⁹² Army Exh. 1-A, E-mail dated 01/17/07 from Jeff Whicker, Health Physicist, LANL, to Paul Cloud, RSO, JPG (11:50 a.m.); see also Army Exh. 1, Anagnostopoulos Direct at 8; Tr. at 211-12 (Anagnostopoulos).

¹⁹³ See NRC Staff Exh. 41, LANL Study at 529; NRC Staff Exh. 5, Schwartzman Direct at 8; Army Exh. 1, Anagnostopoulos Direct at 8.

The Intervenor relies heavily on data showing that the concentration of airborne DU increased by an average of 14% at the perimeter of burned areas.¹⁹⁴ This number must, however, be placed in its proper context — what the 14% increase means in terms of potential doses to humans. The authors of the study estimated that the potential dose from radiation was 0.1 mrem per year in “moderate” controlled burn areas and 14 mrem per year in “severely burned” areas.¹⁹⁵ Both of these upper and lower estimates are within the 25 mrem per year dose limit for members of the public under NRC regulations.¹⁹⁶

Moreover, the upper estimate of 14 mrem per year was calculated using a conservative assumption that the exposure would be to an occupational worker spending 2000 hours per year in the burned areas.¹⁹⁷ In contrast, the closest members of the general public live more than 2 miles away from the DU Impact Area at JPG. Additionally, the DU Impact Area is not always included in the controlled burn area, thus further increasing the public’s distance from that area.¹⁹⁸ Because the airborne concentration of DU would decrease as one is farther away from the source of the DU,¹⁹⁹ the potential exposure from controlled burns at JPG would likely be less than the LANL upper estimate — and still well within the regulatory requirements.

Given these findings, we conclude that the Licensee has provided reasonable assurance that its decision not to include air sampling in the FSP will not prevent it from meeting its obligation to explore all significant pathways for the potential movement of DU in its site characterization analysis.

¹⁹⁴ See STV Exh. 2, Henshel Direct at 25.

¹⁹⁵ See NRC Staff Exh. 41, LANL Study at 528; NRC Staff Exh. 5, Schwartzman Direct at 6; Army Exh. 1, Anagnostopoulos Direct at 9.

¹⁹⁶ See 10 C.F.R. § 20.1403(b). These estimates are also within NRC regulatory limits for exposure to occupational workers. See 10 C.F.R. §§ 20.1201, 20.1207.

¹⁹⁷ See NRC Staff Exh. 41, LANL Study at 527; Army Exh. 3, Skibinski Sur-Rebuttal at 6.

¹⁹⁸ See Army Exh. 1, Anagnostopoulos Direct at 12. Although at LANL the increases in airborne DU were measured at the perimeter, this was because the burn areas were located at the western boundary of LANL. See NRC Staff Exh. 41, LANL Study at 521; Tr. at 200 (Anagnostopoulos). Because the burn areas of concern in this case, those that happen to encompass the DU Impact Area in a given burn event, are in the center of the JPG site, the distance for residents living near JPG is measured from this point. See Army Exh. 1, Anagnostopoulos Direct at 11; NRC Staff Exh. 14, FSP at 2-8; *supra* note 191 & accompanying text.

¹⁹⁹ See Army Exh. 1, Anagnostopoulos Direct at 11.

C. Monitoring of Possible DU in Ground, Surface, and Cave Water

1. The FSP, Completed Actions, and Current Plans Regarding Water Data

The FSP's analysis of waterways was intended to identify groundwater, possible cave, and surface water paths and to assess the contents of those waters. This information is needed in order to determine if DU is leaching or will leach off the site in quantities significant enough that humans might receive more than 25 mrem of total radioactive exposure from all of the site's pathways.²⁰⁰ To locate the ways in which water leaves the site, the FSP set out a phased approach that included fracture trace analysis (FTA), an electrical imaging (EI) survey, site selection of well pairs, installation of well pairs, collection of stage data, comparison of groundwater stage, precipitation and surface water flow data to evaluate connectivity of the installed wells, and groundwater chemistry sampling.²⁰¹

The Licensee's goal in conducting the FTA was to identify the vertical and horizontal sedimentary rock fractures that together provide interconnected pathways (or groundwater conduits) for the aquifer and, it is claimed in the FSP, through which a majority of the aquifer flows.²⁰² Wells would then be located at places where they would intersect with the groundwater conduits.²⁰³ Based upon the precept that bedrock fracture locations and orientations can be interpreted from linear or semi-linear features representing surface fracture traces visible in aerial photographs,²⁰⁴ the Licensee identified bedrock fractures by studying aerial photographs and satellite images of the 22 square miles surrounding the JPG DU Impact Area.²⁰⁵

The Licensee then used or plans to use EI surveys to determine whether an area is water or bedrock by measuring the area's resistivity (a material's opposition to the flow of electric current).²⁰⁶ While based in part upon the subsurface information the FTA uncovered,²⁰⁷ the configuration of EI survey points primarily follow a network of roads surrounding and passing through the DU Impact Area.²⁰⁸ These roads are safe corridors where UXO has been cleared.²⁰⁹

²⁰⁰ See 10 C.F.R. § 20.1403.

²⁰¹ NRC Staff Exh. 26, SAIC Well Location Selection Report at 4-1 (2007).

²⁰² NRC Staff Exh. 14, FSP at 5-1.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ STV Exh. 1, Norris Direct at 10; Army Exh. 5, Snyder Direct at 3.

²⁰⁶ Staff Exh. 14, FSP at 6-2.

²⁰⁷ *Ibid.*

²⁰⁸ Army Exh. 5, Snyder Direct at 30-31.

²⁰⁹ *Id.* at 49.

Based on the results of the FTA, the EI survey, and other tests, monitoring wells of 4 inches in diameter were to be drilled “in areas most likely to be conduits of groundwater flow.”²¹⁰ The Licensee’s selection of a location to position a characterization well would require both a resistivity anomaly from the EI survey and a mapped fracture trace from the FTA.²¹¹ Generally, the Licensee desired that wells be located in areas of permeable materials, in concentrated zones of fractures, downgradient of the DU Impact Area.²¹² During May and June 2007, the Licensee installed wells at six of the ten planned locations.²¹³ No soil sampling or rock coring activities were planned during well installation.²¹⁴ The Licensee intends to determine the connectivity of water pathways by monitoring these wells’ water levels and responses to storm events, as well as surface water staging.²¹⁵ It might install additional monitoring wells based upon the results of ongoing or previous characterization of the site.²¹⁶

The FSP included plans to monitor the flow of surface streams²¹⁷ and the Licensee has taken several steps to do so. It has installed surface water gauging stations at ten locations, including seven automatic recording stream gauge stations, two automatic recording cave stream gauging locations, and one manual/visual staff gauge monitoring location.²¹⁸ It has not yet analyzed data from these locations.²¹⁹ It plans to collect both elevation and flow data from these gauges.²²⁰

In order to characterize the site’s karst features, described by the Licensee as networks of sinkholes and shallow caves lying in between the site’s surface and groundwater, and these networks’ interaction with groundwater, surface water, and cave channels, the Licensee proposed to sample cave streams at cave mouths.²²¹ In September of 2006, the Licensee installed gauges on two springs that flow from caves along Big Creek.²²² The data from these gauges will determine

²¹⁰ NRC Staff Exh. 14, FSP at 6-4.

²¹¹ Army Exh. 5, Snyder Direct at 38; *see also* Tr. at 275 (Norris).

²¹² Army Exh. 5, Snyder Direct at 15-16.

²¹³ NRC Staff Exh. 2, Peckenpaugh Direct at 18.

²¹⁴ NRC Staff Exh. 14, FSP at 6-12.

²¹⁵ Army Exh. 4, Eaby Direct at 41.

²¹⁶ NRC Staff Exh. 4, Peckenpaugh Direct at 18.

²¹⁷ *See* NRC Staff Exh. 14, FSP at 6-31.

²¹⁸ Army Exh. 4, Eaby Direct at 45.

²¹⁹ NRC Staff Exh. 2, Peckenpaugh Direct at 6-7.

²²⁰ Tr. at 236 (Snyder).

²²¹ Army Exh. 5, Snyder Direct at 16.

²²² Tr. at 242 (Peckenpaugh).

whether the Licensee, at the Staff's direction, conducts any low-flow stream and spring cave measurements.²²³

The Licensee has not yet prepared detailed plans to characterize surface water and sediment transport of DU.²²⁴ It has scheduled this work to occur after well installation, so that concurrent sampling of all media can take place.²²⁵

2. *The Intervenor's Assertions Regarding Water Data*

The primary argument presented by the Intervenor is that the Licensee's proposed characterization methods cannot adequately capture the networks of karst features existing under the site and flowing into and out of surface streams. The Intervenor asserted that the Licensee's program "has to be able to identify the major conduits, the conduits that are controlling the hydrogeology on that site,"²²⁶ and that "there are several lines of evidence that indicates the possibility and the probability of the karst networks extending below the surface drainage."²²⁷ The Intervenor maintained that the FSP does not adequately characterize these possible groundwater conduits and that there must be (1) an expanded network of characterization wells to investigate the potential for and evidence of deeper karst elements that might channel water outside the current monitoring web; (2) seepage runs on Big Creek, Middle Fork Creek, and the unnamed tributary of Big Creek that enters the DU Impact Area north of D Road prior to the installation of additional characterization wells; and (3) remote-sensing and on-the-ground geophysical programs designed to delineate in three dimensions major, open karst pathways that would dominate the groundwater flow system into and out of the DU Impact Area.²²⁸

Intervenor witness Norris testified to the Board that the combination of EI surveys and FTA used by the Licensee to select well locations was inadequate to identify many karst features, including large caves people already had physically visited, because some karst features are not fracture-controlled:

The well locations that they are picking right now are using a combined technology that can't identify the caves that we know really exist there because they're visible and can be gone into. The biggest cave on the JPG system is over 900 feet long. It doesn't show up on their fracture trace. It would never be, even if a road ran across

²²³ NRC Staff Exh. 2, Peckenpaugh Direct at 6.

²²⁴ Army Exh. 5, Snyder Direct at 51.

²²⁵ *Ibid.*

²²⁶ Tr. at 251 (Norris).

²²⁷ *Id.* at 258 (Norris).

²²⁸ See STV Proposed Findings at 76-77.

it, would never be something to penetrate with a well because it's invisible to the technology that they're using.²²⁹

Norris asserted that this technological weakness meant that analogous caves *below* stream level too would be missed.²³⁰ As part of a deep karst network, such caves could be of great importance.²³¹ To map these non-fracture-controlled karst features, Norris testified that the Licensee's FTA and EI tests should be supplemented with a map of the karst groundwater conduits significant to the site, developed by running an EI on a grid system and a seismic technique that together "look for entirely different physical properties."²³² He asserted that, if this was done, the resulting wells would capture information from the non-fracture-controlled karst features.²³³

The Intervenor was also critical of the Licensee's EI survey procedures. According to Norris, the FSP EI survey method, using a direct current to look for voltage drops between pairs of electrodes measured along a single line, does not create as much useful information as a grid configuration. "The implementation of the EI survey as a series of isolated lines instead of a grid precludes using the EI survey as a tool to map the three-dimensional patterns of resistivity in the DU area."²³⁴ Norris also faulted the EI survey for having the testing points follow the curves of the road, insisting that "EI results are best when lines are laid out as straight lines."²³⁵ He asserted that the Licensee's EI survey process assumed "that zones with high electrical resistivity represent low permeability rocks that are unsaturated and that zones with low electrical resistivity represent high-permeability groundwater conduits," and that such an assumption is "inappropriately simplistic" for complex karst geology.²³⁶

The identification of streams whose water is interchanged by karst channels and then runs underground, herein "losing streams," that cross the DU impact area was, in the Intervenor's view, fundamentally necessary for characterization of the site.²³⁷ A "seepage run" (i.e., a longitudinal set of flow measurements taken along a stream during a period of steady flow) could identify "the source areas of

²²⁹ Tr. at 251 (Norris), as corrected by Licensing Board Order [Adopting Transcript Corrections] (Nov. 29, 2007) at Appendix A at 3 (unpublished); *see also* Tr. at 275-76 (Norris); STV Exh. 1, Norris Direct at 20.

²³⁰ Tr. at 252 (Norris).

²³¹ *Id.* at 258 (Norris).

²³² *Id.* at 276 (Norris).

²³³ *Ibid.*

²³⁴ STV Exh. 1, Norris Direct at 18.

²³⁵ *Ibid.*

²³⁶ *Id.* at 19.

²³⁷ STV Exh. 1, Norris Rebuttal at 33.

stream gains or the discharge points of stream losses” potentially associated with karst features, and should ideally be conducted before well locations or stream gauging locations are located.²³⁸ The Intervenor criticized the Licensee’s decision not to include such a seepage run in the FSP or its addendum,²³⁹ and instead would have the Licensee identify locations where streams lose water and then conduct die trace tests to trace the water’s course.²⁴⁰ The Intervenor maintained that such seepage runs were critical because they would identify “where active conduits intersect and interact with the surface drainage system.”²⁴¹

In addition to the seepage run studies and EI grid, the Intervenor asserted that the Licensee should have done stream surveys and gauging before installing the initial wells in order to optimize the location of those wells, so that the stream and the groundwater systems were tied together.²⁴² According to the Intervenor’s witness Norris, by drilling the wells without having done this work, the Licensee missed important opportunities to conduct tests, like hydraulic conductivity measurements, and gather critical data that would better pinpoint the movement of water off the site.²⁴³ The Intervenor characterized the Staff and Licensee’s insistence that the Licensee might simply gather some of these data later should the need arise as “faulty on two levels.”²⁴⁴

First, without a plan and pre-identified criteria that would constitute evidence of other karst systems, it requires a high degree of serendipity and a willingness to consider and accept data that may be indicative of a second or third conduit system. Second, the 5-year expansion period is already two years gone. Without deliberately looking for such additional conduit systems, it is questionable that, were they stumbled upon, they could be characterized in a manner and on a time frame that would fit within the remaining 3 years.²⁴⁵

Instead, according to Norris, the FSP should have been designed to gather this information from the beginning, for the reason that “[y]ou have to sequentially go in a program that is designed to identify . . . as quickly as possibl[e] those variety of features that you need to be able [to] characterize.”²⁴⁶

²³⁸ *Ibid.*

²³⁹ *Ibid.*; *see also* STV Exh. 1, Norris Surrebuttal at 19.

²⁴⁰ *See* Tr. at 262-63 (Norris).

²⁴¹ STV Exh. 1, Norris Rebuttal at 25-26.

²⁴² Tr. at 234-35 (Norris).

²⁴³ *Id.* at 236-37 (Norris).

²⁴⁴ STV Proposed Findings at 47.

²⁴⁵ *Ibid.*

²⁴⁶ Tr. at 240-41 (Norris).

3. *The Licensee's Response Regarding Water Data*

Both the Licensee and the Staff characterized the FSP as a flexible, multitiered approach. The Licensee has indicated it will drill initial monitoring wells and position stream and cave gauges, using them to get initial information that will later be supplemented by additional wells and sampling.²⁴⁷ Then, it will collect data from the initial monitoring wells and cave and stream gauges and make determinations concerning where to locate additional wells and gauges, if necessary.²⁴⁸

The Licensee asserted that it is unnecessary to perform the additional site survey activities proposed by the Intervenor because the current well/gauge system will either provide the information or indicate that such information is needed.²⁴⁹ For instance, with regard to the Intervenor's criticism of the Licensee's failure to do stream surveys and gauging as part of the process of installing the initial wells,²⁵⁰ the Licensee's witness Eaby responded that, as part of its evolving, flexible plan, the ten gauges that had been set up represented only a beginning and that data collection must start somewhere.²⁵¹ He rejected Norris's claim that such data collection might be counterproductive, maintaining that "[a]ll of the surface water gauging stations installed as part of this characterization will provide, at a minimum, useful data for developing an understanding of the interaction between precipitation, groundwater, and surface water."²⁵²

Similarly, the Licensee responded to the Intervenor's criticisms regarding the FSP's lack of a plan to identify losing streams by claiming, (1) the importance given to losing streams by the Intervenor was based upon a highly speculative scenario whereby surface water drops into conduits and then resurfaces at a distance;²⁵³ and (2) that such identification might be part of the site characterization.²⁵⁴ The Licensee's witness Snyder also maintained, however, that whether DU might be present in the streams should be determined first and that, if not present, it was not necessary to investigate further the pathway.

MR. SNYDER: We have not determined that there are losing streams. That will be part of our characterization.

JUDGE ABRAMSON: It is part of what you're going to do.

²⁴⁷ See NRC Staff Exh. 2, Peckenpaugh Direct at 11-12, 22; Army Exh. 4, Eaby Direct at 7, 43-45.

²⁴⁸ NRC Staff Exh. 2, Peckenpaugh Direct at 8-9, 22; Army Exh. 4, Eaby Direct at 15-16, 43-35.

²⁴⁹ See, e.g., Army Exh. 4, Eaby Direct at 15-16.

²⁵⁰ Tr. at 234-35 (Norris).

²⁵¹ Army Exh. 4, Eaby Direct at 44.

²⁵² *Id.* at 45.

²⁵³ Army Exh. 5, Snyder Direct at 36.

²⁵⁴ Tr. at 263 (Snyder).

MR. SNYDER: Certainly.

JUDGE ABRAMSON: And when — And if you find losing streams, then what? Is it your plan to figure out where it went?

MR. SNYDER: If it is necessary to characterize the site and the migration of DU, yes.

JUDGE ABRAMSON: And how would you determine whether it's necessary to determine the migration of DU?

MR. SNYDER: The entire program that proves out and develops our site conceptual model starts with DU in the soil. Our program looks at the migration of DU through surface water through the soils and into the groundwater through the caves into the surface water over land into the surface water.²⁵⁵

If any DU was discovered in the water, Snyder asserted that “the pathway would be investigated further.”²⁵⁶

In response to the Intervenor’s assertions that work should be done to identify a possible non-fracture-controlled, deep karst network, the Licensee countered that it was unlikely that a deep karst network even existed on the site.²⁵⁷ Snyder testified that “Mr. Norris expresses concern that there is a DU migration pathway to a remote area (possibly a paleo-karst channel or network) that will go undiscovered and undetected. The geological conditions at the site (flat-lying Silurian-aged siliceous dolomitic limestone) are not likely to host such a condition, and local geological literature makes no reference to such a condition or potential.”²⁵⁸ The witness further maintained that contamination of such a possible aquifer was unlikely because of its depth below the surface; instead, DU would first contaminate surface and shallow groundwater systems that, in his opinion, had been adequately characterized.²⁵⁹ With regard to the Intervenor’s claim that some caves cannot be identified with the FTA, the Licensee asserted that such caves are above the water table and not significant pathways.²⁶⁰

The Licensee further represented that it will in fact collect much of the information sought by the Intervenor. For instance, it planned to gather the stream elevation and hydrological information considered by the Intervenor to be “absolutely necessary to characterize the site.”²⁶¹

²⁵⁵ Tr. at 263-64.

²⁵⁶ Army Exh. 5, Snyder Direct at 49.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *See id.* at 28-29.

²⁶⁰ Tr. at 253 (Snyder).

²⁶¹ Tr. at 235-36 (Norris).

JUDGE ABRAMSON: [D]o you need to collect both elevation and flow data from your stream gauging, and if so, are you intending to do it. And if not, why is [it] not necessary?

MR. SNYDER: This is Steve Snyder. We are intending to do it. It is valuable to do it. We have stage data. We will survey those stage points and all of that stage data becomes elevation data.²⁶²

Finally, the Licensee asserted that it was unlikely DU had contaminated or would contaminate the groundwater. Snyder testified that there was currently no evidence of DU having entered the groundwater,²⁶³ and, while the Licensee's studies regarding DU migration in the soil have not been completed,²⁶⁴ the 2002 Final Environmental Report indicated that the farthest any DU had migrated in the soil from a projectile was fewer than 2 feet.²⁶⁵ Anagnostopoulos described the projectiles they had found so far as

near surface soils, they have a black oxide layer that's fairly tightly adherent with a yellow oxide layer intermixed between the two, and that when you remove the penetrator and look at the soils, typically that yellow discoloration, the uranium is right there next to the penetrator. In other words, you don't see visually a plume of that yellow oxide in the surrounding soils. It's usually in a very tight layer in that area.²⁶⁶

Essentially, the Licensee's witness testified that the examined DU projectiles had not shown signs of having leached extensively into the surrounding soil.²⁶⁷

4. The NRC Staff's Response Regarding Water Data

In common with the Licensee, the Staff asserted that the Intervenor's insistence for a widespread understanding of the karst geology and certain additional tests at the outset of characterization ignored the flexibility and probability of success within the Licensee's FSP, which called upon the Licensee to collect data from the initial monitoring wells and cave and stream gauges and then to determine if additional information is needed.²⁶⁸ For instance, the Staff's witness Peckenpaugh

²⁶² Tr. at 236.

²⁶³ Army Exh. 5, Snyder Direct at 49.

²⁶⁴ See, e.g., Tr. at 310 (Anagnostopoulos) ("We have no idea how those penetrators are corroding right now. We're going to go find out").

²⁶⁵ Army Exh. 8, Environmental Report[.] Jefferson Proving Ground at 3-7 to 3-8 (June 2002).

²⁶⁶ Tr. at 211 (Anagnostopoulos).

²⁶⁷ See *ibid.*

²⁶⁸ NRC Staff Exh. 2, Peckenpaugh Direct at 6, 11-12, 22.

found it appropriate to collect stream gauging data before the karst system became well understood. As he saw it, “[Intervenor] is concerned about installing the stream and spring cave gauges before the groundwater system is better understood. I disagree because stream gauges have priority.”²⁶⁹

More generally, Staff witness Peckenpaugh asserted that the Intervenor had “overstated the importance of the FTA in the location of the monitoring well selection” because if the data are not sufficient, the flexibility of the FSP allows for evaluating potential well sites based on other information as well.²⁷⁰ He described the Intervenor’s proposed use of a combination of electrical resistivity surveying and reflection seismic surveying as “repetitive and unnecessary.”²⁷¹ Similarly, he asserted that conservative assumptions could sufficiently substitute for a number of data points (e.g., hydraulic conductivity values) that Norris had argued were needed.²⁷²

The Staff further maintained that, contrary to the Intervenor’s claims, it was not necessary to identify all of the karst features in order to have an adequate characterization of the site.²⁷³ Peckenpaugh testified that the FSP provided an adequate method, conduit well pairing, to determine if a deeper karst system existed.²⁷⁴ He thought it unlikely, however, that such a system existed because, as the drills had gone deeper, the bedrock had manifested signs of lower permeability, becoming denser and containing more shale.²⁷⁵

5. Board Findings Regarding Water Data

The groundwater, surface, and subsurface water monitoring program in the FSP must assess whether DU will reach offsite humans through drinking water or the consumption of animals or plants (that have in turn consumed water from the JPG site) in quantities significant enough that those offsite humans might receive more than 25 mrems of total radioactive exposure from all of JPG’s pathways per year.²⁷⁶ The Licensee has altered its plan significantly over time, both in response to the Intervenor’s concerns and to Staff Requests for Additional Information (RAIs).²⁷⁷ These changes show both the plan’s iterative nature and

²⁶⁹ *Id.* at 16.

²⁷⁰ *Id.* at 18.

²⁷¹ NRC Staff Exh. 7, Peckenpaugh Rebuttal at 5.

²⁷² *Id.* at 2; *see also* NRC Staff Exh. 6, McLaughlin Rebuttal at 5.

²⁷³ NRC Staff Exh. 2, Peckenpaugh Direct at 6.

²⁷⁴ NRC Staff Exh. 7, Peckenpaugh Rebuttal at 4.

²⁷⁵ Tr. at 273 (Peckenpaugh).

²⁷⁶ *See* 10 C.F.R. § 20.1403.

²⁷⁷ *See* NRC Staff Exh. 15, 16, 17, and 18 (FSP addendums); Army Exh. 9, 10, and 13 (responses to RAIs).

that the Licensee has changed its approach and gathered additional information, like stream gauging data, when necessary.²⁷⁸

We understand the Intervenor's fundamental criticism of the plan to relate to timing and the perceived inefficiencies in the Licensee's plan, rather than to a concern that substantive, significant pieces of data will be missing; essentially, the Intervenor would like much of the work, like stream gauging, to have been done *before* wells were drilled.²⁷⁹ The Intervenor's testimony on this subject failed, however, to provide sufficient evidence to outweigh the Licensee's showing that its plan to modify later stages of work as new site-specific data are collected is reasonably likely to result in sufficient site characterization information at the end of the 5 years. The Intervenor's witness Norris testified that he suspected that such later data "may never be collected."²⁸⁰ We see no reason to indulge in such conjecture. To the contrary, as now formulated, the FSP leaves us in little doubt that the Licensee will continue to collect the additional site-specific data as needed on the basis of obtained test results.

In its criticisms of the Licensee's chronology, the Intervenor has failed to establish that the Licensee's plan to use the data from its initial wells, stream gauging, and cave stream gauging to drill other wells is not likely to result in a network of wells that effectively monitors any DU leaving the site in significant quantities through the groundwater. As previously noted, the Licensee is employing an iterative approach involving fracture trace analysis (FTA), electrical imaging surveys (EI), site selection and installation of well pairs, collection of stage data, comparison of groundwater stage levels, precipitation and surface water flow data to evaluate connectivity of the installed wells, and groundwater sampling. We are satisfied that this approach will be sufficient to obtain all of the verifiable data required for reliable dose modeling and accurate assessment of the effects, if any, of water-related DU pathways, and thus more than sufficient for site characterization and a decommissioning plan. In implementing such a phased iterative approach, the Licensee will work under the Staff's close oversight. We are confident that the Staff will give effect to the Board's legal standard for this alternative schedule, *supra* Part II.A, and ensure that any additional sampling necessary to generate the information for a decommissioning

²⁷⁸ See Tr. at 242 (Peckenpaugh).

²⁷⁹ See, e.g., Tr. at 236 (Norris) ("Timing is absolutely critical with the characterization of this site in a 5-year period and to acquire the knowledge base you need to know what additional characterizations you then subsequently need to collect"); STV Exh. 1, Norris Surrebuttal at 4-5.

²⁸⁰ STV Exh. 1, Norris Surrebuttal at 3.

site characterization, including any sampling needed for any additional models,²⁸¹ will be conducted within the 5-year alternate schedule period.

As to Intervenor's criticism of using the existing JPG network of roads for locating well sites, the existing road network allows access to the entire perimeter of the DU Impact Area and crosses the DU Impact Area in appropriate intervals and along important hydrogeologic features, such as Big Creek.

As previously discussed, *supra* page 115, a site characterization plan need not assess possible chemical toxicity or even radiological ecological contamination, except to such extent, if any, that these issues might affect the 25-mrem total effective dose equivalent limit from the site.²⁸² While a full characterization of the site's karst geology might be helpful to a broader ecological assessment of the site, it is only necessary for site characterization to the extent that such karsts represent DU pathways, as the purpose of the karst and site characterization is to develop a satisfactory and conservative dose assessment.

Both the seepage runs and the complete karst system maps requested by the Intervenor are predicated upon the speculation that non-fracture-controlled networks of deep karst leaving the site exist. As of yet, we are unpersuaded that such networks are below the site: while Norris offers some evidence for their existence,²⁸³ the Licensee has effectively countered that the site's particular geology makes such a possibility unlikely.²⁸⁴ Even if such networks are present, for them to be contaminated by DU presumes that DU has dissolved or will dissolve off the outside of the DU projectiles into the surface and groundwater; however, penetrator soil samples indicate that the uranium did not migrate more than 2 feet from the penetrators between 1994 and 2002.²⁸⁵ Moreover, it is very unlikely that such contamination could occur without the conduits above these networks becoming similarly contaminated and the contamination thus detected, particularly if losing streams are monitored.²⁸⁶ Not only has the Intervenor not presented evidence suggesting that any of the water posed to leave the site contains any amount of DU, but the Licensee has both explained its reasons for not believing such pathways to be particularly significant (or even in existence) and demonstrated that the Licensee has plans to characterize such possible pathways if it is discovered that DU has migrated into the groundwater. At the predecommissioning plan stage, we consider this to be sufficient.

²⁸¹ See NRC Staff Exh. 7, Peckenpaugh Rebuttal at 2-3 (stating that a model other than RESRAD is likely to be needed later in order to characterize dose estimates of the potential DU where karst features exist).

²⁸² See 10 C.F.R. § 20.1403.

²⁸³ See Tr. at 258 (Norris).

²⁸⁴ See *also* Army Exh. 5, Snyder Direct at 49.

²⁸⁵ See Army Exhibit 8, Environmental Report at 3-7 to 3-8; Tr. at 211 (Anagnostopoulos).

²⁸⁶ See Army Exh. 5, Snyder Direct at 28-29.

IV. CONCLUSION

For the foregoing reasons, we conclude that the Intervenor's challenges to the Field Sampling Plan must be rejected with the consequence that the Staff justifiably issued the requested license amendment providing for the alternate schedule.

That said, it does not perforce follow that it is now settled that the decommissioning plan ultimately submitted by the Licensee will be supported by an adequate site characterization. All that we needed to decide, and have decided, in this proceeding is that the FSP provides reasonable assurance that such a characterization will be developed by 2011. As we read the regulation governing the grant of alternate schedules, the Licensee was not obliged to convince us that the FSP provided an absolute guarantee that, at the end of the 5-year period sought by the Licensee for the submission of the decommissioning plan, the site will have been characterized to the satisfaction of all concerned, including both the Staff and this Intervenor.

In that regard, it must be kept in mind that, when the Licensee submits its decommissioning plan in connection with yet another application for a termination of its materials license, the Staff will be required to publish a *Federal Register* notice providing an opportunity for hearing on the application. In response to the notice, any individual or organization with the requisite standing will be entitled to seek a hearing on any aspect of the plan — including the supporting site characterization. For its part, the present Intervenor will be free to challenge the adequacy of the characterization on any grounds that it deems meritorious.²⁸⁷ It will be of no moment in passing upon any such challenge that the Intervenor's objections to the FSP were not accepted in this entirely distinct proceeding. At that point, the question will not be whether the FSP provided reasonable assurance of providing an adequate site characterization. Rather, at hand will be the entirely different question whether, in actuality, that objective was realized.

V. ORDER

For the foregoing reasons, the issues raised by the Intervenor's Contention B-1 are resolved in the Licensee's favor. Accordingly, the grant by the NRC of the requested alternative schedule for the submission of a decommissioning plan must be, and hereby is, *affirmed*.

²⁸⁷ This subject was touched upon at the Oct. 22, 2007 oral argument. In response to the Board's question, the Staff told the Board that the Intervenor "would not at all be foreclosed" from later challenging the decommissioning plan. Tr. at 118.

This Initial Decision shall constitute the final decision of the Commission forty (40) days from the date of its issuance, unless, within fifteen (15) days of its service, a petition for review is filed in accordance with 10 C.F.R. § 2.341(b)(1).
It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD²⁸⁸

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 28, 2008

The separate opinion of Judge Abramson, concurring in the result but disagreeing with the legal analysis contained in a portion of the majority opinion, is attached.

²⁸⁸ Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to counsel for (1) the Licensee, (2) the NRC Staff, and (3) Intervenor.

Separate Opinion of Judge Abramson Concurring in the Result but Disagreeing in Material Aspects of the Legal Analysis

I concur with the end result of the majority's opinion — because its analysis of the factual situation is substantively correct. However, I find the majority's analysis of the legal standards for this proceeding, which underlies their reasons for admission of these contentions, to be fundamentally flawed because it improperly ignores the plain meaning of section 40.42(g)(2) of our regulations.

Section 40.42(g)(2), as is set out explicitly in the introductory paragraph of section II.A of the majority's analysis, is a three-part test for granting or denying a request for an alternate decommissioning schedule. Those parts are that the alternate schedule: (a) "is necessary to the effective conduct of decommissioning operations"; (b) "presents no undue risk from radiation"; and (c) "is otherwise in the public interest."

The majority's analysis of part (a) is that there is imbedded therein some requirement that "the alternate schedule must be reasonably likely to generate the site characterization information needed to support the decommissioning plan. . . ." No such requirement is contained in or implied by clause (a), which on its face simply requires that the requested alternate schedule be necessary to eventual decommissioning. In every instance it is necessary to characterize the site as a precursor to actual decommissioning, and since site characterization has not yet been carried out for the JPG site, a schedule modification to enable these activities to be conducted is manifestly necessary. Nowhere in this regulation is there any hint that the site characterization activities must be satisfactorily completed by the end of the requested 5-year extension; in fact, this was so evident that the Staff added a condition to the license amendment granting this extension requiring that result. Furthermore, no law or precedent is cited by the majority for their proposed rewrite of this clause.²⁸⁹ Nor do "considerations of the history and context of this case" (as the majority would have it) enter into this simple and straightforward interpretation of this requirement of our regulations; it is plainly a simple requirement that decommissioning cannot be carried out unless the requested extension is granted — and that is clear. For these reasons, I find the majority's analysis of clause (a) to be erroneous.

The majority's other principal point in assessing the requirements of section 40.42(g)(2) focuses upon clause (c), requiring that the requested extension be "in the public interest." For my part, since there can be no decommissioning without the site characterization, and therefore without the requested extension, and since it is plainly "in the public interest" to decommission the JPG site,

²⁸⁹ The majority's conclusion (at p. 114) that there must be reasonable assurance that the FSP will generate the required information within the allotted 5-year period, and their attempt to bootstrap this requirement upon their own previous analysis, is simply without foundation.

it cannot be challenged that the requested extension is “in the public interest.” However, the majority would have us read into this clause that because the Army has taken so long to get to the point where it found the technical methods to perform the characterization of this site (which is laden with unexploded ordnance and therefore hazardous to personnel undertaking such efforts), the “history and context” of this proceeding somehow grant them the liberty to rewrite this plain portion of our statute to add a requirement that complete site characterization must be accomplished within the requested 5-year extension.

For the foregoing reasons, I disagree with the majority’s analysis of the legal standards for this proceeding.

So, given the foregoing, one might legitimately inquire why I consented to the initial admission of these contentions and how this Board got to this point. The explanation is not so direct. To be sure, I agree with the Staff that the grant of the requested license extension was entirely warranted and not challengeable — particularly given the nature and character of STV’s technical challenges to the specific elements of the site characterization plan proposed by the Army. However, it was evident from the beginning of this phase of the dispute between STV and Army that the evolving, iterative nature of the Army’s plan to characterize the site was the kernel of the misunderstanding and for potential resolution. For this reason, at the commencement of this phase of the proceeding, this Board required that the parties discuss in depth how the Army’s plan-to-develop-a-plan for site characterization (which is what the FSP in fact is) might incorporate STV’s concerns. Thus, from the outset, this Board attempted to enable the parties to resolve these highly technical debates over how early gathered data should be used to modify the plan to determine the next data to be gathered, etc., with the goal of maximizing the probability that satisfactory site characterization could indeed be accomplished within the license extension — as required by the express conditions of the granted license amendment. Unfortunately, as the majority has described, those talks broke down, leaving all parties dissatisfied with the situation.

Compounding the matter is the fact that the FSP, being an iterative, evolving process, is extremely difficult to challenge on substance because the answer to every technical challenge is simply something of the order of “if we find that to be necessary as future data are generated, we will address that point.” This is exacerbated by the possibility that permitting a challenge at this early stage in the development of the plan can open a Pandora’s box for challenges at each and every step; i.e., each time new data are gathered, there might be a further foundation for a challenge to how the plan should then be modified. Thus, this Board was concerned that whatever proceeding was held at this point not provide such an opening for continuous litigation throughout the requested extension period — a process which would unduly distract the Army and the Staff from the necessary fundamental site characterization effort. This consideration was,

however, balanced by STV's serious concerns regarding the need for effective site characterization, and as a result this Board determined it was proper, in furtherance of the Agency's mission to openly engage with its stakeholders in its efforts to protect the public health and safety, to conduct a single hearing at this point regarding whether or not the FSP is so fundamentally flawed that it cannot reasonably be expected to accomplish site characterization. Obviously, put in this way, STV had an extremely high bar to surmount in its challenge, but, even though it has failed in that effort, it has the opportunity to challenge any decommissioning plan which eventuates from the site characterization eventuating from the evolving, iterative FSP. Thus, when the decommissioning plan becomes clear, STV has the full opportunity to reexamine its relevant concerns in the light of actual data gathered regarding site characterization, and to air them in further proceedings if warranted.

Finally, it is worth noting that one of the conditions precedent to the grant of the requested extension is that it present no undue risk from radiation, and, in this regard, I note several factors: (a) the DU projectiles have been in the site since 1994²⁹⁰ and are lying along a single target line, creating a sort of trench through a portion of the site;²⁹¹ (b) those projectiles are, for all practical purposes, intact;²⁹² and (c) there has been very little leaching of DU off of those projectiles into the soil, with data gathered so far indicating no presence of DU beyond 23.6 inches from a projectile.²⁹³ Thus, there is no reason to believe that any reasonable period of further delay to properly and safely characterize the site creates any risk to the health and safety of the nearby population from radiation from the DU that is the subject of this license.

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

²⁹⁰ Army Exh. 8, Environmental Report[:] Jefferson Proving Ground at 1-1 (June 2002).

²⁹¹ NRC Staff Exh. 14, Field Sampling Plan (FSP) at 2-1 (May 25, 2005).

²⁹² See Tr. at 211-12 (Anagnostopoulos).

²⁹³ Army Exh. 8, Environmental Report at 3-7 to 3-8.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of

Docket No. 30-36974-ML
(Materials License Application)

PA'INA HAWAII, LLC

March 17, 2008

The Commission addresses two questions that the Atomic Safety and Licensing Board certified to the Commission. The Commission concludes that contentions raising irradiator siting concerns are not barred as a matter of law, but must be adequately supported.

REGULATIONS: INTERPRETATION (PART 36)

The Statement of Considerations (SOC) for Part 36 indicates that in developing the Part 36 regulations, the NRC considered whether there was a need to impose limits on irradiator siting, but determined that no specific siting limitations were warranted. The SOC makes clear that the NRC explicitly considered whether there should be siting requirements because of potential floods, tidal waves, airplane crashes, or earthquakes, but concluded that irradiators could be located anywhere that local governments permit an industrial facility to be built. There is no evidence that the Commission intended to exempt underwater irradiators from its conclusion that irradiators can be built anywhere that local authorities permit an industrial facility to be located.

REGULATIONS: INTERPRETATION (PART 36)

The Part 36 Statement of Considerations does hold open the possibility that the NRC may choose, in an exceptional case, to conduct an irradiator facility siting

review, if a unique threat is involved which may not be addressed by state and local requirements. But the general expectation was that the NRC would not need to conduct a special safety review of facility siting. Instead, both the Statement of Considerations and 10 C.F.R. § 36.1(a) stress the responsibility of licensees to satisfy all applicable state and local siting, zoning, land use, and building code requirements.

RULES OF PRACTICE: STATEMENT OF CONSIDERATIONS

The Commission often refers to the Statement of Considerations as an aid in interpreting our regulations.

RULES OF PRACTICE: STATEMENT OF CONSIDERATIONS

As guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the Statement of Considerations is entitled to special weight.

REGULATIONS: INTERPRETATION (PART 36)

The Part 36 rulemaking history leaves open the possibility that there could be a need for the NRC to review facility siting, on a case by case basis, if a unique threat is involved which may not be addressed by state and local requirements. Therefore, a contention calling for a siting safety analysis is not barred by the Part 36 regulatory scheme. But contentions challenging an irradiator facility's siting must be sufficiently supported, in light of the Statement of Considerations' conclusions. Petitioners must set forth, with adequate elaboration and support, a plausible claim that a proposed irradiator facility would not be adequately protective in the event of specific phenomena.

CONTENTIONS, ADMISSIBILITY

The degree of support necessary for an irradiator siting contention will depend on how obvious a threat the asserted risk is, given the irradiator facility's design and protective features (e.g., depth and dimensions, lack of volatility of sources, shielding provided by water and/or concrete, temperatures, pressure, impact, and other conditions the source assemblies have been tested to withstand, etc.).

CONTENTIONS, ADMISSIBILITY

At the contention admissibility stage, it is not necessary to establish a general

“probability threshold” for irradiators to assess in qualitative terms the significance and plausibility of particular asserted siting-related threats.

MEMORANDUM AND ORDER

This proceeding stems from Pa’ina Hawaii, LLC’s (Pa’ina) application for a materials license to possess and use byproduct material in connection with an underwater irradiator, to be located in Honolulu, Hawaii, near the Honolulu International Airport. Recently, the Commission invited the parties to address two questions that the Atomic Safety and Licensing Board certified to the Commission.¹

At issue is the scope of an underwater irradiator licensing proceeding, and whether it requires or otherwise properly may encompass siting-related safety contentions. Intervenor Concerned Citizens of Honolulu (Concerned Citizens) has proffered safety contentions addressing “risks asserted to be endemic” to the proposed irradiator site, including aircraft crashes, earthquakes, hurricanes, and tsunamis. Pa’ina and the NRC Staff argue that except for unusual circumstances not evident in this case, site-related analyses for irradiators are unnecessary and fall beyond the scope of irradiator proceedings.

The Board’s primary certified question to the Commission asks whether “in the circumstances presented, 10 C.F.R. § 30.33(a)(2)² requires a safety analysis of the risks asserted to be endemic (i.e., aircraft crashes and natural phenomena) to the proposed irradiator site at the Honolulu International Airport?”³ In the event the Commission were to conclude that such a siting safety analysis is not “as a matter of law, outside the scope of this proceeding,” the Board also asks the Commission to address what “probability threshold” would trigger the need for such a site analysis.⁴

In this decision, the Commission concludes that contentions raising irradiator siting concerns are not barred, as a “matter of law,” from irradiator proceedings. However, the regulatory history of NRC irradiator regulations indicates that the agency purposefully refrained from adopting any site selection requirements for irradiators because it concluded that irradiators are generally unlikely to pose any significant risk of offsite harm. The Part 36 rulemaking makes clear that in

¹ CLI-07-26, 66 NRC 109 (2007).

² Section 30.33(a)(2) states that an application will be approved if “[t]he applicant’s proposed equipment and facilities are adequate to protect health and minimize danger to life or property.”

³ Memorandum (Certifying Question to the Commission) (Aug. 31, 2007) at 17 (unpublished) (hereinafter Board Memorandum Certifying Question).

⁴ *Id.* at 18.

considering irradiator siting, the NRC expressly considered the potential risks of aircraft crashes and various natural phenomena, yet still concluded that irradiators generally can be safely located anywhere that local authorities permit industrial buildings to be constructed.⁵ As NRC guidance endorsed by the Commission and reached in a rulemaking, following notice and comment, the Part 36 rulemaking conclusions are entitled to special weight, and should be considered in judging whether Concerned Citizens' safety contentions calling for siting analyses present sufficient basis and are otherwise sufficiently supported.

Below we address these conclusions, as well as the Board's question on "probability threshold." Given, however, this long-pending proceeding's complex procedural history, and the number of matters still before the Board, we begin with a look at the current status of Concerned Citizens' contentions. While the Board's certified questions bear only on Concerned Citizens' *safety* contentions, for clarity, we outline both the safety and environmental contentions.

I. BACKGROUND

Concerned Citizens filed a request for hearing on October 3, 2005. Because portions of the Pa'ina application addressing safety issues contained sensitive, publicly unavailable information, the Board bifurcated the contention admissibility portion of the proceeding, issuing separate decisions on the proffered environmental and safety contentions.

The Board first issued a decision on Concerned Citizens' two environmental contentions.⁶ Both contentions claimed that the NRC failed to comply with the National Environmental Policy Act (NEPA) because it improperly invoked a "categorical exclusion" regulation, 10 C.F.R. § 51.22(c)(14)(vii), which permits the NRC to forego conducting an environmental review for irradiator licensing actions. By definition, the "categorical exclusion" rule applies only to classes of licensing actions that the NRC, by rule or regulation, has found "do [] not individually or cumulatively have a significant effect on the human environment."⁷

In its Environmental Contention 1, Concerned Citizens noted that the "categorical exclusion" provision contains an exception for "special circumstances" that could prompt the need for an environmental assessment (EA) or environmental impact statement.⁸ Environmental Contention 1 argued that the NRC failed to consider and explain whether any extraordinary circumstances precluded invoca-

⁵ See Final Rule: "Licenses and Radiation Safety Requirements for Irradiators," 58 Fed. Reg. 7715, 7725 (Feb. 9, 1993) (Final Rule).

⁶ LBP-06-4, 63 NRC 99 (2006).

⁷ See 10 C.F.R. § 51.22(a).

⁸ See 10 C.F.R. § 51.22(b).

tion of the categorical exclusion rule. In Environmental Contention 2, Concerned Citizens went on to claim that due to the possibility of threats unique to the location or design of the proposed Pa'ina irradiator, including potential airplane crashes, tsunamis, and hurricanes, there are "special circumstances" warranting an environmental assessment or environmental impact statement. The Board admitted both contentions, although it found inadmissible portions of Contention 2 that relied on claims of potential terrorist acts or health consequences from irradiated foods.⁹

Following a Joint Stipulation between Concerned Citizens and the Staff, the two parties jointly moved to dismiss the two environmental contentions. As part of the Joint Stipulation, the Staff agreed to prepare an EA for the proposed irradiator, with Concerned Citizens retaining the right to file contentions challenging the adequacy of any NEPA document the Staff might prepare. The Board approved the agreement, and therefore dismissed the environmental contentions.¹⁰

In a separate decision on Concerned Citizens' safety contentions, the Board admitted three contentions, numbered 4, 6, and 7.¹¹ Safety Contentions 4 and 6 asserted that Pa'ina's application failed to describe procedures for responding to accidents involving a prolonged loss of electricity and events involving natural phenomena. NRC regulations for irradiators require licensees to have "emergency or abnormal event procedures" for various events, including a prolonged loss of electricity and natural phenomena, such as an earthquake, tornado, flooding, etc.¹² Following the Board's decision, Pa'ina provided to the NRC outlined procedures for prolonged loss of power and for natural phenomena. The Board then granted a Pa'ina motion to dismiss Safety Contentions 4 and 6 as moot.¹³

⁹LBP-06-4, 63 NRC at 107-15. Pa'ina filed an interlocutory appeal of the Board's decision admitting Environmental Contentions 1 and 2. The Commission denied the interlocutory appeal. *See* CLI-06-13, 63 NRC 508 (2006).

¹⁰Order (Confirming Oral Ruling Granting Motion To Dismiss Contentions) (Apr. 27, 2006) (unpublished). Pa'ina appealed the Board's decision, objecting to the terms of the Joint Stipulation, particularly the Staff's agreement to prepare an EA, even though there had not yet been any litigation on the merits of the Concerned Citizens' contentions challenging the application of the "categorical exclusion" rule. The Commission denied the interlocutory appeal. *See* CLI-06-18, 64 NRC 1 (2006).

¹¹LBP-06-12, 63 NRC 403, 412-20 (2006). Concerned Citizens originally submitted twelve safety contentions, but withdrew two prior to the Board's ruling.

¹²*See* 10 C.F.R. § 36.53(b)(6) and (9).

¹³Memorandum and Order (Ruling on Admissibility of Two Amended Contentions) (June 22, 2006) (unpublished). Pa'ina submitted Amended Safety Contentions 4 and 6 challenging Pa'ina's outlined emergency procedures for prolonged loss of power and natural phenomena, but the Board found the amended contentions inadmissible under NRC contention rules. *Id.*

A. Safety Contention 7

The third admitted safety contention — Safety Contention 7 — claimed that the Pa’ina application “fails completely to address the likelihood and consequences of an air crash,” and that these issues needed to be addressed given the proposed irradiator’s location by the Honolulu International Airport, a major airport claimed to have a relatively high rate of aircraft accidents.¹⁴

In January 2007, Pa’ina moved to dismiss Safety Contention 7 on the ground that it had become moot. Pa’ina argued the contention was moot because the Staff had made available — on the NRC’s Agencywide Documents Access and Management Systems (ADAMS) database — what Pa’ina called a “Safety Topical Report,” addressing the likelihood and consequences of an aircraft crash into the proposed irradiator.¹⁵

The Staff supported Pa’ina’s motion to dismiss Safety Contention 7. The Staff explained that it issued in December 2006 a draft EA for the Pa’ina irradiator, which examined the probability and consequences of an aircraft crash. The Staff further explained that the findings in the draft EA were based upon a report prepared by the Center for Nuclear Waste Regulatory Analyses, titled “Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents.” The Staff’s motion referred to this report in shorthand as the “Safety Topical Report.” Noting that “the EA and Safety Topical Report provide the information allegedly omitted from the application,” the Staff argued that Safety Contention 7 should be dismissed as moot.¹⁶

Because Pa’ina had not met the agency’s procedural requirements for filing motions, the Board did not grant Pa’ina’s motion to dismiss Safety Contention 7. But the Board went on to say that it would later, on its own motion, dismiss the contention as moot, given that the “Draft Safety Topical Report . . . cures the originally alleged failure” to address aircraft crashes.¹⁷ The Board also noted that Concerned Citizens would later be able to file amended contentions challenging the “Draft Safety Topical Report and the Draft Environmental Assessment.”¹⁸

Notably, Safety Contention 7 remains admitted at this time. The Board has not ruled yet on whether Safety Contention 7 is moot, and recently indicated that it

¹⁴LBP-06-12, 63 NRC at 418 (internal citation omitted). The Commission denied Pa’ina’s interlocutory appeal of the Board’s decision to admit Safety Contention 7. See CLI-06-13, 63 NRC 508 (2006).

¹⁵See Applicant Pa’ina Hawaii, LLC’s Motion To Dismiss Safety Contention 7 (Jan. 9, 2007) at 4.

¹⁶NRC Staff Response to Applicant Pa’ina Hawaii, LLC’s Motion To Dismiss Safety Contention #7 (Jan. 19, 2007) at 3.

¹⁷Order (Rejecting Motion To Dismiss) (Jan. 25, 2007) at 2.

¹⁸*Id.* at 4.

will defer ruling on the contention until after the Commission's decision on the Board-certified questions.¹⁹

B. Contentions Challenging Draft Topical Report and Draft Environmental Assessment

On February 9, 2007, Concerned Citizens filed two safety contentions challenging the draft Topical Report.²⁰ Safety Contention 13 challenged the draft Topical Report's analysis of aircraft accident probability and consequences. Safety Contention 14 challenged the draft Topical Report's analysis of the safety risks from natural phenomena, including tsunamis, hurricanes, and earthquakes.

On the same day, Concerned Citizens also filed three environmental contentions challenging the draft EA. Environmental Contention 3 asserted that the draft EA fails to take a "hard look" at the potential environmental impacts of the proposed irradiator. More specifically, Environmental Contention 3 claimed the draft EA (1) relies on generalized statements instead of adequate analysis; (2) fails to consider numerous potential impacts and accident scenarios; (3) fails to consider potential impacts from terrorism, given a recent Ninth Circuit Court of Appeals ruling rejecting the NRC's policy of not providing NEPA analysis of potential terrorism impacts; and (4) fails to address potential impacts from irradiating food. Environmental Contention 4 claimed a failure to address alternatives. Lastly, Environmental Contention 5 claimed that the significance of potential environmental effects requires the NRC to prepare an environmental impact statement.

In an unpublished order, the Board stated that it would wait to rule on the environmental contentions until after the Staff issued its final EA, and until after the deadline for filing any amended contentions challenging the final EA.²¹ The Board also stated that it would rule separately on the proffered safety contentions challenging the draft Topical Report.

C. Contentions Challenging Final Topical Report and Final Environmental Assessment

The Staff made available a final Topical Report in May 2007, and issued its

¹⁹ Board Memorandum Certifying Question at 6.

²⁰ See Intervenor Concerned Citizens of Honolulu's Contentions Re: Draft Environmental Assessment and Draft Topical Report (Feb. 9, 2007).

²¹ See Order (Regarding Environmental Contentions) (unpublished) (July 18, 2007).

final Environmental Assessment in August 2007.²² Concerned Citizens responded by filing amended safety and environmental contentions challenging the final documents.²³ The amended contentions claimed that the final EA and Topical Report repeated deficiencies of the draft documents, and contained new flawed information.

Concerned Citizens' amended safety and environmental contentions challenging the final EA and final Topical Report have the same titles, and present largely similar concerns, as the earlier contentions challenging the draft EA and draft Topical Report. Amended Safety Contentions 13 and 14 claim deficiencies in the Topical Report's analyses of potential aircraft crashes and natural phenomena. Amended Environmental Contention 3 claims that the Staff failed to take a "hard look" at potential environmental impacts.²⁴ Amended Environmental Contention 4 claims that additional analysis of "alternatives" is required. And amended Environmental Contention 5 claims that the proposed irradiator's potential impacts require an environmental impacts analysis.

The Board recently admitted amended Environmental Contentions 3 and 4.²⁵ The Board deferred ruling on the admissibility of amended Environmental Contention 5, which asserts that the Staff is obligated to prepare an EIS for the proposed irradiator. Calling amended Contention 5 "premature," the Board stated it would first "reach[] the merits of [environmental] contentions 3 and 4,"

²² See Final Topical Report on the Effects of Potential Aviation Accidents and Natural Phenomena at the Proposed Pa'ina Hawaii, LLC, Irradiator Facility (May 2007) (ADAMS Accession No. ML071280833); Final Environmental Assessment for Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii (Aug. 2007) (ADAMS Accession No. ML071150121).

²³ Intervenor Concerned Citizens of Honolulu's Amended Safety Contentions #13 and #14 (June 1, 2007); Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions #3 through #5 (Sept. 4, 2007).

²⁴ One of the numerous claims made in Environmental Contention 3 is that while the final Environmental Assessment does examine the potential for terrorist acts, the NRC did not take a sufficiently "hard look" at potential impacts from terrorism.

²⁵ Memorandum and Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) (Dec. 21, 2007) (Memorandum on Environmental Contentions) (slip op.). The Board initially deferred ruling on the portion of Environmental Contention 3 that challenges the Staff's analysis of potential terrorism-related impacts. The Board stated that it would wait to rule on that portion of the contention until it "ha[d] the benefit of the Commission's guidance from its treatment of [an] analogous contention in the *Diablo Canyon* proceeding." *Id.* at 20. Following issuance of the Commission's decision in the *Diablo Canyon* proceeding, the Board directed the parties in this proceeding to provide additional briefs, addressing how the Commission's decision in *Diablo Canyon* might impact the admissibility of the NEPA-based terrorism claims raised in Environmental Contention 3. See Order (Requiring Parties To File Responsive Pleadings) (Jan. 24, 2008) (unpublished). On March 4, 2008, the Board ruled on the admissibility of the terrorism-related challenges, admitting the claims only to the extent that they assert that the Staff failed to disclose data underlying its terrorism analysis. See Memorandum and Order (Ruling on Admissibility of Intervenor's Terrorism-Related Challenges) (Mar. 4, 2008) (unpublished).

which go to the adequacy of the EA, before it could “determine[] whether an EIS is required.”²⁶

D. Additional Comment on the Topical Report

At this point, it bears noting that significant confusion apparently resulted from the Staff — both in its draft and final environmental assessments, and its response to the Pa’ina motion to dismiss Safety Contention 7 — having referred to the Topical Report as the “Safety Topical Report.” This gave the impression that the Topical Report was a Staff *safety review* document, separate from the environmental review conducted in the EA. Significantly, however, in a May 21, 2007 response to Board questions, the Staff clarified that the purpose of the Topical Report was to support the Staff’s environmental review, that the report was prepared “with only the requirements of NEPA in mind,” and that the Staff drew no “safety conclusions” from the report.²⁷

The Staff’s clarification suggests that the Topical Report should only be considered part of the Staff’s environmental review, not its safety review.²⁸ Indeed, the Staff has suggested that, had it conducted a *safety* analysis of potential aircraft crash consequences, such an analysis “would differ” from the Topical Report’s consequence analysis, “completed for the Staff’s environmental review,” because “there are different regulatory standards for environmental and safety reviews.”²⁹

Ultimately, the Staff completed a safety review of the proposed Pa’ina irradiator. In August 2007, the Staff provided a description of its safety review, and

²⁶Memorandum on Environmental Contentions at 33-34.

²⁷Board Memorandum Certifying Questions at 6 (citing NRC Staff Response to the Licensing Board’s April 30, 2007 Order (May 21, 2007) at 4 n.3).

²⁸See also NRC Staff’s Response to Commission’s October 24, 2007 Memorandum and Order (Nov. 7, 2007) (“Staff Response to Commission”), at 8 (Staff did not draw safety conclusions from the Topical Reports because it considers site-specific safety analyses for this licensing action to be unnecessary). If it is the case that the Staff did not rely at all on the Topical Report for its safety review, and considers the report only part of its environmental review, then it would appear inappropriate to classify as “safety” contentions those proffered contentions challenging the Topical Report. In effect, the contentions challenging the Topical Report are challenging the Staff’s environmental review, not its safety review. Given the confusion over what the Topical Report represents, the so-called “safety” contentions (Contentions 13 and 14) challenging the Topical Report could, if appropriate, be added to or folded into the environmental contentions challenging the EA. The Board may wish to seek the parties’ positions on this point.

²⁹NRC Staff Response to the Licensing Board’s June 6, 2007 Order (June 13, 2007) at 6.

issued the irradiator license to Pa'ina.³⁰ Concerned Citizens sought a stay of the effectiveness of the Pa'ina irradiator license. In ruling on the stay application, the Board noted that Pa'ina has yet to enter into a final lease for the proposed site to build the irradiator. The Board therefore is holding the stay application in abeyance "until the question of the Applicant's lease for the proposed irradiator is resolved."³¹

E. Contentions Challenging the Staff's Safety Review

Challenging the Staff's safety review, Concerned Citizens has now submitted two new safety contentions.³² Safety Contention 15 claims that the Staff's review is deficient because it fails to examine safety risks from potential aircraft crashes, tsunamis, or hurricanes. Safety Contention 16 claims that the Staff's review inadequately analyzes the safety risks from earthquakes. At the heart of the contentions is Concerned Citizens' argument that the Staff's safety review does not support a conclusion that the "proposed irradiator would 'protect health and minimize danger to life or property,' as required by 10 C.F.R. § 30.33(a)(2)."³³

II. THE PARTIES' ARGUMENTS ON THE BOARD'S FIRST CERTIFIED QUESTION

In certifying questions to the Commission, the Board asks the Commission to clarify the intent of the regulations governing irradiator licensing, and specifically to resolve whether a safety "siting analysis" of risks asserted to be endemic to the proposed irradiator's site is required and litigable.

The Board's first certified question asks the following:

1. Whether, in the circumstances presented, 10 C.F.R. § 30.33(a)(2) requires a safety analysis of the risks asserted to be endemic (i.e. aircraft crashes and natural phenomena) to the proposed irradiator site at the Honolulu International Airport?

³⁰ Pa'ina Hawaii, LLC, Safety Review (August 18, 2007) (ADAMS Accession No. ML072260186). The Staff explains that the document it refers to as the "Safety Review" is not a formal Safety Evaluation Report (SER), but represents a narrative description of the items considered by the Staff, as it goes down a "safety review checklist typically used . . . when considering an irradiator license application." See NRC Staff Response to Commission at 7 n.22.

³¹ See Board Order (Temporarily Holding in Abeyance Stay Application) (Oct. 5, 2007) at 2 (unpublished). Pa'ina continues to provide monthly updates on the status of its lease negotiations.

³² See Intervenor Concerned Citizens of Honolulu's Contentions Re: Final Safety Evaluation Report (Sept. 14, 2007).

³³ See *id.* at 2.

The Board's question centers on 10 C.F.R. § 30.33(a)(2), a rule stating the general requirement that an applicant's "proposed equipment and facilities [must be] adequate to protect health and minimize danger to life or property." This rule is found in 10 C.F.R. Part 30, which contains NRC rules of *general* applicability to domestic licensing of byproduct material. The NRC also has a set of regulations *specific* to irradiator licensing, codified as 10 C.F.R. Part 36. The NRC issued the Part 36 regulations to "consolidate[], clarif[y], and standardize" requirements for irradiator licensing.³⁴ Prior to implementing Part 36, the NRC licensed irradiators "on a case-by-case basis with relatively few specific requirements contained in formal regulations."³⁵ The Part 36 regulations are intended to provide a "formal, detailed, comprehensive set of regulations" for irradiator licensing.³⁶

Part 36 specifies numerous design, performance, and operations requirements for both *underwater* irradiators, "in which both the sources always remain shielded under water and humans do not have access to the sealed sources or the space subject to irradiation without entering the pool," and *panoramic* irradiators, "in which the irradiations are done in air in areas potentially accessible to personnel."³⁷ Section 36.13 outlines various categories of requirements that must be satisfied for an irradiator license. In particular, section 36.13(a) states, "[t]he applicant shall satisfy the general requirements specified in § 30.33 of this chapter and the requirements contained in this part." Consequently, section 36.13 incorporates into the Part 36 irradiator regulations the general requirement — from section 30.33(a)(2) — that a facility be "adequate to protect health and minimize danger to life or property."

Much of the dispute in this proceeding centers on the relationship between the specific design, performance, operations, and other technical requirements in Part 36 and the general requirement that the facility be adequately protective. In calling for safety analyses of risks asserted to be endemic to the proposed Pa'ina irradiator facility, Concerned Citizens' safety contentions are based on section 30.33(a)(2)'s general requirement. Pa'ina and the Staff, however, argue that Concerned Citizens is improperly invoking the general requirement of section 30.33(a)(2) to seek additional safety analyses that are unnecessary and beyond the scope of this proceeding. The Staff argues, for example, that "considering the text and structure of the regulations, it is clear the Commission intended the

³⁴ See Final Rule, 58 Fed. Reg. at 7716.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 10 C.F.R. § 36.2. The Part 36 regulations apply to two kinds of panoramic irradiators: those in which the sources are stored in shields made of solid material (panoramic dry-source-storage irradiators), and those in which the sources are stored underwater in a storage pool (panoramic wet-source-storage irradiators).

comprehensive requirements in Part 36 to prescribe a means of complying with the general requirement in section 30.33(a)(2).’’³⁸

The Staff and Pa’ina further argue that the Part 36 rulemaking history shows that the NRC already generically considered the risk posed by natural events such as tornados, tidal waves, flooding, and earthquakes, and even considered the risk of an airplane crashing into an irradiator, but nevertheless concluded that irradiators can be safely located anywhere that local governments allow occupied industrial facilities. The Staff therefore claims that absent a showing that an irradiator poses a “unique threat not addressed by State or local requirements, the Commission intended for the specific design and performance requirements in Part 36 to render a site-related safety analysis unnecessary.’’³⁹

Concerned Citizens, on the other hand, stresses that the NRC “cannot possibly determine’’ that the proposed Pa’ina facility will adequately protect public health and safety, as required under section 30.33(a)(2), unless risks asserted to be endemic to the site (i.e., tsunamis, hurricanes, aircraft crashes) are first analyzed.⁴⁰ Concerned Citizens argues that one cannot evaluate whether local requirements will adequately protect against “threats that are endemic to a proposed irradiator unless one first performs a thorough analysis of those threats.’’⁴¹ Additionally, Concerned Citizens stresses that it “does not bear the burden of affirmatively proving that the irradiator would not be safe.’’⁴²

As to the Part 36 rulemaking history, Concerned Citizens argues that “[e]ven if it were proper to consider the regulatory history, nothing in the Statement of Considerations suggests the Commission gave any thought to whether *underwater* irradiators of the design Pa’ina proposes would be safe from aviation accidents and natural disasters.’’⁴³ Moreover, Concerned Citizens argues that it did show that the Pa’ina irradiator’s location presents “unique threats’’ that distinguish it from “ordinary licensing actions.’’⁴⁴

³⁸ NRC Staff’s Reply to Intervenor’s Opening Brief (Nov. 14, 2007) at 2 (Staff Reply). *See also* Applicant Pa’ina Hawaii, LLC’s Brief in Response to Oct. 24, 2007 Memorandum and Order of NRC (Nov. 7, 2007) at 3 (Pa’ina Response).

³⁹ Staff Response to Commission at 13.

⁴⁰ Intervenor Concerned Citizens of Honolulu’s Opening Brief Re: Questions Certified by the Licensing Board on Aug. 31, 2007 (Nov. 7, 2007) at 8 (Intervenor’s Opening Brief).

⁴¹ Intervenor Concerned Citizens of Honolulu’s Reply Re: Questions Certified by the Licensing Board on Aug. 31, 2007 (Nov. 14, 2007) at 8 (Intervenor’s Reply).

⁴² *Id.* at 8.

⁴³ Intervenor’s Opening Brief at 9 (emphasis added).

⁴⁴ *Id.* at 8.

III. ANALYSIS

To address whether safety issues raising siting concerns are litigable in irradiator proceedings, we begin by looking at Part 36 and its rulemaking history. Unlike rules for various other NRC licensing actions which contain express criteria governing site selection, Part 36 does not provide any siting requirements.⁴⁵ The lack of site selection criteria is intentional. The Statement of Considerations (SOC) for Part 36 indicate that in developing the Part 36 regulations, the NRC considered whether there was a need to impose limits on irradiator siting, but determined that no specific siting limitations were warranted.⁴⁶

An entire section in the SOC is devoted to the topic of “Siting, Zoning, Land Use, and Building Code Requirements.” There, the Staff explains its view that irradiators in general are unlikely to pose a significant offsite risk, and therefore can be safely located *anywhere* local governments allow industrial facilities to be built:

The NRC believes that an irradiator meeting the requirements in the new Part 36 would present no greater hazard or nuisance to its neighbors than other industrial facilities, because there is little likelihood of such an irradiator causing radiation exposures offsite in excess of NRC’s part 20 limits for unrestricted areas. All irradiator experience to date indicates that irradiators do not present a threat to people outside the facility. Therefore, the NRC believes that, in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built.⁴⁷

The SOC section on “siting” explains that while irradiators may have a large radioactive inventory, “radioactive materials in irradiators are not volatile like the noble gases and iodines produced in a reactor.”⁴⁸ The section further makes clear that the NRC explicitly considered whether there should be siting requirements because of potential floods, tidal waves, or earthquakes, but concluded that

⁴⁵ Compare, e.g., 10 C.F.R. Part 100, Appendix A; 10 C.F.R. §§ 72.90-.102; 10 C.F.R. Part 40, Appendix A; 10 C.F.R. § 61.50.

⁴⁶ The Commission “often refer[s] to the Statement of Considerations as an aid in interpreting our regulations.” *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208 n.12 (2004). See also *Public Citizen v. Carlin*, 184 F.3d 900, 911 (D.C. Cir. 1999) (“[w]e regularly rely upon the preamble in interpreting” agency rules, given that “[t]he purpose of the preamble, after all, is to explain what follows”).

⁴⁷ Final Rule, 58 Fed. Reg. at 7726.

⁴⁸ *Id.* at 7725.

“irradiators could be built in any area of the country,” although irradiators built in seismic areas would need shielding walls designed to withstand an earthquake.⁴⁹

A separate section of the SOC — indeed titled “Aircraft Crashes” — examines “whether there should be a prohibition against locating irradiators near airports because of risk of radiation overexposures caused by an airplane crash.”⁵⁰ This discussion even conservatively *assumes* the scenario of a “source . . . damaged as a result of an airplane crash,” but concludes nonetheless that “large quantities of radioactivity are unlikely to be spread from the immediate vicinity of the source rack because the sources are not volatile.”⁵¹ The discussion further concludes that “the radiological consequences of an airplane crash at an irradiator would not substantially increase the seriousness of the accident,” and that “[t]herefore, the NRC will allow the construction of an irradiator at any location at which local authorities would allow other occupied buildings to be built.”⁵²

Concerned Citizens points out that the SOC’s siting discussions refer at times to the adequacy of shielding walls of *panoramic* irradiators — which can have walls consisting of 6 feet of reinforced concrete — while the proposed Pa’ina irradiator’s Cobalt-60 sources “would be stored in an irradiator pool with a liner consisting of 6 inches of concrete, with 1/4 inch of steel on the inside and outside.”⁵³ But the Part 36 rules clearly were developed to serve as a standardized set of rules for both panoramic *and* underwater irradiators.⁵⁴ The siting discussions in the SOC look broadly at the question whether siting restrictions are warranted for irradiators. They reach the *blanket* conclusion that irradiators, in general, “can be located anywhere that local governments would permit an industrial facility to be built.”⁵⁵

⁴⁹ *Id.* at 7726. Section 36.39(j) therefore requires panoramic irradiators built in seismic areas to have concrete shielding meeting the seismic design requirements of appropriate industry or local building codes.

⁵⁰ *Id.* at 7726.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Intervenor’s Opening Brief at 2.

⁵⁴ See 10 C.F.R. § 36.1(b); Final Rule, 58 Fed. Reg. at 7716.

⁵⁵ Final Rule, 58 Fed. Reg. at 7726. Simply because the SOC chose to highlight the adequacy of the typically 6-foot-thick concrete walls of panoramic irradiators in no way suggests that underwater irradiators would be more vulnerable to aircraft crash or weather events. As the Staff notes, there are many more requirements for panoramic irradiators than for underwater irradiators. See Staff Reply at 5. Accordingly, panoramic irradiators “may require special safety features to provide protection *equivalent* to that afforded sources in underwater irradiators,” where the sources are attached to the bottom of a deep pool. See Staff Response to Commission at 15 (emphasis in original). For example, there are seismic-related design requirements for panoramic irradiators located in seismic zones, but no specific seismic design requirements for underwater irradiators. See 10 C.F.R. § 36.39(j); see also NUREG-1556, Vol. 6, “Consolidated Guidance About Materials Licenses, Program Specific
(Continued)

And notably, throughout Part 36, there are requirements that apply only to panoramic irradiators or only to underwater irradiators.⁵⁶ There are no Part 36 siting requirements for *any* kind of irradiator, underwater irradiators included, and the SOC nowhere intimates that one or another category of irradiator may present risks warranting special requirements for site selection. As the Staff states, there is “no evidence the Commission intended to exempt underwater irradiators from its conclusion that irradiators can be built in any industrial area.”⁵⁷ Moreover, the aircraft crash analysis in the SOC goes beyond considering the adequacy of irradiator shielding, to conclude that even if a source were damaged, consequences would not be significantly greater than damage from the crash alone.

Therefore, the SOC clearly indicates a deliberate NRC decision to forego imposing specific siting limitations on irradiators. The SOC does hold open the possibility that the NRC may choose, in an exceptional case, to conduct a “facility siting” review, “if a unique threat is involved which may not be addressed by State and local requirements.”⁵⁸ But the general expectation was that the NRC would not need to conduct a special safety review of facility siting. Instead, both the SOC and section 36.1(a) stress the responsibility of licensees to

Guidance About 10 CFR Irradiator Licenses,” Final Report (Jan. 1999) at 8-24 (“[f]or underwater irradiators, no response is required from the applicant” regarding seismic-related shielding design).

Pa’ina similarly argues that the SOC, in referencing the protective nature of thick concrete walls, was emphasizing how even panoramic irradiator sources — which are exposed in air when the irradiator is in use — would be protected in the event of a natural disaster or airplane crash. Pa’ina states that the SOC is referring to panoramic wet-source-storage irradiators, which also are “pool” irradiators, but “typically [have] an *aboveground* 6’ thick reinforced concrete shield whose prime purpose is to prevent radiation from escaping when the source materials are brought up out of the water to treat the fruits, vegetables or other products.” See Applicant Pa’ina Hawaii, LLC’s Reply to Intervenors’ Opening Brief Filed Nov. 7, 2007 (Nov. 14, 2007) (Pa’ina’s Reply) at 5 (emphasis in original). Pa’ina claims that the SOC was considering whether “an airplane crash or natural disaster might occur *while the radioactive sources are above water*” at the wet-source storage panoramic irradiator, while at an underwater irradiator “the source rack is *always* at the bottom of the pool both during storage and during the irradiation of the product.” *Id.* (emphasis in original). The bottom of the proposed Pa’ina irradiator, for example, would have a depth of approximately 18 1/2 feet below floor level. See Pa’ina Application for a Material License (Rev. 00, June 20, 2005) at 46; see also Pa’ina Hawaii, LLC, “Geotechnical Report” (Weidig Geoanalysts) (Nov. 30, 2005) (ADAMS Accession No. ML053460276) (Geotechnical Report) at 2.

In any event, it is clear from the Part 36 rulemaking that the NRC — in promulgating requirements for panoramic *and* underwater irradiators — considered potential safety risks related to siting, but discerned no aircraft crash or natural phenomena risk warranting *any* irradiator siting restrictions, for either underwater or panoramic irradiators.

⁵⁶ See generally, e.g., 10 C.F.R. §§ 36.39, 36.41.

⁵⁷ Staff Response to Commission at 16.

⁵⁸ Final Rule, 58 Fed. Reg. at 7725.

satisfy all applicable state and local “siting, zoning, land use, and building code requirements.”⁵⁹

As guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the SOC is entitled to “special weight.”⁶⁰ Therefore, in judging whether contentions calling for irradiation siting analyses are adequately supported, it would be inappropriate to disregard what the NRC already has concluded about irradiation siting and the potential risks posed by aircraft crashes and various natural phenomena.

For example, Concerned Citizens claims that Pa’ina “must evaluate the likelihood that aviation accidents and natural disasters would occur, and the potential for such events to result in radioactive exposures above the limits established in Part 20 to protect life and property.”⁶¹ Concerned Citizens states that “[w]ithout such analysis, the NRC cannot possibly determine whether Pa’ina’s ‘proposed equipment and facilities are adequate to protect health and minimize danger to life or property,’” as required by 10 C.F.R. § 30.33(a)(2).⁶² But as the SOC makes clear, the NRC itself *already* generically evaluated the potential for aircraft crashes and natural phenomena (tidal waves, tornadoes, flooding, earthquakes), but concluded that, as a general matter, the consequences of such events would not differ significantly because of the presence of an irradiation.⁶³ The NRC therefore found no health and safety basis to restrict irradiation siting, or to impose a requirement that applicants perform siting analyses.

Concerned Citizens argues that section 30.33(a)(2) is “clear in placing the burden on the applicant to demonstrate its proposed facility would be safe from *all threats*,” and that because section 30.33(a)(2) is clear, it is “improper” to even consider the regulatory history of Part 36.⁶⁴ But section 30.33(a)(2) is a general and “standard requirement[] for all NRC licensees,”⁶⁵ while the SOC outlines how the NRC specifically considered, in the rulemaking for irradiation requirements, *the very kinds of “threats”* the intervenors now raise — aircraft crash and natural phenomena. Moreover, by determining that the potential threats posed by aircraft crash and natural phenomena do not warrant a siting review, the

⁵⁹ See 10 C.F.R. § 36.1(a); see also Final Rule, 58 Fed. Reg. at 7725.

⁶⁰ See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375 n.26 (2005) (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290 (1988)); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 711 n.40 (1985).

⁶¹ Intervenor’s Opening Brief at 8.

⁶² *Id.*

⁶³ See, e.g., Final Rule, 58 Fed. Reg. at 7726 (“radiological consequences of an airplane crash at an irradiation would not substantially increase the seriousness of the accident”).

⁶⁴ Intervenor’s Opening Brief at 9 (emphasis added).

⁶⁵ See Final Rule, 58 Fed. Reg. at 7717.

NRC likewise *already determined* that such siting analyses typically should be unnecessary for an applicant to show that its facility is “adequate[ly],” protective, as section 30.33(a)(2) requires.

We are not suggesting that contentions calling for siting reviews are inadmissible as a matter of law. The rulemaking history leaves open the possibility that there could be a need for the NRC to review facility siting “on a case by case basis, if a unique threat is involved which may not be addressed by State and local requirements.”⁶⁶ As the Staff describes, “under the regulatory regime envisioned by the Commission in adopting Part 36, “there could be circumstances where “the Staff needs to conduct a site-specific analysis.”⁶⁷ Therefore, a contention calling for a siting safety analysis is not barred by the Part 36 regulatory scheme.

But contentions questioning an irradiator facility’s siting must be sufficiently supported, in light of the SOC’s conclusions. Contentions demanding that an applicant provide detailed, comprehensive siting analyses must be based on more than generalized, conclusory claims of a potential for an aircraft crash because of a nearby airport, or generalized claims that there could be an earthquake, high winds, flooding, or similar event. To require applicants or the NRC Staff, as an initial matter, to provide comprehensive, detailed studies proving that airports and potential natural phenomena do not pose a significant safety risk, would be contrary to the Part 36 rulemaking conclusions, which specifically found siting safety reviews unnecessary (even assuming such risks). Petitioners must set forth, with adequate elaboration and support, a plausible claim that a proposed facility would not be adequately protective in the event of specific phenomena.⁶⁸ The degree of support necessary for a contention will depend on how obvious a threat the asserted risk is, given the irradiator facility’s design and protective features (e.g., depth and dimensions, lack of volatility of sources, shielding provided by water and/or concrete, temperatures, pressure, impact, and other conditions the

⁶⁶ *Id.* at 7725.

⁶⁷ Staff Response to Commission at 21. The Staff requested additional information from Pa’ina “including [on] some issues relating to seismic design,” even though Part 36 seismic design requirements are applicable only to panoramic irradiators and not underwater irradiators. *See* Staff Response to Commission at 18 n.32; *see also* Staff Reply at 7. The Staff acknowledges that it requested this information. The Staff stresses that its review in this case of two seismic issues, potential soil liquefaction and seismic separation, did “not elevate the issue of seismic design to a requirement in this particular case.” *See* Staff Response to Commission at 18 n.32. However, the Staff’s incorporation of Pa’ina’s responses on the seismic issues into the Pa’ina license, included as License Condition 22, makes Pa’ina’s assurances a license requirement. *See* Pa’ina Hawaii, LLC, New License (Aug. 17, 2007) (ADAMS Accession No. ML072320269) at 3, License Condition 22, referencing Pa’ina’s letters received on Mar. 9, 2006; Sept. 7, 2006; and teleconference notes dated Sept. 28, 2006; *see also* Pa’ina Hawaii, LLC — Deficiency Fax re: Application (Jan. 25, 2006) (ADAMS Accession No. ML060260023); Pa’ina Hawaii, LLC — Deficiency Letter, Request for Additional Information (Aug. 7, 2006) (ADAMS Accession No. ML062190173).

⁶⁸ *See generally* 10 C.F.R. § 2.309(f).

source assemblies have been tested to withstand, etc.). “While we do not expect a petitioner to prove its contention at the pleading stage,” we expect a contention to “present a reasonable scenario” of potential consequences.⁶⁹ The “quality of the evidentiary support” at the contention filing stage, however, “need not be of the quality necessary to withstand a summary disposition motion.”⁷⁰

Our adjudicatory process exists to examine adequately supported claims of public health and safety or environmental harm. It would be an inappropriate use of adjudicatory and other NRC resources to allow petitioners to trigger time-consuming hearings or gratuitous analyses based merely on generalized, poorly supported scenarios of harm, with little or no description of how a claimed harm might actually occur. Asserted threats must be supported by asserted facts, or expert opinions, including appropriate references to the specific sources and documents on which the petitioner intends to rely.⁷¹ Further, there must be an “*explanation* of the basis” for a contention,⁷² in this case an explanation of how a significant harm may result given the design of the facility and sources. If a contention is admissible, a consideration on the merits can determine if a safety analysis is in fact warranted.

Whether Concerned Citizens’ pending safety contentions go beyond generalized claims and are adequately supported is a matter for the Licensing Board to determine. The Board must also determine whether asserted claims are timely, and otherwise meet all contention requirements.⁷³ For instance, the Board must evaluate whether the pending safety contentions raise claims that could have been

⁶⁹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Installation), CLI-04-22, 60 NRC 125, 138-39 (2004).

⁷⁰ See Final Rule: “Rules of Practice for Domestic Licensing Proceedings,” 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

⁷¹ 10 C.F.R. § 2.309(f)(1)(v).

⁷² See 10 C.F.R. § 2.309(f)(1)(ii) (emphasis added); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001). Section 30.33(a)(2) does not specify that an irradiation applicant must conduct a siting safety analysis of man-made or natural external events. A petitioner, therefore, cannot — without more — merely invoke this general regulation to claim that a siting analysis must be performed. Sufficient basis for the contention must be provided.

⁷³ We note, for example, that one of Concerned Citizens’ pending safety contentions — Safety Contention 16 — claims that the Staff’s Safety Review “inadequately analyzes safety risks from earthquakes.” See Intervenor Concerned Citizens of Honolulu’s Contentions Re: Final Safety Evaluation Report (Sept. 14, 2007) at 6-9. The Commission has not evaluated whether the contention meets NRC contention requirements, but we take this occasion to remind the parties that the issue in this proceeding is the adequacy of the Pa’ina application, not the adequacy of the Staff’s Safety Review. See, e.g. *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121-22, *aff’d on motion for reconsideration*, CLI-95-8, 41 NRC 386, 403 (1995). The Staff’s review of seismic design issues apparently stemmed from a geotechnical report submitted by Pa’ina. See Geotechnical Report (Nov. 30, 2005) (ADAMS Accession No. ML053460276).

raised in Concerned Citizens' original petition for hearing. "Petitioners must raise and reasonably specify at the outset their objections" to a licensing action.⁷⁴

Board's Second Certified Question

Because we conclude that safety issues related to irradiator siting are not, as a matter of law, outside the scope of an irradiator proceeding, we next consider the Board's second certified question:

What is the appropriate probability threshold (i.e., probability of an event for which consequences exceed regulatory limits) beyond which a site-related safety analysis is required?

As discussed above, Concerned Citizens claims that the Staff should perform a siting analysis for the proposed Pa'ina irradiator because of "unique" threats posed by the Pa'ina irradiator's particular location — threats not commonly at issue for irradiators in general, but asserted to pose special safety risks for this one. Concerned Citizens also argues that the Commission should establish a "probability threshold" for irradiators. It further suggests that the Commission determine that, for irradiators, the probability of an event occurring for which consequences would exceed regulatory limits is 10^{-6} .⁷⁵ Concerned Citizens goes on to argue that "[w]ithout an established probability threshold, neither the Staff nor the Commission can make a rational and informed determination" whether there is anything "extraordinary and unique" about Pa'ina's proposed site.⁷⁶

We disagree that the Staff must first establish a general "probability threshold" for irradiators to determine if there are significant safety concerns associated with the proposed Pa'ina site location. Concerned Citizens has pointed to particular site-related factors that it believes render the proposed location unsafe, such as the nearby major airport runways and the location within a tsunami evacuation zone. It is not necessary to establish a general "probability threshold" for irradiators to assess in qualitative terms the significance and plausibility of the particular asserted siting-related threats.

If one or more of Concerned Citizens' safety contentions go to hearing, then the Applicant must demonstrate that the proposed facility is "adequate to protect health and minimize danger to life or property." If that is not done, and ultimately there is a determination that one or more siting-related risks require additional safety analysis before the NRC can conclude that the facility meets all applicable

⁷⁴ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 427 (2003).

⁷⁵ Intervenor's Reply at 11.

⁷⁶ *Id.* at 15.

regulatory requirements, including 10 C.F.R. § 30.33(a)(2), then the Staff would need to conduct the additional analysis (or require additional analysis by Pa'ina). This may call for a probability or consequence analysis. But we see no need at this phase of the proceeding to establish a "probability threshold" for irradiators in general or for particular events.

IV. CONCLUSION

To be admissible, a contention calling for an irradiator siting analysis that relies upon 10 C.F.R. § 30.33(a)(2) must conform to all the requirements of 10 C.F.R. § 2.309(f)(1), including providing sufficient basis to show that a siting analysis is necessary to determine that the facility will be "adequate to protect health and minimize danger to life or property." In evaluating whether Concerned Citizens contentions meet NRC threshold contention admissibility standards, appropriate consideration should be given to any relevant reasoning or conclusions outlined in the Part 36 SOC. Whether a siting safety analysis in fact is *required* in this case is appropriately determined by the Board, following a hearing, if safety contentions go to hearing.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of March 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of

Docket No. 30-36974-ML
(Materials License Application)

PA'INA HAWAII, LLC

March 27, 2008

The Commission takes *sua sponte* review of the issue whether the NRC, under the National Environmental Policy Act (NEPA), must analyze the potential health effects of consuming irradiated foods. The Commission establishes a briefing schedule, and seeks the parties' answers to two questions.

INTERLOCUTORY REVIEW

Whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review. In our 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 129, 130 (1998), we encouraged boards to certify, as soon as possible, novel legal or policy questions related to admitted issues. We also noted that we may exercise our supervisory authority over proceedings to direct boards to certify such questions.

MEMORANDUM AND ORDER

In this licensing proceeding for an underwater irradiator, the Atomic Safety and Licensing Board recently issued a Memorandum and Order ruling on the ad-

missibility of intervenor Concerned Citizens of Honolulu's (Concerned Citizens) environmental contentions.¹

Among the issues the Board admitted for hearing is Concerned Citizens' claim that the NRC Staff must analyze potential health effects of consuming irradiated foods.² The hearing notice for this proceeding, however, noted that other agencies, particularly the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) are responsible for "determining the food types and products used for human consumption that may be safely irradiated."³ The Environmental Assessment for the proposed Pa'ina Hawaii irradiator states that the NRC's "role in irradiation, food or otherwise, is to assure that facilities are constructed and operated safely."⁴ As the Board noted, Concerned Citizen's claim raises a "legal issue."⁵ It does not involve factual technical questions that call for expert opinion, and nor does it involve mere routine matters of contention admissibility.

Whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the "kind of broad legal question" appropriate for Commission interlocutory review.⁶ In our 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, we encouraged "boards . . . to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding," and noted that we also may exercise our supervisory authority over proceedings to direct boards to certify such questions.⁷

Given that Concerned Citizens' claim raises a threshold legal question going to the proper scope of this proceeding, and is a matter with potential new significant NEPA implications for the NRC, the Commission finds it appropriate to take *sua sponte* review. We therefore invite the parties to submit briefs on whether NEPA requires the NRC to analyze the potential impacts on health of consuming irradiated food. We particularly seek the parties' view on two questions: (1) whether the NRC lacks authority to reject an irradiator license for nonradiological food safety reasons and therefore need not consider food safety under NEPA;⁸ and

¹ Memorandum and Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) (December 21, 2007) (unpublished).

² *See Id.* at 20-23.

³ *See* Notice of License Request, 70 Fed. Reg. 44,396 (Aug. 2, 2005).

⁴ Final Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii at C-9.

⁵ Memorandum and Order at 23.

⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 540 (2005).

⁷ CLI-98-12, 48 NRC 18, 23 (1998); *see also, e.g., North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998) (where Commission exercised inherent supervisory authority to take *sua sponte* review of novel broad legal issue).

⁸ *See, e.g., Department of Transportation v. Public Citizen*, 541 U.S. 752, 767-68 & n.2, 770 (2004).

(2) whether in light of NEPA's "rule of reason," FDA's comprehensive review and regulation of the safety of irradiated foods, including NEPA reviews, excuse NRC from considering food safety in its own NEPA reviews.⁹

Initial briefs are limited to twenty pages, exclusive of title page, table of contents, or table of authorities, and shall be filed within 14 calendar days of the date of this Order. Reply briefs may be filed within 7 calendar days of the initial briefs' filing, and are limited to ten pages.

IT IS SO ORDERED.

For the Commission

ANDREW L. BATES
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of March 2008.

⁹ See generally, e.g., Final Rule: "Irradiation in the Production, Processing and Handling of Food," 51 Fed. Reg. 13,376 (Apr. 18, 1986); Final Rule, 55 Fed. Reg. 18,538 (May 2, 1990); Final Rule, 65 Fed. Reg. 45,280 (July 21, 2000); Final Rule, 62 Fed. Reg. 64,107 (Dec. 3, 1997); Proposed Rule, 49 Fed. Reg. 5714, 5721 (Feb. 14, 1984); Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 321, 347(7), 348, 409; see also *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991). In this case, Concerned Citizens refers to a 2002 study by Raul et al., and claims the study suggests a "new area of toxicity" that the FDA has yet to examine. See Intervenor Concerned Citizens of Honolulu Amended Environmental Contentions #3 through #5 (Sept. 4, 2007) at 29-30 (citing to affidavit by William Au). The public record indicates that the FDA has addressed the 2002 study by Dr. Rao. See Final Rule, 70 Fed. Reg. 48,057, 48,067 (Aug. 16, 2005).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of

Docket No. 72-26-ISFSI

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Power Plant
Independent Spent Fuel
Storage Installation)**

March 27, 2008

**DISCLOSURE: NATIONAL ENVIRONMENTAL POLICY ACT;
FREEDOM OF INFORMATION ACT**

By law, disclosure of documents under the National Environmental Policy Act (NEPA) is expressly governed by the Freedom of Information Act (FOIA). Based on this linkage, we will not give the petitioners here NEPA-based access to documents exempt from disclosure under FOIA, even under protective measures.

FREEDOM OF INFORMATION ACT

Limited discovery may be allowed in a Freedom of Information Act (FOIA) dispute, but only if absolutely necessary to ensure a complete record and a fair decision. Discovery is sparingly granted in FOIA litigation — which ordinarily is resolved in summary disposition without discovery and without evidentiary trials or hearings.

ORDER

Today's decision relates to Contention 1(b). In CLI-08-1, we admitted that contention "to the extent that it alleges that the [NRC] Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA [Freedom of Information Act] exemptions for [the Staff's] withholding decisions."¹ We directed the Staff to submit a "complete list" of the source documents for its environmental assessment, along with a "*Vaughn* index (or its equivalent)" explaining the FOIA basis for withholding any documents or portions of documents.²

The NRC Staff has now filed its Reference Document List and *Vaughn* index.³ The Staff also filed an addendum to this submission.⁴ The Staff's Reference Document List contains twenty-one documents, and the *Vaughn* index lists redactions to these documents, plus the FOIA exemption that the Staff believes applies to each redaction (the Staff variously applies exemptions 1, 2, and 3, depending upon the nature of the information). The addendum to the Staff's submission corrects an omission in the *Vaughn* index by filling in the basis for withholding one of the documents.⁵

San Luis Obispo Mothers for Peace (SLOMFP) filed a response to the Staff's filing.⁶ The response argued that the *Vaughn* index "is both incomplete and inadequate," that the Staff is unlawfully withholding "secret law" with respect to at least one document, that the Commission should grant SLOMFP access to unredacted documents under a protective order, and that SLOMFP should be given the opportunity to make additional discovery requests to the NRC Staff based on information in the redacted documents that the Staff has provided.⁷

¹ CLI-08-1, 67 NRC 1, 17 (2008).

² *Id.* at 16.

³ NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index (Feb. 13, 2008) (Staff Reference Response).

⁴ Addendum to NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index (Feb. 15, 2008) (Staff Addendum).

⁵ Staff Addendum. The Department of Homeland Security (DHS) is the originator of Reference 4. The Staff provides a link to a DHS website regarding obtaining the document directly from DHS.

⁶ San Luis Obispo Mothers for Peace's Response to NRC Staff's *Vaughn* Index, Request for Leave To Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures To Protect Submission of Sensitive Information (Feb. 20, 2008) (SLOMFP Response).

⁷ SLOMFP Response at 1-2.

Because by law disclosure of documents under NEPA is expressly governed by FOIA,⁸ we decided in CLI-08-1 not to give SLOMFP NEPA-based access to documents exempt from disclosure under FOIA,⁹ thereby rejecting SLOMFP's suggestion that we grant access "under appropriate protective measures."¹⁰ To the extent SLOMFP now seeks reconsideration on the access question — SLOMFP uses the word "reconsideration" in the caption to the section of its response (Section IV) that discusses this issue — our practice is that such petitions be filed within 10 days of the decision.¹¹ CLI-08-1 was issued on January 15, 2008, so the 10-day petition for reconsideration period has long since expired. In any event, SLOMFP has not made a showing of "compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated."¹² SLOMFP's implicit petition for reconsideration is denied.

The balance of SLOMFP's response provides details regarding its challenge to the completeness of the Staff's Reference Document List and the adequacy of the Staff's *Vaughn* index. SLOMFP looks particularly at Document 8 (SECY-04-0222, Decision-Making Framework for Materials and Test Reactor Vulnerability Assessments (Nov. 24, 2004)) and infers that including this document, which on its face is not applicable to independent spent fuel storage installations (ISFSIs), may mean that another document linking Document 8 to ISFSIs has been left out of the Document Reference List. SLOMFP questions whether followup activities referred to in Document 8 — such as participation in DHS vulnerability reviews — generated documents that the Staff should have listed as references. SLOMFP also asks whether the "Risk Analysis and Management for Critical Assets Protection" methodology referred to in Document 8 as developed for DHS by the American Society of Mechanical Engineers should have been included as a reference document. SLOMFP also points to places in Document 8 where the

⁸ CLI-08-1, 67 NRC at 15-16, citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981) and *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 420 (2d Cir. 1989). See also *Missouri ex rel. Shorr v. U.S. Army Corps of Engineers*, 147 F.3d 708, 710-11 (8th Cir. 1998).

⁹ CLI-08-1, 67 NRC at 16-17 ("We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and [the] record. Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents").

¹⁰ San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement (June 28, 2007) (SLOMFP Petition) at 10. Pacific Gas and Electric Company responded to this filing with one of its own: Pacific Gas & Electric Company's Opposition to San Luis Obispo Mothers for Peace Requests for Leave to Conduct Expanded Discovery and for Access to Unredacted Documents (Feb. 26, 2008).

¹¹ See 10 C.F.R. § 2.771(a).

¹² CLI-06-27, 64 NRC 399, 400 (2006). See also 10 C.F.R. § 2.771(b); CLI-06-27, 64 NRC at 400 n.5, 401 n.6.

Staff made redactions but failed to provide a corresponding FOIA exemption in its *Vaughn* index, and argues that the context of some redactions suggests that the Staff is withholding “secret law” on how to conduct its analysis, which should have been disclosed under FOIA.¹³

Rather than review these document-intensive claims ourselves, we direct the previously designated presiding officer to resolve them, focusing in particular on the FOIA exemption justifications and the completeness of the NRC Staff’s reference list. The presiding officer has full authority to use all appropriate adjudicatory tools, including consulting with parties, setting schedules, requesting further briefs, calling for summary disposition motions, holding oral argument, and reviewing documents *in camera*. We expect the presiding officer to resolve all outstanding FOIA issues — in other words, to resolve Contention 1(b) — on an expedited basis. Absent unanticipated circumstances, we expect a decision no later than May 30, 2008. We will entertain petitions for review of the presiding officer’s final decision on Contention 1(b) under our usual standards.¹⁴

In his discretion and only if absolutely necessary to ensure a complete record and a fair decision, the presiding officer may allow limited discovery. But we remind him (and the parties) that discovery “is sparingly granted” in FOIA litigation¹⁵ — which ordinarily is resolved on summary disposition without discovery and without evidentiary trials or hearings.

IT IS SO ORDERED.

For the Commission

ANDREW L. BATES
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of March 2008.

¹³ SLOMFP Response at 2, 5-7, citing *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980).

¹⁴ See 10 C.F.R. § 2.786.

¹⁵ *Public Citizen Health Research Group v. Food and Drug Administration*, 997 F. Supp. 56, 72 (D.D.C. 1998). See also *Wheeler v. Central Intelligence Agency*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (“Discovery is generally unavailable in FOIA actions”); *Simmons v. U.S. Department of Justice*, 796 F.2d 709, 711-12 (4th Cir. 1986) (“the district court has the discretion to limit discovery in FOIA cases and to enter summary judgment on the basis of agency affidavits in a proper case”).

Commissioner Jaczko Respectfully Dissents, in Part

I disagree with the Commission's decision to only allow the presiding officer to resolve the FOIA issues associated with Contention 1(b). I believe the Commission should have also allowed the presiding officer to determine whether there is a need to grant access through an appropriate protective order to documents exempt from disclosure under FOIA, as the agency has done in previous adjudicatory hearings.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of

NRC Investigation No. 2-2006-17

DARYL M. SHAPIRO

March 27, 2008

ATTORNEY-CLIENT PRIVILEGE

Upjohn Co. v. United States, 449 U.S. 383 (1981), holds that the communications between company employees and an attorney conducting an internal investigation presumptively fall within the attorney-client privilege.

ATTORNEY-CLIENT PRIVILEGE: WAIVER

The attorney-client privilege belongs to the client, not to the lawyer. Thus, the client may waive the privilege, either by an express waiver or by an implied waiver.

ATTORNEY-CLIENT PRIVILEGE: WAIVER

Implied waiver of the attorney-client privilege exists when a regulated company voluntarily discloses investigative materials to a government agency. In such cases, courts have assumed, without discussion, that the privileges were waived with respect to the particular agency to which the investigative materials were disclosed.

ATTORNEY-CLIENT PRIVILEGE: WAIVER

If a licensee has voluntarily provided information to the NRC, the voluntary

nature of the submission is not compromised by the NRC's ability to conduct its own investigation into the same matter. The submission of information to a government agency is voluntary even if the company submitting the information feels pressure to do so as a result of its dealings with the federal government. *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997).

ATTORNEY-CLIENT PRIVILEGE: WAIVER

Implied waiver of the attorney-client privilege exists when the holder of the privilege places the report "in issue." Courts have held that if a company claims that the internal investigation establishes it has met its obligation, for example, the requirement to investigate a sexual discrimination charge, then the company has waived the attorney-client privilege associated with the internal investigation. *E.g.*, *McKenna v. Nestle Purina PetCare Co.*, 2007 U.S. Dist. LEXIS 8876 (S.D. Ohio 2007); *McGrath v. Nassau Health Care Corp.*, 204 F.R.D. 240, 247-48 (E.D.N.Y. 2001); *Brownell v. Roadway Package System, Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999); *Worthington v. Endee*, 177 F.R.D. 113, 118 (N.D.N.Y. 1998); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1096 (D.N.J. 1996). In effect, the company places the contents of the report in issue by claiming that the investigation is sufficient or that it meets regulatory requirements.

ATTORNEY WORK-PRODUCT PRIVILEGE

The work-product privilege covers only documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representatives. Fed. R. Civ. P. 26(b)(3).

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a Motion To Quash a subpoena issued by the NRC's Office of Investigations ("OI"). For the reasons stated below, we deny the Motion To Quash.

II. BACKGROUND

Nuclear Fuel Services, Inc. ("NFS") holds an NRC license issued pursuant

to 10 C.F.R. Part 70, under which it operates a fuel fabrication facility located in Erwin, Tennessee. During March 2006, the NRC received an allegation that an NFS executive may have violated provisions of the NRC's Fitness-for-Duty regulations found in 10 C.F.R. Part 26. On March 31, 2006, under the referral provisions of the NRC's Allegation Management Program, the NRC referred the allegation to NFS and requested NFS to conduct an internal review of the events in question and report the results of that investigation to the NRC.

NFS hired Mr. Daryl Shapiro, an outside counsel, to conduct the investigation and prepare a report responding to the NRC's request. In an undated letter, Mr. Dwight Ferguson, NFS' Chief Executive Officer, responded to the NRC's request, attaching a report prepared for NFS by Mr. Shapiro. The report summarized information collected during the investigation.

Subsequently, OI opened an investigation into whether NFS or the executive in question deliberately violated any NRC regulations. In the process, OI investigators interviewed numerous NFS employees under oath. Certain NFS employees made sworn statements that contradict some of the statements in the Shapiro Report. The contradictions are reinforced by documents produced by NFS. The contradictions between the Shapiro Report and credible sworn testimony of NFS employees and documents produced by NFS suggest a violation of NRC regulations. *See, e.g.*, 10 C.F.R. §§ 70.9 and 70.10. Moreover, violations of these regulations may be referred to the Department of Justice as possible criminal violations of federal statutes. *See, e.g.*, 18 U.S.C. § 1001, 42 U.S.C. § 2273. Accordingly, OI subpoenaed Mr. Shapiro in an attempt to resolve those contradictions.

On January 7, 2008, Mr. Shapiro and NFS moved to quash the subpoena. 10 C.F.R. § 2.702(f). Mr. Shapiro and NFS argue that Mr. Shapiro's testimony would violate the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181 (1995). In addition, Mr. Shapiro and NFS claim that Mr. Shapiro's notes and materials prepared in the course of the investigation are covered by the attorney work-product privilege. Finally, in lieu of complying with the subpoena, Mr. Shapiro offers to "receive written questions to the extent that the questions call for responses based upon non-privileged information." Motion at 10. For the reasons that follow, we deny the Motion To Quash, we decline to accept Mr. Shapiro's alternative offer, and we direct OI to establish a date for a formal interview with Mr. Shapiro.

III. SUMMARY

In *Upjohn*, the Supreme Court held that during an internal company investigation, all communications with company lawyers who were hired to provide advice

to the company were privileged. 449 U.S. at 386. The Commission has applied *Upjohn* in rejecting a subpoena issued in a proceeding before a panel of the Atomic Safety and Licensing Board. *Vogtle, supra*. Although the instant subpoena seeks to discover the source of potentially false statements in the Shapiro Report, any questioning of Mr. Shapiro would be directed at the communications between him and NFS employees that took place during his internal investigation. *Upjohn* holds that the communications between company employees and an attorney conducting an internal investigation presumptively fall within the attorney-client privilege. Thus, to overcome the privilege we must find that NFS has waived the privilege, either expressly or impliedly. As discussed more fully below, while NFS has not expressly waived the privilege, it has impliedly done so by voluntarily submitting the Shapiro Report to the NRC in response to the referral of the allegation for internal investigation.

IV. ANALYSIS

A. NFS Has Waived the Attorney-Client Privilege

The attorney-client privilege belongs to the client, not to the lawyer. Thus, the client may waive the privilege, either by an express waiver (i.e., in this case by an appropriate company official saying “we hereby waive the privilege”) or by an implied waiver (i.e., in this case by the company taking some action inconsistent with maintaining the privilege). So far, no NFS official has expressly waived the privilege. But we find that NFS’ submission of the Shapiro Report to the NRC in response to the NRC letter of March 31, 2006, constitutes an implied waiver of the privilege. Two different lines of cases support our conclusion.

The first line of cases addresses whether the attorney-client and attorney work-product privileges have been waived when regulated companies disclose investigative materials to government agencies. The courts deciding these cases have assumed, without discussion, that the privileges were waived with respect to the particular agency to which the investigative materials were disclosed. This situation has frequently arisen in the context of the “voluntary disclosure” program of the Securities and Exchange Commission (“SEC”). Under the voluntary disclosure program, the SEC allows the corporation under investigation to “investigate and reform itself, thus saving the government the considerable expense of a full-scale investigation and prosecution.” *In re Sealed Case*, 676 F.2d 793, 800 (D.C. Cir. 1982).

The cases that discuss attorney-client and attorney work-product privileges in the context of this voluntary disclosure program have generally limited their discussion to whether the privilege covering the voluntarily disclosed information has also been waived with respect to private parties in civil litigation over the same subject matter. In these cases, the Courts accept that the privilege holder

has waived its privilege as to the agency that received the investigative materials. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1418 (3d Cir. 1991); *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *In re Sealed Case*, 676 F.2d 793.¹

The referral process under the NRC's Allegation Management Program is very similar to the SEC's "voluntary disclosure" program. In both programs, the government agency refers a matter to the regulated entity to allow the entity to perform an internal investigation and report the results of the investigation — and the regulated entity's corrective actions — back to the regulator. The regulated entity (in this case, NFS) was not required to participate in the program. Instead, NFS' participation in the Allegation Management Program was voluntarily.

Moreover, submission of the Shapiro Report itself was voluntary. NFS was not compelled to submit the Shapiro Report itself to the NRC. Instead, NRC's Region II "request[ed]" NFS to investigate the allegation and report the results of its investigation to the agency. In some cases, licensees report "the results" of the investigation to the NRC without submitting the report itself. The NRC Staff then decides whether to seek the report or proceed on the basis of the licensee's response. Here, though, NFS chose to submit the actual report.

If NFS had not fulfilled the NRC's request for information, the NRC clearly had the statutory authority to conduct its own investigation into the allegations. But the NRC's authority to act does not compromise the voluntary nature of the disclosure of the Shapiro Report. After all, if an SEC-regulated corporation refuses to participate in the voluntary disclosure program, the SEC (like the NRC) still possesses regulatory authority to conduct its own investigation. The key point is that, with respect to both agencies' programs, the disclosure of the investigative materials to the regulator in both cases is voluntary rather than compelled. *See In re Subpoenas Duces Tecum*, 738 F.2d at 1373 ("The distinction between voluntary disclosure and disclosure by subpoena is that the latter, being involuntary, lacks the self-interest which motivates the former. As such, there may be less reason to find waiver in circumstances of involuntary disclosure"). Submitting information to a government agency is voluntary even if the company submitting the information feels pressure to do so as a result of its dealings with the federal government. *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997).²

¹ Though not at issue here, the majority view is that voluntary disclosure of internal investigative materials to a government agency waives the attorney-client and work-product privileges not only with respect to the particular agency, but also as to third parties. *Compare Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) with *In re Sealed Case*, 676 F.2d at 825.

² *See also Teachers Insurance and Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638, 642 (S.D.N.Y. 1981) ("[T]here is no basis for concluding that Teachers' disclosure
(Continued)

One possible difference between the SEC and NRC programs is that the SEC program explicitly offers leniency for past misconduct in exchange for cooperation. *In re Sealed Case*, 676 F.2d at 801. But while the NRC does not explicitly offer leniency in referrals under its Allegation Management Program, the NRC's Enforcement Policy specifically states that, among other factors, the NRC considers whether a licensee had self-identified the violation and taken appropriate corrective action when determining whether to assess a civil penalty for violation of NRC regulations, and determining the amount of any penalty. See NRC Enforcement Policy at 22-26, available at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.pdf>. Thus, cases applying the SEC's "voluntary disclosure" program appear applicable to the NRC's Allegation Management Program.

The second line of cases that supports implied waiver involves cases where the holder of the privilege placed the report "in issue." Courts have held that if the company claims that the internal investigation establishes it has met its obligation, for example, the requirement to investigate a sexual discrimination charge, then the company has waived the attorney-client privilege associated with the internal investigation. *E.g.*, *McKenna v. Nestle Purina PetCare Co.*, 2007 U.S. Dist. LEXIS 8876 (S.D. Ohio 2007); *McGrath v. Nassau Health Care Corp.*, 204 F.R.D. 240, 247-48 (E.D.N.Y. 2001); *Brownell v. Roadway Package System, Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999); *Worthington v. Endee*, 177 F.R.D. 113, 118 (N.D.N.Y. 1998); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1096 (D.N.J. 1996). In effect, the company places the contents of the report in issue by claiming that the investigation is sufficient or that it meets regulatory requirements. The company cannot then use the attorney-client privilege to withhold details of the investigation. Put another way, the company cannot use the privilege as both a shield and a sword.

In *Brownell*, for example, the defendant company claimed that it had investigated claims of sexual harassment and that its own internal investigation showed that the company acted reasonably in response to the allegations. 185 F.R.D. at 21. However, the company also claimed that the statements made in the course of the investigation were protected by both the attorney-client privilege and the attorney work-product privilege and were not subject to discovery. *Id.* The Court rejected that argument, stating that if the defendant invoked the investigation as an "affirmative defense," it could not withhold the statements on which the investigation was based. 185 F.R.D. at 25 (citations omitted).

Here, the purpose of a referral under the Allegation Management Program is essentially the same as the investigations described in the sexual discrimination

to the SEC was involuntary or compelled. While Teachers made the disclosure pursuant to an agency subpoena, Teachers could have objected to the subpoena on the grounds of privilege. . . . Instead, Teachers chose to produce the material requested without objection").

cases cited above: the NRC refers the allegation to the licensee so that the licensee may conduct its own internal investigation into the matter and report the results back to the NRC. After reviewing the report submitted by the licensee, the NRC may decide either to (1) perform followup inspections or reviews, (2) ask the licensee for additional information to answer questions that have arisen, (3) dispatch OI to perform an investigation, or (4) accept the report as credible and the self-imposed corrective action as sufficient and take no additional action. Thus, the accuracy and veracity of the report itself is placed in issue when it is submitted by an NRC licensee in response to a referral under this Program. If the NRC finds a false statement or other deficiency, the NRC is entitled to look behind the report in an effort to ensure that the agency has accurate information. Thus, an NRC licensee waives the attorney-client privilege regarding information in the report when, as here, it submits the investigative report in response to a referral under the agency's Allegation Management Program.

In this case, NFS submitted the Shapiro Report in an effort to convince the NRC that it had appropriately addressed the referred allegation. In fact, Mr. Shapiro himself telephoned two different NRC officials to question the need for an OI investigation because he believed that his investigation and report had addressed and resolved the referred allegation. Thus, NFS clearly put the contents of the Shapiro Report in issue when it submitted that document in response to the referral under the Allegation Management Program.

B. The Work-Product Privilege Is Inapplicable

Mr. Shapiro and NFS argue that the attorney work-product privilege, which covers attorney-prepared documents in anticipation of litigation, also shields Mr. Shapiro from providing documents to OI. "The privilege protects both 'fact' work product, which consists of documents prepared by an attorney that do not contain the attorney's mental impressions, and opinion work product, which does contain an attorney's mental impressions." Motion at 7, citing *In re Grand Jury Proceedings #5 Empanelled January 28, 2004 v. Under Seal, Defendant*, 401 F.3d 247, 250 (4th Cir. 2005).

But the NRC is not seeking Mr. Shapiro's notes or other papers with his mental impressions; instead it is seeking his testimony about the discrepancies between the report he prepared and the testimony of NFS employees. Therefore, we need not consider the work-product issue. In any event, nothing in the record before us indicates that the Shapiro Report was prepared in anticipation of litigation. The work-product privilege covers only "documents and tangible things that are prepared *in anticipation of litigation or for trial* by or for another party or its representative (including another party's attorney)." Fed. R. Civ. P. 26(b)(3) (emphasis added).

C. Mr. Shapiro's Offer Is Unacceptable

We decline Mr. Shapiro's offer to "receive written questions." That offer provides no assurance that the Commission will receive the information necessary to determine the source of the contradictions between the Shapiro Report and both the testimony of NFS officials and NFS documents. By the offer's own terms, Mr. Shapiro has made no commitment to discuss matters he considers privileged. Given the Commission's need to determine who has submitted false or inaccurate information to the agency in this case, we must insist on direct testimony by Mr. Shapiro, who is the only person capable of explaining the statements appearing in his report.

V. CONCLUSION

For the foregoing reasons, we deny the Motion To Quash. We direct OI to negotiate a suitable date for Mr. Shapiro's interview so that Mr. Shapiro's testimony is taken within 2 weeks from the date of this Order.

IT IS SO ORDERED.

For the Commission

ANDREW L. BATES
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of March 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket Nos. 50-247-LR
50-286-LR**

**ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 2 and 3)**

April 30, 2008

INTERLOCUTORY APPEALS

INTERLOCUTORY RULINGS

The Board here has not made even the threshold ruling on WestCAN's standing and contentions. Therefore, we consider WestCAN's Petition under our usual standard for review of an interlocutory Board order: whether the ruling threatens the petitioner with "immediate and serious, irreparable impact" or will affect the "basic structure of the proceeding in a pervasive and unusual manner." 10 C.F.R. § 2.341(f)(2).

INTERLOCUTORY APPEALS

INTERLOCUTORY RULINGS

A Licensing Board order canceling oral argument on the admissibility of petitioner's proposed contention did not cause serious and irreparable harm to petitioner. Oral argument on contention admissibility is not a "right."

CONTENTIONS

Our rules provide that a petitioner must explain and support its contention in the petition to intervene. 10 C.F.R. § 2.309(f).

INTERLOCUTORY APPEAL

INTERLOCUTORY RULINGS

A Licensing Board's refusal to hear petitioner's oral presentation on contention admissibility would not cause "irreparable" impact. If the Board rejects the petition in its entirety, then petitioner may appeal to the Commission at that time. 10 C.F.R. § 2.311(b). On the other hand, if the Board grants petitioner party status, but declines to admit some of its contentions, this would not constitute "immediate and serious irreparable impact." The rejection or admission of a contention, where the petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the "basic structure of the proceeding in a pervasive and unusual manner." *See, e.g., Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004). *See also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000).

LICENSING BOARDS, AUTHORITY

Licensing Boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants. It is the Board's responsibility to "conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to maintain order." 10 C.F.R. § 2.319. The Commission generally will not interfere with the Board's day-to-day case management decisions, unless there has been an abuse of power. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-07-28, 66 NRC 275 (2007); *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-82-15, 16 NRC 27, 37 (1982). We see no abuse in the Board's actions here.

MEMORANDUM AND ORDER

This Order responds to a request, styled a "petition for review," by Westchester Citizen's Awareness Network (WestCAN), Sierra Club–Atlantic Chapter,

Rockland County Conservation Association, Public Health and Sustainable Energy, and Assemblyman Richard Brodsky (together, WestCAN).¹ The Petition asks us to reverse an Atomic Safety and Licensing Board order canceling oral argument on the issue of contention admissibility in the proceeding to renew the operating license of the Indian Point Nuclear Generating Units 2 and 3.² For the reasons set forth below, we deny the petition.

I. BACKGROUND

The Indian Point license renewal application is highly controversial and the associated adjudication promises to challenge the Board's case management skills. In addition to the organizations who have joined with WestCAN in its petition to intervene, numerous other organizations, as well as state and local governments, have sought admission as parties to this proceeding. These various petitioners have asserted dozens of proposed contentions, many of which set forth similar issues.³ WestCAN's petition to intervene is no exception, with fifty-one contentions proposed in a 785-page pleading (including supporting documents).

Given the large number of petitioners, even scheduling an opportunity for the Board to hear from the various participants on the threshold issue of contention admissibility proved complex. On January 24, 2008, the Board notified the participants that it intended to schedule oral argument on contention admissibility for the week of March 10 in White Plains, New York, and asked them to notify the Board of any scheduling conflicts.⁴ In a February 29 order, the Board scheduled oral arguments, and directed that each petitioner would have the opportunity to make a 10-minute opening statement, followed by questions from the Board.⁵ In the February 29 order, the Board acknowledged that two out of three of WestCAN representatives had notified the Board that they were not available at

¹ See Petition for Review of Atomic Safety and License [*sic*] Board (ASLB) Orders of March 25, 2008 and March 31, 2008 [*sic*] Cancelling Oral Arguments on WestCAN's Contentions (Apr. 4, 2008) (Petition). (Board order denying reconsideration was actually dated April 3, 2008).

² Order (Canceling Oral Argument on WestCAN's Contentions) (Mar. 25, 2008) (unpublished), *reconsideration denied*, Order (Relating to Wagner Letter Dated March 31, 2008) (Apr. 3, 2008) (unpublished).

³ Compare, e.g., WestCAN proposed contention 13 (Time-limited aging analyses), Petition To Intervene with Contentions and Request for Hearing (Dec. 10, 2007), at 109, with Friends United for Sustainable Energy (FUSE) USA proposed contention 48, Superceding Formal Petition To Intervene, Formal Request for Hearing, and Contentions (Dec. 31, 2007), at 359.

⁴ Order (Preliminary Notification Regarding the Scheduling of Oral Argument) (Jan. 24, 2008) (unpublished).

⁵ Order (Scheduling Oral Argument on the Admissibility of Contentions) (Feb. 29, 2008) (unpublished).

the proposed time. The Order stated that if the third WestCAN representative was also unavailable at that time, the Board would hear WestCAN's oral argument at NRC headquarters in Rockville, MD, during the week of March 24, 2008, "or as soon thereafter as is practicable."⁶ In a subsequent order, the Board set argument on WestCAN's petition for April 1, 2008, in Rockville.⁷ This scheduling order provided that the Board would follow the same format as for the other oral arguments: a 10-minute presentation by the representatives followed by questions from the Board. The Board cautioned that it did not intend to hear duplicative material or take supplementary evidence:

It is not the purpose of this proceeding to entertain general presentations regarding contentions which have already been adequately explained in the pleadings. Likewise, this proceeding is intended only as an opportunity for the Board to question, and the litigants to explain, what has previously been submitted. This will not be an evidentiary hearing and, without a specific exemption from the Board, the litigants will not be given an opportunity to supplement the already voluminous record at this point in the proceeding.⁸

Thus, the purpose of the oral argument on contention admissibility was solely to ensure that the Board understood the participants' positions.

The Board canceled the oral argument scheduled relevant to WestCAN's petition to intervene following the prehearing conference. In a March 25 Order, the Board explained that "[b]ased on the pleadings submitted, and the insights into the relevant issues in [the] proceeding gained by the Board during the oral arguments that were presented in White Plains, New York, on March 10-12, 2008, the Board has concluded that its understanding of the issues presented by WestCAN's contentions is adequate to enable us to properly rule on their admissibility and would not be materially assisted by oral argument."⁹

WestCAN responded by letter asking the Board to reconsider and explain its decision to cancel the oral argument.¹⁰ The Board responded with an Order explaining simply that it had no questions for WestCAN, the NRC Staff, or the Applicant on any of the matters raised in WestCAN's petition.¹¹

WestCAN contends that the Board's order rescinding the opportunity for oral

⁶ *Id.* at 3.

⁷ Order (Scheduling WestCAN Oral Argument) (March 7, 2008) (unpublished).

⁸ *Id.* at 3.

⁹ Order (Canceling Oral Argument on WestCAN's Contentions), at 2.

¹⁰ Letter from WestCAN representative Sarah L. Wagner (Mar. 31, 2007). In particular, WestCAN inquired as to whether the Board changed its mind based on information gained from the oral argument that WestCAN was unable to attend.

¹¹ Order (Relating to Wagner Letter Dated March 31, 2008).

argument deprived it of a procedural right that was granted to all other would-be intervenors, the NRC Staff, and the Applicant.

II. DISCUSSION

This preliminary, procedural Board ruling does not merit Commission review. Although WestCAN invokes our rule of procedure at 10 C.F.R. § 2.341, that rule provides standards for review of *final* Board decisions (full or partial initial decisions).¹² The Board here has not made even the threshold ruling on WestCAN's standing and contentions. Therefore, we consider WestCAN's Petition under our usual standard for review of an interlocutory Board order: whether the ruling threatens the petitioner with "immediate and serious, irreparable impact" or will affect the "basic structure of the proceeding in a pervasive and unusual manner."¹³ WestCAN's pleading does not address the standards for interlocutory review, and they clearly have not been met.

First, it cannot be said that the Board's order has harmed WestCAN at all, let alone to a "serious" degree. Oral argument on contention admissibility is not a "right." Rather, Boards often schedule these arguments, as this Board did here, to ensure that its members fully understand the participants' positions. Our rules provide that a petitioner must explain and support its contention in the petition to intervene.¹⁴ The rules further allow a petitioner to reply to any answers to its petition, and WestCAN took the opportunity to file a lengthy reply in this matter.¹⁵ And, as this Board cautioned in its orders scheduling oral argument, a petitioner may not offer additional evidence or arguments during such an oral presentation.

Further, even assuming that the Board's refusal to hear WestCAN's oral presentation and ask followup questions could be said to negatively affect WestCAN, the "impact" would not be irreparable. The supposed harm — which is speculative at this point — would be the Board's misunderstanding of WestCAN's position. If the Board rejects WestCAN's petition in its entirety, then WestCAN may appeal to the Commission at that time.¹⁶ On the other hand, if the Board grants WestCAN party status, but declines to admit some of its contentions, this would not constitute "immediate and serious irreparable impact." We have

¹² 10 C.F.R. § 2.341(b)(1).

¹³ 10 C.F.R. § 2.341(f)(2).

¹⁴ 10 C.F.R. § 2.309(f).

¹⁵ Reply of Petitioners Westchester County Citizen's Awareness Network (WestCAN), Sierra Club–Atlantic Chapter, Rockland County Conservation Association, Public Health and Sustainable Energy, and Assemblyman Richard Brodsky (Feb. 15, 2008). That there appears to be an ongoing issue regarding service of that reply is not material to today's decision.

¹⁶ 10 C.F.R. § 2.311(b).

found — repeatedly — that the rejection or admission of a contention, where the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the “basic structure of the proceeding in a pervasive and unusual manner.”¹⁷

We note that our Boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants. It is the Board’s responsibility to “conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to maintain order.”¹⁸ As a general matter, we decline to interfere with the Board’s day-to-day case management decisions, unless there has been an abuse of power.¹⁹ We see no abuse in the Board’s actions here.

III. CONCLUSION

For the foregoing reasons, the Petition is denied.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of April 2008.

¹⁷ See, e.g., *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004). See also *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000).

¹⁸ 10 C.F.R. § 2.319.

¹⁹ E.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-07-28, 66 NRC 275 (2007); *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-82-15, 16 NRC 27, 37 (1982).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 72-26-ISFSI

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Power Plant
Independent Spent Fuel Storage
Installation)**

April 30, 2008

**NATIONAL ENVIRONMENTAL POLICY ACT; FREEDOM OF
INFORMATION ACT**

By law, disclosure of documents under the National Environmental Policy Act is expressly governed by the Freedom of Information Act. Freedom of information Act litigation is ordinarily “resolved on summary disposition without discovery and without evidentiary trials or hearings,” and discovery is sparingly used.

CONTENTIONS, LATE-FILED; CONTENTIONS, ADMISSIBILITY

Five factors must be balanced (under our pre-2004 rules) before a petition to admit a late-filed contention can be granted. “The first factor — whether good cause exists to excuse the late-filing of the contention — is the most important factor.” “If ‘good cause’ is not shown, a petitioner ‘must make a ‘compelling’ showing’ on the remaining four factors.” “In this analysis, factors three and five are to be given more weight than factors two and four.” If the late-filed contention criteria are satisfied, our next inquiry is whether the proposed contention is suitable for hearing.

**DISCLOSURE: CLASSIFIED AND SAFEGUARDS INFORMATION;
TERRORISM**

It is not practical or legally required for the Nuclear Regulatory Commission to adjudicate the essentially limitless range of conceivable (albeit highly unlikely) terrorist scenarios, where the core evidence (threat assessment and security measures) is protected security information. The National Environmental Policy Act does not contemplate adjudications resulting in the disclosure of matters under law considered secret or confidential.

MEMORANDUM AND ORDER

I. INTRODUCTION

In January we issued an order admitting limited portions of Contentions 1(b) and 2 (proposed by San Luis Obispo Mothers for Peace (SLOMFP)) and setting a schedule for further proceedings in this adjudication on a license application for an independent spent fuel storage installation (ISFSI) at the site of the Diablo Canyon nuclear power reactor in California.¹ We directed the NRC Staff to file a complete listing of the source documents it relied on for its National Environmental Policy Act (NEPA) assessment, “together with a *Vaughn* index (or its equivalent)” detailing the Freedom of Information Act (FOIA) basis for any withheld documents or portions of documents.² The Staff responded to our direction regarding Contention 1(b) by filing its Reference Document List and *Vaughn* index (with later addendum) and providing copies of releasable documents, redacted as it deemed necessary.³

The Staff’s Reference Document List and *Vaughn* index filing prompted two fresh pleadings from SLOMFP. SLOMFP’s first pleading objected to the adequacy of the Staff’s filing, requested additional discovery based on information in the redacted documents the Staff provided, and asked for access to unredacted documents under a protective order.⁴ SLOMFP’s second pleading proposed a new

¹ CLI-08-1, 67 NRC 1 (2008).

