

**NUCLEAR REGULATORY COMMISSION  
ISSUANCES**

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

August 21, 2009 – December 31, 2009

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## PREFACE

This is Book II of the seventieth volume of issuances (565–1050) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from August 21, 2009, to December 31, 2009. Book I covers the period from July 1, 2009, to August 20, 2009.

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 FR 29403 (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).

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Ronald M. Spritzer**, Chairman  
**Michael F. Kennedy**  
**Randall J. Charbeneau**

In the Matter of

**Docket No. 72-71-EA**  
**(ASLBP No. 09-888-03-EA-BD01)**

**DETROIT EDISON COMPANY**  
**(Fermi Power Plant Independent**  
**Spent Fuel Storage Installation)**

**August 21, 2009**

**RULES OF PRACTICE: INTERVENTION PETITION (TIMELINESS)**

For an order issued under 10 C.F.R. § 2.202, the time for filing a hearing request runs from the date of the order, not the date of publication of the order in the *Federal Register*.

**RULES OF PRACTICE: NOTICE OF OPPORTUNITY FOR HEARING**

Publication of notice of the opportunity to request a hearing in the *Federal Register* will generally be sufficient to provide constructive notice to aggrieved persons, even if they lack actual notice.

**RULES OF PRACTICE: NOTICE OF OPPORTUNITY FOR HEARING**

A provision of the Federal Register Act, 44 U.S.C. § 1508, requires that agency notices provide at least 15 days before the opportunity for a hearing is forfeited

unless a shorter period is reasonable. This implies that, if the period between publication of the *Federal Register* notice and the date fixed for termination of the opportunity to be heard is less than the minimum number of days required, then the notice is legally ineffective to provide constructive notice of the right to be heard.

**RULES OF PRACTICE: INTERVENTION PETITION (TIMELINESS)**

A hearing request is timely when the petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice.

**RULES OF PRACTICE: INTERVENTION PETITION (GOOD CAUSE FOR LATE FILING)**

Petitioners have shown good cause for their late filing where, due to the lack of constructive or actual notice before the filing deadline, they could not have filed within the time specified in the notice of opportunity for hearing, and they filed as soon as possible thereafter.

**RULES OF PRACTICE: STANDING TO INTERVENE (LICENSE MODIFICATION PROCEEDING)**

A petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing. In *Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), the court affirmed that the Commission holds the authority to define the scope of a proceeding, as opposed to a petitioner. Thus, where the notice of hearing limits the scope to whether this Order should be sustained, a petitioner's sole remedy is rescission of the order. A petitioner cannot obtain a hearing by simply suggesting that the order should be strengthened in some way. Rather, a petitioner must show that he would be better off in the absence of any order at all.

**RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)**

In nonreactor cases, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any obvious potential for offsite radiological consequences, as well as the nature of the proposed action and the significance of the radioactive source. We decline to adopt a proximity

presumption where petitioners have not shown how the action at issue — a Commission order modifying an ISFSI license — creates any potential for offsite consequences.

**MEMORANDUM AND ORDER**  
**(Ruling on Standing and Contention Admissibility)**

This proceeding involves an order of the Nuclear Regulatory Commission (NRC or Commission) modifying Detroit Edison Company's (DTE) general license to operate an independent spent fuel storage installation (ISFSI) at its Fermi Power Plant (Fermi), located in Monroe County, Michigan. Before the Licensing Board is a petition to intervene and request for hearing filed on behalf of Beyond Nuclear, Keith Gunter, Michael J. Keegan, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, Mark Farris, and Shirley Steinman (Petitioners). Both DTE and the NRC Staff oppose the petition, arguing that it is untimely, raises issues outside the scope of the proceeding, fails to demonstrate standing, and fails to articulate an admissible contention.

For the reasons set forth below, we find that the petition was timely but that Petitioners have failed to establish standing. Accordingly, we deny Petitioners' request for a hearing.

**I. BACKGROUND**

The Commission has issued a general license for the storage of spent fuel at an onsite ISFSI to all persons authorized to possess or operate nuclear power reactors under 10 C.F.R. Part 50 or Part 52.<sup>1</sup> DTE owns and is licensed to operate Fermi Unit 2 under Part 50, and it thus holds such a general license. On December 10, 2007, DTE informed the Commission of its intent to "create and use" an ISFSI at the Fermi site using the Holtec HI-STORM 100 dry cask storage system.<sup>2</sup>

On April 7, 2009, pursuant to 10 C.F.R. § 2.202(a), the Commission issued an order, effective immediately, modifying DTE's general license to operate an ISFSI.<sup>3</sup> The order requires DTE to implement a number of additional security

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<sup>1</sup> See 10 C.F.R. § 72.210.

<sup>2</sup> Letter from Joseph H. Plona, Site Vice President, Nuclear Generation, to NRC Document Control Desk (Dec. 10, 2007) (ADAMS Accession No. ML073521312).

<sup>3</sup> Fermi Power Plant; Order Modifying License, 74 Fed. Reg. 17,890 (Apr. 17, 2009) [hereinafter April 7 order]. The Commission has issued similar orders directed at other licensees over the past several years. See, e.g., LaSalle County Station; Order Modifying License, 74 Fed. Reg. 12,155

*(Continued)*

measures (ASMs), including fingerprinting and background checks of unescorted individuals who wish to enter a protected ISFSI area.<sup>4</sup> These measures, which were developed by the Commission in the wake of the September 11 terrorist attacks, have been deemed necessary to protect the public health and safety in the “current threat environment” and are intended “to strengthen licensees’ capabilities and readiness to respond to a potential attack on a nuclear facility.”<sup>5</sup> The order allows DTE 180 days to implement most of the ASMs. It also allows DTE 20 days to notify the Commission of any objections to the order’s requirements and to submit a schedule for achieving compliance.<sup>6</sup>

In addition, the Commission’s order provides an opportunity for hearing. Specifically, it states that either DTE or “any person adversely affected” by the order may, “within 20 days of the date of the order,” submit an answer to the order and, if desired, request a hearing.<sup>7</sup> Such a person “shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 C.F.R. § 2.309(d).”<sup>8</sup> The order limits the issue to be considered at any hearing to “whether this Order should be sustained.”<sup>9</sup>

On April 22, 2009, DTE filed a timely response to the order, raising no objections to the order’s requirements, and establishing a schedule for achieving compliance with those requirements by October 4, 2009.<sup>10</sup> On May 7, 2009, Petitioners filed a petition to intervene and request for hearing, seeking admission of three contentions.<sup>11</sup> All three contentions, at their core, seem to allege some failure to comply with the National Environmental Policy Act (NEPA).<sup>12</sup> Petitioners demand that the Commission undertake a full environmental impact statement (EIS), which should include “a vulnerability assessment” of DTE’s onsite storage plan, an identification of “alternatives to the current ISFSI general license,” and an analysis of “sociological, civil liberties and societal costs.”<sup>13</sup>

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(Mar. 23, 2009); Catawba Nuclear Station; Order Modifying License, 70 Fed. Reg. 25,116 (May 12, 2005).

<sup>4</sup> 74 Fed. Reg. at 17,892-95.

<sup>5</sup> *Id.* at 17,890.

<sup>6</sup> *Id.* at 17,891.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 17,893.

<sup>10</sup> Letter from Joseph H. Plona, Site Vice President, Nuclear Generation, to NRC Document Control Desk (Apr. 22, 2009) at 2 (ADAMS Accession No. ML091210197).

<sup>11</sup> Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Leave to Intervene in, and/or Request a Hearing Upon, DTE Order Modifying License of ISFSI Security Provisions (May 7, 2009) [hereinafter Petition].

<sup>12</sup> 42 U.S.C. §§ 4321-47 (2006).

<sup>13</sup> Petition at 7.

On May 13, 2009, the NRC referred Petitioners' hearing request to the Atomic Safety and Licensing Board Panel (ASLBP),<sup>14</sup> which established this Licensing Board on May 15, 2009.<sup>15</sup> Both DTE and the NRC Staff filed answers to the petition on June 1, 2009,<sup>16</sup> and on June 9, Petitioners filed a combined reply to those answers.<sup>17</sup>

## II. TIMELINESS OF PETITIONERS' HEARING REQUEST

At the outset, we address DTE's and NRC Staff's argument that we should dismiss Petitioners' hearing request as untimely. We decline to dismiss the petition on that ground.

As both DTE and NRC Staff point out, the Commission's order requires that any interested party file a hearing request within 20 days of the date of the order.<sup>18</sup> Because the order was issued on April 7, 2009, Petitioners' hearing request would appear to have been due on April 27. Petitioners did not file their request until May 7, 2009. But the facts are not so simple. In their reply, Petitioners explain that the first public notice of the April 7 order was a *Federal Register* notice published on April 17, 10 days after the date of the order. This belated public notice left only 10 days of the 20-day window provided by the Commission for the preparation and filing of a petition to intervene. Petitioners contend that they reasonably believed that their hearing request was due 20 days after the Commission's order was published in the *Federal Register* on April 17, 2009.<sup>19</sup> Petitioners further maintain that "there are serious notice defects surrounding the means by which the April 7, 2009 order of the Commission came to the notice of the public; that the April 17, 2009 publication of it in the *Federal Register* was the only public advice of the order's existence; [and] that the law and equities

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<sup>14</sup>Memorandum from Annette L. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, ASLBP Chief Administrative Judge (May 13, 2009).

<sup>15</sup>Corrected Notice of Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 25,282 (May 15, 2009).

<sup>16</sup>Answer of Detroit Edison Company to Petition to Intervene and Request for Hearing Filed on Behalf of Beyond Nuclear and Eight Individual Petitioners (June 1, 2009) [hereinafter DTE Answer]; NRC Staff's Response to Petition for Leave to Intervene and Request for Hearing Filed by Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville, and Marilyn R. Timmer (June 1, 2009) [hereinafter NRC Staff Answer].

<sup>17</sup>Combined Reply of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville, and Marilyn R. Timmer to DTE and NRC Staff Responses in Opposition to Petition for Hearing in ISFSI (June 9, 2009) [hereinafter Combined Reply].

<sup>18</sup>DTE Answer at 10-12; NRC Staff Answer at 2-4.

<sup>19</sup>Combined Reply at 1-6.

of the situation require that the Commission deem the 20-day period to have commenced April 17, and not April 7, 2009.”<sup>20</sup>

The intent of the April 7 order was that those aggrieved by the order should have 20 days to prepare and submit a petition to intervene. The 10-day delay between the signing of the order and its publication in the *Federal Register* effectively thwarted that intent by cutting in half the time available for preparing and filing a petition. The delay in publication was obviously not the fault of the Petitioners, who have no control over the publication process. The delay appears to have resulted from the agency’s belated submission of the order for publication; the *Federal Register* notice indicates that the order was not received for publication until April 16, 9 days after it was signed.<sup>21</sup> We agree with the Petitioners that it would be inequitable to permit the agency’s delay in publishing the order to have the effect of cutting in half the time available to file a petition challenging the order.

Moreover, in this instance the delay in publication of the order raises serious questions about whether the *Federal Register* notice was legally sufficient to provide constructive notice to the public of the date by which a petition must be filed. It is true that, for an order issued under 10 C.F.R. § 2.202, the time for filing a hearing request runs from the date of the order, not the date of publication of the order in the *Federal Register*.<sup>22</sup> The April 7 order so provided.<sup>23</sup> Also, as a general matter, “[p]ublication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice.”<sup>24</sup> Thus, publication of notice of the opportunity to request a hearing in the *Federal Register* will generally be sufficient to provide constructive notice to aggrieved persons, even if they lack actual notice. But, as Petitioners point out,<sup>25</sup> certain minimal requirements must be met before a *Federal Register* notice will be deemed to provide constructive notice. In particular, a provision of the Federal Register Act, 44 U.S.C. § 1508, requires that agency notices provide at least 15 days before the opportunity for a hearing is forfeited unless a shorter period is reasonable:

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress . . . shall be deemed to have been given to all persons

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<sup>20</sup> *Id.* at 1-2.

<sup>21</sup> 74 Fed. Reg. at 17,895 (indicating that the order was filed on April 16, 2009, at 8:45 a.m.).

<sup>22</sup> 10 C.F.R. § 2.202(a)(3).

<sup>23</sup> 74 Fed. Reg. at 17,891.

<sup>24</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 n.60 (2005) (quoting *California v. Federal Energy Regulatory Commission*, 329 F.3d 700, 707 (9th Cir. 2003)).

<sup>25</sup> Combined Reply at 3.

residing within the States of the Union and the District of Columbia . . . when the notice is published in the Federal Register at such a time that the period between the publication and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is —

\* \* \* \*

(2) not less than fifteen days when time for publication is not specifically prescribed by the Act, without prejudice, however, to the effectiveness of a notice of less than fifteen days where the shorter period is reasonable.

Section 1508 governs the validity of the constructive notice allegedly provided by the April 17 *Federal Register* notice. The NRC's notice of the opportunity to be heard concerning an order issued pursuant to 10 C.F.R. § 2.202(a) is certainly "authorized to be given" by an Act of Congress — namely the Atomic Energy Act (AEA).<sup>26</sup> Indeed, the Commission's regulations *require* that such notice be provided, which would make no sense if the notice was not at least authorized by the AEA.<sup>27</sup> Thus, for the April 17 *Federal Register* notice to provide constructive notice of the opportunity to request a hearing concerning the April 7 order, the time period between the date the notice was published in the *Federal Register* and the date fixed in the notice for the termination of the opportunity to be heard must have been at least 15 days, unless it was reasonable to provide a shorter period. Since only 10 days remained to request a hearing when the April 17 notice was published, the agency failed to allow the minimum number of days that section 1508 generally requires. And this was not an instance in which a period shorter than 15 days was reasonable. On the contrary, the April 7 order allowed aggrieved persons 20 days in which to request a hearing. That is the minimum required by the agency's regulations for orders issued under 10 C.F.R. § 2.202(a). Thus, the agency itself has determined that aggrieved persons require 20 days, not 10, to prepare and file a hearing request concerning an order issued under section 2.202(a). It was only because the agency delayed in forwarding the April 7 order to the *Federal Register* that aggrieved persons had only 10 days after the *Federal Register* publication date in which to request a hearing.

Section 1508 implies that, if the period between publication of the *Federal Register* notice and the date fixed for termination of the opportunity to be heard is less than the minimum number of days required, then the notice is legally ineffective to provide constructive notice of the right to be heard. Thus, the NRC may not rely upon publication of the April 17 *Federal Register* notice to provide

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<sup>26</sup> 42 U.S.C. §§ 2011-2297h-13.

<sup>27</sup> NRC regulations require the agency, when issuing an order modifying a license, to "[i]nform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing . . . ." 10 C.F.R. § 2.202(a)(3) (emphasis added).



constructive notice of the right to request a hearing. Of course, even in the absence of constructive notice, the possibility remains that a petitioner had actual notice of the right to request a hearing.<sup>28</sup> But here Petitioners state that they first learned of the April 7 order on April 30, “after reviewing an email exchange between Michael Farr, DTE’s manager of the ISFSI program, and Phil Brochman of the NRC . . . .”<sup>29</sup> Neither the NRC Staff nor DTE has presented evidence to show that Petitioners had actual notice of the April 7 order before the date Petitioners allege. We therefore conclude that Petitioners lacked constructive notice of their right to request a hearing concerning the April 7 order, and that they lacked actual notice of that right until April 30. By that date, the 20-day period for filing a hearing request had expired.

In *Sequoyah Fuels*, the board considered the timeliness of a request to intervene in an adjudicatory hearing convened pursuant to 10 C.F.R. § 2.202. After ruling that the petitioner lacked constructive notice of the opportunity to request a hearing, the board ruled that the petitioner “acted seasonably” when it filed its hearing request within 10 days of its receipt of actual notice.<sup>30</sup> Here the Petitioners acted even more seasonably, filing their hearing request 7 days after they received actual notice. This is substantially less than the 20 days allowed by the April 7 order, and even less than the 10-day period that the NRC Staff and DTE would have us allow. We therefore decline to find the hearing request untimely.

DTE and the NRC Staff argue that the hearing request is necessarily untimely because it was filed after April 27, and that we may only consider the petition if Petitioners satisfy the late-filing factors listed in 10 C.F.R. § 2.309(c)(i)-(viii).<sup>31</sup> For the reasons just explained, we conclude that a hearing request is timely when the petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice. Even if, however, the Petitioners’ hearing request must be deemed untimely, we conclude that the Petitioners have, on balance, satisfied the section 2.309(c) factors.<sup>32</sup> In the recent

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<sup>28</sup> See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), LBP-94-5, 39 NRC 54, 74, *aff’d*, CLI-94-12, 40 NRC 64 (1994).

<sup>29</sup> Combined Reply at 2-3.

<sup>30</sup> LBP-94-5, 39 NRC at 74.

<sup>31</sup> DTE Answer at 11-12; Staff Answer at 3-4.

<sup>32</sup> Section 2.309(c)(1) sets forth eight factors for nontimely intervention petitions, hearing requests, and contentions:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the [petitioner’s] right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the [petitioner’s] property, financial or other interest in the proceeding;

(Continued)

*Crow Butte* ruling, the Commission upheld the licensing board's finding that the petitioner demonstrated "good cause" for its late filing.<sup>33</sup> The Commission affirmed that "'[g]ood cause' is the most significant of the late-filing factors [in] § 2.309(c)."<sup>34</sup> In this case, the Petitioners have shown good cause because, due to the lack of constructive or actual notice before the filing deadline, they "could not have filed within the time specified in the notice of opportunity for hearing," and they "filed as soon as possible thereafter."<sup>35</sup> Other section 2.309(c) factors, including factors (ii), (iv), (vii), and (viii), weigh against Petitioners, primarily for the reasons we explain in our standing analysis, *infra*. But factors (v) and (vi) weigh in favor of Petitioners. On balance, we conclude that Petitioners' strong showing on the "good cause" issue, the most important factor, combined with the other factors that weigh in their favor, is sufficient to allow us to consider the petition even if it was untimely.<sup>36</sup>

Thus, we will not dismiss Petitioners' hearing request on the ground that it was untimely.

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(iv) The possible effect of any order that may be entered in the proceeding on the [petitioner's] interest;

(v) The availability of other means whereby the [petitioner's] interest will be protected;

(vi) The extent to which the [petitioner's] interests will be represented by existing parties;

(vii) The extent to which the [petitioner's] participation will broaden the issues or delay the proceeding; and

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

<sup>33</sup> *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 (2009).

<sup>34</sup> *Id.* at 549 n.61.

<sup>35</sup> *Millstone*, CLI-05-24, 62 NRC at 564-65 (footnote and citation omitted).

<sup>36</sup> The section 2.309(c) factors, DTE maintains, should have been addressed in Petitioners' hearing request. DTE Answer at 12. But we can hardly expect the Petitioners to have addressed the late-filing factors in their hearing request if they were not aware of its alleged untimeliness when they filed it. And we can safely assume that Petitioners were not so aware, because on May 6, 2009, they filed a request for an extension of the time to file a hearing request, under the mistaken belief that "the deadline for our petition for an intervention hearing is currently tomorrow night at midnight." E-mail request from Terry Lodge to Raynard Wharton (May 6, 2009) (ADAMS Accession No. ML091390250). The Commission denied Petitioners' extension request on May 8, one day after the petition was filed. Letter from David W. Pstrak to Terry Lodge (May 8, 2009) (ADAMS Accession No. ML091280321). Thus, in all likelihood, Petitioners were unaware that their petition was due on April 27 when they filed the Petition on May 7. Petitioners' belief that the hearing request was not due until May 7 is understandable, albeit mistaken, given that the Commission's order was published in the *Federal Register* on April 17 and the order allowed aggrieved persons 20 days to file a hearing request.

### III. STANDING

A petitioner's right to participate in a licensing proceeding stems from section 189a of the AEA.<sup>37</sup> That section provides for a hearing "upon the request of any person whose interest may be affected by the proceeding."<sup>38</sup> The Commission has promulgated regulations to help licensing boards determine whether a petitioner has an interest potentially affected by the proceeding.<sup>39</sup> Under those regulations, a petitioner must state (1) the nature of its right under the AEA to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.<sup>40</sup>

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309, licensing boards apply judicial concepts of standing, requiring a petitioner to "(1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision."<sup>41</sup> When an organization petitions to intervene in a proceeding, it must demonstrate either organizational or representational standing. To demonstrate organizational standing, the petitioner must show an "injury-in-fact" to the interests of the organization itself.<sup>42</sup> Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify that member by name and address. Moreover, the organization must show that the members would have standing to intervene in their own right, and that the identified members have authorized the organization to request a hearing on their behalf.<sup>43</sup> In addition, the interests that the representative organization seeks to protect must be germane

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<sup>37</sup> 42 U.S.C. § 2239(a)(1)(A) (2006). Section 189a provides that "[i]n any proceeding under this Act, for the granting, suspending, revoking, or *amending* of any license . . . , the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." *Id.* (emphasis added).

<sup>38</sup> *Id.* § 2239(a)(1)(A).

<sup>39</sup> 10 C.F.R. § 2.309(d).

<sup>40</sup> *Id.* § 2.309(d)(1)(ii)-(iv).

<sup>41</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (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)).

<sup>42</sup> See *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 183 (2007) (citation omitted).

<sup>43</sup> See *id.*; accord *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979) ("An organization seeking representational standing on behalf of its members may meet the 'injury-in-fact' requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding")).

to its own purpose, and neither the asserted claim nor the required relief must require an individual member to participate in the organization's legal action.<sup>44</sup>

The Commission has long recognized that, in certain types of cases, a petitioner may establish standing based entirely upon his geographical proximity to the facility at issue.<sup>45</sup> For example, in proceedings involving nuclear power reactors, the Commission has adopted a proximity presumption, whereby a petitioner who resides within 50 miles of the reactor is presumed to have standing without the need to plead injury, causation, and redressability.<sup>46</sup> In other cases, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any "obvious potential for offsite [radiological] consequences," as well as "the nature of the proposed action and the significance of the radioactive source."<sup>47</sup>

With respect to orders modifying a license, like the one giving rise to the petition before this Licensing Board, the standing analysis contains an added dimension. This dimension was first articulated in *Bellotti v. NRC*.<sup>48</sup> To begin, a petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing. In *Bellotti*, the court affirmed that the Commission holds the authority to define the scope of a proceeding, as opposed to a petitioner.<sup>49</sup> Thus, where the notice of hearing limits the scope to "whether this Order should be sustained," a petitioner's sole remedy is rescission of the order. As the *Bellotti* court explained, "this language limits possible intervenors to those who think the Order should not be sustained, thereby precluding from intervention persons . . . who do not object to the Order but might see further corrective measures."<sup>50</sup> In other words, a petitioner cannot obtain a hearing by simply suggesting that the order should be strengthened in some way. Rather, a petitioner must show that he would be better off in the absence of any order at all.

We conclude that Petitioners have failed to establish standing to participate in this proceeding. Beyond Nuclear has failed to demonstrate both organizational and representational standing. As to organizational standing, Petitioners characterize Beyond Nuclear as a "Maryland-based public education and advocacy group

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<sup>44</sup> *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

<sup>45</sup> See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

<sup>46</sup> See *id.* at 329 (stating that "living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto").

<sup>47</sup> *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (citing *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)).

<sup>48</sup> 725 F.2d 1380, 1381 (1983).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1382 n.2.

that aims to educate and activate the public on issues pertaining to the hazards of nuclear power, its connection to nuclear weapons and the need to abandon both.”<sup>51</sup> While this description identifies some of Beyond Nuclear’s organizational interests, Petitioners make no attempt to demonstrate how the Commission’s order could result in any injury to those interests. Indeed, it seems logical that an order imposing additional security measures on DTE would actually further, not injure, Beyond Nuclear’s organizational mission. In any case, Beyond Nuclear does not identify any “discrete institutional injury to itself, other than general environmental and policy interests of the sorts the [federal courts and NRC] repeatedly have found insufficient for organizational standing.”<sup>52</sup> Thus, we decline to grant Beyond Nuclear standing on an organizational basis.

As to representational standing, Petitioners provide identical declarations of eight Beyond Nuclear members, all of whom claim to live within 50 miles of the Fermi Power Plant.<sup>53</sup> Each of those members is identified by name and address, and each member specifically authorizes Beyond Nuclear to represent him or her in this proceeding.<sup>54</sup> Thus, Petitioners assert, “[b]ecause they live near the proposed site, i.e., within 50 miles, the individually-named Petitioners have presumptive standing by virtue of their proximity to the new nuclear plant that may be constructed on the site.”<sup>55</sup> In addition, each of the individual Petitioners asserts that “if the NRC approves proposed installation and security measures for the Fermi 2 ISFSI in their present form, the construction and deployment of dry cask storage at Fermi 2 could adversely affect my health and safety and the integrity of the environment in which I live.”<sup>56</sup> Thus, Petitioners seek to establish standing on the basis of their proximity to an ISFSI at the Fermi site.

As stated *supra*, the Commission applies the proximity presumption on a case-by-case basis. To our understanding, neither the Commission nor a licensing board has ever considered whether the presumption should apply in a case such as this — where a petitioner challenges an order modifying an ISFSI

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<sup>51</sup> Petition at 2.

<sup>52</sup> *Palisades*, CLI-07-18, 65 NRC at 411-12 (quoting *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)).

<sup>53</sup> Petition, Declaration of Frank Mantei ¶ 1 (May 7, 2009), Declaration of Keith Gunter ¶ 1 (May 7, 2009), Declaration of Michael J. Keegan ¶ 1 (May 7, 2009), Declaration of Leonard Mandeville ¶ 1 (May 7, 2009), Declaration of Marcee Meyers ¶ 1 (May 7, 2009), Declaration of Marilyn R. Timmer ¶ 1 (May 7, 2009), Declaration of Mark Farris ¶ 1 (May 7, 2009), Declaration of Shirley M. Steinman ¶ 1 (May 7, 2009) [hereinafter Petitioners’ Declarations].

<sup>54</sup> Petitioners’ Declarations ¶ 3.

<sup>55</sup> Petition at 5. We assume, for purposes of this decision, that when Petitioners reference their “proximity to the new nuclear plant,” they actually mean “proximity to the Fermi site,” where DTE would construct and operate any ISFSI subject to the Commission’s order.

<sup>56</sup> Petitioners’ Declarations ¶ 2.

license.<sup>57</sup> Thus, we are left to analyze the governing case law and draw our own conclusion. As discussed *supra*, the Commission has clearly established a 50-mile presumption in the context of reactor licensing cases, where the potential for offsite radiological consequences is obvious.<sup>58</sup> In nonreactor cases, however, the potential for offsite consequences is not always clear. Thus, the burden falls on the petitioner to demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”<sup>59</sup> In making this demonstration, the petitioner cannot rely on “conclusory allegations about potential radiological harm,” but must show “*how* these various harms might result from the [proposed action].”<sup>60</sup>

The question facing this Licensing Board, therefore, is whether Petitioners adequately substantiate their allegations of potential injury, such that we should grant them standing on the basis of their proximity to the Fermi site. In our estimation, Petitioners do not. Petitioners provide only the bald statement, reiterated in each of the declarations, that the “proposed installation and security measures . . . could adversely affect my health and safety and the integrity of the environment in which I live.”<sup>61</sup> Petitioners make no attempt to draw a causal link between these alleged effects and the Commission’s order modifying DTE’s license to operate an ISFSI.<sup>62</sup> Moreover, as DTE points out, the Commission has already spoken to the radiological effects of ISFSIs. The Commission has explained that “an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.”<sup>63</sup> Based on this observation, the Commission declined to adopt a proximity presumption in an ISFSI license transfer proceeding, where the petitioner had “not demonstrated that

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<sup>57</sup> Indeed, although several such orders have been issued over the past 8 years, not one has been challenged by a party other than the licensee.

<sup>58</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001).

<sup>59</sup> *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995); *see also Peach Bottom*, CLI-05-26, 62 NRC at 581.

<sup>60</sup> *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999) (emphasis added).

<sup>61</sup> Petitioners’ Declarations ¶ 2.

<sup>62</sup> Petitioners do make reference to various studies, including a 2003 article describing the dangers of a terrorist attack on a fuel-storage pool, Petition at 12-13; Combined Reply at 6-7, and a 1998 German study concluding that “dry casks were vulnerable to attacks, such as by TOW anti-tank missiles,” Petition at 8-9. But these studies have no bearing on the proceeding at hand. The instant proceeding involves dry cask storage in an ISFSI, not a fuel-storage pool, and it deals only with certain additional security measures imposed by the NRC. Petitioners do not provide any support, relevant to the Fermi site, substantiating the notion that offsite radiological consequences may flow from the Commission’s order.

<sup>63</sup> *Big Rock Point ISFSI*, CLI-07-19, 65 NRC at 426.

the mere transfer of the ISFSI somehow increases his risk of radiological harm.”<sup>64</sup> Similarly, in the instant case, we decline to adopt a proximity presumption where Petitioners have not shown how the Commission’s order creates any potential for offsite consequences.<sup>65</sup> Thus, we decline to grant Beyond Nuclear standing on a representational basis.<sup>66</sup>

Moreover, even if Petitioners had established an actual or threatened injury related to the proposed ISFSI, Petitioners have failed to show that any such injury could be redressed by a favorable ruling from the Board. In general, petitioners will rarely be able demonstrate standing in a case such as this, where the Commission issues an order intended to improve safety conditions.<sup>67</sup> The Commission has issued an order intended to enhance security at the Fermi site and has limited the scope of any hearing to the question of “whether this Order should be sustained.”<sup>68</sup> Thus, the only relief available to Petitioners is rescission of the order and, to demonstrate standing, Petitioners must show that rescission of the order will redress their injury. Petitioners do allege various injuries related to a potential terrorist attack affecting onsite fuel storage at the Fermi site. But the Commission’s order is intended to *reduce* the possibility of a terrorist attack at the Fermi site; thus, rescinding the order will not likely redress Petitioners’ injuries. In fact, it will more likely aggravate those injuries, or at least maintain the status

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<sup>64</sup> *Id.*

<sup>65</sup> In their reply, Petitioners assert for the first time that, in fact, all but one of the Petitioners reside within 17 miles of the Fermi site. Combined Reply at 6. Based on this statement, Petitioners imply that we should adopt a 17-mile proximity presumption, following the licensing board’s decision in the *Diablo Canyon* proceeding, a case cited by DTE in its answer. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002); see also DTE Answer at 17. Indeed, the *Diablo Canyon* board adopted a 17-mile presumption in a case involving an application to construct and operate an ISFSI. LBP-02-23, 56 NRC at 429. But, as stated previously, the proximity presumption is applied on a case-by-case basis, taking into account the nature of the proposed action. We see no reason to follow another licensing board’s determination in a different type of proceeding, at a different location, based on a different set of facts. Indeed, in *Diablo Canyon*, the board relied on an agreement amongst the parties that 17 miles was an appropriate radius upon which to presume standing. *Id.* at 428. To our knowledge, no such agreement has been reached in the instant case.

<sup>66</sup> Because we find that Beyond Nuclear has failed to demonstrate that any of its members would have standing to intervene in their own right, an element of representational standing, it follows that none of those members has demonstrated standing to intervene as an individual in this proceeding.

<sup>67</sup> *Bellotti*, 725 F.2d at 1383 (stating that “[The] Commission’s power to define the scope of a proceeding will lead to the denial of intervention . . . when the Commission amends a license to require additional or better safety measures”); see also *Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 406 n.28. In *Alaska Dep’t of Transp.*, the Commission explained that “it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders . . . because such orders presumably enhance rather than diminish public safety.” Although we do not deal with a confirmatory enforcement order in the present case, the same reasoning applies.

<sup>68</sup> 74 Fed. Reg. at 17,892.

quo. Because Petitioners fail to explain why they will be better off in the absence of the Commission's order, Petitioners have failed to demonstrate that a hearing will redress their injury.

Thus, Petitioners lack standing to challenge the April 7 order. We therefore need not reach the arguments of DTE and the NRC Staff that Petitioners have not submitted an admissible contention.

#### **IV. CONCLUSION**

Because Petitioners' hearing request fails to demonstrate standing as required by 10 C.F.R. § 2.309(d), the Board must deny the hearing request and terminate this proceeding.

#### **V. ORDER**

For the foregoing reasons, we hereby ORDER that the hearing request of Beyond Nuclear, Keith Gunter, Michael J. Keegan, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, Mark Farris, and Shirley Steinman, regarding the April 7, 2000 order modifying Detroit Edison Company's license to operate an independent spent fuel storage installation is DENIED. 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.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>69</sup>

Ronald M. Spritzer, Chairman  
ADMINISTRATIVE JUDGE

Michael F. Kennedy  
ADMINISTRATIVE JUDGE

Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 21, 2009

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<sup>69</sup> Copies of this notice and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Detroit Edison Company; (2) Petitioners Beyond Nuclear *et al.*; and (3) NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Michael M. Gibson**, Chairman  
**Dr. Gary S. Arnold**  
**Dr. Randall J. Charbeneau**

**In the Matter of**

**Docket Nos. 52-012-COL  
52-013-COL  
(ASLBP No. 09-885-08-COL-BD01)**

**SOUTH TEXAS PROJECT NUCLEAR  
OPERATING COMPANY  
(South Texas Project, Units 3  
and 4)**

**August 27, 2009**

This 10 C.F.R. Part 52 proceeding concerns the application of South Texas Project Nuclear Operating Co. (STP or the Applicant) to the Nuclear Regulatory Commission (NRC) for two combined operating licenses (COL) that would authorize STP to construct and to operate two new units employing the Advanced Boiling Water Reactor (ABWR) certified design on its South Texas site, located in Matagorda County, Texas. Ruling on a petition filed jointly by the three organizations — the Sustainable Energy and Economic Development Coalition (SEED), the South Texas Association for Responsible Energy, and Public Citizen (Petitioners) — seeking to intervene and to contest the STP Application, the Licensing Board concludes that, having established the requisite standing and proffering one admissible contention, Petitioners are admitted as parties to the proceeding. Additionally, the Licensing Board refrained from ruling on nine contentions and indicated it would issue a decision on the admissibility of those nine at a later date.

**RULES OF PRACTICE: STANDING TO INTERVENE  
(AUTHORIZATION)**

A petitioner's participation in a licensing proceeding hinges on a demonstration of the requisite standing. The agency has established requirements for standing derived from section 189a of the Atomic Energy Act of 1954 (AEA), which instructs the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding."

**RULES OF PRACTICE: STANDING TO INTERVENE  
(AUTHORIZATION)**

The Commission's implementing regulation, 10 C.F.R. § 2.309(a) and (d), directs a licensing board, in ruling on a request for a hearing, to consider (1) the nature of the petitioner's right under the AEA or the National Environmental Policy Act (NEPA) to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

**RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY)**

In cases involving the possible construction or operation of a nuclear power reactor, physical proximity to the proposed facility has been considered sufficient to establish the requisite standing elements. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (proximity presumption generally applies where a petitioner has physical proximity to a nuclear power plant within 50 miles).

**RULES OF PRACTICE: STANDING TO INTERVENE (TYPES OF  
STANDING)**

For an organization to establish standing, it must show either organizational or representational standing.

**RULES OF PRACTICE: STANDING TO INTERVENE  
(ORGANIZATIONAL STANDING)**

Organizational standing requires the party to "demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA." *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998), *rev'd on other*

grounds, CLI-98-16, 48 NRC 119 (1998); see also *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991).

**RULES OF PRACTICE: STANDING TO INTERVENE  
(REPRESENTATIONAL STANDING)**

Representational standing requires the organization (1) to demonstrate that the interest of at least one of its members will be harmed, (2) to identify that member by name and address, and (3) to show that the organization is authorized to request a hearing on behalf of that member. See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). The organization must show that the member has individual standing in order to assert representational standing on his or her behalf, and “the interests that the representative organization seeks to protect must be germane to its own purpose.” *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

**RULES OF PRACTICE: STANDING TO INTERVENE  
(CONSTRUCTION)**

The Commission has indicated that in evaluating a petitioner’s standing, we are to construe the petition in favor of the petitioner. See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

**RULES OF PRACTICE: CONTENTIONS (PROCESS)**

Once establishing standing to intervene in the licensing process, petitioners will then be free to assert any contention, which, if proved, will afford them the relief they seek.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)**

Admissible contentions are governed by 10 C.F.R. § 2.309(f)(1). Another Board recently summarized well the six criteria of 10 C.F.R. § 2.309(f)(1) that govern the admissibility of contentions as follows: (i) Specificity: Provide a specific statement of the issue of law or fact to be raised or controverted; (ii) Brief Explanation: Provide a brief explanation of the basis for the contention; (iii) Within Scope: Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) Materiality: 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) Concise Statement of Alleged Facts or Expert Opinion: 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) Genuine Dispute: 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 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. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 71-72 (2009).

#### **RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)**

Failure to comply with any of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissing a contention. See *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 143, 155-56 (1991).

#### **LICENSE: APPROPRIATENESS (PART 72 LICENSE)**

The assertion that the Applicant might need to obtain a Part 72 license is irrelevant at this time, as a grant of the COL could be accompanied by grant of a Part 72 general license if the Applicant complies with certain conditions. See 10 C.F.R. § 72.210; see also 10 C.F.R. § 72.212(a)(2). The Commission has determined that "the environmental impacts related to storage of spent fuel under part 72 have been generically evaluated under two previous rulemakings and the Commission's waste confidence proceedings. Thus, these potential environmental impacts need not be reassessed." Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites, 55 Fed. Reg. 29,181, 29,188 (1990).

#### **NEPA: AGENCY RESPONSIBILITIES**

In the context of NEPA, the NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the

permits and licenses issued by other governmental agencies. 10 C.F.R. § 51.71(d) & n.3 and Part 51, Appendix A, § 5; *see also Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834-36 (D.C. Cir. 1972).

**RULES OF PRACTICE: CONTENTIONS (CONTENTION OF OMISSION)**

Whenever a contention of omission encompasses issues that are addressed completely in materials the Applicant subsequently files, the contention is rendered moot. *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 (CHALLENGE TO COMMISSION RULE)**

Under 10 C.F.R. § 2.335(a), a licensing board may not admit any contention that challenges a Commission rule or regulation, unless a waiver is requested under 10 C.F.R. § 2.335(b).

**RULES OF PRACTICE: RULEMAKING-WASTE CONFIDENCE RULE (EFFECT ON ADJUDICATION)**

The Commission is currently assessing the applicability of the Waste Confidence Rule to “all reactors” — both current and anticipated. *See* Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008). As the Commission has stated “[i]t has long been agency policy that Licensing Boards ‘should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

**RULES OF PRACTICE: CONTENTIONS (WEIGHT OF INFORMATION)**

Mere statements of government officials are insufficient to overturn 10 C.F.R. § 51.23.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)**

As the Commission has emphasized, the contention requirements were never intended to be turned into a “fortress to deny intervention.” *Oconee*, CLI-99-11, 49 NRC at 335 (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power

Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)). The NRC's pleading rules require merely that a petitioner provide a simple nexus between the contention and the referenced factual or legal support. *See* 10 C.F.R. § 2.309(f)(1)(v). They require nothing more.

**RULES OF PRACTICE: HIGH-LEVEL WASTE (SCOPE)**

In addition to the Commission's determination that there will be a national geologic repository available for the storage of high-level waste, 10 C.F.R. § 51.51, Table S-3 is definitive with respect to radioactivity releases from such a geologic repository.

**RULES OF PRACTICE: EXPERT STATEMENTS**

Expert statements must contain sufficient support to demonstrate a genuine dispute on a material issue of fact or law in order to support admission of a contention. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi).

**RULES OF PRACTICE: GENERIC ISSUES**

The Commission has generically dealt with land use commitment and the environmental effects of the uranium fuel cycle by creating numerical values in Table S-3, and absent a waiver, petitioners cannot challenge the Commission's determination.

**RULES OF PRACTICE: LICENSING BOARD GUIDANCE**

Although NUREG-1555 is only a guidance document, this Board considers this guidance to provide sufficient indication to support contention admissibility where the subject discussions may be required in the ER.

**NEPA: ENVIRONMENTAL REPORT (ALTERNATIVES)**

To demonstrate that this contention is within the scope of this proceeding requires some minimal showing that the alternative is reasonable and feasible in the electrical area that the nuclear units are to serve. As explained in *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 607 (2007): Federal courts now review the range of alternatives in an EIS under the "rule of reason." *Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853, 868 (9th Cir. 2004); *City of Bridgeton v. Federal Aviation Administration*, 212 F.3d 448, 458 (8th Cir. 2000). Under this rule, "the EIS need

not consider an infinite range of alternatives, only reasonable or feasible ones.” *Westlands Water Dist.*, 376 F.3d at 868.

#### **DECOMMISSIONING: COMMISSION REGULATION**

The subject decommissioning rules are designed “(1) to minimize the administrative effort of licensees and the Commission and (2) to provid[e] reasonable assurance that funds will be available to carry out decommissioning in a manner which protects public health and safety.” *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 143 (2001) (citing Final Rule: “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,030 (June 27, 1988) (internal quotations omitted)). In furtherance of this objective, the Commission revised its decommissioning rules in 2007 to address the unique status of COLs — as the prior rules were too stringent upon applicants for both a construction and operating license, where they had yet to even break ground on the subject reactor. *See* Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,406 (Aug. 28, 2007). The Commission specifically revised section 50.75(b)(4) as it applies to COLs under Part 52 because the requirements in place (decommissioning report and certification of financial assurance at the application phase) were too stringent. *See* 72 Fed. Reg. at 49,406. Under the revised rule, the COL applicant must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading. *See* 10 C.F.R. § 52.103(a); *see also* 10 C.F.R. § 50.75(b)(1); 72 Fed. Reg. at 49,406.

#### **DECOMMISSIONING: COMMISSION REGULATION (FUNDING METHODS)**

As NRC guidance, *see* NUREG-1577, “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance,” at 6 (Rev. 1) (Feb. 1999), and rules, 10 C.F.R. § 50.75(e)(1)(ii), suggest, an applicant or licensee is not obligated to choose prepayment, sinking fund, or some other funding assurance method to cover for the total estimated decommissioning cost.

#### **CONTENTION ADMISSIBILITY: NEED FOR POWER (FORECASTING FUTURE DEMAND)**

As another Licensing Board explained: This Board does not decide energy policy, nor do we adjudicate the business wisdom of a proposed investment.



Instead, at this stage, we are simply looking for some indication that Petitioners have identified and articulated some concrete allegation as to how or why the ER fails to satisfy some legal requirement (*e.g.*, Part 51), and some understanding as to what will actually be litigated at the evidentiary hearing. *Levy*, LBP-09-10, 70 NRC at 135.

## **MEMORANDUM AND ORDER**

### **(Ruling on Standing and Admissibility of Certain Contentions)**

Applicant South Texas Project Nuclear Operating Co. (STP or the Applicant) has applied to the Nuclear Regulatory Commission (NRC) for two combined operating licenses (COL) under 10 C.F.R. Part 52 that would authorize STP to construct and to operate two new units employing the Advanced Boiling Water Reactor (ABWR) certified design on its South Texas site, located in Matagorda County, Texas. On April 21, 2009, three organizations — the Sustainable Energy and Economic Development Coalition (SEED), the South Texas Association for Responsible Energy, and Public Citizen (Petitioners) — jointly filed a petition to intervene challenging various aspects of STP’s combined license application (COLA), including its Environmental Report (ER).

For the reasons set forth below, we conclude that (1) Petitioners have established their standing to intervene as of right, and (2) among the nineteen contentions decided in this order, Petitioners have provided one admissible contention, specifically Contention 21. Accordingly, Petitioners are admitted as parties to this contested proceeding for the purpose of litigating that contention. Additionally, in this order, we do not address the admissibility of Contentions 8 through 16, and we intend to issue a subsequent order in September 2009 addressing the admissibility of these contentions.

### **I. BACKGROUND**

On September 20, 2007, STP applied under Part 52 for a COL for two new reactors, STP Units 3 and 4, that it proposes to construct in accordance with the ABWR design.<sup>1</sup> If authorized,<sup>2</sup> construction is slated to take place at the STP site

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<sup>1</sup> See Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 60,394 (Oct. 27, 2009). A publicly available version of the STP COL application for STP Units 3 and 4 can be found on the NRC’s website at <http://www.nrc.gov/reactors/new-reactors/col/south-texas-project.html> (last visited August 26, 2009).

<sup>2</sup> Under the Part 52 licensing process that governs the STP application for STP Units 3 and 4, an  
*(Continued)*

near Bay City, Texas, which is the location of STP Units 1 and 2. STP filed the Application on behalf of the joint applicants for STP Units 3 and 4, including NRG South Texas 3 LLC, NRG South Texas 4 LLC, and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy).

On February 20, 2009, the Commission published a notice of hearing and opportunity to petition for leave to intervene in the COL proceeding for STP Units 3 and 4.<sup>3</sup> The notice informed those persons whose interest would be affected by the proposed COL of the opportunity to file, within 60 days, a request for a hearing and petition for leave to intervene in accordance with 10 C.F.R. § 2.309.<sup>4</sup>

On April 21, 2009, Petitioners timely filed a petition to intervene and request for hearing.<sup>5</sup> Thereafter, on May 1, 2009, this Atomic Safety and Licensing Board was established to adjudicate the STP COL proceeding.<sup>6</sup> On May 18, 2009, STP and the NRC Staff both responded to Petitioners' request for hearing.<sup>7</sup> On May 26, 2009, Petitioners filed replies to the opposition of both STP and the NRC Staff.<sup>8</sup> On June 4, 2009, STP moved to strike<sup>9</sup> portions of Petitioners' reply, and on June 10, Petitioners filed a response<sup>10</sup> to STP's motion to strike. On June 23-24, the Board conducted a 2-day prehearing conference in Bay City, Texas, during which it heard oral argument from the participants regarding the admissibility of Petitioners' twenty-eight contentions.

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entity may apply for a COL that, if granted, would authorize both the construction and operation of a new reactor.

<sup>3</sup> See [STP], Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009).

<sup>4</sup> Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and operating license for a nuclear power plant and the conduct of the hearing that is afforded for a COL.

<sup>5</sup> See Petition for Intervention and Request for Hearing (Apr. 21, 2009) [hereinafter Petition].

<sup>6</sup> See Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 22,184 (May 12, 2009).

<sup>7</sup> See [STP's] Answer Opposing Petition for Intervention and Request for Hearing (May 18, 2009) [hereinafter STP Answer]; NRC Staff's Answer to Petition for Intervention and Request for Hearing (May 18, 2009) [hereinafter Staff Answer].

<sup>8</sup> See Petitioners' Reply to Applicant's Answer to Petition for Intervention and Request for Hearing (May 26, 2009); Petitioners' Reply to NRC Staff's Answer to Petition for Intervention and Request for Hearing (May 26, 2009).

<sup>9</sup> See [STP's] Motion to Strike Portions of Petitioners' Reply (June 4, 2009).

<sup>10</sup> See Petitioners' Response to Applicant's Motion to Strike Portions of Petitioners' Reply (June 10, 2009).

## II. ANALYSIS

### A. Standing of Petitioners to Participate in This Proceeding

#### 1. Legal Requirements for Standing in NRC Proceedings

A petitioner's participation in a licensing proceeding hinges on a demonstration of the requisite standing. The agency has established requirements for standing derived from section 189a of the Atomic Energy Act of 1954 (AEA),<sup>11</sup> which instructs the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding."<sup>12</sup> The Commission's implementing regulation, 10 C.F.R. § 2.309(a) and (d), directs a licensing board, in ruling on a request for a hearing, to consider (1) the nature of the petitioner's right under the AEA or the National Environmental Policy Act (NEPA)<sup>13</sup> to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.<sup>14</sup> In this regard, in cases involving the possible construction or operation of a nuclear power reactor, physical proximity to the proposed facility has been considered sufficient to establish the requisite standing elements.<sup>15</sup>

For an organization to establish standing, it must show either organizational or representational standing.<sup>16</sup> Here, Petitioners seek representational standing. It requires the organization (1) to demonstrate that the interest of at least one of its members will be harmed, (2) to identify that member by name and address, and (3) to show that the organization is authorized to request a hearing on behalf of that member.<sup>17</sup> The organization must show that the member has individual standing in order to assert representational standing on his or her behalf, and "the

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<sup>11</sup> 42 U.S.C. §§ 2011-2297h-13.

<sup>12</sup> *Id.* § 2239(a)(1)(A).

<sup>13</sup> *Id.* §§ 4321-47.

<sup>14</sup> 10 C.F.R. § 2.309(d)(1)(ii)-(iv).

<sup>15</sup> See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (proximity presumption generally applies where a petitioner has physical proximity to a nuclear power plant within 50 miles).

<sup>16</sup> Organizational standing requires the party to "demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA." *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998), *rev'd on other grounds*, CLI-98-16, 48 NRC 119 (1998); see also *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991).

<sup>17</sup> See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

interests that the representative organization seeks to protect must be germane to its own purpose.”<sup>18</sup>

The Commission has indicated that in evaluating a petitioner’s standing, we are to construe the petition in favor of the petitioner.<sup>19</sup> We apply these rules and guidelines in evaluating whether Petitioners have standing.

## **2. Licensing Board’s Ruling on Standing of Petitioners**

For the reasons set forth below, we conclude that the three organizational petitioners — SEED, Public Citizen, and the South Texas Association for Responsible Energy — have established representational standing to participate in this proceeding through one or more of its members. The three individuals who have authorized the three organizational petitioners to represent them in this proceeding have established standing in their own right.<sup>20</sup> Neither the NRC Staff nor the Applicant object to Petitioners’ representational standing.<sup>21</sup>

SEED, Public Citizen, and the South Texas Association for Responsible Energy have each demonstrated that one of its members would have standing to intervene in his or her own right and has authorized the organization to act on his or her behalf in this proceeding. Each of the organizational petitioners has demonstrated that one of its members lives within 50 miles of the proposed new reactors, with the closest member being 8 miles from the proposed facility.<sup>22</sup> These identified members have provided affidavits declaring their concerns that effects from the proposed reactors will adversely affect both their environment as well as their own safety and health.<sup>23</sup>

### **B. Contention Admissibility**

#### **1. Standards for Admissibility of Contentions**

Once establishing standing to intervene in the licensing process, petitioners “will then be free to assert any contention, which, if proved, will afford

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<sup>18</sup> *Consumers Energy Co. (Palisades Nuclear Plant)*, CLI-07-18, 65 NRC 399, 409 (2007).

<sup>19</sup> See *Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia)*, CLI-95-12, 42 NRC 111, 115 (1995).

<sup>20</sup> The Petition includes three affidavits from authorized officials in support of standing for three organizations, SEED, Public Citizen, and the South Texas Association for Responsible Energy. See Petition at 4-5.

<sup>21</sup> See Staff Answer at 9-12; STP Answer at 2.

<sup>22</sup> See Petition at 4-5, Declaration of Susan Dancer (Apr. 17, 2009), Declaration of Bill Wagner (Apr. 17, 2009), Declaration of Daniel A. Hickl (Apr. 18, 2009).

<sup>23</sup> See *id.*

them the relief they seek.”<sup>24</sup> Admissible contentions are governed by 10 C.F.R. § 2.309(f)(1). Another Board recently summarized well the six criteria of 10 C.F.R. § 2.309(f)(1) that govern the admissibility of contentions:

- (i) *Specificity*: “Provide a specific statement of the issue of law or fact to be raised or controverted;”
- (ii) *Brief Explanation*: “Provide a brief explanation of the basis for the contention;”
- (iii) *Within Scope*: “Demonstrate that the issue raised in the contention is within the scope of the proceeding;”
- (iv) *Materiality*: “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) *Concise Statement of Alleged Facts or Expert Opinion*: “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) *Genuine Dispute*: “[p]rovide 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 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.”<sup>25</sup>

Failure to comply with any of these requirements is grounds for dismissing a contention.<sup>26</sup>

## **2. Board Analysis and Rulings on Petitioners’ Contentions**

### **a. Contention 1**

Petitioners state in Contention 1:

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<sup>24</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

<sup>25</sup> *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 71-72 (2009).

<sup>26</sup> See *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 143, 155-56 (1991).

The number and significance of authorizations and permits required for the combined license that have yet to be obtained by the Applicant preclude issuance of the COL. Further, the outstanding items preclude Petitioners from raising all material issues in this adjudication and they should be given appropriate leave to supplement their contentions as information related to the outstanding items is obtained.<sup>27</sup>

Petitioners contend that, because the Applicant has not yet obtained all permits or authorizations from federal, state, and local agencies, this Board should hold this proceeding in abeyance until such permits and authorizations have been secured.<sup>28</sup> The Applicant does not dispute that there are a number of outstanding permits and authorizations, and in fact has catalogued the permits and authorizations that remain to be obtained in Table 1.2-1 of the ER, as required by 10 C.F.R. § 51.45(d). Issue is joined then, not on whether the Applicant has obtained these permits and authorizations, but rather on two separate questions: (1) whether the Applicant's failure to obtain these permits and authorizations is fatal to the NRC issuing the COL for STP Units 3 and 4,<sup>29</sup> and (2) whether the NRC will require the Applicant to obtain a permit to store high-level waste onsite under 10 C.F.R. Part 72, and if so, whether a waste storage permit must precede the issuance of a COL for STP Units 3 and 4.<sup>30</sup>

The Applicant maintains that this contention should be rejected because "there is no legal requirement to obtain any of the permits listed by Petitioners prior to COL issuance" and therefore this contention is inadmissible.<sup>31</sup> Applicant claims 10 C.F.R. § 51.45(d) requires an applicant to provide a list of all applicable permits and authorizations, but does not mandate that they be obtained prior to COL issuance.<sup>32</sup> Applicant also disputes Petitioners' insistence that it will be required to obtain a Part 72 license.<sup>33</sup> The Applicant further claims that Petitioners have failed to provide any legal or factual support for this contention, and hence that it fails to satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iv).<sup>34</sup>

Similarly, the NRC Staff argues Contention 1 is inadmissible for failing to comply with the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi) insofar as Petitioners fail to provide any legal or factual support for their assertion that such permits must precede issuance of the COL.<sup>35</sup> The NRC Staff also claims there

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<sup>27</sup> Petition at 10.

<sup>28</sup> *See id.* at 11; Tr. at 10-12.

<sup>29</sup> Petition at 11-12.

<sup>30</sup> *Id.* at 12; Tr. at 16-19.

<sup>31</sup> STP Answer at 15.

<sup>32</sup> *Id.* at 15-16.

<sup>33</sup> *Id.* at 16.

<sup>34</sup> *Id.* at 16-17.

<sup>35</sup> Staff Answer at 13-14.

to be longstanding Commission precedent that whether “other permits may be required from other agencies is outside the scope of NRC proceedings, and those concerns are properly raised before those respective permitting authorities.”<sup>36</sup> As a consequence, the NRC Staff concludes this contention is inadmissible.

We conclude Contention 1 is inadmissible because Petitioners have failed to allege facts or expert opinions to demonstrate that a genuine dispute exists with the COLA. Petitioners have failed to provide legal support for their claim that all federal, state, and local government agencies must issue all permits and authorizations related to STP Units 3 and 4 before the NRC may issue this COL. Likewise, the assertion that the Applicant might need to obtain a Part 72 license is irrelevant at this time, as a grant of the COL could be accompanied by grant of a Part 72 general license if the Applicant complies with certain conditions.<sup>37</sup> As discussed in Contention 6,<sup>38</sup> the Commission has determined that “the environmental impacts related to storage of spent fuel under part 72 have been generically evaluated under two previous rulemakings and the Commission’s waste confidence proceedings. Thus, these potential environmental impacts need not be reassessed.”<sup>39</sup> Therefore, Petitioners’ assertions do not support admission of this contention.

*b. Contention 2*

Petitioners state in Contention 2:

The Applicant’s COLA is incomplete because it fails to include the requirements of 10 C.F.R. § 52.80(b) under which the Applicant must submit a description and plans for implementation of the guidance strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities assuming the large loss of areas of the plant due to large-scale explosions/fires as required by 10 C.F.R. § 50.54(hh)(2).<sup>40</sup>

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<sup>36</sup> *Id.* at 14 (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 107 (2007); *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121 (1998)). Although not critical to the disposition of this contention, these cases do not enable the NRC Staff to disregard the contents of such permits. In the context of NEPA, the NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the permits and licenses issued by other governmental agencies. 10 C.F.R. § 51.71(d) and n.3 and Part 51, Appendix A, § 5; *see also Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834-36 (D.C. Cir. 1972).

<sup>37</sup> *See* 10 C.F.R. § 72.210; *see also* 10 C.F.R. § 72.212(a)(2).

<sup>38</sup> *See infra* text accompanying notes 116-128.

<sup>39</sup> Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites, 55 Fed. Reg. 29,181, 29,188 (1990).

<sup>40</sup> Petition at 13.

This is a contention of omission alleging that the COLA does not contain the information required by 10 C.F.R. § 52.80(d), which became effective May 26, 2009.<sup>41</sup> Petitioners also allege that the Design Control Document (DCD) for the ABWR contains inadequate safety evaluations.<sup>42</sup> During oral argument, Petitioners clarified that they were not challenging the DCD, but merely pointing out that the DCD was not an adequate response to the new regulation. Petitioners stated, “in our judgment the underlying DCD simply was not adequate to the task of addressing the particular provision of the new regulatory requirement.”<sup>43</sup>

The Applicant argues for the rejection of this contention on the basis that, as of the date of its response, the rule was not yet in effect.<sup>44</sup> Further, the Applicant claims that, by the time the rule became effective, it would have submitted the subject information, rendering the contention moot.<sup>45</sup>

The NRC Staff initially agreed that this contention was admissible in part as a contention of omission with respect to the missing information required by 10 C.F.R. § 52.80.<sup>46</sup> However, the NRC Staff asserts that other issues addressed by the contention are inadmissible because the “Petitioners do not demonstrate that the issues raised are within the scope of this proceeding and impermissibly attack a Commission rule.”<sup>47</sup>

On May 26, 2009, the Applicant submitted its Mitigative Strategies Report, and claims that, as a consequence, Petitioners’ Contention 2 is rendered moot.<sup>48</sup> During oral argument, the NRC Staff changed its position on admissibility because “the applicant has submitted information to comply with the rule, so the staff’s position at this point today is that the contention as a whole is inadmissible.”<sup>49</sup> Prior to oral argument, Petitioners had not been afforded an opportunity to view Applicant’s new information due to its proprietary nature. However, Petitioners, the Applicant, and the NRC Staff worked together to establish appropriate access,<sup>50</sup>

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<sup>41</sup> Final Rule: “Power Reactor Security Requirements,” 74 Fed. Reg. 13,926 (Mar. 27, 2009).

<sup>42</sup> Petition at 14. This is a reference to the generic DCD for the ABWR which is defined in 10 C.F.R. Part 52, App. A, § II.A as “the document containing the Tier 1 and Tier 2 information and generic technical specifications that is incorporated by reference into this appendix.”

<sup>43</sup> Tr. at 36.

<sup>44</sup> STP Answer at 18.

<sup>45</sup> *Id.* at 19.

<sup>46</sup> Staff Answer at 16.

<sup>47</sup> *Id.* at 17.

<sup>48</sup> See STP Units 3 & 4 Letter, Submittal of Mitigative Strategies Report — 10 C.F.R. § 52.80(d) (May 26, 2009) (ADAMS Accession No. ML091470724). The Mitigative Strategies Report is not, however, publicly available because the Applicant maintains it contains sensitive unclassified nonsafeguards information (SUNSI).

<sup>49</sup> Tr. at 31.

<sup>50</sup> Tr. at 33-34.



and on July 1, 2009, the Board issued a protective order permitting Petitioners access to the subject material.<sup>51</sup>

After reviewing this new information, Petitioners filed a Notice, and supporting Brief, stating that they do not view this contention to be moot.<sup>52</sup> Specifically, Petitioners assert “[t]he submittal is deficient because it omits a reference to the magnitude of the fires and explosions”<sup>53</sup> and because it contains “incomplete regulatory commitments that bear on the efficacy of the mitigative strategies.”<sup>54</sup>

In reply to Petitioners’ brief,<sup>55</sup> the Applicant asserts that because the new material “[a]ddresses the [r]equirements of Sections 52.80(d) and 50.54(hh)(2),”<sup>56</sup> and because Petitioners “fail to identify any legally required information that has been omitted from the Mitigative Strategies Report,”<sup>57</sup> the contention is moot.

We agree with Applicant that Contention 2 is now moot based on the Applicant’s filing of May 26, 2009. Whenever a contention of omission encompasses issues that are addressed completely in materials the Applicant subsequently files, the contention is rendered moot.<sup>58</sup> Here, Petitioners alleged the Applicant’s COLA was incomplete because it failed to include what is required by 10 C.F.R. § 52.80(b). While this was true at the time the contention was filed, by virtue of the Applicant’s timely filing of its description and plans as required under 10 C.F.R. § 52.80(b), its COLA no longer suffers from an omission on this subject. Therefore, Contention 2 is inadmissible as moot.<sup>59</sup>

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<sup>51</sup> See Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished).

<sup>52</sup> See Letter from Robert Eye to J. Gibson (July 14, 2009); Petitioners’ Brief Regarding Contention Two’s Mootness (July 21, 2009) [hereinafter Petitioners’ Brief].

<sup>53</sup> Petitioners’ Brief at 2.

<sup>54</sup> *Id.* at 7.

<sup>55</sup> See STP Nuclear Operating Company’s Response to Petitioners’ Brief Regarding Mootness of Contention 2 (July 27, 2009) [hereinafter Applicant Response to Brief].

<sup>56</sup> *Id.* at 4. Section 50.54(hh)(2) requires licensees to develop, implement, and maintain procedures to address potential aircraft threats and large area fires and explosions. Section 52.80(b) requires applicants to describe how they will implement 10 C.F.R. § 50.54(hh)(2) and to develop a plan to do so.

<sup>57</sup> Applicant Response to Brief at 5.

<sup>58</sup> *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).

<sup>59</sup> Our rejection of Contention 2 as moot in no way affects our analysis of the new filings received by the Board on August 14, 2009. We agree with the NRC Staff that the Commission has not established any prerequisite, such as assessment of the information submitted, that must be met before a finding of mootness can be made. Rather, submittal of the information is the basis for the finding of mootness, while the adequacy of the information submitted may be the subject of a new or amended contention. NRC Staff’s Reply to Petitioners’ Brief Regarding Contention Two’s Mootness (July 30, 2009) at 3 n.5 (citing *McGuire/Catawba*, CLI-02-28, 56 NRC at 383 (internal citations omitted)).

c. *Contention 3*

Petitioners state in Contention 3:

The STP Environmental Report erroneously assumes that there will be high-level waste/spent nuclear fuel disposal capacity available at a federal site, presumably Yucca Mountain, Nevada. But even if Yucca Mountain is available as a federal repository for spent nuclear fuel and high-level nuclear waste, its capacity would be reached by waste from the current generation of operating reactors. Therefore, the spent nuclear fuel and high-level waste generated by STP Units 3 and 4 would have to be dispositioned to a subsequent repository that has been neither sited nor authorized.<sup>60</sup>

Petitioners challenge Applicant's assertion in ER § 5.7.6 that a federal high-level waste repository will house the high-level waste that STP Units 3 and 4 will generate.<sup>61</sup> Petitioners claim the Applicant's assertion — that its high-level waste is destined for a federal high-level waste repository — is based on the "Waste Confidence Rule," in 10 C.F.R. § 51.23. Petitioners argue that Applicant cannot rely on the Waste Confidence Rule for three reasons: (1) the Waste Confidence Rule does not apply to new reactors;<sup>62</sup> (2) even if the Waste Confidence Rule does apply to new reactors, were a high-level waste repository to be constructed at Yucca Mountain, it would be filled to capacity by the time the Applicant needed to dispose of any high-level waste generated by proposed STP Units 3 and 4;<sup>63</sup> and (3) the Waste Confidence Rule is premised solely on planned capacity of Yucca Mountain, and it is unreasonable to assume there will be a second federal repository that could accept high-level waste generated by STP Units 3 and 4.<sup>64</sup> To demonstrate the "material issues related to spent nuclear fuel and other high-level wastes," Petitioners provide reports authored by two of Petitioners' experts, Dr. Arjun Makhijani and Dr. Gordon Thompson.<sup>65</sup> Petitioners conclude by stating that

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<sup>60</sup> Petition at 23.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 23-24; Tr. at 53-54, 69-70.

<sup>63</sup> *See* Petition at 24-25, where Petitioners point to reports from the Department of Energy (DOE) and the Nuclear Waste Technical Review Board that include calculations regarding the amount of waste that will need to be stored at Yucca Mountain; Tr. at 52.

<sup>64</sup> *See* Petition at 25.

<sup>65</sup> *Id.* at 25-26; Report by Dr. A. Makhijani, Comments of the Institute for Energy and Environmental Research on the U.S. Nuclear Regulatory Commission's Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage (Feb. 6, 2009); Report by Dr. G. Thompson, Environmental Impacts of Storing Spent Nuclear Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC's Waste Confidence Decision and Environmental Impact Determination (Feb. 6, 2009); Report by Dr. G. Thompson, The U.S. Effort to Dispose of High-Level Radioactive Waste (2008).

the Applicant should revise its ER to eliminate any assumption that a high-level waste repository will be available to receive waste from STP Units 3 and 4.<sup>66</sup>

Applicant responds that the breadth and scope of the NRC's Waste Confidence Rule is so expansive that Petitioners' contention is barred as an impermissible challenge to it.<sup>67</sup> In support of its argument, the Applicant notes that other licensing boards have invoked 10 C.F.R. § 2.335(a) in rejecting nearly identical contentions that those boards deemed to be impermissible challenges to NRC's Waste Confidence Rule, as well as to ongoing rulemaking regarding the Waste Confidence Rule.<sup>68</sup> The Applicant further asserts that this contention must be rejected because Petitioners failed to obtain a waiver<sup>69</sup> from the application of this rule.<sup>70</sup> Finally, Applicant claims that Petitioners' expert, Dr. Makhijani, provides insufficient factual support for this contention.<sup>71</sup>

The NRC Staff likewise asserts this contention is an impermissible challenge to the Waste Confidence Rule and must be found inadmissible in accordance with numerous licensing board decisions.<sup>72</sup> The NRC Staff further argues that the contention is an impermissible challenge to an ongoing rulemaking, in light of the fact the Commission has "published proposed revisions to the WCD [Waste Confidence Decision] and the Waste Confidence Rule."<sup>73</sup>

To begin, to the extent Contention 3 amounts to an attack on the Waste Confidence Rule in 10 C.F.R. § 51.23(a), which addresses the long-term storage of spent fuel and high-level waste generated by nuclear reactors,<sup>74</sup> we are compelled

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<sup>66</sup> Petition at 26; Tr. at 24-25.

<sup>67</sup> STP Answer at 20-21.

<sup>68</sup> Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

<sup>69</sup> A party seeking such a waiver must demonstrate special circumstances. *See* 10 C.F.R. § 2.335(b).

<sup>70</sup> STP Answer at 22 & n.97.

<sup>71</sup> *Id.* at 23. If Applicant is correct in its claim that Petitioners' claims are fatally flawed because Petitioners have made impermissible attacks on the Waste Confidence Rule, we need not reach whether Dr. Makhijani's report contains insufficient factual support for this contention. We also note that the Applicant also rejects Petitioners' reliance on Dr. Makhijani's report as an impermissible attack on ongoing rulemaking — which is, in essence, merely another way of stating that this contention is an impermissible attack on the amendment to the Waste Confidence Rule. Applicant does not address the statement of Dr. Thompson.

<sup>72</sup> *Id.* at 20-21.

<sup>73</sup> Staff Answer at 21-22; Tr. at 54-57.

<sup>74</sup> The current version of the Waste Confidence Rule states, in subsection (a):

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the

(Continued)

to conclude it is inadmissible. Under 10 C.F.R. § 2.335(a), a licensing board may not admit any contention that challenges a Commission rule or regulation, unless a waiver is requested under 10 C.F.R. § 2.335(b). In the present case, Petitioners have not requested a waiver, nor do they allege that any “special circumstances” warrant such a waiver.