² *Id.* at 25.

³ NRC Staff’s Response to Commission Order To Provide Reference List and *Vaughn* Index (Feb. 13, 2008) and Addendum to NRC Staff’s Response to Commission Order To Provide Reference List and *Vaughn* Index (Feb. 15, 2008).

⁴ San Luis Obispo Mothers for Peace’s Response to NRC Staff’s *Vaughn* Index, Request for Leave To Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures To Protect Submission of Sensitive Information (Feb. 20, 2008).

contention — Contention 6 — based on information included in an unredacted portion of a classified document the Staff had released.⁵ Both the Pacific Gas and Electric Company (PG&E)⁶ and the NRC Staff⁷ oppose admission of this new contention.

We addressed the first SLOMFP pleading in an order issued in March.⁸ We denied SLOMFP's implicit request for reconsideration of our earlier ruling on access to unredacted information and reiterated our decision not to grant NEPA-based access to FOIA-exempt documents to SLOMFP “[b]ecause by law disclosure of documents under NEPA is expressly governed by FOIA.”⁹ We delegated the resolution of Contention 1(b) — essentially a FOIA dispute — to the previously delegated presiding officer.¹⁰ We authorized the presiding officer “to use all appropriate adjudicatory tools,” and directed him to issue a decision on an expedited basis — i.e., by May 30, 2008 — “[a]bsent unanticipated circumstances.”¹¹ We also authorized limited discovery, but “only if absolutely necessary to ensure a complete record and a fair decision,” and reminded the presiding officer and the parties of the sparing use of discovery in FOIA litigation, “which ordinarily is resolved on summary disposition without discovery and without evidentiary trials or hearings.”¹²

Before us today are SLOMFP's motion to reconsider our March order on Contention 1(b) and its request to file Contention 6, a new contention based on recently released NRC Staff documents. We deny the motion to reconsider our Contention 1(b) ruling, except to note that the presiding officer can take additional time to decide the contention if necessary, and we find SLOMFP's Contention 6 inadmissible. We also address a number of case-management matters.

⁵ San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 Regarding Diablo Canyon Environmental Assessment Supplement (Feb. 27, 2008) (Contention 6 Petition).

⁶ Pacific Gas and Electric Company's Response to San Luis Obispo Mothers for Peace Proposed Late-Filed Contention 6 (Mar. 5, 2008) (PG&E Contention 6 Response).

⁷ NRC Staff's Response to San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 (Mar. 5, 2008) (Staff Contention 6 Response).

⁸ CLI-08-5, 67 NRC 174 (2008).

⁹ *Id.* at 176.

¹⁰ *Id.* at 177.

¹¹ *Id.*

¹² *Id.*

II. DISCUSSION AND ANALYSIS

A. Contention 1(b)

SLOMFP argues that we should reconsider our unwillingness to give access to safeguards and classified information and that we should also reconsider our expedited schedule for resolving Contention 1(b).¹³ PG&E¹⁴ opposes SLOMFP's motion for reconsideration. The current adjudicatory proceeding arises out of *San Luis Obispo Mothers for Peace v. NRC*,¹⁵ where the Ninth Circuit held that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" was unreasonable under NEPA,¹⁶ and remanded this "NEPA-terrorism" issue to the Commission for "further proceedings consistent with this opinion."¹⁷ As we noted in our initial scheduling order pursuant to this remand, the Ninth Circuit explicitly left to our discretion the precise manner of our procedural approach and our merits consideration of the NEPA-terrorism issue.¹⁸ In so doing, the Ninth Circuit pointed out that the Supreme Court's decision in *Weinberger v. Catholic Action of Hawaii*,¹⁹ supports "the proposition that security considerations may permit or require modification of some of the NEPA procedures" even though security issues do not "result in some kind of NEPA waiver."²⁰ The Ninth Circuit acknowledged that the NRC's information-security "arguments explain why a *Weinberger*-style limited proceeding might be appropriate."²¹

Consistent with the Ninth Circuit's suggestion, we have "use[d] *Weinberger* as our guidepost" throughout this remand proceeding.²² As we stated before, "[o]ur inability to disclose information based on the confidentiality of that information does not mean, however, that the NRC Staff (and the Commission, on review) has not performed the evaluation the Ninth Circuit directed, consistent with *Weinberger* — it simply means that certain information cannot be made public for

¹³ San Luis Obispo Mothers for Peace's Motion for Reconsideration of CLI-08-05 (Apr. 7, 2008) (April Reconsideration Motion).

¹⁴ Pacific Gas and Electric Company's Opposition to San Luis Obispo Mothers for Peace Motion for Reconsideration of CLI-08-05 (Apr. 17, 2008).

¹⁵ *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), cert. denied sub nom. *Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Jan. 16, 2007).

¹⁶ 449 F.3d at 1028.

¹⁷ 449 F.3d at 1035.

¹⁸ CLI-07-11, 65 NRC 148, 149 (2007).

¹⁹ *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981).

²⁰ 449 F.3d at 1034.

²¹ *Id.*

²² CLI-08-1, 67 NRC at 9.

security reasons.’’²³ Against this backdrop, we decline to reconsider our decision to restrict access to security-related information in this proceeding, even under protective order.²⁴

In view of the scheduling concerns SLOMFP raises in its motion for reconsideration, we do, however, remind the presiding officer of his discretion to extend the schedule for resolution of Contention 1(b) if there are “unanticipated circumstances’’²⁵ — which would include a need to obtain more information or to give parties reasonable time to file necessary pleadings or responses to the presiding officer’s inquiries.

B. Contention 6

We turn now to consideration of the admissibility of SLOMFP’s proposed Contention 6. As we reiterated in our January decision, under our pre-2004 rules, our late-filed contention standards were set out in 10 C.F.R. § 2.714(a)(1). The following five factors must be balanced before a petition to admit a late-filed contention can be granted:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner’s interest will be protected.
- (iii) The extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner’s interest will be represented by existing parties.
- (v) The extent to which the petitioner’s participation will broaden the issues or delay the proceeding.

“The first factor — whether good cause exists to excuse the late-filing of the contention — is the most important factor.’’²⁶ “If ‘good cause’ is not shown, a

²³ *Id.*

²⁴ SLOMFP’s latest motion to reconsider (April Reconsideration Motion at 6) complains that the Commission held SLOMFP to a 10-day deadline even though our former rules, applicable to this proceeding, contain no such deadline. This complaint is not without force, but it is not outcome-determinative, as we also found SLOMFP’s motion to reconsider unpersuasive on the merits. *See* CLI-08-5, 67 NRC at 176.

²⁵ *Id.* at 177.

²⁶ CLI-08-1, 67 NRC at 6. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986), citing *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), *Mississippi Power* (Continued)

petitioner ‘must make a ‘‘compelling’’ showing’ on the four remaining factors.’²⁷ ‘‘In this analysis, factors three and five are to be given more weight than factors two and four.’’²⁸ If the late-filed contention criteria are satisfied, our next inquiry is whether the proposed contention is suitable for hearing. Here we find that, on balance, our late-filed contention criteria are not satisfied. We also find proposed Contention 6 unsuitable for hearing for the same reasons that, earlier in this proceeding, we rejected SLOMFP’s virtually identical Contention 3.²⁹

The heading for SLOMFP’s Contention 6 reads:

Inappropriate reliance on the ‘‘Ease’’ indicator to exclude reasonably foreseeable and significant environmental impacts from the NRC’s environmental analysis for the Diablo Canyon ISFSI.³⁰

SLOMFP argues that the Staff violated NEPA in preparing its final environmental assessment supplement by ‘‘excluding reasonably foreseeable threat scenarios from consideration, based on the use of an inappropriate indicator known as ‘‘Ease’’ as a proxy for the probability of a threat scenario.’’³¹ SLOMFP argues that because these excluded threat scenarios could have significant adverse effects on the environment, the Staff should have prepared an environmental impact statement.

SLOMFP relies on the ‘‘Ease’’ factor as the factual basis for Contention 6. SLOMFP states that it learned of the ‘‘Ease’’ factor in an unredacted portion of a classified document. This document, entitled *NRC Spent Fuel Source Term Guidance Document* (Sandia Study), issued by the Sandia National Laboratories (Sandia) in 2004, is listed as a reference in the final environmental assessment supplement, is included in the Staff’s *Vaughn* index, and was produced (in redacted form) by the Staff together with its *Vaughn* index, pursuant to the schedule we set in CLI-08-1. ‘‘Ease’’ is a function of time, complexity, and technology, and ‘‘was developed to estimate how easy or difficult it is to complete an attack scenario.’’³²

and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 483 (2001), *review declined*, CLI-02-3, 55 NRC 155, 156 n.9 (2002).

²⁷ CLI-08-1, 67 NRC at 6, quoting *Braidwood Nuclear Power Station*, CLI-86-8, 23 NRC at 244.

²⁸ CLI-08-1, 67 NRC at 6, citing *Braidwood Nuclear Power Station*, CLI-86-8, 23 NRC at 245.

²⁹ See CLI-08-1, 67 NRC at 18-21.

³⁰ Contention 6 Petition at 2.

³¹ *Id.*

³² *Id.* at 3, citing Sandia Study at 133-34.

In addition to providing the factual basis for Contention 6, SLOMFP argues that disclosure of the “Ease” factor is new information supporting a new contention, so the “good cause” late-filing standard is satisfied. According to SLOMFP, a balancing of our late-filed contention criteria weighs in favor of admission of Contention 6. SLOMFP argues that it satisfies two other late-filing standards because it has no other means besides this proceeding to protect its interest in requiring the NRC to comply with NEPA, and that it may reasonably be expected, because of its experienced counsel and its qualified expert witness, to assist in the development of a sound record.³³ Regarding the final late-filing criterion, SLOMFP concedes that its participation will broaden and delay the proceeding, but argues that any delay is attributable to the NRC and PG&E’s unwillingness to consider NEPA-terrorism issues when this proceeding began over 5 years ago.³⁴

PG&E counters SLOMFP’s arguments by arguing that balancing our late-filed contention standards does not support admitting Contention 6. Pointing to the absence of any new expert witness support, PG&E argues that the good cause standard for late-filing is not met because disclosure of the “Ease” factor, by itself, is insufficient to make a previously inadmissible contention admissible.³⁵ The NRC Staff agrees with PG&E, arguing that Contention 6 is substantively identical to Contention 3, except for SLOMFP’s speculation that the Staff used the “Ease” factor in assessing threat scenarios.³⁶ According to the Staff’s argument, SLOMFP had sufficient information to raise its substantive contention before the existence of the “Ease” factor in the Sandia Study became known — and in fact raised essentially the same contention in Contention 3 — so the good cause standard is not satisfied.³⁷

With respect to the remainder of the late-filing criteria, both PG&E and the NRC Staff argue that Contention 6 would broaden the proceeding beyond its intended scope. The Staff points out that the Commission already ruled that threat scenarios would not be part of this proceeding.³⁸ PG&E maintains that Contention 6 would lead the proceeding into areas “already addressed by other NRC regulations, such as NRC security requirements and ISFSI dry cask designs.”³⁹ PG&E maintains that SLOMFP is unlikely to be able to contribute to the development of a meaningful record because of lack of access to threat information and lack of expertise in threat assessment.⁴⁰ PG&E also argues that

³³ *Id.* at 6.

³⁴ *Id.*

³⁵ PG&E Contention 6 Response at 8 n.7.

³⁶ Staff Contention 6 Response at 5.

³⁷ *Id.*

³⁸ *Id.* at 6.

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 8-9.

SLOMFP has other means of protecting its interests, such as “participating in security-related rulemakings or commenting on dry cask storage Certificates of Compliance rulemakings.”⁴¹ The Staff does not believe SLOMFP’s ability to contribute to the record to be as limited, nor does it believe that SLOMFP’s interests can be vindicated by other parties or through other means, but the Staff nonetheless agrees with PG&E that, on balance, our late-filed contention criteria are not satisfied and Contention 6 should not be admitted.⁴²

We find that the good cause criterion is not satisfied, and that the other factors (to the extent any fall on SLOMFP’s side of the ledger) do not outweigh this fundamental failure. Apart from reliance on the “Ease” factor, Contention 6 bears a strong resemblance to Contention 3 (which we did not admit⁴³), both in the language of the contention and in the legal and expert witness support SLOMFP provides. As the legal basis for Contention 6, SLOMFP cites 10 C.F.R. § 51.20(a)(1) and 40 C.F.R. § 1502.22(b)(3).⁴⁴ The first of these cited regulations states simply the general proposition that if a major federal action significantly affects the quality of the human environment, an environmental impact statement must be prepared.⁴⁵ But the second regulation is the same Council on Environmental Quality (CEQ) regulation⁴⁶ that SLOMFP relied on to support its Contention 3. And the expert witness support that SLOMFP provides⁴⁷ is nearly identical: SLOMFP relies on the same June 2007 report⁴⁸ it relied on for Contention 3, augmented only by a short declaration confirming the continued accuracy of the report and the accuracy of factual statements in Contention 6.⁴⁹ Comparison of Contention 6 and Contention 3 shows how similar the two contentions are:

⁴¹ *Id.* at 9.

⁴² Staff Contention 6 Response at 6.

⁴³ CLI-08-1, 67 NRC at 20-21.

⁴⁴ Contention 6 Petition at 2.

⁴⁵ 10 C.F.R. § 51.20(a)(1).

⁴⁶ The cited section applies where there is incomplete or unavailable information, requires the agency to identify such information, and, “for the purposes of this section,” defines “reasonably foreseeable” to include “impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” 40 C.F.R. § 1502.22(b)(4).

⁴⁷ Contention 6 Petition at 1-2.

⁴⁸ Thompson, Gordon R., *Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: The Case of a Proposed Spent Fuel Storage Installation at the Diablo Canyon Site* (June 27, 2007) (Thompson Report).

⁴⁹ Thompson, Gordon R., *Declaration of Dr. Gordon R. Thompson in Support of San Luis Obispo Mothers for Peace’s Contention 6* (Feb. 27, 2008).

Contention 6:

The Staff's "[i]nappropriate reliance on the 'Ease' indicator" led it "to exclude reasonably foreseeable and significant environmental impacts" and "reasonably foreseeable **threat scenarios**" and "[t]he excluded threat scenarios **could cause significant adverse impacts by contaminating the environment.**"⁵⁰

Contention 3:

The "very small dose consequences estimated" by the Staff in the environmental assessment supplement shows that the Staff failed "to consider credible **threat scenarios that could cause significant environmental damage by contaminating the environment.**"⁵¹

We agree with the Staff⁵² that whether SLOMFP bases its contention on inferences drawn from dose estimates (Contention 3) or from the existence of an "Ease" indicator (Contention 6), the fundamental contention is the same: in either case SLOMFP is challenging the range of threat scenarios examined by the Staff. Contention 3 satisfied our good cause standard as a challenge to the Staff's then newly available environmental assessment supplement and the range of scenarios considered by the Staff in that analysis, so it met our late-filing criteria. Contention 6 is essentially the same as Contention 3; as a challenge to scenarios considered in the no longer newly available environmental assessment supplement, it cannot be timely now. SLOMFP has not shown good cause to admit today a contention that was not admitted when first proposed.

Even if Contention 6 satisfied our late-filing criteria, we would not admit it for hearing. As we found when we rejected SLOMFP's original "threat scenarios" contention (Contention 3), it is not practical or legally required for the NRC to adjudicate the essentially limitless range of conceivable (albeit highly unlikely) terrorist scenarios, where the core evidence (threat assessment and security measures) is protected security information. The Supreme Court's controlling decision in *Weinberger v. Catholic Action of Hawaii*, makes clear that NEPA does not contemplate adjudications resulting in the disclosure of matters under law considered secret or confidential.⁵³ Here, disclosure of such matters would be required to conduct meaningful hearings on alternate terrorist scenarios. As we pointed out in January, "[t]he NRC Staff's supplemental environmental assessment explains that the Staff considered '[p]lausible threat scenarios . . . includ[ing] a large aircraft impact similar in magnitude to the attacks of September 11, 2001, and ground assaults using expanded adversary

⁵⁰Contention 6 Petition at 2 (emphasis added).

⁵¹San Luis Obispo Mothers for Peaces Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement (June 28, 2007) at 12-13 (emphasis added).

⁵²Staff Contention 6 Response at 4.

⁵³CLI-08-1, 67 NRC at 20-21, quoting *Weinberger*, 454 U.S. at 146-47.

characteristics consistent with the design basis threat for radiological sabotage for nuclear power plants.’⁵⁴ This approach is based on the NRC Staff’s access to classified threat assessment information,⁵⁵ and is reasonable on its face. “We do not understand the Ninth Circuit’s remand decision — which expressly recognized NRC security concerns and suggested the possibility of a ‘limited proceeding’ — to require a contested adjudicatory inquiry into the credibility of various hypothetical terrorist attacks against the Diablo Canyon ISFSI.”⁵⁶

III. SCHEDULING MATTER

The NRC Staff, PG&E, and SLOMFP submitted detailed written summaries of facts, data, and arguments and written supporting information, required under 10 C.F.R. § 2.1113, on April 14, 2008.⁵⁷ Thus, under our rules, the Subpart K oral argument (which will be heard by the Commission absent further determination to the contrary) may be held at any time after April 29, 2008. *See* 10 C.F.R. § 2.1113. With the expectation that oral argument will take no more than 1 day, we schedule it for July 1, 2008, at 9:30 a.m. at the Commission’s headquarters in Rockville, Maryland. A more detailed scheduling order, covering matters like order of presentation, format, and time allocations, will be issued in the near future.

IV. CONCLUSION

Consistent with our discussion above, we deny the motion for reconsideration and remind the presiding officer that he has some scheduling flexibility in his resolution of Contention 1(b). We decline to admit Contention 6. Subpart K oral argument on Contention 2 will be heard on July 1, 2008, at 9:30 a.m. at the Commission’s headquarters in Rockville, Maryland.

⁵⁴ CLI-08-1, 67 NRC at 20, quoting Final EA Supplement at 7.

⁵⁵ CLI-08-1, 67 NRC at 20, citing Final EA Supplement at 4-7.

⁵⁶ CLI-08-1, 67 NRC at 20, citing 449 F.3d at 1034-35.

⁵⁷ NRC [Staff] Brief and Summary of Relevant Facts, Data and Arguments upon Which the Staff Proposes to Rely at Oral Argument on San Luis Obispo Mothers for Peace’s Contention 2 (Apr. 14, 2008); San Luis Obispo Mothers for Peace’s Detailed Summary of Facts, Data, and Arguments on Which It Intends to Rely at Oral Argument To Demonstrate the Inadequacy of the U.S. Nuclear Regulatory Commission’s Final Supplement to the Environmental Assessment for the Proposed Diablo Canyon Indep[e]ndent Spent Fuel Storage Installation To Consider the Environmental Impacts of an Attack on the Facility (Contention 2) (Apr. 14, 2008); Summary of Facts, Data, and Arguments on Which Pacific Gas and Electric Company Will Rely at the Subpart K Oral Argument on Contention 2 (Apr. 14, 2008).

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of April 2008.

Commissioner Gregory B. Jaczko Respectfully Dissenting in Part

I respectfully dissent from the majority's decision. I continue to question the Commission's overreliance on *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981), concerning the public release of State secrets, as a basis for categorically withholding classes of information from one of the parties to this hearing. We do have mechanisms we can employ to ensure that sensitive information provided to the participants in the proceeding is protected from disclosure.

I concur with the portions of the Memorandum and Order which make it clear to the presiding officer that he has discretion with regard to adjusting deadlines in his consideration of Contention 1(b) and that sets a date for the Subpart K oral argument.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

Docket No. PAPO-00
(ASLBP No. 04-829-01-PAPO)
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

April 23, 2008

In the pre-license application phase of the High-Level Waste Proceeding, the Pre-License Application Presiding Officer (PAPO) Board denies the Department of Energy's motion to strike the State of Nevada's certification that it has made all its documentary material available on the Licensing Support Network (LSN).

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, BURDEN OF PROOF)

Pursuant to 10 C.F.R. § 2.325, the burden of proof rests on the movant.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, BURDEN OF PROOF)

In the case of any motion resting on assertions of fact, it is reasonable to expect that the movant will buttress it with some concrete evidence, often if not usually supplied in the form of an affidavit or declaration by a person with asserted knowledge of the fact or facts upon which the motion is based.

MEMORANDUM AND ORDER
(Denying the Department of Energy's Motion To Strike)

Before the Pre-License Application Presiding Officer (PAPO) Board is the motion of the Department of Energy (DOE) to strike the January 17, 2008 certification made by the State of Nevada (Nevada), pursuant to 10 C.F.R. § 2.1003(a).¹ The Board heard oral argument on February 28, 2008. Upon consideration of the filings and the oral argument, and for the reasons set forth below, the DOE motion to strike Nevada's certification is denied.

I. BACKGROUND

This proceeding concerns the pre-license application phase of DOE's planned application for an authorization to construct a geologic repository for disposal of high-level radioactive waste (HLW) at Yucca Mountain in Nevada. This phase is established and governed by the Nuclear Regulatory Commission (NRC) regulations set forth in 10 C.F.R. Part 2, Subpart J.

Our prior decisions have outlined and discussed the regulatory structure and history of the pre-application phase.² The event that triggered the issue now before the Board was DOE's October 19, 2007 certification that it had made all of its then extant documentary material available on the NRC's Licensing Support Network (LSN). On October 29, Nevada filed a motion to strike DOE's certification. The Board denied Nevada's motion in a brief December 12 order that was dully explained in a memorandum issued on January 4, 2008.³ DOE's certification, as upheld, triggered the obligation of other potential parties to make their documentary material available on the LSN within 90 days.⁴ On January 17, 2008, Nevada certified that it had complied with that requirement. DOE filed its motion to strike Nevada's certification on January 28, 2008.⁵

¹ The [DOE's] Motion To Strike the January 17, 2008 Licensing Support Network Certification by [Nevada] (Jan. 28, 2008) [hereinafter Motion].

² See LBP-04-20, 60 NRC 300 (2004).

³ See LBP-08-1, 67 NRC 37 (2008). See also Order (Denying Motion To Strike) (Dec. 12, 2007) (unpublished).

⁴ See 10 C.F.R. § 2.1003(a).

⁵ The NRC Staff filed an answer to DOE's motion to strike but declined to take a position on this matter: "Based on a review of DOE's motion, the Staff believes DOE presents factual matters within the purview of the parties and does not raise issues of regulatory interpretation which necessitate Staff comment." NRC Staff Answer to [DOE's] Motion To Strike January 17, 2008 [LSN] Certification by [Nevada] at 2 (Feb. 6, 2008). As a consequence, the Staff did not participate in the oral argument on the motion.

II. POSITIONS OF THE PARTICIPANTS

A. The DOE motion is based on the assertion that Nevada is in possession of documentary material that should have been included in its LSN production, but, to date, has not been submitted to the LSN administrator for that purpose. DOE maintains that Nevada failed to make a substantial good faith effort to ensure the completeness of its LSN production.

First, according to DOE, Nevada previously estimated that its LSN collection would be in the tens of thousands, with the potential of over 100,000 documents.⁶ In light of this asserted fact, DOE believes that Nevada's LSN collection of less than 4800 documents necessarily is substantially incomplete.⁷ DOE also infers the insufficiency of the Nevada LSN collection from the fact that Nevada had produced 3372 of the now total of 4800 documents in 2006. According to DOE, had Nevada then regarded its LSN collection as being that close to completion, it would have so reported.⁸

Second, DOE takes aim at the nature of documents contained in Nevada's LSN collection. DOE claims that a substantial portion of documents added between January 7 and 14, 2008, consists of documents not authored by Nevada, but rather are DOE documents already on the LSN.⁹ In that regard, DOE points to five categories of documents included in Nevada's LSN collection that are either duplicates of documents already placed on the LSN by DOE or publicly available official notice material not required to be on the LSN.¹⁰ DOE further insists that Nevada's scant production of e-mails, less than 100, is not to be taken as a good faith production of that "type" of document.¹¹ As DOE sees it, such a limited production, with fifty-four hits under document type "e-mail," cannot be representative of the actual number of e-mails in Nevada's document collection.

DOE claims that there are other types of documentary material authored by Nevada's experts that should be on the LSN, namely (1) information concerning contentions; (2) review of DOE work product; (3) work product from Nevada's current experts; (4) graphic-oriented documents; and (5) documentation from

⁶ Motion at 6 (citing Tr. at 8 (Charles Fitzpatrick) (case management conference in which Nevada stated it would make available approximately 100,000 documents)).

⁷ *Id.* at 6, 29.

⁸ *Id.* at 9 (citing the Nevada Commission on Nuclear Project's bi-annual report discussing the readiness of Nevada's LSN collection and failing to state that Nevada's production was complete or nearly complete).

⁹ *Id.* at 1 n.2 (citing 10 C.F.R. § 2.1003(a)(1), which DOE characterized as "allowing party to exclude documents that another party has made available on LSN").

¹⁰ *Id.* at 11-13.

¹¹ *Id.* at 4, 30.

Nevada consultants and other contractors.¹² The inadequacy of Nevada's LSN collection, DOE posits, can be inferred from searches for documents authored by, or sent to, Nevada's team of experts. DOE claims it searched Nevada's database and found an absence of work product from most of Nevada's retained experts.¹³ In the few documents DOE did find, the content of the documents referred to additional existing data, calculations, and information that DOE asserts should be on the LSN.¹⁴

Lastly, DOE maintains that Nevada did not institute appropriate procedures to ensure that its documentary material production would be complete. DOE points specifically to the so-called "call memos" that were issued in 2004 and 2007 as instructions regarding the identification of documentary material that had to be retained for inclusion in the LSN collection. According to DOE, those memos were not distributed to all members on Nevada's project team with the consequence that material that should have been included in the collection was never evaluated for that purpose.¹⁵

B. Nevada maintains that DOE's motion has no basis either in law or fact. First, it responds that it implemented procedures and made a good faith effort to make documentary material available in its LSN Collection. It insists that the call memos, as supplemented by less formal communications, reached all of the members of its project team and provided them with the necessary instructions regarding the evaluation and retention of the documentary material that must be included in the LSN collection.¹⁶ Nevada's response details numerous "summits," weekly telephone conferences, and written communications discussing LSN procedures and compliance among team members.¹⁷ Second, Nevada main-

¹² Motion at 14-24. DOE also lists four specific examples of work product by Nevada's team that are missing from the LSN. *Id.* at 23-24. DOE points to examples of expert progress reports made available on the LSN prior to a certain date leading DOE to believe Nevada has only made a partial production of documentary material. *Id.* at 17-18.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 25, 31. DOE additionally claims that "Nevada's call memos [do not] appear to be consistent with the applicable regulations. Those memos are facially inadequate as procedures because they do not purport to extend the requirements for document preservation and submittal of documentary material beyond the direct recipients, and omit the personnel who work with them." *Id.* at 32.

¹⁶ [Nevada's] Response to DOE's Motion To Strike Nevada's LSN Certification (Feb. 8, 2008) at 4 [hereinafter Response]. As stated by Nevada "[c]ontrary to DOE's criticism, the written information Nevada provided to its team reminded them about procedures and training Nevada *had been implementing for several years.*" *Id.*

¹⁷ *Id.* at 3. ("Since 2003, there have been numerous expert 'summits' (meetings of the entire consultant team, attorneys, and Nevada staff); at every one of those meetings, a block of time was set

(Continued)

tains that these instructions were carried out with the consequence that its LSN collection includes all of its extant documentary material. Nevada notes that the collection contains each of the only three specifically identified documents that DOE claimed were missing.¹⁸

Third, Nevada disputes that its earlier estimates of the amount of documentary material have any present relevance.¹⁹ According to Nevada, these were gross estimates designed simply to provide the LSN administrator with some indication as to what might prove to be the time necessary to place the Nevada collection on the LSN.²⁰ It was not intended to be an accurate representation of the size of the ultimate collection.

In the final analysis, Nevada maintains, the DOE motion rests on little more than speculation and conjecture. Nevada purports to counter all of the factual allegations made against it by DOE and disputes DOE's review of its LSN collection. In its response, Nevada lays out the assertions made by DOE and counters each with its own factual assertion or information omitted by DOE.²¹

III. ANALYSIS

A. In large (if not total) measure, and in contrast to the recent unsuccessful motion of Nevada to strike the DOE certification, the motion now in hand seeks to raise purely factual issues. In essence, DOE asks us to conclude that, as a matter of fact, there must be documentary material in Nevada's possession that should have been, but to date has not been, included in Nevada's document collection placed on the LSN.

Pursuant to 10 C.F.R. § 2.325, the burden of proof rests on the movant. As in the case of any motion resting on assertions of fact, it is reasonable to expect that the movant will buttress it with some concrete evidence, often if not usually supplied

aside for the conduct of instruction on the requirements and definitions associated with the LSN and the provision of Documentary Material"). *See id.*, Decl. of Charles Fitzpatrick (Feb. 8, 2008) at 1-2; *id.*, Decl. of Susan Lynch (Feb. 7, 2008) at 2-3 [hereinafter Lynch Decl.] (describing summit meetings and weekly telephone conferences that included discussions of LSN compliance); *id.*, Exh. 1 (guidance memo detailing LSN obligations and compliance procedures); *id.*, Exh. 18 (call memo detailing procedures for collection of documentary material including Regulatory Guide 3.69 and specific examples to analyze LSN-worthiness of documentary material); *id.*, Exh. 19 (e-mail to Nevada team-members about LSN Compliance); *id.*, Exh. 20 (memo describing LSN training and procedures implemented by Nevada); *id.*, Exh. 21 (memo providing Nevada's team with information on how to comply with LSN procedures, including instructions created and used by DOE to assist its team in identifying documentary material for inclusion on the LSN).

¹⁸ *Id.* at 12-14.

¹⁹ *Id.* at 15-17.

²⁰ *Id.* at 17.

²¹ *Id.* at 29-38.

in the form of an affidavit or declaration by a person with asserted knowledge of the fact or facts upon which the motion is based. As the movant seeking an order striking Nevada's certification, DOE bears the burden of supporting all points required for such an order. Here, however, no such solid evidentiary showing was even attempted.

We are provided, instead, with little more than the suspicion of DOE counsel, based upon what is offered as circumstantial evidence, that Nevada necessarily must be deemed to have withheld from its LSN collection documents that it was required to include. In short, what we have before us is little more than rank speculation and conjecture. Indeed, to the extent that DOE saw fit to identify particular documents that assertedly had unjustifiably been omitted from the Nevada collection, it has turned out that all three of those documents were, in actuality, already to be found on the LSN.²² Nor did DOE pursue discovery against Nevada to support its suspicions,²³ request any relief from the Board with respect to conducting discovery, or seek an extension of time to gather support for its motion or to conduct discovery before filing its motion within the time limit imposed by 10 C.F.R. § 2.323(a).

Even if we were to assume that the circumstantial presentation of counsel was sufficient to constitute a *prima facie* case on the otherwise unsupported DOE proposition that Nevada defaulted in carrying out its LSN responsibilities, that assumption does not advance DOE's cause. Any such *prima facie* case has been satisfactorily rebutted in Nevada's response to the motion.

In addition to addressing in the body of that response the underpinnings of the DOE counsel's speculation and conjecture, Nevada attached thereto, *inter alia*, the February 7, 2008 declaration of Susan Lynch in support of Nevada's insistence that it had fully complied with its regulatory obligation to make, in its words, "a good faith effort to create an accurate and complete LSN database."²⁴ Ms. Lynch is the Administrator of Technical Programs in Nevada's Agency for Nuclear Projects, an assignment that she has held since 1998. Her responsibilities in that position have included the participation in, and the monitoring of, the preparation of Nevada's LSN database.²⁵ In the course of the declaration, Ms. Lynch sets forth the measures that were taken to ensure that the database was both accurate and complete. We need not freight this decision with a detailed rehearsal of her representations in that regard. Suffice to say, we find in them adequate support for Nevada's rejoinder to the DOE attack upon the Nevada certification that, once again, has a wholly circumstantial foundation.

²² *Id.* at 12-14.

²³ *See, e.g.*, 10 C.F.R. § 2.1018(a)(1)(v).

²⁴ Response at 1. *See also* Lynch Decl.

²⁵ *See id.* at 2-5. *See also* Lynch Decl. at 1.

Additionally, DOE maintains that Nevada's LSN collection is missing certain types of documentary material, including work product from Nevada's experts. What DOE fails to show, however, is any evidence that the results of its searches represent the entirety of documents in existence on the LSN. Instead, DOE in effect asserts that it performed certain searches on the LSN and failed to realize desired results. Such assertions, without more, demonstrate only that the entered search terms failed to return any documents, not that the documents do not exist on the database. Documents on the LSN are only required to be identified by participant accession number, document date, document type, and title.²⁶ The mandatory guidelines for creating a title of a document to be included on the LSN only require that the title be alphanumeric. Because there is no requirement that the title have any relevance to the document's contents, a search on the LSN for documents by title may be futile. Nevada has sufficiently rebutted DOE's speculation that certain document "types" are missing from the LSN collection by pointing out problems with the search methods used and the absence of any evidence to prove DOE's claims.²⁷ Given this state of affairs, there appears to be no good reason to conduct any additional exploration of the DOE's claims.

To the contrary, to allow DOE now to pursue the matter further through resort to customary discovery procedures would be to countenance what would be little more than an impermissible fishing expedition. Once again, DOE did not request discovery in this matter or an extension of time in order to gather evidence.²⁸ By the same token, there is no cause for this Board to expend time and effort in continuing to pursue the subject itself. The short of the matter is that, once there has been a reasoned refutation of factual claims of a purely conjectural nature, the need for any further consideration of those claims has come to an end.

B. What is left for consideration is the Dissent's insistence that, for reasons developed at great length, Nevada's 2007 call memo was defective. Specifically, according to the Dissent, that call memo was required to address the retention for LSN inclusion purposes of documentary material that does not support Nevada's position in this proceeding, so-called DM-2 documentary material.²⁹ For two separate and independent reasons, it is patent on analysis that the Dissent is off the mark and provides no justification for the rejection of the Nevada certification.

²⁶ See LSN Baseline Design Requirements, Release 1.0, Table A (June 5, 2001).

²⁷ Response at 12-14. Nevada points to DOE's failure to find the three specific documents DOE contends to be missing on the LSN in its motion despite all three documents existing on that database. See also *id.* at 26-28 (detailing DOE's claims of missing documentary material that have no supportive evidence).

²⁸ In that regard, we do not need to reach the question of the extent of discovery permissible under 10 C.F.R. §§ 2.1018 or 2.1004 because DOE made no request for any discovery.

²⁹ See 10 C.F.R. § 2.1001.

1. To begin with, it is beyond cavil that the Dissent's attack upon the 2007 call memo raises a host of factual and legal issues that are not encompassed to any extent in the DOE motion. All that is to be found in that 36-page motion with regard to the adequacy of that call memo is one sentence: "the [2007] call memo seemingly advised recipients to omit critical commentary about Nevada's work product and favorable commentary about DOE's."³⁰ Needless to say, there is absolutely nothing in that passing cursory reference to the call memo that might possibly be taken as constituting a specific claim that the memo was deficient for the reasons that are now assigned at such length by our dissenting colleague.³¹ Indeed, DOE counsel did not even allude in his opening oral argument to the deficiencies asserted in the Dissent. Rather, they first surfaced in our dissenting colleague's extended interrogation of Nevada counsel during the course of that argument.

In our view, it is not this Board's role in passing upon a motion to raise issues on its own that are not presented to it by the moving party. This is particularly the case where, as here, the movant is represented by experienced and clearly competent counsel. Had that counsel thought that there was a genuine issue regarding the failure of the 2007 call memo to have encompassed some class or classes of documentary material, it is reasonable to have expected counsel to have appropriately raised it. Be that as it may, counsel's election not to have properly presented such an issue, either in the motion or in opening oral argument, provided no license to the Board to raise it *sua sponte*.

2. Moreover, the underpinnings of the Dissent's conclusion regarding the 2007 call memo on the grounds that are now offered reflect a crucial misunderstanding of the different responsibilities DOE and Nevada possess at this pre-application stage.³² Undergirding the Dissent's argument is its premise that Nevada must be deemed to possess at this juncture DM-2 documentary material (i.e., material that does not support its position). Upon a full consideration of what is required of a potential party in advance of the filing and docketing of

³⁰ Motion at 31.

³¹ The Dissent's bald assertion that "DOE's Motion *clearly* challenged Nevada's failure to produce Non-Supporting DM" is *clearly* not supported. 67 NRC at p. 232 n.75 (Karlin, J., Dissenting) (emphasis supplied) [hereinafter Dissent].

³² The Dissent makes an unsupported finding of fact that the call memo was the key instruction Nevada used in identifying documentary material. Neither party before us has claimed the call memo to be the "key instructions" or "centerpiece" document used by Nevada. Dissent at pp. 218, 224. In fact, Nevada has presented extensive evidence detailing the other documents and memos used as guidance for identifying documentary material. See *supra* notes 16-17, at pp. 208-09. Nevada, in its response, clearly states that "the written information Nevada provided to its team reminded them about procedures and training Nevada *had been implementing for several years*." Nevada Response at 4.

DOE's license application, it becomes immediately apparent that the premise is unfounded.

The short of the matter is that, under the regulatory scheme, potential parties (such as Nevada) are not now required to possess, let alone to assert, any litigation position. As a consequence, as a matter of law, Nevada need not at this time produce material that either does or does not support a position. Such material will first exist only after the application is filed and then docketed. At that point, Nevada's obligation to file contentions addressed to the application will surface. With it will arise the need to make publicly available any documentary material in its possession that either supports or counters such contentions as, upon review of the license application, Nevada deems warranted in light of its position in the proceeding reflected by its filed contentions.

It would appear that the source of the Dissent's faulty premise is to be found in the failure to give effect to the regulatory definition of both DM-1 (supporting) and DM-2 (nonsupporting) documentary material. DM-1 is "[a]ny information upon which a party . . . intends to rely and/or to cite in support of its *position in the proceeding* for a construction authorization."³³ DM-2 refers to "[a]ny information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or *that party's position [in the proceeding]*."³⁴ In short, it is only information that either supports or fails to support a party's "position in the proceeding" that comes within the ambit of DM-1 and DM-2. Yet, manifestly, no potential party (i.e., petitioner) has such a position prior to the institution of the proceeding — an event that necessarily abides the filing and docketing of the license application and the filing of contentions.³⁵

On this point, it need be added only that our view is fully supported by the Commission's decision in *U.S. Department of Energy (High-Level Waste*

³³ 10 C.F.R. § 2.1001 (emphasis supplied).

³⁴ *Id.* (emphasis supplied).

³⁵ Again deciding an issue not briefed or raised by any party, the Dissent also takes issue with the "relevancy" test that Nevada's call memo applies to all three classes of documentary material. *See* Dissent at pp. 230-31. Specifically, the Dissent disagrees with Nevada's use of the topics included in Regulatory Guide 3.69 as a relevancy standard for DM-1 and DM-2, as well as DM-3, because only the regulatory definition of DM-3 includes a relevancy test incorporating the Regulatory Guide. The Dissent's literalistic argument, however, fails to recognize that Regulatory Guide 3.69 is essentially a soup to nuts compendium of all topics related to an HLW repository and encompasses the NRC Staff's view of the universe of documentary material deemed relevant to Yucca Mountain. The Commission has indicated that "[t]he purpose of the 'Topical Guidelines' is to inform parties, potential parties and interested governmental participants regarding documentary material to be identified . . . or made available . . . via the LSN." Reg. Guide 3.69 (citing 63 Fed. Reg. 71,729, 71,730 (Dec. 30, 1998)). Furthermore, as explained in Regulatory Guide 3.69, the Commission "indicated when revising the definition of documentary material, non-relevant information could affect the responsiveness and usefulness of the LSN by cluttering the system with extraneous material." *Id.*

Repository), CLI-06-5, 63 NRC 143 (2006), holding that the draft license application did not qualify as documentary material. In rejecting this Board's contrary conclusion, the Commission determined that only the information contained in the final version would constitute such material.³⁶ It stated that:

since both Class 1 and Class 2 materials are subject to a "reliance" criterion, it is not reasonable for any participant to be expected to anticipate all documents that will qualify as either Class 1 or Class 2 documentary material prior to the filing of contentions. In fact, the Commission's stated expectation is that Class 1 and Class 2 documentary material will not be completely identified until *after* contentions are accepted. Thus, it is premature to expect any participant to file a complete set of Class 1 or Class 2 documentary material in the pre-application phase, and the sense of urgency Nevada conveys through its efforts to compel production of the draft license application is misplaced.³⁷

As the Commission explained, "[t]he first two classes of documentary material are tied to a 'reliance' criterion. Reliance is fundamentally related to a position that a party in the HLW repository proceeding will take in regard to compliance with the Commission regulations on the issuance of a construction authorization for the repository."³⁸ Stated otherwise, reliance is tied to a party's *litigation* position "in the proceeding." This being so, Nevada is not legally obligated to

³⁶The Commission explained that,

Nevada reasons that the information contained in the draft will be "relied" on by DOE during the proceeding since the information contained in the final and draft license applications will overlap. This argument is no more persuasive here than it was before the PAPO Board. Even though language in a draft license application may be carried over into the final license application, should DOE seek to introduce that material in evidence, DOE will "rely" on the *final* document, not on earlier versions, to set out its position on the issues.

CLI-06-5, 63 NRC at 151.

³⁷*Id.* at 152 (internal citations omitted). The Commission spoke similarly in the regulatory history, stating that "because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted by the Presiding Officer in the proceeding, an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-license application phase." 69 Fed. Reg. at 32,843. The Dissent, ignoring the Commission's recent decision, quotes the next sentence of the regulatory history to the effect that the Commission expects parties to produce all documentary material at the time of initial certification. Dissent at p. 237. Although the Commission's exhortation was meant to encourage the parties to produce as much documentary material as practicable upon certification, it is not a regulatory mandate for Nevada to do so.

³⁸CLI-06-5, 63 NRC at 151 n.29 (quoting 69 Fed. Reg. at 32,843).

produce reliance material, including supporting and nonsupporting DM, until it has a “position in the proceeding” by filing contentions.³⁹

The Dissent’s argument disregards the meaning of the word “position” and the phrase “in the proceeding” as used in the regulatory text defining documentary material. The Dissent argues that Nevada has a longstanding position adamantly opposing the construction and operation of a high-level waste geologic repository at Yucca Mountain with the consequence that it must produce supporting and nonsupporting DM-1 and DM-2 documents.⁴⁰ Nevada’s longstanding displeasure with Yucca Mountain, however, is not its litigation position within the meaning of the word “position” in the regulations. Rather, Nevada’s litigation position will be reflected only in the issues raised in the contentions challenging various aspects of DOE’s license application. Additionally, with respect to a petitioner, “in the proceeding” is a phrase that relates to the licensing proceeding, and not the pre-application phase.⁴¹ The Commission has recognized that “[t]he LSN will continue to be used for document storage and access after the pre-license application phase closes and the actual *proceeding* commences.”⁴² It may well be, as DOE insists, that Nevada has drafted preliminary contentions; however, Nevada is not required to place those contentions or any supporting or nonsupporting information regarding those contentions on the LSN until they are final.

At bottom, the matter comes down to this: DOE has an obligation to file a license application demonstrating compliance with all the requirements of 10 C.F.R. Part 63 (Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada) and NUREG 1804 (2003) (The Yucca Mountain Review Plan) and to place all three classes of documentary material on the LSN with respect to its licensing application. DOE is required to produce all documentary material necessary to support its burden of meeting all points of the license application. This Board has previously discussed the breadth of DOE’s obligation and determined that, “DOE bears the burden to support all points required for a license, and DOE’s certification initiates the entire licensing process.”⁴³ On the other hand, Nevada will be filing contentions in response to the

³⁹The Commission further stated that,

while it is not possible to say there are no special circumstances that would necessitate a ruling by the PAPO on the availability of a particular document in the pre-license application stage based on its Class 1 or Class 2 status, disputes over Class 1 and Class 2 documentary material generally would be of a type that would be more appropriately raised before the Presiding Officer designated during the time following the admission of contentions when the NRC staff is working to complete the Safety Evaluation Report in its entirety.

69 Fed. Reg. at 32,843-44.

⁴⁰Dissent at pp. 218, 232-33.

⁴¹10 C.F.R. § 2.1001.

⁴²CLI-06-5, 63 NRC at 147 (emphasis supplied).

⁴³LBP-04-20, 60 NRC at 315.

license application. Its litigation position in this proceeding will not be determined until it formulates and files its contentions. If there are no final contentions, then as a matter of law, there will be no supporting or nonsupporting information. DOE seemingly acknowledged this fact in its 2004 Answer to Nevada's initial motion to strike, noting that disputes over document production are likely and stating that "no rote or formalistic process can identify documents as documentary materials, especially documents that might contain non-supporting information in the absence of concrete contentions — and judgment calls have to be made."⁴⁴

⁴⁴ Answer of the [DOE] to [Nevada's] Motion To Strike at 2 (July 22, 2004). The Dissent also indicts the Majority for "using a double standard." Dissent at p. 225 n.62. As the Dissent would have it, the Board apparently must respond to DOE's instant motion regarding Nevada's certification in the identical manner it responded to Nevada's 2004 motion challenging DOE's initial LSN certification even though their respective responsibilities for producing documentary material are legally distinct. In any event, as even a cursory review of the factual circumstances surrounding DOE's 2004 LSN document collection and initial certification reveals, the situations are a comparison between apples and oranges. *See* Tr. at 1380-83.

Similarly, the Dissent, quoting without attribution one member of the Board from an earlier 2007 argument on an unrelated motion that "[w]hat's sauce for the goose is sauce for the gander," also claims that the regulatory phase "position in the proceeding" must be read to apply identically to DOE and Nevada to avoid the "perverse result" of DOE not having to produce any supporting or non-supporting documentary material until it files its license application because DOE may never file an application. Dissent at p. 239. As support, the Dissent points to section 113(c)(3) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10133(c)(3) (2006) that the Dissent states prohibits DOE from filing a license application if it determines the site is unsuitable for a repository. *Id.* at pp. 238-39. The Dissent's argument, however, misapprehends the carefully crafted statutory scheme and timing of that statute. Section 113, like its title states, addresses *site characterization*, not the filing of the license application, as the Dissent would have it. The site characterization process to which section 113 speaks long precedes the site approval process and construction authorization (i.e., license application) that is addressed in section 114. Under the statutory scheme of the Waste Policy Act, the scheme upon which the Commission's Subpart J regulations are footed in assigning legally distinct responsibilities to DOE and Nevada, the site characterization process must be completed before the site approval process begins and once the site approval process is completed, section 114(b) mandates that DOE must submit its license application within 90 days. *See* 42 U.S.C. § 10134(b)(2) (2006). Thus, under the sequential process prescribed in the Waste Policy Act, and contrary to the Dissent's assertion, DOE is statutorily required to file a license application once the site approval process has been completed. That action occurred in July 2002, years before DOE certified its document collection under the Commission's regulations. Hence, the Dissent's "perverse result" can only occur with the Dissent's perversion of the provisions of the Waste Policy Act.

Further, there are sound practical reasons underlying the regulation's differing treatment of DOE and Nevada at the pre-license application phase. In formulating initial contentions meeting the rigorous schedule set by 10 C.F.R. Part 2, Appendix D, a potential party may be able to make substantial use of DOE supporting and nonsupporting documentary material. Conversely, and contrary to the Dissent's unfounded allegations that the proceeding will be delayed and DOE's answers will be stunted, Dissent at pp. 218-19, 237, such material from a petitioner is unnecessary in opposing the admission of contentions because factual disputes cannot be resolved at the contention admissibility stage. Thus, if a

(Continued)

IV. CONCLUSION

For the foregoing reasons, the Department of Energy's motion to strike the January 17, 2008 certification by the State of Nevada is *denied*.
It is so ORDERED.

THE PRE-LICENSE APPLICATION
PRESIDING OFFICER BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 23, 2008

proffered contention is properly supported, other contradictory, nonsupporting documentary material is irrelevant to the contention admissibility determination. To be sure, such documents may be highly relevant to the later merits determination but, as we have stated, the regulations require that Nevada produce such material after filling its contentions. *See supra* Section III.B.2, at pp. 213, 215.

Dissent of Judge Karlin

The question presented by the Department of Energy's (DOE's) Motion⁴⁵ is a straightforward one: whether the State of Nevada's (Nevada's) January 17, 2008 document production satisfied Nevada's obligation to make "all documentary material" available as required by 10 C.F.R. § 2.1003(a). As the PAPO Board stated in 2004 when it struck DOE's initial document production, this regulation imposes a "rigorous" and "good faith standard," "requiring [each participant] to make every reasonable effort to gather . . . and to produce all documentary material at the outset." LBP-04-20, 60 NRC 300, 315 (2004). On the basis of the relevant undisputed facts, I conclude that Nevada failed to comply with 10 C.F.R. § 2.1003(a) and that DOE's Motion should be granted.

As discussed more fully below, the factual basis of Nevada's failure to comply with the regulatory requirement is most clearly illustrated by its "June 2007 Call Memo"⁴⁶ — the key instructions that Nevada employed in collecting and producing its documentary material (DM). The June 2007 Call Memo is defective because Nevada used an incorrect, narrow definition of DM that categorically excluded both supporting documentary material (Supporting DM) and *nonsupporting* documentary material (Nonsupporting DM) — two of the three categories of "documentary material" as that term is defined in 10 C.F.R. § 2.1001.⁴⁷ Thus, Nevada's June 2007 Call Memo fails to capture the DM that Nevada should have produced on January 17, 2008.

In addition, Nevada's document production was based on the erroneous premise that unless and until Nevada submits its final contentions, Nevada has "no position" regarding Yucca Mountain, and therefore Nevada has no documents that "support . . . its position" (Supporting DM) and no documents that "do not support" its position (Nonsupporting DM).⁴⁸ See 10 C.F.R. § 2.1001. As will be shown in section II.C, below, the No-Position Premise is legally invalid.

Nevada's June 2007 Call Memo and its No-Position Premise render the duty to produce Supporting DM and Nonsupporting DM essentially meaningless during the pre-license application phase and will make the contention admissibility phase even more difficult. Any suggestion that Nevada, which has actively opposed Yucca Mountain for more than 20 years and has employed scores of experts to develop its case, has no position in this matter is absurd. The No-Position Premise

⁴⁵ [DOE] Motion To Strike the January 17, 2008 Licensing Support Network [LSN] Certification by [Nevada] (Jan. 28, 2008) [Motion].

⁴⁶ Motion, Exh. H, Call Memo: Important Instructions for Your Compliance with LSN Regulations [June 2007 Call Memo].

⁴⁷ DOE raises the under-inclusiveness of the June 2007 Call Memo in its Motion. *Id.* at 31. See also Tr. at 1344, 1362-64.

⁴⁸ Motion at 32-34. See also Tr. at 1344, 1370, 1375.

makes a mockery of the pre-license application discovery period and allows Nevada and all other potential intervenors to stall this proceeding by delaying any disclosure of two-thirds of their DM until after they have filed their contentions.

I. UNDISPUTED FACTS

The relevant facts are not in dispute. Nevada has been involved in opposing the siting of a high-level radioactive waste geologic repository at Yucca Mountain since at least 1985.⁴⁹ Some members of the Nevada team have been working on this matter for more than 20 years. Loux Tr. at 3. During the last few years, Nevada has been “getting ready for potential licensing proceedings” and it currently has a team consisting of five lawyers and “40 to 45 scientists and experts in various disciplines.” *Id.* at 4-5. These experts come from all parts of the world, including China, the United Kingdom, and the United States.⁵⁰ Nevada’s team has prepared at least 2000 draft contentions, challenging various aspects of DOE’s potential license application. Loux Tr. at 7. As Mr. Robert Loux, the Executive Director of the Nevada Agency for Nuclear Projects, recently stated to the Nevada Legislature:

[We are] developing the framework for challenges or in the NRC parlance, contentions, if you would, which are the challenges to major assumptions or other assumptions by DOE in the project. . . . We’re also developing contentions or challenges to DOE’s conclusions or assumptions on the whole gamut of various technical issues. These contentions generally are developed in a way that not only has to put forward what our concern or our critique of what DOE’s information or position is on an issue, but we also have to reinforce that with our own references, our own research, our own documentation, peer-review journals that we have been published in and the like. . . . These contentions . . . have to be detailed enough so that the reviewers can see exactly what we’re challenging, what background information or other information we’re using to do that and what information of DOE’s we believe is not accurate or incomplete or otherwise not correct in terms of what it’s trying to portray or prove. *We currently probably have in the neighborhood drafted a couple thousand contentions, if you would, many more to come.*

⁴⁹ Motion, Exh. X, January 15, 2008 Hearing Before Nevada Legislative Committee on High Level Radioactive Waste, Testimony of Robert Loux at 3 [Loux Tr.].

⁵⁰ Motion, Exh. E, Nevada’s Scientific Experts; *id.*, Exh. D, Petition by the State of Nevada Under Atomic Energy Act Section 274i and 10 C.F.R. § 63.63 for Financial Assistance in the Licensing Review of the Yucca Mountain Nuclear Waste Repository.

Id. at 6-7 (emphasis added). As of 2004, Nevada had spent at least \$78 million in its efforts related to Yucca Mountain.⁵¹

Against this very substantial effort, however, Nevada produced fewer than 4800 documents on the LSN.⁵² Although this may seem like a significant number, many hundreds of these documents are unnecessary duplicates and/or non-Nevada documents serving as filler.⁵³ For example, 153 documents are publicly available transcripts of the NRC Advisory Committee on Nuclear Waste, 68 are publicly available transcripts of proceedings in the U.S. House and Senate, 260+ are documents prepared by DOE and DOE contractors, 389 are publicly available documents from a separate lawsuit, and 130 are documents from other federal agencies. Motion at 12.

More specifically, it is edifying to review the undisputed facts relating to Nevada's production of e-mails. First, it should be remembered that in 2004, Nevada insisted that DOE review 10 million e-mails and produce the hundreds of thousands of them that met the definition of DM. *See* LBP-04-20, 60 NRC at 321-24. Nevada asserted that such e-mails might reveal difficulties in DOE's position and would produce the unvarnished truth.⁵⁴ The PAPO Board granted Nevada's motion, noting pointedly that, although DOE "is not planning to cite or rely on" these e-mails, they could very well be "'nonsupporting' documentary material" that "might very well be of the most importance to persons who may want to question or to challenge" an adversary's position. *See* LBP-04-20, 60 NRC at 323. Indeed, our ruling resulted in DOE's production of some e-mails that Nevada, and some members of Congress, deemed interesting and important.⁵⁵

In stark contrast, Nevada produced an infinitesimal number of e-mails on January 17, 2008. Nevada produced fifty-four documents that it classified as e-mails, and of these, *only twelve were authored by Nevada* personnel,

⁵¹ Motion, Exh. B, Aff. of Robert R. Loux at 6.

⁵² Motion at 1. A March 6, 2008 search of the LSN revealed that Nevada's document production totaled 4758.

⁵³ Nevada's inclusion of unnecessary duplicates and non-DM would be unremarkable, except for the fact that Nevada spent a major portion of its Response attacking the over-inclusiveness of DOE's October 19, 2007 document production. *See* State of Nevada's Response to DOE's Motion To Strike Nevada's LSN Certification at 5-11, 22-26 (Feb. 8, 2008) [Response].

⁵⁴ *See* Tr. at 18 (quoting Nevada's counsel, Joseph Egan: "[W]e don't care that DOE's not going to cite these emails. . . . We want to cite those emails. The few emails that we've been able to find so far have been incredibly damning to DOE. . . . We want those emails. They're extremely relevant to this proceeding").

⁵⁵ Motion, Exh. C, Statement of Joseph R. Egan Before the House Subcommittee on the Federal Workforce and Agency Organization at 2 ("On August 31 of last year, NRC's Licensing Board granted our request to strike DOE's certification on three separate grounds. Among other things, the Board required DOE to produce all of its "archival" e-mails and perhaps millions of additional withheld records. It is only because of our motion to strike and the Board's inquiry that the e-mails that are the subject of this hearing came to light").

experts, consultants, and contractors.⁵⁶ Even an additional search of Nevada’s LSN collection using the word “e-mail” or “electronic mail” in the *title* field revealed only two additional individual e-mails, and a single “document” consisting of a compilation of less than 100 e-mails from Aaron Barkatt, one of Nevada’s experts.⁵⁷ In short, Nevada’s document production included fewer than 114 e-mails from its multiyear, multidisciplinary, multimillion-dollar effort. Nevada never controverted these assertions by DOE.

Nevada’s document production also reflects a very small number of documents of any kind (not just e-mails) to or from Nevada’s large team of experts, scientists, attorneys, and others. For example, DOE lists forty-one of the addressees of the June 2007 Call Memo, and provides the following chart reflecting a search of the LSN of Nevada’s bibliographic headers for documents authored by, or sent to, these individuals:

Name	Author	Addressee
Marta A. Adams	3	0
Lindsay Audin	5	0
James David Ballard	13	0
Jimmy T. Bell	1	2
Martin Blunt	0	0
William Briggs	2	0
Jacqueline Bromfield	0	0
Vince J. Colatriano	0	0
Hank (Henry) Collins	3	1
Norma Conway	0	0
Robert J. Cynkar	2	1
Fred Dilger	24	0
Charles J. Fitzpatrick	8	26
Steve Frishman	2	2
Jim Hall	3	0

(Continued)

⁵⁶ See Motion, Exh. M, Nevada Documents Coded as Doc-Type Email. A March 6, 2008 search of the LSN under the “document type” of “email,” “Email,” “e-mail,” “E-mail,” or “electronic mail” and the “information source” of “State of Nevada” produced only these fifty-four e-mails.

⁵⁷ These facts were easily confirmed by a March 6, 2008 search of the LSN. The two individual e-mails are NEV0002872 and NEV5000009. The compilation of Dr. Barkatt’s e-mails is NEV5000105. Motion, DOE Exh. AA [Series of E-mails from Aaron Barkatt Re: Catholic University Corrosion Data].

Name	Author	Addressee
Robert Halstead	49	5
Judy Hilton	0	0
Merril Hirsh	2	0
Hugh Horstman	0	0
Martin Kelly	0	1
Francis S. Kendorski	2	0
Paul H. Lamboley	1	0
Robert R. Loux	77	33
Susan Lynch	6	105
Martin G. Malsch	7	5
Simon Mathias	0	0
Stephan Matthai	0	0
Lou McDonald	0	0
Susan Montesi	1	0
Richard C. Moore	3	0
Roger B. Moore	2	0
Michael K. O'Mealia	0	2
Dave Owen	1	0
Jamie Pericola	0	0
Lawrence Phillips	0	0
Marvin Resnikoff	9	0
Antonio Rossmann	2	0
Joe Strolin	1	62
Steve Swanton	0	0
Judy Treichel	3	1
Tom Wigley	0	0

As shown by this chart, it is Nevada's position that *zero* DM of any kind (e-mails, memos, correspondence, or reports) were addressed to twenty-eight of Nevada's team members. Similarly, Nevada indicates that fifteen of its team members authored *zero* DM. Eighty percent of the 478 DM listed on the chart are associated with only six of the forty-one individuals (Dilger, Fitzpatrick, Halstead, Loux, Lynch, Strolin). Nevada did not dispute the above-referenced facts, and simple searches on the LSN confirm the basic accuracy of DOE's chart.

One example from the above-referenced chart is Mr. Steve Frishman. Mr. Frishman, a geologist, is the Technical Policy Coordinator for the Nevada Nuclear Project Agency. Tr. at 1477-78. This is an important position on Nevada's team. *Id.* at 1478. He has served in that position for over 10 years and has represented Nevada at LSN-related meetings for 20 years. Motion at 27. Yet according to

Nevada, during the last 20 years, Mr. Frishman has authored or received *only four documents* that Nevada deems to be DM. Nevada did not dispute this astounding fact.⁵⁸ Tr. at 1478.

Nevada responds not by challenging DOE's factual allegations (e.g., numbers of e-mails, numbers of DM addressed to a specific individual), but by asserting two propositions. First, Nevada asserts that DOE's arguments that there "should be" more e-mails and DM are "pure speculation about Nevada's intentions and missing categories of documents." Response at 1. Nevada argues that, in order to sustain its motion, DOE must cite to specific items of documentary material that Nevada has failed or refused to produce. *Id.* at 12. Nevada asserts that there is "a total absence of *any* evidence or proof" that Nevada failed to produce all of its documents, and that DOE's arguments about the dearth of virtually any documents in major categories (such as e-mails) are speculative and conclusory statements. *Id.* at 26.

The second component of Nevada's response is in the nature of a rebuttal and consists of Nevada's declarations that it has "implemented a good faith effort to create an accurate and complete LSN database." *Id.* at 1. Nevada asserts that "[s]ince 2003, there have been numerous expert 'summits' (meetings of the entire consultant team, attorneys, and Nevada staff); at every one of those meetings a block of time was set aside for the conduct of instruction on the requirements and definitions associated with the LSN and the provision of Documentary Material." *Id.* at 3; Decl. of Susan Lynch ¶ 8 [Lynch Decl.]. Nevada held conference calls and answered questions from its team members, Lynch Decl. ¶ 9, gave its team members a copy of the federal regulations, Tr. at 1427, and even gave them a copy of a DOE memorandum concerning its document production. Response at 3.

Nevada's document production effort was anchored by two call memos issued by Joe Egan, one of Nevada's attorneys. The first, entitled "Important Instructions for Your Compliance with LSN Regulations," was a short memo issued in July 2004.⁵⁹ It consisted of three pages, plus a one-page attachment (a certification form) and directed all distributees to gather and produce their DM.

The second call memo, entitled "Call Memo: Important Instructions for Your Compliance with LSN Regulations," dated June 5, 2007, was much longer and more substantive.⁶⁰ It consisted of twenty-three pages, including a five-page cover memo and four attached exhibits: Exhibit A (a copy of NRC's Regulatory Guide 3.69), Exhibit B (Egan's "Guidelines for Inclusion of Documents in the LSN"),

⁵⁸ DOE's motion is replete with examples of other categories of materials (e.g., graphically oriented materials) where Nevada's document production contains only a tiny number of documents.

⁵⁹ Motion, Exh. G, Important Instructions for Your Compliance with LSN Regulations.

⁶⁰ Motion, Exh. H, Call Memo, Important Instructions for Your Compliance with LSN Regulations; Response, Exh. 18, Call Memo, Important Instructions for Your Compliance with LSN Regulations.

Exhibit C (Egan's "LSN: Specific Examples to Analyze LSN-Worthiness of Documentary Material"), and Exhibit D (a one-page certification). The June 2007 Call Memo was addressed to sixty-four individuals and was Nevada's most extensive set of instructions on identifying and producing DM. In the next few months, Nevada redistributed the June 2007 Call Memo, and Exhibit C thereto, several times, describing Exhibit C as "a good 'decision tree' tool for determining LSN inclusion or exclusion."⁶¹ It was clearly the centerpiece of Nevada's document collection and production effort.

II. ANALYSIS

The Majority is confounded by what it sees as a factual impasse. *See* Tr. at 1343, 1347, 1349, 1371, 1399, 1400, 1407, 1484-85. On the one hand, the Majority posits that DOE may have made a prima facie case that Nevada's document production was noncompliant. This is shown, *inter alia*, by the fact that, after opposing Yucca Mountain for more than 20 years, Nevada's document production includes only an infinitesimal number of e-mails and a tiny number of any kind of DM to or from its large, and geographically dispersed, team of scientists, experts, and lawyers. On the other hand, Nevada submitted written declarations that it conducted a good faith search for documents it intends to rely on. The Majority thinks that this rebuts DOE's case and concludes that it must deny DOE's motion on the ground that it failed to carry its burden of persuasion.⁶²

⁶¹ Response, Exh. 19, E-mail from Susan Montesi to Nevada Licensing Team [Montesi E-mail]. *See also* Response, Exh. 20, Nevada [LSN] Procedures at 1 ("Detailed memoranda detailing LSN compliance requirements were sent by Mr. Joe Egan on July 29, 2004 and June 5, 2007. 'Decision tree' and question and answer documents were circulated to every member of the team"); Response, Exh. 21, Memorandum from Charles J. Fitzpatrick to Area Certification Managers of Nevada's Licensing Team (re-circulating the 2004 and 2007 call memos and the "Decision Tree analysis tool" (Exh. C to the June 2007 Call Memo)).

⁶² Assuming *arguendo* that the pleadings and exhibits present certain factual issues, there is no reason why this should paralyze the Board. We were not *supine* in 2004, when Nevada's July 2004 motion to strike DOE's initial certification raised numerous factual issues. Instead, within 48 hours, and without waiting for DOE's answer, the Board issued a set of factual interrogatories to DOE. Memorandum and Order (Regarding State of Nevada's July 12, 2004 Motion) (July 14, 2004) (unpublished). Five days later, the Board fired off another set of factual interrogatories to the LSN Administrator. Memorandum and Order (Directing [LSN] Administrator to Respond to Questions) (July 19, 2004) (unpublished). Next, the Board ordered the LSN Administrator to attend the oral argument on Nevada's initial motion to strike, and we interrogated and took factual testimony from the LSN Administrator. Tr. at 91.

Today, in stark contrast, the Majority chooses not to pursue numerous and readily available avenues to help resolve the supposed factual issues that stymie it. A short set of interrogatories could be sent to Nevada. Two or three of Nevada's key team members could be questioned under oath, either by this

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I respectfully disagree. In my opinion, there is no factual impasse because Nevada's rebuttal is completely off the mark. The undisputed facts show that Nevada's search, training, instructions, and production, and thus its entire rebuttal, are founded upon Nevada's definition of "documentary material," which, as a legal matter, is fundamentally flawed. Nevada's June 2007 Call Memo, Nevada's Response, and the declarations of Mr. Fitzpatrick and Ms. Lynch, systematically exclude entire categories of Nonsupporting DM and Supporting DM. In addition, there is no dispute that Nevada's document production is based on its No-Position Premise that, until it files contentions, Nevada has No Position and therefore it can have no DM that supports its (nonexistent) position and no DM that does not support its (nonexistent) position. For the reasons stated below, the No-Position Premise is legally incorrect.

If the net is torn, then, even if it is cast in good faith, most of the fish will escape. Just so, since Nevada's net for gathering and producing "documentary material" is inconsistent with the regulatory definition, it allowed large swaths of DM to escape. Under its misguided legal interpretations, Nevada produced virtually no e-mails or any document (other than Class 3 DM) that it did not affirmatively intend to cite. Nevada's earnest declarations of instructions, meetings, and document gathering are for naught if Nevada used the wrong criteria. Nevada's declarations of compliance do not rebut DOE's prima facie case. A document production based on a fundamentally flawed definition of "documentary material," even if it is implemented in good faith, simply does not comply with 10 C.F.R. § 2.1001.

A. Deficiencies in Nevada's June 2007 Call Memo⁶³

The best way to illustrate the significant legal errors in Nevada's document production is to compare Nevada's June 2007 Call Memo to the regulatory definition of "documentary material." The regulation states, in pertinent part:

Board or by DOE. Instead, the Majority does nothing except to suggest that DOE could have pursued some form of discovery and having failed to do so, DOE failed to satisfy its burden of persuasion. This is erroneous on several levels. First, the regulations *plainly prohibit the parties from using interrogatories and depositions* (the discovery tools used by the Board in 2004) during the pre-license application period, absent special dispensation (which could not have been obtained within the 10 days that DOE's motion to strike was due). See 10 C.F.R. § 2.1018(a). Second, if the Board had taken this laissez-faire attitude in 2004, we certainly would never have discovered the significant gaps in DOE's 2004 document production and our ruling would have been very different. The Majority is using a double standard.

⁶³Rather than confronting the legal defects in Nevada's June 2007 Call Memo, the Majority dismisses these considerations on the grounds that I have raised these matters *sua sponte*. This concern is misplaced. First, these issues are not raised *sua sponte* because DOE certainly challenged Nevada's

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Documentary material means:

(1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding [Supporting DM]. . . ;

(2) Any information . . . that is relevant to, but does not support that information or that party's position [Nonsupporting DM]; and

(3) All reports and studies . . . relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied on and/or cited by a party [Reports and Studies DM].

10 C.F.R. § 2.1001. Each party and potential party is required to produce all of its extant documentary material on the LSN when it initially certifies. 10 C.F.R. § 2.1003(a); *see also* LBP-08-1, 67 NRC 37 (2008).

1. Call Memo Exclusion of Nonsupporting DM

Nevada's June 2007 Call Memo is riddled with errors in its interpretation of Nonsupporting DM. All of these errors serve to omit and categorically exclude Nonsupporting DM.

First, the June 2007 Call Memo uses an overly narrow "relevance standard" for Nonsupporting DM because it instructs that the Nonsupporting DM must be "*relevant under Reg. Guide 3.69.*"⁶⁴ This is incorrect and contrasts sharply with the plain words of the regulation, which call for the production of any document that contains information that is "*relevant to, but does not support, [Nevada's] information or . . . position.*"⁶⁵ It would be an easy matter for Nevada's experts to follow the simple regulatory language and to identify documents that are relevant (pro or con) to their *positions*. Instead the June 2007 Call Memo obscures the situation by referring to Reg. Guide 3.69. This is not what the regulation states, not what was intended, and substantially narrows the universe of Nonsupporting DM.

The Commission has clearly stated that the "broad scope" of the term documentary material is "intended to provide document discovery rights similar to

exclusion of nonsupporting material, its overly narrow criteria for DM, and its No-Position Premise. *See, e.g.*, Motion at 31, 32-34. Second, the Board's reticence seems inconsistent with our approach in 2004 when critical portions of our decision to grant Nevada's motion to strike were based on regulatory analyses never mentioned in Nevada's motion (*e.g.*, LBP-04-20, 60 NRC at 316-24 [Sec. III.C.1 "Document Texts Withheld Pending DOE's Unfinished Privilege Review" and Sec. III.C.2 "Archival E-mails"]).

⁶⁴ Response, Exh. 18B, Guidelines for Inclusion of Documents in the LSN [Nevada's Guidelines].

⁶⁵ 10 C.F.R. § 2.1001 (emphasis added). Nonsupporting DM is a document that contains information that does not support the producing party's position or *does not support its information*. LBP-04-20, 60 NRC at 312 n.22.

that normally available in NRC licensing proceedings.’’ 66 Fed. Reg. 29,453, 29,460 (May 31, 2001). The LSN must be populated with Nonsupporting DM “during the pre-application phase.” *Id.* at 29,460 n.3. Contrary to Nevada’s June 2007 Call Memo, the Commission says that Nonsupporting DM is relevant if it has “any possible bearing” on a party’s supporting information or a party’s position:

DOE and the other participants remain responsible for incorporating all their “documentary material” that meets the requirements of that definition in § 2.1001, including material that is relevant to, but does not support, DOE positions in the high-level waste repository proceeding Because the LSN will be populated during the pre-application phase of the proceeding before there are any party “contentions” defining the matters in controversy, whether this section 2.1001 “documentary material” is “relevant” *must necessarily be defined in terms of whether it (1) has any possible bearing on a party’s supporting information or a party’s position* for which the party intends to provide supporting information.

Id. (emphasis added). The June 2007 Call Memo uses a relevance standard for Nonsupporting DM that clearly fails to meet the regulatory requirements.

The June 2007 Call Memo’s treatment of Nonsupporting DM is too limited for other reasons as well. For example, the memo only calls for documents that contain information “which does not support Nevada’s *position*.” Nevada’s Guidelines at 2 (emphasis added). In contrast, the regulation defines Nonsupporting DM as documents containing information that does not support Nevada’s *information* or position. Calling for documents that are relevant to A is *necessarily* more restrictive and narrower than calling for documents that are relevant to A or B.

The phrase “that information” in the regulatory definition of Nonsupporting DM must be given meaning and cannot be presumed to be superfluous. Nevada’s omission of the phrase “that information,” improperly narrows the scope of its net.

Perhaps the most obvious legal defects in Nevada’s call for Nonsupporting DM are found in the ten examples that Nevada provides in Exhibit C to its June 2007 Call Memo. Nevada calls these examples its “‘decision tree’ tool for determining LSN inclusion or exclusion.” Montesi E-mail, *supra* note 61, at 8. In each example, Nevada gives hypothetical facts relating to a given situation or document, and then Nevada applies its criteria for determining whether the document constitutes DM.

Example D from Nevada’s decision tree illustrates the problem. The assumed facts of Example D are as follows: “Mike Thorne is asked to give his opinion regarding the likely criticality factors involved with a nuclear waste rail cask

which falls off a bridge and is submerged in the Mississippi River.”⁶⁶ Dr. Thorne gives his opinion in a “final report.” *Id.* Nevada’s entire analysis as to whether the hypothetical report qualifies as Nonsupporting DM is as follows: “There is nothing substantive in the document which does not support Nevada’s position or is likely to be used by DOE or another party. Therefore, not DM-2.” *Id.* This is a non-sequitur, because the hypothetical facts do not indicate the contents of Dr. Thorne’s report. *Nothing* in the Example D hypothetical provides a basis to conclude that “there is nothing substantive in the document which does not support Nevada’s position.” Dr. Thorne’s report may contain information that supports Nevada’s position. It may contain information that nonsupports Nevada’s position. We do not know. Therefore, Nevada’s answer regarding Nonsupporting DM is *necessarily* wrong. The only correct answer to Example D is that, from the facts provided, it *cannot be determined* whether Dr. Thorne’s report qualifies as Nonsupporting DM. Nevada’s fiat that Dr. Thorne’s report contains no nonsupporting information would cause the sixty-four distributees of the call memo to fail to identify and produce Nonsupporting DM.⁶⁷

The problem is compounded by the fact that all ten of the examples in Nevada’s decision tree repeat the same error. In all ten examples, the hypothetical facts are silent as to the contents (supporting or nonsupporting) of the document. Yet in all ten, Nevada categorically concludes that “there is nothing substantive in the document which does not support Nevada’s position,” therefore it is “not DM-2.”⁶⁸ This is logically and legally erroneous.

The result of these errors is clear. *All* of Nevada’s examples *exclude* Nonsupporting DM. Apparently, Nevada can conceive of no example where a document contains information “which does not support Nevada’s position.” The June 2007 Call Memo, both by its methodology and results, categorically concludes that Nevada has no Nonsupporting DM. This categorical exclusion goes a long way toward explaining why Nevada’s document production contains so few e-mails or other documents from its large team.

⁶⁶ Response, Exh. 18C, LSN: Specific Examples to Analyze LSN-Worthiness of Documentary Material at 2 [Documentary Material Examples].

⁶⁷ Note that the June 2007 Call Memo operates on the assumption that Nevada has a position. This is inconsistent with its later, No-Position Premise and the Majority’s conclusion that, until Nevada files its contentions, it has no “position in the proceeding.”

⁶⁸ *See* Documentary Material Examples at 1-5. The ten examples use virtually the same language in their conclusory statement that none of them constitute Nonsupporting DM. For example, Example C states “There is nothing in the emails which is not supportive of Nevada’s position or is likely to be used by DOE or another party. Therefore not DM-2.” Example D is cited above. Example E states “There is nothing in the document which is not supportive of Nevada’s position or is likely to be used by DOE or another party. Therefore not DM-2.” Example F is identical to the conclusion for Example C.

2. Call Memo Omissions of Supporting DM

The ten examples in Exhibit C to the June 2007 Call Memo also significantly misconstrue the definition of Supporting DM. Again consider Nevada's *Example D*: "Mike Thorne is asked to give his opinion regarding the likely criticality factors involved with a nuclear waste rail cask which falls off a bridge and is submerged in the Mississippi River." *Id.* at 2. Dr. Thorne expresses his opinion in a "final report." *Id.* Applying its test as to whether the final report is Supporting DM, Nevada's analysis is as follows: "Nevada will rely on Dr. Thorne's final reports or contentions in the licensing proceeding, as well as his oral testimony, but *not* this *document*. Therefore not DM-1." *Id.* (first emphasis in original, second emphasis added).

The flaw in Nevada's logic is immediately obvious. The regulation defines Supporting DM (or, as the June 2007 Call Memo refers to it, "DM-1") as *information* that the party will rely on. *See* 10 C.F.R. § 2.1001. If a final document contains *information* that Nevada will rely on, then it is DM even if Nevada does not intend to cite or rely on that particular *document*.

Nevada makes the same error with regard to its e-mails. In *Example G*, the hypothetical facts are "Bob Loux asks Steve Frishman to comment on Mike Thorne's criticality report, and he does so by email." Documentary Material Examples at 3. Applying its test as to whether Mr. Frishman's e-mail is Supporting DM, Nevada states: "Nevada will not rely on Steve's email in the licensing proceeding. Therefore not DM-1." *Id.*

Again, incorrect. The question is not whether Nevada will cite or rely on the specific document, i.e., the e-mail itself. A party almost never cites its own e-mails as documentary support for its litigation position (and any such criterion would operate to exclude all e-mails).⁶⁹ The question is whether the e-mail *contains information* that Nevada intends to rely on.⁷⁰ If so, the e-mail is Supporting DM and must be produced. The error in Example G would cause Nevada to fail to produce any e-mails that contain information that support its position. This also helps to explain the infinitesimal number of e-mails in Nevada's document production.

⁶⁹When DOE consulted Nevada about the dearth of e-mails, Mr. Shebelskie stated that Nevada's "responses were invariably, *e-mails are not documentary material*, we are not citing or relying on e-mails, and we don't have to give you any further information. We are not here for you to conduct discovery." Tr. at 1356 (emphasis added).

⁷⁰If, as the Majority concludes, Nevada has no position in the proceeding because (a) there is no "proceeding" and (b) Nevada has not filed any contentions, then the documents it intends to rely on should also be a null set.

3. *Call Memo Imposition of Additional Exclusionary Criterion*

The June 2007 Call Memo suffers from another defect: it excludes *all* documents (not just Nonsupporting DM as discussed above) unless they are deemed relevant to Reg. Guide 3.69. Nevada imposes this test as one of its three mandatory tests for *all* DM⁷¹ and repeatedly states that unless a document meets all three tests, it must be excluded from Nevada’s document production.⁷² However, the regulation only uses this test — relevance to Reg. Guide 3.69 — with regard to the third category of DM and plainly it is not used for the other two categories of DM.

The third part of the definition of DM covers “[a]ll reports and studies . . . *relevant to* both the license application and the issues set forth in the Topical Guidelines in *Regulatory Guide 3.69*, regardless of whether they will be relied on and/or cited by a party.” 10 C.F.R. § 2.1001 (emphasis added). This is the only place where Reg. Guide 3.69 is cited. In contrast, the first part of the definition of DM contains *no* relevance standard, and needs none. The first part of the definition of DM — Supporting DM — requires the production of all documents that contain information upon which the party “intends to rely and/or to cite in support of its position.” *See* 10 C.F.R. § 2.1001. If it meets this criterion, it is DM and must be produced, regardless of whether it is relevant to Reg. Guide 3.69. While there is an overlap between information that a party “intends to rely and/or to cite” and information that is “relevant to Reg. Guide 3.69,” these tests are not identical. Nevada’s interpretation (and by extension, the Majority’s acceptance thereof) makes a hash out of the regulatory language. It moots most of the definition of Supporting DM. This is inconsistent with the plain language of the regulation and is contrary to proper rules of regulatory construction.

As discussed above, Nevada’s imposition of “relevance to Reg. Guide 3.69” as a universal criterion for its document production makes even less sense when compared to the second category of DM — Nonsupporting DM — which has its own, entirely different relevance standard. The regulation specifies that the document must contain information that is “relevant to, but does not support, that information or that party’s position.” 10 C.F.R. § 2.1001. This plain language is broader than, and clearly not the same as, “relevant to Reg.

⁷¹ Nevada’s three tests are: (1) Is the document relevant to Reg. Guide 3.69? (2) Does the document meet the definition of documentary material? And (3), is it (not) a preliminary draft? Nevada’s Guidelines at 1-2.

⁷² The “Guidelines which we have prepared . . . articulate three practical tests of LSN-worthiness, *all three* of which must apply or else the document in question may be omitted from the LSN.” June 2007 Call Memo at 2 (emphasis in original). “Please bear in mind that any documents you have . . . will *only* be required to be sent to Susan Lynch for inclusion on the LSN if they first *pass all three* of the tests.” *Id.* (emphasis in original), “The document must be included in the LSN only if it passes all three of the following tests.” Nevada’s Guidelines at 1 (emphasis in original).

Guide 3.69,”⁷³ and violates the Commission’s instruction that Nonsupporting DM includes documents containing information that has “*any possible bearing* on a party’s supporting information or a party’s position.” 66 Fed. Reg. at 29,460 n.3 (emphasis added). In contrast, Nevada’s misinterpretation narrows the universe of DM and makes the regulatory language concerning Nonsupporting DM superfluous.⁷⁴

B. Nevada’s Declarations Omit All Reference to Nonsupporting DM

Having concluded that Nevada’s June 2007 Call Memo leaves gaping holes in Nevada’s document collection criteria, instructions, and document production, it is clear that Nevada’s declarations in rebuttal miss the central point.

The inadequacy of the rebuttal is demonstrated by the narrow and carefully caged wording of Nevada’s declarations. Nevada declares that its expert consultants were repeatedly cautioned that “anything they might possibly eventually *rely on* in forming opinions or writing reports or testifying in connection with the licensing proceeding must be on the LSN.” Response, Charles J. Fitzpatrick Decl. ¶12 [Fitzpatrick Decl.] (emphasis added). Likewise, Ms. Lynch speaks only of DM that Nevada’s experts might “*rely on*.” Lynch Decl. ¶6 (emphasis added). Nevada’s Response alleges that it repeatedly instructed its experts to gather and produce “anything which they might possibly eventually *rely upon*.” Response at 3.

⁷³ Again, while information that is “relevant to, but does not support, that information or that party’s position,” 10 C.F.R. § 2.1001, may also be “relevant to Reg. Guide 3.69” (Nevada’s substitute relevance standard), these criteria are clearly not identical and the difference is not innocuous. The regulatory language is the lodestar, and it is clearly broader.

⁷⁴ The June 2007 Call Memo suffers from additional legal errors that result in the improper narrowing of the scope of Nevada’s search for, and production of, DM. For example, Nevada overexcludes certain “duplicates.” Although Nevada submits hundreds of duplicates of DOE documents (e.g., violates its own warning against loading the LSN with unnecessary duplicates), when it comes to *documents created by Nevada’s own experts*, it fails, in violation of the regulations, to include them in Nevada’s document production. The regulations allow a party to exclude duplicates *only in one circumstance*, where the DM “has *already been made available by the potential party . . . that originally created the document*.” 10 C.F.R. § 2.1003(a)(1) (emphasis added). But when DOE pointed out that Nevada had only produced thirty-four documents authored by Nevada’s expert, Dr. Aaron Barkatt, Nevada responded that since DOE had already produced another seventy documents authored by Dr. Barkatt, Nevada was not required to produce these “duplicates” on the LSN. Response at 30. This is plainly incorrect and not what the regulation says. A party cannot decline to produce a document that it “originally created” on the ground that some other party has already produced it. One good reason for this rule is to double-check the diligence of a party’s production of its *own* documents, and to provide some assurance that the party indeed produced all of its DM. Nevada’s failure to produce all of the documents generated by its expert, Dr. Barkatt, violated the plain language of 10 C.F.R. § 2.1003(a)(1).

Conspicuously absent from Nevada's Response and declarations is any suggestion that it gathered and produced Nonsupporting DM. Nevada's counsel acknowledged that his declaration did not address Nonsupporting DM.⁷⁵ Tr. at 1452.

The conspicuous failure of Nevada's Response and declarations to assert that Nevada gathered and produced all of its Nonsupporting DM is understandable, perhaps even necessitated, given that Nevada's June 2007 Call Memo categorically excluded Nonsupporting DM, and, as discussed below, Nevada's No-Position Premise would free Nevada of the duty to file any Nonsupporting DM until Nevada files its contentions.

The point is simply that Nevada's Response and declarations miss the boat. They focus solely on what Nevada intends to rely on, and scrupulously avoid any mention of Nonsupporting DM. Nevada fails to address, much less rebut, a most critical part of DOE's Motion.

C. Nevada's No-Position Premise

In addition to the above-stated errors in the June 2007 Call Memo and the glaring omissions in Nevada's rebuttal declarations, it is not disputed that Nevada's document production was based on the No-Position Premise, i.e., that unless and until Nevada submits its final contentions, Nevada "cannot possibly" know what its "position" is regarding Yucca Mountain, and therefore Nevada has no Supporting DM and no Nonsupporting DM. This premise is legally incorrect. In addition, given Nevada's long and substantial opposition to Yucca Mountain and the fact that it has already drafted 2000 contentions, the No-Position Premise is factually absurd. This premise suspends the production of Supporting and Nonsupporting DM until after contentions are filed. Such *suspended animation* is inconsistent with the language and history of the regulation. Acceptance of the No-Position Premise vitiates pre-license application discovery against any party except DOE, and creates a fundamentally unfair double standard for document production.

Nevada raises the No-Position Premise in several ways. Nevada first raised this premise in its appeal of the PAPO Board's denial of Nevada's motion to strike DOE's October 19, 2007 document production.⁷⁶ In that pleading, Nevada contrasted itself with DOE, "who has . . . been working for years on a license application," and thus should be required to produce documents it intends to rely

⁷⁵ Counsel for Nevada stated that Nevada's declarations only focused on DOE's "accusations" and that DOE had not accused Nevada of failing to produce Nonsupporting DM. This is incorrect. DOE's Motion clearly challenged Nevada's failure to produce Nonsupporting DM. Motion at 31.

⁷⁶ See Motion at 32 (citing [Nevada's] Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008) [Nevada Appeal Brief]).

on. Nevada Appeal Brief at 25. Nevada (disregarding the fact that it, also, has been working on its position for years) asserted that it “cannot possibly know for the most part what it will cite or intend to rely upon.” *Id.* Nevada adds that “it has not even seen critical documents upon which DOE will rely and so cannot possibly identify what it will rely upon.” *Id.* at 26. The necessary corollary to Nevada’s theory is that it “cannot possibly” identify and produce any Nonsupporting DM.

Nevada’s Response to DOE’s Motion reiterates the No-Position Premise: “it is difficult at this stage to pinpoint Nevada’s licensing position.” Response at 4. Further, when DOE attempted to consult with Nevada before it filed its motion, Nevada’s response was reported as “because we have nothing finalized [i.e., the 2000 draft contentions], we don’t know what our positions are until we have the license application.” Tr. at 1360-61.

1. Nevada’s Draft Contentions Constitute “Positions” Sufficient for Identification of Supporting DM and Nonsupporting DM

As an initial matter, Nevada’s assertions that it currently has no position or positions with regard to the DOE plan to license and operate a high-level radioactive waste disposal facility at Yucca Mountain, Nevada, is not credible. Nevada has been involved in, and opposed to, DOE’s plan for more than 20 years. Nevada has a team of “40 to 45 scientists and experts” working on this matter. Nevada’s experts have drafted at least 2000 contentions which constitute positions challenging various aspects of DOE’s technical approach and impending license application. Each of these draft contentions represents some degree of analysis, investigation, and/or research by Nevada and its team into some aspect of DOE’s plan. Each draft contention necessarily represents a position challenging some aspect of DOE’s proposal.

The record illustrates that Nevada’s draft contentions are not vague and idle musings, but instead reflect that Nevada’s experts have studied DOE’s science, assumptions, models, or positions and has developed specific and substantive challenges to them. The following is a representative sample of Nevada’s draft contentions (as revealed by the thirty-seven that are in the record):

1. DOE has failed to consider the genetic mutations of microbiological organisms by radiation in the near-field environment outside of the zone of radiation-induced sterility. This zone of sterility is relatively large at first, but decreases as waste radionuclides decay over time. The radiation field will likely allow specific species to metabolize that might thrive in less aggressive environments. [Brenda Little is providing some literature on this, especially from Three Mile Island.] Changes in the microbiological community due to near field environmental conditions may contribute to MIC reactions and may contribute to abnormal hydrogeochemistry.

* * * *

7. DOE's current testing of EBS materials (specifically alloy C-22) under submerged and sub-boiling conditions in ground water (J-13) is non-conservative and unrealistic. Poor choice of environmental conditions used for C-22 testing.

* * * *

15. Diffusion in the vadose zone as calculated by the DOE is based upon a dual permeability system in the welded tuffs, upon porous flow characteristics of the matrix using a sand aquifer model, and is not site specific. It is wrong. Radionuclide retardation, as a function of diffusion, has been calculated by the State of Nevada to be orders of magnitude less than calculated by the DOE.

* * * *

31. Measured Eh's of saturated zone waters are non-representative because they may represent an average or mixed state or only the dominant redox couple. This arises due to the diluteness of the solutions and for kinetic reasons.⁷⁷

Even though these are only draft contentions, two things are clear. First, each draft contention reflects a concrete position. Second, each draft contention is founded upon some supporting information, analysis, or scientific theory.⁷⁸ For example, draft contention 1 asserts that the "zone of sterility is relatively large at first" and that the "radiation field will likely allow specific species to metabolize that might not thrive." Documents containing information that support these assertions would be Supporting DM. Documents that contain information that undermines or tends to contradict these assertions would be Nonsupporting DM. It is ludicrous to suggest that these draft contentions are so vague that Nevada "cannot possibly identify what it will rely upon," Nevada Appeal Brief at 26, and cannot identify information that supports and nonsupports these draft contentions.

Nevada emphasizes that its 2000 draft contentions are not final contentions or even circulated draft contentions. Response at 18; Fitzpatrick Decl. ¶¶ 2, 3. This is a red herring. DOE is not asserting that the draft contentions are, themselves, DM that must be produced under 10 C.F.R. § 2.1001. *See* Tr. at 1361. The point is *whether the draft contention, in its current form, is sufficient to allow a party to identify* those documents that contain information that supports the draft contention and documents that do not support the draft contention. There can be no doubt that Nevada's thirty-seven draft contentions contained in DOE Exhibit P meet this criterion.

⁷⁷ Motion, Exh. P, Progress Reports at P18-23 (listing "Contentions" by "GMII and Dr. R. W. Staehle" from the Nov. 2003 Progress Report) (emphasis in original deleted).

⁷⁸ Counsel for Nevada characterizes the thirty-seven draft contentions as "pure off the hip shot[s]" and a mere "afternoon's work" for one person. Tr. at 1471. Perhaps so. Nevertheless, even if the drafting of these thirty-seven contentions may only have taken a day, they appear to represent a considerable amount of prior analysis and thought and imply the existence of supporting scientific work, documents, and information.

Nor is it relevant that Nevada's 2000 draft contentions are not accompanied by a substantiation of the six elements required by 10 C.F.R. § 2.309(f)(1)(i)-(vi). It is clear that Nevada's thirty-seven draft contentions are as "specific" as many contentions that have been regularly admitted by Licensing Boards in the past.⁷⁹ They satisfy the only regulatory requirement that is even remotely relevant here, the requirement to provide a "specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1)(i). While Nevada cannot put the final touches on its contentions (e.g., provide "references to specific portions of the application" per 10 C.F.R. § 2.309(f)(1)(vi)) until DOE submits its license application, these details are irrelevant for purposes of Nevada's production of DM, so long as the draft contentions are clear enough to permit the identification of Supporting and Nonsupporting DM. *See* Tr. at 1492-93.

2. Nevada's Document Production Should Not Be Held in Suspended Animation Until Nevada's Contentions Are Filed (and Admitted)

Given that the current drafts of Nevada's contentions (a) represent specific positions, and (b) are clear enough to allow the identification of DM that supports and nonsupports those positions, it is necessary to address what I refer to as the "suspended animation" argument. This is the argument that, despite the fact that Nevada has drafted "a couple thousand contentions" with "many more to come," Loux Tr. at 7, Nevada still does not have a position or positions in this matter because each draft contention is subject to change and may not even be filed in this proceeding. Under this theory, Nevada's position(s) is suspended *until* it files its contentions.⁸⁰ The suspended animation approach is inconsistent with the reality of Nevada's active involvement in this matter, inconsistent with the language and purpose of the regulations, and imposes a double standard.

⁷⁹ Examples of admitted contentions that satisfied the requirement to provide a "specific statement of the issue of law or fact to be raised or controverted," per 10 C.F.R. § 2.309(f)(1)(i), and that are equivalent to, or less specific than, the thirty-seven Nevada contentions, include the following: *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 77-80 (2004); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 252 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 276 (2004); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station) [Uprate], LBP-04-28, 60 NRC 548, 580 (2004); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 211, 217 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station) [Renewal], LBP-06-20, 64 NRC 131, 183, 187, 192 (2006); *Shieldalloy Metallurgical Corp.* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, 357-58 (2007).

⁸⁰ Another version of this argument is that a party has no Supporting or Nonsupporting DM until its contentions are *admitted* by the Presiding Officer.

In reality, Nevada has been opposing and working on its positions concerning Yucca Mountain for many years and it is highly unlikely that, after 20 years, there will be some startling new science, assumptions, or information that causes Nevada to significantly change its positions on these issues. Nevada's 2000 draft contentions are based on a multiyear, multimillion-dollar effort by many experts. Nevada is not an uninvolved bystander who simply wandered into the Yucca Mountain proceeding with no opinion or no position in this matter. Nevada's 2000 draft contentions, as of January 15, 2007, represent their good faith *current* position.

The fact that change happens, e.g., that Nevada's 2000 draft contentions are subject to change, does not vitiate Nevada's initial duty to produce Supporting and Nonsupporting DM based on its position(s) as of the initial certification. Certainly, the draft contentions need not remain static and Nevada is currently drafting "many more." Loux Tr. at 7. The scope of Nevada's document production will grow. Likewise, if Nevada decides not to proceed with some contentions, or a contention is not admitted, the scope of Nevada's document production can be narrowed. The required production of DM is a function of the potential party's position(s) *as of the date that the production occurs*. See Tr. at 1370, 1493. If a position changes, the document production changes. Thus, Nevada's initial document production should have been based on the 2000 contentions it had drafted as of January 17, 2008. Its subsequent document productions may be based on the additional contentions that it develops later. Change does not suspend document production.

As a legal matter, the suspended animation approach violates the letter and spirit of the regulations and the pre-license application discovery period. If Nevada has no position until it files its final contentions, then two of the three categories of DM are utterly meaningless, as applied to Nevada (or any other party, including DOE) during the entire pre-license application phase. See Tr. at 1367-68. The No-Position Premise results, categorically, in no Supporting DM and no Nonsupporting DM. This flies in the face of the Commission's statement that "the LSN will be populated [with Nonsupporting DM] during the pre-application phase." 66 Fed. Reg. at 29,460 n.3.

It is certainly true that "the *full scope* of coverage of the reliance concept will only become apparent after proffered contentions are admitted" and that "disputes over Class 1 and Class 2 documentary material *generally* would be of a type that would be more appropriately raised . . . following admission of contentions." 69 Fed. Reg. 32,836, 32,843-44 (June 14, 2004) (emphasis added). But, this

does not mean that parties can *categorically refuse* to produce any Supporting or Nonsupporting DM at the time of their initial document production.⁸¹

[T]he Commission still expects all participants to make a good faith effort to have made available all of the documentary material that may eventually be designated as Class 1 and Class 2 *by the date specified for initial compliance* in section 2.1003(a).

69 Fed. Reg. at 32,843 (emphasis added). The suspended animation approach contravenes the Commission's instructions and renders Supporting DM and Nonsupporting DM a null set until the party files its contentions.

In addition, the suspended animation approach produces bizarre results. Under this approach, the duty to produce all DM *90 days after DOE certifies*, see 10 C.F.R. § 2.1003(a), would be meaningless as applied to two of the three categories of DM (Supporting and Nonsupporting DM). The duty to produce such DM would not attach until *at least 10 months later*, when all potential parties file their contentions (and the pre-license application phase is over).⁸² If Nevada does not provide its Supporting and Nonsupporting DM until it files its 2000 contentions, then DOE's answers will be stunted and substantially delayed, because 25 days will not be enough to allow DOE or any other party the opportunity to review all of the new DM and incorporate it into the answers.⁸³

The suspended animation approach throws 10 C.F.R. § 2.1012(b) into substantial confusion. Under the regulation, a person may not be granted party status "if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 *at the time it requests participation* in the HLW licensing proceeding under § 2.309." 10 C.F.R. § 2.1012(b)(1) (emphasis added). A potential party must be in "substantial and timely compliance" with its duty to make all DM available *when* it files its contentions and "requests participation." But if a potential party's duty to produce two-thirds of its DM is postponed until it files its

⁸¹ In 2004, DOE argued that the quoted language (69 Fed. Reg. 32,843-44 (June 14, 2004)) meant that the PAPO Board lacked jurisdiction to address Nevada's claim that DOE had failed to produce Supporting and Non-supporting DM because all such issues should only be addressed "following the admission of contentions." Answer of [DOE] to [Nevada's] Motion To Strike at 13 (July 22, 2004). We rejected DOE's argument, ruling that disputes over the availability of Supporting and Nonsupporting DM are proper during the pre-license application period. LBP-04-20, 60 NRC at 310. Nevada's attempt to use the same language to avoid production of Supporting or Nonsupporting DM (on the ground that it does not exist yet) should likewise be rejected.

⁸² DOE cannot submit its license application until 6 months after its initial certification. The NRC Staff will then take between 3 to 6 months to docket the application. Potential parties will then have 30 days within which to file their contentions. Six + 3 + 1 = 10 months. If the trigger for producing Supporting and Nonsupporting DM is the *admission* (not just the filing) of contentions, then the duty to produce Supporting and Nonsupporting DM is postponed even further.

⁸³ Answers to requests for hearing and petitions to intervene are due 25 days after service of the request for hearing. 10 C.F.R. § 2.309(h).

contentions, then it is difficult to see how 10 C.F.R. § 2.1012(b)(2) will operate. Instead of addressing and resolving the adequacy of a party's document production and its "substantial and timely compliance" at the PAPO stage, the issue will arise after the contentions are filed, at the contention admissibility stage.

It is already very clear that the 70 days allocated by the Commission for decisions on the admission of contentions, 10 C.F.R. Part 2, Appendix D, will be an extraordinarily, if not impossibly, short time period for this task.⁸⁴ In this respect, the Majority's decision runs counter to the main purpose of the pre-license application discovery phase — to get the DM on the table and resolve documentary production issues early. The Majority's decision exacerbates the severe time constraints already imposed on the post-PAPO contention admissibility Licensing Board(s).

The Majority endorses Nevada's suspended animation approach by focusing on the definition of Supporting DM as "any information upon which a party . . . intends to rely and/or to cite in support of its *position in the proceeding* for a construction authorization." 10 C.F.R. § 2.1001. The Majority says that "the proceeding" relates to the licensing proceeding not the pre-license application phase, and that "under the regulatory scheme, potential parties (such as Nevada) are not now required to possess, let alone assert, any litigation position."⁸⁵ As a consequence, as a matter of law, Nevada need not at this time produce material that either does or does not support a position." Majority at p. 213. In contrast, the Majority states that "DOE has a obligation to file a license application" and "is required to produce all documentary material necessary to support its burden of meeting all points of the license application." Majority at p. 215.

The flaw in the Majority's logic is that until DOE files a license application, there is no "proceeding for a construction authorization for a high-level waste repository" as specified in the regulation upon which the Majority relies so heavily — 10 C.F.R. § 2.1001. According to the Majority, if no "proceeding," then there can be no "position in the proceeding." During this *pre-license application* phase, DOE has neither filed an application nor "assert[ed] any litigation position" in the nonexistent license application proceeding. Indeed, if the advice and urging of Nevada are heeded, DOE will never file an application. More to the point, the law prohibits DOE from filing a license application for Yucca Mountain "[i]f the Secretary [of DOE] at any time determines the Yucca Mountain site to be

⁸⁴ See, e.g., Nevada Response to the [Advisory PAPO] Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) at 2 (Mar. 24, 2008) (a "good faith estimate of the time realistically required to reply to answers is six months").

⁸⁵ I agree that the law does not "require" Nevada to have a position. The point is that Nevada, with 20 years of opposition and 2000 draft contentions, does in fact have a position.

unsuitable for development as a repository.’’ 42 U.S.C. § 10133(c)(3). Even now, there is no assurance that a license application is inevitable.⁸⁶

If the Majority’s reasoning — no position in the proceeding (because there is no proceeding), therefore no Supporting or Nonsupporting DM — is to be adopted, then it must be applied to DOE as well as Nevada. ‘‘What’s sauce for the goose is sauce for the gander.’’ Tr. at 1281.

The inescapable and perverse result is that, since there currently is no ‘‘proceeding,’’ DOE can have no Supporting DM or Nonsupporting DM. The Majority’s reasoning just excused DOE from producing any Supporting DM and Nonsupporting DM unless and until it files its application.⁸⁷

In addition to gutting DOE’s duty to produce DM at its initial certification, the Majority’s interpretation moots most of our 2004 ruling concerning Supporting and Nonsupporting DM. There was no need for DOE to produce any of the hundreds of thousands of e-mails that Nevada demanded in 2004. Postponing DOE’s initial production of Supporting and Nonsupporting DM until it filed its application completely frustrates the purpose of the pre-license application phase by seriously undermining the ability of potential parties to formulate contentions during the pre-license application phase. But that is the result of the Majority’s interpretation of the definition of DM.

For the foregoing reasons, the No-Position Premise and suspended animation approach should be rejected. If the pre-license application discovery period is to mean anything, it must mean that the initial production by each potential party must include the documents containing information that support and nonsupport its position, as that position exists at the moment the production occurs. Neither DOE nor Nevada should be allowed to evade or delay the production of Supporting and Nonsupporting DM on the ground that it has not yet filed a formal ‘‘position in the proceeding,’’ or that its position may change. The LSN is to be populated with Supporting and Nonsupporting DM during the pre-license application phase and every participant must make a rigorous good faith effort to produce such DM on the date specified for initial compliance. *See* 69 Fed. Reg. at 32,843. As we

⁸⁶The Majority argues, in footnote 44, that section 114(b) of the Nuclear Waste Policy Act, 42 U.S.C. § 10134(b) specifies that, because DOE’s recommendation of the Yucca Mountain site was approved in 2002, DOE is legally bound to submit an application, even if DOE were to determine that the Yucca Mountain is not suitable for development as a repository. First, the statute specifies that DOE must terminate activities if DOE ‘‘at any time determines the Yucca Mountain site to be unsuitable.’’ 42 U.S.C. § 10133(c)(3). The statute goes on to call for DOE to ‘‘remove any high-level radioactive waste . . . at or in such site’’ and ‘‘reclaim the site,’’ 42 U.S.C. § 10133(c)(3)(C) and (D), confirming that DOE’s determination to halt can occur at any time, even after the license is issued and waste is emplaced at the Yucca Mountain site. Second, it is simply absurd to suggest that DOE *must* submit an application for Yucca Mountain *even if it concludes that the site is ‘not suitable’* (e.g., *fails to meet EPA’s yet to be promulgated standards for Yucca Mountain*).

⁸⁷DOE attempted to articulate this position. *See* Tr. at 1366.

enforced this rule against DOE in 2004, we should enforce it against Nevada in 2008.

Alex S. Karlin
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 23, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred W. Oliver

In the Matter of

Docket No. 40-8943
(ASLBP No. 07-859-03-MLA-BD01)
(License Amendment)

CROW BUTTE RESOURCES, INC.
(North Trend Expansion Project)

April 29, 2008
(Corrected May 21, 2008*)

In this license amendment proceeding the licensing board finds that three petitioners have standing to intervene and have submitted three admissible contentions, and set further oral argument on one additional contention and whether to grant 10 C.F.R. Part 2, Subpart G, hearing.

**RULES OF PRACTICE: TIMELINESS OF ADDITIONAL
MATERIAL PROFFERED IN SUPPORT OF STANDING
AND CONTENTIONS**

Licensing board finds it appropriate to consider the timeliness of materials proffered by petitioners in support of standing and certain contentions under 10 C.F.R. § 2.309(c) and (f)(2), and found that one document, a recent e-mail from an expert, was not timely, given that petitioners provided no indication of when they

*This corrected version of LBP-08-6 is being issued to correct a mistaken reference, in section VIII.A of the Memorandum and Order as originally issued, to Ms. Debra L. White Plume having been denied standing, when in fact the Licensing Board found, in section IV.C.7, that she had demonstrated standing to participate in the proceeding.

contacted the expert, and his e-mail primarily referenced articles published years earlier; nor did the e-mail constitute “legitimate amplification” of originally filed contentions, given that it was less “focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer,” than it was “new [expert] support” for contentions.

RULES OF PRACTICE: TIMELINESS OF ADDITIONAL MATERIAL PROFFERED IN SUPPORT OF STANDING AND CONTENTIONS

Licensing board finds that one document, consisting primarily of new information in the form of fairly extensive original analysis of essentially the same information contained in the application, and available in NRC ADAMS system 51 days prior to its submission but received by petitioners only 1 day before its submission, was timely under 10 C.F.R. § 2.309(c) and (f)(2).

RULES OF PRACTICE: BRIEFS *AMICUS CURIAE*; PARTICIPATION OF INDIAN TRIBE IN PROCEEDING

Motion of Oglala Sioux Tribe To File Brief Amicus Curiae granted, because Tribe entitled to a “reasonable opportunity to participate” in this proceeding under 10 C.F.R. § 2.315(c).

RULES OF PRACTICE: STANDING TO INTERVENE

A petitioner’s standing, or right to participate in a proceeding, concerns whether a party has “sufficient stake” in a matter, as contrasted with whether there is a real dispute.

RULES OF PRACTICE: STANDING TO INTERVENE

A petitioner bears the burden of demonstrating standing, but in ruling on standing a licensing board is to “construe the petition in favor of the petitioner.”

RULES OF PRACTICE: STANDING TO INTERVENE

The starting point in determining the standing of a petitioner in an NRC proceeding is section 189a of the Atomic Energy Act (AEA), which requires the NRC to provide a hearing “upon the request of any person whose interest may be affected by the proceeding,” and which has been implemented in Commission regulations in 10 C.F.R. § 2.309(d)(1).

RULES OF PRACTICE: STANDING TO INTERVENE

Judicial concepts of standing, to which licensing boards are to look in ruling on standing, provide the following guidance in determining whether a petitioner has established the necessary “interest” under 10 C.F.R. § 2.309(d)(1): To qualify for standing a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision. The injury may be either actual or threatened, but must lie arguably within the “zone of interests” protected by the statutes governing the proceeding — here, either the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA).

RULES OF PRACTICE: STANDING TO INTERVENE

An organization that wishes to establish standing to intervene may do so by demonstrating either organizational or representational standing. To establish organizational standing it must “demonstrate a palpable injury in fact to its organization interests” within the zone of interests of the AEA or NEPA; to establish representational standing, it must (1) demonstrate that the interests of at least one member who has standing to sue in his or her own right may be affected by the licensing action, (2) identify that member by name and address; and (3) show that the organization is authorized to request a hearing on behalf of that member.

RULES OF PRACTICE: STANDING TO INTERVENE

A presumption of standing based on geographical proximity may be applied in nuclear materials licensing cases only when the activity at issue involves a “significant source of radioactivity producing an obvious potential for off-site consequences,” which is determined on a case-by-case basis, depending on how close to the source a petitioner lives or works, and “taking into account the nature of the proposed action and the significance of the radioactive source.” When there is “no obvious potential for harm,” it is the petitioner’s burden to show “specific and plausible means” by which an action may harm the petitioner.

RULES OF PRACTICE: STANDING TO INTERVENE

In “in situ leach,” or “ISL,” mining cases the geographical areas that may be affected by mining operations are largely dependent on the size and other characteristics of underground aquifers, including the hydrogeological conditions that determine how easily and how fast water moves within and among aquifers and interacts with surface water.

RULES OF PRACTICE: STANDING TO INTERVENE, CURING DEFECTS IN PETITIONS

Although the pleading requirements of 10 C.F.R. § 2.309 are “strict by design,” a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects, and *pro se* petitioners are not held to the same standards of pleading as those represented by counsel.

RULES OF PRACTICE: STANDING TO INTERVENE

In ruling on standing, a licensing board is not to assess the merits of a case, but rather to consider whether assertions of harm are plausible, and in this case board found it was plausible to conclude that contaminated water might mix with water ultimately used by at least some of the Petitioners, given past undisputed excursions and spills from Applicant’s mining operations, and lack of complete knowledge about the hydrogeology of the proposed new area of operation, supported by exhibit from state environmental office raising questions about Applicant’s information.

RULES OF PRACTICE: STANDING TO INTERVENE

Organizational petitioner found to have shown representational standing based on member who had and used well drawing from same aquifer Applicant proposed to mine, 1 1/2 miles from proposed site boundary.

RULES OF PRACTICE: STANDING TO INTERVENE

Organizational petitioner found to have shown representational standing based on member who drank from well that drew from aquifer that might mix with aquifer to be mined, in the area of the proposed site, 8 miles from its boundary, supported by exhibit from state environmental office; notwithstanding Applicant’s arguments about how fast water was said to flow in mined aquifer, there were indications that water in aquifer from which well drew flowed at a faster rate.

RULES OF PRACTICE: STANDING TO INTERVENE

Individual petitioner who fished in river downstream from proposed mining operations, into which mining site would drain, found to have shown standing, given history of spill into river and case law supporting arguments that contamination can be carried significant distances in rivers.

RULES OF PRACTICE: STANDING TO INTERVENE

Organizational petitioner that alluded to a number of promising avenues for demonstrating standing, but failed to follow any to a concrete, particular, and specific conclusion that would plausibly establish its standing, denied standing to intervene.

RULES OF PRACTICE: STANDING TO INTERVENE

Individual petitioner who alleged that his well drew from an aquifer that might mix with the mined aquifer or another nearby aquifer, and lived 20 miles from proposed mining site, found not to have plausibly shown, with sufficient specificity, concreteness, or particularity, how he might be injured as a result of proposed operation, and therefore denied standing; but ruling not meant to suggest that any particular distance would or would not confer standing in any case, as all such rulings are dependent on a variety of factors.

RULES OF PRACTICE: CONTENTIONS

To intervene in an NRC proceeding, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. § 2.309(f)(1). Failure of a contention to meet any of the requirements of section 2.309(f)(1) is grounds for its dismissal.

RULES OF PRACTICE: CONTENTIONS

Although the February 2004 revision of the NRC procedural rules no longer incorporates all of the prior provisions, including some of those formerly found in 10 C.F.R. § 2.714(a)(3), (b)(1), which in the past permitted the amendment and supplementation of petitions and filing of contentions after the original filing of petitions, the new rules contain essentially the same substantive admissibility standards for contentions.

RULES OF PRACTICE: CONTENTIONS

The “strict contention rule serves multiple interests,” including (1) focusing the hearing process on real disputes susceptible of resolution in an adjudication (for example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies); (2) putting other parties in the proceeding on notice of the Petitioners’ specific grievances, by requiring detailed pleadings that give other parties a good idea of the claims they will be either supporting or opposing; and

(3) helping to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.

RULES OF PRACTICE: CONTENTIONS

It is not essential that there be “technical perfection” in contention pleading,” and contentions should be decided on their merits rather than on technicalities, but the contention admissibility rules still bar contentions based only on “generalized suspicions.”

RULES OF PRACTICE: CONTENTIONS

A petitioner must read the application, state the position of the applicant as stated therein, and state and explain the petitioner’s opposing view. A contention must directly controvert a position taken by the applicant in the application. A petitioner must explain any alleged deficiencies and support its contentions with documents, expert support, or at least a fact-based argument.

RULES OF PRACTICE: CONTENTIONS

A petitioner is not required to prove its case at the contention admissibility stage of a proceeding, or to state factual allegations in affidavits or formal evidentiary form sufficient to withstand a summary disposition motion, but must do more than make conclusory allegations; a petitioner must show that material facts are in dispute and demonstrate that an in-depth inquiry is appropriate.

RULES OF PRACTICE: CONTENTIONS

A petitioner must provide a sufficient basis to support a contention, which requires not an exhaustive list of bases but enough alleged factual or legal bases to support the contention.

RULES OF PRACTICE: CONTENTIONS

The “brief explanation of the basis” that is required by section 2.309(f)(1)(ii) helps define the scope of a contention, but it is the contention itself, not “bases,” whose admissibility must be determined.

RULES OF PRACTICE: CONTENTIONS

In ruling on contentions originally filed by Petitioners acting *pro se* but who later retained counsel, it is not appropriate to hold the petition itself to the same standards of pleading as would be expected of a lawyer, particularly because under the new procedural rules in 10 C.F.R. Part 2 it is no longer permissible for counsel to file an amended petition.

RULES OF PRACTICE: CONTENTIONS

Expert support is not required for admission of a contention; a fact-based argument may be sufficient on its own.

RULES OF PRACTICE: CONTENTIONS

With regard to contentions involving alleged violations of the National Environmental Policy Act (NEPA), although the requirements of NEPA are directed to federal agencies and thus the primary duties of NEPA fall on the NRC Staff in the NRC proceedings, the initial requirement to analyze the environmental impacts of an action, including a materials licensing amendment, is directed to applicants under relevant NRC rules.

RULES OF PRACTICE: CONTENTIONS

The contention admissibility stage of a proceeding is not the time to go to merits determinations on matters raised in contentions.

RULES OF PRACTICE: CONTENTIONS

The provision in 10 C.F.R. § 2.335(a) that no NRC rule is subject to attack in any adjudicatory proceeding prohibits the admission of any contention or part thereof challenging any dose limits specified in NRC rules.

RULES OF PRACTICE: CONTENTIONS

The provision in 10 C.F.R. § 2.335(a) that no NRC rule is subject to attack in any adjudicatory proceeding does not prohibit the filing of a contention challenging, in a license amendment proceeding, a position of an applicant that is based on a condition in its current license, because a license condition is not the same as an NRC rule.

RULES OF PRACTICE: CONTENTIONS

The licensing board finds that Petitioners have demonstrated that further inquiry in depth is appropriate with regard to two contentions alleging that proposed mining operations could have negative environmental and health and safety impacts, by contaminating groundwater resources that mix with water resources used by Petitioners, and admits contentions in somewhat limited form and reframed to consolidate admissible environmental issues falling logically under NEPA into one admitted contention, and to consolidate admissible public health and safety issues falling under the Atomic Energy Act (AEA) into a second admitted contention. While this results in a somewhat artificial separation of issues, given the interrelatedness of the two sets of issues that are both centered primarily in the underground geology of the area surrounding the proposed expansion area and how groundwater may move among underground aquifers and interact with surface water and thereby potentially affect both the environment and public health and safety through the same underlying mechanisms, the NRC's authority and responsibility to regulate the matters in dispute in this proceeding arise out of two sets of standards, found in NEPA and the AEA, and thus, for the sake of analytical clarity under these dual sets of standards — particularly given the absence of any rules specifically setting standards in ISL cases — the licensing board finds that proceeding in the manner described makes for the most effective organization of the admissible issues under the circumstances.

RULES OF PRACTICE: CONTENTIONS

Issues of drought and climate change are not outside the scope of the proceeding because these fall under the provisions of 10 C.F.R. § 51.45(b)(1), (b)(4), requiring that an environmental report include a description of the environment affected and discuss impacts of the proposed action on the environment, in proportion to their significance, and the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

RULES OF PRACTICE: CONTENTIONS

Licensing board admits contention asserting that prehistoric Indian camp should be inspected by Tribal elders and leaders, finding that in it Petitioners demonstrated a dispute over the material factual/legal issue of whether the consultation process conducted by the Applicant, a precursor to the consultation to be conducted by the NRC as the responsible federal agency, complies with relevant requirements of law; contentions are to be based on documents available at the time the petition is filed, including the environmental report, and Petitioners based their contention on this.

RULES OF PRACTICE: CONTENTIONS

Licensing board denies contention concerned with terrorism, based on failure of Petitioners to distinguish situation at issue from relevant and binding Commission case law that such contentions are outside the scope of NRC adjudicatory proceedings in jurisdictions where no federal court of appeals has ruled to the contrary.

RULES OF PRACTICE: CONTENTIONS

Licensing board defers ruling on contention concerning alleged foreign ownership of Applicant until parties have briefed issue.

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MEMORANDUM AND ORDER
**(Ruling on Standing and Contentions of Petitioners Owe Aku,
Bring Back the Way; Western Nebraska Resources Council;
Slim Buttes Agricultural Development Corporation;
Debra L. White Plume; and Thomas Kanatakeniate Cook)**

I. INTRODUCTION

This proceeding involves an application by Crow Butte Resources, Inc. (CBR, Crow Butte, or Applicant), which is currently licensed to operate an in-situ leach (ISL) uranium recovery facility in Crawford, Dawes County, Nebraska,¹ to amend this license to permit development of additional ISL uranium mining resources in a nearby location. ISL mining involves injecting a leach solution into wells drilled into an ore body, allowing the solution to flow through the ore body and extract uranium, and then removing the uranium from the solution by ion exchange and ultimately precipitation, drying, and packaging into solid yellowcake uranium.² In response to a September 13, 2007, notice of opportunity for hearing that was published on the Nuclear Regulatory Commission (NRC) website, Petitioners Owe Aku, Bring Back the Way (Owe Aku), Western Nebraska Resources Council (WNRC), Slim Buttes Agricultural Development Corporation (Slim Buttes), Debra L. White Plume, and Thomas Kanatakeniate Cook on November 12, 2007, timely filed requests for hearing and petitions to intervene in accordance with 10 C.F.R. § 2.309.³

In this Memorandum and Order, in addition to ruling on three pending matters on which the participants are in dispute, we find that Petitioners WNRC, Owe Aku, and Debra L. White Plume have shown standing to participate in the proceeding, and admit three of their joint contentions, in modified form. The first two of these concern alleged contamination of water resources and potential resulting environmental and health issues; the third concerns the extent of consultation that is required with tribal leaders regarding a prehistoric Indian camp located in the

¹ Source Materials License, SUA-1534.

² Application for Amendment of USNRC Source Materials License SUA-1534 North Trend Expansion Area — Environmental Report [ER] at 1-18, 1-38 (May 30, 2007) (ADAMS Accession No. ML071870300). The ER is continued in ADAMS Accession No. ML071870302.

³ Request for Hearing and/or Petition To Intervene for Owe Aku, Bring Back the Way (Nov. 12, 2007); Request for Hearing and/or Petition To Intervene for Western Nebraska Resources Council (Nov. 12, 2007) [hereinafter WNRC Petition]; Request for Hearing and/or Petition To Intervene for Slim Buttes Agricultural Development Corp. (Nov. 12, 2007); Request for Hearing and/or Petition To Intervene for Debra L. White Plume (Nov. 12, 2007); Request for Hearing and/or Petition To Intervene for Thomas Kanatakeniate Cook (Nov. 12, 2007). Petitions from two other organizations, Chadron Native American Center and High Plains Community Development Corporation, were received but subsequently withdrawn from this proceeding.

region of the proposed expansion site, under the National Historic Preservation Act.

Based on these rulings, we grant the hearing requests of WNRC, Owe Aku, and Debra L. White Plume, and admit them as parties in this proceeding. In addition, we will hold a prehearing conference in the near future, at which we will hear additional oral argument on Contention E, regarding the issue of foreign ownership of Crow Butte Resources, Inc., and on Petitioners' Request for a 10 C.F.R. Part 2, Subpart G, hearing. At this conference we will also address the participation of the Oglala Sioux Tribe in the proceeding, as well as the schedule for the proceeding.

II. BACKGROUND

CBR filed the license amendment application (Application) herein at issue on May 30, 2007.⁴ If granted, the license amendment would allow the development of a satellite ISL uranium recovery facility, the "North Trend Expansion Area," approximately 4.5 miles northwest of CBR's existing ISL mining operation in Crawford, Nebraska.⁵ The Application includes a Technical Report⁶ (TR) and an Environmental Report⁷ (ER). The NRC Staff formally accepted the Application for review on August 28, 2007.⁸ On December 4, 2007, the Secretary of the Commission referred Petitioners' November 12 hearing requests and intervention petitions to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action, in accordance with 10 C.F.R. § 2.346(i). On December 11 this Licensing Board was established to preside over the proceeding, and on December 12 the Board issued an order providing guidance for the proceeding.⁹

Applicant CBR and the NRC Staff filed responses to the Petitions on December 6 and 7, 2007, respectively.¹⁰ On December 28, Petitioners through their newly

⁴ Letter from Stephen P. Collings to Charles L. Miller dated May 30, 2007 (ADAMS Accession No. ML0715500570).

⁵ ER at 3.1-2.

⁶ Application for Amendment of USNRC Source Materials License SUA-1534 North Trend Expansion Area — Technical Report [TR] (May 30, 2007) (ADAMS Accession Nos. ML071760344, ML071760347, ML071760349, ML071760350).

⁷ See *supra* note 2.

⁸ Letter from Stephen J. Cohen to Stephen P. Collings (Aug. 28, 2007) (ADAMS Accession No. ML0723900040).

⁹ Licensing Board Order (Regarding Schedule and Guidance for Proceedings) (Dec. 12, 2007) (unpublished).

¹⁰ Response of Applicant, Crowe Butte Resources to Petitions To Intervene Filed by Ms. Debra L. White Plume, Chadron Native American Center, Inc., High Plains Community Development
(Continued)

retained counsel timely filed a consolidated version of their original Petitions, titled the “Reference Petition,” in compliance with the Board’s prior request,¹¹ based on the substantial similarity of the contents of the original petitions (apart from certain issues related to the standing of the respective Petitioners).¹² Also on December 28, Petitioners filed replies to the Applicant’s and NRC Staff’s Responses.¹³ With the permission of the Board, various affidavits relating to standing and curing defects relating thereto were submitted with the Replies or thereafter.¹⁴ Both the Applicant and NRC Staff filed objections to Petitioners’ supplemental affidavits in support of standing on January 4, 2007.¹⁵

Corporation, Thomas Kanatakeniate Cook, Slim Buttes Agricultural Development Corporation, Western Nebraska Resources Council (Dec. 6, 2007) [hereinafter CBR Response]; NRC Staff Combined Response in Opposition to Petitioners’ Requests for Discretionary Intervention and Petitions for Hearing and/or To Intervene of Debra White Plume, Thomas Cook, Owe Aku, Chadron Native American Center, High Plains Development Corporation, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council (Dec. 7, 2007) [hereinafter NRC Response].

¹¹ See Licensing Board Order (Confirming Matters Addressed on December 18, 2007 Telephone Conference) (Dec. 20, 2007) at 3 (unpublished); Official Transcript of Proceedings [Tr.] at 33-35.

¹² Reference Petition (Dec. 28, 2007). On January 9, 2008, Petitioners filed a “Corrected Reference Petition,” which we refer to as the “Reference Petition” throughout this Memorandum and Order, no party having indicated any dispute with this version at oral argument. Corrected Reference Petition (Jan. 9, 2008) [hereinafter “Reference Petition”]; see Tr. at 60. We also note that the Reference Petition contains no significant changes from the multiple, largely identical Petitions that were previously filed by Petitioners acting *pro se*. See *supra* note 3.