Petitioners’ central arguments are essentially (1) that the Waste Confidence Rule does not apply to reactors that were not in operation at the time the Waste Confidence Rule was amended in 1999; (2) that, even assuming that the Waste Confidence Rule does apply to new reactors, there would be insufficient capacity to accommodate waste from STP Units 3 and 4; and (3) that the ER is therefore in error in its “assumption” that a repository will be available.

Regarding the question whether the phrase “any reactor” as used in 10 C.F.R. § 51.23(a) refers to any new reactor, we note that the Commission in its 1990 review of the Waste Confidence Rule stated the following:

The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors’ [operating licenses]. The same would be true of spent fuel discharged from any new generation of reactor designs.<sup>75</sup>

Viewed in isolation, this statement could be read to suggest that the phrase “any reactors” would encompass future reactors only in the event that a second repository would be available within 30 years thereafter. Further confusion in this regard was added in 2007, when the NRC specifically amended subsections 51.23(b) and (c) to clarify that this part of the Waste Confidence Rule encompasses COL applications.<sup>76</sup> However, because subsection 51.23(a) was not amended, the implication is that “any reactors” may not include reactors that had not been constructed at that time. Fortunately, the Commission has an opportunity to eliminate this confusion because the Rule is again under review at this time. In its proposed rule, issued on October 9, 2008, the Commission stated:

[T]he Commission is now preparing to conduct a significant number of proceedings on combined construction permits and operating licenses (COL) applications for

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twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a).

<sup>75</sup> Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,504 (Sept. 8, 1990). These findings were reaffirmed in the Commission’s review of the Waste Confidence Decision. Waste Confidence Decision Review: Status, 64 Fed. Reg. 68,005, 68,007 (Dec. 6, 1999).

<sup>76</sup> Final Rule: “Licenses, Certifications, and Approvals for Nuclear Power Plants,” 72 Fed. Reg. 49,352, 49,429 (Aug. 28, 2007).

new reactors. The Commission anticipates that the issue of waste confidence may be raised in those proceedings and desires to take a fresh look at its Waste Confidence findings to take into account developments since 1990.<sup>77</sup>

Based on this statement, it is clear that the Commission is currently assessing the applicability of the Waste Confidence Rule to “all reactors” — both current and anticipated. And as the Commission has stated “[i]t has long been agency policy that Licensing Boards ‘should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’”<sup>78</sup>

Petitioners have brought to our attention statements from United States government officials suggesting that the Yucca Mountain high-level waste repository will not be built.<sup>79</sup> Many of these statements post-date the very board decisions that the Applicant and the NRC Staff claim support their position.<sup>80</sup> In spite of these statements from government officials outside the NRC, however, the fact remains that they do not enable this Board to disregard the plain language of 10 C.F.R. § 51.23. Accordingly, we conclude that Petitioners’ Contention 3 is not admissible.

*d. Contention 4*

Petitioners state in Contention 4:

The STP Environmental Report assumes that there will be no significant releases to the environment from management of spent nuclear fuel and high-level wastes. This is a false assumption that is contradicted, among other sources, by the Department of Energy’ [*sic*] Final Environmental Impact Statement on Yucca Mountain that significant radioactivity releases from Yucca Mountain would occur over time. Even DOE’s License Application estimates non-zero releases.<sup>81</sup>

In this contention, Petitioners challenge Applicant’s conclusion in section 5.7.6 of the ER that there will be “no significant releases of radioactivity to the environment related to management of radioactive waste.”<sup>82</sup> In contravention

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<sup>77</sup> 73 Fed. Reg. at 59,553.

<sup>78</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

<sup>79</sup> Petition at 24-25; Tr. at 51.

<sup>80</sup> The majority of licensing board decisions were made prior to March 5, 2009, when United States Secretary of Energy Steven Chu made statements that Petitioners view in conflict with the Waste Confidence Rule. *See* Petition at 25.

<sup>81</sup> Petition at 26.

<sup>82</sup> *Id.* at 26.

of the Applicant's statement that STP Units 3 and 4 will release insignificant radioactivity, Petitioners claim that both the Department of Energy (DOE) (in its high-level waste license application documents)<sup>83</sup> and the Environmental Protection Agency (EPA) (in its regulations)<sup>84</sup> recognize "that significant releases from a Yucca Mountain repository would occur over time."<sup>85</sup> Petitioners claim that both the DOE license application and the DOE final EIS for the proposed DOE Yucca Mountain high-level waste repository, estimate "non-zero releases" and doses "in excess of the EPA limit of 100 mrem beyond 10,000 years."<sup>86</sup> Petitioners claim these statements invalidate the Applicant's conclusion of "no significant releases" for radioactive waste management and that, as a consequence, the ER must include an appropriate analysis of the health and safety impacts of waste management related to STP Units 3 and 4.<sup>87</sup>

Applicant claims this contention amounts to an impermissible attack on NRC rules, insofar as ER § 5.7.6 is a direct application of Table S-3 in 10 C.F.R. § 51.51,<sup>88</sup> which provides environmental impact data for the uranium fuel cycle. Specifically, the Applicant contends that NRC rules<sup>89</sup> require it to "take Table S-3 . . . as the basis for evaluating the contribution of the environmental effects of . . . management of . . . high-level wastes related to uranium fuel cycle activities,"<sup>90</sup> and any challenge to this regulation is impermissible as a violation of 10 C.F.R. § 2.335(a).<sup>91</sup> Additionally, the Applicant claims that Petitioners' efforts to support its contention with statements from DOE miss the point; i.e., there is nothing inconsistent between the allowable radioactivity releases under Table S-3 and any DOE statement that radioactive waste management at Yucca Mountain will produce "no significant release" of radioactivity.<sup>92</sup>

The NRC Staff similarly contends this contention is an impermissible challenge to the "NRC's generic determination, codified in Table S-3, 10 C.F.R. § 51.51(b),

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<sup>83</sup> See Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

<sup>84</sup> See EPA: Final Rule: "Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV," 73 Fed. Reg. 61,256, 61,271-73 (Oct. 15, 2008).

<sup>85</sup> Petition at 26-27 (citing U.S. Department of Energy, Office of Civilian Radioactive Waste Management, NWTRB Repository Panel Meeting: Postclosure Defense and Design Selection Process (Jan. 25, 1999)).

<sup>86</sup> *Id.* at 27.

<sup>87</sup> *Id.*; Tr. at 80-82.

<sup>88</sup> STP Answer at 24; Tr. at 81.

<sup>89</sup> 10 C.F.R. § 51.51.

<sup>90</sup> STP Answer at 24 (quoting 10 C.F.R. § 51.51(a) (internal quotations omitted)).

<sup>91</sup> See Tr. at 83-84.

<sup>92</sup> STP Answer at 24-25.

that there will be no releases from a geologic repository,<sup>93</sup> absent a waiver, which Petitioners did not seek here.<sup>94</sup>

In light of the fact this contention mainly repeats and builds upon assertions made in Contention 3, 10 C.F.R. § 2.335 requires that we not admit it because it is an impermissible challenge to the Waste Confidence Rule. As was the case with Contention 3,<sup>95</sup> mere statements of government officials are insufficient to overturn 10 C.F.R. § 51.23. In addition to the Commission's determination that there will be a national geologic repository available for the storage of high-level waste, 10 C.F.R. § 51.51, Table S-3 is definitive with respect to radioactivity releases from such a geologic repository, and Applicant asserts it has applied that Table to STP Units 3 and 4.<sup>96</sup> Petitioners have not challenged the Applicant's use of Table S-3, but seek to challenge the table itself. Accordingly, Contention 4, which directly challenges these rules,<sup>97</sup> will not be admitted in accordance with 10 C.F.R. § 2.335.

*e. Contention 5*

Petitioners state in Contention 5:

Because no spent nuclear fuel and high-level radioactive waste repository site is now available and future availability of such site is problematic, the COLA adjudication should consider the environmental consequences and public health impacts from long-term storage of high-level waste and spent fuel on site at STP Units 3 and 4.<sup>98</sup>

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<sup>93</sup> Staff Answer at 23.

<sup>94</sup> *Id.* at 23-24. The NRC Staff also asserts a strained interpretation of NRC's pleading rules, claiming that Petitioners' references in support of this contention fail to explain how they support the contention, asserting, "mere mention of a document without providing its contents or an explanation of its significance cannot support admissibility of the contention." *Id.* at 24-25 (citing *USEC Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 597 (2005)). As the Commission has emphasized, the contention requirements were never intended to be turned into a "fortress to deny intervention." *Oconee*, CLI-99-11, 49 NRC at 335 (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)). Based on the numerous substantive deficiencies in this contention that are discussed in the succeeding text, we need not reach this argument but remind the NRC Staff that the NRC's pleading rules require merely that a petitioner provide a simple nexus between the contention and the referenced factual or legal support. *See* 10 C.F.R. § 2.309(f)(1)(v). They require nothing more.

<sup>95</sup> Petitioners also failed to obtain a waiver with Contention 4.

<sup>96</sup> *See* 10 C.F.R. § 51.51(b). By way of explanation of this zero yield, the Applicant asserts that prior to disposal of any spent fuel waste, the rule assumes that all gaseous and volatile constituents (that would give rise to any radioactive releases) in the waste would have been removed. *See* Tr. at 85.

<sup>97</sup> Petitioners might have secured admission of this contention if they had challenged whether the Applicant properly applied this table to STP Units 3 and 4, but Petitioners did not do so.

<sup>98</sup> Petition at 28.

Similar to Contention 4, Petitioners claim that because ER § 5.7.6 uses the phrase “uncertainty associated with the high-level waste and spent fuel disposal component of the fuel cycle,” and the Applicant should conduct an analysis of the “long-term environmental and public health consequences of high-level waste and spent fuel remaining on-site indefinitely.”<sup>99</sup> Petitioners contend this analysis should include the possibility the NRC will require the Applicant to obtain a 10 C.F.R. Part 72 license for onsite storage of high-level waste related to operation of STP Units 3 and 4.<sup>100</sup> At least part of Petitioners’ claim that the NRC will require the Applicant to obtain an onsite storage license is based on a notation in ER Figure 1.1-1,<sup>101</sup> that a “dry cask storage facility is anticipated.”<sup>102</sup> Finally, Petitioners claim the ER is deficient for failing to include an analysis of the health and safety impacts of a radiological incident relating to onsite high-level waste storage.<sup>103</sup>

Petitioners claim the ER fails to address either the potential for terrorist attacks or the possibility of accidents arising from the Applicant’s possible use of long-term dry cask storage.<sup>104</sup> In support of this claim, Petitioners refer to Dr. Thompson’s declaration in support of their assertion that “[t]he COLA should assume that the dry cask storage units will remain on [STP’s] site indefinitely and make radiation exposure projections accordingly.”<sup>105</sup>

Applicant asserts this contention, like Petitioners’ Contention 3, should be dismissed because it constitutes an impermissible attack on the Waste Confidence Rule.<sup>106</sup> In support of this claim, the Applicant asserts that 10 C.F.R. § 51.23(b) provides that an applicant need not consider the environmental impacts of “spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the . . . reactor combined license.”<sup>107</sup> Applicant contends that, absent a waiver under section 2.335(b), this contention should be rejected.

The NRC Staff likewise claims this contention is an impermissible attack on the Waste Confidence Rule.<sup>108</sup> The NRC Staff further asserts that Petitioners fail to provide factual or legal support for their claims with respect to the dangers

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<sup>99</sup> *Id.* at 28; Tr. at 58.

<sup>100</sup> *See* Petition at 28.

<sup>101</sup> *See id.* (citing ER § 1.1-5).

<sup>102</sup> Petition at 28.

<sup>103</sup> *Id.* at 28-29.

<sup>104</sup> *Id.* at 29.

<sup>105</sup> *Id.* The original sentence had erroneously indicated the Applicant was Comanche Peak instead of STP. Comanche Peak is a proposed COL in North Texas.

<sup>106</sup> STP Answer at 26-27.

<sup>107</sup> *Id.* at 27 (quoting 10 C.F.R. § 51.23(b) (internal quotations omitted)).

<sup>108</sup> Staff Answer at 26-27; Tr. at 58-59.



of long-term dry cask storage.<sup>109</sup> Finally, the NRC Staff claims this part of this contention is premature in that the Applicant need not apply for a Part 72 license at this point in time, if at all.<sup>110</sup>

Part of this contention concerns the possible need for the Applicant to obtain a Part 72 license in the future and to evaluate the possibility of long-term dry cask storage solutions that it might someday choose to pursue. This claim is clearly incorrect as issuance of a COL could be accompanied by a Part 72 general license, subject to certain conditions,<sup>111</sup> permitting Applicants to operate an ISFSI onsite without addressing any possible environmental impacts of any such onsite ISFSI.<sup>112</sup>

Finally, Petitioners claim that the Applicant must undertake an extensive analysis of the long-term health and environmental effects of onsite high-level waste storage. This is a direct challenge to the Commission's final rulemaking regarding ISFSIs,<sup>113</sup> where the Commission stated:

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in subpart A of 10 C.F.R. part 51, that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment, and therefore an Environmental Impact Statement (EIS) is not required.<sup>114</sup>

Further, "the environmental impacts related to storage of spent fuel under part 72 have been generically evaluated under two previous rulemakings and the Commission's waste confidence proceedings. Thus, these potential environmental impacts need not be reassessed."<sup>115</sup> We conclude this contention, in common with Contentions 3 and 4, is inadmissible insofar as it is an impermissible attack on

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<sup>109</sup> Staff Answer at 28.

<sup>110</sup> *Id.* at 28-29.

<sup>111</sup> Section 72.210 in its entirety states, "[a] general license is hereby issued for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 C.F.R. part 50 or 10 C.F.R. part 52." *See also* 10 C.F.R. § 72.212(a)(2).

<sup>112</sup> During oral argument regarding onsite storage of waste and the possibility that the Applicant might need a Part 72 permit, it became clear that (1) obtaining a COL is tantamount to obtaining authorization to store spent fuel onsite in an ISFSI if Applicant follows certain conditions; and (2) the Commission has determined that neither the Applicant nor the NRC Staff needs to address further environmental impacts of ISFSIs if NRC-approved casks are used because the Commission has already done so generically. *See* Tr. at 73-74; 55 Fed. Reg. at 29,181.

<sup>113</sup> 55 Fed. Reg. 29,181.

<sup>114</sup> *Id.* at 29,190.

<sup>115</sup> *Id.* at 29,188.

agency regulations and, as such, presents issues that are outside the scope of this proceeding.

*f. Contention 6*

Petitioners state in Contention 6:

The COLA adjudication should consider the public health impacts and environmental consequences of requiring governmental units to become the custodian of high-level waste and spent nuclear fuel at the STP site after the operating license has terminated and post-closure activities have been completed.<sup>116</sup>

Building on Petitioners' assertions in previous contentions<sup>117</sup> that a federal repository will be unavailable for high-level waste storage, Petitioners assert that the Applicant must of necessity store waste from STP Units 3 and 4 onsite. As a consequence, Petitioners argue the COLA must analyze the impacts of a government entity managing onsite high-level waste<sup>118</sup> from STP Units 3 and 4 because the only entity capable of managing such waste on a long-term scale is a unit of government.<sup>119</sup> Specifically, Petitioners claim the ER is deficient for failing to consider "what governmental entity will actually have legal ownership of the spent fuel and high-level waste after the operating license has terminated and post-closure activities have ceased"<sup>120</sup> and that the ER should "quantify the costs related to the long-term custody in ownership of spent nuclear fuel and high-level radioactive waste that remains on site at the termination of an operational license and post-closure activities."<sup>121</sup>

As it argued in seeking to dismiss Contentions 3 and 5, Applicant claims that Contention 6 challenges the Waste Confidence Rule and is therefore inadmissible.<sup>122</sup> Applicant asserts that Petitioners' contention is an impermissible attack on the Waste Confidence Rule because it questions "(1) whether a federal repository will be available for high-level waste and spent fuel generated at STP Units 3 and 4; and (2) the environmental impacts of onsite spent fuel storage."<sup>123</sup>

The NRC Staff objects to the admission of this contention on the grounds that Petitioners have failed to provide any support or "regulatory requirement for

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<sup>116</sup> Petition at 30.

<sup>117</sup> See *supra* Sections II.B.2.c, .d, and .e.

<sup>118</sup> See Petition at 30.

<sup>119</sup> See *id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 31.

<sup>122</sup> STP Answer at 28-29.

<sup>123</sup> *Id.* at 29.

analysis of environmental or health impacts of onsite spent fuel storage in the time frame after ‘post-closure activities of the license have been completed.’”<sup>124</sup> The NRC Staff further objects to Petitioners’ assertion that a governmental entity would be required to take possession and ownership of onsite spent fuel, claiming that this matter is outside the permissible scope of this proceeding because it is an impermissible challenge to the Waste Confidence Rule, 10 C.F.R. § 51.23, in violation of section 2.335.<sup>125</sup>

To the extent this builds upon Petitioners’ assertion that a high-level waste repository is unavailable, it is clearly inadmissible, as discussed in our ruling on Contentions 3, 4, and 5. Absent a waiver under section 2.335, which Petitioners failed to obtain, this contention must be rejected, for it raises matters outside the scope of this proceeding. Further, with respect to Petitioners’ claims that the Applicant has failed to undertake additional analysis of post-closure conditions, Petitioners have failed to point to any legal authority or regulatory requirement mandating such a study.

Petitioners likewise fail to provide any legal authority or regulatory requirement supporting their proposition that the ER should “quantify the costs related to the long-term custody in ownership of spent nuclear fuel and high-level radioactive waste that remains onsite at the termination of an operational license and post-closure activities.”<sup>126</sup> Petitioners’ assertion that the ER fails to include an analysis of the impacts of a governmental entity managing long-term storage of high-level waste onsite and cost quantifications of such management fails to create a genuine dispute that would warrant admission of this contention.<sup>127</sup> In all other respects, this contention is outside the scope of this proceeding and is an impermissible challenge to agency regulations under 10 C.F.R. § 51.23.<sup>128</sup>

*g. Contention 7*

Petitioners state in Contention 7:

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<sup>124</sup> Staff Answer at 31. The NRC Staff asserts that, under 10 C.F.R. § 2.110(i), when a nuclear power plant ceases operations, the owner must apply for a license to terminate, which cannot be granted until the NRC is satisfied that the plant has been properly dismantled and decommissioned so that residual radiation meets established rules, and that no spent fuel or high-level wastes would be onsite. *See* Tr. at 61.

<sup>125</sup> Staff Answer at 32-33.

<sup>126</sup> *Id.* at 31.

<sup>127</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>128</sup> *Id.* § 2.309(f)(1)(iii).

The COLA should consider environmental impacts and public health consequences of accidents and releases related to off-site radioactive waste disposal.<sup>129</sup>

In its entirety, this contention explains:

The STP Environmental Report assumes that there will be no significant radioactive releases to the environment related to off-site disposal of the radioactive waste streams that originate at [STP] Units 3 and 4. STP Environmental Report, Sec. 5.7-8. The COLA should not adopt this assumption. The COLA should fully consider the public health and environment consequences of major releases to the environment of radioactive materials as a result of off-site disposal activities. The off-site releases could originate from on-site processing, transportation accidents, off-site processing, and long-term releases from the disposal site because of either improper or inadequate waste site characterization, natural events such as earthquakes, and intentional or unintentional releases. Irrespective of the cause of the releases such should be considered for the impacts to the environment and public health consequences.<sup>130</sup>

Essentially, Petitioners are maintaining in this contention that the ER must evaluate the effects of releases of waste due to onsite processing, transportation accidents, offsite processing and long-term waste management at the disposal site.<sup>131</sup>

Applicant maintains this contention should be denied because it constitutes an attack on 10 C.F.R. § 51.51, because Petitioners supply no support for the contention, and because it fails to raise a genuine dispute on a material issue of fact or law.<sup>132</sup> Applicant points out that, as was the case with regard to Petitioners' arguments in Contention 4, the NRC regulations and Table S-3<sup>133</sup> preclude this Board from considering Petitioners' grievances with long-term waste disposal and the effects of the uranium fuel cycle. Moreover, the Applicant claims that the COLA considers the effects of waste precisely as prescribed by 10 C.F.R. § 51.51. Consequently, Applicant maintains, Petitioners' only remedy to challenge this rule at this point in time would be to obtain a waiver from 10 C.F.R. § 51.51 and Table S-3, which Petitioners have not done.<sup>134</sup> Applicant further argues that this contention fails to say how the ER is deficient and fails to supply any information to demonstrate its deficiency.<sup>135</sup> Applicant claims

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<sup>129</sup> Petition at 31.

<sup>130</sup> *Id.*

<sup>131</sup> *See* Tr. at 88-90.

<sup>132</sup> STP Answer at 30; Tr. at 87-88, 92.

<sup>133</sup> STP Answer at 30-31.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

that the environmental consequences of transportation accidents are described in ER §§ 3.8, 5.11, and 7.4.<sup>136</sup> Applicant also asserts that Petitioners do not challenge Applicant's conclusions in the ER that the impacts of waste disposal and transportation are SMALL, and thus do not raise a genuine dispute with the COLA.<sup>137</sup>

The NRC Staff opposes admission of this contention for reasons nearly identical to those that Applicant asserts. The NRC Staff argues, as it did with Contention 4, that "the Commission has generically determined numerical values representing the environmental effects of the uranium fuel cycle" and so, in light of the fact Petitioners have failed to obtain a waiver from these regulations, this contention should be denied as an impermissible attack on Tables S-3 and S-4.<sup>138</sup> In addition, the NRC Staff maintains "[t]he Contention does not contain a specific statement of law or fact to be raised or controverted" insofar as Petitioners fail to point to any specific health consequences.<sup>139</sup>

The Board concludes this contention will not be admitted because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and (vi). As both the Applicant and the NRC Staff assert, this contention is almost entirely<sup>140</sup> a challenge to the NRC's classification of the impacts of an offsite disposal, which is governed by 10 C.F.R. § 51.51, Table S-3. We agree with Applicant that Petitioners "do not dispute that the environmental impacts of radioactive waste disposal or transportation are SMALL"<sup>141</sup> — and is thus outside the scope of this proceeding. Consistent with current NRC regulations,<sup>142</sup> which indicate that the values for environmental impacts of waste disposal and transportation are SMALL,<sup>143</sup> Petitioners' assertion that the COLA should not adopt this assumption

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<sup>136</sup> *Id.* at 31 n.26; Tr. at 95. Petitioners provided no specific factual or legal refutation of this information either in their pleadings or during oral argument.

<sup>137</sup> STP Answer at 31-32.

<sup>138</sup> Staff Answer at 34.

<sup>139</sup> *Id.* at 35-36.

<sup>140</sup> Insofar as Petitioners seek to challenge transportation accidents that are beyond the scope of the rules, the NRC Staff asserts that Petitioners are impermissibly attacking Table S-4. *See* Tr. at 91-92. The NRC Staff is in error because, as the Applicant concedes in footnote 126 of its Answer, the core thermal power of STP Units 3 and 4 exceeds the criteria necessary for invoking Table S-4. Nevertheless, the Applicant asserts it has addressed all of such issues in sections 3.8, 5.11, and 7.4 of the ER, and because Petitioners did not challenge the content of these provisions, they have failed to raise a litigable dispute. *See* Tr. at 92-93.

<sup>141</sup> STP Answer at 35.

<sup>142</sup> 10 C.F.R. § 51.51, Table S-3 and 10 C.F.R. § 51.52, Table S-4.

<sup>143</sup> In their pleadings, Petitioners asserted "[t]he STP Environmental Report assumes that there will be no significant radioactive releases to the environment related to off-site disposal of the radioactive waste streams that originate at [STP] Units 3 and 4. STP Environmental Report, Sec. 5.7-8."

(Continued)

that the impacts are small is an attack on NRC rules, not the Application. Accordingly, we conclude this contention is not admissible as not within the permissible scope of this proceeding.<sup>144</sup>

*h. Contention 17*

Petitioners state in Contention 17:

The Applicant's calculations of radiation doses to the general public as a result of consuming radioactively contaminated fish and invertebrates are incorrect. The calculations are done using the LADTAP II model which is obsolete and systematically underestimates doses to the public.<sup>145</sup>

In support of this contention, Petitioners refer to the expert opinion of Dr. Makhijani in his LADTAP II Model Declaration (Makhijani Declaration).<sup>146</sup> Petitioners assert that the data in ER Table 5.4-8 are unreliable as they are based on the LADTAP II program,<sup>147</sup> which Petitioners claim to be outdated. The Makhijani Declaration claims that the "applicant's calculations of radiation doses to the general public as a result of consuming radioactively contaminated fish and invertebrates are incorrect."<sup>148</sup> They point to a newer version of the code, "LADTAP XL," they claim to be an improvement on LADTAP II that yields more appropriate dose estimates. Petitioners claim that, because the Applicant used LADTAP II to calculate doses in the ER, such dose calculations are "unreliable" and should be replaced by calculations performed using LADTAP XL.<sup>149</sup> Further, Petitioners claim, both versions of the LADTAP code use dose conversion factors that inappropriately consider only adults.<sup>150</sup> Specifically, Petitioners claim "the dose conversion factors used even in the more recent model [of LADTAP]

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Petition at 31. The Applicant's Answer claims that the ER demonstrates these impacts will be "small." STP Answer at 32. During oral argument, Petitioners appeared to suggest that Applicant's characterization of these impacts as small was based on the Applicant's subjective assessment. *See, e.g.*, Tr. at 59. However, Petitioners subsequently conceded that the source of Applicant's characterization was 10 C.F.R. § 51.53, Table S-4. *See* Tr. at 93-94; *see also* Tr. at 121, 127.

<sup>144</sup> 10 C.F.R. § 2.309(f)(1)(iii).

<sup>145</sup> Petition at 41.

<sup>146</sup> *Id.* at 42 (citing Makhijani Declaration).

<sup>147</sup> Petition at 42. LADTAP II is a computer code endorsed by the NRC for calculating radiation exposure to humans from routine releases of nuclear reactor liquid effluents. *See* NUREG/CR-1276, "User's Manual for LADTAP II — A Computer Program for Calculating Radiation Exposure to Man from Routine Releases of Nuclear Reactor Liquid Effluents" (Mar. 17, 1980).

<sup>148</sup> *See* Makhijani Declaration.

<sup>149</sup> Petition at 42 (citing ER Table 5.4-8).

<sup>150</sup> *Id.* at 42.

are for adults. The factors for children are considerably higher and, in many circumstances, doses to children from the same environmental contamination are higher than those for adults even when differences in consumption are taken into account.”<sup>151</sup>

Applicant opposes admission of this contention, stating that “[t]he contention lacks adequate support and fails to establish a genuine *material* dispute.”<sup>152</sup> Applicant argues that “Petitioners’ criticism of LADTAP II rests solely on the *unexplained* results of an *unidentified* study comparing use of LADTAP II with LADTAP XL.”<sup>153</sup> Applicant correctly hypothesizes<sup>154</sup> that the unidentified study is a 1991 evaluation of environmental conditions at the Savannah River Site (1991 SRS Study) that compared the results produced by these two versions of LADTAP. Applicant further asserts that “the LADTAP XL spreadsheet [in the 1991 report] is specific to the SRS, and Petitioners provide no support indicating that this spreadsheet is applicable to the STP site.”<sup>155</sup>

The NRC Staff opposes this contention because, in the NRC Staff’s view, “it lacks adequate support and fails to demonstrate a genuine dispute with the Applicant on a material issue of law or fact.”<sup>156</sup> Specifically, the NRC Staff maintains the sole basis for this contention is Dr. Makhijani’s claim that LADTAP II does not correctly calculate dose from ingestion of fish and invertebrates.<sup>157</sup> Yet, in light of the fact that Dr. Makhijani did not identify the source of his information, the NRC Staff claims that Petitioners have failed to provide the necessary support for this contention, rendering the contention inadmissible under NRC’s pleading rules.<sup>158</sup>

The NRC Staff also refers to the ER to dispute Petitioners’ claim that Applicant’s use of LADTAP fails to address the dose of radiation that children would receive. Specifically, the NRC Staff claims that Applicant’s discussion of the “maximally exposed individual” (MEI)<sup>159</sup> in the ER is dispositive of this claim.

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<sup>151</sup> *Id.*

<sup>152</sup> STP Answer at 76.

<sup>153</sup> *Id.* at 77.

<sup>154</sup> During oral argument, Petitioners identified the study used by Dr. Makhijani to support this contention. *See* Tr. at 281. The report is D. M. Hamby, LADTAP XL: An Improved Electronic Spreadsheet Version of LADTAP II, Westinghouse Savannah River Company, WSRC-RP-91-975 (Nov. 18, 1991) (available at <http://www.osti.gov/energycitations/servlets/purl/6704105-cS9Awv/6704105.pdf> (last visited August 26, 2009)) [hereinafter 1991 SRS Study].

<sup>155</sup> STP Answer at 77-78.

<sup>156</sup> Staff Answer at 62.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 64.

<sup>159</sup> The LADTAP model is an implementation of the calculation procedures presented in Reg. Guide 1.109, Calculation of Annual Doses to Man from Routine Releases of Reactor Effluents for the

(Continued)

The MEI, for all organ doses except bone, determined by LADTAP to be a teenager because teenagers tend to use the shoreline more than other age groups, eats fish from and is exposed to the shoreline at Little Robbins Slough. The MEI for organ doses to bone is a child at the same location because of the greater sensitivity (calculationally, larger dose conversion factors) of that organ for that age group to internal exposure from ingestion of fish.<sup>160</sup>

The NRC Staff claims not only that this demonstrates that the Applicant accounted for children in its dose calculation, but also that Petitioners fail to challenge this information as inadequate. For these reasons, NRC Staff asserts that Petitioners have failed to demonstrate a material dispute with respect to this part of this contention.<sup>161</sup>

The Board concludes this contention is inadmissible. First, Petitioners have failed to challenge ER § 5.4-3 which, as the NRC Staff points out,<sup>162</sup> contains dose estimates for appropriate age groups. Second, the 1991 SRS Study upon which Dr. Makhijani relies does not adequately support Petitioners' claims as we discuss below:<sup>163</sup>

Comparisons of LADTAP II and LADTAP XL output show that these enhancements result in an insignificant increase in predictions of total dose to the maximum individual and a 10% increase in total dose to the Savannah River user population.<sup>164</sup>

Dr. Makhijani's statement that there are large differences between LADTAP II and LADTAP XL calculations is central to this contention, and is flatly

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Purpose of Evaluating Compliance with 10 C.F.R. Part 50, Appendix I (Oct. 1977). As stated in this guide, NRC Staff have made use of the "maximum exposed individual" (MEI) approach to provide guidance for implementing section II of Appendix I. In describing and identifying the MEI, four age groups are used with differing characteristics (food consumption, occupancy, internal dose conversion factors, etc.). See Reg. Guide 1.109-1.

<sup>160</sup> Staff Answer at 64 (citing ER 5.4-3).

<sup>161</sup> Staff Answer at 64.

<sup>162</sup> *Id.*

<sup>163</sup> Without wading into the merits of this contention, we note that the 1991 SRS Report certainly cannot be considered as supportive of Petitioners' claims. To the contrary, this study attributes essentially all of the differences between the outputs of LADTAP II and LADTAP XL to different assumptions regarding fish consumption — LADTAP II assumes that the entire U.S. population will consume the affected fish, while LADTAP XL assumes that only persons residing within 50 miles will consume the affected fish. If this study correctly explains this disparity, then the purportedly different outputs could not support Petitioners' claim of a computer code deficiency, but rather indicate that, at most, these differences are extremely modest.

<sup>164</sup> 1991 SRS Report at 4.



contradicted by the very study on which he bases his statement.<sup>165</sup> Because Dr. Makhijani's statement does not otherwise contain sufficient support to demonstrate a genuine dispute on a material issue of fact or law,<sup>166</sup> we find Contention 17 to be inadmissible.

*i. Contention 18*

Petitioners state in Contention 18:

The STP Environmental Report concedes that in order to support the uranium fuel cycle for STP 3 and 4 at least twenty-one acres off-site will never be available for future use. The COLA adjudication should require that the Applicant explain the basis for the permanent dedication of these twenty-one acres to nuclear operations and specify the means by which the twenty-one acres will be secured and maintained in perpetuity.<sup>167</sup>

Petitioners allege there are numerous questions raised by Applicant's ER Table 10.1-2 and section 10.1.2.1, which state that approximately 21 acres "will never be available for future use."<sup>168</sup> Petitioners further allege that the Applicant's asserted failure to consider the long-term impacts of the dedication of 21 acres, termed by Petitioners as a "nuclear wasteland," raise unintended consequences that should be addressed in Applicant's ER.<sup>169</sup> Petitioners claim that "the Applicant should specify the means by which these 21 acres would be secured and maintained in perpetuity."<sup>170</sup>

Applicant opposes admission of this contention on the ground that it impermissibly challenges Table S-3, lacks adequate support, and fails to demonstrate a genuine material issue of law or fact.<sup>171</sup> Specifically, Applicant claims that it derived the 21-acre approximation from mandated calculations in Table S-3 of 10 C.F.R. § 51.51 and that Petitioners' challenge of the 21-acre derivation is a direct challenge to an NRC rule.<sup>172</sup> Applicant points to ER § 5.7.1 which

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<sup>165</sup> See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996) (report before the Board is subject to scrutiny both as to those portions that support an intervenor's assertion and those that do not), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

<sup>166</sup> See 10 C.F.R. § 2.309(f)(1)(v), (vi).

<sup>167</sup> Petition at 43.

<sup>168</sup> *Id.* (quoting STP ER Table 10.2-1, p. 10.1.13).

<sup>169</sup> Petition at 43.

<sup>170</sup> *Id.*; Tr. at 286-88.

<sup>171</sup> STP Answer at 81.

<sup>172</sup> *Id.* at 81-82; Tr. at 290-92.

addresses the environmental effects of a permanent<sup>173</sup> dedication of 21 acres of land and concludes that the impacts of such land use are small.<sup>174</sup> Applicant further rejects Petitioners' assertion that the Application fails to take into account long-term maintenance of the area that would be dedicated for disposal and points to sections of the ER that Petitioners fail to cite, much less dispute.<sup>175</sup>

The NRC Staff also opposes admission of contention 18 on the ground that it fails to comply with 10 C.F.R. § 2.309(f)(1)(iv) and (vi).<sup>176</sup> The NRC Staff maintains, as does the Applicant, that any calculations for land use were derived from Table S-3 and scaled according to the size of STP Units 3 and 4; as a consequence, any challenge to the use of such calculations is an impermissible challenge to Table S-3.<sup>177</sup> Moreover, the NRC Staff asserts that, while Petitioners state that further analysis is required, Petitioners fail to controvert section 5.7 of the ER, which details the environmental impacts of the uranium fuel cycle — and that one such impact is land use.<sup>178</sup>

The Board concludes Contention 18 is inadmissible as it amounts to an impermissible attack on a Commission regulation. Specifically, the Commission has generically dealt with land use commitment and the environmental effects of the uranium fuel cycle by creating numerical values in Table S-3. In accordance with the directive in 10 C.F.R. § 51.51, the Applicant used the value on the Table for “Permanently committed” land and applied an appropriate scale factor to the value to accommodate for the power of the reactors Applicant plans to employ at STP Units 3 and 4, which, in turn, determines the amount of land that would be required for disposal.<sup>179</sup> Having failed to obtain a waiver, Petitioners cannot attack this Commission regulation in this instance. To the extent that Petitioners raise additional “questions” regarding future land use commitment, Petitioners are seeking to require the Applicant to do more than the regulation requires.

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<sup>173</sup> During oral argument, the Applicant suggested that this area is not necessarily permanently dedicated for all future time, but rather that the area can be later restored. Tr. at 291.

<sup>174</sup> STP Answer at 82.

<sup>175</sup> *Id.* at 82-83 (citing ER § 5.5.3).

<sup>176</sup> Staff Answer at 65.

<sup>177</sup> *Id.* at 66, 67-68.

<sup>178</sup> *Id.* at 65-66.

<sup>179</sup> In spite of their recognition that they are prohibited from making such a collateral attack on Table S-3, Petitioners admitted at oral argument that is precisely what they were seeking to do:

Is it an attack of Table S-3? Yes, sir, it is. It's an assault on Table S-3, and future generations will wonder why we didn't assault it earlier and more vigorously, and to that extent we recognize that we'll probably not get much traction on this contention with this panel or anybody else in the chain of command at the NRC, and we may be derided for bringing this up, but I'm proud to sponsor this contention.

Tr. at 288.

Further, we conclude Petitioners' allegations with respect to the Applicant's failure to consider the future maintenance and security of the 21 acres do not create a genuine dispute with the Application. In this instance, Petitioners fail to cite or to dispute ER § 5.7 which addresses future maintenance and security at STP Units 3 and 4. As this contention fails to provide any specific disputed facts relative to the STP COLA, we conclude this contention is inadmissible for failure to comply with 10 C.F.R. §§ 2.309(f)(1)(vi) and 2.335.

*j. Contention 19*

Petitioners state in Contention 19:

The STP Environmental Report states that an unquantified amount of land onsite will be dedicated to licensed radioactive waste disposal facilities and be unavailable for other uses. But the Applicant has failed to specify the location onsite for the disposal facility and has not applied for the necessary permit for such activities pursuant to 10 C.F.R. Part 72.<sup>180</sup>

Petitioners allege that Table 10.1.2 of STP's ER "state[s] conclusively that some onsite land will be used for radioactive waste disposal" and that, as a result, the Applicant is required to obtain a Part 72 license.<sup>181</sup> Petitioners also object to Applicant's perceived failure to designate a specific land area for the location of its dry cask storage.<sup>182</sup>

Applicant opposes admission of this contention on the basis that it is an impermissible challenge to an NRC regulation and does not have sufficient support to demonstrate a material issue.<sup>183</sup> Applicant claims Petitioners have misinterpreted information in the ER and that there are no plans for a "permanent onsite radioactive waste disposal facility."<sup>184</sup> Applicant further claims that it derived the amount of land required for radioactive waste disposal from Table S-3 and, therefore, this contention represents an impermissible challenge to NRC rules — absent a waiver,<sup>185</sup> which Petitioners did not obtain. Applicant maintains that Petitioners have failed to provide any support to dispute the information contained in the ER and that it is not required to provide additional information relative to its dry cask storage.<sup>186</sup>

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<sup>180</sup> Petition at 44.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (citing STP ER Figure 1.1-1, p. 1.1-5/6).

<sup>183</sup> STP Answer at 83.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 83-84.

<sup>186</sup> *Id.* at 84-85.

The NRC Staff similarly objects to this contention and claims that Petitioners have misunderstood Table 10.1-2 in the ER, that the Applicant merely describes “potential environmental impacts onsite and offsite from disposal of radioactive wastes” and that “any disposal area ‘would be a *permitted waste disposal facility* with a land use designated for such activities.’”<sup>187</sup> The NRC Staff points out that the Applicant has adequately discussed the permits and licenses it may potentially need, including a Part 72 license “if necessary.”<sup>188</sup> The NRC Staff claims that because Applicant has not yet applied for a Part 72 license, “issues regarding onsite disposal and dry cask storage are outside the scope of this proceeding.”<sup>189</sup> NRC Staff also claims that Petitioners have failed to provide any support for their assertion that Applicant is required to apply for a Part 72 license at this point.<sup>190</sup>

We conclude that Contention 19 is inadmissible. It is a direct challenge to 10 C.F.R. § 51.51, Table S-3, where both temporary and permanently committed land resources are specified as part of the uranium fuel cycle. ER § 5.7.1 and Table 10.1.2 confirm that the temporary land use will be released for unrestricted use following decommissioning. The land use specified in Table S-3 is not directly associated with possible dry cask storage, and so discussion of a Part 72 license is not relevant to this contention. The Petitioners do not provide a basis for requiring greater specificity of dedicated land use associated with Table S-3 beyond that provided in the ER. Accordingly, Contention 19 is not admitted in accordance with 10 C.F.R. § 2.335.

k. *Contention 20*

Petitioners state in Contention 20:

The uranium fuel cycle has substantial greenhouse gas impacts [*sic*] must be considered in each phase of the uranium fuel cycle.<sup>191</sup>

Petitioners contend that the Applicant has failed to determine the “full impact of STP Units 3 and 4” because it did not analyze the “inevitable greenhouse gas emissions associated with each phase of the fuel cycle.”<sup>192</sup> Petitioners claim *Massachusetts v. U.S. Environmental Protection Agency*,<sup>193</sup> designating carbon dioxide as a pollutant, provides legal support for its position that the inevitable and

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<sup>187</sup> Staff Answer at 70 (quoting ER Table 10.1-2).

<sup>188</sup> Staff Answer at 70 (quoting ER Table 1.2-4).

<sup>189</sup> Staff Answer at 70.

<sup>190</sup> *See id.* at 71.

<sup>191</sup> Petition at 44.

<sup>192</sup> *Id.* at 45; Tr. at 300-01.

<sup>193</sup> 549 U.S. 497 (2007).

predictable carbon emissions associated with nuclear power plant construction and operation should be addressed in the COLA.<sup>194</sup> In addition, Petitioners challenge Applicant's failure to include a carbon emissions analysis comparing "the greenhouse gas effects expected from each of the alternative technologies and their relative costs" with those expected from the uranium fuel cycle.<sup>195</sup>

Applicant claims that underlying Petitioners' challenge to "the adequacy of the consideration of the impacts of greenhouse gases from the uranium fuel cycle" is an attack on Table S-3 of 10 C.F.R. § 51.51, which, in turn, represents an impermissible challenge to NRC rules that is beyond the permissible scope of this proceeding.<sup>196</sup> In support of its position, Applicant claims that background documents used to generate Table S-3, as well as Note 1 of Table S-3, establish that CO<sub>2</sub> emissions from the uranium fuel cycle have already been considered — and that the Commission deems them to be zero.<sup>197</sup> In addition, Applicant contends Petitioners have failed to demonstrate that "the consideration of greenhouse gas emissions from the uranium fuel cycle is a material issue in this proceeding" and rejects Petitioners' claim that the ER must consider and compare carbon emissions in the alternatives analysis.<sup>198</sup> The Applicant argues that similar contentions have been rejected by other licensing boards.<sup>199</sup> Finally, the Applicant contends that, to the extent Petitioners' contention is one of omission, the ER does in fact address greenhouse gases and CO<sub>2</sub> emissions.<sup>200</sup>

Consistent with the Applicant's argument, the NRC Staff asserts this contention is inadmissible because Petitioners fail to address the Applicant's discussion of CO<sub>2</sub> emissions in the ER.<sup>201</sup> The NRC Staff also notes that while other licensing boards have rejected similar contentions, those boards have referred their rulings to the Commission for consideration.<sup>202</sup>

The Board concludes Contention 20 is inadmissible because Petitioners have failed to demonstrate a genuine dispute with the Application. Although structured as a contention of omission — that the COLA lacks an analysis of greenhouse gas emissions from the uranium fuel cycle — it is clear that numerous ER sections address greenhouse gases and CO<sub>2</sub> emissions in various stages of the uranium fuel cycle.<sup>203</sup> We also find that, as Petitioners have failed to challenge such discussion

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<sup>194</sup> Petition at 45.

<sup>195</sup> *Id.*

<sup>196</sup> STP Answer at 85-86; Tr. at 301.

<sup>197</sup> STP Answer at 85-86.

<sup>198</sup> *Id.* at 86-87.

<sup>199</sup> *Id.* at 89.

<sup>200</sup> *Id.* at 88-89.

<sup>201</sup> Staff Answer at 73-75.

<sup>202</sup> *Id.* at 73 n.29.

<sup>203</sup> STP Answer at 88-89 (citing ER §§ 5.7.4, 5.7.8, and 10.4.1.3).

in the ER, Petitioners have raised no genuine dispute with this contention. For both reasons, this contention is inadmissible.

However, we note that central to all of the Applicant's arguments about the uranium fuel cycle is Table S-3, which omits CO<sub>2</sub> in its listing of "gas effluents." As a consequence of this omission, those who use Table S-3 are directed by Footnote 1 to list their CO<sub>2</sub> emission as "zero." There is a legitimate issue whether Table S-3, and the underlying assumptions used to create Table S-3, is correct in the specification of zero CO<sub>2</sub> emissions. In fact, during oral argument, it became clear that Table S-3 was derived from background documents<sup>204</sup> that measured CO<sub>2</sub> before global warming was recognized as a critical issue.<sup>205</sup> Counsel for the NRC Staff explained: "[t]o the extent that . . . you would suggest that Table S-3 be updated, I believe a rulemaking may be in the queue, but I don't know what level priority that's getting and whether it's particularly attributable to the greenhouse gas emissions issue associated with Table S-3."<sup>206</sup> Unquestionably, 10 C.F.R. § 2.335(a) prevents us from admitting a contention that attacks this regulation. At the same time, however, on the one hand, the NRC Staff recognizes Table S-3 might be in error,<sup>207</sup> but on the other hand, the NRC Staff argues that this Board must accept its conclusions as definitively accurate. Accordingly, we encourage the Commission to give expeditious consideration to updating this table.<sup>208</sup>

#### *l. Contention 21*

Petitioners state in Contention 21:

Impacts from severe radiological accident scenarios on the operation of other units at the STP site have not been considered in the Environmental Report.<sup>209</sup>

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<sup>204</sup> Data supporting Table S-3 are provided in Footnote 1 of Table S-3 and include the WASH-1248 "Environmental Survey of the Uranium Fuel Cycle" (Apr. 1974); NUREG-0116, "Environmental Survey of the Reprocessing and Waste Management Portion of the LWR Fuel Cycle" (Supp. 1 to WASH-1248) (Oct. 1976); NUREG-0216, "Public Comments and Task Force Responses Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle" (Supp. 2 to WASH-1248) (Mar. 1977); and in the record of the final rulemaking pertaining to Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management, Docket RM-50-3.

<sup>205</sup> Tr. at 302.

<sup>206</sup> Tr. at 310.

<sup>207</sup> Tr. at 306.

<sup>208</sup> Other licensing boards have referred contentions involving Table S-3 to the Commission, *see Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 418-20 (2008) and *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 444-45 (2008).

<sup>209</sup> Petition at 46.

Petitioners contend that colocation of STP Units 3 and 4 with STP Units 1 and 2 has potentially significant implications in the event a major accident were to occur at any one of the four operating units. Petitioners claim “[t]he STP Environmental Report at Chapter 7 deals with severe accidents but has no discussion or analysis of the impact of a severe radiological accident at any one of the four units as it would impact the other remaining three units,”<sup>210</sup> or how “operations at undamaged units would be continued in the event that the entire site becomes seriously contaminated.”<sup>211</sup> In Petitioners’ estimation, the absence of this evaluation in the ER implies that a serious accident or release of radiological material at one plant would not have an impact at another plant.<sup>212</sup> Finally, Petitioners note “there is no discussion of how the other units would be protected in the event of a major fire or explosion at one of the other units.”<sup>213</sup>

The Applicant argues that this contention should be rejected because “it is based upon an unsupported premise and does not raise an issue that is material to the adequacy of the ER.”<sup>214</sup> Applicant asserts the plant design satisfies General Design Criterion (GDC) 4, which requires that “structures, systems, and components important to safety be appropriately protected ‘from events and conditions outside the nuclear power unit.’”<sup>215</sup> Moreover, Applicant maintains,

General Design Criterion (“GDC”) 4 requires that structures, systems, and components important to safety be appropriately protected “from events and conditions outside the nuclear power unit.” As provided in the ABWR DCD Tier 2, Section 3.1.2.1.4, the ABWR satisfies GDC 4. FSAR Section 3.1 incorporates this section in the DCD without any departures. Given the requirements in GDC 4 and the provisions in the DCD and FSAR showing compliance with GDC 4, Contention 21 does not raise an issue that is material to the adequacy of the evaluation of environmental impacts of accidents provided in ER Chapter 7.<sup>216</sup>

Applicant also rejects Petitioners’ assertion that the COLA fails to explain how the units would be protected from an incident at a neighboring unit. The Applicant states that the Final Safety Analysis Report (FSAR) evaluates the impacts of flammable clouds, onsite fires and chemical hazards at STP Units 1 and 2 on STP Units 3 and 4<sup>217</sup> and also discusses the impact of any radiological accident at STP

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*; Tr. at 335.

<sup>213</sup> Petition at 46.

<sup>214</sup> STP Answer at 89.

<sup>215</sup> *Id.* at 90 (quoting 10 C.F.R. Part 50, App. A).

<sup>216</sup> STP Answer at 90 (footnotes omitted).

<sup>217</sup> *Id.* at 91.

Units 1 and 2 on STP Units 3 and 4.<sup>218</sup> Applicant asserts that Petitioners failed to challenge these sections of the COLA that discuss such impacts and therefore the contention must be rejected.<sup>219</sup> The Applicant asserts that the distance of 1500 feet<sup>220</sup> between STP Units 1 and 2 and STP Units 3 and 4 is sufficient to ensure that fires or explosions at STP Units 1 or 2 would not pose a threat to STP Units 3 and 4.<sup>221</sup>

The NRC Staff opposes admission of the contention on the ground that “[t]he Petitioners state their contention as one of omission in the ER” without demonstrating why “the information must be contained in the ER.”<sup>222</sup> In common with the Applicant, the NRC Staff points out that the Petitioners have failed to dispute either the Applicant’s data or the Applicant’s discussion of the impacts of one incident at STP Units 1 and 2 on STP Units 3 and 4.<sup>223</sup>

The NRC Staff states that, when read in its broadest sense, this contention could be construed as a claim of omission that the ER must include the possibility of an accident at STP Units 3 or 4 that would cause radiological impacts on operations of STP Units 1 and 2.<sup>224</sup> After characterizing the claim in this manner, the NRC Staff concludes that “[t]he safe operation of [STP] Units 1 and 2 is governed by their current operating licenses and NRC regulations and is not within the scope of this proceeding . . . . [A]mendments to the existing [STP] Units 1 and 2 licenses and updates to their FSAR are governed by 10 C.F.R. Part 50.”<sup>225</sup>

We conclude this contention is admissible. In the context of this NEPA-related contention, we find that Petitioners’ assertion that the Applicant must address the potential impacts of a radiological incident on the operations of the other units establishes an admissible contention of omission. Petitioners have provided a specific statement of the issue and have provided a brief explanation of the basis. Given that a completed ER is a prerequisite to issuance of a COL, this issue is necessarily material and within the scope of these proceedings. The alleged fact supporting the contention is that the subject discussion is missing from the Application. For this contention to be admissible, it remains only to be shown that the allegedly missing material is required to be within the ER.

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 91-92.

<sup>220</sup> The Applicant asserts a distance of 1500 feet would be sufficient based on its alleged use of NRC guidance documents that address chemical, fire, radioactive, and explosive releases. *See Tr.* at 341-43.

<sup>221</sup> *See Tr.* at 338-41.

<sup>222</sup> Staff Answer at 76.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 76-77.

<sup>225</sup> *Id.* at 77.



The contention states specifically that the ER omits discussion of the effects of accidents at STP Units 1 or 2 on STP Units 3 or 4 and vice versa. Neither the NRC Staff nor the Applicant points to specific portions of the ER addressing this issue. NUREG-1555 provides guidance for the NRC Staff in the evaluation of severe accidents that is to be included in the ER.<sup>226</sup> Specifically, NUREG-1555 states “[t]he events arising from causes external to the plant that are considered possible contributors to the risk associated with the plant should be discussed.”<sup>227</sup> Petitioners argue that a severe accident at STP Units 1 or 2 could significantly affect safety at STP Units 3 or 4. STP Units 3 and 4 will be about 1500 feet away. Because the ER currently does not address how severe accidents at STP Units 1 or 2 might or might not affect STP Units 3 and 4, the Petitioners’ argument appears reasonable.<sup>228</sup>

Concerning Design Basis Accidents, NUREG-1555 states, “Applicants for construction permits, operating licenses, combined licenses and early site permits are required to evaluate the design and performance of structures, systems, and components of the facility with the objective of assessing the risk to public health and safety resulting from the operation of the facility.”<sup>229</sup> Although NUREG-1555 is only a guidance document, this Board considers this guidance to provide sufficient indication that the subject discussions may be required in the ER.

Accordingly, Petitioners have stated an admissible contention and the Board admits this contention.

*m. Contention 22*

Petitioners state in Contention 22:

The COLA should consider all radiological, environmental and public health impacts related to decommissioning of STP Units 3 and 4.<sup>230</sup>

In this contention, Petitioners challenge Applicant’s failure to include a definite plan for decommissioning and contend that each of the three proposed decom-

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<sup>226</sup> Guidance for the content of the ER is provided by NUREG-1555 “Standard Review Plans for Environmental Reviews for Nuclear Power Plants” (Oct. 1999) [hereinafter NUREG-1555].

<sup>227</sup> NUREG-1555 at 7.2-3.

<sup>228</sup> No NRC rule addresses the distance from the plant at which the effects of a severe accident must be assessed. However, guidance provided in NUREG-1555 makes numerous references to a 50-mile radius for severe accident and severe accident mitigation alternatives (SAMA) analyses. As guidance, this strongly suggests that the 1500 feet between proposed and preexisting units is not so great, by itself, as to preclude the effects of a severe accident affecting safety at other units.

<sup>229</sup> NUREG-1555 at 7.1-3.

<sup>230</sup> Petition at 47.

missioning methods presented in the ER are in error.<sup>231</sup> Those three methods are set forth in section 5.9.2 of the ER.

Petitioners first challenge the Applicant's assumption, central to its discussion of all three proposed methods, that once the Applicant concluded its operation of STP Units 3 and 4, there will be no high-level waste onsite. Instead, Petitioners claim "there is no indication that spent fuel and high-level radioactive waste will ever leave the plant site."<sup>232</sup> Second, Petitioners challenge the Applicant's plan to remove plant parts and components from the site, asserting that "no such [off-site] facility currently exists nor is projected to exist in the future" to receive such parts and components.<sup>233</sup> Third, with respect to the Applicant's proposed decommissioning plans in the ER, Petitioners contend there is no provision for plant maintenance or management associated with the proposal to decommission the plant by maintaining it "in-situ."<sup>234</sup> Fourth, Petitioners assert the Applicant's decommissioning plan fails to address waste-stream and environmental justice issues that would arise from the "disposition of highly irradiated materials off-site."<sup>235</sup> Finally, Petitioners are concerned that the Applicant has made a speculative leap of faith that future decommissioning technologies will become available by the time STP Units 3 and 4 are to be decommissioned.<sup>236</sup>

The Applicant presents several arguments opposing the admission of this contention. First, the Applicant maintains that "an applicant for a COL need not describe its decommissioning plans" in its COLA, but rather, as dictated by 10 C.F.R. §§ 50.82(a)(4) and 52.110(d), decommissioning plans are not required until the Applicant files a "post-shutdown decommissioning activities report," which is not due until 2 years before "permanent cessation of operation."<sup>237</sup> Separate and apart from these legal arguments, the Applicant claims its ER lays out its decommissioning plan, which it claims incorporates the NRC's Generic Environmental Impact Statement (GEIS).<sup>238</sup> Applicant further asserts that Petitioners have failed to controvert either the Applicant's legal assertion that

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* During oral argument, Petitioners asserted that part of its concern in this regard involved the Applicant's purported failure to address environmental justice. *See* Tr. at 343. However, both the Applicant and the NRC Staff claimed that these matters are to be addressed at a much later point in time, when the Applicant submits an application for decommissioning. *See* Tr. at 344, 346.

<sup>233</sup> Petition at 47.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 48.

<sup>237</sup> STP Answer at 93.

<sup>238</sup> NUREG-0586, "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (Aug. 1988).

detailed decommissioning analysis is premature at this time, or the Applicant's factual analysis in the ER that applied the subject GEIS.<sup>239</sup>

The NRC Staff also objects to the admission of this contention, claiming that it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).<sup>240</sup> The NRC Staff, like the Applicant, argues that Petitioners fail to provide any legal support for their claim the Applicant must provide additional analysis with respect to its decommissioning plans,<sup>241</sup> and affirmatively argues that “a combined license applicant is not required to identify a specific method of decommissioning a plant at the time of the Application.”<sup>242</sup> The NRC Staff also argues that the detailed requirements set forth in 10 C.F.R. § 52.110 make clear that decommissioning is not a matter to be dealt with in detail at this stage of the process, but instead is to be addressed extensively near the end of reactor operations.<sup>243</sup> The NRC Staff concludes its argument by criticizing Petitioners for failing to recognize what Staff views as the NRC's longstanding success and history in decommissioning nuclear power plants.<sup>244</sup>

We conclude that Contention 22 is inadmissible for failure to present sufficient information to demonstrate that a genuine dispute exists with the Applicant.<sup>245</sup> This contention is framed as a contention of omission in that Petitioners are alleging the Applicant has neglected to provide information relating to the decommissioning plan in the COLA. Petitioners have failed to provide any legal support for their proposition that such information is required in the COLA. In fact, as both Applicant and Staff point out, 10 C.F.R. §§ 50.82(a)(4) and 52.110(d) require decommissioning plans to be provided in a “post-shutdown decommissioning activities report” due within 2 years of “permanent cessation of operation” and not within the COLA. We likewise reject Petitioners' assertion that Applicant has erroneously claimed high-level waste will remain onsite; this is an impermissible challenge to the Waste Confidence Rule.<sup>246</sup> Accordingly, we conclude that Contention 22 is not admissible.

*n. Contention 23*

Petitioners state in Contention 23:

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<sup>239</sup> *Id.* at 95-96.

<sup>240</sup> Staff Answer at 78.

<sup>241</sup> *Id.* at 78.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 78-79.

<sup>244</sup> *Id.* at 79-80.

<sup>245</sup> *See* 10 C.F.R. § 2.309(f)(1)(vi).

<sup>246</sup> *See* 10 C.F.R. § 2.335.

The STP Environmental Report is inadequate because it fails to make reasonable assumptions about alternatives to the proposed action of constructing and operating STP Units 3 and 4.<sup>247</sup>

Contention 23 catalogues a number of alleged inadequacies in the STP ER concerning the evaluation of alternatives to building STP Units 3 and 4. Specifically, Petitioners claim that the Applicant's comparative evaluation of power generation erroneously excludes a number of renewable alternative energy sources because such sources are intermittent and too unreliable for a baseload power plant.<sup>248</sup> Petitioners also assert that newly developed storage technologies (compressed air storage and ice energy storage) combined with these renewable alternatives (solar and wind) could provide reliable power, but that the Applicant failed to consider such combinations.<sup>249</sup> In particular, Petitioners claim that there are viable geothermal resources within the state of Texas and that production of electricity from biomass is a proven technology, but that the Applicant's evaluation of geothermal and biomass power in the ER is inadequate.<sup>250</sup>

Petitioners contend the Applicant should have considered conservation/energy efficiency (demand side management (DSM)) as a legitimate alternative rather than dismissing it on the ground that DSM itself cannot produce baseload power.<sup>251</sup> Further, Petitioners object to the lack of a "quantified cost comparison of nuclear with energy alternatives,"<sup>252</sup> and contend that without such a comparison, the Applicant's evaluation of alternatives in the ER is inadequate. Finally, Petitioners maintain "there should be a side-by-side comparison of mortality and morbidity consequences of nuclear power compared to renewable fuels" and "a side-by-side comparison of nuclear fuels and renewable fuels related to the effects of catastrophic accidents."<sup>253</sup>

Applicant opposes admission of this contention on several grounds. First, the Applicant claims that Commission case law requires that it evaluate only alternatives that support the purpose of the project.<sup>254</sup> Because the Applicant has characterized the "purpose of the proposed action [as] the construction and operation of a 2,700-MWe nuclear power plant that is to be used as an

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<sup>247</sup> Petition at 48.

<sup>248</sup> *Id.* at 48-49; Tr. at 359.

<sup>249</sup> Petition at 49.

<sup>250</sup> *Id.* at 50-51.

<sup>251</sup> *Id.* at 49.

<sup>252</sup> *Id.* at 53.

<sup>253</sup> *Id.* at 50; Tr. at 377, 382.

<sup>254</sup> STP Answer at 99-100 (citing *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)); Tr. at 360-65.

independent merchant baseload facility,”<sup>255</sup> it maintains that it need not evaluate any alternatives, such as DSM, that “cannot produce baseload power.”<sup>256</sup>

In addition, the Applicant maintains that Petitioners fail to provide any factual or legal support for the proposition that the alternatives analysis must also consider combinations of production and storage systems.<sup>257</sup> Applicant claims that not only did its ER address the environmental impacts of several alternative energy sources including wind, solar, geothermal, biomass, and combinations of sources, but that it concluded these alternative energy sources had “environmental impacts, and some of the alternatives (such as wind and solar power) have large impacts on land.”<sup>258</sup> Further, Applicant controverts Petitioners’ claims that the ER fails to include the estimated costs of STP Units 3 and 4.<sup>259</sup> Applicant also argues that its analysis of these alternatives need not include either a more detailed cost comparison of alternatives, or any side-by-side comparison of mortality, morbidity, or effects of catastrophic accidents.<sup>260</sup>

The NRC Staff opposes admission of this contention on the ground that it does not meet four of the six contention admissibility standards of 10 C.F.R. § 2.309(f)(1).<sup>261</sup> The NRC Staff also argues the Applicant is not required to evaluate DSM as an alternative because the Commission held in one case that “[DSM] is not an alternative to the proposal to build new baseload power generation.”<sup>262</sup> The NRC Staff claims that, unless Petitioners can demonstrate that its proposed alternatives “meet the identified purpose of the proposed action,”<sup>263</sup> the Applicant is not obligated to evaluate such alternatives. Additionally, the NRC Staff rejects Petitioners’ assertion that the Applicant is required to perform a cost comparison of alternatives because, in the NRC Staff’s view, a cost comparison of alternatives is required only where an alternative is both environmentally less detrimental and meets the objective of the project.<sup>264</sup>

Because this contention is a combination of alleged deficiencies and omissions with respect to the Applicant’s evaluation of alternatives, we address the major points separately.

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<sup>255</sup> STP Answer at 99.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 102.

<sup>258</sup> *Id.* at 105.

<sup>259</sup> *Id.* at 109.

<sup>260</sup> *Id.* at 109-12; Tr. 377-78.

<sup>261</sup> Staff Answer at 81 (contention fails to meet 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi)).

<sup>262</sup> *Id.* at 81-82 (citing *Clinton*, CLI-05-29, 62 NRC at 807).

<sup>263</sup> Staff Answer at 85.

<sup>264</sup> *Id.* at 86-87. The NRC Staff also asserts that while a comparison of mortality and morbidity would not be inherently inadmissible, Petitioners would first need to demonstrate there is a reasonable alternative — which they have not shown. *See* Tr. at 381-82.

We turn first to Petitioners' claim that Applicant erred both in failing to address baseload power in such a way that would incorporate DSM and in failing to address an alternative composed solely of renewable energy sources. Applicant notes that ER § 9.2.2.6.1

discusses what the combinations involve, and explicitly mentions mixes of wind power and other types of combined cycle units and other kinds of production facilities that in combination could produce base load power. So it's very clear that our [evaluated] combinations do include wind in combination with other mechanisms that are capable of producing base load power.<sup>265</sup>

Petitioners have not disputed this section of the ER by alleging facts or expert opinion that controverts it. Accordingly, this part of the contention is inadmissible. Because of Petitioners' failure to create a genuine issue in this regard, we need not resolve whether the Applicant's "purpose is unreasonably narrow or whether a proposed alternative is so far beyond the realm of reason that it must be rejected out of hand."<sup>266</sup>

With respect to Petitioners' claim that the Applicant failed to consider newly developed storage technologies (compressed air storage and ice energy storage) in combination with renewable energy sources as a viable alternative to proposed STP Units 3 and 4, we agree with the Applicant that Petitioners simply overlooked the Applicant's alternatives evaluation in its ER.<sup>267</sup> ER § 9.2-19 states:

Wind and solar facilities could be used in combination with storage systems to produce baseload power. By storing the power produced from wind or solar facilities and releasing it when the wind and solar facilities are not generating power, energy storage in combination with the wind or solar facilities would be able to generate electricity continuously. However, large-scale energy storage in Texas is either not available or would not be economically viable. For example, the storage of even one day's output at 2700 MW is well beyond any demonstration projects using batteries, compressed air, hydrogen, or other storage mechanism and the cost of such systems, even if available, would be prohibitive. Adding the significant cost of storage systems to the cost of wind or solar facilities would render the total cost non-competitive.<sup>268</sup>

In this instance, Petitioners fail even to cite, much less dispute, ER § 9.2-19, which discusses such storage technologies and combination of alternatives. As

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<sup>265</sup> Tr. at 322.

<sup>266</sup> *Levy*, LBP-09-10, 70 NRC at 135.

<sup>267</sup> *See* Tr. at 331.

<sup>268</sup> ER § 9.2-19.

this part of the contention fails to allege any facts or expert opinion relative to the Application, we find it inadmissible.

With respect to Petitioners claim that “there should be a side-by-side comparison of mortality and morbidity consequences of nuclear power compared to renewable fuels” and there should be “a side-by-side comparison of nuclear fuels and renewable fuels related to the effects of catastrophic accidents,”<sup>269</sup> Petitioners have referred to no legal requirement for such an evaluation, thus failing to show that this issue “is material to the findings the NRC must make.”<sup>270</sup> Accordingly, this part of the contention is not admissible.

With respect to Petitioners’ claim that the Applicant has not sufficiently addressed the possibility of geothermal energy, “the EIS need not consider an infinite range of alternatives, only reasonable or feasible ones.”<sup>271</sup> To demonstrate that this contention is within the scope of this proceeding requires some minimal showing that geothermal energy is reasonable and feasible in the electrical area that Units 3 and 4 are to serve. Applicant points out that, to date, only shallow geothermal resources have been developed.<sup>272</sup> The only geothermal resources in the vicinity of STP lie in deep formations and their development and use are currently speculative.<sup>273</sup> Petitioners have failed to provide any information suggesting the current feasibility of geothermal power within the electrical area that Units 3 and 4 are to serve and thus have not established this part of the contention to be within the scope of the proceedings. Accordingly, this part of the contention is inadmissible.

With respect to Petitioners’ claim that the Applicant has failed to provide a “quantified cost comparison of nuclear with energy alternatives,”<sup>274</sup> during oral argument, the Applicant pointed to specific sections of the ER containing cost information.<sup>275</sup> While this information is not provided in a comparison format, Petitioners have not provided any legal or factual requirement mandating that

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<sup>269</sup> Petition at 50.

<sup>270</sup> 10 C.F.R. § 2.309(f)(1)(iv).

<sup>271</sup> As explained in *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 607 (2007):

Federal courts now review the range of alternatives in an EIS under the “rule of reason.” *Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853, 868 (9th Cir. 2004); *City of Bridgeton v. Federal Aviation Administration*, 212 F.3d 448, 458 (8th Cir. 2000). Under this rule, “the EIS need not consider an infinite range of alternatives, only reasonable or feasible ones.” *Westlands Water Dist.*, 376 F.3d at 868.

<sup>272</sup> Tr. at 391.

<sup>273</sup> *Id.*

<sup>274</sup> Petition at 53.

<sup>275</sup> Tr. at 396.

it be presented in such a format. In light of the fact that the allegedly missing information is present in the ER, this part of the contention is inadmissible.

Accordingly, this contention is not admitted.

*o. Contention 24*

Petitioners state in Contention 24:

The COLA is inadequate and unreliable because it fails to discuss the access to and costs of uranium used for power plant fuel.<sup>276</sup>

In this contention Petitioners state that “the COLA should consider whether the cost and supply assumptions that underpin the decision to use nuclear fuel are reasonable.”<sup>277</sup> In support of this assertion, Petitioners argue that STP is likely to purchase a significant amount of uranium from foreign sources over the lives of STP Units 3 and 4, and that the cost of uranium and uranium processing has increased over the last 15 years, suggesting that “the long-term trend costs and supplies are much more problematic than suggested in the STP Environmental Report.”<sup>278</sup>

Applicant opposes admission of this contention on the basis that Petitioners do “not challenge the conclusion that the uranium use by STP Units 3 and 4 will constitute a small percent of the overall world resources of uranium.”<sup>279</sup> Applicant also notes that “issues related to the cost of uranium or the source of uranium are not material to an analysis of the environmental impacts of a nuclear plant, and Petitioners have not provided any justification for requiring such an analysis pursuant to NEPA.”<sup>280</sup>

Applicant notes that Petitioners do not actually dispute the availability of uranium.<sup>281</sup> Contention 24 does not mention or contest the uranium cost estimate of 0.435 cent per kW hour provided in the ER.<sup>282</sup> Consequently, Applicant asserts that Petitioners have failed to raise a genuine dispute.<sup>283</sup>

The NRC Staff also opposes admission of this contention, asserting that it “is unsupported by alleged facts or expert opinion, fails to raise a genuine dispute with

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<sup>276</sup> Petition at 57.