¹³ Reply to NRC Staff Response (Dec. 28, 2007) [hereinafter Cook Reply to NRC]; Reply to Applicant’s Response [hereinafter Cook Reply to CBR]; Reply to NRC Staff Response to Petition of Owe Aku and Debra White Plume (Dec. 28, 2007) [hereinafter Owe Aku Reply to NRC]; Reply to CBR Response to Petitions of Owe Aku and Debra White Plume (Dec. 28, 2007) [hereinafter Owe Aku Reply to CBR].

¹⁴ Affidavit of Francis E. Anders (Dec. 28, 2007) [hereinafter Anders Aff.]; Affidavit of Janet Mize (Dec. 28, 2007); Affidavit of Bruce McIntosh (Dec. 28, 2007); Affidavit of Beth Ranger (Dec. 28, 2007); Affidavit of Joseph R. American Horse (Dec. 28, 2007) [hereinafter American Horse Aff.]; Affidavit of Thomas K. Cook (Dec. 28, 2007) [hereinafter Cook Aff.]; Affidavit of Debra White Plume [hereinafter White Plume Aff.] (Ms. White Plume’s Affidavit is attached to the Owe Aku Reply to NRC). Based on the burning of Ms. White Plume’s home, where documents relating to this proceeding were kept, Owe Aku requested two additional weeks to provide additional affidavits, Motion for Extension of Time, Owe Aku (Dec. 28, 2007); and the Board granted an extension until January 11, 2008, Licensing Board Order (Ruling of Petitioner Owe Aku’s Motion for Extension of Time) (Jan. 4, 2008), over the objection of the Staff, NRC Staff’s Answer in Opposition to Owe Aku’s Motion for Extension of Time (Jan. 3, 2008). Affidavits for Owe Aku were then filed on January 10, 2008. Affidavit of David Alan House (Jan. 10, 2008) [hereinafter House Aff.]; Affidavit of Lester “Bo” Davis (submitted Jan. 10, 2008) [hereinafter Davis Aff.]; Affidavit of Sandy Sauser (submitted Jan. 10, 2008) [hereinafter Sauser Aff.].

¹⁵ NRC Staff’s Response to Petitioners’ Supplemental Affidavits in Support of Standing (Jan. 4, 2008) [hereinafter NRC Response to Affidavits]; Applicant’s, Crow Butte Resources, Inc., Response to Affidavits (Jan. 4, 2008) [hereinafter CBR Response to Affidavits].

The Board heard oral argument on Petitioners' standing and contentions on January 16, 2008. During argument, counsel for Petitioners proffered two documents, referred to as Exhibits A and B, in support of Petitioners' standing and as additional bases for Contentions A and B.¹⁶ Thereafter, following up on matters that arose at oral argument and were further addressed in a subsequent telephone conference with all participants,¹⁷ the Board in an Order issued January 24 set deadlines for Applicant and NRC Staff to file responses to the newly filed exhibits.¹⁸ Applicant and NRC Staff filed their responses on February 8,¹⁹ and Petitioners jointly filed a combined reply to these on February 15, 2008.²⁰

Based on matters raised by Petitioners both initially in their Petitions and Replies,²¹ as well as in oral argument,²² the Board in its January 24 Order also directed the parties to file briefs addressing the import of the Fort Laramie Treaties of 1851 and 1868, and the United Nations Declaration on the Rights of Indigenous Peoples, "insofar as [they] may be relevant to standing and any contentions concerning water rights and consultation with Native Americans on historical sites and artifacts."²³ These briefs were timely filed by all parties on February 21 and 22,²⁴ and responses thereto were filed by all parties on February 29.²⁵ In addition, on February 22, the Board received two briefs *amicus*

¹⁶ Tr. at 65-66, 87-88; E-mail from buffalobruce@juno.com to dfrankel@igc.org (Jan. 14, 2008), forwarding E-mail from Hannan LaGarry to buffalobruce@juno.com *et al.* (Jan 14, 2008) (Subject: geology summary) [hereinafter Exhibit A]; Letter from Dr. Steven A. Fischbein, P.G., to Mr. Stephen P. Collings (Nov. 8, 2007), with attached NDEQ Detailed Technical Review Comments [hereinafter Exhibit B].

¹⁷ Tr. at 375-414.

¹⁸ Licensing Board Order (Confirming Matters Addressed at January 23, 2008, Telephone Conference) (Jan. 24, 2008) (unpublished) [hereinafter January 24 Board Order] at 2.

¹⁹ Crow Butte Resources, Inc.'s Response to Newly-Filed Exhibits A and B (Feb. 8, 2008) [hereinafter CBR Response to Exhibits]; NRC Staff's Response to Petitioners' Exhibits A and B (Feb. 8, 2008) [hereinafter NRC Response to Exhibits].

²⁰ Petitioners Combined Reply to NRC Staff's and Applicant's Responses to Exhibits A and B (Feb. 15, 2008) [hereinafter Petitioners Reply on Exhibits].

²¹ See Reference Petition at 3-4; Cook Reply to NRC at 5; Owe Aku Reply to CBR at 10; Owe Aku Reply to NRC at 15.

²² Tr. at 101, 178-86, 304.

²³ January 24 Board Order at 2.

²⁴ NRC Staff's Brief on Law Related to the Fort Laramie Treaties and the United Nations Declaration of Rights of Indigenous Peoples (Feb. 21, 2008) [hereinafter NRC Brief on Treaties]; Crow Butte Resources, Inc.'s Brief on Treaties and United Nations Declaration (Feb. 22, 2008) [hereinafter CBR Brief on Treaties]; Petitioners' Memorandum of Law Regarding Indigenous Rights, Treaties and Federal Indian Law (Feb. 22, 2008) [hereinafter Petitioners' Brief on Treaties].

²⁵ NRC Staff's Reply to Petitioners' Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law (Feb. 29, 2008) [hereinafter NRC Reply to Treaties]; Crow Butte Resources,

(Continued)

curiae, with motions for leave to file the same, one from the Oglala Sioux Tribe,²⁶ and one from the Center for Water Advocacy (CWA), Rock the Earth, and Mr. Robert Lippman.²⁷ Applicant and Staff filed responses to these motions on March 3;²⁸ movants CWA *et al.* filed a reply on March 10;²⁹ and Applicant filed a letter opposing the Reply on March 13, 2008.³⁰

III. BOARD RULINGS ON PENDING MATTERS

A. Documents Filed at January 16, 2008, Oral Argument

As indicated above, during oral argument on Petitioners' standing and contentions, Petitioners' counsel presented two documents only recently received by them, seeking to have them considered with regard to standing and certain contentions.³¹ One of these, marked for identification as Exhibit A, consists of a January 14, 2008, e-mail from Hannan E. LaGarry, with an attached curriculum vitae indicating he has a Ph.D. in geology from the University of Nebraska and currently teaches in the Department of Geosciences at Chadron State College in Chadron, Nebraska. In his e-mail Dr. LaGarry refers to various published scientific literature relating to the geology of the area at issue in this proceeding.

The second document, marked as Exhibit B, consists of a copy of a November 8, 2007, letter from Dr. Steven A. Fischbein, Program Manager with the Nebraska Department of Environmental Quality (NDEQ), to Crow Butte President Stephen

Inc.'s Consolidated Response to Briefs on Treaties and United Nations Declaration (Feb. 29, 2008) [hereinafter CBR Reply to Treaties]; Petitioners' Response to NRC Brief Regarding Treaties, Etc. (Feb. 29, 2008) [hereinafter Petitioners' Reply to NRC Treaties]; Petitioners' Response to Applicant's Brief Regarding Treaties, Etc. (Feb. 29, 2008) [hereinafter Petitioners' Reply on CBR Treaties].

²⁶ Motion for Leave To File a Brief *Amicus Curiae* and Brief of *Amicus Curiae* for Oglala Sioux Tribe (Feb. 22, 2008) [hereinafter Oglala Brief].

²⁷ Motion for Leave To File a Brief *Amicus Curiae* and *Amicus Curiae* Brief of Center for Water Advocacy, Rock the Earth and Robert Lippman in Support of Petitioners' Requests for Discretionary Intervention and Petitions for Hearing and/or To Intervene of Debra White Plume, Thomas Cook, Owe Aku[,], Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council (Feb. 22, 2008) [hereinafter CWA Motion].

²⁸ Crow Butte Resources, Inc.'s Consolidated Answer to Motions for Leave To File Amicus Briefs (Mar. 3, 2008) [hereinafter CBR Answer to Amicus Motions]; NRC Staff's Answer to Motions of Oglala Sioux Tribe and Center for Water Advocacy et al. for Leave To File Briefs Amicus Curiae (Mar. 3, 2008) [hereinafter NRC Answer to Amicus Motions].

²⁹ Reply in Support of Motion of Center for Water Advocacy, Rock the Earth and Robert Lippman for Leave To File a Brief *Amicus Curiae* (Mar. 10, 2008) [CWA Reply].

³⁰ Letter from Tyson R. Smith, Counsel for Crow Butte Resources, Inc., to Administrative Judges, Atomic Safety and Licensing Board (Mar. 13, 2008) [hereinafter Smith Letter to Administrative Judges].

³¹ See Tr. at 65-70, 87-96.

P. Collings, regarding Crow Butte’s ‘‘Petition for Aquifer Exemption North Trend Expansion Area,’’ and an eighteen-page, single-spaced attachment containing ‘‘NDEQ Detailed Technical Review Comments.’’³² In addition to the license amendment application now at issue before the NRC, Crow Butte’s petition to the NDEQ for an ‘‘aquifer exemption’’ must be approved in order for it to mine in the proposed North Trend Expansion area.³³

1. Timeliness of Filings

Provided with opportunity to respond to these documents, including as to whether they should be considered under 10 C.F.R. § 2.309(c), § 2.309(f)(2), or any other relevant law or regulation, Applicant and Staff oppose any consideration of either document, arguing that they are both untimely to support either standing or admission of any contention.³⁴ Citing Petitioners’ ‘‘ironclad obligation’’ to search the public record for information supporting their contentions,³⁵ Staff and Applicant point out that Exhibit A consists of references to material published prior to 1999,³⁶ Staff also noting that Petitioners ‘‘have not indicated when they first contacted Dr. LaGarry, nor have they provided a good reason why they could not have sought and obtained [his] input well before the original filing deadline.’’³⁷ Staff argues that Exhibit B, while it was not available prior to the deadline for filing the original petitions in this proceeding, was ‘‘publicly available in ADAMS since November 26, 2007.’’³⁸ Applicant argues that ‘‘the

³² We note that, according to the Staff, this document is found in NRC’s ADAMS system with the number ML073300399. *See* NRC Response to Exhibits at 15.

³³ *See* ER at 1-58, 3.11-1, 4-12; *see also* Exhibit B. The NDEQ is the Nebraska State agency responsible for the enforcement of matters governed by the federal Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, including the Underground Injection Control (UIC) Program, 42 U.S.C. § 300h. *See also* ER at 4-12 to 4-13. UIC programs may be administered by the Federal Environmental Protection Agency, a State, or an Indian Tribe under the Safe Drinking Water Act, to ensure that subsurface waste injection does not endanger underground sources of drinking water. *See* Memorandum of Understanding Between the Nebraska Department of Environmental Quality and the Nuclear Regulatory Commission for In Situ Uranium Mining, 47 Fed. Reg. 55,444 (Dec. 9, 1982).

³⁴ *See generally* NRC Response to Exhibits; CBR Response to Exhibits.

³⁵ NRC Response to Exhibits at 14 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999)); CBR Response to Exhibits at 5 & n.3 (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

³⁶ NRC Response to Exhibits at 5; CBR Response to Exhibits at 4.

³⁷ NRC Response to Exhibits at 17.

³⁸ *Id.* at 15, referring to the NRC’s document management system that may be found on the NRC website.

few references identified in Exhibit B are to materials published nearly a decade ago.”³⁹

Under 10 C.F.R. § 2.309(c), determinations on any “nontimely filing” of a petition must be based on a balancing of certain factors, the most important of which is “[g]ood cause, if any, for the failure to file on time.”⁴⁰ As Staff has pointed out, this first factor is entitled to the most weight, and where no showing of good cause is made, “petitioner’s demonstration on the other factors must be particularly strong.”⁴¹ Also, under 10 C.F.R. § 2.309(f)(2), other than contentions based on new “data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto,” contentions “may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that —

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

³⁹ CBR Response to Exhibits at 10.

⁴⁰ 10 C.F.R. § 2.309(c) provides:

(c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination . . . that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;

(v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;

(vi) The extent to which the requestor’s/petitioner’s interests will be represented by existing parties;

(vii) The extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record.

⁴¹ NRC Response to Exhibits at 11-12 (citing *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977)).

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.⁴²

Although Exhibits A and B are not themselves either “petitions” or “contentions,” we find it appropriate to consider the timeliness of their filing under 10 C.F.R. § 2.309(c) and (f)(2), given that the exhibits are offered in support of Petitioners’ standing and certain of their contentions. Applying the standards found in these provisions, we agree with the NRC Staff and the Applicant that Petitioners have not shown that Exhibit A was timely filed. Although the e-mail from Dr. LaGarry is dated January 14, 2008, Petitioners have not provided any indication of when they contacted him, and in his e-mail he primarily references articles published years earlier. We do not find that any relevant factors under 10 C.F.R. § 2.309(c) or (f)(2) warrant its consideration.

As to consideration of the document as “legitimate amplification” of originally filed contentions, as argued by Petitioners,⁴³ we note that the Commission in the *Louisiana Energy Services* proceeding ruled that, while this permits a petitioner in a reply to submit arguments that are “focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer,”⁴⁴ it does not permit the filing of “entirely new support for . . . contentions” in a reply.⁴⁵ We note further that *Webster’s Third New International Dictionary* defines “amplify” as “to enlarge, expand, or extend (a statement or other expression of idea in words) by addition of detail or illustration or by logical development.”⁴⁶ We find that Dr. LaGarry’s e-mail falls more under the category of “new [expert] support” for its Contentions A and B.⁴⁷ Thus it would be excluded under the Commission’s *LES* decision.⁴⁸ While Dr. LaGarry may ultimately be an appropriate witness in a hearing in this proceeding, and the documents referenced by him in his e-mail may be appropriate exhibits in any such hearing, we do not find good cause to consider Exhibit A at this point in this proceeding.⁴⁹

⁴² 10 C.F.R. § 2.309(f)(2).

⁴³ Petitioners Reply on Exhibits at 3 (citing *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 359 (2006)).

⁴⁴ *Louisiana Energy Services, L.P.* (National Enrichment Facility) [*LES*], CLI-04-35, 60 NRC 619, 624 (2004).

⁴⁵ *Id.* at 621.

⁴⁶ *Webster’s International Dictionary* 74 (3d ed. 1976).

⁴⁷ *See* 10 C.F.R. § 2.309(f)(1)(v).

⁴⁸ *See supra* note 44.

⁴⁹ We do not find, as Petitioners argue, that Exhibit A is the sort of document or information of which we should take official notice under 10 C.F.R. § 2.337(f), nor do we find that it should have been disclosed as part of any discovery requirements, as we have not reached the discovery phase of this proceeding. *See* Petitioners Reply on Exhibits at 2, 4-5.

With regard to Exhibit B, however, it is undisputed that Petitioners' counsel received the document only on the evening before the January 16, 2008, oral argument, from another organization.⁵⁰ Regarding Applicant's argument that Exhibit B contains references to previously published materials,⁵¹ we note that, in contrast to Exhibit A, Exhibit B consists primarily of fairly extensive original analysis. Regarding Staff's indication that the document was actually placed in "ADAMS" (the electronic document management system available through NRC's public website) on November 26, 2007, we note that this was 2 weeks after the deadline for, and Petitioners' filing of, their original requests for hearing and petitions,⁵² and fifty-one (51) days prior to the date Petitioners actually presented it at the January 16 oral argument.

Petitioners point out that, when they did a search in ADAMS using Applicant's license number as a search term, Exhibit B did not appear, although 115 other documents were found. We find this to be significant, given that, in NRC's public website, "License Number" is one of the specified search fields that one may use in searching for documents. It is thus quite reasonable that, with regard to a proceeding involving the amendment of a license, one would search for documents relating to that proposed license amendment by using the relevant license number as the search term; indeed, it is probably one of the most relevant search terms that persons such as Petitioners could use to find documents related to the Application at issue. However, possibly due to Staff's view that the document is *irrelevant* to the Application at issue, when it was entered into ADAMS it was not done so in a manner that would permit access to it using the license number relating to the amendment Application at issue. This approach obviously did not facilitate actual location of the document in the context of this proceeding.

Under these circumstances, we find, under 10 C.F.R. § 2.309(f)(2), that the document was not "previously available" to Petitioners in any reasonable sense prior to the date they received it from the other organization, that the information and analysis found in it is materially different than information previously available, and that it was submitted in a timely fashion based on when it did become available to Petitioners. Alternatively, we find, under 10 C.F.R. § 2.309(c), that Petitioners had good cause to file it when they did and that no other criteria under section 2.309(c) mitigate against our consideration of it. As noted by the Staff "the test [for 'Good Cause for Late Filing'] is when the information became available[,] . . . when Petitioners reasonably should have become aware of that information," and whether Petitioners "acted promptly after learning of the new

⁵⁰ Tr. at 89.

⁵¹ CBR Response to Exhibits at 10.

⁵² We do not have access to the original notice of opportunity for hearing that was at one point on NRC's public website, but presume that the deadline set for filing of petitions was 60 days after the September 13, 2007, date of the notice, or November 12, 2007.

information.”⁵³ We find that Petitioners reasonably became aware of Exhibit B only when it was provided to them by the other organization, and that they had good cause to present it when they did, “promptly after learning of” the document.

Even assuming *arguendo* that the document was “reasonably available” on November 26, the time period from that date to the January 16 oral argument was less than the 60-day period specified in 10 C.F.R. § 2.309(b)(3) for the filing of requests for hearing and petitions to intervene. Although some licensing boards have set 30-day periods for the filing of new contentions based on new information, starting from the date the information becomes available, or reasonably available,⁵⁴ in such situations parties generally are directed to *provide* relevant materials containing such information to each other,⁵⁵ rather than require parties to search for it — in contrast to the situation before us, in which no such deadlines have been set and no requirements regarding disclosures have come into play. On this basis as well, therefore, we would find that Petitioners had good cause not to provide the NDEQ document identified as Exhibit B earlier, and timely filed it shortly after learning of it. In addition, a balancing of the other relevant factors under either 10 C.F.R. § 2.309(c) or (f)(2) supports Petitioners’ position. We therefore deem it appropriate to consider Exhibit B as additional support for Petitioners’ standing and Contentions A and B.

2. *Relevance of Exhibit B in This Proceeding*

Staff argues that Exhibit B is “completely unrelated to this NRC proceeding,”⁵⁶ and “outside the scope of th[e] proceeding and not material to a decision that the NRC must make” because it is “part of the NDEQ aquifer exemption process and reflects information submitted by the Applicant to NDEQ, not information submitted to NRC.”⁵⁷ Crow Butte suggests that the information in Exhibit B is in the nature of NRC Staff requests for additional information, or “RAIs,” noting case law that “petitioners must do more than ‘rest on [the] mere existence’ of

⁵³ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164 (1993) (emphasis added); *see also* NRC Response to Exhibits at 18.

⁵⁴ *See, e.g., Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Licensing Board Order (Establishing Schedule for Proceeding and Addressing Related Matters) at 7 (Dec. 20, 2006) (unpublished) [hereinafter *Pilgrim* Dec. 20, 2006, Order]; *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), Licensing Board Order (Initial Scheduling Order) at 7 (Nov. 17, 2006) (unpublished).

⁵⁵ *See, e.g., Vermont Yankee* Nov. 17, 2006, Order at 3-4; *Pilgrim* Dec. 20, 2006, Order at 3-4.

⁵⁶ NRC Response to Exhibits at 9.

⁵⁷ *Id.* at 21; *see also id.* at 20-22.

RAIs as a basis for their contention.”⁵⁸ Applicant argues further that “a contention cannot simply be based on a comment[] by a state agency regarding a permitting issue apart from the NRC’s review, especially where the contention could have been drafted based on the original application and environmental report”;⁵⁹ and that “[n]othing in Exhibit B is based on information that is different from information available in applicant’s application and ER.”⁶⁰

In ruling on the relevance of Exhibit B in this proceeding, we first observe that the final quoted argument of Crow Butte renders unpersuasive Staff’s argument to the effect that the matters addressed in Exhibit B are different than and therefore irrelevant to those at issue herein. According to Crow Butte, the information on which Exhibit B is based is essentially the same as that to be found in the Application. Moreover, in contrast to Exhibit A, the document does not merely refer to other documents. Nor, contrary to Crow Butte’s argument, does it merely request additional information from the Applicant. To provide just two examples, the document contains significant analysis and criticism of the information submitted to NDEQ by Applicant as being “unsupported and misleading,”⁶¹ and at one point contains the suggestion that Applicant consider measures relating to the domestic water supply, to protect the health and safety of the public.⁶²

The essential thrust of Petitioners’ water-related arguments is that Petitioners may be injured by contamination of ground and surface water resulting from Applicant’s proposed expansion of its mining operations, through the mixing of waters directly affected by such operations with waters used by Petitioners. Petitioners contend that various portions of the Application, stating in effect that the proposed expansion project involves no possible mixing of aquifers and will have no negative environmental or safety impacts, are contradicted by other portions of the Application, in which a *lack* of relevant knowledge about faults and fractures that might allow for mixing of the water in different aquifers is essentially acknowledged. It follows, to paraphrase Petitioners, that there is a possibility that any water within a mined aquifer that is in any way contaminated might mix with water in aquifers from which Petitioners draw and use water, and that this, as well as spills and leaks into surface water, endanger their safety and health and pose the possibility of negative impacts on the environment.⁶³

⁵⁸ CBR Response to Exhibits at 10 (citing *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998)).

⁵⁹ *Id.* at 9.

⁶⁰ *Id.* at 10 (emphasis added).

⁶¹ Exhibit B, Detailed Review at 11; *see also id.* at 1, 4, 5, 8.

⁶² *Id.* at 17.

⁶³ *See infra* sections IV.B, VI.A.1, VI.B.1, VI.B.4.

Of course, when Petitioners filed their original Petitions, they were acting *pro se*, and as a result some of their arguments come across as less than optimally organized or articulated.⁶⁴ The cogency of their fundamental points, however, is bolstered by Exhibit B, which speaks to some of the same concerns that Petitioners put forward, including, e.g., hydraulic conductivity⁶⁵ and communication among aquifers and the White River.⁶⁶ These concerns, as well as the NDEQ's challenging of the sufficiency of the information provided by Applicant, would clearly be relevant and material additional support for Petitioners' standing arguments and for their Contentions A and B, and the information provided in it would be within the scope of the proceeding.

More specifically, first, in the introductory letter portion of Exhibit B, it is stated among other things that Applicant's Petition for an Aquifer Exemption for its North Trend Expansion Area "lacks site specific data, inclusion of recent research, and the presentation of well supported scientific interpretations to be considered acceptable."⁶⁷ The letter and the "NDEQ Detailed Technical Review Comments" that make up the remainder of Exhibit B go on to raise concerns relating to domestic water use and to the geology of the area, and to point out significant weaknesses in CBR's application for an aquifer exemption. Although questions are posed in them, the letter and Detailed Review go well beyond mere requests for additional information.

Among the numerous instances of allegedly inadequate analysis and presentation of information on the part of Applicant that are criticized in the Review is a reference to CBR's claims that the proposed expansion area "is comparable to the original [area]," with the Reviewer(s) noting that, to the contrary, "[o]ther than on a gross formational level scale, there is no evidence collected at North Trend to support this claim," and that "[t]his is a recurring theme throughout the [Application to NDEQ]."⁶⁸ Specific questions in this regard are raised regarding CBR's failure to discuss

differences between the two areas which are significant in that the Basal Chadron at North Trend was deposited into a basin that may have been actively subsiding at the time of deposition; that North Trend is dominated by an artesian groundwater system, significantly different from the existing mine site; and that overlying aquitards or aquicludes may be significantly different texturally due to basin subsidence.⁶⁹

⁶⁴ We note that counsel subsequently became involved, but that under current NRC procedural rules would not be permitted to file amended petitions. *See infra* note 254; *see also infra* notes 167, 433.

⁶⁵ Exhibit B, Detailed Review at 6.

⁶⁶ *Id.* at 14, 15.

⁶⁷ Exhibit B, Letter at 1.

⁶⁸ Exhibit B, Detailed Review at 1.

⁶⁹ *Id.*

In addition, the Review states that “no supporting evidence is provided [by CBR] to establish the permeability of the Middle Chadron within North Trend, or where this unit thickens and thins,” and that

[o]ne thing that is conspicuously missing from this document are ANY lithologic logs. Further, the hydraulic conductivity of the “Middle Chadron” at North Trend is inferred from vertical hydraulic conductivity data collected from the original Crow Butte Study Area (CSA). Again, as previous, why is this data not site specific? Additionally, how is it possible that the mineralogical, petrologic, and petrophysical character of the Middle Chadron at North Trend is the same as the CSA when it is clear (from the data presented in this document) that the “Middle Chadron” at North Trend has been deposited into an actively subsiding basin. This depositional environment is completely different than that to the south of the Crawford/White River Structure, which is where the original CSA is located.⁷⁰

Moreover, it is emphasized in the NDEQ Review that, because CBR’s Petition “forms the foundation for any future discussion for an aquifer exemption,”

[e]ach claim made within the document must be substantiated and appropriately referenced and based on sound science. If the claim is made out of original research, from original unpublished data collected, then the data set must be shown, along with the associated interpretation. Anyone reading this document, who decides to research the referenced claims, must be able to reach the same conclusions. If it is new data presented, then the interpretation of this data must be supported by the data. At this point in the document, there is a lack of ANY supporting evidence that has been collected and analyzed directly from the North Trend prospect.⁷¹

Regarding permeability, the Review states that it is

inappropriate to lump the Brule and Chadron together as a single confining interval for the purpose of this discussion. Additionally, siltstones and claystones of the Lower Brule may be fractured due to the structural modification on the Crawford/White River Structure, and thus may be more permeable than other locales. This coupled with the widely dispersed or intermittent channel sandstones of the lower Brule may create permeability pathways that are heretofore uncharacterized.⁷²

“Additionally,” the Review asks, “why is there no reference to more recent data, such as Figure 4 from LaGarry (1998) or Figure 3 from Terry and LaGarry (1998)

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 5.

⁷² *Id.* at 6.

which shows details of faulting in the Toadstool Park area.’’⁷³ It is noted that, as Terry and LaGarry “‘demonstrated,’’

faults clearly offset the Peanut Peak and Big Cottonwood Creek Members of the Chadron Formation in Toadstool Park. . . . How is the offset of these units at Toadstool related to the structure at Crawford? Is it related at all? If there have been a series of deformational events, how does this [a]ffect the hydrogeology of the area.⁷⁴

The Review quotes several provisions found in CBR’s application to NDEQ, including the statement that “[t]he geologic information presented in this application clearly demonstrates the lateral continuity of the overlying and underlying confining zones on both regional and local scales, as well as the lateral occurrence and distribution of the Basal Chadron Sandstone,’’ and indicates that “[a]s stated previously, these types of statements are unsupported and misleading.’’⁷⁵ Also, it is noted in the Review that “‘CBR states that groundwater gradient in the Basal Chadron within the NTEA is to the east,’’ but further, that

[t]his by itself seems in question, as this gradient is directed, at least in part, towards the uplift on the Crawford/White River Structure. Although this data is placed within the caveat that it is only four data points, it is clear this gradient would be contrary to what would be expected. Again, this analysis suffers from lack of information⁷⁶

The Review also raises questions about the relationship between groundwater and surface water. Specifically, it is noted that

CBR states that the water bearing zone within the Brule is likely dissected, and is in communication with the White River. Given that [*sic*] this one possible, but important interpretation, wouldn’t it be appropriate to provide monitoring data from the White River and from wells set into the Brule aquifer adjacent to sampling locations in the White River? This could be especially important information with regards to future potential failure of injection or production wells through the Brule that may result in communication with surface water. The exact nature of the relationship between groundwater and surface water within the proposed exemption area should be established as part of the exemption process.⁷⁷

⁷³ *Id.* at 8.

⁷⁴ *Id.* at 10.

⁷⁵ *Id.* at 11.

⁷⁶ Exhibit B, Detailed Review at 12.

⁷⁷ *Id.* at 14.

Further, the Review observes that:

CBR states that no hydraulic communication has been identified between the Basal Chadron Sandstone and the White River. Has CBR conducted any surface water monitoring during any aquifer testing programs to verify this statement? What has CBR done to “identify” this possible connection?

The statement that groundwater flow does not appear to be defined by the Crawford/White River Structure is not supported.⁷⁸

With regard to possible domestic use of the Basal Chadron Aquifer, the Review notes that, contrary to CBR’s claim that there is no such use, “in close proximity outside the exemption boundary at least one well is used for domestic purposes, and a number of wells are used for agricultural purposes.”⁷⁹ Continuing, it is stated that “[t]his then seems to establish that the groundwater in the vicinity of the NTEA has some beneficial use, and is (or can be) used for domestic purposes.”⁸⁰ The question is posed, “Is there possibly an overarching solution that can be presented by CBR with regards to domestic water supplies to protect the health and safety of persons in the vicinity of Crawford?”⁸¹

In light of the preceding and other similar comments, and given, as noted above, that Exhibit B is based on essentially the same information as that in the Application before us,⁸² we are not inclined to grant much credence either to Staff’s arguments to the contrary, or to Applicant’s arguments that there is “nothing” in Exhibit B “that calls into question the license application’s conclusion that the Basal Chadron is hydraulically separated from the Brule aquifer,”⁸³ or shows “any ‘distinct new harm or threat apart from the activities already license[d].’”⁸⁴ Finally, with regard to Staff’s assertion that Petitioners should have provided more explanation of the significance of Exhibit B,⁸⁵ we note the irony of the fact that Petitioners presented the document the very morning after they received it, and that same day made arguments based on it that addressed its significance.⁸⁶

In conclusion, although all the concerns raised in Exhibit B may ultimately be satisfactorily addressed by Crow Butte with both the NDEQ and NRC Staff,

⁷⁸ *Id.* at 15.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.*

⁸¹ *Id.* at 17.

⁸² See *supra* text accompanying note 60.

⁸³ CBR Response to Exhibits at 13.

⁸⁴ *Id.* (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001)).

⁸⁵ NRC Response to Exhibits at 12-13.

⁸⁶ See, e.g., Tr. at 89, 92-95, 203, 207-10.

we find it appropriate to consider the NDEQ letter and Review in ruling on Petitioners' standing and Contentions A and B, based on the evident significance of the document and the information that has been presented to us at this point.

B. Motions To File Briefs *Amicus Curiae*

On February 22, 2008, the deadline previously set for the Petitioners, Applicant, and Staff to file briefs on any law relating to the 1851 and 1868 Fort Laramie Treaties and the United Nations Declaration on the Rights of Indigenous Peoples,⁸⁷ two briefs *amicus curiae* were filed, with accompanying motions for leave to file the same. One was filed on behalf of the Oglala Sioux Tribe;⁸⁸ the other was filed by Center for Water Advocacy (CWA), Rock the Earth, and Mr. Robert Lippman (hereinafter collectively CWA or CWA *et al.*).⁸⁹ The respective motions indicate they were filed pursuant to 10 C.F.R. § 2.315(d).

NRC Staff does not oppose the Tribe's motion, because it is entitled to a "reasonable opportunity to participate" in this proceeding under 10 C.F.R. § 2.315(c),⁹⁰ but requests denial of the motion of CWA *et al.*⁹¹ Staff first points out that 10 C.F.R. § 2.315(d) applies to briefs filed before the Commission, not to briefs filed before Atomic Safety and Licensing Boards, but notes as well NRC case law for the proposition that, although NRC rules "do not explicitly authorize *amicus* briefs at the licensing board level, such briefs might still be granted in appropriate circumstances."⁹² Staff argues, however, that movants have not complied with the requirements of 10 C.F.R. § 2.323(a) and (b), that any motion must be filed within 10 days of the "occurrence or circumstance from which the motion arises," and that any movant must contact other parties prior to filing the motions.⁹³

According to Staff, although an *amicus* brief that supplied a "perspective that would materially aid the Licensing Board's deliberations" would be permissible, the CWA brief does not do this, but rather impermissibly "inject[s] new issues into [the] proceeding [and] alter[s] the content of the record developed by the parties."⁹⁴ At the same time, Staff maintains that, "[w]hen the information that

⁸⁷ January 24 Order at 2.

⁸⁸ Oglala Brief.

⁸⁹ CWA Motion.

⁹⁰ NRC Answer to Amicus Motions at 3.

⁹¹ *Id.* at 4.

⁹² *Id.* at 2 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987)).

⁹³ *Id.*

⁹⁴ *Id.* at 3 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 96 (1997)).

is redundant [to information provided by Petitioners], irrelevant, and outside the scope of a proper *amicus* brief is stripped from [it], there is no significant new information to warrant” its consideration.⁹⁵

Crow Butte argues that both CWA and the Oglala Sioux Tribe attempt to raise new matters and fail to comply with 10 C.F.R. § 2.323(b), and therefore both their motions should be denied.⁹⁶

In reply, CWA *et al.* argue that there are no NRC regulations that actually prohibit the filing of the *amicus* briefs at issue, and notes that 10 C.F.R. § 2.315(d) explicitly provides that an *amicus* brief must be filed “within the time allowed to the party whose position the brief will support.”⁹⁷ In addition, CWA argues among other things that *amicus* briefs are “normally allowed when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide,”⁹⁸ and that all the issues CWA raises in its brief are related to the 1851 and 1868 treaties, out of which arises a trust duty in the NRC as a federal permitting agency.⁹⁹ Crow Butte argues that under 10 C.F.R. § 2.323(c), CWA has no right to file a reply.¹⁰⁰

Based on the same reasoning put forth by the Staff, we grant the Oglala Sioux Tribe’s Motion for Leave To File a Brief *Amicus Curiae* of Oglala Sioux Tribe. Further, pursuant to the Tribe’s right to participate in this proceeding under 10 C.F.R. § 2.315(c), we will add the Tribe’s counsel to our service list, and ask the Office of the Commission Secretary and all parties to add the Tribe’s counsel to their electronic and paper service lists. Although we do not in fact rest any of our rulings herein on the Tribe’s current brief, we expect that its participation in future stages of this proceeding may be helpful, and will take up specific aspects of the Tribe’s participation under section 2.315(c) in a prehearing conference to be held in this proceeding, as addressed *infra* in section VIII of this Memorandum and Order.

⁹⁵ *Id.* at 4.

⁹⁶ CBR Answer to Amicus Motions at 3-4; Crow Butte also argues that in NRC proceedings such motions may be filed only with respect to issues on appeal, absent special circumstances that do not exist in this proceeding. *Id.* at 2-3.

⁹⁷ CWA Reply at 3, 4.

⁹⁸ *Id.* at 6-7 (citing *Community Association for Restoration of Environment (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974 (E.D. Wash. 1999)).

⁹⁹ *Id.* at 7-8 (citing *Northwest Sea Farms Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996); *Muskleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1514 (W.D. Wash. 1988); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986) (en banc), *modified on other grounds*, 793 F.2d 1171 (10th Cir.); *Assiniboine & Sioux Tribe of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 794-96 (9th Cir. 1986); *Enos v. United States*, 672 F. Supp. 1391, 1993-94 (D. Wyo. 1987)).

¹⁰⁰ Smith Letter to Administrative Judges.

With regard to the CWA brief, although there is no rule or law of which we are aware that would definitively prohibit our consideration of it, we find it unnecessary to rest any of our rulings on it in any event. Therefore it is not necessary to make any ruling on it. It may be that, as the case progresses, CWA may wish to follow the proceeding through consultation with Petitioners and their counsel, and/or reference to the NRC's electronic hearing docket,¹⁰¹ and at future appropriate times submit additional briefing on matters of concern. Given our appreciation for any insights that any entity or person may provide that would appropriately assist us in fulfilling our lawful functions, and the right of any entity at least to file such a motion and brief, we therefore do not rule out the possibility that we might consider and grant a future CWA motion to file a brief *amicus curiae*, to an extent found to be appropriate at the time. Also, CWA *et al.* are of course free, as is any member of the public, to attend any and all proceedings in the case.

C. Relevance of Treaties and Related Law

As pointed out by Petitioners, in order to address issues associated with the Gold Rush and significant warfare between the United States and Native American tribes in the 19th century, the United States and a number of tribes including those of the Sioux Nation entered into two significant peace treaties — the Fort Laramie Treaties of 1851 and 1868 — that are asserted to be relevant to various issues in this proceeding. According to the Oglala Sioux Tribe, the Pine Ridge Reservation “was established in part to encourage an agrarian lifestyle for the Oglala. The Oglala were encouraged to farm and raise livestock, as well as abandon a nomadic lifestyle and remain within the Reservation.”¹⁰² Prior to these treaties, the Sioux had occupied and controlled a large area of land, including that where the proposed North Trend Expansion site is now located.¹⁰³ Two descendants of Chiefs who signed these treaties, Chief Joseph American Horse and Chief Oliver Red Cloud, spoke at the oral argument held January 16 on Petitioners' standing and contentions. As stated by Chief American Horse, the Sioux Nation was a large nation with 10,000 campfires located in what are now several states including Nebraska and the Dakotas, the names of which come from the Lakota language.¹⁰⁴

¹⁰¹ See http://ehd.nrc.gov/EHD_Proceeding/home.asp.

¹⁰² Oglala Brief at 9-10 (citing Treaty with the Sioux, Apr. 29, 1868, art. 3, 15 stat. 635 [hereinafter 1868 Fort Laramie Treaty]).

¹⁰³ Petitioners' Brief on Treaties at 2.

¹⁰⁴ Tr. at 179. See also *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 n.1 (1980), which is cited in the NRC Brief on Treaties at 5.

Petitioners argue among other things that the current mine sites are within the Treaty boundaries, that they possess water and mineral rights under the Treaties, that infringement of the treaties would constitute injury in fact for purposes of standing, and that the Treaties provide bases supportive of Contentions A and C, relating respectively to impacts on water from the proposed project at issue, and consultation responsibilities vis-à-vis tribal leaders on the part of Applicant and/or the NRC Staff.¹⁰⁵ They also cite article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in support of their Petition.¹⁰⁶

In this proceeding, we are not being asked to rule on the treaty or water rights of the Oglala Tribe per se. The only relevance of either general treaty rights issues or more specific water rights issues is insofar as either or both may pertain to our rulings on standing and Contentions A and C. Although in an appropriate situation such considerations might be more critical to these or other rulings,¹⁰⁷ we do not, as illustrated in our analyses below, find it necessary to rely on any of these matters in this proceeding in order to rule on either standing or the contentions in question. We do note certain treaty-related matters in passing, but these are not determinative on any of these issues.

¹⁰⁵ Cook Reply to NRC at 5, 16-17, 19; Owe Aku Reply to NRC at 15-16; Tr. at 86, 100, 186-88, 304, 307. See NRC Brief on Treaties at 2-3.

¹⁰⁶ Reference Petition at 3-4; Cook Reply to NRC at 16-17; Owe Aku Reply to NRC at 15.

¹⁰⁷ We note, regarding the case law cited by Staff and Applicant (NRC Brief on Treaties at 11; CBR Brief on Treaties at 5) for the proposition that a licensing board would have no jurisdiction to consider any treaty-related or water-rights questions in an NRC adjudicatory proceeding, that although there is some dicta to this effect, the cases actually relate to disputes, including jurisdictional disputes, that at the times in question were actually or potentially before other tribunals. See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1990-91 (1982); *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313) [HRI], CLI-06-29, 64 NRC 417, 420 (2006).

In contrast, there might arise NRC adjudicatory proceedings in which, for example, a licensing board, in fulfilling its responsibility to rule on issues before it and to consider any and all law that might pertain to such issues, may find some treaty-related law to be pertinent to its ruling and therefore very appropriately consider it. For example, there might be water-related issues that are integrally related to questions requiring a licensing board's determination, which are not, and are not expected to be, in dispute in any other forum, or, on the other hand, which may indeed have been resolved in another forum, producing case law now relevant to the issues before the licensing board. In such circumstances, a licensing board would have a duty to apply any existing law of which it is aware and that is on point to the facts at issue in the matter legitimately before the board, and if such law included any treaty-related law, the board could appropriately consider and apply it along with other pertinent law. This situation would clearly be distinguishable from resolving disputes over the existence or extent, for example, of specific treaty-related water rights. In this case, as we do not find any treaty-related law to be necessary to our rulings herein, we do not rely on it in making these rulings.

IV. STANDING OF PETITIONERS TO PARTICIPATE IN PROCEEDING

A. Legal Requirements for Standing in NRC Proceedings

Any person requesting a hearing and seeking to intervene in an NRC proceeding must demonstrate that he or she has “standing” to participate in the proceeding. Standing is a concept that concerns whether a party has “sufficient stake”¹⁰⁸ in a matter, as defined by relevant legal principles. The question of standing “focuses on the question of whether the litigant is the proper party to fight the lawsuit” — as contrasted with the separate question of whether there is a “justiciable,” or “real and substantial controversy . . . appropriate for judicial determination,” and not merely a hypothetical dispute.¹⁰⁹ The petitioner bears the burden of demonstrating standing, but in ruling on standing a licensing board is to “construe the petition in favor of the petitioner.”¹¹⁰

The Atomic Energy Act (AEA) is the starting point in determining the standing of a petitioner in an NRC proceeding. Section 189a of the Act requires the NRC to provide a hearing “upon the request of any person whose interest may be affected by the proceeding.”¹¹¹ Thus, in determining whether any petitioner has standing, we must ascertain what that petitioner’s “interest” is and whether it “may be affected by the proceeding.”

More specifically, the Commission has implemented the requirements of section 189a in its regulations in 10 C.F.R. § 2.309(d)(1), which provides in relevant part that a licensing board shall consider three factors when deciding whether to grant standing to a petitioner: the nature of the petitioner’s right under the AEA to be made a party to the proceeding; the nature and extent of the petitioner’s property, financial, or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the petitioner’s interest.¹¹² In addition, Commission precedent directs licensing

¹⁰⁸ *Black’s Law Dictionary* 1405 (6th ed. 1990) (definition for “Standing to sue doctrine”). The Supreme Court has described the concept as addressing the following question:

Have [petitioners] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which [a tribunal] so largely depends for illumination of difficult . . . questions?

Baker v. Carr, 369 U.S. 186, 204 (1962) (substituting terms relevant in NRC proceedings).

¹⁰⁹ *Black’s Law Dictionary* at 1405; *id.* at 865 (definition for “Justiciable controversy”).

¹¹⁰ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

¹¹¹ 42 U.S.C. § 2239(a)(1)(A) (2000).

¹¹² 10 C.F.R. § 2.309(d)(1)(ii)-(iv). The provisions of 10 C.F.R. § 2.309 were formerly found in 10 C.F.R. § 2.714, prior to a major revision of the Commission’s procedural rules for adjudications in

(Continued)

boards, in deciding whether a petitioner in an NRC proceeding has established the necessary “interest” to show standing under Commission rules, to follow the guidance found in judicial concepts of standing, as stated in federal court case law.¹¹³ Under these concepts, we are to consider whether a petitioner has “allege[d] [1] a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.”¹¹⁴ The requisite injury may be either actual or threatened,¹¹⁵ but must arguably lie within the “zone of interests” protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA).¹¹⁶ And, as indicated above, the injury must be “concrete and particularized,” and not “conjectural” or “hypothetical.”¹¹⁷

For an organizational petitioner to establish standing, it must show “either immediate or threatened injury to its organizational interests or to the interests of identified members.”¹¹⁸ An organization seeking to intervene in its own right — i.e., to establish “organizational” standing — “must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA.”¹¹⁹ An organization asserting standing on behalf of one or more of its members — i.e., “representational” standing — must (1) demonstrate that the interests of at least one of its members will be so harmed, (2) identify that member by name and address, and (3) show that the organization is authorized to request a hearing on behalf of that member.¹²⁰ The organization must show that the member has individual standing in order to assert

2004; thus, case law interpreting the prior section remains relevant. See Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004).

¹¹³ See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Tech*, CLI-95-12, 42 NRC at 115.

¹¹⁴ *Yankee*, CLI-98-21, 48 NRC at 195 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)).

¹¹⁵ See *Yankee*, CLI-98-21, 48 NRC at 195 (citing *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)).

¹¹⁶ *Id.* at 195-96 (citing *Ambrosia Lake Facility*, CLI-98-11, 48 NRC at 6).

¹¹⁷ See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

¹¹⁸ *Georgia Tech*, CLI-95-12, 42 NRC at 115; see also *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Yankee*, CLI-98-21, 48 NRC at 195.

¹¹⁹ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998).

¹²⁰ See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

representational standing on his behalf, and “the interests that the representative organization seeks to protect must be germane to its own purpose.”¹²¹

Under Commission case law, some circumstances exist in which petitioners may be *presumed* to have standing based on their geographical proximity to a facility or source of radioactivity, without the need to show injury in fact, causation, or redressability.¹²² In nuclear power reactor construction permit and operating license proceedings, showing proximity within 50 miles of a plant is often enough on its own to demonstrate standing.¹²³ In proceedings not involving power reactors, however, the Commission has held that proximity *alone* is not sufficient to establish standing.¹²⁴ Rather, a *presumption* of standing based on geographical proximity may be applied in nuclear materials licensing cases only when the activity at issue involves a “significant source of radioactivity producing an obvious potential for offsite consequences.”¹²⁵ Thus petitioners who wish to base their standing on such a presumption must demonstrate that the radiological material at issue presents such an “obvious potential for offsite consequences.” How close to the source a petitioner must live or work to invoke this “proximity plus” presumption “depends on the danger posed by the source at issue.”¹²⁶ Thus, whether and at what distance a proposed action carries with it an “obvious potential for offsite consequences” such that a petitioner can be “presumed to be affected” must be determined “on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”¹²⁷

B. Petitioners’ Standing in This Proceeding

Five petitioners assert standing to participate in this proceeding: three organizations — WNRC, Owe Aku, and Slim Buttes; and two individuals — Thomas Kanatakeniate Cook and Debra White Plume. Although Petitioners do

¹²¹ *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

¹²² See *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

¹²³ See, e.g., *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148-49 (2001).

¹²⁴ See *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998).

¹²⁵ *CFC Logistics, Inc.*, LBP-03-20, 58 NRC 311, 319 (2003); see also *Big Rock Point*, CLI-07-19, 65 NRC at 426; *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22.

¹²⁶ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22.

¹²⁷ *Georgia Tech*, CLI-95-12, 42 NRC at 116-17.

not assert standing based on any proximity presumption,¹²⁸ the geographic area that could potentially be affected by CBR's ISL mining at the proposed North Trend Expansion site is nonetheless at the heart of the standing arguments in this case, as Staff and Applicant challenge whether there could be any injury in fact that could be caused by the proposed project at issue at any distances greater than very minimal ones.

We note that ISL mining cases present unique issues because the geographical areas that may be affected by mining operations are largely dependent on the characteristics — e.g., size, makeup, configuration, interconnections, and interconductivity — of underground aquifers that contain groundwater that may potentially be affected by ISL mining practices. Standing in this particular context has been addressed by the Commission in only one proceeding: *Hydro Resources, Inc. (HRI)*. The licensing board in *HRI* granted standing to “anyone who use[d] a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites”; such a showing was found to be sufficient to demonstrate an “injury in fact.”¹²⁹ The “reasonably contiguous” standard was not, however, specifically defined in *HRI*.

NRC Staff notes that the material at issue in this proceeding is unenriched natural uranium (yellowcake), and claims that yellowcake is “not a significant source of radioactivity,” comparing it to a highly enriched uranium source that was at issue in the *Nuclear Fuel Services (NFS)* proceeding.¹³⁰ We make two observations regarding this comparison. First, in *NFS*, the Commission was applying the “proximity plus” presumption we discuss above, and under this analysis found “no obvious potential for harm at [petitioner’s] property 20 miles” from the facility location.¹³¹ Thus, the Commission stated, it became that petitioner’s “burden to show a specific and plausible means how . . . activities at the NFS site will affect her,” a burden she was found not to meet.¹³² As indicated above, Petitioners do not assert standing based on any proximity presumption. Thus we must look to whether they show “specific and plausible means” by which CBR’s proposed expansion of mining activities will affect them.

Second, with regard to distances more generally, the sources at issue in this proceeding are distinguishable from those at issue in *NFS* and similar cases because, unlike sources primarily involving potential airborne transmission of

¹²⁸ Some of the Petitioners do indicate, regarding standing, that their “property values” or “health values” are “adversely impacted by . . . proximity to the ISL Uranium mine,” Reference Petition at 6-7, but we do not interpret such language as a claim based on proximity alone or on any proximity presumption.

¹²⁹ *HRI*, LBP-98-9, 47 NRC at 275.

¹³⁰ NRC Response at 8, 10.

¹³¹ *Nuclear Fuel Services, Inc. (Irwin, Tennessee) [NFS]*, CLI-04-13, 59 NRC 244, 248 (2004).

¹³² *Id.*

contaminants, or contamination of surface water, soil, or plants, ISL mining may also involve potential contamination of groundwater resources that are relatively more confined in underground aquifers, which may in fact be quite large. And, as touched on above, the potential for injury arising through the water in such aquifers depends on many complex factors, including not only the size of the aquifers but also the hydrogeological conditions that determine how easily and how fast water moves within and among aquifers and also how it interacts with surface water. These are all factual questions that, at this stage of a proceeding with regard to standing, are appropriately determined by considering whether an asserted potential injury is “plausible,” as the Commission indicated in *NFS* and as we discuss further below.

Petitioners in this proceeding assert that relevant members and other persons drink and otherwise use water from aquifers that may mix with the aquifer in which CBR mines uranium.¹³³ They argue that the AEA “requires that they be admitted as intervenors in the proceeding despite any nonmaterial failures to comply with highly specific and technical regulations that may or may not be in ‘harmony’ with the origin and purpose of the statute.”¹³⁴ Petitioners also allege that “leaks of radioactive [and] arsenic laden fluid into the Brule aquifer . . . from prior ‘Excursions’ from CBR’s operations” have caused problems including a “slow-moving radioactive plume of contaminated water” that is mixing with the High Plains and/or Arikaree aquifers due to connectivity between these aquifers.¹³⁵ Petitioners indicate that the High Plains and Arikaree aquifers run beneath the Pine Ridge Indian Reservation.¹³⁶ We note that the High Plains also underlies parts of several states including Nebraska, South Dakota, Colorado, Kansas, New Mexico, Oklahoma, Texas, and Wyoming, according to the U.S. Geological Survey [USGS] Ground Water Atlas of the United States, cited by Petitioners in support of their Contention A.¹³⁷

Applicant CBR disagrees with Petitioners’ argument, claiming that the “Brule Aquifer in this area is not hydrologically connected to Arikaree Aquifer.”¹³⁸ Moreover, the Applicant argues, the “Arikaree is not present in the area at issue in this application.”¹³⁹ Applicant submits that it is required by its NRC license to install wells designed to “monitor the horizontal or vertical movement of mining

¹³³ Reference Petition at 6-8.

¹³⁴ Cook Reply to CBR at 2.

¹³⁵ Reference Petition at 3.

¹³⁶ *Id.*

¹³⁷ U.S. Geological Survey “Ground Water Atlas of the United States: Kansas, Missouri and Nebraska, HA 730-D (http://capp.water.usgs.gov/gwa/ch_d/D-text2.html) (Jan. 3, 2008); see Reference Petition at 9.

¹³⁸ CBR Response at 2.

¹³⁹ *Id.*

solutions in the Chadron and Brule formation,”¹⁴⁰ and asserts that, in order for a radioactive plume of contaminated water to be present in these aquifers as Petitioners claim, “such a phenomenon would have to have gone undetected” by its monitoring wells.¹⁴¹ Finally, Applicant claims that “without any evidence, anecdotal or otherwise, to suggest a connection between the Brule and the Basal Chadron that might cause some mixing [of those aquifers],” there is no basis to support a showing of injury necessary to meet the requirements for standing.¹⁴²

NRC Staff agrees with the Applicant, claiming that the Application’s Technical Report (TR) indicates that the “Chadron Formation is a different aquifer than the High Plains Aquifer and that no reasonable mechanism for mixing has been identified due to the very low hydraulic conductivity of the confining layers between the Brule and Chadron Formations.”¹⁴³ Moreover, Staff posits, “in order to make a fairly traceable argument not only do they have to show that water can move from the site to their location, but they also have to provide some sense that there will in fact be an offsite consequence from it.”¹⁴⁴ Staff also argues that Petitioners fail to provide any evidence that “CBR’s excursion history has resulted in release of radioactive constituents to underground sources of drinking water.”¹⁴⁵

Petitioners counter these arguments by citing parts of the Application’s Environmental Report (ER), in which, among other things, it is noted that the “exact definition of the ‘overlying aquifer’ at North Trend is somewhat difficult to determine.”¹⁴⁶ They note that the ER states that “[r]egional data regarding flow in the Basal Chadron [is] limited,” and that additional future testing should be completed prior to mining in the North Trend area.¹⁴⁷ Petitioners also point to instances in which they contend the ER provides “some causes of possible excursions of uranium and other heavy metals in the re-injection of mine wastewater”; Petitioners suggest that potential water contamination may be caused by “unknown (but known to exist) fracturing between the Brule aquifer and the upper aquifer used by private wells in the North Trend area.”¹⁴⁸

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.* at 3-4. According to CBR, it has approximately 319 wells associated with its current ISL operations south of Crawford that were installed to monitor the horizontal and vertical movement of mining solutions in the Chadron and Brule formations. *Id.*

¹⁴² Tr. at 141-42.

¹⁴³ NRC Response at 7 (citing TR at 2.7-9).

¹⁴⁴ Tr. at 112.

¹⁴⁵ NRC Response at 7-8.

¹⁴⁶ Cook Reply to CBR at 9 (citing ER at 3.4-78).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Petitioners argue among other things that they meet their burden of showing a chain of causation that is plausible, through the Nebraska Department of Environmental Quality (NDEQ) document (Exhibit B) addressed in section III above, which they contend indicates that Applicant’s data and analysis relating to the proposed North Trend Expansion are “not accurate,” “insufficient,” and “old.”¹⁴⁹ Further, Petitioners point out, according to the NDEQ document, “the subsurface structural anomaly . . . that is present in the southern portion of the [North Trend Expansion Area] . . . is inadequately defined [by Applicant CBR] and must be accurately delineated for consideration.”¹⁵⁰ Petitioners also refer to NDEQ’s statement that “[because of lack of studies and what is known,] there may be significant textural changes in the Basal Chadron,” and that such textural changes “will likely impact potential vertical and horizontal hydraulic conductivities.”¹⁵¹ Petitioners aver that this demonstrates the plausibility of an interconnection between the aquifers, which may support mixing of potentially contaminated water, resulting in threatened harm to Petitioners who use water from those aquifers.¹⁵²

Petitioners also raise issues of contamination of surface water and the White River, which lies approximately one-half mile from the proposed expansion site, and of long-term effects of any contamination arising from CBR’s proposed expansion project.¹⁵³ Petitioners indicate that they recognize that underground contamination “might take years . . . to impact the Pine Ridge Reservation,” but that they “believe that . . . you have to look at what will be the impact in generations in the future.”¹⁵⁴ We address additional arguments relating to each Petitioner separately in our ruling, which follows.

C. Licensing Board’s Rulings on Standing of Petitioners

We begin our analysis of Petitioners’ standing in this proceeding by addressing two sets of issues that are of general applicability to some or all of the Petitioners — first, timeliness issues concerning whether various information presented to us after the initial filing of the Petitions may properly be considered in making our rulings on standing; and second, issues raised by Petitioners regarding aquifer conductivity and mixing of water between and among the aquifers in the area surrounding the proposed project. We then address the separate claims of standing.

¹⁴⁹ Tr. at 89.

¹⁵⁰ *Id.* at 166; *see* Exhibit B, Letter at 1.

¹⁵¹ *Id.* at 167 (quoting Exhibit B, Detailed Review at 3-4).

¹⁵² *Id.* at 167-69.

¹⁵³ *Id.* at 98-99.

¹⁵⁴ *Id.* at 99.

1. *Timeliness Issues Related to Petitioners' Standing*

With regard to issues of timeliness, upon objection by NRC Staff and the Applicant that defects existed in the original affidavits submitted by Petitioners in support of representational standing, the Board granted Petitioners an opportunity to cure those defects through submittal of supplemental affidavits. Applicant and Staff object to allowing any statements in these affidavits that were absent from the original petitions to “serve as further bases for . . . standing”¹⁵⁵ to the extent they go “beyond identifying information”¹⁵⁶ and “raise issues different than those raised in the original petition.”¹⁵⁷

Although the pleading requirements of 10 C.F.R. § 2.309 are “strict by design,”¹⁵⁸ a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects.¹⁵⁹ Indeed, licensing board determinations on standing involve a reasonable degree of discretion.¹⁶⁰ In *North Anna*, the Appeal Board found that a petition, which “was not submitted under oath and did not state expressly the manner in which the petitioner’s interest would be affected by the proceeding,” involved “defects [that were] readily curable.”¹⁶¹ The Appeal Board noted that “the participation of intervenors in licensing proceedings can furnish valuable assistance to the adjudicatory process,”¹⁶² and observed that, while there must be “strict observance of the requirements governing intervention, in order that the adjudicatory process is invoked only by those persons who have real interests at stake and who seek resolution of concrete issues[,] . . . it is not necessary to the attainment of that goal that

¹⁵⁵ NRC Response to Affidavits at 3; CBR Response to Affidavits at 3.

¹⁵⁶ CBR Response to Affidavits at 3.

¹⁵⁷ NRC Response to Affidavits at 3.

¹⁵⁸ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

¹⁵⁹ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 118 (1994) (pleading “niceties” should not be used to exclude parties who have a clear, albeit imperfectly stated, interest).

¹⁶⁰ See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 31 (2001) (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Georgia Tech*, CLI-95-12, 42 NRC at 116).

¹⁶¹ *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973) (emphasis added). We note that even under the new 10 C.F.R. Part 2 rules, parties and licensing boards typically still refer to pre-2004 case law for guidance in making rulings on standing and contentions, and we see no reason not to do the same with this Appeal Board decision, which we find provides thoughtful and pertinent guidance with regard to the circumstances before us in this proceeding.

¹⁶² *Id.*

interested persons be rebuffed by the inflexible application of procedural requirements.”¹⁶³ Similarly, the federal courts have rejected the “approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”¹⁶⁴

Staff and Applicant, however, would have us apply such a strict standard that Staff indeed even objected to Owe Aku’s request for a 2-week extension to file its affidavits,¹⁶⁵ based on the destruction by fire of Ms. White Plume’s home, where critical documents relating to this case (many of which still apparently have to be reconstructed or duplicated) were kept.¹⁶⁶ We find a more balanced approach, which takes into account appropriate considerations of prejudice and fairness, to be in order.

We find that Petitioners’ supplemental affidavits, including any additional expressions of “the manner in which [their interests] would be affected by [this] proceeding” that are found therein, create no undue prejudice or delay in this proceeding; Applicant and Staff have had ample opportunity to respond to them. We note as well that, when Petitioners first filed their petitions, they were acting *pro se*. As recently noted by another licensing board, “longstanding agency precedent instructs us that, as a rule, *pro se* petitioners are not held to the same standard of pleading as those represented by counsel.”¹⁶⁷ In light of the preceding considerations and principles, we find that fundamental fairness mandates that we consider the interests so asserted by Petitioners. In addition, as stated above, in ruling on the standing of Petitioners we also find it appropriate to consider the NDEQ document submitted as Exhibit B by Petitioners at oral argument.¹⁶⁸

2. *Aquifer Conductivity and Related Issues*

On issues relating to aquifer conductivity and mixing of water, we note that some of the arguments raised by the Applicant and Staff, to the effect that Petitioners’ allegations regarding mixing of the aquifers are incorrect, may ultimately prevail in this proceeding. We also note that some of Applicant’s arguments, for example, that the Chadron and Brule aquifers “are not hydrologically

¹⁶³ *Id.* at 633-34.

¹⁶⁴ *Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 289-90 (8th Cir. 1988).

¹⁶⁵ NRC Staff’s Answer in Opposition to Owe Aku’s Motion for Extension of Time at 1-2.

¹⁶⁶ Tr. at 286.

¹⁶⁷ *Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 188 (2007) (citing *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973)).

¹⁶⁸ See *supra* section III.A of this Memorandum.

connected,”¹⁶⁹ are brought into question by Exhibit B. Applicant insists that any uncertainty “is not great enough to call into question the overall conclusions” of no connection.¹⁷⁰ However, factual arguments over such matters as the geological makeup of the area, the direction of flow, and the time it takes for water to flow a certain distance, go to the merits of the case and, as Petitioners point out, we must avoid “the familiar trap of confusing the standing determination with the assessment of petitioner’s case on the merits.”¹⁷¹ Moreover, as Petitioners also point out, the Application itself “acknowledges that the geology and hydrology of the area connecting the Brule, Chadron and High Plains Aquifers is not completely understood.”¹⁷² We note, as just one example, the Application’s recommendation that “additional future testing” be done prior to ISL mining operations in the proposed expansion area.¹⁷³ Thus, even without reference to Exhibit B, and as in *HRI*, “[b]ecause knowledge of the relevant rock formations is still rudimentary . . . , there are enough reasonable doubts to establish ‘injury in fact.’”¹⁷⁴

Exhibit B emphasizes this conclusion and lends credibility to the doubts and uncertainty regarding various hydrogeological issues. As noted therein, in addition to substantive doubts, at least some of the uncertainty lies in the nomenclature regarding geologic information — the NDEQ reviewer states that the “nomenclature utilized by CBR is outdated and does not conform to widely accepted and published geologic literature from the area.”¹⁷⁵ We note further indication of a lack of complete clarity with regard to nomenclature and identification of various aquifers and formations in the *USGS Ground Water Atlas*’s description of the Brule Formation being one of the units “included in the [High Plains] aquifer,” at least “[w]here it contains fracture or solution permeability”; the Brule is also described as being the “upper unit of the White River Group.”¹⁷⁶ The Atlas further suggests that the “Arikaree Group” is also part of the High Plains aquifer; and that the “Chadron Formation that is part of the White River Group of Tertiary age . . . directly underlies the High Plains aquifer in most of western Nebraska.”¹⁷⁷ Of course, these are the sorts of issues that are appropriate for later determination on the merits of the issues in the proceeding.

¹⁶⁹ Tr. at 140-41.

¹⁷⁰ Tr. at 146.

¹⁷¹ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 68 (1994); see Cook Reply to CBR at 2.

¹⁷² Owe Aku Reply to CBR at 5; see also Cook Reply to CBR at 9.

¹⁷³ Cook Reply to CBR at 9 (citing ER at 3.4-79).

¹⁷⁴ *HRI*, LBP-98-9, 47 NRC at 275.

¹⁷⁵ Exhibit B, Detailed Summary at 1.

¹⁷⁶ See *supra* note 137.

¹⁷⁷ *Id.*

At this point, however, we find that neither the Applicant nor the NRC Staff advances arguments refuting the plausibility, at least, that potential groundwater contamination from ISL mining at the North Trend Expansion might mix with surrounding aquifers and affect private wells at some distances from the ISL mining location. And a determination that the “injury is fairly traceable to the challenged action . . . is not dependent on whether the cause of the injury flows directly from the challenged action, but *whether the chain of causation is plausible.*”¹⁷⁸

As Petitioners emphasize, it is at least plausible to conclude, in light of past undisputed excursions and spills from Applicant’s mining operations over the years, taken together with the lack of complete knowledge about the hydrogeology of the area in question, that there is the possibility of contamination of water that might mix with water ultimately used by at least some of the Petitioners.¹⁷⁹ In this regard we note that asserted harm “need not be great” to establish an injury in fact for standing,¹⁸⁰ and that the standing requirement for showing injury in fact “has always been significantly less than for demonstrating an acceptable contention.”¹⁸¹ In the case of exposure to radiation similar to that claimed by Petitioners here, “a small or minor unwanted exposure, even one well within regulatory limits, is sufficient to establish an injury in fact.”¹⁸²

As in effect suggested by Staff and Applicant, “upon further analysis it may turn out that there is no way”¹⁸³ for the radioactive materials and byproducts from the ISL mining operation at the North Trend Expansion site to cause harm to persons living nearby. But we similarly “[n]onetheless . . . can[not] decide, at this early stage of the proceeding, that there is no reasonable possibility that such harm could occur.”¹⁸⁴ Petitioners have demonstrated that some level of interconnection and conductivity between aquifers is plausible. It is in this context that we turn to the separate grounds for standing asserted by each of the Petitioners.

¹⁷⁸ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 (emphasis added).

¹⁷⁹ Owe Aku Reply to CBR at 6. We note that the town of Crawford takes its drinking water from the White River. Tr. at 126; ER 3.4-38. Although Crawford would appear to be upstream from Applicant’s new proposed expansion site, Tr. at 125-26, we note that there may be members of Petitioners who live downstream from the project, and that “[t]he river flows northeast into South Dakota, passing through boundaries of the Pine Ridge . . . Reservation”). ER at 3.5-16.

¹⁸⁰ *Hydro Resources, Inc.* (Crownpoint, New Mexico), LBP-03-27, 58 NRC 408, 414 (2003).

¹⁸¹ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 249 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994).

¹⁸² *HRI*, LBP-03-27, 58 NRC at 414.

¹⁸³ *Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 155 (1982).

¹⁸⁴ *Id.*

3. *Standing of Petitioner WNRC*

Petitioner WNRC asserts that its petition shows “palpable injury in fact to its organizational interests,” which are “to protect the natural resources of Western [Nebraska]”¹⁸⁵ with a focus on “potential water quality/quantity degradation practices.”¹⁸⁶ Petitioner WNRC also claims representational standing on behalf of four individuals.¹⁸⁷

One of these individuals, Dr. Francis E. Anders, lives in Crawford, Nebraska, about 1 mile from the current CBR mining operations.¹⁸⁸ Dr. Anders and his family use a well on his property for drinking, bathing, irrigation, and stock water. In his Affidavit he makes the following observations about his well and the water from it:

I have observed a bad odor emanating from my well water which was not present before [CBR] began drilling about one (1) mile from my well in Fall 2007.

I have observed that since CBR started drilling near my well in Fall 2007, there is a weekly cycle during which the CBR crew starts on Monday and by Wednesday, my well water becomes discolored, and the CBR crew quits on Friday and by Monday morning, my well water is clear again. This cycle repeats weekly.

Since CBR’s operations started, I have noticed an increase in the amount of sand in my water filter and in my toilet which I believe is due to the lowering of the water table.¹⁸⁹

We note that CBR’s ER indicates that a well referred to as the “Anders” well is located approximately 1.5 miles southeast of the proposed expansion site boundary.¹⁹⁰ It further appears that Dr. Anders’ well draws from the Basal Chadron aquifer,¹⁹¹ which is the same aquifer that CBR plans to mine in its proposed expansion operations.¹⁹² Thus, it is not necessary to rely on mixing of water in different aquifers in the case of Dr. Anders.

At oral argument, both the Applicant and NRC Staff argued that Dr. Anders’ affidavit fails to state an injury related to the license amendment, but instead

¹⁸⁵ Reference Petition at 7.

¹⁸⁶ WNRC Petition at A-1.

¹⁸⁷ Cook Reply to NRC at 6.

¹⁸⁸ See Anders Aff. ¶ 3.

¹⁸⁹ *Id.* ¶¶ 6-8.

¹⁹⁰ See ER at 4-10, 3.4-94. It does not appear to be disputed that the Anders well is that of Dr. Anders.

¹⁹¹ See ER at 4-10; Tr. at 127-28; see also Tr. at 142.

¹⁹² See ER at 4.3-78 (“The Production Zone in the North Trend is the Basal Chadron Sandstone”).

claims injury “related to the existing operation.”¹⁹³ Staff posits that such an injury is “really not within the scope of this proceeding.”¹⁹⁴ Applicant adds that “there is nothing here to suggest that there is a connection between the North Trend operations and what would be in [Dr. Anders’] well as it exists currently.”¹⁹⁵

We are not persuaded by the arguments of Staff and Applicant that the occurrences at Dr. Anders’ well that are allegedly associated with CBR’s current mining operations cannot be used to suggest potential injury from the proposed North Trend Expansion. First, this position is inconsistent with arguments made by the Staff and the analysis used throughout CBR’s Application that the current operation is relevant to the extent that it provides historical information on the adequacy of CBR’s radiation protection and monitoring programs, site characterization, operating procedures, and training programs.¹⁹⁶ These matters are obviously relevant to how the new proposed site might be operated if the license amendment request at issue is ultimately granted. Moreover, the close proximity of the Anders well to the boundary of the proposed expansion site — only 1.5 miles as compared to the 1-mile distance from CBR’s current mining operations¹⁹⁷ — seriously undercuts Staff’s and Applicant’s arguments. And when the occurrences Dr. Anders describes with his well water are taken into the mix,¹⁹⁸ along with the fact that his well draws from the same aquifer in which CBR proposes to mine in the North Trend site, it is impossible not to find a plausible injury in fact, traceable to the action at issue, which would be redressed by a decision favorable to Petitioner WNRC. We thus find that WNRC has standing to participate in this proceeding through its representation of the interests of Dr. Anders.

4. Standing of Petitioner Owe Aku

Petitioner Owe Aku, which was formed in 1998 to preserve and revitalize the

¹⁹³ Tr. at 126; *see also id.* at 155.

¹⁹⁴ *Id.* at 126.

¹⁹⁵ *Id.* at 155-56.

¹⁹⁶ *See, e.g.*, NRC Response at 22 n.18; Tr. at 127. CBR takes the approach throughout its Application of using previous and existing reports and studies of the current ISL mining operation for analysis of the proposed North Trend location. *See, e.g.*, ER at 3.4-50 to 3.4-51 (“the hydrogeology of North Trend area is expected to be similar in many respects to that encountered in the [current mining location]”).

¹⁹⁷ ER at 4-10; *see also* Anders Aff. ¶ 6.

¹⁹⁸ We note the NDEQ’s observation that the well in question, “while outside the proposed exemption boundary, will end up being located between two active uranium mining areas.” Exhibit B at 16. We also note the NDEQ’s recognition that “future potential failure of injection or production wells *through* the Brule . . . may result in communication with surface water.” *Id.* at 14 (emphasis added).

Lakota way of life, invokes representational standing through submission of four affidavits of persons authorizing Owe Aku to represent their interests. Affiant David Alan House indicates he resides outside Crawford, “approximately 8 miles south south-west of the [CBR] mining operation and proposed expansion.”¹⁹⁹ He states that he consumes water from a well on his property that he understands draws from the Brule Aquifer, and that he is also concerned with surface water contamination given CBR’s history of leaks.²⁰⁰

At oral argument Staff noted with regard to any surface water contamination (of the White River into which the North Trend Expansion Area would drain²⁰¹) that Mr. House lives upstream of the proposed project, arguing that any possible injury in fact could thus not be traceable to the proposed operation.²⁰² Applicant argued that the impacts on a petitioner from groundwater must be much greater than with surface water, “given the flow rate which in the Chadron . . . is on the order of 10 feet per year,” and that CBR’s monitoring wells 300 feet outside the production and injection wells of the project are “designed to capture any potential excursions.”²⁰³

Given our determination above that some level of mixing of the water between aquifers is at least plausible, particularly between the Brule and Chadron aquifers,²⁰⁴ we further find that the potential for contamination of the water Mr. House uses at his property 8 miles from the proposed North Trend area and “in the vicinity of Crawford”²⁰⁵ — the area the NDEQ suggests Applicant address with regard to “domestic water supplies” and “protect[ing] the health and safety of persons” in such vicinity²⁰⁶ — establishes a sufficiently plausible and specific threatened injury that is “fairly traceable to the challenged action.”²⁰⁷ We thus

¹⁹⁹ House Aff. at 1. Two other individuals (in addition to Debra L. White Plume, whose standing is discussed below) who submitted affidavits authorizing Owe Aku to represent their interests indicate respectively that they live 4 miles north of the Nebraska/South Dakota state line, and 100 yards from the White River in South Dakota, *see* Sauser and Davis Affidavits, which places Mr. House closest to the proposed North Trend Expansion Area.

²⁰⁰ House Aff. at 1-2.

²⁰¹ Tr. at 119.

²⁰² *Id.* at 119-20.

²⁰³ *Id.* at 136-38.

²⁰⁴ *See supra* section III.A.2.

²⁰⁵ Regarding the rates at which water in relevant aquifers flows, we note, as Petitioners point out in support of Contention A, Reference Petition at 11, that water in the Brule aquifer, from which Mr. House draws his water, moves at a rate of “less than 25 feet/day” according to the Application at 3.4-51, so that water from the Chadron that mixed with water in the Brule aquifer would, once it entered the Brule, move faster than Applicant asserts water moves in the Chadron aquifer, which could be significant given Petitioners’ claims of long-term effects. Reference Petition at 15, 18; *see also* Tr. at 258-61, 271-73, 282.

²⁰⁶ *See* Exhibit B at 17, as noted *supra* at text accompanying notes 79-81.

²⁰⁷ *Yankee*, CLI-98-21, 48 NRC at 195.

find that Owe Aku's allegations regarding its increased risk, supported by at least one member who has demonstrated a threatened injury that is reasonably plausible, traceable to the proposed project, and redressable by an ultimate ruling in Owe Aku's favor, are sufficiently specific, concrete, and particular to pass muster for representational standing.²⁰⁸

5. *Standing of Petitioner Slim Buttes Agricultural Development Corporation*

Petitioner Slim Buttes asserts "a palpable injury in fact to its organizational interests,"²⁰⁹ which are "to foster rural self-sufficiency and agricultural development" and to develop "small family and community gardens and farm projects" in the Pine Ridge Indian Reservation.²¹⁰ Slim Buttes is a nonprofit association, chartered by the Oglala Sioux Tribe, that has been in continuous operation for over 20 years, engaged in the development of these gardening and agricultural projects, 356 of which are currently tractor-tilled and supported "across the 4,500 square-mile reservation."²¹¹ The organization asserts among other things that its employees and clients "drink water from an aquifer that may mix with the Chadron aquifer and/or the Brule aquifer in which CBR mines uranium,"²¹² and "eat from the community gardens."²¹³ It is argued that approval of the Application "would put Petitioner's employees and clients, including the families who eat from the community gardens plowed by Petitioner, at . . . risk of personal health problems associated with contamination of the air, surface water and groundwater by CBR's operations."²¹⁴ Petitioner also claims to have representational standing through two individuals, Thomas K. Cook and Chief Joe American Horse,²¹⁵ each of whom has provided an affidavit stating that he authorizes Slim Buttes to represent his interests in this proceeding.

Affiant Cook indicates that he lives with his family in Chadron, Nebraska, which is 20 miles east of CBR's mining operation and 150 feet below the

²⁰⁸ See *supra* notes 117, 131-132.

²⁰⁹ Cook Reply to CBR at 5.

²¹⁰ Reference Petition at 7; see also Tr. at 78-79. We note the similarity of these interests to one of the purposes of the establishment of the Pine Ridge Reservation, i.e., to encourage the Oglala Sioux Tribe "to farm and raise livestock, as well as abandon a nomadic lifestyle and remain within the Reservation." See 1868 Fort Laramie Treaty art. 3; see also *supra* note 102.

²¹¹ Reference Petition at 7.

²¹² *Id.*

²¹³ *Id.* at 8.

²¹⁴ *Id.*

²¹⁵ Cook Reply to NRC at 6.

operation's elevation.²¹⁶ Also provided by Cook is a statement that Slim Buttes "has invested substantial resources in developing small family and community gardens which are irrigated with water from local wells," stating further that "[t]his work has been made more difficult by extreme drought conditions and the drying up of the White River that begins from headwaters near Crawford."²¹⁷ Affiant American Horse indicates that he lives in Pine Ridge, South Dakota, and also makes the same declaration of Slim Buttes' efforts in the community.²¹⁸ Both affiants for Slim Buttes also address the Oglala Sioux religious/cultural practice of "inipi" (a Lakota term referring to the practice called the "sweat lodge" ceremony²¹⁹) in which they participate and in which water is a central part of the practice.²²⁰

The Applicant and NRC Staff object to these affidavits and to Slim Buttes' claim for representational standing. They question the religious and cultural practices in which these two affiants state they engage,²²¹ arguing that no relationship is demonstrated in their affidavits between Slim Buttes and these religious practices, and that any alleged injuries that would occur in this regard are not within Slim Buttes' purpose and mission.²²² Staff also avers that the statements related to the work of Slim Buttes do not pertain to the individual standing of these affiants and are "thus inappropriate for the purpose of supporting representational standing of [Slim Buttes]."²²³

The standing of Slim Buttes presents a close question. On the one hand, the purpose of the organization, in supporting gardening and agriculture on the Pine Ridge Indian Reservation, is integrally tied to the need for water. In addition, the organization is concerned with long-term effects, for generations into the future,²²⁴ and there is no reason to believe that the Pine Ridge Indian Reservation will not remain where it is for generations into the future.

On the other hand, under controlling Commission case law, even taking into account long-term effects, it is appropriate to expect a fairly specific explanation of any injury asserted to be caused by the proposed project, given (1) the relatively low significance, as radioactive sources, of the uranium solution and yellowcake that would be involved in the proposed project, in comparison to other possible radioactive sources involving greater potential doses to the public; and (2) the

²¹⁶ Cook Aff. ¶ 3.

²¹⁷ *Id.* ¶ 4.

²¹⁸ American Horse Aff. ¶¶ 3, 4.

²¹⁹ Petitioners' Brief on Treaties at 19.

²²⁰ Cook Aff. ¶¶ 5, 6; American Horse Aff. ¶¶ 5, 6.

²²¹ CBR Response to Affidavits at 2, 3; NRC Response to Affidavits at 11.

²²² NRC Response to Affidavits at 11.

²²³ *Id.*

²²⁴ *See* Tr. at 99.

relatively greater distances involved in the case of Slim Buttes, in comparison to other Petitioners in this case, and in the *HRI* case, for example.²²⁵ This is not to say that any given distance would automatically confer, or result in a denial of, standing in a case involving ISL mining; many different variables, including the characteristics of the hydrogeology of a particular region and of aquifers in it,²²⁶ could inform any standing decision. In the circumstances of this proceeding, we find the distances in question to be too great to support any presumption of standing based on proximity alone. No such presumption is argued, however, and we must therefore look to whether any circumstances presented to us by this Petitioner support a finding based on “specific and plausible means” through which injury could occur.

In this regard, we note first that surface water plays more of a role with respect to Slim Buttes than it does with the other Petitioners. As recounted above, it is asserted that both ground and surface water may be contaminated as a result of the proposed expansion, and Affiant Cook also makes reference to the “drying up of the White River.”²²⁷ Moreover, the NDEQ in Exhibit B, offered in support of standing, raises questions about communication between the Brule and Basal Chadron aquifers and the White River.²²⁸ We also note that Petitioners in their support of Contention B refer to the fact that the proposed expansion site drains into the White River, which runs toward the Pine Ridge Reservation.²²⁹ Indeed, we observe that, according to the Application’s ER § 3.5.7, cited to us by Petitioners,²³⁰ the “White River . . . flows northeast into South Dakota, passing through boundaries of the Pine Ridge . . . Indian reservation[.]”²³¹ And we recall that at oral argument Petitioners amplified on an earlier reference in their Petition to a 300,000-gallon leak, to the effect that this spilled onto the frozen surface of the White River.²³²

We note further, regarding rivers generally and the question of how far contamination of various sorts may be carried in them, that although distances involved in case law on the subject are generally much shorter than those at issue here, there are cases involving significant distances in which plaintiffs have been found to have a right to apply for preventive relief (where copper mining tailings were carried 25 miles to plaintiff’s farm),²³³ or to prevail against a motion for

²²⁵ See *HRI*, LBP-98-9, 47 NRC at 277-78.

²²⁶ See *supra* section IV.B.

²²⁷ See *supra* text accompanying note 217.

²²⁸ Exhibit B at 14, 15; see Tr. at 87; see also *supra* notes 77, 78.

²²⁹ Reference Petition at 17 (citing to TR at 2.2-21).

²³⁰ *Id.* at 17.

²³¹ ER at 3.5-16.

²³² See Tr. at 289; Reference Petition at 2, 15.

²³³ See *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 52 (1913).

summary judgment (where chloride spillage was allegedly carried 100 miles to plaintiff's farm).²³⁴ We note with regard to the latter that the standard for deciding a motion for summary judgment is, of course, significantly stricter not only than that regarding contention admissibility, but even more so than that for determining standing.

In light of all these factors, we might be inclined to view favorably Slim Buttes' arguments in support of standing, but for certain circumstances that we find we cannot, in light of the Commission precedent discussed above, ignore in making our ruling. First, although Petitioner indicates that its employees and clients "drink water from an aquifer that may mix with the Chadron aquifer and/or the Brule aquifer in which CBR mines uranium," there is a lack of specificity as to how this might occur, in comparison, for example, with the arguments for standing and affidavits of WNRC and Owe Aku. Also, although there are references to surface water and to the White River, nowhere do we find any references to how water from the river or any other surface water might be used by any of Petitioners' members, clients, or employees, such as by using it to water gardens, for fishing and recreational purposes, or for any other purposes. Nor do we find any references to how close any member's residence, or any community gardens, might be to the river, such that there might be contamination by river water into which a leak from Applicant's mining operations might have spilled.²³⁵ In addition, although Petitioner presents compelling statements of the spiritual significance of water to the Oglala Sioux Tribe, no connection between such significance and the purposes of Slim Buttes itself is shown.

In sum, Petitioner alludes to a number of promising avenues for demonstrating standing, but fails to follow any to a concrete, particular, and specific conclusion that would plausibly establish its standing.²³⁶ We must therefore find that Petitioner Slim Buttes has not shown standing to participate in this proceeding as a party. We note in making this ruling, however, that its contentions are the same as those submitted by the Petitioners for whom we do find standing, and that the same counsel who represents Slim Buttes also represents WNRC; therefore it is to be expected that as a practical matter the interests of Slim Buttes will be protected in this proceeding. Moreover, members of Petitioner may attend, and may possibly be able to offer relevant testimony in this proceeding regarding, for example, agricultural issues that may be of concern to Slim Buttes.

²³⁴ See *Hale v. Colorado River Municipal Water District*, 818 S.W.2d 537, 538-39 (Tex. 1991).

²³⁵ On a map of the area, the river appears to run about 15 miles from the town of Pine Ridge, South Dakota. The *Times Atlas of the World* 108 (Times Books ed., 8th ed. 1990).

²³⁶ See *supra* notes 117, 131-32.

6. *Standing of Petitioner Thomas Kanatakeniate Cook*

Like Slim Buttes, Petitioner Cook presents a close case. He states that he lives approximately 20 miles east of the proposed North Trend Expansion site, downwind and downgrade from it, and drinks water from a well that draws from an aquifer that “may mix with the Basal Chadron . . . or Brule aquifer.”²³⁷ Mr. Cook is also a Commissioner on the Nebraska Commission on Indian Affairs and thus has a special interest in this proceeding. We are not, however, aware of any law that would make this admirable involvement in community affairs on his part relevant to his standing in this proceeding. And, given the relatively greater distance of his home from the site in comparison to those of others, and the somewhat speculative nature of his assertion regarding his well, we are constrained to find that he has not plausibly shown, with sufficient specificity, concreteness, or particularity, how he might be injured as a result of CBR’s proposed expansion of mining operations, so as to establish standing. Again, in making this ruling we are not suggesting that any particular distance would or would not confer standing in any case, as all such rulings are dependent on a variety of factors, as discussed above with regard to the standing of Slim Buttes. But in this case we find the combination of factors presented is not sufficient for us to conclude that Petitioner Cook has demonstrated standing to participate in this proceeding. We note, however, that given his clear interest in, and devotion of time and energy to, the issues put forward by all the Petitioners, he may wish to follow the proceeding as it progresses, and may indeed be able to provide testimony on such issues as drought, based on the information in his Affidavit.

7. *Standing of Debra L. White Plume*

Petitioner Debra L. White Plume, like Petitioner Cook, states that she lives downwind of the proposed expansion site, and that she drinks water from a well that “draws water from an aquifer that may mix with the Chadron . . . or Brule aquifer in which CBR mines.”²³⁸ She lives 60 miles from the site.²³⁹ In her December 28, 2008, Affidavit, however, she also provides various additional information, including that she and her family fish in the White River, “which drains from the project area and then flows through the Pine Ridge Reservation,” and that “[i]f this River is contaminated, we will lose valuable fishing rights.”²⁴⁰ She also states that the proposed expansion area is where her family gathers eagle

²³⁷ Reference Petition at 6.

²³⁸ *Id.* at 6-7.

²³⁹ White Plume Aff. at 1.

²⁴⁰ *Id.* at 2.

feathers for ceremonial uses, and that she is concerned that “the expansion will scare the eagles away and interfere with our religious practices.”²⁴¹

Staff opposes Ms. White Plume’s standing on several grounds, including that she “does not specify at what location on the river she fishes and the frequency with which this activity occurs,” and that she “does not state how often she participates in [gathering eagle feathers, or] explain why the proposed expansion would scare eagles away.”²⁴² Applicant argues that her Affidavit is “speculative and conjectural as well as irrelevant.”²⁴³

In our discussion of the standing of Petitioner Slim Buttes we addressed particular considerations relating to rivers and how far contamination might be carried in them, noting one case in which a plaintiff prevailed against a motion for summary judgment where chloride spillage was allegedly carried 100 miles to his farm.²⁴⁴ Ms. White Plume states that she lives 60 miles from the proposed expansion site, and thus it may reasonably be presumed that she fishes at a location approximately the same distance from the site, in any event within 100 miles of it. She makes specific reference to CBR’s operations draining into the White River. In contrast to our ruling on the standing of Slim Buttes, therefore, we find that Ms. White Plume has sufficiently provided specific, concrete, and particular information plausibly demonstrating how she might be injured as a result of CBR’s proposed expansion of mining operations. Taking her statement of fishing in the White River together with the information about the past spill onto the frozen White River,²⁴⁵ along with the information from Exhibit B raising questions about communication between the Brule and Chadron aquifers and the White River,²⁴⁶ we find that Petitioner Debra L. White Plume has established standing to participate as a party in this proceeding.²⁴⁷

V. STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

As has previously been noted in a number of NRC adjudications,²⁴⁸ to in-

²⁴¹ *Id.*

²⁴² NRC Response to Affidavits at 5.

²⁴³ CBR Response to Affidavits at 4.

²⁴⁴ *See supra* note 234.

²⁴⁵ *See supra* text accompanying note 232; *infra* text accompanying note 350.

²⁴⁶ *See supra* text accompanying notes 77, 78.

²⁴⁷ The standing of Ms. White Plume also provides an alternative ground for finding standing on the part of Owe Aku.

²⁴⁸ *See, e.g., Pilgrim*, LBP-06-23, 64 NRC at 272-74; *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 302-12 (2007). An Appendix to the *Pilgrim* decision provides a more detailed summary of relevant case law on contention admissibility than that found in this Memorandum and Order. *See also Pilgrim*, LBP-06-23, 64 NRC at 351-59.

tervene in such a proceeding a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).²⁴⁹ Failure of a contention to meet any of the requirements of section 2.309(f)(1) is grounds for its dismissal.²⁵⁰ Heightened standards for the admissibility of contentions originally came into being in 1989, when the Commission amended its rules to “raise the threshold for the admission of contentions.”²⁵¹ The Commission has stated that the “contention rule is strict by design,” having been “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’”²⁵² More recent amendments to the NRC procedural rules, which went into effect in 2004,²⁵³ put into place various additional restrictions²⁵⁴ and

²⁴⁹ See 10 C.F.R. § 2.309(a). Section 2.309(f)(1) states that:

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to the specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.

²⁵⁰ See *Private Fuel Storage, L.L.C. [PFS]* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

²⁵¹ Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989); see also *Oconee*, CLI-99-11, 49 NRC at 334.

²⁵² *Millstone*, CLI-01-24, 54 NRC at 358 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

²⁵³ See 69 Fed. Reg. at 2182.

²⁵⁴ For example, the current version of the rules no longer incorporates provisions formerly found in 10 C.F.R. § 2.714(a)(3), (b)(1), which permitted the supplementation of petitions and the filing of contentions after the original filing of petitions. Under the current rules, contentions must be filed with the original petition within 60 days of notice of the proceeding in the *Federal Register*, unless a longer period is therein specified; an extension is granted, see *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004), *reconsideration denied*, (Continued)

changes to provisions relating to the hearing process.²⁵⁵ The rules do, however, contain essentially the same substantive admissibility standards for contentions.

The Commission has explained that the “strict contention rule serves multiple interests.”²⁵⁶ These include the following (quoted in list form):

First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies.

Second, the rule’s requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners’ specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing.

Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.²⁵⁷

In its Statement of Considerations adopting the most recent revision of the rules, the Commission reiterated the same principles that were previously applicable, namely, that “[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.”²⁵⁸

It has also, however, been recognized that “technical perfection is not an essential element of contention pleading,”²⁵⁹ and that the “[s]ounder practice is to decide issues on their merits, not to avoid them on technicalities.”²⁶⁰ Nonetheless,

CLI-04-35, 60 NRC 619, 625 (2004); 69 Fed. Reg. at 2200; or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time, *see* 10 C.F.R. §§ 2.309(b)(3)(iii), (c), (f)(2).

²⁵⁵ In this connection we note that a challenge to the new rules by several public interest groups was rejected in the case of *Citizens Awareness Network, Inc. v. NRC* [*CAN v. NRC*], 391 F.3d 338 (1st Cir. 2004), on the basis that the new procedures “comply with the relevant provisions of the [Federal Administrative Procedure Act (APA)] and that the Commission has furnished an adequate explanation for the changes.” *Id.* at 343; *see id.* at 351, 355.

²⁵⁶ *Oconee*, CLI-99-11, 49 NRC at 334.

²⁵⁷ *Id.* (citations omitted).

²⁵⁸ 69 Fed. Reg. at 2189-90.

²⁵⁹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001) (citing *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979), in which it is stated that “[i]t is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed”).

²⁶⁰ *South Texas*, ALAB-549, 9 NRC at 649.

the rules are still held to “bar contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’”²⁶¹

A petitioner must “read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.²⁶² A contention must directly controvert a position taken by the applicant in the application,²⁶³ and “explain why the application is deficient.”²⁶⁴ And a petitioner must support its contentions with “[d]ocuments, expert opinion, or at least a fact-based argument.”²⁶⁵

A petitioner is not, however, “require[d] . . . to prove its case at the contention stage,”²⁶⁶ and “need not proffer facts in ‘formal affidavit or evidentiary form,’ sufficient ‘to withstand a summary disposition motion.’”²⁶⁷ But “a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.”²⁶⁸ In other words, “a petitioner ‘must present sufficient information to show a genuine dispute’ and reasonably ‘indicating that a further inquiry is appropriate.’”²⁶⁹ “[S]ome sort of minimal basis indicating the potential validity of the contention” is required.²⁷⁰

A petitioner is not required “to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention.”²⁷¹ Finally, the “brief explanation of the basis” that is required by section 2.309(f)(1)(ii) helps define the scope of a contention — “[t]he reach of

²⁶¹ *McGuire*, CLI-03-17, 58 NRC at 424 (citing *Oconee*, CLI-99-11, 49 NRC at 337-39).

²⁶² 54 Fed. Reg. at 33,170; *Millstone*, CLI-01-24, 54 NRC at 358.

²⁶³ See *Oconee*, CLI-99-11, 49 NRC at 342.

²⁶⁴ 54 Fed. Reg. at 33,170; *Palo Verde*, CLI-91-12, 34 NRC at 156.

²⁶⁵ *Oconee*, CLI-99-11, 49 NRC at 342.

²⁶⁶ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citing 54 Fed. Reg. at 33,171).

²⁶⁷ *Id.* (citing *Georgia Tech*, CLI-95-12, 42 NRC at 118).

²⁶⁸ *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980); see 54 Fed. Reg. at 33,171.

²⁶⁹ *Yankee*, CLI-96-7, 43 NRC at 249 (citing 54 Fed. Reg. at 33,171; *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 204 (1980)); *Vermont Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519, 554 (1978)). See also *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). It has also been observed that a contention must demonstrate “that there has been sufficient foundation assigned for it to warrant further exploration.” See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990) (footnote omitted).

²⁷⁰ 54 Fed. Reg. at 33,170.

²⁷¹ *LES*, CLI-04-35, 60 NRC at 623.

a contention necessarily hinges upon its terms coupled with its stated bases.’’²⁷²
But it is the contention, not ‘‘bases,’’ whose admissibility must be determined.²⁷³

VI. BOARD ANALYSIS AND RULINGS ON PETITIONERS’ CONTENTIONS

Petitioners raise six contentions,²⁷⁴ identified as Contentions A through F, the first two of which concern alleged contamination of water resources, with resulting alleged impacts on the environment and public health and safety. Our discussion of these first two contentions begins with discussions of each contention and all responses and arguments relating to each as presented to us, and concludes with our rulings on all of the issues presented in both contentions. We ultimately decide to admit the contentions in somewhat limited form, and reframe them in a manner that more clearly sets forth those issues that we find Petitioners have adequately presented and supported so as to be litigable in this proceeding. We consolidate the proposed environmental issues that we find admissible and that would logically fall under the National Environmental Policy Act (NEPA) into one admitted contention, and the public health and safety issues that we find admissible and that would fall under the Atomic Energy Act (AEA) into a second admitted contention. We recognize that this results in a somewhat artificial separation of issues, given the interrelatedness of the two sets of issues, both of which are centered primarily in the underground geology of the area surrounding the proposed expansion area and the ways, and extent to which, groundwater may move among underground aquifers and interact with surface water, and thereby potentially affect both the environment and public health and safety through the same underlying mechanisms. However, the NRC’s authority and responsibility to regulate the matters in dispute in this proceeding arise out of two sets of standards, found in NEPA and the AEA, and thus, for the sake of analytical clarity under these dual sets of standards — particularly given the absence of any rules specifically setting standards in ISL cases — we find that proceeding in the manner described makes for the most effective organization of issues under the circumstances.

With the exception of Contention E, on which we defer our ruling until further briefing and argument on related legal issues, our discussion and analysis of Petitioners’ remaining contentions proceeds in the traditional manner, addressing and ruling on the issues and arguments relating to each contention separately and

²⁷² *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991).

²⁷³ See 10 C.F.R. § 2.309(a).

²⁷⁴ Reference Petition at 1-2.

individually. We note further that, in an introductory section of their Petition, Petitioners list several “Relevant Facts,” which they then incorporate by reference into the basis discussion for each separate contention.²⁷⁵ In our consideration of each contention we have taken these alleged facts also into account.

A. Contention A: Alleged Contamination of Water Resources

Petitioners in Contention A state:

CBR’s Mining Operations Use And Contaminate Substantial Water Resources and Radioactive Wastewater Mixes With Brule and High Plains Aquifers and Moves in a Slow-Moving Plume.²⁷⁶

1. Petitioners’ Support for Contention A

In this contention Petitioners challenge parts of the Application having to do with water usage and with the hydrology and geology of the area surrounding the proposed expansion site, charging essentially that water used in CBR’s mining process is not returned to the ground in the same condition in which it was removed, and that due to movement of allegedly contaminated water through fractures that allow for transport and mixing of the groundwater in various aquifers, the public health and safety is endangered. Petitioners assert that CBR currently “[u]ses 9,000 gallons per minute [gpm] of pristine water and returns that amount of radioactive, geochemically changed water to the Chadron aquifer.”²⁷⁷ Petitioners state that “[t]he basis for the contentions is that [in] several places in the Application and in . . . public testimony . . . CBR gives a misimpression that its water usage is relatively nominal,” but that “a ‘net consumption’ number suggested by CBR of about 113 gpm” is incorrect “because the water returned to the aquifer is very different [in that] it contains low-level radioactivity.”²⁷⁸ Petitioners assert that “[t]he issue is in the scope of the proceeding because CBR seeks to use . . . 4,500 gpm [in addition to the 9,000 gpm used under its current license], for a total of []13,500 gpm, at a time when the aquifer is not recharging as fast as it is being used and at a time of widespread drought.”²⁷⁹

²⁷⁵ See *id.* at 2-5, 9, 15, 21, 23, 25, 26.

²⁷⁶ *Id.* at 1, 9.

²⁷⁷ *Id.* at 9; see also *id.* at 2.

²⁷⁸ *Id.* at 9. The public testimony to which Petitioners refer occurred in an August 21, 2007, Legislative Hearing on Uranium Mining in Northwest Nebraska held before the Nebraska Natural Resources Committee.

²⁷⁹ Reference Petition at 9. Petitioners cite ER § 1.1.3, “Operating Plans, Design Throughput, and Production,” which indicates that CBR’s current plant “is licensed for a flow rate of 5,000 gallons per

(Continued)

Petitioners argue that the issue put forth in Contention A “is material to the findings of the NRC” because the NRC “is required to determine whether CBR’s current operation and proposed operation is in the best interests of the general public [and] water usage is key to that determination.”²⁸⁰ Petitioners “believe[] there is a slow-moving plume of radioactive water in the High Plains aquifer caused by CBR’s current operation[,] . . . which poses a health risk to the people who use the High Plains aquifer in Colorado, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming.”²⁸¹ They contend that “[t]he Arikaree aquifer that runs under the Eastern portion of Pine Ridge Indian Reservation mixes with the Brule aquifer in which CBR has documented radioactive leaks[,] and mixes further with the other elements of the High Plains aquifer.”²⁸²

Petitioners cite the *USGS Ground Water Atlas*, contending that it “indicates that the Brule aquifer mixes with the unconfined water in the High Plains aquifer and that the High Plains aquifer is being depleted faster than it is being recharged.”²⁸³ Moreover, they claim, CBR states in its Application that it returns the water to the aquifer in a changed state and “that there is slow movement between fractures in Brule aquifer and the High Plains aquifer.”²⁸⁴ Petitioners assert that “[l]ittle is known about the White River Fault [a structural feature of the local geology] and how it may contribute to fractures that allow for movement of radioactive water when Excursions occur.”²⁸⁵

In support of their arguments Petitioners quote from several parts of the Application’s Technical and Environmental Reports. First they contrast ER 2.2 with ER 5.4.1.3.2. The first of these addresses groundwater “restoration” and states among other things that the “goal of the groundwater restoration is to return the water quality of the affected zone to a chemical quality consistent with baseline conditions or, as a secondary goal, to the quality level specified by the [NDEQ].”²⁸⁶ ER 5.4.1.3.2 concerns the “Establishment of Restoration Goals” and states that, although

minute, excluding restoration flow, under SUA-1534,” and that the proposed North Trend satellite plant “will operate at a flow rate of 4,500 gpm with an expected annual production rate of 500,000 to 600,000 pounds U₃O₈,” in support of their argument that “restoration flow should always be excluded when discussing water usage because radioactive water is not equal to pristine water.” *Id.* at 14.

²⁸⁰ *Id.* at 9.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*; see *supra* note 137.

²⁸⁴ Reference Petition at 9.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 10 (quoting from ER at 2-5).

the primary goal of restoration is to return the mine unit to preoperational water quality condition on a mine unit average[, s]ince ISL operations alter the groundwater geochemistry, it is unlikely that restoration efforts will return the groundwater to the precise water quality that existed before operations. Restoration goals are established by NDEQ to ensure that, if baseline water quality is not achievable after diligent application of best practicable technology (BPT), the groundwater is suitable for any use for which it was suitable before mining. NRC considers these NDEQ restoration goals as the secondary goals.²⁸⁷

Petitioners suggest that this shows that water used in CBR's proposed expansion of mining operations will not "really [be] restored" to its prior condition, and that "CBR knows [this]."²⁸⁸

Petitioners cite TR 2.2.3 for the statement "that Basal Chadron is not used for domestic supply in the North Trend area," with Petitioners urging that the section "omits to state that water that mixes with Basal Chadron and Brule aquifers is used by people and animals in the areas surrounding the North Trend area."²⁸⁹ Petitioners also quote the following two sections on water use:

ER 3.4.5 WATER USE INFORMATION

As discussed . . . in Section 3.4.1, local water use is very limited. Isolated household wells are completed in the Brule Formation, and the city of Crawford uses two wells completed in the Brule outside the North Trend Expansion Area (see Figure 3.4-2). One well completed in the Basal Chadron is used for household purposes (Well No. 61; approximately 1.5 miles southeast of the Expansion Area boundary).²⁹⁰

ER 4.4.3.1 Groundwater Consumption

. . . . [A related] application states that water levels in the City of Crawford (approximately three miles northwest of the mining area) could potentially be impacted by approximately 20 feet by consumptive withdrawal of water from the Basal Chadron Sandstone during mining and restoration operations (based on a 20-year operational period).

A similar order of magnitude impact (drawdown) likely exists for the North Trend operations. No impact to other users of groundwater is expected because: (1) there is no documented existing use of the Basal Chadron in the proposed North Trend expansion area; and, (2) the potentiometric head of the Basal Chadron Sandstone in

²⁸⁷ *Id.* (quoting from ER at 5-24).

²⁸⁸ *Id.* at 10.

²⁸⁹ *Id.* at 10 (emphasis omitted).

²⁹⁰ *Id.* at 14 (quoting ER at 3.4-94). As noted in our discussion of standing above, *see supra* text accompanying notes 190-192, section 4.4.3.1 of the ER, at 4-10, also indicates that Well No. 61 is the Anders well.

the North Trend expansion area ranges from approximately 10 to more than 50 feet above ground surface.²⁹¹

Petitioners assert that these sections omit relevant information concerning local use in towns and farms beyond the 2-mile radius.²⁹²

Petitioners cite the following sections of the Application as showing that there are fractures that would allow mixing of water from different aquifers:

TR 2.6.2.5 Upper Chadron and Brule Formations, Upper Confinement

Based on data from the CSA,²⁹³ the vertical hydraulic conductivity of the upper confining intervals at Crow Butte is less than 1.0×10^{-10} cm/sec.

* * * * *

Infrequent fine-to-medium-grained sandstone channels have been observed in the lower part of the Brule Formation. When observed, these sandstone channels have very limited lateral extent. The Brule-Chadron contact is sometimes difficult to ascertain, as the contact between the two formations is gradational and cannot be consistently picked in drill cuttings or electric logs. Therefore, the Upper Chadron/Lower Brule may be considered a single confining interval.

ER 3.4.3.1 Regional Groundwater Hydrology

Souder indicates that the Brule is a tight formation with a minimal hydraulic conductivity of less than 25 feet/day, although in a few areas there may be a significant saturated thickness, presumably where sandier intervals are present. The Chadron is described as consisting of claystones with extensive volcanic ash that is tight with low hydraulic conductivity comparable to the Brule, except where fractured, although the coarse Basal Chadron Sandstone is present at the bottom of the formation. The Pierre is described by Souders (2004) as a dark grey, bentonitic shale that is “very tight and is not considered to hold any extractable groundwater” except where fractured. Fractures may increase Brule and Chadron permeability in localized areas (Souders, 2004). It is noted that CBR operations in the CSA to date do not support evidence of fracturing in the Pierre to a degree such that it would impact the designation of the Pierre as a lower confining unit below the Basal Chadron Sandstone.²⁹⁴

Petitioners contend that the preceding selections demonstrate the possibility of more saturated areas, and state that CBR’s indication that there is no fracturing in the Pierre “to the degree that it would no longer serve as a lower confining unit”

²⁹¹ *Id.* (quoting ER at 4-10).

²⁹² *Id.*

²⁹³ We note that, according to the Application, “CSA” is an acronym for “Commercial Study Area.” TR at 2.6-1, 2.6-9; *see also* ER at 3.4-50.

²⁹⁴ Reference Petition at 11 (quoting from ER at 3.4-51, 4-52).

is “in contention.”²⁹⁵ They also cite ER § 3.4.3.2 as demonstrating the possibility of “movement of radioactive water amongst the aquifers,”²⁹⁶ and ER § 3.4.3.3 to support their challenge of CBR’s statement that “adequate confinement exists[,] in light of admitted conductivity between the Brule formation and High Plains aquifer.”²⁹⁷

Petitioners cite ER 3.4.4 as showing that “CBR admits that failures with its Chadron well casing caused increased Uranium and Radium-226 in the Brule well,” and that “[t]his shows contamination of the Brule which flows unconfined with the High Plains aquifer.”²⁹⁸ This section provides:

ER 3.4.4 Surface Water and Groundwater Quality

CBR believes that integrity problems with the Chadron well casing may have had an impact on the water quality in the Brule well. The Chadron well has since been plugged and abandoned. It is noted that gross alpha and beta analyses were not performed because uranium and radium were the anticipated compounds and were thus specifically included on the analyte list.²⁹⁹

Petitioners contend that the following sections “show[] that CBR really doesn’t know whether the White River fault, tectonic movements and/or nearby drilling of other wells will cause increased movement of water between the aquifers’’:³⁰⁰

TR 2.6.2.7 — North Trend Structure

....

In summary, current data suggest that the White River Fault may be present at depth and movement along this feature impacted the deposition of the Middle/Upper Chadron. However, data do not clearly require that this fault transect the Middle/Upper Chadron or Brule, and mapped data suggest that movement along the structure occurred during deposition of the Chadron/Brule via uplift of a monocline or fold in this area. Crow Butte is committed to conduct additional exploratory drilling to better define the nature of the feature before commencing mining operations.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 12 (citing ER at 3.4-71).

²⁹⁷ *Id.* at 12 (citing ER at 3.4-78 to 3.4-79).

²⁹⁸ *Id.* at 13.

²⁹⁹ *Id.* at 12-13 (quoting from ER at 3.4-83). Petitioners also allege that ER Table 3.4-15, which is a “Laboratory Analysis Report [for] Brule Well W-78,” “shows arsenic in Brule rising from .005, to .006, to .007 [parts per million or ppm] in a few months in 1997,” noting that “this is from the existing ISL mining operation which had a large spill in 1997.” *Id.* at 13.

³⁰⁰ *Id.* at 14.

ER 4.3.1 Geologic Impacts

If the White River structural feature is in fact a fault, changes in aquifer pressure potentially could impact activity related to the fault and the transmissive characteristics of the fault (e.g., resistance to flow). There are numerous documented cases where injection in the immediate vicinity of a fault has caused an increase in seismic activity. However, such response typically occurs when injection operations have increased the pressure in the aquifer by a significant amount (e.g., 40 to 200 percent pressure increase over initial conditions). The pressure in the Basal Chadron will be increased by localized scale by injection operations during mining and restoration operations, and will be more than offset by production within each wellfield pattern.

ER 3.4.6 CONCEPTUAL MODELING OF SITE HYDROLOGY

Regional data regarding flow in the Basal Chadron are limited. Based on those data, the structural feature does not appear to dramatically impact flow in the Basal Chadron Sandstone. Additional investigations to be conducted during development of North Trend are expected to provide detailed information regarding the impact of this feature on regional and local flow in the Basal Chadron.³⁰¹

Petitioners state that “CBR is assuming things about the structural feature — the White River Fault — related to the flow in the Basal Chadron Sandstone,” which they contend means that CBR “do[es]n’t know about how contained the radioactive fluid will be.”³⁰²

Petitioners also cite TR § 2.2.2.2.1, which concerns agriculture in the vicinity of the expansion area, stating that it “omits to state that huge numbers of people rely on . . . irrigated water for farms, pasture, habitat and/or rangeland,” and that CBR considers only a “2.25 mile radius for this purpose[,] when it should consider entire radius of at least 80 Km or the radius involving the 174,000 sq. miles of the High Plains aquifer.”³⁰³ In addition, according to Petitioners, the Application “fails to state that area is in the 8th year of a drought,” or “what impact [an] earthquake would have besides causing leaks of radioactive material into the water supplies,” or “how [the] risk of earthquakes and tectonic shifts would be mitigated.”³⁰⁴ Finally, Petitioners suggest that a statement in ER § 4.3.1, that “water and wind erosion are concerns at the North Trend site,” indicates the importance of evaluating climate change.³⁰⁵

³⁰¹ *Id.* at 13 (quoting from TR at 2.6-16, 2.6-17; ER at 3.4-97, 4-6).

³⁰² *Id.* at 14.

³⁰³ *Id.* at 10 (referring to TR at 2.2-10).

³⁰⁴ Reference Petition at 10.

³⁰⁵ *Id.*

2. *Applicant's Response to Contention A*

Applicant CBR argues that Contention A is not admissible because Petitioners in it “do nothing more than set forth Petitioners’ attempt to characterize as a consumptive use the non-consumptive use of water CBR is permitted to withdraw and reinject.”³⁰⁶ According to CBR, “[n]inety-nine percent (99%) of the water CBR withdraws is in fact reinjected.”³⁰⁷ Further, Petitioners’ belief that there is a slow-moving plume of radioactive water in the High Plains aquifer caused by CBR’s current operations is “misplaced,” first, because the Brule aquifer is “not hydrologically connected to the Arikaree Aquifer,” and the Arikaree is “not present in the area in question.”³⁰⁸ Second, according to CBR, as required by the NRC it “collect[s] quarterly uranium and radium²²⁶ samples from the streams, impoundments and private wells located within one kilometer of an active mining unit,” and the radiochemistry of these samples “does not indicate the presence of any radioactive contamination,” with the private wells all having a “uranium concentration below the drinking water standard of 0.03 mg/l.”³⁰⁹ In addition, CBR has installed monitoring wells “to monitor the horizontal or vertical movement of mining solutions in the Chadron and Brule formation,” and according to CBR, “[i]n order for there to be a slow-moving radioactive plume of contaminated water moving through the related aquifers, such phenomenon would have to have gone undetected” by 177 shallow monitor wells and 142 deep monitor wells in the Chadron formation, which are sampled on a biweekly basis.³¹⁰ CBR asserts that all other allegations are “not factually based.”³¹¹

3. *NRC Staff's Response to Contention A*

In response to Petitioners’ Contention A, NRC Staff argues that the “numerous allegations” Petitioners raise related to groundwater use and contamination are “immaterial to these proceedings; not adequately supported with documentation or expert opinion; and[] not stated with sufficient specificity to support an admissible contention.”³¹² Moreover, Staff urges, to the extent any of these allegations relates to CBR’s current mining operation, they are “not material

³⁰⁶ CBR Response at 3.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 3-4.

³¹¹ *Id.* at 4.

³¹² NRC Response at 20. Staff also faults Petitioners for not having provided the testimony they cite from a Nebraska Natural Resources Committee hearing, and for providing an incorrect citation for it. *Id.* note 16. We note, however, that Petitioners did later, with their Replies, provide a copy of this testimony.

to this license amendment, and should be rejected.”³¹³ The Staff treats each of fourteen subparts of the basis offered by Petitioners in support of Contention A separately, in effect arguing that none on its own is an admissible contention, and otherwise making largely the same arguments with regard to each.³¹⁴ In Staff’s view, Petitioners fail to provide supporting documents or expert opinion to controvert the statements in the application.³¹⁵ Further, Staff argues, Petitioners provide no “basis in fact or law controverting the application,” and their claims are “not a challenge to the adequacy of the application” and are therefore “insufficient to establish an admissible contention.”³¹⁶

Staff responds to Petitioners’ claims regarding water use by asserting that Petitioners “have not provided expert opinions or documentation indicating that the aquifer will not be restored according to NDEQ regulations,” and that the “contention” that “‘restoration efforts will not meet . . . proposed goals’ has no basis and is inadmissible.”³¹⁷ Stating that data in the Application “demonstrat[es] that groundwater in the Chadron Formation already contains radionuclides and other inorganic constituents that render the groundwater unsafe for human consumption and, thus [] not ‘pristine,’”³¹⁸ Staff faults Petitioners for not providing “any analytical data to the contrary or show[ing] that the Applicant is required to restore the groundwater to a more pristine level.”³¹⁹ Nor, according to Staff, “have they challenged [the] factual underpinnings of the application related to groundwater restoration.”³²⁰

³¹³ *Id.*

³¹⁴ We note that Petitioners do use the word “contention” in several places within what we consider to be the basis for each contention, thus providing occasion for confusion. We note further, however, that on the first page of their Petition they indicate their intent to submit only six “contentions” in NRC parlance, listing six “Admissible Contentions” identified by the letters A through F — which they indicate are “described in detail” in another part of the Petition. We consider these “detailed descriptions” to be the bases for the six contentions, and take the more generic use of the word “contention” at multiple points in these bases to be intended merely to introduce various arguments in support of the six “Contentions” listed at the beginning of the Petition. *See also* Tr. at 240-44.

³¹⁵ NRC Response at 27, 28, 29, 30, 31, 32.

³¹⁶ *Id.* at 31 (citing *Rancho Seco Nuclear Generating Station*, LBP-93-23, 38 NRC at 247-48); *see also id.* at 26, 28, 29, 32.

³¹⁷ *Id.* at 26.

³¹⁸ *Id.* at 21 (citing ER at 3.4-39, 3.4-40). We also note, regarding Petitioners’ reference to Table 3.4-15 of the Application showing “arsenic in Brule rising from .005 to .006, to .007 in a few months in 1997,” that Staff disputes the significance of this, stating that the actual arsenic level readings were 0.005, 0.003, 0.006, and 0.007, and arguing that “therefore there was not a continuous rise in the values,” which are in units of parts per million, so that “the variation may reflect inherent variation in the measurement technique or natural water quality rather than a true increase in arsenic levels.” *Id.* at 31 n.25.

³¹⁹ *Id.* at 21.

³²⁰ *Id.*

Staff also argues that Petitioners' allegations regarding NDEQ standards being used to " 'restore' an aquifer that is not really restored," and challenging ER 2.2, constitute "impermissible challenge[s] to the existing license conditions."³²¹ Staff states that "NRC's groundwater protection program is embodied in NUREG-1569,³²² which the Staff developed at the Commission's direction."³²³ Claiming that Petitioners' challenge to the Applicant's use of the NDEQ groundwater restoration standards as secondary standards is impermissible because "CBR does not propose to modify that license condition in this amendment application,"³²⁴ Staff further argues that Petitioners' challenges to the "adequacy of the NRC's groundwater restoration standards [are] impermissible under 10 C.F.R. § 2.335(a)."³²⁵

Regarding "Petitioners[]" assertion that the Basal Chadron is used by animals and people," Staff argues that this is "not a challenge to the adequacy of the application because the application provides documentation that it is unsuitable for domestic or livestock purposes."³²⁶ "In any event," Staff argues, "without sufficient documentation to support their belief, the contention should be rejected."³²⁷

In the Staff's view, Petitioners have also failed to present any supporting facts or documentation for the existence of a "slow moving plume," citing legal precedent for the principle that "speculation or bare assertions that a matter should be considered are not sufficient to allow admission of a contention."³²⁸ Petitioners have, according to Staff, "failed to present any support, expert or otherwise, for the assertion that 'radioactive wastewater' mixes with Brule and High Plains Aquifers, or that the plume, if it does exist, poses a health threat."³²⁹ Staff asserts that the Applicant "provides data in its Technical Report [at 2.7-37] that

³²¹ *Id.* at 24; *see* Reference Petition at 10.

³²² NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications: Final Report" (June 2003).

³²³ NRC Response at 25 n.21 (citing National Mining Association; Denial of Petition for Rulemaking, 67 Fed. Reg. 44,573, 44,577 (July 3, 2002)). Staff also quotes the following language from "License Condition 10.3C":

The secondary goal of groundwater restoration shall be on a parameter-by-parameter basis to return the average well field unit concentration to the numerical class-of-use standards established by the [NDEQ]" *Id.* at 25.

³²⁴ *Id.*

³²⁵ *Id.* at 32. In oral argument, Staff argued alternatively that "that license condition is not within the scope of this proceeding." Tr. at 240.

³²⁶ NRC Response at 28 (citing TR at 2.2-4).

³²⁷ *Id.*

³²⁸ *Id.* at 22 (citing *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003)).

³²⁹ *Id.*

demonstrates hydraulic separation between the Brule and Chadron Formations,’’ and that Petitioners provide no information to counter this.³³⁰

On Petitioners’ references to the USGS Atlas, Staff argues that “on its face [it] cannot be used to explain the conditions at the North Trend site or to challenge the adequacy of the application.”³³¹ Statements from the Atlas regarding the current condition of the High Plains aquifer, Staff suggests, “reflect the aquifer’s condition in a global sense and do not describe the specific conditions at the North Trend site or in its immediate vicinity.”³³² Because the Atlas addresses the High Plains aquifer, which covers an area of 174,000 square miles, “from a large-scale perspective,” Staff insists that it is “neither instructive nor applicable to the geological conditions existing at the North Trend site.”³³³

In addition, Staff argues that Petitioners’ allegations, including those on climate change, drought, and earthquakes, “are beyond the scope of the proceeding”³³⁴ and “fail[] to state a genuine dispute with the applicant on a material issue of fact” or to “state a basis under [] 10 C.F.R. § 51.45 for requiring such a review.”³³⁵ Nor, insists Staff, do Petitioners provide any expert or “authoritative references” on climate change,³³⁶ or “provide a basis for their claim that operations would contribute to further widespread drought.”³³⁷

With regard to Petitioners’ statements to the effect that “[l]ittle is known about the White River fault and how it may contribute to fractures that allow for movement of radioactive water when excursions occur,” Staff argues that these are mere assertions insufficient to support admission of such a “contention,” and that Petitioners “provide no basis in fact [or] documentation to support this assertion or demonstrate how the proposed operation impacts the White River fault or vice versa.”³³⁸ According to Staff, Petitioners additionally “fail to provide sufficient information or expert opinion to support a review beyond 2.25 miles.”³³⁹ Relying on NUREG-1569, which “states that applicants should consider water usage onsite and within a 2 mile radius of the proposed facility,” Staff points out that Applicant has stated “that it used a 2.25 mile radius to be

³³⁰ *Id.* at 24.

³³¹ *Id.* at 23-24.

³³² *Id.* at 23.

³³³ *Id.*

³³⁴ NRC Response at 27.

³³⁵ *Id.*

³³⁶ *Id.* at 32.

³³⁷ *Id.* at 21.

³³⁸ *Id.* at 24 (citing *Fansteel*, CLI-03-13, 58 NRC at 203); *see also id.* at 31-32; Reference Petition at 9, 14.

³³⁹ NRC Response at 26-27 & n.23 (citing Reference Petition at 10; NUREG-1569); *see also id.* at 33.

consistent with previous historical studies that also used a 2.25 mile radius,’’³⁴⁰ and that the Application “provides an analysis of specific distances using the methodology contained in NUREG-1569 and NUREG-1748.’’³⁴¹

Finally, regarding Petitioners’ reference to CBR purportedly “admit[ing] that failures with its Chadron well casing caused increased Uranium and Radium-226 in the Brule well,’’³⁴² Staff asserts that Petitioners take Applicant’s statements out of context.³⁴³ What is actually referred to, according to Staff, is a statement from a section of the Application describing “[a] pre-application monitoring program that the applicant undertook ‘to establish baseline groundwater quality conditions in the North Trend area,’” involving two monitoring wells, one in the Chadron aquifer and a well in the Brule aquifer.³⁴⁴ Staff argues that, contrary to Petitioners’ implication “that the Applicant’s operations have contaminated or will contaminate the Brule aquifer,” the “wells and readings that Petitioners refer to were for testing of *baseline* groundwater conditions and are not related to operations under the proposed license amendment.’’³⁴⁵

Staff states that, “[d]uring this baseline monitoring, which took place in 1996 and 1997, readings in the Brule well were higher than expected, leading the applicant to conclude that ‘integrity problems with the Chadron well casing may have had an impact on the water quality in the Brule well,’ but that “[i]n fact, the ER notes that the Chadron well in question has been ‘plugged and abandoned.’”³⁴⁶ Again, Staff argues, Petitioners provide “no basis for their allegation that disputes the Applicant’s data indicating that the Brule and Chadron aquifers are hydraulically separated.’’³⁴⁷

B. Contention B: Alleged Environmental and Health Impacts

Petitioners in Contention B state:

ISL Mining is NOT Environmentally Friendly; ISL Mining May Have Caused Health Impacts at Pine Ridge Indian Reservation Closing 98 Wells.³⁴⁸

³⁴⁰ *Id.* at 27 n.23 (citing NUREG-1569 at 2-4; TR at 2.2-1).

³⁴¹ *Id.* at 27 n.24.

³⁴² *Id.* at 30 (citing ER at 3.4-83); *see* Reference Petition at 13.

³⁴³ NRC Response at 30.

³⁴⁴ *Id.*

³⁴⁵ *Id.* (emphasis in original).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Reference Petition at 1, 15.

1. Petitioners' Support for Contention B

Stating that CBR “claims throughout the Application and in public testimony that its ISL mining process is proven and environmentally friendly,” Petitioners state that the “basis for the contention[] is that CBR gives a mis-impression that its operations are environmentally friendly when there are at least 23 reported incidences of spills at its current facility and reports of excursions of radioactive wastewater into the Brule aquifer which does mix with the High Plains aquifer.” They assert that the issue they raise is within the scope of this proceeding “because CBR seeks to expand its operations on the basis that it is a less harmful alternative to open pit uranium mining but CBR fails to take responsibility for environmental damage caused by its form of ISL mining.” Materiality is asserted, based on the NRC being “required to determine whether CBR’s current operation and proposed operation is in the best interests of the general public,” with “environmental safety [being] key to that determination.”³⁴⁹

Petitioners allege as fact that “CBR is responsible for several leaks including a 300,000 gallon leak of which only 200,000 gallons w[ere] cleaned up[;] a 25,000 [square foot] contamination[;] and a two year long . . . leak [from a broken coupling] of at least one (1) gallon per hour of radioactive waste.”³⁵⁰ Petitioners contend that “[t]hese leaks migrated and may have caused the contamination of 98 water wells on Pine Ridge Indian Reservation.”³⁵¹ Noting CBR’s claim in its Application “that it believes that its operations result[] in minimal short term impacts and no long term impacts,” Petitioners state that they believe that CBR’s “operations result in major short term and long term adverse impacts.”³⁵² Petitioners challenge sections of the Application in which Applicant, referring to operations under its current license, claims (1) that “[p]roduction of uranium has been maintained at design quantities throughout that period with no adverse environmental impacts,” (2) that “the current commercial project, including the successful restoration of groundwater . . . demonstrates that such a program can be implemented with minimal short-term environmental impacts and with no significant risk to the public health or safety,” and (3) that it has “environmental

³⁴⁹ *Id.* at 15.