<sup>277</sup> *Id.* at 58; Tr. at 426-27.

<sup>278</sup> Petition at 58 (citing Energy Information Administration, Uranium Marketing Annual Report, <http://www.eia.doe.gov/cneaf/nuclear/umar/summarytable1.html> (last accessed August 26, 2009)).

<sup>279</sup> STP Answer at 113.

<sup>280</sup> *Id.* at 113.

<sup>281</sup> *Id.* at 113-14.

<sup>282</sup> *Id.* at 114 (citing ER Table 10.4-2).

<sup>283</sup> STP Answer at 114.



the application, and does not raise an issue that is material to this proceeding.”<sup>284</sup> The NRC Staff claims the primary assertion by Petitioners is that “the Applicant should consider whether the cost and supply assumption underlying the decision to use nuclear fuel are reasonable.”<sup>285</sup> But the NRC Staff asserts that Petitioners have failed to provide any basis in fact or law for such an evaluation.<sup>286</sup> Furthermore, Petitioners do not provide “any information to indicate that foreign sources of uranium have a significant link to health and safety or the environment and, therefore, raise an issue not material to the outcome of this proceeding.”<sup>287</sup>

We find that this contention is inadmissible because it does not create a genuine dispute with the Application.<sup>288</sup> Petitioners have failed to allege facts or expert opinions that controvert any of the information presented in the Application, and as a consequence, have failed to raise a genuine dispute. Further, as a contention of omission, Petitioners have failed to cite any rule requiring, or provided a reasoned argument for, inclusion of the discussion of environmental impacts of using foreign fuel. Accordingly, this contention is inadmissible.

*p. Contention 25*

Petitioners state in Contention 25:

The Decommissioning Funding Assurance described in the application is inadequate to assure sufficient funds will be available to fully decontaminate and decommission South Texas Project Units 3 and 4. The NRG Licensees must use the prepayment method of assuring decommissioning funding.<sup>289</sup>

In this contention, Petitioners challenge the Applicant’s selection of an external sinking fund, pursuant to 10 C.F.R. § 50.75, to ensure there will be sufficient monies available for decommissioning STP Units 3 and 4.<sup>290</sup> Petitioners argue that selection of this financial method contradicts the Applicant’s statement in the COLA that the “NRG Licensees do not technically qualify to use the sinking fund method.”<sup>291</sup> Arguing that NRG does not qualify to use a sinking fund, Petitioners claim, the Applicant must prepay all of the costs of decommissioning.<sup>292</sup> Likewise,

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<sup>284</sup> Staff Answer at 87.

<sup>285</sup> *Id.* at 88.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 88-89.

<sup>288</sup> See 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

<sup>289</sup> Petition at 59.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*; Tr. at 437-38.

Petitioners assert that the Applicant cannot use a sinking fund established under Texas law to satisfy its decommissioning obligations under federal law.<sup>293</sup>

Applicant rejects Petitioners' claim that it may not use the Texas sinking fund to enable it to qualify for the NRC's external sinking fund method of decommissioning funding.<sup>294</sup> As it explains:

The terms of 10 C.F.R. § 50.75(e)(1)(ii) embody the principle that NRC will defer to state economic regulators where decommissioning funding is assured by the fact that any shortfall in decommissioning funds will be provided by ratepayers pursuant to state law. The Texas statute provides precisely this type of assurance, which enables the NRG Licensees to use a variant of the external sinking fund method even though, under the Texas law, the plan and desire is that ratepayers would never be called upon to actually fund decommissioning.<sup>295</sup>

Accordingly, Applicant maintains that this Texas statutory provision merely enables the Applicant to comply with the federal regulation, provided it otherwise meets the requirements of the NRC's external sinking fund — which the Applicant claims it has done.<sup>296</sup> Finally, the Applicant disputes Petitioners' claim that it is obligated to pursue prepayment of its decommissioning costs, but instead claims it may choose from any of the methods advanced in 10 C.F.R. § 50.75(e)(1) to meet its decommissioning obligations.<sup>297</sup>

The NRC Staff contends that Petitioners' claim the Applicant is limited to pursuing the prepayment method for decommissioning funding is an impermissible challenge to the Commission's regulations set forth in 10 C.F.R. Part 50, specifically 10 C.F.R. § 50.75.<sup>298</sup> To the contrary, the NRC Staff maintains that the Commission's regulations and NRC case law authorize applicants to choose among different mechanisms to provide decommissioning assurance.<sup>299</sup> The NRC Staff also maintains Petitioners' claim — that the Applicant cannot qualify for the Texas sinking fund — is outside the scope of this proceeding.<sup>300</sup>

The subject decommissioning rules are designed “(1) to minimize the administrative effort of licensees and the Commission and (2) to provid[e] reasonable assurance that funds will be available to carry out decommissioning in a manner

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<sup>293</sup> Petition at 60.

<sup>294</sup> See STP Answer at 115-17.

<sup>295</sup> *Id.* at 117-18 (internal footnote omitted).

<sup>296</sup> STP Answer at 119; Tr. at 438-39.

<sup>297</sup> STP Answer at 121-22.

<sup>298</sup> Staff Answer at 90.

<sup>299</sup> *Id.* at 90-92.

<sup>300</sup> *Id.* at 93-94.

which protects public health and safety.”<sup>301</sup> In furtherance of this objective, the Commission revised its decommissioning rules in 2007 to address the unique status of COLs — as the prior rules were too stringent upon applicants for both a construction and operating license, where they had yet to even break ground on the subject reactor.<sup>302</sup> The Commission specifically revised section 50.75(b)(4) as it applies to COLs under Part 52 because the requirements in place (decommissioning report and certification of financial assurance at the application phase) were too stringent.<sup>303</sup> Under the revised rule, the COL applicant must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading.<sup>304</sup> Petitioners claim the Applicant must undertake a specific prepayment method of funding decommissioning costs, but point us to no requirement that the Applicant do so. On the other hand, NRC guidance<sup>305</sup> and rules<sup>306</sup> suggest an applicant or licensee is not obligated to choose prepayment, sinking fund, or some other funding assurance method to cover for the total estimated decommissioning cost. Accordingly, Petitioners’ claim that the Applicant must pursue the prepayment method conflicts with the NRC guidance and rules in this regard and so is outside the permissible scope of this proceeding under 10 C.F.R. § 2.335(a).

With respect to Petitioners’ claim that there is some defect in the Texas scheme designed to enable applicants to qualify for the external sinking fund mechanism,

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<sup>301</sup> *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 142 (2001) (citing Final Rule: “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,030 (June 27, 1988) (internal quotations omitted)).

<sup>302</sup> See Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,406 (Aug. 28, 2007).

<sup>303</sup> 72 Fed. Reg. at 49,406 states:

[R]equiring the combined license applicant to comply with the current requirement in § 50.75(b)(4) that the operating license applicant submit a copy of the financial instrument obtained to satisfy the requirements of § 50.75(e), would place a more stringent requirement on the combined license applicant, inasmuch as that applicant would be required to fund decommissioning assurance at an earlier date as compared with the operating license applicant.

<sup>304</sup> See 10 C.F.R. § 52.103(a); see also 10 C.F.R. § 50.75(b)(1); 72 Fed. Reg. at 49,406.

<sup>305</sup> See NUREG-1577, “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance” at 6 (Rev. 1) (Feb. 1999).

<sup>306</sup> 10 C.F.R. § 50.75(e)(1)(ii), which states in pertinent part:

(ii) External sinking fund. An external sinking fund is a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the administrative control of the licensee and its subsidiaries or affiliates in which the total amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected. An external sinking fund may be in the form of a trust, escrow account, or Government fund, with payment by certificate of deposit, deposit of Government or other securities, or other method acceptable to the NRC.

we see none. Texas has determined that its taxpayers will serve as the functional guarantors of the Applicant's decommissioning liabilities. While certainly unique among the fifty states in this approach,<sup>307</sup> Petitioners have not cited any legal authority that the guarantee afforded Applicant fails to comply with the NRC rules on decommissioning funding.

Accordingly, because 10 C.F.R. Part 50 has established clear rules governing decommissioning funding requirements and enables an applicant to choose its method of meeting these funding requirements, Petitioners' contention constitutes an impermissible challenge to the Commission's decommissioning regulations. Likewise, because the State of Texas has supplied a guarantee for applicants to meet these funding costs,<sup>308</sup> because Applicant has indicated it meets the Texas statutory requirements, and because Petitioners have failed to allege facts or expert opinions controverting Applicant's claims in this regard, Petitioners have failed to create a genuine dispute with the Application. Accordingly, this contention is inadmissible under 10 C.F.R. § 2.335(a) as being outside of the permissible scope of this proceeding and inadmissible for failure to create a genuine dispute under 10 C.F.R. § 2.309(f)(1)(vi).<sup>309</sup>

*q. Contention 26*

Petitioners state in Contention 26:

The Applicant has not established that there is a need for the power that would be generated by STP Units 3 and 4.<sup>310</sup>

Petitioners claim that, in accordance with 10 C.F.R. Part 51 and NUREG-1555, because a San Antonio-based municipal utility, CPS Energy, is involved in the Application, the Applicant bears a greater burden to demonstrate a need for power in accordance with 10 C.F.R. Part 51 and NUREG-1555. Moreover, Petitioners argue that the Applicant has failed to meet this burden, and consequently, that the Applicant cannot justify the construction and operation of STP Units 3 and 4.<sup>311</sup> Petitioners' factual support for this contention is a report by its expert, Dr. Makhijani, that addresses "San Antonio's specific circumstances related to additional generating capacity and costs related thereto."<sup>312</sup>

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<sup>307</sup> See Tr. at 441.

<sup>308</sup> 10 C.F.R. § 2.309(f)(1)(iii).

<sup>309</sup> See *id.*

<sup>310</sup> Petition at 62.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (citing Energy Efficiency Potential: San Antonio's Bright Future, Arjun Makhijani, Ph.D. (Oct. 2008)); Tr. at 452-53.

Petitioners claim there are several ways in which the Applicant has failed to establish the need for power that would justify adding STP Units 3 and 4. First, Petitioners claim that CPS Energy itself has conceded it is experiencing a declining use of electricity.<sup>313</sup> Second, Petitioners assert this decline in demand obligates the Applicant to assess “the viability of new nuclear generation from the economic downturn and the increased funding for energy efficiency and renewable energy sources,” but that the Applicant has not done so.<sup>314</sup> Third, Petitioners maintain that CPS Energy’s decision to retire three of its natural gas-fired power plants confirms that there is inadequate demand in the area served, and so, for this reason as well, the Applicant cannot justify adding STP Units 3 and 4.<sup>315</sup>

Applicant asserts it has performed a need for power analysis, as required by NEPA,<sup>316</sup> in ER Chapter 8, and that the analysis has gone unchallenged by Petitioners.<sup>317</sup> Applicant further claims that Petitioners wrongly insist that the appropriate Region of Interest (ROI) is the CPS Energy service area rather than the Applicant’s choice of ROI — which is the Electric Reliability Council of Texas (ERCOT) service area.<sup>318</sup> The Applicant explains that excess power in the CPS Energy service area is of no consequence because “any generating capacity that exceeds the demand in the CPS Energy service area would be sold in the ERCOT wholesale market.”<sup>319</sup> Consequently, the Applicant concludes, “Petitioners’ allegations regarding a purported lack of need for power in the CPS Energy service area are simply immaterial to the need for power analysis for STP Units 3 and 4.”<sup>320</sup>

The Applicant also urges the Board to reject Petitioners’ assertion that its demand forecasts are insufficiently precise, claiming the NRC accepts that demand forecasting contains inherent uncertainties.<sup>321</sup> Similarly, Applicant maintains that its demand forecast is not flawed for failing to focus exclusively on an analysis of the current economic downturn because “[s]hort term fluctuations are not material to a long term need for power analysis.”<sup>322</sup> With respect to Petitioners’ assertion that CPS Energy conceded a declining electricity demand in its service area, the Applicant claims Petitioners have failed to show how such a concession is

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<sup>313</sup> Petition at 62 (citing statements from the Deputy General Manager of CPS Energy).

<sup>314</sup> Petition at 63.

<sup>315</sup> *Id.* at 63-64.

<sup>316</sup> STP Answer at 127.

<sup>317</sup> *Id.* at 123.

<sup>318</sup> *Id.* at 124.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> STP Answer at 125.

<sup>322</sup> *Id.* at 126.

material to the outcome of this licensing proceeding.<sup>323</sup> Finally, with respect to the retirement of CPS Energy's three natural gas-fired plants, the Applicant claims the retirement of these plants instead supports, not refutes, its need for power analysis because the retirement of these plants will require more power — which STP Units 3 and 4 will provide.<sup>324</sup>

Like the Applicant, the NRC Staff asserts that Petitioners have failed to address, much less controvert, the Applicant's need for power analysis.<sup>325</sup> The NRC Staff maintains that the Commission has for some time viewed the need for power analysis as limited to reasonable demand forecasts, and asserts that Petitioners have failed to show that the Applicant's analysis is unreasonable.<sup>326</sup> The NRC Staff also concurs with the Applicant's assessment of the appropriate ROI.<sup>327</sup> The NRC Staff concludes that Petitioners' assertions and supporting references fail to support the contention or show that the outcome of a different need for power analysis would be material to this proceeding and therefore, the contention must be rejected as inadmissible.<sup>328</sup>

We conclude Contention 26 is inadmissible for failure to raise a genuine dispute with the Application.<sup>329</sup> Petitioners have failed to provide any legal authority for their assertion that the subject ROI is the CPS Energy service area rather than the ERCOT system. Moreover, the Applicant has provided factual support for its selection of ERCOT as the appropriate ROI by demonstrating that there will be a need for power in the entire ERCOT system, which is inclusive of the CPS Energy service area.<sup>330</sup> Petitioners have not controverted this in any way. Likewise, Petitioners have failed to provide any legal or factual support for their claim that the involvement of a municipal utility creates a greater burden on the Applicant's need for power analysis. Even if we were to accept at face value Petitioners' claims of reduced energy consumption, economic downturn, and the retirement of other power generating units, these allegations are insufficient to controvert whether the Applicant's need for power analysis is reasonable.

When petitioners made a similar argument before another Board, that Board explained:

This Board does not decide energy policy, nor do we adjudicate the business wisdom of a proposed investment. Instead, at this stage, we are simply looking for some

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<sup>323</sup> *Id.* at 127.

<sup>324</sup> *Id.* at 129.

<sup>325</sup> Staff Answer at 95-96.

<sup>326</sup> *Id.* at 97.

<sup>327</sup> *Id.* at 97-98.

<sup>328</sup> *Id.* at 98-99; Tr. at 466.

<sup>329</sup> See 10 C.F.R. § 2.309(f)(1)(vi).

<sup>330</sup> See ER § 8.4.4.

indication that Petitioners have identified and articulated some concrete allegation as to how or why the ER fails to satisfy some legal requirement (*e.g.*, Part 51), and some understanding as to what will actually be litigated at the evidentiary hearing. This contention is not admissible because it is not plausibly explained or supported by alleged facts.<sup>331</sup>

Similarly here, Petitioners have entirely failed to allege facts or expert opinions that could create a genuine dispute with the Applicant's analysis of the need for power, and as such, their contention fails to demonstrate a genuine dispute.<sup>332</sup> Accordingly, we conclude this contention is inadmissible for failing to meet the requirements of 10 C.F.R § 2.309(f)(1)(vi).

*r. Contention 27*

Petitioners state in Contention 27:

The numerous "construction-related unavoidable impacts" have unacceptable adverse impacts. There should be remediation measures put in place that would effectively address these adverse impacts, but none are described, and apparently none are planned.<sup>333</sup>

Petitioners contend the Applicant has failed to quantify properly the adverse impacts relating to construction activities, including the potential dewatering of the aquifers and wells, impacts to water quality, increased sediment load,<sup>334</sup> increased air emissions and anticipated radiation doses to construction workers.<sup>335</sup> Petitioners also assert the Applicant has failed to provide necessary remediation efforts for these adverse impacts.<sup>336</sup>

Applicant asserts that Petitioners ignore the "extensive discussion in the ER of measures for mitigating construction impacts"<sup>337</sup> that directly address Petitioners' concerns.<sup>338</sup> With respect to Petitioners' allegations that construction activities will cause adverse impacts on the Colorado River, the Applicant claims several

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<sup>331</sup> *Levy*, LBP-09-10, 70 NRC at 135.

<sup>332</sup> *See* 10 C.F.R. § 2.309(f)(1)(vi).

<sup>333</sup> *Petition* at 64.

<sup>334</sup> *Tr.* at 478.

<sup>335</sup> *Petition* at 64-65; *Tr.* at 483.

<sup>336</sup> *Petition* at 65-66.

<sup>337</sup> *STP Answer* at 130.

<sup>338</sup> *Id.* at 131-33. During oral argument, the Applicant suggested that it plans to construct a slurry wall to a depth of 125 feet below grade. Behind the slurry wall, the Applicant asserted it plans to dewater the area where construction will occur, and that the slurry wall will ensure that the groundwater near the construction site will not be adversely impacted. *See Tr.* at 471-72.

ER sections<sup>339</sup> establish not only that “impacts of construction on the aquatic ecology of the Colorado River”<sup>340</sup> will be negligible, but that it will implement “mitigative measures”<sup>341</sup> to minimize those adverse impacts that will occur. With respect to Petitioners’ claim that construction activities will create excessive air emissions that are not addressed in the ER, the Applicant claims its ER details mitigative measures.<sup>342</sup> Finally, Applicant disputes Petitioners’ assertion that radiation protection is required for construction workers because 10 C.F.R. Part 20 establishes those work areas that might require such monitoring — and this is not one of them.<sup>343</sup> In this regard, the Applicant also argues that ER § 4.5 indicates that any potential dose to any construction worker for STP Units 3 and 4 will be “below the limits for members of the public in unrestricted areas.”<sup>344</sup>

The NRC Staff claims Petitioners have cherry-picked the ER, referring to certain isolated portions but not to others that contain critical information regarding this contention.<sup>345</sup> The NRC Staff also claims that Petitioners’ grievances with potential construction impacts, both to the workers and the environment, are discussed in detailed portions of the ER,<sup>346</sup> and that Petitioners fail to controvert the information in these provisions.<sup>347</sup>

We find this contention inadmissible because Petitioners have failed to demonstrate that a genuine dispute exists with the Application.<sup>348</sup> Although Petitioners claim that there will be impacts based on alleged dewatering of local aquifers and wells and the quantity of the drinking water will be negatively impacted, they fail to provide any support for this claim.

Petitioners’ contention fails in two fundamental respects. First, as set forth herein, there are several ER sections<sup>349</sup> pertinent to this contention that Petitioners fail to controvert. Second, although Petitioners assert Applicant has failed to analyze certain issues in the ER, they have provided no legal support mandating that such issues be addressed in the ER. Accordingly, we conclude Contention 27 is not admissible.

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<sup>339</sup> See ER §§ 10.1.1, 3.9S, 4.2, and 4.6.

<sup>340</sup> STP Answer at 133.

<sup>341</sup> *Id.* at 134.

<sup>342</sup> *Id.* at 130, 135 (citing ER §§ 10.1.1, 3.9S.1.1 and Tables 10.1-1 and 4.6-1).

<sup>343</sup> STP Answer at 135.

<sup>344</sup> *Id.*

<sup>345</sup> Staff Answer at 100-101.

<sup>346</sup> See ER §§ 10.1.1, 3.9S, 4.2, 4.6 and Tables 10.1-1 and 4.6-1.

<sup>347</sup> Staff Answer at 100-101.

<sup>348</sup> See 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

<sup>349</sup> See *supra* note 342.



s. *Contention 28*

Petitioners state in Contention 28:

Whooping cranes and endangered species analysis and protection are inadequate.<sup>350</sup>

Petitioners contend that the ER fails to address potential impacts to the endangered whooping crane. Petitioners claim section 2.4-4 of the Application places the “wintering habitat” of whooping cranes at only 35 miles southwest of STP Units 3 and 4, and assert “the migration of whooping cranes brings them even closer to the nuclear reactor site at times.”<sup>351</sup> Petitioners assert that despite the alleged close proximity of whooping cranes to STP Units 3 and 4, Applicant has failed to perform the necessary analysis.<sup>352</sup> Petitioners assert there are reports indicating “at least one crane . . . in the Bay City area”<sup>353</sup> and increased mortality rates for whooping cranes.<sup>354</sup> Petitioners argue the Applicant has also failed to analyze the effects of nuclear reactor accidents on the cranes as well as of the effects of radioactivity on the whooping crane food chain.<sup>355</sup>

Applicant asserts that Petitioners’ claim that the ER fails to address all pertinent information about whooping cranes is without any reliable factual support.<sup>356</sup> Applicant also argues that Petitioners have not controverted the Applicant’s conclusion in the ER that there “is no critical habitat within or adjacent to the STP site, noting that the whooping crane has not been observed within the STP site.”<sup>357</sup>

The NRC Staff interposes similar objections to the admission of this contention, claiming Petitioners have failed to provide the requisite support for their claim that the whooping crane population will be adversely affected by the operation of STP Units 3 and 4.<sup>358</sup> With respect to Petitioners’ allegation that Applicant must analyze the radiation exposure of the whooping crane food chain, the NRC Staff argues that Applicant has performed such an analysis in section 5.4-5 of its ER. The NRC Staff asserts that this analysis details potential radiological doses using “surrogate species that provide representative information about the various dose pathways potentially affecting broader classes of living organisms.”<sup>359</sup> In addition, the NRC

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<sup>350</sup> Petition at 66.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*; see also Tr. at 487.

<sup>353</sup> Petition at 66 (citing Aerial Census Report by Tom Stehn (Mar. 14, 2007)).

<sup>354</sup> Petition at 66 (citing Report by Tom Stehn (Apr. 7, 2009)).

<sup>355</sup> *Id.* at 67.

<sup>356</sup> STP Answer at 137.

<sup>357</sup> *Id.* (internal footnote omitted).

<sup>358</sup> Staff Answer at 103.

<sup>359</sup> *Id.* at 102-03 (quoting STP ER 5.4-5).

Staff claims that Petitioners have failed to provide any legal authority mandating any additional analysis.<sup>360</sup> The NRC Staff also takes issue with Petitioners' claimed support from a Mr. Tom Stehn — who apparently Petitioners wish to use as an expert here — because (1) the NRC Staff maintains Petitioners have failed to show how Mr. Stehn's references support their contention and (2) the NRC Staff claims it was unable to retrieve one of Mr. Stehn's reports, making it impossible for the NRC Staff to review the validity of this claim in the contention.<sup>361</sup>

We conclude Contention 28 is inadmissible for failure to raise a genuine dispute with the Application. This contention is footed in Petitioners' concern that construction of proposed STP Units 3 and 4 would endanger the habitat, migration patterns, and food chain of whooping cranes. With respect to Petitioners' primary concerns, Petitioners have not provided any expert support or facts to show that any critical habitat of whooping cranes would be adversely affected by the construction activities for proposed STP Units 3 and 4.<sup>362</sup> Petitioners not only have failed to place a single whooping crane on the proposed site for STP Units 3 and 4,<sup>363</sup> but they can, at best, assert the closest whooping crane sighting to be 35 miles from the site.<sup>364</sup>

Additionally, with respect to the whooping crane flight path, Petitioners were unable to show that there was any migratory flight path in danger of being affected by the site plans.<sup>365</sup> With respect to Petitioners' claim that Applicant has failed to analyze the radiological impacts of the proposed two new units on the food chain, in fact the Applicant addresses this very issue in ER § 5.4-5<sup>366</sup> — which Petitioners did not controvert.<sup>367</sup> Accordingly, Petitioners have failed to raise a genuine dispute with the Application and their contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi).

### III. CONCLUSION

Having found standing on the part of Petitioners, and admitted one of their contentions, we conclude that the requested hearing in this proceeding should be granted.

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<sup>360</sup> Staff Answer at 103-04.

<sup>361</sup> *Id.* at 104-05.

<sup>362</sup> Given a chance at oral argument to identify any critical habitat that would be adversely affected by the construction activities, Petitioners could not do so. *See* Tr. at 488.

<sup>363</sup> Tr. at 488-89.

<sup>364</sup> Tr. at 489-90.

<sup>365</sup> Tr. at 490-92.

<sup>366</sup> *See* ER § 5.4-5.

<sup>367</sup> Tr. at 496-97.

#### IV. ORDER

Based on our conclusions, we hereby ORDER the following:

A. Petitioners SEED, Public Citizen, and the South Texas Association for Responsible Energy are admitted as parties in this proceeding, and their Petition for Intervention and Request for Hearing is granted in part and denied in part. A hearing is GRANTED with respect to their Contention 21.

B. Contentions numbered 1-7, 17-20, and 22-28 are inadmissible and will not be litigated in this proceeding. Contentions 8-16 will be addressed in a separate and subsequent Order.

C. Regarding the conduct of the hearing in this proceeding, as Petitioners have not requested that the hearing be conducted under 10 C.F.R. Part 2, Subpart G, we ORDER that the proceeding be conducted under the procedures set forth at 10 C.F.R. Part 2, Subparts C and L.

D. In October 2009, the Licensing Board will schedule a prehearing telephone conference during which the parties will address relevant scheduling matters in the proceeding, and thereafter will issue an Order setting forth a schedule of further proceedings in this matter. Prior to such time, the parties may wish to confer in the interest of reaching consensus on scheduling matters and submitting a joint proposal to the Board for its consideration.

E. 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.<sup>368</sup>

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<sup>368</sup> Appeals relative to this ruling need to be made on a timely basis in accordance with 10 C.F.R. § 2.311. There will be a separate order with the decision on contentions 8-16, and that order will contain separate appeals rights.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Michael M. Gibson, Chairman  
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Dr. Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 27, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alex S. Karlin**, Chairman  
**Dr. Anthony J. Baratta**  
**Dr. William M. Murphy**

**In the Matter of**

**Docket Nos. 52-029-COL  
52-030-COL  
(ASLBP No. 09-879-04-COL-BD01)  
(Combined License Application)**

**PROGRESS ENERGY FLORIDA, INC.  
(Levy County Nuclear Power Plant,  
Units 1 and 2)**

**August 27, 2009**

**INITIAL SCHEDULING ORDER**

This proceeding concerns an application by Progress Energy Florida, Inc. (PEF) for licenses to construct and operate two nuclear power reactors in Levy County, Florida. Under the NRC regulations, this Board has the “duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.” 10 C.F.R. § 2.319. This initial scheduling order is designed to ensure proper case management of this proceeding, including “[e]xpediting the disposition of the proceeding; . . . [e]stablishing early and continuing control so that the proceeding will not be protracted because of lack of management; . . . [d]iscouraging wasteful prehearing activities; . . . [i]mproving the quality of the hearing; . . . and . . . [f]acilitating settlement,” 10 C.F.R. § 2.332(c)(1)-(5). The initial scheduling order

must be issued “as soon as practicable” after the request for hearing is granted. 10 C.F.R. § 2.332(a).<sup>1</sup>

## I. BACKGROUND

On July 28, 2008, PEF submitted an application to the NRC for licenses to construct and operate the proposed Levy Nuclear Plant Units 1 and 2, in Levy County, Florida. On December 8, 2008, the NRC published a “Notice of Hearing and Opportunity to Petition for Leave to Intervene” in the PEF proceeding in the *Federal Register*. 73 Fed. Reg. 74,532 (Dec. 8, 2008). On February 6, 2009, three entities — the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (jointly, Intervenors) — filed a joint petition requesting intervention herein. On July 8, 2009, the Board ruled, *inter alia*, that Intervenors had standing to challenge PEF’s combined license application and had presented at least one contention that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1).<sup>2</sup> The Board granted Intervenors’ hearing request and admitted portions of three of their contentions.<sup>3</sup> The Board also ruled, based on the information available at that time, that the 10 C.F.R. Part 2, Subpart L hearing procedures were appropriate for each of the three contentions. LBP-09-10, 70 NRC at 146.

On July 10, 2009, the Board scheduled an initial conference, pursuant to 10 C.F.R. §§ 2.329 and 2.332, for the purpose of developing a scheduling order to govern the conduct of this proceeding.<sup>4</sup> The Order stated that the scheduling conference would cover, *inter alia*, nineteen enumerated items related to the schedule and management of the case and directed the parties to confer concerning these items. In addition, the Order instructed the NRC Staff to submit a written estimate of its projected schedule for completion of its safety and environmental evaluation reports. In response, on July 28, 2009, the NRC Staff filed its estimate that the Staff would issue its Final Environmental Impact Statement (FEIS) on the proposed license application on September 22, 2010, and its Final Safety Evaluation Report (FSER) on May 5, 2011.<sup>5</sup> On August 14, 2009, the parties filed

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<sup>1</sup> See also 10 C.F.R. Part 2, Appendix B, § II, Model Milestones for Hearing Conducted Under 10 C.F.R. Part 2, Subpart L (Initial scheduling order to be issued within 55 days of Board decision granting intervention and admitting contentions).

<sup>2</sup> *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51 (2009).

<sup>3</sup> PEF has appealed the Board’s ruling. *Progress Energy Florida, Inc.’s Brief in Support of Appeal from LBP-09-10* (July 20, 2009).

<sup>4</sup> Licensing Board Order (Scheduling Initial Scheduling Conference) (July 10, 2009) (unpublished) (Order).

<sup>5</sup> Letter from Sara Kirkwood, Counsel for NRC Staff (July 28, 2009).

a joint motion regarding the nineteen enumerated items, together with proposed language addressing these items, and other matters, to be considered for inclusion in the initial scheduling order.<sup>6</sup>

On August 18, 2009, the Board conducted the initial scheduling conference. The parties, including the NRC Staff, stated their views regarding the nineteen items listed in the Order, as well as their views on certain other matters that arose.<sup>7</sup> Based on the Joint Motion, the parties' statements at the conference, the NRC Staff's projected schedule, the regulatory requirements, and the nature and circumstances of this case, the Board now issues this initial scheduling order.

## II. SCHEDULE

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the Board establishes the following initial schedule for this matter.

### A. Mandatory Disclosures and Production of Hearing File<sup>8</sup>

The regulations specify that, within thirty (30) days of the Board's ruling admitting contentions, the parties must automatically make certain mandatory disclosures. 10 C.F.R. § 2.336(a). Likewise, the NRC Staff must make certain mandatory disclosures. 10 C.F.R. § 2.336(b). In addition, Subpart L proceedings require the NRC Staff to produce a hearing file and make it available to all parties. 10 C.F.R. § 2.1203(a). In this case, the Board denied a motion to suspend such disclosures (ruling that the pendency of an appeal should not suspend this proceeding),<sup>9</sup> but granted a short extension to accommodate certain logistical difficulties of one of the representatives of the parties.<sup>10</sup> Thus, the deadline for the first mandatory disclosures and the production of the hearing file is September 1, 2009.

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<sup>6</sup> Joint Motion Regarding Enumerated Matters in Initial Scheduling Conference Order (Aug. 14, 2009) (Joint Motion).

<sup>7</sup> Pursuant to 10 C.F.R. § 2.1202(b)(2), the NRC Staff notified the Board that it will participate as a party on all admitted contentions. Letter from Sara Kirkwood, Counsel for NRC Staff (July 23, 2009).

<sup>8</sup> Except where otherwise specified herein, the term "mandatory disclosures" includes the witness lists and privilege logs required under 10 C.F.R. § 2.336(a) and (b).

<sup>9</sup> Order (Denying Motion to Suspend Discovery) (July 23, 2009) (unpublished).

<sup>10</sup> Order (Suspending Certain Mandatory Disclosures Until September 1, 2009) (July 31, 2009) (unpublished).

### **1. *Updating of Disclosures***

The regulations specify that the parties and the NRC Staff have a “continuing” duty to update their mandatory disclosures, 10 C.F.R. § 2.336(d), and that the NRC Staff has a “continuing” duty to update the hearing file. 10 C.F.R. § 2.1203(c). But the regulations are not clear as to the frequency of such updates. Based on the Joint Motion and discussions during the August 18, 2009 conference, the Board directs that the parties and the NRC Staff shall update their disclosures and the hearing file monthly, on the second Thursday in October and November of 2009, and thereafter on the third Thursday of every month beginning in January 2010.<sup>11</sup> Each update shall cover all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party or the NRC Staff (or their agents) as of the last day of the preceding month.<sup>12</sup>

### **2. *Privilege Logs***

The regulations require that the parties and the NRC Staff provide a “list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.” 10 C.F.R. § 2.336(a)(3). *See also* 10 C.F.R. § 2.336(b)(5). These are referred to as “privilege logs.”<sup>13</sup> The parties have waived the requirement to provide privilege logs for documents claimed to be covered by the attorney-client privilege and the attorney work product privilege. However, the parties and NRC Staff agreed that they must still produce, as part of their mandatory disclosures, privilege logs covering documents claimed to qualify for protected status as security-related information or as proprietary documents. *See, e.g.*, 10 C.F.R. § 2.390(a)(1), (3), and (4).

### **3. *Scope of Disclosures and Hearing File***

(i) If a party or the NRC Staff generates the document in question, then it may limit mandatory disclosures to its final document and need not include its internal drafts, including comments on drafts, resolution of comments, draft transmittals, or other similar documents. However, if a party or the NRC Staff has legal possession, custody, or control of a document developed by someone

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<sup>11</sup> The Parties need not update their disclosures or the hearing file in December of 2009.

<sup>12</sup> The Board recognizes that the September 1, 2009 disclosures cannot be completely current as of September 1, and will entail some reasonable lag time.

<sup>13</sup> Section 2.336(a)(3) and (b)(5) covers documents claimed to be *privileged* and documents claimed to be *protected*. In both cases, the party or the NRC Staff must identify and list the document “together with sufficient information for assessing the claim of privilege or protected status . . . .” *Id.*



else, and which is otherwise subject to mandatory disclosure (e.g., relevant to a contention), then the party or the NRC Staff must produce that document (even if it is labeled “draft”) unless that party or the NRC Staff knows that the other person has already disclosed that document herein.<sup>14</sup>

(ii) A party and the NRC Staff need not identify or produce a document that has been served on the other parties to this proceeding.

(iii) If a document exists in both hard copy and electronic formats, then the party or the NRC Staff need only produce the electronic copy.

(iv) All documents that are required to be disclosed pursuant to 10 C.F.R. § 2.336(b) and that are available via the NRC’s website or the NRC’s Agencywide Documents Access and Management System (ADAMS) shall be specifically identified by the NRC Staff as required under 10 C.F.R. §§ 2.336(b) and 2.1203. Documents so disclosed and so identified do not need to be identified or produced by any other party.<sup>15</sup>

#### ***4. Electronically Stored Information***

(i) REASONABLE SEARCH. Mandatory disclosures and the production of the hearing file shall include electronically stored information and documents (ESI). In implementing their responsibilities, the parties and the NRC Staff shall conduct a reasonable good faith search for all documents or information, including ESI, subject to the mandatory disclosure and hearing file requirements. Each production or disclosure shall include a signed affidavit attesting that the party or the NRC Staff has conducted such a search, and that the disclosure or production excludes only (a) documents or information exempted from disclosure pursuant to the law, including NRC regulations or this order, and (b) information that is not reasonably accessible because of undue burden or cost.<sup>16</sup>

(ii) FORMAT OF PRODUCTION. The parties and the NRC Staff shall disclose each document in the same form as the original document in the party’s or the Staff’s possession, custody, or control. ESI shall be disclosed or produced in

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<sup>14</sup>The reason for this rule is simple. If the person who developed a document considered it sufficiently final to share it with an external third party (e.g., a party or the NRC Staff) who is a litigant herein, then we do not deem that document, even if it is still labeled “draft,” exempt from the mandatory disclosure requirements.

<sup>15</sup>At the evidentiary hearing stage, however, the Board may require the NRC Staff or the parties to produce separate electronic or paper copies of certain important documents such as the FEIS, FSER, and COLA.

<sup>16</sup>*Cf.* Fed. R. Civ. P. 16(b)(5) (scheduling order to include “provisions for disclosure of electronically stored information”); 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost”).

searchable electronic form to the same extent that the original ESI in that person's possession, custody, or control was searchable.

### **5. Termination**

The duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing.

## **B. Protective Order and Nondisclosure Agreement<sup>17</sup>**

### **1. Confer**

On or before October 1, 2009, the parties and the NRC Staff shall confer with one another for the purpose of discussing and developing a joint proposed protective order and nondisclosure agreement dealing with the handling (and redaction) of documents that are claimed to contain privileged, proprietary, or otherwise protected information.<sup>18</sup>

### **2. Submission**

On or before October 15, 2009, the parties and the NRC Staff shall submit to the Board either (i) a unanimously agreed upon proposed protective order and nondisclosure agreement; or (ii) individually or jointly proposed protective orders and nondisclosure agreements. In either event, the proposals may be accompanied by a short brief, not to exceed five (5) pages, explaining the proposal and submission.

### **3. Response Brief**

If, but only if, the parties and the NRC Staff are unable to submit a unanimously agreed upon proposed protective order and nondisclosure agreement, then, on or before October 22, 2009, the parties and the NRC Staff may each file a brief (not

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<sup>17</sup> Documents covered by a protective order are nevertheless required to be included in a privilege log. Indeed, the only way that an opposing party can learn of the existence of such a document, and thus to request access to that document, is for it to be included in the privilege log.

<sup>18</sup> See Licensing Board Order (Protective Order Governing Non-Disclosure of Certain Documents Claimed to be Proprietary) (Jan. 12, 2007) (unpublished) (ADAMS Accession No. ML070120327) in *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR, ASLBP No. 06-849-03-LR, for a good example of a protective order and nondisclosure agreement in a Subpart L proceeding.

to exceed five (5) pages) responding to any points previously raised by the other parties.

### **C. Disclosure Disputes and Motions to Compel**

On or before October 29, 2009, the parties and the NRC Staff shall file any motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected, concerning any disclosures occurring prior to that date. Thereafter, any such motion or challenge shall be filed within ten (10) days after the occurrence or circumstance from which the motion arises, in accordance with 10 C.F.R. § 2.323(a).<sup>19</sup> For example, an objection to the claim that a document qualifies for protection as a “proprietary” document must ordinarily be filed within ten (10) days of the service of the privilege log where that document was first added.

### **D. Monthly Status Report**

Commencing on October 1, 2009, the NRC Staff shall submit a short report specifying its best estimate of the dates it expects to issue the draft and final version of the Environmental Impact Statement (DEIS and FEIS), the Advanced Final Safety Evaluation Report (AFSER) and the Final Safety Evaluation Report (FSER), and the dates when it understands that the Advisory Committee on Reactor Safety (ACRS) and its relevant subcommittees plan to issue any reports concerning PEF’s proposed combined license. Thereafter, the Staff shall update this status report on the first Thursday of each month.

### **E. Requests for Subpart G Proceeding Based on Disclosures of Eyewitness<sup>20</sup>**

A request that a contention or other contested matter be handled pursuant to Subpart G procedures based on 10 C.F.R. § 2.310(d) (which focuses, *inter alia*, on issues “where the credibility of an eyewitness may reasonably be expected to

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<sup>19</sup> If they believe that it will facilitate the amicable resolution of privilege claim disputes without the intervention of the Board, the parties and/or the NRC Staff may propose to the Board a modification to the 10-day rule and/or other dispute resolution mechanisms.

<sup>20</sup> Mandatory disclosures by the parties include the disclosure of “[t]he name . . . of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion.” 10 C.F.R. § 2.336(a)(1).

be at issue, and/or issues of motive or intent of the party or eyewitness”) shall be filed as follows:

1. For witnesses identified in the September 1, 2009, mandatory disclosures, on or before September 22, 2009; and
2. For additional witnesses identified by an opposing party in subsequent mandatory disclosures, within twenty (20) days of said event.

## **F. Additional Contentions**

### **1. Consolidated Briefing**

If a party seeks to file a motion or request for leave to file a new or amended contention (timely or untimely), then it shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a *timely* new or amended contention under 10 C.F.R. § 2.309(f)(2), *or* a motion for leave to file an *untimely* new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention. Within seven (7) days of service of the answer, the movant may file a reply.<sup>21</sup>

### **2. Timeliness**

A motion and proposed new contention specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) *and* the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).

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<sup>21</sup> This procedure resolves difficulties that have arisen in several proceedings concerning the interplay of the sequence and timing for motions under 10 C.F.R. §§ 2.309(f)(2) and 2.323 (motion, answer), and the sequence and timing for contentions under 10 C.F.R. § 2.309(h) (contention, answer, reply). Further, this procedure expedites the process by collapsing the two-step process established by the regulations into a single step.

### **3. Selection of Hearing Procedures**

A motion and proposed new contention specified in section II.F.1, above, may address the selection of the appropriate hearing procedure for the proposed new contention. *See* 10 C.F.R. §§ 2.309(g) and 2.310(d).

## **G. Pleadings and Motions — Generally**

### **1. Pleadings — Page Limitation**

Motions and answers to motions shall not exceed fifteen (15) pages in length (including signature page but excluding attachments, *see* section II.K.5, *infra*) absent preapproval of the Board. A motion for preapproval to exceed this page limitation shall be submitted in writing no less than three (3) business days prior to the time the motion or answer is due to be filed. A motion to exceed this page limitation must (i) indicate whether the request is opposed or supported by the other participants to the proceeding; (ii) provide a good faith estimate of the number of additional pages that will be filed; and (iii) demonstrate good cause for being permitted to exceed the page limitation.

### **2. Response to New Facts or Arguments in Answer Supporting a Motion**

Except for a motion to file a new or amended contention as set forth in section II.F, *supra*, or where there are compelling circumstances, the moving party has no right to reply to an answer or response to a motion. *See* 10 C.F.R. § 2.323(c). However, if the NRC Staff or any party files an answer that *supports* a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a response to any new facts or arguments presented in that answer. Except as otherwise specified herein, no further supporting statements or responses thereto will be entertained.<sup>22</sup>

### **3. Motion for Leave to File Reply**

If a party or the NRC Staff seeks to file a reply, it must first obtain leave of the Board. A motion for leave to file a reply shall be submitted no less than three (3) business days prior to the time the reply would need to be filed.<sup>23</sup> In addition to all

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<sup>22</sup> This provision avoids unnecessary confusion and litigation that has arisen on this point in several cases. This provision is modeled on 10 C.F.R. § 2.710(a).

<sup>23</sup> Although the agency's rules of practice regarding motions do not provide for reply pleadings, the Board will presume that for a reply to be timely it would have to be filed within seven (7) days of the date of service of the response it is intended to address. *See* 10 C.F.R. § 2.309(h)(2).

other requirements, a motion to file a reply must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate good cause for permitting the reply to be filed.

#### ***4. Motion for Extension of Time***

A motion for extension of time shall be submitted in writing at least three (3) business days before the due date for the pleading or other submission for which an extension is sought. In addition to all other requirements, a motion for extension of time must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate appropriate cause that supports permitting the extension.

#### ***5. Answer Opposing a Motion to Exceed the Page Limitation, to File a Reply, or to Extend the Time for Filing a Pleading***

An answer to a motion to exceed the page limit, to file a reply, or to extend the time for filing a pleading shall be filed and served on the next business day after the filing of the request.

#### ***6. Motion Certification***

In accordance with 10 C.F.R. § 2.323(b), a motion will be rejected if it does not include the following certification by the attorney or representative of the moving party:

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.<sup>24</sup>

#### ***7. Answer Certification***

If the attorney or representative of a party is contacted pursuant to the consulta-

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<sup>24</sup> Although in general the movant has only ten (10) days within which to file its motion under 10 C.F.R. § 2.323(a), the Board believes that, in order to be sincere, the effort should be timely, i.e., not initiated at the last minute, but instead should be commenced sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 128 (2006). If the initial consultation is initiated at a reasonable time and the parties believe that all or part of the matter may be resolved amicably if additional time for filing the motion were provided, the parties are encouraged to file a joint motion requesting an extension of time.

tion requirement of 10 C.F.R. § 2.323(b), then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion. If the answering party is unaware of any attempt by the moving party to contact it, then the answer shall so certify. Otherwise, an answer will be rejected if it does not include the following certification by the contacted attorney or representative (or his or her alternate) of the answering party:

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

It is inconsistent with the dispute avoidance/resolution purposes of 10 C.F.R. § 2.323(b), and thus insufficient, for the contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that "it takes no position on the motion (or issues) and that it reserves the right to file a response to the motion when it is filed."

#### **8. *Supplemental Information***

The certifications specified in the foregoing two subsections may be supplemented with any additional information that the representative or attorney deems necessary to ensure the accuracy of the certification or to explain the situation.

#### **9. *Consolidation of Intervenors for Purposes of Consultation***

Pursuant to 10 C.F.R. § 2.314(b), each of the three Intervenors has designated one or more of its own members to serve as its *pro se* representative, and each of them has filed a notice of appearance.<sup>25</sup> During the initial scheduling conference, the NRC Staff asked whether 10 C.F.R. § 2.323(b) required consultation with all three representatives. Tr. at 450. In response, the Intervenors filed a statement indicating that they had jointly designated Mary Olson as the lead point of contact, and Michael Mariotte as the alternate point of contact, for all three of

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<sup>25</sup> Notice of Appearance of Mary Olson on Behalf of Nuclear Information and Resource Service (Feb. 6, 2009); Notice of Appearance of Cara Campbell [on Behalf of the Ecology Party of Florida] (Apr. 6, 2009); Notice of Appearance of Gary Hecker [on Behalf of the Ecology Party of Florida] (Apr. 6, 2009); Notice of Appearance of Michael Canney [on Behalf of the Green Party of Florida] (Apr. 6, 2009).

the Intervenors.<sup>26</sup> Accordingly, and pursuant to our authority under 10 C.F.R. §§ 2.316 and 2.319(c), the Board determines that the NRC Staff or a party may consult with Ms. Olson or Mr. Mariotte and, for purposes of 10 C.F.R. § 2.323 and consultation hereunder, these individuals shall be deemed to speak for, and have the authority of, all three Intervenor organizations. These individuals shall be responsible for internal coordination, communication, and authorization among the three Intervenor organizations.

#### **H. Dispositive Motions**

Given that dispositive motions, such as motions for summary disposition under 10 C.F.R. § 2.1205 and Subpart L evidentiary hearings under 10 C.F.R. § 2.1207, are both conducted on the basis of *written* pleadings, testimony, and exhibits, the Board finds that such motions for summary disposition, especially if filed late in the proceeding when the parties are heavily engaged in other important tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serving to narrow or expedite the resolution of the adjudicatory proceeding. Indeed, the Subpart L proceeding has two key advantages over motions for summary disposition. First, in a Subpart L evidentiary hearing the Board may ask the witnesses to appear in person and answer questions, the answers to which might significantly assist in resolving the matter.<sup>27</sup> This is not possible when ruling on a motion for summary disposition. Second, in an evidentiary hearing the Board may *weigh* competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where “there is no genuine issue as to any material fact.” 10 C.F.R. § 2.710(d)(2). *See also id.* § 2.1205. Further, a motion for summary disposition requires significant and often duplicative time and effort from all parties (and the Board), whereas Subpart L evidentiary hearings have proven to be short, usually requiring a day or less to hear a contention. In these circumstances, motions for

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<sup>26</sup> Notice of Appearance [of Mary Olson] (Aug. 20, 2009); Notice of Appearance [of Michael Mariotte] (Aug. 20, 2009).

<sup>27</sup> 10 C.F.R. § 2.1207(b)(6). The Board may also allow parties to conduct cross-examination in Subpart L proceedings pursuant to 10 C.F.R. § 2.1204(b)(3). To date, no party has ever been granted the opportunity to conduct cross-examination in a Subpart L proceeding.



summary disposition and other dispositive motions, while permissible, will be managed in this proceeding as follows:<sup>28</sup>

### ***1. Certification***

A dispositive motion (e.g., motion for summary disposition or a motion to dismiss) will be rejected unless, in addition to the signature requirements of 10 C.F.R. § 2.304(d) and the certifications required by 10 C.F.R. § 2.323(b) and this order, the motion includes the following certification by the attorney or representative of the moving party:

I certify that this motion is not interposed for delay, prohibited discovery, or any other improper purpose, that I believe in good faith that there is no genuine issue as to any material fact relating to this motion, and that the moving party is entitled to a decision as a matter of law, as required by 10 C.F.R. §§ 2.1205 and 2.710(d).<sup>29</sup>

### ***2. Additional Time for Dispositive Motions***

In light of the gravity and importance of dispositive motions, and in order to accommodate careful consultation as specified above, dispositive motions may be filed twenty (20) days after the occurrence or circumstance from which the motion arises (rather than the ten (10) day time frame established by 10 C.F.R. § 2.323(a)),

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<sup>28</sup>The Commission has stated that

[t]here may be times in the proceeding where motions for summary disposition should not be entertained because consideration of the motion would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues or distracting other parties and the presiding officer from their preparation for a scheduled hearing. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The presiding officer . . . is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide presiding officers the flexibility to make that determination in most proceedings.

Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2186 (Jan. 14, 2004). More recently, the Commission issued a notice in an expedited case prohibiting summary disposition motions from proceeding absent an affirmative finding by the Board that it would expedite the proceeding (“the Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Licensing Board finds that such motions, if granted, are likely to expedite the proceeding”). Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation; In the Matter of Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility), 74 Fed. Reg. 38,052, 38,057 (July 30, 2009).

<sup>29</sup>See 10 C.F.R. § 2.304(d) (Representations of a Signatory to a Pleading); cf. Fed. R. Civ. P. 11(b).

*provided that* the moving party commences sincere efforts to contact and consult all other parties within ten (10) days of the occurrence or circumstance, and the accompanying certification so states.

### **3. Answers**

In accordance with 10 C.F.R. § 2.1205(b), an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within twenty (20) days after service of the motion. *See also* section II.G.4, *supra*.

### **4. Continuance**

If it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party “cannot, for reasons stated, present by affidavit facts essential to justify the party’s opposition,” the Board may refuse the application for summary disposition or may order a continuance as may be necessary or just. *See* 10 C.F.R. § 2.710(c); *cf.* Fed. R. Civ. P. 56(f).

### **5. Deadline**

With regard to any contention based on 10 C.F.R. Part 51 or the National Environmental Policy Act, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the FEIS.<sup>30</sup> With regard to any other contention or issue, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the Advanced FSER (AFSER).

## **I. Clarification, Simplification, and Amendment of the Pleadings**

In the August 14, 2009, Joint Motion and during the initial scheduling conference, the parties and the NRC Staff stated that it was their consensus that it is premature to address the following issues:

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<sup>30</sup>Consistent with the Commission’s scheduling instructions in a recent case, *see* 74 Fed. Reg. 38,057 (July 30, 2009)), if all contentions, other than Part 51 and NEPA contentions, have been dismissed when the FEIS is published, then *no answer* to a motion for summary disposition or other dispositive motion filed after the FEIS is published *is required*, or appropriate, *unless and until ten (10) days after* the Board issues an affirmative determination that the motion will not interfere with preparations and filings related to the evidentiary hearing and that its resolution will serve to expedite the proceeding. The Board will endeavor to make such determination within ten (10) days.

1. The clarification, simplification, or specification of the issues;
2. The necessity or desirability of amending the pleadings;
3. Opportunities to develop stipulations or admissions of fact; and
4. Opportunities for the settlement of issues or contentions.

Nevertheless, the Board encourages the parties and NRC Staff to continue to consider and pursue such measures, as specified in 10 C.F.R. §§ 2.329(c)(1)-(3) and 2.338. We will revisit these issues throughout this proceeding. For example, if it appears that stipulations or admissions of fact can narrow or eliminate factual or legal disputes, the parties and the NRC Staff are encouraged to consult with each other and/or file motions to pursue same.

## **J. Evidentiary Hearing Filings**

The Board currently contemplates a single evidentiary hearing herein, which will cover both the two environmental contentions and the single safety contention. Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing. The Board has determined that the earliest practicable trigger date for the initiation of such filings is the date when the NRC Staff makes the FEIS publicly available or the date when the ACRS makes its final report on the PEF application publicly available, whichever is last to occur.<sup>31</sup> This shall be deemed the “Trigger Date.”<sup>32</sup>

### ***1. Initial Statements of Position, Testimony, Affidavits, and Exhibits***

Forty-Five (45) days after the Trigger Date, all parties and the NRC Staff shall file their initial written statement of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise roadmap of the party’s case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence supports a factual or legal position). The

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<sup>31</sup> Section 2.332(d) of 10 C.F.R. prohibits the commencement of evidentiary hearings on environmental issues until after the FEIS. It also prohibits commencement of evidentiary hearings on safety issues until after the FSER, unless the Board affirmatively finds that the safety hearing can be held earlier and still expedite the ultimate resolution of the case.

<sup>32</sup> By using the ACRS final report as the Trigger Date, we are accelerating the Subpart L evidentiary hearing by several months. Heretofore, most boards have (explicitly or implicitly) used the FSER as the Trigger Date to commence the evidentiary hearing filings.

written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for their statements or position.

## **2. *Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits***

No later than twenty (20) days after service of the materials submitted under paragraph J.1, the parties and the NRC Staff shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for their statements or position. Being in the nature of rebuttal, the response, rebuttal testimony, and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.

## **3. *Motions In Limine or to Strike***

No later than ten (10) days after service of the materials submitted under section II.J.2, the parties and the NRC Staff shall file their motions in limine or motions to strike regarding the materials submitted under sections II.J.1 and II.J.2. Answers shall be filed no later than seven (7) days after service of such motions.

## **4. *Proposed Questions for Board to Ask***<sup>33</sup>

No later than thirty (30) days after service of the materials submitted under section II.J.2, all parties and the NRC Staff shall file proposed questions for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The direct or rebuttal examination plans should contain a brief description of the issue or issues which the party contends need further examination, the objective of the examination, and the proposed line of

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<sup>33</sup> A party should cover all essential points in the direct and rebuttal testimony that it prefiles for each of its own witnesses. The prefiled proposed questions should not focus on a party's own witnesses, but should instead be directed to the witnesses of the *other* parties.

questioning (including specific questions) that may logically lead to achieving the objective. The proposed direct examination questions and plans should be filed *in camera* and not served on the NRC Staff or any other party.

**5. *Motions for Cross-Examination***<sup>34</sup>

No later than thirty (30) days after service of the materials submitted under section II.J.2, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b). The motion for cross-examination shall be filed with all parties, but the cross-examination plan itself should be filed *in camera* and not be served on the NRC Staff or any other party.

**6. *Evidentiary Hearing***

Although the specific time and date for the evidentiary hearing will be determined later, the Board currently contemplates that it will commence between thirty (30) and seventy-five (75) days after the service of the material specified in sections J.4 and J.5.

**7. *Witness with Written Testimony Must Be Available in Person***

Unless the Board expressly provides otherwise, each party (including the NRC Staff) must, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony attends the evidentiary hearing in person and is available to testify and to respond orally to questions.<sup>35</sup>

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<sup>34</sup>“The standard for allowing the parties to conduct cross-examination is the same under Subparts G and L, to wit — the Administrative Procedure Act (APA) standard for cross-examination in formal administrative proceedings as set forth in 5 U.S.C. § 556(d) (“A party is entitled . . . to conduct such cross examination as may be required for a full and true disclosure of the facts”). See *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004); see also 69 Fed. Reg. at 2195-96.” *Levy County*, LBP-09-10, 70 NRC at 145.

<sup>35</sup> If, after reading the prefiled testimony, the Board concludes that it has no questions for a particular witness, it will so advise the parties and that individual will not need to attend the evidentiary hearing. Likewise, if the Board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and will resolve that contention pursuant to 10 C.F.R. § 2.1208.

## **K. Attachments to Filings**

### **1. Documents Must Be Attached**

If a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), then a copy of that document, or the relevant portion thereof, shall be submitted with and attached to the pleading. The pleading must cite to the specific page or section of the document that is relevant.

### **2. Exception**

If the following documents are publicly available on the NRC ADAMS system, then they do not need to be attached to a motion or pleading: PEF's Application and Environmental Report, the DEIS, the FEIS, the AFSEER, and the FSEER. With regard to such documents, it is sufficient if the pleading clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the specific page or section that is relevant. All other documents (or the relevant portions thereof), even if they can be found in ADAMS, should be attached to the pleading.<sup>36</sup>

### **3. Attached Documents Are "Attachments"**

All documents referred to in the pleadings (pursuant to the two preceding paragraphs) shall be labeled and referred to as "Attachments," not exhibits.<sup>37</sup>

### **4. Designation and Marking of Attachments**

A separate numeric designation shall be assigned to each Attachment (e.g., Attachment 3). With regard to Attachments covered by section II.K.1, the numeric designation shall be prominently marked either on the first page of the appended document or on a cover/divider sheet in front of the appended document.

### **5. Page Limits/Method of Electronic Submission**

Attachments are not subject to the page limitation set forth in section II.G.1,

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<sup>36</sup>The NRC's E-Filing guidance document has guidance concerning the filing of copyrighted material. See <http://www.nrc.gov/site-help/e-submittals.html> (under Submittal Instructions, access link for Guidance for Electronic Submissions to the NRC, Revision 4).

<sup>37</sup>The term "exhibit" is reserved for use as a designation for those items that are submitted pursuant to section II.J as proffered *evidence* for the evidentiary hearing.

above. All Attachments associated with a pleading shall be submitted *together* via the E-Filing system as a *single* electronic file that consists of the pleading or other submission, the certificate of service, and all the Attachments. If, however, the submission exceeds 15 megabytes in size, then the pleading should be separated into two submissions, each less than 15 megabytes.<sup>38</sup>

IT IS SO ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>39</sup>

Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta  
ADMINISTRATIVE JUDGE

Dr. William M. Murphy  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 27, 2009

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<sup>38</sup>This accords with NRC's E-Filing guidance (at page 14). See <http://www.nrc.gov/site-help/e-submittals.html> (under Submittal Instructions, access link for Guidance for Electronic Submissions to the NRC, Revision 4).

<sup>39</sup>Copies of this Memorandum and Order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Progress Energy Florida, Inc. (2) Nuclear Information and Resource Service, The Green Party of Florida, and The Ecology Party of Florida; and (3) NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**G. Paul Bollwerk, III, Chairman**  
**Dr. Richard F. Cole**  
**Dr. Jeffrey D. E. Jeffries**

**In the Matter of**

**Docket No. 52-037-COL**  
**(ASLBP No. 09-884-07-COL-BD01)**

**AMERENUE**  
**(Callaway Plant, Unit 2)**

**August 28, 2009**

In this 10 C.F.R. Part 52 proceeding regarding the application of AmerenUE (AUE) for a combined license (COL) to authorize the construction and operation of an additional reactor at the existing Callaway Plant site, in ruling on a joint motion for approval of a settlement agreement filed by AUE, the NRC Staff, and the various Petitioners who seek to intervene to challenge the AUE COL application, finding the agreement is consistent with the content and form provisions of 10 C.F.R. § 2.338(g)-(h) and is in the public interest in accord with section 2.338(i), the Licensing Board grants the participants' motion, approves the settlement agreement, and terminates the contested adjudicatory hearing in the proceeding.

**RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION**

As is reflected in 10 C.F.R. § 2.107(a), when an applicant decides it no longer wishes to have the agency evaluate its application, the usual approach is for the applicant to request that the agency permit it to withdraw its licensing request. Such a termination would, of course, end all agency consideration of the matter,



including any Staff technical review and any adjudicatory proceeding, either as to contested matters raised by any intervenors or any uncontested/mandatory hearing that might be required.

**RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION**

In an instance in which a hearing notice has been issued, the withdrawal would be subject to “such terms as the presiding officer may prescribe.” 10 C.F.R. § 2.107(a).

**RULES OF PRACTICE: NOTICE OF HEARING (RENOTICE)**

Whatever authority a licensing board might have to order the renoticing of a licensing proceeding pending before it, *see Rochester Gas & Electric Corp.* (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233 (1983), in an instance in which an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action. *See Eastern Testing & Inspection, Inc.*, LBP-96-11, 43 NRC 279, 282 n.1 (1996).

**LICENSING BOARD(S): JURISDICTION (SETTLEMENT OF CONTESTED PROCEEDINGS)**

When a licensing board will have no remaining role in a COL proceeding once the contested hearing is terminated because the board is not empowered to conduct the mandatory hearing, if the previously terminated contested hearing is subsequently renoticed, a new licensing board would need to be established to preside over the renoticed litigation.

**RULES OF PRACTICE: SUA SPONTE REVIEW**

The section 2.341(a)(2) sua sponte review process that applies to a licensing board determination approving a settlement agreement, *see* 10 C.F.R. § 2.338(i), affords the Commission the opportunity to correct any participant or Board misapprehensions regarding the items contemplated in the settlement agreement.

**LICENSING BOARD(S): RESPONSIBILITIES (RESOLUTION OF ISSUES)**

**RULES OF PRACTICE: STANDING TO INTERVENE (UNCONTESTED)**

A settlement agreement provision whereby the applicant agrees not to contest the standing of specified petitioners in any renoticed licensing proceeding would not bind a future licensing board to make any particular determination regarding whether any of those petitioners has established its standing, either as of right or as a matter of discretion in accord with 10 C.F.R. § 2.309(d)-(e). *See* 10 C.F.R. § 2.309(a), (d)(3) (in ruling on hearing request/intervention petition, licensing board will determine whether petitioner has interest affected by the proceeding); *id.* § 2.309(e) (in ruling on discretionary intervention request, licensing board will consider and balance enumerated factors weighing in favor of and against allowing intervention); *see also Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 149 (in assessing intervention petition, licensing board must determine whether standing elements are met even though there are no objections to petitioner’s standing), *appeals denied*, CLI-09-16, 70 NRC 33 (2009).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED PROCEEDINGS (SETTLEMENT FORM)**

The form for a settlement in a contested proceeding conducted under 10 C.F.R. Part 2 is set forth in section 2.338(g), which states that it “must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted.” Also, the settlement must be signed by the consenting parties or their authorized representatives.

**RULES OF PRACTICE: INTERESTED GOVERNMENTAL ENTITY (PARTICIPATION PRIOR TO ADMISSION OF PARTIES/CONTENTIONS, ROLE IN SETTLEMENT OF CONTESTED PROCEEDING)**

Even though, as a potential 10 C.F.R. § 2.315(c) interested governmental entity rather than a potential party to the proceeding, a governmental entity would not have a formal role in the proceeding absent the admission of parties and contentions, such an entity nonetheless should be kept appropriately apprised of the other participants’ settlement efforts. *See* Licensing Board Memorandum and Order (Postponing Initial Prehearing Conference and Setting Schedule for

Submission of Settlement Agreement) (July 16, 2009) at 4 n.3 (citing *Pa'ina Hawaii, LLC*, CLI-06-18, 64 NRC 1, 7 (2006)) (unpublished).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED PROCEEDINGS (SETTLEMENT AGREEMENT CONTENT)**

As to the content of a settlement agreement in a contested proceeding, what the agreement “must” contain is governed by 10 C.F.R. § 2.338(h), which specifies four items. An agreement that fulfills each of the elements in paragraph (h) must have provisions that include (1) an admission of all jurisdictional facts; (2) an express waiver of further procedural steps before the presiding officer, of any right to challenge the validity of any order entered into in accord with the agreement, and of all rights to seek judicial review or otherwise contest the validity of this consent order; (3) a statement that this consent order has the same force and effect as an order made after a full hearing; and (4) a statement that matters identified in the agreement, required to be adjudicated, have been resolved by the agreement and consent order.

**LICENSING BOARD(S): JURISDICTION (SETTLEMENT OF CONTESTED PROCEEDINGS)**

In accord with 10 C.F.R. § 2.338(i), when a notice of hearing has been issued by the Commission in a COL proceeding, the licensing board assigned to preside over the adjudication of any hearing petitions has jurisdiction to approve a settlement agreement relating to that contested hearing.

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED PROCEEDINGS**

In accord with 10 C.F.R. § 2.338(i), a settlement agreement must be approved as appropriate so as to be binding in the proceeding.

**ATOMIC ENERGY ACT: REQUIREMENT OF HEARING**

**COMBINED LICENSE (COL) HEARINGS:  
MANDATORY/UNCONTESTED HEARING**

**NUCLEAR REGULATORY COMMISSION: ADJUDICATORY  
RESPONSIBILITIES**

**RULES OF PRACTICE: HEARING REQUIREMENT (COMBINED  
LICENSE APPLICATIONS, MANDATORY/UNCONTESTED  
HEARING)**

A licensing board decision dismissing the contested adjudication relating to a COL application has no impact on the subsequent need to conduct a mandatory hearing relating to the application. Under current Commission policy, the Commission would preside over that uncontested adjudicatory proceeding. *See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-24, 66 NRC 38, 38 & n.2 (2007).*

**MEMORANDUM AND ORDER  
(Approving Settlement Agreement and  
Terminating Contested Adjudicatory Proceeding)**

Before the Licensing Board is an August 14, 2009 joint motion by Applicant Union Electric Company d/b/a AmerenUE (AUE), the Nuclear Regulatory Commission (NRC) Staff, and Petitioners Missouri Coalition for the Environment and Missourians for Safe Energy (MCE/MSE), Missourians Against Higher Utility Rates (MAHUR), and the Missouri Office of the Public Council (MPC) seeking approval pursuant to 10 C.F.R. § 2.338(i) of an accompanying settlement agreement that would (at least for the time being) bring to an end the contested adjudicatory hearing associated with this 10 C.F.R. Part 52 combined license (COL) proceeding.<sup>1</sup> Finding that the participants' settlement agreement is consistent with the content and form provisions of section 2.338(g)-(h) and, in accord with section 2.338(i), is in the public interest, the Board approves their agreement and terminates this contested hearing.

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<sup>1</sup> See Joint Motion of [AUE], NRC Staff, MCE/MSE, MAHUR, and MPC Requesting Approval of Settlement Agreement and Termination of Contested Portion of Hearing (Aug. 14, 2009) [hereinafter Joint Settlement Motion].

## I. BACKGROUND

On July 24, 2008, AUE applied under Part 52 for a COL that would authorize the construction and operation of a new nuclear power reactor utilizing the U.S. Evolutionary Power Reactor (EPR) design at the site in Callaway County, Missouri, currently housing its existing nuclear reactor, Callaway Plant Unit 1. Pursuant to a January 29, 2009 hearing opportunity notice,<sup>2</sup> two separate hearing requests were filed on April 6, 2009, challenging the AUE COL application (COLA), one jointly by Petitioners MCE/MSE,<sup>3</sup> and one by petitioner MAHUR.<sup>4</sup> In addition, on that same date, governmental entities MPC and the Public Service Commission of the State of Missouri (PSCM) requested that they be granted discretionary intervention pursuant to 10 C.F.R. § 2.309(e), with the latter also seeking leave to participate as an interested governmental entity in accordance with 10 C.F.R. § 2.315(c).<sup>5</sup>

By memorandum dated April 23, 2009,<sup>6</sup> the NRC Secretary referred these petitions to the Chief Administrative Judge who, in turn, assigned them to this Licensing Board for adjudication.<sup>7</sup> On May 1, 2009, AUE and the Staff filed

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<sup>2</sup> See [AUE]; Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a [COL] for the Callaway Plant Unit 2, 74 Fed. Reg. 6064 (Feb. 4, 2009).

<sup>3</sup> See Petition to Intervene and Request for Hearing in Callaway Plant Unit 2 Combined Construction and Operating License Application (Apr. 6, 2009).

<sup>4</sup> See Petition to Intervene and Request for Hearing by [MAHUR] (Apr. 6, 2009).

<sup>5</sup> See Petition to Intervene in Docket No. 52-037, AmerenUE Callaway 2 Nuclear Power Plant Combined Construction and License Application (Apr. 6, 2009); Petition for Leave to Intervene as an Interested State, or, in the Alternative, Petition for Discretionary Intervention (Apr. 6, 2009). PSCM subsequently withdrew its request for discretionary intervention. See [PSCM] Reply to NRC Staff's Answer and [AUE] Answer to [PSCM] Petition for Leave to Intervene as an Interested State, or, in the Alternative, Petition for Discretionary Intervention (May 15, 2009) at 2.

<sup>6</sup> See Memorandum from Annette L. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Apr. 23, 2009).

<sup>7</sup> See [AUE]; Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 20,355 (May 1, 2009).

answers to the various petitions,<sup>8</sup> to which MCE/MSE, MAHUR, MPC, and PSCM filed replies on May 15.<sup>9</sup>

At the same time as AUE and the Staff were preparing their responsive filings to the various hearing petitions, the Board became aware of a public statement issued by AUE President and Chief Executive Officer Thomas R. Voss. That statement announced AUE's intention to suspend its efforts to build the new Callaway unit in light of the apparent unwillingness of the Missouri legislature to provide AUE with a construction work in progress (CWIP) authorization that would permit AUE to collect from ratepayers some portion of the costs of construction prior to actual operation of the new Callaway unit.<sup>10</sup> As a consequence, on April 27, 2009, the Board asked that, in conjunction with their answers to the petitions, AUE and the Staff "address the current status of, and the schedule for staff review associated with, the AUE application at issue in this proceeding."<sup>11</sup>

In responding to the Board's request, the Staff stated that it would "continue to review the Callaway application consistent with existing and planned resource availability," and that the "Applicant requested that the NRC continue reviewing" the COLA.<sup>12</sup> For its part, AUE indicated in its responses to the various petitions that it was "sensitive to the fact that continuation of the review of the COLA impacts the NRC resources" and was committed to "keep the Board, the Staff, the Commission, and any admitted intervenors informed of the status of [AUE]'s

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<sup>8</sup> See [AUE] Answer Opposing the [MCE/MSE] Petition to Intervene and Request for Hearing in Callaway Plant Unit 2 [COLA] (May 1, 2009) [hereinafter AUE Answer to MCE/MSE Petition]; [AUE] Answer Opposing Petition to Intervene and Request for Hearing by [MAHUR] (May 1, 2009); [AUE] Answer Opposing the [MPC] Petition to Intervene in Docket No. 52-037, [AUE] Callaway 2 Nuclear Power Plant [COLA] (May 1, 2009); [AUE] Answer to the [PSCM] Petition for Leave to Intervene as an Interested State, or, in the Alternative, Petition for Discretionary Intervention (May 1, 2009); NRC Staff Answer to Petition to Intervene and Request for Hearing in Callaway Plant Unit 2 [COLA] (May 1, 2009); NRC Staff Answer to Petition to Intervene and Request for Hearing by [MAHUR] (May 1, 2009); NRC Staff Answer to "Petition to Intervene in Docket No. 52-037, [AUE] Callaway 2 Nuclear Power Plant [COLA]" Submitted by the [MPC] and "Petition for Leave to Intervene as an Interested State, or, in the Alternative, Petition for Discretionary Intervention" Submitted by the [PSCM] (May 1, 2009).

<sup>9</sup> See Reply of MCE/MSE (May 15, 2009); Reply of [MAHUR] to [AUE] Answer Opposing Petition to Intervene (May 14, 2009); [MPC]'s Reply to Answers (May 15, 2009); [MPC] Reply to NRC Staff's Answer and [AUE] Answer to [PSCM] Petition for Leave to Intervene as an Interested State, or, in the Alternative, Petition for Discretionary Intervention (May 15, 2009).

<sup>10</sup> See Licensing Board Memorandum and Order (Initial Prehearing Order) (Apr. 27, 2009) at 4-5 (unpublished) (citing Media Release, [AUE] Requests Sponsors to Withdraw Missouri Clean and Renewable Energy Construction Bills in General Assembly (Apr. 23, 2009), <http://ameren.mediaroom.com/index.php?s'43&item'634>).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> Letter from Ann Hodgdon, Staff Counsel, to Licensing Board (May 1, 2009). By letter dated May 5, 2009, the Staff provided the Board with the letter it had sent to AUE stating the same. See Letter from Ann Hodgdon, Staff Counsel, to Licensing Board (May 5, 2009).

internal review.”<sup>13</sup> With these responses in hand, as well as a May 13, 2009 letter from AUE counsel advising the Board of certain conflicts relative to the potential schedule for an initial prehearing conference,<sup>14</sup> in a May 20, 2009 issuance, the Board scheduled an initial prehearing conference to hear argument on the admissibility of the various intervention petitions for July 28, 2009, in Fulton, Missouri.<sup>15</sup>

Thereafter, by motion filed June 26, 2009, AUE asked that the adjudicatory hearing in this COL proceeding be terminated.<sup>16</sup> In its motion, AUE stated it had “determined that it is in [AUE’s] best interests to suspend review of the COLA, and requested that the NRC Staff suspend all activities relating to the COLA by letter dated June 23, 2009 . . . . Accordingly, [AUE] requests that the Board terminate the hearing in this proceeding.”<sup>17</sup> Having agreed to suspend its review of AUE’s COLA,<sup>18</sup> the Staff filed a July 6, 2009 answer to AUE’s motion supporting the AUE request.<sup>19</sup> In the only other response to the AUE termination motion, joint petitioner MCE/MSE declared it did not oppose a hearing termination order, which it asserted should include either (1) dismissal of the AUE COLA so as to terminate further Staff review; or (2) certain conditions, including (a) assurance that reactivation of the Staff’s COLA review would cause the agency to issue a new hearing notice and provide notification to the individual petitioner, (b) acceptance of new contentions filed consistent with the hearing notice as timely, with no requirement that new parties meet late intervention requirements, and (c) the payment of MCE/MSE litigation expenses, including attorney fees, accrued to date.<sup>20</sup>

When the Board indicated in a July 7, 2009 issuance that it would add the motion to terminate to the various other issues to be addressed by the parties at the July 28 initial prehearing conference,<sup>21</sup> the participants responded with a joint motion asking the Board to (1) reconsider its July 7 directive and cancel the oral argument/prehearing conference as it related to the questions of participant

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<sup>13</sup> *E.g.*, AUE Answer to MCE/MSE Petition at 3.

<sup>14</sup> *See* Letter from Jay E. Silberg, AUE Counsel, to Licensing Board (May 13, 2009).

<sup>15</sup> *See* Licensing Board Memorandum and Order (Initial Prehearing Conference Schedule; Notice of Need for More Time; Schedule for Adoption of Contentions; Entry of Appearance; Opportunity for Written Limited Appearance Statements) (May 20, 2009) at 1-2 (unpublished).

<sup>16</sup> *See* Motion of [AUE] Requesting Termination of Hearing (June 26, 2009).

<sup>17</sup> *Id.* at 2.

<sup>18</sup> Letter from Ann Hodgdon, Staff Counsel, to Licensing Board (June 30, 2009).

<sup>19</sup> NRC Staff’s Answer in Support of [AUE] Request to Terminate Hearing (July 6, 2009).

<sup>20</sup> *See* Response of MCE/MSE to [AUE] Motion Requesting Termination of Hearing (July 6, 2009) at 2-6.

<sup>21</sup> *See* Licensing Board Memorandum and Order (Permitting Reply to Responses to Motion to Terminate Hearing; Prehearing Conference Argument Time Allocations; Electronic Copy of Application) (July 7, 2009) at 1-2 (unpublished).

standing and contention admissibility; and (2) hold a limited telephone oral argument, only if the Board deemed it necessary, on the subject whether to grant the AUE termination motion.<sup>22</sup> In a July 16, 2009 memorandum and order, the Board noted that an approach whereby the Board would place the adjudicatory proceeding in suspension after hearing argument regarding, and then ruling on, the validity of the pending intervention petitions, appeared consistent with the Staff's determination to permit the AUE COLA to remain docketed, but to suspend any further Staff technical consideration.<sup>23</sup> The Board also indicated, however, that, given the participants' apparent agreement concerning most of the conditions associated with terminating the adjudicatory hearing, it would postpone the prehearing conference and provide the participants with an opportunity to submit a settlement agreement outlining the terms under which they would propose that a consent order terminating the proceeding be entered.<sup>24</sup>

The pending joint motion to accept a settlement agreement reflects the efforts of the participants in response to this July 16 Board order.

## II. ANALYSIS

As is reflected in 10 C.F.R. § 2.107(a), when an applicant decides it no longer wishes to have the agency evaluate its application, the usual approach is for the applicant to request that the agency permit it to withdraw its licensing request.<sup>25</sup> Such a termination would, of course, end all agency consideration of the matter, including any Staff technical review and any adjudicatory proceeding, either as to contested matters raised by any intervenors or any uncontested/mandatory hearing that might be required.

That is not the approach Applicant AUE has taken in this instance, choosing instead to seek to have the application stay docketed with the Staff while trying to terminate the adjudicatory forum in which its COLA is also subject to review. And as it turns out, the various petitioners who wish to challenge the Callaway COLA apparently have concluded that allowing the application to remain pending before the Staff — but not before a licensing board — meets their current expectations

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<sup>22</sup> See Joint Motion by AUE, NRC Staff, MCE/MSE, MAHUR, and MPC Requesting Leave to File a Motion for Reconsideration and Requesting Reconsideration (July 10, 2009) at 5-6 [hereinafter Joint Reconsideration Motion].

<sup>23</sup> See Licensing Board Memorandum and Order (Postponing Initial Prehearing Conference and Setting Schedule for Submission of Settlement Agreement) (July 16, 2009) at 2-3 (citing Joint Reconsideration Motion at 6 n.7) [hereinafter Board Settlement Agreement Submission Order].

<sup>24</sup> See *id.* at 3-5.

<sup>25</sup> In an instance, such as this one, in which a hearing notice has been issued, see 74 Fed. Reg. at 6064, the withdrawal would be subject to "such terms as the presiding officer may prescribe." 10 C.F.R. § 2.107(a).



as well. They have, however, reached an accord with AUE and the Staff in this regard based on certain agreed terms that are set forth as Exhibit 1 to this decision, and about which the Board notes the following:

#### **A. Renoticing Contested Portion of the Proceeding**

As is reflected in clause 2 of the settlement agreement, in the event AUE, or any other entity, at some point in the future decides to revive the Callaway COLA by requesting that the Staff resume its technical review of the application, the Staff agrees to use its “best efforts” to see that the Commission will issue a new hearing opportunity notice.<sup>26</sup> This provision, which undoubtedly is of central importance to the Petitioners, appears to be based on the participants’ agreed assessment of the degree to which the Staff can provide assistance in securing the renoticing of a contested hearing opportunity relative to the Callaway COLA.<sup>27</sup> In this regard, the agency’s practice concerning the issuance of hearing opportunity notices in reactor licensing cases varies, with the Staff sometimes issuing such hearing notices,<sup>28</sup> while other hearing opportunity notices are issued by the Commission.<sup>29</sup>

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<sup>26</sup> Exh. 1, at 2.

<sup>27</sup> Certainly, the Board’s ability to provide the Petitioners anything further in this regard is problematic. Whatever authority a licensing board might have to order the renoticing of a licensing proceeding pending before it, *see Rochester Gas & Electric Corp.* (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233 (1983), in an instance in which an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action. *See Eastern Testing & Inspection, Inc.*, LBP-96-11, 43 NRC 279, 282 n.1 (1996). Thus, given this Board will have no remaining role in this COL proceeding once the contested hearing is terminated because it is not empowered to conduct the mandatory hearing associated with the Callaway COLA, *see infra* note 38, if the previously terminated contested hearing is subsequently renoticed, a new licensing board would need to be established to preside over the renoticed litigation.

Also with respect to the Board’s authority in this instance, given the participants’ settlement agreement, we see no cause for the Board to attempt to obtain Commission avowal of the renoticing process contemplated by the participants, either by way of a Staff inquiry made at the Board’s direction, *see* 10 C.F.R. § 2.338(e), or via a certified question, *see id.* § 2.319(l). Of course, the section 2.341(a)(2) sua sponte review process that applies to this Board determination, *see id.* § 2.338(i), affords the Commission the opportunity to correct any participant or Board misapprehensions regarding the renoticing process (or any other items) contemplated in the settlement agreement.

<sup>28</sup> *See* Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. NPF-41, NPF-51, and NPF-74 for an Additional 20-Year Period; Arizona Public Service Company; Palo Verde Nuclear Generating Station, Units 1, 2, and 3, 74 Fed. Reg. 22,978, 22,981 (May 15, 2009) (signed by Director, Division of License Renewal, Office of Nuclear Reactor Regulation).

<sup>29</sup> *See id.* at 6067 (Callaway COL hearing notice signed by NRC Secretary). One possible explanation for the Commission being the noticing authority in the COL cases is the need to include the additional order regarding potential party access to nonpublic information. *See id.* at 6065-67.

The notice here having been issued in the first instance by the Commission, this settlement agreement clause apparently reflects the participants' considered judgment that, absent some delegation of authority to the Staff to renotify this proceeding, a new hearing opportunity notice regarding the Callaway COLA will need to come from the Commission, which is the renoticing process this settlement agreement clause seeks to advance.<sup>30</sup>

## **B. Standing**

Settlement agreement clause 8 regarding standing indicates that, in the event a contested hearing for the Callaway COLA is renoticed, relative to any hearing petition filed by MAHUR, MCE/MSE, or MPC, Applicant AUE "shall not challenge" the standing of these petitioners.<sup>31</sup> We note that by its terms, this provision does not apply to the Staff, nor would it bind a future licensing board to make any particular determination regarding whether any of these Petitioners has established its standing, either as of right or as a matter of discretion in accord with 10 C.F.R. § 2.309(d)-(e).<sup>32</sup>

## **C. Settlement Form and Settlement Agreement Content**

The form for a settlement in a contested proceeding conducted under 10 C.F.R. Part 2 is set forth in section 2.338(g), which states that it "must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted." Also, the settlement must be signed by the consenting parties or their authorized representatives. As is evident from the motion and the accompanying settlement agreement exhibit, all these form prerequisites have been fulfilled.<sup>33</sup>

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<sup>30</sup>This clause also seemingly rests on the participants' considered legal judgment that, upon reactivation of the Staff technical review process for the Callaway COLA, renoticing of the contested hearing portion of this proceeding would be necessary and appropriate.

<sup>31</sup>Exh. 1, at 3.

<sup>32</sup>See 10 C.F.R. § 2.309(a), (d)(3) (in ruling on hearing request/intervention petition, licensing board will determine whether petitioner has interest affected by the proceeding); *id.* § 2.309(e) (in ruling on discretionary intervention request, licensing board will consider and balance enumerated factors weighing in favor of and against allowing intervention); *see also Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 149 (in assessing intervention petition, licensing board must determine whether standing elements are met even though there are no objections to petitioner's standing), *appeals denied*, CLI-09-16, 70 NRC 33 (2009).

<sup>33</sup>Although authorized representatives for AUE, the Staff, MCE/MSE, MAHUR, and MPC all signed the agreement, as is reflected in the exhibit attached to the participants' motion residing in  
(Continued)

As to the content of a settlement agreement in such a contested proceeding, what the agreement “must” contain is governed by section 2.338(h), which specifies four items. In this instance, we find the agreement provided by the participants fulfills each of the elements in paragraph (h) in that its provisions include (1) an admission of all jurisdictional facts;<sup>34</sup> (2) an express waiver of further procedural steps before the presiding officer, of any right to challenge the validity of any order entered into in accord with the agreement, and of all rights to seek judicial review or otherwise contest the validity of this consent order;<sup>35</sup> (3) a statement that this consent order has the same force and effect as an order made after a full hearing;<sup>36</sup> and (4) a statement that matters identified in the agreement, required to be adjudicated, have been resolved by the agreement and consent order.<sup>37</sup>

#### **D. Public Interest Considerations**

In accord with 10 C.F.R. § 2.338(i), we find that, by its terms, the settlement agreement attached as Exhibit 1 to this decision is consistent with the public interest and is appropriate so as to be binding in this proceeding.

### **III. CONCLUSION**

In accord with 10 C.F.R. § 2.338(g)-(i), the Board has reviewed the proposed settlement agreement among participants AUE, the Staff, MCE/MSE, MAHUR, and MPC to determine whether the settlement form and content are appropriate and whether approval of the agreement and termination of this contested adjudicatory

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the agency’s electronic hearing docket for this proceeding, *see* Joint Settlement Motion, Exh. 1, at 4, for the purpose of this Memorandum and Order, we have included only the terms of the agreement without the various signature pages.

With respect to authorized participant execution of the agreement, we also note that while the settlement agreement is not executed by a PSCM representative, the joint motion nonetheless indicates that petitioner PSCM “does not oppose” the motion. Joint Motion at 1. This is consistent with our previous observation that even though, as a potential section 2.315(c) interested governmental entity rather than a potential party to the proceeding, PSCM would not have a formal role in the proceeding absent the admission of parties and contentions, we nonetheless expected that PSCM would be kept appropriately apprised of the other participants’ settlement efforts. *See* Board Settlement Agreement Submission Order at 4 n.3 (citing *Pa’ina Hawaii, LLC*, CLI-06-18, 64 NRC 1, 7 (2006)).

<sup>34</sup> *See* Exh. 1, at 672-73 (cl. 1). We also note that, in accord with section 2.338(i), a notice of hearing having been issued by the Commission in this COL proceeding, *see* 74 Fed. Reg. at 6064, the Board has jurisdiction to approve this settlement agreement.

<sup>35</sup> *See* Exh. 1, at 674 (cl. 9).

<sup>36</sup> *See id.* (cl. 10).

<sup>37</sup> *See id.* (cl. 11).

hearing are consistent with the public interest. Based on that review, the Board has concluded that (1) the settlement content and form are appropriate; and (2) the participants' agreement is in the public interest. Accordingly, we grant the joint motion of AUE, the Staff, MCE/MSE, MAHUR, and MPC to approve the settlement agreement and terminate the contested hearing portion of this agency licensing proceeding regarding the AUE COLA for Callaway Unit 2.<sup>38</sup>

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For the foregoing reasons, it is this 28th day of August 2009, ORDERED that:

1. The August 14, 2009 joint motion of AUE, the Staff, MCE/MSE, MAHUR, and MPC is *granted* and we *approve* their August 14, 2009 "Settlement Agreement," which is attached as Exhibit 1 to, and incorporated by reference in, this Memorandum and Order.
2. Commission review of this settlement agreement, as approved by the Board, shall be conducted in accordance with 10 C.F.R. § 2.341.
3. The contested adjudicatory portion of this COL proceeding is *terminated*.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>39</sup>

G. Paul Bollwerk, III, Chairman  
ADMINISTRATIVE JUDGE

Richard F. Cole  
ADMINISTRATIVE JUDGE

Jeffrey D. E. Jeffries  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 28, 2009

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<sup>38</sup> In accord with the Commission's February 4, 2009 hearing notice, *see* 74 Fed. Reg. at 6064, if at some point the Staff's technical review goes forward, this decision dismissing the contested adjudication relating to the Callaway COL has no impact on the subsequent need to conduct a mandatory hearing relating to the Callaway COLA. Under current Commission policy, the Commission would preside over that uncontested adjudicatory proceeding. *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-07-24, 66 NRC 38, 38 & n.2 (2007).

<sup>39</sup> Copies of this Memorandum and Order were sent this date by the agency's E-Filing system to counsel for (1) Applicant AUE; (2) Petitioners MCE/MSE, MAHUR, PSCM, and MPC; and (3) the Staff.

## EXHIBIT 1

### SETTLEMENT AGREEMENT

This Settlement Agreement, dated August 14, 2009, is entered into by and between Union Electric Company d/b/a AmerenUE (“AmerenUE”), the Missouri Coalition for the Environment and Missourians for Safe Energy (“MCE/MSE”), Missourians Against Higher Utility Rates (“MAHUR”), the Missouri Office of the Public Counsel (“MPC”), and the Staff of the United States Nuclear Regulatory Commission (“NRC Staff”) (individually a “Party” and collectively the “Parties”).

WHEREAS, on July 24, 2008, AmerenUE submitted to the United States Nuclear Regulatory Commission (“NRC” or “Commission”) an application seeking a combined license to construct and operate a new nuclear plant in Callaway County, Missouri (“COLA”);

WHEREAS, on December 12, 2008, the NRC docketed the COLA as sufficient for review by the NRC Staff;

WHEREAS, on February 4, 2009, the NRC published a “Notice of Hearing and Opportunity to Petition for Leave to Intervene” in a proceeding (Docket No. 52-037) to consider the COLA;

WHEREAS, on April 6, 2009, MCE/MSE, MAHUR, MPC, and the Missouri Public Service Commission filed petitions requesting leave to intervene in Docket No. 52-037, which included requests for hearing submitted by MCE/MSE and MAHUR;

WHEREAS, on June 23, 2009, AmerenUE requested that the NRC Staff suspend its review of the COLA;

WHEREAS, on June 26, 2009, AmerenUE filed a motion requesting that the Atomic Safety and Licensing Board established to preside over the proceeding (“Board”) terminate the hearing in Docket No. 52-037;

WHEREAS, on June 29, 2009, the NRC Staff stated that it would suspend its review of the COLA,

WHEREAS, on July 6, 2009, MCE/MSE filed a response to AmerenUE’s request for termination asking, among other things, that the Board impose certain conditions in the event the Board terminates the hearing;

WHEREAS, on July 16, 2009, the Board issued a Memorandum and Order “Postponing Initial Prehearing Conference and Setting Schedule for Submission of Settlement Agreement,” which provided the Parties with the opportunity to file a settlement agreement with the Board reflecting the conditions under which the hearing regarding the COLA and the pending hearing requests would be resolved:

NOW, THEREFORE, the Parties hereby agree to the following:

1. *Request for Termination of Hearing.* As soon as possible after the date of this Settlement Agreement, but in no event later than August 14, 2009, the

Parties shall jointly submit this Settlement Agreement to the Board and shall request that the Board issue an order consenting to this Settlement Agreement in the form of Attachment 1 hereto (“Consent Order”) and terminating the contested portion of the hearing established in Docket No. 52-037.

2. *New Notice of Hearing.* It is the understanding of the Parties that, in the event the Board terminates the contested portion of the hearing as requested pursuant to Section 1 of this Settlement Agreement, and AmerenUE, or any other entity, subsequently requests that the NRC Staff resume its review of the COLA, whether in its current form or amended, revised, modified or changed in any manner, and NRC Staff determines that the COLA is complete for docketing, the NRC Staff will use its best efforts to have the Commission issue a new Notice of Opportunity to Petition for Leave to Intervene, and AmerenUE shall, or shall cause such other entity to, provide a copy of such Notice to each person listed on the service list in Docket No. 52-037 as such list exists on the date of this Settlement Agreement.
3. *Intervention in New Proceeding.* No Party shall object to a request for hearing or petition for leave to intervene submitted by any other Party (or other person) in the proceeding initiated by the Notice described in Section 2 of this Settlement Agreement based on a claim that such other Party’s or person’s request or petition fails to satisfy the Commission’s rules for timely filing, except if such request or petition is not filed within the time period for timely intervention set forth by the Notice.
4. *Proposed Contentions in New Proceeding.* No Party shall object to any proposed contention raised by any other Party (or other person) in the proceeding initiated by the Notice described in Section 2 of this Settlement Agreement based on a claim that such proposed contention fails to satisfy the Commission’s rules for timely proposing contentions, except if such proposed contention is not filed within the time period for timely submittal of contentions set forth by the Notice.
5. *No Withdrawal.* In the event the Board terminates the contested portion of the hearing in Docket No. 52-037 as requested by the Parties pursuant to Section 1 of this Settlement Agreement, no Party (other than AmerenUE) shall seek withdrawal of the COLA from the NRC’s docket or request that the NRC remove the COLA from the NRC’s docket, except in the event that the Commission issues the Notice described in Section 2 of this Settlement Agreement.
6. *No Litigation Fees.* In the event the Board terminates the contested portion

of the hearing in Docket No. 52-037 as requested by the Parties pursuant to Section 1 of this Settlement Agreement, no Party shall make any claim for recovery of its litigation expenses, including attorneys' fees, incurred in connection with Docket No. 52-037 prior to the date of this Settlement Agreement.

7. *Joint Request.* In the event the Board does not terminate the contested portion of the hearing in Docket No. 52-037 as requested by the Parties pursuant to Section 1 of this Settlement Agreement, or terminates the contested portion of the hearing without consenting to the conditions agreed to by the Parties in Sections 2-6 of this Settlement Agreement, the Parties may file a joint request that the Commission terminate the contested portion of the hearing (if the Board has not done so) and approve any such conditions not consented to by the Board. If all Parties do not join in the request, no Party will oppose such request filed by the other Parties.
8. *Standing.* In any proceeding initiated by the Notice described in Section 2 of this Settlement Agreement, or in any new or renewed proceeding relating to the COLA, AmerenUE shall not challenge the standing of MAHUR, MCE/MSE or MPC. Nothing in this Section 8 or any other provision of this Settlement Agreement shall limit any Party's right to challenge the admissibility of any and all contentions proposed by MAHUR, MCE/MSE or MPC in any such proceeding.
9. *Waiver of Further Proceedings.* The Parties waive further procedural steps before the Board, any right to challenge the validity of the Consent Order entered in accordance with this Settlement Agreement, and all rights to seek judicial review or otherwise contest the validity of the Consent Order.
10. *Effect of Consent Order.* The Consent Order shall have the same force and effect as an order issued by the Board after a full hearing.
11. *Resolution of All Issues.* The Settlement Agreement and the Consent Order resolve all issues among the Parties in Docket No. 52-037 identified in this Settlement Agreement that were required to be adjudicated.
12. *Authority.* Each Party hereby represents and warrants that it has the authority and is otherwise fully authorized to enter into this Settlement Agreement on its own behalf and on behalf of any other person or entity who may claim from, through, or under such Party.
13. *Entire Agreement.* This Settlement Agreement constitutes the entire agreement among the Parties respecting the subject matter hereof, supersedes

all previous discussions, negotiations, representations, agreements concerning such matters, and shall not be changed or modified in any respect except by a signed writing executed by duly authorized representatives of the Parties.

14. *Counterparts.* This Settlement Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, and which together constitute one and the same instrument.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Michael C. Farrar**, Chairman  
**E. Roy Hawkens**  
**Nicholas G. Trikouros**

**In the Matter of**

**Docket No. IA-05-052**  
**(ASLBP No. 06-845-01-EA)**

**DAVID GEISEN**

**August 28, 2009**

In this Initial Decision concerning the validity of an Enforcement Order brought by the NRC Staff against David Geisen, a former employee of the Davis-Besse Nuclear Power Station located in northwestern Ohio and operated by FirstEnergy Nuclear Operating Company (“FENOC” or “Licensee”), a majority of the Board concluded that the Staff failed to show by a preponderance of the evidence that Mr. Geisen engaged in the deliberate misrepresentation with which he was charged. Accordingly, the Board set aside the charges in the Enforcement Order as unsupported by the evidence. As a consequence, also set aside were the immediately effective sanctions the Enforcement Order imposed against Mr. Geisen, including the 5-year ban on his employment in the nuclear industry.

**ENFORCEMENT PROCEEDING: SCOPE OF REVIEW**

A Licensing Board reviews a Staff Enforcement Order *de novo* and determines on the basis of the hearing record whether the charges are sustained and the sanction imposed is warranted. *Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980); *Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979).

**ENFORCEMENT PROCEEDING: BURDEN OF PROOF**

The NRC Staff's role at a hearing in an enforcement proceeding is "akin to that of a prosecutor," and it has the burden to prove its allegations "by a preponderance of the reliable, probative, and substantial evidence." *Radiation Tech., Inc.*, ALAB-567, 10 NRC at 536-37; Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,644, 40,673 (Aug. 15, 1991).

**ENFORCEMENT PROCEEDING: BURDEN OF PROOF; 10 C.F.R. § 50.5(a)(2)**

To prevail, the Staff was called upon to demonstrate by a preponderance of the evidence that Mr. Geisen had actual knowledge of the information associated with his actions and that he deliberately acted contrary to that knowledge. 10 C.F.R. § 50.5(a)(2).

**REGULATIONS: MISCONDUCT STANDARD; 10 C.F.R. § 50.5(a)(2)**

Section 50.5(a)(2) states that an employee of a licensee may not "[d]eliberately submit to the NRC . . . information that [he] knows to be incomplete or inaccurate in some respect material to the NRC." Deliberate misconduct within the meaning of that regulation refers to "an intentional act or omission" that the person "knows" would cause a licensee to be in violation of any rule. *See* 10 C.F.R. § 50.5(c)(1). In this regard, the Staff's practice is to charge a person with deliberate misconduct only when that person is knowledgeable about information associated with his actions and willfully and deliberately acts in contradiction to that knowledge. Thus, careless disregard in the execution of one's duties does not amount to deliberate misconduct or a violation of 10 C.F.R. § 50.5(a)(2). Therefore, as the Staff interprets the regulation, the element of "actual knowledge" must be present to sustain a charge of deliberate misconduct under the NRC's regulations.

**REGULATIONS: ACTUAL KNOWLEDGE; 10 C.F.R. § 50.5(a)(2)**

An inquiry into an individual's "actual knowledge is entirely factual, requiring examination of the record." *Ziegler v. Connecticut General Life Insurance Co.*, 916 F.2d 548, 553 (9th Cir. 1990). Where, as is common in proceedings of this nature, the record may be devoid of direct evidence to establish knowledge (e.g., a defendant's admission, or documents drafted by the defendant that include representations entirely inconsistent with what he had written elsewhere), the Staff may have to build its case upon circumstantial evidence alone. The issue

then becomes the quality of circumstantial evidence sufficient to give rise to a finding that the person charged actually knew the information.

**REGULATIONS: ACTUAL KNOWLEDGE; 10 C.F.R. § 50.5(a)(2)**

Establishing a party's actual knowledge requires showing more than that a party had a suspicion "that something was awry." *Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987). Thus, constructive knowledge (that is, knowledge of facts sufficient to prompt an inquiry which would have uncovered the misrepresentations) is not actual knowledge. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992); *see also Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222-23 (7th Cir. 1990) (district court erred in using constructive knowledge because the law required actual knowledge).

**EVIDENCE: SCOPE OF REVIEW; KNOWLEDGE HIERARCHY**

The evidence at the hearing confirmed the commonsense view that not every document, whether paper or electronic, processed by an individual gets the same level of attention. But the degree of attention paid to a document initially can later be a strong determinant of the extent to which a person can later recall the contents of, and therefore can be said to have "knowledge" of, that particular document.

**EVIDENCE: SCOPE OF REVIEW; KNOWLEDGE HIERARCHY**

An individual's later recall of the contents of any document will turn on several factors, including (1) the effort, or lack thereof, that the worker put into its creation or application; (2) the need, or lack thereof, for the worker to have responded to the document in the course of employment; and (3) the significance, or lack thereof, of the information in the document to those tasks assigned to the worker that are viewed as having higher priority or greater significance than others.

**EVIDENCE: SCOPE OF REVIEW**

If a person can be charged — as always, in *retrospect* — with knowledge of a *particular* sentence in a document he once saw, then — looked at *prospectively* (i.e., at the time the document first came to his attention) — he is subject to being later held accountable for *every* sentence in that document, and, for that matter, for every word in all the documents that ever came before him. For at the time he first examines a document, he has no inkling of what will later be viewed as a

crucial fact that he will be held to have “known.” The overly simplistic view that “he saw it, so he knew it” is an analytical conundrum that cannot be the rule.

#### **COLLATERAL ESTOPPEL**

Collateral estoppel is a form of issue preclusion that prevents “the relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies.” *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977). As a general matter, collateral estoppel may be applied in administrative adjudicatory proceedings. *Id.* at 562-63.

#### **COLLATERAL ESTOPPEL**

In order to apply collateral estoppel and to preclude the relitigation of an issue, four factors must be present: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd*, ALAB-575, 11 NRC 14 (1980).

#### **COLLATERAL ESTOPPEL**

In applying collateral estoppel principles, the question is not whether the subsequent tribunal believes that the prior tribunal correctly decided the issue at hand; rather, if all factors of the doctrine are met, collateral estoppel comes into play. *Davis-Besse*, ALAB-378, 5 NRC at 563-64 & n.7; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 173 (2002).

#### **COLLATERAL ESTOPPEL**

Even where all of the factors are met, the application of collateral estoppel by the subsequent tribunal is to some degree a discretionary matter. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Thus, Boards have some leeway to consider the existence of other considerations that could outweigh the jurisprudential reasons for applying the doctrine.

## **COLLATERAL ESTOPPEL**

Examples of such considerations that can lead a Board to exercise its discretion not to apply collateral estoppel, as found in this proceeding, are: (1) the pendency of an appeal of the criminal court judgment upon which estoppel would be based; (2) the questions over the equivalence of the “knowledge” standard that governed the jury and the standard applicable in this administrative proceeding; and (3) the possibility that the jury verdict was internally inconsistent.

### **COLLATERAL ESTOPPEL: PENDENCY OF APPEAL**

Ordinarily, the pendency of an appeal need not preclude reliance upon the decision being appealed to estop relitigation of the same matter in another forum. *Southern Pacific Communication Co. v. American Telephone & Telegraph Co.*, 740 F.2d 1011, 1018 (D.C. Cir. 1984). Under that generally useful view, the potentially duplicative and unnecessary litigation in the second forum does not take place while the appeal is pending, but if the appeal later proves successful — thus invalidating the original judgment upon which collateral estoppel had been based — then the litigation in the second forum is allowed to proceed. *Davis-Besse*, ALAB-378, 5 NRC at 563. There might be many circumstances in which such an efficient approach would be entirely workable, and acceptable to both parties, if the estoppel ruling covered the whole case and neither party was hurt by the ensuing trial delay. But that is not the only way to proceed, and where delay is already a problematic factor, it may clearly not be the way to proceed.

### **COLLATERAL ESTOPPEL: PENDENCY OF APPEAL**

“[C]are should be taken in dealing with judgments that are final, but still subject to direct review,” so as to avoid “the risks of denying relief on the basis of a judgment that is subsequently overturned.” *Martin v. Malhoit*, 830 F.2d 237, 264 (D.C. Cir. 1987). To avoid those risks, a court may want to avoid the question by staying the case pending the appeal. *See* 18A Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction* 2d § 4433 (1981).

### **COLLATERAL ESTOPPEL: DISCRETIONARY FACTORS; PREJUDICIAL DELAY**

Where the impact of delay is a concern, the desirability of avoiding any further delay in reaching a final merits determination can be a key discretionary factor counseling nonreliance upon the collateral estoppel principle (even if that doctrine otherwise appeared applicable).

**COLLATERAL ESTOPPEL: DIFFERENCES IN LEGAL STANDARDS**

The complexity of the issues and facts underlying both the Staff's Enforcement Order and the jury verdict in the criminal case raises at least a question as to whether the issues essential to the prior judgment are the same as those before us. Where a serious question exists as to whether the law regarding "knowledge" applied in a parallel criminal case was the same as the law governing a Board proceeding, the existence of that question may cause a Board to invoke its discretion not to preclude full litigation of the pending charges.

**REGULATIONS: 10 C.F.R. § 50.5(a)(2); DELIBERATE MISCONDUCT STANDARD**

The "deliberate ignorance" theory is not embraced within the "deliberate misconduct" standard that governs NRC proceedings.

**COLLATERAL ESTOPPEL: LEGITIMACY OF JURY VERDICT**

A Licensing Board is in no position, and has no authority, to express a direct opinion on the legitimacy of a jury verdict from a criminal trial; determining whether a conviction can stand is a matter for the appellate court with jurisdiction over the appeal. But even if possible deficiencies in the verdict are not of sufficient weight to warrant a reversal in the appellate court, the existence of such questions may nonetheless appear sufficiently colorable or weighty to provide a discretionary reason not to apply collateral estoppel principles to preclude litigation of the similar matter pending before a Board.

**COLLATERAL ESTOPPEL: APPLICATION OF PRIOR RULING**

Given the extensive concern federal courts have exhibited over the legitimacy of the "deliberate ignorance" jury instruction, its use in a parallel criminal case — when it is not embraced by NRC regulations — makes the two proceedings sufficiently different that the ruling in the one cannot be binding in the other. And, even if application of collateral estoppel were permissible in these circumstances, it would not be required, and a Board may exercise its discretion not to apply it: to win on direct appeal, a litigant might need to show that the expanded instruction actually tainted the jury verdict, while he need raise before a Board only a legitimate concern that it did so.

### **COLLATERAL ESTOPPEL: ABSENCE OF SPECIAL VERDICT**

With the jury in the parallel criminal case not having been asked to render a special verdict, the general verdict provides the Board insufficient guidance from which to determine whether the jury conviction was premised on actual knowledge or on deliberate ignorance.

### **COLLATERAL ESTOPPEL**

The fact that the original judgment is subject to alternative interpretations provides reason for a Board to exercise its discretion not to apply collateral estoppel. For the Board to conduct a realistic and rational examination of the record in the criminal case to determine whether a reasonable jury could have grounded its verdict on any basis other than that asserted by the Staff as having been the controlling issue would require the Board to perform a thorough examination of the evidence underlying the Government's case in the criminal trial. But performing such a duplicative examination is precisely what application of collateral estoppel is intended to prevent. If a Board must reexamine the issue one way or another, it makes more sense to do it on the evidence presented to us than on the evidence presented elsewhere.

### **ENFORCEMENT PROCEEDINGS: SCOPE OF REVIEW**

The Staff brings the charges that frame our review of enforcement orders. Boards should not be in the position of upholding Staff enforcement orders on legal theories that (1) the Staff did not and does not embrace and (2) in any event do not fit the circumstances of the case before them.

### **SANCTIONS**

The nuclear regulatory system depends upon the agency being able to depend upon applicants and licensees, and their employees, not to submit information that they know to be false. For the decisions of the agency's dedicated regulators to be effective in protecting the public health and safety, there is no room for the submission of falsified information.

### **SANCTIONS**

The appropriateness of a 5-year ban may not depend upon a Board's upholding all of the several charges and then imposing a multiyear ban on a sort of "one year for each violation" approach. To the contrary, a single charge, if serious enough, could itself justify a 5-year ban.

**SANCTIONS: FACTORS FOR CONSIDERATION;  
RESPONSIBILITY FOR ACTIONS**

One of the key factors in establishing the length of a potential ban is whether the subject has taken responsibility for his actions and expressed the appropriate remorse. Just because an individual does not admit to his guilt does not necessarily mean that this factor should be weighed against him in setting the length of the employment ban. Neither should the continuing refusal to admit his guilt exacerbate the weight of this factor. Instead, if an individual engages in searching self-examination and in retrospect confirms an earlier wish that he had done far more to uncover the problems with the submissions to the NRC and to address the entire matter much more aggressively, those factors should be given weight. An agonizing admission of what the subject of an Enforcement Order “should have done” does not prove the deliberate misconduct charges against him; but what it does do is at least eliminate the negative aspects that might be assigned to ‘taking responsibility’ and “expressing regret” factors — and to some degree turn them into positive attributes that count in his favor.

**SANCTIONS**

Anyone who would willfully provide falsified information on a reactor safety matter should bear in mind that a 5-year ban may well be the result, both in light of its consistency with other enforcement measures taken through the years, and for its deterrent effect, advising other nuclear industry workers of the standards by which their own future conduct will be judged.

**SANCTIONS: IMMEDIATELY EFFECTIVE ORDERS**

There is a need to ensure that those who by their conduct have shown they cannot be trusted to operate a nuclear power plant are removed from a position in which they can harm the public health and safety. There will be instances in which such steps must be taken immediately. But this type of immediately effective deprivation of the legally acknowledged right to pursue one’s livelihood should not be imposed without the Staff having substantial reason to do so and explaining its reasons in advance and in some detail.

**SANCTIONS: IMMEDIATELY EFFECTIVE ORDERS**

The agency’s procedural regulations provide two measures that might be seen as alleviating the risk that an immediately effective order will be set aside after it has already had its adverse impact. The first is the chance to challenge the



immediate effectiveness; the second is the promise of an expedited hearing. 10 C.F.R. § 2.202(c)(1) and (c)(2)(i).

**INITIAL DECISION**

This proceeding concerns the validity of an Enforcement Order brought some time ago by the NRC Staff against David Geisen, a former employee of the Davis-Besse Nuclear Power Station (“Davis-Besse”), a pressurized water reactor (PWR) facility located in northwestern Ohio and operated by FirstEnergy Nuclear Operating Company (“FENOC” or “Licensee”). A majority of the Board<sup>1</sup> holds herein that the Staff failed to show by a preponderance of the evidence that Mr. Geisen engaged in the deliberate misrepresentation with which he was charged.

We therefore set aside the charges in the Enforcement Order as unsupported by the evidence. As a consequence, also set aside are the sanctions the Enforcement Order imposed against Mr. Geisen, including the 5-year ban on his employment in the nuclear industry — a ban that, because it was made immediately effective, has been depriving him of the opportunity to pursue his chosen career.

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<sup>1</sup> This Initial Decision (for which a Table of Contents appears below) represents the views of Judges Farrar and Trikouros. Judge Hawkens dissents (*see* below p. 809).

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## I. INTRODUCTION AND HISTORICAL BACKGROUND

In August of 2001, the NRC issued Bulletin 2001-01, requiring every PWR licensee, including Davis-Besse, to respond to information regarding a safety concern involving the potential for the cracking of nozzles penetrating the reactor vessel head. A symptom or indicator of such cracking was *small* boric acid deposits accumulating on the reactor vessel head. Davis-Besse had a history of *large* boric acid deposits from a less serious problem, i.e., leakage from certain flanges located well above the reactor vessel head.

FENOC made a series of written submissions to the NRC in response to this Bulletin. Based on the information FENOC initially provided, the NRC Staff threatened to shut down operations at Davis-Besse by December 31, 2001, to allow additional detailed plant inspections. FENOC therefore met with the NRC Staff on several occasions in October and November of 2001 to provide clarifying information requested by the Staff. After reviewing FENOC's submissions, the agency decided that Davis-Besse could continue to operate until its next refueling outage, scheduled for March of 2002.

During that refueling outage, an unprecedented, potentially dangerous corrosion cavity was discovered in the Davis-Besse reactor vessel head. This discovery led to a massive inquiry by the NRC Staff's Office of Investigations (OI).

One of the matters investigated by OI was whether FENOC as a company,

or individual employees located at or responsible for the Davis-Besse facility, had failed to provide complete and accurate information to the NRC in the submissions responding to the NRC Bulletin and in associated communications. After a detailed inquiry into the entire episode, OI issued an internal report dated August 22, 2003,<sup>2</sup> concluding that FENOC's submissions in response to the Bulletin were materially incomplete and inaccurate and therefore in violation of 10 C.F.R. § 50.9(a).

On January 4, 2006, almost 2½ years after the OI report was completed, the NRC Staff issued an Enforcement Order against Mr. Geisen, several other individuals, and FENOC as a company. Insofar as Mr. Geisen was concerned, the Enforcement Order charged that, while employed at Davis-Besse, he had engaged in deliberate misconduct by contributing to the submission of information to the NRC that he knew was not complete or accurate in some material respect, in violation of 10 C.F.R. § 50.5(a)(2).<sup>3</sup>

As a result of these alleged violations, the NRC Staff barred Mr. Geisen, *effective immediately*, from involvement in all NRC-licensed activities for a period of 5 years. At that time, Mr. Geisen had been working, without apparent incident, for the preceding 3 years at the Kewaunee Nuclear Power Plant in Kewaunee, Wisconsin.

The Staff's Enforcement Order resulted in his loss of that employment. In February 2006, Mr. Geisen filed an answer to the Order and requested the expedited hearing to which NRC regulations entitled him.<sup>4</sup> *See* 10 C.F.R. § 2.202(c)(1), providing that in such circumstances a "hearing will be conducted expeditiously, giving due consideration to the rights of the parties."

Moving parallel to the NRC's enforcement action, the United States Department of Justice (DOJ) was considering criminal charges against FENOC and several FENOC employees and contractors, including Mr. Geisen. On January 19, 2006, a federal grand jury for the Northern District of Ohio returned a five-count indictment against Mr. Geisen and two other FENOC employees/contractors, based on many of the same facts and issues as the underlying NRC Enforcement Order.<sup>5</sup>

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<sup>2</sup>That report, documenting the results of OI's investigation, was identified as OI Report No. 3-2002-006.

<sup>3</sup>Mr. Geisen's purported actions also were said to have placed the Licensee in violation of 10 C.F.R. § 50.9(a).

<sup>4</sup>Answer and Demand for Expedited Hearing (Feb. 23, 2006). Mr. Geisen did not exercise the opportunity provided by 10 C.F.R. § 2.202(c)(2)(i) to challenge, apparently on limited grounds, the immediate effectiveness of the Enforcement Order.

<sup>5</sup>In November of 2005, the Government had offered Mr. Geisen a deferred prosecution agreement that would have required him to admit knowledge of the falsity of the statements he had made. Mr. Geisen rejected that offer. Tr. at 1782-83.

Around that same time, FENOC entered into a settlement agreement with DOJ under which FENOC would pay a \$28 million penalty based on its conduct relating to the problems discovered at Davis-Besse, and would cooperate with the ongoing criminal administrative investigations.<sup>6</sup> None of FENOC's officers were indicted; the other criminal indictments handed up were against Andrew Siemaszko, a former Davis-Besse systems engineer, and Rodney M. Cook, an outside contractor-consultant who had worked at Davis-Besse for many years.

As noted above, Mr. Geisen challenged the NRC Enforcement Order by requesting a hearing before this Board. Although agency regulations called for an "expedited hearing," the Staff, acting at the request of DOJ in an attempt to avoid an asserted potential conflict between the NRC enforcement proceeding and the criminal trial, sought a stay of this proceeding in March 2006.<sup>7</sup> We denied the Staff's stay motion.<sup>8</sup> That denial was upheld by the Commission.<sup>9</sup>

In October 2006, as the case was moving through pretrial preparation, the Staff again sought, at DOJ's request, to stay the proceeding.<sup>10</sup> The Board denied that request as well,<sup>11</sup> but on appeal, the Commission granted a stay pending the outcome of the criminal proceeding.<sup>12</sup>

In that criminal proceeding, a jury that had received a controversial "deliberate ignorance" or "willful blindness" instruction (*see* below pp. 710, 715) subsequently found Mr. Geisen guilty on three counts of the indictment, one of which (Count 4) involved the identical FENOC document (the so-called "Serial Letter 2744") that underlay an aspect of the Enforcement Order.<sup>13</sup> In May of 2008, after denying a motion to set aside the verdict — in what he described as a "close" case<sup>14</sup>

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<sup>6</sup> Press Release, Department of Justice, First[E]nergy Nuclear Operating Company to Pay \$28 Million Relating to Operation of Davis-Besse Nuclear Power Station: Two Employees and a Contractor Indicted for Making False Statements to the Nuclear Regulatory Commission (Jan. 20, 2006).

<sup>7</sup> NRC Staff Motion to Hold the Proceeding in Abeyance (Mar. 20, 2006).

<sup>8</sup> LBP-06-13, 63 NRC 523 (2006).

<sup>9</sup> CLI-06-19, 64 NRC 9 (2006).

<sup>10</sup> NRC Staff Motion for Stay of Proceeding or in the Alternative for a Preclusion Order (Oct. 27, 2006).

<sup>11</sup> Licensing Board Order (Denying Government's Request to Stay Proceeding) (Jan. 12, 2007) (unpublished).

<sup>12</sup> CLI-07-6, 65 NRC 112 (2007).

<sup>13</sup> The criminal indictment charged Mr. Geisen with five counts of knowingly and willfully concealing and covering up material facts, regarding the condition of Davis-Besse's reactor vessel head and the nature and findings of previous inspections of the reactor vessel head, in: (1) documents and communications occurring between September 4, 2001, and February 16, 2002, generally; (2) Serial Letter 2735, October 17, 2001; (3) Serial Letter 2741, October 30, 2001; (4) Serial Letter 2744, October 30, 2001; and (5) Serial Letter 2745, November 1, 2001. Mr. Geisen was found guilty on Counts 1, 3, and 4, not guilty on Counts 2 and 5. Counts 3 and 5 of the indictment involved documents that had not been the subject of the NRC Enforcement Order. *See generally* Criminal Indictment.

<sup>14</sup> *United States v. Geisen*, 2008 WL 1840759, at \*1 (N.D. Ohio Apr. 22, 2008).

— the trial judge declined to accept the prosecutor’s recommendation of a prison term and instead sentenced Mr. Geisen to 3 years’ probation, prohibiting him during that probationary period from employment in the nuclear power industry.<sup>15</sup> The district court indicated, however, that if the NRC adjudication were to find in favor of Mr. Geisen, the court would be open to reconsidering the employment ban.<sup>16</sup>

In June of 2008, Mr. Geisen requested that the administrative hearing on the Staff’s Enforcement Order be reactivated.<sup>17</sup> In response to the Board’s request,<sup>18</sup> both parties filed briefs agreeing that, notwithstanding the pendency of Mr. Geisen’s appeal to the Sixth Circuit, the conviction and sentencing constituted an “outcome” of the criminal proceeding as the term was contemplated by the Commission in imposing, in CLI-06-19, a condition precedent for lifting the imposed stay.<sup>19</sup> The Board agreed, and undertook an expedited implementation of the pretrial phase.

The parties entered into a lengthy stipulation whose central feature was agreement that certain statements made by FENOC and Mr. Geisen were in fact false, but with no concession that Mr. Geisen knew of their falsity. *See* Staff Ex. 77. After the Board declined to grant at that juncture the Staff’s collateral estoppel motion,<sup>20</sup> an evidentiary hearing was conducted from December 8 to 12, 2008, in the Board’s Rockville, Maryland, hearing room. Both parties thereafter filed Proposed Findings of Fact and Conclusions of Law.<sup>21</sup> We then held a post-trial oral argument on March 3, 2009. *See* Tr. at 2343-2484.

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We move on from the foregoing background by setting out, in Part II below (pp. 690-99), a summary of relevant technical information that underlies the events brought before us by the Enforcement Order. We then provide an overview of

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<sup>15</sup> Judgment in *United States v. Geisen*, 2008 WL 612567, at \*3 (N.D. Ohio May 2, 2008); *see also* Transcript from the Sentencing Hearing Before the Honorable David A. Katz at 19-20 [hereinafter Sentencing Tr.].

<sup>16</sup> *See* Sentencing Tr. at 30.

<sup>17</sup> Letter from Richard Hibey to the Licensing Board (June 24, 2008).

<sup>18</sup> Licensing Board Order (Calling for Briefs) at 1 (June 30, 2008) (unpublished).

<sup>19</sup> Brief of David C. Geisen in Response to Board’s Order Dated June 30, 2008 (July 7, 2008) [hereinafter Geisen Response to June 30 Order]; NRC Staff Response to Board’s Order Calling for Briefs (July 14, 2008).

<sup>20</sup> NRC Staff Motion for Collateral Estoppel (Nov. 17, 2008) [hereinafter Collateral Estoppel Motion]; Opposition of David C. Geisen to NRC Staff’s Motion for Collateral Estoppel (Nov. 26, 2008) [hereinafter Opposition to Collateral Estoppel Motion].

<sup>21</sup> NRC Staff Proposed Findings of Fact and Conclusions of Law (Jan. 16, 2009) [hereinafter Staff Findings]; Post-Trial Brief of David Geisen with Proposed Findings of Fact and Conclusions of Law (Jan. 30, 2009) [hereinafter Geisen Findings]; NRC Staff’s Reply to Mr. Geisen’s Post-Trial Brief with Proposed Findings of Fact and Conclusions of Law (Feb. 5, 2009) [hereinafter Staff’s Reply].

our decision in Part III (pp. 700-06). Next we provide, in Part IV (pp. 706-26), an analysis of the basic legal principles that govern our decision, including key ones about the acquisition of knowledge and of the role of discretion in determining whether the collateral estoppel doctrine should apply here. Part V (pp. 726-76) includes a detailed analysis of the evidence and our resulting findings of fact.

A series of brief portions follow: Part VI (pp. 776-80) covers our analysis of the sanction imposed upon Mr. Geisen and the problems with the Enforcement Order having been made immediately effective; and Part VII (pp. 780-94) contains a summary of our key findings; our general response to the Dissent; and our formal Conclusions of Law. We close, in Part VIII (pp. 794-95), with our formal Order, which also indicates the time limits for any appeals that might be undertaken.

## II. TECHNICAL INFORMATION

### A. Davis-Besse Reactor Design

To create steam for electricity production, Davis-Besse employs a pressurized water reactor, with the reactor vessel, pressurizer, and steam generators located within a containment structure. Tr. at 836-37; Staff Ex. 2. The reactor coolant system contains boric acid in solution to help control the nuclear reaction taking place inside the reactor vessel. Tr. at 837, 846. The coolant, including the boric acid solution, is heated to approximately 600 degrees Fahrenheit and pressurized to approximately 2150 pounds per square inch. Tr. at 846.

The top of the reactor vessel is a domed lid approximately 13 feet in diameter, referred to as the reactor vessel head. Tr. at 841. From the top of the reactor vessel head emerge a number of nozzles, which house the reactor control rods. Tr. at 839. These nozzles support the reactor control rod drive mechanisms (CRDMs). Staff Ex. 6; Tr. at 839.

There are a total of sixty-nine nozzle penetrations on the reactor vessel head. Tr. at 840. Each such penetration is specifically numbered in a ring-like fashion beginning in the center of the head and proceeding in concentric circles outward. Tr. at 859-60. Thus, the higher numbered nozzles are on the periphery of the vessel head. Tr. at 860.

Above the head sits a horizontal layer of reflective metal insulation (approximately 2 inches thick) housed in a service structure, which serves to minimize the heat lost from the reactor coolant system. Staff Ex. 5; Tr. at 843.<sup>22</sup> The top of each nozzle terminates above the insulation in a flange that supports the control rod drive mechanism housings. Each flange consists of a mechanical joint with

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<sup>22</sup> In other facilities, the insulation rests in contact with the reactor vessel head, not at some distance above it. Tr. at 1822; *see also* Staff Ex. 8 at 5.

a seal. If this seal leaks, the borated reactor coolant system water could deposit itself above the insulation or on the reactor vessel head. Tr. at 848.<sup>23</sup>

The reactor vessel head itself is made of 6-inch carbon steel. Tr. at 842. Because concentrated boric acid is corrosive to carbon steel (Tr. at 843), the reactor vessel, including the head, is protected internally by a corrosion barrier of stainless steel cladding (Tr. at 842).

The Davis-Besse reactor vessel head service structure contained a number of “mouseholes,” which are 5-inch by 7-inch cutouts in the service structure, each assigned a distinct number. Tr. at 843, 849, 859. The mouseholes provide access, primarily for inspection and cleaning purposes, to the outside of the reactor vessel head and to the area between the head and the insulation. Tr. at 844, 849.

## **B. Nozzle Cracking Issue**

The CRDM nozzles are attached to the inside surface of the reactor vessel head with structural circumferential welds. The nozzles themselves, and the nickel-based alloy material used for the welds, are subject to cracking during reactor operation. Tr. at 847, 852. Such cracking typically manifests itself as a vertical, or axial, crack in the nozzles or as a crack at the weld location. Tr. at 852, 854. Although through-wall axial cracks leak, this was not of itself thought to present a major safety concern.

Such cracks in the reactor coolant pressure boundary allow the leaking borated coolant to enter the very narrow “interference fit” gap between the nozzle and the reactor head. This can have two consequences. The first, which was long recognized and relatively benign, occurs when pressure causes the borated solution to travel up the nozzle and, after flashing to steam as it reaches the external surface of the reactor vessel head, to deposit boric acid residue on that outer surface. Tr. at 852.

The other consequence involves a more threatening process, a process internal, rather than external, to the reactor vessel head. Specifically, the corrosive solution released by an axial crack, and thereby present in the gap between the nozzle and the head, can act upon the nozzle which it thus surrounds to generate a circumferential crack therein. Tr. at 852-53. If circumferential nozzle cracking occurs above the weld to the extent seen at another nuclear facility (Oconee) and documented in the NRC Bulletin, or if cracking of the J-groove weld occurs, it has the potential to lead to the separation of the nozzle and the forceful ejection of the top of the nozzle, along with the control rod, from the top of the reactor

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<sup>23</sup> It does not take a large leak to produce fairly substantial deposits: the Staff’s preliminary calculations demonstrated that a 0.001 gallon per minute leak would ultimately result in 15 pounds of boric acid buildup over an operating cycle. Tr. at 903.



vessel head. This would not only trigger a loss of coolant accident but would also decrease the degree of control of the core nuclear reaction. Tr. at 853.

Boric acid solution can also reach the outer surface of the reactor vessel head from a leaking flange. Tr. at 848, 857. As noted earlier, the top of each nozzle terminates in a flange located above the reactor vessel head and the insulation that supports the control rod drive mechanism housings. Tr. at 848. Each flange contains a mechanical joint with a seal. If this seal were to leak (not of itself a safety concern), the borated coolant can escape and deposit on the top of the insulation. Tr. at 848, 857. Occasionally, the leaking fluid will not remain above the insulation but will flow down the CRDM nozzle and deposit on the nearby part of the reactor vessel head. Because the solution is under pressure, spray from a larger flange leak could reach adjacent nozzles, thus depositing boric acid on larger areas of the reactor vessel head. Tr. at 848-49.

### **C. Inspections to Detect Nozzle Cracking**

Inspections of the reactor vessel head, like many other maintenance activities inside the containment building at a nuclear power plant, can be conducted only while the reactor is shut down, typically during a refueling outage, or RFO. Davis-Besse operated on a 2-year cycle, shutting down after that period to refuel. For ease of reference, Davis-Besse numbered its refueling outages consecutively, e.g., the 2002 refueling outage was "13RFO." Relevant to this proceeding, Davis-Besse performed and videotaped reactor vessel head inspections during 10RFO in 1996, 11RFO in 1998, and 12RFO in 2000. Staff Ex. 81 (DVD of 1996, 1998, and 2000 inspections).

During refueling, the top surface of a reactor vessel head is subject to visual inspection to identify leakage of reactor coolant containing the borated water solution. Tr. at 855. A leak in the CRDM nozzles could result in the borated solution escaping at the interface where the CRDM nozzles penetrate the reactor vessel head. Tr. at 855. If there is such a leak, the borated solution will flash to steam where the nozzle penetrates the dome of the reactor vessel head (also known as the nozzle-to-head interface). Tr. at 855-56. This would leave behind deposits of boric acid, which would be characteristically white in color and, depending on their extent, have been described as "popcorn-like" deposits. Tr. at 856.

For the period in question, FENOC relied upon visual examinations to inspect the Davis-Besse reactor vessel head for evidence of leakage and also to support its Boric Acid Corrosion Control (BACC) Program. Tr. at 866. Davis-Besse employees performed visual inspections of the reactor vessel head by inserting a camera on a stick through the mouseholes in the service structure to view the nozzle-to-head interfaces. Tr. at 855-56, 867.

A monitor located outside the service structure provided the means for the

person manipulating the camera to view the inspection in real time. Tr. at 855. The “as-found” inspections conducted using this technique were often videotaped.

The method Davis-Besse used was affected by performance difficulties because the geometry of the domed head limited the range of access of a camera mounted rigidly on a stick. Those limitations in inspection technique precluded getting the camera in a position where the center-most nozzle penetrations could be viewed. Tr. at 855, 901. (Although, as we discuss later, the Staff did not prove that Mr. Geisen was aware of the full extent of this problem.)

The 1996 reactor vessel head inspection and cleaning during 10RFO was conducted by FENOC senior mechanical engineer for Design Basis Engineering, Prasoon Goyal. A different FENOC employee, Peter Mainhardt, a service water systems engineer for the Systems Engineering department, conducted the visual inspections for 11RFO in 1998. In 2000, for 12RFO, the visual inspections were performed by Andrew Siemaszko, who was also a systems engineer in Systems Engineering, and others (including contractors from Framatome). *During these three refueling outages, Mr. Geisen had specific responsibilities in areas that were completely unrelated to the reactor vessel head inspection and cleaning; therefore, he was not involved in any of these inspections.* Tr. at 1539, 1541-42, 1545-46, 1558-60.

#### **D. Issuance of NRC Bulletin 2001-01**

Before issuing Bulletin 2001-01, the NRC had issued Information Notice 2001-05 on April 30, 2001, to alert all PWR licensees to the discovery of through-wall circumferential cracks at the Oconee nuclear power plant. Staff Ex. 29 at 1.<sup>24</sup> During an inspection at Oconee, that licensee had discovered nine degraded CRDM nozzles, which included through-wall circumferential cracks in two of the CRDM penetration nozzles and weldments. Staff Ex. 29 at 1. The Information Notice explained that the visual examination at Oconee identified the presence of small amounts of boric acid residue in the vicinity of the nine nozzles. Staff Ex. 29 at 1.

Prior to the Oconee discovery, nozzle cracking was thought to be almost exclusively axial and confined to the base materials. Tr. at 869. The Oconee findings were thus unexpected. Tr. at 869. In any event, corrosion on the reactor vessel head from boric acid deposits was not considered likely because

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<sup>24</sup> Information Notice 2001-05, Through-Wall Circumferential Cracking of Reactor Pressure Vessel Head Control Rod Drive Mechanism Penetration Nozzles at Oconee Nuclear Station, Unit 3 (Apr. 30, 2001) (“Information Notice”). Staff Ex. 29.

the extremely high temperatures atop the head would result in a dry (and thus noncorrosive) environment.<sup>25</sup>

Following the issuance of the Information Notice, another unit at Oconee identified circumferential cracking. Staff Ex. 8 at 3; Tr. at 1200. As a consequence, the NRC issued Bulletin 2001-01,<sup>26</sup> addressed again to all PWR licensees, to express the agency's concern about the newly discovered circumferential cracking at Oconee and to alert PWR licensees to what the NRC expected from them in addressing the situation. Tr. at 869. While axial cracks are relatively benign, a circumferential crack could propagate to a point where pressure inside the reactor could drive the affected nozzle out of the reactor vessel head and cause a loss of reactor coolant and an excursion in core reactivity. This event is one of the serious postulated accidents a plant must be designed to withstand; it thus receives careful study in the plant's safety analysis report.

The purpose of the Bulletin<sup>27</sup> was to generate an information-gathering exercise (with the goal of determining the status of every PWR plant) to cure NRC's lack of sufficient knowledge regarding the adequacy of previous inspections and to review whether future inspection plans were acceptable. Tr. at 1205; *see also* Tr. at 1220. This concern was paramount because, prior to Oconee, the consensus was that a nozzle that was leaking *substantial* quantities of boric acid would be readily detected and the underlying cause rectified. Tr. at 1208. Instead, the potentially significant cracks at Oconee left only *very small* boric acid deposits of about 1 cubic inch. Tr. at 1208. A significant concern was whether licensee inspections would be adequate to detect such small deposits. Tr. at 1210.

The Bulletin asked PWR licensees to rank each plant in one of three categories (high, moderate, or low) corresponding to the different degrees of susceptibility to this problem. Tr. at 869. That susceptibility was based on the number of effective full-power years ("EFPY") of operation the plant was from reaching similar conditions to Oconee. Tr. at 870. For example, if a plant was within

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<sup>25</sup> Boric acid deposits on the surface of the reactor vessel head with no water source would dry out and not be a corrosion concern. The presence of such deposits on a head that averages 600 degrees Fahrenheit was therefore not expected to develop into a corrosive environment. Tr. at 1222.

<sup>26</sup> NRC Bulletin 2001-01, Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles ("Bulletin"). Staff Ex. 8. Bulletins are used by the NRC as a form of generic communication to the industry. Tr. at 1201. Unlike Information Notices, NRC Bulletins require responses by licensees. Tr. at 1201. The information the NRC receives in a Bulletin response is used on a plant-specific basis to determine if additional regulatory actions are needed by the NRC, either for the individual plant or for the industry as a whole. Tr. at 1202. At that point, NRC was issuing bulletins very infrequently: NRC Bulletin 2001-01 was the first of 2001, and was, in fact, the first bulletin that had been issued since 1997. Tr. at 1202-03.

<sup>27</sup> Prior to the issuance of the Bulletin, the NRC had held public meetings with the industry. The industry had exhibited a high interest in the issue and had evinced a desire to implement appropriate voluntary actions to forestall the imposition of NRC requirements. Tr. at 1203.

5 EFY of the Oconee service condition, it was to be placed into the “high susceptibility” category. Tr. at 870.<sup>28</sup> FENOC’s analysis categorized Davis-Besse as within 5 EFY, thus making it a high-susceptibility plant.

In terms of remedy, the Bulletin stated that if the licensee did not plan to perform inspections before December 31, 2001, it was to “provide [its] basis for concluding that the regulatory requirements discussed in the Applicable Regulatory Requirements section will continue to be met until the inspections are performed.” Staff Ex. 8 at 12. The Bulletin did not specifically indicate, however, that licensees not satisfactorily meeting this requirement would be forced to shut down operations until more thorough inspections were completed.

Put another way, and as stated by one of the Staff’s witnesses at the hearing, the purpose of the Bulletin was to gather information; it was not to force licensee action (Tr. at 1217), but instead was to make the industry aware of methods for meeting the NRC’s expectations for future inspections (Tr. at 1254). The NRC wanted to solicit information about what licensees had done with regard to inspections, and to use that information to make regulatory decisions to prevent the type of problem discovered at Oconee.<sup>29</sup>

#### **E. Summary of Documents and Communications**

The focus of this proceeding is on a series of written submissions provided to the NRC by FENOC and associated oral communications between FENOC personnel and the NRC Staff. The information in question was provided in response to NRC Bulletin 2001-01, described above. *The parties agree that instead of providing complete and accurate information, FENOC’s factual presentations to the NRC contained omissions and inaccuracies.* Staff Ex. 77.

1. After its technical review, and before learning of any inaccuracies in FENOC’s first submission (Serial Letter 2731), the NRC Staff found that submission to be inadequate to resolve the pending matters. As a result, it notified FENOC that Davis-Besse might be required to shut down operations by December 31, 2001 — 2 months earlier than the March 2002 date requested by FENOC to tie in with its scheduled refueling — in order to conduct additional inspections.

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<sup>28</sup> A plant could also be placed into that susceptibility category if it had actually experienced cracking or detected boric acid deposits. Staff Ex. 8 at 7; Tr. at 870.

<sup>29</sup> As a Staff witness explained, “the Bulletin [was] [for] gathering information. [NRC] want[ed] to find out what have licensees done, what’s the condition of their head, what are their inspection strategies going forward. This part of the Bulletin just lays out a logic path, if you will, that if you go back and review records and you find certain things, then here’s a way that that information should be interpreted. We didn’t want to restrict licensees from doing anything. We were just trying to figure out what information they have and what they’re planning to do at this point.” Tr. at 1217.

This notification triggered a series of phone calls, meetings, and supplemental submittals to the NRC in an effort by FENOC to provide the agency reasonable assurance that Davis-Besse could safely remain in operation until the plant's scheduled refueling outage in the spring of 2002.<sup>30</sup> The agency eventually consented to the 3-month delay,<sup>31</sup> for reasons that were left unexplained at our hearing.<sup>32</sup> Summary information about the submissions to, or communications with, the agency that were the subject of the charges against Mr. Geisen is provided in **Table 1**, on p. 697.

2. Among the principal evidence advanced by the Staff, in its effort to demonstrate that Mr. Geisen was knowledgeable about the nozzle cracking issue discovered at Oconee prior to the submittal of Serial Letter 2731, was a series of documents ("trip reports") summarizing business trips taken by an engineer in his department, Prason Goyal. These documents — sent to Mr. Swim, with a copy to Mr. Geisen and several others — are summarized in **Table 2**, on p. 698.

3. To support its case that Mr. Geisen had knowledge that the Davis-Besse reactor vessel head inspections were impeded by geometric restrictions and boric acid deposits, the Staff entered into evidence certain information, including two condition reports and a photo,<sup>33</sup> all of which Mr. Geisen would have seen in 2000 during 12RFO (described in detail in our findings of fact below). It also presented a June 27, 2001 memorandum, prepared by Mr. Goyal, that was reviewed by Mr. Goyal's Supervisor, Mr. Swim, and approved by Mr. Geisen.

The Staff also submitted into evidence e-mail correspondence, again from Mr. Goyal, of which Mr. Geisen was one of the direct or copied recipients. That e-mail correspondence is summarized in **Table 3**, on p. 699.