³⁵⁰ *Id.*; see also *id.* at 3, wherein Petitioners cite a statement in the July 8, 1997, *Chadron Record*, to the effect that the two-year leak from the broken coupling resulted in an unknown amount of contamination of at least 8760 gallons per year, which Petitioners state was incorrect and should have been “535,600 gallons per year.” *Id.* at 3 n.2. Regarding the alleged 25,000-square-foot leak, this contaminated the Brule aquifer in 1996, according to Petitioners. *Id.* at 3. At oral argument Petitioners indicated that the 300,000-gallon leak spilled onto the frozen White River, stating that “it would have been much worse and none of it probably would have been cleaned up if it were summertime.” Tr. at 289.

³⁵¹ Reference Petition at 15.

³⁵² *Id.*

monitoring programs . . . to ensure that any impact to the environment or public is minimal.”³⁵³

In support of their arguments Petitioners again quote the statement from ER 5.4.1.3.2 that “[s]ince ISL operations alter the groundwater geochemistry, it is unlikely that restoration efforts will return the groundwater to the precise water quality that existed before operations.”³⁵⁴ Noting references in the Application to a number of “excursions,” or movements of water used in the mining process out of the wellfield area, Petitioners argue that these call into question CBR’s claims of minimal environmental impact.³⁵⁵ Petitioners quote the following from the Application in support of this argument:

ER 4.4.3.2 Impacts on Groundwater Quality

In addition to uranium, other metals will mobilize by the mining process. This process affects the mining zone, which must be exempted from Clean Water Act protections by the NDEQ and the EPA under the aquifer exemption provisions of the State and Federal UIC regulations.

Excursions represent a potential effect on the adjacent groundwater as a result of operations. During production, injection of the lixiviant into the wellfield results in a temporary degradation of water quality in the exempted aquifer compared to pre-mining conditions. Movement of this water out of the wellfield results in an excursion.

Excursions of contaminated groundwater in a wellfield can result from an improper balance between injection and recovery rates, undetected high permeability strata or geologic faults, improperly abandoned exploration drill holes, discontinuity and unsuitability of the confining units which allow movement of the lixiviant out of the ore zone, poor well integrity, and hydrofracturing of the ore zone or surrounding units.

To date, there have been several confirmed horizontal excursions in the Chadron sandstone in the current license area. These excursions were quickly detected and recovered through overproduction in the immediate vicinity of the excursion. In all but one case, the reported vertical excursions were actually due to natural seasonal fluctuations in Brule groundwater quality and very stringent upper control limits (UCLs).

In no case did the excursions threaten the water quality of an underground source of drinking water since the monitor wells are located well within the aquifer exemption

³⁵³ *Id.* at 15-16 (quoting from TR at 1-2, 1-6; ER at 4-12, 5-24).

³⁵⁴ *Id.* at 16 (emphasis omitted).

³⁵⁵ *Id.*

area approved by the EPA and the NDEQ. Table 4.4-1 provides a summary of excursions reported for the current license area.³⁵⁶

Another argument raised by Petitioners is that, according to the Application, CBR “does not perform any ecological monitoring at the current licensed operation,” and that it “does not propose to perform any ecological monitoring for the North Trend Expansion Area,” based on its discussion of ecological impacts elsewhere in its Application.³⁵⁷ They further note a reference in the Application to a recent amendment to its current license authorizing an increased flow rate, along with a reference to an estimated “corresponding [22%] increase in the emission of radon-222 from the current operation” that would “have a cumulative effect” with the license amendment request at issue herein.³⁵⁸ Petitioners contend that the Application “should state the currently effective increases in Radon-222.”³⁵⁹

Petitioners cite an example of “heavy rains push[ing the] water table up to high levels and caus[ing] Excursions . . . in June and July [of] 2005,” to support an argument that “CBR must do climate change analysis due to the impact of rains and flooding on the safety of its operations.”³⁶⁰ In this regard, Petitioners cite the Application for statements that the “North Trend area drains into the White River,” which flows “Northeast towards the Pine Ridge Indian Reservation,” and that the “White River is subject to fluctuating water levels and flooding,” among other things.³⁶¹

Petitioners also quote the following section, regarding community water supplies:

ER 3.4.1 — In summary, there is no domestic groundwater use of the Basal Chadron Sandstone within the North Trend Expansion Area. Two residences are supplied by wells completed in the Brule Formation. Based on population projections (see Section 3.10), future water use within the North Trend Expansion Area and the 2.0-mile review area likely will be a continuation of present use. It is unlikely that any irrigation development will occur within the license area due to the limited water supplies, topography, and climate. Irrigation within the review area is anticipated to be consistent with the past (e.g., limited irrigation in the immediate vicinity of the White River). It is anticipated that the City of Crawford municipal water supply will continue to be provided by the groundwater and infiltration galleries related to the White River and associated tributaries.³⁶²

³⁵⁶ *Id.* at 16 (quoting from ER at 4-12, 4-13).

³⁵⁷ *Id.* at 17 (citing ER at 6-60).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 16-17.

³⁶¹ Reference Petition at 17 (quoting TR at 2.2-21, ER at 3.5-16).

³⁶² *Id.* (quoting from ER at 3.4-41).

Petitioners contend that in the preceding “CBR fails to consider climate change, drought conditions[,] and that Crawford’s water supply comes from the White River,” and that “the North Trend project drains into the White River[,] meaning that the community water supplies may be contaminated with radioactive waste from the CBR mine.”³⁶³

Petitioners also challenge, among others, various parts of the following sections of the Application, all relating to potential impacts on the environment and public health and safety: ER 3.11.1.2 — Potential Declines in Groundwater Quality; ER Table 3.11-1 — Excursion Summary; ER 4.4.3.3 — Potential Groundwater Impacts from Accidents; TR 2.6.2.8 — Conclusions – Site Geology and Confining Strata; ER 1.3.2.5.2 — Liquid Waste Disposal; ER 3.11.2.1 — Exposures from water pathways; ER 3.11.2.2 — Exposures from Air Pathways; and ER Figure 4.12-1 — Human Exposure Pathways for Known and Potential Sources from North Trend.³⁶⁴

Regarding ER 3.11.1.2 — Potential Declines in Groundwater Quality, Petitioners quote language referring to “several confirmed horizontal excursions in the Chadron sandstone in the current license area” and stating among other things that these “were quickly detected and recovered,” and that

[t]he long term impacts on groundwater quality should also be minimal, as restoration activities have been shown to be successful in returning the groundwater quality to background or class of use standards. Additionally, there is no mechanism in EPA or NDEQ regulations to “unexempt” an aquifer. Therefore, the groundwater in the immediate mining area will never be used as a USDW. The primary purpose for restoration is to ensure that postmining conditions do not affect adjacent USDWs.³⁶⁵

Petitioners disagree with the conclusions of the Applicant in ER 3.11.1.2, contending that “[t]he long term impacts on groundwater quality are major,” and that “restoration activities are not the same as returning the water to non-radioactive condition because of movement of the radioactive material.” They question Applicant’s knowledge that the excursions have not affected any drinking water, as well as the effects of excursions on “water that feeds grass that is eaten by deer and other wildlife.”³⁶⁶ Petitioners note that six “excursions of mining solution

³⁶³ *Id.* at 18. Petitioners also make a reference to the Environmental Justice section of the Application (TR 2.3.3), and cite TR § 2.4.1, which states that “Harvey Whitewoman of the Oglala Sioux called before the follow up calls were begun to ask what effect the proposed project might have on water quality,” asserting that “[n]o one answered the questions of Harvey Whitewoman of the Oglala Sioux Tribe concerning the impact on the water quality.” *Id.* See also *infra* section VI.C.

³⁶⁴ See Reference Petition at 18-21.

³⁶⁵ *Id.* at 18 (quoting from ER at 3.11-3). USDW is an acronym for “underground source of drinking water.” See ER at 3.11-1.

³⁶⁶ Reference Petition at 18.

into the water table, one surface leak and problems with a high water table due to heavy spring rains” are to be found in ER Table 3.11-1, arguing that such problems “would likely worsen due to climate change.”³⁶⁷

Petitioners quote the following from ER 4.4.3.3, which concerns “Potential Groundwater Impacts from Accidents”:

Groundwater quality could potentially be impacted during operations due to an accident such as evaporation pond leakage or failure, or an uncontrolled release of process liquids due to a wellfield accident. If there should be an uncontrolled pond leak or wellfield accident, potential contamination of the shallow aquifer (Brule), as well as surrounding soil, could occur. This could occur as a result of a slow leak or a catastrophic failure, a shallow excursion, an overflow due to excess production or restoration flow, or due to the addition of excessive rainwater or runoff.

Over the course of the current licensed operation, CBR has experienced several leaks associated with the inner pond liner on the commercial evaporation ponds. **These small leaks are virtually unavoidable since the liners are exposed to the elements.**³⁶⁸

Petitioners argue that “CBR’s admission that leaks of radioactive material are unavoidable means they cannot be considered an environmentally friendly operation,” and that TR §§ 2.5.1 and 2.5.3 also “fail to account for climate change and current drought conditions.”³⁶⁹

Citing provisions of TR 2.6.2.8 (“Conclusions – Site Geology and Confining Strata”) relating to the “very fine grain sizes” of clay minerals and referring among other things to “the vertical hydraulic conductivity of the confining shales and clays overlying and underlying the Basal Chadron Sandstone [being] on the order of 10^{-10} cm/sec, or lower,” Petitioners contend this “shows conductivity between aquifers which means there is slow movement between radioactive material deposited in the Brule aquifer and the Chadron aquifer which has been mined.”³⁷⁰

Petitioners counter statements found in ER 1.3.2.5.2 (“Liquid Waste Disposal”), to the effect that “CBR has operated [a] deep disposal well at the current license area for over ten years with excellent results and no serious compliance issues,” and that “CBR expects that the liquid waste stream at the North Trend Satellite Facility will be chemically and radiologically similar to the waste dis-

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 19 (emphasis added by Petitioners).

³⁶⁹ *Id.* at 19; TR §§ 2.5.1 and 2.5.3 concern meteorological conditions in the region surrounding the North Trend Expansion Area and precipitation in the region.

³⁷⁰ *Id.* at 19.

posed of in the current deep disposal well,” by reference to CBR’s prior leaks and excursions.³⁷¹

Finally, Petitioners challenge the Application’s statements regarding radioactive doses to human beings, submitting that certain dosage amounts from radon — estimated in ER 3.11.2.2 to be 23.2 mrem/yr (0.232 mSv/yr) to the most affected resident, or 23.2% of 100 mrem/yr dose constraint³⁷² — “are now doubled by [an] existing increase in upflow to 9000 gpm and should be recalculated since [the upflow] results in increased Radon-222 emissions.”³⁷³ Petitioners also cite the Application for their argument that “ingestion of meat, air, dust, water would cause health impacts to the residents of the area with[in] an 80 Km radius from the site,” and that “there is no such thing as a safe low dose of radiation and that cumulative effects of these contaminations causes adverse health impacts.”³⁷⁴

2. Applicant’s Response to Contention B

Applicant characterizes as erroneous all of Petitioners’ allegations, and, regarding the alleged 1996 leak, states that Petitioners “mischaracterize” it. According to CBR, the facts about this leak are:

During 1996 injection well I 196-5 failed the five year mechanical integrity test. Subsequent investigation determined that the leak had contaminated an area in the shallow aquifer around the well. Wells were drilled in the area to delineate the area of contamination. A remediation plan was prepared and submitted to NRC and the NDEQ on May 28, 1996. On August 19, 1999, the NDEQ, upon review of the restoration data, determined that the affected waters had been returned to or brought within acceptable levels of baseline conditions and declared that the restoration efforts had been successful. This excursion and all other excursions have been successfully remediated.³⁷⁵

3. NRC Staff’s Response to Contention B

Staff argues that Contention B “should be rejected [as] outside the scope of this proceeding,” and because it alternatively fails to show a genuine dispute on

³⁷¹ *Id.* at 19-20. In the “Relevant Facts” section of their Reference Petition, Petitioners argue that this history of leaks and excursions “contradicts CBR’s statements that they have operated without any environmental impacts and indicates that CBR should not be allowed to expand.” *Id.* at 3 & n.1, 2.

³⁷² Reference Petition at 20 (quoting from ER at 3.11-4, 3.11-5).

³⁷³ *Id.* at 21.

³⁷⁴ *Id.* (citing ER Figure 4.12-1, regarding “Human Exposure Pathways for Known and Potential Sources from North Trend”).

³⁷⁵ CBR Response at 4.

a material issue of fact or law, or fails to provide supporting expert opinions.³⁷⁶ Asserting that issues relating to CBR's compliance history "are not at issue in this amendment proceeding," Staff argues that its review of CBR's license amendment request is "limited to a whether the amendment application satisfies the requirements under 10 C.F.R. § 40.31(h) and 10 C.F.R. § 51.45."³⁷⁷ In Staff's view, Petitioners' arguments based on prior spills, excursions, and contamination are in effect an "attempt to transform these proceedings into an enforcement proceeding," but that "[a]ny request for enforcement action or desire to raise compliance issues should be submitted pursuant to 10 C.F.R. § 2.206."³⁷⁸ Nor, argues Staff, do Petitioners' references to past activities "contain any specific claim of inadequacy with respect to the current amendment application's sufficiency in satisfying NRC requirements."³⁷⁹ Moreover, Staff urges, any allegations challenging "the fitness of CBR as an ISL operator . . . are not applicable to the adequacy of the Application or a legal requirement in this amendment."³⁸⁰

According to Staff, none of Petitioners' claims address any requirements relevant to the amendment Application, "nor do they demonstrate how the applicant's evaluation of environmental impacts is in error," nor is the claim that ISL operations are not environmentally friendly "a challenge to the adequacy of the Application."³⁸¹ Further, Staff argues, Petitioners' beliefs regarding "major short term and long term adverse impacts" are "unsupported by any authoritative references or expert opinions contradicting the applicant's review of adverse impacts in the environmental report [at] 4.1-48, 8-3."³⁸²

Staff makes the following additional arguments regarding Petitioners' references to various sections of the Application: On Petitioners' assertions that "CBR's excursions call into question its claim to have only a minimal impact on the environment," Staff argues this shows no genuine dispute with the Applicant

³⁷⁶ NRC Response at 33 (citing 10 C.F.R. § 2.309(f)(1)(iii), (v), (vi)).

³⁷⁷ *Id.* at 34.

³⁷⁸ *Id.* (citing Reference Petition at 4).

³⁷⁹ *Id.* at 35.

³⁸⁰ *Id.* at 34 (citing Reference Petition at 15, and Petitioners' references to CBR giving a "mis-impression that its operations are environmentally friendly when there are at least 23 reported incidences of spills at its current facility and reports of excursions of radioactive wastewater into the Brule aquifer which does mix with the High Plains aquifer"; to CBR being responsible for several leaks that "migrated and may have caused the contamination of 98 water wells on the Pine Ridge Indian Reservation"; to CBR "fail[ing] to take responsibility for environmental damage caused by its form of ISL mining"; to CBR's operations resulting in "major short term and long term adverse impacts"; and to CBR being "responsible for several leaks including a 300,000 gallon leak . . . [which] may have migrated and may have caused the contamination of 98 water wells on Pine Ridge Indian Reservation").

³⁸¹ NRC Response at 35.

³⁸² *Id.*

on a material issue of fact or law, and alleges no “deficiency in the Application that is supported by documentation or expert opinion.”³⁸³ According to the Staff, Petitioners misunderstand the term “excursion.” It does not, Staff asserts, mean a release of radioactive material; “in reality [it] is an increase in concentration of non-radioactive ions in the monitoring well.”³⁸⁴ Staff also repeats its argument in response to Contention A that climate change and drought are outside the scope of this proceeding, citing 10 C.F.R. Part 51, and notes, regarding the November 2007 license amendment NRC granted to CBR, that the 22% increase in radon emissions has been addressed by CBR.³⁸⁵

Staff argues that Petitioners “fail to demonstrate the manner in which drought affects the adequacy of the application, since the City of Crawford obtains its water from the White River which, according to the application is hydraulically isolated from the Basal Chadron Formation at North Trend.”³⁸⁶ In addition, Staff avers, “Petitioners have provided no expert opinion or facts to support the claim that the North Trend operation will contaminate either the White River or Crawford’s water supply” and “[t]hus, this basis for the contention is inadequate to support admission of the contention.”³⁸⁷

Regarding long-term impacts on groundwater quality, Staff argues that Petitioners fail “to provide sufficient information or expert opinion” to support their contention. Noting that groundwater restoration is addressed in the application, Staff considers Petitioners’ questions to be “mere conjecture” that is unsupported and fails to “present a genuine dispute with the Applicant on a material issue of fact.”³⁸⁸

Staff describes “Petitioners’ conclusion that ‘CBR’s admission that leaks of radioactive material are unavoidable means that they cannot be considered an environmentally friendly operation’” as not “relevant to the adequacy of the application,” noting that “[t]he regulations require that the application include an evaluation of the environmental impacts of the amendment, and this contention by petitioners does not appear to challenge the content of that evaluation.”³⁸⁹ Pointing out that “the ponds in question have both an inner and outer liner which act[] as a barrier to leaks,” and that “the application states that CBR monitors groundwater around their ponds to detect potential releases from the ponds,” Staff asserts that “Petitioners do not dispute any of these statements in the application

³⁸³ *Id.*

³⁸⁴ *Id.* Staff at oral argument revised this statement somewhat, stating that “an excursion does not necessarily mean a release of radioactive material offsite.” Tr. at 246 (emphasis added).

³⁸⁵ NRC Response at 36.

³⁸⁶ *Id.* (citing TR at 2.7-9).

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 36-37 (citing ER at 5-18 to 5-30, TR at 6-1 to 6-16).

³⁸⁹ *Id.* at 37.

nor do they indicate a premise with supporting bases to challenge the conclusions of the application in this regard.”³⁹⁰ Thus, Staff asserts, the contention should be rejected, because it “does not raise a genuine dispute with the Applicant on a material issue of fact or law and is not a challenge to the adequacy of the application.”³⁹¹

On Petitioners’ reference to “a one gallon per hour leak from a coupling for two years and . . . one or more excursions from its disposal well,” Staff also claims that Petitioners “fail to specifically identify a genuine dispute with the Applicant on a material issue of law or fact related to the amendment application, [fail] to explain how their allegation of excursions at the current facility is relevant to this amendment application,” and fail to provide any reference to specific facts, portions of the Application, or actual supportive documents.³⁹²

With respect to Petitioners’ arguments on dosage-related issues, Staff first argues that “claims concerning the effects of an increase in upflow to 9,000 gpm are outside the scope of this proceeding because the increase they refer to relates to a different amendment application,” adding that Petitioners’ allegations lack any support.³⁹³ Staff asserts that other statements regarding dose are unsupported as well, and calls the allegation that there is “no such thing as a safe low dose of radiation” an “impermissible attack on NRC regulations that set maximum permissible doses.”³⁹⁴ Arguing that “Petitioners do not allege or provide documentation or expert opinion supporting a claim that the current amendment application will result in activities that fail to meet NRC dose limits,” Staff says Petitioners “offer no supporting documentation or expert opinion that ‘cumulative effects of these contaminations causes adverse health impacts’ nor explain how their health would be adversely impacted by operations described in the application.”³⁹⁵

³⁹⁰ *Id.* (citing ER at 4-15, 6-59 to 6-60; TR at 4-5 to 4-7).

³⁹¹ *Id.*

³⁹² *Id.* at 38.

³⁹³ *Id.* at 39. Staff states that the March 2007 amendment application:

requested an increase in the processing plant throughput at the main facility. NRC’s review of this throughput amendment involved an assessment and confirmation of the additional dose contributed by the new ion exchange columns. Because the new columns will be pressurized downflow columns instead of the original upflow columns, radon remains in solution and only gets vented when the resin is removed and through wellfield. Therefore, doses to workers and the public would not double, as alleged by the petitioner.

Id. at 39 n.27 (citing Letter from Stephen P. Collings to Gary Janosko (Oct. 17, 2006) at 5-6 (ADAMS Accession No. ML063390348)).

³⁹⁴ NRC Response at 39-40 (citing 10 C.F.R. § 20.1301).

³⁹⁵ *Id.* at 40.

4. *Petitioners' Replies Regarding Contentions A and B*

In response to Applicant and Staff's factual arguments relating to the High Plains aquifer, Petitioners argue among other things that they do present genuine disputes on material issues, that both new geologic mapping and the Application's indication of the need for further testing and investigation support their own arguments regarding conductivity and mixing of aquifers, and that a "hearing and expert testimony is required to ascertain the amount of mixing and whether it poses a threat."³⁹⁶ They emphasize that water asserted to be unusable is actually currently being used, cite an example of drought in recent dryness of Squaw Creek, and offer arguments including that they are not required at this point to support their contentions with documents or expert opinions.³⁹⁷

5. *Additional Argument on Contentions A and B at January 16, 2008, Oral Argument*

Among the arguments made by Petitioners at oral argument is the assertion that the water "consumption versus restoration" issue they raise is supported by the requirement of 10 C.F.R. § 51.45(b)(5) that an applicant's environmental report must discuss "[a]ny irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."³⁹⁸ According to Petitioners, this supports their argument that the contention is within the scope of the proceeding, and suggests that the NRC cannot examine this issue if the impression Applicant gives is that there is no "substantial commitment of resources."³⁹⁹ Moreover, Petitioners argued, this also suggests the need for an environmental impact statement.⁴⁰⁰

In support of Contentions A and B and their arguments on mixing of water from different aquifers and related issues, Petitioners also presented the NDEQ letter and review (Exhibit B) on which we rule above and which we discuss further below. Petitioners cited NUREG/CR-6870, "Consideration of Geochemical Issues in Groundwater Restoration at Uranium in Situ Leach Mining Facilities," in support of their argument that groundwater after Applicant's mining and restoration contains more radioactivity, also asserting that the water at issue is in fact used for drinking water.⁴⁰¹ Arguing that because NUREGs are "legal

³⁹⁶ Cook Reply to CBR at 9; *see also id.* at 6-9; Cook Reply to NRC at 8, 11-13; Owe Aku Reply to CBR at 9; Owe Aku Reply to NRC at 11-14.

³⁹⁷ Cook Reply to NRC at 9-10.

³⁹⁸ 10 C.F.R. § 51.45(b)(5); *see also* Tr. at 197.

³⁹⁹ Tr. at 197-98.

⁴⁰⁰ *Id.* at 198.

⁴⁰¹ *Id.* at 205-07.

guidance,” Petitioners contended they should be able to use them in their reply arguments to Applicant’s and Staff’s response arguments.⁴⁰²

As to long-term effects, Petitioners reiterated that once an aquifer has been exempted it cannot be unexempted, and that “[t]herefore, the groundwater in the immediate mining area [would] never be used as U.S. drinking water.”⁴⁰³ Petitioners argued that this itself “conflicts with the primary goal of restoration . . . to return it to the baseline.” In addition, according to Petitioners, “if we have intermixing with other aquifers that flow at different rates . . . that then goes to the long-term effects.”⁴⁰⁴ Indications of geological differences between CBR’s current and proposed sites, evidence of fractures and faults, and lack of information and knowledge about the extent of these in the area of the proposed North Trend expansion site support their contention that mixing among aquifers likely occurs, Petitioners emphasized.⁴⁰⁵ Stating that Bruce McIntosh, Chairman of WNRC and a scientist, believes the slow-moving plume asserted in their Petition in fact exists,⁴⁰⁶ Petitioners also argued that the existence of conductivity between aquifers provides “common sense” support for this assertion.⁴⁰⁷

Regarding Staff’s materiality arguments, Petitioners contended that the “[c]urrent operation is clearly material not because it’s already licensed but because they are intending to replicate it in the North Trend expansion.” Their major dispute is with Applicant’s view that “its operations result in minimal short-term impacts and no long-term impacts,” when they believe that short- and long-term impacts will be “major.”⁴⁰⁸ Because the proposed operation would be a “self-monitoring, self-regulating entity,” there is no control or check on the operation’s impacts, Petitioners argued.⁴⁰⁹ In addition, Petitioners emphasized Applicant’s “failure to

⁴⁰² *Id.* at 274. Applicant through counsel argued that, although some NUREGs are guidance, others are contractor reports that deal more with facts. *Id.* at 275. In support of this argument, Staff at oral argument read language from NUREG/CR-6870, including that the report “summarizes the application of a geochemical model to the restoration process to estimate the degree to which a licensee has decontaminated a site where the leach mining has been used,” and that, “[t]oward that end, this report analyzes the respective amounts of water and chemical additives pumped into the mine regions to remove and neutralize the residual contamination using ten different restoration strategies,” and “also summarizes the conditions under which various restoration strategies will prove successful.” *Id.* at 277-78.

Petitioners also cited the NUREG for a reference to a “1979 Kaiser report,” in which minerals that can be mobilized by the ISL process are identified as including arsenic, uranium, thorium, radium, radon, and respective daughter products. *Id.* at 291-92.

⁴⁰³ *Id.* at 272.

⁴⁰⁴ *Id.* at 273.

⁴⁰⁵ *Id.* at 207-10.

⁴⁰⁶ *Id.* at 210-11.

⁴⁰⁷ *Id.* at 211.

⁴⁰⁸ *Id.* at 279.

⁴⁰⁹ *Id.* at 280.

consider climate change, drought conditions, . . . and that the North Trend project drains into the White River.’’⁴¹⁰ With regard to climate change, Petitioners argued that they are not challenging any regulation, because ‘‘[t]he regulations say the effect on the environment has to be considered [and] climate change is part of the environment,’’ which is a matter of ‘‘common knowledge.’’⁴¹¹

On the contamination of wells on the Pine Ridge Reservation, Petitioners stated that it was the Tribal Water Program that closed the wells,⁴¹² asserting also that Shannon County, where the Reservation is located, is the ‘‘second poorest county in the country.’’⁴¹³ Petitioners contended this contamination was a result of Applicant’s operation, and stated that the information they had on this was in Ms. White Plume’s home when it burned,⁴¹⁴ but that they would like the opportunity to duplicate this information for this proceeding.⁴¹⁵ On causation, Petitioners admitted that they could not at the time prove the source of the contamination, but stated through counsel that, ‘‘if these wells are on the part of the reservation closest to the site where the mining is occurring and it’s where the fault runs, and . . . there may be a mixture of the aquifers,’’ this suggests a relationship, particularly in light of spills from Applicant’s current operation, regarding which Petitioners suggested Applicant should provide more information.⁴¹⁶

In response to the Reservation well closings, Staff indicated that these occurred when EPA changed the maximum level of arsenic that is allowable in drinking water, suggesting that this indicates that the well closings ‘‘[do not] necessarily point to any contamination coming from elsewhere.’’⁴¹⁷ Staff also among other things reiterated its argument that Petitioners cannot challenge the standards for water restoration, relying on 10 C.F.R. § 2.335(a) and urging that the license conditions are thus ‘‘not at issue in this license proceeding,’’ and, like everything else relating to the current license, ‘‘not within the scope of this proceeding.’’⁴¹⁸ Following up its argument relating to the USGS, Staff suggested that, in indicating that effects on the High Plains aquifer ‘‘in this section of Nebraska have not been drastic as opposed to the effects in other areas,’’ the USGS ‘‘rather than supporting their contention . . . actually goes against it.’’⁴¹⁹ On more specific

⁴¹⁰ *Id.* at 281.

⁴¹¹ *Id.* at 301-02.

⁴¹² *Id.* at 286.

⁴¹³ *Id.* at 282.

⁴¹⁴ *See supra* note 14.

⁴¹⁵ Tr. at 285-86.

⁴¹⁶ *Id.* at 288.

⁴¹⁷ *Id.* at 295.

⁴¹⁸ *Id.* at 238, 240, 244; *see id.* at 238-40, 244-45.

⁴¹⁹ *Id.* at 251.

points, Staff stated through counsel that conductivity of “1 times 10 to the minus 10 centimeters per second” is “incredibly low.”⁴²⁰

Regarding the liner leaks, Staff conceded that surface water drainage into the White River “would be a concern,” but faulted Petitioners for providing no support to challenge Applicant’s monitoring program.⁴²¹ Petitioners pointed out, vis-à-vis the 34-mil evaporation pond liners, that “even Home Depot sells 50 mil.”⁴²² Staff countered that there are two liners, the outer one of which actually prevented a leak on the occasion in question.⁴²³

Applicant at oral argument argued that Petitioners provide “no basis” for their disagreements.⁴²⁴ In addition, Applicant made various statements of its views about the actual facts relating to its Application,⁴²⁵ arguing that “there is no evidence that there has been any — that there would be any mixing or connection between the Brule Aquifer or any of the overlying aquifers in the Basal Chadron.”⁴²⁶ Applicant agreed that there could “potentially” be fractures between the Chadron, Brule, and High Plains aquifers, but argued that “that could not occur in the area of the [proposed] site,” at least in part because water there moves “on the order of 10 feet per year.”⁴²⁷ Applicant argued that anything related to the aquifer exemption process is out of the scope of this proceeding, even though it “is important as to whether or not the project goes forward.”⁴²⁸

With regard to the 300,000-gallon spill, this was said to be “a spill into the shallow aquifer that came from an incomplete casing, a problem with the casing of the well,” and that, because it was into a shallow aquifer, “that aquifer was actually pumped and treated and was fully restored to baseline water quality and not just secondary standards but all the way back to baseline water quality.”⁴²⁹ This, argued Applicant’s counsel, “demonstrates just additionally that there are processes in place to control any excursion which in the history of the current facility have been few and far between.”⁴³⁰ Moreover, for “those that have been[,

⁴²⁰ *Id.* Staff also stated, regarding conductivity in general, that flow velocity is “gradient times conductivity divided by porosity.” *Id.* at 252.

⁴²¹ Tr. at 297-98.

⁴²² *Id.* at 284-85.

⁴²³ *Id.* at 296.

⁴²⁴ *Id.* at 255.

⁴²⁵ *Id.* at 255-56.

⁴²⁶ *Id.* at 257.

⁴²⁷ *Id.* at 265.

⁴²⁸ *Id.* at 300.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

CBR has] been able to respond to quickly and reverse any problems before they migrated offsite or even out of the mining area.”⁴³¹

6. *Licensing Board’s Ruling on Contentions A and B*

We begin by noting once more that in Exhibit B the Nebraska Department of Environmental Quality, apparently considering information that is essentially the same as that contained in the Application at issue,⁴³² raises, on a much more sophisticated level, many of the same concerns that Petitioners raise in their Reference Petition. We note further that the Corrected Reference Petition, to which we will refer herein as the Petition, is essentially identical to the Petitions originally filed by Petitioners, at that time acting *pro se*. Thus, even though they later retained counsel, it would not be appropriate to hold the Petition itself “to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere,”⁴³³ particularly as, under the new procedural rules in 10 C.F.R. Part 2, it is not permissible for counsel to file an amended petition in such circumstances.⁴³⁴

It is perhaps owing to this situation that, as with the other contentions, Contentions A and B of the Petition consist largely of references to, quotations from, and comparisons between language from various sections of the Application, noting some inconsistencies and pointing out some statements they challenge by reference to other statements therein. There is nothing that prohibits such an approach, however. Expert support is not required for admission of a contention; a fact-based argument may be sufficient on its own.⁴³⁵ We note, indeed, that even the Staff does not disagree that Petitioners may base contentions on internal inconsistencies in an Application, provided that they explain “why, if it’s not obvious[,] why there is an inconsistency or why they disagree.”⁴³⁶

Petitioners provide explanations for most such arguments in Contentions A and B. It is true that many of these are less than perfectly articulated, and some lack an ideal level of support. Some, however, albeit somewhat inartfully, do raise significant questions concerning the lack of information about fractures, faults,

⁴³¹ *Id.* at 301.

⁴³² *See supra* text accompanying note 60.

⁴³³ *Salem*, ALAB-136, 6 AEC at 489. The Appeals Board in *Salem* opined that, “[w]hile a totally deficient [contention] may not be justified on th[e] basis [that it was prepared by a nonlawyer], at the same time . . . a *pro se* petitioner should [not] be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere.” *Id.*

⁴³⁴ *See supra* note 254.

⁴³⁵ *See Oconee*, CLI-99-11, 49 NRC at 342.

⁴³⁶ *Tr.* at 247-48; *see id.* at 249.

conductivity between aquifers, and related issues, as well as about the potential environmental, health, and safety impacts of these.

We note, for example, Petitioners' references to leaks, including the spill onto the frozen White River — which according to the Application flows toward and then into the Pine Ridge reservation, as discussed in the standing section above.⁴³⁷ And Petitioners provide information about current usage of well water for drinking — including from the same Basal Chadron aquifer from which Applicant proposes to mine — which, notwithstanding Applicant's and Staff's arguments that this either does not (or *should not*) occur or is irrelevant, would appear to be significant with regard to the question of health and safety impacts of the proposed project at issue. To ignore this information is obviously not appropriate. And the information is corroborated by statements in Exhibit B,⁴³⁸ as are assertions regarding possible conductivity between aquifers.⁴³⁹ In addition, we note Petitioners' pointing out of places in the Application that indicate a lack of complete information, which is of course bolstered by Exhibit B.⁴⁴⁰

With regard to Applicant's argument that there is nothing in Exhibit B that "calls into question the license application's conclusion that the Basal Chadron is hydraulically separated from the Brule aquifer," or shows any new harm or threat distinct from CBR's current operation,⁴⁴¹ we do not agree that any threat of harm from the proposed expansion is "speculative" and "bordering on the physically impossible."⁴⁴² And as to Staff's faulting of Exhibit B for not specifically indicating which if any faults are located "anywhere near the proposed site," and arguing that the document is "completely unrelated to this NRC proceeding"⁴⁴³ — again, these are belied by Applicant's indication that the information underlying it is essentially the same as that at issue herein. For the same reasons discussed above in section III.A.2, we find the information in Exhibit B to be persuasive and strong support for Petitioners' arguments regarding

⁴³⁷ See *supra* text accompanying notes 230-233, 240.

⁴³⁸ See Exhibit B, Detailed Review at 16-17. With regard to the Anders well, although it is outside the actual site boundary, it is, as noted by the NDEQ, between CBR's current and proposed sites and very close to both — 1 mile from one, a mile and a half from the other. *Id.* at 16. See also *supra* text accompanying notes 79-81, 190-192.

⁴³⁹ See *supra* text accompanying notes 70-78.

⁴⁴⁰ See *id.*

⁴⁴¹ CBR Response to Exhibits at 13. We note that these statements were made in opposition to standing but we consider them as well with regard to Contentions A and B, to give Applicant the benefit of the doubt on these issues.

⁴⁴² *Id.*

⁴⁴³ NRC Response to Exhibits at 9. As with the Applicant's response, we give the Staff the benefit of the doubt and include its arguments not only on these contentions but also insofar as they oppose standing, which of course demands a lower standard than for contentions, so that any arguments against use of the document in support of standing would logically also apply against the contentions.

the inadequacy of the Application in addressing issues of conductivity, at least between the Chadron and Brule aquifers, and between groundwater and the White River. Taking this in conjunction with Petitioners' references to prior excursions and spills, including that onto the frozen White River, we find that Petitioners have sufficiently supported Contentions A and B.

The information regarding prior leaks and spills is relevant because the Application itself relies on CBR's prior mining operations as an indication of how it would conduct its proposed new operation. It would be manifestly unfair not to permit the Petitioners also to use such historical information. Regarding any new harm or threat from the proposed new operation, although any increased threat to others might not be so dramatic, Dr. Anders' well, located between CBR's existing and proposed mining sites, illustrates very distinctly the potential for any existing harm or threat to public health from current operations being in effect almost doubled by the proposed new project in his case.

Moreover, issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are clearly within the scope of this proceeding, and material to the decision whether to grant or deny the requested license amendment.⁴⁴⁴ Petitioners provide a fact-based argument that, supported by Exhibit B, clearly satisfies the "brief explanation" and "specific" and "concise statement[s]" requirements of the rule.⁴⁴⁵ They provide extensive specific references to the Application, basing, as required under 10 C.F.R. § 2.309(f)(2), their allegations on the "documents available at the time the petition [was required] to be filed," including the Application and its Technical and Environmental Reports. And particularly through Exhibit B, Petitioners provide more than sufficient information to show that the parties are in genuine dispute over the material issues that they raise.⁴⁴⁶ Exhibit B, the significance of which is essentially self-evident and (notwithstanding our discussion in section II.A.2 above) needs little if any explanation to point out its relevance, provides information in the nature of expert support for Petitioners' arguments, raising significant questions about the issues of concern to Petitioners, including potential mixing of contaminated water between and among aquifers and with surface water, and potential resulting impacts on public health and safety and the environment.⁴⁴⁷

⁴⁴⁴ See, e.g., 10 C.F.R. §§ 40.32(d), 51.45(b); 10 C.F.R. § 2.309(f)(1)(iii), (iv).

⁴⁴⁵ See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v).

⁴⁴⁶ See 10 C.F.R. § 2.309(f)(1)(vi).

⁴⁴⁷ If, of course, it turns out that further provision of material to NDEQ results in its approval of Applicant's aquifer exemption request and effective retraction of the statements in Exhibit B, such facts could be submitted in this proceeding in support of the Applicant's and Staff's positions on the matters at issue herein, at appropriate points in this proceeding, with appropriate opportunity for Petitioners to respond. But this is not the situation before us at this point in this proceeding.

It is true, as Applicant argues, that NEPA speaks to what is required of Federal agencies. An agency is to “include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact to the proposed action.”⁴⁴⁸ Nevertheless, although the requirements of NEPA are directed to Federal agencies and thus the primary duties of NEPA fall on the NRC Staff in the NRC proceedings,⁴⁴⁹ the initial requirement to analyze the environmental impacts of an action, including a materials licensing amendment, is directed to applicants under relevant NRC rules.⁴⁵⁰ Accordingly, 10 C.F.R. § 51.60(a) requires a materials license amendment applicant to submit with its application an environmental report, which is required to contain the information specified in section 51.45.⁴⁵¹

As indicated above,⁴⁵² for the sake of analytical clarity under the dual sets of standards under NEPA and the AEA, in admitting Contentions A and B we reframe them in a manner that more clearly sets forth those issues we find to be relevant and litigable in this proceeding, consolidating proposed environmental issues that we find admissible and that would logically fall under NEPA into one admitted contention, and proposed public health and safety issues that we find admissible and that would fall under the Atomic Energy Act into a second admitted contention.

We note that not all issues would fall under the contentions as we have reframed them. For example, challenges to dose limits in NRC regulations are not appropriate for admission under 10 C.F.R. § 2.335(a).⁴⁵³ In contrast, however, we find several of Staff’s arguments, including some relating to the scope of this proceeding, to be unpersuasive. For example, with regard to issues such as drought and climate change, Staff insists that these are outside the scope of the proceeding because they are not within the purview of regulations including 10 C.F.R. § 51.45. We note, however, that this section includes the following language:

(b) Environmental Considerations. The environmental report shall contain a

⁴⁴⁸ 42 U.S.C. § 4332(2)(c) (2000); see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

⁴⁴⁹ See, e.g., 10 C.F.R. § 51.70(b), which states among other things that “[t]he NRC staff will independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement.”

⁴⁵⁰ See *id.* § 51.41.

⁴⁵¹ See *id.* § 51.60(a).

⁴⁵² See *supra* introductory part of section VI.

⁴⁵³ See 10 C.F.R. § 20.1301.

description of the proposed action, a statement of its purposes, a *description of the environment affected*, and discuss the following considerations:

(1) The impact of the proposed action on the environment. Impacts shall be discussed in proportion to their significance;

....

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity⁴⁵⁴

Drought and climate change would clearly fall within any reasonable consideration of the concepts expressed in the quoted excerpts of the rule. First, anything relevant to these should be included in any “description of the environment affected.” Second, Petitioners’ arguments to the effect that impacts of the proposed expansion of mining operations will exacerbate drought, for example, would arguably necessitate discussion of the level of the significance of impacts in relation to this under section 51.45(b)(1). Third, the “maintenance and enhancement of long-term productivity” would reasonably warrant consideration of any aspects of climate change, for example, along with other long-term effects as alleged by Petitioners.

Moreover, Petitioners themselves, as well as others who live and farm in the area, would be capable of addressing drought conditions they have observed; and although there are some who dispute the reality of climate change, it is widely viewed as being a part of today’s environment that warrants serious consideration at least, in any long-term view of the environment and productivity in it. Petitioners allege essentially that, by consuming and/or rendering unfit for human use or consumption groundwater resources that mix with water resources that they use, in an environmental setting that includes drought and climate change, CBR’s proposed mining operations could have negative impacts. Whether or not this is the case is not to determine at this stage of the proceeding, and indeed it may be that climate change would have no significant impact in the matters at issue herein. Petitioners have, however, posed the issues and supported them sufficiently under the contention admissibility rules, with fact-based arguments as well as such things as the USGS Water Atlas and the NDEQ document quoted above.

We also find Staff’s arguments, that conditions in CBR’s current license as to restoration standards are not subject to attack under section 2.335(a), to be legally in error and unsupportable. The plain language of section 2.335(a) makes this clear — the exclusion applies only to a “rule or regulation of the Commission,” not to license conditions. In any event, there is no requirement that the same conditions that exist in a current license would necessarily and always apply to a new project under a license amendment. And although there currently exist some

⁴⁵⁴ *Id.* § 51.45 (emphasis added).

relatively broadly applicable law and regulations that govern this proceeding, along with various NRC guidance documents, we note the current absence of any rules specifically setting standards in ISL cases. And guidance documents such as NUREGs are just that — documents that provide guidance, with some persuasive authority, but not binding. This is true, whether in the context of water restoration standards or standards on such things as the size of the geographic area to be reviewed by Staff. The lack of specific rules on such matters makes these issues much less definite than Staff or Applicant might wish to argue, but this is the situation that exists, and we may not give guidance documents any more, or less, significance than they warrant in any given circumstance.

In conclusion with regard to Contentions A and B, we find that Petitioners have raised some significant issues and demonstrated that further “inquiry in depth” is appropriate regarding these material legal and factual issues. Finally, we would reemphasize that, contrary to the approach of the Applicant in centering much of its argument on disputing the allegations of Petitioners, except as otherwise stated above, all such matters remain open issues at this point in this proceeding. We note, based on the NDEQ document, that many factual assertions of the Applicant would themselves appear to be fraught with a number of questions regarding adequate support for them. But the contention admissibility stage of a proceeding is not the time to go to merits determinations on such matters, and we do not mean to suggest in any of our rulings any ultimate findings on these issues. We do, however, find that Contentions A and B have been posed and supported sufficiently, including through Exhibit B, to demonstrate genuine disputes on material issues that (1) are within the scope of this proceeding, (2) warrant further “inquiry in depth,” and (3) are therefore appropriate for us to admit, in the form of the following reframed contentions:

- Contention A. CBR’s License Amendment Application does not accurately describe the environment affected by its proposed mining operations or the extent of its impact on the environment as a result of its use and potential contamination of water resources, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.
- Contention B. CBR’s proposed expansion of mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River,

C. Contention C: Alleged Need To Inspect Prehistoric Indian Camp

Petitioners in Contention C state that a:

Prehistoric Indian Camp Should Be Inspected by Tribal Elders and Leaders.⁴⁵⁵

1. *Petitioners' Support for Contention C*

Applicant's cultural resource analysis in its Application indicates that "a variety of prehistoric and historic resources of potential significance exist" in the general region surrounding Crawford and the North Trend Expansion area.⁴⁵⁶ Specifically, two archeological sites, one historic and one prehistoric, were identified in the Applicant's archeological site search for the general vicinity.⁴⁵⁷ The historic site is the ruins of a mill, and the prehistoric site is a "reported Indian camp"⁴⁵⁸ — the one at issue in this contention. In addition, a cultural resource inventory and survey relating to the North Trend Expansion was conducted by the Applicant, which identified three additional historic sites and three isolated prehistoric artifacts.⁴⁵⁹ The Applicant assessed these resources as "not likely to yield information important in prehistory or history," and thus, the Applicant concluded, the "proposed North Trend Expansion . . . will have no effect on historic properties, and no further cultural resource work is recommended."⁴⁶⁰

Petitioners submit that "[CBR] is not qualified to make any determinations concerning the significance of the prehistoric Indian camp found at the North Trend site," and that "Oglala Sioux elders and leaders should be consulted immediately before any further action is taken that might interfere with the archeological value of the prehistoric Indian camp."⁴⁶¹ Petitioners challenge the Applicant's belief that the site "is not significant," contending that the Applicant not only has no basis to reach that conclusion; it is "not authorized" to make

⁴⁵⁵ Reference Petition at 1, 21.

⁴⁵⁶ ER at 3.8-1; cultural resources in the area include "the Hudson-Meng prehistoric bison kill to the north of the area, several prehistoric camps and artifact scatters in the general areas, fur-trade period sites associated with the early history of Chadron, Fort Robinson to the west of Crawford, the Sidney-Deadwood Trail, the two historic railroads that cross where the town of Crawford emerged, and the town of Crawford itself." *Id.*

⁴⁵⁷ *Id.* (both of these sites are reported as being outside the assessment area).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 3.8-2 (the historic sites are the ruins of an abandoned farm complex, an occupied farm complex, and a "refuse disposal area"; and the prehistoric artifacts include "an early historic metal trade point, a chert core, and a Plains Archaic chert point fragment").

⁴⁶⁰ *Id.* at 4-27.

⁴⁶¹ Reference Petition at 23.

such a “decision” in any event.⁴⁶² Petitioners argue that the issue is in the scope of the proceeding “because CBR seeks to expand its operations on the basis [of] the planned ground disturbances,” and that it is “material to the findings . . . the NRC . . . is required to [make in determining] whether CBR’s . . . proposed operation is in the best interests of the general public,” because “respect for Indian artifacts is key to that determination.”⁴⁶³ At oral argument, Petitioners emphasized that consultation should have occurred with “the traditional indigenous leaders within this area” to determine the importance of the sites discovered during the Applicant’s cultural resource analysis.⁴⁶⁴ Petitioners added, “this is a major omission with regard to protecting religious and cultural rights of the Lakota people.”⁴⁶⁵

2. *Applicant’s and NRC Staff’s Responses to Contention C*

In response to Petitioners’ contention, the Applicant denies all allegations,⁴⁶⁶ and the NRC Staff asserts that the bases offered in support of Contention C fail to present a genuine dispute with the Applicant on a material issue of fact or law.⁴⁶⁷ Staff argues that Petitioners fail to provide any facts to support their dispute with the Applicant’s conclusions relating to the prehistoric camp site, nor do they provide any authoritative reference documents indicating that consultation with Oglala Sioux Tribe elders and leaders “would affirmatively identify any dispute with the information in the application.”⁴⁶⁸ More specifically, Staff asserts that Petitioners did not dispute information in the Application that the site in question is “outside the assessment area”; thus, Staff argues, “the area of concern was considered in the application” and Petitioners have not disputed those conclusions.⁴⁶⁹ Regarding the requirement for further consultation, Staff notes that Staff-level review of the cultural resource analysis in the ER has not yet taken place, but that, in accordance with the National Historic Preservation Act (NHPA), the consultation process conducted by the Applicant will be reviewed.⁴⁷⁰

At oral argument, Applicant through counsel provided an overview of the consultation process it used in its cultural resource analysis, including the issuance

⁴⁶² *Id.*

⁴⁶³ *Id.* at 21.

⁴⁶⁴ Tr. at 304.

⁴⁶⁵ *Id.*

⁴⁶⁶ CBR Response at 5.

⁴⁶⁷ NRC Response at 40.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 41.

⁴⁷⁰ Tr. at 313. NRC Staff submits that, as part of the review process, Staff will potentially have to look at the possibility of consulting tribal historic preservation offices. *Id.*

of letters identifying the nature and location of the project to the Nebraska Commission on Indian Affairs; Applicant indicated that “about 50 letters were sent to other various tribal leaders soliciting input on the project or help identifying any proposed impacts.”⁴⁷¹ According to Applicant, follow-up telephone calls were also made to verify that the letters were received and to identify any questions, and no concerns were identified.⁴⁷² Applicant asserted that the lack of response to the letters and telephone calls indicated that the tribes did not “avail themselves of the opportunity to make a determination.”⁴⁷³ When questioned by the Board, however, about one telephone call to Applicant from a Tribe member, Mr. Harvey Whitewoman, Applicant through counsel stated that his concerns were “apparently” addressed but was unable to indicate any particulars as to how this was done, leaving the impression that it may in fact not have been done.⁴⁷⁴

Applicant stated that it had conducted “the same process . . . that the NRC [must] comply with under the [NHPA],”⁴⁷⁵ and argued that the information in the ER regarding cultural resources were acquired by a qualified archaeologist and submitted to and approved by the State Historic Preservation Officer (SHPO). Therefore, Applicant insisted, there is nothing to suggest that the statements made in the Application regarding the lack of importance of those artifacts are inaccurate.⁴⁷⁶ Applicant further asserted that there is no evidence or indication of a dispute as to whether there will be any impacts on cultural resources at the North Trend Expansion area,⁴⁷⁷ maintaining that what the Applicant “has done here is more than what’s required by the law.”⁴⁷⁸ Finally, Applicant argued, “there is no legal requirement that the *applicant* consult with state or tribal authorities under the [NHPA]’”;⁴⁷⁹ the requirement to consult applies only to federal agencies.⁴⁸⁰

⁴⁷¹ *Id.* at 317-18. The ER states that on April 30, 2004, the Applicant sent letters to the Nebraska Commission on Indian Affairs and thirteen Indian tribes, including the Oglala Sioux Nation, informing them of the “nature and location of the proposed project.” ER at 3.8-1.

⁴⁷² Tr. at 318. The Applicant stated through counsel that follow-up telephone calls were made to the same groups to “verify that the information had reached the appropriate persons in each tribe and to ask whether the tribes had any concerns about the project or were aware of any traditional concerns in the immediate vicinity of the project.” *Id.*

⁴⁷³ *Id.* at 326.

⁴⁷⁴ *Id.* at 318-21.

⁴⁷⁵ *Id.* at 319.

⁴⁷⁶ *Id.* at 321-22.

⁴⁷⁷ *Id.* at 318.

⁴⁷⁸ *Id.* at 330.

⁴⁷⁹ CBR Response to Briefs on Treaties at 10 (citing 16 U.S.C. § 470) (emphasis in original).

⁴⁸⁰ *Id.*

3. *Petitioners' Replies Regarding Contention C*

In reply, Petitioners argue that NRC Staff merely supports the conclusions of the Applicant in its ER,⁴⁸¹ and assert that Staff ignores “the consultation requirements embodied in the UN Declaration on the Rights of the World’s Indigenous Peoples, which requires consultation with traditional Chiefs prior to development of resources within indigenous land.”⁴⁸² Without this, Petitioners argue, Applicant “fails to analyze the issue properly in its application and fails to obtain approval from Native American authorities.”⁴⁸³ Petitioners at oral argument also noted that consultation is required under both NHPA and NEPA.⁴⁸⁴ They emphasize that they “dispute[] any authority Applicant may be using to make any conclusions about such Native American matters.”⁴⁸⁵ Petitioners do concede that the Applicant made calls in an effort to follow up with Native American tribes to verify receipt of letters regarding the proposed North Trend Expansion, but allege a lack of further action.⁴⁸⁶ Petitioners urge recognition that “one of the things that indigenous people have for decades now been claiming is that federal agencies have been ignoring them.”⁴⁸⁷

4. *Licensing Board’s Ruling on Contention C*

In light of the foregoing arguments, and after considering the consultation requirements of the National Historic Preservation Act (NHPA), we find that Contention C is admissible. Contrary to the NRC Staff’s argument that Petitioners fail to present a genuine dispute with the Applicant on a material issue of fact or law, the contention demonstrates a dispute between Petitioners and the Applicant over the material factual/legal issue of whether the consultation process conducted by the Applicant in conjunction with its Application (a precursor to the consultation to be conducted by the NRC as the federal agency responsible for reviewing and approving or disapproving this Application) complies with relevant requirements of law.

In the NHPA,⁴⁸⁸ Congress declared that this Nation’s historical heritage “is in the public interest so that its vital legacy of cultural, educational, aesthetic,

⁴⁸¹ Cook Reply to NRC at 16.

⁴⁸² Owe Aku Reply to NRC at 15.

⁴⁸³ Cook Reply to NRC at 16.

⁴⁸⁴ Tr. at 307.

⁴⁸⁵ Cook Reply to NRC at 16.

⁴⁸⁶ *Id.* The Board notes that, after oral argument, Petitioners submitted an affidavit of Mr. Harvey Whitewoman, stating among other things that his concerns regarding water quality impacts were not resolved. Affidavit of Harvey Whitewoman (Feb. 19, 2008).

⁴⁸⁷ Tr. at 307.

⁴⁸⁸ 16 U.S.C. § 470 *et seq.*

inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.’’⁴⁸⁹ Section 106 of the Act among other things requires a federal agency, prior to the issuance of any license, to ‘‘take into account’’ the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places.⁴⁹⁰

Detailed regulations, developed to give substance to the consultation requirements of section 106, provide a complex consultative process that must be followed to obtain compliance with the NHPA.⁴⁹¹ As part of this process, a tribe may become a consulting party when it considers property potentially affected by a federal undertaking to have religious or cultural significance.⁴⁹² A consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties (including those of traditional religious and cultural importance), articulate its views on the undertaking’s effects on such properties, and participate in resolution of adverse effects.⁴⁹³ Moreover, the regulations under NHPA also state that the federal agency ‘‘should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties,’’ and should ‘‘invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement.’’⁴⁹⁴

Petitioners’ assertions in and in support of Contention C are based on information provided in the Applicant’s environmental and technical reports, as required by 10 C.F.R. § 2.309(f)(2). And with regard to the requirements of 10 C.F.R. § 2.309(f)(1), in addition to providing a specific statement of their contention and briefly explaining the basis for it, Petitioners support it with references to the Application and a fact-based argument, stating why they disagree with the Applicant’s actions and position.⁴⁹⁵ The issues presented in the contention are clearly within the scope of this proceeding and material to the findings the NRC must make regarding the Application, and the parties are clearly in dispute over these issues.

Because an agency’s compliance with the requirements of section 106 of NHPA is nondiscretionary, the Staff’s compliance with NHPA is obviously material to the findings the NRC must make in addressing the Applicant’s license amendment Application. It is true that NHPA and NEPA — out of which the

⁴⁸⁹ *Id.* § 470(b)(4).

⁴⁹⁰ *Id.* § 470f; *see id.* § 470a(a) (National Register guidelines).

⁴⁹¹ 36 C.F.R. Part 800; *see* Rules and Regulations Advisory Council on Historic Preservation, Final Rule: Revision of Current Regulations, 65 Fed. Reg. 77,698 (Dec. 12, 2000).

⁴⁹² *See* 36 C.F.R. § 800.2(c)(2)(ii).

⁴⁹³ *See id.* § 800.2(c)(2)(ii)(A).

⁴⁹⁴ *See id.* § 800.2(c)(2)(iii).

⁴⁹⁵ *See supra* notes 262-265.

NHPA requirements at issue arise, relating as they do to the environmental aspects of the action at issue — speak to what is required of federal agencies. As we note in our ruling on Contentions A and B, however, even though the primary duties of NEPA fall on the NRC Staff in the NRC proceedings,⁴⁹⁶ an applicant in a materials licensing proceeding is required under 10 C.F.R. § 51.60(a) to submit with its application an environmental report that contains information specified in 10 C.F.R. § 51.45.⁴⁹⁷ And, specific to this contention, section 51.45(d) requires the Applicant to provide a list of all approvals and describe the status of those approvals with the applicable environmental standards and requirements.⁴⁹⁸ In addition, 10 C.F.R. § 2.309(f)(2) requires among other things that “[c]ontentions must be based on documents . . . available at the time the petition is to be filed, such as the . . . environmental report . . . filed by an applicant.” And this is what Petitioners did.

Staff and Applicant raise questions about the location of the resources at issue and whether these are within the area that is relevant to the proposed project. Applicant also argues that the law was followed, that tribal leaders were notified of the project, and that follow-up calls were made. What NHPA requires in terms of the amount of consultation, however, is a reasonableness inquiry, and “a mere request for information is not necessarily sufficient to constitute the ‘reasonable effort’ section 106 requires.”⁴⁹⁹ In addition to notification requirements, NHPA obligates federal agencies to consult with any Indian tribe that attaches religious or cultural significance to identified properties during the evaluation of any historic significance.⁵⁰⁰ And relevant regulations specifically state that the federal agency “shall acknowledge that Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”⁵⁰¹ Moreover, the regulations require the federal agency to notify all consulting parties, including Indian tribes, when a finding of

⁴⁹⁶ See, e.g., 10 C.F.R. § 51.70(b), which states among other things that “[t]he NRC staff will independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement.”

⁴⁹⁷ See *id.* § 51.60(a).

⁴⁹⁸ See *id.* § 51.45(d).

⁴⁹⁹ *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995) (the Court held that because communications from the tribes indicated the existence of traditional cultural properties and because the Forest Service should have known that tribal customs might restrict the ready disclosure of specific information, the agency did not reasonably pursue the information necessary to evaluate the site).

⁵⁰⁰ See 36 C.F.R. § 800.4(b).

⁵⁰¹ See *id.* § 800.4(c)(1).

no effect has been made, and to provide those consulting parties with an invitation to inspect the documentation prior to approving the undertaking.⁵⁰²

It may be that the Staff in its review process will address Petitioners' concerns.⁵⁰³ At this point, however, the matters at issue in Contention C are clearly material, and there is clearly a dispute between Petitioners and Applicant, supported by the Staff, over whether reasonable measures under relevant rules have been taken and over how these matters should be resolved. We therefore find Contention C to be admissible in this proceeding, in the following reframed form:

Contention C: Reasonable consultation with Tribal Leaders regarding the prehistoric Indian camp located in the area surrounding CBR's proposed North Trend Expansion Project has not occurred as required under NEPA and the National Historic Preservation Act.

D. Contention D: Alleged Terrorist Risk and Potential for Trucking Accident

Petitioners in Contention D state that:

Proposed Trucking of Radioactive Resin Between CBR Facilities Creates Substantial Homeland Security Risk of Terrorist Attack and Presents the Risk of Contamination to the Public and the Environment in the Event of Accidents and Spills.⁵⁰⁴

1. Petitioners' Support for Contention D

Petitioners contend the Applicant's proposed plan to truck radioactive material back and forth between the current facility and the North Trend facility will expose

⁵⁰² See *id.* § 800.4(d)(1). The *HRI* case involved a similar issue, albeit under the pre-2004 adjudicatory procedures in 10 C.F.R. Part 2, Subpart L proceedings. *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-26, 62 NRC 442 (2005). *HRI* involved an application to license a multiphased project to do ISL mining on different parcels of land over the course of 20 years. Intervenors in that case challenged the adequacy of consultation with tribal groups, claiming that, other than a "form letter" sent by HRI to the tribes, tribal groups were not consulted or given an opportunity to participate in the NHPA review process. *Id.* at 465. Ultimately, the presiding officer held that adequate consultation with tribal groups had occurred because "the Staff (1) closely coordinated its NHPA review with the [SHPO], (2) obtained relevant NHPA information from numerous tribal leaders and traditional practitioners, and (3) conscientiously provided tribal groups with updated information regarding the cultural resources review, as well as a meaningful opportunity to participate in the review process." *Id.* at 467-68.

⁵⁰³ See *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 445 n.65 (2006).

⁵⁰⁴ Reference Petition at 2, 23.

the surrounding community to a “substantial risk of terrorist attack and/or criminal interference resulting in a release of a radioactive material — the equivalent of a ‘dirty bomb.’”⁵⁰⁵ Petitioners note plans in the Application to have one truckload per day carry radioactive resin from the North Trend site to the current facility, which would be “unguarded radioactive waste.”⁵⁰⁶ Petitioners further argue that by “dramatically increasing” the transport of radioactive material on public highways on a regular basis over a fixed route “makes the radioactive material a potential target for terrorist attack.”⁵⁰⁷ Petitioners claim this issue is within the scope of this proceeding because such actions increase the public exposure to radioactive materials, and argue it is material to the findings the NRC must make, to determine whether the proposed operation is in the best interest of the public.⁵⁰⁸ Finally, Petitioners argue that the Applicant’s failure to consider the security risks, and the potential threat to the environment and the public, associated with such trucking activity demonstrates “the falsity of [the Applicant’s] conclusion that it is ‘relatively safe and simple’ to transport the resin.”⁵⁰⁹

2. Applicant’s and NRC Staff’s Responses to Contention D

NRC Staff challenges this contention on the basis of Commission case law holding that terrorism need not be considered under NEPA. According to NRC Staff, “[t]he Commission has consistently held that the NRC has no legal duty to consider the environmental impacts of terrorism at NRC licensed facilities.”⁵¹⁰ That line of reasoning was most recently upheld, according to NRC Staff, in the *Oyster Creek* proceeding,⁵¹¹ in which the Commission rejected a contention that the NRC was required under NEPA to conduct a review of the environmental impacts of terrorism in a license renewal proceeding, notwithstanding the Ninth Circuit Court of Appeals’ ruling in *San Luis Obispo Mothers for Peace v. NRC (Mothers for Peace)*.⁵¹² Staff notes that, in *Oyster Creek*, the Commission reiterated its position that a reasonably close causal relationship must exist

⁵⁰⁵ *Id.* at 5.

⁵⁰⁶ *Id.* at 23.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 23-24.

⁵⁰⁹ *Id.* at 24.

⁵¹⁰ NRC Response at 41 (citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141 (2007)).

⁵¹¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007).

⁵¹² 449 F.3d 1016 (9th Cir. 2006); in *Mothers for Peace* the Ninth Circuit held that the NRC must consider the environmental impacts of a terrorist attack against an independent spent fuel storage installation at the Diablo Canyon Nuclear Power Plant.

between a federal agency action and any environmental consequences of that action in order to trigger a NEPA review, and that such a relationship does not exist with terrorism.⁵¹³ Staff argues that Petitioners have not identified any information distinguishing this proceeding from *Oyster Creek*, and that based on this Contention D should be denied, because it fails to demonstrate a genuine dispute on a material issue of law or fact and raises issues outside the scope of the proceeding.⁵¹⁴

Applicant also argues that, contrary to Petitioners' contention, the Application contains information addressing the environmental impacts of transportation due to a potential traffic accident, including procedures proposed to minimize exposure and risk to the public and the environment from those accidents.⁵¹⁵ Applicant insists that nothing provided by Petitioners in Contention D calls into question any of the Applicant's conclusions or analyses of this issue.⁵¹⁶ Staff similarly avers that Petitioners' claim should be rejected for failing to dispute the information in the amendment application, including the approach proposed in the Application to reduce or avoid environmental impacts from transportation of these sources.⁵¹⁷ Staff notes examples of "[t]he planned transportation route [being] designed to avoid travel on U.S. [federal and state highways],"⁵¹⁸ and the Application providing emergency procedures for any spills.⁵¹⁹

3. *Petitioners' Reply Regarding Contention D*

In their Reply, Petitioners address the NRC Staff's argument that there is no duty to address the environmental impacts from a terrorist attack by claiming that "the environmental impact is part of the homeland security evaluation that must be performed."⁵²⁰ Attempting to distinguish this proceeding from cases like *Oyster Creek*, Petitioners argue that the Commission rejected the triggering

⁵¹³ See NRC Response at 41 (citing *Oyster Creek*, CLI-07-8, 65 NRC at 129). NRC Staff states that, "following the same line of reasoning in *Oyster Creek*, the Commission also rejected terrorism-related NEPA contentions in two other decisions. Referencing their decision in *Oyster Creek* and their decision not to follow *Mothers for Peace* in each instance, the Commission found contentions requiring an evaluation of terrorist attacks under NEPA inadmissible in the license renewal of a nuclear power plant, *Palisades*, CLI-07-9, 65 NRC 139 (2007), and an early site permit in *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 147 (2007)." *Id.* at 41 n.30

⁵¹⁴ *Id.* at 42.

⁵¹⁵ Tr. at 343.

⁵¹⁶ NRC Response at 42.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* (citing ER at 4-5).

⁵¹⁹ *Id.* (citing TR at 4-9, 5-28).

⁵²⁰ Cook Reply to NRC at 14.

of NEPA review for consequences of terrorism against licensed facilities when no new type of activity is being licensed, whereas the application at issue is for licensing of a newly proposed activity.⁵²¹ Thus, Petitioners insist, Applicant should have addressed terrorism and security issues relating to Applicant's proposed trucking plan.⁵²² Moreover, Petitioners argue, Applicant provided no evidence demonstrating that the transport of radioactive resin is "relatively safe and simple," especially when such transport occurs on dirt and trail roads instead of well-maintained highways.⁵²³

4. *Licensing Board's Ruling on Contention D*

Beginning with its 2002 decision in *Private Fuel Storage, L.L.C.*, the Commission has determined that, even post-9/11, the NRC has no legal duty to consider the environmental impacts of terrorism at NRC-licensed facilities.⁵²⁴ Recent Commission rulings are to the same effect, including the Commission's decision in *Oyster Creek* that "NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities."⁵²⁵ Because the Supreme Court has neither endorsed nor rejected the reasoning of the Ninth Circuit in *Mothers for Peace*, and because the proposed North Trend Expansion is located outside the jurisdiction of the Ninth Circuit, we are bound by the Commission's decision in *Oyster Creek*, absent anything that would distinguish this case from that one.

We do not find that Petitioners have distinguished this proceeding from the *Oyster Creek* proceeding in any way that is meaningful under the cited Commission authorities. Thus, to the extent Contention D raises concerns regarding potential terrorism, we must, and do, find it to be inadmissible, because it is beyond the scope of this proceeding, and not "material to the findings the NRC must make to support the action that is involved in the proceeding," as required under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

To the extent that Petitioners raise environmental impact claims related to transportation, we also deny their request. Section 2.309(f)(1)(vi) requires that a petitioner provide sufficient information to demonstrate that a genuine dispute

⁵²¹ *Id.*

⁵²² Tr. at 337.

⁵²³ *Id.* at 338.

⁵²⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); see *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357 (2004); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).

⁵²⁵ *Oyster Creek*, CLI-07-8, 65 NRC at 129.

exists with the application on a material issue of law or fact. Petitioners claim merely that the Applicant fails to consider the threat to the environment imposed by the proposed trucking plan for the North Trend Expansion. As noted by both the Applicant and NRC Staff, issues relating to the environmental impacts of transportation due to potential traffic accidents are addressed in Applicant's environmental and technical reports. As indicated above, these include emergency spill response plans and analyses of available roadways in order to minimize potential effects.⁵²⁶ Petitioners fail to dispute this information. Thus, we also find this portion of Contention D inadmissible for failure to comply with 10 C.F.R. § 2.309(f)(1)(vi) by providing sufficient information and support demonstrating a genuine dispute on a material issue of law or fact.

E. Contention E: Alleged Foreign Ownership and Impacts Thereof

Petitioners in Contention E state:

CBR Fails to Mention It is Foreign Owned by Cameco, Inc. So All The Environmental Detriment and Adverse Health Impacts Are For Foreign Profit and There Is No Assurance The CBR Mined Uranium Will Stay In US for Power Generation.⁵²⁷

1. *Petitioners' Support for Contention E*

In this contention Petitioners challenge Applicant's acquisition by a foreign-owned company, asserting that this issue is in the scope of the proceeding because the Applicant seeks to expand its operations on the basis that the uranium it produces is needed to fulfill U.S. demand while such demand may likely be diverted to other foreign interests.⁵²⁸ Petitioners contend that understanding Applicant's foreign ownership is key to the determination of whether the Applicant's current and proposed operations are within "the best interests of the U.S. general public," and that this issue is thus material to the findings of the NRC.⁵²⁹ Petitioners further argue that the Applicant deliberately omitted references to foreign ownership in its application "in order to give the mis-impression that CBR's [u]ranium mining operations are somehow profitable to U.S. interests" when, as a Canadian-owned company, its operations are "clearly for the profit of foreign

⁵²⁶ See *supra* text accompanying notes 518, 519; Tr. at 341, 343.

⁵²⁷ Reference Petition at 2, 24.

⁵²⁸ *Id.* at 24-25; Petitioners state that Cameco also runs operations in Canada and Kazakhstan, and also allegedly sells uranium products to other non-U.S. buyers, potentially including China, India, Pakistan, North Korea, and possibly Iran, unless the Canadian government legally restricts such sales. *Id.* at 25.

⁵²⁹ *Id.*

interests.”⁵³⁰ Finally, Petitioners state that the Applicant also neglects to include information in its application regarding the “chain of possession of this nuclear source material or who the buyers are and where it may end up or how it may be ultimately used.”⁵³¹ As a result, “all the environmental detriment and adverse health impacts” are asserted to be “for foreign profit [with] no assurance [that] the CBR mined uranium will stay in [the] U.S. for power generation.”⁵³²

2. Applicant’s and NRC Staff’s Responses to Contention E

In the Staff’s view, the contention is outside the scope of the proceeding and raises concerns which are “irrelevant because whether a company is foreign-owned is not material to the safety and environmental requirements under 10 C.F.R. Part 40, Appendix A or section 51.45.”⁵³³ Staff also argues that Petitioners’ claim that there is no assurance the CBR-mined uranium will stay in the U.S. for power generation is not a matter “material to NRC requirements nor the adequacy of the amended application.”⁵³⁴ Staff avers Petitioners are wrong in their claim that CBR’s ownership by a Canadian company that will make profits or lose on its investments is material; “[m]arket conditions and concerns are business matters of the Applicant” and the Petitioners fail to indicate how these concerns relate to any NRC requirement.⁵³⁵ Finally, Staff argues that Petitioners do not provide supporting documentation or point to any law or regulation requiring the Applicant to consider “the chain of possession of this nuclear source material,” and therefore this contention is inadmissible.⁵³⁶

Applicant agrees with Staff that Contention E does not raise any issues within the scope of this proceeding.⁵³⁷ More directly, Applicant states that although Cameco is a Canadian-owned company, the chain of ownership of such nuclear materials will be monitored under the Nuclear Non-Proliferation Treaty, of which Canada is a signatory.⁵³⁸ In addition, according to Applicant, Canada has a safeguards agreement and protocol that provides the International Atomic Energy

⁵³⁰ *Id.*

⁵³¹ *Id.* at 26.

⁵³² *Id.* at 24.

⁵³³ NRC Response at 43.

⁵³⁴ *Id.*

⁵³⁵ *Id.* at 44.

⁵³⁶ *Id.*

⁵³⁷ Tr. at 353.

⁵³⁸ *Id.* at 354.

Agency (IAEA) with “the right and obligation to monitor Canada’s nuclear related activities and verify nuclear material inventories and flows into Canada.”⁵³⁹

3. *Petitioners’ Replies on Contention E*

In addition to the general argument that their contentions are material and within the scope of this proceeding, Petitioners assert that “the NRC itself lacks authority under the [AEA] to grant a license where, as here, there is no benefit to the U.S. national interest, common defense or security and there are clear detriments to the health and safety of the public.”⁵⁴⁰ Petitioners add that “mere technical compliance with NRC disclosure regulations” is not enough to satisfy AEA purposes; thus, the NRC is “required to deny a license amendment that would not serve the U.S. national interest or common defense and security or would fail to protect public health and safety.”⁵⁴¹

Citing 42 U.S.C. § 2012(d), regarding the regulation of source material, Petitioners challenge Staff’s and Applicant’s silence on “how it would [be] in furtherance of the protection of the health and safety of the public to grant a foreign owned Applicant’s amendment to expand to the North Trend area.”⁵⁴² Petitioners also contend that Applicant provides no assurance that the ISL mining product, yellowcake uranium, “will not be used for nuclear weapons of a foreign country or terrorists or fall into the hands of such enemies of the [U.S.],” and the Applicant fails to provide any evidence that the uranium products “will not be sold to China, Pakistan, North Korea or elsewhere to the highest bidder.”⁵⁴³ Finally, Petitioners argue that “NRC lacks authority to grant such a licence amendment without evidence that this risk is mitigated.”⁵⁴⁴

4. *Licensing Board’s Ruling on Contention E*

We first note that Petitioners’ allegation of foreign ownership of Crow Butte Resources, Inc., was not disputed by the Applicant at any time in this proceeding; thus, for purposes of this discussion, it is assumed the Applicant is foreign-

⁵³⁹ Citations to International Agreements (Jan. 30, 2008) at 2. In 2000, as part of an effort to strengthen IAEA safeguards, Canada signed an additional protocol to its safeguards agreement giving the “IAEA enhanced rights of access to nuclear sites and other locations and provid[ing] it with access to information about nuclear-related activities in Canada.” *Id.*

⁵⁴⁰ Cook Reply to NRC at 1-2.

⁵⁴¹ *Id.* at 2.

⁵⁴² Owe Aku Reply to NRC at 15.

⁵⁴³ Cook Reply to NRC at 13.

⁵⁴⁴ *Id.* at 14.

owned.⁵⁴⁵ Second, contrary to arguments presented by the Applicant and NRC Staff, we find that Contention E is not outside the scope of this proceeding. The concerns raised by Petitioners related to the Applicant's foreign ownership are potentially material to the safety and environmental requirements of 10 C.F.R. Part 40.

The Atomic Energy Act of 1954, as amended, provides that the processing of source material "must be regulated *in the national interest* and in order to provide for the common defense and security and to protect the health and safety of the public."⁵⁴⁶ Moreover, section 103(d) of the AEA, which governs "Commercial Licenses," states that "no license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."⁵⁴⁷ If in the opinion of the Commission "the issuance of a license to such a person would be inimical to the common defense and security or the health and safety of the public," such license should not be issued.⁵⁴⁸ In addition, 10 C.F.R. § 40.38 provides that a source material license "may not be issued to the Corporation, if the Commission determines that: (A) The Corporation is owned, controlled or dominated by . . . a foreign corporation."⁵⁴⁹ From this point forward, however, the matter becomes a bit cloudy.

The language in the Act and in 10 C.F.R. § 40.38 appears to be more or less straightforward. It would seem that the type of license Crow Butte has and wishes to amend is a "commercial license," which would seem to render its foreign ownership prohibitive of its being granted a license under the Act. We are not aware of a definition of the term, "Commercial License," but this would seem to be fairly straightforward. The situation is confused, however, by a definition for the term "Corporation" that is found in 10 C.F.R. § 40.4.

⁵⁴⁵ We note that the Commission has determined that a facility is foreign-owned when a foreign interest has the "power," direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the Applicant. *General Electric Co.*, 3 AEC 99, 101 (1966). No argument has been made by Staff or Applicant that Cameco, a Canadian corporation, does not have control, or "power," to direct CBR's activities.

⁵⁴⁶ 42 U.S.C. § 2012(d) (emphasis added).

⁵⁴⁷ *Id.* § 2133(d). See also *supra* note 545.

⁵⁴⁸ 42 U.S.C. § 2133(d).

⁵⁴⁹ 10 C.F.R. § 40.38(a). We note that the Commission also incorporated the limitations stated in section 103(d) of the Act into 10 C.F.R. Part 50, concerning the "Domestic Licensing of Production and Utilization Facilities." See Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999). Specifically, section 50.38 provides that "[a]ny person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license."

For the purposes of Part 40 of the Commission's regulations, which concern the domestic licensing of source material, the definition in section 40.4 for "Corporation" seems to indicate that this term embraces exclusively the United States Enrichment Corporation (USEC) or a successor thereto.⁵⁵⁰ This suggests the rather unusual result that the only corporation subject to the prohibitions of 10 C.F.R. § 40.38 is USEC — an interpretation that would seem to be in conflict with section 103(d) the Act. On the other hand, the definitions in section 40.4 for "Government agency" and "Persons" refer to the term "corporation" in a way suggesting that it is to be interpreted according to its ordinary meaning. Also potentially brought into play is section 40.3, which states that a "*person* subject to the regulations [of Part 40] may not . . . possess . . . radioactive material . . . or any source material . . . unless authorized in a specific or general license issued by the Commission under the regulations of this part."⁵⁵¹ The upshot of all this is that the meaning of section 40.38 is at least ambiguous, and its applicability to this proceeding thus becomes one of statutory and regulatory interpretation.

Minimally, the regulations under 10 C.F.R. Part 40 for "Domestic Licensing of Source Material" clearly require, in section 40.32(d), that "the issuance of the license will not be inimical to the common defense and security or to the health and safety of the public."⁵⁵² As argued by Petitioners, whether a license would serve the U.S. national interest and the common defense and security is very material to the findings the NRC must make in determining whether to grant a license, or, as in this proceeding, a license amendment. In an early case analyzing congressional intent for the phrase "common defense and security," the D.C. Circuit Court of Appeals suggested that there was "internal evidence [in] the Act" that

⁵⁵⁰ See 10 C.F.R. § 40.4. The definition in question states:

Corporation means the United States Enrichment Corporation (USEC), or its successor, a Corporation that is authorized by statute to lease the gaseous diffusion enrichment plants in Paducah, Kentucky, and Piketon, Ohio, from the Department of Energy, or any person authorized to operate one or both of the gaseous diffusion plants, or other facilities, pursuant to a plan for the privatization of USEC that is approved by the President.

We note that at one time the AEA also included references to USEC, which were to be, and apparently were, repealed when USEC was privatized. See, e.g., 42 U.S.C. §§ 2061, 2297b. It is unclear whether there was ever any parallel intention to repeal the definition in 10 C.F.R. § 40.4 for "Corporation," but in any event, it appears this has not been done.

⁵⁵¹ 10 C.F.R. § 40.3 (emphasis added). We note in addition section 40.6, stating that, "[e]xcept as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission." Of course, any rulings by this Board interpreting any regulations would be appealable to, subject to review by, and thus not binding on, the Commission.

⁵⁵² 10 C.F.R. § 40.32(d).

Congress was thinking of such things as not allowing the new industrial needs for nuclear materials to preempt the requirements of the military; of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States.⁵⁵³

And the Commission has held that, among other things, the phrase refers to “the absence of foreign control over the applicant.”⁵⁵⁴

The Applicant posits that the foreign ownership element is not of any concern because Cameco is a Canadian-owned corporation, which, along with the United States, is a signatory to the Non-Proliferation Treaty. However, “previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with.”⁵⁵⁵ As such, we are not inclined to resolve the issue so hastily as Applicant might prefer.

The questions before us are twofold: (1) whether the issuance of a license amendment to the Applicant would be in direct violation of 10 C.F.R. § 40.38; and (2) if not restricted under section 40.38, whether foreign ownership of the Applicant would, under Part 40, including section 40.32(d), have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting the sought license amendment. As these are significant questions on which this Board believes the parties should be heard,⁵⁵⁶ and on which we wish to make a fully informed ruling, we will therefore refrain from ruling on the admissibility of Contention E and these related issues at this time, and direct the parties to brief the issue, to be followed up by oral argument at a time to be determined.⁵⁵⁷

F. Contention F: Alleged Nonsharing of Economic Benefits

Petitioners in Contention F state:

⁵⁵³ *Siegel v. AEC*, 400 F.2d 778, 784 (D.C. Cir. 1968).

⁵⁵⁴ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1400 (1984).

⁵⁵⁵ 64 Fed. Reg. at 52,357.

⁵⁵⁶ We note our surprise that neither Staff’s nor Applicant’s counsel mentioned the statutory and regulatory provisions we reference, given their ethical duty as officers of the court to alert NRC adjudicatory bodies to information relevant to the matters being adjudicated. *See* Model Code of Prof’l Responsibility R. 3.3 (2004) (a lawyer shall not knowingly “fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”); *see also* D.C. Rules of Prof’l Conduct R. 3.3 (2007).

⁵⁵⁷ We address the particulars of this below in our Conclusion and Order.

The Economic Benefits Conferred by the Applicant on Crawford, Nebraska are not Shared by Other Communities that Bear Burdens Downwind and Downstream like Chadron, Slim Buttes, Pine Ridge Indian Reservation and Hot Springs, South Dakota.⁵⁵⁸

1. Petitioners' Support for Contention F

In support of this contention, Petitioners claim that Applicant “argues that its economic contributions should be balanced against the environmental costs but only provides a comparison that includes economic benefits conferred on a small percentage of the people affected by the environmental pollution.”⁵⁵⁹ As additional support, Petitioners contend that the Applicant’s cost-benefit analysis should consider the “additional costs of nuclear power [including] . . . the proper disposal of fuel rod waste” and the effects of “the use of depleted uranium on innocent civilians and our troops when used in conflicts abroad.”⁵⁶⁰

Petitioners argue that this issue is in the scope of the proceeding because “CBR seeks action on the basis that its economic contributions justify its environmental burdens.”⁵⁶¹ Asserting that the NRC must determine whether the Applicant’s current and proposed operations are in the best interests of the public, Petitioners further argue that “understanding the disproportionate allocation of [the Applicant’s] benefits compared to the distribution of environmental burdens” would be key to that determination. As such, Petitioners claim this issue is material to the findings the NRC must make with regard to the Application at issue.⁵⁶² Finally, contrary to claims made by the Applicant in its ER, Petitioners submit that the impacts of contamination are major and permanent in nature.⁵⁶³

2. Applicant’s and NRC Staff’s Responses to Contention F

At oral argument Applicant asserted through counsel, relying on a Commission decision in the *Private Fuel Storage* proceeding, “that a failure to receive a benefit from a project is not an environmental impact.”⁵⁶⁴ NRC Staff submits that this

⁵⁵⁸ Reference Petition at 2, 26.

⁵⁵⁹ *Id.* at 26.

⁵⁶⁰ *Id.* at 27.

⁵⁶¹ *Id.* at 26.

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ Tr. at 362-63 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153-54 (2002)). In *PFS*, the Commission stated that “[e]nvironmental harm is NEPA’s ‘core interest’; that t]he essence of an environmental justice claim, in NRC practice, is

(Continued)

contention is inadmissible because “Petitioners do not provide any expert opinion or facts that support the Petitioners’ statement that Chadron, Slim Buttes, and the Pine Ridge Reservation bear any burden from the North Trend site.”⁵⁶⁵ Citing to section 4.10 of the Application, regarding “Socioeconomic Impacts,” NRC Staff states “CBR employs people from Harrison and Chadron,” and it purchases “millions of dollars of goods and services from within Dawes County,” and pays “state taxes that benefit communities well beyond Crawford.”⁵⁶⁶

Regarding Petitioners’ arguments relating to fuel rod waste disposal, Staff notes that ISL uranium recovery “do[es] not involve disposal of fuel rod waste.”⁵⁶⁷ Furthermore, Staff claims, “Petitioners’ misplaced references to the ‘use of depleted uranium . . . on innocent civilians and our troops when used in conflicts abroad’ does not explain how such a discussion is relevant to the cost-benefit analysis performed by the applicant for this proposed amendment.”⁵⁶⁸ Thus, Staff argues, this contention “raises concerns that are outside the scope of these proceedings.”⁵⁶⁹ Moreover, according to the Staff, Petitioners do not identify a legal basis or expert opinion requiring that Applicant must conduct such a review.⁵⁷⁰

3. Licensing Board’s Ruling on Contention F

We find that Petitioners do not provide a sufficiently specific explanation of particular ways in which the Applicant’s analysis should have considered additional benefits relating to an enlarged area. Petitioners say essentially two things. First, they claim that the benefits that Applicant describes in its Application do not, but should, extend to communities outside the 80-km radius that Applicant purportedly used in its analysis, and that in view of asserted harm extending to a larger area, additional benefits should also have been considered for a larger area. However, the effect of considering additional benefits might be viewed as actually *supporting* the proposed project, by adding to the “positives” in the cost-benefit analysis — a process that is required to be undertaken in order

disparate environmental harm,” 56 NRC at 153; and that “nothing in . . . NEPA . . . suggest[s] that a failure to receive an economic benefit should be considered tantamount to a disproportionate environmental impact,” *id.* at 154. The Commission denied a hearing on a contention alleging “a disparity in the financial benefits that the PFS project may bring to different members of the [Community].” *Id.* at 156.

⁵⁶⁵ NRC Response at 45.

⁵⁶⁶ *Id.* (citing ER at 4-30).

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.* at 46.

to ensure that all environmental ramifications of a project are adequately taken into consideration before approving the project. In any event, Petitioners have not stated with any significant specificity how such considerations should come into play in this proceeding, or explained with sufficient specificity any genuine dispute on a material issue in this proceeding. Moreover, to the extent Contention F concerns environmental justice, it would seem to be inadmissible under the Commission's *PFS* decision.⁵⁷¹

Second, Petitioners argue that certain costs — proper disposal of fuel rod waste and the costs of cancer caused by depleted uranium used in ammunition on gunnery ranges and in conflicts abroad — should be included in the cost-benefit analysis. However, as Staff points out, ISL mining does not involve fuel rod waste; and to the extent such waste is indirectly relevant, the “Waste Confidence” rule would prohibit consideration of this in this proceeding.⁵⁷² And Petitioners’ statements regarding the costs of cancer from depleted uranium provide no specific fact-based, logical argument, only the mere assertion, which is not enough to warrant admission of a contention.

In light of the preceding, we deny admission of Contention F.

VII. PETITIONERS’ REQUEST FOR 10 C.F.R. PART 2, SUBPART G HEARING

Petitioners formally request that this Board apply “Subpart G Hearing Procedures to this proceeding, pursuant to 10 C.F.R. § 2.310(d),” because these contentions necessitate resolution of issues of material fact relating to the occurrence of past events, i.e., whether CBR disputes any of the Relevant Facts [incorporated into each contention by reference].”⁵⁷³ Staff opposes the request, arguing that Petitioners’ reliance on section 2.310(d) is misplaced as it does not apply to license amendments issued under Part 40, but instead “applies only to ‘nuclear power reactors.’”⁵⁷⁴ Staff argues that certain language of 10 C.F.R. § 2.310(a) — i.e., that “licensee-initiated amendments . . . subject to part[] . . . 40 . . . may be conducted under the procedures of subpart L of [part 2]” — should, in conjunction with relevant language of 10 C.F.R. § 2.1200, be interpreted to mean

⁵⁷¹ *PFS*, CLI-02-20, 56 NRC at 156. See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004); see also *supra* note 564.

⁵⁷² 10 C.F.R. § 51.23; see *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 268 (2007); *Nevada v. NRC*, No. 05-1350, 2006 WL 2828864, at 1 (D.C. Cir., Sept. 22, 2006).

⁵⁷³ Reference Petition at 5.

⁵⁷⁴ NRC Response at 17.

that proceedings such as this one *must* be conducted under 10 C.F.R. Subpart L.⁵⁷⁵ Staff supports its argument with a Commission statement, made when it adopted certain revisions to the NRC procedural rules in 10 C.F.R. Part 2, that “the listed proceedings [in § 2.310] *are to be conducted under Subpart L,*” unless one of the exceptions of subsections (b) through (h) is applicable.⁵⁷⁶ Staff concludes because this proceeding does not apply to any of the applications specified in paragraphs (b) through (h), “the appropriate hearing procedure is Subpart L.”⁵⁷⁷

At oral argument, Petitioners argued that the licensing board in *Vermont Yankee*⁵⁷⁸ specifically rejected the argument now put forth by Staff, by virtue of the use of the permissive term, “may,” in 10 C.F.R. § 2.310(a), which indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G.⁵⁷⁹ Petitioners urged that a Subpart G Hearing is appropriate “due to the nature of the issues in this case, the technical issues related to water movement, geological formations, intermixing of the aquifers, as well as the cultural and indigenous peoples issues, and [] in order to have a proper record.”⁵⁸⁰ Petitioners asserted that the Subpart L procedures, while found “to comply technically with the Administrative Procedure Act,”⁵⁸¹ would not provide the discovery and expert testimony procedures more appropriate for the issues before the Board in this proceeding.⁵⁸² Staff and Applicant contended that a Subpart G hearing is “just not permitted under the rules.”⁵⁸³

We note that the January 16, 2008, oral argument on Subpart G was effectively cut short at the end of the day, and as a result, the Board deems it appropriate to conduct limited additional argument on this matter in conjunction with argument on Contention E, to be scheduled at a later date.

⁵⁷⁵ *Id.* (citing 10 C.F.R. §§ 2.310(a), 2.1200) (emphasis added).

⁵⁷⁶ *Id.* (citing Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2206 (Jan. 14, 2004) (emphasis added)).

⁵⁷⁷ *Id.* at 17-18; the Applicant did not specifically address Petitioners’ request for Subpart G hearing in pleadings, but did argue in opposition to the request at oral argument.

⁵⁷⁸ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006).

⁵⁷⁹ Tr. at 365-66.

⁵⁸⁰ *Id.* at 366.

⁵⁸¹ See *CAN v. NRC*, 391 F.3d at 351, wherein the First Circuit upheld the validity of the Subpart L regulations on the basis of NRC’s representation that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) of Subpart L is equivalent to the opportunity for cross-examination under the APA, 5 U.S.C. § 556(d), i.e., that cross-examination is available whenever it is “required for a full and fair adjudication of the facts.”

⁵⁸² Tr. at 366.

⁵⁸³ *Id.* at 369; *see id.* at 367-69.

VIII. CONCLUSION AND ORDER

Based, therefore, upon the preceding findings and rulings, it is, this 29th day of April 2008, ORDERED as follows:

A. Petitioners Owe Aku, Western Nebraska Resources Council, and Debra L. White Plume are admitted as parties in this proceeding and their Requests for Hearing and Petitions To Intervene are granted in part and denied in part. A hearing is granted with respect to their joint Contentions A, B, and C, reframed and limited as follows:

- Contention A. CBR's License Amendment Application does not accurately describe the environment affected by its proposed mining operations or the extent of its impact on the environment as a result of its use and potential contamination of water resources, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.
- Contention B. CBR's proposed expansion of mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River,
- Contention C. Reasonable consultation with Tribal Leaders regarding the prehistoric Indian camp located in the area surrounding CBR's proposed North Trend Expansion Project has not occurred as required under NEPA and the National Historic Preservation Act.

The Requests for Hearing and Petitions of Slim Buttes Agricultural Development Corporation and Thomas Kanatakeniate Cook are denied, as is admission of Contentions D and F. The Board will hear additional argument on Contention E, in accordance with relevant provisions of the preceding Memorandum.

B. The Board will conduct additional oral argument on Petitioners' request to hold the hearing in this proceeding under the procedures set forth at Subpart G of 10 C.F.R. Part 2, at a date to be specified in the near future.

C. The Oglala Sioux Tribe may participate in the hearing pursuant to 10 C.F.R. § 2.315(c). The particulars and extent of the Tribe's participation will be addressed in a prehearing conference to be held in the near future, in conjunction with oral argument on Contention E and Petitioners' request that the hearing be held under 10 C.F.R. Part 2, Subpart G, and other preliminary matters.

D. We request that any other interested State, local governmental body, and affected, federally recognized Indian Tribe that wishes to participate in the hearing pursuant to 10 C.F.R. § 2.315(c) file a Request and Notice of such intent within

thirty (30) days, or by May 29, 2008. Any such notice shall, as required by section 2.315(c), contain a designation of a single representative for the hearing, and an identification of the contention or contentions on which it will participate.

E. After discussing with the parties relevant scheduling matters in the aforementioned prehearing conference, the Licensing Board will issue a schedule of further proceedings in this matter.

F. This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311. Any petitions for review meeting applicable requirements set forth in that section must be filed within ten (10) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Fred W. Oliver
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 29, 2008⁵⁸⁴

⁵⁸⁴Copies of this Corrected Memorandum and Order were sent this date by Internet e-mail transmission to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

J.E. Dyer, Director

In the Matter of

Docket No. 50-271
(License No. DPR-28)

ENTERGY NUCLEAR VERMONT
YANKEE, LLC, AND ENTERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power
Station)

April 28, 2008

The New England Coalition (NEC or the Petitioner) requested that Nuclear Regulatory Commission (NRC) promptly restore reasonable assurance of adequate protection of public health and safety that is now degraded by the failure of the Licensee and its employees to report adverse conditions leading to a reduction in plant safety margins at the Vermont Yankee Nuclear Power Station (Vermont Yankee), or otherwise order a derate or shutdown of Vermont Yankee until it can be determined to what extent Vermont Yankee is being operated in an unanalyzed condition. Specifically, the petition requested the following actions: (1) NRC completion of a Diagnostic Evaluation Team examination or Independent Safety Assessment of Vermont Yankee to determine the extent of condition of nonconformances, reportable items, hazards to safety, and the root causes thereof; (2) NRC completion of a safety culture assessment to determine why worker safety concerns were not previously reported and why assessments of safety culture under the Reactor Oversight Process failed to capture the fact or reasons that safety concerns have gone unreported; (3) derate Vermont Yankee to 50% of licensed thermal power with a mandatory hold at 50% until a thorough and detailed structural and performance analysis of the cooling towers, including the alternate cooling system, has been completed by the Licensee; reviewed and approved by NRC; and until the above steps (1) and (2) have been completed; and

(4) NRC investigation and determination of whether or not similar nonconforming conditions and causes exist at other Entergy-run nuclear power plants.

The Petition Review Board (PRB) reviewed the petition and decided to reject requests (1), (2), and (4) for review under the section 2.206 process and accept a portion of request (3) related to the cooling tower cell collapse.

The final Director's Decision (DD) was issued on April 28, 2008. The final DD stated that the Office of Nuclear Reactor Regulation has decided to deny the Petitioner's request to derate Vermont Yankee, but has granted the petition related to the request for the NRC Staff's review of Entergy's evaluation and analysis of the partial cooling tower collapse and associated causes. The NRC Staff's evaluation of the concerns considered results of the inspection of the Licensee's cooling tower inspection program and processes, and the investigations associated with Entergy's Root Cause Analysis of the collapse. Based on the NRC Staff's evaluation and inspections, and Entergy's completed and planned corrective actions, the Staff concluded that the Petitioner's concerns have been adequately addressed and resolved.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated August 27, 2007, as supplemented on October 3, 2007, Mr. Raymond Shadis, consultant to the New England Coalition (NEC or the Petitioner) filed a petition pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, with the Nuclear Regulatory Commission (NRC or the Commission). The NEC petition requested that NRC promptly restore reasonable assurance of adequate protection of public health and safety that is now degraded by the failure of the licensee and its employees to report adverse conditions leading to a reduction in plant safety margins at the Vermont Yankee Nuclear Power Station (Vermont Yankee), or otherwise order a derate or shutdown of Vermont Yankee until it can be determined to what extent Vermont Yankee is being operated in an unanalyzed condition. Specifically, the petition requested the following actions: (1) NRC completion of a Diagnostic Evaluation Team examination or Independent Safety Assessment of Vermont Yankee to determine the extent of condition of nonconformances, reportable items, hazards to safety, and the root causes thereof; (2) NRC completion of a safety culture assessment to determine why worker safety concerns were not previously reported and why assessments of safety culture under the Reactor Oversight Process failed to capture the fact or reasons that safety concerns have gone unreported; (3) derate Vermont Yankee to 50% of licensed thermal power with a mandatory hold at 50% until a

thorough and detailed structural and performance analysis of the cooling towers, including the alternate cooling system, has been completed by the licensee; reviewed and approved by NRC; and until the above steps (1) and (2) have been completed; and (4) NRC investigation and determination of whether or not similar nonconforming conditions and causes exist at other Entergy-run nuclear power plants. On September 6, 2007, the NRC Staff notified the Petitioner that, based on the recommendation of the Petition Review Board (PRB), the request for immediate action to derate or shut down Vermont Yankee was denied because the petition did not identify any safety hazards sufficient to warrant those actions.

Mr. Raymond Shadis, in his capacity as the Petitioner's consultant, participated in two telephone conference calls with the NRC's PRB on September 12, 2007, and October 3, 2007, to discuss the petition and provide any additional information in light of the PRB's initial recommendation. The PRB's initial recommendation was to reject requests (1), (2), and (4), which are the diagnostic evaluation team examination, safety culture assessment, and the NRC investigation at other Entergy facilities. These requests were rejected for review under the section 2.206 process because they are not requests for enforcement-type actions. However, the PRB determined that request (3) is a request for an enforcement-type action and that the underlying concern, the partial collapse of a cooling tower, was credible and sufficient to warrant further inquiry, and, therefore, meets the criteria for review in the section 2.206 process. The teleconferences were transcribed and the transcriptions were treated as supplements to the petition. Those discussions were considered in reaching the PRB's final recommendation regarding the Petitioner's request for action and in establishing the schedule for the review of the petition. The PRB confirmed its initial recommendation to reject requests (1), (2), and (4) for review under the section 2.206 process and accept a portion of request (3) related to the cooling tower cell collapse. *See* Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions," with respect to granting a portion of action item (3).

In an acknowledgment letter dated November 6, 2007, the NRC informed the Petitioner that the petition was accepted, in part, for review under 10 C.F.R. § 2.206, and had been referred to the Office of Nuclear Reactor Regulation for appropriate action. As explained below, after full consideration of the petition, the Office of Nuclear Reactor Regulation decided to deny the petition, in part, and to grant the petition in part. The Petitioner's request to derate Vermont Yankee was denied, but the petition was granted, in part, for the NRC Staff's review of Entergy's evaluation and analysis of the partial cooling tower collapse and associated causes. The NRC's documentation of this review included a noncited violation in connection with the Licensee's inadequate cooling tower inspection program.

Copies of the petition, transcripts, and acknowledgment letter are available for inspection at the Commission's Public Document Room (PDR) at One White Flint

North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC website at <http://www.nrc.gov/reading-rm/adams.html> under ADAMS Accession No. ML072920218. Persons who do not have access to ADAMS or who have problems in accessing the documents in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to pdr@nrc.gov.

The NRC Staff sent a copy of the proposed Director's Decision (DD) to the Petitioner for comment on February 29, 2008. The NRC Staff did not receive any comments on the proposed DD.

II. DISCUSSION

As a basis for request (3), the petition cited problems related to the inadequate performance of Vermont Yankee Inservice Inspection, Maintenance, Engineering, and Quality Assurance, which led to a cooling tower cell collapse. The third-quarter NRC Integrated Inspection Report 05000271/2007004, dated November 7, 2007 (ADAMS Accession No. ML073110213) documented a noncited violation (NCV) titled "Inadequate Inspection Program Resulted in the Partial Collapse of a Non-Safety-Related Cooling Tower Cell" for Entergy's failure to effectively implement industry operating experience into the cooling tower inspection program and processes. This violation was treated as an NCV because it was considered to have very low safety significance and was entered into Entergy's corrective action program.

The NRC's review of this cooling tower collapse is further documented in the NRC's fourth-quarter 2007 Integrated Inspection Report 05000271/2007005, dated January 31, 2008 (ADAMS Accession No. ML080310363). The NRC inspectors reviewed Entergy's Root Cause Analysis (RCA) for the partial collapse of cooling tower (CT) cell 2-4, and a separate RCA for the human performance deficiencies identified during Entergy's review of the event. The NRC inspectors evaluated the thoroughness of the RCAs, including the extent-of-condition, and the completed and planned corrective actions, including the corrective actions to preclude recurrence. Corrective actions included a physical inspection of both safety-related and non-safety-related CTs, focusing on "B" and "C" columns in the fill area where a partial collapse of CT cell 2-4 occurred, and the repair of identified structural components; the incorporation of operating experience into procedures for future inspections; ensuring all identified CT deficiencies are documented into the corrective action program; and planned completion of a corrective action effectiveness review within 1 year. The CT cell 2-4 which collapsed on August 21, 2007, was non-safety-related. The NRC

inspectors considered the investigations associated with the RCAs to be detailed and thorough, and found Entergy's completed and planned corrective actions for future inspections to be acceptable. Based on this inspection, the NRC Staff finds that the Petitioner's concerns have been adequately addressed by Entergy's RCAs and corrective actions.

III. CONCLUSION

Based on the above, the Office of Nuclear Reactor Regulation has decided to deny the Petitioner's request to derate Vermont Yankee, but has granted the petition, in part, with the NRC Staff's review of Entergy's evaluation and analysis of the partial cooling tower collapse and associated causes. The NRC's documentation of this review included a noncited violation in connection with the Licensee's inadequate cooling tower inspection program. Petitioner's concern regarding the partial collapse of the cooling tower cell at Vermont Yankee has been adequately resolved such that no further action is needed.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

J.E. Dyer, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 28th day of April 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-293-LR

**ENTERGY NUCLEAR GENERATION
COMPANY and ENTERGY
NUCLEAR OPERATIONS, INC.
(Pilgrim Nuclear Power Station)**

May 16, 2008

RULES OF PRACTICE: CLOSE OF HEARING

A Court order required the Commission to stay “the close of hearings” to afford the Commonwealth of Massachusetts an opportunity to request status as an interested state so that it would qualify to request a suspension of the proceeding under 10 C.F.R. § 2.802(d). “The close of hearings” refers to the close of the proceeding as a whole, including the Commission’s ultimate decision on review, and not to the ministerial act of closing the evidentiary record. As the Commonwealth has already filed a notice of intent to participate as an interested state, it may petition to suspend the proceedings under 10 C.F.R. § 2.802(d) after the Board closes the evidentiary record.

MEMORANDUM AND ORDER

On April 8 the United States Court of Appeals for the First Circuit issued a decision denying two petitions for review filed by the Commonwealth of Massachusetts challenging the dismissal of its sole contention in the Pilgrim

and Vermont Yankee license renewal proceedings.¹ The Court also ordered a “stay [of] the close of hearings in both plant license renewal proceedings for 14 days following the date of issuance of mandate in this case in order to afford the Commonwealth an opportunity to request participant status under 10 C.F.R. § 2.315(c), should it desire to do so.”² Today we address the effect of the court-ordered stay on the ongoing *Pilgrim* proceeding.

Under the Federal Rules of Appellate Procedure, the mandate must issue 7 calendar days after the time to request rehearing expires or a timely filed rehearing petition is denied, whichever is later.³ In cases where a Federal agency is a party, a request for rehearing may be requested within 45 days after entry of judgment.⁴ In this case, then, the court-ordered stay will remain in effect until at least June 13, 2008 (45-day rehearing period, plus the 7-day mandate period, plus 14 days, as ordered by the First Circuit).

An Atomic Safety and Licensing Board (the Board) held an evidentiary hearing on Pilgrim Watch Contention 1, the sole admitted contention in this proceeding, on April 10, just 2 days after the First Circuit decision. The First Circuit’s stay order generated some confusion at the hearing as to what exactly the Court meant by the phrase “the close of hearings.” Following the hearing, Entergy filed a “Request for Guidance on the First Circuit’s Administrative Stay.”⁵ On May 12 the Board issued a scheduling order that renders Entergy’s concerns largely moot.⁶ But because the stay remains in effect, we find it appropriate to provide guidance on how to proceed in light of the stay.

Entergy argues that the Commission should “interpret the Court’s order as staying only the termination of the adjudication, and not the closing of the evidentiary record and receipt of proposed findings.”⁷ Pilgrim Watch filed a response opposing Entergy’s proposed interpretation.⁸ Pilgrim Watch argues that “[e]nding the evidentiary hearing and closing the record would eviscerate the right to participate that the Court of Appeals granted the Commonwealth.”⁹

¹ *Massachusetts v. NRC*, Nos. 07-1482, 07-1483 (1st Cir. Apr. 8, 2008).

² *Id.*, slip op. at 31-32.

³ Fed. R. App. P. 41.

⁴ Fed. R. App. P. 40.

⁵ Entergy’s Request for Guidance on the First Circuit’s Administrative Stay (Apr. 17, 2008) (Request).

⁶ Order (Setting Deadlines for Provisional Proposed Findings and Conclusions on Contention 1, and for Pleadings Related to Pilgrim Watch’s Recent Motion Regarding CUFs) (May 12, 2008) (unpublished).

⁷ Request at 3.

⁸ Pilgrim Watch Response to Entergy’s Request for Guidance on the First Circuit’s Administrative Stay (Apr. 21, 2008) (Pilgrim Watch Response).

⁹ Pilgrim Watch Response at 2.

Entergy's argument is persuasive. The First Circuit ordered the stay not out of any concerns about the evidentiary hearing on Pilgrim Watch's contention, but to "afford the Commonwealth [of Massachusetts] an opportunity to request participant status under 10 C.F.R. § 2.315(c), should it desire to do so."¹⁰ The Court explained that the reason Massachusetts might desire to seek participant status under section 2.315(c) was to "qualify to request a suspension of [license renewal] proceedings under § 2.802(d),"¹¹ a provision in our rules allowing rulemaking petitioners who are also "parties" to licensing proceedings to request a suspension of those proceedings pending the outcome of the rulemaking petition. Massachusetts has filed a license renewal-related rulemaking petition.¹²

The Court stated that it would "bind the NRC to its litigation position" (stated in the agency's First Circuit brief) that these procedures would be available to Massachusetts in this proceeding.¹³ In other words, the Court ordered the stay so that during that period of time the Commission would not allow the adjudication to reach a point where it would no longer allow Massachusetts to seek participant status and request a suspension of the proceedings. Massachusetts recently took advantage of this opportunity by filing a notice of its intent to participate in this proceeding as an interested state.¹⁴ Massachusetts has not yet sought a suspension of the proceedings. Even though Massachusetts has now entered the case, the court-ordered stay, by its own terms, remains in effect.

The Court may have borrowed the phrase "close of hearings" from 10 C.F.R. § 2.1209, which requires parties to file proposed findings of fact and conclusions of law on the contentions addressed in the hearing "within thirty (30) days of the close of the hearing or at such other time as the presiding officer directs."¹⁵ In that regulation, "the close of the hearing" refers to the closing of the evidentiary record. But the administrative record (and the hearing process) remains open — the Board's initial decision, any petition for review thereof, and the Commission's ultimate decision on review are all docketed and included in the administrative record following the closing of the Board's evidentiary record. In this proceeding, the Commonwealth has already filed a notice of intent to participate as an

¹⁰ *Massachusetts*, slip op. at 32.

¹¹ *Id.* at 31.

¹² *Id.* at 16-18.

¹³ *Id.* at 4; *see also id.* at 31. A prior Commission decision (*Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-13, 65 NRC 211, 215 n.16 (2007)) and the Commission's court of appeals brief indicated that Massachusetts would be permitted to seek "interested state" status.

¹⁴ Commonwealth of Massachusetts' Notice of Intent To Participate as an Interested State (May 6, 2008).

¹⁵ The First Circuit did not cite to that regulation in issuing the stay.

interested state and may petition to suspend the proceedings under 10 C.F.R. § 2.802(d) after the Board closes the evidentiary record.

In short, we do not read the First Circuit's phrase "the close of hearings" to refer to the ministerial act of closing the evidentiary record for Pilgrim Watch Contention 1 under 10 C.F.R. § 2.1209, but to refer instead to the proceeding as a whole. It is not necessary for the parties or the Board to suspend their work on findings of fact and conclusions of law for Pilgrim Watch Contention 1 to protect the right of Massachusetts to participate as ordered by the Court. Massachusetts's concerns are entirely unrelated to Pilgrim Watch Contention 1.¹⁶ If Massachusetts petitions the Commission to suspend the proceeding, that action will not affect the evidentiary hearing record on Contention 1, the parties' proposed findings and conclusions, or the Board's merits determination.

For this reason, we direct the Board to close the evidentiary record on Pilgrim Watch Contention 1, per its usual course, and proceed with its new schedule for the submission of proposed findings of fact and conclusions of law. The proceeding-at-large and the administrative record remain open in accordance with the Court's stay order. Contrary to Pilgrim Watch's characterization, this will not "eviscerate the right to participate that the Court of Appeals granted the Commonwealth" but instead will ensure that Massachusetts may participate in precisely the manner the First Circuit sought to protect.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of May 2008.

¹⁶ Massachusetts explained to the First Circuit that it has "expressed no interest" in the contentions of other parties and seeks only to address the issues raised in its original contention, issues currently pending before the Commission in Massachusetts's rulemaking petition. *See* Reply Brief for Petitioner Commonwealth of Massachusetts at 13 (Nov. 8, 2007). A copy is available on the Agencywide Documents Access and Management System (ADAMS), Accession No. ML073250351.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-219-LR
(License Renewal)

AMERGEN ENERGY COMPANY, LLC
(Oyster Creek Nuclear Generating
Station)

May 28, 2008

ORDER
(Requesting Additional Briefs)

Nuclear Information and Resource Service, Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (collectively, Citizens) have petitioned for Commission review¹ of the Initial Decision of the Atomic Safety and Licensing Board, LBP-07-17.² In its decision, the Board rejected Citizens' challenge to the renewal of the operating license of AmerGen Energy Company, LLC (AmerGen or Applicant) for its Oyster Creek Nuclear Generating Station (Oyster Creek). AmerGen³ and the

¹ Citizens' Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008). Initially, Petitioners referred to themselves collectively as "NIRS" — for ease of reference we use their later choice, "Citizens," throughout this decision.

² 66 NRC 327 (2007).

³ AmerGen's Answer Opposing Citizens' Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 24, 2008) (AmerGen Answer).

NRC Staff⁴ filed answers opposing the petition for review. Citizens replied to AmerGen's and the Staff's filings.⁵

The initial decision included an "Additional Statement" by Judge Baratta,⁶ one of two technical judges on the Board, in which he expressed his agreement with the majority except on the single question of "whether the Licensee has fully shown that there is reasonable assurance that the factor of safety required by the regulations will be met throughout the period of extended operation assuming a 4-year (every other refueling) inspection cycle."⁷ In this connection, Judge Baratta expressed concern about the extent of knowledge about the current thickness of the drywell shell and wanted a "conservative best estimate analysis of the actual drywell shell" to be performed.⁸

To perform this analysis, Judge Baratta suggested imposing an additional requirement on the three-dimensional (3-D) finite element structural analysis of the drywell shell that the Applicant committed to perform prior to the period of extended operation. The AmerGen commitment (Staff's proposed license condition 7⁹), on which Judge Baratta would impose the additional requirement, reads:

AmerGen will perform a 3-D finite element structural analysis of the primary containment drywell shell using modern methods and current drywell shell thickness data to better quantify the margin that exists above the Code required minimum for buckling. The analysis will include sensitivity studies to determine the degree to which uncertainties in the size of thinned areas affect Code margins. If the analysis determines that the drywell shell does not meet required thickness values, the NRC will be notified in accordance with 10 [C.F.R. Part] 50 requirements.¹⁰

On top of this commitment, Judge Baratta would specifically require AmerGen "to perform a series of sensitivity analyses, at least one of which includes the use of an extrapolation scheme to determine the thicknesses between the measured locations."¹¹

In its Answer to Citizens' Petition for Review, in discussing this issue, AmerGen states that "[i]n fact, AmerGen has committed to conduct such an analysis,

⁴ NRC Staff's Answer to Citizens' Petition for Review of LBP-07-17 (Jan. 24, 2008).

⁵ Citizens' Consolidated Reply Regarding Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 29, 2008).

⁶ LBP-07-17, 66 NRC at 373 (Additional Statement).

⁷ *Id.*

⁸ *Id.* at 376.

⁹ NRC Staff Exh. 1, at 1-18.

¹⁰ AmerGen Exh. 10, encl. at 11.

¹¹ LBP-07-17, 66 NRC at 376.

including sensitivity analyses that Judge Baratta refers to in his Additional Statement.”¹²

In view of the foregoing, the Commission asks the parties to address the following:

Explain whether the structural analysis that AmerGen has committed to perform, and that is reflected in the Staff’s proposed license condition, matches or bounds the sensitivity analyses that Judge Baratta would impose. In any event, explain whether additional analysis is necessary.

Initial briefs on this question should be filed 14 days from the date of this order, and are limited to 10 pages in length. If desired, reply briefs may be filed 7 days later, with a five-page limitation.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of May 2008.

¹² AmerGen Answer at 9.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

E. Roy Hawkens, Presiding Officer

In the Matter of

**Docket No. 72-26-ISFSI
(ASLBP No. 08-860-01-ISFSI-BD01)**

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Power Plant
Independent Spent Fuel Storage
Installation)**

May 14, 2008

In the Diablo Canyon proceeding, the Presiding Officer grants the NRC Staff's uncontested motion for summary disposition of Contention 1(b), which alleged that the Staff failed to provide a complete list of source documents underlying its Environmental Assessment, and also failed to identify appropriate Freedom of Information Act exemptions for its withholding decisions.

RULES OF PRACTICE: SUMMARY DISPOSITION

Summary disposition motions are addressed in 10 C.F.R. § 2.710, which states that summary disposition shall be granted if the "filings in the proceeding . . . together with the statements of the parties and the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law" (10 C.F.R. § 2.710(d)(2)).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PROOF)

The moving party bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PROOF)

The nonmoving party cannot rest on the mere allegations or denials of a pleading, but must “go beyond the pleadings and by [the party’s] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial” (*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

RULES OF PRACTICE: SUMMARY DISPOSITION

The tribunal must examine the evidence in the light most favorable to the nonmoving party (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

RULES OF PRACTICE: SUMMARY DISPOSITION (EVIDENTIARY SHOWING)

The moving party “has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required” (*Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-443, 6 NRC 741, 754 (1977); accord *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970)).

FREEDOM OF INFORMATION ACT: SUMMARY DISPOSITION

Challenges in FOIA cases routinely are resolved on the basis of summary judgment pleadings. See, e.g., *Wickwire Gavin, P.C. v. U.S. Postal Service*, 356 F.3d 588 (4th Cir. 2004); *Cooper Cameron Corp. v. U.S. Department of Labor*, 280 F.3d 539 (5th Cir. 2002); *Minier v. Central Intelligence Agency*, 88 F.3d 796 (9th Cir. 1996); *Lewis v. Internal Revenue Service*, 823 F.2d 375 (9th Cir. 1987).

FREEDOM OF INFORMATION ACT: IN CAMERA REVIEW

Where the agency has submitted detailed public affidavits that permit resolution of FOIA issues, *in camera* review of redacted information or sealed documents is not necessary. See *Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1083 (9th Cir. 2004) (*in camera* review ought to occur only in the “exceptional case” after the “government has submitted as detailed public affidavits . . . as possible”) (quoting *Doyle v. Federal Bureau of Investigation*, 722 F.2d 554, 556 (9th Cir. 1983)).

FREEDOM OF INFORMATION ACT: PUBLIC ACCESS (STATUTORY REQUIREMENTS)

Regarding the public disclosure requirements of an agency’s NEPA analysis, Congress has established that the Environmental Impact Statement “shall be made available . . . to the public as provided by [FOIA]” (42 U.S.C. § 4332(2)(C)).

FREEDOM OF INFORMATION ACT: EXEMPTIONS (PUBLIC ACCESS)

An agency need not disclose information if it falls within one of the nine exemptions in FOIA (5 U.S.C. § 552(b)). An agency may “withhold public disclosure of any NEPA documents, in whole or in part, under the authority of an FOIA exemption” (*Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981)).

FREEDOM OF INFORMATION ACT: PUBLIC ACCESS (REQUEST AND COMPLIANCE)

Ordinarily, when access to documents is disputed in FOIA litigation, the “government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption” (*Lion Raisins Inc. v. U.S. Dep’t of Agric.*, 354 F.3d at 1082). This can be usually accomplished by the agency’s preparation of a *Vaughn* Index and explanatory affidavits that are sufficiently detailed to support a tribunal’s plenary assessment of the validity of a claimed exemption. See *Lion Raisins Inc.*, 354 F.3d at 1082-83; *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

FREEDOM OF INFORMATION ACT: PUBLIC ACCESS (REQUEST AND COMPLIANCE)

In evaluating the validity of a claimed FOIA exemption, the experience and expertise of an affiant, coupled with a detailed and specific affidavit, lends special weight to the affiant's statements and conclusions. *See Lion Raisins Inc.*, 354 F.3d at 1080.

FREEDOM OF INFORMATION ACT: EXEMPTION 2

FOIA Exemption 2 authorizes an agency to withhold "matters that are . . . related solely to the internal personnel rules and practices of an agency" (5 U.S.C. § 552(b)(2)). Relevant case law supports the conclusion that NRC records are protected from disclosure under Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials. *E.g., Dirksen v. U.S. Department of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986); *Ginsburg, Feldman, & Bress v. Federal Energy Administration*, 591 F.2d 717 (D.C. Cir.), *aff'd en banc and per curiam*, 591 F.2d 752 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

AGENCY NEPA REVIEW: ENVIRONMENTAL ASSESSMENT

Under NRC Regulations, an Environmental Assessment must include a Reference Document List that "(identifi[es the] sources used" (10 C.F.R. § 51.30(a)(2)). This List should include ("[a]ll references (i.e., sources used) used in the preparation of the EA . . . including those cited in the text of the EA and those that were not specifically cited but served as useful guidance during document development" (NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" § 3.4.12 (Aug. 2003)).

ORDER

(Granting NRC Staff's Unopposed Motion for Summary Disposition of San Luis Obispo Mothers for Peace's Contention 1(b))

In this case, San Luis Obispo Mothers for Peace (SLOMFP) raised several contentions challenging the NRC Staff's Supplemental Environmental Assessment (EA) that analyzed the environmental impacts that would result from a terrorist attack on a proposed Independent Spent Fuel Storage Installation (ISFSI) at the Diablo Canyon Nuclear Power Plant site. On March 27, 2008, the Commission

issued an order directing me to resolve a single contention — Contention 1(b) — which alleges that the NRC Staff (1) failed to provide source documents or information underlying its environmental analysis, and (2) failed to identify appropriate Freedom of Information Act (FOIA) exemptions for the Staff’s withholding decisions. On April 18, 2008, the NRC Staff filed a motion seeking summary disposition of Contention 1(b). *See* NRC Staff’s Motion for Summary Disposition of SLOMFP’s Contention 1(b) (Apr. 18, 2008) [hereinafter NRC Staff Summary Disposition Motion].

On April 26, SLOMFP filed a response stating that it did not oppose the NRC Staff’s motion. *See* SLOMFP’s Response to NRC Staff’s Motion for Summary Disposition of Contention 1(b) (Apr. 26, 2008) [hereinafter SLOMFP Response to Summary Disposition Motion]. SLOMFP’s response does not pretermit my inquiry, however, because the NRC Staff must show it is entitled to summary disposition even in the absence of SLOMFP’s opposition (*infra* Part II.A.2). As discussed below, the Staff has satisfied this burden, and its motion for summary disposition is therefore granted.

I. BACKGROUND

A. Adjudicative History of Contention 1(b)

In December 2001, Pacific Gas and Electric Co. (PG&E) applied for a license under 10 C.F.R. Part 72 to construct and operate an ISFSI for dry cask storage of spent nuclear fuel at its Diablo Canyon Nuclear Power Plant site. Pursuant to the National Environmental Policy Act (NEPA), the NRC Staff reviewed the application and issued an EA.¹ Meanwhile, in response to a notice of opportunity for hearing published by the NRC Staff (67 Fed. Reg. 19,600 (Apr. 22, 2002)), SLOMFP petitioned for a hearing, and its petition included several proffered

¹NEPA has the dual goals of requiring an agency “to consider every significant aspect of the environmental impact of a proposed action[, and] ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process” (*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation omitted)). In furtherance of these goals, NEPA requires federal agencies to prepare an environmental impact statement (EIS) prior to any major federal action significantly affecting the environment (42 U.S.C. § 4332(2)(C)). An EIS must include, *inter alia*, a detailed statement on the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided if the proposal is implemented, and alternatives to the proposed action (*ibid.*). If the agency is uncertain whether an action is a major federal action significantly affecting the environment, it must first prepare an environmental assessment (EA) (40 C.F.R. § 1501.4). No EIS is necessary if the EA concludes with a “finding of no significant impact,” which briefly presents the reasons why the proposed action will not significantly impact the environment (40 C.F.R. §§ 1501.4(e), 1508.13; *see Department of Transportation v. Public Citizen*, 541 U.S. 752, 756-58 (2004)).

contentions alleging that the NEPA analysis improperly failed to consider environmental impacts of a terrorist attack. The then-presiding Licensing Board denied SLOMFP's NEPA-terrorist contentions, and it referred its decision to the Commission (LBP-02-23, 56 NRC 413 (2002)). The Commission accepted the referral and affirmed the Board's rejection of the contentions (CLI-03-1, 57 NRC 1 (2003)).

The United States Court of Appeals for the Ninth Circuit reversed (*San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007)). The Ninth Circuit held that the Commission's refusal to consider the environmental effects of a terrorist attack was inconsistent with the requirements of NEPA, and it remanded for further proceedings (449 F.3d at 1028, 1035).

On remand, the Commission directed the NRC Staff to prepare a revised EA addressing the likelihood of a terrorist attack on the Diablo Canyon ISFSI and the potential consequences of such an attack (CLI-07-11, 65 NRC 148, 149 (2007)). The Commission directed the Staff to base its analysis, to the extent practicable, on "information already available in agency records, and consider in particular the Commission's [design-basis threat (DBT)]² for power plant sites and other information on the ISFSI design, mitigative, and security arrangements bearing on likely consequences, consistent with the requirements of NEPA [and] the Ninth Circuit's decision" (*id.* at 150) (footnote added and omitted). The Commission stated that the NRC Staff should make "public as much of its revised environmental analysis as feasible," recognizing, however, that it "may prove necessary to withhold some facts underlying the Staff's findings and conclusions," such as classified national security information or safeguards information (*id.* at 150-51).

Pursuant to the Commission's direction, the NRC Staff in May 2007 published a Draft Supplemental EA for public comment. In June 2007, SLOMFP proffered five contentions challenging the Draft Supplemental EA, but before the Commission ruled on the admissibility of these contentions, the NRC Staff in August 2007 issued the Final Supplemental EA. In November 2007, the NRC Staff issued an addendum to the EA augmenting the Reference Document List, which lists the sources used by the Staff in its preparation of the EA (10 C.F.R. § 51.30(a)(2)).

Following publication of the Final Supplemental EA, the Commission directed the parties to file pleadings as to the effect, if any, of the Final EA on SLOMFP's

² Although NRC regulations require nuclear reactor power plant security plans to provide protection against the DBT of radiological sabotage (10 C.F.R. §§ 50.34(c) & (d), 73.55(a)), this requirement does not extend to a specifically licensed ISFSI like the one involved here (CLI-07-11, 65 NRC at 150 n.10). However, where — as here — an ISFSI is located at a reactor site, the reactor plant licensee typically includes protection of the ISFSI within the reactor plant's security plan. Consistent with that approach, PG&E amended its reactor security plan to cover protection of the ISFSI (*ibid.*).

pending contentions. In October 2007, SLOMFP responded that its five proffered contentions remained valid and should be admitted.

Only one of SLOMFP's proffered contentions — Contention 1(b) — is relevant here. On January 15, 2008, the Commission admitted Contention 1(b) "to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for its withholding decisions" (CLI-08-1, 67 NRC 1, 17 (2008)). In an effort to have the NRC Staff redress these alleged deficiencies, the Commission directed the Staff to prepare:

a complete list of the documents on which it relied in preparing its [EA, i.e., a Reference Document List], together with a *Vaughn* Index³ (or its equivalent) for any document for which the Staff claims a FOIA exemption . . . Releasable documents (or releasable portions of documents), if any, should be turned over to the other parties at that time. The other parties may respond to the NRC Staff's *Vaughn* Index (or detailed affidavit) . . . We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and the public record.

Id. at 16 (footnote added). The Commission stated that any documents exempt from disclosure under FOIA would not be released (*ibid.*), because under the terms of NEPA, agencies are authorized to withhold NEPA documents if they fall within a FOIA exemption (*id.* at 15-16).

Pursuant to the Commission's direction, the NRC Staff on February 13, 2008 filed a Reference Document List and a *Vaughn* Index, and it released documents that it determined were not exempt from disclosure under FOIA. *See* NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index (Feb. 13, 2008). On February 15, 2008, the NRC Staff filed an addendum to the *Vaughn* Index, listing a Department of Homeland Security (DHS) document it had inadvertently failed to justify withholding. Although the Staff refrained from producing that document on the ground that DHS was the originator, the Staff provided a website for obtaining the document directly from DHS. *See* Addendum to NRC Staff's Response to Commission Order To Provide Reference List and *Vaughn* Index (Feb. 15, 2008).

On February 20, 2008, SLOMFP filed with the Commission a challenge to the NRC Staff's filing, arguing — as relevant here — that the Reference Document List improperly failed to list all the sources upon which the Staff relied in preparing

³The term "Vaughn Index" derives from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), where the court established a procedure for facilitating litigation in FOIA cases. Namely, when an agency's withholding of documents is disputed in FOIA litigation, the agency will ordinarily provide what has become known as a "Vaughn Index," which identifies the documents withheld, the FOIA exemptions claimed, and an explanation of why each document falls within the claimed exemption (*Vaughn*, 484 F.2d at 823-25).

the EA, and that the *Vaughn* Index improperly failed to identify, or to provide justifications for withholding, all redacted information (SLOMFP's Response to NRC Staff's *Vaughn* Index, Request for Leave To Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures To Protect Submission of Sensitive Information at 2-7 (Feb. 20, 2008) [hereinafter SLOMFP Response to *Vaughn* Index]).

By Order dated March 27, 2008, the Commission acknowledged that the following claims embedded in Contention 1(b) remained unresolved:

- (i) The NRC Staff included Document 8 (SECY-04-0222, Decision-Making Framework for Materials and Test Reactor Vulnerability Assessments (Nov. 24, 2004)) in the Document Reference List, but Document 8 on its face is not applicable to ISFSIs. SLOMFP claims that the Staff's inclusion of SECY-04-0222 means that another document linking that document to ISFSIs has been left off the List.
- (ii) SLOMFP claims that the "Risk Analysis and Management for Critical Assets Protection" (RAMCAP) methodology referred to in SECY-04-0222 should have been included in the Document Reference List.
- (iii) SLOMFP claims that certain activities mentioned in SECY-04-0222 — such as participation in DHS vulnerability reviews — generated documents the NRC Staff should have included in the Document Reference List.
- (iv) SLOMFP argues that the context of the redaction of two phrases on page 5 of SECY-04-0222 suggests that the NRC Staff is improperly withholding "secret law" on how to conduct its analysis.
- (v) SLOMFP points to places in SECY-04-0222 where the NRC Staff made redactions but failed to provide a corresponding FOIA exemption in the *Vaughn* Index.

CLI-08-5, 67 NRC 174, 176 (2008). Rather than reviewing these "document-intensive claims" itself, the Commission directed me to resolve them, "focusing in particular on the FOIA exemption justifications and the completeness of the NRC Staff's [Reference Document List]" (*id.* at 177). The Commission stated that Contention 1(b) should be resolved on an "expedited basis" and, absent unanticipated circumstances, a decision should be issued by May 30 (*ibid.*).

On April 2, 2008, I convened a telephone conference call with the parties, and we crafted an expedited schedule that provided for the filing of all pleadings by the first week in May so that, if warranted, oral argument could be heard during the week of May 5. *See* Scheduling and Case Management Order for Adjudication of Contention 1(b) (Apr. 4, 2008) (unpublished).

B. The NRC Staff's Motion for Summary Disposition

On April 18, 2008, the NRC Staff filed a motion for summary disposition accompanied by two affidavits. The first affidavit was executed by three NRC employees — one individual who supervised the EA's preparation, and two individuals who participated in its preparation (NRC Staff Summary Disposition Motion, Attachment 1 at 1). These affiants explained how the Document Reference List was compiled, informed why specific documents were included and excluded, and attested that the List "includes all documents . . . which the Staff relied upon directly or used as guidance during the development of the Supplemental EA" (*id.* at 2).

The NRC Staff's second affidavit was executed by an NRC employee who is a Senior Project Manager for the NRC Safeguards Information Program (NRC Staff Summary Disposition Motion, Attachment 2 at 1). The affiant attested that, following a thorough review of SECY-04-0222, he determined that two previously redacted phrases could be released consistent with public safety (*id.* at 2). He also certified that, aside from these two redactions, all the remaining information in SECY-04-0222 that was "reasonably segregable from information exempt from disclosure was released, and that the FOIA exemptions invoked by the Staff were proper" (*ibid.*).⁴

Based on these affidavits, the NRC Staff argued it had demonstrated as a factual matter that (1) the Document Reference List was complete, and (2) the information in SECY-04-0222 that the Staff declined to disclose was permissibly withheld pursuant to FOIA exemptions. *See* NRC Staff Summary Disposition Motion at 8-11. Accordingly, argued the Staff, summary disposition of Contention 1(b) was appropriate.

PG&E supported the NRC Staff's motion for summary disposition. *See* PG&E's Answer in Support of NRC Staff Motion for Summary Disposition of Contention 1(b) (Apr. 28, 2008).

C. SLOMFP's Response to the NRC Staff's Motion for Summary Disposition

SLOMFP responded that it did "not oppose summary disposition of Contention 1(b)" (SLOMFP Response to Summary Disposition Motion at 3). With regard to the completeness of the Document Reference List, SLOMFP stated that the

⁴On April 18, 2008, the NRC Staff also filed a second addendum to the *Vaughn* Index, disclosing releasable portions of an NRC document that was listed as a reference in the Addendum to the Supplemental EA, but was inadvertently omitted from the *Vaughn* Index. *See* Second Addendum to the Staff's Response to Commission Order To Provide Reference List and *Vaughn* Index (Apr. 18, 2008); *see also* NRC Staff Summary Disposition Motion, Attachment 1 at 4-5.

“Staff has now provided an adequate listing of the reference documents on which it relied for the draft and final supplements to its [EA] for the proposed Diablo Canyon ISFSI. Therefore SLOMFP considers that aspect of Contention 1(b) to be resolved” (*id.* at 1). With regard to the propriety of the Staff’s reliance on FOIA exemptions to withhold certain information in SECY-04-0222, SLOMFP stated that, “without conceding that the Staff has fully complied with [FOIA] in its decisions regarding the redaction of reference documents and its explanations for those redactions, SLOMFP does not seek additional public disclosure of information in the reference documents” (*id.* at 3).⁵

II. DISCUSSION

A. Legal Standards

1. Standards Governing Disclosure of NEPA Information

As relevant here, an EA must include a Reference Document List that “identi[fi]es the sources used” (10 C.F.R. § 51.30(a)(2)). NRC guidance instructs the NRC Staff to list in an EA “[a]ll references (i.e., sources used) used in the preparation of the EA . . . including those cited in the text of the EA and those that were not specifically cited but served as useful guidance during document development” (NUREG-1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs” § 3.4.12 (Aug. 2003)).

Regarding the public disclosure requirements of an agency’s NEPA analysis, Congress has established that the EIS (*supra* note 1) “shall be made available . . . to the public as provided by [FOIA]” (42 U.S.C. § 4332(2)(C)). Thus, if information underlying an EIS is exempt from public disclosure pursuant to one of the nine exemptions in FOIA (5 U.S.C. § 552(b)), an agency need not disclose that information. As a matter of logic, public disclosure of an EA is likewise governed by FOIA (CLI-08-1, 67 NRC at 15). This conclusion is compelled by *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981), where the Supreme Court stated that an agency may “withhold public disclosure of *any* NEPA documents, in whole or in part, under the authority of an FOIA exemption” (*id.* at 143) (emphasis added). *See also Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 420 (2d Cir. 1989)

⁵ Prior to submitting its response to the NRC Staff’s summary disposition motion, SLOMFP had requested permission to conduct additional discovery with regard to Contention 1(b). *See* SLOMFP’s Motion for Leave To Conduct Supplemental Discovery (Apr. 10, 2008). SLOMFP withdrew its motion for discovery, however, when it declined to oppose the Staff’s motion for summary disposition of Contention 1(b). *See* SLOMFP Response to Summary Disposition Motion at 3. SLOMFP’s discovery request has thus been rendered moot.

(citing *Weinberger*, 454 U.S. at 145) (“Congress, in enacting § 102(2)(C) [of NEPA], had already set the balance between the public’s need to be informed and the government’s need for secrecy”). The NRC Staff’s obligation to disclose NEPA documents in this case is thus governed by FOIA.⁶

Ordinarily, when access to documents is disputed in FOIA litigation, the “government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption” (*Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004)). This is usually accomplished by the agency’s preparation of a *Vaughn* Index (*supra* note 3) and explanatory affidavits that are sufficiently detailed to support a tribunal’s plenary assessment of the validity of a claimed exemption. See *Lion Raisins Inc.*, 354 F.3d at 1082-83.

2. Standards Governing Summary Disposition

Challenges in FOIA cases routinely are resolved on the basis of summary judgment pleadings. See, e.g., *Wickwire Gavin, P.C. v. U.S. Postal Service*, 356 F.3d 588 (4th Cir. 2004); *Cooper Cameron Corp. v. U.S. Department of Labor*, 280 F.3d 539 (5th Cir. 2002); *Minier v. Central Intelligence Agency*, 88 F.3d 796 (9th Cir. 1996); *Lewis v. Internal Revenue Service*, 823 F.2d 375 (9th Cir. 1987).

In NRC adjudicatory proceedings, summary disposition motions — which are the functional equivalent of summary judgment motions (*Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993)) — are addressed in 10 C.F.R. § 2.710, which states that summary disposition shall be granted if the “filings in the proceeding . . . together with the statements of the parties and the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law” (10 C.F.R. § 2.710(d)(2)).

The moving party bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The nonmoving party cannot rest on the mere allegations or

⁶ Although SLOMFP does not oppose summary disposition of Contention 1(b), it nevertheless asserts that, “as a general matter, under the Atomic Energy Act . . . , the NRC was *required* to give SLOMFP access to the [redacted information in the NEPA] reference documents under a protective order” (SLOMFP Response to Summary Disposition Motion at 3) (emphasis added). To be sure, nothing prevents an agency from exercising its informed discretion to provide a litigant with sensitive information under a protective order. But SLOMFP’s assertion that the NRC was *required* to disclose such information ignores NEPA’s unambiguous language (42 U.S.C. § 4332(2)(C)), and disregards compelling precedent (*Weinberger*, 454 U.S. at 143).

denials of a pleading, but must “go beyond the pleadings and by [the party’s] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial” (*id.* at 324) (internal quotation marks omitted). The tribunal must examine the evidence in the light most favorable to the nonmoving party (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Where, as here, the nonmoving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment. The moving party “has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.” *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977) (internal quotation marks omitted); *accord Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970) (“[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented”) (internal quotation marks omitted); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-33, 50 NRC 161, 165 (1999) (same).

B. Analysis

Contention 1(b) challenges: (1) the completeness of the Reference Document List; and (2) the adequacy of the *Vaughn* Index. As discussed below, I conclude that the NRC Staff has met its burden of showing — as a matter of fact and law — that these challenges lack merit and, accordingly, that its motion for summary disposition of Contention 1(b) should be granted.⁷

1. The NRC Staff’s Affidavit Demonstrates That the Reference Document List Is Complete

Contention 1(b)’s challenge to the completeness of the Reference Document List arose from the following inferences that SLOMFP drew from SECY-04-0222. First, because SECY-04-0222 — which is included in the Reference Document List — does not appear to apply to ISFSIs, SLOMFP theorized that the NRC Staff may have failed to reference a document linking SECY-04-0222 to ISFSIs.

⁷ The detailed public affidavits submitted by the NRC Staff permit me to resolve the issues presented without resorting to *in camera* review of redacted information or sealed declarations. See *Lion Raisins Inc.*, 354 F.3d at 1083 (*in camera* review of redacted information or sealed declarations ought to occur only in the “exceptional case” after the “government has submitted as detailed public affidavits . . . as possible”) (quoting *Doyle v. Federal Bureau of Investigation*, 722 F.2d 554, 556 (9th Cir. 1983)).

Second, SLOMFP conjectured that the Staff may have improperly failed to reference the RAMCAP methodology, which was mentioned in SECY-04-0222. Third, SLOMFP hypothesized that certain activities mentioned in SECY-04-0222 may have generated documents that the Staff failed to include on the List. *See* SLOMFP Response to *Vaughn* Index at 3-5.

The NRC Staff addressed these claims in a detailed affidavit that was executed by three NRC employees who were personally involved in preparing the EA, including James Randall Hall, who is the Project Manager for the Diablo Canyon ISFSI and who has over 25 years of service with the NRC.⁸ The Staff's affidavit convincingly rebutted each of the three speculative concerns in Contention 1(b) regarding the completeness of the EA.

First, the NRC Staff explained that, although SECY-04-0222 was not specific to ISFSIs, the document applied to broad categories of NRC licensees, including ISFSIs (NRC Staff Summary Disposition Motion, Attachment 1 at 2). The Staff declared that it was necessary to include SECY-04-0222 in the Reference Document List because discrete aspects of the framework assessment methodology outlined in SECY-04-0222 were applied to ISFSIs (*ibid.*). In particular, the Staff attested that it "refer[red] to the consequence evaluation criteria in SECY-04-0222 (and its enclosures) when developing the set of assumptions used to calculate the estimated dose to the nearest resident to the Diablo Canyon ISFSI," and the Staff provided an affidavit to SLOMFP and the Commission containing a detailed explanation of how the dose was calculated (*id.* at 2-3). By explaining with clarity and specificity why it included SECY-04-0222 on the Reference Document List, the Staff negated the suggestion in Contention 1(b) that the Staff may have failed to reference a document linking SECY-04-0222 to ISFSIs.

The NRC Staff likewise negated the suggestion that the RAMCAP methodology — which was mentioned in SECY-04-0222 — may have improperly been omitted from the Document Reference List. The Staff acknowledged that the RAMCAP methodology "informed the NRC's development of the framework assessment methodology in 2004" (NRC Staff Summary Disposition Motion, Attachment 1 at 4). However, the Staff attested that it "did not expressly adopt the

⁸The other two affiants are (1) Shana R. Helton, Nuclear Engineer/Dose Assessment Specialist, Division of Spent Fuel Storage and Transportation, and (2) Paul Kelley, Jr., Security Specialist with the Materials, Waste, and International Security Branch. Ms. Helton and Mr. Kelley participated in the preparation of the Supplemental EA under the superintendence of Mr. Hall. *See* NRC Staff Summary Disposition Motion, Attachment 1 at 1.

In reviewing the experience and expertise of all the NRC Staff's affiants, I discerned nothing that would cause me to question their qualifications or trustworthiness to attest to the factual matters at issue in Contention 1(b). To the contrary, the undisputed record shows that they were eminently qualified to address these matters. Their experience and expertise, coupled with their detailed and specific affidavits, lend special weight to their statements and conclusions. *Cf. Lion Raisins Inc.*, 354 F.3d at 1080 (court observes that affiant's "experience lends considerable weight to his testimony").

RAMCAP or any other methodology," and that the RAMCAP methodology was "not relied on by the Staff when developing the Supplemental EA for the Diablo Canyon ISFSI" (*ibid.*). The Staff's explanation demonstrates that the Staff acted properly in not including the RAMCAP methodology on the Reference Document List.

Finally, the NRC Staff cogently refuted the conjectural assertion that certain activities mentioned in SECY-04-0222 may have generated documents that the NRC Staff omitted from the List. The Staff affirmatively declared that the Reference List "includes all documents . . . which the Staff relied upon directly or used as guidance during the development of the Supplemental EA" (NRC Staff Summary Disposition Motion, Attachment 1 at 2).⁹ Additionally, the Staff attested that "[a]ll input from other agencies which was relied upon or used as guidance in the development of the Supplemental EA is contained in the documents in the Reference List" (*id.* at 4). *See also id.* at 2 (Staff certifies that in compiling the List, it "attempted to err on the side of being overly inclusive to ensure that the List was complete").

I conclude that the NRC Staff has shown that the Reference Document List includes all documents the Staff relied upon or used as guidance during the development of the Supplemental EA. Stated in the negative, the Staff has convincingly shown that those documents that were not included on the List did not need to be included, because they were not relied upon or used as guidance. The Staff is therefore entitled to summary disposition of Contention 1(b) to the extent it challenges the completeness of the Reference Document List.

2. *The NRC Staff's Affidavit and Vaughn Index Demonstrate That the FOIA Withholdings Are Justified*

Contention 1(b) also raises the following two challenges regarding the *Vaughn* Index: (1) the NRC Staff's redaction of two phrases on page 5 of SECY-04-0222 was improper; and (2) the NRC Staff's redaction of Table 1 from Attachment 2 of SECY-04-0222 was unexplained in the *Vaughn* Index and therefore improper. *See* SLOMFP Response to *Vaughn* Index at 6-7.

The NRC Staff addressed these allegations in a detailed affidavit that was executed by Bernard Stapleton, who is an authorized NRC classifier and who has been a Senior Program Manager for the NRC Safeguards Information Program for 5 years (NRC Staff Summary Disposition Motion, Attachment 2 at 1). Mr.

⁹The NRC Staff explained that in compiling its sources for the Reference Document List, it "included in the scope of what was 'relied upon' and 'guidance' those documents specifically considered by the Staff in developing the statements, characterizations, and determinations in the Supplemental EA" (NRC Staff Summary Disposition Motion, Attachment 1 at 2).

Stapleton's affidavit negated the two claims in Contention 1(b) regarding the validity of redactions in SECY-04-0222.¹⁰

First, in Attachment 3 to its Summary Disposition Motion, the NRC Staff disclosed the two phrases that had been redacted from page 5 of SECY-04-0222. Mr. Stapleton explained that this material previously had been withheld pursuant to FOIA Exemption 2 (*see infra* note 11) because the Staff believed the redactions contained "internal NRC analysis of a specific security feature which would aid an adversary if disclosed" (NRC Staff Summary Disposition Motion, Attachment 2 at 2) (quoting *Vaughn* Index at 130). Mr. Stapleton attested, however, that on "further review of those two redactions, [he had] determined that they are not of such a sensitive nature that they cannot be released" (*ibid.*). The Staff's release of this material renders moot the assertion that the redactions were improper under FOIA.

With regard to the concern that the NRC Staff's unexplained redaction of Table 1 from Attachment 2 of SECY-04-0222 was improper under FOIA, Mr. Stapleton stated that Table 1 — which is entitled "Activity-Specific Attractiveness Category Ranking Matrix" — is redacted from page 3 of Attachment 2 to SECY-04-0222. He further stated that the Staff withheld the Table under FOIA Exemption 2 because it contains "NRC Staff guidance for using the framework methodology to estimate potential consequences" that, if disclosed, could aid an adversary seeking to breach security measures that protect nuclear materials (NRC Staff Summary Disposition Motion, Attachment 2 at 2) (quoting *Vaughn* Index at 131).¹¹ Mr. Stapleton explained that the "matrix [in Table 1] is used by the Staff

¹⁰ Mr. Stapleton also has authored several NRC guidance documents involving classified and sensitive topics. Prior to joining the NRC, he worked as a National Security Advisor in the Department of Energy's classification office. *See* NRC Staff Summary Disposition Motion, Attachment 2 at 1. As mentioned *supra* note 8, the undisputed record indicates Mr. Stapleton is eminently qualified to attest to the matters addressed in his affidavit.

¹¹ FOIA Exemption 2 authorizes an agency to withhold "matters that are . . . related solely to the internal personnel rules and practices of an agency" (5 U.S.C. § 552(b)(2)). In *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980), the Ninth Circuit held that this exemption extended to the Bureau's "Raids and Searches" manual, because Congress did not intend to force agencies to release "law enforcement materials, disclosure of which may risk circumvention of agency regulation" (*id.* at 657). Thereafter, in *Dirksen v. U.S. Department of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986), the Ninth Circuit applied *Hardy* to hold that FOIA Exemption 2 extended to Medicare processing guidelines, because to "turn such [information] over to those who are the subject of regulatory supervision is to dig a den for the fox inside the chicken coop" (*id.* at 1459) (quoting *Ginsburg, Feldman, & Bress v. Federal Energy Administration*, 591 F.2d 717, 730 (D.C. Cir.), *aff'd en banc and per curiam by an equally divided court*, 591 F.2d 752 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)). Based on the rationale in *Hardy* and *Dirksen*, I have no difficulty concluding that NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials.

as part of its assessment of the attractiveness of certain scenarios to adversaries. The Table contains specific parameters placed into the matrix including iconic value, complexity of planning, resources needed, execution risk, and public protection measures.” He attested that, based on his review, he “believe[d] that if the information in the Table were disclosed, it would provide adversaries with additional information to form sabotage scenarios based on how the United States protects potential targets” containing nuclear materials (NRC Staff Summary Disposition Motion, Attachment 2 at 2). In my judgment, Mr. Stapleton’s particularized explanation for the redaction of Table 1 — viewed against the backdrop of his experience and expertise — provides ample basis for concluding that, as a factual matter, Table 1 is exempt from disclosure under FOIA Exemption 2. Cf. *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (in reviewing the validity of a withholding under any FOIA exemption, deference must be accorded to the executive in its area of expertise “so long as the government’s declarations raise legitimate concerns that disclosure would impair national security”), *cert. denied*, 540 U.S. 1104 (2004).

Finally, although Contention 1(b) did not challenge other redactions from SECY-04-0222, Mr. Stapleton declared that he reviewed the entire document, and he certified that “all of the information reasonably segregable from information exempt from disclosure was released, and that the FOIA exemptions invoked by the Staff were proper” (NRC Staff Summary Disposition Motion, Attachment 2 at 2). I conclude, based on the *Vaughn* Index and the detailed explanations contained in Mr. Stapleton’s affidavit, that the NRC Staff has satisfied its burden of establishing valid bases for the redactions from SECY-04-0222 and, accordingly, that summary disposition on this aspect of Contention 1(b) is appropriate.

III. CONCLUSION

For the foregoing reasons, I conclude that the NRC Staff has shown that no genuine issue of material fact exists regarding the following: (1) the Staff disclosed all documents on which it relied or which it used as guidance in developing the Supplemental EA (*supra* Part II.B.1); and (2) the challenged redactions in SECY-04-0222 have either been released, or they have been explained with sufficient detail by a qualified NRC affiant to demonstrate they were properly withheld under a FOIA exemption (*supra* Part II.B.2). The NRC Staff is therefore entitled to summary disposition of Contention 1(b) as a matter of law, and its motion for summary disposition of Contention 1(b) is granted. SLOMFP’s request for discovery with regard to Contention 1(b) is moot (*supra* note 5).

It is so ORDERED.

BY THE PRESIDING OFFICER¹²

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 14, 2008

¹² Copies of this Order were sent this date by Internet e-mail to counsel for: (1) Pacific Gas and Electric Co.; (2) San Luis Obispo Mothers for Peace; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket Nos. PAPO-00
PAPO-001
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

June 5, 2008

The Commission denies a motion to disqualify counsel for conflicts of interests.

ATTORNEY CONDUCT: CONFLICTS OF INTEREST

The Commission takes seriously any allegation that an unresolved conflict of interest or other ethical breach threatens the integrity of an NRC licensing proceeding, potentially leading to a biased result and potentially compromising public health and safety. We recognize that our regulations do not address conflicts of interest as such, but the absence of a specific rule does not interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before this Commission.

ATTORNEY CONDUCT: CONFLICTS OF INTEREST

We may not lightly interfere in arrangements made between parties and their lawyers. In investigations, for example, the D.C. Circuit has held that the NRC may not disqualify attorneys representing multiple witnesses unless it has “concrete evidence” that the attorney will obstruct and impede the investigation.

While this standard does not require proof of wrongdoing, it requires more than mere concern or speculation.

ATTORNEY CONDUCT: CONFLICTS OF INTEREST

The Commission could (among other remedies) disqualify a party's counsel from participating in an NRC proceeding upon a concrete showing that a conflict of interest or other ethics concern would obstruct our obtaining a full range of necessary safety or environmental information, or would otherwise threaten the integrity of our regulatory process.

MEMORANDUM AND ORDER

Before us today is a motion by the State of Nevada to disqualify the law firm Morgan, Lewis & Bockius LLP (Morgan Lewis) from representing the Department of Energy (DOE) "in all NRC Yucca Mountain proceedings."¹ Nevada argues that Morgan Lewis has conflicts of interest that are "not susceptible to waiver or mitigation" and could affect "the integrity of the NRC's impending Yucca Mountain licensing proceedings."² Both the NRC Staff and DOE oppose the motion to disqualify.³ For the reasons below, we deny the motion.

I. BACKGROUND

Nevada asks us to disqualify Morgan Lewis from NRC's Yucca Mountain proceeding (if it takes place) because the law firm also represents several nuclear utility companies that are suing DOE for violation of what is commonly known as the "Standard Contract," a contract committing DOE to take title to and dispose of commercial spent nuclear fuel.⁴ Nevada claims that Morgan Lewis's "actions

¹ Motion of the State of Nevada to Disqualify the Law Firm of Morgan, Lewis & Bockius LLP Because of Conflicts of Interest (April 3, 2008) (Nevada Motion) at 7. A number of Morgan Lewis attorneys have filed notices of appearance before the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board) (Docket No. PAPO-001).

² Nevada Motion at 6, 7 n.9.

³ See U.S. Department of Energy's Answer in Opposition to the State of Nevada's Motion To Disqualify the Law Firm of Morgan, Lewis & Bockius LLP (April 14, 2008) (DOE Answer); NRC Staff Response to State of Nevada Motion To Disqualify Law Firm (April 14, 2008).

⁴ See 10 C.F.R. Part 961 (codifying the terms of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste).

on behalf of DOE” for the Yucca Mountain licensing “could harm the interests of its Standard Contract clients and vice versa.”⁵

More specifically, Nevada argues that DOE has statutory public safety obligations under the Nuclear Waste Policy Act, which oblige DOE to suspend work on Yucca Mountain, decline to submit a license application or, if necessary, withdraw an application for construction authorization, if at any time DOE determines that Yucca Mountain would be unsuitable as a repository.⁶ As Nevada’s argument goes, DOE’s statutory obligations could require it to “giv[e] up on Yucca Mountain,” but this “would be contrary to the overarching interests of [Morgan Lewis’s] Standard Contract clients, who would be understandably upset for having paid millions of dollars to DOE for a repository at Yucca Mountain but not getting one.”⁷ In short, Nevada claims that Morgan Lewis’s “duty to its client DOE” may conflict with its “duty of loyalty to its Standard Contract clients.”⁸ Nevada further claims that because of “DOE’s overriding statutory duty to protect the environment and public health,” the “apparent conflict of interest [is] not susceptible to waiver or mitigation.”⁹

In support of its motion, Nevada points to a recent DOE Inspector General (IG) “Special Report” that examined alleged conflicts of interest involving DOE’s choice of Morgan Lewis to assist in Yucca Mountain licensing matters. The report concluded that DOE’s procurement for legal services “appeared to follow the conflicts of interest requirements set forth in the Federal Acquisition Regulations [FAR], Department of Energy Acquisition Regulations [DEAR], and District of Columbia Bar Rules of Professional Conduct.”¹⁰ Specifically, the report noted that DOE required and approved a Morgan Lewis plan to avoid or mitigate any legal ethics or organizational conflict of interest; granted a waiver of the conflict of interest, pursuant to applicable regulations; and “also consented to the Morgan Lewis legal representation of the agency under the District of Columbia Rules of Professional Conduct.”¹¹

But the report also concluded that “the public interest would have been better served had [DOE] done more to document the key decision points relating to this procurement,” including documenting the reasons why DOE shifted from its

⁵ Nevada Motion at 4.

⁶ *Id.* at 4 (citing § 113(c)(3) of the Nuclear Waste Policy Act, 42 U.S.C. § 10133).

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ *Id.* at 6.

¹⁰ Special Report, Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application, U.S. Department of Energy, Office of Inspector General, Office of Audit Services, DOE/IG-0792 (April 2008) (IG Report), Cover Memorandum by Gregory H. Friedman (April 2, 2008) at 2.

¹¹ *Id.*, IG Report at 6-7; *see also* Cover Memorandum at 2.

policy position in 1999 that law firms representing utilities in spent fuel litigation be excluded from consideration for Yucca Mountain work.¹² As described in the IG report, DOE's view during a similar procurement for legal services in 1999 was that "[a] law firm whose loyalties lie with the utility companies might urge a less thorough process that could conclude earlier, when the Department's best interests lie with a careful approach that may indeed take longer and be a more expensive process."¹³

In response, DOE claims that Nevada's motion to disqualify Morgan Lewis is "tactical."¹⁴ DOE states that it has complied with all federal procurement regulations and applicable rules of professional responsibility. DOE further stresses that federal regulations explicitly permit a waiver of conflicts of interest when it is in the overall interest of the United States to award a contract, and that "at every step of the procurement process, DOE adhered to FAR and DEAR regulations regarding organizational conflicts of interests."¹⁵ DOE acknowledges that "there is some overlap of subject matter (disposition of spent nuclear fuel)" between the NRC licensing proceeding and the Standard Contract litigation, but claims that the two matters involve different forums and largely distinct legal and factual issues, and therefore applicable rules of professional conduct for attorneys permit waiver of the Morgan Lewis conflicts of interest.¹⁶

Moreover, DOE emphasizes that the agency had no obligation to follow the same procurement policy followed in 1999, and that its views on conflicts and on its specialized needs for legal services have "evolved over time."¹⁷ DOE states that its current "need for specialized legal services and the resulting limited pool of available firms with such expertise justified the acceptance and mitigation of a specific conflict of interest that the agency had defined as [] unacceptable at the time of the 1999 procurement."¹⁸ DOE also states that it was not required by law to document and "justify the difference in procurement approaches" between 1999 and 2007.¹⁹

DOE additionally argues that: (1) Nevada lacks standing to seek disqualification of DOE's chosen counsel; (2) the NRC is the wrong forum to raise challenges to DOE's procurement decision and choice of counsel; and (3) Nevada simply has not met "its burden [to] establish[] that disqualification of DOE's counsel,

¹² *Id.*, Cover Memorandum at 4.

¹³ *Id.*, IG Report at 2-3.

¹⁴ DOE Answer at 7.

¹⁵ *Id.* at 10, 12.

¹⁶ *Id.* at 16-18.

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14.

which is a discretionary remedy, is appropriate under the circumstances.”²⁰ DOE also suggests that the Nevada motion is untimely.²¹

II. DISCUSSION

As we have outlined above in some detail, Nevada’s motion to disqualify Morgan Lewis for conflict of interests involves many issues, including whether DOE properly executed conflict of interest waivers under agency and other federal procurement regulations, the overall propriety of DOE’s procurement process in 2007, the adequacy of the Morgan Lewis conflicts mitigation plan, and whether the arrangements at issue implicate any legal ethics concern under District of Columbia Bar Rules of Professional Conduct. For the most part, these are matters outside the scope of the NRC’s safety and environmental responsibilities.²²

Only one aspect of Nevada’s motion goes to the NRC’s statutory responsibility to protect public health and safety. That is the suggestion that Morgan Lewis’s conflict of interest might adversely affect the “integrity” of the Yucca Mountain licensing proceedings.²³ We take seriously any allegation, such as Nevada’s, that an unresolved conflict of interest or other ethical breach threatens the integrity of an NRC licensing proceeding, potentially leading to a biased result and potentially compromising public health and safety. We recognize that our regulations do not address conflicts of interest as such, but the absence of a specific rule “does not — and could not — interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before this Commission.”²⁴ If demanded by compelling circumstances, therefore, we would act to assure that a claimed conflict of interest not jeopardize the exercise of our health-and-safety responsibilities.

Here, though, no such showing has been made. In awarding the contract to Morgan Lewis, DOE was fully aware of the conflict of interest and imposed mitigating measures ensuring separation between Morgan Lewis’s “Standard

²⁰ *Id.* at 1-2; *see also id.* at 5-7, 8-9, 20-21.

²¹ *Id.* at 3 n.4.

²² To the extent that Nevada may have a cognizable interest to challenge DOE’s procurement process, there are other forums with the jurisdiction and expertise to review procurement protests. *See, e.g.*, 31 U.S.C. § 3552 (jurisdiction of Government Accountability Office); 28 U.S.C. § 1491(a)(1) (jurisdiction of Court of Federal Claims). Further, the District of Columbia Bar’s Board on Professional Responsibility is empowered to consider complaints on attorney discipline matters. *See* District of Columbia Bar Rules XI, § 4.

²³ Nevada Motion at 7 n.9.

²⁴ *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75 (1976). *See also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 53 (1998) (Commission has “plenary supervisory authority . . . to interpret and customize its process for individual cases”).

Contract” and “Yucca Mountain” litigating groups. DOE’s Inspector General found that these measures had been “implemented.”²⁵ Notwithstanding these measures, Nevada remains dissatisfied. Nevada postulates, for example, that Morgan Lewis may discover information indicating that the Yucca Mountain site is unsuitable to be a repository, but that its “duty of loyalty” to its Standard Contract clients may interfere with proper disclosures of significant information.²⁶ Nevada further presents a hypothetical scenario, questioning what Morgan Lewis might do if it discovered “DOE e-mails . . . suggesting serious quality assurance defects in scientific work supporting the Yucca Mountain license application, and DOE asked Morgan Lewis for advice whether the NRC should be notified and whether consideration of the affected parts of the license application should be suspended until the scientific work could be redone?”²⁷ Nevada argues that Morgan Lewis’s “duty to its client DOE would surely require it to say ‘yes’ to both questions, but its duty of loyalty to its Standard Contract clients may suggest otherwise.”²⁸

In other words, Nevada suggests that Morgan Lewis might advise DOE to conceal significant safety information from the NRC. But concealing such information would violate NRC regulations and might amount to criminal misbehavior.²⁹ Based merely on speculation in Nevada’s motion, we will not proceed on an assumption that there is any significant possibility that Morgan Lewis or DOE would engage in serious misconduct by withholding significant health and safety information from the NRC. A “presumption of regularity attaches to the actions of Government agencies.”³⁰ Absent “clear evidence to the contrary,” we presume that public officers will “properly discharge[] their official duties.”³¹ Nevada’s motion provides no showing of actual or likely bad faith by DOE or Morgan Lewis, nor otherwise presents any concrete basis for us to assume that they would take actions verging on criminality.

We may not lightly interfere in arrangements made between parties and their lawyers. In investigations, for example, the D.C. Circuit has held that

²⁵ See IG Report, Cover Memorandum at 2.

²⁶ Nevada Motion at 4.

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 5.

²⁹ See, e.g., 10 C.F.R. § 63.11 (deliberately submitting to NRC “inaccurate” or “incomplete” information on Yucca Mountain is misconduct suitable for enforcement action); 10 C.F.R. § 63.73 (requiring DOE to report Yucca Mountain “deficiencies” to NRC); 10 C.F.R. § 63.172 (making “willful” violations of sections 63.11 and 63.73, among others, subject to criminal penalties under section 223 of the Atomic Energy Act, 42 U.S.C. § 2273). See also 18 U.S.C. § 2001 (making “material false statements” to the government subject to criminal penalties).

³⁰ *United States v. Postal Service*, 534 U.S. 1, 10 (2001).

³¹ See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989).

the NRC may not disqualify attorneys representing multiple witnesses, unless it has “concrete evidence” that the attorney will “obstruct and impede” the investigation.³² While this standard does not require proof of wrongdoing, it requires more than “mere concern or speculation.”³³ Nevada’s motion in this case presents nothing more than this.

If a Yucca Mountain license application is tendered, it will be the NRC’s responsibility to review the application to assure that all safety and environmental requirements are met. DOE will be responsible for the accuracy and completeness of that application throughout the licensing process.³⁴ As we indicated above, we could (among other remedies) disqualify DOE’s (or any other party’s) counsel from participating in an NRC proceeding upon a concrete showing that a conflict of interest or other ethics concern would obstruct our obtaining a full range of necessary safety or environmental information, or would otherwise threaten the integrity of our regulatory process. Nevada’s motion, however, makes no such showing.³⁵

III. CONCLUSION

Nevada’s motion to disqualify the law firm Morgan Lewis from representing DOE in all NRC Yucca Mountain proceedings is *denied*.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of June 2008.

³² See *Professional Reactor Operator Society v. NRC*, 939 F.2d 1047, 1051-52 (D.C. Cir. 1991). NRC’s regulations on investigations reflect the D.C. Circuit’s ruling. See 10 C.F.R. § 19.18.

³³ See Final Rule: “Exclusion of Attorneys from Interviews Under Subpoena,” 57 Fed. Reg. 61,780, 61,782-83 (Dec. 29, 1992).

³⁴ See 10 C.F.R. § 63.10.

³⁵ Because we find insufficient basis for Nevada’s loss of “integrity” claim, we need not reach DOE’s arguments that Nevada does not have standing to seek the NRC to disqualify DOE’s choice of counsel, and that Nevada’s motion is untimely. See DOE’s Answer at 3 n.4, 5-7.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. PAPO-00
(ASLBP No. 04-829-01-PAPO)
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

June 17, 2008

REGULATORY INTERPRETATION: GENERAL RULES

“The interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself.” Recourse to regulatory history is not necessary unless the language and structure of the regulation reveal an ambiguity that must be resolved. It is a fundamental precept that “the entirety of the provision must be given effect.”

RULES OF PRACTICE: SUBPART J (DOCUMENTARY MATERIAL)

Section 2.1003’s reference to “all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by” clearly “conveys that possession or control of the documentary material is a prerequisite [to] the duty to produce it.” Thus, as our regulations indicate, at the time it made its initial certification, the Department of Energy was required to place on the Licensing Support Network only extant material on which it intended to rely.

REGULATORY INTERPRETATION: GENERAL RULES

The use of the Licensing Support Network was intended, among other things, to “enabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.” That is not to say that documents were not envisioned to be entered into the Licensing Support Network post-certification. The Licensing Support Network does not have to be frozen at the time of certification.

RULES OF PRACTICE: SUBPART J

Our Subpart J rules do not provide for the filing of reply briefs in the context of appeals from interlocutory decisions (10 C.F.R. § 2.1015(b)). Nor do our Subpart J rules permit reply briefs in connection with appeals from initial or partial decisions of the presiding officer (10 C.F.R. § 2.1015(c)). When reply briefs are permitted, our rules provide explicitly for their filing (10 C.F.R. § 2.341(b)(3)), or set strict conditions on their filing (10 C.F.R. § 2.323(c)).

MEMORANDUM AND ORDER

The State of Nevada (Nevada) appeals¹ from the Pre-License Application Presiding Officer (PAPO) Board’s denial² of Nevada’s Motion To Strike the United States Department of Energy’s (DOE’s) certification of the availability of its documentary material on the Licensing Support Network (LSN) and to suspend the obligation of the other potential parties to the proceeding to make their documentary material available on the LSN within 90 days thereafter. DOE,³

¹ The State of Nevada’s Notice of Appeal from the PAPO Board’s January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008) (Nevada’s Notice); The State of Nevada’s Brief on Appeal from the PAPO Board’s January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008) (Nevada’s Appeal).

² LBP-08-1, 67 NRC 37 (2008) (January Memorandum); Order (Denying Motion To Strike) (Dec. 12, 2007) (unpublished) (December Order). (The PAPO Board heard oral argument on Nevada’s motion on December 5, 2007. It issued a short denial of Nevada’s motion in December, followed by a memorandum setting forth its full reasoning in January.)

³ The Department of Energy’s Brief on Appeal in Opposition to the State of Nevada’s Notice of Appeal from the PAPO Board’s January 4, 2008 and December 12, 2007 Orders (Jan. 25, 2008) (DOE Brief).

the NRC Staff,⁴ and the Nuclear Energy Institute (NEI)⁵ oppose Nevada's Appeal.

Nevada also filed a motion for leave to file a reply and a reply brief.⁶ DOE,⁷ the NRC Staff,⁸ and NEI⁹ answered opposing Nevada's motion for leave to file a reply (but requesting the opportunity to respond should Nevada be allowed to file its reply).

We agree with the PAPO Board's decision denying Nevada's motion to strike, and therefore affirm its decision for the reasons it gives. We also deny Nevada's motion to file a reply.

I. NEVADA'S MOTION TO STRIKE DOE'S CERTIFICATION

Subject to certain exclusions, 10 C.F.R. § 2.1003 requires DOE to "make available, no later than six months in advance of submitting its license application for a geologic repository . . . all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by" DOE.¹⁰ Explicitly among the exclusions to requirement is documentary material that falls under 10 C.F.R. § 2.1003(e), specifically, "any additional material created after the time of . . . initial certification."¹¹

"Documentary material" is defined to include three categories:

- (1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or cite in support of its position in [this] proceeding . . . ;
- (2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position; and

⁴NRC Staff Brief in Opposition to State of Nevada's Appeal from the December 12, 2007 and January 4, 2008 PAPO Board Orders (Jan. 28, 2008) (Staff Brief).

⁵Brief of the Nuclear Energy Institute Opposing the State of Nevada's Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Jan. 28, 2008) (NEI Brief).

⁶The State of Nevada's Motion for Leave To File a Limited Reply (Feb. 4, 2008) (Nevada Reply Motion); The State of Nevada's Reply on Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Feb. 4, 2008) (Nevada Reply Brief).

⁷Answer of the Department of Energy Opposing "The State of Nevada Motion for Leave To File a Limited Reply" (Feb. 13, 2008).

⁸NRC Staff Answer to the State of Nevada's Motion for Leave To File a Limited Reply (Feb. 13, 2008).

⁹Answer of the Nuclear Energy Institute Opposing "The State of Nevada's Motion To File a Limited Reply" (Feb. 11, 2008).

¹⁰10 C.F.R. § 2.1003(a).

¹¹10 C.F.R. § 2.1003(a) and (e).

(3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, . . . regardless of whether they will be relied upon and/or cited by a party. . . .¹²

Our regulations, at 10 C.F.R. § 2.1009, require DOE to certify that it has established procedures for implementing the requirements of section 2.1003, that it has trained its personnel to comply with these procedures, and that the documentary material specified in section 2.1003 has been made available.¹³ This initial DOE certification is the subject of Nevada’s motion to strike. DOE’s certification started the clock for certification of documentary materials by the NRC Staff (30 days) and by other potential parties (90 days).¹⁴ DOE’s certification must be updated “at the time DOE submits the license application.”¹⁵

Nevada argues, based on these provisions and on its perception of their purpose, that DOE was required to finalize and place all core technical documentary material that it intends to rely on in the proceeding on the LSN prior to DOE’s initial certification of compliance with section 2.1003. Nevada argues that the PAPO Board’s view, that certification based on the production of *extant* documents alone, with more documents to be created and produced later, satisfies section 2.1003, defeats the purpose of the certification requirement. According to Nevada, the purpose of the certification requirement is to guarantee a minimum 6-month period — before DOE files its license application — during which potential parties will be able to review a complete set of all core technical documents required to evaluate the license application and prepare contentions. Nevada argues that the Board’s construction of the regulations makes the certification requirement meaningless: carrying the Board’s logic to its extreme, Nevada says, DOE could have certified before it had any documents available.

Nevada argues that the word “intends” (in the phrase “intends to rely”) in the first part of the section 2.1001 definition of “documentary material,” was meant to encompass *all* core documents that DOE might end up relying on in its license application. Nevada also argues that because the documentary material on the LSN must be complete at certification, DOE cannot certify compliance until it has created and finalized all documents that it will rely on in its license application and has placed them on the LSN. In Nevada’s view, rather than wait until the all of the documents were complete and ready for the LSN, DOE certified its document collection simply to satisfy its own arbitrary deadline. Nevada argues that this tactic deprives DOE’s adversaries of the 6-month review period (to frame contentions) Nevada believes the regulations guaranteed.

¹² 10 C.F.R. § 2.1001.

¹³ 10 C.F.R. § 2.1009(a)(2) and (b).

¹⁴ 10 C.F.R. § 2.1003.

¹⁵ 10 C.F.R. § 2.1009(b).

“Supplementation” of the document collection pursuant to section 2.1003(e) means, according to Nevada’s interpretation, relatively minor additions to the LSN rather than the addition of documents essential to the preparation of contentions. According to Nevada, the documents that DOE has not yet finalized, which are therefore not yet on the LSN, are documents critical to preparing meaningful contentions, rather than documents appropriate for later “supplementation” — and DOE’s decision to keep these documents in “draft” form rather than finalizing them prior to certification was a deliberate effort to withhold information from its adversaries. Consequently, from Nevada’s perspective, the 6-month document review period has been reduced to a 6-month period during which potential parties can review a large quantity of documents that will not help in formulating contentions.

DOE counters Nevada’s position by arguing that the purpose of the certification requirement was not to create a guaranteed 6-month period for reviewing a complete set of documentary material, but was rather to decouple the document production requirement from the site selection and link it instead to the license application, in order to ease the initial burden of compliance with the requirement to populate the LSN. The NRC Staff argues that the 6-month period was not a deadline, but rather was viewed as an appropriate amount of time for potential parties to prepare for the licensing proceeding.¹⁶ DOE points out that section 2.1001 is a definitional section that says nothing about certification requirements or the timing of document production. Certification requirements are addressed in section 2.1009, DOE maintains, and section 2.1009 does not require DOE to attest, as part of its initial certification, that all of the supporting documentary material for its license application is complete. Instead, according to DOE, section 2.1009 requires DOE to certify that it has procedures in place and has trained its personnel to meet its LSN obligations (including ongoing update requirements), that it has placed documentary material in its possession at the time of certification on the LSN, and that it also will place newly created or identified documentary material on the LSN in the future as it is generated or identified.

DOE argues that the “supplementation” requirement in section 2.1003(e) is not limited in any manner — the Commission referred to supplementation with “any” additional documentary material created after initial certification — even though the Commission could have limited supplementation to less significant additions had it chosen to frame the regulation in that way. According to DOE, this militates against Nevada’s view that DOE’s “complete” documentary material must be placed on the LSN at the time of initial certification. DOE also argues that the Board’s interpretation of our regulations does not, as Nevada would have

¹⁶ Staff Brief at 13, citing Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,459 (May 31, 2001).

it, eliminate the fundamental requirement that DOE produce the documentary material upon which it intends to rely. Rather, the Board's interpretation clarifies that Nevada is wrong about the *timing* of the placement of the reliance material on the LSN.

Finally, the NRC Staff, while not taking a position on whether DOE's certification satisfied the regulatory requirements, and while not embracing all of DOE's various arguments, argues that the Board correctly interpreted the plain meaning of our regulations. We agree. "The interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself."¹⁷ Recourse to regulatory history is not necessary unless the language and structure of the regulation reveal an ambiguity that must be resolved.¹⁸ Like the Board, we see no ambiguity here.¹⁹ The use of the word "intends" in the first part of the definition of "documentary material" is, as the Board found, "simply the natural result of the fact that the 'reliance' in question will necessarily occur in the future, when DOE submits the license application"²⁰ and does not indicate that DOE (or any other party) must provide a complete set of all documents it plans to rely on during the licensing proceeding at the time of certification. Moreover, Nevada's reading of our regulations violates the fundamental precept that "the entirety of the provision must be given effect."²¹ Nevada's interpretation renders superfluous DOE's (and the other participants') continuing duty, under our regulations, to supplement the LSN with *any* additional documentary material created after the time of initial certification, as spelled out in section 2.1003(e). Nevada's *reductio ad absurdum* extrapolation — that under the Board's reading of the regulations DOE could have certified before it created any documents at all — is not illustrative of the reality here, and would not satisfy our good faith expectations.²²

We agree with the Board that "the duty to produce documentary material applies only to documents and information in existence at the time . . . initial

¹⁷ CLI-06-5, 63 NRC 143, 154 (2006), quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988), *review denied*, CLI-88-11, 28 NRC 603 (1988), and referring also to *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

¹⁸ See *Shoreham Nuclear*, ALAB-900, 28 NRC at 288.

¹⁹ Even if there were an ambiguity, the regulatory history of Subpart J (as the Board notes) supports the Board's finding that our regulations do not prohibit certification prior to the completion of all "reliance" documentary material, and Nevada cites to no contrary statement in the regulatory history. LBP-08-1, 67 NRC at 49.

²⁰ *Id.* at 48.

²¹ *Id.* at 46, citing CLI-06-5, 63 NRC 143, 154 (2006).

²² See, e.g., Licensing Proceeding for the Receipt of High-Level Radioactive Waste at a Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket, 68 Fed. Reg. 66,372, 66,376 (Nov. 26, 2003).

certification occurs, and [our regulations] do not impose a requirement that DOE, or any other party, . . . delay certification until all documentary material that it intends to rely on is finished and complete.”²³ As the Board notes, section 2.1003’s reference to “all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by” clearly “conveys that possession or control of the documentary material is a prerequisite [to] the duty to produce it.”²⁴ Thus, as our regulations indicate and as the PAPO Board held, at the time it made its initial certification, DOE was required to place on the LSN only *extant* information upon which it intends to rely.

The use of the LSN was intended, among other things, to “enabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.”²⁵ That is not to say that documents were not envisioned to be entered into the LSN post-certification and we support the Board’s ruling that the LSN does not have to be frozen at the time of certification.

In practicality, during the 6-month period between DOE’s certification and the filing of the license application, potential parties had access to millions of DOE documents upon which to begin formulating meaningful contentions.²⁶ And DOE’s ongoing duty to supplement its document collection potentially creates additional opportunities to file meaningful new and amended contentions based on that supplementary material. This is by no means an unfair or prejudicial document production procedure.²⁷

For these reasons, and for the reasons given by the PAPO Board, we affirm the Board’s denial of Nevada’s motion to strike DOE’s LSN certification.

II. NEVADA’S MOTION FOR LEAVE TO FILE A LIMITED REPLY

As Nevada concedes in its pleading, our Subpart J rules, applicable here, do not provide for the filing of reply briefs in the context of appeals from interlocutory

²³ LBP-08-1, 67 NRC at 47.

²⁴ *Id.* at 46.

²⁵ Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,926 (April 14, 1989).

²⁶ “DOE indicates that it has produced approximately 3.5 million documents on the LSN, consisting of more than 30 million pages.” LBP-08-1, 67 NRC at 42.

²⁷ Nevada filed a State of Nevada’s Motion to the Commission to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain (April 28, 2008). We will act on that motion separately.

decisions (10 C.F.R. § 2.1015(b)). Nor do our Subpart J rules permit reply briefs in connection with appeals from initial or partial initial decisions of the presiding officer (10 C.F.R. § 2.1015(c)). When reply briefs are permitted, our rules provide explicitly for their filing (10 C.F.R. § 2.341(b)(3)), or set strict conditions on their filing (10 C.F.R. § 2.323(c)). Because reply briefs are not provided for here, we deny Nevada's motion for leave to file a limited reply. If DOE files a repository application that the NRC Staff accepts for docketing, the ensuing litigation is likely to prove complex, with numerous pleadings. The Licensing Board and the Commission should permit extra filings only where necessity or fairness dictates.

III. CONCLUSION

We affirm the PAPO Board's decision (in LBP-08-1) denying Nevada's motion to strike DOE's initial LSN certification. We also deny Nevada's motion to file a limited reply brief.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June 2008.

Additional Views from Commissioner Gregory B. Jaczko

I write separately on this order because I believe the Commission should be providing high-level guidance to the PAPO Board and the potential parties in this matter on the appropriate standard that would have to be met to challenge a certification of the LSN, something the majority's order does not do. Thus, while I agree that certification of the LSN only requires documents currently in existence to be certified, and that the LSN was not intended to be "frozen" at the time of certification, I do not agree that these limited holdings provide potential parties with much additional guidance. These holdings help identify the extreme edges of the LSN certification issue, but offer little to guide the parties through the many gray areas in-between.

The LSN is critical to a potential proceeding on this application. As the Commission has made clear, it was the Commission's expectation that the LSN, "among other things, would provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application." *See* Final Rule: "Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket," 69 Fed. Reg. 32,836, 32,843 (June 14, 2004). The LSN clearly was established for a multitude of purposes, not the least of which is to help the agency fulfill its 3-year statutory commitment to reach a decision on the licensing of a potential HLW repository. If the PAPO Board and the Commission spend unnecessary time dealing with arguments over the certification issues, the purpose of the LSN is essentially defeated.

Therefore, I believe the Commission should establish a standard for review of any motion to strike an LSN certification. The appeal of the Board's decision on this matter provides us the opportunity to do so and I believe that not doing so will leave the potential parties in the unfortunate position of having to continually challenge the certification efforts in order to probe the Commission for insight into how the Commission will view these motions. I do not believe this is an efficient approach, especially in a case where the Commission will be operating under a strict statutory time frame.

Thus, I believe this order should include a standard for review of the certification motions, such as the standard laid out by the NRC staff in its brief to the Board on this issue. *See* "NRC Staff Answer to Nevada Motion To Strike Department of Energy Licensing Support Network Certification," Nov. 9, 2007. In that filing, the Staff described its view of how the review of these motions should be approached. The Staff noted that the Board had previously ruled that DOE must satisfy a good faith standard for document production, one that depended upon a

consideration of a number of factors. The Staff continued by noting that because now there were claims of “omissions” from the Certification, the Board should also determine the completeness of the DOE LSN collection by applying a standard of whether the DOE LSN collection is materially or substantially incomplete based on documents “created” at the time of certification. I believe the approach outlined by the Staff is reasonable and would provide the potential parties with some much-needed guidance on how motions to strike LSN certifications would be considered by the Board and the Commission.

I also believe the Commission should use this opportunity to remind the potential parties of the Commission’s expectation of good faith compliance with the Subpart J LSN requirements. The Commission recognized that compliance with certain classes of documentary material required to be included in the LSN would be difficult to judge, at least until the proffered contentions are admitted into the proceeding, but nonetheless, good faith compliance is vital if the Commission is to meet its statutory 3-year obligation.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-219-LR

AMERGEN ENERGY COMPANY, LLC
(Oyster Creek Nuclear Generating
Station)

June 17, 2008

RULES OF PROCEDURE: STAY

Commission rules of procedure do not provide for a motion to stay issuance of a license while proceedings are pending before the Board. In practice, however, we have held that a motion to stay issuance of a license might be granted where the factors usually considered in granting emergency injunctive relief are satisfied, including the likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest. *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006).

RULES OF PROCEDURE: STAY

Failure to address the four stay factors in a motion to stay issuance of a license is reason enough to deny the motion. *See State of Illinois*, CLI-90-11, 32 NRC 333, 334 (1990).

RULES OF PROCEDURE: STAY

A party opposing a renewed license does not face “irreparable harm by

the mere issuance of a renewed license, because the license may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review. *See* 10 C.F.R. § 54.27(c); *cf. Vermont Yankee*, CLI-06-8, 63 NRC at 238.

LICENSE RENEWAL: ISSUANCE AFTER COMMISSION APPROVAL

In accordance with established practice, the Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission. *See, e.g.*, Memorandum from Annette Vietti-Cook, Secretary, to William D. Travers, Executive Director of Operations re: Staff Requirements — SECY 02-0088 — Turkey Point Nuclear Plant, Units 3 and 4, Renewal of Full-Power Operating Licenses (June 5, 2002).

MEMORANDUM AND ORDER

This Memorandum and Order responds to a stay motion filed by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation (together, Citizens) on April 11, 2008.¹ We deny the request for several reasons. First, the Motion is moot in part, because Citizens requested that the proceeding be held open pending its decision to file a new contention, and Citizens have now filed such a contention (along with a motion to reopen). The Motion also fails to meet the standard for either a stay of this adjudicatory proceeding or to stay issuance of a renewed license.

I. BACKGROUND

Citizens' Motion comes many months after the record closed in the proceeding before the Board.² AmerGen Energy Company, LLC (AmerGen) filed its license

¹ Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation to Stay License Renewal Proceedings for Oyster Creek Nuclear Power Plant Pending Resolution of the Significant New Issue Notified by Staff (Apr. 11, 2008) (Motion).

² The record in this proceeding closed (subject to transcript corrections) at the conclusion of the September 25, 2007, hearing. *See* Tr. 878.

renewal application in July 2005. Citizens intervened in the proceeding at the outset, and was granted a hearing on a single contention concerning the drywell liner.³ After a September 2007 evidentiary hearing on the sole contested issue, the Board issued an Initial Decision in AmerGen's favor.⁴ The Commission is considering Citizens' petition for review.⁵

On April 3, 2008, the NRC Staff notified the Commission, the Board, and the parties that it had recently become aware of a question concerning the conservatism of a calculation used by several license renewal applicants — including AmerGen — to determine the effects of metal fatigue on certain reactor components.⁶ The Staff stated that it intended to ask AmerGen to submit a confirmatory analysis showing that its metal fatigue calculation remained valid and conservative. On April 29, 2008, the Staff formally issued a request for additional information (RAI), and AmerGen submitted its RAI response on May 1, 2008.⁷ This new information does not pertain to the contested issues addressed in the evidentiary hearing before the Board.

Following the notification, Citizens asked that the Commission stay "its final decision . . . until the Staff has resolved the metal fatigue issue and Citizens have had a reasonable opportunity to request a hearing on the issue."⁸

II. DISCUSSION

A. Insofar as the Motion Requests Time To File a New Contention, It Is Moot

The stay motion requested the Commission to refrain from making a final decision on the issuance of a renewed license until the Staff had completed its review of the confirmatory analysis and Citizens had had "a reasonable time to review the confirmatory analysis and decide whether to move to add a new contention in this proceeding."⁹ But Citizens have now filed their Motion To

³ LBP-06-7, 63 NRC 188 (2006).

⁴ LBP-07-17, 66 NRC 327 (2007).

⁵ Citizens' Petition for Review of LBP-07-17 and Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008).

⁶ Memorandum from Samson S. Lee to Commissioners, Board, and parties, "Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application" (Apr. 3, 2008) (ADAMS Accession No. ML080940688).

⁷ Letter from Alex S. Polonsky to Dale E. Klein notifying Commission of AmerGen's filing enclosed RAI response on metal fatigue analysis (May 1, 2008) (ADAMS Accession No. ML081290455).

⁸ Motion at 11.

⁹ *Id.* at 2.

Reopen the Record and Admit New Contention.¹⁰ We referred the Motion to Reopen, together with associated pleadings related to the same motion, to the Licensing Board.¹¹ Insofar as the Motion requests a stay of the adjudicatory proceeding to allow Citizens time to file a motion to reopen the record and submit a new contention, it is moot and no stay is necessary.

B. Citizens Have Not Met Standards to Support Stay with Respect to Issuance of a Renewed License

Citizens have not demonstrated that a stay of a final license renewal decision is necessary to prevent them from suffering immediate and irreparable harm. Commission rules of procedure do not provide for a motion to stay issuance of a license while proceedings are pending before the Board. In practice, however, we have held that a motion to stay issuance of a license might be granted where the factors usually considered in granting emergency injunctive relief are satisfied.¹² These standards are set forth in our rule allowing a motion to stay the effect of a Board decision pending appeal.¹³ The moving party must show that four factors weigh in its favor: “likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest.”¹⁴ The first two factors are the most important.¹⁵ If a movant cannot show irreparable harm, it must make an “overwhelming showing that it is likely to succeed on the merits.”¹⁶

Citizens do not address the four stay factors in their Motion, which is reason enough to deny it.¹⁷ In any event, application of the factors to the facts in this

¹⁰ Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation To Reopen the Record and for Leave To File a new Contention, and Petition To Add a New Contention (Apr. 18, 2008) (Motion To Reopen).

¹¹ Order of the Secretary of the Commission (May 9, 2008) (unpublished). In its motion, Citizens requested the Commission order AmerGen to forward a nonproprietary version of the metal fatigue analysis to the parties in this proceeding. The Applicant has since provided its RAI response. To the extent that this request remains unaddressed, the issue should be resolved by the Board in connection with the Motion To Reopen. *Id.*

¹² *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006).

¹³ 10 C.F.R. § 2.342(e).

¹⁴ *Vermont Yankee Nuclear Power Station*, CLI-06-8, 63 NRC at 237.

¹⁵ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994).

¹⁶ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998), citing *Kerr-McGee Chemical Corp.* (West Chicago Rare Earth Facility), ALAB-928, 31 NRC 263, 269 (1990).

¹⁷ *See State of Illinois*, CLI-90-11, 32 NRC 333, 334 (1990).

case does not weigh in Citizens' favor. First, there is no threat of immediate and irreparable harm to Citizens, because the issuance of Oyster Creek's license renewal is not imminent. The Staff has not completed its review of the metal fatigue issue. And the Staff has not requested our authorization to issue the license renewal.¹⁸ In that respect, the motion for a stay is premature.¹⁹ In any case, Citizens would not be irreparably harmed even if the license were at the point of issuance. A license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review.²⁰

Absent a showing of irreparable harm, the movant must show that success on the merits is a virtual certainty.²¹ Citizens, however, have not shown a likelihood of success on the merits. AmerGen had not yet submitted its confirmatory analysis at the time Citizens filed its motion for stay. AmerGen has now responded to the Staff's RAI. Citizens' Motion To Reopen is pending before the Board. At this preliminary stage, prior to the admission of any late-filed contention, we do not yet know whether there is a disputed issue for hearing, let alone whether there is a basis for concluding that Citizens would prevail on the merits of any such issue. Therefore, this important factor does not favor Citizens' request.

Citizens' failure to show irreparable harm or a likelihood of success on the merits makes it unnecessary to consider the remaining stay factors: balance of harms and the public interest. Here, we are confident that the review of the metal fatigue issue that the NRC Staff initiated will result in a full consideration of the issue and appropriate licensing action once all the facts are known and reviewed. As we indicated above, Citizens have filed their own late-filed contention on metal fatigue and we have referred it to the Board. There is no reason for a stay or for other Commission action related to metal fatigue at this time.

C. No Need To Stay Proceedings Pending Resolution of Court Appeal

As an additional ground for staying the issuance of a final decision on renewing Oyster Creek's license, Citizens urge us to wait until the U.S. Court of Appeals for the Second Circuit decides a pending lawsuit challenging a 2006 NRC rulemaking

¹⁸In accordance with established practice, the Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission. *See, e.g.*, Memorandum from Annette Vietti-Cook, Secretary, to William D. Travers, Executive Director of Operations re: Staff Requirements — SECY 02-0088 — Turkey Point Nuclear Plant, Units 3 and 4, Renewal of Full-Power Operating Licenses (June 5, 2002).

¹⁹*See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 22 & n.37 (2007).

²⁰*See* 10 C.F.R. § 54.27(c); *cf. Vermont Yankee*, CLI-06-8, 63 NRC at 238.

²¹*Nuclear Fuel Services, Inc.* (Erwin, Tennessee), LBP-04-2, 59 NRC 77, 80 (2004), *citing Sequoyah Fuels*, CLI-94-9, 40 NRC at 7.

decision relating to license renewal.²² In the challenged decision, the NRC denied a rulemaking petition²³ that sought to expand the scope of issues reviewed in a license renewal application. Two of the organizations making up the Citizens group — New Jersey Sierra Club and New Jersey Environmental Federation — have sought judicial review of that denial in the Second Circuit.²⁴

Again, considering a stay at this time is premature. There is currently a Motion to reopen the record in this proceeding before the Board and for leave to file a new contention. In accordance with established practice, the Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission.²⁵ Without imminent issuance of Oyster Creek's license renewal, there is no threat of immediate and irreparable harm to Citizens. Nor has Citizens demonstrated a likelihood of success on the merits. As mentioned above, absent a demonstration of irreparable harm or likelihood of success on the merits, the Commission finds no basis upon which to grant a stay at this time.

III. CONCLUSION

For the foregoing reasons, the Motion is denied.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June 2008.

²² Denials of Petition for Rulemaking, 71 Fed. Reg. 74,848 (Dec. 13, 2006).

²³ 10 C.F.R. § 2.802 provides a procedure whereby interested parties may ask the Commission to “issue, rescind or amend” a regulation.

²⁴ *Spano v. NRC*, Nos. 07-0324 & 07-1276 (2d Cir.).

²⁵ *See supra* note 18.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. PAPO-001
(ASLBP No. 08-861-01-PAPO-BD01)
(Pre-Application Matters,
Advisory PAPO Board)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

June 17, 2008

ADJUDICATORY PROCEEDINGS: JURISDICTION

A proceeding commences when a notice of hearing or notice of proposed action under 10 C.F.R. is issued.

MEMORANDUM AND ORDER

On March 31, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board or Board) issued a Memorandum requesting that the Commission delegate to the Board additional authority to issue binding case management orders.¹ For the reasons set forth below, we authorize the Advisory PAPO Board to issue binding case management orders for specified purposes.

¹Memorandum (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority) (March 31, 2008) (unpublished) (Request).

I. BACKGROUND

In COMSECY-07-0030, dated October 17, 2007, Chief Administrative Judge Hawkens requested that the Commission authorize him to issue and, if appropriate, to delegate authority to the Pre-License Application Presiding Officer (PAPO) Board to issue case management orders “covering the broad range of procedural matters expected to accompany the upcoming adjudication regarding the Department of Energy’s (DOE) application for authorization to construct a high-level waste repository at Yucca Mountain, Nevada.”² At that time, Judge Hawkens requested the authority for the Atomic Safety and Licensing Board Panel to develop and issue a series of procedural case management orders that would permit, among other things, organization, labeling, and tracking of contentions from the commencement of the proceeding.

By Staff Requirements Memorandum (SRM) dated December 13, 2007, we authorized the Panel, on its own or through the PAPO Board, “to obtain input and suggestions from NRC Staff and potential parties on the broad range of procedural matters expected to arise and associated case management requirements that could be imposed” in an adjudicatory proceeding regarding an application for a high-level waste repository at Yucca Mountain, Nevada.³ At that time, we directed the Panel to submit its proposed case management language to the Commission “for possible inclusion in the Commission’s notice of opportunity to request a hearing and order governing the hearing process.”⁴ We also directed the Panel to return to the Commission in the event that it perceived the need to obtain additional authority.

Shortly thereafter, the Advisory PAPO Board was established.⁵ Since its establishment, the Board has issued three requests for information from potential parties relevant to case management issues.⁶ The March 6 Memorandum requested

² COMSECY-07-0030, “Requesting Authority To Issue Case Management Orders in High-Level Waste Proceeding Prior to the Issuance of a Notice of Opportunity for Hearing” (Oct. 17, 2007), at 1 (footnote omitted).

³ See “Staff Requirements Memorandum — COMSECY-07-0030 — Requesting Authority To Issue Case Management Orders in High-Level Waste Proceeding Prior to the Issuance of a Notice of Opportunity for Hearing” (Dec. 13, 2007).

⁴ *Id.* The Commission has determined that, as a policy matter, a mandatory hearing would be held in conjunction with an application for construction authorization for a high-level waste repository. 10 C.F.R. § 2.101(e)(8); see Final Rule: “Disposal of High-Level Radioactive Wastes in Geologic Repositories: Licensing Procedures,” 37 Fed. Reg. 13,971, 13,974 (Feb. 25, 1981). Therefore, should an application be docketed, a notice of hearing will issue pursuant to 10 C.F.R. § 2.104(c)(1).

⁵ Establishment of an Atomic Safety and Licensing Board, 73 Fed. Reg. 9358 (Feb. 20, 2008).

⁶ Notice and Memorandum (Requesting Information from Potential Parties) (Mar. 6, 2008) (unpublished) (March 6 Memorandum); Memorandum (Requesting Input from Potential Parties on Format

(Continued)

best, good-faith estimates of (1) the number of initial contentions; (2) the number of days needed to file reasoned answers to contentions; and (3) the number of days needed to file replies to the answers. In addition, the Board requested that DOE file the current draft version of the table of contents of its license application.⁷ The Board received a number of responses to this request by late March. The April 4 Memorandum invited the potential parties to comment on several procedural issues related to formatting and labeling of contentions, as well as the employment of a uniform system for referencing or attaching supporting materials. The Board also invited comment on certain procedural issues raised in DOE's and the State of Nevada's responses to the March 6 Memorandum.⁸ The Board received a number of responses to this second information request in late April.

The Board convened a conference to discuss case management matters at the agency's Las Vegas hearing facility on May 14, 2008.⁹ The May 2 Memorandum lists a number of matters on which the potential parties commented at that time, including procedural matters relating to the timing of the submission of an application by DOE, the timing of the Staff's review, and a number of matters relating to hearing petitions, answers, and replies.

This Request arose following the Board's review of information submitted pursuant to the March 6 Memorandum.

II. DISCUSSION

To support its Request, the Advisory PAPO Board notes that DOE had publicly stated its intent to file a license application for construction of a high-level waste repository at Yucca Mountain, Nevada, in June 2008.¹⁰ Further, the Board states that responses to its first request for information "make it apparent" that it needs the authority to issue binding case management orders, to ensure effective planning for an orderly proceeding in sufficient time to permit potential parties

for Contentions) (Apr. 4, 2008) (unpublished) (April 4 Memorandum); Memorandum (Requesting Additional Input from Potential Parties on Hearing Petition-Related Matters) (May 2, 2008) (unpublished) (May 2 Memorandum).

⁷ The Board is considering an organizational structure for petitions to intervene in which petitioners label contentions in a way that models the table of contents of a DOE license application. March 6 Memorandum, slip op. at 6.

⁸ See April 4 Memorandum, slip op. at 5-6 n.8. Thereafter, the Board issued an additional memorandum permitting potential parties to file optional written responses to the comments of other parties in advance of the May 14 conference. Memorandum (Requesting Additional Written Comments from Potential Parties on Format for Contentions) (Apr. 29, 2008) (unpublished).

⁹ *Id.*, slip op. at 6-7; Memorandum (Logistics for Conference) (Apr. 16, 2008) (unpublished).

¹⁰ Request at 1-2.

to comply with the Board's case management standards and the rigorous time limitations in 10 C.F.R. Part 2, Appendix D.¹¹

Aside from the anticipated scope of the proceeding, the Advisory Board's principal concern is time. The Board argues that its existing advisory authority is insufficient because, under the rigorous schedule for the proceeding set forth in Appendix D, "there simply will not be enough time for potential parties to implement" its proposed standards if they are issued only when the Commission publishes the notice of hearing.¹²

The Board's concerns are well taken. On the basis of estimated information provided to the Board, and taking into account the voluminous body of information upon which a postulated adjudicatory proceeding would be based, if a proceeding is, in fact, initiated on an application to construct a high-level waste repository at Yucca Mountain, then it has the potential to be one of the most expansive proceedings in agency history.¹³

The Board is correct that the Commission has broad authority to delegate powers to the Atomic Safety and Licensing Boards.¹⁴ In the matter before us,

¹¹ *Id.* at 2-3; see 10 C.F.R. § 2.1026(a). The Board notes that the number of anticipated contentions in a high-level waste proceeding could exceed 650, with the bulk of those proffered by the State of Nevada.

¹² See Request at 3. On June 3, 2008, DOE submitted an application to the NRC.

¹³ See, e.g., Nevada Response to the Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Mar. 24, 2008); Clark County's Response to Notice and Memorandum Requesting Information from Potential Parties (Mar. 21, 2008); Nuclear Energy Institute Response to the Advisory PAPO Board's March 6, 2008 Notice and Memorandum (Mar. 20, 2008); Nye County Response to Advisory PAPO Board NOTICE AND MEMORANDUM (Requesting Information from Potential Parties) (Mar. 20, 2008); Response by Churchill, Esmeralda, Lander and Mineral Counties to Notice and Memorandum (Requesting Information from Potential Parties) (Mar. 12, 2008); Response of Lincoln County, Nevada to Notice and Memorandum Requesting Information from Potential Parties (Mar. 6, 2008); Eureka County's Response to the Advisory PAPO Board's March 6, 2008, Order (Mar. 24, 2008); Inyo County Response (Untitled) (Mar. 19, 2008); NRC Staff Response to Board's March 6 Notice and Memorandum (Requesting Information from Potential Parties) (Mar. 24, 2008); U.S. Department of Energy's Response to Advisory PAPO Board Notice and Memorandum (Requesting Information from Potential Parties) (Mar. 24, 2008).

¹⁴ Request at 4 n.6. Section 191a of the Atomic Energy Act of 1954, as amended, provides in relevant part:

[T]he Commission is authorized to establish one or more atomic safety and licensing boards . . . to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking, or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder.

The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate.

(Continued)

there is not yet a proceeding.¹⁵ However, the Yucca Mountain matter is *sui generis*, in that (among many other things) the duration of the Staff's review is time-limited by statute, and the adjudicatory proceeding promises to be unusually complex. Further, as we have recently reiterated, our adjudicatory boards have broad discretion to regulate the course of proceedings and the conduct of participants, and we are reluctant to embroil ourselves in day-to-day case management issues.¹⁶

The organization of petitions to intervene, in particular, the formatting and labeling of contentions, an associated structure for responses and replies regarding contentions, the organization of standing arguments, and a uniform system for referencing or attaching supporting materials, are case management matters for which early and binding notice would be beneficial. Issuance of procedural requirements on these matters should enhance the ability of potential parties, and of one or more adjudicatory boards, to address matters in controversy more efficiently and effectively. Therefore, we authorize the board to issue binding case management orders on those subjects, which would apply if a proceeding is initiated. Of course, the Board remains free to make advisory recommendations to the Commission which the Commission could consider for inclusion in a notice of hearing or could endorse after receipt of such recommendations.

Although DOE has now tendered an application to the NRC, there is no guarantee of when — or if — that application will be accepted for docketing and a notice of opportunity for hearing published. That we approve the Advisory PAPO Board's Request in part today in no way bears upon the Staff's review of the application that DOE has submitted, and we do not assume that DOE's application will be accepted for review. Rather, our decision is intended to permit the Advisory PAPO Board to address by binding order certain additional procedural aspects of an adjudicatory proceeding as specified above, which would apply *in the event a proceeding is initiated*.¹⁷

III. CONCLUSION

For the foregoing reasons, the Advisory PAPO Board's request for authority to issue binding case management orders is granted for the purposes specified above.

42 U.S.C. § 2241(a) (emphasis added). *See* 10 C.F.R. § 1.15 (“The [Panel] . . . conducts hearings for the Commission and other such regulatory functions as the Commission authorizes”).

¹⁵ Our regulations provide that a proceeding commences when a notice of hearing or a notice of proposed action under 10 C.F.R. § 2.105 is issued. 10 C.F.R. § 2.318(a).

¹⁶ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187 (2008).

¹⁷ Further, our ruling today should not be interpreted as precedential, as it takes into consideration the unique facts and circumstances surrounding the Yucca Mountain matter.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Richard E. Wardwell
Dr. William Reed

In the Matter of

Docket No. 40-7102-MLA
(ASLBP No. 07-852-01-MLA-BD01)

**SHIELDALLOY METALLURGICAL
CORPORATION**
(Amendment Request for
Decommissioning of the
Newfield, New Jersey Facility)

June 2, 2008

MEMORANDUM
(Bringing Matter of Concern to Commission's Attention)

I. INTRODUCTION

Before this Licensing Board is a proceeding involving the decommissioning of an industrial site on which radioactive material is present in sufficient quantities to be of concern to the State in which that site is located. It now is a full decade since the termination in 1998 of the activity generating that material under the auspices of an NRC license. Despite that lengthy period, it appears that this proceeding will remain in a state of suspension for at least another 14 months to await the completion of the NRC Staff's review of the safety and environmental aspects of the Licensee's most recently submitted decommissioning plan — a review that commenced more than 1½ years ago. In short, it likely will be at least late 2009 or early 2010 before the concerned State will obtain a hearing on

its Board-admitted contention that the submitted plan does not provide adequate protection to its citizenry. In the meantime, not even a portion of the protective measures contemplated by the challenged plan are in place.

Although the Board deems this state of affairs to be unacceptable, it is not empowered to involve itself to any extent in the manner in which the Staff conducts its review of decommissioning plans, including the matter of the degree of urgency that the Staff might attach to conducting and completing the technical review of such plans once in its hands. Moreover, it does not appear that there is much that can be done at this juncture to accelerate the date upon which the concerned State will get its hearing on the challenged decommissioning plan. Nonetheless, the Board believes that it has the responsibility to direct the current situation to the attention of the Commission, which does exercise oversight authority over the manner in which the Staff carries out its functions.

In this regard, we have reason to conclude that what has transpired to date in this case is not susceptible of being brushed aside as simply an aberration that is not reflective of what might be expected in the Staff's treatment of other site decommissioning matters. As will also be discussed below, there is a second case that has received the now-and-again attention of first a presiding officer and then a licensing board ever since early 2000. Although the licensed activity there-involved terminated in 1994, it currently is a virtual certainty that there will not be a viable decommissioning plan submitted to the Staff any earlier than 2011 — some 17 years thereafter. It can be said that the lion's share of this extreme delay might appropriately be placed at the doorstep of the Licensee. The inescapable fact remains, however, that, at the very least, the Staff has countenanced in that matter a situation that will leave the citizens in the area surrounding the activity site in doubt for close to two decades regarding what measures will ultimately be taken for their protection. In common with the existing situation in the proceeding now before this Board, that hardly seems consistent with the intent underlying the Commission regulation (10 C.F.R. § 40.42) concerned with the decommissioning of sites on which licensed activities have terminated.

II. HISTORY

A. Shieldalloy Decommissioning Proceeding

The site at issue here is owned and operated by Shieldalloy Metallurgical Corporation ("Shieldalloy") located in the Borough of Newfield, Gloucester County, New Jersey. During an extended period beginning in 1940 and ending in June 1998, the facility among other things processed pyrochlore, a concentrated ore containing columbium (niobium), to produce ferrocolumbium, an additive used in the production of specialty steel and superalloy materials. Containing more than 0.05% by weight uranium and thorium, pyrochlore is subject to NRC

regulation as a radioactive source material.¹ Accordingly, Shieldalloy sought and obtained license No. SMB-743 that entitled it to ship, to receive, to possess, and to store such material.

The decommissioning plan at issue is addressed to a substantial pile of slag and baghouse dust that contains a quantity of radioactive material and is currently present at Shieldalloy's Newfield site.² It proposes to retain the pile on an 8-acre parcel within the storage yard at the Newfield site. The primary decommissioning activity contemplated by the plan includes the grading and shaping of the pile, which would then be covered with an engineered barrier consisting principally of native soil and rocks. Long-term maintenance and monitoring of this restricted area would then be conducted under NRC Staff supervision.

This proceeding was initiated by the publication of a notice in the *Federal Register* to the effect that the Commission was considering the issuance of an amendment to Shieldalloy's Source Material License.³ In response to the notice, hearing requests were filed by, or on behalf of, a number of individuals and entities, among them, the New Jersey Department of Environmental Protection (New Jersey). Determining it fulfilled the requirements needed to meet the standards imposed by 10 C.F.R. § 2.309(f), this Board granted New Jersey's hearing request in March 2007.⁴ That grant was based upon the Board's determination that New Jersey had standing and had advanced at least one admissible contention to the effect that the proposed decommissioning would not sufficiently protect the area surrounding the Newfield site from unacceptable environmental harm.⁵

According to the November 2006 *Federal Register* notice, Shieldalloy had advised the Commission in August 2001 that it ceased using radioactive source

¹ See 10 C.F.R. § 40.4.

² The revised decommissioning plan now under NRC Staff review addresses principally an accumulation on the Newfield site of 18,000 cubic meters of slag and 15,000 cubic meters of baghouse dust, all of which contains uranium and thorium. LBP-07-5, 65 NRC 341, 344 (2007).

³ Notice of Consideration of Amendment Request for Decommissioning for Shieldalloy Metallurgical Corporation, Newfield, NJ and Opportunity To Request a Hearing, 71 Fed. Reg. 66,986 (Nov. 17, 2006).

⁴ See LBP-07-5, 65 NRC at 341.

⁵ *Id.* at 357-58. Having found acceptable one of New Jersey's contentions, the Board went on to consider whether it should determine at that time the viability of its other contentions. It decided against doing so. Its reason was that there appeared to be a substantial possibility, if not probability, that, as a result of the NRC Staff's technical review, the decommissioning plan would undergo significant alterations that might render many, if not most, of New Jersey's current contentions either academic or in need of major revision. LBP-07-5, 65 NRC at 360-61. The Board additionally determined that further proceedings on the adequacy of the decommissioning plan should await the completion of the NRC Staff's technical review. *Id.* at 359-60. The Commission declined to disturb the Board's decision. See CLI-07-20, 65 NRC 499, 501-02 (2007).

material and intended to decommission the Newfield facility.⁶ Consequently, the Commission had amended the license in November 2002 to authorize only decommissioning activities. Again, according to the notice, Shieldalloy submitted its initial decommissioning plan on October 21, 2005, which proposed the use of a possession-only license for long-term control of the site. This plan was subsequently rejected by the NRC Staff by letter dated January 26, 2006. A revised decommissioning plan, submitted on June 30, 2006, was found acceptable by the NRC Staff for the purpose of initiating technical review of the plan that would eventually produce both a safety evaluation report (SER) and an environmental impact statement (EIS).⁷

As a follow-up to its contention admissibility determination, the Board issued an order directing the NRC Staff to file bimonthly status reports, with the first due on June 8, 2007. The reports were to contain both “(1) a brief statement regarding the then status of the technical review; and (2) the Staff’s then best estimate as to the completion date of the review and the release of the documents associated with it.”⁸ For its part, the Commission thereafter issued an order on its own in which it further directed that additional filings be made with the Board by the same date. Specifically, Shieldalloy was to disclose in its filing the status of its decommissioning plan, as well as “any relevant developments such as fundamental shifts in [its] approach to decommissioning the site.”⁹

On June 7, 2007, the Board received filings from the Staff and Shieldalloy in compliance with the Commission’s directive. On the matter of when the technical review might be completed and the associated documents issued, the Staff indicated that its best estimates were the following: issuance of a final SER in January 2008; publication of a draft EIS in March 2008; and issuance of a final EIS in October 2008.¹⁰

The Staff has since filed a total of six status reports, with three of them noting slippage in the forecasted schedule. On the basis of the last report, filed this April, it now appears that the final EIS will not surface any earlier than August 2009, if then.¹¹ In that report, the Staff indicated that, to provide a full response to the Requests for Additional Information, or “RAIs,” Shieldalloy “intends to conduct additional leachability tests on slag and baghouse dust from the Newfield site.”¹²

⁶ 71 Fed. Reg. at 66,986. The *Federal Register* notice also stated, however, that ferroalloy production at the Newfield site ceased in June 1998. *Id.*

⁷ *Id.*

⁸ See Licensing Board Order (Directing the Filing of Status Reports) at 2 (May 8, 2007) (unpublished).

⁹ See CLI-07-20, 65 NRC at 501-02.

¹⁰ See NRC Staff’s First Status Report at 1-2 (June 8, 2007).

¹¹ See NRC Staff’s Sixth Status Report at 2 (Apr. 11, 2008).

¹² *Id.* at 1-2.

Taking into account the required response times for the current decommissioning plan revision, the schedule now reflects a slippage of nearly 1 year from that projected in the Staff's initial status report to the Commission and the Board. It thus appeared that it would be more than 11 years after the 1998 termination of the licensed activity before there might be a consideration on the merits of New Jersey's already-admitted contention that the decommissioning plan is not adequate to prevent unacceptable environmental harm. This prompted the Board to hold an April 28 telephone conference with the parties to obtain an explanation as to the nature of Shieldalloy's latest proposed revision to its decommissioning plan, and to be informed as to the reasons why the revision will require more than a year to factor into the technical review. The Board additionally desired to explore with counsel the current measures designed to avoid or at least ameliorate any environmental impacts of the amassed slag and baghouse dust at the Newfield site.

Still further, the Board was concerned that the substantial delay in both the submittal and approval of the decommissioning plan might involve a violation of the NRC regulation, 10 C.F.R. § 40.42, addressing the obligations of a licensee once a licensed activity has terminated.¹³ This concern stemmed from the fact that, according to the *Federal Register* notice, Shieldalloy's *initial* decommissioning plan had been submitted to Staff in 2005 — nearly 7 years after its ferroalloy production ceased in 1998.¹⁴

During the April 28 telephone conference, two things became apparent. First, contrary to the background statement in the *Federal Register* notice, a decommissioning plan had been submitted to the Staff considerably earlier than 2005.¹⁵ Further, interaction between Shieldalloy and the Staff had taken place in the years leading up to and following submittal of its initial decommissioning plan.¹⁶ This revelation led the Board to request detailed written accounts from the Staff and Shieldalloy of precisely what had transpired between 1998 and the submittal of the supposedly revised decommissioning plan in 2005.¹⁷

Second, it became clear to this Board that no interim protective measures have been put in place at the Newfield site. The pile of slag and baghouse dust remains as it was when Shieldalloy notified the NRC that its production activities had

¹³ See discussion *infra* pp. 416-17.

¹⁴ 71 Fed. Reg. at 66,986.

¹⁵ Official Transcript [Tr.] at 9-10, 12.

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 33-34.

ceased.¹⁸ The central issue in this proceeding is the adequacy of the proposed engineering barrier. During the telephone conference, New Jersey reiterated its concern regarding the inadequacy of Shieldalloy's proposed cap, also stating that "interim measures should be taken" before the decommissioning plan is approved "to prevent the contamination that [is] occurring right now" to the surrounding environment.¹⁹

On May 8, 2008, in response to the Board's directive, the Staff filed a summary of actions, and Shieldalloy filed a chronology of events, both relevant to the decommissioning of the Newfield facility.²⁰ These documents provide a detailed account of events as portrayed by each party and are readily available to the Commission and the public alike through the NRC's Agencywide Documents Access and Management System (ADAMS).²¹

In sum, the parties' submittals portray that Shieldalloy's operations ceased in 1998 with the decommissioning of the facility except for the continuing presence of the slag and baghouse dust at issue here.²² Shieldalloy thereafter sought to find a market for these waste materials, meanwhile notifying the Staff of its efforts.²³ From 1998 to 2001, the Staff permitted Shieldalloy to delay development of a decommissioning plan and to continue the pursuit of a slag and baghouse dust market. When, after 2 years that endeavor proved unavailing, Shieldalloy requested, and was granted, an additional year by the Staff to locate a buyer for the slag and baghouse dust.²⁴ In 2001, Shieldalloy expressed to the Staff its intention to terminate its license and was granted another year to prepare a decommissioning plan; this decommissioning plan (denominated Rev. 0) was submitted in August 2002 — more than 4 years after operations had ceased at the Newfield facility.²⁵ The August 2002 decommissioning plan was then rejected for

¹⁸ *Id.* at 19 (Mr. Travieso-Diaz: "One of the features of the decommissioning plan is to provide a very hefty layer of rock cover, and an impervious membrane . . . on top of [the slag and baghouse dust] once the decommissioning plan gets approved. Right now, there is no cover"). *See also id.* at 21.

¹⁹ *Id.* at 45.

²⁰ NRC Staff's Summary of Actions Relevant to Decommissioning Shieldalloy's Newfield Facility (May 8, 2008) [hereinafter Staff's Submittal]; Shieldalloy's Submittal Regarding Chronology of Events Related to the Decommissioning of the Newfield, NJ Facility (May 8, 2008) [hereinafter Shieldalloy's Submittal].

²¹ Staff's Submittal (ADAMS Accession No. ML081360527); Shieldalloy's Submittal (ADAMS Accession No. ML081350612). Documents available in ADAMS may be accessed on NRC's public website at <http://www.nrc.gov/reading-rm/adams/web-based.html>.

²² Staff's Submittal at 4.

²³ Shieldalloy's Submittal at 5; Staff's Submittal at 4.

²⁴ Staff's Submittal at 4-5.

²⁵ *Id.* at 6.

its presumption that the State of New Jersey would assume an oversight role for the decommissioning of the site.²⁶

From 2002 to 2005, Shieldalloy and the Staff pursued multiple approaches for a restricted license termination with enforceable institutional controls. In October 2005, Shieldalloy submitted a new decommissioning plan (denominated Rev. 1). As with the 2002 plan, it was summarily rejected, this time for deficiencies in dose modeling, surface water hydrology, and erosion protection.²⁷ These deficiencies were purportedly corrected with the submittal of the decommissioning plan (Rev. 1a) on June 30, 2006.²⁸ The Board now understands that further delays are occurring as Shieldalloy addresses deficiencies in this latest revision that was docketed by the Staff in late 2006.²⁹

B. U.S. Army Decommissioning Proceeding

In recent years, there has been only one other adjudicatory proceeding involving the decommissioning of a facility at which the terminated activity carried out under an NRC materials license had left onsite a quantity of radioactive material. The proceeding's history up to the present time is fully chronicled in a recent Licensing Board decision.³⁰ It is not necessary to rehearse here the detailed account contained in that decision. For present purposes, the following summary should suffice.

For a period of 10 years commencing in 1984, under the auspices of an NRC materials license the Department of the Army conducted accuracy testing of depleted uranium (DU) tank penetration rounds at its Jefferson Proving Ground (JPG) site in Indiana. In 1999, some 5 years after the testing came to a permanent halt, the Army submitted a decommissioning plan to the NRC Staff that purportedly addressed the accumulation of DU munitions that remained on the JPG site. In response to the customary *Federal Register* notice of opportunity

²⁶ Shieldalloy's Submittal at 6.

²⁷ Staff's Submittal at 8.

²⁸ *Id.* at 9.

²⁹ The Staff in its submittal also indicates that while reviewing Shieldalloy's decommissioning plan, it has taken into account public comments on Rev. 1a, most notably New Jersey's 228 comments and the United States Environmental Protection Agency's 283 distinct comments. Staff's submittal at 11.

In its latest submittal to the Board, Shieldalloy suggested that a substantial portion of the delay was attributed to New Jersey. New Jersey filed a response in defense of these allegations, which is also available publicly in ADAMS. New Jersey Department of Environmental Protection's Reply to the NRC Staff and Shieldalloy Submissions Regarding the Chronology of Decommissioning Events (May 15, 2006) (ADAMS Accession No. ML081440776).

³⁰ *U.S. Army* (Jefferson Proving Ground Site), LBP-08-4, 67 NRC 105, 107-13 (2008).

for hearing, a local organization filed a hearing request challenging the plan.³¹ In 2000, that request was granted.³²

More than 8 years have now elapsed since the initiation of that proceeding. Yet, not only has there been no resolution of the issues raised by the intervening organization, there is not even a decommissioning plan currently on the table for consideration by either the NRC Staff or a licensing board.

To begin with, both the 1999 decommissioning plan and a revised one submitted in 2001 were withdrawn by the Army, the second in favor of an application in 2003 for a 5-year renewable possession-only license (POLA). Then, before the NRC Staff had completed its evaluation of that submission, the POLA application itself was withdrawn and replaced by an Army request in mid-2005 for an alternate schedule amendment to the materials license that would give it an additional 5 years to complete a site characterization of the JPG site. Thereupon, a new decommissioning plan, incorporating the site characterization, would be submitted to the Staff and presumably be subject to challenge before a licensing board.

The alternate schedule proposal was accepted by the Staff and last February approved by the licensing board over the objections of the intervenor to some features of the methodology the Army intends to employ in carrying out the site characterization.³³ The proposal calls for the submission of a decommissioning plan by 2011. Thus, it will likely be some 17 years after the testing activity was permanently terminated before the decommissioning plan for the JPG site will next undergo Staff scrutiny.

Moreover, even if the then plan meets with Staff approval, it well might be contested as insufficient by the local organization that has been involved in this matter over the course of more than 8 years. In the event of such a contest, it could be another year or two before there is a final determination regarding the measures, if any, that must be taken to ensure that the public health and safety and the environment are not adversely affected by the DU munitions remaining on the JPG site.

III. DISCUSSION

A. The Commission's regulations are most specific with regard to the obligations of the holder of an NRC materials license once either (1) a decision has been reached to cease permanently the principal activities conducted under the aegis

³¹ Notice of Consideration of Amendment Request for U.S. Army Jefferson Proving Ground Site in Madison, Indiana, and Opportunity for a Hearing, 64 Fed. Reg. 70,294 (Dec. 16, 1999).

³² *U.S. Army* (Jefferson Proving Ground Site), LBP-00-9, 51 NRC 159 (2000).

³³ *See Army*, LBP-08-4, 67 NRC at 146.

of the license; or (2) no such activities have been conducted for a period of 24 months. In such circumstances, the licensee must provide written notification to the NRC Staff within 60 days and, additionally, either (1) begin decommissioning of the site so that the building or outside area is suitable for release in accordance with NRC requirements; or (2) submit a decommissioning plan to the Staff within 12 months of the notification.³⁴

Implicit in those requirements would appear to be a recognition that, once a licensed activity has come to an end, the decommissioning of the site should proceed with dispatch to ensure that all measures required to ensure the public health and safety and to protect the environment are seasonably taken.³⁵ Granted, section 40.42(d) does not establish a time period within which the Staff must make its ultimate determination regarding what decommissioning activities might be necessary in order to provide such assurance and protection. Obviously, what the Staff review will entail in a particular case will be largely dependent upon the complexity of the safety and environmental issues presented in that case. That said, however, it is reasonable to read into the section a contemplation that, upon being apprised of the termination of a licensed activity, the Staff will deem its duty to include seeing to it that all decommissioning issues are approached and resolved as expeditiously as possible. Indeed, is not that the justifiable expectation of those persons who are located in close enough proximity to the site to have legitimate concerns regarding the radioactive materials that remain on site?

In that regard, it often will be in the economic interest of a licensee to put off as long as possible implementing expensive remediation measures, whether determined necessary by the NRC Staff or by a licensing board, in its consideration of an intervenor's challenge to a submitted decommissioning plan.³⁶ Given that financial reality, it seems to us that there might be a particular obligation on the part of the Staff to insist that the licensee not merely comply strictly with the provisions of section 40.42(d) but, as well, do whatever is thereafter required of it in a sufficiently timely fashion to ensure no unnecessary delay in the accomplishment of site decommissioning.

³⁴ See 10 C.F.R. § 40.42(d).

³⁵ See *Timeliness in Decommissioning of Materials Facilities*, 59 Fed. Reg. 36,026, 36,026 (July 15, 1994) (the timeliness in decommissioning rule incorporated into section 40.42 "is intended to reduce the potential risk to public health and the environment from radioactive material remaining for long periods of time at such facilities after licensed activities have ceased").

³⁶ Although we are not prepared to conclude that such a consideration played a part in Shieldalloy's conduct since it terminated the licensed activity a decade ago, the fact remains that it is faced with at least the possibility of being ordered at day's end to do much more by way of site remediation than it now proposes.

B.1. As previously summarized in this Memorandum, in submittals provided at our direction, Shieldalloy and the NRC Staff provided full accounts of what has transpired on the decommissioning front since 1998. In addition, New Jersey responded in writing to the Shieldalloy charge that the State bears most of the responsibility for the current state of affairs.³⁷ We do not intend to freight this Memorandum with a close analysis of the content of the several submissions.³⁸ It is enough to note that we have failed to discern in the submissions of either Shieldalloy or the Staff a sense of anything even remotely approaching urgency with regard to the resolution of the decommissioning issues on the table.

As a consequence, 10 years after the licensed activity ceased, there remains on Shieldalloy's Newfield site a large slag pile containing radioactive material. Acting on behalf of its citizens, New Jersey maintains, among other things, that the passage of rainwater through the pile will produce unacceptable groundwater contamination. In that connection, it disputes the adequacy of Shieldalloy's proposal to cap the pile with nothing more than native soil and rock. The validity of that proposal apparently will now not receive a Staff determination for over another year (if not still longer). In the meanwhile, as has been the case for the past decade, the pile will not even have the assertedly inadequate cover called for in the challenged decommissioning plan, or some type of alternate cover, to reduce ongoing impacts.

We think it beyond cavil that the residents of the Newfield area who might possibly be affected by contaminated groundwater were entitled to greater consideration. And, while acknowledging the importance of the Staff taking the time necessary to ensure that the conclusion reached on the issues raised by New Jersey (and any others that occur to it on its own) are fully informed ones, it is worth noting that what is involved here is nothing more than a slag pile. As such, we would think that the Staff inquiry here rates relatively low in comparative complexity among the numerous site decommissioning proposals it confronts.

B.2. With respect to the JPG decommissioning situation, it is now some 14 years since the Army terminated the munitions testing on the site. Yet, no decision has been reached regarding what measures are to be taken to ensure that the DU munitions amassed onsite do not present an undue radiological safety or environmental threat. Still more to the point, there is not even a decommissioning plan currently on the table. Instead, as matters now stand, it likely will be at least 2011 — some 17 years after the licensed activity came to an end — before the Staff will have in hand a decommissioning plan that might possibly meet with its approval (and that of a licensing board if challenged).

³⁷ See *supra* note 29.

³⁸ As previously noted, *supra* note 21, the submissions are available for inspection on ADAMS.

As we have seen, this state of affairs is the product of the Army having waited 5 years to file its initial decommissioning plan (in seeming violation of section 40.42(d)) and then, over a period of several years, having changed directions several times. If the Staff had any concern with the erratic course that the Army pursued up to and including its application for an additional 5 years to come up with yet another decommissioning plan, that concern certainly was not made known. To the contrary, for all appearances, the Staff has seen no problem with the residents of the JPG site area being kept in the dark for conceivably as long as two decades with regard to what (if anything) the Army will be required to do to remediate the site.

IV. CONCLUSION

As this Board sees it, the history of these two decommissioning proceedings speaks for itself. It remains at least possible, of course, that it is not the universally held and applied belief of the NRC Staff that it is appropriate to have decommissioning issues remain unresolved for well over a decade. Nonetheless, there seems to be a substantial possibility that these proceedings do not stand alone as representatives of a more than casual attitude on the Staff's part with regard to the decommissioning of sites on which radioactive materials remain as a potential threat to public health and safety and to the environment.

Given that licensing boards lack the authority themselves to oversee the Staff's performance of its regulatory responsibilities (apart from compliance with the dictates of the National Environmental Policy Act), we are not empowered to inquire further into the matter, let alone to order some corrective measures. Thus, as noted in the introduction to this Memorandum, the sole course available to us is a referral of the matter to the Commission for its consideration.

To avoid any possible misunderstanding, we wish to make it clear that nothing that has been said above should be taken as a criticism of anything that the NRC Staff has substantively done in the course of its technical review in either case. Our concern is exclusively with the pace, and therefore not at all with the content, of the Staff's review. Additionally, we are not suggesting that there are steps that might be taken at this point to accelerate materially decommissioning in the specific proceedings discussed herein. In the totality of the present circumstances, that might well be beyond achievement. (The Commission might, however, wish to make clear to the Staff that it will look with disfavor upon any further slippage in either the August 2009 completion of the Shieldalloy technical review or the Army's submission by 2011 of a new decommissioning plan for the JPG site.) Our primary interest is, instead, in the avoidance of like-protracted delay in the

resolution of issues arising in future decommissioning endeavors. Once again, those living in the vicinity of the sites being decommissioned are owed no less.

THE ATOMIC SAFETY AND
LICENSING BOARD*

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Dr. William Reed
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 2, 2008

*Copies of this Memorandum were sent by e-mail transmission on this date to counsel for (1) Licensee Shieldalloy Metallurgical Corp.; (2) Intervenor New Jersey Dept. of Environmental Protection; and (3) the NRC Staff. In addition, as a courtesy, copies will be informally provided to the service list in the *Army* proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Paul B. Abramson
Dr. Michael Kennedy

In the Matter of

Docket No. 50-423-OLA
(ASLBP No. 08-862-01-OLA-BD01)

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Unit 3)

June 4, 2008

RULES OF PRACTICE: STANDING TO INTERVENE
(PROXIMITY)

In addition to the traditional requirements for standing, the Commission has recognized that a petitioner may have standing based upon its geographical proximity to a particular facility. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). In appropriate circumstances, a petitioner's proximity to the facility in question provides for a so-called presumption that "a petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001). However, in an uprate proceeding, demonstrating standing in this manner additionally requires a "determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-

95-12, 42 NRC 111, 116 (1995); *see also PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 18 (2007); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553-54 (2004).

**RULES OF PRACTICE: STANDING TO INTERVENE
(REPRESENTATIONAL STANDING)**

An organization seeking to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, must identify that member by name and address, and must show that it is authorized by that member to request a hearing on his or her behalf. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

RULES OF PRACTICE: SCOPE OF UPRATE PROCEEDING

An applicant for a change in the operating conditions of its nuclear power plant (in this case, a power uprate) is required to comply with all relevant NRC regulations. The standard to be met is whether the application meets the requirements for a License Amendment. The relevant NRC regulations for a power uprate, be it a SPU or an EPU, are set forth in 10 C.F.R. §§ 50.90 to 50.92. *See* 10 C.F.R. §§ 50.90 to 50.92.

**RULES OF PRACTICE: EFFECT OF COMPLIANCE WITH
REGULATORY GUIDANCE**

The failure of an applicant to address any guidance topics or deviation from the guidance provided does not rise to the level of failure to comply with NRC regulations.

RULES OF PRACTICE: CONTENTIONS

A contention must specifically challenge the license application to be admissible. 10 C.F.R. § 2.309(f)(1)(vi). This can either be in the form of an asserted omission from the application of required information or an asserted error in a specific analysis or other technical matter set out in the application. *Id.* The former form of challenge must be supported by specific reasons why the alleged omissions are relevant and material, and the latter form of challenge must be supported by reasons why the analysis is deficient. *Id.*

RULES OF PRACTICE: CONTENTIONS

To the extent a contention calls for requirements in excess of those imposed by Commission regulations, it must be rejected as a collateral attack on the regulations. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286-87 (2001); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

In determining whether an amendment to a license will be issued, the Commission is “guided by the considerations which govern the issuance of initial licenses,” 10 C.F.R. § 50.92(a), i.e., the same regulatory criteria that govern the initial license issuance govern each amendment. Therefore, as amendments are approved, they become part of the licensing baseline, all evaluated against the same standards. The current application for an amendment to the license to permit a power uprate must be evaluated against the current baseline (i.e., as against the status quo). Thus the structural operating margins are evaluated considering the plant’s current design limits (which are based upon the cumulative effect of the original license and all of the amendments previously approved). Challenges to the current operating license are outside the scope of matters challengeable in a power uprate application, and therefore fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

Whether Millstone Unit 3 has a valid NPDES permit is outside the scope of this uprate proceeding. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 92-93 (2004); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (2007).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

Challenges to how the Staff performs its reviews are outside the scope of this proceeding. *See Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 37 (2002) (“It is a well-established principle of NRC adjudication that ‘contentions must rest

on the *license application*, not on NRC Staff reviews’ As the Commission stated when it amended the contentions rule, ‘a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis’ because ‘the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than adequacy of the NRC Staff performance’ ’’) (internal citations omitted) (emphasis in original).

MEMORANDUM AND ORDER

(Ruling on Petition To Intervene and Request for Hearing)

Before us is a petition to intervene and request for hearing filed by the Connecticut Coalition Against Millstone and Nancy Burton (collectively CCAM or Petitioners) concerning the application of Dominion Nuclear Connecticut, Inc. (Dominion or Applicant) for an amendment to its Operating License NPF-49 for Millstone Power Station Unit 3 (Millstone) in Waterford, Connecticut. The proposed Stretch Power Uprate License Amendment Request would increase the unit’s authorized core power level from 3411 to 3650 megawatts thermal, and make changes to Technical Specifications as necessary to support operation at the stretch power level.

Both Dominion and the NRC Staff oppose Petitioners’ request for hearing. For the reasons set forth below, we find that Petitioners, CCAM and Nancy Burton, have standing to intervene in the proceeding, but neither CCAM nor Nancy Burton has submitted an admissible contention as required by 10 C.F.R. § 2.309(a). Therefore, we deny Petitioners’ request for an evidentiary hearing.

I. BACKGROUND

On July 13, 2007, pursuant to 10 C.F.R. § 50.90, Dominion requested an amendment to its NRC Operating License NPF-49 for its Millstone Power Station Unit 3.¹ The amendment was styled as a proposed Stretch Power Uprate (SPU) License Amendment Request (LAR) and would increase the unit’s authorized core power level from 3411 megawatts thermal (MWt) to 3650 MWt, and make changes to Technical Specifications as necessary to support operation at the stretch power level.² Dominion stated that it developed its LAR utilizing the guidelines in NRC Review Standard, RS-001, ‘‘Review Standard for Extended

¹The License Amendment Request was subsequently supplemented on July 13, September 12, November 19, December 13, and December 17, 2007. 73 Fed. Reg. 2546, 2549 (Jan. 15, 2008).

²*Id.* at 2549.

Power Uprates.”³ RS-001 states that a SPU is typically characterized by power level increases “up to 7 percent and do[es] not generally involve major plant modifications.”⁴

On January 15, 2008, the Commission published a “Biweekly Notice: Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations” (Notice).⁵ The Notice permitted any person whose interest may be affected by the proposed amendment to the Millstone Unit 3 license the opportunity to file a request for a hearing and petition for leave to intervene within 60 days of the Notice.⁶ It directed that any petition must set forth with particularity the specific contentions sought to be litigated.⁷

On March 17, 2008, CCAM and Nancy Burton filed a joint petition to intervene and request for hearing.⁸ The petition states that the Dominion “application has grave potential to increase safety risks and diminish safety margins at Millstone Unit 3.”⁹ The petition contains nine proposed contentions and requests that the LAR be rejected.

Following the designation of this Licensing Board,¹⁰ Dominion¹¹ and the NRC Staff¹² timely filed Answers on April 11, 2008, to Petitioners’ petition to intervene and request for hearing. Dominion does not challenge CCAM’s standing to seek to participate in this proceeding nor does it object to Ms. Burton acting as CCAM’s representative.¹³ Dominion states, however, that “Ms. Burton has not demonstrated standing to intervene in her own right.”¹⁴ The NRC Staff does not contest the standing of CCAM or of Nancy Burton individually.¹⁵ Both Dominion

³ LAR, Attachment 5, SPU Licensing Report (ADAMS Accession No. ML072000400) at 1-1 [hereinafter LAR, Attachment 5].

⁴ Review Standard for Extended Power Uprates, RS-001, Revision 0 (Dec. 2003) (ADAMS Accession No. ML033640024) at Background [hereinafter Review Standard, RS-001].

⁵ 73 Fed. Reg. at 2546.

⁶ *Id.* at 2547, 2549-50.

⁷ *Id.* at 2547.

⁸ Connecticut Coalition Against Millstone and Nancy Burton Petition To Intervene and Request for Hearing (Mar. 17, 2008) [hereinafter CCAM Petition].

⁹ *Id.* at 1 (CCAM Petition filed with pages unnumbered).

¹⁰ Dominion Nuclear Connecticut, Inc.; Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 18,010 (Apr. 2, 2008).

¹¹ Dominion Nuclear Connecticut’s Response to Connecticut Coalition Against Millstone and Nancy Burton’s Petition To Intervene and Request for Hearing (Apr. 11, 2008) [hereinafter Dominion Answer].

¹² NRC Staff Answer to Request To Intervene and for Hearing of the Connecticut Coalition Against Millstone and Nancy Burton (Apr. 11, 2008) [hereinafter NRC Staff Answer].

¹³ Dominion Answer at 4.

¹⁴ *Id.* at 4-5.

¹⁵ NRC Staff Answer at 1.

and the NRC Staff contend that CCAM and Nancy Burton have not proffered an admissible contention.¹⁶

On April 22, 2008, CCAM and Nancy Burton timely filed a Reply to the Dominion and NRC Staff Answers.¹⁷

II. ANALYSIS

NRC regulations require that any individual, group, business, or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must: (1) establish that it has standing; and (2) offer at least one admissible contention.¹⁸

A. Standards Governing Standing

A petition for leave to intervene must provide certain basic information supporting the petitioner's claim to standing. The required information includes: (1) the nature of the petitioner's right under the governing statutes to be made a party; (2) the nature of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order on the petitioner's interest.¹⁹ In determining whether an individual or organization should be granted party status in a proceeding based on standing "as of right," the agency has applied contemporaneous judicial standing concepts that require a participant to establish: (1) it has suffered or will suffer "a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute[s]" (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) "the injury is likely to be redressed by a favorable decision."²⁰

In addition to the traditional requirements for standing, the Commission has recognized that a petitioner may have standing based upon its geographical

¹⁶ Dominion Answer at 1; NRC Staff Answer at 25.

¹⁷ Connecticut Coalition Against Millstone and Nancy Burton Reply to Responses of NRC Staff and Dominion Nuclear Connecticut, Inc. to Petition To Intervene and Request for Hearing (Apr. 22, 2008) [hereinafter CCAM Reply]. Petitioners' replies were originally due on April 18, 2008, but Petitioners requested and were granted an extension of time to file a consolidated reply on April 22, 2008. See Licensing Board Order (Granting CCAM and Nancy Burton Request for Extension of Time To File Consolidated Reply) (Apr. 17, 2008).

¹⁸ 10 C.F.R. § 2.309(a).

¹⁹ 10 C.F.R. § 2.309(d)(1).

²⁰ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

proximity to a particular facility.²¹ In appropriate circumstances, a petitioner's proximity to the facility in question provides for a so-called presumption that "a petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity."²² However, in an uprate proceeding such as this one, demonstrating standing in this manner additionally requires a "determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences."²³ The petitioner's proximity to the proposed source of radioactivity must also be "judged on a case by case basis, taking into account the nature of the proposed action and the significance of the radioactive source."²⁴

An organization seeking to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, must identify that member by name and address, and must show that it is authorized by that member to request a hearing on his or her behalf.²⁵ In determining whether a petitioner has met the requirements for establishing standing, the Commission has directed us to "construe the petition in favor of the petitioner."²⁶

B. Rulings on Standing

1. CCAM

CCAM's petition asserts it is "a public-interest organization founded in 1998 to educate the public about the Millstone Nuclear Power Station and engage in activities to protect the public health and safety of the community otherwise at risk from Millstone operations."²⁷ The CCAM petition includes the name of one of its members, Ms. Cynthia M. Besade, who resides in Uncasville, Connecticut,

²¹ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

²² *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001).

²³ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995); *see also PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 18 (2007); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553-54 (2004).

²⁴ *Georgia Tech.*, CLI-95-12, 42 NRC at 116-17; *see also Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

²⁵ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

²⁶ *Georgia Tech*, CLI-95-12, 42 NRC at 115.

²⁷ CCAM Petition at 2.

approximately 10 miles north-northeast of the Millstone Nuclear Power Station.²⁸ In her declaration, Ms. Besade asserts that “[a]ccording to Dominion’s own projections, the license amendment, if granted, will result in an estimated 9 per cent increase in radionuclide releases to the environment, including the air I and my family and friends and neighbors breathe, and such releases will increase health risks by the same proportion,” and “will also heighten safety risks.”²⁹ Ms. Besade’s Declaration states she is a member of CCAM and authorizes Nancy Burton to represent her rights and interests in this case.³⁰

CCAM has demonstrated that the licensing action will affect at least one of its members, has identified that member by name and address, and has shown that it is authorized by that member to request a hearing on his or her behalf.³¹ We find that the organization CCAM has representational standing in this proceeding and the CCAM organization has designated Ms. Burton as its representative.

2. *Nancy Burton*

Ms. Burton seeks individual standing based on her seasonal residence in a cottage in Mystic, Connecticut, approximately 10 miles downwind of Millstone Unit 3.³² Dominion objects to Ms. Burton’s assertion of individual standing.³³ Dominion states that Ms. Burton’s seasonal residency in Mystic is “too vague to demonstrate standing.”³⁴ Dominion further states the pleadings do not provide evidence of the likelihood of an “ongoing connection and presence.”³⁵ In her Reply Ms. Burton states she “shares frequent spring, summer and fall occupancy of a summer cottage in Mystic.”³⁶ She also states she has done so “since 1970 and . . . expects to continue to do [so] into the future.”³⁷

Ms. Burton’s Declaration provides the street address of the cottage and it appears the cottage is approximately 10 miles from the Millstone facility.³⁸

²⁸ CCAM Petition, Declaration of Cynthia M. Besade (Mar. 16, 2008) ¶¶ 2-3 [hereinafter Besade Decl.].

²⁹ *Id.* ¶¶ 21-22.

³⁰ *Id.* ¶¶ 25-26.

³¹ *Cf. Susquehanna*, LBP-07-10, 66 NRC at 18 (citing *Vermont Yankee*, LBP-04-28, 60 NRC at 553-54).

³² CCAM Petition at 4; CCAM Reply at 3.

³³ Dominion Answer at 4-5.

³⁴ *Id.* at 5.

³⁵ *Id.* at 5 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 & n.3 (1998); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)).

³⁶ CCAM Reply at 3.

³⁷ *Id.*

³⁸ CCAM Petition, Declaration of Nancy Burton (Mar. 17, 2008) ¶ 2 [hereinafter Burton Decl.].

While Ms. Burton could have been more specific about the length and nature of her seasonal residency to establish a bond between the petitioner and the facility's vicinity³⁹ and the likelihood of an ongoing and continuing connection and presence, we find Ms. Burton has met the requirements for individual standing in this proceeding.

C. Standards Governing Contention Admissibility

Section 2.309(f)(1) of the Commission's regulations sets out the requirements that must be met if a contention is to be admitted. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.⁴⁰

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."⁴¹ The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."⁴² The Commission has emphasized that the rules on contention admissibility are "strict by design."⁴³ Further, contentions challenging applicable

³⁹ See *Georgia Tech*, CLI-95-12, 42 NRC at 116-17 (daily commute near vicinity of reactor sufficient to establish standing). But, occasional trips to areas located close to reactors have been found to be insufficient grounds to demonstrate a risk to the intervenor's health and safety. See, e.g., *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 337-38 (1979) (occasional trip, of unspecified frequency, to farm located near reactor insufficient).

⁴⁰ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁴¹ 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); see also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 553-54 (1978); *Business and Professional People for the Public Interest v. Atomic Energy Commission*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

⁴² 69 Fed. Reg. at 2202.

⁴³ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002).

statutory requirements or Commission regulations are not admissible in agency adjudications.⁴⁴ Failure to comply with any of these requirements is grounds for the dismissal of a contention.⁴⁵

The application of these requirements has been further developed by NRC case law, as is summarized below:

1. *Specific Statement and Brief Explanation of the Basis for the Contention (10 C.F.R. § 2.309(f)(1)(i) and (ii))*

A contention must provide a “specific statement of the issue of law or fact to be raised or controverted.”⁴⁶ Additionally, a “brief explanation of the basis for the contention” is a necessary prerequisite of an admissible contention.⁴⁷ The comment in the Commission’s Statement of Considerations prefacing its adoption of the revisions to our contention admissibility standards in 1989 that “a petitioner must provide some sort of minimal basis indicating the potential validity of the contention”⁴⁸ cannot be read in a vacuum. “The reach of a contention necessarily hinges upon its terms coupled with its stated bases.”⁴⁹ “Thus, where a question arises as to the admissibility of a contention, we look to both the contention and its stated bases.”⁵⁰ What actually is to be litigated must be determined by a Board through examination not only of the general formulation of the contention by the petitioner, but by examination of the bases and support actually offered.⁵¹ Therefore, Boards commonly reformulate, or expressly limit contentions to focus them to the precise matters which are supported.⁵²

2. *Within the Scope of the Proceeding (10 C.F.R. § 2.309(f)(1)(iii))*

A petitioner must demonstrate that the “issue raised in the contention is within

⁴⁴ 10 C.F.R. § 2.335(a).

⁴⁵ 69 Fed. Reg. at 2221; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

⁴⁶ 10 C.F.R. § 2.309(f)(1)(i).

⁴⁷ 10 C.F.R. § 2.309(f)(1)(ii).

⁴⁸ 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

⁴⁹ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988); see also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CL1-02-28, 56 NRC 373, 379 (2002).

⁵⁰ *Seabrook*, ALAB-899, 28 NRC at 97.

⁵¹ See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 181 (2005).

⁵² See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006).

the scope of the proceeding.”⁵³ The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.⁵⁴ Any contention that falls outside the specified scope of the proceeding must be rejected.⁵⁵

Challenges to NRC Regulations are similarly outside the scope of the proceeding. With limited exceptions, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁵⁶ Additionally, the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner’s own view regarding the direction regulatory policy should take.⁵⁷ Any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission’s regulatory process must be rejected.⁵⁸

3. Materiality (10 C.F.R. § 2.309(f)(1)(iv))

In order to be admissible, the petitioner must demonstrate that a contention asserts an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding,”⁵⁹ that is to say, the subject matter of the contention must impact the grant or denial of a pending license application.⁶⁰ “Materiality” requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.⁶¹ This means that there must be some significant link between the claimed deficiency and the agency’s ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment.⁶²

⁵³ 10 C.F.R. § 2.309(f)(1)(iii).

⁵⁴ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

⁵⁵ See *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

⁵⁶ 10 C.F.R. § 2.335(a); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

⁵⁷ *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33.

⁵⁸ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20-21).

⁵⁹ 10 C.F.R. § 2.309(f)(1)(iv).

⁶⁰ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998).

⁶¹ *Id.* at 179.

⁶² *Id.* at 180.

4. Concise Allegation of Supporting Facts or Expert Opinion (10 C.F.R. § 2.309(f)(1)(v))

Contentions must be supported by “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.”⁶³ “It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately.”⁶⁴ “[F]ailure to do so requires that the contention be rejected.”⁶⁵

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is, however, not a hearing on the merits.⁶⁶ The petitioner does not have to prove its contention at the admissibility stage.⁶⁷ While adequate support and demonstration of a genuine issue of material fact are required to create an admissible contention under 10 C.F.R. § 2.309, the amount of support required to meet the contention admissibility threshold is less than is required at the summary disposition stage.⁶⁸ And, as with a summary disposition motion,⁶⁹ a “Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner.”⁷⁰

Nonetheless “[m]ere ‘notice pleading’ is insufficient under these standards.”⁷¹ Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.⁷² A petitioner’s contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare asser-

⁶³ 10 C.F.R. § 2.309(f)(1)(v).

⁶⁴ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 356 (2006).

⁶⁵ *Id.*; *Palo Verde*, CLI-91-12, 34 NRC at 155.

⁶⁶ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 151 (2006).

⁶⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

⁶⁸ 54 Fed. Reg. at 33,171 (“[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion”).

⁶⁹ *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 342 (2003).

⁷⁰ *Palo Verde*, CLI-91-12, 34 NRC at 155.

⁷¹ *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁷² *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

tions and speculation.’’⁷³ And if a petitioner neglects to provide the requisite support for its contentions, the Board may not make assumptions of fact that favor the petitioner, or supply information that is lacking.⁷⁴ Likewise, simply attaching material or documents in support of a contention, without setting forth an explanation of that information’s significance, is inadequate to support the admission of the contention.⁷⁵ Thus, the supporting facts or expert opinions provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply adequate support for the contention.⁷⁶

5. *Genuine Dispute Regarding Specific Portions of Application (10 C.F.R. § 2.309(f)(1)(vi))*

All contentions must “show that a genuine dispute exists” with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.⁷⁷ Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed.⁷⁸

Applying the above stated standards, we conclude below that the various contentions proffered by CCAM and Ms. Burton are not admissible.

D. Rulings on Petitioners’ Contentions

1. *CCAM Contention 1*

The proposed power level for which Dominion has applied to uprate Millstone Nuclear Power Station Unit 3 exceeds the NRC’s SPU regulatory “criteria.” The SPU application fails to satisfy the first NRC “criterion” that the NRC has set the power limit for SPUs at “. . . up to 7%. . . .”⁷⁹

⁷³ *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

⁷⁴ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

⁷⁵ See *Fansteel*, CLI-03-13, 58 NRC at 204-05.

⁷⁶ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

⁷⁷ 10 C.F.R. § 2.309(f)(1)(vi).

⁷⁸ See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994).

⁷⁹ CCAM Petition at 7 (emphasis in original).

In Contention 1, CCAM argues that Dominion's proposed power uprate exceeds NRC regulatory criteria for a SPU, which CCAM contends is limited to 7%.⁸⁰ Therefore, CCAM argues that the NRC cannot approve the LAR for the Millstone Unit 3 SPU — instead it must be reviewed as an Extended Power Uprate (EPU).⁸¹

CCAM relies upon the Declaration of Arnold Gundersen to support this contention, as well as Contentions 2, 3, 4, and 5.⁸² Mr. Gundersen reaches his conclusion regarding Contention 1 by multiplying Dominion Millstone Unit 3's currently licensed output of 3411 thermal megawatts (MWt) by 7% (3411 × 1.07) to get 3649.7 MWt.⁸³ This figure, CCAM argues, is the limit for a SPU at Millstone Unit 3.⁸⁴ CCAM argues that Dominion has rounded its proposed power level up to 3650 MWt, which it concludes exceeds the purported 7% limit for a SPU.⁸⁵

The NRC Staff and Dominion argue that Contention 1 raises no issue material to the findings that the NRC must make, provides insufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, and is an attack on the NRC regulatory process.⁸⁶

At the outset, we note that an applicant for a change in the operating conditions of its nuclear power plant (in this case, a power uprate) is required to comply with all relevant NRC regulations. The standard to be met is whether the application meets the requirements for a License Amendment. The relevant NRC regulations for a power uprate, be it a SPU or an EPU, are set forth in 10 C.F.R. §§ 50.90 to 50.92.⁸⁷ CCAM refers us to statements on the NRC website and to regulatory guidance documents (such as Review Standard RS-001),⁸⁸ but these references are

⁸⁰ *Id.* at 7-8.

⁸¹ *Id.* at 9, 11.

⁸² *Id.* at 5. Mr. Gundersen is a Nuclear Engineer and has worked for a number of utilities, including 4 years as an engineer assigned to Millstone Unit 2 during its startup phase. CCAM Petition, Exh. A., Declaration of Arnold Gundersen Supporting Connecticut Coalition Against Millstone in Its Petition for Leave To Intervene, Request for Hearing, and Contentions (Mar. 15, 2008), Curriculum Vitae at 7 [hereinafter Gundersen Decl.].

⁸³ Gundersen Decl. ¶ 14.

⁸⁴ CCAM Petition at 9.

⁸⁵ *Id.*

⁸⁶ *See* Staff Answer at 10; Dominion Answer at 11. For example, Dominion, in its Answer, states Contention 1 lacks a factual basis and fails to demonstrate a genuine material dispute with the LAR. Dominion Answer at 11. Dominion states that “[n]either Petitioners nor Mr. Gundersen explain how NRC guidance categorizing uprates raises any material dispute concerning the adequacy of the LAR.” *Id.* at 13. Dominion maintains that “Petitioners do not claim or show that categorizing the LAR as an SPU resulted in any material error or omission in the application.” *Id.*

⁸⁷ *See* 10 C.F.R. §§ 50.90 to 50.92; 73 Fed. Reg. at 2546, 2549.

⁸⁸ *See* CCAM Petition at 6, 8, 10.

not the applicable law. They are only guidance prepared by the Staff to indicate to an applicant the matters it should address.

Review Standard RS-001 sets forth the Staff guidance to an applicant seeking to increase its operating power level, listing, among other things, the information the applicant should provide and the matters it should address in applying for a license amendment to increase its operating power.⁸⁹ The failure of an applicant to address any of those guidance topics or deviation from the guidance provided does not rise to the level of failure to comply with NRC regulations.