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Sorting through the implications and ramifications of the events and documents reflected in the foregoing three tables is a complicated endeavor, as appears in Part V of this Initial Decision. We first set out, however, in Part III, an overview of the decision that emerges from that endeavor.

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<sup>30</sup> Enforcement Order at 2.

<sup>31</sup> *Id.*

<sup>32</sup> The Staff team assigned to the project urged that Davis-Besse be shut down at the end of 2001; the team was not advised as to precisely what process led to its being allowed to operate past that point, and why. Tr. at 1436-37 ("my personal belief was [] that we should not have allowed them to continue to operate . . . I cannot tell you why the NRR Office Director ultimately decided not to issue the order"); *see also* 1325-27, 1438.

<sup>33</sup> *See* Staff Ex. 18; Staff Ex. 19; Staff Ex. 66.

**Table 1**  
**Submissions to or Communications with NRC**

<b>Date</b>	<b>Submission or Communication to NRC</b>	<b>Mr. Geisen's Involvement</b>
9/4/01	Serial Letter 2731	Signed FENOC internal "Green Sheet"* 8/28/01; Signed Green Sheet* for Moffitt 8/30/01.
10/3/01	Conference Call between FENOC and NRC Staff	Stated 100% of the head had been inspected for nozzle leakage except for 5-6 nozzles at the top of the head due to flange leakage.
10/11/01	FENOC Briefing of the Commissioner's Technical Assistants	Presented two slides related to prior reactor vessel head inspections that contained incorrect information.
10/17/01	Serial Letter 2735	Signed Green Sheet* 10/17/01; provided oversight of "nozzle by nozzle" table, and inserted footnote to nozzle table regarding 1996 (10RFO) inspection.
10/30/01	Serial Letter 2744	Signed Green Sheet* 10/30/01; oversight of "nozzle by nozzle" table, and inserted footnote to nozzle table regarding 1996 (10RFO) inspection; wrote captions describing various photos taken from inspection videotapes.
11/9/01	Advisory Committee on Reactor Safeguards (ACRS) Meeting	Answered question regarding the limitations of the 1998 (11RFO) and 2000 (12RFO) inspections.

\*Mr. Geisen was one of sixteen signatories to the "Green Sheet" for each NRC submission. The others included eight at subordinate levels, three other plant managers at his level, three plant directors above his level, and the plant vice president. The Green Sheet instructions state that the "technical accuracy of a response to the NRC is the responsibility of the Director and Management individual assigned the action,"<sup>34</sup> which in no instance pointed to Mr. Geisen. Tr. at 1902-03.

<sup>34</sup> Staff Ex. 10 at 2, "Block 14" (emphasis added); *see also* Staff Ex. 12 at 2, "Block 14" and Staff Ex. 14 at 2, "Block 14."

**Table 2  
Trip Reports**

<b>Date</b>	<b>Author</b>	<b>Recipients</b>	<b>Content of Information Disclosed</b>
1/30/01	Goyal	<i>To:</i> Swim, Supervisor <i>Cc:</i> Gallatin, Geisen, Hayes, Lang, LeBlanc, McDougall, Mominee	Impact of Oconee nozzle leakage identified during Oconee's last outage, including the detection of boric acid crystals on the reactor vessel head.
4/26/01	Goyal	<i>To:</i> Swim, Supervisor <i>Cc:</i> Campbell, Geisen, Lang, LeBlanc, McDougall, Myers, Mominee, Weakland	Industry response to circumferential cracking discovered at Oconee as indicated by boric acid deposits on the reactor vessel head during outage inspections.
7/12/01	Goyal	<i>To:</i> Swim, Supervisor <i>Cc:</i> Campbell, Geisen, Lang, LeBlanc, McLaughlin, McDougall, Myers, Mominee, Siemaszko, Weakland	Lessons learned from Oconee discovery, including that service structure access is needed for cleaning and inspection, that leaking nozzles produce very little boric acid, and that a clean head is needed to see leaking nozzle.
8/22/01	Goyal	<i>To:</i> Swim, Supervisor <i>Cc:</i> Campbell, Cunnings, Galetan, Geisen, Lang, LeBlanc, Lockwood, McLaughlin, Moffitt, Mominee	NRC public meeting on Bulletin 2001-01 to explain the agency's expectations for the bulletin response. Explained that the purpose of the Bulletin was to gather information to assess the potential safety significance and to determine if additional regulatory action was required.

**Table 3**  
**Summary of E-mail Correspondence from Goyal**

<b>Date</b>	<b>Recipients</b>	<b>Subject of E-mail</b>	<b>E-mail content</b>
7/10/01	<i>To:</i> Siemaszko <i>Cc:</i> Cunnings, Swim, Geisen, Eshelman	Plant-specific data verification	Discussion of tables being treated by the “industry” to collect plant-specific data regarding visual inspections.
8/11/01	<i>To:</i> Swim, Geisen <i>Cc:</i> Wuokko	NRC Bulletin 2001-01 Circumferential Cracking of RV Head Penetration Nozzles	Summary of meeting held with Mr. Lockwood for identifying the actions required for completing the Bulletin response, including a commitment to conduct a 100% qualified visual examination of the head during 13RFO.
8/17/01	<i>To:</i> Fyfitch/Gray (Framatome) <i>Cc:</i> Wuokko, Geisen, Swim, Kennedy	NRC Bulletin	Directing Framatome to provide a response to certain parts of the Bulletin for Davis-Besse, including the commitment to perform a 100% visual inspection during 13RFO and to use 1998 for the crack growth model because that was when a “good head exam was done.”



### III. OVERVIEW OF DECISION

We reviewed the evidence before us to determine whether to uphold the charges against Mr. Geisen contained in the Staff's Enforcement Order, which asserts that his contributions to FENOC's inaccurate and incomplete submissions to the NRC were made with a "deliberate" and "knowing" state of mind. *See generally* Enforcement Order; *see also* 10 C.F.R. §§ 50.5(a), 50.9. We are thus called upon to determine Mr. Geisen's state of mind at the time FENOC filed the inaccurate submissions with the NRC, including the extent of Mr. Geisen's involvement in, and contribution to, those submissions. As the proponent of the Enforcement Order, the NRC Staff carries the burden of proof and must demonstrate by the preponderance of the evidence, the standard set forth by NRC precedent,<sup>35</sup> that the charges set forth in the Enforcement Order should be upheld.

The Board recognized early on that a jury verdict of guilty in the criminal case might, as a matter of law, collaterally estop Mr. Geisen from contesting any similar charges in the Enforcement Order pending before us. It has turned out, however, that the application here of the collateral estoppel principle is complicated by multiple factors (explained more fully below). The most substantial factor is the difference between the legal standard that governs here (under the terms of our regulations) and the more expansive standard that was applied in the criminal case (under the trial judge's instructions to the jury). We decline the application of collateral estoppel primarily because of this crucial difference between the two proceedings.

On the merits, we have studied all the briefs and other filings, analyzed the documentary evidence we received and the oral testimony we heard, and taken demeanor credibility into account, in order to determine whether the Staff proved by a preponderance of the evidence that Mr. Geisen had knowledge, at the time these submissions were made, of the inaccuracies and omissions in the information, and whether Mr. Geisen deliberately concealed the truth. In plain language, we had to determine whether the Staff proved that Mr. Geisen lied, rather than that he was simply misinformed or mistaken.

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<sup>35</sup> One week prior to the hearing, the Board rejected Mr. Geisen's motion seeking to require that the Staff be put to a higher burden of proof by meeting a "clear and convincing" rather than "preponderance of the evidence" standard. With the precedents pointing so clearly to the appropriateness of the latter standard, the Board was unwilling to explore, on the eve of the hearing, the adoption of a standard that, while perhaps arguably supportable, would have certainly left in doubt the validity of any decision based thereon, and in any event would have been highly prejudicial to the Staff, whose counsel had by then nearly completed preparation of its case with the expectation that the preponderance of the evidence standard would apply. Our determination that the rules cannot be changed just *before* the start of a trial presages another ruling we make herein, namely, that the rules cannot be changed *after* the trial is over. *See* below p. 717.

Fundamental to our decision today is the concept that (contrary to a major assumption made by the Dissent) “knowledge” does not necessarily follow simply from previous *exposure* to individual facts. Instead, to have knowledge, an individual must have a current *appreciation* of those facts and of what those facts mean in the circumstances presented.

In the circumstance of this case, it is not just the *absorption* of the key facts that is in issue. Beyond knowing the existence of those facts, to be found liable for a knowing misrepresentation Mr. Geisen had to know of their *significance*. Crucial in this respect was that Mr. Geisen knew the Davis-Besse plant had always had a problem with leaking flanges, and had a general understanding that inspections were made more difficult — but not, in his mind, impossible — by the geometry of the head and its access ports. He also, for entirely valid and understandable reasons, believed — mistakenly, along with many others — that the reactor vessel head had been cleaned after the inspection in 2000, and this influenced some of what he represented to the NRC.

In sum, Mr. Geisen filtered incoming facts against this always limited, and sometimes mistaken, knowledge base, and was slow to recognize that the new facts that he did absorb heralded a new era of problems. But without such recognition, he did not attain the degree of “knowledge” sufficient to establish guilty misrepresentation — rather than innocent mistakenness fueled by disinformation coming from his co-workers and elsewhere within the company.

Thus, the question before us is not whether Mr. Geisen could have done a better job or should have known that — or should have taken steps to determine whether — the information being provided to the NRC was inaccurate or incorrect. Rather, the question was whether the Staff has proven that he had actual knowledge, at the time the submissions were made, that the information being provided was false and that he deliberately acted contrary to that knowledge.

Mr. Geisen persuasively argued and established that looking at the situation with the benefit of hindsight — as the NRC Staff did in formulating and defending its Enforcement Order — tends to introduce a biased perspective on the evidence. We have therefore taken some care to view the evidence in the situational context that existed when it was created, so as to avoid a “hindsight” mindset in trying to understand fully not only Mr. Geisen’s frame of mind, but also that of his superiors, his subordinates, and even the NRC regulators reviewing the information in question at that time.

Having done so, and viewing the evidence in light of the charges in the Enforcement Order and the content of FENOC’s submissions to the NRC, we find that the Staff did not prove the charges it brought against Mr. Geisen by a preponderance of the evidence, and thus failed to establish that he engaged in deliberate misconduct. The charges against him were not generalized in nature, but instead concerned specific pieces of information that Mr. Geisen, purportedly knowing of their inaccurate and incomplete nature, still concurred in submitting

to the NRC. Insofar as Mr. Geisen was concerned, we find that FENOC's submissions, although later stipulated to be false, were not contradictory to his then-understanding of the relevant situation and information. In making those determinations, it was crucial to our analysis of the evidence to recognize where hindsight could be prejudicial and context could be informative.

Much emphasis and focus were placed on FENOC's first response to the Bulletin, and in that regard the Staff did not prove by a preponderance of the evidence that Mr. Geisen acted knowingly as to any erroneous information contained therein when, at the last minute, he merely concurred in the submittal of Serial Letter 2731. Mr. Geisen was *not* involved in the development and preparation of that response, which was a 25-page single-spaced document responding to various technical issues requested by the Bulletin, with input provided by a number of personnel from various departments and coordinated by a contractor hired by the Regulatory Affairs Department for that specific purpose.

Moreover, some of the information contained in that submission, although later stipulated to be false, would not have appeared plainly inaccurate or incomplete to someone in Mr. Geisen's role, which was merely to sign the "Green Sheet" along with fifteen others. Those fifteen included not only four other plant managers at his level and three plant supervisors (some of whom had direct management responsibility for the reactor vessel head inspections), but also and more importantly, eight at a subordinate level, several of whom had been directly involved in the preparation of Serial Letter 2731 and personally involved in prior inspections of the reactor vessel head at Davis-Besse.

Furthermore, Mr. Geisen's department — Design Basis Engineering — was *not* responsible for the reactor vessel head inspections; therefore, and notwithstanding the Enforcement Order's specific reliance on this proposition,<sup>36</sup> he was also specifically *not* "the FENOC manager responsible for ensuring the completeness and accuracy" of the content in Serial Letter 2731 in this regard. *See* Staff Ex. 10 at 2, "Block 14" (emphasis added); *see also* Tr. at 1902-04.<sup>37</sup> Instead, we can discern from the evidence that he was being asked, in essence, only to sign off that nothing in the letter was inconsistent with his department's knowledge or policies.

The Board was not provided with any evidence that would connect Mr. Geisen to Serial Letter 2731 in any way prior to his signing the Green Sheet. Nor, based on what we learned at the hearing, would we expect that any such evidence exists. Given Mr. Geisen's involvement in other pressing matters during the period of

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<sup>36</sup> Enforcement Order at 7-8.

<sup>37</sup> The Systems Engineering Department was responsible for the reactor vessel head, including the inspections and cleanings of that part of the plant, and would therefore have been responsible for the technical information in Serial Letter 2731 in this regard. *See* Tr. at 1033 (inspections were performed by systems engineers); 1668 (Systems Engineering "owned the head").

time that Serial Letter 2731 was being prepared, and given that its content did not involve matters that were his responsibility, there would be no plausible reason for him to have diverted his attention to the response at that time.

More specifically, the Bulletin was issued in August of 2001, when Mr. Geisen was preparing for two projects critical to the plant and to his career: (1) the INPO inspection scheduled for the next month, and (2) the upcoming outage which, although 6 months in the future, had attached to it imminent advance deadlines, requiring his department — Design Basis Engineering — to have all its plant modification packages in order, so that those charged with procuring the necessary equipment and services would have sufficient lead time to do so. This is why he saw Serial Letter 2731 only in its final version at the end of August, and why for the entire month of September he had nothing to do with the Bulletin response. This also fully explains why he did not view it as a top priority, while managing his in-box, to read or to focus on an assertedly key document — the so-called “Gibbs Report” addressed to his supervisor and affecting the work of a different department — that the Staff would charge him with knowledge of.

To further its position that Mr. Geisen was aware of the misrepresentations in Serial Letter 2731, the Staff put forward evidence that it claims establishes that Mr. Geisen had viewed videotapes of the past inspections at Davis-Besse as early as August of 2001. Specifically, the Staff introduced the typed version of abbreviated handwritten notes taken in March of 2002 by Jack Martin, reflecting a 20-minute interview of Mr. Geisen. Mr. Martin’s notes — not intended to be a verbatim record of an interview that was being conducted for other purposes — state that Mr. Geisen told him that awareness that the reactor vessel head had not adequately been cleaned arose from “review[ing] the videos of the inspections while preparing for the NRC interactions in August, 2001.” Staff Ex. 63.

After hearing their testimony and observing their demeanor, we find that both Mr. Martin and Mr. Geisen were credible witnesses, and both of them presented (Mr. Geisen orally, Mr. Martin through the document) what they reasonably believed were truthful accounts of what was said during the interview. We conclude, however, that Mr. Martin’s abbreviated notes were understandably mistaken, as they contradict critical facts stipulated or proven to be true. On the evidence before us, it is clear that Mr. Geisen first became involved in the company’s interactions with the NRC about the Bulletin at the beginning of October 2001. Thus, the Board majority finds unequivocally that the Martin document *cannot* serve to establish that Mr. Geisen viewed the past inspection videotapes in August of 2001. This is important, because not having seen those videotapes, he could not draw upon them to question the information being presented to the NRC.

As to that topic, Mr. Geisen had the general view that the information requested by the Bulletin was forward-looking, which is how the nuclear industry, including

other employees at Davis-Besse, viewed the Bulletin at the time it was issued. In other words, as a Staff witness confirmed was appropriate, instead of reviewing the additional responses to the Bulletin as a means to prove the past inspections were “acceptable,” he was focusing instead on where those inspections might have been lacking, providing a plan to the NRC as to how future inspections would meet future regulatory requirements for reactor vessel head inspections, and looking to results of new analyses to provide the assurances needed to keep the plant in operation. Mr. Geisen was assigned to oversee these new projects, and it was that effort that created in him the legitimacy of trying to persuade the NRC to allow the plant to keep operating until that time.

At the beginning of October, Mr. Geisen was suddenly tasked as a member of a response team to answer discrete questions posed by the NRC Staff in ongoing discussions, questions that were not within his areas of expertise but about which he was more knowledgeable than other team members. The evidence establishes that he based his answers on information he then believed was sound, in that he knew it had been provided by others who had been, or still were, directly involved in the relevant activities. For example, the evidence indicates that Mr. Geisen continually depended on information provided to him by Mr. Siemaszko, the seemingly most qualified individual at Davis-Besse regarding past inspections of the reactor vessel head. Yet the OI’s detailed investigation into FENOC’s Bulletin responses consistently labeled that information as false. (Mr. Siemaszko, whose appeal is also pending from a conviction by a federal criminal jury that did not receive the “willful blindness” instruction, has recently dropped his challenge to the NRC’s Enforcement Order against him.<sup>38</sup>)

From this perspective, the Staff did not advance evidence to demonstrate that Mr. Geisen knew the statements he made during the October 3 conference call or the October 11 meeting with the Commissioner’s Technical Assistants were false. Then, when Mr. Geisen realized, after participating in one conference call and one in-person meeting with NRC officials, that information he was providing or had provided was erroneous, he made an immediate attempt to correct the errors. That attempt, pursued in accordance with company guidelines as to who is allowed to communicate with the NRC,<sup>39</sup> confirms for us the validity of Mr. Geisen’s claim that he was not knowledgeable of the earlier misstatements when they were made. What followed, although perhaps appearing to be a comedy — or rather, a tragedy — of errors, is fully explicable, not as continuing misconduct but as continuing misunderstanding, fueled by a continuing flow of misinformation.

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<sup>38</sup> See *Andrew Siemaszko*, LBP-09-11, 70 NRC 151, 151-52 (2009).

<sup>39</sup> The Staff’s attempt to downgrade Mr. Geisen’s corrective efforts because he followed company policy, rather than federal regulations, in the manner in which he presented those corrections, was unavailing for purposes of our fact-finding in this proceeding. See Tr. at 1946-52.

Finally, the Staff did not provide sufficient evidence to support two critical points upon which the Staff and the Dissent rely heavily. First, the evidence does not demonstrate that Mr. Geisen knew that Davis-Besse's inspection method was incapable of viewing some of the nozzles on the reactor vessel head. Instead, Mr. Geisen testified that he understood that the method presented difficulties, but not that it was entirely ineffective in achieving its purposes. Certainly, the evidence does not demonstrate that Mr. Geisen understood what turned out to be the fact, i.e., that up to 14% of the nozzles could not be viewed. *See* Dissent at 829. Second, the testimony presented at the hearing, from Mr. Geisen and others, confirmed that he believed that the boric acid deposits that had accumulated on the reactor vessel head, of which he was aware, were from flange leakage.

With an understanding that the above represented Mr. Geisen's mindset, the Board reviewed again the submissions to the NRC and did not find that they were inconsistent with these aspects of what Mr. Geisen believed, particularly in later submittals (i.e., Serial Letters 2735 and 2744). That any errors in those submissions were inadvertent is substantiated by their other aspects, which in both tabular and illustrative form provided an account of each nozzle as well as a summary of the number of nozzles that could not be viewed, specifically during the 1998 and 2000 inspections. It was not until an NRC Staff expert (Melvin Holmberg) was tasked with reviewing this information in great detail (taking 58 hours to do so) that the vast mischaracterizations in those submissions — prepared on the basis of information provided by persons other than Mr. Geisen — were revealed.

No evidence presented to the Board proved to us that Mr. Geisen was aware of the severity of the boric acid accumulations on the reactor vessel head. He testified that he knew there were boric acid deposits on the head (from flange leakage), he was aware that the then-current inspection method presented difficulties, and he knew that a new type of analysis — the so-called crack-growth model — would be a more reliable method for making a case to the NRC for allowing Davis-Besse to continue operating until its next rescheduled outage.

In this regard, and notwithstanding the extensive investigation that OI conducted of over thirty of Mr. Geisen's co-workers at Davis-Besse — a number of whom ended up cooperating with the Government — not a single one was put on the stand to testify that he had observed Mr. Geisen engage in any conduct during the period in question, or heard him utter any words during the NRC interactions (or any concessions after the discovery of the corrosion cavity), that would have established a basis for finding that he had greater knowledge than he asserts that he had.

The *presence* of evidence of that nature would have spoken forcefully about the state of Mr. Geisen's knowledge. Its *absence* likewise speaks loudly — the investigation apparently did not reveal a single co-worker who, based on his

observations of, or interactions with, Mr. Geisen, saw any conduct or heard any words that were incriminating.

In light of the legal principles that govern us (*see* Part IV, below) and the detailed findings we make (*see* Part V, below), we cannot adopt the NRC Staff's theory that Mr. Geisen had knowledge of the falsity of the statements for which he is charged and, in disregard of that knowledge, engaged in a wrongful attempt to deceive the NRC. We therefore set aside the Enforcement Order as unsupported by a preponderance of the evidence.

#### IV. GOVERNING LEGAL PRINCIPLES

##### A. Nature of Review and Burden of Proof

We review the NRC Staff's Enforcement Order *de novo*<sup>40</sup> and determine on the basis of the hearing record whether the charges are sustained and the sanction imposed is warranted.<sup>41</sup> The NRC Staff's role at a hearing in an enforcement proceeding is "akin to that of a prosecutor," and it has the burden to prove its allegations "by a preponderance of the reliable, probative, and substantial evidence."<sup>42</sup> In order to prevail, then, in establishing that Mr. Geisen's actions constituted a violation of 10 C.F.R. § 50.5(a)(2), the Staff was called upon to demonstrate by a preponderance of the evidence that he had *actual knowledge* of the information associated with his actions and that he deliberately acted contrary to that knowledge. 10 C.F.R. § 50.5(a)(2); *see also* Tr. at 2031; Tr. at 2028-29 (Staff confirms that "actual knowledge" is the standard to be applied in this case).

Mr. Geisen agreed to a joint stipulation of facts that the submissions to the NRC upon which the Enforcement Order was based were inaccurate and incomplete (and were material to the NRC's work). Thus, what remained for adjudication concerned Mr. Geisen's knowledge at the time the statements related to these submissions were provided, and, if he were found to have engaged in deliberate misconduct, the appropriateness of the sanction imposed.<sup>43</sup>

Specifically, as has been seen in Table 1, above, the Enforcement Order charged that Mr. Geisen made the alleged false statements in three documents and during three conversations as follows:

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<sup>40</sup> *See Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980).

<sup>41</sup> *See Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979).

<sup>42</sup> *Id.* at 536-37, citing 5 U.S.C. § 556(d); *see also* Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,644, 40,673 (Aug. 15, 1991).

<sup>43</sup> Collateral Estoppel Motion at 3.

- "Serial Letter 2731," September 4, 2001, FENOC initial response to the Bulletin;
- Conference Call, October 3, 2001, between FENOC personnel and NRC Staff;
- Meeting, October 11, 2001, with NRC Commissioners' Technical Assistants;
- "Serial Letter 2735," October 17, 2001, a supplement to FENOC's initial Bulletin Response;
- "Serial Letter 2744," October 30, 2001, an additional supplement to FENOC's initial Bulletin Response; and
- Meeting, November 9, 2001, response to question from Advisory Committee on Reactor Safeguards (ACRS).

We organize our detailed analysis and findings of fact (Section V.B) to evaluate the specifics of each such charge that the Staff lodged against Mr. Geisen.

## **B. Misconduct and Knowledge Standards**

The Staff's Enforcement Order charges that Mr. Geisen violated 10 C.F.R. § 50.5(a)(2). That regulation provides that an employee of a licensee may not "deliberately submit to the NRC . . . information that [he] knows to be incomplete or inaccurate in some respect material to the NRC."<sup>44</sup>

Deliberate misconduct within the meaning of this regulation refers to "an intentional act or omission" that the person "knows" would cause a licensee to be in violation of any rule. *See* 10 C.F.R. § 50.5(c)(1). In this regard, the Staff's practice is to determine that deliberate misconduct occurs only when a person is knowledgeable about information associated with his actions and willfully and deliberately acts in contradiction to that knowledge. Tr. at 2026. Thus, careless disregard in the execution of one's duties does not amount to deliberate misconduct or a violation of 10 C.F.R. § 50.5(a)(2). Tr. at 2027-29; *see also* Tr. at 2032 (a deliberate misconduct violation requires a deliberate action). Therefore, as the Staff interprets it, the element of "actual knowledge" must be present to sustain a charge of deliberate misconduct under the NRC's regulations. *See* Tr. at 2028-29.

An inquiry into an individual's "actual knowledge is entirely factual, requiring

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<sup>44</sup> Enforcement Order at 4, 14-15. The Order also found that Mr. Geisen's actions caused FENOC, the licensee, to violate 10 C.F.R. § 50.9.



examination of the record.”<sup>45</sup> This is especially critical in this proceeding, where, as is common in others of this nature, the record is devoid of direct evidence to establish knowledge (e.g., a defendant’s admission, or documents drafted by the defendant that include representations entirely inconsistent with what he had written elsewhere), and instead is built upon circumstantial evidence alone. The issue then becomes the quality of circumstantial evidence sufficient to give rise to a finding that the person charged actually knew the information.<sup>46</sup>

With this in mind, the evidence at the hearing confirmed the commonsense view that not every document, whether paper or electronic, processed by an individual in a position like Mr. Geisen’s gets the same level of attention. But, as the evidence here showed, the degree of attention paid to a document *initially* can later be a strong determinant of the extent to which a person can *later* recall the contents of, and therefore can be said to have “knowledge” of, that particular document.<sup>47</sup>

Thus, an individual’s later recall of the contents of any document will turn on several factors, including (1) the effort, or lack thereof, that the worker put into its creation or application; (2) the need, or lack thereof, for the worker to have responded to the document in the course of employment; and (3) the significance, or lack thereof, of the information in the document to those tasks assigned to the worker that are viewed as having higher priority or greater significance than others.

Looked at another way, there are at least three levels of activity that might affect later recall. The highest recall involves a document that the worker either drafts initially or plays a significant role in redrafting or editing. Such documents, in common experience, are highly likely to become embedded in memory such that, when matters touching on them later arise, knowledge and recall follow naturally.

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<sup>45</sup> *Ziegler v. Connecticut General Life Insurance Co.*, 916 F.2d 548, 553 (9th Cir. 1990).

<sup>46</sup> Establishing a party’s actual knowledge requires showing more than that a party had a suspicion “that something was awry.” *Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987). Thus, constructive knowledge (that is, knowledge of facts sufficient to prompt an inquiry which would have uncovered the misrepresentations) is not actual knowledge. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992); *see also Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222-23 (7th Cir. 1990) (district court erred in using constructive knowledge because the law required actual knowledge).

<sup>47</sup> This is in contrast to cases involving, for example, contracts or tax returns, where an individual is legally bound to know the contents of a document by the mere existence of his or her signature thereon. *Cf. United States v. Olbres*, 61 F.3d 967, 971 (1st Cir. 1995) (jury may infer that a taxpayer read his return and knew its contents from the bare fact that he signed it under penalty of perjury); *Clyde A. Wilson International Investigations, Inc. v. Travelers Insurance Co.*, 959 F. Supp. 756, 763 (S.D. Tex. 1997) (citing *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) (one who signs a contract is presumed to know its contents)).

Next in the hierarchy would be documents that, although not created by the worker, ask that the worker respond to them or take action based upon them. Again, the level of thought necessary to perform those tasks tends to enhance later recall.

Lowest in the hierarchy are those documents that require only a “sign-off” or, even less, are just “FYI.” These, while of interest at the moment they are in front of a worker, are frequently processed in passing, and tend not to be subject to later recall at the level of those in the other categories. Similarly, the longer and more abstruse a document is, the less likely that any specific aspect of it will later be recalled.

Throughout the course of this decision, we evaluate documents that came before Mr. Geisen through this prism. The evidence as to a document’s genesis, audience, and purpose helped establish how significant those documents were to Mr. Geisen’s work and how important — or likely — it was that he would absorb their contents so that he would remember them when addressing future matters.<sup>48</sup>

### C. Collateral Estoppel

On November 17, 2008, the Staff filed a motion requesting that the Board utilize the doctrine of collateral estoppel to apply the guilty verdict on the underlying facts of Count 4 in the criminal case *to establish the validity of the Staff’s parallel charge, and only that charge, that Mr. Geisen knowingly provided inaccurate and incomplete information to the NRC in Serial Letter 2744.*<sup>49</sup> In this regard, the Staff notes that the Enforcement Order’s charges relevant to Serial Letter 2744 turn upon facts identical to those underlying Count 4 of the criminal indictment.<sup>50</sup> No other count of the criminal indictment upon which Mr. Geisen was found guilty had a direct counterpart in the Staff’s Enforcement Order.<sup>51</sup>

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<sup>48</sup> We found it instructive to recognize that if, independent of the principle just stated in the text, a person can be charged — as always, in *retrospect* — with knowledge of a *particular* sentence in a document he once saw, then looked at *prospectively* — i.e., at the time the document first came to his attention — he is subject to being later held accountable for *every* sentence in that document, and, for that matter, for every word in all the documents that ever came before him. For at the time he first examines a document, he has no inkling of what will later be viewed as a crucial fact that he will be held to have “known.” This cannot be the rule, yet the Dissent never comes to grips with this analytical conundrum, preferring instead to rely on one version or another of the overly simplistic “he saw it, so he knew it.”

<sup>49</sup> Collateral Estoppel Motion at 1.

<sup>50</sup> Collateral Estoppel Motion at 3, 6-7.

<sup>51</sup> For example, the indictment’s Count 3, on which he was found guilty, involved Serial Letter 2741, not covered by the Enforcement Order. And certain charges in the Enforcement Order were not the subject of the criminal indictment. As to the charge in the Enforcement Order involving Serial Letter 2735, that was covered by the indictment’s Count 2, of which Mr. Geisen was acquitted.

Prior to the Staff's submission of its collateral estoppel motion, counsel for Mr. Geisen communicated to the Staff his intent to contest such a motion on the ground that the trial judge in the criminal case gave the jury a "deliberate ignorance" instruction, which involved a "fundamentally different theory of [Mr. Geisen's] potential liability than the Staff's [Enforcement Order]." Tr. at 635; *see also* Tr. at 634-35, 691. On November 26, 2008, Mr. Geisen filed a response opposing the Staff's motion on this ground, among others.<sup>52</sup>

### ***1. The Procedural Background***

The Board recognized early on (Tr. at 354-55 (Nov. 14, 2006 Oral Argument)) that the collateral estoppel principle might have a bearing on the present case.<sup>53</sup> Specifically, we acknowledged the theory that the jury verdict of guilty in the criminal case could, as a matter of law, estop Mr. Geisen from contesting the merits of any of the charges in the Enforcement Order pending before us that mirrored the criminal charges on which he was found guilty. This would follow because the "beyond a reasonable doubt" standard of proof the Government (i.e., DOJ) had to meet in the criminal case was even higher than the "preponderance of the evidence" standard the Government (i.e., the NRC Staff) would have to meet in this administrative proceeding.

As we examined the matter with the aid of the parties, however, it became clear, well before the start of our hearing, that the application of the collateral estoppel principle would not be as simple as first envisioned. *See, e.g.*, Tr. at 633-38. Its application became complicated by multiple factors, including (1) the fact that only one of the counts of the criminal indictment that had resulted in guilty verdicts had a counterpart charge in the Enforcement Order (*see, above*, notes 13, 51); (2) the difference between the substantive standards of guilt that govern here (under the terms of our regulations), and the more expansive standards that were applied in the criminal case (under the trial judge's instructions to the jury); (3) the jury's routine rendering of a general verdict in the criminal case, rather than of a special verdict that might have allowed us to isolate the influence of the expanded standard in the jury instructions (*see* Tr. at 691); and (4) the pendency of an appeal of the criminal conviction.

Against that background, especially because the reach of any collateral estoppel we might invoke would not cover the entire case, we chose not to make an *advance* ruling that would, rather than eliminate our evidentiary hearing, only limit its scope — we feared this could perhaps lead to inefficiencies and delays at the

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<sup>52</sup> *See* Opposition to Collateral Estoppel Motion.

<sup>53</sup> *See also* Licensing Board Order (Calling for Briefs) at 2 (June 30, 2008) (unpublished) [hereinafter June 30 Order].

hearing as counsel sparred over whether particular pieces of evidence were barred by that scope ruling. *See* Tr. at 730. Instead, we took briefs on the issues surrounding the application of collateral estoppel, and carried those issues with the case for later resolution. These issues also became the subject of post-trial briefing and argument. *See* Tr. at 725, 730-31, 760; *see also* Tr. at 2393-98.<sup>54</sup>

We now address the matter. As we explain, several factors prompt us to exercise our discretion not to apply the collateral estoppel principle to any of the issues before us.

## **2. *The Nature of the Doctrine and the Role of Discretion***

Collateral estoppel is a form of issue preclusion that prevents “the relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies.”<sup>55</sup> As a general matter, collateral estoppel may be applied in administrative adjudicatory proceedings.<sup>56</sup> In order to apply collateral estoppel and to preclude the relitigation of an issue, four factors must be present:

- (1) the issue sought to be precluded must be the same as that involved in the prior action;
- (2) that issue must have been actually litigated;
- (3) it must have been determined by a valid and final judgment; and
- (4) the determination must have been essential to the prior judgment.<sup>57</sup>

For our purposes, the first of these factors is the crucial one: collateral estoppel applies only if an issue determined in the criminal proceeding is identical to one in front of us.<sup>58</sup>

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<sup>54</sup>The entire evolution of the collateral estoppel debate can be found in the following documents and discussions: June 30 Order; NRC Staff Response to the Board’s Order (July 7, 2008); Brief of David C. Geisen in Response to Board’s Order Dated June 30, 2008 (July 7, 2008); Tr. at 633-38 (Pretrial Conference Call, July 21, 2008); Tr. at 690-92, 701-06, 716-17, 724-26 (Pretrial Conference Call, Oct. 23, 2008); Staff Motion for Collateral Estoppel (Nov. 17, 2008); Opposition to Collateral Estoppel Motion; Tr. at 745-47 (Pretrial Conference Call, Nov. 26, 2008); Tr. at 760-61 (Pretrial Conference Call, Dec. 4, 2008); Tr. at 2028 (Evidentiary Hearing, Dec. 12, 2008); NRC Staff Response to Board Questions (Jan. 30, 2009); David Geisen’s Response to the Board’s Questions (Feb. 9, 2009); Tr. at 2393-98, 2433-36 (Post-hearing Oral Argument, Mar. 3, 2009).

<sup>55</sup>*Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977).

<sup>56</sup>*Id.* at 562-63.

<sup>57</sup>*Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff’d*, ALAB-575, 11 NRC 14 (1980).

<sup>58</sup>In applying collateral estoppel principles, the question is not whether the subsequent tribunal believes that the prior tribunal *correctly* decided the issue at hand; rather, if all factors of the doctrine

*(Continued)*

Even where all of the factors are met, however, the application of collateral estoppel by the subsequent tribunal is to some degree a discretionary matter.<sup>59</sup> Thus, *we are given some leeway to consider the existence of other considerations that could outweigh the jurisprudential reasons for applying the doctrine.*<sup>60</sup>

*There are three such considerations before us* that provide ample reason not to apply the doctrine to preclude relitigation here of the Government's charges concerning Serial Letter 2744 (which contains the only charges that are the "same" as those on which Mr. Geisen was found guilty in the criminal case<sup>61</sup>). Those considerations are: (1) the pendency of the appeal of the criminal court judgment; (2) the questions over the equivalence of the "knowledge" standard that governed the jury to the standard applicable in this administrative proceeding; and (3) the possibility that the jury verdict was internally inconsistent.

### **3. The Discretionary Factors**

#### *a. The Pendency of the Appeal*

Ordinarily, as the Dissent points out, the pendency of an appeal need not preclude reliance upon the lower court's decision being appealed to estop relitiga-

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are met, collateral estoppel comes into play. *See Davis-Besse*, ALAB-378, 5 NRC at 563-64 & n.7; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 173 (2002).

<sup>59</sup> *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), granting courts (and by extension administrative tribunals) *broad discretion* to determine when collateral estoppel should be applied, at least (1) when, as here, it is sought to be used offensively (i.e., against a defendant), and particularly (2) where the doctrine could be applied only in a one-way direction in that the nonmovant would not have been able to use the doctrine had he prevailed in the previous litigation (which was exactly Mr. Geisen's situation, for he could not have used a verdict of "not guilty" in the criminal case to estop the Staff here, given the Government's higher standard of proof — beyond a reasonable doubt versus by a preponderance of the evidence — in the criminal case).

<sup>60</sup> *Private Fuel Storage*, LBP-02-20, 56 NRC at 182 ("an exception to this customary practice occurs when broad public policy considerations or special public interest factors are involved such that an agency's need for flexibility outweighs the reasons underlying this repose doctrine so as to favor relitigation of a particular issue"); *Davis-Besse*, 5 NRC at 563 n.7 (making clear that "overriding competing policy considerations" can provide discretion to "withhold the application of collateral estoppel," but noting that no such considerations had been shown to exist there). *In sharp contrast to that situation, here the delay factor's crucial role in blocking the fair administration of justice is both a public policy consideration and a special public interest factor virtually requiring that we find the flexibility to avoid further delay, which as we explain herein we have attempted to do.*

<sup>61</sup> Although, as we see it, the Dissent treats the case as though it were otherwise, the Enforcement Order's six charges against Mr. Geisen involved specified activities, and the state of his knowledge must be addressed that way, not in generalized fashion.

tion of the same matter in another forum.<sup>62</sup> Under that generally useful view, the potentially duplicative and unnecessary litigation in the second forum does not take place while the appeal is pending, but if the appeal later proves successful — thus invalidating the original judgment upon which collateral estoppel had been based — then the litigation in the second forum is allowed to proceed.<sup>63</sup>

There might be many circumstances in which such an efficient approach would be entirely workable, and acceptable to both parties, if the estoppel ruling covered the whole case and neither party was hurt by the ensuing trial delay. But that is not the only way to proceed, and — in view of the already problematic delay factor (*see* below pp. 713, 714, and Part VI) — it seemed clearly not the way to proceed here.

A different approach would emerge from heeding the D.C. Circuit’s warning that “care should be taken in dealing with judgments that are final, but still subject to direct review,” so as to avoid “the risks of denying relief on the basis of a judgment that is subsequently overturned.”<sup>64</sup> To avoid those risks, the knowledgeable commentators Wright & Miller recommend that a court inclined to apply collateral estoppel based on a judgment that is subject to appeal may want to avoid the question by staying the case pending the appeal.<sup>65</sup>

In the matter before us, *neither approach would do justice in the circumstances, where the 5-year employment ban has inexorably been having its impact on Mr. Geisen while the wheels of justice grind.* The standard approach, had we adopted it before trial, would have had us bar the relitigation of the narrow issue in question, conduct the trial with limited scope, render a decision, and — if the appeal were later successful — reopen the matter to allow Mr. Geisen to present evidence on the previously barred matter.<sup>66</sup> Under the Wright & Miller approach, we would have stayed the case entirely.

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<sup>62</sup> *Southern Pacific Communication Co. v. American Telephone & Telegraph Co.*, 740 F.2d 1011, 1018 (D.C. Cir. 1984) (collateral estoppel may be applied even while judgment is pending on appeal), citing *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941).

<sup>63</sup> *Davis-Besse*, ALAB-378, 5 NRC at 563. The Dissent’s suggestion (at p. 813) that the pendency of an appeal has no effect on a judgment’s finality might be true as far as it goes, but in the collateral estoppel context the question is not as simple as the Dissent would have it. As the Dissent (at p. 813 n.5) suggests, if the appeal is successful, the party against whom the principle had been invoked could then apply for appropriate relief. The Dissent does not mention in that regard the delay that would thus have ensued, although avoiding such delay would seem crucial to the sound administration of justice in a proceeding in which lengthy delay (in obtaining review of the charges) is already at the heart of a controversy concerning the immediate effectiveness of the sanction imposed (*see* Part VI.B, below).

<sup>64</sup> *Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987).

<sup>65</sup> *See* 18A Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction* 2d § 4433 (1981).

<sup>66</sup> Because we conducted the trial subject to the motion, we would now have to — if we agreed with the Staff’s motion — sort through the evidence to determine which of it should not be considered, then render a decision on the remaining evidence on the other charges, which decision would accompany

(Continued)

As may be seen, under either approach the one constant would be further delay, delay that would work to Mr. Geisen's disadvantage. Once again, he has been banned from pursuing his career since January 4, 2006, so within 16 months he will have served his entire 5-year punishment. Every additional unnecessary delay brings more to the fore the maxim "justice delayed is justice denied." *This matter needs to be finally decided before it becomes any more moot than it now is. Hence, a powerful discretionary factor points us toward the most practical remedy: eschew collateral estoppel, look at the facts de novo, and render one decision that conclusively covers the entire case.*

In contrast, the Dissent's approach (at p. 813 n.5) to resolving the problem presented by the pending appeal of the criminal conviction elevates legal theory over practical considerations.<sup>67</sup> The Dissent's approach would add more delay to a case in which the burden of that delay — and of all the delays that have gone before — has been inequitably borne by one party, and one party alone, namely, through Mr. Geisen's long-standing inability to obtain a ruling on whether he can return to his chosen career.

By ignoring this factor, the Dissent is even able to say (*id.*) — as though it were true — that there are "no 'overriding' public policy consideration[s]" that dictate against the application of collateral estoppel.<sup>68</sup> But, as promised above (p. 712), we discuss at length in this section three such considerations. Further delay in the resolution of a person's right to work is what was at stake in this respect here, which is why there is such irony in the Dissent's notion (p. 813 n.5) that it is the Majority's views that would generate "corrosive disrespect" for adjudicatory tribunals.

In sum, the desirability of avoiding any further delay in our reaching a final merits determination is the key discretionary factor counseling nonreliance upon the collateral estoppel principle (even if that doctrine otherwise appeared applicable), based on a judgment subject to a pending appeal that has not yet been set for oral argument and is thus unlikely to be decided in the short term. The use

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a conclusion that the Staff case on Serial Letter 2744 was established by collateral estoppel. Had we instead applied the doctrine last fall and conducted our hearing as one of limited scope so as not to be relitigating the matters that the Staff sought to preclude (even though the correctness of the prior resolution was on appeal), we would have faced two problems. Not only would scope issues then have plagued us in determining the admissibility of evidence related to the intertwined communications and charges before us, but we would also have run the risk, if the pending appeal were successful, of later having to reconsider and relitigate some of what had already transpired before us.

<sup>67</sup> This same elevation of legal theory over practical realities affects the validity of the Dissent's lengthy analysis (at pp. 817-19) of "deliberate ignorance" as a proxy for knowledge. Whether or not that analysis can withstand scrutiny, it has no place in a case like this one, where the fact pattern simply does not bring the proxy theory into play.

<sup>68</sup> See also Dissent at p. 823, asserting that "no countervailing interest militates against" application of collateral estoppel.

of discretion also plays a role in determining whether the doctrine would apply at all, the subject to which we now turn.

*b. The Differences in the Respective “Knowledge” Standards*

The complexity of the issues and facts underlying both the Staff’s Enforcement Order and the jury verdict in the criminal case raises at least a question as to whether the issues essential to the prior judgment are the same as those before us. As we see it, the law regarding “knowledge” applied in the criminal case was not the same as the law we are to apply here. The Dissent disagrees. While we think the question not even a close one, the existence of any question at all would cause us to invoke our discretion not to preclude full litigation of the charges pending before us.

The jury’s guilty verdict in the criminal case came after it received a set of instructions that included a “deliberate ignorance” theory. Specifically, the district court instructed the jury that it could convict Mr. Geisen of the charges if it found he had deliberately ignored the potential for falsity in the statements provided in the submissions and presentations to the NRC.<sup>69</sup>

In presenting its motion, the Staff flatly and unmistakably conceded that the “deliberate ignorance” theory is not embraced within the “deliberate misconduct” standard that governs our proceedings.<sup>70</sup> As to the merits of this test, the Staff never wavered from this concession.<sup>71</sup> It would seem to follow inexorably that we would have to refrain from adopting the collateral estoppel doctrine here because the “deliberate ignorance” instruction is more favorable to the Government than is the NRC regulatory standard.<sup>72</sup> But two reasons why the existence of this

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<sup>69</sup> “Next, I want to explain something about proving a defendant’s knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that a defendant deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC [concealed] material facts . . . or included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict.” Transcript of Record, *United States v. Geisen*, Docket No. 3:06-CR-712 at 2239-39 [hereinafter *Crim. Tr.*].

<sup>70</sup> *See* Collateral Estoppel Motion at 23 (“Staff acknowledges that the 6th Circuit deliberate ignorance instruction does not meet the NRC’s deliberate misconduct standard, and instead would be classified as careless disregard”).

<sup>71</sup> *See, e.g.*, *Tr.* at 2028-29. The Dissent’s late-developing disagreement with the Staff as to the law applicable to the merits of this case, while perhaps interesting to explore in future matters, is entirely irrelevant here, given the theory on which the charges were based and tried.

<sup>72</sup> *See* Collateral Estoppel Motion at 23.



difference is *not* determinative are being urged upon us, the first by the Dissent, the second by the Staff.

(i) THE DISSENT'S REASONING

As we read the Dissent, it articulates a belief that the deliberate ignorance instruction, properly understood, is essentially no different from the deliberate misconduct standard.<sup>73</sup> In support of this position, the Dissent presents authorities that assertedly stand for that proposition. Whatever may be said of that proposition ordinarily, this hearing before us was guided by the Staff's concession to the opposite effect in its moving papers. To counter that compelling point, the Dissent argues that the Staff changed that position at the end of the case.

*The Staff's Unchanged Position*

On that latter score, at the post-trial oral argument, the Staff was asked a series of questions concerning whether the judicial and agency "knowledge" standards were essentially the same, *ostensibly* for purposes of *collateral estoppel* (as we shall see, there is a danger here, if that view were to be accepted, of having it at least *implicitly* affect as well the "knowledge" standard that governs *the merits*<sup>74</sup>). The Staff commendably did not take that opportunity to change its position (*see* Tr. at 2396-98), having previously not done so either at the evidentiary hearing or in its post-hearing written response to the Board's written questions.<sup>75</sup> The Staff

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<sup>73</sup>The reader should not be lulled into thinking that this controversy about the definition of "knowledge" is relevant only to the application of collateral estoppel. As we see it, the Dissent's view of the law concerning the attribution of knowledge *for collateral estoppel purposes* gets carried over into its evaluation *of the merits* of the Staff's charges. This approach — albeit rejected by the Staff as impermissible here — appears to underlie the Dissent's evaluation of the evidence and its attribution to Mr. Geisen of culpable "knowledge" about the details of the communications that came to him. This seems to us to be the actualization of the same danger the courts have warned about — i.e., that the concept of "should have known" will improperly influence the factfinder's determinations on "actual knowledge."

<sup>74</sup>We could have devoted far less attention to this matter had it affected only the application of collateral estoppel, given the nature of the Staff's concessions here which, once again, coming from the "prosecutor," cannot be undone by a Board, post-hearing, to the detriment of the person contesting the charges. The reason we discuss the matter at such length is to avoid having the Dissent's theories about the "knowledge" standard improperly carry over to influence analysis of the merits.

<sup>75</sup>NRC Staff Response to Board Questions at 1-4 (Jan. 30, 2009) [hereinafter Staff Response to Questions]; *see also* Licensing Board Order (Concerning Oral Argument) at 1-2 (Feb. 25, 2009).

disavowed any notion of reliance upon a theory that deliberate ignorance is the equivalent of deliberate misrepresentation.<sup>76</sup>

In light of what the Staff wrote and said, reflected in the record references above, we disagree with the Dissent's interpreting the Staff's steadfast oral and written refusal to agree with its analysis as an endorsement thereof. Perhaps it is because the Staff declined the invitation in diplomatic and guarded fashion<sup>77</sup> that the Dissent asserts that the Staff *did* change its position. *See* Dissent at pp. 820-21.

The Dissent then goes on to use that last-minute (asserted) changed position to bolster its collateral estoppel analysis. *Id.* at p. 822. In other words, even though it seems plain to us that the Staff would not concede that it had changed its position, the Dissent asserts that the Staff has indeed taken a changed position, proceeds to uphold that illusory position, and then relies upon it to reach a result with which we disagree.

Before we address the merits of the Dissent's legal analysis, we note that, as far as the merits of the case are concerned, even if the Staff had changed its position, it would have come too late to be allowable: the debate about the nature of the Staff's position on the respective agency and judicial standards regarding knowledge came after all the evidence had been adduced. Thus, even had the Staff been inclined to change its position on the merits of the "knowledge" standard that controls this case, it would have been too late to do so, because that change — broadening the standard under which Mr. Geisen could be held liable here — would have sufficiently altered the theory of the case to have been unfair to Mr. Geisen, whose evidentiary presentations had been tailored to the Staff's original theory (*see* above note 35, regarding the consistency of this approach).<sup>78</sup>

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<sup>76</sup>We note that the Staff did not "waive" that position. *See* Dissent at pp. 820-21. Instead, upon full consideration, the Staff *disavowed* that position throughout, including at the very end. *See* below, note 78.

<sup>77</sup>*See, e.g.*, Tr. at 2397, which reads:

JUDGE HAWKENS: So you are disavowing the applicability of collateral estoppel to the deliberate ignorance theory or you are not taking a position on it?

MS. SEXTON: We're not taking a position. We're saying that instead of trying to equate both theories to each other just look at the facts and in this case the facts point to actual knowledge.

<sup>78</sup>In contrast, Mr. Geisen did shift his position at one point, but very early on. Specifically, he gave a short-lived indication, upon the expiration of the stay and the resurrection of this proceeding, that the criminal verdict had foreclosed our considering questions of "guilt," leaving us to consider only the matter of "sanctions." *See* Geisen Response to June 30 Order at 4. As we explored that matter during the prehearing phase, however, it became clear that the guilt/sanctions dichotomy was a false one (Tr. at 631-32), and that even if the collateral estoppel doctrine were broadly applicable in theory, there were serious and complex questions about how it could and should be applied in practice (Tr. at 633).

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That acknowledgment of the existence and applicability of the more limited “knowledge” standard here guided both parties in their presentation of evidence, including cross-examination, and also guided the Board’s questioning.<sup>79</sup> In that regard, for reasons that were repeatedly explained but need not be rehearsed here (*see generally* above note 66), the Board carried the Staff motion regarding collateral estoppel with the case, thinking that would be a more efficient way to proceed without affecting either party’s procedural rights or substantive presentations.

*The Dissent’s Asserted Authorities*

On the merits, the Dissent makes what appears to be an eloquent case in support of the position it believes the Staff adopted. The authorities it cites do not, however, take account of the holdings of a number of courts that have addressed the practicalities, not just the theories, of the situation. Their holdings serve as a

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At the same time, Mr. Geisen developed a theory, based on the expansive nature of the criminal trial’s jury instructions, about why collateral estoppel was not applicable at all. *See generally* Opposition to Collateral Estoppel Motion.

The Board and the parties wrestled with these questions, which eventually led to the Staff and Mr. Geisen negotiating a long, detailed, and complex stipulation of facts to govern our proceeding. Staff Ex. 77. At no point in that lengthy process did the Staff object to the evolution that had transpired in Mr. Geisen’s thinking and theories, and the entire trial preparation and presentation were conducted upon the premise that, apart from the stipulation, the Staff had to establish by evidence — not by collateral estoppel — all the elements of its case. Tr. at 687.

To be sure, the Staff continued to press — in essence in the alternative — for the application of collateral estoppel to establish particular elements of its case. Tr. at 2395. In doing so, however, it specifically and unmistakably acknowledged that the agency’s regulatory test for “knowledge” was not as expansive as the one that, by way of the jury instructions, had governed the criminal case. Collateral Estoppel Motion at 23. The Staff’s alternative arguments essentially became that (1) we should apply collateral estoppel because it was plain the jury had based its verdict on actual knowledge; and (2) quite apart from collateral estoppel, the Staff had by its evidence proven actual knowledge in our proceeding. Tr. at 2397.

<sup>79</sup>The Dissent expresses (at pp. 821-22 n.11) a misplaced belief that a Staff decision at or after the close of the hearing to change its litigating position on the central substantive legal issue in the case — the one to which all its evidence had been tied — would not have come too late. In support of that belief, the Dissent relies, incorrectly, on the proposition that Mr. Geisen had been given the opportunity to respond to the Staff’s position at each juncture. To be sure, Mr. Geisen has been given the opportunity to respond on the *collateral estoppel* question every time it was considered — but the related *substantive knowledge* issue that can so dramatically affect the merits (*see* above notes 73, 74) arose after the trial had been concluded; and unfairness would arise were it allowed now to control when the shaping of the evidence at trial involved a different “knowledge” standard. This is why we noted earlier at such length that the “knowledge” issue is not just a matter that affects collateral estoppel — it goes to the entire case. The Staff knows that, which is why in the final analysis (NRC Staff Response to Board Questions at 2-4) it stated what it believed the two cases were about so simply and elegantly, *without any reliance upon the Dissent’s late-breaking theory, which the Staff concedes is inconsistent with our regulations.*

reminder of why Justice Holmes said that “the life of the law has not been logic, it has been experience.”<sup>80</sup>

In this regard, the Dissent labors to establish that the “willful blindness” or “deliberate ignorance” corollary simply explains a way of acquiring the “knowledge” upon which accountability is based, and thus does not expand on the agency requirement that such knowledge exist for a violation to be found. There are two major problems with this reasoning.

In the first place, the instruction given by the district court has its place, and thus sees frequent usage in drug possession cases where the defendant purports not to know, for example, what is in the package someone asked him to deliver in secretive fashion.<sup>81</sup> Where the fact pattern is not of that or of an analogous nature, however, a number of courts have held that giving that instruction creates a serious danger of misleading the jury (*see below*).<sup>82</sup>

On this point, the Dissent points to the warning jurors are also routinely given (and were given here) that the added instruction is not intended to allow them to base guilt on negligence or carelessness. Indeed, there is a Sixth Circuit decision indicating that the warning is sufficient to legitimize the instruction.<sup>83</sup>

That reasoning ignores, however, that the risk of confusion is compounded in a case where there is *no evidence presented* that fits the “willful blindness/deliberate disregard” fact pattern.<sup>84</sup> We cannot speak to the precise nature of the evidence that was before the district court jury, but we can say there was no such evidence put before us, and presumably the Government’s presentations in the two proceedings were not greatly dissimilar.

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<sup>80</sup> Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

<sup>81</sup> *See, e.g., United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc) (defendant found driving car with strong scent used to mask marijuana odor); *United States v. Asubike*, 564 F.3d 59 (1st Cir. 2009) (defendant in possession of briefcase full of heroin); *United States v. Orji-Nwosu*, 549 F.3d 1005 (5th Cir. 2008) (defendant in possession of heavy suitcase containing concealed canisters of cocaine); *United States v. Wilson*, 503 F.3d 195 (2d Cir. 2007) (defendant made residence available for manufacture and distribution of illegal drugs).

<sup>82</sup> The Sixth Circuit “harmless error” cases upon which the Dissent relies (at p. 820) — to support its view that the controversial instruction is commonly used — actually prove two other, more crucial points: the Sixth Circuit is increasingly focusing on (1) problems caused when (as here) the evidence does not support the use of the deliberate ignorance charge (*United States v. Ross*, 502 F.3d 521, 528 (2007)); and (2) the difference (which the Dissent labors to establish does not exist) between deliberate ignorance and actual knowledge (*United States v. Rayborn*, 491 F.3d 513, 521 (2007)).

<sup>83</sup> *See United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995).

<sup>84</sup> The Dissent’s reliance (at pp. 819-20) on the warning the district court included in its jury instructions is misplaced for two reasons. The first, once again, is that its legal analysis to the effect that the warning “forecloses the possibility” of a problem ignores the practical impact the “deliberate ignorance” instruction might have had here. The second is that the Dissent does not come to grips with the more recent Sixth Circuit ruling calling the legal theory into question in particular cases.

Be that as it may, the second problem is even more compelling: independent of the state of the record, *a number of other courts, including the Sixth Circuit at a later date, have expressly cautioned against the use of the expansive instruction, even with the warning attached, because of its per se risk of instilling confusion.*<sup>85</sup> We are of course in no position, and have no authority, to express a direct opinion on the legitimacy of the jury verdict and whether it was a product of such confusion as those courts warned about. We can observe, however, that we were informed that the jury provided comments to counsel post-trial indicating that the “deliberate ignorance” instruction had led them to believe that Mr. Geisen “should have done” a better job.<sup>86</sup>

Of course, sorting that out for purposes of whether the conviction can stand is, again, a matter for the Sixth Circuit on direct appeal.<sup>87</sup> But even if such possible deficiencies are not of sufficient weight to warrant a reversal there, the existence of all these questions nonetheless appears sufficiently colorable, indeed weighty, to provide another discretionary reason not to apply collateral estoppel principles to preclude litigation of the similar matter pending in our forum.<sup>88</sup>

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<sup>85</sup> See, e.g., *United States v. Springer*, 262 Fed. Appx. 703, 706 (6th Cir. 2008) (“[s]uch an instruction should be used with caution to avoid the possibility that the jury convict on the lesser standard that the defendant *should* have known his conduct was illegal”) (emphasis in original), citing *United States v. Rivera*, 926 F.2d 1564, 1571 (11th Cir. 1991) (danger of “such an instruction in an inappropriate case is that juries will convict on a basis akin to a standard of negligence”); see also *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) (“despite the instruction’s cautionary disclaimer, there is a possibility that the jury will be led to employ a negligence standard and convict a defendant on [an] impermissible ground”), and see *id.* at 651 (instruction can “reliev[e] the government of its constitutional obligation to prove the defendant’s knowledge beyond a reasonable doubt”) (internal quotations omitted); *United States v. Wofford*, 560 F.3d 341, 352 (5th Cir. 2009) (“[w]here the *mens rea* required for conviction is that the defendant act “knowingly” or “willfully,” a deliberate ignorance instruction creates a risk that the jury might convict for negligence or stupidity, i.e., that the defendant should have been aware of the illegal conduct); *United States v. Wasserson*, 418 F.3d 225, 237 (3rd Cir. 2005) (instruction must be tailored to “avoid the implication that a defendant may be convicted simply because he or she should have known of the facts of which he or she was unaware”).

<sup>86</sup> See Opposition to Collateral Estoppel Motion at 4 n.1; Defendant’s Memorandum in Aid of Sentencing at 11, *United States v. Geisen*, No. 3:06CR712 (N.D. Ohio 2008).

<sup>87</sup> The fact that all members of the Board agree that the issue of jury confusion “is a matter for the Sixth Circuit on direct appeal” (Dissent p. 820 text accompanying n.9) does not eliminate the existence or alter the impact of the three public policy considerations that, individually and in total, give us the discretion not to apply collateral estoppel here: (1) there is a colorable appeal pending; (2) there is at least a serious issue as to whether the same “knowledge” standard was applied in both cases; and (3) there is an issue about jury confusion that is within our discretion to consider, for collateral estoppel purpose, even if it proves insufficient to upset the verdict on the merits.

<sup>88</sup> The central flaw in the Dissent’s deliberate ignorance theory is that it operates in the academic or theoretical world. Thus, the Dissent (at pp. 817-18) inexorably conflates deliberate ignorance and actual knowledge, notwithstanding the practical differences between the two concepts that have led

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On that score, given the extensive concern federal courts have exhibited (*see* above note 85) over the legitimacy of the expanded instruction,<sup>89</sup> we believe that its use in the criminal case — when it is not embraced by our regulations — makes the two proceedings sufficiently different that the ruling in the one cannot be binding in the other.<sup>90</sup> And, even if application of collateral estoppel were *permissible* in these circumstances, it would not be *required*, and we would exercise our discretion not to apply it here — again, to win on direct appeal, Mr. Geisen might need to show that the expanded instruction *actually* tainted the jury verdict, while he need here only raise a legitimate *concern* that it did so (*see also*, similarly, the discussion of the possibility of an inconsistency in the jury verdict, discussed below). Taking our guidance from the decisions cited above, we have a sufficient degree of such concern that, if all we had before us were the Dissent’s theories, we would decline to rely upon collateral estoppel to foreclose litigation of the similar matters before us.<sup>91</sup>

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to judicial recognition of their confusion-inducing potential. Because of this acknowledged risk of confusion, little stock can be put in the Dissent’s glib but insubstantial assurance (at p. 817 n.7) of what the jury was “well aware” of.

<sup>89</sup> The Dissent’s reliance (at p. 817) upon the Model Penal Code’s definition of “knowledge,” and (at p. 818) upon a modest mention in a Supreme Court footnote (*Leary v. United States*, 395 U.S. 6, 46 n.93 (1969)), to confer legitimacy on its position is misguided. To be sure, that Code indicates that “knowledge is established if a person is aware of a high probability of its existence,” but this is followed immediately by the exception “unless he actually believes that it does not exist.” This exception, seemingly highly relevant to the facts before us, was not included in the instructions to the criminal court jury, but the Dissent — which throughout presents a number of highly controversial thoughts as though they were incontestable propositions — dismisses (at p. 817) the absence from the jury instruction of this important Model Penal Code exception as “not alter[ing] the conclusion.” That *ipse dixit* ignores that the assertedly inconsequential exception would appear, instead, to be at the heart of the controversy that was before the district court.

<sup>90</sup> Once again, this is not a case in which an alleged drug runner disclaims knowledge of what is in the package he is delivering, and a finding of a “high probability” that he knew would fit the fact pattern, while any disclaimer would be inherently lacking in credibility. Instead, the entire basis of the defense here was that, upon close analysis, it can be established that Mr. Geisen “actually believe[d] that” the information he was submitting was true. *See* Model Penal Code above note 89. Either he knew it was false, or he believed it was true — on the evidence presented, “high probability” had nothing to do with it and thus should not be employed in our decision-making process. *See U.S. v. Barnhart*, 979 F.2d at 652 (indicating “there is no doubt that there was evidence of either actual knowledge or no knowledge on [the defendant’s] part,” but dismissing other evidentiary theories relating to deliberate ignorance). The Staff essentially acknowledges as much; its argument is that collateral estoppel applies for a different reason (and that if it does not, the evidence presented to us supports its assertion that Mr. Geisen had actual knowledge). *See* above note 77.

<sup>91</sup> The Dissent’s discussion of waiver attempts to work around the Staff’s refusal to adopt the Dissent’s expanded concept of “knowledge” that the Staff believes is not embraced by the agency’s governing regulations. By citing a number of judicial decisions indicating that courts have the discretion to overlook waiver of the assertion of collateral estoppel principles, the Dissent appears

(Continued)

(ii) THE STAFF'S ARGUMENT

The Staff has a different reason why the doctrine might nonetheless still be useful here. Its argument is essentially that there was sufficient evidence for the jury in the criminal trial to have convicted on the deliberate misconduct standard (without falling back on the deliberate ignorance corollary), and that we should recognize that to be the case.<sup>92</sup> Were we to do so, goes the argument, collateral estoppel would preclude Mr. Geisen from having the opportunity to contest here any like charges to which the same standard applied.

The Staff's argument may be legitimate in theory but it does not work in practice. It might have worked had the jury rendered, rather than the usual general verdict it announced, a special verdict indicating in some fashion the legal theory it applied to reach any findings of guilt. But the jury was not asked to provide any "special or particularized findings" of that nature.<sup>93</sup>

Accordingly, it is not apparent on the face of the verdict whether the jury found that Mr. Geisen knowingly concealed information from the NRC in submissions and presentations, or whether the jury went in another direction based on the deliberate ignorance instruction (or, for that matter, whether — as indicated in the post-trial meetings with counsel — it convicted on an impermissible "should have known" theory). Had there been a special verdict, our task in applying the Staff's theory might have been an easy one. But with the jury not being asked to render such a verdict, the Board has insufficient guidance available from which to determine whether the jury conviction was premised on Mr. Geisen having had actual knowledge, or on Mr. Geisen having been deliberately ignorant. The prior conclusion would support a finding of deliberate misconduct under our regulations; the latter would not, as the Staff conceded.<sup>94</sup>

We would, therefore, be left to conduct our own analysis to determine if the Staff's theory can be applied here. In a less complex case, it might be a matter of only minor difficulty to ferret out that, in light of the evidence presented, a jury verdict could be clearly read as embracing one, but not another, of the prosecution's theories. But this is not a simple case, and the threads of evidence

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to be asserting (at pp. 820-23) that the Staff merely "waived" reliance on the "deliberate ignorance" theory. Once again, the Staff did not inadvertently waive this theory — *it deliberately and steadfastly, from beginning to end, disclaimed this theory as legally impermissible on the merits.*

<sup>92</sup> This Staff position points up the one valid conclusion — a very important one — that can be drawn from the Dissent's reliance on the deliberate ignorance corollary. Specifically, *the Dissent would not have to rely on the deliberate ignorance theory if it had real confidence in its belief that the Staff had proven that Mr. Geisen in fact had actual knowledge.* The Staff says that is what its case is about, but the Dissent apparently does not believe to a high probability that the Staff succeeded in its proof.

<sup>93</sup> Collateral Estoppel Motion at 8; *cf.* Fed. R. Civ. P. 49.

<sup>94</sup> *See* Collateral Estoppel Motion at 23.

that make up the story of the nature of Mr. Geisen's involvement and knowledge are difficult to follow. We have studied them for a long time in order to reach our judgment. The jury had much less time to do the same; without a special verdict to guide us, we would not deign to interpret the jury's thinking.<sup>95</sup>

In short, the fact that the original judgment is subject to alternative interpretations provides reason to exercise our discretion not to apply collateral estoppel. The Staff argues that such a challenge is easily overcome by our conducting a realistic and rational examination of the record in the criminal case to determine whether a reasonable jury could have grounded its verdict on any basis other than that asserted by the Staff as having been the controlling issue.<sup>96</sup> Using this approach, the Staff maintains that the Board will find "no rational evidence to support a different finding," and therefore, collateral estoppel should apply.<sup>97</sup>

We do not agree. For the Board to determine that the jury's verdict was based on Mr. Geisen knowingly providing materially inaccurate and incomplete information to the NRC in Serial Letter 2744 (Count 4) would require us to perform a thorough examination of the evidence underlying the Government's case in the criminal trial. But performing such a duplicative examination is precisely what application of collateral estoppel is intended to prevent. If we must reexamine the issue one way or another, it makes more sense to do it on the evidence presented to us than on the evidence presented elsewhere.

There are other reasons to reject the Staff's position that we should be able to determine, or at least intuit, that there was ample evidence for the jury to have found Mr. Geisen guilty on the deliberate misconduct standard. In the first place, as appears from our discussion of the merits below, we do not believe that the evidence before us shows that the Government (here, the NRC Staff) met that

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<sup>95</sup> Like us, courts have been reluctant to take on such a task. *See, e.g., Barnhart*, 979 F.2d at 653 (refusing to indulge in the Government's view as to what was "obviously one plausible interpretation of the jury's thought processes" when "on the other hand" there was another theory as to what "the jury may have found," and thus holding that because, *inter alia*, of "the risks associated with an improperly tendered willful blindness instruction," erroneous use of the instruction — in a case where the evidence did not support it — was not harmless error beyond a reasonable doubt). It is one thing, on a motion to set aside a verdict, to examine a record to determine whether, taking everything in the light most favorable to the government, there was sufficient evidence upon which a reasonable jury *could* have based a conviction; it is an entirely different matter to conclude affirmatively — for harmless error or collateral estoppel purposes, looking at the evidence from the perspective of the defendant opposing the doctrine's application — and without speculating, that a jury *must* have adopted one of two competing theories.

<sup>96</sup> *See* Collateral Estoppel Motion at 11 (citing *Otherson v. Department of Justice, Immigration & Naturalization Service*, 711 F.2d 267, 274 (D.C. Cir. 1983)). In accordance with *Otherson*, to determine whether to apply collateral estoppel to a general verdict, a trial judge is to "examine[ ] the record of the prior trial in detail to see if the [jury] might have disbelieved some aspects of the acts charged . . ." *Otherson*, 711 F.2d at 274.

<sup>97</sup> Collateral Estoppel Motion at 11.



substantive standard as to Serial Letter 2744, even under the relaxed procedural standard of “preponderance of the evidence.”

Second, there is some question about whether the guilty verdicts delivered by the jury were based on inconsistent and conflicting findings. We discuss that now, as the third factor which causes us to determine that collateral estoppel would be inappropriate here.

*c. The Possibility of an Internally Inconsistent Jury Verdict*

The Staff posits that the jury convicted Mr. Geisen on all counts that contained charges relating to knowledge acquired after October 17, 2001 (the date of the submittal of Serial Letter 2735, about which the jury acquitted Mr. Geisen).<sup>98</sup> This would explain the Indictment’s Count 3, involving Serial Letter 2741 submitted to the NRC on October 30, 2001; it would do as well for Count 4, with the jury’s theory for that count being that Mr. Geisen was found to have knowingly provided the information, stipulated by the parties to be incorrect and inaccurate, in Serial Letter 2744, which was also submitted to the NRC on October 30, 2001. *See* Staff Ex. 13.

But the jury acquitted Mr. Geisen on Count 5, which alleged that Mr. Geisen knowingly made a false statement through the submission of Serial Letter 2745, which was submitted to the NRC just a day after the two earlier submittals, i.e., on November 1, 2001. *See* Criminal Indictment at 14. Serial Letter 2745 included language nearly identical to that contained in the *earlier* Serial Letter 2744 that formed the basis for Count 4 of the indictment, upon which Mr. Geisen was convicted. *See id.*

The Staff avers that these facially inconsistent verdicts are easily reconciled, upon review of the evidence advanced by the Government at trial, owing to the placement of the inaccurate statement in Serial Letter 2745 in such a location that the jury was likely to attribute the statement as “something other than a factual assertion.”<sup>99</sup> But we have no basis in the record to determine whether or not that postulate is supported. Instead, the possibility that the jury reached inconsistent verdicts offers another reason not to apply collateral estoppel here.<sup>100</sup>

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<sup>98</sup> *Id.* at 19. The Dissent concedes (at p. 815) that the jury was not convinced “beyond a reasonable doubt” of the state of Mr. Geisen’s knowledge “prior to October 17, 2001.” We can certainly understand that, since we are not convinced to even a preponderance of the evidence of the state of his knowledge before or after that date.

<sup>99</sup> Collateral Estoppel Motion at 20.

<sup>100</sup> The Dissent’s suggestion (at p. 815) in this regard that one tribunal should not “blithely” conclude that another tribunal’s jury acted irrationally is of a piece with the Dissent’s insistence that we are required to presume that juries follow the instructions they are given. These propositions may

*(Continued)*

The Dissent asserts that the acquittal on Count 5 can be explained by the district court's refusal to let DOJ present key evidence related to that count. The Dissent even says (at p. 815), as though it signifies something important, that it must take as true the Staff's "undisputed representation" to that effect. But the Dissent reads far too much into the Staff's representation about the limitations placed on what the prosecution could present. For, consistent with what the Staff fairly represented, the only evidence that DOJ was precluded from introducing on this score involved the potential health and safety consequences of the threatened nuclear plant accident to the populace, information that the court thought might be prejudicial in inflaming the jury and was not probative of the matters before the court<sup>101</sup> — or to us. Thus, the Dissent's reliance on the Staff's "unopposed representation" about the rejected evidence implies that far more significance should be attributed to the excluded material than it will bear.

In sum, none of that material is probative of the key matter: what did Mr. Geisen know about the central subject of Serial Letter 2745? As to the indictment's Count 5, the jury must have concluded "not enough." But it had reached the opposite conclusion about essentially the same material that underlay an earlier count.<sup>102</sup> It is of course not for us, but rather for the Sixth Circuit, to determine whether those two verdicts are necessarily inconsistent. For our purposes, the colorable possibility that an inconsistent verdict was rendered provides us another discretionary reason not to use the collateral estoppel doctrine to foreclose Mr. Geisen's opportunity to litigate the substance of a count of the indictment insofar as it appears before us in a counterpart charge in the Enforcement Order.

Each of the three factors discussed above, standing alone, provides sufficient grounds to eschew collateral estoppel in the circumstances of this case. Taken together, they virtually mandate that we exercise our discretion along those lines.<sup>103</sup>

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well be true as a general matter, but the presumption embodied in them becomes less credible and less compelling in circumstances where a number of Courts of Appeals have warned against giving certain instructions because of their inherent tendency to sow confusion.

<sup>101</sup> See *United States v. Geisen*, 2007 WL 1452729, at \*1 (N.D. Ohio May 15, 2007).

<sup>102</sup> Thus, the Dissent is wrong to assert (at p. 815) that "there is no question" that the jury necessarily made a particular factual determination, because that conclusion disregards the other portion of the jury verdict that *per se* calls that "unquestionable" result into question.

<sup>103</sup> The Dissent (at p. 822) places a *theoretical* concern about the "corrosive disrespect" that allegedly stems from relitigation, above Mr. Geisen's intensely *practical* — but assertedly "insubstantial" — interest in that relitigation. But we have already seen that there are several factors that militate against viewing his interest as insubstantial, including the serious question — which the Dissent dismisses out of hand (at pp. 822-23) — about whether Mr. Geisen had a "full and fair opportunity to litigate" *the very same issue* in the criminal proceeding, where he was saddled with *the deliberate ignorance theory* which even the Staff says *has no place here*.

The Staff disavowed the applicability here of the expansive standard used in the criminal case and by the Dissent. Thus, whatever may be said of the merits of that standard, it has no place here, either for purposes of invoking collateral estoppel or for evaluating Mr. Geisen's conduct.

Put another way, the Staff brings the charges that frame our review of enforcement orders. Boards should not be in the position of upholding Staff enforcement orders on legal theories that (1) the Staff did not and does not embrace and (2) in any event do not fit the circumstances of the case before them. With the collateral estoppel principle inapplicable, our job is just this: to ascertain whether the Staff has presented evidentiary facts that fit the legal theories it did advance and thus has demonstrated that Mr. Geisen engaged in the misconduct charged in the Enforcement Order. We now turn to that question.

## **V. DETAILED ANALYSIS AND FINDINGS OF FACT**

In this part of our decision, we provide the factual detail underlying the Board majority's decision in this case. We first provide, in Section A, a very brief recitation of the identity and roles of the witnesses whose live and transcribed testimony came before us. Section B provides a detailed account of our findings as to what the evidence establishes, and does not establish, regarding each of the six charges and related events; those findings form the basis for the Summary of Findings in Part VII.A, and lead to some of the Conclusions of Law that follow in Part VII.C.

### **A. Witnesses**

In support of the charges alleged in its Enforcement Order, the Staff (1) presented the live testimony of four individuals and (2) submitted excerpts from transcripts of the testimony of two other individuals that was given during Mr. Geisen's criminal case. The live witnesses at our hearing were: Melvin Homberg, a Reactor Inspector for the NRC in Region III, Tr. at 832; Allen Hiser, a Branch Chief for the NRC in the Steam Generator Tube Integrity and Chemical Engineering Branch of the Office of Nuclear Reactor Regulation (Tr. at 1196); Prasoon Goyal, a former Senior Mechanical Engineer at Davis-Besse (Tr. at 1018); and John Martin, a former Regional Administrator for the NRC and current owner of an engineering and consulting company that focuses on nuclear safety issues (Tr. at 1472-73). Transcripts of previously presented testimony came from Stephen Moffitt, former Technical Services Director in the Engineering Department of Davis-Besse, a role that made him Mr. Geisen's supervisor (Staff Exs. 70, 74); and Gregory Gibbs, former owner of Piedmont Management &

Technical Services, Inc., which provided consulting services primarily to nuclear plants in the Midwest (Staff Ex. 44 at 1-2, Staff Ex. 75 at 815).

The Staff also called Kenneth O'Brien, an NRC Region III Enforcement Officer involved in the development and issuance of the enforcement action against Mr. Geisen, as a witness to testify about the sanctions imposed as a result of the Enforcement Order. Tr. at 2009. At the Board's request, the Staff additionally called James Leuhman, former Deputy Director for the Office of Enforcement, to provide historical information concerning the imposition of sanctions in other enforcement actions. Tr. at 2250-51.

The defense presented Mr. Geisen as a witness, Tr. at 1535. Under an agreement between the parties, the Staff's cross-examination of Mr. Geisen was not limited to the subjects covered in his direct testimony, but included as well subjects of inquiry the Staff would have elicited on direct had it presented him as its own ("hostile") witness. *See* Tr. at 749-50, 1396.

## **B. Findings of Fact**

The inaccuracies and misrepresentations in FENOC's responses to the Bulletin and related correspondence were primarily associated with the condition of the reactor vessel head as viewed during prior inspections. Specifically, the Staff asserted that the prior reactor vessel head inspections were hindered by limitations that were not disclosed by FENOC in its submissions or representations to the NRC.

First, the geometry of the reactor vessel head limited the inspections: the domed-shape head did not allow the rigid stick used to hold the camera to have straight-line access from the mouseholes to the nozzles at the top of the head. Thus, the camera was unable to view the entire area of interest.

Second, the inspections were hindered by the presence of boric acid deposits on the reactor vessel head.<sup>104</sup> Each of the inspections from 1996 to 2000 revealed such accumulations in increasing amounts.<sup>105</sup> Davis-Besse employees associated this boric acid accumulation, however, not with cracks at the head-nozzle interface, but with the plant's history of leaks in the flanges at the top of the nozzles (independent of the head-nozzle interface) that are often the source of these types of deposits. During the Davis-Besse refueling outage in 2000 (12RFO), FENOC scheduled maintenance in a full-scale effort to fix the leaking flanges and to clean the reactor vessel head to rid it of all existing boric acid deposits.

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<sup>104</sup> When leaked coolant contacts the extremely hot reactor vessel head, the water flashes to steam, leaving behind boric acid deposits.

<sup>105</sup> Among its supporting exhibits, the Staff presented inspection videos. During the hearing, the Staff showed the Board portions of the 1996 as-found inspection, the 2000 as-found inspection, and the 2000 cleaning video. Staff Ex. 81; *see also* Tr. at 825.

FENOC failed to disclose much of this information, and the extent of the boric acid accumulation, in its submittals to the NRC. After the corrosion cavity was discovered at Davis-Besse during the 2002 refueling stage, both the NRC and the DOJ held FENOC accountable for these incomplete and inaccurate submittals, with the two agencies fining the company approximately \$5 million and \$28 million, respectively.

As already indicated, however, this case requires us to focus on the conduct and knowledge of Mr. Geisen, not those of FENOC. Accordingly, our findings of fact focus on Mr. Geisen's activities and understanding leading up to, and involved in, the events in question.

***1. FENOC's Initial Response to Bulletin 2001-01 (Serial Letter 2731)***

***a. Mr. Geisen's Involvement in Serial Letter 2731 (September 4, 2001)***

FENOC's initial response to the Bulletin (Serial Letter 2731) was drafted by a group of engineers whose efforts were coordinated by Rodney Cook, a contractor working with the Licensing Group (also referred to as "Regulatory Affairs") whose services were engaged for this purpose. Tr. at 1123-24. *Mr. Geisen was not a member of Mr. Cook's team and was not involved in drafting Serial Letter 2731.* Tr. at 1123; Staff Ex. 71 at 1861; Staff Ex. 74 at 1276.

Prasoon Goyal, Andrew Siemaszko, and Rodney Cook were assigned to draft a response to item "1.d" of the Bulletin, which requested a description of the plant's previous nozzle and reactor vessel head inspections during the past 4 years, including a description of any limitations, structural or otherwise, on those inspections. Staff Ex. 8; Tr. at 1124. Mr. Goyal, a Senior Mechanical Engineer, was a plant expert on reactor vessel head nozzle circumferential cracking issues. Tr. at 1595; Staff Ex. 75 at 1273. He was a member of the B&W Owner's Group Materials Committee, which dealt with nozzle cracking issues. Tr. at 1018-19. He was involved in conducting the reactor vessel head inspection during 10RFO in 1996. Tr. at 1023. He also reviewed and disposed of a condition report related to the 11RFO head inspection in 1998, which was performed by Peter Mainhardt. Tr. at 1061-64. On both occasions, he was not yet under Mr. Geisen's supervision (*see* below note 118).

Mr. Siemaszko, an engineer in the Systems Engineering group (which Mr. Geisen was neither part of nor responsible for), participated in the inspection and cleaning of the reactor vessel head in 2000. Staff Exs. 18, 19. At the time the Bulletin was issued and Serial Letter 2731 was prepared and submitted, Mr. Siemaszko was the FENOC employee with primary responsibility for the reactor vessel head. Tr. at 1692.

The FENOC team that was assembled to respond to the Bulletin exchanged multiple versions of potential responses and developed specific language for

inclusion in Serial Letter 2731. Geisen Exs. 1-11. *The evidence presented at the hearing established that Mr. Geisen did not receive relevant e-mail correspondence concerning, or review drafts of, Serial Letter 2731, nor was he included in any discussions regarding either the development or the accuracy of the language included in those drafts. See Geisen Exs. 1-11; Tr. at 1129-30, 1636-38.*

In addition, at the time the initial Bulletin response was being prepared, Mr. Geisen was completely preoccupied with significant managerial responsibilities unrelated to the Bulletin. These included (1) implementation of a comprehensive design basis engineering department improvement program; (2) an upcoming (September 2001) Institute of Nuclear Power Operations (INPO) reevaluation that was extremely important not only to the company in terms of safety but also to Mr. Geisen in terms of job performance rating (as reflected in admonitions from his vice president, Mr. Campbell) (Tr. at 1621-29);<sup>106</sup> and (3) oversight of modification preparations that needed to be completed soon in order to meet the deadline of 6 months prior to the upcoming refueling outage scheduled for March of 2002 (13RFO) (Tr. at 1621-29; Staff Ex. 71 at 1860-61). These three areas of responsibility placed enormous pressure on Mr. Geisen and were consuming all of his time and effort through the summer of 2001. With so much dependent upon his success in these areas, there would have to have been an urgent reason for him to divert his attention from these matters. Thus, it is not surprising that he was not a participant in the activities associated with the development of Serial Letter 2731 by another department. *See* Tr. at 1123.

Indeed, it would have been unexpected for him to be extensively involved in an activity that was relatively unimportant to him at that time. The significance of Serial Letter 2731's development has appeared only in hindsight. Another department was properly handling the responsibility, including the hiring of a contractor to manage the effort. Mr. Geisen's direct involvement was not necessary or expected at that time, so it would certainly have been unanticipated for him to decide arbitrarily to take such an active role.

The evidence presented to the Board established that Mr. Geisen's first involvement with Serial Letter 2731 occurred on August 28, 2001. On that date, he read a final draft of the 25-page document for the so-called "Green Sheet" review (i.e., the internal review and approval process employed by FENOC at

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<sup>106</sup>The Board takes official notice of the importance with which INPO evaluations are viewed in the nuclear industry. INPO was established following the March 1979 accident at the Three Mile Island nuclear power plant, to "work to help the nuclear industry achieve the highest levels of safety and reliability" through what is in essence a peer review process seeking to spread "best practices" in the industry to all plants. *See* <http://www.inpo.info/AboutUs.htm> (accessed May 28, 2009). Mr. Geisen also testified that the outcome of the INPO evaluation in September was dispositive on whether he maintained employment at Davis-Besse. *See* Tr. at 1623 ("We either did well in that INPO evaluation in August or I was going to be out of a job").

Davis-Besse). Tr. at 1638. The Green Sheet for Serial Letter 2731 contained sixteen approval signatures including three other plant managers, eight employees at a subordinate level, three plant directors, and the plant vice president. *See* Staff Ex. 10.

Mr. Geisen signed the Green Sheet for Serial Letter 2731 twice, first as Manager for Design Basis Engineering, on August 28, 2001 (the day it first came to his attention); and then on behalf of his supervisor, FENOC Technical Services Director at Davis-Besse, Steven Moffitt, on August 30, 2001. Tr. at 1639; *see* Staff Ex. 10. Before Mr. Geisen signed the Green Sheet in his own capacity, he reconciled the information in the document with his own knowledge (limited as it was) and verified that the appropriate individual contributors had signed off on the document. Tr. at 1639-40; Staff Ex. 71 at 1861-62. Prior to signing the Green Sheet on behalf of Mr. Moffitt, Mr. Geisen verified that the appropriate other managers reporting to Mr. Moffitt had reviewed and approved the document. Tr. at 1640. Without any evidence directly linking Mr. Geisen to the development of Serial Letter 2731, we cannot reasonably attribute to Mr. Geisen more knowledge than the engineers, supervisor, and manager directly responsible for the work in question who had all previously signed the Green Sheet.

*Under the Green Sheet internal review process, and contrary to the erroneously stated premise that underlay the Enforcement Order (at 7) and is carried forward by the Dissent (at pp. 841-42 and note 35), Mr. Geisen was not “the” manager responsible for the letter’s technical accuracy (see above p. 697).*<sup>107</sup> In any event, Mr. Geisen testified that, on both occasions when he signed the Green Sheet, he did not have any sense that Serial Letter 2731 contained inaccurate, misleading, or unfounded information. Tr. at 1640-41. Nothing before us provides any basis for disbelieving him, as we now explain.

*b. Mr. Geisen’s General Awareness of Bulletin Issues*

Mr. Geisen started employment with Davis-Besse in 1988 as a systems engineer in the Mechanical Systems Group. Tr. at 1539. From 1988 to 1994, he had primary responsibility for the reactor coolant pumps and containment spray and air cooling system. Tr. at 1536, 1539. In 1994, Mr. Geisen entered a 2-year Senior Reactor Operator training program to become a qualified supervisor of reactor operators. Tr. at 1539-40. Following his training, Mr. Geisen was promoted within Systems Engineering and became a supervisor in the Electrical and Controls Group. Tr.

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<sup>107</sup> During the criminal trial, Mr. Geisen testified that as a signatory in the Design Basis Engineering Department he was “part of management” and willingly conceded that he thought himself responsible for the technical accuracy of the portion that covered that department’s work. Staff Ex. 71 at 1971. Mr. Geisen testified that this obligated him to satisfy himself that the information was accurate. *Id.*

at 1540-41. Mr. Geisen then became Manager for Design Basis Engineering in March of 2000. Tr. at 1548.

The Dissent begins with the proposition that Mr. Geisen's tenure in the nuclear industry and in various training and supervisory roles demonstrates his broad knowledge and experience in the operation and management of nuclear power plants. Dissent at pp. 824-25.<sup>108</sup> *Notably, however, in his various roles at Davis-Besse in the 12 years between 1988 and 2000, Mr. Geisen's responsibilities did not involve him in work associated with the reactor vessel head or related systems.* Tr. at 1541, 1546, 1560. Accordingly, although he may have had general knowledge about these matters, he was not an expert on the specific details related to the reactor vessel head, *i.e., he never personally performed an inspection or cleaning of the reactor vessel head, nor was he directly responsible for the planning or outcome of these tasks.*

As is standard in the industry, the reactor vessel head inspections and cleanings at Davis-Besse are performed during scheduled refueling outages, which occurred there at 2-year intervals. *During the refueling outages in 1996, 1998, and 2000, Mr. Geisen's basic responsibilities at Davis-Besse were entirely unrelated to the reactor vessel head.* Rather, prior to his promotion as Manager for the Design Basis Engineering Department at Davis-Besse in 2000, Mr. Geisen's responsibilities were related to the plant's reactor coolant pumps, which remained his primary focus during the 1996 and 1998 refueling outages. Tr. at 1539, 1541-42, 1545-46.

Mr. Geisen was the Manager for Design Basis Engineering during the 2000 refueling outage, and as such *his attention was focused on ensuring timely implementation of scheduled modifications.* Tr. at 1558-60. *The schedule for the 2000 refueling outage did not include any planned modifications related to the inspection or cleaning of the reactor vessel head.* Tr. at 1560.

During the second half of the 2000 refueling outage, Mr. Geisen took on additional duties when he relieved one of his subordinates, Theo Swim (Mr. Goyal's direct supervisor), as the engineering point-of-contact in Outage Central. Tr. at 1560-62. During his time in Outage Central, Mr. Geisen's responsibility was to address engineering issues that developed during the outage. His role was

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<sup>108</sup>The Dissent goes to great lengths (at pp. 824-25) to recite Mr. Geisen's work history, presumably to establish (at p. 825) that his "education and experience rendered him eminently capable of recognizing and understanding safety-sensitive information." No one, including Mr. Geisen, disagrees. But the question before us is a different one — did he focus on the particular portions of the wave of information that washed over his desk that, in retrospect, turned out to be crucial? The Dissent says (at p. 825) that not to hold him to knowledge of all that information is to "attribute[ ] profound negligence to Mr. Geisen." Whether or not looking at the situation that way could be justified on the evidence (a question not before us), that way certainly has more evidence to support it than does attributing deliberate misrepresentation to him.



to identify the issue, to assign the appropriate individual to address the issue, to contact the appropriate group, and to keep the schedule on track. Tr. at 1562-63.

While in Outage Central, Mr. Geisen reviewed two condition reports prepared by Mr. Siemaszko describing, *inter alia*, the “large [ ] lava-like” deposits of boron that had accumulated on top of the insulation and the reactor vessel head. Tr. at 1571-72.<sup>109</sup> *Mr. Geisen viewed these two Condition Reports as addressing boric acid accumulation on the reactor vessel head that occurred, not from cracks at the nozzle-head interface, but as a result of leaking flanges above the insulation, a historically well-known problem at Davis-Besse that was not viewed with particular alarm.* Tr. at 1573.<sup>110</sup>

Mr. Siemaszko designated one of the condition reports, CR2000-1037, as a “mode restraint,” a condition requiring an engineering evaluation to determine if any outage-related work was needed prior to putting the reactor back into power operation. Tr. at 1573. Mr. Geisen reviewed CR2000-1037 and determined that the reactor vessel head required cleaning. Tr. at 1573-74, 1834. Mr. Geisen noted that a work order for cleaning of the reactor vessel head was already scheduled during the Outage, and therefore signed an addendum to the report removing the mode restraint because — until addressed — the existence of the work order itself prevents reactor startup. Tr. at 1578. According to Mr. Geisen’s judgment, this closed the matter. Tr. at 1578-79.

During one of his shifts in Outage Central, Mr. Geisen also participated in a brief discussion regarding the permissibility of an alternate cleaning method for the reactor vessel head when Mr. Siemaszko reported that his initial cleaning effort had been unsuccessful. Tr. at 1565-69. Although recognizing the possible shortcomings of this technique, the engineers in Outage Central, including Mr. Geisen, reached a consensus and authorized the use of hot water to clean the reactor vessel head. *According to Mr. Geisen, he believed, based upon information he received, that this technique had successfully cleaned the reactor vessel head.* Tr. at 1585-86.

One major source of Mr. Geisen’s belief that the reactor vessel head had been cleaned was a one- to two-page newsletter update, “Outage Insider,” that was posted daily at Davis-Besse during scheduled outages in an effort to keep all employees up-to-date regarding major events occurring during that period. Tr.

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<sup>109</sup> Condition Reports are generated in response to the identification of a problem at the plant. Tr. at 1022. Specifically, Mr. Geisen reviewed CR2000-0782 (Staff Ex. 19) and CR2000-1027 (Staff Ex. 18). Tr. at 1571-72.

<sup>110</sup> Contrary to the Dissent’s suggestion (at p. 827 n.18), the Staff presented no evidence to indicate that Mr. Geisen knew of the difference between the types of boric acid deposits or of what they signified.

at 1586.<sup>111</sup> Mr. Geisen stated that it was his practice to read the Outage Insiders daily as they were issued. Tr. at 1587. It was also clear from the nature of these communications, and the expectation at Davis-Besse, that all employees would read the Outage Insider when they were distributed, and that the information contained therein would leave behind a vivid impression. Tr. at 1586-87.

On April 29, 2000, the 29th day of 12RFO, the Outage Insider featured a “human interest” story commending Mr. Siemaszko for successfully cleaning the reactor vessel head at Davis-Besse, an effort characterized as “challenging” and “difficult.” Geisen Ex. 18; Tr. at 1587. Moreover, that Outage Insider explained that, when Mr. Siemaszko joined Davis-Besse just 1 year prior, he had “set a personal goal to resolve [the] dilemma” posed by boric acid buildup on the reactor vessel head. Geisen Ex. 18.

Mr. Geisen stated that this formed not only his belief, but that of all the employees at Davis-Besse, that the entire reactor vessel head had been cleaned. Tr. at 1586. Again, with that matter thought to be closed with a clean reactor vessel head, the lack of actual head-cleaning success cannot — without more than was shown in our hearing — be considered part of Mr. Geisen’s knowledge base prior to the submittal of Serial Letter 2731.<sup>112</sup>

The Staff also refers to evidence that during the 2000 refueling outage, Mr. Geisen saw detailed descriptions of the large boric acid deposits in condition reports, as well as an “as-found” photograph of the reactor vessel head prior to the cleaning, that showed what Mr. Geisen believed to be flange leakage flowing in a lava-like fashion from some mouseholes at the bottom of the reactor vessel head. Tr. at 1569. The Staff elicited testimony from various witnesses that this photograph, referred to during the hearing as the “Red Photo,” should have caused the engineers at Davis-Besse to be “alarmed” that the color signified rusting and that there was thus a safety issue developing in the reactor vessel head area. Tr.

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<sup>111</sup>The Outage Insiders were transmitted to all employees at Davis-Besse during an outage, “in an effort to try to keep everybody on the site in the loop . . . [by communicating] the activities that were completed usually within the last 24 hours or that [were] big ones scheduled for that day. . . .” Tr. at 1586.

<sup>112</sup>The Dissent’s focus (at p. 831) on another aspect of the Outage Insider article misses the main point. The striking part of that article — which, Mr. Martin confirmed, pervaded thinking around the plant well into the future — indeed, the very reason it was published, was its highlighting of Mr. Siemaszko’s signal achievement (had it been true) of getting the head cleaned. But the Dissent never mentions this feature.

Thus, the Dissent rings hollow when it later asserts (at p. 849) that a tribunal should not ignore that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it.” As seen in this example, ignoring dramatic evidence that shaped everyone’s mindset in a “knowledge” case does not cumulate evidence, it distorts it. For our part, we have indeed cumulated the impact of the individual pieces of evidence. But, as is true in mathematics as well, the cumulation of individual pieces of evidence that each establish nothing about the critical issue yields nothing upon which to support the Enforcement Order.

at 1289, 1521. Moreover, the Staff's experts stated that one need not be an expert in inspection or nozzle cracking to recognize from the discoloration that a rusting process was ongoing in some fashion. Tr. at 1521.

Evidence was provided, however, that, along with Mr. Geisen, the NRC Resident Inspector at Davis-Besse was also privy to viewing both the "Red Photo" and the condition reports during the refueling outage in 2000.<sup>113</sup> We mention this not to suggest that it establishes any type of dereliction of duty on the part of the Staff or its personnel, but instead because it illustrates, yet again, the benefit that hindsight can have on how evidence is analyzed. Geisen Ex. 28.

On that point, following the discovery of the reactor vessel head corrosion, anyone viewing the "Red Photo" — as we did during the hearing — would instinctively appreciate the warning that it should have conveyed.<sup>114</sup> Mr. Geisen testified, however, that, when he saw the "Red Photo" during the 2000 refueling outage, it did not create any alarm or strike him as a warning that any pressure boundary leakage issue existed. Tr. at 1570. As noted above, confirming the legitimacy of his (non)reaction, the Davis-Besse Resident Inspector also reviewed the condition reports and saw the "Red Photo" during the 2000 refueling outage, yet did not recognize the significance of the boric acid corrosion.

That the Resident Inspector saw the "Red Photo" at the same time as Mr. Geisen serves to establish that other trained minds were not alarmed; thus, we cannot fairly infer that Mr. Geisen *must* have known of its ramifications, when others did not. Of greater import, everyone in the industry believed, prior to the incident at Davis-Besse, that corrosion of the reactor vessel head while the reactor was operating was not likely because the extremely high temperatures would cause any water on the head to flash to steam, removing the opportunity for a corrosive environment. In other words, no one was open to entertaining any potential for corrosion. It would have taken a significant departure from the thought prevailing at that time to have evoked any major concern regarding potential reactor vessel

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<sup>113</sup> See Geisen Ex. 27 at 3, 12, an Office of the Inspector General Semiannual Report to Congress, wherein the NRC disclosed that "Region III managers, while planning inspection activities for the Davis-Besse 12 RFO, reviewed NRC inspection reports which documented recurring boric acid leakage and also received numerous accounts of boric acid leakage and corrosion from the onsite resident inspectors." *Id.* at 12. Specifically, the "Senior Resident Inspector and Resident Inspector . . . reviewed Davis-Besse CR 2000-0782 [which contained the "Red Photo"] during 12 RFO . . . [but] . . . these inspectors did not recognize the significance of the boric acid corrosion described in the condition report." *Id.* (emphasis added).

Moreover, the Semiannual Report also stated that "OIG found that Region III inspection staff — the NRC staff with regulatory oversight of Davis-Besse — did not relay the information depicted in the condition report to Region III managers [and] . . . there was ineffective communication among Region III managers concerning boric acid leakage and corrosion at Davis-Besse." *Id.* at 3.

<sup>114</sup> Mr. Geisen testified that, with the benefit of hindsight, he now believes he should have been more alarmed by the photograph. Tr. at 1569; Staff Ex. 71 at 1833; Staff Ex. 79 at 54-55.

head corrosion, as that was outside the realm of established experience. Tr. at 1222.

*In any event, it is a fact that at least one key Staff official was no better at diagnosing the disastrous potential of what was seen than was Mr. Geisen.*<sup>115</sup> This is especially notable when considering Dr. Hiser's testimony that if the Resident Inspector had seen the Red Photo he would have hoped that the situation would have been flagged and reported to Headquarters as soon as it was seen. Tr. at 1291. We are unwilling to impute to Mr. Geisen knowledge that the Staff was unable to derive for itself (and the absence of which led, as far as we were advised, to no consequences for individual Staff employees).

Again, however, even if Mr. Geisen had recalled the Red Photo as alerting him to the condition of the reactor vessel head from the 2000 outage, the information in Serial Letter 2731 does not on its face appear to contrast so significantly with that knowledge that it would catch the attention of one whose role in that letter was so minimal. *Mr. Geisen is not being charged with failing to identify a corrosion issue as illustrated in the Red Photo.* He is charged with deliberately providing incomplete and inaccurate information by signing the Green Sheet review for Serial Letter 2731. *See* below p. 744. The evidence does not support Mr. Geisen's culpability in this respect.

As Manager of Design Basis Engineering (his final position at Davis-Besse, *see* above p. 731), Mr. Geisen supervised five groups that encompassed forty-two employees. Tr. at 1550. These groups were responsible for a wide range of issues including, *inter alia*, nuclear calculations, mechanical design, electrical and instrumentation design, plant computer engineering, and engineering procurement. Tr. at 1549-54. These areas are quite broad and far removed from reactor vessel head inspections.

Coincident with being named Design Basis Engineering Manager, Mr. Geisen was also made a member of the nuclear utility industry's B&W Steering Committee. Tr. at 1590. That Steering Committee received input from its working groups and evaluated project proposals and funding needs for the fleet of B&W reactors. Tr. at 1021, 1590. Issues came before the Steering Committee regarding circumferential nozzle cracking and specific information about Oconee and other nuclear power plants in late 2000 and early 2001. Tr. at 1591-93. *Mr. Geisen's involvement with the Steering Committee did not expose him to any specific knowledge about Davis-Besse's past inspection and cleaning history.* Tr. at 1593.

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<sup>115</sup> Along those lines, no internal agency sanctions were taken by the Staff against the Resident Inspector. Geisen Ex. 28. If the failure to recognize the "Red Photo" as a significant issue concerning the condition of the reactor vessel head was viewed as an understandable lapse by Staff personnel, it is seemingly inconsistent for the Staff to try to impute that knowledge to Mr. Geisen for the purpose of charging him with deliberate misrepresentation.

Mr. Geisen also joined FENOC's Corrective Action Review Board (CARB) when he became Design Basis Manager. Tr. at 1544. The CARB reviewed condition reports submitted by plant engineers. Tr. at 1022. During the hearing, the Staff presented extensive testimony about a condition report written by Mr. Goyal after he had conducted the 1996 inspection (PCAQR 96-551, Staff Ex. 16) and a condition report written by Mr. Mainhardt after he conducted the 1998 inspection (CR 98-0767, Staff Ex. 17). *Neither of these condition reports came before the CARB after Mr. Geisen joined the Board in 2000, and Mr. Geisen did not see either report before the crucial discoveries in the spring of 2002. This being so, we had no evidence before us that he had knowledge of them before the targeted communications in the fall of 2001.* Tr. at 1544-45.

Finally, Mr. Geisen's managerial position involved him as a member of FENOC's Project Review Group (PRG). Tr. at 1557. The PRG is a manager-level group that reviewed and prioritized proposed company projects to recommend appropriate funding for them. Tr. at 1556. The Staff presented extensive testimony about a repeatedly proposed modification to cut larger access holes in the service structure to facilitate improved reactor vessel head inspections and cleanings. Staff Ex. 72; Tr. at 1054-60. This evidence included the introduction of minutes from a PRG meeting in which the proposed modification was discussed and delayed. Staff Ex. 72; Tr. at 1054-60.

*The PRG discussion of the modification had no bearing on Mr. Geisen's state of mind. The meeting in question predated Mr. Geisen's tenure as a member; accordingly, neither at that meeting nor — as far as the evidence shows — at any other time was he involved in discussions regarding the proposed modification.* Staff Ex. 72; Tr. at 1058, 1556.

The modification request, pending for a decade, had its genesis long before Mr. Geisen had any involvement in PRG or the implementation of such a modification. Tr. at 1058, 1556. He did not become aware of the modification request until he became the manager of Design Basis Engineering in 2000. Tr. at 1557. At that time, Mr. Geisen stated that his department was working on approximately seventy modifications; not one of the modifications was related to the inspection or cleaning of the reactor vessel head. Tr. at 1560. He also understood that the modification request was never canceled, but was instead continuously rescheduled for later refueling outages. Tr. at 1619. Although the modification request was of great importance to Mr. Goyal, he never "pressed" Mr. Geisen about the issue and Mr. Geisen was not aware that Mr. Goyal had been talking to others at Davis-Besse about the request. Tr. at 1861.

*c. Mr. Geisen's Receipt of Various Communications*

The Staff argues that Mr. Geisen's receipt of various e-mails, trip reports, and memoranda in the 9 months prior to the issuance of the Bulletin demonstrates

that he “knew” representations made in Serial Letter 2731 were false. We do not agree.

In his role as Manager of Design Basis Engineering, Mr. Geisen demanded trip reports from engineers in his reporting chain.<sup>116</sup> More routinely, he also received between fifteen and forty e-mails per day (i.e., some 3600 to 9600 e-mails per year), with approximately one-third of those coming from people who reported directly to him. Tr. at 1596.<sup>117</sup>

It was Mr. Geisen’s practice to read his e-mails. Tr. at 1867. It was also his practice not to reply to an e-mail that was merely providing information, rather than requesting any action or response. Tr. at 1867.

Because of the volume of e-mails he received, Mr. Geisen imposed on his employees a policy that, if an e-mail or memorandum had particular urgency or importance, it was to be marked “Action Needed,” or “Action Requested,” or to indicate in some other fashion the need for his response or action. Tr. at 1596. Without such an indication, Mr. Geisen would assume that the document was sent for informational purposes only. This was particularly the case when an e-mail was sent to him marked as an “FYI.” Tr. at 1596.

In the 9-month period prior to the NRC’s issuance of the Bulletin, one of the employees Mr. Geisen indirectly oversaw, Mr. Goyal,<sup>118</sup> attended meetings and participated in industry discussions regarding the issue of circumferential cracking of CRDM nozzles. Tr. at 1595. He sent e-mails and trip reports to Mr. Swim, his direct supervisor, or to Mr. Siemaszko, the Systems Engineer assigned to the reactor vessel head, regarding those meetings and discussions. Staff Ex. 21-24, 28, 30, 32-33. Mr. Geisen was among others who received electronic copies of the e-mails and trip reports, but was never their primary recipient. These

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<sup>116</sup> As was the case elsewhere at Davis-Besse, employees within Design Basis Engineering were required to fill out a trip report following work travel to preserve any salient points learned as a result of the trip. Mr. Geisen’s oft-used maxim for his subordinates was along the lines of “We’re not funding nuclear tourism. If you’re going to go on a trip, we want you to get some value out of it and bring that back.” Tr. at 1599. The policy within the group was that expense reports were not paid until a trip report was submitted. Each submittal was distributed in a specified fashion. Foremost, the trip report was to be submitted to the employee’s supervisor, who had the responsibility of reviewing the “lessons learned” and passing along that information to the respective groups. Tr. at 1599. As the higher-tier manager of a group, Mr. Geisen was also listed on the standard distribution to receive a copy of trip reports from the employees who worked in the chain of command under him.

<sup>117</sup> The Dissent emphasizes (at p. 837 n.29 ) with respect to this volume of e-mails that Mr. Geisen “read them all, regardless of whether he was the principal recipient or a copied recipient,” but the testimony to that effect does not establish that Mr. Geisen *retained* each bit of information contained in every piece of electronic correspondence — and thus does not, without more, establish his later “knowledge” of such information.

<sup>118</sup> When Mr. Geisen became Manager of Design Basis Engineering, Mr. Goyal was a design engineer working under Mr. Swim, the supervisor of the mechanical design group. Tr. at 1554-55. Mr. Geisen had had no prior interactions with Mr. Goyal. Tr. at 1555.

e-mails and memoranda were spaced weeks apart — eight communications over a 9-month period — and reflected working-level details in which Mr. Geisen was not directly involved.<sup>119</sup> Staff Exs. 21-24, 28, 30, 32-33. *See also* Table 2 and Table 3 above pp. 698, 699.

Mr. Goyal also wrote a four-page memorandum, dated June 27, 2001, entitled “Mode 5 Reactor Vessel Head Inspection Recommendation.” Staff Ex. 31. This memorandum was reviewed by Mr. Goyal’s supervisor, Mr. Swim, and then ratified by Mr. Geisen. Staff Ex. 31; Tr. at 1099.<sup>120</sup>

The Staff places great reliance upon a section of that memorandum to support its position that Mr. Geisen had the requisite knowledge needed to understand, 2 months later, the inaccuracies in Serial Letter 2731. Specifically, it points to a paragraph on the second page of that document indicating that “[l]arge boron leakage from CRDM flange was observed” and that “this leakage did not permit the detailed inspection of CRDM nozzles.” Staff Ex. 31 at 2.

Mr. Goyal testified, however, that Mr. Geisen had no involvement in the preparation of that memorandum. Tr. at 1103. *And neither that memorandum nor the e-mails or trip reports indicated to Mr. Geisen that action was needed by him on the matters covered or that the items were urgent or alarming.* Staff Exs. 21-24, 28, 30, 32-33. *The direct and uncontradicted evidence from Mr. Goyal — who was fully cooperating with the Government as part of his deferred prosecution agreement — was that he never spoke to Mr. Geisen about any of the documents*<sup>121</sup>

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<sup>119</sup>The documents upon which the Staff relied were e-mails and trip reports from Mr. Goyal reporting his work on the B&W Steering Committee. These included reports on four business trips between January and August of 2001, and three e-mails designating Mr. Geisen as a courtesy copy recipient between June and August of 2001.

<sup>120</sup>The June 27, 2001 Memorandum provided an engineering evaluation of the internally generated pre-Bulletin question as to whether Davis-Besse would be well advised to perform a visual head inspection prior to December 31, 2001, if it had to shut down for any reason, or whether it would be appropriate even in such a circumstance to wait until the next planned outage (13RFO in March of 2002). *See* Staff Ex. 31 at 1; *see also* Tr. at 1101. The engineering evaluation determined that “[n]o catastrophic failures [were] anticipated in delaying the head inspection from [December 31, 2001] to 13RFO.” Staff Ex. 31 at 3. Mr. Goyal prepared the evaluation under Mr. Swim’s supervision; Mr. Geisen had no involvement in its preparation. Tr. at 1103.

<sup>121</sup>For example, another portion of the June 27 memo, given to Mr. Geisen to ratify, contained false information Mr. Swim had insisted Mr. Goyal include (*see* below p. 740). Mr. Geisen was not advised of this situation. *See, e.g.*, Tr. at 1169:

JUDGE FARRAR: and then you also did not go to Mr. Geisen and say, “I need your help, Mr. Big Boss. I just signed something that’s not true.”

[MR. GOYAL]: Right. I did not go to Mr. Geisen.

JUDGE FARRAR: So when Mr. Geisen got this he had no way, and since you hadn’t talked to him about [it] he had no way of knowing from the documents that this problem existed.

(Continued)

*and that Mr. Geisen never responded to this memorandum or, for that matter, to any of Mr. Goyal's e-mails or trip reports.* Tr. at 1076, 1112, 1597, 1600, 1602, 1610, 1613.

A simple explanation for the lack of follow-up activity is that the areas covered by the contents of these documents — reactor vessel head cleaning and inspections, nozzle cracking, and the findings at Oconee — were not directly related to Mr. Geisen's core duties as Manager of Design Basis Engineering, which included various groups ranging from nuclear calculations to engineering procurement as discussed above. *See* Tr. at 1549-53. As far as the evidence shows, the documents did no more for Mr. Geisen than simply to confirm his general understanding of the past history of flange leakage at Davis-Besse and of the challenges facing engineers conducting inspections and cleanings of the reactor vessel head at the plant. Tr. at 1608, 1610, 1614-16, 1634-35. It is not surprising that a manager of forty-two people, all performing various engineering functions and continually sending e-mails and reports, would months later fail to retain and to recall specific sentences from, or details of, any one particular document that was not related to the focus of his own endeavors or otherwise clothed with some urgency.

To the extent that the documents reflected the work of one of the engineers in his chain of command, it is consistent with his general approach to communications that Mr. Geisen understood — absent any request for action or for some other response — the documents to be informational in nature, and not communications seeking action on his part. Tr. at 1596. There is no evidence to establish that these various documents naturally created any state of mind that was contradicted by the information Mr. Geisen saw during his Green Sheet review of Serial Letter 2731.

For example, Mr. Goyal's e-mails and trip reports primarily concerned the information from the Oconee incident (Staff Exs. 21-24, 28, 30, 33), information that was much the same as Mr. Geisen received through briefings provided to the nuclear industry's B&W Steering Committee. Tr. at 1600. Therefore, according to Mr. Geisen, he understood that Oconee had found small deposits resembling "popcorn" and that the Oconee engineers believed their having made this discovery was due, in part, to the fact that Oconee had a clean reactor vessel head. Tr. at 1600. Taken in context, the Information in Serial Letter 2731 does not suggest that Davis-Besse's reactor vessel head was in a comparable condition to Oconee's. Staff Ex. 9. Serial Letter 2731 does not state that the reactor vessel

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[MR. GOYAL]: Right.

JUDGE FARRAR: There was nothing to alert him later that same day that he shouldn't sign this because of the problem you just talked about. He didn't know about that problem.

[MR. GOYAL]: Right.



head was in a “pristine” or even “clean” condition, which was arguably necessary for a good inspection in accordance with the Bulletin. *See* Staff Ex. 9. Rather, Serial Letter 2731 disclosed that boric acid accumulations were located on the reactor vessel head at Davis-Besse both in 1998 and 2000. Staff Ex. 9 at 2-3.

Mr. Goyal’s e-mails, trip reports, and memoranda also referenced boric acid deposits discovered at Davis-Besse reported as attributable to flange leakage. Staff Exs. 32, 39. Mr. Geisen was generally familiar with these findings, based on the discussions of flange leakage and the need for a special head-cleaning effort during his shifts in Outage Central in 2000. Tr. at 1569.

*Mr. Geisen also testified that he understood that the reactor vessel head had been cleaned successfully at that time and that the flanges that caused the boric acid deposits had been repaired.* We credit this testimony, based on two independent sources.

The first is the headline story in the Outage Insider, already mentioned above. The second source is found in *the same portion of Mr. Goyal’s June 27, 2001 memorandum upon which the Staff relied.* There, Mr. Goyal advised unequivocally that the problems he was discussing had been solved:

During 12th RFO at Davis-Besse (DB) the Reactor Vessel head inspection was performed in accordance with boron inspection walkdown as required by GL-88-05 and GL 97-01. Large boron leakage from a CRDM flange was observed. This leakage did not permit the detailed inspection of CRDM nozzles. *The flange was repaired and the head was cleaned.*

Staff Ex. 31 (emphasis added).

*Mr. Goyal disclosed during his testimony that he included this statement, which he knew to be false, at the request of his supervisor, Mr. Swim.* Tr. at 1104-07. *Indeed, at the direction of Mr. Swim, Mr. Goyal changed the honest language he had written despite knowing that the resulting language was incorrect.* Tr. at 1106. *Mr. Swim, the alleged prime mover, was not prosecuted, nor was he the subject of any NRC enforcement action.*

We credit the testimony of Mr. Goyal — who was prosecuted, and entered into a deferred prosecution agreement, for this offense — that Mr. Geisen, unlike Mr. Swim, was not aware that the June 27 Memorandum’s conclusion that the reactor vessel head had been cleaned was a misrepresentation. Tr. at 1107. Given its consistency with the knowledge he had previously gathered from the Outage Insider’s report of the “success” of the cleaning method he had a hand in authorizing, then to the extent he focused at all on the Memorandum, Mr. Geisen understandably would have taken that conclusion at face value.

As a source of Mr. Geisen’s knowledge, the Staff also relied upon Mr. Goyal’s August 17, 2001 e-mail to Steven Fyfitz at Framatome, on which Mr. Geisen was a courtesy copy recipient. Staff Ex. 39. In that e-mail, Mr. Goyal asked “[i]s

it possible to go back to 1998 that is when a good head exam was done with no nozzle leakage (meaning not taking any credit for 2000 inspection).” Staff Ex. 39. Mr. Geisen testified that he had no recollection of talking to Mr. Goyal about this e-mail (Tr. at 1634), but explained the sentence would have told him the 2000 inspection was affected by flange leakage (a fact known to Mr. Geisen) and that the 1998 inspection was “good,” i.e., not affected by flange leakage (Tr. at 1634).

Neither of those statements contradicted Mr. Geisen’s general understanding as of that date. More importantly, neither contradicted information Mr. Geisen later reviewed in Serial Letter 2731. *See* Staff Ex. 9 at 3 (“*April 2000 Inspection Results (12RFO)* . . . Inspection of the reactor vessel head/nozzles area indicated some accumulation of boric acid deposits”).

*d. Mr. Geisen’s Interview with John Martin*

In the final analysis, the key element that both the Staff and the Dissent point to as establishing Mr. Geisen’s knowledge is the following. The Staff claims that Mr. Geisen viewed videotapes of the past reactor vessel head inspections as early as August of 2001, and thus would have from the beginning — and throughout the interactions with the NRC — been aware of the deficiencies therein. The sole support for that assertion is a document assertedly reflecting John Martin’s interview of Mr. Geisen in the last week of March 2002, soon after the discovery of the corrosion cavity. Staff Ex. 63; Tr. at 1475.

Mr. Martin was a nuclear industry consultant, and past high-ranking NRC official, who was hired by FENOC to conduct an evaluation of management and organizational issues at Davis-Besse following the March 2002 discovery of the corrosion cavity in the reactor vessel head. Tr. at 1474-75. Mr. Martin’s review was not intended to be a formal investigation. Tr. at 1491. Instead, it was a survey focused on identifying those individuals who knew boric acid deposits were left on the reactor vessel head after the refueling outage in 2000. Tr. at 1481, 1491. *The focus was not on FENOC’s Bulletin responses, representations in those responses, or any individual’s review of the videotapes.* Tr. at 1481, 1489. Mr. Martin interviewed approximately fifteen people over a 1-week period and *had no present recollection of his interview of Mr. Geisen independent of the document reflecting the notes he took during the interview.* Tr. at 1478, 1480.<sup>122</sup>

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<sup>122</sup>We share the Dissent’s description (Dissent at p. 838) of Mr. Martin as a “credible witness.” But that statement does not support the conclusion one might otherwise infer from it. For, as all recognize, on the witness stand Mr. Martin was able to recall nothing of the interview other than that he attempted to have his notes accurately reflect what had been said, a good-faith effort that we credit. His inherent credibility cannot negate the innocent error he made in rendering a written account of the interview.

Mr. Martin handwrote his notes during all the interviews, and *had no intent that his notes would provide a verbatim transcript*. Tr. at 1484. After the interviews were completed, Mr. Martin gave his handwritten notes to a Davis-Besse secretary for typing. Tr. at 1484. The original handwritten notes of Mr. Geisen's interview are no longer available. Tr. at 1494-95. Mr. Martin testified that he had no recollection of what followed in that regard upon the secretary providing him with the typed version of his notes. Tr. at 1485; *see also* Tr. at 1502-03.

The typed notes from the interview contain typographical errors, as Mr. Martin acknowledged. Tr. at 1503. Mr. Martin also acknowledged that his handwriting was sometimes difficult to read, even for him. Tr. at 1503. Indeed, the two-sentence paragraph of interest in this proceeding contains two errors. The paragraph, dealing with the subject of when Mr. Geisen learned that the reactor vessel head had not been cleaned, reads:

*I know became aware of it in reviewing the videos of the inspections while preparing for the NRC interactions in August, 2001. At that point, I was disappointed but not worded since we all had a conviction that there wasn't a problem with boric acid corrosion on a 600 F Head.*

Staff Ex. 63 (errors in italics). Whether or not these errors are of themselves consequential,<sup>123</sup> for present purposes they serve to signify that the document is, on that ground alone, not a perfect rendition of the interview.

*More significantly, Mr. Geisen was not provided an opportunity to review the typed notes because Mr. Martin did not have a need to follow up with Mr. Geisen after the interview.* Tr. at 1491. Therefore, Mr. Geisen had no occasion to clarify either the accuracy or meaning of "preparing for the NRC interactions in August 2001" in Mr. Martin's notes, or that phrase's chronological or causal connection with what preceded it. Tr. at 1494.

On that score, apart from the Martin document, *no other evidence was provided that Mr. Geisen had any "interactions" with the NRC until the teleconference on October 3, 2001, or was "preparing" for them at any point until the alarm that was sounded on September 28, 2001 (see below pp. 751, 752)*. This is not surprising, for as seen above, Mr. Geisen was preoccupied through August of 2001 with preparations for the INPO audit and the design modification packages for the upcoming outage, such that he had no involvement in the drafting of Serial Letter 2731. Tr. at 1623-25; Staff Ex. 71 at 1860-61.

*Confirming that view, Mr. Goyal — again, motivated and committed by his agreement with the Government to provide honest testimony — testified that*

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<sup>123</sup> Obviously, "worded" should be "worried," and can naturally be attributed to the typist's misreading of Mr. Martin's handwritten notes. The missing pronoun between the words "know" and "became" is more problematic, as is the substance of the entire first sentence.

*systems engineers held the inspection videotapes, and that Mr. Geisen did not ask Mr. Goyal about viewing the tapes in August of 2001. Tr. at 1160-61. Indeed, no evidence exists to establish any physical connection between Mr. Geisen and any reactor vessel head inspection videotapes until mid-October of 2001. No one testified that they saw Mr. Geisen reviewing videotapes. No one testified that a surrogate asked for the videotapes at the request of Mr. Geisen. It is highly unlikely that Mr. Geisen could have acquired the videotapes, which were under the control of the Systems Engineering Department (not Design Basis Engineering, which was Mr. Geisen's Department), reviewed the videotapes, and returned the tapes without alerting a single witness to that effect.*

In this same vein, no reason was even suggested as to why Mr. Geisen might have first undertaken, then hidden, such an activity at that time, since none of the subsequent critical events had yet transpired. To further support this, Mr. Moffitt testified that the "re-review" of the inspection videotapes referenced in Serial Letter 2731 was not a reference to any actions previously conducted by Mr. Geisen. Staff Ex. 74 at 1281.

The Board notes that OI had an opportunity to clarify this issue close in time to the Martin-Geisen interview. In October of 2002, OI agents interviewed Mr. Martin and, 2 weeks later, Mr. Geisen. Tr. at 2175; Staff Ex. 79. OI had the Martin document at the point of the latter interview. Geisen Ex. 24; Tr. at 2176-77. Presumably, recollections of the conversation were fresher in the minds of Mr. Martin and Mr. Geisen then, 7 months after the conversation, than in December of 2008, 6½ years after the conversation. *The agents chose, however, not to ask either Mr. Martin or Mr. Geisen about the conversation (Tr. at 1702-03), and thus the Martin document became a key piece of evidence both for triggering and for defending the Enforcement Order against Mr. Geisen.*

Although their versions of events and of the interview seem to be at odds, there is a simple, and natural, way to reconcile the seemingly competing "truths" Messrs. Geisen and Martin presented, and to do so in a fashion that is consistent with our view that both proved to be highly credible. What might — indeed, *must* — have occurred was that Mr. Martin took Mr. Geisen's description of the *company's* interaction with the NRC in August 2001 as indicating that Mr. Geisen had been *personally* involved at that time. This could have transpired through Mr. Geisen's (1) use of the word "we" in describing what the company was doing (a usage that a reader of the Transcript can readily discern was commonplace for him), or his (2) telling the story of the *company's* August interactions as a *prelude* to what *he later* did, or as a way of relating his later viewing of the videos (see the events of November 8, 2001, recounted below) back to the earlier events that triggered the need to do so.

However it transpired, it would be easy for someone not attempting to take verbatim notes to conflate different parts of Mr. Geisen's narrative and to record in his notes — all in good faith — a version that reflects fragments of what was

said but combines them in a mistaken or misleading fashion. In many instances, such an error might be inconsequential; in others, it might be caught upon review. Here, the erroneous report — based on what the interviewer genuinely thought he heard — was neither corrected nor inconsequential.

The upshot is this: whether the missing pronoun should have been “I” or “we,” there is a perfectly rational, indeed commonplace, explanation for why the Martin document reads as it does. *But the document is irrefutably inconsistent with the body of other evidence about Mr. Geisen’s activities in August of 2001, and thus can carry no weight, notwithstanding the inherent credibility of its author.* We find that Mr. Martin simply conflated various elements of the Geisen interview, none of which involved a matter concerned with the essential purposes of that interview.<sup>124</sup>

*e. Findings of Fact Regarding Serial Letter 2731*

The Staff’s Enforcement Order asserts that Serial Letter 2731 was materially incomplete and inaccurate in that it: (1) mischaracterized the boric acid accumulation on the reactor vessel head in 2000; (2) failed to include information indicating that the licensee’s access to the bare metal head of the reactor was impeded by significant boric acid deposits in both 11RFO (1998) and 12RFO (2000); (3) failed to disclose that the boric acid deposits were not limited to the area beneath the CRDM flanges; and (4) failed to indicate that the boric acid deposits were so significant that not all nozzles on the reactor vessel head could be inspected.<sup>125</sup> Mr. Geisen was charged with concurring in this submittal to the NRC notwithstanding that he was aware of these materially incomplete and inaccurate statements. Enforcement Order at 8-9.

The Staff introduced documents and testimony to support its claim that Mr. Geisen had personal knowledge about the actual limitations on head inspections through the receipt of information from multiple sources on many occasions. Specifically, the Staff argues that Mr. Geisen knew that the top of the reactor vessel head was not visible or accessible through Davis-Besse’s “camera-on-a-stick” inspection technique because the geometric constrictions prevented a full head inspection, and that significant boric acid deposits also impeded Davis-

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<sup>124</sup> Shorthand renditions can be useful, but in this instance we find that not to be the case: Mr. Martin’s good-faith effort compressed the substance of the interview at the cost of losing its meaning on a matter that later proved crucial.

<sup>125</sup> The Dissent (at p. 843) wrongly asserts that Serial Letter 2731 also “falsely reported that a qualified visual inspection during the 13th RFO ‘will not be compromised due to any pre-existing boric acid crystal deposits.’” The parties did not stipulate to any such purported inaccuracy in Serial Letter 2731 (Staff Ex. 77); and the Enforcement Order does not charge Mr. Geisen with any misrepresentation in this regard (Enforcement Order at 8-9).

Besse's ability to perform adequate nozzle inspections. Staff Proposed Findings at 25, 50; *see also* Staff Reply at 3-4.

The Staff maintains that information regarding these limitations was presented to Mr. Geisen in numerous reports and other correspondence that Mr. Geisen testified that he read. Staff Reply at 4. In that regard, the Staff points to Mr. Goyal's e-mails, trip reports, and memoranda as noting the difficulty of completing inspections and cleanings through the existing mouseholes and advocated cutting access holes in the service structure. Staff Exs. 33, 36.<sup>126</sup> All this, argues the Staff, provided evidence that Mr. Geisen therefore "knew" the configuration of the head precluded a complete inspection and cleaning.

On this point, the Dissent notes on more than one occasion (at pp. 825 n.14, 849) that Mr. Geisen "read, carefully reviewed, discussed, or approved" a particular document. Only once does the Dissent claim that he "wrote" it, and *never* does the Dissent assert that he acted upon, or even reacted to, a particular document. Nonetheless, the Staff argument that is accepted in the Dissent is that there is "an abundant amount of evidence" supporting the conclusion that Mr. Geisen was aware that Davis-Besse's inspection technique precluded the view of nozzles toward the top of the reactor vessel head. Staff Findings at 29; Dissent at p. 824. *To the contrary, Mr. Geisen understood that past inspections had been completed, notwithstanding the challenges presented by the structural configuration of the reactor vessel head.* For example, Mr. Goyal communicated this message when he reported in his August 17, 2001 e-mail that Davis-Besse conducted *a good inspection* in 1998. Staff Ex. 39.

Mr. Geisen acknowledged that he knew the inspection technique had its difficulties, but he was not aware that it physically precluded the ability to view all of the nozzles. Tr. at 1616 (he did not have a sense that there were parts of the head that were entirely inaccessible, just that "you couldn't get up and around

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<sup>126</sup>The Staff also points to the "Outage Insider," which stated:

Due to a history of leaking Control Rod Drive Mechanism (CRDM) flanges on the Reactor Head, boric acid has built up in this area. Access to this area is very difficult due to the construction of the Service Structure surrounding the area. Geisen Ex. 18; *see also* Staff Findings at 27 and Dissent at p. 831.

This excerpt simply verifies what Mr. Geisen stated was his prior knowledge of the condition of the reactor vessel head: (1) there was a history of leaking flanges (Tr. at 1569-70); (2) boric acid had built up at the top of the head from these leaking flanges (Tr. at 1573); and (3) access to the reactor vessel head through the mouseholes presented challenges making cleaning and inspection difficult (Tr. at 1848, 1970).

More importantly, the topic of this particular Outage Insider was *a commendation to Mr. Siemaszko for the successful cleaning of the reactor vessel head*, thus establishing Mr. Geisen's belief that the head had been cleaned during 12RFO in 2000. Geisen Ex. 18.

like you wanted to”).<sup>127</sup> At no time did Mr. Geisen concede that he was aware that the camera-on-a-stick inspection technique prevented an inspection of the entire reactor vessel head. Instead, Mr. Geisen explained that he “has since come to understand that [the method] was a huge impediment,” but that in 2000 he was not certain that a rigid stick was used to mount the camera and believed that a “boroscope-type camera”<sup>128</sup> was used instead, affording much greater flexibility. Tr. at 1939.

What seems to be the Dissent’s most compelling reference to the testimony of record involves its abbreviated reference (at pp. 832-33) to a brief exchange between Staff counsel and Mr. Geisen. Indeed, this seems to be the sole direct testimony upon which the Dissent relies to demonstrate that Mr. Geisen *knew* the camera-on-a-stick method physically precluded the ability to view all the nozzles. But the brief exchange elliptically quoted does not convey a valid picture of Mr. Geisen’s testimony, which stemmed from an exchange about the use of the crack growth rate model (Tr. at 1955).

To begin with, Mr. Geisen’s counsel had objected to a question in this line of inquiry as having previously been “asked and answered” and “been over . . . three or four times.” *See* Tr. at 1957. We do not pause here to analyze the answers provided earlier, upon which the Dissent does not rely, but do point out that the Staff’s question as propounded related, only and simply, to the modification request initially generated in 1994 and carried forward from that time.

The question initially asked whether Mr. Geisen “knew that the reason for th[at] modification request was because they couldn’t inspect the entire head. Correct?” Tr. at 1957, lines 12-14. The question was then restated as “whether that modification . . . was there because you couldn’t access the entire head through the weep holes.” Tr. at 1958, lines 3-5. Mr. Geisen interjected a “no” answer as the Board was considering his counsel’s objection. Tr. at 1958, lines 7-11. After being granted some leeway, the Staff reasked a series of questions, ending with the first of the two questions to which the Dissent refers, namely (Tr. at 1958, line 25, to 1959, line 4):

[Y]ou knew the access holes were being requested in that modification because they couldn’t get to the entire head using a camera on a stick through a weep hole. Isn’t that correct?

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<sup>127</sup>The Dissent erroneously concludes (at p. 830 n.21) that Mr. Geisen “conceded he was aware these impediments prevented a full head inspection” when all Mr. Geisen stated was that he knew the methods impeded the inspection. Further, the Dissent’s reliance (*id.*) upon the not “even a viable option” remark is taken entirely out of context (*see* below note 131).

<sup>128</sup>Mr. Geisen described a “boroscope” (also sometimes called a “borescope” or other similar names) as a more flexible device that is controlled by a joystick that would allow the camera to be moved around the reactor vessel head. Tr. at 1940.

After Mr. Geisen answered “correct,” the Staff asked the next question, which was (Tr. at 1959, lines 6-7):

So you knew that it was not possible to see 100 per cent of the head in 1996. Isn't that correct?

Mr. Geisen' answer was a narrow one (Tr. at 1959, lines 9-10):

I would say that's correct the way that's worded.

Given his previous “no” answer and his emphasis on the “way it was worded,” we are not as comfortable as is the Dissent (at pp. 832-33) in adding interpretative elliptical qualifiers to the question as worded. That question did not include the qualifying words “by using the camera-on-a-stick technique” that the Dissent inserted. Given that Mr. Geisen's response was that he “would say that was correct the way that's worded,” precision is critical, because there exists throughout the hearing record Mr. Geisen's repetitive and uncontroverted testimony to a different effect, namely that he was unaware that the camera-on-a-stick technique did not just present difficulties but actually was inadequate to provide a view of all the nozzles. *See* above pp. 744-46.

Furthermore, Mr. Geisen was copied on an August 17, 2001 e-mail wherein Mr. Goyal represented to Framatome that Davis-Besse “will be performing a 100% qualified visual examination in the next outage in April 2002.” Staff Ex. 39. This same representation was made by Mr. Goyal to Mr. Swim a week prior to that in an August 11, 2001 e-mail.<sup>129</sup> Staff Ex. 36 (“It was agreed that the response will include a commitment to perform a 100% qualified visual examination of all the nozzles during 13thRFO”). Had he focused on these e-mails, the information would not have been surprising or noteworthy, for Mr. Geisen was aware that arrangements had been made to secure a “rover” for use in the upcoming inspection to overcome the structural and geometrical challenges. Tr. at 1613-16; Staff Ex. 71 at 1854.<sup>130</sup>

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<sup>129</sup>The August 11 e-mail also stated that Mr. Siemaszko was requesting three large access holes be cut in the service structure to ease with cleaning of the reactor vessel head. Mr. Geisen stated that this would have informed him that Mr. Siemaszko was requesting this modification “to make it easier to do the viewing and cleaning” (Tr. at 1872), but *not*, as the Staff (Staff Findings at 28) and the Dissent (at p. 832) portray, that the modification was necessary because the reactor vessel head could not otherwise be fully inspected and cleaned (Tr. at 1872).

<sup>130</sup>During a side-bar conversation at a B&W Owners Group meeting, Mr. Geisen discussed with a representative from another plant a new technology for doing visual inspections, i.e., use of a robotic rover. Mr. Geisen then funded, out of Design Basis Engineering's budget, a rover for Systems Engineering's use during 13RFO in 2002. Tr. at 1614.



This knowledge formed the basis for Mr. Geisen's understanding of the language in Serial Letter 2731 regarding FENOC's plans for the 2002 inspections at Davis-Besse. The "rover" also obviated the need, according to Mr. Geisen, for Davis-Besse to perform the long-delayed modification request for larger access holes in the service structure. Tr. at 1880.<sup>131</sup> (*The plans to use the rover, it turns out, provide what might be the best evidence of Mr. Geisen's belief that the head had been successfully cleaned. The rover's magnetic wheels can operate only when in contact with the bare metal of the head.* Tr. at 1617. Unless Mr. Geisen had procured the rover to provide a cover story for the future lying he expected to do in response to an inquiry that did not yet exist on a matter that was not within his responsibility, the proactive steps he took to procure a rover speak definitively, for they make sense only if he held the view that the head had been cleaned.)

Moreover, the issues discussed in the e-mails, trip reports, and memoranda largely served only to confirm Mr. Geisen's general understanding of the past history of flange leakage at Davis-Besse. Mr. Geisen testified to the "technical arrogance" instilled in employees at the plant regarding the boric acid deposits originating only from leaking flanges. Staff Ex. 79 at 77.<sup>132</sup> The consistent understanding he presented was that flange leakage precluded the view of several nozzles on the top of the reactor vessel head.<sup>133</sup> More importantly, the conclusions Mr. Geisen reasonably took from the documents and his understanding of the condition of the head were not contradicted by statements provided in Serial Letter 2731, which stated that there was some accumulation of boric acid deposits on the top of the reactor vessel head. Tr. at 1743-44 (Mr. Geisen testified that his understanding was that there was "some boron on the top of the head . . . that prevented [the view] of some of the nozzles" but not that "the entire head was coated and you couldn't inspect anything").

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<sup>131</sup> Seen in this light, Mr. Geisen's testimony that he did not "view the camera-on-a-stick as even a viable option anymore" (Tr. at 1880), does not support the negative inference concerning Mr. Geisen's attitude that the Staff and the Dissent would draw from it. Instead, it is simply the product of, and consistent with, his testimony that the future inspection of the reactor vessel head planned for the 13RFO in 2002 included the use of the "rover," a new and better option to use in place of the earlier technique.

<sup>132</sup> Mr. Holmberg testified that at the time it was not unreasonable for Davis-Besse employees to have believed the source of the buildup was from flange leakage. Tr. at 906 ("everyone believed that was the source"). In hindsight, Mr. Holmberg agrees it is now known that the buildup could not have come exclusively from a source above the reactor vessel head. Tr. at 906.

<sup>133</sup> The Dissent accuses Mr. Geisen (at p. 843 n.36) with knowing the falsity of the statements in Serial Letter 2731 that there was "[n]o visible evidence of nozzle leakage" and that the boric acid deposits were "not indicative of nozzle leakage," because any review could not definitively attribute those deposits to flange leakage. Mr. Geisen consistently — and credibly both from a substantive and a demeanor standpoint — testified, however, that the mindset at Davis-Besse at that time was that these deposits were indeed caused by flange leakage.

It bears reemphasis that the Bulletin embodied simply an information-gathering exercise to assess the nature of the PWR licensees' prior inspections so as to enable the NRC to consider regulatory changes going forward to prevent situations like those that had developed at Oconee. The Bulletin did not specifically require licensees to conduct inspections in a particular way, but instead provided guidance as to the type of visual inspections the NRC thought would be adequate to ensure safety measures were met, particularly for high-susceptibility plants. Tr. at 1227. Therefore, although it would have gone a long way toward demonstrating thorough compliance with the Bulletin, Davis-Besse was *not required* to perform a qualified visual inspection in order to meet the purpose and needs of the Bulletin.<sup>134</sup>

With regard to past inspections at Davis-Besse, FENOC's initial response to the Bulletin failed, as indicated by the Enforcement Order (at 8), to state that access to the bare metal head was impeded by significant boric acid deposits in both 11RFO (1998) and 12RFO (2000). Serial Letter 2731 did report, however, under the results of the 1998 inspection, that "visual inspection showed an uneven layer of boric acid deposits . . . [with] lumps of boron, with the color varying from brown to white," and in 2000, "some accumulation of boric acid deposits" were found on the reactor vessel head and nozzles. Staff Ex. 9 at 3. The observed boric acid on the reactor vessel head for both inspections was attributed to leaking flanges. *See id.* The description of the inspection results, as provided in Serial Letter 2731, would inform any technically educated reader that a bare metal inspection was *not* fully accomplished during either the 1998 or 2000 inspections.<sup>135</sup>

Prior to our hearing, Mr. Geisen conceded that information in Serial Letter 2731 proved to be inaccurate and incomplete. Staff Ex. 77 at 3-4.<sup>136</sup> But that does

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<sup>134</sup>The Bulletin states that plants placed into the high-susceptibility category were *encouraged* to perform a 100% qualified visual examination of the reactor vessel head nozzles. Staff Ex. 8 at 8 ("a qualified volumetric examination of 100% of the VHP nozzles . . . may be appropriate"). Moreover, Mr. Geisen's understanding that the 1998 and 2000 inspections would not have been considered a "qualified visual inspection" signifies nothing in the context of what the Bulletin was seeking or what the charges against him allege. *Cf.* Dissent at p. 829.