There is no different legal standard for an applicant wishing to upgrade its operating power by more than 7% than for one requesting an increase of less than 7%; i.e., there is no distinction between the legal requirements for a SPU and an EPU. The statement on the NRC's website that SPUs are typically less than a 7% core power level increase has no impact upon which of the NRC's regulations is applicable or upon the regulations themselves, although it may describe, to some degree, how the Staff performs its reviews. But, challenges to how the Staff performs its reviews are outside the scope of this proceeding.⁹⁰ Furthermore, CCAM's challenge to whether the Dominion application should be treated as a SPU or EPU has no basis in the law and therefore, this contention is inadmissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

If CCAM Contention 1 is construed to be a challenge to the LAR, it must specifically challenge the application to be admissible. This can either be in the form of an asserted omission from the application of required information or an asserted error in a specific analysis or other technical matter set out in the application.⁹¹ The former form of challenge must be supported by specific reasons why the alleged omissions are relevant and material, and the latter form of challenge must be supported by reasons why the analysis is deficient.⁹² Although CCAM, through Mr. Gundersen's Declaration, provides a historical perspective on previous NRC power uprate approvals, no challenge to the Millstone Unit 3 power uprate LAR was presented.⁹³ Therefore, this contention fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

⁸⁹ Review Standard RS-001, Purpose.

⁹⁰ See *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 37 (2002) (“It is a well-established principle of NRC adjudication that ‘contentions must rest on the *license application*, not on NRC Staff reviews.’ . . . As the Commission stated when it amended the contentions rule, ‘a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis’ because ‘the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than adequacy of the NRC Staff performance.’”) (internal citations omitted) (emphasis in original).

⁹¹ 10 C.F.R. § 2.309(f)(1)(vi).

⁹² *Id.*

⁹³ See CCAM Petition at 10.

Finally, even if this contention were somehow found to challenge the LAR with the required specificity, CCAM has failed to present any support to indicate the materiality of this contention to the ultimate findings the Commission must make. CCAM has presented no indication that the fact that the requested power level increase rises 0.3 MWt above the 3649.7 MWt level (which would represent a 7% increase in power) is in any way material to the findings the NRC must make. This contention, therefore, does not meet the materiality test in 10 C.F.R. § 2.309(f)(1)(iv).

As discussed above, CCAM Contention 1 fails to meet the standards set forth in paragraphs (iii), (iv), and (vi) of 10 C.F.R. § 2.309(f)(1) of the Commission's regulations.

CCAM Contention 1 is rejected.

2. *CCAM Contention 2*

Dominion's application fails to meet the NRC's second "criterion" for a SPU application because Millstone Unit 3 already has had its design margins dramatically and substantially reduced.⁹⁴

CCAM's second contention can be viewed as either a contention of omission or a challenge to the LAR. In either case it fails to satisfy the contention admissibility standards. Construed as a contention of omission, CCAM argues that the Millstone SPU application must be denied because "Dominion's application entirely fails to consider the significant reduction in structural operating margins already in place at Millstone 3 prior to the present application for power uprate."⁹⁵ However, CCAM errs because the effects of the requested power uprate upon containment pressure, and therefore upon the structural operating margins, are discussed in Attachment 5 to the LAR.⁹⁶ CCAM has erroneously posited an omission from the LAR, thus failing the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

On the other hand, CCAM's contention could be construed as a concern that somehow the cumulative effect of the proposed power uprate and prior plant changes would challenge the ability of the facility to withstand the containment pressures associated with design basis events. However, CCAM neither challenges any specific analysis in the LAR regarding the containment pressurizations (set out in Table 2.6.1.3 of the LAR) nor supports their proposition by suggesting any particular containment design limit that would be challenged by the proposed power uprate. Contention 2 fails to challenge any specific portion of the LAR or

⁹⁴ *Id.* at 11.

⁹⁵ *Id.* at 12.

⁹⁶ *See* LAR, Attachment 5 at 2.6-1 to 2.6-221.

to raise a genuine issue regarding any material fact, and therefore does not meet the standards set forth in paragraphs (iv) and (vi) of 10 C.F.R. § 2.309(f)(1) of the Commission's regulations.

Finally, we note CCAM's emphasis on the effects of previously approved changes in the plant's operating conditions, each of which has already been considered and incorporated in Millstone Unit 3's current facility operating license. Specifically, CCAM's substantive argument here is that Dominion's application fails to consider the reduction in structural operating margins caused by previous amendments to the Millstone Unit 3 license.⁹⁷ But the current application for an amendment to the license to permit a power uprate must be evaluated against the current baseline (i.e., as against the status quo).⁹⁸ Thus the structural operating margins are evaluated considering the plant's current design limits (which are based upon the cumulative effect of the original license and all of the amendments previously approved).⁹⁹ Here, Petitioners' concerns regard only previously approved changes,¹⁰⁰ thus attacking the current state of the license, not the changes that would be affected by the proposed power uprate. Indeed, CCAM states that, "[t]he Millstone Unit 3 Containment structure and its requisite systems have already been 'stretched' by previous changes to its design basis when the Containment was converted from Sub-Atmospheric Containment to Dry Containment more than a decade ago" and that "the proposed changes to Containment systems and structures that have already been reanalyzed and fine tuned once over a decade ago constitutes a dramatic decrease in '... the *operating margins* included in the design of a particular plant.'" ¹⁰¹ These are all challenges to the current operating license and are outside the scope of matters challengeable

⁹⁷ See Gundersen Decl. ¶¶ 21-22.

⁹⁸ In determining whether an amendment to a license will be issued, the Commission is "guided by the considerations which govern the issuance of initial licenses," 10 C.F.R. § 50.92(a); i.e., the same regulatory criteria that govern the initial license issuance govern each amendment. Therefore, as amendments are approved, they become part of the licensing baseline, all evaluated against the same standards.

⁹⁹ See LAR, Attachment 5 at 2.6-1.

¹⁰⁰ In their supporting documentation, Petitioners and their expert, Mr. Gundersen, point only to a number of facility changes that they assert were previously implemented at Millstone Unit 3. See CCAM Petition at 12-17. These changes are now part of the current licensing baseline for Millstone Unit 3. This baseline is, for all practical purposes, what is referred to as the current licensing basis as defined in 10 C.F.R. § 54.3 for license renewal considerations. Because the applicant must evaluate the impact of the proposed change against the relevant regulatory criteria, the assertions based on previous facility changes are outside the scope of the proceeding and therefore fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

¹⁰¹ Gundersen Decl. ¶ 22 (emphasis in original).

in a power uprate application, and therefore fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).¹⁰²

CCAM Contention 2 is therefore rejected.

3. *CCAM Contention 3*

When compared to all other Westinghouse Reactors, Millstone Unit 3 is an “outlier” or “anomaly.” Dominion’s proposed uprate is the largest per cent power uprate for a Westinghouse reactor, while Millstone Unit 3 also has the smallest containment for any Westinghouse reactor of roughly comparable output.¹⁰³

CCAM, in explaining the significance of this statement, argues that this should make a power uprate inappropriate because the integrity and adequacy of the Millstone Unit 3 containment is somehow compromised.¹⁰⁴

As in Contention 2, Contention 3 makes only general allegations concerning the Millstone Unit 3 containment, but never addresses specific sections of the LAR or challenges any analysis or conclusions set out in the LAR. In determining whether the Millstone Unit 3 containment is capable of performing its intended function, the NRC Staff looks to ensure that the regulatory requirements of 10 C.F.R. Part 50, Appendix A (specifically, General Design Criteria 16 and 50) are satisfied.¹⁰⁵ These criteria require that “the peak calculated containment pressure following a loss-of-coolant accident, or a steam or feedwater line break, should be less than the containment design pressure.”¹⁰⁶ Dominion, in its Answer, states that the LAR shows that the Millstone Unit 3 containment has a design limit well in excess of the calculated peak containment pressure.¹⁰⁷ But CCAM fails to controvert Dominion’s statement or to identify any specific deficiencies or omissions in the Applicant’s analysis of the peak containment pressure. Therefore CCAM has failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

¹⁰² See *supra* note 100. Challenges to the current licensing basis of the plant (in this instance, the characteristics of the subatmospheric containment) are not within the scope of this license amendment proceeding — they are properly challenged through the process prescribed by 10 C.F.R. § 2.206.

¹⁰³ CCAM Petition at 18.

¹⁰⁴ *Id.* at 20-22. This argument relies on Mr. Gundersen’s observation that when Millstone Unit 3 is compared to twenty-five other domestic nuclear reactors, the ratio of the initial licensed power level to the containment volume shows that Millstone Unit 3 has the smallest power-to-volume ratio of any dry containment Westinghouse reactor in the nation. Gundersen Decl., tbls.2, 3, & 4.

¹⁰⁵ See 10 C.F.R. Part 50, Appendix A.

¹⁰⁶ Standard Review Plan, NUREG-0800, Revision 3, PWR Dry Containments, Including Subatmospheric Containments (Mar. 2007) § 6.2.1.1.A, at 6.2.1.A-4 (NUREG-0800, Revision 2 (July 1981), which contains the same language, is referenced in Review Standard RS-001 § 2.1, Matrix 6, at 1).

¹⁰⁷ Dominion Answer at 19 (citing LAR, Attachment 5, § 2.6.2.2.2).

In regard to the power level to be used in the accident analysis, CCAM argues that because of Dominion's history of exceeding its licensed power, any analysis of the Millstone Unit 3 containment should use a 9% additional power level.¹⁰⁸ However, although not for the reasons asserted by CCAM, that is precisely what the Applicant did.¹⁰⁹ Contention 3, therefore, does not raise a genuine material dispute with the LAR and fails to meet the standard set forth in section (vi) of 10 C.F.R. § 2.309(f)(1) of the Commission's regulations.

CCAM Contention 3 is therefore rejected.

4. *CCAM Contention 4*

Construction problems due to the unique sub-atmospheric containment design, coupled with the impact upon the containment concrete by the operation of the containment building at very high temperature, very low pressure and very low specific humidity, place the calculations used to predict stress on that concrete containment in uncharted analytical areas.¹¹⁰

In Contention 4, Petitioners challenge the integrity of the Millstone Unit 3 containment based on a series of alleged "[c]onstruction problems due to the unique sub-atmospheric containment design."¹¹¹ The support for this contention is a series of statements by CCAM's expert witness Gundersen alleging errors and flaws that occurred during construction of the Millstone Unit 3 containment.¹¹² These statements all refer to matters that occurred in the 1970s,¹¹³ and which are now part of the Millstone Unit 3 current licensing basis (CLB).¹¹⁴ Petitioners make no connection of these potential issues to the requested power uprate LAR. Their argument provides no factual challenges to any specific portion of the LAR nor raises any genuine dispute with the Applicant over any fact material to the findings the NRC must make. Therefore CCAM Contention 4 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi). To the extent Petitioners assert problems that fall within the CLB, this contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

¹⁰⁸ CCAM Petition at 21-22; Gundersen Decl. ¶ 44E.

¹⁰⁹ Dominion states that the containment peak pressure analysis is based on an initial power level of 3723 MWt, which is 9% above the current licensed power level and precisely what was recommended by Mr. Gundersen. Dominion Answer at 20.

¹¹⁰ CCAM Petition at 23.

¹¹¹ *Id.*

¹¹² Gundersen Decl. ¶¶ 48B-48H.

¹¹³ *Id.* ¶ 48.

¹¹⁴ *See supra* note 100 & accompanying text.

CCAM further alleges that Dominion's license amendment fails to assess adequately the long-term impact of a power uprate on the Millstone Unit 3 concrete containment.¹¹⁵ Here, as the foundation for this assertion, CCAM questions the impact over time that the operating environment (high temperature, low pressure, and low specific humidity) will have on the containment.¹¹⁶ In this contention CCAM posits that during the life of Millstone Unit 3, the concrete containment will shrink and argues that Dominion has not done any studies of this phenomenon.¹¹⁷ However, CCAM offers no support for this proposition; rather, it refers to Mr. Gundersen's assertions regarding early construction problems and the alteration, over time, of the approved operating conditions at the plant.¹¹⁸ These are unsupported challenges to the Millstone Unit 3 CLB and are, therefore, outside the scope of this proceeding.¹¹⁹

Finally, as Dominion states in its Answer,¹²⁰ Contention 4 does not challenge any of the containment analysis conducted relevant to the power uprate. As noted above, the LAR contains an analysis of the peak pressure and temperature loads imparted on the Millstone Unit 3 containment during design basis accidents and finds those loads are within design limits.¹²¹ Petitioners do not present any indication that these studies are flawed, provide no factual materials to support their assertions, and fail to provide any analyses, references, or sources indicating that these alleged conditions could have an adverse effect on the structural

¹¹⁵ CCAM Petition at 23.

¹¹⁶ *Id.*; Gundersen Decl. ¶¶ 45, 47.

¹¹⁷ CCAM Petition at 23-24; Gundersen Decl. ¶ 45. Mr. Gundersen states a containment analysis is complicated for Millstone Unit 3 because, "for the first four years of its operation, [it] operated at the high temperature, low pressure, low specific humidity unique to its [s]ub-[a]tmospheric [c]ontainment and . . . thereby may have compromised the structural integrity of the concrete." Gundersen Decl. ¶ 47.

¹¹⁸ Mr. Gundersen alleges, among other things, major construction problems with the way the original concrete was poured, the amount of rebar used, concrete voids between rebar, and the construction techniques used to fill these rebar/concrete voids. Gundersen Decl. ¶ 48.

¹¹⁹ The Commission has held that license amendment proceedings are not a forum "to litigate historical allegations' or past events with no direct bearing on the challenged licensing action." *Millstone*, CLI-01-24, 54 NRC at 366.

¹²⁰ See Dominion Answer at 21-22.

¹²¹ See LAR, Attachment 5, § 2.6.1.2.

integrity of the containment concrete.¹²² Therefore, this contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Contention 4 is therefore rejected.

5. *CCAM Contention 5*

The impact of flow-accelerated corrosion at Dominion's proposed higher power level for Millstone Unit 3 has not been adequately analyzed nor addressed.¹²³

Petitioners' expert, Mr. Gundersen, alleges that flow-accelerated corrosion (FAC) is a "significant risk" due to the application of a 7+% uprate and the fact that the plant is "in the second-half of its engineered design life."¹²⁴

CCAM asserts that FAC was "not addressed" in the LAR. However, FAC was indeed analyzed and addressed in the Licensee's submittal. Dominion's FAC information is contained in the SPU application dated July 13, 2007.¹²⁵ From a "contention of omission" perspective, Contention 5 is inadmissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). At the same time, even if this contention were interpreted as asserting that the manner in which FAC was addressed was inadequate, CCAM Contention 5 makes no reference to the LAR, identifies no specific deficiencies in the FAC Program described in the LAR, and makes only vague and general statements about FAC and the impact of the SPU on FAC at Millstone Unit 3. CCAM raises no specific challenges to

¹²² Furthermore, Dominion notes that "the evaluations performed in the Millstone license renewal proceeding indicate that the [Millstone Unit 3] containment is not subject to temperatures that would reduce the strength or modulus of concrete." Dominion Answer at 22. Dominion continues,

The ASME Code, Section III, Division 2, Subsection CC, indicates that aging due to elevated temperature exposure is not significant as long as concrete general area temperatures do not exceed 150°F and local area temperatures do not exceed 200°F. Accordingly, the NRC's Generic Aging Lessons Learned Report ("NUREG 1801") requires further evaluation only if temperatures exceed these limits.

Id. at 22-23 (citing Generic Aging Lessons Learned (GALL) Report (NUREG-1801, Vol. 2, Rev. 1) (Sept. 2005), tbl.II.A.1). Dominion's license renewal application states: "No concrete structural components exceed specified temperature limits. General area temperatures remain below 150°F and local area temperatures remain below 200°F." *Id.* at 23 (quoting MPS3 License Renewal Application, Reduction of Strength and Modulus of Concrete Structures Due to Elevated Temperature § 3.5.2.2.1.3 (Jan. 20, 2004) (ADAMS Accession No. ML040260103) at 3-491).

¹²³ CCAM Petition at 26.

¹²⁴ Gundersen Decl. ¶ 49D.

¹²⁵ LAR, Attachment 5, § 2.1.8, at 2.1-76 to 2.1-100.

Dominion's LAR. Thus CCAM Contention 5 also fails to satisfy this aspect of the standard in 10 C.F.R. § 2.309(f)(1)(vi).¹²⁶

Petitioners further allege that the Licensee's application does not adequately address the guidance of NUREG-1800 and that the plant has not provided adequate information to determine if the Licensee has the proper management systems and staff to evaluate FAC.¹²⁷ Petitioners offer no explanation as to why conformance of the FAC Program with the GALL Report recommendations, or having proper management systems and staff to evaluate FAC, should be treated as a regulatory requirement for a power uprate LAR. Therefore, CCAM Contention 5 does not raise a material dispute relative to this proceeding and fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(iv).

Finally, Petitioners allege that "Millstone Unit 3's program for assessing [FAC] in Dominion's proposed uprate of the plant fails to comply with 10 C.F.R. 50 Appendix B, XVI,"¹²⁸ but again provide no support for this assertion. Title 10 of the *Code of Federal Regulations*, Part 50, Appendix B, Criterion XVI requires that measures be established to assure that conditions adverse to quality are promptly identified and corrected.¹²⁹ As Dominion notes, "[i]t is indisputable that the FAC Program for [Millstone Unit 3] includes requirements for the identification and replacement of large and small bore piping segments whose predicted thickness is less than a specified fraction of the component's nominal

¹²⁶ See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 n.8 (2001) ("As the Commission has frequently emphasized, . . . 'the burden of coming forward with admissible contentions is on their proponent . . . not the licensing board.' The Licensing Board may not properly supply missing information to a proffered contention to make it admissible") (internal citations omitted).

¹²⁷ CCAM Petition at 29-30 (citing Gundersen Decl. ¶¶54-55). In its Answer, Dominion states that "[t]he LAR clearly points out that conformance of the [Millstone Unit 3] FAC Program with the guidance in the GALL Report [(which NUREG-1800 recognizes as providing an acceptable standard),] has already been established in the license renewal proceeding." Dominion Answer at 26. As Dominion explains, the NRC Staff evaluated the Millstone Unit 3 FAC Program against the guidance in the GALL Report and documented its evaluation in the Safety Evaluation Report (SER) (NUREG-1838) in the license renewal proceeding. *Id.* In its LAR, Dominion noted the NRC Staff's conclusion in the license renewal SER that:

[T]he FAC Program is adequate to manage the aging effects for which it is credited. . . . The requirements, methods, and criteria of the existing FAC Program will continue to be implemented following the SPU; no changes to these elements are required as a result of the SPU. Evaluations of impact of the SPU on system parameters affecting FAC have been performed within the scope of the existing program. Therefore, the SPU does not affect the conclusions in the License Renewal SER regarding the FAC Program, and no new aging effects requiring management are identified.

Id. (quoting LAR, Attachment 5 at 2.1-86).

¹²⁸ CCAM Petition at 28; Gundersen Decl. ¶50.

¹²⁹ 10 C.F.R. Part 50, Appendix B, Criterion XVI.

thickness. These requirements implement the provisions of Criterion XVI.’’¹³⁰ Petitioners fail to specify in which respects Dominion’s FAC Program does not comply with Appendix B, Criterion XVI. The FAC Program for Millstone Unit 3 includes requirements addressing the provisions of the agency’s regulations, and CCAM fails to point to a single error or deficiency in this program. Accordingly, Contention 5 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

CCAM Contention 5 is therefore rejected.

6. CCAM Contention 6

Dominion’s application for a Millstone Unit 3 7+ per cent uprate cannot be and should not be analyzed as a SPU application insofar as the NRC has not adopted standards nor regulatory requirements for reviewing SPU applications.¹³¹

In Contention 6, the Petitioners challenge the NRC’s lack of “specific guidance or standards which nuclear reactor licensees must meet in order to qualify for approval of SPU applications.’’¹³² Pointing to the information located on the Commission’s website,¹³³ Petitioners rehash many of the same arguments they raised in Contentions 1, 2, and 3¹³⁴ to support their view that the Staff must have specific guidance for reviews of SPU applications. However, as we discussed in our ruling on CCAM Contention 1, there is no such regulatory requirement and challenges to the NRC regulatory process are inadmissible in this proceeding.¹³⁵ This contention fails to raise an issue within the scope of the proceeding, and therefore fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(iii). Further, it fails

¹³⁰ Dominion Answer at 29 (citing LAR, Attachment 5, § 2.1.8, at 2.1-84 to 2.1-85).

¹³¹ CCAM Petition at 31.

¹³² *Id.* at 32.

¹³³ The standards used by NRC Staff to evaluate a SPU are stated on the NRC’s public website. There it states,

Since many of the available stretch power uprates have already been approved by the NRC, and since only a limited number of stretch power uprate applications are expected in the future, there is no specific guidance for stretch power uprates. The NRC, *therefore, uses previously approved stretch power uprates, along with RS-001, for guidance.*

<http://www.nrc.gov/reactors/operating/licensing/power-uprates.html> (last visited May 31, 2008) (emphasis added).

¹³⁴ See CCAM Petition at 32-33.

¹³⁵ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). “[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.” *Peach Bottom*, ALAB-216, 8 AEC at 20.

to identify any specific deficiencies or omissions in the LAR, and thus it fails to meet 10 C.F.R. § 2.309(f)(1)(vi).

CCAM Contention 6 is rejected.

7. CCAM Contention 7

Dominion has neglected to provide all information to the NRC staff as it has requested and therefore its application for Millstone Unit 3 uprate should be considered to be incomplete and inadequate.¹³⁶

Petitioners' allegation is based on the issuance of Requests for Additional Information (RAI) by the NRC Staff to Dominion to support the NRC Staff's review of the LAR.¹³⁷

To the extent this contention rests upon a challenge to the NRC Staff's determination that the application was sufficiently complete to docket and initiate the review process, NRC case law is clear. The manner in which the NRC Staff conducts its sufficiency review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding.¹³⁸ Therefore, this contention fails to meet 10 C.F.R. § 2.309(f)(1)(iii).

Further, the RAI process is routine and customary in NRC licensing reviews. The fact that, at this stage, there are a number of RAIs outstanding does not give rise to an evidentiary hearing.¹³⁹ For this reason also, this contention fails to meet 10 C.F.R. § 2.309(f)(1)(iii).

Finally, Contention 7 fails to identify any specific deficiencies or omissions in the LAR, and thus it fails to meet 10 C.F.R. § 2.309(f)(1)(vi).

CCAM Contention 7 is rejected.

8. CCAM Contention 8

The uprate will result in heightened releases of radionuclides and consequent exposures to plant workers and to the public estimated by Dominion to be 9 per cent but likely in excess of 9 per cent above current levels and such increases will result in corresponding 9 per cent (or more) increases of the risk of harmful health

¹³⁶ CCAM Petition at 33-34.

¹³⁷ *Id.* at 34.

¹³⁸ *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (1998); *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 395-96 (1995); *see also New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978).

¹³⁹ *See Oconee*, CLI-99-11, 49 NRC at 336-37; *Calvert Cliffs*, LBP-98-26, 48 NRC at 242.

effects. Dominion's application for Millstone 3 uprate makes no provision for new shielding or other techniques to mitigate increased radionuclide release levels. Since Millstone first went online in 1970, cancer incidences in the communities surrounding Millstone have become the highest in the state for many types of cancer; the Millstone host communities suffer high incidences of fetal distress, stillbirth, premature birth, genetic defects and childhood cancer. Cancer is widespread among current and former Millstone workers. Under these circumstances, Dominion's application is entirely inadequate to assure that the uprate will not endanger plant workers or the public to an unsafe and unacceptable degree. Dominion's application must be rejected.¹⁴⁰

Petitioners rely upon the Declaration of Dr. Ernest J. Sternglass, who refers to the conclusion of the 2005 National Academy of Sciences report entitled "Health Risks from Exposure to Low Levels of Ionizing Radiation" (BEIR VII — Phase 2), for the proposition "that there is no safe level or threshold of ionizing radiation exposure and that the smallest dose of low-level ionizing radiation has the potential to cause an increase in health risks to humans."¹⁴¹ Contention 8 also cites to the Declaration of Cynthia M. Besade, a CCAM member, who enumerates various cancer cases in the residential neighborhoods near Millstone.¹⁴² Here, however, Petitioners fail to identify any deficiencies or omissions in the LAR. Therefore this contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

To the extent Petitioners challenge the compliance of the maximum projected doses for the LAR with the NRC's safety standards, CCAM fails to point to any failure of the Applicant to comply with the NRC's requirements regarding radiological releases or exposures, and therefore presents no genuine dispute with the LAR. It offers nothing to indicate that the radiological consequences of these releases exceed any NRC regulatory limits. As Dominion notes in its Answer, the LAR shows that radiological releases resulting from the uprate will remain within

¹⁴⁰ CCAM Petition at 37-38.

¹⁴¹ CCAM Petition, Exh. B, Declaration of Ernest J. Sternglass, Ph.D. in Support of Connecticut Coalition Against Millstone and Nancy Burton Petition To Intervene and Request for Hearing (Mar. 15, 2008) ¶ 7 [hereinafter Sternglass Decl.]. Dr. Sternglass states, "[i]f the Millstone Unit 3 nuclear reactor is permitted to release radionuclides to the environment at levels 9 percent greater than current levels, it is likely that there will be a closely corresponding increase in adverse effects on human health." Sternglass Decl. ¶ 8. He concludes that "[o]ne would expect this to be the case based on our present experience and the accepted nearly linear relation between radiation exposure and adverse health effects — including illness, death and harm to developing fetuses — at this range." *Id.* ¶ 9.

¹⁴² CCAM Petition at 41-43 (citing Besade Decl.).

NRC regulatory dose limits.¹⁴³ Therefore this fails to raise a genuine dispute over a material fact and fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

Also, to the extent this contention calls for requirements in excess of those imposed by Commission regulations, it must be rejected as a collateral attack on the regulations.¹⁴⁴ As noted recently by another licensing board:

When a contention alleges that increases in radioactive releases create higher doses, but does not provide information or expert opinion to dispute the conclusion that the higher doses would still be under NRC regulatory limits, and no evidence has been presented to show that the higher levels will cause harm, sufficient information to show that a material dispute exists has not been provided and the contention making these claims should not be admitted.¹⁴⁵

For these reasons Contention 8 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv).

Petitioners finally allege that the increases in radionuclide production and dispersion estimated by the Applicant may actually be greater “given the enhanced dynamics of Unit 3 operations with faster-moving coolant and heightened temperatures.”¹⁴⁶ This allegation, which is unsupported speculation, is insufficient to support an admissible contention and fails to meet 10 C.F.R. § 2.309(f)(1)(v).

For the foregoing reasons, CCAM Contention 8 is rejected.

9. CCAM Contention 9

Dominion’s application for a 7+ per cent power generation uprate at Millstone Unit

¹⁴³The LAR shows that,

with the SPU, the whole body dose to the maximally exposed individual is 0.00261 mrem/year from liquid effluents and 0.0203 mrem/year from gaseous effluents. This represents 0.087% and 0.406%, respectively, of the levels that are considered in the NRC regulations to be “as low as reasonably achievable.” The LAR also shows that the maximum dose from direct radiation is 0.1443 mrem/year, so “the current annual whole body dose from all pathways due to liquid releases, gaseous releases and direct shine is conservatively estimated at 0.17 mrem (i.e., 0.0026 + 0.0203 + 0.1433).” This calculated dose is far below the 100 mrem annual dose limit for members of the public permitted by 10 C.F.R. § 20.1301(a)(1), and is also a small fraction of the annual dose limit of 25 mrem to the whole body of any member of the public beyond the site boundary set forth in 40 C.F.R. § 190.10(a).

Dominion Answer at 39-40 (internal citations omitted).

¹⁴⁴See *Millstone*, LBP-01-10, 53 NRC at 286-87; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

¹⁴⁵*Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 266 (2007) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 83, 93-94, *aff’d*, CLI-03-14, 58 NRC 207 (2003)).

¹⁴⁶CCAM Petition at 40.

3 will result in significant new releases of radioactive material to the environment and it will result in discharges of significant volumes of water to the Long Island Sound at heightened temperatures, both of which consequences are inadequately addressed in the application.¹⁴⁷

Petitioners concede that the LAR addresses the environmental impact of the proposed uprate but conclude the proposed uprate “will have devastating environmental consequences, such as overheating the Long Island Sound and thereby destroying critical fish habitat and contaminating fruits and vegetables raised locally for sale for human consumption.”¹⁴⁸ Petitioners’ concerns are generalized and do not contest any specific portions or conclusions contained in the LAR, nor do they address any part of Dominion’s Supplemental Environmental Report (LAR, Attachment 2).¹⁴⁹ Therefore, Contention 9 fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(vi).

Further, Petitioners provide no supporting documentation or expert opinion that would support the proposition that there would be “significant adverse environmental impacts which have not been adequately analyzed”¹⁵⁰ as a result of the thermal discharge and radiological effluent increases. Therefore, Contention 9 fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(v).

In their Reply, Petitioners attack Dominion’s assertion that “the hotter thermal plume discharged from Millstone Unit 3 resulting from implementation of the SPU ‘will still be within the limits allowed by the plant’s National Pollutant Discharge Elimination System (NPDES) permit’ ” by asserting that the permit expired in 1997.¹⁵¹ Whether Millstone Unit 3 has a valid NPDES permit is outside

¹⁴⁷ *Id.* at 44.

¹⁴⁸ *Id.* at 46.

¹⁴⁹ *See generally id.* at 44-46.

¹⁵⁰ *Id.* at 44.

¹⁵¹ CCAM Reply at 35 (quoting Dominion Answer at 45). CCAM raised a similar contention in the Millstone Units 2 and 3 license renewal proceeding. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 92-93 (2004). There CCAM alleged, “Millstone Units 1 and 2 operations require the uninterrupted flow through intake and discharge structures of cooling water, which conduct requires a valid National Pollution Discharge Elimination System permit and the facility lacks such a valid permit.” *Id.* The licensing board in the Millstone license renewal case held:

This contention raises an issue solely within the purview of the Connecticut State Department of Environmental Protection (DEP), which administers the Federal Water Pollution Control Act (FWPCA or “Clean Water Act”) within the jurisdiction of the State of Connecticut. While 10 C.F.R. § 51.45(d) requires an applicant seeking a license renewal to “list all Federal permits, licenses, approvals, and other entitlements which must be obtained in connection with the proposed action,” it does not impose a requirement that the applicant actually *possess* such

(Continued)

the scope of this uprate proceeding. Therefore this assertion fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

CCAM Contention 9 is therefore rejected.

III. CONCLUSION

In conclusion, although Petitioners CCAM and Nancy Burton have standing to participate in this proceeding, the Request for Hearing must be denied in its entirety because no admissible contention was presented. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met for the Board to admit a contention.¹⁵² Title 10 of the *Code of Federal Regulations*, § 2.309(f)(1)(iii) requires the petitioner to demonstrate that the issues raised in the contentions are within the scope of the proceeding.¹⁵³ As discussed above, all the contentions raised are either outside the scope of this proceeding, fail to raise issues that are material to the findings the NRC must make as required by 10 C.F.R. § 2.309(f)(1)(iv), fail to provide supporting facts or expert opinion as required by 10 C.F.R. § 2.309(f)(1)(v), or fail to raise specific deficiencies or omissions in the application as required by 10 C.F.R. § 2.309(f)(1)(vi). And because CCAM did not meet the required showing under all of the required contention admissibility factors, it cannot have its contentions admitted. Therefore, the Request for Hearing by CCAM and Nancy Burton is denied.¹⁵⁴

permits at the time of application. Therefore, even if the CCAM allegation that Dominion does not have a “valid” DEP permit were accurate (and the Licensee has presented record testimony of the DEP to the effect that the current permit *is* valid), that would not be relevant for this proceeding. In short, CCAM asks to litigate before this Board the State of Connecticut’s DEP permitting process, a matter outside the scope of this proceeding and outside the reach of the jurisdiction of this Board. This contention is, therefore, inadmissible.

Id. at 93 (emphasis in original); *see also Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (2007) (The Clean Water Act “precludes [the NRC] from either second-guessing the conclusions in NPDES permits or imposing our own effluent limitations — thermal or otherwise”).

¹⁵² 10 C.F.R. § 2.309(a).

¹⁵³ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁵⁴ On May 1, 2008 Dominion filed a Motion To Strike portions of CCAM and Nancy Burton’s Reply to Responses to Petition To Intervene. Dominion Nuclear Connecticut’s Motion To Strike Portions of Connecticut Coalition Against Millstone and Nancy Burton’s Reply to Responses to Petition To Intervene (May 1, 2008). On May 12, 2008, CCAM and Nancy Burton filed an Answer to Dominion Nuclear Connecticut Inc.’s Motion To Strike. Connecticut Coalition Against Millstone and Nancy Burton’s Answer to Dominion Nuclear Connecticut, Inc.’s Motion To Strike (May 12, 2008). The Board considered CCAM’s Petition and its Reply. In light of our rulings today, we need not address Dominion’s Motion or CCAM’s Answer to the Motion To Strike. The matter is now moot.

IV. ORDER

Because CCAM and Ms. Burton have failed to provide a single admissible contention, the Board must DENY their hearing request and terminate this proceeding.

For the foregoing reasons, it is, this 4th day of June 2008, ORDERED that:

1. The hearing request of CCAM and Ms. Burton filed on March 17, 2008, is denied.

2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁵⁵

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Dr. Michael Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 4, 2008

¹⁵⁵ Copies of this Order were sent this date by the agency's E-Filing system to counsel for (1) Applicant Dominion Nuclear Connecticut, Inc.; (2) the Connecticut Coalition Against Millstone and Nancy Burton; and (3) the NRC Staff. A courtesy copy was also sent to these individuals via e-mail.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Paul S. Ryerson

In the Matter of

Docket No. PAPO-001
(ASLBP No. 08-861-01-PAPO-BD01)
(Pre-Application Matters,
Advisory PAPO Board)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

June 20, 2008

The Advisory Pre-License Application Presiding Officer Board sets forth binding case management requirements and makes certain related recommendations pertaining to petitions to intervene, contentions, responses and replies, standing arguments, and referencing or attaching supporting materials, in any adjudication regarding the Department of Energy's application for authorization to construct a high-level waste repository at Yucca Mountain, Nevada.

MEMORANDUM AND ORDER

(Case Management Order Concerning Petitions To Intervene, Contentions, Responses and Replies, Standing Arguments, and Referencing or Attaching Supporting Materials)

I. INTRODUCTION

On December 13, 2007, the Commission authorized the establishment of

an Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board or Board) to obtain the views of potential parties¹ and recommend case management requirements for any adjudication regarding an application by the Department of Energy (DOE) for authorization to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada.² Pursuant to this authority, this Board was established on February 13, 2008.³

On June 17, 2008, the Commission supplemented the Board's recommendation authority with authority to issue binding case management orders for specified procedural aspects of any HLW proceeding that may be initiated.⁴ Because early notice will be beneficial, we hereby establish such binding case management requirements, and also make certain related recommendations.

II. BACKGROUND

By memoranda issued on March 6, April 4, April 29, and May 2, 2008, the Advisory PAPO Board requested comments from potential parties on a variety of issues. The Board also held a full-day conference with potential parties at the Commission's Las Vegas Hearing Facility on May 14, 2008, with video conference participation from the Commission's headquarters in Rockville, Maryland. Further written comments from potential parties were received on May 28, 2008. Numerous potential parties expressed their views, including: DOE; the NRC Staff; the State of Nevada (Nevada); the Nevada counties of Churchill, Esmeralda, Lander, and Mineral (jointly); the Nevada counties of Clark, Nye, Eureka, and Lincoln; the Nuclear Energy Institute (NEI); the California Attorney General's Office (California Department of Justice) and the California Energy Commission; and the California county of Inyo.

The potential parties' comments confirmed that any HLW repository construction authorization adjudication will be challenging. Collectively, their responses indicated that potential parties may file more than 650 contentions, which is approximately five times the largest number filed in any Nuclear Regulatory Commission proceeding since the contention admissibility standards were significantly revised in 1989. Moreover, as Nevada and others recognized, this

¹ "Potential party," as it is used here, means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definition of "party," "potential party," or "interested governmental participant" under 10 C.F.R. § 2.1001.

² Staff Requirements Memorandum COMSECY-07-0030-Requesting Authority To Issue Case Management Orders in High-Level Waste Proceeding Prior to the Issuance of a Notice of Opportunity for Hearing (Dec. 13, 2007).

³ See 73 Fed. Reg. 9358 (Feb. 20, 2008). The Board was reconstituted on March 20, 2008. See 73 Fed. Reg. 16,077-78 (Mar. 26, 2008).

⁴ CLI-08-14, 67 NRC 402, 406 (2008).

total may likely be even higher, if “subcontentions” are broken into single-issue contentions.⁵ As the Commission has stated, any proceeding that may be initiated concerning an HLW repository at Yucca Mountain “has the potential to be one of the most expansive proceedings in agency history.”⁶

In light of the number of contentions that will likely have to be addressed within the rigorous schedule established by 10 C.F.R. Part 2, Appendix D, the potential parties that participated in our process generally supported the concept of employing a prescribed format for contentions (as well as answers and replies) to expedite the process. Specifically, there was a consensus among the participants that, to facilitate briefing and decisions concerning admissibility of potentially hundreds or even thousands of contentions, the contentions and subsequent, related documents should be submitted in a uniform format, employing a uniform protocol for demonstrating compliance with the criteria for admissibility and a uniform system for referencing or attaching supporting material.

The Advisory PAPO Board therefore believes that the case requirements set forth below are supported by a majority of the potential parties that participated before the Board. These requirements are limited to procedural matters, and are intended to help both potential parties and licensing boards address the admissibility of contentions in any HLW proceeding effectively and efficiently. They are not intended to make the process more difficult. Accordingly, because the requirements are being imposed for the first time in a unique and complex proceeding, failure to comply with these case management requirements shall not be grounds for any potential party to object to the admissibility of a proffered contention or the filing of an answer, although the licensing boards retain the right to reject proffered contentions should a potential party significantly and in bad faith ignore these requirements.

This Order applies to documents likely to be filed in support of, or in opposition to, intervention as a party in an HLW proceeding. Because it is less common and involves rather different considerations, the Board has not attempted to formulate requirements concerning participation other than as a party.⁷ Nor has the Board addressed the extent (if any) to which similar case requirements might be appropriate in adjudications other than an HLW proceeding. As the Commission has recognized, the Yucca Mountain matter presents “unique facts and circumstances.”⁸

⁵ See Nevada Response to the Board’s Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Mar. 24, 2008) at 2.

⁶ CLI-08-14, 67 NRC at 405.

⁷ See, e.g., 10 C.F.R. § 2.315 (participation by a person not a party).

⁸ CLI-08-14, 67 NRC at 406 n.17.

III. CASE MANAGEMENT REQUIREMENTS FOR ANY HLW PROCEEDING

A. Intervention Petitions

Each intervention petition shall consist of three sections: (1) an introduction; (2) contentions; and (3) supporting attachments.

1. Introduction to Petition

The introduction shall contain at least three subsections.

First, in accordance with 10 C.F.R. § 2.309(d), the introduction shall identify the petitioner and set forth the basis on which it asserts standing, including specific, labeled sections addressing, as applicable, the required elements, such as injury-in-fact and zone of interests. Any petitioner requesting discretionary standing pursuant to 10 C.F.R. § 2.309(e) shall likewise label its discussion of each of the applicable regulatory requirements.

Second, if the petition sets forth more than ten contentions, the introduction shall contain a table of contents, including the titles of each contention and of each attachment to the petition.

Third, the introduction shall designate which (if any) contentions are submitted as joint contentions pursuant to 10 C.F.R. § 2.309(f)(3) and, for each such joint contention, list all sponsors and designate the participant that has authority to act with respect to the contention. (This information shall be provided in the petition of each sponsor of a joint contention.)

2. Format for Contentions

Each contention shall consist of four parts: (1) a label; (2) a title; (3) a body, addressing separately, in order and clearly labeled, each of the six requirements for contentions set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi); and (4) a statement concerning whether the contention is a joint contention.

First, the label shall contain three subparts: (1) a three-letter designation of the participant submitting the contention; (2) a descriptor that designates the subject matter of the contention; and (3) a number that sequentially designates the particular contention in that subject matter category. (E.g., NEV-SAFETY-352.)

To avoid duplication, potential parties shall ensure that their adopted three-letter participant designations are unique. Where practicable, a potential party shall use the first three letters of the first principal word in its name (e.g., NEV) or a familiar acronym (e.g., NEI).

Subject matter descriptors shall be selected from among three possibilities: (1) SAFETY (to be used with safety/technical contentions pertaining to the DOE

license application, including the safety analysis report); (2) NEPA (to be used with National Environmental Policy Act-related contentions pertaining to the DOE NEPA documents, including supplemental environmental impact statements and any of the rail transportation supplements, or the NRC Staff position statement on adoption of DOE environmental documents); and (3) MISC (to be used with all other contentions). (E.g., NEV-SAFETY-352; CAL-NEPA-101; NYE-MISC-22.)

Second, solely for ease of reference, each contention shall have a short, descriptive title that is unique to that contention (e.g., ‘Failure To Discuss Pre-Closure Dismantling of Subsurface Radiation Monitoring Facility’). Such titles will not be given any substantive significance in determining the admissibility of contentions.

Third, the body of each contention shall address separately, in order and clearly labeled, each of the six requirements for contentions set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi). In addition to the requirements expressly set forth in those six subsections, potential parties shall comply with the following further requirements:

Section 2.309(f)(1)(i) requires ‘‘a specific statement of the issue of law or fact to be raised or controverted.’’ This statement shall set forth petitioner’s contention in precisely the form it wishes the contention to be considered, and rarely should require more than a sentence or two. Potential parties shall also strive to frame narrow, single-issue contentions, notwithstanding that this may result in the filing of an increased number of contentions and some duplication in drafting. Although difficult to define, what this means is that, while at the same time placing other potential parties on notice of the claims they will be either supporting or opposing, contentions should be sufficiently specific as to define the relevant issues for eventual rulings on the merits, and not require the parties or licensing boards to devote substantial resources to narrow or to clarify them. In addition, each contention that raises a legal issue or is a contention of omission shall so state.

Contentions raising purely legal issues may be easier to parse into single-issue contentions, and potential parties shall do so to the maximum extent possible. Contentions that raise factual or mixed factual and legal issues, however, should also be framed as single-issue contentions. For example, a contention that identifies a single alleged error or omission that petitioner believes independently demonstrates that DOE has failed to meet one or more closely related regulatory requirements would be a single-issue contention. A contention can allege that more than one regulatory requirement is violated and still be a single-issue contention if it identifies only a single factual (or legal) rationale and the regulatory requirements are closely related. A contention that identifies a single set of facts, but alleges violations of more than one closely related section of a single statute, would also be a single-issue contention. Conversely, a contention that identifies

a single set of facts but alleges violations of more than one statute (e.g., Atomic Energy Act, Nuclear Waste Policy Act, or NEPA) generally would not be a single-issue contention. In such circumstances, the alleged violation of each pertinent statute should be set forth as a separate contention. Notwithstanding the above, however, a petitioner shall not be precluded from alleging, in a separate contention, that the cumulative impact of errors or omissions set forth in other contentions, taken together, demonstrates a violation of regulatory requirements, whether or not the errors or omissions alleged in such other contentions are considered material by themselves.

Section 2.309(f)(1)(ii) requires “a brief explanation of the basis for the contention.” Rarely should this require more than a sentence or two.

Section 2.309(f)(1)(iii) requires a showing that “the issue raised in the contention is within the scope of the proceeding.” Often, this requirement may be satisfied by reference to a potential party’s response to the next provision (section 2.309(f)(1)(iv)).

Section 2.309(f)(1)(iv) requires a showing that “the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.” This requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention. Citation to a specific statutory or regulatory requirement is preferable to citation to a more general statutory or regulatory requirement. Potential parties shall cite the principal statutory or regulatory requirement or requirements on which they rely.

Section 2.309(f)(1)(v) requires, in addition to a concise statement of the alleged facts or expert opinions that support its position and on which it intends to rely, that a potential party provide “references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” Such “references” shall be as specific as reasonably possible. Readily available legal authorities, materials that cannot be attached because of copyright restrictions, and Licensing Support Network (LSN) documentary material need not be attached to a potential party’s petition. Referenced LSN documents, however, shall include the LSN accession number and the title, date, and specific page number of the document. All other supporting documents shall be electronically attached to the petition. Specifically, a reference to an active, publicly accessible Internet universal resource locator (URL) should not be made without electronically attaching copies of the information being cited, as the content of such web sites may change or subsequently become inaccessible. *See* 10 C.F.R. § 2.1013(c)(1)(vi). Attached affidavits shall be individually paginated and contain numbered paragraphs that can be cited with specificity.

Section 2.309(f)(1)(vi) requires, among other things (and except for contentions of omission), “references to specific portions of the application (including the applicant’s environmental [documents] and safety report) that the petitioner

disputes and the supporting reasons for each dispute.’’ Because these documents will be on the LSN, it will be sufficient to reference them in the same manner as other LSN documents, citing to the most specific portion of the document that is practicable.

Fourth, where applicable, a statement shall be included indicating that the contention is jointly sponsored pursuant to 10 C.F.R. § 2.309(f)(3), listing all participants that are sponsoring the contention, and designating the specific participant with authority to act with respect to the contention. (This information shall be provided in the introduction to the petition of each sponsor of a joint contention.)

3. Attachments

As noted above, except for readily available legal authorities, materials that cannot be attached because of copyright restrictions, and documents available on the LSN, all documents that are referenced in support of one or more contentions shall be electronically attached to the petition.

Attachments shall be numbered consecutively and individually paginated. Because of the way in which the Commission’s electronic filing system is programmed, such supporting documents should be designated as ‘‘attachments’’ and not as ‘‘exhibits’’ (a term that is reserved for evidentiary exhibits at later stages in the adjudication process).

B. Answers

Insofar as practicable, answers (including any attachments thereto) shall follow the format of petitions, in order and clearly labeled.

Answers shall be limited to addressing specific, alleged deficiencies in petitions and particular contentions. For example, if a potential party challenges only another potential party’s standing, and not the admissibility of any particular contention, the answer should address only standing. If a potential party challenges only whether the petitioner is in substantial and timely compliance with the requirements of 10 C.F.R. § 2.1003, as required by 10 C.F.R. § 2.1012(b)(1), the answer should address only that issue. If a potential party challenges whether a particular contention satisfies only certain of the six requirements for contentions set forth in 10 C.F.R. § 2.309(f)(1) — e.g., an alleged failure to show that the issue raised is within the scope of the proceeding pursuant to section 2.309(f)(1)(iii) — the answer should address only those specific requirements. Nonspecific answers that provide only a boiler-plate objection (e.g., ‘‘the contention fails to provide a sufficient supporting basis’’) are not helpful and should be avoided.

C. Replies

Insofar as practicable, replies (including any attachments thereto) shall follow the format of answers, in order and clearly labeled.

Replies shall be limited to addressing points that have been raised in answers. For example, if no potential party has challenged whether the existence of a genuine dispute has been established with respect to a particular contention, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), a petitioner's reply need not and should not address that issue any further with respect to that contention.

D. Nontimely, New, and Amended Contentions

Insofar as practicable, and in addition to demonstrating compliance with other applicable requirements set forth in 10 C.F.R. § 2.309, nontimely, new, and amended contentions shall follow the prescribed format for initial petitions and contentions.

E. E-Filing Requirements

The potential parties are reminded that, consistent with the Pre-License Application Presiding Officer (PAPO) Board's fourth case management order,⁹ attachments or enclosures to a submission and any related responsive pleadings shall be submitted via the agency's E-Filing system as part of a single electronic file that consists of the pleading or other submission, the certificate of service, and all the attachments or enclosures associated with the pleading or submission. Also, in accordance with the agency's E-Filing guidance, multiple electronic files shall be used for pleadings or submissions with attachments or enclosures only if the filing exceeds 50 megabytes in size. *See* Guidance for Electronic Submissions to the NRC, Revision 3 (Nov. 20, 2007) at 10 (ADAMS Accession No. ML071580647). In contrast, exhibits (and prefiled written testimony) should be submitted via the agency's E-Filing system as separate electronic files. *See* 10 C.F.R. § 2.304(g).

IV. RECOMMENDATIONS

Potential parties are encouraged, but not required, to identify groups of contentions that they believe might most efficiently be considered together by a single Atomic Safety and Licensing Board.

⁹ *See* PAPO Board Fourth Case Management Order (Concerning Electronic Filing, DDMS, Safeguards Information, and Other Items) (Oct. 5, 2007) at 1-4 (unpublished).

Potential parties are encouraged, but not required, to confer and submit joint contentions, pursuant to 10 C.F.R. § 2.309(f)(3), where practicable.

Potential parties are encouraged, but not required, to provide the applicant and other participants with the LSN accession numbers of documents they intend to reference in their petitions several days in advance of filing petitions.

The Advisory PAPO Board recommends to future Atomic Safety and Licensing Boards with responsibility for any HLW proceeding that they impose the following additional case management requirements:

- A participant that wishes to adopt the contention of another participant, pursuant to 10 C.F.R. § 2.309(f)(3), should do so within either: (1) 45 days of the filing of the contention to be adopted; or (2) 45 days of the admission of the contention to be adopted. A pleading regarding adoption should state whether the adopter has contacted the originator of the contention regarding adoption and whether there is agreement on which participant will have authority to act regarding the contention.
- New or amended contentions, which may be filed with leave of the presiding officer pursuant to 10 C.F.R. § 2.309(f)(2), should be presumed timely if they are filed within 30 days after the availability of new or materially different information. If a participant requests additional time to file reasonably before such 30-day period expires, new or amended contentions may also be considered timely upon a Board finding that there has been an adequate showing of need for the additional time requested.

Finally, although the participating potential parties agreed that petitions should set forth the elements necessary to establish standing, there was not agreement as to what showing is required for certain affected units of local government. The participating potential parties identified a possible ambiguity in the Commission's regulations. Subpart J (which is specifically applicable to HLW proceedings) defines a "party" to include, among others, "any affected unit of local government" as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101(31) — implying that such entities enjoy standing as of right. *See* 10 C.F.R. § 2.1001. Subpart J, however, does not take precedence over certain other Commission regulations, including 10 C.F.R. § 2.309. *See* 10 C.F.R. § 2.1000. Section 2.309(d)(2), in contrast, provides that a local governmental body need not address standing requirements if it wishes to be a party in a proceeding for a facility "located within its boundaries." Otherwise, by its terms, 10 C.F.R. § 2.309(d)(2) appears to require that affected units of local government must establish standing in the same manner as all other potential parties. Accordingly, in order to avoid complex and potentially unnecessary briefing and decisions, the Board respectfully suggests that the Commission may

wish to clarify its intent in this regard no later than in any applicable notice of hearing.

It is so ORDERED.

THE ADVISORY PRE-LICENSE
APPLICATION PRESIDING
OFFICER BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Paul S. Ryerson
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 20, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman
Nicholas G. Trikouros
Lawrence G. McDade

In the Matter of

Docket No. 70-3098-MLA
(ASLBP No. 07-856-02-MLA-BD01)

SHAW AREVA MOX SERVICES
(Mixed Oxide Fuel Fabrication
Facility)

June 27, 2008

In this proceeding regarding the application of Shaw AREVA MOX Services (MOX Services) for a license to possess and use byproduct, source, and special nuclear material at the planned Mixed Oxide Fuel Fabrication Facility (MFFF, or the MOX facility) that it is building for the U.S. Department of Energy (DOE) on the federal government's Savannah River Site (SRS), the Licensing Board — ruling on a hearing petition filed by Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information and Resource Service (NIRS) (collectively "Petitioners") seeking to intervene to contest the MOX Services Application — concludes that the Petitioners have proffered one admissible contention, that one previously admitted contention should be dismissed after reconsideration, and that a new contention should be dismissed, with its denial conditioned upon the other parties notifying the Petitioners when action on that subject is next contemplated.

The Chairman issued a concurring opinion to point out possible ways in which the Commission might avoid disruptions or errors attributable to safety-culture or due-process shortcomings. The first is that the Commission has stressed the need for safety culture to drive the performance of the NRC Staff in its regulation and oversight of the industry. In the Chairman's judgment, this proceeding has exposed

matters that might indicate that that culture is being undermined. Secondly, the Chairman suggests that the Commission needs to issue directives or policies that would enable adjudications to proceed differently when circumstances call for it, so as to assure that the agency's hearing process is "meaningful."

LICENSING BOARD(S): AUTHORITY

While the Licensing Board is concerned about the need to make — and the legitimacy of making — significant decisions intrinsic to the operating license proceeding when construction of the facility has scarcely begun, this concern alone is not sufficient to permit admission of an environmental contention in the face of the Commission's specific direction that environmental issues would be resolved at an earlier phase.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A contention based solely on information relating to possible design or capacity changes that have not yet been presented to the agency (e.g., as an amendment to the Application) must fail because "a possible future action must at least constitute a 'proposal' pending before the agency to be ripe for adjudication." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Unlike contentions that deal with the capability of the facility as designed to accommodate interruptions in waste transfer that could significantly influence the facility's environmental impact and safe operation, a contention revolving around the possibility of future design changes to the facility is speculative and would for that reason be inadmissible even absent restrictions on environmental contentions in general.

LICENSING BOARD: DISCRETION IN MANAGING PROCEEDINGS (REFRAMING CONTENTIONS)

RULES OF PRACTICE: CONTENTIONS

When the Safety Evaluation Report (SER) was not explicitly mentioned in the original version of the contention, but was the subject of supporting information that the Petitioners did cite explicitly, it is appropriate to include a reference to it in a Board-revised contention. In any event, whether or not the referenced SER

citation appears in the revised contention, the relevant SER *material* will deserve attention in any adjudication that may eventually take place on the contention.

What is far more consequential are the implications of the argument that an SER prepared at one stage lacks force at the next stage. If that is the position being asserted, then much of the underpinning of, and reliance placed upon, the Staff's regulatory review would be vitiated. Such a position must be rejected.

**LICENSING BOARD: DISCRETION IN MANAGING
PROCEEDINGS (IMPOSING CONDITIONS ON DENIAL OF
CONTENTION)**

RULES OF PRACTICE: CONTENTIONS (CONDITIONED DENIAL)

The admission of a "grand contention of omission" based on failure to meet the requirements of 10 C.F.R. § 70.23(a)(8) regarding facility completion could be justified in order to preserve, untrammelled, a Petitioners' litigation options where a notice of hearing on an operating license for a facility is published at the nascent stages of a 6-year construction process. Nonetheless, a better approach is to dismiss the contention on the condition that the Applicant and the NRC Staff provide specified notices of the pendency of the "completion" finding. This will provide the Petitioners with reasonable notice of an opportunity to formulate — in an effective and efficient manner — any challenges they may then have regarding the substance of that finding, and to present such a substantive contention without the need for extraordinary allotments of additional time (beyond the norm) to do so.

**LICENSING BOARD: DISCRETION IN MANAGING
PROCEEDINGS (SETTING A TIME FRAME FOR SUBMITTAL OF
NEW CONTENTIONS)**

**RULES OF PRACTICE: CONTENTIONS (NEW CONTENTIONS
BASED ON TRIGGERING EVENTS)**

It has been customary in other proceedings for licensing boards, after intervention has been allowed, to establish a specific time period after the occurrence of a triggering event during which new contentions will, if filed within that time, be deemed to have been filed "in a timely fashion based on the availability of the subsequent information" within the meaning of 10 C.F.R. § 2.309(f)(2)(iii). Many times, boards have selected 30 days as that specific presumptive time period. The Board finds that a longer period is justified here. The task facing citizen-intervenors who are monitoring the publication of documents on the progress of facility planning and construction in an effort to file timely new

contentions is enormous. Given the disparity in resources, the Applicant's choice to file well in advance of the start of construction should not be allowed to place upon the Petitioners the burden of having to face, continuously for the entirety of a 6-year construction period, a rolling 30-day deadline for monitoring, reviewing, analyzing, and critiquing documents. That period is too short in these circumstances.

Given the length of time that this proceeding will consume, there is no room for the Applicant to argue that its interests, or the public interest, would be harmed by extending the Petitioners' time. An extension of a rolling 30-day deadline to a rolling 60-day one confers the benefit of doubling the Petitioners' time to prepare any one contention while adding a total of only 30 days — during a 6-year construction period — to the *overall* time Petitioners will have to file contentions. This would seem a worthwhile investment in making the opportunity for a hearing a meaningful one.

MEMORANDUM AND ORDER

(Ruling on Contentions and All Other Pending Matters)

We previously ruled that three organizational Petitioners, then appearing before us *pro se*, had standing to challenge the application of Shaw AREVA MOX Services (MOX Services, or Applicant) for a license that would allow it to operate the Mixed Oxide Fuel Fabrication Facility (MFFF, or the MOX facility) it has commenced building on the federal government's Savannah River Site (SRS) south of Aiken, South Carolina.¹ In that same decision, we tentatively ruled that two of the Petitioners' five original contentions appeared to be admissible. In light of the unusual posture of the case and nature of those contentions, however, we invited reconsideration of that ruling; we also requested comments on certain novel procedural approaches that we suggested might be appropriate to invoke.

Since that time, the parties have filed, on their own initiative or at the Board's request, a variety of pleadings addressed to, *inter alia*, admitting initial contentions, submitting or opposing new contentions, debating questions about whether facility construction should be halted, and analyzing the wisdom and possible content of a case management order to guide the proceeding's future course. As a consequence, we held two more oral arguments to aid our understanding of the parties' positions: the first was held on January 8, 2008; the second, which was combined with a prehearing conference, was held on April 9, 2008.

We now resolve all the matters pending before the Board. The actions we take today are summarized immediately below (pp. 464-65) and — following

¹ LBP-07-14, 66 NRC 169 (2007). The three petitioners are identified in note 13, below.

our recitation of the background of the proceeding in Part I (pp. 465-75) — the reasoning which led us to take those actions is set out in full in Parts II-IV of this opinion (pp. 475-94), leading to our formal Order (pp. 494-96). The concurring opinion of Judge Farrar follows (pp. 497-508).

1. Dismissal of Environmental Contentions

Because this phase of the proceeding is limited to safety issues, on reconsideration we dismiss environmentally focused Contention 3, which we had initially admitted because of what then seemed to be its tie-in to safety-oriented Contention 4. Similarly, we dismiss, as outside this proceeding's scope, new Contention 6, which has an exclusively environmental focus.

2. Acceptance of Reshaped Contention

After the January 8, 2008, oral argument, we reshaped Contention 4 to promote clarity and to narrow its focus, and invited the parties' comments thereon.² As a result of those comments and the April 9, 2008, prehearing conference, we further revise that contention and finalize our ruling thereon.

We admit Contention 4 as thus revised. With their standing previously acknowledged, the admission of this contention completes the process for granting the Petitioners' intervention.

3. Action on Other Matters

In early February, 2008, the Petitioners retained counsel to represent them. In addition to submitting views on matters already pending, counsel filed a new contention, Contention 7, challenging the Applicant's future entitlement to an operating license under a regulatory interpretation the Staff had recently announced concerning the timing and conditioning of action on the license.³ Contemporaneously, a motion to stay facility construction pending design completion was filed; it led to the submittal, with our permission, of additional pleadings. The April 9, 2008, oral argument was held primarily to address the matters presented in the additional pleadings.

In light of a change in the Staff's litigating position on the issue of license timing and conditioning, adopted at the conclusion of the additional round of pleadings (and described on p. 489 below), we are not admitting new Contention

²Licensing Board Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) (Jan. 16, 2008) (unpublished).

³That interpretation is described at pp. 472-74, below.

7. We are, however, conditioning its denial, requiring the other parties to notify the Petitioners when action on that subject is next contemplated. As to the request for a stay of construction, we find that it fails to meet the criteria that could support such relief and thus deny that request. We end by taking a case management step to guide the proceeding.

I. BACKGROUND

The current proceeding involves a challenge to the November 17, 2006, application of MOX Services for a license that would allow it to operate the MOX facility that it is building on the SRS.⁴ That facility, for which a Construction Authorization was issued on March 30, 2005, is designed to fabricate mixed plutonium and uranium oxide (MOX) fuel for use in commercial nuclear power reactors as part of DOE's program for the disposition of surplus weapons-grade plutonium.

A. The Prior Proceeding

This is the second adjudicatory stage at which the licensing of the MOX facility has been considered. The first stage began on February 28, 2001, when the Applicant⁵ filed a construction authorization request (CAR) seeking permission to build an MFFF on the SRS.⁶ The MFFF was to be designed to operate for 20 years and to convert 36.4 tons of surplus weapons-grade plutonium into MOX fuel for civilian reactors.⁷ Although DOE would own the MOX facility, its contractor, the Applicant consortium, would be the license holder and facility operator. *Id.*

⁴The Applicant submitted its original application in September, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Sept. 27, 2006) (ADAMS Accession No. ML062750195). This application was revised at the request of the NRC Staff, and that version was submitted in November, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Nov. 17, 2006) (ADAMS Accession No. ML070160311) [hereinafter Application].

⁵At that time, the Applicant was a consortium of several companies known as Duke Cogema Stone & Webster. The makeup and name of the consortium had changed by the time the current phase of the proceeding was launched, but those changes are not of consequence to our description of the proceeding or to our decision on the issues.

⁶See Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority To Construct a Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 19,994, 19,995 (Apr. 18, 2001).

⁷*Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 410-11 (2001). It was anticipated that, after fabrication, the MOX fuel would be used in four Duke Energy Corporation reactors: Units 1 and 2 of the Catawba Nuclear Station near York, South Carolina, and Units 1 and 2 of the McGuire Nuclear Station near Huntersville, North Carolina. *Id.* at 411.

1. Procedure for Considering Environmental Issues

Prior to receiving the Applicant's CAR, the Commission had published a notice setting out the general procedures to be followed in any proceeding concerning the MFFF.⁸ This notice specified that the matter would be conducted in two phases. The first phase was to cover three aspects: (1) "design bases for the principal structures, systems, and components"; (2) "the quality assurance program"; and (3) "environmental issues." *Id.* The second phase was to involve "all other issues related to the issuance of a 10 C.F.R. part 70 license." *Id.* On April 18, 2001, after reviewing the Application, the Commission published a notice of its acceptance for docketing and of an opportunity for a hearing on the first phase, the construction authorization. 66 Fed. Reg. at 19,994.

The Commission subsequently confirmed that this two-phase licensing procedure was intended to resolve in the CAR proceeding all the environmental issues related to both constructing and operating the MFFF.⁹ The Commission emphasized that nothing in its regulations requires that NRC's environmental and safety reviews occur simultaneously, and that a review of the environmental effects of operating the facility could therefore be conducted prior to the safety review that would constitute the second phase of the licensing procedure. *Id.*

As this Board noted in a previous order, a practical effect of this licensing procedure is that no environmental report was submitted as part of the Application in the current stage of the proceeding, and no Environmental Impact Statement (EIS) will be prepared as part of the Staff review during this phase of the proceeding. LBP-07-14, 66 NRC at 184. This limitation on the scope of the current proceeding affects the admissibility of environmental contentions submitted by the Petitioners, as discussed in Part II below.

2. Procedure for Considering Safety and Other Issues

The two-stage licensing process applicable to the MOX facility, and the Notice of Opportunity for a Hearing issued for the CAR phase of the proceeding, "specified that the NRC would consider *operation* of the MOX facility later, when the agency would decide whether 'construction of the facility has been properly completed (*see* 10 CFR 70.23(a)(8)), and . . . all other applicable 10

⁸ Notice of Opportunities for Hearings Related to Licensing the Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 6701, 6701 (Jan. 22, 2001).

⁹ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214-16, 220-21 (2002). That approach was set up by the Commission specifically for the proceedings related to this facility.

CFR Part 70 requirements have been met.’’¹⁰ The Commission emphasized that it intended for safety issues related to operation of the MOX facility to be resolved at the current stage of the licensing process. *Id.* at 220. Accordingly, the Notice of Opportunity to Request a Hearing that launched the current proceeding specifically refers to the Staff conducting a safety review and preparing a Safety Evaluation Report.¹¹

In addition, the former Licensing Board presiding over the initial phase of the MOX licensing adjudication reserved consideration of the emergency plan to the second stage of the licensing process. *Duke Cogema*, LBP-01-35, 54 NRC at 462-63. According to that initial Board, “10 C.F.R. § 70.22(i)(1)(ii) does not require the submission of an emergency plan until [the Applicant] files an application for a possession and use license.” *Id.* at 463. A contention related to this issue was submitted at the commencement of the current proceeding. LBP-07-14, 66 NRC at 179. That emergency plan contention was, however, rejected by this Board for failure to demonstrate the existence of a material dispute. *Id.* at 198.

For these reasons, this proceeding is currently limited to a consideration of safety issues related to operation of the MOX facility. We turn to a description of where the proceeding now stands.

B. The Current Proceeding

A notice of the pending MOX Services Application and of the opportunity to request a hearing was published in the *Federal Register* on March 15, 2007.¹² On May 14, 2007, three citizens’ organizations (collectively, Petitioners), two of which had participated in the earlier construction permit proceeding, jointly filed a timely *pro se* Petition for Intervention and Request for Hearing.¹³ The Petition included five contentions that formed the basis for the challenge to the requested license.

On June 11, 2007, the NRC Staff filed an answer opposing the Petition, the

¹⁰ *Duke Cogema*, CLI-02-7, 55 NRC at 212 (citing 66 Fed. Reg. at 19,994) (emphasis and ellipsis in original).

¹¹ Notice of License Application for Possession and Use of Byproduct, Source, and Special Nuclear Materials for the Mixed Oxide Fuel Fabrication Facility, Aiken, SC, and Opportunity To Request a Hearing, 72 Fed. Reg. 12,204, 12,204-05 (Mar. 15, 2007). The notice cites the EIS prepared as part of the CAR review, but does not open the question of further environmental review. *Id.*

¹² 72 Fed. Reg. at 12,204.

¹³ Petition for Intervention and Request for Hearing (May 14, 2007) [hereinafter Petition]. The organizations were the Blue Ridge Environmental Defense League (BREDL), which participated in the earlier construction authorization proceeding; Nuclear Watch South (NWS), which participated in the prior proceeding under its former name of Georgians Against Nuclear Energy (GANE); and the Nuclear Information and Resource Service (NIRS).

Petitioners' standing, and all five contentions.¹⁴ The Applicant filed an answer 2 days later, taking similar positions,¹⁵ and the Petitioners filed their reply on June 27, 2007.¹⁶

These pleadings all preceded the start of facility construction. The Applicant, which had received its construction permit on March 30, 2005, filed its request for an operating license on November 17, 2006, as noted above, and began actual construction of the facility on August 1, 2007.¹⁷

Having heard the first of what turned out to be a series of oral arguments on August 22, 2007 (after a site visit the previous day), the Board issued a ruling on October 31, 2007, in which we (1) determined that all three petitioning organizations had standing to intervene in this proceeding, and (2) tentatively admitted two and rejected three of the five contentions initially proffered by the Petitioners. LBP-07-14, 66 NRC at 190, 206. Each of the two admitted contentions, labeled Contention 3 and Contention 4, challenged the Applicant's plans for the handling of radioactive waste that will be generated by the MOX facility.¹⁸

1. Board's Request for Additional Briefing on Contentions 3 and 4

At the time Contention 3 and Contention 4 were tentatively admitted, the Board noted that the Application had been received (and the Petitioner's contentions were therefore due) before construction of the MOX facility had begun, and that our ruling on contention admissibility therefore had to be made before substantial construction had taken place. *Id.* at 203. Indeed, construction is not scheduled to be completed until 2014, and we were thus aware that "any safety contention about construction outcomes . . . could scarcely avoid containing elements of speculation." *Id.* For that reason, although we tentatively concluded that both contentions met the admissibility requirements of 10 C.F.R. § 2.309(f)(1), we did not believe that they were ripe for litigation on the merits at that time. *Id.* at 206.

¹⁴ NRC Staff Response to Petition for Intervention and Request for Hearing (June 11, 2007) [hereinafter Staff Answer].

¹⁵ Shaw AREVA MOX Services, LLC Answer Opposing BREDL et al., Petition for Intervention and Request for Hearing (June 13, 2007) [hereinafter Applicant Answer].

¹⁶ Reply of the Petitioning Organizations to the Answers Filed June 11 and 13 by NRC Staff and the License Applicant to Our Petition for Intervention and Request for Hearing Filed May 14, 2007 (June 27, 2007) [hereinafter Reply].

¹⁷ Shaw AREVA MOX Services, LLC June 28, 2007 Status Report at 2.

¹⁸ *Id.* at 198. The first of these contentions challenged the Applicant's waste plan from an environmental perspective, while the second was safety oriented. At the time of admission, however, the Board noted that "the proffered basis for the latter also incorporates the bases underlying the former, and thus to that extent they are interrelated; in any event, the two contentions present a common, overriding issue." *Id.*

We therefore invited the parties to submit additional briefs discussing alternatives for how the Board might proceed, and indicated that the Board would be open to reconsidering its admission decision if another mechanism were available to preserve the Petitioners' hearing rights until such time as litigation on the merits of a contention was feasible. *Id.* In particular, we asked the parties to discuss the desirability of the following four options:

- (1) Rejecting Contentions 3 and 4 on condition that one or more additional notices of opportunity for hearing would be issued at appropriate times;
- (2) Deferring a ruling on the admissibility of the contentions until a more appropriate time;
- (3) Rejecting the contentions but keeping the proceeding open; and
- (4) Rejecting the contentions in return for acceptance of a license condition.

Id. at 206-09.

The Applicant and the NRC Staff filed their responses to this order on November 9, 2007.¹⁹ The Applicant rejected all four of the Board's proposed alternatives and continued to argue that Contentions 3 and 4 were inadmissible. Applicant Response to Board Order at 4-7. With respect to the preservation of the Petitioners' hearing rights as construction progresses between now and 2014, the Applicant argued that:

[T]he Commission's regulations provide procedural mechanisms for Petitioners to raise contentions, when ripe, in the future in relation to the MOX Services License Application. Those mechanisms, which are set forth in 10 CFR §§ 2.309 and 2.326 of the Commission's regulations, provide well-accepted, time-honored, and Commission-approved avenues for effective public participation in NRC licensing proceedings. They are available to Petitioners in this proceeding, and in MOX Services' strongly held view, should suffice. MOX Services respectfully suggests that there is no need for this Board to create new and novel processes to replace the existing regulatory regime.

Id. at 3. Like the Applicant, the Staff opposed all four of the alternatives presented in the Board's October 31 Order, reiterated its opposition to the decision to admit Contentions 3 and 4, and requested that the Board reconsider its decision and dismiss the contentions. Staff Response to Board Order at 1-2.

¹⁹MOX Services' Brief in Response to Memorandum and Order (Ruling on Standing and Contentions) (Nov. 9, 2007) [hereinafter Applicant Response to Board Order]. NRC Staff's Response to the Board's October 31, 2007 Order and Request for Reconsideration (Nov. 9, 2007) [hereinafter Staff Response to Board Order].

The Petitioners filed their response to the Board order 10 days later, on November 19, 2007,²⁰ in which they argued that the appropriate course of action was to admit Contentions 3 and 4 and to hold them in abeyance until they are ripe for a hearing on the merits. *Id.* at 4. In terms of when that might be, the Petitioners made this suggestion:

the appropriate deadline for resuming the proceeding is when the Staff completes a draft SER that addresses the Applicant's compliance with the requirement of 10 C.F.R. § 70.23, including the safety of the proposed operation and the requirement of § 70.23(a)(8) that construction of the principal structures, systems, and components that were approved in the construction authorization proceeding "has been completed in accordance with the application."

Id. at 5. Although the Petitioners did not specifically address the four alternatives proposed by the Board, they rejected the proposed remedies presented by the Applicant and the NRC Staff on the grounds that "[t]here is only one time when a hearing request and contentions are not subject to discretionary rejection by the Commission, and that is now." *Id.* at 6.

2. *New Contention 6*

On October 5, 2007, the Petitioners filed a new contention, labeled Contention 6, alleging that the license application for the MOX facility fails to address proposed changes in the DOE strategy for disposing of surplus plutonium.²¹ The Applicant filed its answer opposing Contention 6 on October 29,²² and the NRC Staff followed suit on October 31.²³ The Petitioners filed their reply on November 7.²⁴ Because briefing of Contention 6 was not complete at the time of our October 31 Order, we did not rule on it therein. LBP-07-14, 66 NRC at 213.

²⁰Intervenors' Response to Atomic Safety and Licensing Board's Order of October 31, 2007 (Nov. 19, 2007).

²¹Petitioners' Late-Filed Contention Regarding the Need To Supplement EIS for Proposed MOX Plutonium Processing Facility (Oct. 5, 2007) [hereinafter Contention 6 Pleading].

²²Shaw AREVA MOX Services LLC's Answer Opposing Petitioners' Late-Filed Contention (Oct. 29, 2007) [hereinafter Applicant Answer to Contention 6].

²³NRC Staff Response to Petitioners' Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Fuel Processing Facility (Oct. 31, 2007) [hereinafter Staff Answer to Contention 6].

²⁴Intervenors' Reply to Applicant and NRC Staff Responses to Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Processing Facility (Nov. 7, 2007) [hereinafter Contention 6 Reply].

3. *Issues Pending After January Oral Argument*

Oral argument was held on the pending issues in the case on January 8, 2008.²⁵ That session covered a number of subjects, including (1) the admissibility of the Petitioners' recently filed Contention 6; (2) the reconsideration of our earlier decision to admit Contentions 3 and 4; and (3) the need for, and the appropriate contents of, a case management order to govern the future course of the proceeding (assuming that at least one admitted contention were to remain pending).

During the oral argument, the Board indicated that it was considering whether to limit and to recast the previously admitted contentions. The Board also indicated that, were it to do so, it would promptly send a draft of the Board-revised contention to the Petitioners so that they could determine whether, as limited and recast, it remained a contention that they wished to litigate. Tr. at 360-61. The filing of a positive answer to that inquiry would trigger a response from the Applicant and from the NRC Staff as to their respective positions on whether the recast contention was admissible, and if not, why not. *Id.*

4. *Reformulated Contention 4*

The Board submitted the revised contention (labeled Contention 4 from the earlier contention upon which it is principally based) to the parties on January 16, 2008, along with a brief explanation of the reasoning behind the Board's proposed clarifications.²⁶ In the same order, the Board requested that the parties confer on, and then brief the issue of, how the proceeding might best be managed in the future, given the possibility of new contentions during the long construction timeline. *Id.* at 2, 7-8.

The Petitioners subsequently indicated that they agreed with the contention as recast and were willing to proceed with its litigation.²⁷ The Applicant responded with several objections to the Board's draft restatement of the contention, and supplied proposed remedial changes, indicating that it did not object to the Board's revision provided that the Applicant's proposed changes were incorporated in the

²⁵The oral argument was originally scheduled for December 6, 2007. Licensing Board Order (Scheduling Oral Argument) (Nov. 21, 2007) (unpublished). It was moved to January 8, 2008, however, at the request of the Applicant's counsel. Licensing Board Memorandum and Order (Rescheduling Oral Argument and Providing Notice of Expected Date for Decision) (Dec. 4, 2007) (unpublished).

²⁶Licensing Board Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) (Jan. 16, 2008) (unpublished) [hereinafter Order Recasting Contention 4]. The substance of and reason for the revisions will be discussed in Part III below.

²⁷Intervenors' Acceptance of Recast Contention #4 (Jan. 25, 2008) [hereinafter Petitioners' Response to Order Recasting Contention 4].

final language.²⁸ The NRC Staff responded by reiterating its opposition to the original contention and further objecting to the Board's version.²⁹

5. Case Management Issues, New Contention 7, and Request To Suspend Construction

On January 31, 2008, the Applicant and the Petitioners informed the Board that the parties had conferred as directed in the Order Recasting Contention 4, but were unable to reach agreement on a case management approach.³⁰ On February 11, 2008, the Applicant and the NRC Staff both filed briefs which argued that Licensing Boards do not have the authority to regulate the timing of contentions, such as by entertaining new contentions at specific milestones in the case.³¹

On the same date, the Petitioners informed the Board that they were no longer appearing *pro se* but instead had retained counsel.³² Contemporaneously, the Petitioners submitted their views regarding the Board's authority to manage the case to protect the interests of citizen-intervenors and suggested several ways to proceed with the case in the future.³³ The Petitioners agreed with the Applicant and Staff that the Board's ability to manage the timing of this proceeding is limited, and noted that they did *not* want to have their ability to file new contentions constrained by any particular milestones in the case. *Id.* at 2-3. Rather, they suggested that "[a]dditional action by the Commission is . . . needed to ensure that the premature docketing of the license application does not prejudice the Intervenors' hearing rights." *Id.* at 3.

In addition, the Petitioners submitted a new contention, labeled Contention 7, which stated that the Application "should be denied because Shaw AREVA has not demonstrated that construction of the principal structures, systems and components approved under 10 C.F.R. § 70.23(b) has been completed in accordance

²⁸ Shaw AREVA MOX Services LLC's Response to Petitioners' Contention 4 as Reformulated by the Board (Feb. 7, 2008) [hereinafter Applicant Response to Order Recasting Contention 4], at 1.

²⁹ NRC Staff's Response to Recast Contention Four (Feb. 8, 2008) [hereinafter Staff Response to Order Recasting Contention 4].

³⁰ Applicant's Report in Response to the Board's January 16, 2008 Memorandum and Order (Jan. 31, 2008); Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 (Jan. 31, 2008).

³¹ Shaw AREVA MOX Services LLC's Views on the Appropriate Content of a Case Management Order (Feb. 11, 2008); NRC Staff's Brief on the Board's Case Management Authority (Feb. 11, 2008).

³² Notice of Appearance by Diane Curran and Notice of Withdrawal of Appearances by Glenn Carroll, Louis A. Zeller, and Mary Olson (Feb. 11, 2008).

³³ Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 Regarding Case Management Issues (Feb. 11, 2008) [hereinafter Petitioners' Case Management/Contention 7 Response].

with the application.’’ *Id.* As the basis for this contention, the Petitioners alleged that the Applicant ‘‘has hardly begun construction of the proposed facility, and therefore has not built the principal structures, systems and components that were approved by the NRC in its construction authorization decision’’ and argued that the NRC therefore ‘‘has no basis for concluding that Shaw AREVA has complied with 10 C.F.R. § 70.23(a)(8).’’ *Id.*

In further support of this contention, the Petitioners noted that, until the oral argument of January 8, 2008, they had reasonably believed that they would have the opportunity to challenge the adequacy of the MOX facility’s construction at around the time the NRC Staff completed its safety review (*id.* at 4), but at that oral argument the NRC Staff had announced that it planned to issue a license *before* construction was complete. The Petitioners filed their new contention based on, and in response to, this new information. *Id.* at 4-5.

The Petitioners’ Case Management/Contention 7 pleading of February 11 (*see* note 33, above) contained an additional element. Specifically, they requested that the Board submit to the Commission their request to suspend construction of the MOX facility until the facility design is complete. *Id.* at 5-10.

On February 21, 2008, the Board ordered the Applicant and the NRC Staff to address certain questions in their answers to the Petitioners’ February 11, 2008, filing.³⁴ On March 7, 2008, the Applicant responded, indicating that the Petitioners’ position on case management (opposing the establishment of contention-filing milestones) was compatible with that of the Applicant.³⁵ The Applicant also indicated, however, its opposition both to Contention 7 and to the Petitioners’ request regarding the suspension of construction. *Id.* On March 10, 2008, the NRC Staff submitted an answer which took the same position as the Applicant.³⁶

The Petitioners filed their reply regarding Contention 7 on March 14, 2008.³⁷

³⁴Licensing Board Memorandum and Order (Regarding Content of Answers) (Feb. 21, 2008) (unpublished) [hereinafter Order Regarding Content of Answers]. (The Board sought answers to questions regarding: (1) the public’s access to information on the ongoing status of the facility design; (2) the 10 C.F.R. § 70.23(a)(8) determination process; and (3) the opportunities for intervenors to review and challenge the designs and the 10 C.F.R. § 70.23(a)(8) determination.) *See also* Licensing Board Memorandum and Order (Scheduling Prehearing Conference and Oral Argument) (Mar. 19, 2008) (unpublished) (setting out questions related to Contention 7 for the parties to answer at oral argument) [hereinafter March 26 Oral Argument Order].

³⁵Shaw AREVA MOX Services LLC’s Answer to Petitioners’ February 11, 2008 Response Regarding Case Management Issues (Mar. 7, 2008) at 2 [hereinafter MOX Services Answer to Feb. 11 Response].

³⁶NRC Staff’s Response to Intervenors’ Late-Filed Contention Seven and Board’s Memorandum and Order of February 21, 2008 (Mar. 10, 2008) [hereinafter NRC Staff Response to Feb. 21 Order].

³⁷Intervenors’ Response to Shaw AREVA MOX Services’ and NRC Staff’s Opposition to Admission of Contention 7 (Mar. 14, 2007).

On the same date, they filed a Motion for Leave To Reply, along with the Reply itself, to those portions of the Applicant and Staff answers that addressed the construction suspension request.³⁸ The Applicant filed its opposition to this motion on March 19, 2008,³⁹ requesting in the alternative the opportunity to respond to the Petitioner's reply. The next day, the Board issued an order granting the Petitioner's Motion for Leave To Reply and also granting the alternative relief requested by the Applicant.⁴⁰ The Applicant filed its response on April 3, 2008,⁴¹ and the NRC Staff filed its response on April 4, 2008.⁴²

6. April Oral Session

The Board held a prehearing conference and additional oral argument on April 9, 2008,⁴³ in order to conduct a focused examination of the outstanding issues in the case that would help precipitate their resolution. The prehearing conference portion centered on the reframed Contention 4. March 26 Oral Argument Order at 1. The oral argument covered three main topics: (1) the admissibility of the recently filed Contention 7; (2) the jurisdictional and substantive issues relating to the Petitioners' request that facility construction be suspended pending completion of the facility's design; and (3) the need for, and possible outlines of, a case management order. *Id.* at 1-2.

The aforesaid written pleadings and oral presentations have positioned us to rule on all the pending matters. The explanation for those rulings, summarized on pp. 464-65 above, follows in Part II: Inadmissible Contentions (pp. 475-80);

³⁸Intervenors' Motion for Leave To Reply to Shaw AREVA MOX Services' and NRC Staff's Oppositions to Intervenors' Request to ASLB To Request NRC Commissioners to Suspend Construction of Proposed MOX Plutonium Processing Facility (Mar 14, 2007); Intervenors' Reply to Shaw AREVA MOX Services' and NRC Staff's Oppositions to Intervenors' Request to ASLB to Request NRC Commissioners To Suspend Construction of Proposed MOX Plutonium Processing Facility (Mar 14, 2007).

³⁹Shaw AREVA MOX Services, LLC's Answer to Motion for Leave To Reply to Opposition to Petitioners' Request Regarding Suspension of Construction (Mar. 19, 2008).

⁴⁰Licensing Board Order (Authorizing Filing of Additional Briefs) (Mar. 20, 2008) (unpublished). This order also permitted the NRC Staff to file a response.

⁴¹Shaw AREVA MOX Services LLC's Response on MFFF Construction Suspension Issues (Apr. 3, 2008) [hereinafter Applicant Construction Suspension Response].

⁴²NRC Staff's Response to Petitioners' Reply of March 14, 2008, Regarding Petitioners' Request To Suspend Construction (Apr. 4, 2008).

⁴³The argument was originally scheduled for March 26, 2008. March 26 Oral Argument Order at 1. At the request of the parties, however, it was postponed to the later date. Licensing Board Order (Rescheduling Oral Session and Briefing Deadline, and Providing Additional Guidance Regarding Oral Argument) (Mar. 25, 2008) (unpublished).

Part III: Reformulated Contention 4 (pp. 480-88); and Part IV: New Contention, Current Activity, and Future Direction (pp. 488-94).

II. INADMISSIBLE CONTENTIONS

A. Reconsideration of Contention 3

Upon further reflection, and in light of the reformulation of Contention 4 discussed in Part III below, the Board has reconsidered the admissibility of Contention 3, and now dismisses it. At the time those contentions challenging waste handling were submitted, there was, as we noted in our initial ruling, considerable overlap between the two. LBP-07-14, 66 NRC at 198-206. This overlap stemmed in part from the Petitioners having incorporated the extensive material supporting Contention 3 by reference into Contention 4. Petition at 23. Our main goal in reformulating Contention 4 was to remove this overlap and to distinguish more clearly between the thrust of the two contentions. Once this was accomplished, a clear difference emerged: Contention 3 concerns the environmental impact of any disruption in the transfer of waste away from the MOX facility, while Contention 4 focuses on the safety impact if waste cannot be transferred and must remain on site.⁴⁴

Given the two-stage process established for this facility's licensing proceedings, there are barriers to admitting an environmental contention that go beyond the normal pleading rules that apply to safety contentions here (and as well to environmental contentions in other proceedings). See Section I.A.1 above. In our previous published order of October 31, 2007, this Board indicated that an environmental contention may be admitted at this stage of this proceeding only under a very limited set of circumstances, and observed that these could include situations where: (1) a petitioner relies upon newly available, significant information within the framework of 10 C.F.R. § 2.309(f)(2); (2) a petitioner meets the nontimely filing requirements of section 2.309(c); or (3) a petitioner successfully argues for supplementing the EIS pursuant to 10 C.F.R. § 51.92. LBP-07-14, 66 NRC at 192.

The Petitioners' original argument regarding Contention 3 does use the words "[n]ew and significant information" (the term used in section 2.309(f)(2)); it does not, however, identify any such information. Rather, the Petitioners' argument focuses on a lack of progress in designing and constructing a Waste Solidification Building (WSB), a facility located elsewhere on the larger DOE site and not

⁴⁴ See *MOX Services*, LBP-07-14, 66 NRC at 205 n.87, in which we noted that "our primary concern is with the safety contention," but that we "carry the environmentally related contention along (for now) because of the potential environmental consequences of safety failures." At that time we noted that the safety contention would remain even if the environmental contention were dismissed. *Id.*

covered by the MOX facility license, but anticipated by DOE to receive waste from that facility. Petition at 17-18. Because the WSB has not yet been designed, Contention 3 is based not on new information as that term is ordinarily understood, but rather on a lack of available information that is an inexorable consequence of an application to operate the facility being submitted so early in the construction process. *See* Section I.B.1 above.

The Board is concerned about the need to make — and the legitimacy of making — significant decisions intrinsic to this operating license proceeding⁴⁵ when construction of the facility has scarcely begun. This concern alone, however, is not sufficient to permit admission of Contention 3 in the face of the specific direction regarding this particular licensing process, namely, that environmental issues would be resolved at the earlier CAR phase. Absent more specific new information that would support admission of a new environmental contention under 10 C.F.R. § 2.309(f)(2), or a focused pleading related to one of the other legal theories that could support admission of an environmental contention at this stage, we must, on reconsideration, reverse our previous decision and dismiss Contention 3.

B. New Contention 6

The full text of Contention 6, as submitted by the Petitioners, reads as follows:

The license application for the mixed oxide (“MOX”) plutonium fuel factory (“MFFF”) fails to comply with the National Environmental Policy Act (“NEPA”) or NRC implementing regulation 10 C.F.R. § 51.92, because the U.S. Nuclear Regulatory Commission’s (“NRC’s” or “Commission’s”) environmental impact statement (“EIS”) for the facility does not address significant proposed changes in the U.S. Department of Energy’s (“DOE’s”) strategy for disposing of surplus weapons-grade plutonium, which in turn would require modifications to the design of the MOX plutonium fuel processing facility. The environmental impacts of these design changes, their implications with respect to connected actions, and alternatives that would avoid or mitigate their impacts, must be considered before the facility can be licensed to operate.

Contention 6 Pleading at 1-2. As a basis for this contention, the Petitioners cite the requirement, as outlined by the Supreme Court, that agencies reconsider their environmental review of proposed actions when “new and significant

⁴⁵ Although formally denominated as a proceeding involving a “possession and use permit,” the matter before us has been referred to as involving facility “operation” both by the Commission in an adjudicatory decision and by the Staff in a formal notice (*see* text accompanying note 10, above), and has been conceded by the Applicant to be essentially of that nature. Tr. at 110-11.

information” arises.⁴⁶ The Petitioners also cite 10 C.F.R. § 51.92(a)(1)-(2), which requires supplementation of the EIS if “(1) There are substantial changes in the proposed action that are relevant to environmental concerns; or (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

This contention stems, Petitioners explain, from the September 5, 2007, publication by DOE of an Amended Record of Decision (ROD) regarding its intent to ship up to eleven additional metric tons of surplus, non-pit, weapons-usable plutonium metals and oxides to the SRS. *Id.* at 3-4. According to the Petitioners, although DOE asserts that this decision relates only to the storage of the plutonium, it may become necessary, in the absence of other ways to dispose of the material, to modify the MFFF to accommodate a greater quantity of plutonium than currently planned. *Id.* at 4-5. This is especially true, the Petitioners say, because a significant portion of the additional plutonium is likely to contain impurities that exceed the specifications of the current MOX facility design. *Id.* at 5-6.

According to the Petitioners, Contention 6 meets the filing requirements contained in 10 C.F.R. § 2.309(c) that are applicable to nontimely contentions. *Id.* at 7-8. The first of these requirements, good cause for nontimely filing, they say is met because the contention was filed within 30 days of the release of the September 5 Amended ROD. *Id.* at 7. The Petitioners then argue that the other requirements are met because the Petitioners have already established standing and demonstrated their interest in the outcome of the proceeding. *Id.* at 8.

The Applicant opposes admission of Contention 6 on the grounds that it is “speculative and premature” and “fails to demonstrate that the NRC’s standards for admissibility of contentions have been met.” Applicant Answer to Contention 6 at 1. The Applicant agrees with the Petitioners that the Amended ROD relates to storage of surplus plutonium. *Id.* at 4. The Applicant parts company with the Petitioners, however, regarding the consequences of the storage decision for any future plans for the MOX facility. The Amended ROD does not provide any information on ultimate disposition, the Applicant says, and any further decisions regarding disposition would be the subject of future determinations and NEPA analyses. *Id.* at 4-6. In advance of any decision in that regard, it is “premature to speculate whether such decision would constitute a substantial change relevant to environmental concerns, or significant new circumstances or information relevant to environmental concerns.” *Id.* at 7. According to the Applicant, Contention 6 is therefore premature. *Id.*

Furthermore, the Applicant argues that because there is currently no plan to change the MOX facility to accommodate additional materials, there is no genuine

⁴⁶ *Id.* at 2 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-72 (1989)).

dispute of material fact or law pending. *Id.* at 8. Accordingly, the Applicant urges that Contention 6 fails to satisfy the contention pleading requirements of 10 C.F.R. § 2.309(f)(1) and must be dismissed. *Id.*

The NRC Staff also argues that the information upon which the Petitioners rely fails to demonstrate any change in, or differential environmental impact from, the MOX facility plans. From this premise, it argues that Contention 6 falls outside the scope of this proceeding because the two-stage process that governs licensing of the MOX facility required that all environmental issues be resolved at the previously completed first stage. Staff Answer to Contention 6 at 6. To be admissible, the NRC Staff continues, any new environmental contention would have to satisfy the 10 C.F.R. § 51.92 requirements for supplementing the EIS, in particular the requirements of subsections 51.92(a)(1) and (2) that there are “substantial changes in the proposed action” or “significant new circumstances or information.” *Id.* According to the NRC Staff, the Petitioners have not shown that any such changes or new circumstances or information exist. *Id.* at 7.

To the contrary, according to the NRC Staff, the Amended ROD merely indicates that the MFFF is one of the options the DOE is considering for disposition of the additional plutonium, not that any modification of the facility to accommodate additional plutonium is currently planned. *Id.* The Staff also notes that the agency has not received any requests to modify the current Application, and observes that the Commission has stated that NRC proceedings are to be based on the application as it exists at a given time and not on any potential future amendments.⁴⁷ Finally, the Staff argues that Contention 6 fails to satisfy the requirements for new contentions in 10 C.F.R. § 2.309(f)(2) and (c) because all information available in the September amended ROD was also available in a Notice of Intent (NOI) that the DOE published on March 28, 2007. *Id.* at 9.

In their Reply, the Petitioners urge that Contention 6 should be treated the same way Contentions 3 and 4 were in our prior order on contention admissibility. Contention 6 Reply at 2-3 (citing LBP-07-14, 66 NRC at 204-05). The Petitioners say that any defects in Contention 6 are due to the Applicant’s decision to file its license application early, and the contention should therefore be admitted at this stage even though it depends upon future events. *Id.* at 3. According to the Petitioners, Contention 6 should be admitted as a “way to handle these concerns with a mind to the greatest protection of the affected public.” *Id.*

In ruling on the admissibility of Contention 6, we again note that the threshold for admitting environmental contentions in this proceeding is considerably higher than it is in most licensing adjudications. The two-stage process being used in this proceeding put environmental and safety issues on separate tracks, with environ-

⁴⁷ *Id.* at 7-8 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002)).

mental issues expected to be addressed in the first stage, and safety issues to be divided across the two stages. Therefore, at this stage, environmental contentions must meet not only the usual contention pleading requirements applicable to all proceedings, but also the additional requirements for new contentions under 10 C.F.R. §§ 2.309(f)(2) or 2.309(c), or for supplementing the EIS pursuant to 10 C.F.R. § 51.92. As all parties agree, the last of these regulations requires the Staff to supplement the EIS if there are “substantial changes in the proposed action” or “significant new circumstances or information” that bear on environmental concerns. 10 C.F.R. § 51.92(a)(1)-(2).

Contention 6 is based solely on DOE’s Amended ROD, which itself does not reflect any changes to the design or capacity of the MOX facility or to the type of materials to be processed there. As the Staff correctly observes, a contention dealing with changes that have not yet been presented to the agency (e.g., as an amendment to the Application) must fail because “a possible future action must at least constitute a ‘proposal’ pending before the agency” to be ripe for adjudication.’⁴⁸ No such proposal based on the Amended ROD is currently before the NRC.⁴⁹

We also note an area in which our October 31, 2007, Order does not support the meaning that the Petitioners would attribute to it, and where the proper reading highlights what we consider to be an important difference between Contention 6 and Contentions 3 and 4. Specifically, the Petitioners’ Reply characterizes our decision on Contentions 3 and 4 as indicating that “mere uncertainty about whether a *proposal to change the MOX facility design* should be carried out should not defeat the admissibility of [a] contention.” Contention 6 Reply at 3 (emphasis added). That proposition does not reflect our meaning. As we saw the matter, Contentions 3 and 4 deal *not* with proposed changes to the MOX facility design, but rather with the facility *as designed* being able to accommodate an interruption in the transfer of stored liquid high alpha waste out of the MOX facility that could significantly influence the facility’s environmental impact and safe operation. LBP-07-14, 66 NRC at 204.

Contention 6, in contrast, revolves around the possibility of future design changes to the facility. As such, it is entirely speculative and would for that

⁴⁸ Staff Answer to Contention 6 at 9 (citing *McGuire/Catawba*, CLI-02-14, 55 NRC at 295).

⁴⁹ Furthermore, the Applicant notes that the Amended ROD itself indicates that DOE is preparing a separate EIS (a document presumably not yet complete as it was not furnished by any of the parties) on the issue of how to dispose of the surplus plutonium that may be transferred to the SRS for storage. Applicant Answer to Contention 6 at 4 n.7. In the event that DOE eventually decides to dispose of some or all of the additional plutonium at the MOX facility, it may well be that a contention focusing on this subject matter would then be both ripe and timely to present.

reason be inadmissible at this stage even absent the restrictions on environmental contentions in general.⁵⁰

III. REFORMULATED CONTENTION 4

Contention 4 was originally synopsised by the Petitioners in this fashion:

Whether the License Application for the proposed plutonium processing facility is inadequate because it does not address safety and public health risks posed by indefinite storage of liquid high-alpha waste at the site or contain measures for the safe storage of that waste.

Petition at 6. A complete, full-page statement of the original contention can be found later in the Petition (at 23). Because that full statement also incorporates by reference the several pages (Petition at 17-23) of material supporting Contention 3, its precise dimensions are the subject of some ambiguity. We attempted to cure this ambiguity and to eliminate overlap with Contention 3 in the manner described below.

A. Board Proposal to Recast Contention 4

As mentioned in Section I.B.4 above, on January 16, 2008, a week after the second oral argument, the Board recast Contention 4 and submitted that draft to the parties for their consideration, along with a brief explanation of the reasoning behind the Board's proposed revisions. Order Recasting Contention 4. The Petitioners thereupon indicated that they agreed with the contention as recast and were indeed willing to proceed with its litigation.⁵¹

The Applicant, expressing some concern with the proposed revised contention, took the constructive steps of (1) submitting several proposed changes to the Board's version and (2) indicating that it would not object to our admitting the recast contention if those changes were incorporated in the final version.⁵² For its part, as noted above, the NRC Staff responded by reiterating its opposition to the original contention and by further objecting to the Board's proposal, including the addition of a reference to, and the role of, the Staff's earlier SER.⁵³

⁵⁰ In light of the disposition we make of this contention, we need not address its alleged belatedness.

⁵¹ Petitioners' Response to Order Recasting Contention 4.

⁵² Applicant Response to Order Recasting Contention 4.

⁵³ Staff Response to Order Recasting Contention 4.

1. *The Board's Initial Proposal*

As reshaped by the Board (including the relevant portions of Contention 3 incorporated by reference), the new Contention 4 proposed to the parties read as follows:

CONTENTION 4:
LICENSE APPLICATION FAILS TO ADDRESS
HAZARDS POSED BY UNPLANNED INTERRUPTIONS
IN THE TRANSFER OF RADIOACTIVE WASTE

The License Application and Integrated Safety Analysis Summary (ISA Summary) for the proposed mixed oxide fuel fabrication facility (MOX FFF) are inadequate because they do not address safety and public health risks posed by an inability to transfer waste from the facility, resulting in the need to forego receipt of radioactive materials and/or to safely shut down the facility and to store liquid high-alpha waste at the site for an extended period of time.

The MOX FFF License Application does not assure that there is always sufficient waste storage capacity to bring the facility to a safe configuration in the event that waste transfer is interrupted, in that it fails to describe how active waste generating operations would be terminated or curtailed before the waste storage capacity exceeds design limits, allowing for any backlog of waste in the facility. *See* NUREG-1821 (MOX FFF Construction Authorization Request FSER), § 11.2.1.3.11, p. 11-48 in which the NRC Staff required that actual setpoints would be provided in the License Application. This requires that a detailed evaluation be performed and coordinated with the ISA Summary.

Additionally, the License Application does not address the safety issues associated with waste aging within the facility given protracted onsite storage that might be occasioned by a delay in waste transfer operations caused by circumstances either within or outside the facility boundary. This would entail including in the ISA Summary procedures for the identification and mitigation of any hazards posed by aging wastes over short, intermediate, and long duration timeframes. *See* Letter from Graham B. Wallis [ACRS], to Nils J. Diaz, Review of the Final Safety Evaluation Report for the Mixed Oxide Fuel Fabrication Facility Construction Authorization Request (Feb. 24, 2005).

Order Recasting Contention 4 at 5.

2. *Legal Authority for Board Reformulation of Contentions*

As we noted in the unpublished order that transmitted the recast Contention 4,⁵⁴

⁵⁴Order Recasting Contention 4 at 3.

Licensing Boards, though not *obligated* to reformulate contentions,⁵⁵ are *permitted* to do so in certain circumstances.⁵⁶ In a seminal decision, the *Susquehanna* Board rewrote many of the petitioner's contentions, noting that

such a course commended itself to us because of the similarity of different contentions, the commingling in some contentions of certain extraneous, irrelevant, or legally unacceptable statements, and the desirability of defining issues simply and directly, while including therein all matters raised by the petitioners which are suitable for litigation in this proceeding.

Id. at 296. There would appear to be more cause for a Board to take such action when (as was the case here when Contention 4 was first proposed) petitioners are appearing *pro se*. In such instances, material embracing legitimately admissible contentions may not be presented as clearly as would be expected when counsel familiar with our proceedings has been retained for contention-drafting purposes.⁵⁷ As we also noted, a Board's authority in this area is circumscribed in the sense that it may not, on its own initiative, provide basic, threshold information required for contention admissibility.⁵⁸ In the final analysis, a Board may reframe admissible contentions "for purposes of clarity, succinctness, and a more efficient proceeding," but must not add material not raised by the petitioners to make an otherwise inadmissible contention admissible.⁵⁹

With that limitation in mind, Licensing Boards in recent cases have reformulated a wide range of contentions in order either to *eliminate extraneous issues* or to *consolidate related issues for a more efficient proceeding*.⁶⁰ Authority for

⁵⁵ *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974).

⁵⁶ *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979).

⁵⁷ *Pro se* petitioners are not "held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973). In this vein, *see Zion*, ALAB-226, 8 AEC at 406, where the Appeal Board noted that "[p]lainly there is no duty placed upon a licensing board by the Administrative Procedure Act, or by our Act and the regulations promulgated thereunder, to recast contentions offered by one of the litigants for the purpose of making those contentions acceptable." This was especially true when "the party is represented by competent legal counsel." *Id.*

⁵⁸ Order Recasting Contention 4 at 3-4 (citing *Arizona Public Services Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)). *See also PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 23 (2007); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

⁵⁹ *In the Matter of Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006) (citing *Palo Verde*, CLI-91-12 at 155).

⁶⁰ *See* Order Recasting Contention 4 at 4 n.3 for a list of recent published orders in which Licensing Boards have reformulated contentions.

both types of reformulation is found in 10 C.F.R. § 2.319(j), which authorizes the presiding officer to hold conferences “before or during the hearing for settlement, simplification of contentions, or any other proper purpose,” and in section 2.329(c)(1), which specifies that a prehearing conference may be held for “[s]implification, clarification, and specification of the issues.”

3. *Rationale for the Board’s Proposal Regarding Contention 4*

In reformulating the Petitioners’ contentions in the fashion it did, the Board took into account the two-stage process for licensing the MOX facility, which we described in our October 31, 2007, Order and in Section I.A.1 above. *See* LBP-07-14, 66 NRC at 176, 184. In order to ensure that there remained no ambiguity regarding the issues to be raised by Contention 4, the Board restated Contention 4 with the specific intent of eliminating environmental issues and materials that are beyond the scope of this proceeding, rather than allowing such extraneous material to be blended with the safety issues that may more properly be considered.

Having said that, we did draw upon certain material presented in Contention 3, and incorporated by reference in Contention 4, to the extent that it did bear upon the safety issue embodied in Contention 4. The recast Contention 4 removed any reference to Contention 3, but preserved what the Board perceived to be the intent of the contention, which was to identify a deficiency in the License Application associated with the potential safety effects of the inability to transfer waste in terms of facility startup, safe shutdown, and protracted waste storage. In particular, the Board noted that the Petitioners cited the sections of the License Application that they challenge in their discussion of Contention 3, and that the significance of the ACRS letter cited in Contention 4 is explained at some length in Contention 3. Petition at 18. Such elements legitimately belong to both contentions and can be incorporated into Contention 4 without inappropriately mixing environmental and safety considerations.

B. *Ruling on Parties’ Proposed Contention 4 Revisions*

As indicated above, both the Applicant and Staff objected to certain aspects of the recast version of Contention 4 put forward by the Board. In the prehearing conference portion of the April 9, 2008, session, we discussed the specifics of each objection and how the related changes they had suggested would eliminate those objections. Tr. at 404-45. We address each of those objections below, and for the reasons there set out, we (1) accept the Applicant’s suggestions in their entirety, but (2) reject the Staff’s main objection as nonmeritorious (while

adopting its other ones). We then present the revised contention in its final form, and admit it for adjudication.

1. The Applicant's Objections and Suggestions

The Applicant characterized its objections as falling into two categories: two were said to raise "legal issues," and four dealt with "corrections and clarifications." We address them in that manner, and do so in a much abbreviated fashion where no controversy remains.

a. Applicant's "Legal Issues"

(i) "LIQUID HIGH-ALPHA WASTE" v. WASTE GENERALLY

The Applicant objected to the general nature of the recast contention's concern with *all* radioactive waste, as opposed to the original contention's having specified "liquid high-alpha waste" as the concern. The Petitioners agreed to accept this limitation,⁶¹ and the Staff assured us that its eventual regulatory review of the Application and of facility construction would address all waste streams, not just the one now to be the focus of the contention. Tr. at 405-07. In that circumstance, the Applicant's suggested revision is accepted.

(ii) PROBLEMS "OUTSIDE FENCE" ONLY v. PROBLEMS "INSIDE FENCE" AS WELL

At oral argument, counsel for the Applicant argued that "the contention, as written, . . . is intended [only] to address the problem of the unavailability of the WSB to receive waste" and of any measures that might be necessary in order for the MOX facility to store liquid high-alpha waste over a period of time as a result of that unavailability. Tr. at 429. According to the Applicant, extending the contention to cover any problems with waste management *within* the MOX facility itself is inappropriate. Tr. at 430. The Petitioners disagreed, arguing that the problem is not just whether the WSB is built and in a condition to receive waste, but also whether the waste produced within the MOX facility meets the waste acceptance criteria for sending it to the WSB. Tr. at 435. For this reason, the Petitioners said, a broader inquiry into the waste issue is appropriate. Tr. at 435-36.

The Board noted, however, that Contention 4 incorporated the material sup-

⁶¹ Intervenors' Response to Shaw Areva MOX Services' and NRC Staff's Proposed Changes To Recast Contention 4 (Feb. 19, 2008) [hereinafter Petitioners' Response To Recast Contention], at 1-2; Tr. at 405.

porting Contention 3, which appeared to focus on problems of a nature that might occur only *outside* the MOX facility. Tr. at 432. On this score, the Applicant and the Petitioners disagreed fundamentally about the proper way to interpret the ACRS letter cited in Contention 4. The Applicant believes that that letter, too, refers almost exclusively to the potential unavailability of the WSB, Tr. at 433-34, while the Petitioners maintain that it also refers to events within the MOX facility that might render the waste unacceptable for processing at the WSB. Tr. at 437.

Although an argument exists that the contention should be framed more broadly, we sustain the Applicant's objection and limit the contention as requested. We do so with, and on, the understanding that the crucial points sought to be raised by the contention (and of especial concern to both the ACRS and to this Board) will be addressed even under the limited version.⁶²

b. Applicant's Other Objections

(i) OTHER MEASURES GENERALLY v. SPECIFIC NAMED MEASURES ONLY

The Applicant objected to the specificity with which one aspect of the contention was restated, i.e., where the Board's version reflected an assumption that particular named actions would have to be taken in the event of a failure; the Applicant suggested that the contention should also leave open the possibility of taking other remedial measures as well. The Petitioners concurred in the Applicant's quite reasonable suggestion.⁶³ We agree as well.

(ii) SER SETPOINT "EXPECTATION" v. SER SETPOINT "REQUIREMENT"

The Applicant argued that, in redrafting the contention, we should not have converted the Staff's stated "expectation" that setpoints would be needed into a future "requirement" that they be in place, and instead that such a step should await further developments and analyses. In the absence of any objection from the Petitioners, we grant the Applicant's request.

(iii) "POSSIBLE" PROBLEMS v. "GIVEN" PROBLEMS

The Applicant correctly pointed out that we referred to certain problems as "given" when we intended to be speaking hypothetically. We agree that referring to them as "possible" problems would better reflect the situation presented, and we thus accept the Applicant's suggestion.

⁶² See Tr. at 429, lines 17-25 (Mr. Silverman); Tr. at 434, lines 15-22 (Judge Trikouros); Tr. at 434-35 (Mr. Silverman).

⁶³ Petitioners' Response to Recast Contention at 3; Tr. at 409.

(iv) “ANALYSES” v. “PROCEDURES”

The Applicant urged that our reference in the revised contention to the need for certain “procedures” would have been better stated had we referred to the need to conduct future “analyses.” The suggestion is accepted.

2. *The Staff’s Objection to Including an SER Reference*

The Staff’s major objection⁶⁴ to the form of the reframed contention is its inclusion — for purposes of providing support for the need for a particular requirement the contention seeks to have imposed — of a reference to the Safety Evaluation Report (SER) prepared by the Staff at the earlier construction authorization stage of the proceeding.⁶⁵ The Staff first argues that the SER was not specifically mentioned in Contention 4 (or in the incorporated-by-reference Contention 3) as originally drafted by Petitioners. The Staff, supported by the Applicant, goes on to assert that in any event the earlier SER does not and cannot of itself establish *any* binding requirements (Staff Response to Order Recasting Contention 4 at 6), for those are found only in the governing statutes, regulations, and other materials. *Id.*; Tr. at 411-14.

The Staff is wrong on both counts. Although the SER was not explicitly mentioned in the original version of the contention, the SER was the precise subject of, and was thus reflected in, the letter from the ACRS that the Petitioners did cite explicitly. In reviewing the SER, that letter focused in part on the very issues raised by the Petitioners. In these circumstances, it is thus but a small and appropriate step to highlight explicitly in the revised contention the material already implicitly embodied in the original contention.

Of course, in a larger sense the matter is not a consequential one. Whether or not the referenced SER *citation* appears in the revised contention, the relevant SER *material* will deserve attention in any adjudication that may eventually take place on the contention.

What is far more consequential are the implications of the Staff’s second argument, i.e., that an SER prepared at one stage lacks force at the next stage. The Staff appears to be arguing here that a definitive statement in an earlier SER about the need to resolve a serious matter in a future license application, a

⁶⁴The Staff lodged two other objections. One mirrors the Applicant’s concern (*see* pp. 484-85, above) about extending the contention to include problems created “within” the site boundary (Staff Response to Order Recasting Contention 4 at 6). The other suggests the inclusion of a clarifying reference (*id.* at 7), a suggestion which we adopt (*see* final version of contention, pp. 487-88, below).

⁶⁵Staff Response to Order Recasting Contention 4 at 3-6 (discussing NUREG-1821, Final Safety Evaluation Report on the Construction Authorization Request for the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina (Mar. 2005) (ADAMS Accession No. ML050960447)).

determination that paves the way for awarding the first license (here a construction authorization), has no essential force at the second stage, when the time arrives to take the steps previously said to be needed.

It is possible that we have misapprehended the thrust of the Staff argument. If the Staff meant to say only that an earlier SER is not self-executing, and that its solutions must first be translated into license conditions, or the like, to have legal force, its position might well be valid. But, looked at in context, the Staff seemed to be arguing that the determinations embodied in and relied upon in an earlier SER may or may not be followed in the next licensing phase. If that is the position being asserted, then much of the underpinning of, and reliance placed upon, the Staff's regulatory review would be vitiated.

Such a position must be rejected. For now, however, we content ourselves, for purposes of the specific matter before us, with leaving intact the SER reference we placed in the reframed Contention 4.

3. *Final Version of Contention 4 for Adjudication*

To complete the evolution of Contention 4, we have amended the recast version that we earlier presented to the parties to reflect the proposed changes and suggestions that we have just accepted. That process yields a final revision of the contention — asserting that the approach taken by the Applicant thus far falls short of what is required of an ISA Summary (*see* 10 C.F.R. §§ 70.60, 70.61, 70.62(c) — that reads as follows:

CONTENTION 4:
LICENSE APPLICATION FAILS TO ADDRESS
HAZARDS POSED BY UNPLANNED INTERRUPTIONS
IN THE TRANSFER OF RADIOACTIVE WASTE

The License Application and Integrated Safety Analysis Summary (ISA Summary) (Chapter 5 of the license application) for the proposed mixed oxide fuel fabrication facility (MFFF) are inadequate because they do not address safety and public health risks posed by an inability to transfer liquid high-alpha waste from the facility, resulting in the need to forego receipt of radioactive materials, safely shut down the facility, or take other appropriate measures, and to store liquid high-alpha waste at the site for an extended period of time.

The MFFF License Application does not assure that there is always sufficient liquid high-alpha waste storage capacity to bring the facility to a safe configuration in the event that liquid high-alpha waste receipt by DOE is interrupted, in that it fails to describe how active waste generating operations would be terminated or curtailed before the liquid high-alpha waste storage capacity exceeds design limits, allowing for any backlog of such waste in the facility. *See* NUREG-1821 (MFFF Construction Authorization Request FSER), § 11.2.1.3.11, p. 11-48, in which the

NRC Staff stated its expectation that actual setpoints would be provided in the License Application.

Additionally, the License Application does not address the safety issues associated with liquid high-alpha waste aging within the facility due to possible protracted onsite storage that might be occasioned by a delay in liquid high-alpha waste transfer operations caused by an unplanned interruption in the receipt of liquid high-alpha waste by DOE. This would entail including in the ISA Summary analyses of hazards posed by aging liquid high-alpha wastes over short, intermediate, and long duration timeframes. See Letter from Graham B. Wallis [ACRS], to Nils J. Diaz, Review of the Final Safety Evaluation Report for the Mixed Oxide Fuel Fabrication Facility Construction Authorization Request (Feb. 24, 2005).

As thus restated, the contention reflects all of the suggestions that the Applicant presented. Once again, the Applicant indicated that incorporation of those suggestions would eliminate its objections to the admission of the contention.⁶⁶

IV. NEW CONTENTION, CURRENT ACTIVITY, AND FUTURE DIRECTION

A. Situational Overview

Some time ago, the Commission established, initially in the environmental arena, the concept of a “contention of omission.”⁶⁷ Under this concept, those opposing a planned license may launch a challenge by simply pointing out that the license proponents had failed (i.e., omitted) to address a particular matter *at all*. Once the license proponents address the omission, the original contention of generalized omission becomes moot by its terms, but may be replaced by a particularized contention arguing that the action curing the omission is deficient in some substantive respect.⁶⁸

In advancing Contention 7, the Petitioners in effect filed a “grand contention of

⁶⁶ Applicant Response to Order Recasting Contention 4 at 1; Tr. at 405.

⁶⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002) (cited and discussed in our earlier opinion herein, LBP-07-14, 66 NRC at 206 n.88 & accompanying text).

⁶⁸ As the Commission put it: “There is, in short, a difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.” *McGuire/Catawba*, CLI-02-28, 56 NRC at 382-83. Although the Commission was speaking in terms of a failure *to supply information* (the omission issue then before it), we have been pointed to no reason, and are aware of none, why the principle there enunciated is not equally applicable to the difference between a challenge to a license proponent’s failure *to take action* (the analogous “omission”) and a challenge to the substance of the action once taken.

omission” addressing the current absence of an overriding regulatory precondition to the award of an operating license — namely, the 10 C.F.R. § 70.23(a)(8) requirement that every major aspect of the facility “has been completed” in accordance with its design.⁶⁹ Although the Applicant and Staff have been heard to state the matter differently, the Petitioners were essentially relying upon the undisputed and incontestable fact that the facility’s major aspects could not have been “completed” within the meaning of the regulation because construction of them had just begun.

The filing of Contention 7 appeared intended not to create the need for an early adjudication of its merits but simply to preserve the “completion” issue for subsequent litigation. The need for such a placeholder was triggered, explain the Petitioners, by the enunciation of a Staff position at the January 8, 2008, oral argument that the section 70.23(a)(8) finding would likely be made without notice and well in advance of actual “completion” of construction.⁷⁰ *See* pp. 472-73, above.

Whatever may be said of that Staff position — and as the matter progressed we indicated that its ramifications needed to be addressed⁷¹ — and of the resulting need for and appropriateness of Contention 7, the matter was essentially mooted just before the most recent oral argument. At that time, the Staff notified us of a change in litigating position whereby it abandoned the questionable regulatory interpretation previously advanced and indicated it would await the completion of construction before (if warranted) issuing the license.⁷²

With the controversy over the prior Staff position thus mooted, some of the rationale underlying the filing of Contention 7 was removed. Its admissibility remains, however, to be decided, and we turn now to that question.

B. Admissibility of Contention 7

The admission of Contention 7 — presented in elegantly simple form — could be justified in order to preserve, untrammelled, the Petitioners’ litigation options on this, one of the unusual issues presented by the publication of a notice of hearing on an operating license for a facility at the nascent stages of a 6-year construction process. Nonetheless, a better approach commends itself to us. Given the Staff’s change of position as to the timing of the “completion” finding, the long construction process ahead, and the impracticality of litigating

⁶⁹ We attach the adjective “grand” to this contention because it focuses on the feature of this proceeding which the Commission previously singled out as its major focus. *See* pp. 466-67, above, text accompanying note 10.

⁷⁰ Petitioners’ Case Management/Contention 7 Response at 3-5; Tr. at 458-59.

⁷¹ *See* Order Regarding Content of Answers at 1-2; March 26 Oral Argument Order at 3.

⁷² NRC Staff’s Notification of Change of Approach (Apr. 7, 2008) at 1.

this contention before its time, we have decided against admitting the contention and having it sit open on the docket as a placeholder for the future.

Instead, we are dismissing the contention, but only on the condition that the Applicant and the NRC Staff take the following action at the appropriate time: (1) the Applicant will give the Petitioners at least 60 days written notice prior to asking the Staff to make the “completion” finding; and (2) the Staff, once asked by the Applicant, will provide Petitioners at least 30 days written notice⁷³ prior to making its decision on the “completion” finding.

In this fashion, the Petitioners will have reasonable notice of an opportunity to formulate — in an effective and efficient manner — any challenges they may then have to the substance of that finding, and to present such a substantive contention without the need for extraordinary allotments of additional time (beyond the norm) to do so. Failure of the license proponents, or either of them, to honor this condition will be deemed to provide “good cause” — calculated on a day per day basis — for delayed filing of any substantive contention the Petitioners may bring on this subject.

C. Stay of Construction

The Petitioners have also asked us to pass on to the Commission their request that construction of the MOX facility, and this hearing process, be suspended “until the design of primary safety and security systems is complete.”⁷⁴ According to the Petitioners, “[i]f — as contemplated by the regulations — the primary features of the facility design are completed before the operating license proceeding begins — the procedural problems that now plague this proceeding are likely to be resolved.” *Id.* The Petitioners cite several ways in which they allege that the current design is incomplete, among them the lack of sufficient waste storage capacity, the possibility of design changes to accommodate additional feedstocks, and possible discrepancies regarding the standards to be applied in protecting the facility from terrorist threats. *Id.* at 6-8.

The Applicant argues that this request “is effectively a motion to stay the effectiveness of the Construction Authorization issued by NRC Staff,” and that it should be denied because it is extremely late and does not address the factors for granting such a stay that are laid out in 10 C.F.R. § 2.1213. MOX Services Answer to Feb. 11 Response at 15. According to the Applicant, the Petitioners should have made this request of the licensing board presiding over the earlier CAR proceeding, and the request should have been submitted within 5 days of the Construction Authorization issuance on April 6, 2005. *Id.* (citing 10 C.F.R.

⁷³ If the Staff process for making the “completion” finding is to take fewer than 30 days, the Staff shall instead provide notice of the start of that process and of its expected duration.

⁷⁴ Petitioners’ Case Management/Contention 7 Response at 10.

§ 2.1213(a)). Further, the Applicant says, the Petitioners' request does not even attempt to address the four factors that influence the grant of stay under 10 C.F.R. § 2.1213(d):

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm the other participants; and
- (4) Where the public interest lies.

Id. at 15-16.

The Applicant goes on to argue that, were these factors addressed, they would weigh against issuing the stay, because the stay would harm the Applicant's interests and because the public interest lies in completing the facility without unneeded delays or costs. *Id.* at 16. The Applicant further asserts that some of the alleged flaws in the design that the Petitioners cite are themselves contentions that have been submitted for resolution in this proceeding (in particular Contentions 4 and 6), while others are simply speculative. *Id.* at 17-20.

The NRC Staff agrees that the Petitioners' request should be treated as a request for a stay, and agrees with the Applicant that the Petitioners have failed to meet the standards for granting such a stay.⁷⁵ In any event, the Staff says, the request "runs afoul of the construction authorization approved under section 70.23(b)," and of the overall procedure for licensing the MOX facility. *Id.* at 17. Furthermore, the request was untimely because it should have been submitted to the CAR board within 10 days of the decision of the presiding officer to approve the construction authorization request. *Id.* at 18 (citing 10 C.F.R. § 2.342(e)). Finally, the Staff claims that the Petitioners have failed to demonstrate that permitting construction to proceed would cause an irreparable injury. *Id.* at 18-20. For all these reasons, the Staff argues that the request should be denied.

The Board agrees that this pleading should be treated the same as a motion to stay; we should therefore not pass it along to the Commission without first determining that it has some merit based on the classic four factors listed in the regulations, which reflect the similar judicial precedents.⁷⁶ We find that these four factors mandate our denying the Petitioner's request. Accordingly, we need not address the issue of which timeliness test applies to this situation.⁷⁷

⁷⁵ NRC Staff Response to Feb. 21 Order at 17. Staff and Applicant each point to different regulations governing motions to stay with the Staff using 10 C.F.R. § 2.342(e) and the Applicant pointing to 10 C.F.R. § 2.1213(d); however, each of these regulations includes the same factors to be analyzed.

⁷⁶ 10 C.F.R. § 2.1213(d); 10 C.F.R. § 2.342(e).

⁷⁷ Under 10 C.F.R. § 2.342(a), a party must file the stay application within 10 days after service of the decision, while under 10 C.F.R. § 2.1213(a), a party has 5 days to file its stay application after the issuance of the notice of the Staff's action.

Under the first of these factors, the Petitioners have not shown that they will be irreparably harmed if the stay is not granted. To be sure, the Petitioners raise various design issues; they do not, however, indicate how a failure to address these issues now will cause irreparable injury. The Petitioners have also failed to make a strong showing that ultimately they will prevail on the merits, as for example by demonstrating that the initial decision of the Licensing Board in the CAR proceeding was in error. In essence, the Petitioners' request asks us to look at issues that were clearly in the purview of the board that handled the CAR, and were resolved in the course of the initial proceeding by that Board's approval of the design bases of the principal structures, systems, and components.⁷⁸ We do not believe the Petitioners have provided the support for a determination that the CAR board was in error, and the structure of this licensing process does not permit us to reopen issues resolved by the earlier proceeding absent circumstances that do not appear to exist here.

Of course, as we have already discussed, the Staff has yet to make the section 70.23(a)(8) determination — relevant and requisite to this proceeding — that the facility's principal structures, systems, and components have been constructed in accordance with the Application. It may be that at that juncture the merits of some of the matters underlying the stay motion will be ripe for consideration. *See* p. 490, above.

Finally, it is clear that a stay would harm the Applicant by adding to the costs and uncertainties involved in constructing the MOX facility. And it is far from clear that there is any overriding public interest that would be served by staying the proceeding.⁷⁹

Insofar as we have treated the Petitioners' request as the equivalent of a stay motion, we therefore deny it. We also find that it lacks sufficient merit to warrant passing it up to the Commission.⁸⁰

⁷⁸ *See* 66 Fed. Reg. at 6,701.