<sup>135</sup>The Dissent incorrectly states (at pp. 842-43) that Serial Letter 2731 "falsely implied that Davis-Besse performed a full 'bare metal' inspection" during 11RFO and 12RFO. In fact, Serial Letter 2731 states that the "scope of the visual inspection was to inspect the bare metal RPV head area that was accessible through the weep holes." Staff Ex. 9, Attachment 1, at 2. This statement does not imply that a "full bare metal inspection" was conducted. At most, this statement indicates that the inspection was conducted to view the portion of the bare metal head that was accessible.

<sup>136</sup>The Dissent starts by emphasizing (at p. 809) its view that Mr. Geisen "*concedes*" that the information "*he*" provided to the NRC between September and November 2001 was materially incomplete and inaccurate. To be sure, Mr. Geisen does concede that the information *FENOC* submitted was of that quality. But no one familiar with this record should find that Mr. Geisen "submitted" anything in September, given (1) his last-minute, minuscule role in reviewing Serial

(Continued)

not negate the impact of the information, referred to earlier herein, that formed the basis for Mr. Geisen's understanding of the language in Serial Letter 2731 at the time it came before him for a brief "Green Sheet" approval. Nor does it address his approach: Mr. Geisen testified that he, as well as others in the industry, viewed the Bulletin as simply calling for evaluating details of past industry inspections to determine those methods that might not have been "quite right" and to look ahead to determine "what are we going to do as an industry changing our criteria going forward." Tr. at 1825-26. Therefore, Mr. Geisen's general view was that the information requested by the Bulletin, including possible limitations on inspection of the reactor vessel head,<sup>137</sup> was *forward* looking. Tr. at 1826-27.<sup>138</sup>

With the foregoing in mind, we find that the evidence does not establish that Mr. Geisen, as a mere last-minute reviewer of a 25-page technical response to the Bulletin, had the requisite knowledge to recognize the inaccuracies or incomplete statements provided in Serial Letter 2731. Moreover, seven other management-level reviewers, including the supervisor and manager of the actual department that performed the reactor vessel head inspections, also signed the Green Sheet for Serial Letter 2731. No evidence has been provided to indicate that Mr. Geisen would have had greater knowledge than these technically responsible individuals.

The evidence presented by the Staff, and summarized above, demonstrates that, at the time Mr. Geisen signed off on Serial Letter 2731, he had only a general, not a particularized, understanding of issues relevant to the information provided

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Letter 2731, and (2) the Dissent's inability to find him responsible for anything more than failing to catch an omission (at pp. 842-43) in a 25-page document prepared by others without his input.

<sup>137</sup>In terms of those limitations, Mr. Geisen explained that, rather than trying to hide anything about the close working quarters between the head and the insulation, he had viewed the insulation as not impeding access to the reactor vessel head because Davis-Besse's setup of the insulation provided some space above the head, unlike the situation at some other plants (*see* above note 22) where the insulation rested directly on the head. Tr. at 1824.

<sup>138</sup>We disagree entirely with the Dissent's discounting (at p. 840 n.33) of this fact on the basis of Mr. Geisen's having testified that he read the Bulletin "from front to back" (Tr. at 1823). In the context in which Mr. Geisen said that — where the Staff's questions were focusing on particular portions of the Bulletin — and in light of what else he said in the same breath, it was clear to us that what Mr. Geisen meant was that when he read the Bulletin initially, he simply went from front to back without focusing — as he was being called upon to do at the hearing — on the meaning and significance of particular aspects. The Dissent's reading of "front to back" as though it meant "thoroughly from cover to cover" may be a permissible one on the words alone, but does not reflect the context in and demeanor with which the words were spoken, and what else was said at the same time. *See* Tr. at 1823. Thus, once again, the Dissent adopts the interpretation that suggests that when a person reads a document, all of it is retained, even if the reading of it was unfocused. As we observed his testimony, what Mr. Geisen was saying was that — consistent with the knowledge hierarchy (pp. 708-09, above) — he saw more in the Bulletin when focusing on a particular section for a particular purpose, than when he read it as a whole to gain general familiarity with it.

to the NRC in response to the Bulletin. On that score, we make the following specific findings:

- Mr. Geisen was not the expert at Davis-Besse on the subject of reactor vessel head inspections or cleaning, nor had he been involved in any earlier resolutions of those issues. Mr. Geisen was not personally involved in the inspections or cleanings in 1996 or 1998, and his involvement in 2000 was limited.
- Although Mr. Geisen was aware that the configuration of the head and service structure presented some obstacles to cleaning, he viewed these methods as imposing restrictions, not as rendering parts of the reactor vessel head entirely inaccessible. Tr. at 1616; *see also* Tr. at 1822-23.
- Mr. Geisen understood that Davis-Besse had a history of flange leakage resulting in boric acid accumulation on the reactor vessel head, but he also understood that the flanges had been thoroughly repaired and the boric acid deposits had been cleaned to allow for an inspection, via use of an automated “rover” during the refueling outage in March of 2002, that could be compared to a bare metal baseline. He also believed that the 2000 cleaning effort had been successful through the use of pressurized hot water, a step that would have had to have occurred for the rover’s magnetic wheels to function.
- Mr. Geisen also understood that engineers from Systems Engineering (e.g., Mr. Siemaszko), and from his own group (e.g., Prasoon Goyal), were involved in working on the relevant issues, and he had placed confidence in their efforts. Notwithstanding the misrepresentations they made within the company, at that time he had no reason not to believe them.

## **2. *October 3, 2001 Teleconference***

### ***a. Mr. Geisen’s Statements During October 3 Teleconference***

Based on the evidence presented, Mr. Geisen’s first substantive participation in FENOC’s submittals to the NRC took place during a conference call that occurred on Wednesday, October 3, 2001, and that was preceded by one or more planning sessions. This participation was triggered by an assignment he received Friday, September 28, 2001.

A month earlier (a couple of days after Mr. Geisen signed the Green Sheet for Serial Letter 2731 as Design Basis Engineering Manager), Mr. Goyal had sent an August 30, 2001 e-mail to Mr. Siemaszko, Mark McLaughlin, Rodney Cook, and Dale Miller that included the sentence “[w]e do not say anywhere in our response

to the bulletin that inspection thru the mouse holes creates an impediment for 100% visual examination (management need to know this).” Staff Ex. 42. *Mr. Goyal did not copy Mr. Geisen on this e-mail, nor did he speak with Mr. Geisen about this concern.* Tr. at 1169-70, 1644.<sup>139</sup> *This further confirms that, as those within the company recognized, there was no significant role being played by Mr. Geisen to that point.*

This finding is fully explicable in terms of Mr. Geisen’s duties. It bears repeating that during the month of September, Mr. Geisen’s time and attention had been split between (1) the INPO evaluation and (2) the preparation of design modifications for the next refueling outage. Tr. at 1623-25, 1646; Staff Ex. 71 at 1860-61.

Mr. Geisen’s first significant involvement in relation to the Bulletin occurred on Friday, September 28, 2001. Tr. at 1644. On that date, Guy Campbell, Vice President of Davis-Besse, learned that his superior, FENOC’s Chief Nuclear Officer, Bob Saunders, had received a telephone call from Brian Sheron, NRC’s Associate Director of Project Licensing and Technical Analysis and a key figure in reviewing bulletin responses, expressing the NRC Staff’s view that Davis-Besse might need to shut down operations by year’s end. Tr. at 1645; Staff Ex. 46. Mr. Campbell pulled David Lockwood, FENOC’s Director of Regulatory Affairs, and Mr. Moffitt, Director of Technical Services, out of the INPO-audit exit meeting, at which Mr. Geisen was also in attendance, to discuss the call. Tr. at 1670. Mr. Moffitt returned to the meeting and designated his subordinate, Mr. Geisen, to get involved in the shutdown threat in his stead because Mr. Moffitt was the peer evaluator for INPO and was required to complete his responsibilities for the INPO debriefing. Tr. at 1644-45, 1670-71.

Mr. Lockwood arranged an October 3, 2001 conference call with the NRC to determine the basis for the agency’s concern. Tr. at 1645; *see also* Staff Exs. 51, 52; Tr. at 1647. Mr. Geisen did not have a defined role for that call, but attended meetings of upwards of a dozen people held in preparation for the call and reviewed documents related thereto. Tr. at 1646-47. *Mr. Geisen testified in that regard that, although he did not “own” the reactor vessel head issues, there was no one there to speak up for those who did, so he said he “would take care of it.”* Tr. at 1667-68.

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<sup>139</sup>The Board asked Mr. Goyal on several occasions whether he had ever gotten replies to his memos or ever followed up with the recipients. For example, one exchange went as follows:

JUDGE FARRAR: You had told them by sending them a copy?  
[MR. GOYAL]: Sending this e-mail, not verbally communicating.  
JUDGE FARRAR: [ ] Did you ever hear back from any of these people?  
[MR. GOYAL]: No.

This was typical of the fate of Mr. Goyal’s written communications.

At the time of the call, FENOC was unaware of which portion of Serial Letter 2731 had been found deficient, nor was the company aware what subject had triggered the NRC Staff's concerns. Tr. at 1668. FENOC's attempts during the conference call to explore the reasons underlying the NRC Staff's conclusion about the possible shutdown of Davis-Besse were met with the response that such information was "predecisional," and therefore could not be disclosed. Tr. at 1666.

In the course of the company's preparation for this call, Mr. Geisen reviewed Serial Letter 2731. Tr. at 1647. Mr. Geisen testified that, during that review, nothing in the letter caught his attention or struck him as untrue. Tr. at 1647.

The content of the letter supports the veracity of his testimony. For example, the letter included a report that "Framatome . . . performed a 100% video inspection of CRDM flanges above the insulation" in April 2000 and identified five leaking CRDM flanges. Staff Ex. 9 at 3. It also reported that some boric acid deposits were located beneath the leaking flanges on the reactor vessel head. Staff Ex. 9 at 3. Finally, it stated that recent review of the videotapes of that inspection "re-confirm[ed]" that the indications of boron leakage were thus not similar to the indications at Oconee and were not indicative of nozzle leakage. Staff Ex. 9 at 3.

Moreover, the evidence did not show that, in the preparation meetings that Mr. Geisen attended, any other participants — some of whom, including those from Framatome, were in far better position than he to know the underlying facts — expressed any concern about Serial Letter 2731's accuracy. Tr. at 1647-48. Agendas and notes from those preparation meetings also reflect that Mr. Goyal — who had authored the note that was critical of Serial Letter 2731 but was not sent to Mr. Geisen — was in attendance for some of the meetings. Staff Exs. 47, 48.

So was someone else who knew more about the shortcomings than did Mr. Geisen: a handwritten note on a page titled "Discussion Agenda" reads "concerned that we don't have a frame by frame review. Why not? If NRC comes or sees our tapes we are wide open." Staff Ex. 47 at 1259. The significance of the seemingly damaging "wide-open" admission was apparently never explored, much less determined, during the OI investigation. Upon our inquiring at the hearing, Staff Counsel represented that they did not know who the author of that note was. Tr. at 1660-61.

Later, after consultation with OI personnel, Staff counsel reported that the note had been written by Dale Miller, who was the Davis-Besse Regulatory Affairs Supervisor (and who managed Mr. Cook, the contractor who had coordinated the

preparation of Serial Letter 2731). Mr. Miller was not in Mr. Geisen's department. Tr. at 1800.<sup>140</sup>

*Mr. Geisen had no recollection of hearing such a concern about what the tapes would reveal articulated at the preparation meetings he attended. He testified that such a statement would have caught his attention because it would have communicated that Davis-Besse had problems of which he was unaware. Tr. at 1651-52. No evidence contradicted this testimony.*

The meeting agendas the Staff put into evidence reflect discussions of the reactor vessel head inspections and cleanings in 1998 and 2000. Staff Ex. 47. The names associated with the discussions of those efforts do not include Mr. Geisen; instead, they are "McLaughlin/Siemaszko." Mr. McLaughlin worked for the Life Cycle Management Group and was the engineer in charge of preparations for the upcoming refueling outage. Tr. at 1603, 1668. Mr. Siemaszko worked for the Systems Engineering Group and had performed the 2000 inspection and cleaning. Staff Exs. 18, 19. Neither of these individuals worked under Mr. Geisen in the Design Basis Engineering Department.

The teleconference itself was held on October 3, 2001. According to Mr. Miller's notes of the call, Mr. Geisen stated that in 2000 David-Besse conducted a 100% inspection of the reactor vessel head except for some areas near the center of the head that were precluded from inspection due to flange leakage. Staff Ex. 51; *see also* Staff Ex. 52 (meeting notes state that "100% of the reactor vessel head was inspected which included the CRD housing to head interfaces . . . . However, for 5-6 nozzles near the center of the head, boric acid from CRD flange leakage precluded definitive conclusions that the CRD nozzle welds were not leaking"). Mr. Geisen testified that he has no present recollection of making such comments but stipulated before the hearing that he has no reason to doubt the accuracy of Mr. Miller's notes.<sup>141</sup> Tr. at 1652. Based on Mr. Miller's handwritten note, discussed

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<sup>140</sup> Remarkably, the Board learned nothing more from the Staff about this seemingly important — and seemingly chargeable — handwritten note. Based on other evidence, Mr. Miller had been the subject of an NRC enforcement order banning him, effective immediately, from all work in the regulated industry for 5 years. After Mr. Miller requested a hearing to challenge that order, the NRC Staff entered into a settlement agreement with him that was approved on September 29, 2006, by a Licensing Board with the same makeup as this Board. That agreement released Mr. Miller from any further punishment or liability in exchange for his making two presentations in which he was to convey to a large group of individuals in the regulated industry both his personal experiences and the lessons he learned. *Dale L. Miller*, LBP-06-21, 64 NRC 219 (2006). Whether an awareness of the "wide-open" handwritten note would have altered the Staff's, or our, view of the situation is no longer a matter for adjudication or analysis.

<sup>141</sup> There was no other indication that Mr. Geisen was accountable for the purported statement made to the NRC during the October 3, 2001 teleconference than Mr. Miller's denotation of Mr. Geisen's initials in the appropriate location in his notes. Dr. Hiser and Mr. Holmberg testified that they did not recall who at Davis-Besse made the statement during the conference call. Tr. at 944-45, 1249.

above and unknown to OI, it seems that Mr. Miller knew that this was incorrect, yet he did not volunteer a correction during the October 3 conference call.

By way of further explanation, Mr. Geisen testified that, although he has no reason to doubt that the notes from the conference call reflect what was said, he does not recall the context under which they were provided to the NRC nor is he aware of the nature of the question that probed for such a response. Tr. at 1910-12. Mr. Geisen also explained that, if he had spoken the words “100% inspection except for 5 or 6 nozzles,” his intention would have been to communicate that Davis-Besse had attempted to conduct a whole head, rather than a sample-type, inspection. Tr. at 1667.

*b. Findings of Fact Regarding October 3 Teleconference Statements*

The Staff’s Enforcement Order asserted that the information communicated by Mr. Geisen in the October 3, 2001 conference call was materially incomplete and inaccurate in that Davis-Besse did not conduct a 100% inspection of the reactor vessel head during 12RFO due to “significant boric acid accumulations on the head” obscuring the view of “a significant number of nozzles.” Enforcement Order at 9-10.

Given the stipulation, we accept Mr. Miller’s attribution of the comments to Mr. Geisen as correct. But this does not serve to sustain the Staff’s charge, for it is clear that Mr. Geisen did *not* say that Davis-Besse’s employees had seen every nozzle during the 2000 inspection. Conforming to the knowledge summarized above, Mr. Geisen generally knew that Davis-Besse had a history of flange leakage and that several nozzles (i.e., five or six) were obscured from visual inspection. Tr. at 1745.

Confirming this, Mr. Moffitt, who participated on the teleconference, testified that Mr. Geisen “absolutely” did not say the entire head and all of the nozzles had been inspected, and knows this because he would have known such a statement to be incorrect. Staff Ex. 74 at 1284. *The Staff evidence is to the same effect: notes taken by Allen Hiser and Melvin Holmberg during the call reflect that the speaker said that there was boric acid interference on five to six nozzles.* Staff Ex. 52.<sup>142</sup> We also note that Framatome, the company responsible for having conducted the inspection in 2000, had three representatives on the conference call. Staff Ex. 50. Mr. Geisen would have expected, as would we, that one of the Framatome representatives would have corrected Mr. Geisen if he had mistakenly

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<sup>142</sup>On direct, Dr. Hiser testified that Davis-Besse reported that 100% of the head was inspected, which he took to mean the entire head was observed. Tr. at 1245-46. His own notes, however, read “100% inspection of head” followed immediately by the line “boric acid interferences on some nozzles — 5-6 nozzles.” Staff Ex. 52. Given the more complete content of his contemporaneous notes, we place more reliance on those notes than upon his more limited present testimonial recollection.



characterized the inspections with which they were intimately familiar. Tr. at 1665. And again, Mr. Miller did not volunteer the information that he had regarding the videotapes based on his handwritten notes.

Although Mr. Geisen testified that he did not recall reviewing any other documentation in preparation for the conference call other than Serial Letter 2731, the Staff argues that Mr. Geisen's purported sources of knowledge for what he said on the conference call could not have been Serial Letter 2731 and the interactions cited above, because they do not support what was stated on the call. In the face of this, Mr. Geisen was unable to cite any basis for his statement that there had been an attempt to inspect 100% of the reactor vessel head. Tr. at 1920-21. In particular, Mr. Geisen could not identify language in Serial Letter 2731 to support this statement. Tr. at 1920-21. Mr. Geisen did point out, however, that he had participated in preparation meetings for the conference call, specifically meetings held on October 2, 2001 (Tr. at 1915), and explained that he could have drawn upon discussions that took place during this preparation meeting in formulating and supporting such a statement (Tr. at 1919). No further evidence was provided by either party to substantiate or to undermine Mr. Geisen's memory of these events.

We have no better evidence as to the nature of the discussions during the preparatory meetings, nor is there in the record a list of participants in that meeting. All we are left with is that Mr. Geisen is unable to explain now the specific basis for a general statement he does not recall making then. This is too slim a reed to support the allegation that Mr. Geisen knowingly concealed information from the NRC, particularly in view of Mr. Miller's actions, and the lack of involvement by the knowledgeable Framatome staff, all of whom were likely involved in the preparation meetings for the conference call with the NRC Staff.

Against this background, we believe Mr. Geisen when he says that he relayed information he understood, at that time, to be true. Tr. at 1709. Mr. Geisen had no independent recollection of other information concerning prior inspections at Davis-Besse — for which he had no responsibility, exercised no oversight, and conducted no analysis — other than his review of Serial Letter 2731 and interactions associated with preparations for the conference call.

Also brought into issue on this score by the Staff and the Dissent is Mr. Geisen's purported receipt of a report prepared by Mr. Gibbs (the "Gibbs Report") on September 14, 2001. *See* Staff Findings at 51-52; Staff Reply at 6-8; Dissent at p. 844 n.37. The Gibbs Report was prepared by the former owner of Piedmont Management & Technical Services, Inc., who was hired by Mr. Moffitt to assist Mark McLaughlin in preparation efforts for the 13RFO planned for 2002. Staff Ex. 75 at 816.

The Staff maintains that, after having read the Gibbs Report, Mr. Geisen would have been informed that "information FENOC provided to the NRC regarding

head inspections was not accurate and incomplete.” Staff Reply at 7. Even more forcefully, the Dissent asserts that the Gibbs Report made a key observation, i.e., that FENOC had “incorrectly represented” in Serial Letter 2731 that “the top head visual inspections would not be compromised [in the 13th RFO] due to any pre-existing boric acid crystal deposits.”<sup>143</sup> Dissent at p. 844 n.37 (citing Staff Ex. 44 at 1).

The Gibbs Report does not, however, indicate in any clear fashion that the material it quotes from Serial Letter 2731 was, as the Dissent puts it, an “incorrect representation.” In fact, it appears to go to some lengths to obscure that fact. To that end, the Gibbs Report diplomatically indicates, under point number 1, that:

CRDM Inspection and Repair Project team members are not in agreement concerning the need to proceed with cutting access holes in the Reactor Service Structure at the start of 13RFO. Some see this as a contingency action for which all preparations should be in place and implemented only if required. It is noted that on completion of 12RFO, the Reactor Vessel head did have boric acid crystal deposits of considerable depth left in the center top area of the head, since cleaning of this area at that time was not successful in removing all the deposits (partly due to limited access).

Davis-Besse stated in its response to NRC Bulletin 2001-01 that the top head visual inspections would not be compromised due to any pre-existing boric acid crystal deposits. Given previous experience in removing boric acid deposits from the head, the likely need to remove these deposits at the center top head by mechanical means, the severely restricted access allowed by the service structure mouse holes for mechanical cleaning, the industry experience of Duke Power that clearly emphasizes the need for good access to the head for cleaning and inspection and the NRC commitments and inspection requirements for the visual inspection, the most prudent course of action to avoid outage delays would be to access holes in the Reactor Service Structure as soon as possible in 13RFO.

Staff Ex. 44 at 1. As may be seen, the letter leaves any connection among the three key passages<sup>144</sup> for the careful reader to draw.<sup>145</sup> *There was no reason for Mr. Geisen to be such a careful reader at the time, as the matters covered in it*

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<sup>143</sup> We note that the Dissent’s reference (at p. 844 n.37) to the importance of the Gibbs Report appears to be misplaced. The reference places emphasis on a section of Serial Letter 2731 that is not brought into issue by the Enforcement Order.

<sup>144</sup> Those three passages are the last sentence in the first paragraph, the first sentence in the second paragraph, and the last clause (beginning with “the most prudent course”) in the second paragraph.

<sup>145</sup> Mr. Gibbs himself testified that “he never drew a conclusion about what [Serial Letter 2731] said,” because that was “not clear to him.” He did agree that notwithstanding his belief, “I guess you could draw a conclusion that [statements in Serial Letter 2731] potentially were misleading.” Staff Ex. 75 at 842-44. Compare the more limited quotation that appears at Dissent at p. 844 n.37.

*were only peripherally related to his responsibilities as Manager of Design Basis Engineering.* Tr. at 1890, 1892-93.

The only information in the Gibbs Report that was arguably different from that reported in Serial Letter 2731 was that the reactor vessel head had not been cleaned during the 12RFO in 2000. The other points raised would, in many ways, have simply reiterated points Mr. Geisen already acknowledged: (1) that the mouseholes restricted (but not necessarily prohibited) access to the reactor vessel head for cleaning and inspections; and (2) that boric acid deposits were found in the center top area of the reactor vessel head. Of most importance, the Gibbs Report does not advise Mr. McLaughlin, and others, in direct terms that statements in Serial Letter 2731 were false and misleading (regardless of what a careful reader could otherwise discern).

It is also not clear at what point in time Mr. Geisen read the Gibbs Report. The Staff suggests that Mr. Geisen would have read the September 14 Gibbs Report prior to the October 3, 2001 conference call. Mr. Geisen noted that the Gibbs Report would have been placed on his desk in the middle of the September 2001 INPO evaluation, so he would have been preoccupied and not likely to have read the Gibbs Report during that time. Tr. at 1893-94. The Staff points out that even if Mr. Geisen had been distracted by the INPO evaluation, that event ended on Friday, September 28, 2001, which the Staff says was “well before” the Wednesday, October 3 conference call. Staff Findings at 52. With only two business days intervening, and much for Mr. Geisen to catch up on following the distraction of the INPO audit and his other pressing assignment, we cannot — in the absence of evidence — presume that he immediately focused on the Gibbs Report before the call.<sup>146</sup>

In that regard, no evidence was presented that Mr. Geisen actually read the Gibbs Report immediately after it was left on his desk, or soon thereafter, or even at any time before the October 3 call. The report, the creation of which had been assigned by Mr. Moffitt, was addressed to Mr. McLaughlin. On that score, the Staff introduced testimony from the criminal trial in which Mr. Gibbs stated that he left a copy on Mr. Geisen’s desk as a courtesy because certain activities discussed in the report involved Mr. Geisen’s department. Staff Ex. 44; Tr. at 1890.<sup>147</sup>

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<sup>146</sup>Mr. Geisen explained to us the manner in which he attempted to respond to all the difficulties he encountered in managing his in-box during that time period. Tr. at 1899. Nothing in that explanation indicated that Mr. Geisen’s system would have led him to give high priority to the Gibbs Report.

<sup>147</sup>Once again ignoring the practicalities of the workplace in favor of legal theories (this time using, apparently, the rules regarding formal service of process), the Dissent (at p. 836 n.27) treats leaving a document on someone’s desk as establishing — for a fact — that “on” that date the person thereby “received notice” of the document’s contents. This approach would be startling enough if there were

*(Continued)*

Other than leaving a courtesy copy, there was no follow-up with Mr. Geisen about the report or its content. Moreover, Mr. Geisen testified during his criminal trial that he did not learn that the reactor vessel head had *not* been successfully cleaned during the 12RFO until “sometime in October of 2001 . . . after the meeting on the 3rd of October,” which indicates an additional likelihood that Mr. Geisen had not focused on the implications of the Gibbs Report prior to obtaining this information. Staff Ex. 71 at 1833-34. His lack of knowledge, shared by many others, of the incompleteness of the 12RFO reactor vessel head cleaning was supported by the testimony of Mr. Martin, who expressed “surprise” at this widespread misinformation.<sup>148</sup>

Based on the foregoing, the majority finds that there is no evidence that Mr. Geisen had learned anything new prior to the October 3, 2001 conference call beyond what he knew when he signed off on Serial Letter 2731. His statements during the call were consistent with the information he believed at the time to be true.

### **3. *October 11, 2001 Meeting with Commissioners’ Technical Assistants***

#### ***a. Assignments After October 3 Teleconference***

Following the October 3, 2001 teleconference, Mr. Geisen became more involved in the relevant events when he was charged with overseeing two new tasks to which the company had committed during the conference call. Tr. at 1690. The first was the development of a “crack growth rate” model to be performed by Davis-Besse’s probabilistic risk assessment expert, Kenneth Byrd. Tr. at 1690-91. The second was the development of a “nozzle-by-nozzle” table characterizing the scope of past inspections. Tr. at 1692. Construction of that table was assigned to Mr. Siemaszko, an engineer who was not in Mr. Geisen’s Design Basis Engineering department, but who had primary responsibility for (“owned”) the reactor vessel head, and who had performed the 12RFO reactor vessel head inspection and cleaning and was therefore in possession of the past inspection information. Tr. at 1692-94.

Mr. Geisen met with Mr. Siemaszko to review his methodology for conducting that task at some point in the period between making the assignment and Octo-

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no other evidence on the matter. But here there was explicit evidence from Mr. Geisen about (1) the difficulties of managing his inbox during that extremely busy period and (2) the reasons why he would not have treated the reading of that document as a high priority.

<sup>148</sup> See Tr. at 1482-83, where Mr. Martin indicated that Mr. Geisen “was not aware that boric acid had been left on the head. . . . And [he] thought that was interesting also that at least [Mr. Geisen], along with a lot of other people thought that the head had been cleaned, but it hadn’t. He didn’t know that until 2001 sometime.” This continuing confusion might well have been attributable to the continuing influence of the Outage Insider’s incorrect headline story (*see* above p. 733).

ber 11. Tr. at 1694. The meeting occurred at Mr. Siemaszko's desk and lasted for approximately 1 hour. Tr. at 1694, 1696.

Prior to that meeting, Mr. Siemaszko had the inspection videotapes transferred to DVD format because he had encountered difficulty capturing clear stop-action images from the original format without having lines or other disturbances in the picture. Tr. at 1694-95. The digital format allowed Mr. Siemaszko to move through the file frame-by-frame with more clarity. Tr. at 1695.

During the meeting, Mr. Siemaszko showed Mr. Geisen still-frames of the digitized videotapes and explained his methodology for determining nozzle conditions as needed for the Bulletin's purposes. Tr. at 1696-97. *This meeting in early October was the first time Mr. Geisen viewed portions of the past inspection videotapes.* Tr. at 1696. According to Mr. Geisen's uncontradicted testimony, and contrary to the Dissent's speculation (*see* below pp. 790-91), at no time during the meeting with Mr. Geisen did Mr. Siemaszko play the video in running fashion (the manner in which the Staff played the tapes for the Board during the evidentiary hearing). Tr. at 1697.

Mr. Siemaszko explained to Mr. Geisen that his overall approach involved looking to see whether the downhill side of a nozzle was clear of any popcorn-type deposits in order to declare the nozzle acceptable from an interface cracking perspective. Tr. at 1698. For some nozzles, Mr. Siemaszko told Mr. Geisen he had to look at a nozzle from multiple perspectives to get a good angle or view. Tr. at 1698. Mr. Siemaszko showed Mr. Geisen some photos depicting nozzles with boron accumulated on the uphill side of the nozzle. Tr. at 1699. For those nozzles, Mr. Siemaszko explained that he would look to see if the deposits appeared to have fallen from above and come to rest on the nozzle (i.e., they represented leakage from flanges above the insulation), or whether the deposits were piled up on the nozzle (i.e., they represented leakage from nozzles or other sources). Tr. at 1699. Mr. Siemaszko told Mr. Geisen that he also looked for streaks on the nozzles or stalactites on the mirror insulation as a further way to determine if there was evidence that the boric acid had come from a source above the reactor vessel head. Tr. at 1699.

Mr. Geisen does not know from which prior inspections the still frames he viewed came, but assumes they were from 1998 and 2000, given that the meeting occurred before Mr. Siemaszko began to look at 1996 inspections for the table. Tr. at 1697. He did not see anything during that meeting resembling the portions of the 2000 inspection videotape (exhibited by the Staff during the evidentiary hearing) where the camera was running into large piles of boron. Tr. at 1700. Based upon their 1-hour meeting, Mr. Geisen was satisfied with Mr. Siemaszko's methodology. Tr. at 1700.

The wisdom of that assessment is not before us as part of any Staff charges, but in any event no evidence established it to be illegitimate under the standards applicable when it was made. During the agency's investigatory phase, and at the

request of OI and the Department of Justice, Staff witness Melvin Holmberg spent 58 hours reviewing the Davis-Besse inspection videotapes from 1996, 1998, and 2000, and making determinations about whether nozzles were viewable and in a condition sufficient to be determined not to be leaking. Tr. at 892.<sup>149</sup> In this effort, Mr. Holmberg employed a standard he had recently developed for the purpose of the present litigation. Tr. at 951. Regarding evidence of leakage, that standard followed criteria established in an EPRI document that had not been issued until either 2002 or 2003 (i.e., after the time in which Mr. Siemaszko conducted his review). Tr. at 952-53. Mr. Holmberg conceded that the standard he employed was different from the one FENOC utilized in making its determinations to be presented to the NRC in response to the Bulletin. Tr. at 953-55.

As to the FENOC standard, Mr. Siemaszko's methodology was shown to comport with the understanding of Staff witness, Dr. Hiser, of what was acceptable at the time the challenged communications were occurring, although falling short of the standard Mr. Holmberg later devised. In August of 2002, Dr. Hiser was interviewed by the OI and asked about his understanding of FENOC's representations in the October 3, 2001 teleconference regarding prior inspections of the nozzles:

Question: On the nozzles excluding the five or six that may have had interferences, when you were told that they have done an inspection of the other nozzles, do you interpret that as a 360 degree inspection.

Answer: I would have expected at that point in time that we would not have been as detailed as 360 degrees, but I think the intent of the discussion would have been that it would have provided a sufficient coverage to effectively clear the nozzle. They did not say 360 degrees, but at least it would have been sufficient familiarity with what was observed at each nozzle to say there was no leakage there. As an example, I would have expected at the minimum that the observed area would have been what's called the downhill side of the nozzle, which is if the nozzle is cut into a curved part of the head, that would be the part that has the lowest elevation.

Geisen Ex. 20; Tr. at 1408-10. *There is no ground, then, to criticize Mr. Geisen for relying upon Mr. Siemaszko's similar approach to form his knowledge base.*

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<sup>149</sup>Mr. Holmberg appeared especially well qualified for the tasks about which he testified. He has worked for the NRC for 15 years and has been a reactor inspector since 1995. Tr. at 831-32. The certification process to become a reactor inspector involved 2000 hours of training and hands-on experience, and Mr. Holmberg has conducted more than a dozen reactor vessel head inspections. Tr. at 834, 948-49.

*b. Mr. Geisen's Role During October 11 Meeting with Technical Assistants*

After the October 3, 2001 conference call, at Mr. Campbell's direction, Mr. Lockwood arranged a meeting with the NRC Commissioners' Technical Assistants on October 11, 2001. Tr. at 1703. The FENOC employees attending the meeting were Mr. Campbell, Mr. Moffitt, Mr. Lockwood, and Mr. Geisen. Staff Ex. 55. Mr. Fyfitch from Framatome also attended as part of the FENOC team. Staff Ex. 55.

At the October 11 meeting, the FENOC team delivered information to the Technical Assistants through a Powerpoint slide presentation. Tr. at 1703-04; Staff Ex. 55. The slides were prepared the night before the meeting by Mr. Campbell, Mr. Moffitt, Mr. Lockwood, Mr. Geisen, Gerry Wolf, and Ken Byrd.<sup>150</sup> Presumably, each of these individuals agreed with the accuracy of the information in all of the Powerpoint slides. Tr. at 1704, 1725. During the meeting, Mr. Geisen spoke to two of the presentation slides, which contained statements regarding Davis-Besse's past inspections. Staff Ex. 55.

Mr. Geisen indicated that the basis for his belief in the accuracy of those statements was his review of Serial Letter 2731 in preparation for the October 3, 2001 teleconference, as well as discussions with others involved in the development of the slides the night before. Tr. at 1925-26. As previously noted, prior to the October 11, 2001 meeting, Mr. Geisen had also participated in the October 2, 2001 preparation sessions (Tr. at 1647-52), and had met with Mr. Siemaszko to review Mr. Siemaszko's methodology (Tr. at 1694-99).

The first slide Mr. Geisen presented was entitled "Davis-Besse's NRC Bulletin Response," and included the following statements: "Conducted and recorded video inspections of the head during 11RFO (April 1998) and 12RFO (April 2000)" and "No head penetration leakage was identified." Staff Ex. 55. The second slide, entitled "Facts," represented that "All CRDM penetrations were verified to be free from "popcorn" type deposits using video recordings from 11RFO or 12RFO." Staff Ex. 55.

*c. Mr. Geisen's Effort to Avoid and to Correct Errors*

The original text of the slide entitled "Facts" stated "All CRDM penetrations were verified to be free from 'popcorn' type deposits using video recordings from 11RFO and 12RFO." Tr. at 1722 (emphasis added). By changing the word "and" to "or," Mr. Geisen conformed the sentence to what he understood on October 11, 2001. Tr. at 1723; Staff Ex. 71 at 1918. At that time, Mr. Geisen believed the use of the word "and" suggested that either inspection could stand on its own,

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<sup>150</sup> Mr. Wolf worked in Regulatory Affairs with Mr. Lockwood (Tr. at 1726), and Mr. Byrd was the engineer assigned to manage the creation of the crack-growth model (Tr. at 1690-91).

which was not true because Davis-Besse was using videotape footage from both outages to come to this conclusion. Tr. at 1723. Mr. Moffitt testified he believed the change was suggested by Mr. Geisen because the original wording could lead someone to believe the 2000 inspection was better than it actually was. Staff Ex. 74 at 1291-92.

At some point between the October 11, 2001 meeting and the submission of Serial Letter 2735 (FENOC's supplemental response to the Bulletin) on October 17, 2001, Mr. Siemaszko presented Mr. Geisen with the preliminary results of the nozzle-by-nozzle table. Tr. at 1720. Upon reviewing the table, Mr. Geisen realized that the information therein could not be reconciled with the information the FENOC team had provided to the Commissioners' Technical Assistants. Tr. at 1945-46.

*Mr. Geisen promptly informed Mr. Moffitt that they had provided inaccurate information to the Commissioners' Technical Assistants that needed to be corrected.* Tr. at 1721, 1946. Mr. Geisen believed this was the "genesis" of Serial Letter 2735, which was to correct the inaccurate information Mr. Geisen and others on the FENOC team had provided to the Technical Assistants on October 11, 2001. Tr. at 1721, 1946.

*Mr. Moffitt testified at the criminal trial that when Mr. Geisen reported the error, Mr. Geisen was very disappointed in the mistake.* Staff Ex. 74 at 1293-94. *Mr. Moffitt also testified that he did not sense that Mr. Geisen was trying to cover up the mistake or to conceal it from the NRC.* Staff Ex. 74 at 1293-94.

During cross-examination of Mr. Geisen, the Staff's questioning suggested it held the view that, rather than informing Mr. Moffitt and the company's Regulatory Affairs officials of the error and asking them to rectify it, Mr. Geisen should have himself placed a telephone call to the Technical Assistants, as appears may be called for by NRC regulations. *See* Tr. at 1946-52; 10 C.F.R. § 50.9. The evidence establishes that Mr. Geisen did not follow that course (if he even knew it existed), but instead followed FENOC protocols by reporting the mistake to his superiors and participating in creating FENOC's corrective submission, which took place within 6 days of the discovery of the new information.<sup>151</sup>

We do not fault an employee at Mr. Geisen's level for, in such circumstances, following his company's procedures, rather than federal regulations. The impor-

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<sup>151</sup> The Dissent falls short of the mark in attempting (at p. 846 n.40) to discount Mr. Geisen's efforts to correct false information. Mr. Geisen thought he had acquired the corrected information, and he saw to it that this new information was included in the followup submission. That the followup submission "nowhere acknowledges that [he had earlier] provided . . . false information" — i.e., does not admit that FENOC's earlier submission was false — would in most regulated industries have been a decision made by company counsel or other personnel with overall responsibility for communications with the Government, and would not be the province of someone in Mr. Geisen's position.



tant point for our purposes is that *he took prompt action, within his normal sphere of influence, to get the error corrected.*<sup>152</sup>

*d. Findings of Fact Regarding October 11 Meeting Representations*

The Staff's Enforcement Order found that FENOC's presentation to the Commissioners' Technical Assistants was materially incomplete and inaccurate for failing to state that the boric acid accumulation on the reactor vessel head was so significant that not all nozzles could be visually inspected. Mr. Geisen was said to be accountable for lacking a basis for the slides he presented stating "no visible evidence of RPV penetration nozzle leakage was detected." Enforcement Order at 11.

The Staff asserts that Mr. Geisen knew these representations were false because he knew it was impossible to view all of the nozzles during 11RFO and 12RFO, or to verify they were free from popcorn-type deposits, for two reasons: (1) the camera-on-a-stick inspection method used by Davis-Besse did not allow a full head inspection, and (2) a significant number of nozzles were obscured by significant boric acid deposits. Staff Findings at 60-61.

As we discussed above, we have concluded the evidence does not show that Mr. Geisen was aware that Davis-Besse's inspection method prevented the inspection of all nozzles atop the reactor vessel head. Moreover, Mr. Geisen was persuaded, as were many others at Davis-Besse, that the boric acid deposits were exclusively from flange leakage — a problem verified by Framatome in prior inspections.

Of equal import, there is no evidence that anyone else on the FENOC team conveyed to Mr. Geisen during the course of preparing slides and planning the presentation that the information was incorrect. *Others in the room plainly knew more than Mr. Geisen on these matters.* Tr. at 1725. The evidence demonstrates that the FENOC managers worked as a team the night before to prepare the presentation, and therefore, without any evidence that Mr. Geisen was informed of any inaccuracies in any of the information stated in the two slides in question, we are unable to find that that information is contradictory to the general understanding he had then of the facts at hand.

Moreover, the evidence also demonstrates that (1) when Mr. Geisen received the nozzle-by-nozzle table from Mr. Siemaszko after this meeting with the NRC, he realized then — for the first time — that the information he had presented was inaccurate; and that (2) he promptly brought this to the attention of his

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<sup>152</sup>If that effort had failed, and Mr. Geisen were to have learned that FENOC had not tried to correct the inaccuracies, he — and eventually we — would have had to address what obligations that situation would have placed upon him. That situation did not transpire, however, for after Mr. Geisen followed company protocol and notified the appropriate employees at Davis-Besse, then, to his knowledge, the inaccuracies were corrected with the submittal of Serial Letter 2735.

management. To disclose this information, FENOC management decided to include information in Serial Letter 2735, which was filed on October 17, 2001 (i.e., within 6 days of the meeting) and included Mr. Siemaszko's completed nozzle-by-nozzle table, documenting his determinations of the 1998 and 2000 inspections.

We also note that the Staff official most responsible for the Enforcement Order testified that he had been unaware, before that Order was issued, of any efforts by Mr. Geisen to correct the filing of mistaken information, and that such efforts, if known, "would definitely [be] take[n] into consideration as a part of [his] recommendation." Tr. at 2061-64. He agreed that a failure to follow precise procedures in pursuing those corrections would not change what the correction effort itself "would indicate . . . to us about what this fellow does when he knows something [was wrongly submitted]." Tr. at 2064-65.

This important testimony confirms the view of the evidence that we had already reached. Accordingly, we therefore find that Mr. Geisen is not to be held responsible for knowingly representing the inaccuracies provided in the two October 11 slides.

#### ***4. Supplement to FENOC's Initial Bulletin Response (Serial Letter 2735)***

##### *a. Mr. Geisen's Involvement in Serial Letter 2735 (October 17, 2001)*

FENOC submitted Serial Letter 2735 to the NRC on October 17, 2001. See Staff Ex. 11. That Serial Letter contained information requested by the NRC in the October 3, 2001 teleconference, including the nozzle-by-nozzle table and the initial results of the crack growth rate analysis. See Staff Ex. 11, Attachment 1 at 2-3. Specifically, Serial Letter 2735 reported that, during 1996, sixty-five of sixty-nine nozzles were inspected; in 1998, fifty of sixty-nine nozzles were inspected; and, in 2000, forty-five of sixty-nine nozzles were inspected. Staff Ex. 11. Serial Letter 2735 also included information Mr. Geisen believed corrected the inaccurate statements the FENOC team had delivered to the NRC during the October 11, 2001 meeting with the Commissioners' Technical Assistants. Tr. at 1951.

Mr. Geisen testified that he was not surprised that Mr. Siemaszko's nozzle-by-nozzle review led to more detailed results. Tr. at 1727. *Furthermore, with Mr. Siemaszko having made no effort to hide that his nozzle-by-nozzle table yielded different results than he had initially reported, Mr. Geisen had further support for his trust in Mr. Siemaszko.* Tr. at 1728.

Mr. Geisen's reaction was a permissible one. To put it in perspective, Dr. Hiser was advised of the differing results at nearly the same time. On October 3, 2001, FENOC informed Dr. Hiser that the 2000 inspection involved a 100% inspection of the reactor vessel head except for five or six nozzles that were obscured by

boric acid deposits; and on October 17, 2001, Serial Letter 2735 reported that the same inspection viewed only forty-five of sixty-nine nozzles. Tr. at 1247; Staff Ex. 11 at 5. *Dr. Hiser testified that — rather than viewing this change as evidence of deception — he believed FENOC was gathering more information to clarify data.* Tr. at 1372-73 (“I thought it was a good engineering effort to validate the information that had been provided previously”).

Mr. Geisen participated in the development and review of Serial Letter 2735. Tr. at 1952. He signed the Green Sheet for 2735, after Mr. Siemaszko, Mr. Goyal, and Mr. McLaughlin, among others. Staff Ex. 12. Serial Letter 2735 contains a section titled “Previous Inspection Results.” Staff Ex. 11 at 5. In that section, the Serial Letter reports:

The inspection performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV [reactor vessel] head in accordance with the [Davis-Besse] Boric Acid Control Program pursuant to Generic Letter 88-05 . . . . During 10RFO, 65 of 69 nozzles were viewed, during 11RFO 50 of 69 nozzles were viewed, and during 12RFO 45 of 69 nozzles were viewed.

Staff Ex. 11 at 5.

As it turned out, the information presented in Serial Letter 2735 was also flawed in that significantly fewer nozzles were viewed during the prior inspections than were represented in the submittal.<sup>153</sup> Mr. Geisen testified without contradiction, however, that he approved its submission to the NRC believing it was accurate. We were provided with no evidence to support a finding to the contrary or to discredit Mr. Geisen’s testimony in this regard.

*b. Findings of Fact Regarding Serial Letter 2735*

The Staff’s Enforcement Order asserted in general terms that Serial Letter 2735 was materially incomplete and inaccurate in that FENOC did not view the stated number of reactor vessel nozzles during the referenced outages noted in the response. The Enforcement Order itself, however, is not explicit about the details of the charge.

Be that as it may, the Stipulation between the parties clarifies that the inaccurate and incomplete information related to the number of nozzles that were claimed

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<sup>153</sup>The inaccurate and incomplete statements were not discovered by the NRC Staff until Mr. Holmberg completed his detailed review of the inspection videos in the spring of 2002 after the corrosion cavity had been discovered. Mr. Holmberg testified that he spent 58 hours to review the videotapes of the prior inspections to make his determinations. Tr. at 947. He also testified that he used a new method to make his determinations that was not standard at the time Mr. Siemaszko would have conducted his review for the nozzle-by-nozzle table. Tr. at 951; *see also* above pp. 761.

to have been viewed for each outage, i.e., sixty-five of sixty-nine nozzles in 10RFO, fifty of sixty-nine nozzles in 11RFO, and forty-five of sixty-nine nozzles in 12RFO. The Stipulation indicates that “significantly fewer nozzle penetrations were viewed during that inspection.” Staff Ex. 77 at 7. It is not clear, however, that the Enforcement Order was referring specifically to this portion of Serial Letter 2735. Mr. Geisen was charged to have been aware that Serial Letter 2735 was materially incomplete and inaccurate, but concurred in the response, thus allowing it to be submitted to the NRC. Enforcement Order at 12.

The parties stipulated that several aspects of Serial Letter 2735 were inaccurate and incomplete; the parties did not stipulate, however, that it was inaccurate to say that a “whole head inspection” was completed. *See* Staff Ex. 77 at 7-8. The Staff argues that the plain meaning of the phrase “whole head inspection” was that every part of the reactor vessel head had been seen. Staff Proposed Findings at 66.

We acknowledge the definitive-sounding character of this language but note that, for each of the numerous instances in which FENOC reported that a “100% inspection” or “whole head inspection” or “entire head inspection” was conducted,<sup>154</sup> that phrase was modified by presentation of phraseology setting forth the exceptions or qualifiers. Although these characterizations do not appear to be the optimal approach for conveying the notion that, for example, “an attempt to perform a 100% inspection did not succeed, because views of 5-6 nozzles were precluded,” the approach used — awkward though its syntax may be — was a consistent one that does not appear, in its totality, intended to deceive, or to conceal the truth from, the NRC. For example, on October 3, 2001, Mr. Geisen’s “100% inspection” comment contained the caveat “except for 5 or 6 nozzles precluded by flange leakage.” Staff Ex. 51, 52. Likewise, Serial Letter 2735 reported a “whole head visual inspection” and that “the entire head was inspected” in 2000 but qualified those statements with the report that, in 2000, “forty-five of sixty-nine nozzles were viewed.” Staff Ex. 11 at 2.

Serial Letter 2735 also included Mr. Siemaszko’s nozzle-by-nozzle table, which partially served to support the statements provided regarding the number of nozzles viewed during each inspection. Staff Ex. 11. Included as a footnote to the table was a note Mr. Geisen drafted stating that, “In 1996 during 10RFO, the entire reactor vessel head was inspected. Since the video was void of head orientation narration, each specific nozzle view could not be correlated.” Staff Ex. 11 at 10; *see also* Tr. at 1952.

Mr. Geisen testified that the footnote was based upon Mr. Siemaszko’s statement to Mr. Geisen that there was no head orientation on the 1996 inspection videotape. Tr. at 1952. The Staff suggests Mr. Geisen knew that to be false, and

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<sup>154</sup> *See* Staff Ex. 11 at 2, 10; Staff Ex. 13 at 2, 8; *see also* Staff Ex. 52.

elicited testimony, both from Mr. Holmberg (Tr. at 908-17) and Mr. Goyal (Tr. at 1027-29), describing the verbal head orientation cues that were on the 1996 inspection videotape viewed at the hearing. Staff Ex. 81. The Staff posits Mr. Geisen knew the 1996 inspection videotapes had an audio narration because he viewed portions of the 1996 inspection tape in August and early October of 2001. Staff Proposed Findings at 69.

No evidence was, however, presented — aside from the nonprobative Martin document (*see* Section V.B.1.d above) — to substantiate the Staff's claim that Mr. Geisen had seen the inspection video in August. Nor did a viewing take place during Mr. Geisen's meeting with Mr. Siemaszko, where Mr. Siemaszko demonstrated his methodology for creating the nozzle-by-nozzle table using only the still-frame digital images (*see* above Section V.B.3.a).

Indeed, Dr. Hiser was not able to recall whether he heard any sound during his viewing of the 1996 inspection videotape at NRC Headquarters on November 8, 2001 (*see* Section V.B.6.a, below). Tr. at 1363. Likewise, no evidence was presented to refute Mr. Geisen's testimony that Mr. Siemaszko informed him — untruthfully — that the 1996 inspection videotape was devoid of any audio narration. Tr. at 1952. Therefore, the Staff did not provide probative evidence that Mr. Geisen included the footnote with the knowledge that the videotapes did have audio narration, nor did we receive any evidence to refute Mr. Geisen's testimony that he believed the information provided to him by Mr. Siemaszko was true.

Although not identified as a misrepresentation for which Mr. Geisen was charged in the Enforcement Order, both the Staff and the Dissent note that Serial Letter 2735 reported that the inspections performed for 10, 11, and 12RFO were done in accordance with the BACC Program, which they argue Mr. Geisen would have known was inaccurate. *See* Staff Findings at 67; Dissent at pp. 847-48. Mr. Geisen received training with Davis-Besse's BACC Program prior to entering 12RFO in 2000. Staff Ex. 79 at 40. He testified that he was therefore aware that, to comply with the BACC Program, a bare metal head inspection would require removal of boron sufficiently enough to evaluate the bare metal. Tr. at 1939. Thus, the Staff argues that Mr. Geisen would have known this statement in Serial Letter 2735 to be inaccurate because deposits on the head would have prevented such an inspection. Staff Findings at 67-68; *see also* Dissent at p. 848.

The inspections performed during 10, 11, and 12RFO at Davis-Besse were not bare metal head inspections. But Mr. Geisen did not represent the contrary. Importantly, Serial Letter 2735 also reported that a fair number of nozzles were not visually inspected, particularly during 11RFO and 12RFO, where up to 35% of the nozzles were not viewed. Staff Ex. 11, Attachment 1 at 2-3. Moreover, Serial Letter 2735 provided head maps on which the 11 and 12RFO inspection findings were depicted, including an illustration of the area on the reactor vessel head where substantial boric acid accumulations were observed. Staff Ex. 11, Attachment 3. The recorded boric acid deposits on the reactor vessel head for all

three inspections were attributed to leaking flanges. Staff Ex. 11, Attachment 1 at 3. The description of the inspection results, and the illustrative head maps, would inform any technically educated reader that a statement that the inspection was conducted in accordance with the BACC Program was meant as an indication of how the company proceeded, rather than as an indication that a bare metal inspection was fully accomplished.

Accordingly, without evidence to the contrary, we cannot find that Mr. Geisen had the requisite knowledge to recognize that the information provided in Serial Letter 2735 was inaccurate. As previously stated, the Staff charges Mr. Geisen with knowing that the number of nozzles that Serial Letter 2735 stated were viewed for each outage was significantly greater than the actual number of nozzles that could be viewed. The Staff was not aware, however, of these inaccuracies until Mr. Holmberg completed his extensive (58-hour) review of the videotapes for prior inspections — using a methodology he stated was different than that used by Mr. Siemaszko — in the spring of 2002. In fact, Serial Letter 2735 did disclose to the NRC Staff that boric acid accumulations disabled the view of a substantial portion of the reactor vessel head. The Staff provided no evidence, however, to prove that Mr. Geisen knew the severity of those deposits or that the number of viewable nozzles during prior inspections was significantly less than that reported.

**5. Additional Supplement to Initial Bulletin Response (Serial Letter 2744)**

*a. Mr. Geisen's Involvement in Serial Letter 2744 (October 30, 2001)*

FENOC submitted Serial Letter 2744 to the NRC on October 30, 2001. Staff Ex. 13. It included photographic images of the 1996, 1998, and 2000 reactor vessel head inspections that had been extracted from the inspection videotapes for the respective years. Several images were accompanied by a descriptive caption. Staff Ex. 13. Serial Letter 2744 also included the nearly identical nozzle-by-nozzle table and reactor vessel head map diagrams that FENOC had presented in Serial Letter 2735. Tr. at 1750.

The images were provided to the NRC as a means of documenting the inspections for the Staff. Tr. at 1749. *For this purpose, Mr. Geisen requested that Mr. Siemaszko provide representative photos of the images Mr. Siemaszko viewed when he performed the evaluation for the nozzle-by-nozzle table.* Tr. at 1749. *All of the images included in Serial Letter 2744 were those provided to Mr. Geisen by Mr. Siemaszko in response to this request.* Tr. at 1749-50. Mr. Geisen did not provide the titles to the images identifying each nozzle, but he drafted descriptive captions for several images. Mr. Geisen stated that he based the information in those captions upon his conversations with Mr. Siemaszko. Tr. at 1749-52. No evidence was presented to suggest that Mr. Geisen omitted

images showing extensive boric acid accumulations on the reactor vessel head. In fact, some of the images included in Serial Letter 2744 did provide images of boron accumulation built up around nozzles. Staff Ex. 13; *see also* Staff Ex. 80.

*b. Findings of Fact Regarding Serial Letter 2744*

The Staff's Enforcement Order asserted that Serial Letter 2744 was materially incomplete and inaccurate in that the photographic images of the reactor vessel head nozzles and the accompanying labels were not consistent with the actual reactor vessel head conditions or with the nozzles portrayed in the photographs. Specifically, the Enforcement Order noted that images of the significant boric acid accumulations present on the reactor vessel head were omitted, and that many of the nozzle images were mislabeled or mere copies of other images with the labels changed. The Enforcement Order asserted what Mr. Geisen confirmed at the hearing that he provided captions for several images based on his understanding of the reactor vessel head inspections and his discussions with Mr. Siemaszko, but it also charges that Mr. Geisen was aware that the information contained in Serial Letter 2744 was incomplete and inaccurate and still concurred in the response. Enforcement Order at 13; *see also* Tr. at 1749.

The parties have stipulated that the information in Serial Letter 2744 misrepresented the condition of the reactor vessel head by omitting images available in the inspection videotape that show large boric acid deposits, consequently hiding what the Staff suggests were true conditions of the reactor vessel head during these inspections. Thus, Mr. Geisen was charged with providing the Staff with Serial Letter 2744 knowing of the inaccuracies contained therein.

Although the parties stipulated to the purported inaccuracies, no evidence was presented suggesting that Mr. Geisen knowingly omitted photographs showing extensive boric acid accumulations on the reactor vessel head. There is no probative evidence before us to establish that, at that juncture, he had yet seen the videotapes. Thus, it was natural for him to take what was given him by Mr. Siemaszko — whom he did not directly supervise and whom he had no reason not to place trust in or reliance upon.

Moreover, some of the photographs included in Serial Letter 2744 did show nozzles with boric acid accumulations. In those instances, Mr. Geisen included captions explaining Mr. Siemaszko's methodology for concluding the deposits were not from leaking nozzles. While Mr. Siemaszko's methodology proved to be flawed, again no evidence was provided showing Mr. Geisen was aware

that the analysis and the information were flawed and therefore that he had been *deliberately* inaccurate.<sup>155</sup>

## **6. ACRS Meeting and Related Events**

### *a. Mr. Geisen's Role in November 8, 2001 Video Session for NRC Staff*

A public meeting requiring FENOC's attendance was scheduled for the morning of November 8, 2001, at NRC Headquarters in Rockville, Maryland, to tie in with an ACRS meeting scheduled for the following day. Tr. at 1757. Mr. Geisen did not travel to Rockville until early on November 8, one day later than the other individuals on the FENOC team, who had gathered the day before to prepare to attend the public meeting. Tr. at 1759. When he arrived, he was informed by Mr. Lockwood that he had been selected by his colleagues to bring the videotapes of the prior inspections to NRC Headquarters that evening to show them to assembled members of the NRC Staff. Tr. at 1758.

The meeting to show the videotapes had been scheduled by Mr. Lockwood the prior evening, without any advance notice to Mr. Geisen. Tr. at 1758-59. There was no evidence provided that Mr. Geisen expressed any reluctance to present the tapes to the Staff. Such reluctance, had it existed, might have been an indication that he had seen the videotapes; in contrast, his willingness to present the inspection videotapes could be taken as an indicator, or even as compelling proof, that he was unaware of their contents.

In any event, the inspection videotapes were provided to Mr. Geisen between late morning and mid-day, and he was scheduled to present them to the NRC Staff at a 5:30 p.m. meeting. Tr. at 1758-59. Mr. Geisen testified that he was given a stack of six or so VHS cassettes that, based on the labels provided on the videotapes, depicted the inspections from 1996, 1998, and 2000. Tr. at 1759. Prior to the 5:30 p.m. meeting, Mr. Geisen was attending meetings with Dr. Hiser and others from the NRC Staff, providing little to no opportunity for Mr. Geisen to review the videotapes in advance. Tr. at 1361; *see also* Staff Ex. 79 at 1932; Tr. at 1295.

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<sup>155</sup> Context is again significant with regard to the Staff's imputation of knowledge to Mr. Geisen that he knowingly presented inaccurate information. Serial Letter 2744 included methodologies and statements that were clearly flawed and inaccurate; review by the NRC Staffers would, however, have exposed those deficiencies. For example, the admission that boric acid had accumulated on the reactor vessel head would indicate clearly to the NRC Staff that a pristine head could not have been viewed. Additionally, the Bulletin specifically stated that boric acid deposits were not to be credited to leakage from other sources if those deposits could mask the popcorn-type deposits created by control rod drive nozzle cracking. Neither of these conditions was withheld by FENOC in Serial Letter 2744, and yet the NRC Staffers reviewing the submission were not alarmed by its contents.



At some time after 5:30 p.m., Mr. Geisen met with a number of Staff personnel, including Dr. Hiser, and began showing them the inspection videotapes. Mr. Geisen was the only representative from FENOC at the meeting; all of the other participants in the meeting were NRC Staff. Tr. at 1296. The session occurred at NRC Headquarters, in a room that Mr. Geisen had not had unaccompanied access to prior to the start of the meeting. Tr. at 1363. Mr. Geisen showed the videotapes on a television and VCR with which he had no opportunity to gain any prior familiarity. Tr. at 1364. Dr. Hiser, who was present at this meeting, recalls viewing portions of the 1996 and 1998 inspection videotapes. Tr. at 1295. Dr. Hiser testified that Mr. Geisen did not show any of the 2000 inspection to the Staff. Tr. at 1301.

Mr. Geisen placed the first videotape into the VCR and hit the play button. Tr. at 1316. At times, he fast-forwarded or rewound through the tape, sometimes at the Staff's direction. Tr. at 1316, 1362. At no point did Mr. Geisen refuse to stop, rewind, or forward the videotape at the Staff's request. Tr. at 1362. When Mr. Geisen rewound or fast-forwarded the tape, the images remained on the screen in a faster backward or forward motion, but remained viewable by the Staff; at no time did the television screen go blank. Tr. at 1362-63.

Notably, Dr. Hiser did not recall that Mr. Geisen displayed any suspicious behavior during the meeting. Nor did he have the impression that Mr. Geisen came to the meeting with an agenda not to show the NRC Staff parts of the videotapes or deliberately to withhold anything from the NRC. Tr. at 1363, 1365-66.

Dr. Hiser testified that on November 8, 2001, he and the other Staff members watched the 1996 videotape for approximately 30 minutes. Tr. at 1317. Not so coincidentally, the 1996 as-found inspection videotape the Staff played at the hearing had a total running time of just over 28 minutes. Staff Ex. 81. Dr. Hiser stated that the 1996 videotape showed "relatively benign conditions, not a lot of boron on the head . . . boron in various places, but . . . clearly not a significant problem." Tr. at 1300.<sup>156</sup>

Following the viewing of the 1996 inspection, Mr. Geisen played the 1998 inspection videotapes for those present. Tr. at 1364. Dr. Hiser testified that the portions of the 1998 videotape he saw during that meeting clearly showed more boric acid on the reactor vessel head than the prior inspection, making it harder to see the nozzle interfaces (Tr. at 1324), but he also emphasized that it was "nothing that would really raise a lot of concerns" (Tr. at 1300).

According to Mr. Geisen, Staff personnel present at the meeting were inquiring as to how individual nozzles had been determined to be "leakers" or "non-leakers."

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<sup>156</sup> Dr. Hiser also testified that there were portions of the 1996 inspection he did not see during the November 8, 2001 session. Those portions are not concentrated at the beginning or end of the tape, but instead are spread throughout the tape. For example, Dr. Hiser testified that he did not see portions of the tape located at 2:24 and 15:14 but might have seen the portion at 5:25. Tr. at 1414-15.

Tr. at 1762; *see also* Tr. at 1431. Mr. Geisen recalled (1) telling the Staff that he was unable to answer their questions and (2) offering to have Mr. Siemaszko visit the NRC at some future date to explain how those judgment calls were made. Tr. at 1762-63.

Although Dr. Hiser did not recall that specific statement, he did recall that Mr. Siemaszko was at a public meeting with the NRC discussing the 2000 inspection shortly thereafter. Tr. at 1431. Mr. Geisen confirmed that Mr. Siemaszko visited NRC Headquarters 1 week after the November 8, 2001 meeting to address the NRC's questions that Mr. Geisen had been unable to answer. Tr. at 1765.

Regardless, the Enforcement Order does not charge Mr. Geisen with any misconduct at the November 8, 2001 videotape session. Indeed, that session is not even mentioned in the Enforcement Order.

In our view, the conclusions that might be drawn from that session cut the other way. Indulging in the assumption that he had earlier viewed the videotapes (by crediting the Staff's view of the Martin document), we would begin our analysis convinced that Mr. Geisen viewed the videotapes in August of 2001. The impact of that viewing would be considerable — both for establishing his interest in and concern about the matter early on, and for the knowledge it would establish — for, as one of Mr. Geisen's colleagues later noted about these videotapes, "if the NRC saw the tapes, we would be wide open." *See* Staff Ex. 47 at 1259; *see also* above pp. 753-54.

Against that background, we would then have to believe that whenever Mr. Geisen made, or joined with others at FENOC in making, a submission that has since been stipulated to be false, *he did so knowing that any government official who might later view the videotapes would have clear evidence of his misconduct.* Then, despite that knowledge, he — without protest — accepted an assignment, on very short notice, to be the lone FENOC employee presenting the videotapes to an after-hours roomful of Staff officials, *a showing that he would have had to think — on the assumptions we are now indulging — could expose all his prevarications.* Nothing in the evidence, or in Mr. Geisen's demeanor, would lend credence to this chain of events.

*b. Mr. Geisen's Response at November 9, 2001 ACRS Meeting*

On November 9, 2001, Mr. Geisen and other FENOC managers met with the NRC's Advisory Committee on Reactor Safeguards (ACRS) to discuss Davis-Besse's crack growth rate model and to present information on potential circumferential cracking of the Davis-Besse reactor vessel head nozzles. Staff Ex. 77 at 10; Tr. at 1757.

During the ACRS meeting, Mr. Moffitt made a presentation regarding Davis-Besse's crack growth analysis. During that presentation, Mr. Geisen — who was not scheduled to appear formally — responded to a question from Vice Chairman

Bonaca. Referring to a representation that the 1998 and 2000 inspections had been limited, Dr. Bonaca asked “what was the extent of the inspection?” Staff Ex. 59. Mr. Geisen responded by stating:

I’ll talk to that. What we did is recognize — this is Dave Geisen. With regard to these inspections, recognize that they were not done looking for this particular phenomenon. They were looking for other things. *The two inspections done in 1998 and 2000 were really looking for the impact of boric acid leakage from leaky flanges that we had subsequently repaired and what was the impact to that.* So the view that we got from those was in many cases some of the drives you couldn’t even get a good view of. There were many cases, the camera angle was looking upwards because it was looking at the structural material of the service structure on top of the head. When we looked at the 1996 data, you got more of a downward look at these nozzles because we were specifically following around a vacuum and problem that was looking for head wastage as a result of the boron being deposited on the head. *So what really comes down to it, the best video we have on this goes all the way back to 1996.*

Staff Ex. 59 at 397-98 (emphasis added).

The context of this response is instructive. The subject was the crack growth analysis, which was being conducted to justify the plant’s operation beyond December 31, 2001, by demonstrating that a developing crack would not propagate in a manner that could result in ejection of a nozzle by that time. Tr. at 1881-82. Mr. Moffitt had been explaining to the ACRS that the analysis assumed that a crack would grow from a starting point when no nozzle cracking was present. This would be determined by an inspection that provided assurance that no indications of nozzle leakage were present. Tr. at 1882. Therefore, the validity of the crack growth analysis depended on starting with a good reactor vessel head inspection. The adequacy of the inspection used as a baseline was therefore essential to the crack growth analysis.

*Mr. Geisen testified that the intent of his explanation to the ACRS was to communicate that during the 1998 and 2000 inspections, the videotapes were not made for the purpose of looking for circumferential cracking and that as a result Davis-Besse did not have a good view of many of the nozzles.* Tr. at 1771. His comments were based upon his understanding of what Mr. Siemaszko discovered during his review and communicated during their brief meeting. Tr. at 1787-88. Mr. Geisen denied that his intent was to mislead the ACRS about the content of the inspection videotapes (Tr. at 1771), but rather to focus on 1996 as the appropriate starting date for the crack growth analysis.

*c. Findings of Fact Regarding November 9 ACRS Meeting Statements*

The Staff’s Enforcement Order asserted that the information provided by

FENOC and Mr. Geisen at the ACRS meeting was materially incomplete and inaccurate in that each of the videotapes was helpful in understanding: (1) the significant boron accumulations present at the start of each outage, (2) the clear impediments to conducting a 100% inspection of the reactor vessel head, and (3) the difficulty FENOC encountered in its attempts to fully clean the reactor vessel head of boron or to complete a comprehensive inspection of the reactor vessel nozzles. Enforcement Order at 13.

The Staff charges that Mr. Geisen knew that all inspections of the reactor vessel head were conducted to view the condition of the head, and that Mr. Geisen's response to the ACRS was incomplete because he knew that the only reason the 1996 inspection was used for the crack growth model was because the later inspections were obscured by significant boron deposits. The Staff therefore charged Mr. Geisen with knowingly providing this purportedly incomplete information to the NRC.

The Staff's assertions regarding Mr. Geisen's statements are not substantiated by the evidence. To the extent that Mr. Geisen's message is that the 1996 videotape provided the best view of the nozzles available for use in making the crack growth model calculations, the evidence indicates that a review of the videotapes would prove this true.<sup>157</sup> Of more import, Mr. Geisen could have concealed the true condition of the reactor vessel head during the prior inspections only if he was aware of the full contents of the 1998 and 2000 videotapes at the time the statements were made. We have found no evidence to prove that Mr. Geisen had seen those videotapes at any point prior to his participation in a video session before the NRC Staff on the previous evening, November 8, 2001.