⁷⁹ The Board also notes that, to the extent that the grounds for the stay overlap any contentions already submitted herein, our determinations related to those contentions apply to the stay as well. The Applicant alleges that the part of the stay request focusing on waste issues is a variation on Contention 4 (MOX Services Answer to Feb. 11 Response at 17), a contention that remains a part of this proceeding and will be resolved as litigation progresses. Additionally, the part of the stay request that discusses additional feedstocks is similar to Contention 6, *id.*, which has already been rejected for reasons discussed. *See* pp. 478-80, above. Other parts of the Petitioners' request fall short in that, although they do not duplicate existing contentions, they fail to satisfy the applicable regulatory standards for granting a stay.

⁸⁰ In light of our determination that each of the four factors is lacking, our conclusion is not affected by the Supreme Court's recent decision concerning the importance of one of the factors. *Munaf v. Geren*, No. 06-1666, 553 U.S. ___ (slip op. at 12-13) (June 12, 2008).

D. Case Management Approach

In our earlier opinion, we expressed some concern over the logistical and related problems threatened to be created by launching an operating license proceeding before construction had begun.⁸¹ In an effort to anticipate those problems, we suggested for the parties' consideration a number of approaches that might provide a sensible alternative to the admission of one or more contentions which, by their nature and in light of the nascent stage of facility construction, would not be suitable for litigation for some time. LBP-07-14, 66 NRC at 206-09. In addition, we asked the parties to confer to see if they might agree on any form of case management approach that would allow for a more effective and efficient proceeding. As a result, these subjects were discussed at some length during the January and April oral sessions.

Without reciting the various positions taken and arguments advanced, it became clear that no wholesale innovations were both desired by the participants and workable. Nonetheless, we are faced with having to apply, to an unusual adjudicatory situation, a regulatory regime which was written with different types of adjudications primarily in mind. Upon reflection, it appears that a "wait-and-see" attitude, and a minimalist approach, is most appropriate at this time.

On a related subject, it has been customary in other proceedings for licensing boards, after intervention has been allowed, to establish a specific time period after the occurrence of a triggering event during which new contentions will, if filed within that time, be deemed to have been filed "in a timely fashion based on the availability of the subsequent information" within the meaning of 10 C.F.R. § 2.309(f)(2)(iii). Many times, boards have selected 30 days as that specific presumptive time period.⁸²

We think that a longer period is justified here. At several junctures during this proceeding, we have noted the enormity of the task — either in terms of the volume of paperwork or the system for its dissemination — facing citizen-intervenors who are monitoring the publication of documents on the progress of facility

⁸¹ To be sure, no law or regulation *precluded* the Applicant from filing its application when it did, but neither was the Applicant *required* to submit it that early. Tr. at 227-28. It appears that once the Applicant made that election, the Staff was required to notice the application, once it was docketed, for possible hearing.

⁸² See, e.g., *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR (ASLBP No. 06-849-03-LR), Licensing Board Order (Initial Scheduling Order) (Nov. 17, 2006) at 7 (unpublished); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Docket No. 50-293-LR (ASLBP No. 06-848-02-LR), Licensing Board Order (Establishing Schedule for Proceeding and Addressing Related Matters) (Dec. 20, 2006) at 7 (unpublished); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Docket No. 52-011-ESP (ASLBP No. 07-850-01-ESP-BD01), Licensing Board Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 3 (unpublished).

planning and construction in an effort to file timely new contentions. Given the disparity in resources, the Applicant's choice to file well in advance of the start of construction should not be allowed to place upon the Petitioners the burden of having to face, continuously for the entirety of a 6-year construction period, a rolling 30-day deadline for monitoring, reviewing, analyzing, and critiquing documents. That period is too short in these circumstances.

Given the length of time that this proceeding will consume, there is no room for the Applicant to argue that its interests, or the public interest, would be harmed by extending the Petitioners' time. After all, an extension of a rolling 30-day deadline to, for example, a rolling 60-day one, confers the benefit of doubling the Petitioners' time to prepare any one contention while adding a total of only 30 days — during a 6-year construction period — to the *overall* time Petitioners will have to file contentions. This would seem a worthwhile investment in making the opportunity for a hearing a meaningful one.

Until amended by us on a showing of changed circumstances, then, new or amended contentions filed in this proceeding will be deemed timely if filed within *60 days* of the Petitioners learning, or being in position to learn, of the availability of information about the event or document triggering the filing of such a contention. If additional time to file is needed, Petitioners may, before the expiration of the 60 days, seek an extension based on a showing of need; if such an extension is granted, the new or amended contention(s) will likewise be considered timely.

V. ORDER

For the foregoing reasons (and with Judge Farrar filing a concurring opinion), the Board takes the following actions:

1. On reconsideration, Contention 3 is DISMISSED and Contention 4 is ADMITTED;
2. The Petitioners having previously been found to have standing, and one of their contentions now having been found admissible, their Petition To Intervene and Request for a Hearing is GRANTED;
3. Recently filed Contention 6 is DISMISSED;
4. Recently filed Contention 7 is DISMISSED, on the condition that future notice concerning the subject matter of the contention be provided as detailed on p. 490 above;⁸³

⁸³Specifically, those notice conditions require (with an explanatory footnote omitted) that “the Applicant and the NRC Staff take the following action at the appropriate time: (1) the Applicant will
(Continued)

5. The request that we refer the motion for a stay of construction to the Commission is DENIED; and

6. The 60-day period detailed in the Case Management Approach section of this opinion is ADOPTED to govern the filing of such contentions as may hereafter be submitted.

Appeal Rights

The agency's Rules of Practice provide, in 10 C.F.R. § 2.311, that within 10 days after service of this Memorandum and Order (which shall be considered to have been served by regular mail for purposes of calculating that date) an appeal can be taken, in the format prescribed, to the Commission on the question whether the Petition to Intervene "should have been denied in its entirety."⁸⁴ Responses to any such appeal are due within 10 days after service of the appeal. 10 C.F.R. § 2.311(a). The appeal and any answers shall conform to the requirements of 10 C.F.R. § 2.341(c)(2).

Under the regulation (cited above) governing appeal rights at this juncture, so long as one contention is admitted, dismissal of other contentions is deemed interlocutory in nature. Those dismissals are therefore not subject to appeal by the Petitioners until the proceeding is later terminated or unless the Commission directs otherwise. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360, 361 (2003). Accordingly, Petitioners need not take any action at this time to preserve any challenge they may later wish to bring to our dismissal rulings.

Because our declining to refer the Petitioners' request for a stay of construction to the Commission was the equivalent of the direct denial of a stay motion, a petition for review may be filed, pursuant to 10 C.F.R. § 2.341(b)(1) and (f)(2), within 15 days after service of this Memorandum and Order (which shall be considered to have been served by regular mail for purposes of calculating that date).⁸⁵ Answers to any such petition are due within 10 days after service of the petition, and the petitioner may file a reply within 5 days of service of any answer.

give the Petitioners at least 60 days written notice prior to asking the Staff to make the 'completion' finding; and (2) the Staff, once asked by the Applicant, will provide Petitioners at least 30 days written notice prior to making its decision on the 'completion' finding."

⁸⁴ If the Applicant were to take such an appeal, it would be for the Commission to determine the estoppel impact, if any, of the Applicant's earlier representation that Contention 4 would be acceptable were the Board to adopt the Applicant's suggestions as to that contention's content. *See* p. 488, above.

⁸⁵ Under an earlier version of the agency's rules, stay motions were appealable under former 10 C.F.R. § 2.786(g), as applied by the Commission in *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998) and in *Duke Cogema*, 55 NRC at 205, 214 n.15. Because the provisions of the new rules cited in the text roughly correspond to

(Continued)

10 C.F.R. § 2.341(b)(3). The petition and any subsequent filings shall conform to the requirements of 10 C.F.R. § 2.341(b) and (f)(2).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Lawrence G. McDade
ADMINISTRATIVE JUDGE

With respect to the concurring opinion of Judge Farrar that follows (pp. 497-508), his colleagues believe that the expression of those views is not necessary to a decision on the matters now before us.

Rockville, Maryland
June 27, 2008

Copies of this Memorandum and Order were sent this date by e-mail to counsel for (1) Applicant Shaw AREVA MOX Services, (2) the NRC Staff, and (3) Petitioners Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information and Resource Service (NIRS).

former section 2.786(g), the Petitioners should, *absent contrary Commission directive*, follow the same appeal procedure that was previously in force.

Concurring Opinion of Judge Farrar

I agree with the Board's disposition of the pending matters and with the reasoning that led to that result. I offer these additional thoughts because this proceeding has, in my view, highlighted a number of troubling aspects about practices that have developed and are being employed in the operation of the NRC's regulatory and adjudicatory systems.

Concededly, as my colleagues note in declining to join in these thoughts (*see* p. 476), it is not ordinarily within our judicial role to provide comments that are not necessary to decide the issues pending before us. But because the matters involved could affect the future of this proceeding, as well as upcoming proceedings, I believe that it would serve the public interest to bring them to the attention of the Commission.

The first matter involves the NRC's internal safety culture. There is general agreement that plant safety is, in the first instance, crucially dependent on the existence of a robust industrial safety culture. Looking beyond that principle, the Commission has stressed the need for that same type of safety culture to drive the performance of the NRC Staff in its regulation and oversight of the industry. In my judgment, this proceeding has exposed matters that might indicate that that culture is being undermined — and thus ought to cause those responsible for instilling that Staff culture, and nurturing its existence, to take notice.

The other matters center on potential intervenors' right to a hearing, which is an empty promise unless there is an opportunity to be heard "at a meaningful time and in a meaningful manner."¹ It is in that spirit that this concurrence respectfully suggests a need for Commission directives or policies that would enable agency adjudications to proceed differently when circumstances call for it. Specifically, those adjudications should be conducted in a way that more nearly assures that the agency's hearing process — one of the means by which nuclear safety is promoted and the natural environment protected — makes the hearings mandated by the Atomic Energy Act "meaningful."

In that regard, this proceeding has illustrated how the adjudicatory system established by the Commission can become contorted so as to place artificial — even unfair — barriers in the way of those citizens, organizations, or governments genuinely seeking to participate in a constructive manner. The Commission made its intervention rules "strict by design" — but that does not justify what we have seen here.

The proceeding has also focused attention on the unnecessarily short and burdensome time periods that routinely govern potential intervenors' prehearing participation in the adjudicatory process. In contrast, industry parties are routinely — and quite properly — granted great blocks of time, both within and outside the

¹*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

adjudicatory process, to prepare or to reformulate their presentations. All agree that the better an Applicant's presentation, the more that safety will be promoted. But does not the Atomic Energy Act require us at least to allow for the possibility that the same might be said of a particular Intervenor's presentation?

1. Safety Culture

The NRC Staff quite rightly focuses, in the course of conducting its regulatory mission, on the safety culture of an Applicant organization. It does so on the universally held theory that the absence of a fully committed dedication to the promotion of safety throughout an organization will eventually result in safety shortcomings, regardless of whether a snapshot reveals safety deficiencies at the moment. We need not belabor the point — the extent of, or lack of, a licensee's safety culture is a key point in the nuclear regulatory scheme administered by the Staff.²

The significance of having a well-developed safety culture is not limited to the regulated industry. Examination of the agency's policy directives and other official records indicates that, from the Commission on down, the strength of the Staff's own performance is, not surprisingly, also viewed as highly dependent upon its own internal safety culture.³

The approaches the Staff took to two matters during this proceeding appear to raise concerns about the robustness of the agency's internal safety culture. Perhaps those two matters were aberrational, and can be explained away as of little broader consequence. But, on the other hand, they may be symptomatic of safety culture deficiencies, and thus raise a serious question about a foundation of nuclear safety — the culture of the government organization responsible for promoting it. To protect against that possibility, I discuss the two matters below.

a. The Regulatory Shortcut

It seems to me a matter of great concern that the Staff would, at one juncture, have been willing to take an obviously unauthorized shortcut in considering

²For example, significant remedial and punitive steps were taken when such a culture was found wanting, following the Davis-Besse reactor vessel head incident of several years ago.

³See, e.g., Dr. Richard A. Meserve, Chairman, U.S. Nuclear Regulatory Comm'n, "Safety Culture: An NRC Perspective" at the INPO CEO Conference (Nov. 8, 2002); Gregory B. Jaczko, Commissioner, U.S. Nuclear Regulatory Comm'n, "Public Confidence and the Nuclear Regulatory Commission" at the Nuclear Power and Global Warming Symposium (Nov. 8, 2005) at 3; Staff Requirements Memorandum — Briefing on State of NRC Technical Programs (Apr. 3, 2008) at 2.

issuance of a license.⁴ The initial willingness of the Staff to ignore the unmistakable meaning of the regulations,⁵ if left unaltered, would have sped the grant of a license (albeit an unlawful one) to the Applicant. To be sure, the specific shortcut has now been abandoned, after the Board challenged it with a series of questions (*see* note 5), and the Staff personnel who produced that outcome are to be commended.

But does the culture which led to the promotion of that shortcut still exist?⁶ The Commission's regulations that govern us reflect a valid purpose in seeking to avoid unnecessary delays in reaching final decisions in the adjudicatory process. But is it possible that the constant pressure outside the adjudicatory process to "do it faster" could have not only a procedural but a substantive impact on the quality of the Staff's work (technical and legal) that eventually finds its way to us inside the adjudicatory process?

b. The Disappearing SER

Perhaps this case simply presents a "perfect storm" of circumstances which will not soon again come together, and thus the abandoned shortcut just referred to can be safely regarded as portending nothing about the system as a whole. But what about the seemingly cavalier treatment of the earlier Safety Evaluation Report, whose instructions the Staff seems to be so ready to cast aside? *See* Board opinion at pp. 486-87.

There are consequential, if not breathtaking, implications in the Staff's argument that an SER prepared at one stage need not be given formal force at the next stage. Over the years, many important safety issues in many different proceedings, whether the subject of adjudication or not, have been put to rest — and an applicant awarded a permit or license — on the strength of a Staff SER indicating what needed to be done to resolve that matter.⁷

⁴ *See* Board opinion at p. 489, describing the Staff's earlier plan to award the license prior to construction completion, and then to monitor activities leading to completion, notwithstanding that a regulatory precondition to a license award — embodied in the applicable regulation's unmistakable language — flatly requires that construction "has been completed." *See also* the discussion below, pp. 502-03, of Contention 7 in another context.

⁵ *See* Board opinion, pp. 473, 489.

⁶ Lest I be misunderstood, I am *not* suggesting that the early grant of an unlawful license would of itself create a safety problem. Rather, my concern is that if such a grant were the product of a Staff attitude that elevated "do it faster" above regulatory principles (or other valid standards), that *attitude* could create safety problems somewhere down the line.

⁷ I refer primarily to nonadjudicatory situations, where the Staff's SER was viewed as providing essentially the defining word in the regulatory process. But even in adversarial adjudications, where no party's evidence has primacy based only on its source, the expertise underlying SER determinations has in the past often carried the day.

Under that practice, at least implicit in the notion of what the SER said was “needed to be done” was that, as activity under the thus-awarded permit or license proceeded, it would “indeed be done.” The Staff appears to be arguing here, however, that a definitive statement in an earlier SER about how to resolve a serious matter — serious enough for it to draw the specific attention of the ACRS and for us to focus on it in our earlier opinion (LBP-07-14, 66 NRC at 204) — so that a license could be awarded, has no essential force when the time to take the stated steps later arrives.⁸

The Board’s resolution of this matter takes care of the issue for purposes of reframing Contention 4. But does it remove the threat of an SER being issued in the future at one stage of a proceeding and its conclusions being ignored at a later stage? In other words, are Staff SERs now to be — like the railroad tickets discussed in the cases that beginning law students read about in their contracts course⁹ — “good this day only,” i.e., long enough to keep a licensing proceeding moving at the mandated speed but not long enough to guide that proceeding to its eventual destination?

The Staff work that comes before us in adjudications represents, in most instances, a very small part of the Staff’s overall endeavors. Thus, it is no answer to dismiss, without analysis, the two events of concern here as not adding up to much. The question is, rather, whether those events are symptomatic of larger trends. I think it appropriate to call these concerns to the attention of those in authority.

2. *Meaningful Hearing*

The Petitioners were instrumental in focusing the Board’s attention on the troubling matters discussed above. That they did so is a testament to the contribution that they, and others like them, can make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages. That is the subject to which I now turn, wondering how much more they might contribute to our proceedings — and thus to nuclear safety — if the adjudicatory process allowed them to.

⁸ The Board’s opinion (pp. 486-87, above) recognizes the possibility that the Staff may be arguing only that an SER is not self-executing, in that it must later be incorporated in other, binding, licensing documents. I share that recognition, but nonetheless have a concern here over the apparent absence of any manifest Staff intent to mandate such incorporation.

⁹ See, e.g., *Elmore v. Sands*, 54 N.Y. 512 (1874).

a. *Entry Barriers*

In the course of periodically tightening the agency's contention pleading rules, previous Commissions have explained their purpose in terms of making adjudicatory proceedings more effective and efficient, while maintaining fundamental fairness.¹⁰ Whatever may be said of those doctrines in the normal case, their operation, when applied to a proceeding such as this one, raises serious questions not previously addressed by the Commission, nor seemingly contemplated by its predecessors when the governing regulations were promulgated.

The anomalous situation before us was triggered by the Applicant's voluntary decision to file what can be fairly described as a "very early" operating license application (i.e., it was filed well before construction commenced, and well before the Staff needed to have the application in hand to assure timely processing in terms of generating a licensing decision in advance of construction completion). This situation, in turn, created an opportunity for the erection of additional pleading hurdles — beyond those fairly contemplated by the already-strict rules — for the Petitioners to overcome.

The Board explained this concern about pleading requirements in its earlier decision. (LBP-07-14, 66 NRC at 201-02 & n.94), where it addressed the Applicant's and Staff's arguments that the contentions filed were speculative and/or premature. In that regard, we concluded that

[i]f those arguments were to carry the day, however, NRC hearing opportunities could soon come to be viewed as chimerical — a result that would seem to be the opposite of what Commissioners past and present have said is their goal [footnote omitted]. For in an "early notice" situation like this one, it would never be possible for a petitioner to have a contention admitted if potentially legitimate safety concerns about actual construction practices, or upcoming operational procedures, were automatically rejected, without recourse, because they were filed before construction had either commenced at all or proceeded any distance. *It would be paradoxical to let that situation label the challenge, rather than the notice [of opportunity for hearing], as premature, thus ending the process and eliminating ready later opportunities to raise construction-practice matters freely.*

Id. at 202 (emphasis added).

We returned to this theme later, where in a footnote we indicated that "given the timing of the Notice of [Opportunity for] Hearing here, contentions challenging construction outcomes will necessarily contain an element of the theoretical. As

¹⁰ See *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981); *Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168 (Aug. 11, 1989); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182 (Jan. 14, 2004).

we have seen, that is not the Petitioners' fault — the Applicant's plans themselves have elements of incompleteness and are thus open to challenge via contentions of omission." *Id.* at 209 n.94.

It may be that the action the Board has taken herein, both in (1) admitting Contention 4 while conditioning the rejection of Contention 7, and (2) establishing certain guidelines for managing the proceeding going forward, reconciles the terms of the regulations with the circumstances of the case, and does substantial justice for all parties. But a larger, more general concern about the problematic nature of "early notice" proceedings nonetheless remains, exemplified in the two specific matters described below.

(i) THE TRIGGER FOR CONTENTION 7

As indicated in today's Board decision (*see* note 69) and earlier in this concurrence (note 4), Contention 7 goes to the heart of one of the fundamental purposes for which this portion of the MOX proceeding was convened, i.e., to deal with the issue of whether the facility, or at least its principal components, "has been completed" (emphasis added) in accordance with its design as required by 10 C.F.R. § 70.23(a)(8). The Applicant and Staff nonetheless claim that the contention before us is "speculative" and that it "does not raise a genuine issue of fact."

To the contrary, the contention is not at all speculative — it relies quite precisely on the existing situation, namely, the incontestible fact that construction has barely begun and thus it clearly *has not been*, and cannot be described as, "completed" as expressly demanded by the governing regulation. On that score, the license proponents are also misguided in arguing that there is no genuine issue of fact before us — that is so, but the undisputed facts cut in the Petitioners' favor, not theirs.

To be sure, the Applicant may *one day* be entitled to have the Staff make, and the Board to sustain, the "completion" finding. But the Petitioners would, if they sought it, be entitled to a grant of summary disposition that as of *this day* the undisputed facts are that the facility has not been completed in any sense of that word.

In this sense, this contention — focusing on today's facts — is the polar opposite of those that attempt to speculate that the Applicant will later take some action out of keeping with licenses previously issued,¹¹ or that — as we have seen

¹¹ This Board is well aware of the doctrine that it is not to be assumed, in determining whether to issue a license, that the *licensee* may later fail to do what the license or agency regulations require of it. *See* cases cited in LBP-07-14, 66 NRC at 209 n.94. Whatever may be the reach of that doctrine to preclude such speculative *post*-licensing-focused contentions, it surely was not intended to provide a

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here in contentions (like # 6) that the Board has rejected — the Applicant will change the design or purpose of its facility. Changes such as those can readily be challenged if and when (but only when) they are formalized in an amendment to the license application.

On the other hand, admitting (and even summarily adjudicating) Contention 7 would be devoid of practical impact. It would not preclude the Applicant from continuing the construction process, an effort it plainly intends to carry on. In this respect, this contention of omission is unlike those that challenge a failure to present or to discuss information, for those failures might indeed go unremedied in the absence of the contention.

In joining the Board in not allowing pursuit of Contention 7 at this juncture, I am also influenced by that contention's peculiar genesis and resulting timing. This provides a lesson learned for avoiding that result in other early notice cases: *petitioners might well need to file at the very outset of a proceeding any broadscale contentions of omission they may wish to bring.* Although this approach might present certain burden-shifting pleading conundrums as construction and litigation proceed, Boards are already equipped to handle such problems. Of course, it would be a welcome development were the Commission to elect to provide guidance as to better approaches in “early-notice” cases.¹²

(ii) THE PREMATURITY/BELATEDNESS DILEMMA

The second example flows from the threatened impact of the inconsistency between alternative arguments that the Applicant and Staff presented to those of the Petitioners' contentions that were not included in the original Petition.¹³ On the one hand, those contentions were said to be premature, for complaining of projected developments that had not yet occurred.¹⁴ On the other hand, if they were not found to be premature, we were urged to reject them as untimely because

presumptive substitute for the *pre*-licensing performance that is required before a sought-after license may be issued.

¹² In this regard, however, *see* note 17, below.

¹³ Contentions filed after, and less formally than in, the initial petition (which is a formal response to a notice of opportunity for hearing) must carry with them a demonstration that they are “timely” or that there is (among other things) good cause for their untimeliness. *See* 10 C.F.R. §§ 2.309(f)(2)(i)-(iii) and 2.309(c)(1). Thus, for the remainder of the construction period, the Applicant would have the opportunity to raise the alternative and inconsistent “premature/untimely” defenses.

¹⁴ Tr. at 194-95. I omit from this category contentions like #7, which (as does #4) complain that actions that were supposed to have been taken *had not yet been accomplished*. As to contentions like those, the “prematurity” defense may be readily rejected so long as Boards recognize it for what it is, or more accurately for what it lacks (*see* p. 502, above, note 11 & accompanying text; p. 504, below, note 16 & accompanying text). Rather, I refer here to contentions like #6, which complained of potential changes to the facility that *had not yet been formally proposed*.

some even older document made mention of them in a fashion that should have, so the theory goes, triggered the Petitioners' attention at that time. Tr. at 194.

Ordinarily, parties to litigation are entitled to make alternative arguments, even inconsistent ones. *See, e.g.*, Fed. R. Civ. P. 8(d)(3). But the potential repetition of the "premature/untimely" defenses — by those who control the creation of, and to some extent the access to, the vast numbers of documents that have already emerged, and will continue to emerge for the next 6 years of construction — threatens to create entry demands on the Petitioners that are both procedurally unworkable and fundamentally unfair.

These demands occur because, after the initial pleading is filed, the Petitioners must constantly review documents during the entire remaining period of construction (here, some 6 years) to see if there is anything in them that might generate a contention. They must be prepared to act quickly (*see* note 13, above), within a certain time period after discovering the new material.

But if they thereupon file the contention, they will be told it is premature, on the ground that the problem it portends has not yet been realized. If, on the other hand, they do not file it, they will later be told they are too late, on the ground that the earlier document should have served to trigger their action.

Under this scenario, no amount of learned advice (*see, e.g.*, Tr. at 204) can solve Petitioners' dilemma for them. There is no preventing either (1) an enormous waste of resources¹⁵ or (2) a critical loss of opportunity. Justice should not be dispensed so randomly.

There may, however, be a path to a solution. As noted above, the Applicant and Staff have argued strenuously that contentions about future events (as distinguished from current shortcomings) are premature until the event of which they complain has come to fruition. Where appropriate, I intend to take guidance from that argument to this extent — in justifying any alleged failure to have acted more quickly in presenting new contentions, the Petitioners are free (at least in my judgment) to *rely upon the principle* (ardently espoused herein by the Applicant and Staff) to the effect that *contentions are premature when they complain of an event outside the scope of the application (or of other obligations of the applicant) that has not yet transpired*.¹⁶ Absent some special circumstances, I would expect (based on the arguments the license proponents have thus far relied upon) to look askance at any claims, after the event has transpired and a contention been duly filed, that such a just-ripened event — even if it could have earlier been predicted

¹⁵ Ordinarily, of course, a vast disparity exists between the resources of facility proponents and those of facility opponents. Although this does not relieve such opponents of their obligations (*Statement of Policy* [note 10, above], CLI-81-8, 13 NRC at 454), in fairness, they ought not be forced to churn and to dissipate their resources needlessly in response to "Catch-22" situations.

¹⁶ Contentions 4 and 7, in contrast, each complain that *an event necessary to the grant of the license had not yet transpired*.

by careful scrutiny of an earlier document — should have been the subject of an earlier contention.

Otherwise, this proceeding would turn into a shell game, with the usual street-corner outcome: whatever guess the Petitioners make will prove wrong. The Petitioners ought not be expected to proceed for the next 6 years on that basis.

Perhaps the simple rejection of the Applicant's prematurity arguments on the estoppel-type grounds outlined above will promote sensible case management going forward. This issue threatens to appear, however, in other early notice cases, and the Commission might do both litigants and Boards a service by providing generally applicable guidance on this score.¹⁷

b. Inappropriate Deadlines

The question of timing arises in another context. The Board has herein defined what will be considered a presumptively "timely" new contention as one filed within 60 days, rather than the usual 30 days, after the discovery of new information.¹⁸ That is good, so far as it goes, in that it begins to deal with one aspect of the larger problem plaguing our proceedings, namely, the lack of symmetry between the times allotted, and the second chances afforded, to applicants on the one hand, and petitioners/intervenors on the other.

To be sure, at some phases of a proceeding (e.g., the submission of prefiled testimony before an evidentiary hearing, and the preparation of post-trial briefs thereafter), both sides are treated alike (as they should be) in terms of time allotments. But that equity of treatment occurs largely at and around the evidentiary hearing stage. The inequity which concerns me comes earlier, where it can readily operate unfairly to deprive facility opponents of a meaningful opportunity to advance their issues to the critical hearing stage, where Boards can assure them fairness.

The unfairness starts at the beginning. Notices of opportunity for hearing, prepared by the NRC Staff in the name of the Commission, are too often either terse and uninformative, or long and convoluted.¹⁹ They may contain within them

¹⁷ In the Board's prior opinion (LBP-07-14, 66 NRC at 207-08), we noted that the regulations governing Combined Operating License proceedings — where, as here, authorization to operate will be part of what is sought before construction begins — provide for a later "last-chance" opportunity for plant opponents to challenge construction practices, perhaps thereby alleviating some of the problems raised here.

¹⁸ While we have set 60 days as the presumptive minimum, we have made provision for the Petitioners to seek more time on the grounds circumstances make it appropriate.

¹⁹ Rather than cite specific examples that might later suggest my disqualification from sitting in a particular case, I simply note my general impression from reading various notices. Facility-specific

(Continued)

all the elements legally prescribed, but too often are not crafted in a manner that would allow them to be a source of easily comprehensible guidance as to the precise nature and timing of the intense procedural²⁰ and substantive activity that must be undertaken in a very short time for an intervention to succeed.

There might be more of an effort made by the agency as a whole to see to it that its notices serve as such a source, e.g., by highlighting key points or by involving the Office of Public Affairs in their drafting. But licensing boards have absolutely no role to play in supervising the Staff, so this too is a matter for the Commission to consider.

Such notices frequently allow, as prescribed by the regulations, 60 days for the initial filing of contentions.²¹ But an applicant has usually had many years to prepare the application that is being contested, and applications are lengthy and complex. If more time to prepare a responsive petition is needed, especially in “early notice” cases (like this one where construction had not even started),²² the Commission may wish to consider awarding it more routinely, so that when the proceeding gets to us the contentions are more thoroughly framed and supported, and we can move more efficiently and effectively to deal with their substance.

In sum, the Commission may wish to consider (1) insisting that notices of hearing opportunities, upon which the public relies to know how to proceed, be more artfully crafted so as to articulate more clearly what is required; (2) allowing more time to file intervention petitions in circumstances where, like here, the adjudication is not yet on the critical path²³ and time is not yet of the essence (*see* note 22); and (3) making it clear that well-founded extensions of time for filing petitions or taking other actions at the contention stage are not disfavored in any proceeding, particularly where the Applicant has taken extraordinary amounts of time to put its materials together.

descriptions (if included) and deadlines, needed to draft intervention pleadings, seem too often to be obscured by boilerplate, rather than highlighted in some fashion.

²⁰The procedural difficulties petitioners might encounter, for example, in preparing to act in accordance with the agency’s Electronic Information Exchange, can scarcely be overstated. The Notice is long; the instructions are longer; and becoming skilled is not easy.

²¹To be sure, prospective petitioners will usually have had an opportunity for access to at least a redacted version of an application for some additional period before the Staff issues the notice that formally triggers the opportunity to participate.

²²As previously noted, construction did not start until after the intervention petition was filed, and will not be completed for 6 more years. The Staff Safety Evaluation Report is not scheduled for issuance for nearly 2½ years (December 20, 2010), and litigation of any admitted contentions usually awaits that development. In this “early notice” case, then, time was not of the essence — but the deadlines imposed on petitioners made it seem otherwise.

²³In most instances, pursuant to Commission direction, evidentiary hearings on admitted contentions await the Staff’s later issuance of key analytical documents. 10 C.F.R. § 2.332(d).

The latter two steps would advance symmetry, for if the Staff detects deficiencies in an application before or after a notice of hearing opportunity is issued, the applicant will freely be given (outside the adjudicatory process) ample opportunity to amend it. This is as it should be, for it serves the public interest in safety for a facility *application* to be as good as it can be.²⁴ But it can also serve the public interest in safety, one would think, for a facility *opposition* to be as good as it can be.

This is most readily achieved by granting more time at the outset. For once the initial petition is filed, facility proponents routinely press within the adjudicatory process to ensure that any attempt thereafter to cure any deficiencies — as in a response to the proponents’ answers — is rejected as untimely.²⁵

It is no answer to say that disparate, unfair treatment does not exist, in that the limitless opportunities for the applicant to “get it right” take place *outside* the hearing process, while the denial of opportunities for the petitioners to raise their challenges occurs *inside* the hearing process, where “the rules are the same for everyone.” That is a meaningless bromide when the crucial adjudicatory pleading deadlines have practical exclusionary impact on only one of the parties — the petitioners.

As an example, at an earlier stage of this case, the Applicant and Staff took actions that resulted in *delays of well over a year* in the issuance of the Construction Authorization.²⁶ But the Applicant later opposed a *5-day extension of time* for the petitioners to file a pleading before us.²⁷

In my view, a set of conditions that fosters these approaches and disparities should not have been allowed to continue to develop within the bounds of the Commission’s adjudicatory system. The Board’s action today, providing a more

²⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 710 n.12 & accompanying text (2005).

²⁵ See, e.g., *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

²⁶ See *Duke Cogema Stone & Webster*, (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 347 n.44 (2003). Similarly, at one stage of the PFS proceeding (see note 24, above), questions about the Applicant’s approach to accidental aircraft crash issues led it to seek deferral of the entire proceeding for what turned out to be several months. That Board later commented that the regulatory system, and the public interest, benefited from that delay. LBP-05-29, 62 NRC at 712. Thus, my point is not that applicants should not be allowed to “get it right”; rather, their opponents should not have to beg for even a minimum extension for them also to “get it right.” There should be at least some modicum of even-handedness extended to them, if not in absolute time to prepare their filings, at least in relative receptivity to a plea for some additional time.

²⁷ Applicant’s “Answer Opposing Joint Request for 5-Day Extension . . .” (June 19, 2007). Compare note 25 of the Board’s opinion.

expansive period for filing timely new or amended contentions, begins — but only begins — to right that situation. The Commission should speak to it.

In the final analysis, all this seems reminiscent of, and analogous to, the procedural due process doctrine that governs the notification of absent parties. That doctrine essentially prescribes that where personal service cannot be made, one must use a form of “legal notice” that one would employ if one were *really trying* to reach the person. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).²⁸ The analogy here is simple — the adjudicatory system ought to operate in the way it would if it were “really trying” (1) to encourage the participation of those who are protected by the Atomic Energy Act’s grant of hearing rights and (2) to provide them the opportunity for a meaningful hearing.

Of course, as perhaps suggested by some of the practices that have evolved, some might have believed that facility opponents have nothing to contribute to the hearing process. Those who subscribe(d) to that view have always had the option to seek to have the Act amended to abolish the hearing process and to leave final regulatory decisions to informal interaction between applicants and the NRC Staff, with no public participation.

Barring such a change in the law, the hearing opportunity it provides ought to be a meaningful one. In that respect, Contention 4, which we have admitted and which involves a serious matter, stands as a testament to the contribution intervenors might make to assuring that this facility, if built, measures up to the safety standards applicable to it.

3. *Conclusion*

The adjudicatory system — and its impact on public safety and environmental protection — benefits both from robust Staff performance and from meaningful intervenor participation. To that end, the foregoing views have been presented with one aim in mind: to point to ways in which the nuclear regulatory regime might avoid disruptions or errors attributable to safety-culture or due-process shortcomings.

²⁸ “The means employed must be such as one desirous of actually reaching the absentee might reasonably adopt to accomplish it.” *Id.* at 315. Those means may differ considerably depending on the situation and the circumstances, but the point is that the notifier cannot hide behind legalistic niceties when a ready, practical way to reach the recipient was known to exist.

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- Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970)
where the evidentiary matter in support of a summary disposition motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented; LBP-08-7, 67 NRC 372 (2008)
- Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993)
in NRC adjudicatory proceedings, summary disposition motions are the functional equivalent of summary judgment motions; LBP-08-7, 67 NRC 371 (2008)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125-26 (2006)
the Commission disfavors review of interlocutory board orders, which would result in unnecessary piecemeal interference with ongoing licensing board proceedings; CLI-08-2, 67 NRC 34 n.10 (2008)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007)
a reasonably close causal relationship must exist between a federal agency action and any environmental consequences of that action in order to trigger a NEPA review; LBP-08-6, 67 NRC 332 (2008)
NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities; LBP-08-6, 67 NRC 331, 332, 333 (2008)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 211, 217 (2006)
examples of admitted contentions that satisfy the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 n.79 (2008)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006)
boards commonly reformulate, or expressly limit contentions, to focus them to the precise matters that are supported; LBP-08-9, 67 NRC 430 (2008)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006)
contentions may be divided into a challenge to the application's adequacy based on the validity of the information that is in the application, a challenge to the application's adequacy based on its alleged omission of relevant information, or some combination of these two challenges; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 95 (2008)
- Anderson v. Evans*, 314 F.3d 1006, 1018 (9th Cir. 2002)
in determining whether there is no significant impact, the government does not need to show that there is no risk of injury, but only that the risk is not significant; CLI-08-1, 67 NRC 29 (2008)
- Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)
in deciding a summary disposition motion the tribunal must examine the evidence in the light most favorable to the nonmoving party; LBP-08-7, 67 NRC 372 (2008)
- Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006)
boards may reframe admissible contentions for purposes of clarity, succinctness, and a more efficient proceeding, but must not add material not raised by the petitioners to make an otherwise inadmissible contention admissible; LBP-08-11, 67 NRC 482 (2008)

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- Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 52 (1913)
regarding rivers generally and the question of how far contamination of various sorts may be carried in them, plaintiffs have been found to have a right to apply for preventive relief where copper mining tailings were carried 25 miles to plaintiff's farm; LBP-08-6, 67 NRC 286 (2008)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)
a board's authority to recast contentions is circumscribed in that it may not, on its own initiative, provide basic, threshold information required for contention admissibility; LBP-08-11, 67 NRC 482 (2008)
as with a summary disposition motion, a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner; LBP-08-9, 67 NRC 432 (2008)
failure to comply with any of the contention pleading requirements is grounds for the dismissal of a contention; LBP-08-9, 67 NRC 430, 432 (2008)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)
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- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991)
contentions must directly controvert a position taken by the applicant in the application and explain why the application is deficient; LBP-08-6, 67 NRC 292 (2008)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1990-91 (1982)
a licensing board has no jurisdiction to consider any treaty-related or water-rights questions in an NRC adjudicatory proceeding; LBP-08-6, 67 NRC 269 n.107 (2008)
- Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 155 (1982)
although further analysis may show that there is no way for the radioactive materials and byproducts from ISL mining operations to cause harm to persons living nearby, a board cannot decide, when making a standing determination, that there is no reasonable possibility that such harm could occur; LBP-08-6, 67 NRC 280 (2008)
- Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)
the right to a hearing is an empty promise unless there is an opportunity to be heard at a meaningful time and in a meaningful manner; LBP-08-11, 67 NRC 497 (2008)
- Assiniboine & Sioux Tribe of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 794-96 (9th Cir. 1986)
a trust duty in the NRC as a federal permitting agency arises out of 1851 and 1868 treaties with Indian tribes; LBP-08-6, 67 NRC 267 (2008)
- Baker v. Carr*, 369 U.S. 186, 204 (1962)
whether petitioners have alleged such a personal stake in the outcome of a controversy as to assure that concrete adverseness that sharpens the presentation of issues upon which a tribunal so largely depends for illumination of difficult questions is the question that determines standing; LBP-08-6, 67 NRC 270 (2008)
- Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)
NEPA has the dual goals of requiring an agency to consider every significant aspect of the environmental impact of a proposed action and ensuring that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process; LBP-08-7, 67 NRC 365 n.1 (2008)
- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 53 (1998)
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- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998)
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- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (1998)
the fact that there are a number of requests for addition information outstanding does not give rise to an evidentiary hearing; LBP-08-9, 67 NRC 444 (2008)
the manner in which the NRC Staff conducts its sufficiency review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding; LBP-08-9, 67 NRC 444 (2008)
- Brownell v. Roadway Package System, Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999)
if a company claims that the internal investigation establishes that it has met its obligation, then the company has waived the attorney-client privilege associated with the internal investigation; CLI-08-6, 67 NRC 184 (2008)
if a defendant invokes the investigation as an affirmative defense, it cannot withhold the statements on which the investigation was based; CLI-08-6, 67 NRC 184 (2008)
- Business and Professional People for the Public Interest v. Atomic Energy Commission*, 502 F.2d 424, 428 (D.C. Cir. 1974)
contention pleading requirements serve to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-08-9, 67 NRC 429 (2008)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001)
NRC's Subpart K process is described; CLI-08-1, 67 NRC 25 (2008)
- Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)
the proponent of summary disposition bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact; LBP-08-7, 67 NRC 371 (2008)
- Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)
the opponent of summary disposition cannot rest on the mere allegations or denials of a pleading, but must go beyond the pleadings and by the party's own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial; LBP-08-7, 67 NRC 372 (2008)
- Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (D.C. Cir. 2003)
in reviewing the validity of a withholding under any FOIA exemption, deference must be accorded to the executive in its area of expertise so long as the government's declarations raise legitimate concerns that disclosure would impair national security; LBP-08-7, 67 NRC 376 (2008)
- CFC Logistics, Inc.*, LBP-03-20, 58 NRC 311, 319 (2003)
presumption of standing based on geographical proximity may be applied in nuclear materials licensing cases only when the activity at issue involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-08-6, 67 NRC 272 (2008)
- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983)
good cause to excuse the late-filing of a contention is the most important factor; CLI-08-1, 67 NRC 6 (2008); CLI-08-8, 67 NRC 197 n.26 (2008)
- Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 343, 351, 355 (1st Cir. 2004)
the new contention admission procedures comply with the relevant provisions of the federal Administrative Procedure Act and the Commission has furnished an adequate explanation for the changes; LBP-08-6, 67 NRC 291 n.255 (2008)
- Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004)
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977)
no defense to an insufficient showing for summary disposition is required; LBP-08-7, 67 NRC 372 (2008)
where the nonmoving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment, but has the burden to show that he is entitled to judgment under established principles; LBP-08-7, 67 NRC 372 (2008)
- Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986)
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if good cause is not shown for late-filing of a contention under the pre-2004 rules, petitioner must make a compelling showing on the four remaining factors; CLI-08-1, 67 NRC 6 (2008); CLI-08-8, 67 NRC 197-98 (2008)
- Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986)
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- Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974)
licensing boards, though not obligated to reformulate contentions, are permitted to do so in certain circumstances; LBP-08-11, 67 NRC 482 (2008)
there is no duty placed upon a licensing board by the Administrative Procedure Act, or by the Atomic Energy Act and the regulations promulgated thereunder, to recast contentions offered by one of the litigants for the purpose of making those contentions acceptable; LBP-08-11, 67 NRC 482 n.57 (2008)
- Community Association for Restoration of Environment v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974 (E.D. Wash. 1999)
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- Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)
a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that a dispute exists, but must make a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate; LBP-08-6, 67 NRC 292 (2008)
- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001)
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- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001)
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- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001)
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- Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-82-15, 16 NRC 27, 37 (1982)
the Commission generally declines to interfere with a board's day-to-day case management decisions unless there has been an abuse of power; CLI-08-7, 67 NRC 192 (2008)
- Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)
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- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007)
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- Cooper Cameron Corp. v. U.S. Department of Labor*, 280 F.3d 539 (5th Cir. 2002)
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- Costle v. Pacific Legal Foundation*, 445 U.S. 198, 204 (1980)
petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-08-6, 67 NRC 292 (2008)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121-22, *aff'd on motion for reconsideration*, CLI-95-8, 41 NRC 386, 403 (1995)
the issue in a licensing proceeding is the adequacy of the application, not the adequacy of the Staff's safety review; CLI-08-3, 67 NRC 168 n.73 (2008)
- Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 395-96 (1995)
the manner in which the NRC Staff conducts its sufficiency review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding; LBP-08-9, 67 NRC 444 (2008)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 756-58 (2004)
no environmental impact statement is necessary if the environmental assessment concludes with a finding of no significant impact, which briefly presents the reasons why the proposed action will not significantly impact the environment; LBP-08-7, 67 NRC 365 n.1 (2008)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 767-68 & n.2, 770 (2004)
the Commission seeks the parties' views on whether the NRC lacks authority to reject an irradiation license for nonradiological food safety reasons and therefore need not consider food safety under NEPA; CLI-08-4, 67 NRC 172 (2008)
- Dirksen v. U.S. Department of Health and Human Services*, 803 F.2d 1456, 1459 (9th Cir.1986)
NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 375 n.11 (2008)
- Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977)
voluntary disclosure of internal investigative materials to a government agency waives the attorney-client and work-product privileges not only with respect to the particular agency, but also as to third parties; CLI-08-6, 67 NRC 183 n.1 (2008)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003)
with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-08-9, 67 NRC 431 (2008)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 83, 93-94, *aff'd*, CLI-03-14, 58 NRC 207 (2003)
a contention that alleges that increases in radioactive releases create higher doses, but does not provide information or expert opinion to dispute the conclusion that the higher doses would still be under NRC regulatory limits or that the higher levels will cause harm will not be admitted; LBP-08-9, 67 NRC 446 (2008)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)
although the pleading requirements of 10 C.F.R. 2.309 are strict by design, a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects; LBP-08-6, 67 NRC 277 (2008)
petitioner must read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-08-6, 67 NRC 292 (2008)

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- the contention rule is strict by design, having been toughened in 1989 because in prior years licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation; LBP-08-6, 67 NRC 290 (2008); LBP-08-9, 67 NRC 429 (2008)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001)
- there must be an explanation of the basis for a contention; CLI-08-3, 67 NRC 168 (2008)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)
- license amendment proceedings are not a forum to litigate historical allegations or past events with no direct bearing on the challenged licensing action; LBP-08-9, 67 NRC 440 n.119 (2008)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 92-93 (2004)
- whether applicant has a valid NPDES permit is outside the scope of a power uprate proceeding; LBP-08-9, 67 NRC 447 n.151 (2008)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 276 (2004)
- examples of admitted contentions that satisfied the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 n.79 (2008)
- Doyle v. Federal Bureau of Investigation*, 722 F.2d 554, 556 (9th Cir. 1983)
- in camera* review of redacted information or sealed declarations ought to occur only in the exceptional case after the government has submitted as detailed public affidavits as possible; LBP-08-7, 67 NRC 372 n.7 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 & n.15 (2002)
- the Commission undertook interlocutory review of a petition that questioned the very structure of the two-step licensing process announced for a proposed mixed oxide fuel fabrication facility; CLI-08-2, 67 NRC 35 n.16 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002)
- NRC has no legal duty to consider the environmental impacts of terrorism at NRC-licensed facilities; LBP-08-6, 67 NRC 333 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)
- a board's authority to recast contentions is circumscribed in that it may not, on its own initiative, provide basic, threshold information required for contention admissibility; LBP-08-11, 67 NRC 482 (2008)
- if petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner, or supply information that is lacking; LBP-08-9, 67 NRC 433 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 342 (2003)
- as with a summary disposition motion, a board may appropriately view petitioner's support for its contention in a light that is favorable to the petitioner; LBP-08-9, 67 NRC 432 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286, 292-93 (2004)
- a dispositive motion seeking dismissal of contentions of omission as moot is appropriate when applicant provides the missing information and petitioner fails to amend its contention for further challenges; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 96 (2008)
- contentions of omission charging that an application is missing certain design information must be amended to then challenge the quality of additional applicant information provided in a subsequent filing; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 95 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005)
- a request to file a reply to a summary disposition answer is granted; LBP-08-2, 67 NRC 67 (2008); LBP-08-3, 67 NRC 98 (2008)

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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 80 (2005)
a board should not, at the summary disposition stage, try to untangle the experts' affidavits and decide which experts are more correct; CLI-08-2, 67 NRC 33 (2008)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 80-81 (2005)
summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained; LBP-08-2, 67 NRC 71 n.12 (2008); LBP-08-3, 67 NRC 101 n.9 (2008)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004)
to be "irreparable," the harm must be of a kind that cannot be reversed on appeal, as when the challenged order would reveal safeguards or privileged information to persons not authorized to review it; CLI-08-2, 67 NRC 36 n.20 (2008)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208 n.12 (2004)
the Commission often refers to the Statement of Considerations as an aid in interpreting its regulations; CLI-08-3, 67 NRC 163 n.46 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002)
NRC proceedings are to be based on the application as it exists at a given time and not on any potential future amendments; LBP-08-11, 67 NRC 478 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002)
a possible future action must at least constitute a proposal pending before the agency to be ripe for adjudication; LBP-08-11, 67 NRC 479 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002)
NRC has no legal duty to consider the environmental impacts of terrorism at NRC-licensed facilities; LBP-08-6, 67 NRC 333 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)
the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-08-9, 67 NRC 430 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)
there is a difference between contentions that merely allege an omission of information and those that challenge substantively and specifically how particular information has been discussed in a license application; LBP-08-11, 67 NRC 488 n.68 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)
an intervenor attempting to litigate an issue based on expressed concerns about the draft environmental impact statement may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the environmental report that supported the contention's admission, submit a new contention; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 95 (2008)
for contentions or portions of contentions challenging an application as having omitted a required item or items, post-contention admission events, such as issuance of a Staff DEIS, can render the contention subject to dismissal as moot; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 94 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003)
contentions that amount to generalized suspicions that petitioners hope to substantiate later are barred; LBP-08-6, 67 NRC 292 (2008)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 427 (2003)
petitioners must raise and reasonably specify at the outset their objections to a licensing action; CLI-08-3, 67 NRC 169 (2008)

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- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)
once an initial intervention petition is filed, facility proponents routinely press within the adjudicatory process to ensure that any attempt thereafter to cure any deficiencies is rejected as untimely; LBP-08-11, 67 NRC 507 (2008)
petitioners have an ironclad obligation to search the public record for information supporting their contentions; LBP-08-6, 67 NRC 256 (2008)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)
a licensing proceeding is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process; LBP-08-9, 67 NRC 443 n.135 (2008)
the contention rule is strict by design, having been toughened in 1989 because in prior years licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation; LBP-08-6, 67 NRC 290 (2008)
the strict contention pleading rule is designed to focus the hearing process on genuine disputes susceptible of resolution, puts the other parties on notice of the specific grievances at issue, and restricts participation to those able to proffer at least some minimal factual and legal foundation in support of their contentions; CLI-08-1, 67 NRC 8 (2008); LBP-08-6, 67 NRC 291 (2008)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336-37 (1999)
the fact that there are a number of requests for addition information outstanding does not give rise to an evidentiary hearing; LBP-08-9, 67 NRC 444 (2008)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999)
contentions that amount to generalized suspicions that petitioners hope to substantiate later are barred; LBP-08-6, 67 NRC 292 (2008)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999)
petitioners have an ironclad obligation to search the public record for information supporting their contentions; LBP-08-6, 67 NRC 256 (2008)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 342 (1999)
contentions must directly controvert a position taken by the applicant in the application; LBP-08-6, 67 NRC 292 (2008)
petitioner must support its contentions with documents, expert opinion, or at least a fact-based argument; LBP-08-6, 67 NRC 292, 318 (2008)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982)
petitioners have an ironclad obligation to search the public record for information supporting their contentions; LBP-08-6, 67 NRC 256 (2008)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985)
the scope of a proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-08-9, 67 NRC 431 (2008)
- Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977)
determinations on any nontimely filing of a petition must be based on a balancing of factors under 10 C.F.R. 2.309(c), the most important of which is good cause, if any, for the failure to file on time; LBP-08-6, 67 NRC 257 (2008)
- Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1300-31 (9th Cir. 2003)
an environmental assessment shall identify the proposed action and include a list of agencies and persons consulted, and identification of sources used; CLI-08-1, 67 NRC 14 (2008)
- Elmore v. Sands*, 54 N.Y. 512 (1874)
presiding officer questions whether Staff SERs are good long enough to keep a licensing proceeding moving at the mandated speed but not long enough to guide that proceeding to its eventual destination; LBP-08-11, 67 NRC 500 (2008)
- Enos v. United States*, 672 F. Supp. 1391, 1993-94 (D. Wyo. 1987)
a trust duty in the NRC as a federal permitting agency arises out of 1851 and 1868 treaties with Indian tribes; LBP-08-6, 67 NRC 267 (2008)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 351-59 (2006)
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- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 356 (2006)
failure to present factual information and expert opinions to support a contention adequately requires that the contention be rejected; LBP-08-9, 67 NRC 432 (2008)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 359 (2006)
documents that provide legitimate amplification of originally filed contentions are discussed; LBP-08-6, 67 NRC 258 (2008)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007)
rejection or admission of a contention, where the petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-08-7, 67 NRC 192 (2008)
the Commission disfavors review of interlocutory board orders, which would result in unnecessary piecemeal interference with ongoing licensing board proceedings; CLI-08-2, 67 NRC 34 n.10 (2008)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 272-74 (2006)
to intervene in a proceeding a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. 2.309(f)(1); LBP-08-6, 67 NRC 289 (2008)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-07-28, 66 NRC 275 (2007)
the Commission generally declines to interfere with a board's day-to-day case management decisions unless there has been an abuse of power; CLI-08-7, 67 NRC 192 (2008)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187 (2008)
adjudicatory boards have broad discretion to regulate the course of proceedings and the conduct of participants, and the Commission is reluctant to embroil itself in day-to-day case management issues; CLI-08-14, 67 NRC 406 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)
the proponent of a stay must show that likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest weigh in its favor; CLI-08-13, 67 NRC 399 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006)
a motion to stay issuance of a license might be granted where the factors usually considered in granting emergency injunctive relief are satisfied; CLI-08-13, 67 NRC 399 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 238 (2006)
a license renewal may be set aside or appropriately conditioned even after it has been issued, upon subsequent administrative or judicial review; CLI-08-13, 67 NRC 400 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4-5 nn.11-19 (2007)
the Commission may review a board ruling pursuant to the inherent supervisory powers where a significant issue may affect multiple pending or imminent licensing proceedings; CLI-08-2, 67 NRC 34 n.12 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 22 & n.37 (2007)
where there is no threat of immediate and irreparable harm and license renewal is not imminent, a motion for a stay of license renewal is premature; CLI-08-13, 67 NRC 400 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (2007)
the Clean Water Act precludes NRC from either second-guessing the conclusions in NPDES permits or imposing its own effluent limitations, thermal or otherwise; LBP-08-9, 67 NRC 448 n.151 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553-54 (2004)
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- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 580 (2004)
examples of admitted contentions that satisfied the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 n.79 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 151 (2006)
determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits; LBP-08-9, 67 NRC 432 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 183, 187, 192 (2006)
examples of admitted contentions that satisfy the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 n.79 (2008)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006)
use of the permissive term, “may,” in 10 C.F.R. 2.310(a) indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 343 (2008)
- Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1009 (9th Cir. 2006)
the purpose of an environmental assessment is to determine whether an action has a significant impact, thus informing the decision whether the preparation of an EIS and detailed assessment of impacts is required; CLI-08-1, 67 NRC 29 (2008)
- Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005)
some circumstances exist in which petitioners may be presumed to have standing based on their geographical proximity to a facility or source of radioactivity, without the need to show injury in fact, causation, or redressability; LBP-08-6, 67 NRC 272 (2008)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004)
rejection or admission of a contention, where the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-08-7, 67 NRC 192 (2008)
the Commission disfavors review of interlocutory board orders, which would result in unnecessary piecemeal interference with ongoing licensing board proceedings; CLI-08-2, 67 NRC 34 n.10 (2008)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 20-21 (2006)
the Commission may review a board ruling pursuant to the inherent supervisory powers where novel questions of potentially broad application are involved; CLI-08-2, 67 NRC 34 n.12 (2008)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 252 (2004)
examples of admitted contentions that satisfy the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 n.79 (2008)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 181 (2005)
what actually is to be litigated must be determined by a board through examination not only of the general formulation of the contention by the petitioner, but by examination of the bases and support actually offered; LBP-08-9, 67 NRC 430 (2008)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
mere notice pleading is insufficient to satisfy contention pleading standards; LBP-08-9, 67 NRC 432 (2008)
petitioner’s contention will be ruled inadmissible if the petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-08-6, 67 NRC 302, 303 (2008); LBP-08-9, 67 NRC 433 (2008)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)
simply attaching material or documents in support of a contention, without setting forth an explanation of that information’s significance, is inadequate to support admission of the contention; LBP-08-9, 67 NRC 433 (2008)

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- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001)
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001)
petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity; LBP-08-9, 67 NRC 427 (2008)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148-49 (2001)
in nuclear power reactor construction permit and operating license proceedings, showing proximity within 50 miles of a plant is often enough on its own to demonstrate standing; LBP-08-6, 67 NRC 272 (2008)
- FMRI, Inc. [formerly Fansteel, Inc.]* (Muskogee, Oklahoma Facility), LBP-04-8, 59 NRC 266, 275 (2004)
despite lack of compliance with various agency NUREGs, a decommissioning plan is lawful because it acknowledges the fiscal realities of the licensee's bankruptcy and is consistent with the mandate that the plan be completed as soon as practicable and adequately protect the health and safety of workers and the public; LBP-08-4, 67 NRC 115 n.65 (2008)
- General Electric Co.*, 3 AEC 99, 101 (1966)
a facility is foreign-owned when a foreign interest has the power, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant; LBP-08-6, 67 NRC 337 n.545 (2008)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
for an organizational petitioner to establish standing, it must show immediate or threatened injury either to its organizational interests or to the interests of identified members; LBP-08-6, 67 NRC 271 (2008)
judicial concepts of standing are applied in NRC proceedings; LBP-08-6, 67 NRC 271 (2008)
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995)
in an uprate proceeding, demonstrating proximity-based standing requires a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-08-9, 67 NRC 427 (2008)
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995)
daily commute near vicinity of a reactor is sufficient to establish standing; LBP-08-9, 67 NRC 429 n.39 (2008)
in determining whether petitioner has met requirements for standing, the board must construe the petition in favor of the petitioner; LBP-08-9, 67 NRC 427 (2008)
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995)
at the contention stage, petitioner need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-08-6, 67 NRC 292 (2008)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, *aff'd in part on other grounds*, CLI-95-12, 42 NRC 111 (1995)
if petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-08-9, 67 NRC 433 (2008)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181 (1995)
the Commission rejected a subpoena issued in a proceeding before a panel of the Atomic Safety and Licensing Board; CLI-08-6, 67 NRC 181 (2008)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995)
to be "irreparable," the harm must be of a kind that cannot be reversed on appeal, as when the challenged order would reveal safeguards or privileged information to persons not authorized to review it; CLI-08-2, 67 NRC 36 n.20 (2008)
- Ginsburg, Feldman, & Bress v. Federal Energy Administration*, 591 F.2d 717, 730 (D.C. Cir.), *aff'd en banc and per curiam by an equally divided court*, 591 F.2d 752 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)
NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 375 n.11 (2008)
- Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)
like Congress, the Commission is not to be assumed to hide elephants in mouseholes; LBP-08-1, 67 NRC 48 (2008)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)
an organization asserting representational standing on behalf of one or more of its members must demonstrate that the interests of at least one of its members will be so harmed, identify that member by name and address, and show that the organization is authorized to request a hearing on behalf of that member; LBP-08-6, 67 NRC 271 (2008)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)
petitioner's contention will be ruled inadmissible if the petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-08-9, 67 NRC 433 (2008)
- Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994)
petitioner must present sufficient information to show a genuine dispute and reasonably indicate that a further inquiry is appropriate; LBP-08-6, 67 NRC 292 (2008)
- Hale v. Colorado River Municipal Water District*, 818 S.W.2d 537, 538-39 (Tex. 1991)
plaintiffs have prevailed against a motion for summary judgment where chloride spillage was allegedly carried 100 miles to plaintiff's farm; LBP-08-6, 67 NRC 287 (2008)
- Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1096 (D.N.J. 1996)
if a company claims that the internal investigation establishes that it has met its obligation, then the company has waived the attorney-client privilege associated with the internal investigation; CLI-08-6, 67 NRC 184 (2008)
- Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980)
NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 375 n.11 (2008)
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- Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)
it is neither congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed, the sounder practice being to decide issues on their merits, not to avoid them on technicalities; LBP-08-6, 67 NRC 291 (2008)
technical perfection is not an essential element of contention pleading; LBP-08-6, 67 NRC 291 n.259 (2008)
- Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 420 (2d Cir. 1989)
Congress, in enacting section 102(2)(C) of NEPA set the balance between the public's need to be informed and the government's need for secrecy; LBP-08-7, 67 NRC 370 (2008)
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- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998)
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- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998)
if a stay proponent cannot show irreparable harm, it must make an overwhelming showing that it is likely to succeed on the merits; CLI-08-13, 67 NRC 399 (2008)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998)
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- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 275 (1998)
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- Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 420 (2006)
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- Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), LBP-03-27, 58 NRC 408, 414 (2003)
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- Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), LBP-05-26, 62 NRC 442, 465 (2005)
a form letter is not sufficient to constitute the reasonable effort that section 106 of the National Historic Preservation Act requires; LBP-08-6, 67 NRC 330 n.502 (2008)
- Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), LBP-05-26, 62 NRC 442, 467-68 (2005)
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- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 57-58 (2001)
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- Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998)
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- In re Grand Jury Proceedings #5 Empanelled January 28, 2004 v. Under Seal, Defendant*, 401 F.3d 247, 250 (4th Cir. 2005)
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- In re Sealed Case*, 676 F.2d 793, 800 (D.C. Cir. 1982)
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- In re Sealed Case*, 676 F.2d 793, 801 (D.C. Cir. 1982)
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- In re Sealed Case*, 676 F.2d 793, 825 (D.C. Cir. 1982)
in the context of privilege covering voluntarily disclosed information, the privilege holder has waived its privilege as to the agency that received the investigative materials; CLI-08-6, 67 NRC 183 n.1 (2008)
- In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984)
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- In re Subpoenas Duces Tecum*, 738 F.2d at 1367, 1373 (D.C. Cir. 1984)
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- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998)
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- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998)
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- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 31 (2001)
licensing board determinations on standing involve a reasonable degree of discretion; LBP-08-6, 67 NRC 277 (2008)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001)
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- Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986) (en banc), *modified on other grounds*, 793 F.2d 1171 (10th Cir.)
a trust duty in the NRC as a federal permitting agency arises out of 1851 and 1868 treaties with Indian tribes; LBP-08-6, 67 NRC 267 (2008)
- Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)
under judicial concepts of standing, boards are to consider whether a petitioner has alleged a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-08-6, 67 NRC 271 (2008)
- Kerr-McGee Chemical Corp.* (West Chicago Rare Earth Facility), ALAB-928, 31 NRC 263, 269 (1990)
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- Lewis v. Internal Revenue Service*, 823 F.2d 375 (9th Cir. 1987)
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- Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989)
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- Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1080 (9th Cir. 2004)
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- Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004)
when access to documents is disputed in FOIA litigation, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption; CLI-08-1, 67 NRC 16 (2008); LBP-08-7, 67 NRC 371 (2008)
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- Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1082-83 (9th Cir. 2004)
when access to documents is disputed in FOIA litigation, a *Vaughn* index and explanatory affidavits that are sufficiently detailed to support a tribunal's plenary assessment of the validity of a claimed exemption are ordinarily sufficient; LBP-08-7, 67 NRC 371 (2008)
- Lion Raisins Inc. v. U.S. Department of Agriculture*, 354 F.3d 1072, 1083 (9th Cir. 2004)
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- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *review denied*, CLI-88-11, 28 NRC 603 (1988)
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- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290 (1988)
as guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the Statement of Considerations is entitled to special weight; CLI-08-3, 67 NRC 166 (2008)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1400 (1984)
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- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 96 (1997)
although an *amicus* brief that supplies a perspective that would materially aid a licensing board's deliberations would be permissible, a brief that injects new issues into the proceeding and alters the content of the record developed by the parties would not be; LBP-08-6, 67 NRC 266 (2008)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998)
a board may consider environmental contentions made against an applicant's environmental report as challenges to an agency's subsequent draft environmental impact statement; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 95 (2008)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619, 625 (2004)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004)
once an initial intervention petition is filed, facility proponents routinely press within the adjudicatory process to ensure that any attempt thereafter to cure any deficiencies is rejected as untimely; LBP-08-11, 67 NRC 507 (2008)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 621 (2004)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 624 (2004)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 540 (2005)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 77-80 (2004)
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- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-72 (1989)
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- McGrath v. Nassau Health Care Corp.*, 204 F.R.D. 240, 247-48 (E.D.N.Y. 2001)
if a company claims that the internal investigation establishes that it has met its obligation, then the company has waived the attorney-client privilege associated with the internal investigation; CLI-08-6, 67 NRC 184 (2008)
- McKenna v. Nestle Purina PetCare Co.*, 2007 U.S. Dist. LEXIS 8876 (S.D. Ohio 2007)
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- Minier v. Central Intelligence Agency*, 88 F.3d 796 (9th Cir. 1996)
challenges in FOIA cases routinely are resolved on the basis of summary judgment pleadings; LBP-08-7, 67 NRC 371 (2008)
- Miscavige v. Internal Revenue Service*, 2 F.3d 366, 368 (11th Cir. 1993)
a relatively detailed index or affidavit should provide a sufficient basis for a decision as to the bases for withholding enumerated source documents; CLI-08-1, 67 NRC 25 n.118 (2008)
- Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982)
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- Missouri ex rel. Shorr v. U.S. Army Corps of Engineers*, 147 F.3d 708, 710-11 (8th Cir. 1998)
disclosure of documents under the National Environmental Policy Act is expressly governed by the Freedom of Information Act; CLI-08-5, 67 NRC 176 (2008)
- Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)
the procedural due process doctrine that governs the notification of absent parties essentially prescribes that where personal service cannot be made, one must use a form of legal notice that one would employ if one were really trying to reach the person; LBP-08-11, 67 NRC 508 (2008)
- Muskleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1514 (W.D. Wash. 1988)
a trust duty in the NRC as a federal permitting agency arises out of 1851 and 1868 treaties with Indian tribes; LBP-08-6, 67 NRC 267 (2008)
- Nevada v. NRC*, No. 05-1350, 2006 WL 2828864, at 1 (D.C. Cir., Sept. 22, 2006)
ISL mining does not involve fuel rod waste and to the extent such waste is indirectly relevant, the Waste Confidence rule would prohibit consideration of a license amendment proceeding; LBP-08-6, 67 NRC 342 (2008)
- New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978)
the manner in which the NRC Staff conducts its sufficiency review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding; LBP-08-9, 67 NRC 444 (2008)
- North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998)
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- North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991)
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- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 n.8 (2001)
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- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286-87 (2001)
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- Northwest Sea Farms Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996)
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- Nuclear Fuel Services, Inc.* (Irwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004)
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- Nuclear Fuel Services, Inc.* (Erwin, Tennessee), LBP-04-2, 59 NRC 77, 80 (2004)
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- Nuclear Information and Resource Service v. NRC*, 457 F.3d 941, 946 (9th Cir. 2006)
the average annual dose in the United States, with considerable variation, has been estimated to be around 300 mrem; CLI-08-1, 67 NRC 29 n.120 (2008)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)
once an initial intervention petition is filed, facility proponents routinely press within the adjudicatory process to ensure that any attempt thereafter to cure any deficiencies is rejected as untimely; LBP-08-11, 67 NRC 507 (2008)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139 (2007)
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- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 140-41 (2007)
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- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141 (2007)
NRC has no legal duty to consider the environmental impacts of terrorism at NRC licensed facilities; LBP-08-6, 67 NRC 331 (2008)
- Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979)
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- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 711 n.40 (1985)
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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)
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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 n.33 (1974)
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- Pollard v. Federal Bureau of Investigation*, 705 F.2d 1151, 1154-55 (9th Cir. 1983)
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- Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979)
any contention that falls outside the specified scope of the proceeding must be rejected; LBP-08-9, 67 NRC 431 (2008)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 302-12 (2007)
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- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 18 (2007)
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- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 23 (2007)
a board's authority to recast contentions is circumscribed in that it may not, on its own initiative, provide basic, threshold information required for contention admissibility; LBP-08-11, 67 NRC 482 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-8, 47 NRC 307, 320 & n.4 (1998)
mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final board decisions; CLI-08-2, 67 NRC 35 n.15 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 & n.3 (1998)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000)
a board's refusal to admit a late-filed contentions did not have a pervasive or unusual effect on the litigation; CLI-08-2, 67 NRC 35 n.17 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000)
rejection or admission of a contention, where the petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-08-7, 67 NRC 192 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153 (2002)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153-54 (2002)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 154 (2002)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002)
NRC has no legal duty to consider the environmental impacts of terrorism at NRC-licensed facilities; LBP-08-6, 67 NRC 333 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360, 361 (2003)
as long as one contention is admitted, dismissal of other contentions is deemed interlocutory in nature, and those dismissals are therefore not subject to appeal by petitioners until the proceeding is later terminated or unless the Commission directs otherwise; LBP-08-11, 67 NRC 495 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Installation), CLI-04-22, 60 NRC 125, 138-39 (2004)
although petitioner is not expected to prove its contention at the pleading stage, the contention must present a reasonable scenario of potential consequences; CLI-08-3, 67 NRC 168 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004)
petitioner does not have to prove its contention at the admissibility stage; LBP-08-9, 67 NRC 432 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)
materiality requires that petitioner show why an alleged error or omission is of possible significance to the result of the proceeding; LBP-08-9, 67 NRC 431 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998)
to be admissible, a contention must assert an issue of law or fact that is material to the findings the NRC must make to support the action that is involved in the proceeding; LBP-08-9, 67 NRC 431 (2008)

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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998)
to be admissible, a contention must assert some significant link between a claimed deficiency and NRC's ultimate determination regarding whether or not a license applicant will adequately protect the health and safety of the public and the environment; LBP-08-9, 67 NRC 431 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-33, 50 NRC 161, 165 (1999)
where the evidentiary matter in support of a summary disposition motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented; LBP-08-7, 67 NRC 372 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001)
technical perfection is not an essential element of contention pleading; LBP-08-6, 67 NRC 291 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 171-72 (2001), *petition for review denied*, CLI-04-4, 59 NRC 31, 40-41 (2004)
contentions may be divided into a challenge to the application's adequacy based on the validity of the information that is in the application, a challenge to the application's adequacy based on its alleged omission of relevant information, or some combination of these two challenges; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 95 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001), *petition for review denied*, CLI-04-4, 59 NRC 31, 40-41 (2004)
a board may consider environmental contentions made against an applicant's environmental report as challenges to an agency's subsequent draft environmental impact statement; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 95 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 483 (2001), *review declined*, CLI-02-3, 55 NRC 155, 156 n.9 (2002)
good cause to excuse the late-filing of a contention is the most important factor under the pre-2004 rules for late-filed contentions; CLI-08-1, 67 NRC 6 (2008); CLI-08-8, 67 NRC 197-98 n.26 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001)
boards should not, at the summary disposition stage, try to untangle the expert affidavits' and decide which experts are more correct; CLI-08-2, 67 NRC 34 n.10 (2008)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 710 & n.12 (2005)
it serves the public interest in safety for a facility application to be as good as it can be; LBP-08-11, 67 NRC 507 (2008)
- Professional Reactor Operator Society v. NRC*, 939 F.2d 1047, 1051-52 (D.C. Cir. 1991)
NRC may not disqualify attorneys representing multiple witnesses, unless it has concrete evidence that the attorney will obstruct and impede the investigation; CLI-08-11, 67 NRC 385 (2008)
- Public Citizen v. Carlin*, 184 F.3d 900, 911 (D.C. Cir. 1999)
the Commission regularly relies upon the preamble in the Statement of Considerations in interpreting agency rules, given that the purpose of the preamble, after all, is to explain what follows; CLI-08-3, 67 NRC 163 n.46 (2008)
- Public Citizen Health Research Group v. Food and Drug Administration*, 997 F. Supp. 56, 72 (D.D.C. 1998)
in his discretion and only if absolutely necessary to ensure a complete record and a fair decision, the presiding officer may allow limited discovery, but that discovery is sparingly granted in FOIA litigation; CLI-08-5, 67 NRC 177 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983)
according to the Commission's longstanding practice, a board order is considered appealable where it disposes of a major segment of the case or terminates a party's right to participate; CLI-08-2, 67 NRC 34 n.14 (2008)

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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1075 (1983)
grant of summary disposition on finding no material factual issue did not affect the structure of the proceeding in a pervasive or unusual manner; CLI-08-2, 67 NRC 35 n.17 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987)
although NRC rules do not explicitly authorize *amicus* briefs at the licensing board level, such briefs might still be granted in appropriate circumstances; LBP-08-6, 67 NRC 266 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 95 (1988)
where the language of a contention mentioned neither blockage nor corrosion of the cooling system, but the contention's heading and its assigned basis mentioned blockage, clearly showed that the contention was intended to embrace only cooling system blockage; LBP-08-2, 67 NRC 72 n.13 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991)
a purpose of the bases of a contention is to put the other parties on notice as to what issues they will have to defend against or oppose; LBP-08-2, 67 NRC 78 (2008)
the brief explanation of the basis that is required by section 2.309(f)(1)(ii) helps define the scope of a contention, the reach of the contention necessarily hinging upon its terms coupled with its stated bases; LBP-08-6, 67 NRC 293 (2008)
the support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity; LBP-08-2, 67 NRC 73 (2008)
the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-08-9, 67 NRC 430 (2008)
where a question arises as to the admissibility of a contention, boards look to both the contention and its stated bases; LBP-08-9, 67 NRC 430 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990)
a contention must demonstrate that there has been sufficient foundation assigned for it to warrant further exploration; LBP-08-6, 67 NRC 292 n.269 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982)
any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-08-9, 67 NRC 431 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982)
a contention that calls for requirements in excess of those imposed by Commission regulations must be rejected as a collateral attack on the regulations; LBP-08-9, 67 NRC 446 (2008)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989)
absent clear evidence to the contrary, it is presumed that public officers will properly discharge their official duties; CLI-08-11, 67 NRC 384 (2008)
- Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973)
pro se petitioners are not held to the same standard of pleading as those represented by counsel; LBP-08-6, 67 NRC 278 (2008)
- Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)
even if petitioners later retain counsel, it would not be appropriate to hold the petition itself to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-6, 67 NRC 318 n.433 (2008)
pro se petitioners are not held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-11, 67 NRC 482 n.57 (2008)

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- Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995)
a mere request for information is not necessarily sufficient to constitute the reasonable effort that section 106 of the National Historic Preservation Act requires; LBP-08-6, 67 NRC 329 n.499 (2008)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)
judicial concepts of standing are applied in NRC proceedings; LBP-08-6, 67 NRC 271 (2008)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998)
to establish standing, the injury to petitioner must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-08-6, 67 NRC 271 (2008)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)
an agency is to include in every recommendation or report on major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action; LBP-08-6, 67 NRC 321 (2008)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994)
increased litigation burden of one contention, where other contentions were pending in proceeding, did not have a pervasive effect on the structure of the litigation; CLI-08-2, 67 NRC 35 n.19 (2008)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994)
claims that are not a challenge to the adequacy of the application are insufficient to establish an admissible contention; LBP-08-6, 67 NRC 301 (2008)
contentions that fail directly to controvert the application or that mistakenly assert the application does not address a relevant issue can be dismissed; LBP-08-9, 67 NRC 433 (2008)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 249 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994)
the standing requirement for showing injury in fact has always been significantly less than for demonstrating an acceptable contention; LBP-08-6, 67 NRC 280 (2008)
- SafeCard Services v. Securities and Exchange Commission*, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991)
a relatively detailed index or affidavit should provide a sufficient basis for a decision as to the bases for withholding enumerated source documents; CLI-08-1, 67 NRC 25 n.118 (2008)
- Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1994)
a board's order consolidating an informal Subpart L proceeding with a formal Subpart G proceeding affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-08-2, 67 NRC 35 n.16 (2008)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)
NRC must consider the environmental impacts of a terrorist attack against an independent spent fuel storage installation at the Diablo Canyon Nuclear Power Plant; LBP-08-6, 67 NRC 331 (2008)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124, 1035 (2007)
identification of the inadequacies in the NRC's NEPA analysis should not be construed as constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis; CLI-08-1, 67 NRC 5 n.17 (2008)
NRC's categorical refusal to consider the environmental effects of a terrorist attack in an independent spent fuel storage installation licensing proceeding is unreasonable under the National Environmental Policy Act; CLI-08-1, 67 NRC 4 (2008)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028, 1035 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007)
the Commission's refusal to consider the environmental effects of a terrorist attack is inconsistent with the requirements of NEPA; LBP-08-7, 67 NRC 366 (2008)
- Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005)
NEPA obligates federal agencies to evaluate all of the environmental effects of their actions, not only those regulated under their own statutes; CLI-08-1, 67 NRC 22 (2008)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994)
likelihood of success on the merits and irreparable harm are the most important factors in determining stay motions; CLI-08-13, 67 NRC 399 (2008)

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- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994)
absent a showing of irreparable harm, a stay movant must show that success on the merits is a virtual certainty; CLI-08-13, 67 NRC 400 (2008)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)
to establish standing, the injury to petitioner must be concrete and particularized, and not conjectural or hypothetical; LBP-08-6, 67 NRC 271 (2008)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994)
a determination that an injury is fairly traceable to the challenged action is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-08-6, 67 NRC 280 (2008)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)
how close to the source a petitioner must live or work to invoke the proximity-plus presumption depends on the danger posed by the source at issue; LBP-08-6, 67 NRC 272 (2008)
- in nuclear power reactor construction permit and operating license proceedings, showing proximity within 50 miles of a plant is often enough on its own to demonstrate standing; LBP-08-6, 67 NRC 272 (2008)
- petitioner's proximity to the proposed source of radioactivity must also be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-08-9, 67 NRC 427 (2008)
- presumption of standing based on geographical proximity may be applied in nuclear materials licensing cases only when the activity at issue involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-08-6, 67 NRC 272 (2008)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 68 (1994)
boards must avoid the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits; LBP-08-6, 67 NRC 279 (2008)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 118 (1994)
pleading niceties should not be used to exclude parties who have a clear, albeit imperfectly stated, interest; LBP-08-6, 67 NRC 277 n.159 (2008)
- Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 188 (2007)
pro se petitioners are not held to the same standard of pleading as those represented by counsel; LBP-08-6, 67 NRC 278 (2008)
- Shieldalloy Metallurgical Corp.* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, 357-58 (2007)
examples of admitted contentions that satisfied the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 n.79 (2008)
- Siegel v. AEC*, 400 F.2d 778, 784 (D.C. Cir. 1968)
congressional intent for the phrase "common defense and security," is analyzed in the context of foreign ownership prohibitions; LBP-08-6, 67 NRC 339 (2008)
- Sierra Club v. Morton*, 405 U.S. 727 (1972)
for an organizational petitioner to establish standing, it must show either immediate or threatened injury to its organizational interests or to the interests of identified members; LBP-08-6, 67 NRC 271 (2008)
- Simmons v. U.S. Department of Justice*, 796 F.2d 709, 711-12 (4th Cir. 1986)
the district court has discretion to limit discovery in FOIA cases and to enter summary judgment on the basis of agency affidavits in a proper case; CLI-08-5, 67 NRC 177 (2008)
- South Louisiana Environmental Council v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir. 1980)
a hidden and unjustified assumption in Staff's environmental assessment is asserted to violate NEPA by impairing the agency's consideration of the adverse environmental effects of a proposed project; CLI-08-1, 67 NRC 17 (2008)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 266 (2007)
a contention that alleges that increases in radioactive releases create higher doses, but does not provide information or expert opinion to dispute the conclusion that the higher doses would still be under

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- NRC regulatory limits or that the higher levels will cause harm will not be admitted; LBP-08-9, 67 NRC 446 (2008)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 268 (2007)
- ISL mining does not involve fuel rod waste and to the extent such waste is indirectly relevant, the Waste Confidence rule would prohibit consideration in a license amendment proceeding; LBP-08-6, 67 NRC 342 (2008)
- State of Illinois*, CLI-90-11, 32 NRC 333, 334 (1990)
- failure of a motion to address the four stay factors is reason enough to deny it; CLI-08-13, 67 NRC 399 (2008)
- State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993)
- determinations on any nontimely filing of a petition must be based on a balancing of factors under 10 C.F.R. 2.309(c), the most important of which is good cause, if any, for the failure to file on time; LBP-08-6, 67 NRC 257 (2008)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)
- the purpose of strict contention pleading rules is to make adjudicatory proceedings more effective and efficient, while maintaining fundamental fairness; LBP-08-11, 67 NRC 501 (2008)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998)
- boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding; CLI-08-4, 67 NRC 172 (2008)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981)
- the purpose of strict contention pleading rules is to make adjudicatory proceedings more effective and efficient, while maintaining fundamental fairness; LBP-08-11, 67 NRC 501 (2008)
- Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)
- under judicial concepts of standing, boards are to consider whether a petitioner has alleged a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-08-6, 67 NRC 271 (2008)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 145 (2007)
- the Commission disagrees with the Ninth Circuit's view that NEPA demands a terrorism inquiry; CLI-08-1, 67 NRC 5 (2008)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 147 (2007)
- contentions requiring an evaluation of terrorist attacks under NEPA are inadmissible in an early site permit proceeding; LBP-08-6, 67 NRC 332 n.513 (2008)
- Teachers Insurance and Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638, 642 (S.D.N.Y. 1981)
- submitting information to a government agency is voluntary even if the company submitting the information feels pressure to do so as a result of its dealings with the federal government; CLI-08-6, 67 NRC 183-84 n.2 (2008)
- Tenet v. Doe*, 544 U.S. 1, 8 (2005)
- public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated; CLI-08-1, 67 NRC 20 (2008)
- Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 37 (2002)
- contentions must rest on the license application, not on NRC Staff reviews; LBP-08-9, 67 NRC 435 n.90 (2008)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73 (1992)
- determinations on any nontimely filing of a petition must be based on a balancing of factors under 10 C.F.R. 2.309(c), the most important of which is good cause, if any, for the failure to file on time; LBP-08-6, 67 NRC 257 (2008)

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- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164 (1993)
the test for good cause for late filing is when the information became available, when petitioners reasonably should have become aware of that information, and whether petitioners acted promptly after learning of the new information; LBP-08-6, 67 NRC 260 (2008)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975)
according to the Commission's longstanding practice, a board order is considered appealable where it disposes of a major segment of the case or terminates a party's right to participate; CLI-08-2, 67 NRC 34 n.14 (2008)
- Totten v. United States*, 92 U.S. 105, 107 (1876)
public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters that the law itself regards as confidential, and respecting which it will not allow the confidence to be violated; CLI-08-1, 67 NRC 20 (2008)
- U.S. Army* (Jefferson Proving Ground Site), LBP-08-4, 67 NRC 105, 146 (2008)
an alternate schedule proposal for submission of a decommissioning plan by 2011 was accepted by the Staff and approved by the licensing board; LBP-08-8, 67 NRC 416 (2008)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-06-5, 63 NRC 143 (2006)
a draft license application does not qualify as documentary material; LBP-08-5, 67 NRC 213-14 (2008)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-06-5, 63 NRC 143, 154 (2006)
interpretation of a regulation, like interpretation of a statute, begins with the language and structure of the provision itself; CLI-08-12, 67 NRC 391 (2008); LBP-08-1, 67 NRC 46 (2008)
- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357 (2004)
NRC has no legal duty to consider the environmental impacts of terrorism at NRC-licensed facilities; LBP-08-6, 67 NRC 333 (2008)
- United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997)
submitting information to a government agency is voluntary even if the company submitting the information feels pressure to do so as a result of its dealings with the federal government; CLI-08-6, 67 NRC 183 (2008)
- United States v. Postal Service*, 534 U.S. 1, 10 (2001)
a presumption of regularity attaches to the actions of government agencies; CLI-08-11, 67 NRC 384 (2008)
- United States v. Reynolds*, 345 U.S. 1, 10-11 (1953)
public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters that the law itself regards as confidential, and respecting which it will not allow the confidence to be violated; CLI-08-1, 67 NRC 20 (2008)
- United States v. Reynolds*, 345 U.S. 1, 11 (1953)
the "state secrets" privilege is absolute; CLI-08-1, 67 NRC 21 n.97 (2008)
- United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 n.1 (1980)
petitioners argue that mine sites are within the Indian Treaty boundaries, that they possess water and mineral rights under the Treaties, that infringement of the treaties would constitute injury in fact for purposes of standing; LBP-08-6, 67 NRC 268 (2008)
- United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75 (1976)
absence of a specific rule does not, and could not, interfere with NRC's inherent supervisory authority over the conduct of adjudicatory proceedings before the Commission; CLI-08-11, 67 NRC 383 (2008)
- Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981)
during an internal company investigation, all communications with company lawyers hired to provide advice to the company are privileged; CLI-08-6, 67 NRC 181 (2008)
- USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 445 n.65 (2006)
when a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the NRC Staff in an environmental impact statement, the contention is moot; LBP-08-6, 67 NRC 330 (2008)

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- Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973)
the process referred to as a *Vaughn* index is described; CLI-08-1, 67 NRC 16 (2008)
when an agency's withholding of documents is disputed in FOIA litigation, the agency will ordinarily provide a *Vaughn* index, which identifies the documents withheld, the FOIA exemptions claimed, and an explanation of why each document falls within the claimed exemption; LBP-08-7, 67 NRC 367 n.3 (2008)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978)
contention pleading requirements serve to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-08-9, 67 NRC 429 (2008)
- Vermont Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519, 554 (1978)
petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-08-6, 67 NRC 292 (2008)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990)
facts or expert opinions provided in support of a contention will be carefully examined by the board to confirm that on their face they do supply adequate support for the contention; LBP-08-9, 67 NRC 433 (2008)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)
organizations seeking representation intervention must demonstrate that the licensing action will affect at least one of its members, must identify that member by name and address, and must show that it is authorized by that member to request a hearing on his or her behalf; LBP-08-9, 67 NRC 427 (2008)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973)
a petition that is not submitted under oath and does not state expressly the manner in which the petitioner's interest would be affected by the proceeding involves defects that are readily curable; LBP-08-6, 67 NRC 277 (2008)
participation of intervenors in licensing proceedings can furnish valuable assistance to the adjudicatory process; LBP-08-6, 67 NRC 277 (2008)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973)
while there must be strict observance of the requirements governing intervention, in order that the adjudicatory process is invoked only by those persons who have real interests at stake and who seek resolution of concrete issues, it is not necessary to the attainment of that goal that interested persons be rebuffed by the inflexible application of procedural requirements; LBP-08-6, 67 NRC 278 (2008)
- Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 337-38 (1979)
occasional trips to areas located close to reactors have been found to be insufficient grounds to demonstrate a risk to the intervenor's health and safety; LBP-08-9, 67 NRC 429 n.39 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981)
security considerations may permit or require modification of some of the NEPA procedures even though security issues do not result in some kind of NEPA waiver; CLI-08-8, 67 NRC 196 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981)
NEPA § 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure of any NEPA documents, in whole or in part, under the authority of a FOIA exemption; CLI-08-1, 67 NRC 15 (2008); LBP-08-7, 67 NRC 370 (2008)
the Commission need not and will not provide petitioner with access to exempt documents; CLI-08-1, 67 NRC 17 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 144-46 (1981)
if the existence of a document is classified, such that disclosure of the title and a description of the contents would also be classified, then, where the environmental impact statement is classified because the very presence or absence of nuclear weapons is classified, FOIA Exemption 1 would

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- apply, and even limited information, such as the title of the document, could be withheld; CLI-08-1, 67 NRC 16 n.71 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981)
Congress, in enacting section 102(2)(C) of NEPA set the balance between the public's need to be informed and the government's need for secrecy; LBP-08-7, 67 NRC 371 (2008)
disclosure of documents under the National Environmental Policy Act is expressly governed by the Freedom of Information Act; CLI-08-5, 67 NRC 176 (2008)
protecting national security information overrides ordinary NEPA disclosure requirements; CLI-08-1, 67 NRC 9 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146 (1981)
an inability to adjudicate or publicize NEPA information does not justify an agency's failure to perform a NEPA analysis; CLI-08-1, 67 NRC 21 n.98 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146-47 (1981)
NEPA does not contemplate adjudications resulting in the disclosure of matters under law considered secret or confidential; CLI-08-8, 67 NRC 201 (2008)
public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters that the law itself regards as confidential, and respecting which it will not allow the confidence to be violated; CLI-08-1, 67 NRC 20 (2008)
- Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 202-03 (1981)
NEPA provides that any information kept from the public under the exemptions in FOIA need not be disclosed; CLI-08-1, 67 NRC 15 (2008)
- Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1418 (3d Cir. 1991)
in the context of privilege covering voluntarily disclosed information, the privilege holder has waived its privilege as to the agency that received the investigative materials; CLI-08-6, 67 NRC 183 (2008)
- Wheeler v. Central Intelligence Agency*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003)
discovery is generally unavailable in FOIA actions; CLI-08-5, 67 NRC 177 (2008)
- Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001)
like Congress, the Commission is not to be assumed to hide elephants in mouseholes; LBP-08-1, 67 NRC 48 (2008)
- Wickwire Gavin, P.C. v. U.S. Postal Service*, 356 F.3d 588 (4th Cir. 2004)
challenges in FOIA cases routinely are resolved on the basis of summary judgment pleadings; LBP-08-7, 67 NRC 371 (2008)
- Wiener v. Federal Bureau of Investigation*, 943 F.2d 972, 977 (9th Cir. 1991)
when access to documents is disputed in FOIA litigation, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption; CLI-08-1, 67 NRC 16 (2008)
- Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)
injury in fact may be either actual or threatened to establish standing; LBP-08-6, 67 NRC 271 (2008)
- Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 289-90 (8th Cir. 1988)
federal courts have rejected the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits; LBP-08-6, 67 NRC 278 (2008)
- Worthington v. Endee*, 177 F.R.D. 113, 118 (N.D.N.Y. 1998)
if a company claims that the internal investigation establishes that it has met its obligation, then the company has waived the attorney-client privilege associated with the internal investigation; CLI-08-6, 67 NRC 184 (2008)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-1, 43 NRC 1, 6 (1996)
in determining whether an individual or organization should be granted party status based on standing as of right, NRC has applied contemporaneous judicial standing concepts; LBP-08-9, 67 NRC 426 (2008)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 249 (1996)
petitioner is not required to prove its case at the contention stage and need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-08-6, 67 NRC 292 (2008)

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- petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-08-6, 67 NRC 292 (2008)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998)
- for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interests of identified members; LBP-08-6, 67 NRC 271 (2008)
- injury in fact may be either actual or threatened to establish standing; LBP-08-6, 67 NRC 271 (2008)
- under judicial concepts of standing, boards are to consider whether a petitioner has alleged a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-08-6, 67 NRC 271 (2008)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998)
- to establish standing, the injury to petitioner must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-08-6, 67 NRC 271 (2008)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375 n.26 (2005)
- as guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the Statement of Considerations is entitled to special weight; CLI-08-3, 67 NRC 166 (2008)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 377 (2005)
- a site characterization plan should provide sufficient information to allow the NRC to determine the extent and range of expected radioactive contamination; LBP-08-4, 67 NRC 116, 117 (2008)
- what constitutes "sufficient information," in a site characterization depends, to a large extent, on site-specific conditions; LBP-08-4, 67 NRC 117 (2008)
- with respect to an adequate site characterization, it is reasonable to interpret the regulations as requiring decommissioning plan submissions to contain the type of information discussed in the NUREG-1700 acceptance criteria; LBP-08-4, 67 NRC 116 n.73 (2008)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
- any contention supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-08-9, 67 NRC 432 (2008)

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- 10 C.F.R. 1.15
the Commission has broad authority to delegate powers to the Atomic Safety and Licensing Boards; CLI-08-14, 67 NRC 406 n.14 (2008)
- 10 C.F.R. 2.104(c)(1)
a proceeding commences when a notice of hearing or notice of proposed action is issued; CLI-08-14, 67 NRC 403 n.4 (2008)
- 10 C.F.R. 2.105
a proceeding commences when a notice of hearing or a notice of proposed action is issued; CLI-08-14, 67 NRC 406 (2008)
- 10 C.F.R. 2.206
request for an enforcement-type action where the underlying concern is the partial collapse of a cooling tower is credible and sufficient to warrant further inquiry; DD-08-1, 67 NRC 348-51 (2008)
requests for diagnostic evaluation team examination, safety culture assessment, and the NRC investigation at other licensee facilities are rejected for review because they are not requests for enforcement-type actions; DD-08-1, 67 NRC 348-51 (2008)
the current licensing basis of a plant is properly challenged through the process prescribed by this section; LBP-08-9, 67 NRC 438 n.102 (2008)
- 10 C.F.R. 2.304(g)
exhibits and prefiled written testimony should be submitted via the agency's E-Filing system as separate electronic files; LBP-08-10, 67 NRC 457 (2008)
- 10 C.F.R. 2.309
although the contention pleading requirements are strict by design, a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects; LBP-08-6, 67 NRC 277 (2008)
- 10 C.F.R. 2.309(a)
all six factors for contention admissibility must be met for the board to admit a contention; LBP-08-9, 67 NRC 448 (2008)
any individual, group, business, or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must establish that it has standing and offer at least one admissible contention; LBP-08-9, 67 NRC 426 (2008)
it is the contention, not bases, whose admissibility must be determined; LBP-08-6, 67 NRC 293 (2008)
- 10 C.F.R. 2.309(b)(2)
the initial 6-month period between DOE's initial certification and license application provides an opportunity to frame focused and meaningful contentions at the initial juncture, 30 days after NRC docket the license application; LBP-08-1, 67 NRC 50-51 (2008)
- 10 C.F.R. 2.309(b)(3)(iii)
contentions must be filed with the original intervention petition within 60 days of notice of the proceeding in the *Federal Register*, unless a longer period is therein specified, an extension is granted, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-08-6, 67 NRC 291 n.254 (2008)
- 10 C.F.R. 2.309(c)
a late-filed environmental contention may be admitted only where petitioner relies upon newly available, significant information, meets the nontimely filing requirements, or successfully argues for supplementing the EIS; LBP-08-11, 67 NRC 475 (2008)

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- although exhibits are not themselves either “petitions” or “contentions,” the board considers the timeliness of their filing, given that the exhibits are offered in support of petitioners’ standing and certain of their contentions; LBP-08-6, 67 NRC 258 (2008)
- contentions must be filed with the original intervention petition within 60 days of notice of the proceeding in the *Federal Register*, unless a longer period is therein specified, an extension is granted, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-08-6, 67 NRC 291 n.254 (2008)
- determinations on any nontimely filing of a petition must be based on a balancing of certain factors, the most important of which is good cause, if any, for the failure to file on time; LBP-08-6, 67 NRC 257 (2008)
- late contentions may always be filed for good cause; LBP-08-1, 67 NRC 44 (2008)
- late-filed environmental contentions must meet not only the usual contention pleading requirements applicable to all proceedings, but also the additional requirements for new contentions; LBP-08-11, 67 NRC 479 (2008)
- under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline; LBP-08-1, 67 NRC 51 (2008)
- 10 C.F.R. 2.309(c)(1)
- contentions filed after, and less formally than in, the initial petition must carry with them a demonstration that they are timely or that there is (among other things) good cause for their untimeliness; LBP-08-11, 67 NRC 503 n.13 (2008)
- 10 C.F.R. 2.309(d)
- the introduction to intervention petitions shall identify the petitioner and set forth the basis on which it asserts standing, including specific, labeled sections addressing, as applicable, the required elements, such as injury-in-fact and zone of interests; LBP-08-10, 67 NRC 453 (2008)
- 10 C.F.R. 2.309(d)(1)
- petitions to intervene must provide certain basic information supporting the petitioner’s claim to standing; LBP-08-9, 67 NRC 426 (2008)
- 10 C.F.R. 2.309(d)(1)(ii)-(iv)
- a licensing board shall consider three factors when deciding whether to grant standing to a petitioner; LBP-08-6, 67 NRC 270 (2008)
- 10 C.F.R. 2.309(d)(2)
- a local governmental body need not address standing requirements if it wishes to be a party in a proceeding for a facility located within its boundaries; LBP-08-10, 67 NRC 458 (2008)
- affected units of local government must establish standing in the same manner as all other potential parties; LBP-08-10, 67 NRC 458 (2008)
- 10 C.F.R. 2.309(e)
- any petitioner requesting discretionary standing shall label its discussion of each of the applicable regulatory requirements; LBP-08-10, 67 NRC 453 (2008)
- 10 C.F.R. 2.309(f)
- petitioner must explain and support its contention in the petition to intervene; CLI-08-7, 67 NRC 191 (2008)
- petitioners must set forth, with adequate elaboration and support, a plausible claim that a proposed facility would not be adequately protective in the event of specific phenomena; CLI-08-3, 67 NRC 167 (2008)
- 10 C.F.R. 2.309(f)(1)
- all six factors for contention admissibility must be met for the board to admit a contention; LBP-08-9, 67 NRC 448 (2008)
- in addition to providing a specific statement of their contention and briefly explaining the basis for it, petitioners must support it with references to the application and a fact-based argument, stating why they disagree with the applicant’s actions and position; LBP-08-6, 67 NRC 328 (2008)
- the support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity so as to put the other parties on notice as to what issues they will have to defend against or oppose; LBP-08-2, 67 NRC 73 (2008)
- to be admissible, a contention calling for an irradiator siting analysis must conform to all the requirements of this section, including providing sufficient basis to show that a siting analysis is

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- necessary to determine that the facility will be adequate to protect health and minimize danger to life or property; CLI-08-3, 67 NRC 170 (2008)
- to intervene in such a proceeding a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of this section; LBP-08-6, 67 NRC 290 (2008)
- 10 C.F.R. 2.309(f)(1)(i)
- contentions must provide a specific statement of the issue of law or fact to be raised or controverted; LBP-08-5, 67 NRC 235 (2008); LBP-08-9, 67 NRC 430 (2008)
- examples of admitted contentions that satisfy the requirement to provide a specific statement of the issue of law or fact to be raised or controverted are provided; LBP-08-5, 67 NRC 235 (2008)
- in addition to the six requirements for contentions set forth in section 2.309(f)(1)(i)-(vi), potential parties shall provide a specific statement of the issue of law or fact to be raised or controverted; LBP-08-10, 67 NRC 454 (2008)
- 10 C.F.R. 2.309(f)(1)(i)-(vi)
- each contention shall consist of a label, a title, a body addressing separately, in order and clearly labeled, each of the six requirements for contentions, and a statement concerning whether the contention is a joint contention; LBP-08-9, 67 NRC 429 (2008); LBP-08-10, 67 NRC 453 (2008)
- 10 C.F.R. 2.309(f)(1)(ii)
- a brief explanation of the basis for the contention is a necessary prerequisite of an admissible contention; CLI-08-3, 67 NRC 168 (2008); LBP-08-9, 67 NRC 430 (2008)
- the brief explanation of the basis that is required helps define the scope of a contention, the reach of a contention necessarily hinging upon its terms coupled with its stated bases; LBP-08-6, 67 NRC 292-93 (2008)
- the requirement for a brief explanation of the basis for the contention should rarely exceed more than a sentence or two; LBP-08-10, 67 NRC 455 (2008)
- 10 C.F.R. 2.309(f)(1)(iii)
- a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis, because the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than adequacy of the NRC Staff performance; LBP-08-9, 67 NRC 435 (2008)
- assertions based on previous facility changes are outside the scope of a license amendment proceeding; LBP-08-9, 67 NRC 437 n.100 (2008)
- concerns regarding potential terrorism are inadmissible because it is beyond the scope of a license amendment proceeding and not material to the findings the NRC must make to support the action that is involved in the proceeding; LBP-08-6, 67 NRC 333 (2008)
- issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of and material to a license amendment proceeding; LBP-08-6, 67 NRC 320 (2008)
- petitioner must demonstrate that the issue raised in the contention is within the scope of the proceeding; LBP-08-9, 67 NRC 430-31, 448 (2008)
- the manner in which the NRC Staff conducts its sufficiency review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding; LBP-08-9, 67 NRC 444 (2008)
- the requirement for a showing that the issue raised in the contention is within the scope of the proceeding may be satisfied by reference to a potential party's response to the provision for section 2.309(f)(1)(iv); LBP-08-10, 67 NRC 455 (2008)
- 10 C.F.R. 2.309(f)(1)(iv)
- a showing that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention; LBP-08-9, 67 NRC 431 (2008); LBP-08-10, 67 NRC 455 (2008)
- concerns regarding potential terrorism are inadmissible because it is beyond the scope of a license amendment proceeding and not material to the findings the NRC must make to support the action that is involved in the proceeding; LBP-08-6, 67 NRC 333 (2008)
- issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of and material to a license amendment proceeding; LBP-08-6, 67 NRC 320 (2008)

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- 10 C.F.R. 2.309(f)(1)(v)
contentions must be supported by a concise statement of the alleged facts or expert opinions that support the requestor's/petitioner's position on the issue together with references to the specific sources and documents on which petitioner intends to rely to support its position; CLI-08-3, 67 NRC 168 (2008); LBP-08-9, 67 NRC 432 (2008); LBP-08-10, 67 NRC 455 (2008)
- 10 C.F.R. 2.309(f)(1)(vi)
challenge to a license application can be in the form of either an asserted omission from the application of required information or an asserted error in a specific analysis or other technical matter set out in the application; LBP-08-9, 67 NRC 435 (2008)
contentions must show that a genuine dispute exists with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-08-5, 67 NRC 235 (2008); LBP-08-6, 67 NRC 333 (2008); LBP-08-9, 67 NRC 433 (2008)
for documents that are on the LSN, it will be sufficient to reference them in the same manner as other LSN documents, citing to the most specific portion of the document that is practicable; LBP-08-10, 67 NRC 456 (2008)
- 10 C.F.R. 2.309(f)(2)
a late-filed environmental contention may be admitted only where petitioner relies on newly available, significant information, meets the nontimely filing requirements, or successfully argues for supplementing the EIS; LBP-08-11, 67 NRC 475 (2008)
although exhibits are not themselves either "petitions" or "contentions," the board considers the timeliness of their filing, given that the exhibits are offered in support of petitioners' standing and certain of their contentions; LBP-08-6, 67 NRC 258 (2008)
an intervenor attempting to litigate an issue based on expressed concerns about the draft environmental impact statement may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the environmental report that supported the contention's admission, submit a new contention; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 95 (2008)
contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer if they successfully address the three factors in this section; LBP-08-6, 67 NRC 257 (2008); LBP-08-10, 67 NRC 458 (2008)
contentions must be based on documents or information available when the hearing petition is to be filed; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 94 (2008); LBP-08-6, 67 NRC 329 (2008)
contentions must be filed with the original intervention petition within 60 days of notice of the proceeding in the *Federal Register*, unless a longer period is therein specified, an extension is granted, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-08-6, 67 NRC 291 n.254 (2008)
in the face of a Staff DEIS or FEIS that includes additional probative information, an intervenor would be wise to amend its contention to reflect any relevant changes or additions, thereby avoiding any question about whether this additional information falls outside the scope of the admitted contention so as to preclude it from consideration as support for the contention; LBP-08-2, 67 NRC 72 n.13 (2008)
late-filed environmental contentions must meet not only the usual contention pleading requirements applicable to all proceedings, but also the additional requirements for new contentions; LBP-08-11, 67 NRC 479 (2008)
the licensing board finds that the lateness of petitioner's filing is justifiable because a relevant document was not revealed in a search of NRC's public database because of deficiencies in tagging; LBP-08-6, 67 NRC 259 (2008)
under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline; LBP-08-1, 67 NRC 51 (2008)
- 10 C.F.R. 2.309(f)(2)(i)-(iii)
contentions filed after, and less formally than in, the initial petition must carry with them a demonstration that they are timely or that there is (among other things) good cause for their untimeliness; LBP-08-11, 67 NRC 503 n.13 (2008)

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- 10 C.F.R. 2.309(f)(3)
a participant that wishes to adopt the contention of another participant should do so within either 45 days of the filing of the contention to be adopted or 45 days of the admission of the contention to be adopted; LBP-08-10, 67 NRC 458 (2008)
potential parties are encouraged, but not required, to confer and submit joint contentions where practicable; LBP-08-10, 67 NRC 458 (2008)
the introduction to intervention petitions shall designate which (if any) contentions are submitted as joint contentions; LBP-08-10, 67 NRC 453 (2008)
where applicable, a statement shall be included indicating that a contention is jointly sponsored, listing all participants that are sponsoring the contention, and designating the specific participant with authority to act with respect to the contention; LBP-08-10, 67 NRC 456 (2008)
- 10 C.F.R. 2.309(h)
answers to requests for hearing and petitions to intervene are due 25 days after service of the request for hearing; LBP-08-5, 67 NRC 237 n.83 (2008)
- 10 C.F.R. 2.309(h)(2)
petitioner may file a reply to applicant/staff answers to hearing requests; LBP-08-2, 67 NRC 67 n.8 (2008); LBP-08-3, 67 NRC 98 n.7 (2008)
- 10 C.F.R. 2.310(a)
use of the permissive term, "may," indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 342-43 (2008)
- 10 C.F.R. 2.311
within 10 days after service of the Memorandum and Order, an appeal can be taken to the Commission on the question whether the petition to intervene should have been denied in its entirety; LBP-08-11, 67 NRC 495 (2008)
- 10 C.F.R. 2.311(a)
responses to any appeal are due within 10 days after service of the appeal; LBP-08-11, 67 NRC 495 (2008)
- 10 C.F.R. 2.311(b)
if a board rejects an intervention petition in its entirety, then its sponsor may appeal to the Commission at that time; CLI-08-7, 67 NRC 191 (2008)
- 10 C.F.R. 2.315(c)
a stay of the close of hearings in both license renewal proceedings for 14 days following the date of issuance of mandate is ordered to afford a state the opportunity to request participant status under this section; CLI-08-9, 67 NRC 354, 355 (2008)
Indian tribes are entitled to a reasonable opportunity to participate in NRC proceedings; LBP-08-6, 67 NRC 266 (2008)
- 10 C.F.R. 2.315(d)
an *amicus* brief must be filed within the time allowed to the party whose position the brief will support; LBP-08-6, 67 NRC 267 (2008)
this section applies to briefs filed before the Commission, not to briefs filed before Atomic Safety and Licensing Boards; LBP-08-6, 67 NRC 266 (2008)
- 10 C.F.R. 2.318(a)
a proceeding commences when a notice of hearing or a notice of proposed action is issued; CLI-08-14, 67 NRC 406 (2008)
- 10 C.F.R. 2.319
it is the board's responsibility to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to maintain order; CLI-08-7, 67 NRC 192 (2008)
- 10 C.F.R. 2.319(j)
the presiding officer is authorized to hold conferences before or during the hearing for settlement, for simplification of contentions, or any other proper purpose; LBP-08-11, 67 NRC 483 (2008)
- 10 C.F.R. 2.323(a)
a reply is due within 7 days after the submission of a response to a summary disposition motion rather than the 10 days generally provided for a motion; LBP-08-2, 67 NRC 67 n.8 (2008); LBP-08-3, 67 NRC 98 n.7 (2008)

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- any motion must be filed within 10 days of the occurrence or circumstance from which the motion arises, and any movant must contact other parties prior to filing the motions; LBP-08-6, 67 NRC 266 (2008)
- 10 C.F.R. 2.323(b)
although a court can act to order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter, there is no explicit mention of such a motion in NRC's Rules of Practice; LBP-08-2, 67 NRC 66 (2008); LBP-08-3, 67 NRC 97 (2008)
- any motion must be filed within 10 days of the occurrence or circumstance from which the motion arises, and any movant must contact other parties prior to filing the motions; LBP-08-6, 67 NRC 266 (2008)
- 10 C.F.R. 2.323(c)
a moving party has no right to reply; LBP-08-1, 67 NRC 51 n.14 (2008)
- permission to file a reply to a response to a motion may be granted in compelling circumstances, such as when the moving party could not reasonably anticipate response arguments; LBP-08-2, 67 NRC 67 n.8 (2008); LBP-08-3, 67 NRC 98 n.7 (2008)
- when reply briefs are permitted, NRC rules set strict conditions on their filing; CLI-08-12, 67 NRC 393 (2008)
- 10 C.F.R. 2.325
the burden of proof rests on the movant; LBP-08-5, 67 NRC 209 (2008)
- 10 C.F.R. 2.329(c)(1)
a prehearing conference may be held for simplification, clarification, and specification of the issues; LBP-08-11, 67 NRC 483 (2008)
- 10 C.F.R. 2.332(d)
evidentiary hearings on admitted contentions await the Staff's later issuance of key analytical documents; LBP-08-11, 67 NRC 506 n.23 (2008)
- 10 C.F.R. 2.335(a)
challenges to dose limits in NRC regulations are not appropriate for admission; LBP-08-6, 67 NRC 321 (2008)
- challenges to the adequacy of the NRC's groundwater restoration standards are impermissible; LBP-08-6, 67 NRC 316 (2008)
- the exclusion applies only to a rule or regulation of the Commission, not to license conditions; LBP-08-6, 67 NRC 322 (2008)
- with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-08-9, 67 NRC 430, 431 (2008)
- 10 C.F.R. 2.336(a)(3), (b)(5)
parties agree to waive the obligation to provide a privilege log; LBP-08-2, 67 NRC 61 n.3 (2008); LBP-08-3, 67 NRC 92 n.3 (2008)
- 10 C.F.R. 2.341(b)(1)
because the board's declining to refer petitioners' request for a stay of construction to the Commission is the equivalent of the direct denial of a stay motion, a petition for review may be filed; LBP-08-11, 67 NRC 495 (2008)
- petitions for review are allowed after a full or partial initial decision, which are considered "final" decisions; CLI-08-2, 67 NRC 34 (2008)
- this rule provides standards for review of final board decisions (full or partial initial decisions); CLI-08-7, 67 NRC 191 (2008)
- 10 C.F.R. 2.341(b)(3)
when reply briefs are permitted, NRC rules provide explicitly for their filing; CLI-08-12, 67 NRC 393 (2008)
- 10 C.F.R. 2.341(c)(2)
appeals and any answers shall conform to the requirements of this section; LBP-08-11, 67 NRC 495 (2008)
- 10 C.F.R. 2.341(f)(2)
a party may pursue interlocutory appeal only where the ruling affects the basic structure of the proceeding in a pervasive or unusual manner or threatens the party adversely affected by it with immediate, serious, and irreparable harm that could not be alleviated through a petition for review of the board's final decision; CLI-08-2, 67 NRC 34 (2008); CLI-08-7, 67 NRC 191 (2008)

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- because the board's declining to refer petitioners' request for a stay of construction to the Commission is the equivalent of the direct denial of a stay motion, a petition for review may be filed; LBP-08-11, 67 NRC 495 (2008)
- the mere potential for legal error does not justify interlocutory review; CLI-08-2, 67 NRC 35 (2008)
- 10 C.F.R. 2.342(a)
a party must file a stay application within 10 days after service of the decision; LBP-08-11, 67 NRC 491 n.77 (2008)
- 10 C.F.R. 2.342(e)
factors that influence the grant of a stay are addressed; LBP-08-11, 67 NRC 491 (2008)
motions to stay the effect of a board decision pending appeal are allowed; CLI-08-13, 67 NRC 399 (2008)
- 10 C.F.R. 2.710(a)
following response by an opposing party to a summary disposition motion, no further supporting statements or responses will be entertained; LBP-08-2, 67 NRC 67 n.8 (2008); LBP-08-3, 67 NRC 98 n.7 (2008)
if a summary disposition movant discusses a matter in its statement of undisputed facts, it would not be untoward for the board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement; LBP-08-2, 67 NRC 68 n.9 (2008); LBP-08-3, 67 NRC 98 n.8 (2008)
the opponent of summary disposition must counter any adequately supported material facts provided by the movant with its own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 94 (2008)
the party opposing a motion for summary disposition may respond in writing to new facts and arguments presented in any statement filed in support of the motion; LBP-08-1, 67 NRC 51 n.14 (2008)
the proponent of summary disposition bears the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 94 (2008)
to the degree that the response to a summary disposition motion fails to contravene the material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-08-2, 67 NRC 63 (2008); LBP-08-3, 67 NRC 94 (2008)
- 10 C.F.R. 2.710(d)(2)
summary disposition may be entered with respect to any or all matters in a proceeding if the motion, along with any appropriate supporting materials, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-08-2, 67 NRC 64 (2008); LBP-08-3, 67 NRC 94 (2008); LBP-08-7, 67 NRC 371 (2008)
where a material factual disputes still exist regarding the adequacy of the ER/DEIS, making a grant of summary disposition would be improper; LBP-08-2, 67 NRC 76 (2008)
- 10 C.F.R. 2.714
although the Commission's procedural rules for adjudications were revised, case law interpreting this prior section remains relevant; LBP-08-6, 67 NRC 270-71 n.112 (2008)
- 10 C.F.R. 2.714(a)(1)
under pre-2004 rules, five factors must be balanced before a petition to admit a late-filed contention can be granted; CLI-08-1, 67 NRC 6 (2008); CLI-08-8, 67 NRC 197 (2008)
- 10 C.F.R. 2.714(b)(2)
even if the late-filed contention criteria are satisfied under the pre-2004 rules, proposed contentions still must meet the admissibility standards of this section; CLI-08-1, 67 NRC 8 (2008)
pleading requirements for contentions are described; CLI-08-1, 67 NRC 8 (2008)
- 10 C.F.R. 2.714(b)(2)(iii)
a contention that fails to identify a genuine dispute on a material issue of law or fact within the scope of the proceeding must be rejected; CLI-08-1, 67 NRC 10 (2008)
- 10 C.F.R. 2.714(d)(2)
petitioner must show a genuine dispute of material fact or law; CLI-08-1, 67 NRC 28 (2008)

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- 10 C.F.R. 2.714(d)(2)(i)
a contention shall not be admitted if the pleading requirements are not satisfied; CLI-08-1, 67 NRC 8 (2008)
- 10 C.F.R. 2.714(d)(2)(ii)
a contention shall not be admitted if the contention, even if proven, would not entitle the petitioner to relief; CLI-08-1, 67 NRC 8 (2008)
- 10 C.F.R. 2.717, 2.718
the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel shall designate an administrative judge to sit as presiding officer; CLI-08-1, 67 NRC 26 (2008)
- 10 C.F.R. 2.740
discovery, including interrogatories, requests for admissions, and requests for production of documents in Subpart K proceedings are governed by the general provisions of this section, except that oral depositions will be permitted only upon a showing of compelling need and with appropriate security precautions; CLI-08-1, 67 NRC 25 (2008)
- 10 C.F.R. 2.749(a) (2003)
parties responding to summary disposition motions may interpose additional “factual” information by way of affidavits and other submissions; LBP-08-2, 67 NRC 67 n.8 (2008); LBP-08-3, 67 NRC 98 n.7 (2008)
- 10 C.F.R. 2.771(a)
NRC practice is that petitions for reconsideration be filed within 10 days of the decision; CLI-08-5, 67 NRC 176 (2008)
- 10 C.F.R. 2.771(b)
a petition for reconsideration will be granted upon a showing of compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated; CLI-08-5, 67 NRC 176 (2008)
- 10 C.F.R. 2.786(g)
under an earlier version of the agency’s rules, stay motions are appealable; LBP-08-11, 67 NRC 495 (2008)
- 10 C.F.R. 2.802
interested parties may ask the Commission to issue, rescind, or amend a regulation; CLI-08-13, 67 NRC 401 (2008)
- 10 C.F.R. 2.802(d)
an interested state may petition to suspend proceedings; CLI-08-9, 67 NRC 355-56 (2008)
- 10 C.F.R. Part 2, Subpart J
“party” is defined to include, among others, any affected unit of local government; LBP-08-10, 67 NRC 458 (2008)
this subpart does not take precedence over certain other Commission regulations, including section 2.309; LBP-08-10, 67 NRC 458 (2008)
- 10 C.F.R. 2.1001
categories of “documentary material” are described; CLI-08-12, 67 NRC 389 (2008)
documentary material includes any information upon which a party, potential party, or interested governmental participant intends to rely; LBP-08-1, 67 NRC 41 (2008)
“documentary material” is defined; LBP-08-1, 67 NRC 47 (2008)
nonsupporting documentary material refers to any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party’s position in the proceeding; LBP-08-5, 67 NRC 213, 230 (2008)
“potential party,” means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definition of “party,” “potential party,” or “interested governmental participant”; LBP-08-10, 67 NRC 451 n.1 (2008)
supporting documentary material is any information upon which a party intends to rely and/or to cite in support of its position in the proceeding for a construction authorization; LBP-08-5, 67 NRC 213, 218, 225, 227, 230, 231 n.73, 238 (2008)
the definition of party implies that local governments enjoy standing as of right; LBP-08-10, 67 NRC 458 (2008)

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- the meaning of the word “intends” in the phrase “intends to rely” in the first part of this section is interpreted; CLI-08-12, 67 NRC 389 (2008)
- whether a call memo was required to address the retention for LSN inclusion purposes of documentary material that does not support a party’s position is decided; LBP-08-5, 67 NRC 211 (2008)
- with respect to a petitioner, “in the proceeding” is a phrase that relates to the licensing proceeding, and not the pre-license application phase; LBP-08-5, 67 NRC 215 (2008)
- 10 C.F.R. 2.1003
- DOE’s certification started the clock for certification of documentary materials by the NRC Staff and by other potential parties; CLI-08-12, 67 NRC 389 (2008)
- 10 C.F.R. 2.1003(a)
- DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before DOE files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 39, 50 (2008)
- DOE must make available, no later than six months in advance of submitting its license application for a geologic repository, all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by” DOE; CLI-08-12, 67 NRC 388 (2008)
- DOE’s certification that it had made all of its then extant documentary material available on the NRC’s Licensing Support Network triggered the obligation of other potential parties to make their documentary material available on the LSN within 90 days; LBP-08-5, 67 NRC 206, 218, 226, 237 (2008)
- DOE’s production of documentary material and certification triggers the duty of other potential parties to make their documentary material available 90 days thereafter; LBP-08-1, 67 NRC 39 (2008)
- exclusion to this requirement is documentary material created after the time of initial certification; CLI-08-12, 67 NRC 388 (2008)
- 10 C.F.R. 2.1003(a)(1)
- a party may exclude duplicates where the documentary material has already been made available by the potential party that originally created the document; LBP-08-5, 67 NRC 231 n.74 (2008)
- DOE, in its initial certification, must make available all documentary material generated by, or at the direction of, or acquired by DOE; LBP-08-1, 67 NRC 40 (2008)
- potential parties must produce all documentary material generated by or acquired by them; LBP-08-1, 67 NRC 42 (2008)
- the duty to produce documentary material only applies to extant documents; LBP-08-1, 67 NRC 45 (2008)
- the requirements of this regulation apply equally to all potential parties; LBP-08-1, 67 NRC 48 (2008)
- 10 C.F.R. 2.1003(a)(2)
- the duty to produce graphic-oriented material is stated in the past tense, and thus applies only to documents in existence at the date of certification; LBP-08-1, 67 NRC 42 (2008)
- 10 C.F.R. 2.1003(b)
- exclusions to the duty to produce documentary material include preliminary drafts, basic licensing documents generated by DOE, and any additional material created after the time of initial certification; LBP-08-1, 67 NRC 46-47 (2008)
- 10 C.F.R. 2.1003(e)
- any documentary material that DOE creates after its initial certification must be made available in its monthly supplements; LBP-08-1, 67 NRC 50 (2008)
- DOE and the other participants have a continuing duty to supplement the Licensing Support Network with any additional documentary material created after the time of initial certification; CLI-08-12, 67 NRC 391 (2008); LBP-08-1, 67 NRC 43, 48 (2008)
- exclusion to this requirement is documentary material created after the time of initial certification; CLI-08-12, 67 NRC 388 (2008)
- exclusions to the duty to produce documentary material include preliminary drafts, basic licensing documents generated by DOE, and any additional material created after the time of initial certification; LBP-08-1, 67 NRC 46-47 (2008)
- “supplementation” with “any” additional documentary material created after initial certification is discussed; CLI-08-12, 67 NRC 389 (2008)

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- 10 C.F.R. 2.1004
a board does not need to reach the question of the extent of discovery permissible if no request for any discovery has been made; LBP-08-5, 67 NRC 211 (2008)
- 10 C.F.R. 2.1009
the regulations are unclear as to whether header searchability is a prerequisite of certification; LBP-08-1, 67 NRC 52 (2008)
- 10 C.F.R. 2.1009(a)(2)
DOE must certify that it has established procedures for implementing the requirements of section 2.1003, that it has trained its personnel to comply with these procedures, and that the documentary material specified in section 2.1003 has been made available; CLI-08-12, 67 NRC 389 (2008)
- 10 C.F.R. 2.1009(b)
DOE must certify that it has established procedures for implementing the requirements of section 2.1003, that it has trained its personnel to comply with these procedures, and that the documentary material specified in section 2.1003 has been made available; CLI-08-12, 67 NRC 389 (2008)
DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before DOE files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 39 (2008)
DOE must update its certification at the time it submits the license application; CLI-08-12, 67 NRC 389 (2008); LBP-08-1, 67 NRC 43, 48 (2008)
DOE must update its document production when it submits its license application; LBP-08-1, 67 NRC 50 (2008)
- 10 C.F.R. 2.1012(a)
DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before DOE files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 39 (2008)
the license application must be accompanied by an updated certification; LBP-08-1, 67 NRC 48 (2008)
- 10 C.F.R. 2.1012(b)(1)
a person may not be granted party status if it cannot demonstrate substantial and timely compliance with the requirements of section 2.1003 at the time it requests participation in the HLW licensing proceeding under section 2.309; LBP-08-5, 67 NRC 237 (2008)
- 10 C.F.R. 2.1013(c)(1)(vi)
reference to an active, publicly accessible Internet universal resource locator should not be made without electronically attaching copies of the information being cited, as the content of such web sites may change or subsequently become inaccessible; LBP-08-10, 67 NRC 455-56 (2008)
- 10 C.F.R. 2.1015(b)
Subpart J rules do not provide for the filing of reply briefs in the context of appeals from interlocutory decisions; CLI-08-12, 67 NRC 393 (2008)
- 10 C.F.R. 2.1015(c)
Subpart J rules permit reply briefs in connection with appeals from initial or partial initial decisions of the presiding officer; CLI-08-12, 67 NRC 393 (2008)
- 10 C.F.R. 2.1018
a board does not need to reach the question of the extent of discovery permissible if no request for any discovery has been made; LBP-08-5, 67 NRC 211 (2008)
even after DOE tenders the license application, it must continue to supplement its documentary material, and discovery will continue for approximately 2 more years; LBP-08-1, 67 NRC 50 (2008)
- 10 C.F.R. 2.1018(a)
parties are prohibited from using interrogatories and depositions during the pre-license application period, absent special dispensation; LBP-08-5, 67 NRC 225 n.62 (2008)
- 10 C.F.R. 2.1018(a)(1)(v)
proponent of a motion to strike may pursue discovery to support its suspicions, may request any relief from the board with respect to conducting discovery, or may seek an extension of time to gather support for its motion or to conduct discovery before filing its motion within the time limit; LBP-08-5, 67 NRC 210 (2008)

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- 10 C.F.R. 2.1019
even after DOE tenders the license application, it must continue to supplement its documentary material, and discovery will continue for approximately 2 more years; LBP-08-1, 67 NRC 50 (2008)
- 10 C.F.R. 2.1101
Subpart K procedures apply where invoked by a party; CLI-08-1, 67 NRC 5 (2008)
- 10 C.F.R. 2.1204(b)(3)
the opportunity for cross-examination under this section is equivalent to the opportunity for cross-examination under the Administrative Procedure Act, 5 U.S.C. § 556(d); LBP-08-6, 67 NRC 343 n.581 (2008)
- 10 C.F.R. 2.1205(b)
a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable board discretionary decision permitting the filing; LBP-08-2, 67 NRC 67 n.8 (2008); LBP-08-3, 67 NRC 98 n.7 (2008)
- 10 C.F.R. 2.1205(c)
under informal hearing procedures, summary disposition motions are to be resolved in accord with the standards for dispositive motions for formal hearings; LBP-08-2, 67 NRC 61 n.3 (2008); LBP-08-3, 67 NRC 94 (2008)
- 10 C.F.R. 2.1207(a)(3)(iii)
proposed questions, submitted by the parties, for the board, that were originally filed under seal with the board, will be made public in a separate issuance; LBP-08-4, 67 NRC 113 n.52 (2008)
- 10 C.F.R. 2.1209
“the close of the hearing” refers to the closing of the evidentiary record; CLI-08-9, 67 NRC 355 (2008)
- 10 C.F.R. 2.1213(a)
a party has 5 days to file its stay application after the issuance of the notice of the Staff’s action; LBP-08-11, 67 NRC 491 n.77 (2008)
- 10 C.F.R. 2.1213(d)
factors that influence the grant of a stay are addressed; LBP-08-11, 67 NRC 491 (2008)
- 10 C.F.R. Part 2, Appendix D
even after DOE tenders the license application, it must continue to supplement its documentary material, and discovery will continue for approximately 2 more years; LBP-08-1, 67 NRC 50 (2008)
- 10 C.F.R. 19.18
NRC may not disqualify attorneys representing multiple witnesses, unless it has concrete evidence that the attorney will obstruct and impede the investigation; CLI-08-11, 67 NRC 385 (2008)
- 10 C.F.R. 20.1003
the “total effective dose equivalent” is defined as the sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures); LBP-08-4, 67 NRC 126 n.143 (2008)
- 10 C.F.R. 20.1201(a)(1)
NRC’s occupational dose limits for adults includes as one dose limit the total effective dose equivalent to 5 rems; CLI-08-1, 67 NRC 29 n.120 (2008)
- 10 C.F.R. 20.1301
challenges to dose limits in NRC regulations are not appropriate for admission under section 2.335(a); LBP-08-6, 67 NRC 321 (2008)
- 10 C.F.R. 20.1301(a)(1)
a maximum dose from direct radiation that is conservatively estimated at 0.17 mrem is far below the 100-mrem annual dose limit permitted for members of the public; LBP-08-9, 67 NRC 446 n.143 (2008)
- 10 C.F.R. 20.1403
a decommissioning plan for a restricted release site will be judged exclusively upon whether residual radioactivity levels will be as low as is reasonably achievable and the total effective dose equivalent to offsite human beings will be below 25 mrem; LBP-08-4, 67 NRC 115, 135, 143, 145 (2008)
licensee ultimately must be able, with the aid of the site characterization submitted with its decommissioning plan, to establish that it will meet the requirements for restricted release; LBP-08-4, 67 NRC 132 (2008)
the field sampling plan’s analysis of waterways is intended to identify groundwater, possible cave, and surface water paths and to assess the contents of those waters to determine if depleted uranium is

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- leaching or will leach off the site in quantities significant enough that humans might receive more than 25 mrems of total radioactive exposure from all of the site's pathways; LBP-08-4, 67 NRC 135 (2008)
- the groundwater, surface, and subsurface water monitoring program must assess whether depleted uranium will reach offsite humans through drinking water or the consumption of animals or plants that have in turn consumed water from the site in quantities significant enough that those offsite humans might receive more than 25 mrems of total radioactive exposure from all pathways per year; LBP-08-4, 67 NRC 143 (2008)
- there are no requirements for the decommissioning plan regarding chemical toxicity, the general harm that unexploded ordnance might pose, or even ecological contamination, except as these issues affect radioactivity levels and exposure to humans; LBP-08-4, 67 NRC 115, 125, 145 (2008)
- there is no requirement that the field sampling plan describe the collection of information needed for the decommissioning plan's environmental assessment or environmental impact statement; LBP-08-4, 67 NRC 125 (2008)
- 10 C.F.R. 20.1403(b)
- licensee has made provisions for legally enforceable institutional controls that provide reasonable assurance that the total effective dose equivalent from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem per year; LBP-08-4, 67 NRC 127 n.145 (2008)
- the regulatory limit of 25 mrem per year represents the value for the total effective dose equivalent; LBP-08-4, 67 NRC 126 n.143 (2008)
- 10 C.F.R. 30.33(a)(2)
- applicant's proposed equipment and facilities must be adequate to protect health and minimize danger to life or property; CLI-08-3, 67 NRC 161 (2008)
- by determining that the potential threats posed by aircraft crash and natural phenomena do not warrant a siting review, the NRC already determined that such siting analyses typically should be unnecessary for an applicant to show that its irradiator facility is adequately protective; CLI-08-3, 67 NRC 166-67 (2008)
- if, in response to a petitioner's admitted safety contentions, applicant cannot demonstrate that the proposed facility is adequate to protect health and minimize danger to life or property, then the Staff would need to conduct the additional analysis or require additional analysis by applicant; CLI-08-3, 67 NRC 169-70 (2008)
- petitioner cannot, without more, merely invoke this general regulation to claim that a siting analysis must be performed; CLI-08-3, 67 NRC 168 (2008)
- Staff's safety review must support a conclusion that a proposed irradiator would protect health and minimize danger to life or property; CLI-08-3, 67 NRC 160 (2008)
- the Commission responds to the board's question whether this regulation requires a safety analysis of the risks asserted to be endemic (i.e., aircraft crashes and natural phenomena) to a proposed irradiator site at an airport; CLI-08-3, 67 NRC 153, 160 (2008)
- to be admissible, a contention calling for an irradiator siting analysis must conform to all the requirements of section 2.309(f)(1), including providing sufficient basis to show that a siting analysis is necessary to determine that the facility will be adequate to protect health and minimize danger to life or property; CLI-08-3, 67 NRC 170 (2008)
- 10 C.F.R. Part 36
- a contention calling for a siting safety analysis is not barred by the regulatory scheme; CLI-08-3, 67 NRC 167 (2008)
- the lack of site selection criteria in this part is intentional; CLI-08-3, 67 NRC 163 (2008)
- these regulations are intended to provide a formal, detailed, comprehensive set of requirements for irradiator licensing; CLI-08-3, 67 NRC 161 (2008)
- 10 C.F.R. 36.1(a)
- licensees must satisfy all applicable state and local siting, zoning, land use, and building code requirements; CLI-08-3, 67 NRC 165-66 (2008)
- 10 C.F.R. 36.1(b)
- Part 36 rules clearly were developed to serve as a standardized set of rules for both panoramic and underwater irradiators; CLI-08-3, 67 NRC 164 (2008)

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- 10 C.F.R. 36.2
in panoramic irradiators, the irradiations are done in air in areas potentially accessible to personnel; CLI-08-3, 67 NRC 161 (2008)
in underwater irradiators, both sources always remain shielded under water and humans do not have access to the sealed sources or the space subject to irradiation without entering the pool; CLI-08-3, 67 NRC 161 (2008)
- 10 C.F.R. 36.13
this section incorporates into the Part 36 irradiator regulations the general requirement from section 30.33(a)(2) that a facility be adequate to protect health and minimize danger to life or property; CLI-08-3, 67 NRC 161 (2008)
- 10 C.F.R. 36.39(j)
panoramic irradiators to be built in seismic areas must have concrete shielding meeting the seismic design requirements of appropriate industry or local building codes; CLI-08-3, 67 NRC 164 n.49 (2008)
there are seismic-related design requirements for panoramic irradiators located in seismic zones, but no specific seismic design requirements for underwater irradiators; CLI-08-3, 67 NRC 164 n.55 (2008)
- 10 C.F.R. 36.53(b)(6) & (9)
licensees must have emergency or abnormal event procedures for various events, including a prolonged loss of electricity and natural phenomena, such as an earthquake, a tornado, or flooding; CLI-08-3, 67 NRC 155 (2008)
- 10 C.F.R. 40.3
a person subject to the regulations of Part 40 may not possess radioactive material or any source material unless authorized in a specific or general license issued by the Commission under the regulations of this part; LBP-08-6, 67 NRC 338 (2008)
- 10 C.F.R. 40.4
“corporation” is defined; LBP-08-6, 67 NRC 338 n.550 (2008)
pyrochlore is subject to NRC regulation as a radioactive source material; LBP-08-8, 67 NRC 410-11 (2008)
- 10 C.F.R. 40.6
except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission; LBP-08-6, 67 NRC 338 n.551 (2008)
- 10 C.F.R. 40.32(d)
issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of a license amendment proceeding; LBP-08-6, 67 NRC 320 (2008)
- 10 C.F.R. 40.38
the only corporation subject to the foreign ownership prohibitions of this section is the United States Enrichment Corporation; LBP-08-6, 67 NRC 338 (2008)
- 10 C.F.R. 40.38(a)
a source material license may not be issued to a corporation if the Commission determines that the corporation is owned, controlled, or dominated by a foreign corporation; LBP-08-6, 67 NRC 337 (2008)
- 10 C.F.R. 40.42
substantial delay in both the submittal and approval of a decommissioning plan might involve a violation; LBP-08-8, 67 NRC 413 (2008)
- 10 C.F.R. 40.42(d)
licensee must provide written notification to NRC Staff within 60 days and either begin decommissioning of the site or submit a decommissioning plan to the Staff within 12 months of the notification; LBP-08-8, 67 NRC 417 (2008)
when licensee permanently ceases site activities, it must notify NRC in writing of that development and, within 12 months thereof, submit a decommissioning plan; LBP-08-4, 67 NRC 115 n.63 (2008)
- 10 C.F.R. 40.42(g)(2)
an alternate schedule for the submittal of a decommissioning plan should be approved if it is necessary to the effective conduct of decommissioning operations, presents no undue risk from radiation, and is otherwise in the public interest; LBP-08-4, 67 NRC 114, 115 n.68, 125, 148 (2008)

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- application for approval of an alternate schedule for the submission of a decommissioning plan for a site containing expended depleted uranium munitions is approved; LBP-08-4, 67 NRC 106 (2008)
- approval of an alternate schedule for submission of a decommissioning plan hinges upon a demonstration that prosecution of the alternative schedule as proposed by the licensee is necessary to the effective conduct of decommissioning operations; LBP-08-4, 67 NRC 114 (2008)
- the board finds that the biota sampling component of the field sampling plan is sufficient to meet the criteria for a 5-year alternate schedule for submission of a decommissioning plan; LBP-08-4, 67 NRC 125 (2008)
- 10 C.F.R. Part 40, Appendix A
concerns raised by petitioners related to the applicant's foreign ownership are potentially material to the safety and environmental requirements; LBP-08-6, 67 NRC 335 (2008)
- 10 C.F.R. 42.40(g)(4)
acceptance of a decommissioning plan is based upon its conformity to the 25-mrem standard; LBP-08-4, 67 NRC 116 (2008)
- 10 C.F.R. 42.40(g)(4)(i)
a decommissioning plan must include a description of the conditions of the site or separate building or outdoor area sufficient to evaluate the acceptability of the plan; LBP-08-4, 67 NRC 114, 116 (2008)
- 10 C.F.R. 50.34(c) & (d)
nuclear reactor power plant security plans must provide protection against the design basis threat of radiological sabotage, but this requirement does not extend to a specifically licensed independent spent fuel storage installation; LBP-08-7, 67 NRC 366 n.2 (2008)
- 10 C.F.R. 50.34(h)(3)
although a standard review plan sets forth the criteria that the Staff uses to evaluate whether an application conforms to the agency's regulations, it nonetheless is considered nonbinding on the Staff and on a licensing board; LBP-08-2, 67 NRC 70 n.10 (2008)
- 10 C.F.R. 50.38
a source material license may not be issued to a corporation if the Commission determines that the corporation is owned, controlled, or dominated by a foreign corporation; LBP-08-6, 67 NRC 337 n.549 (2008)
- 10 C.F.R. 50.92(a)
in determining whether an amendment to a license will be issued, the Commission is guided by the considerations that govern the issuance of initial licenses; LBP-08-9, 67 NRC 437 n.98 (2008)
- 10 C.F.R. Part 50, Appendix A, GDC 16 and 50
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- 10 C.F.R. Part 50, Appendix B, Criterion XVI
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- 10 C.F.R. 51.10(a)
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- 10 C.F.R. 51.10(b)
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- 10 C.F.R. 51.20(a)(1)
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- 10 C.F.R. 51.22(a)
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- 10 C.F.R. 51.22(b)
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- 10 C.F.R. 51.22(c)(14)(vii)
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- 10 C.F.R. 51.23
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- 10 C.F.R. 51.30(a)
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- 10 C.F.R. 51.30(a)(1)
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- 10 C.F.R. 51.30(a)(2)
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- 10 C.F.R. 51.41
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- 10 C.F.R. 51.45
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- 10 C.F.R. 51.45(b)
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- 10 C.F.R. 51.45(d)
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- 10 C.F.R. 51.60(a)
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- 10 C.F.R. 51.70(b)
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- 10 C.F.R. 51.71(d)
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it is environmental quality standards and requirements that the environmental analysis is obliged to address, not security issues; CLI-08-1, 67 NRC 22 (2008)
- 10 C.F.R. 51.92
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- 10 C.F.R. 51.92(a)(1)-(2)
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- 10 C.F.R. 52.17(a)(2)
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- 10 C.F.R. 54.27(c)
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- 10 C.F.R. 63.10
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- 10 C.F.R. 63.11
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- 10 C.F.R. 63.21(c)(5)
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- 10 C.F.R. 63.73
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- 10 C.F.R. 63.172
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- 10 C.F.R. 70.9 & 70.10
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- 10 C.F.R. 70.23(a)(8)
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- 10 C.F.R. 72.106(a)(1)
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- 10 C.F.R. 72.106(b)
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- 10 C.F.R. 73.55(a)
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- 10 C.F.R. Part 961
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- 36 C.F.R. 800.2(c)(2)(ii)
a tribe may become a consulting party when it considers property potentially affected by a federal undertaking to have religious or cultural significance; LBP-08-6, 67 NRC 328 (2008)
- 36 C.F.R. 800.2(c)(2)(ii)(A)
a consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties (including those of traditional religious

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- and cultural importance), articulate its views on the undertaking's effects on such properties, and participate in resolution of adverse effects; LBP-08-6, 67 NRC 328 (2008)
- 36 C.F.R. 800.2(c)(2)(iii)
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- 36 C.F.R. 800.4(b)
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- 36 C.F.R. 800.4(c)(1)
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- 36 C.F.R. 800.4(d)(1)
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- 40 C.F.R. 190.10(a)
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- 40 C.F.R. 1501.4
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- 40 C.F.R. 1501.4(e)
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- 40 C.F.R. 1502.22(b)
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- 40 C.F.R. 1502.22(b)(3)
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- 40 C.F.R. 1502.22(b)(4)
"reasonably foreseeable" impacts include those that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason; CLI-08-8, 67 NRC 200 n.46 (2008)
- 40 C.F.R. 1502.24
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- 40 C.F.R. 1508.13
no environmental impact statement is necessary if the environmental assessment concludes with a finding of no significant impact, which briefly presents the reasons why the proposed action will not significantly impact the environment; LBP-08-7, 67 NRC 365 n.1 (2008)

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- 18 U.S.C. § 2001
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- 28 U.S.C. § 1491(a)(1)
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NRC proceedings are not an appropriate forum to challenge DOE's procurement process, which fall under the jurisdiction of the Government Accountability Office or Court of Federal Claims; CLI-08-11, 67 NRC 383 n.22 (2008)
- Atomic Energy Act, 42 U.S.C. § 2012(d)
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- National Historic Preservation Act, 16 U.S.C. § 470
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- National Historic Preservation Act, 106, 16 U.S.C. 470f
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- Nuclear Waste Policy Act of 1982, 2, 42 U.S.C. § 10101(31)
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- Nuclear Waste Policy Act of 1982, 113, 42 U.S.C. § 10133 (2006)
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- United Nations Declaration on the Rights of Indigenous Peoples art. 32
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- Black's Law Dictionary* 865 (6th ed. 1990)
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- Black's Law Dictionary* 1405 (6th ed. 1990)
"standing to sue doctrine" is defined; LBP-08-6, 67 NRC 270 n.108 (2008)
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- D.C. Rules of Prof'l Conduct R. 3.3 (2007)
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- District of Columbia Bar Rules XI, § 4
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- Fed. R. App. P. 40
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- Fed. R. App. P. 41
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- Fed. R. Civ. P. 8(d)(3)
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- Fed. R. Civ. P. 12(f)
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- Webster's Third New International Dictionary* 74 (3d ed. 1976)
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the privilege protects both fact work product, which consists of documents prepared by an attorney that do not contain the attorney's mental impressions, and opinion work product, which does contain an attorney's mental impressions; CLI-08-6, 67 NRC 179 (2008)

ATTORNEY-CLIENT PRIVILEGE

communications between company employees and an attorney conducting an internal investigation presumptively fall within the attorney-client privilege; CLI-08-6, 67 NRC 179 (2008)

if a company claims that its internal investigation establishes that it has met its obligation, then the company has waived the privilege associated with the internal investigation; CLI-08-6, 67 NRC 179 (2008)

implied waiver of the privilege exists when a regulated company voluntarily discloses investigative materials to a government agency; CLI-08-6, 67 NRC 179 (2008)

the privilege belongs to the client, not to the lawyer, and thus the client may waive the privilege, either by an express waiver or by an implied waiver; CLI-08-6, 67 NRC 179 (2008)

BURDEN OF PERSUASION

opponents of summary disposition must counter any adequately supported material facts provided by the movant with their own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

proponents of a summary disposition motion bear the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

BURDEN OF PROOF

it is reasonable to expect that movant will buttress its motion with some concrete evidence, usually in the form of an affidavit or declaration by a person with asserted knowledge of the fact or facts upon which the motion is based; LBP-08-5, 67 NRC 205 (2008)

the opponent of summary disposition cannot rest on the mere allegations or denials of a pleading, but must go beyond the pleadings and by the party's own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial; LBP-08-7, 67 NRC 361 (2008)

the proponent of summary disposition bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact; LBP-08-7, 67 NRC 361 (2008)

where the nonmoving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment, but has the burden to show that he is entitled to judgment under established principles; LBP-08-7, 67 NRC 361 (2008)

CASE MANAGEMENT

adjudicatory boards have broad discretion to regulate the course of proceedings and the conduct of participants, and the Commission is reluctant to embroil itself in day-to-day case management issues; CLI-08-14, 67 NRC 402 (2008)

binding requirements and related recommendations pertaining to petitions to intervene, contentions, responses and replies, standing arguments, and referencing or attaching supporting materials are provided for high-level waste repository proceeding; LBP-08-10, 67 NRC 450 (2008)

licensing boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants; CLI-08-7, 67 NRC 187 (2008)

the Commission generally declines to interfere with a board's day-to-day case management decisions unless there has been an abuse of power; CLI-08-7, 67 NRC 187 (2008)

the presiding officer is authorized to hold conferences before or during the hearing for settlement, simplification of contentions, or any other proper purpose; LBP-08-11, 67 NRC 460 (2008)

CERTIFICATION

in the pre-license application phase, the board denies the Department of Energy's motion to strike the State of Nevada's certification that it has made all its documentary material available on the Licensing Support Network; LBP-08-5, 67 NRC 205 (2008)

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CERTIFIED QUESTIONS

boards are encouraged to certify, as soon as possible, novel legal or policy questions related to admitted issues; CLI-08-4, 67 NRC 171 (2008)

CLASSIFIED INFORMATION

hearings on the essentially limitless range of conceivable but highly unlikely terrorist scenarios could not be meaningfully conducted without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance; CLI-08-1, 67 NRC 1 (2008)

CLIMATE CHANGE

this issue clearly falls within any reasonable consideration of the concepts expressed in 10 C.F.R. 51.45; LBP-08-6, 67 NRC 241 (2008)

COMMISSIONERS, AUTHORITY

NRC may not disqualify attorneys representing multiple witnesses, unless it has concrete evidence that the attorney will obstruct and impede the investigation; CLI-08-11, 67 NRC 379 (2008)

NRC regulations do not address conflicts of interest as such, but the absence of a specific rule does not interfere with the Commission's inherent supervisory authority over the conduct of adjudicatory proceedings; CLI-08-11, 67 NRC 379 (2008)

the Commission could disqualify a party's counsel from participating in an NRC proceeding upon a concrete showing that a conflict of interest or other ethics concern would obstruct its obtaining a full range of necessary safety or environmental information, or would otherwise threaten the integrity of its regulatory process; CLI-08-11, 67 NRC 379 (2008)

the Commission has plenary supervisory authority to interpret and customize its process for individual cases; CLI-08-11, 67 NRC 379 (2008)

COMMON DEFENSE AND SECURITY

congressional intent for the phrase "common defense and security," is analyzed in the context of foreign ownership prohibitions; LBP-08-6, 67 NRC 241 (2008)

COMPLIANCE

failure of an applicant to address any guidance topics or deviation from the guidance provided does not rise to the level of failure to comply with NRC regulations; LBP-08-9, 67 NRC 421 (2008)

CONFIDENTIAL INFORMATION

NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 361 (2008)

CONFLICT OF INTEREST

NRC may not disqualify attorneys representing multiple witnesses, unless it has concrete evidence that the attorney will obstruct and impede the investigation; CLI-08-11, 67 NRC 379 (2008)

NRC regulations do not address conflicts of interest as such, but the absence of a specific rule does not interfere with the Commission's inherent supervisory authority over the conduct of adjudicatory proceedings; CLI-08-11, 67 NRC 379 (2008)

the Commission could disqualify a party's counsel from participating in an NRC proceeding upon a concrete showing that a conflict of interest or other ethics concern would obstruct its obtaining a full range of necessary safety or environmental information, or would otherwise threaten the integrity of its regulatory process; CLI-08-11, 67 NRC 379 (2008)

the Commission takes seriously any allegation that an unresolved conflict of interest or other ethical breach threatens the integrity of an NRC licensing proceeding; CLI-08-11, 67 NRC 379 (2008)

CONSULTATION DUTY

a consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, articulate its views on the undertaking's effects on such properties, and participate in resolution of adverse effects; LBP-08-6, 67 NRC 241 (2008)

a form letter is not sufficient to constitute the reasonable effort that section 106 of the National Historic Preservation Act requires; LBP-08-6, 67 NRC 241 (2008)

a mere request for information is not necessarily sufficient to constitute the reasonable effort that section 106 of the National Historic Preservation Act requires; LBP-08-6, 67 NRC 241 (2008)

SUBJECT INDEX

federal agencies must notify all consulting parties, including Indian tribes, when a finding of no effect has been made, and to provide those consulting parties with an invitation to inspect the documentation prior to approving the undertaking; LBP-08-6, 67 NRC 241 (2008)

whether the consultation process conducted by applicant with a Native American tribe complies with relevant requirements of law is an admissible issue; LBP-08-6, 67 NRC 241 (2008)

CONTAINMENT

the Commission asks the parties to address whether the structural analysis that applicant has committed to perform on its primary containment drywell shell matches or bounds the sensitivity analyses that one of the ALSBP judges would impose; CLI-08-10, 67 NRC 357 (2008)

CONTENTIONS

a contention of inadequacy asserts that the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect; LBP-08-2, 67 NRC 54 (2008)

a contention of omission challenges a portion of the application because it fails in toto to address a required subject matter; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

all material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

although exhibits are not themselves either "petitions" or "contentions," the board considers the timeliness of their filing; LBP-08-6, 67 NRC 241 (2008)

answers in the high-level waste repository proceeding shall be limited to addressing specific alleged deficiencies in particular contentions; LBP-08-10, 67 NRC 450 (2008)

boards commonly reformulate, or expressly limit contentions to focus them to the precise matters that are supported; LBP-08-9, 67 NRC 421 (2008)

contentions must be based on documents or information available when the hearing petition is to be filed; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

format of pleadings for high-level waste repository proceeding are specified; LBP-08-10, 67 NRC 450 (2008)

in the high-level waste repository proceeding, except for readily available legal authorities, materials that cannot be attached because of copyright restrictions, and documents available on the LSN, all documents that are referenced in support of one or more contentions shall be electronically attached to the petition; LBP-08-10, 67 NRC 450 (2008)

licensing boards, though not obligated to reformulate contentions, are permitted to do so in certain circumstances; LBP-08-11, 67 NRC 460 (2008)

recommendations are made for the adoption of contentions by other parties in the high-level waste repository proceeding; LBP-08-10, 67 NRC 450 (2008)

the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-08-9, 67 NRC 421 (2008)

there is a difference between contentions that merely allege an omission of information and those that challenge substantively and specifically how particular information has been discussed in a license application; LBP-08-11, 67 NRC 460 (2008)

to intervene in a proceeding a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. 2.309(f)(1); LBP-08-6, 67 NRC 241 (2008)

See also Amendment of Contentions

CONTENTIONS, ADMISSIBILITY

a board may consider environmental contentions contesting applicant's environmental report as challenges to NRC's subsequent draft environmental impact statement as long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

a board's authority to recast contentions is circumscribed in that it may not, on its own initiative, provide basic, threshold information required for contention admissibility; LBP-08-11, 67 NRC 460 (2008)

a contention calling for a siting safety analysis for an irradiator is not barred by the Part 36 regulatory scheme, but must be sufficiently supported, in light of the Statement of Considerations' conclusions; CLI-08-3, 67 NRC 151 (2008)

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- a contention of omission is subject to dismissal in connection with those aspects for which it is appropriately established that the Staff DEIS provides any purported missing analysis or discussion; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- a contention revolving around the possibility of future design changes to a facility is speculative and thus inadmissible; LBP-08-11, 67 NRC 460 (2008)
- a contention shall not be admitted if the admissibility requirements are not satisfied or if the contention, even if proven, would not entitle the petitioner to relief; CLI-08-1, 67 NRC 1 (2008)
- a late-filed environmental contention may be admitted only where petitioner relies upon newly available, significant information, meets the nontimely filing requirements, or successfully argues for supplementing the EIS; LBP-08-11, 67 NRC 460 (2008)
- a licensing board order canceling oral argument on the admissibility of petitioner's proposed contention did not cause serious and irreparable harm to petitioner; CLI-08-7, 67 NRC 187 (2008)
- a possible future action must at least constitute a proposal pending before the agency to be ripe for adjudication; LBP-08-11, 67 NRC 460 (2008)
- a recent e-mail from an expert that provided no indication of when petitioners contacted the expert and that primarily referenced articles published years earlier is untimely support and does not constitute legitimate amplification of originally filed contentions; LBP-08-6, 67 NRC 241 (2008)
- a ruling granting summary disposition on a single contention, where other contentions are still pending in an adjudication, is not a final decision, and is not susceptible to Commission review; CLI-08-2, 67 NRC 31 (2008)
- admission of a grand contention of omission based on failure to meet the requirements of 10 C.F.R. 70.23(a)(8) regarding facility completion could be justified; LBP-08-11, 67 NRC 460 (2008)
- any contention that falls outside the specified scope of the proceeding must be rejected; LBP-08-9, 67 NRC 421 (2008)
- as with a summary disposition motion, a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner; LBP-08-9, 67 NRC 421 (2008)
- at the admissibility stage, it is not necessary to establish a general probability threshold for irradiators to assess in qualitative terms the significance and plausibility of particular asserted siting-related threats; CLI-08-3, 67 NRC 151 (2008)
- boards look to both the contention and its stated bases; LBP-08-9, 67 NRC 421 (2008)
- challenges to dose limits in NRC regulations are not appropriate for admission; LBP-08-6, 67 NRC 241 (2008)
- challenges to how the Staff performs its reviews are outside the scope of licensing proceedings; LBP-08-9, 67 NRC 421 (2008)
- challenges to license applications must be in the form of an asserted omission from the application of required information or an asserted error in a specific analysis or other technical matter set out in the application; LBP-08-9, 67 NRC 421 (2008)
- challenges to the adequacy of the NRC's groundwater restoration standards are impermissible; LBP-08-6, 67 NRC 241 (2008)
- challenges to the current operating license are outside the scope of matters challengeable in a power uprate application; LBP-08-9, 67 NRC 421 (2008)
- challenges to the position of an applicant that is based on a condition in its current license are permissible; LBP-08-6, 67 NRC 241 (2008)
- claims that are not a challenge to the adequacy of the application are insufficient to establish an admissible contention; LBP-08-6, 67 NRC 241 (2008)
- concerns raised by petitioners related to the applicant's foreign ownership are potentially material to the safety and environmental requirements; LBP-08-6, 67 NRC 241 (2008)
- contention pleading requirements serve to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-08-9, 67 NRC 421 (2008)
- contentions must be based on documents available at the time the petition is to be filed, such as the environmental report filed by an applicant; LBP-08-6, 67 NRC 241 (2008)
- contentions must be filed with the original intervention petition within 60 days of notice of the proceeding in the *Federal Register*, unless a longer period is therein specified, an extension is granted, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-08-6, 67 NRC 241 (2008)

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contentions must directly controvert a position taken by the applicant in the application and explain why the application is deficient; LBP-08-6, 67 NRC 241 (2008)

contentions must specifically challenge the license application to be admissible; LBP-08-9, 67 NRC 421 (2008)

contentions that amount to generalized suspicions that petitioners hope to substantiate later are barred; LBP-08-6, 67 NRC 241 (2008)

contentions that call for requirements in excess of those imposed by the Commission must be rejected as a collateral attack on the regulations; LBP-08-9, 67 NRC 421 (2008)

drought and climate change issues are within the scope of a materials license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

error-related challenges to license applications must be supported by reasons why the analysis is deficient; LBP-08-9, 67 NRC 421 (2008)

even if late-filing criteria are satisfied, proposed contentions must still meet the Commission's pleading standards; CLI-08-1, 67 NRC 1 (2008)

expert support is not required at the admission stage; LBP-08-6, 67 NRC 241 (2008)

failure of a contention to meet any of the requirements of section 2.309(f)(1) is grounds for its dismissal; LBP-08-6, 67 NRC 241 (2008)

five factors must be balanced under pre-2004 rules before a petition to admit a late-filed contention can be granted; CLI-08-8, 67 NRC 193 (2008)

if good cause is not shown for late filing of a contention, petitioner must make a compelling showing on the four remaining factors; CLI-08-8, 67 NRC 193 (2008)

if petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner, or supply information that is lacking; LBP-08-9, 67 NRC 421 (2008)

if petitioner requests additional time to file before the 30-day period expires, new or amended contentions in the high-level waste repository proceeding may be considered timely upon a board finding that there has been an adequate showing of need for the additional time requested; LBP-08-10, 67 NRC 450 (2008)

in a summary disposition context, the question about the need to amend or file a new contention becomes relevant when there is a dispute about whether an admitted issue statement is a contention of omission or a contention of inadequacy; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

in five-factor analysis for admission of a late-filed contention, factors three and five are to be given more weight than factors two and four; CLI-08-8, 67 NRC 193 (2008)

ISL mining does not involve fuel rod waste and to the extent such waste is indirectly relevant, the Waste Confidence rule would prohibit its consideration in a license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of a license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

late-filed environmental contentions must meet not only the usual contention pleading requirements applicable to all proceedings, but also the additional requirements for new contentions; LBP-08-11, 67 NRC 460 (2008)

materiality requires that petitioner show why an alleged error or omission is of possible significance to the result of the proceeding; LBP-08-9, 67 NRC 421 (2008)

mere notice pleading is insufficient to satisfy contention pleading standards; LBP-08-9, 67 NRC 421 (2008)

new information proffered by petitioners must show a distinct new harm or threat apart from the activities already licensed; LBP-08-6, 67 NRC 241 (2008)

new or amended contentions in the high-level waste repository proceeding should be presumed timely if they are filed within 30 days after the availability of new or materially different information; LBP-08-10, 67 NRC 450 (2008)

NRC has no legal duty to consider the environmental impacts of terrorism at NRC-licensed facilities; LBP-08-6, 67 NRC 241 (2008)

NRC proceedings are to be based on the application as it exists at a given time and not on any potential future amendments; LBP-08-11, 67 NRC 460 (2008)

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omission-related challenges to license applications must be supported by specific reasons why alleged omissions are relevant and material; LBP-08-9, 67 NRC 421 (2008)

oral argument is not a right; CLI-08-7, 67 NRC 187 (2008)

petitioner is not required to prove its case at the contention stage and need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-08-6, 67 NRC 241 (2008); LBP-08-9, 67 NRC 421 (2008)

petitioner is obliged to present the factual information and expert opinions necessary to support its contention adequately; CLI-08-7, 67 NRC 187 (2008); LBP-08-6, 67 NRC 241 (2008); LBP-08-9, 67 NRC 421 (2008)

petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-08-6, 67 NRC 241 (2008)

petitioner must read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-08-6, 67 NRC 241 (2008)

petitioners have an ironclad obligation to search the public record for information supporting their contentions; LBP-08-6, 67 NRC 241 (2008)

petitioners must do more than rest on the mere existence of Staff requests for additional information as a basis for their contention; LBP-08-6, 67 NRC 241 (2008)

post-contention admission events, such as issuance of a Staff draft environmental impact statement, can render a previously admitted contention of omission subject to dismissal as moot; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

pro se petitioners are not held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-11, 67 NRC 460 (2008)

rules on contention admissibility are strict by design; LBP-08-9, 67 NRC 421 (2008)

speculation or bare assertions that a matter should be considered are not sufficient to allow admission of a contention; LBP-08-6, 67 NRC 241 (2008)

support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity; LBP-08-2, 67 NRC 54 (2008)

technical perfection is not an essential element of contention pleading; LBP-08-6, 67 NRC 241 (2008)

the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner's own view regarding the direction regulatory policy should take; LBP-08-9, 67 NRC 421 (2008)

the brief explanation of the basis that is required by section 2.309(f)(1)(ii) helps define the scope of a contention, but it is the contention, not bases, whose admissibility must be determined; LBP-08-6, 67 NRC 241 (2008)

the contention rule is strict by design, having been toughened in 1989 because in prior years licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation; LBP-08-6, 67 NRC 241 (2008)

the degree of support necessary for an irradiator siting contention will depend on how obvious a threat the asserted risk is, given the irradiator facility's design and protective features; CLI-08-3, 67 NRC 151 (2008)

the fact that there are a number of requests for additional information outstanding does not give rise to an evidentiary hearing; LBP-08-9, 67 NRC 421 (2008)

the February 2004 revision of the rules no longer incorporates provisions that permitted the amendment and supplementation of petitions and filing of contentions after the original filing of petitions; LBP-08-6, 67 NRC 241 (2008)

the lateness of petitioner's filing is justifiable because a relevant document was not revealed in a search of NRC's public database because of deficiencies in tagging; LBP-08-6, 67 NRC 241 (2008)

the quality of the evidentiary support at the contention filing stage need not be of the quality necessary to withstand a summary disposition motion; CLI-08-3, 67 NRC 151 (2008)

the scope of a proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-08-9, 67 NRC 421 (2008)

the specificity requirement for contentions puts the other parties on notice as to what issues they will have to defend against or oppose; LBP-08-2, 67 NRC 54 (2008)

the standing requirement for showing injury in fact has always been significantly less than for demonstrating an acceptable contention; LBP-08-6, 67 NRC 241 (2008)

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the strict contention rule serves multiple interests; LBP-08-6, 67 NRC 241 (2008)
when a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the NRC Staff in an environmental impact statement, the contention is moot; LBP-08-6, 67 NRC 241 (2008)
whether applicant has a valid NPDES permit is outside the scope of a power uprate proceeding; LBP-08-9, 67 NRC 421 (2008)
whether good cause exists to excuse the late-filing of a contention is the most important factor; CLI-08-8, 67 NRC 193 (2008)
whether the consultation process conducted by applicant with a Native American tribe complies with relevant requirements of law is an admissible issue; LBP-08-6, 67 NRC 241 (2008)

CONTENTIONS, LATE-FILED

a late-filed environmental contention may be admitted only where petitioner relies upon newly available, significant information, meets the nontimely filing requirements, or successfully argues for supplementing the EIS; LBP-08-11, 67 NRC 460 (2008)
before a petition to admit a late-filed contention can be granted, five factors must be balanced; CLI-08-1, 67 NRC 1 (2008)
environmental contentions must meet not only the usual contention pleading requirements applicable to all proceedings, but also the additional requirements for new contentions; LBP-08-11, 67 NRC 460 (2008)
even if late-filing criteria are satisfied, proposed contentions must still meet the Commission's pleading standards; CLI-08-1, 67 NRC 1 (2008)
five factors must be balanced under pre-2004 rules before a petition to admit a late-filed contention can be granted; CLI-08-8, 67 NRC 193 (2008)
if good cause is not shown for the late filing of a contention, petitioner must make a compelling showing on the four remaining factors; CLI-08-1, 67 NRC 1 (2008); CLI-08-8, 67 NRC 193 (2008)
in addition to demonstrating compliance with other applicable requirements set forth in 10 C.F.R. 2.309, nontimely contentions in the high-level waste repository proceeding shall follow the prescribed format for initial petitions and contentions; LBP-08-10, 67 NRC 450 (2008)
in the five-factor analysis for admission of late-filed contentions, the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record and the extent to which this participation will broaden the issues or delay the proceeding are to be given more weight than the availability of other means for protecting the petitioner's interest and the extent to which this interest will be represented by existing parties; CLI-08-1, 67 NRC 1 (2008); CLI-08-8, 67 NRC 193 (2008)
new or amended contentions in the high-level waste repository proceeding should be presumed timely if they are filed within 30 days after the availability of new or materially different information; LBP-08-10, 67 NRC 450 (2008)
the test for good cause for late filing is when the information became available, when petitioners reasonably should have become aware of that information, and whether petitioners acted promptly after learning of the new information; LBP-08-6, 67 NRC 241 (2008)
under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline; LBP-08-1, 67 NRC 37 (2008)
whether good cause exists to excuse the late-filing of the contention is the most important of the five factors; CLI-08-1, 67 NRC 1 (2008); CLI-08-8, 67 NRC 193 (2008)

COOLING TOWERS

request for an enforcement-type action where the underlying concern is the partial collapse of a cooling tower is credible and sufficient to warrant further inquiry; DD-08-1, 67 NRC 347 (2008)

COUNSEL

officers of the court have an ethical duty to alert NRC adjudicatory bodies to information relevant to the matters being adjudicated; LBP-08-6, 67 NRC 241 (2008)

See also Attorney

CROSS-EXAMINATION

the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the Administrative Procedure Act; LBP-08-6, 67 NRC 241 (2008)

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CULTURAL RESOURCES

a federal agency, prior to the issuance of any license, must take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-08-6, 67 NRC 241 (2008)

CULTURAL SENSITIVITY

federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues; LBP-08-6, 67 NRC 241 (2008)

DEADLINES

licensee must submit a decommissioning plan within 12 months of permanent cessation of its authorized activity; LBP-08-4, 67 NRC 105 (2008)

DECISIONS

See Partial Initial Decisions

DECOMMISSIONING

approval of an alternate schedule for submission of a decommissioning plan hinges upon a demonstration that prosecution of the alternative schedule as proposed by the licensee is necessary to the effective conduct of decommissioning operations; LBP-08-4, 67 NRC 105 (2008)

DECOMMISSIONING PLANS

a site characterization must include sufficient information so that it can effectively track pathways for significant offsite contamination and estimate the quantity of those pathways; LBP-08-4, 67 NRC 105 (2008)

a site characterization plan should provide sufficient information to allow the NRC to determine the extent and range of expected radioactive contamination; LBP-08-4, 67 NRC 105 (2008)

an adequate site characterization must be included; LBP-08-4, 67 NRC 105 (2008)

an alternate schedule for the submittal of a decommissioning plan should be approved if it is necessary to the effective conduct of decommissioning operations, presents no undue risk from radiation, and is otherwise in the public interest; LBP-08-4, 67 NRC 105 (2008)

application for approval of an alternate schedule for the submission of a decommissioning plan for a site containing expended depleted uranium munitions is approved; LBP-08-4, 67 NRC 105 (2008)

description of the conditions of the site or separate building or outdoor area must be sufficient to evaluate the acceptability of the plan; LBP-08-4, 67 NRC 105 (2008)

despite lack of compliance with various agency NUREGs, a decommissioning plan is lawful because it acknowledges the fiscal realities of the licensee's bankruptcy and is consistent with the mandate that the plan be completed as soon as practicable and adequately protect the health and safety of workers and the public; LBP-08-4, 67 NRC 105 (2008)

licensee must provide written notification to NRC Staff within 60 days and either begin decommissioning of the site or submit a decommissioning plan to the Staff within 12 months of the notification; LBP-08-4, 67 NRC 105 (2008); LBP-08-8, 67 NRC 409 (2008)

substantial delay in both the submittal and approval of a plan might involve a violation of 10 C.F.R. 40.42; LBP-08-8, 67 NRC 409 (2008)

the board finds that the biota sampling component of the field sampling plan is sufficient to meet the criteria for a 5-year alternate schedule for submission of a decommissioning plan; LBP-08-4, 67 NRC 105 (2008)

there are no requirements regarding chemical toxicity, the general harm that unexploded ordnance might pose, or even ecological contamination, except as these issues affect radioactivity levels and exposure to humans; LBP-08-4, 67 NRC 105 (2008)

there is no requirement that the field sampling plan describe the collection of information needed for the decommissioning plan's environmental assessment or environmental impact statement; LBP-08-4, 67 NRC 105 (2008)

when licensee permanently ceases site activities, it must notify NRC in writing of that development and, within 12 months thereof, submit a decommissioning plan; LBP-08-4, 67 NRC 105 (2008)

with respect to an adequate site characterization, it is reasonable to interpret the regulations as requiring decommissioning plan submissions to contain the type of information discussed in the NUREG-1700 acceptance criteria; LBP-08-4, 67 NRC 105 (2008)

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DEFINITIONS

“amplify” as in reply briefs means to enlarge, expand, or extend (a statement or other expression of idea in words) by addition of detail or illustration or by logical development; LBP-08-6, 67 NRC 241 (2008)

“documentary material” includes any information upon which a party, potential party, or interested governmental participant intends to rely; LBP-08-1, 67 NRC 37 (2008)

“exhibits” is a term that is reserved for evidentiary exhibits at later stages in an adjudication process; LBP-08-10, 67 NRC 450 (2008)

in the high-level waste repository proceeding, “potential party,” means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definition of “party,” “potential party,” or “interested governmental participant”; LBP-08-10, 67 NRC 450 (2008)

irradiator types are described; CLI-08-3, 67 NRC 151 (2008)

“justiciable controversy” is defined; LBP-08-6, 67 NRC 241 (2008)

“standing to sue doctrine” is defined; LBP-08-6, 67 NRC 241 (2008)

“total effective dose equivalent” is defined as the sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures); LBP-08-4, 67 NRC 105 (2008)

See also Regulations, Interpretation

DELAY

substantial delay in both the submittal and approval of a decommissioning plan might involve a violation of 10 C.F.R. 40.42; LBP-08-8, 67 NRC 409 (2008)

DEPARTMENT OF ENERGY

at the time it made its initial certification, DOE was required to place on the Licensing Support Network only extant material on which it intended to rely; CLI-08-12, 67 NRC 386 (2008)

DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before it files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 37 (2008)

NRC proceedings are not an appropriate forum to challenge DOE’s procurement process, which fall under the jurisdiction of the Government Accountability Office or Court of Federal Claims; CLI-08-11, 67 NRC 379 (2008)

willful violations of 10 C.F.R. 63.11 and 63.73, among others, are subject to criminal penalties; CLI-08-11, 67 NRC 379 (2008)

DEPLETED URANIUM

application for approval of an alternative schedule for the submission of a decommissioning plan for a site containing expended depleted uranium munitions is approved; LBP-08-4, 67 NRC 105 (2008)

DISCLOSURE

disclosure of documents under the National Environmental Policy Act is expressly governed by the Freedom of Information Act; CLI-08-5, 67 NRC 174 (2008); CLI-08-8, 67 NRC 193 (2008)

hearings on the essentially limitless range of conceivable but highly unlikely terrorist scenarios could not be meaningfully conducted without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance; CLI-08-1, 67 NRC 1 (2008)

NRC need not disclose information if it falls within one of the nine exemptions in the Freedom of Information Act; LBP-08-7, 67 NRC 361 (2008)

NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytical guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 361 (2008)

petitioners will not be given NEPA-based access to documents exempt from disclosure under FOIA, even under protective measures; CLI-08-5, 67 NRC 174 (2008)

proposed questions, submitted by the parties, for the board, that were originally filed under seal with the board, will be made public in a separate issuance; LBP-08-4, 67 NRC 105 (2008)

regarding public disclosure of an agency’s NEPA analysis, Congress has established that the environmental impact statement shall be made available to the public as provided by FOIA; LBP-08-7, 67 NRC 361 (2008)

SUBJECT INDEX

when access to documents is disputed in FOIA litigation, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption; LBP-08-7, 67 NRC 361 (2008)

DISCOVERY

a board does not need to reach the question of the extent of discovery permissible if no request for any discovery has been made; LBP-08-5, 67 NRC 205 (2008)

disclosure of documents under the National Environmental Policy Act is expressly governed by the Freedom of Information Act; CLI-08-5, 67 NRC 174 (2008)

Freedom of information Act litigation is ordinarily resolved on summary disposition without discovery and without evidentiary trials or hearings, and discovery is sparingly used; CLI-08-8, 67 NRC 193 (2008)

limited discovery may be allowed in a Freedom of Information Act dispute, but only if absolutely necessary to ensure a complete record and a fair decision; CLI-08-5, 67 NRC 174 (2008)

DISQUALIFICATION

the Commission could disqualify a party's counsel from participating in an NRC proceeding upon a concrete showing that a conflict of interest or other ethics concern would obstruct its obtaining a full range of necessary safety or environmental information, or would otherwise threaten the integrity of its regulatory process; CLI-08-11, 67 NRC 379 (2008)

DOCUMENT PRODUCTION

applicant has a duty to continue to supplement documentary material after the initial certification; LBP-08-1, 67 NRC 37 (2008)

DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before it files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 37 (2008)

DOE's production of documentary material and certification triggers the duty of other potential parties to make their documentary material available 90 days thereafter; LBP-08-1, 67 NRC 37 (2008); LBP-08-5, 67 NRC 205 (2008)

exclusions to the duty to produce documentary material in the high-level waste proceeding include preliminary drafts, basic licensing documents generated by DOE, and any additional material created after the time of initial certification; LBP-08-1, 67 NRC 37 (2008)

the duty to produce all documentary material generated by, or at the direction of, or acquired by, a potential party pursuant to 10 C.F.R. 2.1003(a)(1) applies to extant documentary material and does not require that the potential party delay its initial certification until all documentary material that it intends to rely on is finished and complete; LBP-08-1, 67 NRC 37 (2008)

the duty to produce graphic-oriented material under 10 C.F.R. 2.1003(a)(2) is stated in the past tense, and thus applies only to documents in existence at the date of certification; LBP-08-1, 67 NRC 37 (2008)

the regulations are unclear as to whether header searchability is a prerequisite of certification; LBP-08-1, 67 NRC 37 (2008)

whether a call memo was required to address the retention for LSN inclusion purposes of documentary material that does not support a party's position is decided; LBP-08-5, 67 NRC 205 (2008)

DOCUMENTARY MATERIAL

at the time it made its initial certification, DOE was required to place on the Licensing Support Network only extant material on which it intended to rely; CLI-08-12, 67 NRC 386 (2008)

DOE's certification that it had made all of its then extant documentary material available on the NRC's Licensing Support Network triggered the obligation of other potential parties to make their documentary material available on the LSN within 90 days; LBP-08-5, 67 NRC 205 (2008)

section 2.1003's reference to "all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by" clearly conveys that possession or control of the documentary material is a prerequisite to the duty to produce it; CLI-08-12, 67 NRC 386 (2008)

the duty to produce all documentary material generated by, or at the direction of, or acquired by, a potential party pursuant to 10 C.F.R. 2.1003(a)(1) applies to extant documentary material and does not require that the potential party delay its initial certification until all documentary material that it intends to rely on is finished and complete; LBP-08-1, 67 NRC 37 (2008)

DOSE LIMITS

contentions challenging NRC regulations are not admissible; LBP-08-6, 67 NRC 241 (2008)

SUBJECT INDEX

DRAFT ENVIRONMENTAL IMPACT STATEMENT

a board may consider environmental contentions contesting applicant's environmental report as challenges to NRC's subsequent DEIS so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

when filed with an intervention petition, an environmental contention and its associated bases quite properly address an applicant's ER, rather than the then still-being-developed Staff DEIS; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

DROUGHT

this issue clearly falls within any reasonable consideration of the concepts expressed in 10 C.F.R. 51.45; LBP-08-6, 67 NRC 241 (2008)

DRYWELL

the Commission asks the parties to address the whether the structural analysis that applicant has committed to perform on its primary containment drywell shell matches or bounds the sensitivity analyses that one of the ALSBP judges would impose; CLI-08-10, 67 NRC 357 (2008)

ELECTRONIC FILING

requirements for high-level waste repository proceeding are specified; LBP-08-10, 67 NRC 450 (2008)

ENFORCEMENT ACTIONS

deliberately submitting to NRC inaccurate or incomplete information on Yucca Mountain is misconduct suitable for enforcement action; CLI-08-11, 67 NRC 379 (2008)

request for an enforcement-type action where the underlying concern is the partial collapse of a cooling tower is credible and sufficient to warrant further inquiry; DD-08-1, 67 NRC 347 (2008)

requests for diagnostic evaluation team examination, safety culture assessment, and the NRC investigation at other licensee facilities are rejected for review because they are not requests for enforcement-type actions; DD-08-1, 67 NRC 347 (2008)

willful violations of 10 C.F.R. 63.11 and 63.73, among others, are subject to criminal penalties; CLI-08-11, 67 NRC 379 (2008)

ENVIRONMENTAL ANALYSIS

an EA must include a Reference Document List that identifies the sources used; LBP-08-7, 67 NRC 361 (2008)

the National Infrastructure Protection Plan is concerned with security issues, not environmental quality standards and requirements, and it is environmental quality standards and requirements that the environmental analysis is obliged to address, not security issues; CLI-08-1, 67 NRC 1 (2008)

ENVIRONMENTAL ASSESSMENT

there is no requirement that the field sampling plan describe the collection of information needed for the decommissioning plan's environmental assessment or environmental impact statement; LBP-08-4, 67 NRC 105 (2008)

ENVIRONMENTAL EFFECTS

failure to receive a benefit from a project is not an environmental impact; LBP-08-6, 67 NRC 241 (2008)

ENVIRONMENTAL IMPACT STATEMENT

an agency is to include in every recommendation or report on major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action; LBP-08-6, 67 NRC 241 (2008)

if a major federal action significantly affects the quality of the human environment, an environmental impact statement must be prepared; CLI-08-8, 67 NRC 193 (2008)

information underlying EISs or environmental assessments shall be made available to the President, the Council on Environmental Quality, and to the public, but information that must be considered as part of the NEPA decisionmaking process may be withheld from public disclosure pursuant to FOIA exemptions; CLI-08-1, 67 NRC 1 (2008)

"reasonably foreseeable" impacts include those that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason; CLI-08-8, 67 NRC 193 (2008)

regarding public disclosure of an agency's NEPA analysis, Congress has established that the EIS shall be made available to the public as provided by FOIA; LBP-08-7, 67 NRC 361 (2008)

SUBJECT INDEX

there is no requirement that the field sampling plan describe the collection of information needed for the decommissioning plan's environmental assessment or EIS; LBP-08-4, 67 NRC 105 (2008)

See also Draft Environmental Impact Statement

ENVIRONMENTAL ISSUES

a board may consider environmental contentions contesting applicant's environmental report as challenges to NRC's subsequent draft environmental impact statement so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

a late-filed environmental contention may be admitted only where petitioner relies upon newly available, significant information, meets the late filing requirements, or successfully argues for supplementing the EIS; LBP-08-11, 67 NRC 460 (2008)

contentions must be based on documents or information available when the hearing petition is to be filed; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

ENVIRONMENTAL JUSTICE

the essence of an environmental justice claim, in NRC practice, is disparate environmental harm;

LBP-08-6, 67 NRC 241 (2008)

ENVIRONMENTAL REPORT

a board may consider environmental contentions contesting applicant's ER as challenges to NRC's subsequent draft environmental impact statement so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008);

when filed with an intervention petition, an environmental contention and its associated bases quite properly address an applicant's ER, rather than the then still-being-developed Staff draft environmental impact statement; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

ENVIRONMENTAL REVIEW

a reasonably close causal relationship must exist between a federal agency action and any environmental consequences of that action in order to trigger a NEPA review, and such a relationship does not exist with terrorism; LBP-08-6, 67 NRC 241 (2008)

agencies must reconsider their environmental review of proposed actions when new and significant information arises; LBP-08-11, 67 NRC 460 (2008)

ETHICAL ISSUES

counsel, as officers of the court, have an ethical duty to alert NRC adjudicatory bodies to information relevant to the matters being adjudicated; LBP-08-6, 67 NRC 241 (2008)

EVIDENCE

in the case of any motion resting on assertions of fact, it is reasonable to expect that the movant will buttress it with some concrete evidence; LBP-08-5, 67 NRC 205 (2008)

where the nonmoving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment, but has the burden to show that he is entitled to judgment under established principles; LBP-08-7, 67 NRC 361 (2008)

EXEMPTIONS

FOIA Exemption 2 authorizes an agency to withhold matters that are related solely to the internal personnel rules and practices of an agency; LBP-08-7, 67 NRC 361 (2008)

in evaluating the validity of a claimed FOIA exemption, the experience and expertise of an affiant, coupled with a detailed and specific affidavit, lends special weight to the affiant's statements and conclusions; LBP-08-7, 67 NRC 361 (2008)

NRC need not disclose information if it falls within one of the nine exemptions in the Freedom of Information Act; LBP-08-7, 67 NRC 361 (2008)

NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytical guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 361 (2008)

when access to documents is disputed in FOIA litigation, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption; LBP-08-7, 67 NRC 361 (2008)

SUBJECT INDEX

EXTENSION OF TIME

if petitioner requests additional time to file before the 30-day period expires, new or amended contentions in the high-level waste repository proceeding may be considered timely upon a board finding that there has been an adequate showing of need for the additional time requested; LBP-08-10, 67 NRC 450 (2008)

FIELD SAMPLING PLAN

a site characterization must include sufficient information so that it can effectively track pathways for significant offsite contamination and estimate the quantity of those pathways; LBP-08-4, 67 NRC 105 (2008)

analysis of waterways is intended to identify groundwater, possible cave, and surface water paths and to assess the contents of those waters to determine if depleted uranium is leaching or will leach off the site in quantities significant enough that humans might receive more than 25 mrems of total radioactive exposure from all of the site's pathways; LBP-08-4, 67 NRC 105 (2008)

the board finds that the biota sampling component of the field sampling plan is sufficient to meet the criteria for a 5-year alternate schedule for submission of a decommissioning plan; LBP-08-4, 67 NRC 105 (2008)

there is no requirement that the licensee describe the collection of information needed for the decommissioning plan's environmental assessment or environmental impact statement; LBP-08-4, 67 NRC 105 (2008)

FOREIGN OWNERSHIP

a facility is foreign-owned when a foreign interest has the power, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant; LBP-08-6, 67 NRC 241 (2008)

concerns raised by petitioners related to the applicant's foreign ownership are potentially material to the safety and environmental requirements; LBP-08-6, 67 NRC 241 (2008)

congressional intent for the phrase "common defense and security," is analyzed in the context of foreign ownership prohibitions; LBP-08-6, 67 NRC 241 (2008)

FREEDOM OF INFORMATION ACT

challenges in FOIA cases routinely are resolved on the basis of summary judgment pleadings; LBP-08-7, 67 NRC 361 (2008)

copies of environmental impact statements shall be made available to the President, the Council on Environmental Quality, and the public; CLI-08-1, 67 NRC 1 (2008)

disclosure of documents under the National Environmental Policy Act is expressly governed by the Freedom of Information Act; CLI-08-5, 67 NRC 174 (2008); CLI-08-8, 67 NRC 193 (2008)

Exemption 2 authorizes an agency to withhold matters that are related solely to the internal personnel rules and practices of an agency; LBP-08-7, 67 NRC 361 (2008)

in evaluating the validity of a claimed FOIA exemption, the experience and expertise of an affiant, coupled with a detailed and specific affidavit, lends special weight to the affiant's statements and conclusions; LBP-08-7, 67 NRC 361 (2008)

information in an environment impact statement or environmental assessment that must be considered as part of the NEPA decisionmaking process may be withheld from public disclosure pursuant to FOIA exemptions; CLI-08-1, 67 NRC 1 (2008)

limited discovery may be allowed in a FOIA dispute, but only if absolutely necessary to ensure a complete record and a fair decision; CLI-08-5, 67 NRC 174 (2008)

litigation is ordinarily resolved on summary disposition without discovery and without evidentiary trials or hearings, and discovery is sparingly used; CLI-08-5, 67 NRC 174 (2008); CLI-08-8, 67 NRC 193 (2008)

NEPA does not contemplate adjudications resulting in the disclosure of matters under law considered secret or confidential; CLI-08-8, 67 NRC 193 (2008)

NRC need not disclose information if it falls within one of the nine exemptions in the Freedom of Information Act; LBP-08-7, 67 NRC 361 (2008)

NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials; LBP-08-7, 67 NRC 361 (2008)

SUBJECT INDEX

- regarding public disclosure of an agency's NEPA analysis, Congress has established that the environmental impact statement shall be made available to the public as provided by FOIA; LBP-08-7, 67 NRC 361 (2008)
- when access to documents is disputed in FOIA litigation, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption; LBP-08-7, 67 NRC 361 (2008)
- when the agency has submitted detailed public affidavits that permit resolution of FOIA issues, *in camera* review of redacted information or sealed documents is not necessary; LBP-08-7, 67 NRC 361 (2008)
- GOVERNMENT PARTIES**
- the definition of "party" under the Nuclear Waste Policy Act implies that local governments enjoy standing as of right; LBP-08-10, 67 NRC 450 (2008)
- GROUNDWATER CONTAMINATION**
- challenges to the adequacy of the NRC's groundwater restoration standards are impermissible; LBP-08-6, 67 NRC 241 (2008)
- the field sampling plan's analysis of waterways is intended to identify groundwater, possible cave, and surface water paths and to assess the contents of those waters to determine if depleted uranium is leaching or will leach off the site in quantities significant enough that humans might receive more than 25 mrems of total radioactive exposure from all of the site's pathways; LBP-08-4, 67 NRC 105 (2008)
- HEARING REQUESTS, LATE-FILED**
- under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline; LBP-08-1, 67 NRC 37 (2008)
- HEARINGS**
- "close of the hearing" in 10 C.F.R. 2.1209 refers to the closing of the evidentiary record; CLI-08-9, 67 NRC 353 (2008)
- in cases where a federal agency is a party, a request for rehearing may be made within 45 days after entry of judgment; CLI-08-9, 67 NRC 353 (2008)
- HIGH-LEVEL WASTE REPOSITORY**
- DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before it files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 37 (2008)
- DOE's production of documentary material and certification triggers the duty of other potential parties to make their documentary material available 90 days thereafter; LBP-08-1, 67 NRC 37 (2008)
- each potential party shall continue to supplement its documentary material made available to other participants via the Licensing Support Network with any additional material created after the time of its initial certification; LBP-08-1, 67 NRC 37 (2008)
- the duty to produce all documentary material generated by, or at the direction of, or acquired by, a potential party pursuant to 10 C.F.R. 2.1003(a)(1) applies to extant documentary material and does not require that the potential party delay its initial certification until all documentary material that it intends to rely on is finished and complete; LBP-08-1, 67 NRC 37 (2008)
- HIGH-LEVEL WASTE REPOSITORY PROCEEDING**
- binding case management requirements and related recommendations pertaining to petitions to intervene, contentions, responses and replies, standing arguments, and referencing or attaching supporting materials are provided; LBP-08-10, 67 NRC 450 (2008)
- DOE's certification that it had made all of its then extant documentary material available on the NRC's Licensing Support Network triggered the obligation of other potential parties to make their documentary material available on the LSN within 90 days; LBP-08-5, 67 NRC 205 (2008)
- in the pre-license application phase, the board denies the Department of Energy's motion to strike the State of Nevada's certification that it has made all its documentary material available on the Licensing Support Network; LBP-08-5, 67 NRC 205 (2008)
- under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline; LBP-08-1, 67 NRC 37 (2008)
- whether a call memo was required to address the retention for LSN inclusion purposes of documentary material that does not support a party's position is decided; LBP-08-5, 67 NRC 205 (2008)

SUBJECT INDEX

IN CAMERA PROCEEDINGS

review ought to occur only in the exceptional case after the government has submitted as detailed public affidavits as possible; LBP-08-7, 67 NRC 361 (2008)
when the agency has submitted detailed public affidavits that permit resolution of FOIA issues, *in camera* review of redacted information or sealed documents is not necessary; LBP-08-7, 67 NRC 361 (2008)

IN SITU LEACH MINING

a showing that anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either an injection or processing site is sufficient to demonstrate an injury in fact for standing; LBP-08-6, 67 NRC 241 (2008)
although further analysis may show that there is no way for the radioactive materials and byproducts from ISL mining operations to cause harm to persons living nearby, a board cannot decide, when making a standing determination, that there is no reasonable possibility that such harm could occur; LBP-08-6, 67 NRC 241 (2008)
application of the proximity presumption to determinations of standing are largely dependent on the size and other characteristics of underground aquifers; LBP-08-6, 67 NRC 241 (2008)
ISL mining does not involve fuel rod waste and to the extent such waste is indirectly relevant, the Waste Confidence rule would prohibit its consideration in a license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

INFORMAL PROCEEDINGS

summary disposition motions are to be resolved in accord with the standards for dispositive motions for formal hearings, as set forth in Part 2, Subpart G; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

See also Subpart L Proceedings

INJURY IN FACT

a determination that an injury is fairly traceable to the challenged action is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-08-6, 67 NRC 241 (2008)
a showing that anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either an injection or processing site is sufficient to demonstrate an injury in fact for standing; LBP-08-6, 67 NRC 241 (2008)
a small or minor unwanted exposure, even one well within regulatory limits, is sufficient to establish an injury in fact; LBP-08-6, 67 NRC 241 (2008)
although further analysis may show that there is no way for the radioactive materials and byproducts from ISL mining operations to cause harm to persons living nearby, a board cannot decide, when making a standing determination, that there is no reasonable possibility that such harm could occur; LBP-08-6, 67 NRC 241 (2008)
asserted harm need not be great to establish an injury in fact for standing; LBP-08-6, 67 NRC 241 (2008)
injury may be either actual or threatened to establish standing, but must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-08-6, 67 NRC 241 (2008)
plaintiffs have been found to have a right to apply for preventive relief where copper mining tailings were carried 25 miles to plaintiff's farm; LBP-08-6, 67 NRC 241 (2008)
plaintiffs have prevailed against a motion for summary judgment where chloride spillage was allegedly carried 100 miles to plaintiff's farm; LBP-08-6, 67 NRC 241 (2008)
the standing requirement for showing injury in fact has always been significantly less than for demonstrating an acceptable contention; LBP-08-6, 67 NRC 241 (2008)

INTERESTED STATE

a stay of the close of hearings in both license renewal proceedings for 14 days following the date of issuance of mandate is ordered to afford a state the opportunity to request participant status under this section; CLI-08-9, 67 NRC 353 (2008)

an interested state may petition to suspend proceedings; CLI-08-9, 67 NRC 353 (2008)

INTERLOCUTORY RULINGS

when a board has not made even a threshold ruling on petitioner's standing and contentions, the Commission considers a petition under its usual standard for review of an interlocutory Board order; CLI-08-7, 67 NRC 187 (2008)

SUBJECT INDEX

INTERVENTION

any individual, group, business, or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must establish that it has standing and offer at least one admissible contention meeting the requirements of 10 C.F.R. 2.309(f)(1); LBP-08-6, 67 NRC 241 (2008); LBP-08-9, 67 NRC 421 (2008)

INTERVENTION PETITIONS

although the pleading requirements of 10 C.F.R. 2.309 are strict by design, a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of a petition because of inarticulate draftsmanship or procedural or pleading defects; LBP-08-6, 67 NRC 241 (2008)

answers in the high-level waste repository proceeding shall be limited to addressing specific alleged deficiencies in petitions; LBP-08-10, 67 NRC 450 (2008)

format of pleadings for high-level waste repository proceeding are specified; LBP-08-10, 67 NRC 450 (2008)

in the high-level waste repository proceeding, except for readily available legal authorities, materials that cannot be attached because of copyright restrictions, and documents available on the LSN, all documents that are referenced in support of one or more contentions shall be electronically attached to the petition; LBP-08-10, 67 NRC 450 (2008)

petitioner must explain and support its contention in the petition to intervene; CLI-08-7, 67 NRC 187 (2008)

pro se petitioners are not held to the same standard of pleading as those represented by counsel; LBP-08-6, 67 NRC 241 (2008)

INTERVENTION PETITIONS, LATE-FILED

under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline; LBP-08-1, 67 NRC 37 (2008)

INTERVENTION RULINGS

boards must avoid the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits; LBP-08-6, 67 NRC 241 (2008)

if a board rejects an intervention petition in its entirety, then its sponsor may appeal to the Commission at that time; CLI-08-7, 67 NRC 187 (2008)

INVESTIGATION

if a licensee has voluntarily provided information to the NRC, the voluntary nature of the submission is not compromised by the NRC's ability to conduct its own investigation into the same matter; CLI-08-6, 67 NRC 179 (2008)

requests for diagnostic evaluation team examination, safety culture assessment, and the NRC investigation at other licensee facilities are rejected for review because they are not requests for enforcement-type actions; DD-08-1, 67 NRC 347 (2008)

submission of information to a government agency is voluntary even if the company submitting the information feels pressure to do so as a result of its dealings with the federal government; CLI-08-6, 67 NRC 179 (2008)

IRRADIATED FOODS

whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-4, 67 NRC 171 (2008)

IRRADIATOR

at the contention admissibility stage, it is not necessary to establish a general probability threshold for irradiators to assess in qualitative terms the significance and plausibility of particular asserted siting-related threats; CLI-08-3, 67 NRC 151 (2008)

in an exceptional case, NRC may conduct an irradiator facility siting review if a unique threat is involved which may not be addressed by state and local requirements; CLI-08-3, 67 NRC 151 (2008)

licensees must satisfy all applicable state and local siting, zoning, land use, and building code requirements; CLI-08-3, 67 NRC 151 (2008)

the degree of support necessary for an irradiator siting contention will depend on how obvious a threat the asserted risk is, given the irradiator facility's design and protective features; CLI-08-3, 67 NRC 151 (2008)

SUBJECT INDEX

the Statement of Considerations for Part 36 indicates that in developing those regulations, the NRC considered whether there was a need to impose limits on irradiator siting, but determined that no specific siting limitations were warranted; CLI-08-3, 67 NRC 151 (2008)
there is no evidence that the Commission intended to exempt underwater irradiators from its conclusion that irradiators can be built anywhere that local authorities permit an industrial facility to be located; CLI-08-3, 67 NRC 151 (2008)

IRREPARABLE INJURY

a party opposing a renewed license does not face irreparable harm by the mere issuance of a renewed license; CLI-08-13, 67 NRC 396 (2008)
rejection or admission of a contention, where the petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-08-7, 67 NRC 187 (2008)
See also Injury in Fact

JURISDICTION

a proceeding commences when a notice of hearing or notice of proposed action is issued; CLI-08-14, 67 NRC 402 (2008)

LICENSE AMENDMENT PROCEEDINGS

in proceedings not involving power reactors, proximity alone is not sufficient to establish standing; LBP-08-6, 67 NRC 241 (2008)

LICENSE AMENDMENTS

in determining whether an amendment will be issued, the Commission is guided by considerations that govern the issuance of initial licenses; LBP-08-9, 67 NRC 421 (2008)

LICENSE APPLICATIONS

applicant's Safety Analysis Report is a required part of its license application and must include a preclosure safety analysis; LBP-08-1, 67 NRC 37 (2008)

LICENSE CONDITIONS

challenges to the position of an applicant that is based on a condition in its current license are permissible; LBP-08-6, 67 NRC 241 (2008)

LICENSE RENEWALS

a party opposing a renewed license does not face irreparable harm by the mere issuance of a renewed license; CLI-08-13, 67 NRC 396 (2008)
Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission; CLI-08-13, 67 NRC 396 (2008)
the renewal may be set aside or appropriately conditioned even after it has been issued, upon subsequent administrative or judicial review; CLI-08-13, 67 NRC 396 (2008)

LICENSEES

if a licensee has voluntarily provided information to the NRC, the voluntary nature of the submission is not compromised by the NRC's ability to conduct its own investigation into the same matter; CLI-08-6, 67 NRC 179 (2008)

LICENSING BOARDS

the Commission has broad authority to delegate powers to the Atomic Safety and Licensing Boards; CLI-08-14, 67 NRC 402 (2008)

LICENSING BOARDS, AUTHORITY

a board's authority to recast contentions is circumscribed in that it may not, on its own initiative, provide basic, threshold information required for contention admissibility; LBP-08-11, 67 NRC 460 (2008)
a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable board discretionary decision permitting the filing; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
adjudicatory boards have broad discretion to regulate the course of proceedings and the conduct of participants, and the Commission is reluctant to embroil itself in day-to-day case management issues; CLI-08-14, 67 NRC 402 (2008)
although NRC rules do not explicitly authorize *amicus* briefs at the licensing board level, such briefs might still be granted in appropriate circumstances; LBP-08-6, 67 NRC 241 (2008)
boards commonly reformulate, or expressly limit contentions to focus them to the precise matters that are supported; LBP-08-9, 67 NRC 421 (2008)

SUBJECT INDEX

if petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner, or supply information that is lacking; LBP-08-9, 67 NRC 421 (2008)

licensing boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants; CLI-08-7, 67 NRC 187 (2008)

licensing boards, though not obligated to reformulate contentions, are permitted to do so in certain circumstances; LBP-08-11, 67 NRC 460 (2008)

use of the permissive term, "may," in 10 C.F.R. 2.310(a) indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 241 (2008)

LICENSING BOARDS, JURISDICTION

a licensing board has no jurisdiction to consider any treaty-related or water-rights questions in an NRC adjudicatory proceeding; LBP-08-6, 67 NRC 241 (2008)

LICENSING SUPPORT NETWORK

DOE must make all of its documentary material available on the Licensing Support Network, and to so certify to the PAPO Board, at least 6 months before it files its application to construct the HLW geologic repository at Yucca Mountain; LBP-08-1, 67 NRC 37 (2008)

DOE's certification that it had made all of its then extant documentary material available on the NRC's LSN triggered the obligation of other potential parties to make their documentary material available on the LSN within 90 days; LBP-08-1, 67 NRC 37 (2008); LBP-08-5, 67 NRC 205 (2008)

each potential party shall continue to supplement its documentary material made available to other participants via the LSN with any additional material created after the time of its initial certification; LBP-08-1, 67 NRC 37 (2008)

the duty to produce all documentary material generated by, or at the direction of, or acquired by, a potential party pursuant to 10 C.F.R. 2.1003(a)(1) applies to extant documentary material and does not require that the potential party delay its initial certification until all documentary material that it intends to rely on is finished and complete; LBP-08-1, 67 NRC 37 (2008)

the LSN does not have to be frozen at the time of certification; CLI-08-12, 67 NRC 386 (2008)

the regulations are unclear as to whether header searchability is a prerequisite of certification; LBP-08-1, 67 NRC 37 (2008)

whether a call memo was required to address the retention for LSN inclusion purposes of documentary material that does not support a party's position is decided; LBP-08-5, 67 NRC 205 (2008)

MATERIALITY

petitioner show why an alleged error or omission is of possible significance to the result of the proceeding; LBP-08-9, 67 NRC 421 (2008)

MATERIALS LICENSE AMENDMENT APPLICATIONS

applicant must provide a list of all approvals and describe the status of those approvals with the applicable environmental standards and requirements; LBP-08-6, 67 NRC 241 (2008)

applicant must submit an environmental report, which is required to contain the information specified in 10 C.F.R. 51.45; LBP-08-6, 67 NRC 241 (2008)

MATERIALS LICENSE AMENDMENT PROCEEDINGS

in proceedings not involving power reactors, proximity alone is not sufficient to establish standing; LBP-08-6, 67 NRC 241 (2008)

issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of the proceeding; LBP-08-6, 67 NRC 241 (2008)

MATERIALS LICENSES

a source material license may not be issued to a corporation if the Commission determines that the corporation is owned, controlled, or dominated by a foreign corporation; LBP-08-6, 67 NRC 241 (2008)

licensees must satisfy all applicable state and local siting, zoning, land use, and building code requirements for irradiators; CLI-08-3, 67 NRC 151 (2008)

MOOTNESS

post-contention admission events, such as issuance of a Staff draft environmental impact statement, can render a previously admitted contention of omission subject to dismissal as moot; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008); LBP-08-6, 67 NRC 241 (2008)

SUBJECT INDEX

MOTIONS

any motion must be filed within 10 days of the occurrence or circumstance from which the motion arises, and any movant must contact other parties prior to filing the motions; LBP-08-6, 67 NRC 241 (2008)

MOTIONS TO STRIKE

a motion to strike is an inappropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

answers to a motion to strike are limited to legal or factual issues raised by the motion, and new issues should be raised in a separate motion; LBP-08-1, 67 NRC 37 (2008)

in high-level waste repository proceeding, the burden of proof rests on the movant; LBP-08-5, 67 NRC 205 (2008)

it is reasonable to expect that movant will buttress its motion with some concrete evidence, usually in the form of an affidavit or declaration by a person with asserted knowledge of the fact or facts upon which the motion is based; LBP-08-5, 67 NRC 205 (2008)

MUNITIONS

application for approval of an alternative schedule for the submission of a decommissioning plan for a site containing expended depleted uranium munitions is approved; LBP-08-4, 67 NRC 105 (2008)

NATIONAL ENVIRONMENTAL POLICY ACT

a reasonably close causal relationship must exist between a federal agency action and any environmental consequences of that action in order to trigger a NEPA review, and such a relationship does not exist with terrorism; LBP-08-6, 67 NRC 241 (2008)

adjudications resulting in the disclosure of matters under law considered secret or confidential are not contemplated; CLI-08-8, 67 NRC 193 (2008)

although the requirements of NEPA are directed to federal agencies and thus the primary duties of NEPA fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants; LBP-08-6, 67 NRC 241 (2008)

an agency is to include in every recommendation or report on major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action; LBP-08-6, 67 NRC 241 (2008)

an environmental assessment must include a Reference Document List that identifies the sources used; LBP-08-7, 67 NRC 361 (2008)

copies of environmental impact statements shall be made available to the President, the Council on Environmental Quality, and the public; CLI-08-1, 67 NRC 1 (2008)

disclosure of documents under NEPA is expressly governed by the Freedom of Information Act; CLI-08-5, 67 NRC 174 (2008); CLI-08-8, 67 NRC 193 (2008)

if a major federal action significantly affects the quality of the human environment, an environmental impact statement must be prepared; CLI-08-8, 67 NRC 193 (2008)

information in an environment impact statement or environmental assessment that must be considered as part of the NEPA decisionmaking process may be withheld from public disclosure pursuant to FOIA exemptions; CLI-08-1, 67 NRC 1 (2008)

“reasonably foreseeable” impacts include those that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason; CLI-08-8, 67 NRC 193 (2008)

regarding public disclosure of an agency's NEPA analysis, Congress has established that the environmental impact statement shall be made available to the public as provided by FOIA; LBP-08-7, 67 NRC 361 (2008)

the National Infrastructure Protection Plan is concerned with security issues, not environmental quality standards and requirements, and it is environmental quality standards and requirements that the environmental analysis is obliged to address, not security issues; CLI-08-1, 67 NRC 1 (2008)

whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-4, 67 NRC 171 (2008)

SUBJECT INDEX

NATIONAL HISTORIC PRESERVATION ACT

- a federal agency, prior to the issuance of any license, must take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-08-6, 67 NRC 241 (2008)
- a form letter is not sufficient to constitute the reasonable effort that section 106 of the National Historic Preservation Act requires; LBP-08-6, 67 NRC 241 (2008)
- a mere request for information is not necessarily sufficient to constitute the reasonable effort that section 106 requires; LBP-08-6, 67 NRC 241 (2008)
- a tribe may become a consulting party when it considers property potentially affected by a federal undertaking to have religious or cultural significance; LBP-08-6, 67 NRC 241 (2008)
- federal agencies must notify all consulting parties, including Indian tribes, when a finding of no effect has been made, and to provide those consulting parties with an invitation to inspect the documentation prior to approving the undertaking; LBP-08-6, 67 NRC 241 (2008)

NATIONAL INFRASTRUCTURE PROTECTION PLAN

- NIPP is concerned with security issues, not environmental quality standards and requirements, and it is environmental quality standards and requirements that the environmental analysis is obliged to address, not security issues; CLI-08-1, 67 NRC 1 (2008)

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

- whether applicant has a valid NPDES permit is outside the scope of a power uprate proceeding; LBP-08-9, 67 NRC 421 (2008)

NATIONAL SECURITY INFORMATION

- NRC has a statutory obligation to protect national security information; CLI-08-1, 67 NRC 1 (2008)

NATIVE AMERICANS

- a tribe may become a consulting party when it considers property potentially affected by a federal undertaking to have religious or cultural significance; LBP-08-6, 67 NRC 241 (2008)
- federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues; LBP-08-6, 67 NRC 241 (2008)
- tribes are entitled to a reasonable opportunity to participate in NRC proceedings; LBP-08-6, 67 NRC 241 (2008)

NONCOMPLIANCES

- despite lack of compliance with various agency NUREGs, a decommissioning plan is lawful because it acknowledges the fiscal realities of the licensee's bankruptcy and is consistent with the mandate that the plan be completed as soon as practicable and adequately protect the health and safety of workers and the public; LBP-08-4, 67 NRC 105 (2008)

NOTIFICATION

- licensee must provide written notification to NRC Staff within 60 days and either begin decommissioning of the site or submit a decommissioning plan to the Staff within 12 months of the notification; LBP-08-8, 67 NRC 409 (2008)

NRC GUIDANCE DOCUMENTS

- despite lack of compliance with various agency NUREGs, a decommissioning plan is lawful because it acknowledges the fiscal realities of the licensee's bankruptcy and is consistent with the mandate that the plan be completed as soon as practicable and adequately protect the health and safety of workers and the public; LBP-08-4, 67 NRC 105 (2008)

NRC POLICY

- the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner's own view regarding the direction regulatory policy should take; LBP-08-9, 67 NRC 421 (2008)

NRC REVIEW

- an environmental assessment must include a Reference Document List that identifies the sources used; LBP-08-7, 67 NRC 361 (2008)

NRC STAFF REVIEW

- although the requirements of NEPA are directed to federal agencies and thus the primary duties of NEPA fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants; LBP-08-6, 67 NRC 241 (2008)
- challenges to how the Staff performs its reviews are outside the scope of licensing proceeding; LBP-08-9, 67 NRC 421 (2008)

SUBJECT INDEX

- the safety review must support a conclusion that a proposed irradiator would protect health and minimize danger to life or property; CLI-08-3, 67 NRC 151 (2008)
- NUCLEAR REGULATORY COMMISSION**
NRC has a statutory obligation to protect national security information; CLI-08-1, 67 NRC 1 (2008)
- NUCLEAR REGULATORY COMMISSION, AUTHORITY**
if a licensee has voluntarily provided information to the NRC, the voluntary nature of the submission is not compromised by the NRC's ability to conduct its own investigation into the same matter; CLI-08-6, 67 NRC 179 (2008)
the Commission has broad authority to delegate powers to the Atomic Safety and Licensing Boards; CLI-08-14, 67 NRC 402 (2008)
the Commission may review a board ruling pursuant to the inherent supervisory powers where a significant issue may affect multiple pending or imminent licensing proceedings; CLI-08-2, 67 NRC 31 (2008)
whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-4, 67 NRC 171 (2008)
- NUCLEAR REGULATORY COMMISSION, JURISDICTION**
NRC proceedings are not an appropriate forum to challenge DOE's procurement process, which fall under the jurisdiction of the Government Accountability Office or Court of Federal Claims; CLI-08-11, 67 NRC 379 (2008)
- NUCLEAR WASTE POLICY ACT**
the definition of "party" implies that local governments enjoy standing as of right; LBP-08-10, 67 NRC 450 (2008)
- OPERATING LICENSE AMENDMENT PROCEEDINGS**
applicant for a power uprate must comply with all relevant NRC regulations, whether the application meets the requirements for a license amendment; LBP-08-9, 67 NRC 421 (2008)
challenges to the current operating license are outside the scope of matters challengeable in a power uprate application; LBP-08-9, 67 NRC 421 (2008)
whether applicant has a valid NPDES permit is outside the scope of a power uprate proceeding; LBP-08-9, 67 NRC 421 (2008)
- OPERATING LICENSES**
the overriding regulatory precondition to the award of an operating license is that every major aspect of the facility has been completed in accordance with its design; LBP-08-11, 67 NRC 460 (2008)
- ORAL ARGUMENT**
a licensing board order canceling oral argument on the admissibility of petitioner's proposed contention did not cause serious and irreparable harm to petitioner; CLI-08-7, 67 NRC 187 (2008)
- PARTIAL INITIAL DECISIONS**
the provision expressly permitting immediate review of a partial initial decision is an exception to the Commission's established policy of disfavoring interlocutory appeals; CLI-08-2, 67 NRC 31 (2008)
- PARTIES**
in the high-level waste repository proceeding, "potential party," means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definition of "party," "potential party," or "interested governmental participant"; LBP-08-10, 67 NRC 450 (2008)
- PLEADINGS**
although the pleading requirements of 10 C.F.R. 2.309 are strict by design, a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects; LBP-08-6, 67 NRC 241 (2008)
even if petitioners later retain counsel, it would not be appropriate to hold their petition to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-6, 67 NRC 241 (2008)
pro se petitioners are not held to the same standard of pleading as those represented by counsel; LBP-08-6, 67 NRC 241 (2008); LBP-08-11, 67 NRC 460 (2008)
- POWER UPRATE**
applicant for a power uprate must comply with all relevant NRC regulations, whether the application meets the requirements for a license amendment; LBP-08-9, 67 NRC 421 (2008)

SUBJECT INDEX

- challenges to the current operating license are outside the scope of matters challengeable in a power uprate application; LBP-08-9, 67 NRC 421 (2008)
- demonstrating proximity-based standing requires a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-08-9, 67 NRC 421 (2008)
- relevant NRC regulations, be it a stretch power uprate or an extended power uprate, are set forth in 10 C.F.R. 50.90 to 50.92; LBP-08-9, 67 NRC 421 (2008)
- whether applicant has a valid NPDES permit is outside the scope of a power uprate proceeding; LBP-08-9, 67 NRC 421 (2008)
- PRESIDING OFFICER, AUTHORITY**
- the presiding officer is authorized to hold conferences before or during the hearing for settlement, simplification of contentions, or any other proper purpose; LBP-08-11, 67 NRC 460 (2008)
- PRIVILEGE**
- See Attorney-Client Privilege
- PRO SE LITIGANTS**
- even if petitioners later retain counsel, it would not be appropriate to hold their petition to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-6, 67 NRC 241 (2008)
- petitioners who act without attorney representation are not held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-6, 67 NRC 241 (2008); LBP-08-11, 67 NRC 460 (2008)
- PROXIMITY PRESUMPTION**
- a showing that anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either an injection or processing site is sufficient to demonstrate an injury in fact for standing; LBP-08-6, 67 NRC 241 (2008)
- daily commute near vicinity of a reactor is sufficient to establish standing; LBP-08-9, 67 NRC 421 (2008)
- demonstrating proximity-based standing in a power uprate proceeding requires a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-08-9, 67 NRC 421 (2008)
- in in-situ leach mining cases the geographical areas that may be affected by mining operations are largely dependent on the size and other characteristics of underground aquifers; LBP-08-6, 67 NRC 241 (2008)
- in proceedings not involving power reactors, proximity alone is not sufficient to establish standing; LBP-08-6, 67 NRC 241 (2008)
- occasional trips to areas located close to reactors have been found to be insufficient grounds to demonstrate a risk to the intervenor's health and safety; LBP-08-9, 67 NRC 421 (2008)
- petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity; LBP-08-9, 67 NRC 421 (2008)
- some circumstances exist in which petitioners may be presumed to have standing based on their geographical proximity to a facility or source of radioactivity, without the need to show injury in fact, causation, or redressability; LBP-08-6, 67 NRC 241 (2008)
- there is no obvious potential for harm at petitioner's property 20 miles from a uranium enrichment facility location; LBP-08-6, 67 NRC 241 (2008)
- whether and at what distance a proposed action carries with it an obvious potential for offsite consequences such that a petitioner can be presumed to be affected must be determined on a case-by-case basis; LBP-08-6, 67 NRC 241 (2008)
- PYROCHLORE**
- this substance is subject to NRC regulation as a radioactive source material; LBP-08-8, 67 NRC 409 (2008)
- RADIATION PROTECTION STANDARDS**
- a decommissioning plan for a restricted release site will be judged exclusively upon whether residual radioactivity levels will be as low as is reasonably achievable and the total effective dose equivalent to offsite human beings will be below 25 mrem; LBP-08-4, 67 NRC 105 (2008)

SUBJECT INDEX

the regulatory limit of 25 mrem per year represents the value for the total effective dose equivalent; LBP-08-4, 67 NRC 105 (2008)

the "total effective dose equivalent" is defined as the sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures); LBP-08-4, 67 NRC 105 (2008)

RADIATION SURVEYS

the field sampling plan's analysis of waterways is intended to identify groundwater, possible cave, and surface water paths and to assess the contents of those waters to determine if depleted uranium is leaching or will leach off the site in quantities significant enough that humans might receive more than 25 mrems of total radioactive exposure from all of the site's pathways; LBP-08-4, 67 NRC 105 (2008)

RADIOACTIVE MATERIALS

pyrochlore is subject to NRC regulation as a radioactive source material; LBP-08-8, 67 NRC 409 (2008)

RADIOLOGICAL CONTAMINATION

a site characterization plan should provide sufficient information to allow the NRC to determine the extent and range of expected radioactive contamination; LBP-08-4, 67 NRC 105 (2008)

See also Groundwater Contamination

RADIOLOGICAL EXPOSURE

a small or minor unwanted exposure, even one well within regulatory limits, is sufficient to establish an injury in fact; LBP-08-6, 67 NRC 241 (2008)

the "total effective dose equivalent" is defined as the sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures); LBP-08-4, 67 NRC 105 (2008)

RADIOLOGICAL MONITORING

a site characterization must include sufficient information so that it can effectively track pathways for significant offsite contamination and estimate the quantity of those pathways; LBP-08-4, 67 NRC 105 (2008)

groundwater, surface, and subsurface water monitoring programs must assess whether depleted uranium will reach offsite humans through drinking water or the consumption of animals or plants that have in turn consumed water from the site in quantities significant enough that those offsite humans might receive more than 25 mrems of total radioactive exposure from all pathways per year; LBP-08-4, 67 NRC 105 (2008)

the board finds that the biota sampling component of the field sampling plan is sufficient to meet the criteria for a 5-year alternate schedule for submission of a decommissioning plan; LBP-08-4, 67 NRC 105 (2008)

REGULATIONS

contentions that call for requirements in excess of those imposed by the Commission must be rejected as a collateral attack on the regulations; LBP-08-9, 67 NRC 421 (2008)

failure of an applicant to address any guidance topics or deviation from the guidance provided does not rise to the level of failure to comply with NRC regulations; LBP-08-9, 67 NRC 421 (2008)

NRC regulations do not address conflicts of interest as such, but the absence of a specific rule does not interfere with the Commission's inherent supervisory authority over the conduct of adjudicatory proceedings; CLI-08-11, 67 NRC 379 (2008)

relevant NRC requirements for a power uprate, be it a stretch power uprate or an extended power uprate, are set forth in 10 C.F.R. 50.90 to 50.92; LBP-08-9, 67 NRC 421 (2008)

REGULATIONS, INTERPRETATION

a contention calling for a siting safety analysis for an irradiator is not barred by the Part 36 regulatory scheme, but must be sufficiently supported, in light of the Statement of Considerations' conclusions; CLI-08-3, 67 NRC 151 (2008)

as guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the Statement of Considerations is entitled to special weight; CLI-08-3, 67 NRC 151 (2008)

as with a statute, interpretation begins with the language and structure of the provision itself; CLI-08-12, 67 NRC 386 (2008)

"close of the hearing" in 10 C.F.R. 2.1209 refers to the closing of the evidentiary record; CLI-08-9, 67 NRC 353 (2008)

SUBJECT INDEX

except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in Part 40 by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission; LBP-08-6, 67 NRC 241 (2008)

like Congress, the Commission is not to be assumed to hide elephants in mouseholes; LBP-08-1, 67 NRC 37 (2008)

recourse to regulatory history is not necessary unless the language and structure of the regulation reveal an ambiguity that must be resolved; CLI-08-12, 67 NRC 386 (2008)

section 2.1003's reference to "all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by" clearly conveys that possession or control of the documentary material is a prerequisite to the duty to produce it; CLI-08-12, 67 NRC 386 (2008)

the Commission often refers to the Statement of Considerations as an aid in interpreting its regulations; CLI-08-3, 67 NRC 151 (2008)

the entirety of the provision must be given effect; CLI-08-12, 67 NRC 386 (2008)

the proper interpretation of a regulation begins with the language and structure of the provision itself; LBP-08-1, 67 NRC 37 (2008)

the Statement of Considerations for Part 36 indicates that in developing those regulations, the NRC considered whether there was a need to impose limits on irradiator siting, but determined that no specific siting limitations were warranted; CLI-08-3, 67 NRC 151 (2008)

under Part 36, in an exceptional case, NRC may conduct an irradiator facility siting review if a unique threat is involved which may not be addressed by state and local requirements; CLI-08-3, 67 NRC 151 (2008)

use of the permissive term, "may," in 10 C.F.R. 2.310(a) indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 241 (2008)

REGULATORY GUIDES

failure of an applicant to address any guidance topics or deviation from the guidance provided does not rise to the level of failure to comply with NRC regulations; LBP-08-9, 67 NRC 421 (2008)

REPLY BRIEFS

answers to a motion to strike are limited to legal or factual issues raised by the motion, and new issues should be raised in a separate motion; LBP-08-1, 67 NRC 37 (2008)

format of pleadings for the high-level waste repository proceeding are specified; LBP-08-10, 67 NRC 450 (2008)

if no potential party has challenged whether the existence of a genuine dispute has been established with respect to a particular contention, petitioners reply need not and should not address that issue any further with respect to that contention; LBP-08-10, 67 NRC 450 (2008)

petitioner may not file entirely new support for contentions in a reply; LBP-08-6, 67 NRC 241 (2008)

petitioner may submit arguments that are focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer; LBP-08-6, 67 NRC 241 (2008)

Subpart J rules do not provide for the filing of reply briefs in the context of appeals from interlocutory decisions or initial or partial decisions; CLI-08-12, 67 NRC 386 (2008)

REPLY TO ANSWER TO MOTION

a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable board discretionary decision permitting the filing; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

permission to file must be sought from the board before the replies are due; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

the appropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention is a reply pleading, for which permission to file should have been sought from the board before the replies were due; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

REQUEST FOR ACTION

request for an enforcement-type action where the underlying concern is the partial collapse of a cooling tower is credible and sufficient to warrant further inquiry; DD-08-1, 67 NRC 347 (2008)

SUBJECT INDEX

- requests for diagnostic evaluation team examination, safety culture assessment, and the NRC investigation at other licensee facilities are rejected for review because they are not requests for enforcement-type actions; DD-08-1, 67 NRC 347 (2008)
- REQUEST FOR ADDITIONAL INFORMATION
 - outstanding RAIs do not give rise to an evidentiary hearing; LBP-08-9, 67 NRC 421 (2008)
- RESTRICTED RELEASE
 - a decommissioning plan will be judged exclusively upon whether residual radioactivity levels will be as low as is reasonably achievable and the total effective dose equivalent to offsite human beings will be below 25 mrem; LBP-08-4, 67 NRC 105 (2008)
- REVIEW
 - See Appellate Review; NRC Review; NRC Staff Review; Safety Review
- REVIEW, INTERLOCUTORY
 - whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-4, 67 NRC 171 (2008)
- REVIEW, SUA SPONTE
 - the Commission may review a board ruling pursuant to the inherent supervisory powers where a significant issue may affect multiple pending or imminent licensing proceedings; CLI-08-2, 67 NRC 31 (2008)
 - whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-4, 67 NRC 171 (2008)
- RULES
 - contentions challenging dose limits in NRC regulations are not admissible; LBP-08-6, 67 NRC 241 (2008)
- RULES OF PRACTICE
 - a contention shall not be admitted if the admissibility requirements are not satisfied or if the contention, even if proven, would not entitle petitioner to relief; CLI-08-1, 67 NRC 1 (2008)
 - a late-filed environmental contention may be admitted only where petitioner relies upon newly available, significant information, meets the late-filing requirements, or successfully argues for supplementing the EIS; LBP-08-11, 67 NRC 460 (2008)
 - a licensing board order canceling oral argument on the admissibility of petitioner's proposed contention did not cause serious and irreparable harm to petitioner; CLI-08-7, 67 NRC 187 (2008)
 - a motion to strike is an inappropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
 - a ruling granting summary disposition on a single contention, where other contentions are still pending in an adjudication, is not a final decision, and is not susceptible to Commission review; CLI-08-2, 67 NRC 31 (2008)
 - a stay of the close of hearings in both license renewal proceedings for 14 days following the date of issuance of mandate is ordered to afford a state the opportunity to request participant status under this section; CLI-08-9, 67 NRC 353 (2008)
 - a supporting document available in NRC ADAMS system 51 days prior to its submission, but received by petitioners only 1 day before its submission, is timely filed; LBP-08-6, 67 NRC 241 (2008)
 - all material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
 - although exhibits are not themselves either "petitions" or "contentions," the board considers the timeliness of their filing; LBP-08-6, 67 NRC 241 (2008)
 - although NRC rules do not explicitly authorize *amicus* briefs at the licensing board level, such briefs might still be granted in appropriate circumstances; LBP-08-6, 67 NRC 241 (2008)
 - although the pleading requirements of 10 C.F.R. 2.309 are strict by design, a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects; LBP-08-6, 67 NRC 241 (2008)
 - an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in

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the ER that supported the contention's admission, submit a new contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

an organization asserting representational standing on behalf of one or more of its members must demonstrate that the interests of at least one of its members will be so harmed, identify that member by name and address, and show that the organization is authorized to request a hearing on behalf of that member; LBP-08-6, 67 NRC 241 (2008); LBP-08-9, 67 NRC 421 (2008)

answers to a motion to strike are limited to legal or factual issues raised by the motion, and new issues should be raised in a separate motion; LBP-08-1, 67 NRC 37 (2008)

as guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the Statement of Considerations is entitled to special weight; CLI-08-3, 67 NRC 151 (2008)

before a petition to admit a late-filed contention can be granted, five factors must be balanced; CLI-08-1, 67 NRC 1 (2008)

binding case management requirements and related recommendations pertaining to petitions to intervene, contentions, responses and replies, standing arguments, and referencing or attaching supporting materials are provided; LBP-08-10, 67 NRC 450 (2008)

boards must avoid the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits; LBP-08-6, 67 NRC 241 (2008)

challenges to how the Staff performs its reviews are outside the scope of licensing proceedings; LBP-08-9, 67 NRC 421 (2008)

challenges to the current operating license are outside the scope of matters challengeable in a power uprate application; LBP-08-9, 67 NRC 421 (2008)

contentions must be based on documents or information available when the hearing petition is to be filed; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

contentions must be filed with the original intervention petition within 60 days of notice of the proceeding in the *Federal Register*, unless a longer period is therein specified, an extension is granted, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-08-6, 67 NRC 241 (2008)

contentions must directly controvert a position taken by the applicant in the application and explain why the application is deficient; LBP-08-6, 67 NRC 241 (2008)

contentions must specifically challenge the license application to be admissible; LBP-08-9, 67 NRC 421 (2008)

contentions that call for requirements in excess of those imposed by Commission must be rejected as a collateral attack on the regulations; LBP-08-9, 67 NRC 421 (2008)

even if late-filing criteria are satisfied, proposed contentions must still meet the Commission's pleading standards; CLI-08-1, 67 NRC 1 (2008)

even if petitioners later retain counsel, it would not be appropriate to hold their petition to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere; LBP-08-6, 67 NRC 241 (2008)

expert support is not required for admission of a contention; LBP-08-6, 67 NRC 241 (2008)

factors that influence the grant of a stay are addressed; LBP-08-11, 67 NRC 460 (2008)

failure of a contention to meet any of the requirements of section 2.309(f)(1) is grounds for its dismissal; LBP-08-6, 67 NRC 241 (2008)

five factors must be balanced under pre-2004 rules before a petition to admit a late-filed contention can be granted; CLI-08-8, 67 NRC 193 (2008)

for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interests of identified members; LBP-08-6, 67 NRC 241 (2008)

if good cause is not shown for the late filing of a contention, petitioner must make a compelling showing on the four remaining factors; CLI-08-1, 67 NRC 1 (2008); CLI-08-8, 67 NRC 193 (2008)

in deciding a summary disposition motion the tribunal must examine the evidence in the light most favorable to the nonmoving party; LBP-08-7, 67 NRC 361 (2008)

in determining whether an individual or organization should be granted party status based on standing as of right, NRC has applied contemporaneous judicial standing concepts; LBP-08-9, 67 NRC 421 (2008)

in five-factor analysis for admission of a late-filed contention, factors three and five are to be given more weight than factors two and four; CLI-08-1, 67 NRC 1 (2008); CLI-08-8, 67 NRC 193 (2008)

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in high-level waste repository proceedings, the burden of proof rests on the proponent of a motion to strike; LBP-08-5, 67 NRC 205 (2008)

in proceedings not involving power reactors, proximity alone is not sufficient to establish standing; LBP-08-6, 67 NRC 241 (2008)

injury in fact may be either actual or threatened to establish standing, but must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-08-6, 67 NRC 241 (2008)

issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of a license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

judicial concepts of standing are applied in NRC proceedings; LBP-08-6, 67 NRC 241 (2008)

Native American tribes are entitled to a reasonable opportunity to participate in NRC proceedings; LBP-08-6, 67 NRC 241 (2008)

NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-08-6, 67 NRC 241 (2008)

opponents of summary disposition cannot rest on the mere allegations or denials of a pleading, but must go beyond the pleadings and by the party's own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial; LBP-08-7, 67 NRC 361 (2008)

opponents of summary disposition must counter any adequately supported material facts provided by the movant with their own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

petitioner bears the burden of demonstrating standing, but in ruling on standing a licensing board is to construe the petition in favor of the petitioner; LBP-08-6, 67 NRC 241 (2008)

petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity; LBP-08-9, 67 NRC 421 (2008)

petitioner is not required to prove its case at the contention stage and need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-08-6, 67 NRC 241 (2008)

petitioner must present sufficient information to show a genuine dispute and reasonably indicate that a further inquiry is appropriate; LBP-08-6, 67 NRC 241 (2008)

petitioner must read the pertinent portions of the license application, including the safety analysis report and the environmental report, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-08-6, 67 NRC 241 (2008)

petitioner must support its contentions with documents, expert opinion, or at least a fact-based argument; LBP-08-6, 67 NRC 241 (2008)

petitioner's right to participate in a proceeding concerns whether the petitioner has sufficient stake in a matter, as contrasted with whether there is a real dispute; LBP-08-6, 67 NRC 241 (2008)

petitioners have an ironclad obligation to search the public record for information supporting their contentions; LBP-08-6, 67 NRC 241 (2008)

post-contention admission events, such as issuance of a Staff draft environmental impact statement, can render a previously admitted contention of omission subject to dismissal as moot; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

pro se petitioners are not held to the same standard of pleading as those represented by counsel; LBP-08-6, 67 NRC 241 (2008)

proponents of summary disposition bear the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

proponents of summary disposition bear the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact; LBP-08-7, 67 NRC 361 (2008)

section 2.1003's reference to "all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by" clearly conveys that possession

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or control of the documentary material is a prerequisite to the duty to produce it; CLI-08-12, 67 NRC 386 (2008)

some circumstances exist in which petitioners may be presumed to have standing based on their geographical proximity to a facility or source of radioactivity, without the need to show injury in fact, causation, or redressability; LBP-08-6, 67 NRC 241 (2008)

Subpart J rules do not provide for the filing of reply briefs in the context of appeals from interlocutory decisions or initial or partial decisions; CLI-08-12, 67 NRC 386 (2008)

Subpart K procedures apply where invoked by a party; CLI-08-1, 67 NRC 1 (2008)

summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained; LBP-08-2, 67 NRC 54 (2008)

summary disposition may be entered with respect to any matter in a proceeding if the motion, along with any appropriate supporting materials, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008); LBP-08-7, 67 NRC 361 (2008)

summary disposition motions in informal, Subpart L, proceedings are to be resolved in accord with the standards for dispositive motions for formal hearings, as set forth in Part 2, Subpart G; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity; LBP-08-2, 67 NRC 54 (2008)

technical perfection is not an essential element of contention pleading; LBP-08-6, 67 NRC 241 (2008)

the argument that information provided in support of an intervenor's response to a summary disposition motion should not be considered because the information is outside the scope of the intervenor's admitted contention, if true, can be a meritorious assertion; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

the brief explanation of the basis that is required by section 2.309(f)(1)(ii) helps define the scope of a contention, but it is the contention, not bases, whose admissibility must be determined; LBP-08-6, 67 NRC 241 (2008)

the Commission often refers to the Statement of Considerations as an aid in interpreting its regulations; CLI-08-3, 67 NRC 151 (2008)

the contention rule is strict by design, having been toughened in 1989 because in prior years licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation; LBP-08-6, 67 NRC 241 (2008)

the duty to produce all documentary material generated by, or at the direction of, or acquired by, a potential party pursuant to 10 C.F.R. 2.1003(a)(1) applies to extant documentary material and does not require that the potential party delay its initial certification until all documentary material that it intends to rely on is finished and complete; LBP-08-1, 67 NRC 37 (2008)

the February 2004 revision of the rules no longer incorporates provisions that permitted the amendment and supplementation of petitions and filing of contentions after the original filing of petitions; LBP-08-6, 67 NRC 241 (2008)

the standard for review of an interlocutory board order is whether the ruling threatens the petitioner with immediate and serious, irreparable impact or will affect the basic structure of the proceeding in a pervasive and unusual manner; CLI-08-7, 67 NRC 187 (2008)

the strict contention rule serves multiple interests; LBP-08-6, 67 NRC 241 (2008)

to the degree the response to a summary disposition motion fails to contravene the material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

use of the permissive term, "may," in 10 C.F.R. 2.310(a) indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 241 (2008)

when a board has not made even a threshold ruling on petitioner's standing and contentions, the Commission considers a petition under its usual standard for review of an interlocutory Board order; CLI-08-7, 67 NRC 187 (2008)

where the nonmoving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment, but has the burden to show that he is entitled to judgment under established principles; LBP-08-7, 67 NRC 361 (2008)

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- whether applicant has a valid NPDES permit is outside the scope of a power uprate proceeding;
LBP-08-9, 67 NRC 421 (2008)
- whether good cause exists to excuse the late-filing of a contention is the most important factor; CLI-08-8,
67 NRC 193 (2008)
- RULES OF PROCEDURE**
- a motion to stay issuance of a license might be granted where the factors usually considered in granting
emergency injunctive relief are satisfied, including the likelihood of success on the merits, irreparable
harm, absence of harm to others, and the public interest; CLI-08-13, 67 NRC 396 (2008)
- failure to address the four stay factors in a motion to stay issuance of a license is reason enough to deny
the motion; CLI-08-13, 67 NRC 396 (2008)
- license renewal may be set aside or appropriately conditioned even after it has been issued, upon
subsequent administrative or judicial review; CLI-08-13, 67 NRC 396 (2008)
- no rule exists for a motion to stay issuance of a license while proceedings are pending before the board;
CLI-08-13, 67 NRC 396 (2008)
- SAFEGUARDS INFORMATION**
- hearings on the essentially limitless range of conceivable but highly unlikely terrorist scenarios could not
be meaningfully conducted without substantial disclosure of classified and safeguards information on
threat assessments and security arrangements and without substantial litigation over their significance;
CLI-08-1, 67 NRC 1 (2008)
- SAFETY ANALYSIS**
- applicant's safety analysis report is a required part of its license application and must include a preclosure
safety analysis; LBP-08-1, 67 NRC 37 (2008)
- SAFETY ANALYSIS REPORT**
- applicant's SAR is a required part of its license application and must include a preclosure safety analysis;
LBP-08-1, 67 NRC 37 (2008)
- SAFETY CULTURE**
- requests for diagnostic evaluation team examination, safety culture assessment, and the NRC investigation
at other licensee facilities are rejected for review because they are not requests for enforcement-type
actions; DD-08-1, 67 NRC 347 (2008)
- SAFETY ISSUES**
- whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises
the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-4, 67 NRC
171 (2008)
- SAFETY REVIEW**
- in an exceptional case, NRC may conduct an irradiator facility siting review if a unique threat is involved
which may not be addressed by state and local requirements; CLI-08-3, 67 NRC 151 (2008)
- Staff's review must support a conclusion that a proposed irradiator would protect health and minimize
danger to life or property; CLI-08-3, 67 NRC 151 (2008)
- SCHEDULING**
- application for approval of an alternate schedule for the submission of a decommissioning plan for a site
containing expended depleted uranium munitions is approved; LBP-08-4, 67 NRC 105 (2008)
- SECURITY**
- disclosure of documents under the National Environmental Policy Act is expressly governed by the
Freedom of Information Act; CLI-08-8, 67 NRC 193 (2008)
- SEISMIC DESIGN**
- panoramic irradiators to be built in seismic areas must have concrete shielding meeting the seismic design
requirements of appropriate industry or local building codes; CLI-08-3, 67 NRC 151 (2008)
- SITE CHARACTERIZATION**
- a decommissioning plan for a restricted release site will be judged exclusively upon whether residual
radioactivity levels will be as low as is reasonably achievable and the total effective dose equivalent to
offsite human beings will be below 25 mrem; LBP-08-4, 67 NRC 105 (2008)
- a decommissioning plan must include an adequate site characterization; LBP-08-4, 67 NRC 105 (2008)
- description of the conditions of the site or separate building or outdoor area must be sufficient to evaluate
the acceptability of the decommissioning plan; LBP-08-4, 67 NRC 105 (2008)

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SITE CHARACTERIZATION PLANS

sufficient information must be included so that pathways for significant offsite contamination can be effectively tracked and the quantity of those pathways estimated; LBP-08-4, 67 NRC 105 (2008)
sufficient information should be provided to allow the NRC to determine the extent and range of expected radioactive contamination; LBP-08-4, 67 NRC 105 (2008)
what constitutes "sufficient information," depends, to a large extent, on site-specific conditions; LBP-08-4, 67 NRC 105 (2008)

SITE RESTORATION

challenges to the adequacy of the NRC's groundwater restoration standards are impermissible; LBP-08-6, 67 NRC 241 (2008)

SITE SUITABILITY

in an exceptional case, NRC may conduct an irradiator facility siting review if a unique threat is involved which may not be addressed by state and local requirements; CLI-08-3, 67 NRC 151 (2008)
the Statement of Considerations for Part 36 indicates that in developing those regulations, the NRC considered whether there was a need to impose limits on irradiator siting, but determined that no specific siting limitations were warranted; CLI-08-3, 67 NRC 151 (2008)

SOURCE MATERIAL

pyrochlore is subject to NRC regulation as a radioactive source material; LBP-08-8, 67 NRC 409 (2008)

STANDARD OF REVIEW

the standard for review of an interlocutory board order is whether the ruling threatens the petitioner with immediate and serious irreparable impact or will affect the basic structure of the proceeding in a pervasive and unusual manner; CLI-08-7, 67 NRC 187 (2008)

STANDARD REVIEW PLANS

with respect to an adequate site characterization, it is reasonable to interpret the regulations as requiring decommissioning plan submissions to contain the type of information discussed in the NUREG-1700 acceptance criteria; LBP-08-4, 67 NRC 105 (2008)

STANDING TO INTERVENE

a determination that an injury is fairly traceable to the challenged action is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-08-6, 67 NRC 241 (2008)

a licensing board shall consider three factors when deciding whether to grant standing to a petitioner; LBP-08-6, 67 NRC 241 (2008)

a local governmental body need not address standing requirements if it wishes to be a party in a proceeding for a facility located within its boundaries; LBP-08-10, 67 NRC 450 (2008)

a showing that anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either an injection or processing site is sufficient to demonstrate an injury in fact for standing; LBP-08-6, 67 NRC 241 (2008)

a small or minor unwanted exposure, even one well within regulatory limits, is sufficient to establish an injury in fact; LBP-08-6, 67 NRC 241 (2008)

although further analysis may show that there is no way for the radioactive materials and byproducts from ISL mining operations to cause harm to persons living nearby, a board cannot decide, when making a standing determination, that there is no reasonable possibility that such harm could occur; LBP-08-6, 67 NRC 241 (2008)

although the pleading requirements of 10 C.F.R. 2.309 are strict by design, a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects; LBP-08-6, 67 NRC 241 (2008)

asserted harm need not be great to establish an injury in fact for standing; LBP-08-6, 67 NRC 241 (2008)

boards are to consider whether a petitioner has alleged a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-08-6, 67 NRC 241 (2008)

boards must avoid the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits; LBP-08-6, 67 NRC 241 (2008)

daily commute near vicinity of a reactor is sufficient to establish standing; LBP-08-9, 67 NRC 421 (2008)

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- demonstrating proximity-based standing in a power uprate proceeding requires a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-08-9, 67 NRC 421 (2008)
- in determining whether an individual or organization should be granted party status based on standing as of right, NRC has applied contemporaneous judicial concepts; LBP-08-6, 67 NRC 241 (2008); LBP-08-9, 67 NRC 421 (2008)
- in in-situ leach mining cases the geographical areas that may be affected by mining operations are largely dependent on the size and other characteristics of underground aquifers; LBP-08-6, 67 NRC 241 (2008)
- in proceedings not involving power reactors, proximity alone is not sufficient to establish standing; LBP-08-6, 67 NRC 241 (2008)
- injury in fact may be either actual or threatened to establish standing, but must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-08-6, 67 NRC 241 (2008)
- “justiciable controversy” is defined; LBP-08-6, 67 NRC 241 (2008)
- NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-08-6, 67 NRC 241 (2008)
- occasional trips to areas located close to reactors have been found to be insufficient grounds to demonstrate a risk to the intervenor’s health and safety; LBP-08-9, 67 NRC 421 (2008)
- petitioner bears the burden of demonstrating standing, but in ruling on standing a licensing board is to construe the petition in favor of the petitioner; LBP-08-6, 67 NRC 241 (2008)
- petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity; LBP-08-9, 67 NRC 421 (2008)
- petitioner’s right to participate in a proceeding concerns whether the petitioner has sufficient stake in a matter, as contrasted with whether there is a real dispute; LBP-08-6, 67 NRC 241 (2008)
- plaintiffs have been found to have a right to apply for preventive relief where copper mining tailings were carried 25 miles to plaintiff’s farm; LBP-08-6, 67 NRC 241 (2008)
- some circumstances exist in which petitioners may be presumed to have standing based on their geographical proximity to a facility or source of radioactivity, without the need to show injury in fact, causation, or redressability; LBP-08-6, 67 NRC 241 (2008)
- “standing to sue doctrine” is defined; LBP-08-6, 67 NRC 241 (2008)
- the definition of “party” under the Nuclear Waste Policy Act implies that local governments enjoy standing as of right; LBP-08-10, 67 NRC 450 (2008)
- the lateness of petitioner’s filing is justifiable because a relevant document was not revealed in a search of NRC’s public database because of deficiencies in tagging; LBP-08-6, 67 NRC 241 (2008)
- the standing requirement for showing injury in fact has always been significantly less than for demonstrating an acceptable contention; LBP-08-6, 67 NRC 241 (2008)
- there is no obvious potential for harm at petitioner’s property 20 miles from an uranium enrichment facility location; LBP-08-6, 67 NRC 241 (2008)
- whether and at what distance a proposed action carries with it an obvious potential for offsite consequences such that a petitioner can be presumed to be affected must be determined on a case-by-case basis; LBP-08-6, 67 NRC 241 (2008)
- STANDING TO INTERVENE, ORGANIZATIONAL**
- for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interests of identified members; LBP-08-6, 67 NRC 241 (2008)
- STANDING TO INTERVENE, REPRESENTATIONAL**
- an organization asserting representational standing on behalf of one or more of its members must demonstrate that the interests of at least one of its members will be so harmed, identify that member by name and address, and show that the organization is authorized to request a hearing on behalf of that member; LBP-08-6, 67 NRC 241 (2008); LBP-08-9, 67 NRC 421 (2008)
- STATEMENT OF CONSIDERATIONS**
- as guidance reached in a rulemaking following notice and comment, and endorsed by the Commission, the SOC is entitled to special weight; CLI-08-3, 67 NRC 151 (2008)
- the Commission often refers to the SOC as an aid in interpreting its regulations; CLI-08-3, 67 NRC 151 (2008)

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the SOC for Part 36 indicates that in developing those regulations, the NRC considered whether there was a need to impose limits on irradiator siting, but determined that no specific siting limitations were warranted; CLI-08-3, 67 NRC 151 (2008)

STAY

a mandate for stay must issue 7 calendar days after the time to request rehearing expires or a timely filed rehearing petition is denied, whichever is later; CLI-08-9, 67 NRC 353 (2008)

a motion to stay issuance of a license might be granted where the factors usually considered in granting emergency injunctive relief are satisfied; CLI-08-13, 67 NRC 396 (2008)

a party opposing a renewed license does not face irreparable harm by the mere issuance of a renewed license; CLI-08-13, 67 NRC 396 (2008)

a stay of the close of hearings in both license renewal proceedings for 14 days following the date of issuance of mandate is ordered to afford a state the opportunity to request participant status; CLI-08-9, 67 NRC 353 (2008)

because the board's declining to refer petitioners' request for a stay of construction to the Commission is the equivalent of the direct denial of a stay motion, a petition for review may be filed; LBP-08-11, 67 NRC 460 (2008)

factors that influence the grant of a stay are addressed; LBP-08-11, 67 NRC 460 (2008)

failure to address the four stay factors in a motion to stay issuance of a license is reason enough to deny the motion; CLI-08-13, 67 NRC 396 (2008)

if proponent cannot show irreparable harm, it must make an overwhelming showing that it is likely to succeed on the merits; CLI-08-13, 67 NRC 396 (2008)

likelihood of success on the merits and irreparable harm are the most important factors in determining stay motions; CLI-08-13, 67 NRC 396 (2008)

NRC rules of procedure do not provide for a motion to stay issuance of a license while proceedings are pending before the board; CLI-08-13, 67 NRC 396 (2008)

proponent must show that likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest weigh in its favor; CLI-08-13, 67 NRC 396 (2008)

STRUCTURAL ANALYSIS

the Commission asks the parties to address whether the structural analysis that applicant has committed to perform on its primary containment drywell shell matches or bounds the sensitivity analyses that one of the ALSBP judges would impose; CLI-08-10, 67 NRC 357 (2008)

SUBPART G PROCEDURES

use of the permissive term, "may," in 10 C.F.R. 2.310(a) indicates that licensing boards have some discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 241 (2008)

SUBPART J PROCEEDINGS

NRC rules do not provide for the filing of reply briefs in the context of appeals from an interlocutory decision or initial or partial decisions; CLI-08-12, 67 NRC 386 (2008)

section 2.1003's reference to "all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by" conveys that possession or control of documentary material is a prerequisite to the duty to produce it; CLI-08-12, 67 NRC 386 (2008)

SUBPART L PROCEDURES

use of the permissive term, "may," in 10 C.F.R. 2.310(a) indicates that boards have discretion in determining whether to hold hearings under Subpart L or Subpart G; LBP-08-6, 67 NRC 241 (2008)

SUBPART L PROCEEDINGS

proposed questions, submitted by the parties, for the board, that were originally filed under seal with the board, will be made public in a separate issuance; LBP-08-4, 67 NRC 105 (2008)

summary disposition may be entered with respect to any matter in a proceeding if the motion, along with any appropriate supporting materials, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)

the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the Administrative Procedure Act; LBP-08-6, 67 NRC 241 (2008)

See also Informal Proceedings

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SUMMARY DISPOSITION

- a motion to strike is an inappropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable board discretionary decision permitting the filing; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- a ruling granting summary disposition on a single contention, where other contentions are still pending in an adjudication, is not a final decision, and is not susceptible to Commission review; CLI-08-2, 67 NRC 31 (2008)
- all material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- boards should not, at the summary disposition stage, try to untangle the expert affidavits' and decide which experts are more correct; CLI-08-2, 67 NRC 31 (2008)
- FOIA litigation is ordinarily resolved in summary disposition without discovery and without evidentiary trials or hearings; CLI-08-5, 67 NRC 174 (2008); LBP-08-7, 67 NRC 361 (2008)
- if the filings in the proceeding together with the statements of the parties and the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law, such a motion shall be granted; LBP-08-7, 67 NRC 361 (2008)
- in deciding a summary disposition motion the tribunal must examine the evidence in the light most favorable to the nonmoving party; LBP-08-7, 67 NRC 361 (2008)
- in informal, Subpart L, proceedings, summary disposition motions are to be resolved in accord with the standards for dispositive motions for formal hearings, as set forth in Part 2, Subpart G; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- opponents of summary disposition must counter any adequately supported material facts provided by the movant with their own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- proponents bear the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008); LBP-08-7, 67 NRC 361 (2008)
- the appropriate vehicle to address whether arguments in a summary disposition answer raise matters outside the scope of a contention is a reply pleading; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- the argument that information provided in support of an intervenor's response to a summary disposition motion should not be considered because the information is outside the scope of the intervenor's admitted contention, if true, can be a meritorious assertion; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- this is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- to the degree the response to a summary disposition motion fails to contravene the material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008)
- where the nonmoving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment, but has the burden to show that he is entitled to judgment under established principles; LBP-08-7, 67 NRC 361 (2008)

SUMMARY JUDGMENT

- plaintiffs have prevailed against a motion for summary judgment where chloride spillage was allegedly carried 100 miles to plaintiff's farm; LBP-08-6, 67 NRC 241 (2008)

SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

- Staff must supplement the EIS if there are substantial changes in the proposed action or significant new circumstances or information that bear on environmental concerns; LBP-08-11, 67 NRC 460 (2008)

SUBJECT INDEX

SUSPENSION OF PROCEEDING

an interested state may petition to suspend proceedings; CLI-08-9, 67 NRC 353 (2008)

TERRORISM

hearings on the essentially limitless range of conceivable but highly unlikely terrorist scenarios could not be meaningfully conducted without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance; CLI-08-1, 67 NRC 1 (2008)

NRC has no legal duty to consider the environmental impacts of terrorism at NRC licensed facilities; LBP-08-6, 67 NRC 241 (2008)

the National Infrastructure Protection Plan is concerned with security issues, not environmental quality standards and requirements, and it is environmental quality standards and requirements that the environmental analysis is obliged to address, not security issues; CLI-08-1, 67 NRC 1 (2008)

TOTAL EFFECTIVE DOSE EQUIVALENT

a decommissioning plan for a restricted release site will be judged exclusively upon whether residual radioactivity levels will be as low as is reasonably achievable and the total effective dose equivalent to offsite human beings will be below 25 mrem; LBP-08-4, 67 NRC 105 (2008)

the TEDE is defined as the sum of the deep-dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures); LBP-08-4, 67 NRC 105 (2008)

TRUST RELATIONSHIP DOCTRINE

a trust duty in the NRC as a federal permitting agency arises out of 1851 and 1868 treaties with Indian tribes; LBP-08-6, 67 NRC 241 (2008)

URANIUM

See Depleted Uranium

URANIUM ENRICHMENT FACILITIES

there is no obvious potential for harm at petitioner's property 20 miles from the facility location; LBP-08-6, 67 NRC 241 (2008)

VAUGHN INDEX

when access to documents is disputed in FOIA litigation, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption; LBP-08-7, 67 NRC 361 (2008)

VIOLATIONS

substantial delay in both the submittal and approval of a decommissioning plan might involve a violation of 10 C.F.R. 40.42; LBP-08-8, 67 NRC 409 (2008)

WAIVER

attorney-client privilege belongs to the client, not to the lawyer, and thus the client may waive the privilege, either by an express waiver or by an implied waiver; CLI-08-6, 67 NRC 179 (2008)

if a company claims that its internal investigation establishes that it has met its obligation, then the company has waived the attorney-client privilege associated with the internal investigation; CLI-08-6, 67 NRC 179 (2008)

implied waiver of the attorney-client privilege exists when a regulated company voluntarily discloses investigative materials to a government agency; CLI-08-6, 67 NRC 179 (2008)

WASTE CONFIDENCE RULE

ISL mining does not involve fuel rod waste and to the extent such waste is indirectly relevant, the Waste Confidence rule would prohibit its consideration in a license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

WATER QUALITY

issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are within the scope of a license amendment proceeding; LBP-08-6, 67 NRC 241 (2008)

the field sampling plan's analysis of waterways is intended to identify groundwater, possible cave, and surface water paths and to assess the contents of those waters to determine if depleted uranium is leaching or will leach off the site in quantities significant enough that humans might receive more than 25 mrems of total radioactive exposure from all of the site's pathways; LBP-08-4, 67 NRC 105 (2008)

SUBJECT INDEX

WITNESSES, EXPERT

summary disposition is not the vehicle for untangling expert disputes so long as the experts are competent and the information they provide is adequately stated and explained; LBP-08-2, 67 NRC 54 (2008)

ZONE OF INTERESTS

injury in fact may be either actual or threatened to establish standing, but must arguably lie within the zone of interests protected by the statutes governing the proceeding; LBP-08-6, 67 NRC 241 (2008)

FACILITY INDEX

DIABLO CANYON POWER PLANT INDEPENDENT SPENT FUEL STORAGE INSTALLATION; Docket No. 72-26-ISFSI
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; January 15, 2008; MEMORANDUM AND ORDER; CLI-08-1, 67 NRC 1 (2008)
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; March 27, 2008; ORDER; CLI-08-5, 67 NRC 174 (2008)
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; April 30, 2008; MEMORANDUM AND ORDER; CLI-08-8, 67 NRC 193 (2008)
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PRE-LICENSE APPLICATION MATTERS; June 17, 2008; MEMORANDUM AND ORDER; CLI-08-12, 67 NRC 386 (2008); CLI-08-14, 67 NRC 402 (2008)
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LICENSE RENEWAL; January 15, 2008; MEMORANDUM AND ORDER; CLI-08-2, 67 NRC 31
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DD-08-1, 67 NRC 347 (2008)