We believe that Mr. Geisen's intent was to explain to the ACRS that the videotapes of the 1998 and 2000 inspections were not made for the purpose of looking for circumferential cracking, and that, as a result, these videotapes did not provide a thorough view of many of the nozzles. Mr. Geisen's comments were based on his understanding of what had been communicated to him by Mr. Siemaszko regarding the nature of the inspections on the videotapes. Given the lack of context and clarity of the evidence regarding the ACRS meeting, we cannot conclude that Mr. Geisen's comments, made *ad lib* in response to a question, even if proven inaccurate for one purpose, were made with the intent to deceive this agency. *They were accurate for the purpose offered. It is commonplace in such situations — when a person speaking is not on the agenda but is interjecting for a limited purpose — to provide relatively constricted answers, given the setting and the other business waiting to be conducted, rather than to elaborate on all*

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<sup>157</sup> Staff witness Holmberg testified that the 1996 inspection was the most systematic inspection and had the best coverage. Tr. at 951.

*aspects of the background from which the question emanates, as might be done in a different setting.*

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The foregoing provides a detailed account of our findings on the principal matters before us. To the extent warranted, we have dealt with the arguments included in the Staff's post-hearing papers explicitly or implicitly. To the extent that any of the Staff's arguments are not addressed herein, it is either because we have determined that a response to them is unnecessary to our decision or because, in rejecting them, we simply intend to rely upon the reasoning reflected in the post-hearing briefs of Mr. Geisen, which we adopt to that extent.

## VI. SANCTIONS

As has been seen, our decision today sets aside the charges the Staff brought against Mr. Geisen, the Staff having failed to establish the validity of those charges by a preponderance of the evidence. In light of this determination, all sanctions the Enforcement Order imposed against him — including the 5-year ban on employment in the nuclear industry — must be set aside.<sup>158</sup> The circumstances of the case require, however, that a bit more be said.

### A. Sanctions if Order Had Been Sustained

Ordinarily, had the charges against Mr. Geisen been established, we would have found little reason to disturb the 5-year employment ban. The nuclear regulatory system depends upon the agency being able to depend upon applicants and licensees, and their employees, not to submit information that they know to be false. For the decisions of the agency's dedicated regulators to be effective in protecting the public health and safety, there is no room for the submission of falsified information.

Here, violation of that principle cost the company dearly in monetary terms. Likewise, had we found that Mr. Geisen had been part of that overall wrongful

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<sup>158</sup> Our Order makes our decision immediately effective, so that — as far as we are concerned — Mr. Geisen may seek employment in the nuclear industry forthwith. In that regard, we considered but rejected the notion of temporarily staying the impact of our decision, so as to allow the Staff time — if it chooses to appeal our decision to the Commission — to seek from the Commission a longer stay, e.g., a stay pending the outcome of such an appeal. We do not take such action for two reasons: (1) we *should* not, because to do so would be inconsistent with our view that Mr. Geisen has already unjustly suffered the impact of the employment ban; and (2) we *need* not, because for now Mr. Geisen is in any event barred by the district court's sentence from seeking such employment, and the Staff should thus have ample time to seek a stay from the Commission before our decision has any practical impact.

enterprise, a 5-year ban would have seemed appropriate in several contexts: (1) in terms of his deserving it; (2) in light of its consistency with other enforcement measures taken through the years;<sup>159</sup> and (3) in view of its deterrent effect in plainly advising other nuclear industry workers of the standards by which their own future conduct will be judged, and the consequences for not meeting those standards.

In that regard, we do not disagree with the Staff's theory that the appropriateness of the 5-year ban would not depend upon our upholding all of the several charges and then imposing a multiyear ban on a sort of "one year for each violation" approach. To the contrary, as discussed in a colloquy with Staff counsel (Tr. at 2400), a single charge, *if serious enough*, could itself justify a 5-year ban.

In any event, had we upheld one or more charges and found them serious enough, we would likely not have disagreed in principle with the Dissent's reasoning as to the legitimacy, at the time it was imposed, of the 5-year ban the Staff attached to its Enforcement Order. Although we do not necessarily endorse everything the Dissent says on that score, our agreement with the general result allows us to leave unaddressed the particulars of most matters the Dissent covers.<sup>160</sup>

That does not, however, end the matter. One of the key factors in establishing the length of a potential ban is whether the subject has taken responsibility for his actions and expressed the appropriate remorse. On this point, the Staff tells us — and the Dissent (at p. 855) agrees — that because Mr. Geisen did not admit to his guilt, this factor weighed against him in setting the length of the employment ban. Moreover, having heard Mr. Geisen's testimony, the key Staff witness on the sanctions issue, Kenneth O'Brien of Region III, who had the lead role in the original enforcement decision, now asserts that Mr. Geisen's continuing refusal to admit his guilt exacerbates the weight of this factor (Tr. at 2119). Not only that, but the Staff presentation — pointing to the provision of the Order (at 15)

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<sup>159</sup>The Board inquired of an experienced and knowledgeable Staff Witness, James Leuhman, who was testifying at our request, about historical information on all other enforcement cases wherein individuals were prohibited from NRC-licensed activities for 5 years or more. Tr. at 2252-53. The Board appreciates Mr. Leuhman's thereupon supplying us with a report thoroughly outlining this information and demonstrating that, over the past 15 years, approximately fifty individuals have received bans of 5 years or more. *See* Staff Findings, Attachment 1.

<sup>160</sup>Some indication that the length of the ban should be reduced, even if the charges were to be upheld, stems from the recognition, at trial, that the Staff officials responsible for the Enforcement Order had been unaware of the efforts Mr. Geisen made to correct the filing of mistaken information, efforts that if known "would definitely [be] take[n] into consideration." *See* above p. 765. This factor, coupled with the Staff's and the Dissent's focus on the activities after October 17, 2001 (i.e., on just the last two, seemingly less serious charges) could yield an employment ban of somewhat shorter duration were misconduct limited only to that time frame.

that requires Mr. Geisen to seek Staff approval to return to the regulated industry once the employment ban expires — suggested that the Staff might be planning to take that factor into account in determining whether to authorize such a step.

If this is the Staff's position, we reject it entirely. We observed Mr. Geisen, throughout his testimony, engage in searching self-examination and confirm what he has said from the beginning of the investigation, namely, that in retrospect he wishes he had done far more to uncover the problems with FENOC's submissions and to address the entire matter much more aggressively. As we have seen, his agonizing admission of what he "should have done" does not prove the deliberate misconduct charges against him; but what it does do is at least eliminate the negative aspects the Staff would see in the "taking responsibility" and "expressing regret" factors — and to some degree turn them into positive attributes that count in his favor.

In view of the outcome we have reached in the entire case, we could stop there on this issue but for the Staff's potential threat that this factor may be used against Mr. Geisen were he to seek to return to the regulated industry. Accordingly, we additionally rule that the evidence the Staff presented provides no basis for using the "preapproval" aspect of the Order to block any such return by Mr. Geisen. Of course, if any evidence emerges between now and then that would call for a further ban on Mr. Geisen's employment in the regulated industry, the Staff is free to issue another Enforcement Order to that effect.

## **B. Problems with Order Having Been Immediately Effective**

As indicated above, the nuclear regulatory system depends upon the agency being able to rely upon applicants and licensees, and their employees, not to submit information that they know to be false. In order for the decisions of the agency's dedicated regulators to be effective in protecting the public health and safety, there is no room for the submission of falsified information.

In line with our comments above, anyone who would willfully provide falsified information on a reactor safety matter should bear in mind that a 5-year ban may well be the result, both in light of its consistency with other enforcement measures taken through the years,<sup>161</sup> and for its deterrent effect, advising other nuclear industry workers of the standards by which their own future conduct will be judged.

Our problem with the sanction on Mr. Geisen is not that it would necessarily have been too long (had the charges been sustained), but that it was unnecessarily felt too soon, i.e., it was made immediately effective. We fully appreciate the need to insure that those who by their conduct have shown they cannot be trusted to

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<sup>161</sup> See above p. 777.

operate a nuclear power plant are removed from a position in which they can harm the public health and safety. We likewise appreciate that there will be instances in which such steps must be taken immediately.<sup>162</sup> In our judgment, however, this type of immediately effective deprivation of the legally acknowledged right to pursue one's livelihood<sup>163</sup> should not be imposed without the Staff having substantial reason to do so.

To be sure, the agency's procedural regulations provide two measures that might be seen as alleviating the risk of what occurred here. The first<sup>164</sup> is the chance to challenge the immediate effectiveness (an opportunity not taken); the second<sup>165</sup> is the promise of an expedited hearing (a promise not honored).

As to the first, counsel for Mr. Geisen made the decision to forgo a hearing request on the immediate effectiveness of the Order, which we assume was because they anticipated an expeditious hearing on all of the charges and believed that it would be a better venue, given the complexity of the case and the reality that the loss of Mr. Geisen's employment had already occurred. That was a perfectly understandable approach in light of what anyone would have thought could be accomplished there simply by reading — without the benefit of the hindsight we now have — the severe limitations that the text of the regulation appears to place on the scope of that hearing.

As to the second, they had a misplaced belief that the promised expedited hearing opportunity would be provided. The reasons that promise went unfulfilled need not be rehearsed here. It suffices to say it is simply not justified to tell a suspected malefactor of any sort that a penalty of 5 years' duration will be immediately imposed but that no hearing on the legitimacy of that penalty will be held until nearly 3 years of that penalty has already elapsed.

In any event, the Board did not receive a satisfactory explanation for the agency's action, on the one hand, in allowing Mr. Geisen to work in the nuclear industry for the 2½ years that the enforcement process dragged on after the lengthy OI investigation had been completed, and, on the other hand, making his subsequent ban from the industry immediately effective. To be sure, there are times when a ban must be imposed immediately, and those were discussed at our hearing. But we were provided no reason why that had to be done here, several years late — which likely explains why the Enforcement Order ritualistically

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<sup>162</sup> We of course do not dispute the fundamental consideration upon which the Commission relied in adopting the immediately effective regulations — that the agency must have room to ban immediately malefactors whose continued presence in the workplace causes an immediate threat to the public health and safety. *See* Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,195 (May 12, 1992).

<sup>163</sup> *See* LBP-06-13, 63 NRC at 547.

<sup>164</sup> 10 C.F.R. § 2.202(c)(2)(i).

<sup>165</sup> 10 C.F.R. § 2.202(c)(1).



advanced (at 15) the “need to protect the health and safety of the public” without even attempting to explain in concrete terms how that important value might come into play in Mr. Geisen’s situation. Mr. O’Brien’s testimony shed little additional light on that matter.

In licensing cases, prospective intervenors are called upon to spell out their views in great detail just to get a contention heard. Should not the Staff have to explain, in advance and in some detail, why a nuclear industry worker’s career must be destroyed before he is given a chance to be heard before an independent adjudicator?

At this point, the respective views of the members of the Board majority diverge. Judge Trikouros believes that, given our lack of authority now to remedy the situation (where much of the ban has already been served), we should rest with briefly calling the matter to the Commission’s attention. Judge Farrar believes that, given what the record before us reveals, the picture needs to be painted more clearly for the Commission, so that it, or any other institution that may be in a position to provide a remedy, might be able to prevent such a miscarriage of justice in the future.

To avoid any further delay, Judge Farrar is joining Judge Trikouros in issuing these limited views today, and will supply his additional views on the subject in the near future. The Board majority thus simply asks the Commission to explore how this result — in which the subject of an Order endured nearly three quarters of a 5-year ban from his chosen career before being exonerated, and is left without apparent remedy — could have been avoided while the public interest was still protected.

## **VII. SUMMARY CONCLUSIONS**

We present in Section A of this Part a summary of the key findings that drove our decision.<sup>166</sup> Then, in Section B, we express in general terms our thematic disagreements with, and responses to, the views expressed in the Dissent. Finally, in Section C, we set out the formal Conclusions of Law that follow from our analysis of applicable law and from the facts found.

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<sup>166</sup>The failure to include in this section any fact previously found should not be deemed as diminishing the intrinsic importance of any such fact. And if any fact is set out within this section for the first time, its presence here shall be deemed to make it as significant as if it had been stated earlier.

## A. Summary of Findings

### 1. *The Documentary Evidence Does Not Prove That Mr. Geisen Acted “Knowingly”*

Mr. Geisen is a highly educated individual who had broad knowledge and experience in the operation and management of nuclear power plants. Mr. Geisen was not, however, the expert at Davis-Besse on the subject of reactor vessel head inspections or cleaning, nor had he participated in any earlier actions of that nature.

The ability to grasp the import of the information contained in the initial Bulletin response (Serial Letter 2731) — and, more significantly, to achieve the level of knowledge needed to identify the extent of the inaccuracies and incompleteness in that response — called for not only a particular understanding of the reactor vessel head, but also an awareness of specific details relating to the actual cleaning and inspection activities that had occurred during the prior refueling outages. Mr. Geisen’s involvement in various groups (i.e., the Steering Committee, the CARB, or the PRG) did not expose him to any specific knowledge about Davis-Besse’s past inspection and cleaning history (nor did the training he received to qualify to serve as a naval officer and as senior reactor operator, or to become familiar with the BACC program).

Mr. Geisen never performed an inspection or cleaning of the reactor vessel head, nor was he directly responsible for the planning or outcome of these tasks. Specifically, Mr. Geisen was not personally involved in the inspections or cleanings in 1996 or 1998, and his involvement in 2000 was limited to his time spent in Outage Central, a time which, it turns out, imbued him with long-lasting *disinformation* shared by others at the plant.

Specifically, while in Outage Central, Mr. Geisen played an important role in a decision to use a novel cleaning technique on the reactor vessel head. He soon “learned” (incorrectly) from the plant’s daily communication on the progress of the outage — the “Outage Insider,” to which not only he but many plant personnel naturally paid great heed — that the reactor vessel head had successfully been cleaned.<sup>167</sup> This “news” was of great significance to him (in that, if true as he believed, it demonstrated that the decision he had helped guide had been a good one). Accordingly, the mindset thus created stayed with him (and others) a long time, as Mr. Martin later confirmed.

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<sup>167</sup> The Staff’s attempt (Tr. at 1892-93) to get Mr. Geisen to agree that later he would naturally have paid as much attention to another report (issued in mid-September 2001), relevant not to his work but to the work of a colleague, at a time when he was working 12 hours a day on two important matters, fell far short of the mark. The fact that Mr. Geisen’s supervisor was interested in the latter report does not make the two situations in any way analogous, when the matter was not within his own purview.

Mr. Geisen also understood that engineers from Systems Engineering (i.e., Mr. Siemaszko), and from his own department (i.e., Mr. Goyal), were involved in working specifically on the reactor vessel head cleanings and inspections, and he understandably placed confidence in their efforts. Notwithstanding the misrepresentations they were later realized to have made, he had no reason, at the times relevant here, to mistrust them. Also, Mr. Geisen understood that there were management personnel within the Systems Engineering Department who had direct technical and managerial responsibility for the work associated with the reactor vessel head (and who signed the Green Sheet for Serial Letter 2731 and later submissions).

*a. Mr. Geisen's Knowledge of Boric Acid Accumulation on the Reactor Vessel Head Did Not Contradict Information Provided to the NRC*

The evidence presented established that Mr. Geisen understood that (1) Davis-Besse had a history of flange leakage resulting in boric acid accumulation on the reactor vessel head and a recurring need to repair those flanges, but that (2) in 2000 a more permanent type of flange repair had been made. Coupling this information with his (mistaken, but justified) belief that the reactor head had been cleaned of boric acid deposits in 2000, his mindset — in terms of the forward-looking aspects of the Bulletin which he thought were paramount — was that an inspection could be conducted during the upcoming refueling outage in March of 2002 to evaluate any deposits that might be present compared to a bare metal baseline.

Mr. Geisen's receipt of the various communications upon which the Staff relied to imbue him with chargeable knowledge included trip reports and e-mails from Mr. Goyal. These included four reports between January and August of 2001 regarding business trips, and three e-mails between June and August of 2001 which designated Mr. Geisen as a courtesy copy recipient. The communications also included one memorandum (prepared by Mr. Goyal, signed by his supervisor, Mr. Swim, and ratified by Mr. Geisen) providing an engineering evaluation resulting in an internal company determination that delaying a reactor vessel head inspection until 13RFO (in 2002) would not result in any catastrophic failures.

These documents and communications did not stand out amidst the large number of documents Mr. Geisen received during this timeframe in the ordinary course of business as Manager of Design Basis Engineering. Neither Mr. Goyal's memorandum nor the e-mails or trip reports indicated to Mr. Geisen either that action was needed by him on the matters covered or that those matters were urgent or alarming. The evidence also established that Mr. Goyal never spoke to Mr. Geisen about any of the documents and that Mr. Geisen never responded to any of Mr. Goyal's e-mails or trip reports. Given a lack of evidence regarding his involvement in, or response to them, Mr. Geisen's mere receipt of these

communications does not allow us to impute to him absorption and appreciation of their contents such that he can be held accountable for later retained “knowledge” of them.

Moreover, the state of mind naturally created by these various documents was not contradicted by the information Mr. Geisen saw during his Green Sheet review of FENOC’s initial Bulletin response, Serial Letter 2731, regarding boric acid deposits accumulated on the reactor vessel head from ongoing flange leakage. That submission to the NRC does not state that at the last inspection the reactor vessel head was in a “pristine” or even “clean” condition, which was arguably necessary for a good inspection in accordance with the Bulletin (and notably, also the BACC program). Rather, Serial Letter 2731 indeed disclosed that boric acid accumulations were located on the reactor vessel head at Davis-Besse in both 1998 and 2000, which was consistent with Mr. Geisen’s mindset.

*b. Mr. Geisen Did Not Know the Degree of the Limitations Imposed by the Camera-on-a-Stick Inspection Technique*

Although Mr. Geisen was aware that the configuration of the reactor vessel head and service structure presented some obstacles to cleaning, he viewed these methods as *restricting* the viewing of certain nozzles, not as *prohibiting* such viewing. The several aforementioned communications from Mr. Goyal supported his perception that the camera-on-a-stick inspection technique created challenges, but not insurmountable ones.

Mr. Goyal’s e-mails, trip reports, and memoranda noted the difficulty of completing inspections and cleanings through the existing mouseholes, and advocated cutting access holes in the service structure. These communications also represented, however, that past inspections and cleanings had been completed, notwithstanding the challenges presented by the structural configuration of the reactor vessel head. At no time during the investigation or trial did Mr. Geisen concede that he was aware that the camera-on-a-stick inspection technique prevented an inspection of the entire reactor vessel head, and no evidence was presented that he ever spoke or acted differently in the workplace.

In any event, Mr. Geisen had taken proactive steps to procure a “rover,” an automated device, to conduct the inspections in the future, and for this reason was no longer especially concerned about the limitations of the previous method (which provided the context for his statement that he viewed the former method as “no longer viable”). In that regard, he had arranged — long before the Bulletin was issued — a mutual assistance agreement with another nuclear power plant to loan each other their respective rovers if the need arose, an agreement that would have made no sense had he thought the reactor vessel head had *not* been cleaned, *for the rover’s magnetic wheels could operate only when in contact with bare metal.*

**2. *Mr. Geisen Did Not View Videotapes of Past Inspections (Other Than Still Frames Selectively Shown to Him) Prior to November 8, 2001***

A last-minute meeting was arranged at the NRC on November 8, 2001, for FENOC to show the NRC Staff videotapes of reactor vessel head inspections conducted during the 1996, 1998, and 2000 refueling outages. Mr. Geisen was selected by his colleagues the night before (in his absence) to handle this task. Based on the evidence presented, we cannot find that Mr. Geisen previously saw the videotapes of these past inspections.

The Staff provided no convincing evidence to the contrary. On that score, the Martin document — never provided to Mr. Geisen, either by Mr. Martin or by OI investigators, for a check on its accuracy — must yield to the highly probative evidence before us conclusively establishing that Mr. Geisen was not involved in interactions with the NRC in August of 2001. Indeed, he was entirely occupied at the time with two other projects with major safety-enhancement and career-determinative implications, and thus would have had no reason then to become involved at all, much less to view the videotapes.

To be sure, in October of 2001, Mr. Geisen was shown still frames of the videotapes digitized by Mr. Siemaszko that were used to prepare the nozzle-by-nozzle table and to provide the photographic images included with Serial Letter 2744. Mr. Geisen had a 1-hour meeting with Mr. Siemaszko to go over the methodology being used to create the nozzle-by-nozzle table and to make determinations regarding the condition of each nozzle. The evidence presented does not support a finding that Mr. Geisen was exposed even to portions of the past inspection videotapes *prior* to his meeting with Mr. Siemaszko. And at no time *during* the meeting with Mr. Geisen did Mr. Siemaszko play the video in running fashion. Instead, Mr. Siemaszko called up still frames to illustrate, perhaps misleadingly, how he was evaluating the status of each nozzle.

Finally, Mr. Geisen's lack of hesitation to show the videotapes to NRC Staff personnel during the November 8 meeting, in conjunction with the testimony by Staff witnesses that he neither displayed any suspicious behavior during the meeting nor appeared to have come to the meeting with the intent to deliberately withhold anything from the NRC, makes entirely implausible the assertion that he had seen the videotapes earlier. Had he previously seen them, and had he previously knowingly submitted false information, then an awareness of what those tapes would display to the NRC Staff would have had him convinced that, by showing the tapes, he would be providing clear evidence of his misconduct. There was nothing in Mr. Geisen's demeanor in a full day on the witness stand before us, or for that matter in the entire week he was present for his hearing, that would lend credence to such a theory (a theory under which, his counsel correctly observed (Tr. at 2329), would have required him to perform like "the greatest riverboat gambler" ever). This further substantiates his assertion that he did not

view anything but selected still frames of the videotapes of prior inspections until the November 8, 2001 meeting.

### ***3. The Evidence Is Fully Consistent with Mr. Geisen's Recounting of His State of Mind and Compels a Finding in His Favor***

A theme about the nature of the evidence related to Mr. Geisen's knowledge runs through this proceeding. Specifically, we were told by the Staff in essence that, in the absence of direct testimony by Mr. Geisen and of incriminating documents authored by him, the state of his knowledge can be established — as would be the case in many instances where state of mind is crucial — only by circumstantial evidence.

We do not dispute that circumstantial evidence can be compelling. That principle should *not*, however, be allowed to obscure a salient observation, namely, that notwithstanding the extensive investigation that OI conducted of over thirty of Mr. Geisen's co-workers at Davis-Besse — a number of whom ended up cooperating with the Government — not a single one was put on the stand to testify that he had observed Mr. Geisen engage in any conduct during the period in question, or heard him utter any words during the NRC interactions (or any concessions after the discovery of the corrosion cavity), that would have established a basis for finding that he had greater knowledge than he asserts that he had.<sup>168</sup>

The *presence* of evidence of that nature would have spoken forcefully about the state of Mr. Geisen's knowledge. Its *absence* likewise speaks loudly — the investigation apparently did not reveal a single co-worker who, based on his observations of, or interactions with, Mr. Geisen, saw any conduct or heard any words that were incriminating. Direct evidence can come from many sources — and the failure to find it in Mr. Geisen's words on the witness stand<sup>169</sup> does not

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<sup>168</sup> The one who did take the stand, Mr. Goyal, proved precisely the opposite. Mr. Goyal, who had been the subject of both civil enforcement and criminal indictment for falsifying a document at his supervisor's insistence, had been treated leniently by both DOJ and the NRC in return for his truthful cooperation in the investigation, and thus had every motivation to tell the truth, which his demeanor indicated he was doing. He sent a number of written communications to Mr. Geisen that in retrospect look alarming but which had no such explicit indicia accompanying them. *Mr. Goyal repeatedly confirmed that he had never heard back from Mr. Geisen on those matters and had never sought him out to warn him of the possible severity of the underlying problems.* See, e.g., Tr. at 1076, 1112, 1119, 1169-70.

<sup>169</sup> The Board Chairman exhibited some impatience at the hearing with what was perceived as Staff counsel's inordinate focus on what Staff officials were thinking at critical times, rather than on Mr. Geisen's state of mind (see, e.g., Tr. at 1037-38, 1043, 1222). As it turned out, the problem was not lack of focus but lack of evidence. Of course, such evidence might have been generated through

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minimize *the significance of also not finding it anywhere in the reports of his co-workers, either in investigatory interviews or as courtroom witnesses (before us or in the parallel criminal proceeding).*

Nonetheless, it is fully understandable why the Staff investigation would, at its outset, have focused on Mr. Geisen as a likely source of the falsified information. Notwithstanding his lack of prior involvement, or expertise, in the inspections of the reactor vessel head, Mr. Geisen was thrust into an increasingly visible role as the FENOC/NRC interactions moved along. Indeed, because there were times when he served as the company *spokesman*, Staff officials dealing with the company's responses could naturally have come to the conclusion that he was the company *expert* and was therefore fully knowledgeable about the many subjects under discussion.

Mr. Geisen did not make it a focus of his presentations to point out his lack of extensive background on the subjects at hand. Thus, it is not surprising that when FENOC's submissions were found to have been falsified, the investigators chose to focus on Mr. Geisen. But as is seen herein, the conclusions the investigation reached, on evidence that turned out not to be as it first seemed, did not reflect the state of Mr. Geisen's knowledge at the time submissions and representations were made.

Our determination that the evidence did not demonstrate that Mr. Geisen had the requisite knowledge while participating in statements that proved to be false finds further support in his prompt efforts to set the record straight when he received later information that cast an earlier statement into doubt. His earnest and sincere efforts to see to it that the error was rectified speak loudly as to his commitment to the truth.

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This case is not about FENOC or its other employees. It is about David Geisen. But it is not about whether he could, or even should, have performed his job differently in the fall of 2001. In hindsight, he should have, and he has conceded this point. Dating back to his interview in October of 2002 with the NRC Office of Investigations, Mr. Geisen has been consistently critical of his own performance. Mr. Geisen even testified as to his "tunnel vision."

That all may be, but it does not establish the validity of the charges before us. Instead, we find that, notwithstanding some superficial appearances, the Staff has not proven that Mr. Geisen deliberately provided inaccurate or incomplete information to this agency. Despite the commendable effort that Staff Counsel,

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cross-examination of Mr. Geisen, but we found — from both the demeanor and substance of his testimony — that he provided fully credible and believable explanations for why he believed what he did, and why his submissions to the NRC comported with those beliefs, until he found that he had been misinformed, at which time he insisted on supplying corrections.

drawing upon an abundance of circumstantial evidence, has put into supporting the underlying charges of the Enforcement Order, its key arguments are, upon analysis and as explained herein, unable to withstand scrutiny. Stated most simply, based on our appreciation of the key facts before us, the Staff did not carry its burden to establish that Mr. Geisen engaged in deliberate misconduct.

## **B. Response to Dissent**

As has been seen, the facts of this case are complex, and take some effort to describe fully. But once those facts are wholly understood, the case becomes a simple one to decide. *See* our Overview, Part III (pp. 700-06), and our Summary, Section A immediately above.

In that same vein, we have already dealt, throughout the more than seventy-some pages contained in Parts IV and V, with those of our disagreements with the Dissent that are complex to explain. In this brief section, we address the Dissent's problematic themes in simpler terms.

For its ultimate support, the Dissent relies upon two of the same shaky evidentiary pillars as did the Staff's Enforcement Order, as well as three jurisprudential pillars of its own making. All five pillars, and much of what makes the case against Mr. Geisen seem strong on superficial review, collapse upon detailed analysis.

1. The first evidentiary pillar is Serial Letter 2731, the 25-page response to the Bulletin, that uncontroverted evidence establishes Mr. Geisen had nothing to do with until he signed off on it just prior to its submittal. It was written by, discussed among, and commented upon by numerous other FENOC employees at a time when Mr. Geisen was otherwise occupied. Nonetheless, the Dissent makes the same error (at pp. 841-42 n.35) as did the Staff's Enforcement Order (at 7) in charging Mr. Geisen as *the* FENOC manager responsible for ensuring the technical accuracy of the document in accordance with FENOC's "Green Sheet" internal review process.

But as the Green Sheet itself reveals, the lead responsibility for technical accuracy regarding prior inspections of the reactor vessel head belonged not to Mr. Geisen and his department, but to other personnel in another department entirely. To be sure, Mr. Geisen acknowledged that in his role within the company he viewed it as his responsibility to check for technical accuracy insofar as he was aware of matters contained therein. Staff Ex. 71 at 1971. On that score, however, Mr. Geisen had played no role whatsoever in the letter's creation, and had not been involved in any of the prior reactor vessel head inspections to which it referred, other than *to authorize a special cleaning method that he believed had been successful*. Ignoring these simple facts, the Dissent would, as the Staff, charge him with knowledge of the errors in Serial Letter 2731's contents.

2. The second evidentiary pillar is the typed document created from Mr.



Martin's handwritten notes. The Dissent again makes the same error (at pp. 837-38) as did the Enforcement Order (at 6) in crediting an abbreviated, even cryptic, portion of those notes as demonstrating beyond question that Mr. Geisen viewed the crucial videotapes shortly after the Bulletin was received. All the other evidence in the case demonstrates not only that such viewing did not occur, but also that there would have been no reason or occasion for it to occur.

What that means is simple and understandable — Mr. Martin's good-faith attempt to capture in abbreviated notes what had been told him in a 20-minute interview missed the mark, not because he intended that to occur, but because he confused or conflated what had been said. But the Dissent says (at p. 838) that because Mr. Martin was a credible witness, the typed version of his notes carries the day, *even though his only testimony to us was essentially that he had no recollection whatsoever of the interview.*

Thus, the Dissent views all the rest of what transpired in the critical interval (the period between the beginning of October and the early part of November) through the same distorted lens as did the Staff's Enforcement Order, i.e., with the belief that Mr. Geisen had, early on, studied the supposedly crucially-revealing inspection videotapes and had authored the seminally-misrepresenting Bulletin response. Building on these unshakeable but unjustifiable beliefs results in flawed analyses of everything that happened later, leading the Staff to take away a man's career — and the Dissent now to find no injustice therein.

In contrast, we begin by finding that Mr. Geisen had no early involvement with the videotapes or with the initial letter. It is then understandable that he was saddled with limited information and a narrow mindset as he carried out what became his role in the subsequent chain of events that led to the charges against him. But the Dissent views the foundational evidence as probative, rather than faulty, and this taints its view of everything that comes after.

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Even alerted to this problem, only a careful reader would discern that the Dissent's powerful writing style masks weak evidentiary support. The Dissent appears persuasive; it uses adverbial advocacy to apparent great effect,<sup>170</sup> and is couched in elegant language and subtle syllogisms. But the Dissent's operative theme throughout is essentially what led it to its conclusions regarding Mr. Geisen's knowledge about Serial Letter 2731 — concerning underlying documents, "he saw it once, therefore he knew it always." But the legal world recognizes what the practical world teaches — recall depends upon involvement.

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<sup>170</sup> See, e.g., Dissent at pp. 825 ("highly knowledgeable member"); 831 n.22 ("acted in patent derogation"); 838 (forcefully . . . confirmed Mr. Geisen's already-existing knowledge"); 839 ("overwhelming volume of persuasive evidence").

3. The first jurisprudential pillar that collapses under the weight of the Dissent is its tendency to draw unwarranted conclusions and even to engage in raw speculation. Thus, when the Dissent makes an effort to tie pieces of information to the charges against Mr. Geisen,<sup>171</sup> it too often relies on leaps of language to bridge an impassable chasm between the facts at hand (about Mr. Geisen’s *having encountered a document in passing*) and the conclusion it postulates (about his *having recalled its contents in perpetuity*). We need not burden this summary with a detailed response to each such instance; rather, we simply list in the margin the places in the Dissent where the presence of persuasive rhetoric obscures a lack of careful reasoning.<sup>172</sup>

At other times, a careful reading of the Dissent reveals missing links, that is, supposed connections that do not exist in the record. For example, the Dissent can be seen to equate knowledge of the existence of a problem with knowledge of the severity of that problem. Those two forms of knowledge are not necessarily coextensive.

In this vein, the Dissent constantly paints as background to the overall picture that Mr. Geisen “knew” that there was boric acid on the reactor vessel head, especially during 12RFO — which links to the Red Photo, the condition reports, and the reactor vessel head needing to be cleaned. But Mr. Geisen never submitted

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<sup>171</sup> While we deal in this decision with the precise charges the Staff brought, the Dissent on more than one occasion seems to find Mr. Geisen culpable on grounds not charged in the Enforcement Order. *See, e.g.*, Dissent at pp. 842-43 (asserting that Serial Letter 2731 falsely implied that a full “bare metal” inspection was performed during 11RFO and 12RFO in compliance with the BACC Program, which Mr. Geisen purportedly would have known not to be true); at 843 (asserting that Serial Letter 2731 falsely reported that a qualified visual inspection during 13RFO would not be compromised due to preexisting boric acid deposits, which Mr. Geisen knew was false because the head had not been cleaned during 12RFO); at 844 (asserting that during the October 3 conference call Mr. Geisen represented, with no basis, that Davis-Besse had an 80% confidence level in its conclusion from the 12RFO inspection that boric acid deposits were not from nozzle leakage); and at 847 (pointing to the statement in Serial Letter 2735 that the head was cleaned during 12RFO, asserting that this suggests a qualified visual inspection could be done during 13RFO and that Mr. Geisen would have known this to be false).

<sup>172</sup> The most prominent examples of what in effect are *ipse dixit*s of this nature in the Dissent are the following:

- (1) at p. 836 n.27: asserting that a report by Mr. Gibbs dated September 14, 2001, resulted in Mr. Geisen “once again receive[ing] notice” on that date “that the head had not been successfully cleaned.” But the evidence showed that, because of the press of the INPO audit, Mr. Geisen did not see the report, if at all, until later in the month and even then did not focus on it, as it did not affect his responsibilities at that time.
- (2) at p. 837: in reviewing a document concerning *future* inspection opportunities, Mr. Geisen is said by the Dissent to have “understood that . . . deposits prevented the detailed inspection of CRDM nozzles,” rather than that those deposits — by then believed to have been cleaned away — “had hindered” a previous inspection in 2000 (but not in 1998).

information inconsistent with the limited knowledge he gained from these sources. The only FENOC submittal that facially mischaracterizes the severity of the boric acid buildup is Serial Letter 2731 (which cannot be held against Mr. Geisen), but even that submittal states that there were accumulations on the reactor vessel head from flange leakage in both 1998 and 2000. And on the October 3 conference call, Mr. Geisen again stated that nozzles could not be viewed because of flange leakage (although he wrongly believed that only five or six nozzles were obscured by deposits).

Similarly, Serial Letters 2735 and 2744 clearly indicate that large portions of the reactor vessel head could not be inspected: they both indicate, in tables and text, the number of nozzles that were viewed and supply as well a map of the reactor vessel head for each inspection, indicating large surface areas where boric acid accumulations blocked inspections. Even if Mr. Geisen can be held accountable for those statements, they are, to the extent untrue at all, consistent with the degree or extent of his knowledge.

In other words, none of this establishes that Mr. Geisen knew the severity of the issue. Looking at those submittals *without* the benefit of hindsight, and simply with the information that there were boric acid deposits on the reactor vessel head from flange leakage, a reviewer would not find the inaccuracies in those submittals to be apparent or obvious.

A troublesome aspect of the Dissent involves the occasions in which finding of facts gives way to speculating about presumptions. Thus, the Dissent speculates (at p. 838) that, when meeting with Mr. Siemaszko, Mr. Geisen “would then have reviewed closely all three inspection videos,” leaving to plain inference that he would have watched them *in running fashion* and thus would have been aware of their shortcomings when making later presentations to the NRC. This is not only rank speculation, but also is made all the more objectionable by its failure to consider *the uncontroverted record facts that describe the meeting in terms that undeniably paint an entirely different picture*: Mr. Geisen went to the meeting to check on Mr. Siemaszko’s approach to a project assigned to him, at that point had no reason to distrust his co-worker (who was the company expert on the matter at hand), and simply observed *the still frames* that were shown to him as illustrative of Mr. Siemaszko’s approach to the project at hand.

In these circumstances, the Dissent’s broad speculation (scarcely necessary if the Martin document, with its recounting about watching the tapes in August, was able to withstand scrutiny) would have the reader believe — contrary to the undisputed facts — that Mr. Geisen had the tapes played for him in running fashion in early October, a viewing that would have tainted his conduct over the

next month. Such unjustified speculation is not only generally forbidden but is also specifically inharmonious with the facts that emerged at the hearing.<sup>173</sup>

Nonetheless, as rhetoric, such speculation appears to persuade, and that is its danger; fortunately, as reasoning, it fails to pass, and that is its redemption.<sup>174</sup> Upon careful analysis, the same may be said of the Dissent as a whole.

4. The second of the Dissent's jurisprudential pillars that cannot withstand scrutiny involves its inordinate focus on legal theories to the virtual exclusion of practical realities, particularly in its collateral estoppel analysis regarding the jury instruction. *See generally* above p. 719. One such example is its insistence (at p. 814) that the jury "necessarily" made certain factual determinations about which there was nothing "ambiguous," which illustrates the importance the Dissent places on abstract theory. Its views might carry the day in other situations, but cannot do so here in the face of the practical realities of what jurors said in the post-trial interviews (in which Mr. Geisen's counsel participated and about which they have informed us). *See* above note 86 and accompanying text. *See also* Dissent at p. 815, which ignores the impact of those interviews in asserting that we have "uncritically attributed irrational behavior to" the jury, when what we have in essence done — with some thought, analysis, and awareness — is simply to recognize the very natural course of their behavior when faced with a potentially or demonstrably confusing instruction.

This case — both the merits of the Enforcement Order and the verdict of the criminal trial — has much more to do with fact-finding related to human nature than with analytical research related to legal theories. But the Dissent continually

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<sup>173</sup> Another, albeit perhaps less dramatic, example of speculation upon which the Dissent depends occurs at p. 846: "one might reasonably assume [Mr. Geisen] would have subjected the letter to meticulous review, accepting nothing less than scrupulous accuracy." This speculation is compounded when the Dissent asserts, once again in contravention of the Green Sheet review process, that "Mr. Geisen vouched for the technical accuracy of the letter" and that he did so "knowing" (without any explanation of the basis of that knowledge) "it contained material inaccuracies." If we were permitted to speculate, we might wonder why a person insisting that a corrective letter be sent to the NRC would then deliberately falsify the information in that letter. Rather than speculate in that fashion, we point to the evidence — Mr. Geisen again relied upon the findings put forward by Mr. Siemaszko, whom he did not then view as untrustworthy.

<sup>174</sup> Other misleading aspects of the Dissent are less significant, but should be noted and corrected here. For example, the Dissent mentions frequently (*e.g.*, Dissent at p. 841) that Mr. Geisen's motivation was to persuade the NRC, leaving it open to the reader to infer that was an illegitimate objective. Along those lines, the Dissent later implies (at pp. 850) that this tactic was successful, in that Davis-Besse was permitted to stay in operation. As we have already seen (*see* above note 32), the Staff team assigned to the project was not lulled into reaching, or otherwise induced to reach, that conclusion. The team's recommendation that the plant be shut down was overruled at a higher level, for reasons not made known to us. *See* Tr. at 1325-27, 1436-37, 1438. Moreover, Mr. Geisen's efforts were premised, not on the results of the past inspections on which he was not well informed, but on the new crack-growth analysis rate whose development he was overseeing.

ignores this aspect of the case, noting (at p. 817 n.7) what the jury “was well aware of,” and putting forward again (at p. 816), for example, its view of what the jury “necessarily found” with no regard for the explicit post-trial interviews, much less for the implicit and inherent unknown of how a particular jury reached a specific verdict. The Dissent compounds its mistake in this regard when (at p. 817) it again claims to know, “*as a matter of law*,” precisely what the jury “concluded,” and when (at p. 818) it expresses the belief, contrary to what many courts have said, that the warning to the jury “forecloses the possibility” of any problem or confusion.

It is not just the Dissent’s analysis of the jury’s purported thinking that suffers from this flaw. It puts theory ahead of practice in suggesting how to handle, for collateral estoppel purposes, the pendency of the appeal, when it ignores the delay its approach would do to Mr. Geisen’s intensely practical interests (*see above* p. 714). It goes even further when it appears to import legal doctrines concerning the service of process to rule that Mr. Geisen necessarily had “notice” of the contents of a document on the very day it was left on his desk in the midst of an extraordinarily busy period in his work life (*see above* pp. 758-59).

5. The third problematic jurisprudential pillar, and perhaps the most inappropriate viewpoint expressed in the Dissent, is its repeated accusation (at pp. 821 n.10, 822-23) that the Staff is “wrong” or “mistaken” in its legal theories. A careful analysis in the proper case might perhaps show the Dissent to be correct in the legal theories it espouses. But, again, as judges, it is not our charge to try a case that *might* have been brought. We are here instead to assess whether the Staff, as the equivalent of a prosecutor, has proven the case that it *did* bring — on factual charges and legal theories several years in development — that a nuclear industry worker violated the agency’s regulations and should therefore be deprived of his career.<sup>175</sup>

Perhaps other charges could have been brought (as DOJ decided to do) and other theories could have been advanced. But it should be beyond needing a citation of authority for us to point out the obvious — those subjects against whom the power of Government is brought in the form of charges of criminal or civil wrongdoing are entitled to know the nature of the charges against them, so that they can prepare to meet those charges.<sup>176</sup> While amendments of initial

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<sup>175</sup> That the Staff is not just a “party” here, but is the “prosecutor,” makes irrelevant the Dissent’s claim (at p. 823) that “[n]either this Board, nor the Commission, is constrained in the resolution of legal issues by a party’s misunderstanding of the law.” We may or may not be so constrained, but we are constrained from altering the nature of charges that the Staff freely decided to bring in the form presented to us.

<sup>176</sup> As to criminal matters, *see* the Sixth Amendment, guaranteeing that a person “be informed of the nature and cause of the accusation.” U.S. Const. amend. VI. As to civil matters brought by the

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charges may often be appropriate, that is never allowed, we would assume, after a trial has been concluded, unless a new trial is offered as a part thereof.<sup>177</sup>

But here the Dissent states repeatedly that the Staff got it wrong, and proceeds to propound the legal theories upon which, it believes, the Staff should have proceeded. There is no other way to say it — this is wrong as to Mr. Geisen’s rights, and it is wrong as to a judge’s role.

### C. Conclusions of Law

The Licensing Board has considered all the material presented by the parties on Mr. Geisen’s challenge to the Staff’s Enforcement Order of January 4, 2006. Based upon our analysis of the entire evidentiary record that was amassed, including the Stipulation of Facts; the proposed findings of fact and conclusions of law that were submitted by the parties; the parties’ other motions and briefs, and their oral and written arguments; and in accordance with the views set out herein — which we believe are in accordance with applicable law and supported by a preponderance of the reliable, material, and probative evidence in the record — the Board majority has decided the matters in controversy concerning the Enforcement Order and reaches the following legal conclusions:

1. The NRC Staff has the burden of proof to establish all the elements necessary to support the Enforcement Order.
2. Our review of that Enforcement Order is conducted on a *de novo* basis.
3. The NRC Staff acknowledged throughout our proceeding that the instructions given the jury in the parallel federal court criminal case of *United States v. Geisen* presented a more expansive theory upon which to find knowledge than do the NRC’s regulations; accordingly, Mr. Geisen’s defense to the NRC Staff’s presentation of its case was tailored to the less expansive theory.

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Government, see *United States v. Florida East Coast Railway Co.*, which states that “[t]he right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.” 410 U.S. 224, 243 (1973) (internal citations omitted), citing *Morgan v. United States*, 304 U.S. 1, 18-19 (1938).

<sup>177</sup> We pause to note, without elaboration, what everyone familiar with Commission jurisprudence knows, namely, that potential Intervenors in licensing cases must surmount many hurdles, even early on, if they seek to amend their “contentions,” the vehicle by which they advance their theories and claims in an attempt to launch a proceeding. The later they try to amend, the harder it is. The notion that the legal theories underlying potentially career-ending charges of wrongdoing against an individual can nonetheless be altered *after* a trial is concluded would, we would think, be not only impermissible as a matter of due process but would be anathema to the Commission’s normal jurisprudence.

4. In attempting to support the Enforcement Order, the NRC Staff can place no reliance on the jury verdict in the parallel federal court criminal case of *United States v. Geisen*, for in all the circumstances the doctrine of collateral estoppel either (1) is inapplicable here, or (2) if applicable, is not *required* to be applied, and — having found good reasons why it would be unjust or unjustified to apply it — we have exercised our *discretion* not to apply it.
5. The NRC Staff has not carried its burden of proof to demonstrate by a preponderance of the evidence that Mr. Geisen committed the knowing misrepresentations alleged in the Enforcement Order’s several charges against him.
6. Had the NRC Staff established that Mr. Geisen had committed those knowing misrepresentations, the length of the ban imposed by the Enforcement Order (but not its immediate effectiveness) would initially have been justified, in principle, by the nature of that misconduct.
7. Nothing in the evidence presented, in particular that concerning the importance of taking responsibility and expressing regret, supports the utilization of the portion of the Staff’s Enforcement Order that would allow the Staff to prohibit Mr. Geisen’s return to the regulated industry after the employment ban is lifted (or expires). Accordingly, in the absence of new developments, utilization of that part of the Order for that purpose is prohibited. The Staff is, of course, free to issue a new Enforcement Order against Mr. Geisen, before or after his return to the regulated industry, if further developments warrant.

## **VIII. ORDER**

For the reasons stated in this Initial Decision, the Enforcement Order of January 4, 2006, directed to David Geisen is hereby SET ASIDE. Subject to the terms of the judgment in the criminal case, Mr. Geisen is free to seek employment in the nuclear industry forthwith.

Pursuant to 10 C.F.R. § 2.1210(a), this Decision will constitute final agency action on the Enforcement Order 40 days after its issuance unless: (1) a party files a petition for Commission review within 15 days after service of this Decision (10 C.F.R. §§ 2.341(b)(1), 2.1212), or within any extended period of time granted by the Commission for “good cause” shown (10 C.F.R. § 2.307(a)); or (2) the Commission, in its discretion, determines that review is warranted (10 C.F.R. § 2.1210(a)(3)). Unless otherwise authorized by law, a party who wishes to seek judicial review of this Decision must first seek Commission review (10 C.F.R. § 2.1212).

It is so ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD\*

Michael C. Farrar, Chairman\*\*  
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 28, 2009

Copies of this Initial Decision and of the Dissenting Opinion were sent this date by e-mail transmission to counsel for Mr. Geisen and for the NRC Staff.

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\*Judge Hawkens does not subscribe to the above opinion; his dissenting views appear on the following pages.

\*\*As noted at the conclusion of Part VI (above p. 780), Judge Farrar will in the near future be filing additional views on the "immediate effectiveness" aspect of the Enforcement Order, which will appear in the bound "NRC Issuances" immediately after this Order and before the Dissent. The Board majority is following this course because it does not wish to have the creation of those views, which will not alter the nature of the essential judgments herein, to be the source of further delay in the issuance of this Initial Decision.



## Additional Views of Judge Farrar

### I. INTRODUCTION

In the foregoing Initial Decision, the Board found that the Enforcement Order issued against Mr. Geisen could not be sustained, and thus set aside the 5-year employment ban the Order had imposed upon him.<sup>1</sup> Because the Enforcement Order had made that 60-month employment ban immediately effective, Mr. Geisen had felt the force of that ban for nearly 44 months by the time of the Board's decision.

The agency's rules do not provide a mechanism for remedying or neutralizing the significant adverse impacts Mr. Geisen suffered in those many months. In that respect, in addition to the psychological frustration that flows from being made to endure a punishment before the validity of that punishment is adjudicated, the ban here led directly — according to the testimony we heard — to specific and extraordinary negative impacts upon Mr. Geisen's financial status, career development, and family life, impacts that are to no extent addressed, much less ameliorated, by our finding that the charges against him were not proven.

Judge Trikouros and I joined in calling this matter to the Commission's attention (LBP-09-24, 70 NRC at 780). Even though the Board is powerless to *do* more, I believe someone must *say* more — for the seemingly unjust outcome that resulted here calls out to be addressed more fully, and to have its ramifications commended to those in position to prevent similar future outcomes from occurring. This focus on what transpired here should take place *regardless of whether one accepts the Board's or the Dissent's view of the facts*.

Put another way, there is a difference between the issues of (1) whether Mr. Geisen should be held responsible for the charges against him; and (2) whether Mr. Geisen was treated fairly in the bringing of those charges. The Board addressed the first issue in determining that the Staff's evidence did not meet its burden of proof to support the charges. We based that decision on the evidentiary record compiled at our hearing, without regard to any views as to whether the Staff had rightly or wrongly made its enforcement order immediately effective.

But now it is time to address the question of fair treatment, not because the outcome will affect the merits of Mr. Geisen's case but because it should guide the handling of future cases. I believe that, at least where "career death sentences"

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<sup>1</sup> After the Board's decision was issued, the Staff petitioned the Commission for review of the merits of that decision and for a stay of its effectiveness pending that review. The Commission has since (1) extended indefinitely the time for its decision on the merits Petition (Order of the Secretary (Granting Extension of Time for Commission) (Oct. 26, 2009)) but (2) denied the interim stay (*In re David Geisen*, CLI-09-23, 70 NRC 935 (2009)).

are involved and the facts are complex and disputed (*compare* note 13, below, and accompanying text), the Commission should instruct that more care be brought to the process than appears was the case here. The apparently unjust outcome the agency must confront flowed inexorably, in the first instance, from the sanction's having been made immediately effective when it need not and should not have been, with that misstep compounded by the Government's then denying Mr. Geisen the expedited hearing to which the regulations explicitly entitle him.<sup>2</sup>

Of course, some might question whether this is the case in which to discuss immediate-effectiveness issues since, as the Board Decision noted (70 NRC at 687 n.4), Mr. Geisen had not exercised "the opportunity provided by 10 C.F.R. § 2.202(c)(2)(i) to challenge, apparently on limited grounds, the immediate effectiveness of the Enforcement Order." In other words, goes the argument, with Mr. Geisen having waived the remedy available at an earlier stage, I should not be concerned with the absence of a remedy at this stage.

We did cover briefly in the Board Decision (70 NRC at 779-80) why that fact does not preclude addressing the matter for present purposes. To the extent the point might have some remaining validity, what I say later (*see* pp. 801-03 & note 12) about the deficiencies in the earlier remedy addresses it more fully.<sup>3</sup>

In any event, that there might be an adjudicatory remedy that can promptly be invoked but was not invoked by the recipient of an unwarranted immediate effectiveness order scarcely means that the issuance of such an order is tolerable. To the contrary, all those acting under NRC licenses are entitled to fair treatment at the hands of the Staff in the first instance so that it will not prove necessary to incur the travail and expense associated with having to bring a challenge before a licensing board.

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To begin with, there is no dispute over the legitimacy of allowing immediately effective orders in appropriate situations. The agency must have the means available to ban immediately any malefactors whose continued presence in the

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<sup>2</sup>In my view, the frustration attendant upon being denied the right to a timely hearing on the validity of a punishment, while the punishment is being endured, adds significantly to the impact of the punishment. Although that impact may not be readily *quantifiable*, it provides further *qualitative* reason — even if the Commission were to disagree with the Board that Mr. Geisen should be exonerated — for the Commission (1) to indicate that it does not endorse the juridical or literary concept of "punishment first, trial afterwards" and (2) to say "enough" rather than to reinstate the remainder of the employment ban (as to the status of the ban, *see* note 21, below).

<sup>3</sup>In a related vein, there is no validity at all in the argument that the initial success of the criminal prosecution should alleviate any concern about the employment ban. The criminal indictment had not yet been handed down when the immediately effective employment ban was imposed, and the Board Decision explains at great length (70 NRC at 709-26) why the later criminal conviction, now on appeal, does not constrain our analysis here.

regulated workplace creates the potential for an imminent threat to the public health and safety.<sup>4</sup> Here, however, punishment was imposed in advance of trial when there was no plausible reason stated, or existent, to do so. That Staff action breached three fundamental principles.

The *first* involves the unfairness *generally* inherent in requiring a person to serve a punishment before its validity is tested in whatever adjudicatory process exists for that purpose. The *second* was in not expressing — and even worse, in not having — adequate reason for departing in this *specific* instance from the first principle. The *third* was in not seeking to develop some lesser measure(s) that could have protected the values the Staff claimed to be serving — protecting the public health and safety — without destroying a person’s career before the legitimacy of that ultimate measure could be adjudicated. I discuss each of these below.

## II. PRINCIPLES

### A. Imposing Punishment Before Trial

A fundamental principle of our legal system is that an accused must be provided the opportunity to challenge the validity of the accusations *before* being required to endure the punishment attendant thereto. To be sure, the Staff must be given the necessary authority to protect the public health and safety by banning individuals, effective immediately, when appropriate. But this power is granted, and this action is allowed, not as a *routine means to impose on the accused punishment for past action*, but as an *extraordinary measure to protect the public against potentially dangerous future wrongdoing*. As such, it cannot be viewed as the norm, but rather as an exception that is allowed — and tolerated — only when needed.

In that regard, the law frequently requires that the more weighty the power, the more carefully and cautiously it must be exercised and the more quickly the circumstances underlying the exercise of that power must be brought before independent adjudicators for testing.<sup>5</sup> But that did not occur here. Instead,

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<sup>4</sup>Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,195 (May 12, 1992).

<sup>5</sup>*Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (“It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas”); *Katzenbach v. Morgan*, 384 U.S. 641, 654 n.15 (1966) (“the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened”); *Groppi v. Leslie*, 404 U.S. 496, 504  
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the Staff compounded the injustice, through its advocacy of the Department of Justice's repeated stay motions, by delaying the "expedited hearing" — supposedly guaranteed by agency regulations — that would have tested the validity of the punishment relatively early on. *Cf.* Board Decision at p. 688; CLI-07-6, 65 NRC 112 (2007). The Staff position indeed seemed to be that the length of that delay was susceptible to no limits.<sup>6</sup>

Prosecutors wield enormous power over their targets' lives. To be sure, the *ultimate* determination of guilt or innocence is not made by the prosecutor, but by an independent adjudicator, whether jury or judge.<sup>7</sup> Nonetheless, the decision to prosecute often has an interim life-altering effect upon a target, and prosecutors ought generally to proceed with a large degree of thoughtfulness and carefulness, given the impact of their decisions.<sup>8</sup> This principle applies even more forcefully where, as here, the initiation of charges also resulted in the onset of the punishment attached to those charges.

Perhaps, above all, prosecutors need to consider the *possibility* they could be making an erroneous decision, and the *costs* such a decision would impose in the period before a formal adjudication can be held (whether that period be

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n.8 (1972) ("The Court has been careful to limit strictly the exercise of the summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge"); *cf. Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 959 (1983) ("carefully crafted restraints" in the Constitution "preserve freedom" by curbing "the exercise of power"). In this regard, the Staff cannot seek to describe itself in terms akin to being "only a prosecutor" (*cf.* NRC Staff Response to Board Questions at 8 (Jan. 30, 2009)) such that any misjudgments or lapses are wiped away by the Licensing Board hearing. That might be true where the Staff simply *proposes* a punishment, but not when it also *imposes* the punishment.

<sup>6</sup> Thus, the Staff argued orally at the first appearance in the case that if the hearing were delayed *even for the full 5 years* there would not necessarily be any injustice. Transcript of David Geisen Enforcement Proceeding Oral Arguments at 35-38 (Apr. 11, 2006). Then, quite recently, as if to demonstrate that the tenor of its initial position was not due to failure to have anticipated the question presented, the Staff moved in writing for a stay of our decision while (1) giving scant attention to the impact that would have upon Mr. Geisen (*see Geisen*, CLI-09-23, 70 NRC at 937), and (2) without acknowledging that — were the Commission to have granted the stay and then to have taken a normal period to review this complex matter — the employment ban would likely be well into its final year before the Commission would be in position to rule on the merits.

<sup>7</sup> In this vein, the Board's probing of the facts resolved the merits of the problems involving the reconciliation of the "Martin document" and the participation in Serial Letter 2731, problems caused in no small measure by deficiencies in the Staff investigatory and enforcement processes (*see pp.* 800-01, below). But resolving them for merits purposes does not undo the impact they had in driving the immediately effective punishment.

<sup>8</sup> With respect to a prosecutor's role, and as most lawyers who ever worked for the Government know, Government lawyers should understand and follow the venerable maxim that "the Government wins when justice is done." *See, e.g., United States v. Dawkins*, 562 F.2d 567, 569 (8th Cir. 1977). To discount this maxim would be to adhere to the converse, i.e., that "Justice is done whenever the government wins." *Goehring v. United States*, 870 F. Supp. 106, 109 (D. Md. 1994).

a mini-hearing at the outset, the promised full-blown expedited hearing, or the long-delayed hearing that eventually transpired here). I saw no evidence here that either the possibility or the consequences of error were given any consideration.<sup>9</sup>

Had that been done, it might have led to an entirely different conclusion, at least as to immediate effectiveness (my concern here), if not also as to the length of the ban and indeed the bringing of charges at all. For example, we learned at the hearing that, as the Staff process for filing charges nears its culmination, *the subjects of those charges are often afforded a “last chance” interview* to explain the matter before charges are lodged. Transcript of Hearing (Dec. 8-12, 2008) at 2267-68 (Tr.). *Mr. Geisen was not offered such an interview, even though he had in effect not even had a “first chance” interview.*<sup>10</sup>

Such an interview might have been revealing in a number of respects, all to Mr. Geisen’s advantage. In the first place, it would likely have provided an opportunity, not otherwise taken by the agency personnel involved during the investigation or during the enforcement deliberations, to look for some way to reconcile the discrepancy between the Martin document and Mr. Geisen’s views. *See* LBP-09-24, 70 NRC at 743. Instead, it appears that Mr. Geisen was never informed of the existence of that crucial document, much less given an opportunity to confront it. And it might have led the Staff to reassess its view as to the ongoing state of Mr. Geisen’s knowledge had he been able to point out that he had played not a central but a very limited role in the drafting of Serial Letter 2731.

Similarly, an interview would almost assuredly have brought to light the steps Mr. Geisen had taken to correct an error once he learned of it. As the Board

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<sup>9</sup> In this regard, *see* David Ignatius, *Certainty That Hit a Wall*, The Washington Post, July 7, 2009, at A-17, noting, on the passing of former Secretary of Defense Robert McNamara, that “perhaps the memory of this brilliant and tragic man will keep us from being too certain of our own judgment — and encourage us to consider, even when we feel most confident, the possibility that we could be wrong.” Here, no matter how convinced it was that Mr. Geisen was the bad actor at the heart of the Davis-Besse problem, the Staff should have considered that, if it were later to be proven wrong about him (as the Board later found it was), he would — if the Staff’s order were immediately effective — end up subjected to years of unfair and unjustified punishment. By entertaining this possibility, the Staff could have eschewed immediate effectiveness, and the worst that would have happened, had the Staff been proven right on the merits (as the Dissent believed), his punishment could have waited — without harming the public interest — for the adjudication to be completed before being imposed, just as it had already waited for 28 months (*see* pp. 806-07, below).

<sup>10</sup> All the investigators who had actually spoken to Mr. Geisen, having later been assigned to work with DOJ on its investigation, a matter covered by grand jury secrecy rules, were thus unavailable to provide their views to the agency’s enforcement panel. Tr. at 2154.

Decision noted, the Staff witness conceded that such information might well have served to reduce the penalty imposed. *See* 70 NRC at 765, 777 n.160.<sup>11</sup>

It is no answer to suggest that the Staff need not be too concerned about making proposed punishments immediately effective, because the agency's regulations provide for a very early review of any such immediate effectiveness. There are three problems with that notion.

The *first* is that the pertinent regulation (10 C.F.R. § 2.202(c)(2)(i)) purports to *limit severely the scope of that early review*, and appears to embody the premise that the Order's immediate effectiveness (depriving the accused of the freedom to work pending trial) is presumptively valid, placing the burden on the accused to demonstrate its invalidity.<sup>12</sup> In sharp contrast (*see* p. 806, below), the rules that govern an analogous situation — the grant or denial of bail pending trial in criminal prosecutions — place the burden squarely on the Government to demonstrate not only the reasons why bail should be denied (thereby depriving the accused of liberty pending trial) but also that *there are no conditions, short of denying bail, that can accomplish the same purposes*.

The *second* problem is that adjudicators are not necessarily in as good a position, or as adequately empowered, as are prosecutors to ascertain the critical facts at the outset of a proceeding. Given the narrowness of the review standard in the current regulation, it might be much harder for judges to detect error than for the Staff to prevent error.

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<sup>11</sup> I need add only that the Dissent also recognized that this eminently sensible step of a presanction interview should have been taken. Specifically, the Dissent pointed out the following (LBP-09-24, 70 NRC at 852 n.45 (Hawkens, J., dissenting)):

In the unique facts of this case, it appears the NRC Staff had ample time prior to issuance of the immediately effective Enforcement Order to accord Mr. Geisen "some form of [predeprivation] hearing" (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)). When the NRC Staff can, consistent with its duty to protect public health and safety, accord some form of predeprivation hearing, such a course of action is advisable in light of the important "private interest in retaining employment" and the fact that such a proceeding provides "some opportunity for the employee to present his side of the case" (*id.* at 543). As the *Loudermill* Court explained, providing predeprivation "notice and informal hearing permit[s] the [employee] to give his version of the events [and] provide[s] a meaningful hedge against erroneous action" (*id.* at 543 n.8) (quoting *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975)).

In this regard, I concur entirely with the Dissent's analysis, and note that the Staff witnesses were unable to supply any valid reason why this did not occur here.

<sup>12</sup> To succeed under the terms of that regulation, the challenge brought by the Order's target must show that "the order, including the need for immediate effectiveness, is not based on adequate evidence but on *mere suspicion, unfounded allegations, or error*" (emphasis added). In addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well, as is indicated by the next sentence, which requires the challenge to "state with particularity the reasons why the order is not based on adequate evidence" and to "be accompanied by affidavits or other evidence relied on." 10 C.F.R. § 2.202(c)(2)(i). All in 20 days, unless extended. *Id.* § 2.202(a)(2).

The *third* problem involves inequality of time and resource availability, an issue that might not arise in the routine cases that appear to be the grist of the agency's enforcement mill,<sup>13</sup> but that is central here, where the Staff took nearly 4 years to compile its case (16 months during the OI investigation, the report of which was issued on August 22, 2003, and over 28 more months before issuing its Order in early January 2006). In contrast, in this or any complicated case, the person eventually charged might well, at the time he or she would have to exercise the right to challenge the ban's immediate effectiveness, not only have just recently been served with the Enforcement Order, but also have no control over — or even access to — the underlying evidentiary documents the Staff has been studying for years.

In such circumstances, how can an accused, even aided by counsel, respond in a brief period to the enormous file of interviews and documents that the Staff took nearly 4 years to compile? In this respect, only after our full evidentiary hearing did some of the deficiencies in the Staff's support of its Enforcement Order emerge.

For all these reasons, Staff officials contemplating the issuance of an immediately effective order that destroys the subject's opportunity to work at a chosen profession ought to be as careful as we would be in analyzing that aspect of the proposed order's impact. And they should do so in light of the principles of national policy that apply in an analogous area (i.e., pretrial bail).<sup>14</sup>

Put another way, whether or not the remedy of an early hearing on immediate effectiveness is expected to be invoked, the responsibility to act in accordance with the rule of law perdures at every level of the agency's management. If the rule of law is put aside (*see* Section B, below) and a person (*even if later found to have committed the misdeeds alleged*) is unnecessarily and unfairly deprived

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<sup>13</sup> Analysis of the material provided to us by the Staff (Attachment 1 to NRC Staff Proposed Findings of Fact and Conclusions of Law (Jan. 16, 2009)) indicates that out of the forty-seven other immediately effective Enforcement Orders issued by the Staff in the last 15 years involving 5-year employment bans (not related to the Davis-Besse incident), forty-four appear to have dealt with cases of simple and/or uncontroverted wrongdoing, such as providing false urine specimens for drug testing.

<sup>14</sup> I recognize that the enormity of the Davis-Besse incident and inquiry might have led the Staff to believe it so obvious that Mr. Geisen was at the heart of the problem that he could not be allowed to work another day. But when such passion is most present is when due process is most important. As to fairness, most observers would not think it tolerable, at the very outset of any type of enforcement matter, for the authorities to tell a suspected malefactor — no matter how guilty he appeared — that a punishment with a 5-year duration was being imposed but that no hearing on the legitimacy of that penalty would be held until nearly 3 years of that penalty had already been endured. *Cf. In re Andrew Siemaszko*, Licensing Board Order (Sept. 29, 2005) at 8 (separate Statement of Judge McDade, dissenting from the grant of a stay of hearing on a proposed punishment that, even though not made immediately effective, nonetheless had immediate practical impact). *See also* note 17, below.

of the opportunity to work before trial, there has been harm — harm to the values upon which our legal system is based.

## **B. Failing to Provide Plausible Reasons**

The Enforcement Order has certain indicia of having been prepared in some haste, notwithstanding the lengthy period — 28 months — that had passed since the publication of the OI Report that had detailed what the investigation revealed.<sup>15</sup> But the single most troubling aspect of the Enforcement Order is not any possible carelessness in its drafting. It is, rather, the real deficiencies in its reasoning.

Specifically, the Enforcement Order, while setting forth allegations of misconduct at Davis-Besse, fails to provide, with any specificity, how or why these allegations warranted Mr. Geisen’s immediate dismissal from his position at Kewaunee. To be sure, that Order and its cover letter indicated at several points that it was effective immediately, and once stated generally that “the public health, safety and interest” required the result that Mr. Geisen be relieved immediately of his NRC-regulated responsibilities. But the only attempt to give *any* specific supporting reason(s) as to why or how that conclusion was reached was limited to twenty-six words in a nineteen-page document, i.e., that his alleged conduct “raise[s] serious doubt as to whether he can be relied upon to comply with NRC requirements and to provide complete and accurate information to the NRC.” Order at 15, Part IV; 71 Fed. Reg. at 2575.

Even a layman would question whether it is permissible for the Government to direct that a person be removed from his employment and his career, effective immediately — before he has a chance to be heard — without specifying plausible, considered reasons for taking such drastic action. In any event, such an explanation is required by the very regulation that permits the Staff to issue an immediately effective Enforcement Order upon finding “that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful” — viz., section 2.202(a)(5) explicitly requires the Staff to

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<sup>15</sup>One mistake in the Enforcement Order might seem to be trivial but in context is seen to be significant. Specifically, that Order contains a duplicative paragraph that appears to have been electronically cut and pasted from the similar order involving Mr. Goyal, for his name still appears therein. Compare Order at 17 with 18-19; 71 Fed. Reg. at 2576. There is, of course, nothing wrong as a drafting matter with copying text from one document to help create another. But care must be taken to conform the copied material to the context of the new document. This was not done here — *and no one noticed*. In these circumstances, it is not unreasonable to think that perhaps the reason for this oversight was that the documents — or at least the one concerning Mr. Geisen — were processed with unseemly haste.



“state[] reasons” (emphasis added) for making those findings. The Staff’s merely asserting, without explaining, that such is the case is inadequate.<sup>16</sup>

Of course, it is plain now — after the hearing has been held — why no reasoned explanation for the immediacy of the employment ban was provided in the Order. There did not exist any explanation that could have survived scrutiny.

This conclusion follows from the facts that eventually emerged. After its investigation was completed, the Staff had delayed any action for 28 months, during all of which time Mr. Geisen was employed in a (different) nuclear power plant. Had anyone on the Staff thought that *during those 2-plus years* there was genuine reason to believe Mr. Geisen’s work at Kewaunee constituted a *real and imminent risk* to public health and safety — in that there did indeed exist, as the Order later stated, “serious doubt as to whether he can be relied upon to comply with NRC requirements and to provide complete and accurate information to the NRC” — we must presume that the job debarment action would have been taken *then*, for failure to have done so would be an indictment of the NRC Staff rivaling that brought against Mr. Geisen.

Therefore, unless something new was uncovered just before January 4, 2006 — and the trial revealed no such discovery — any serious explanation that might have been given for the immediate effectiveness of the Order issued that date would have called into serious question whether the Staff had fulfilled its responsibilities to the public in the foregoing years. So, no such explanation was given in the Order. And, as the evidence showed, none existed.

Instead, the explanation — such as it was — that we heard from the Staff at the hearing was that the issuance of enforcement orders sometimes, as occurred here, awaits parallel consideration of criminal charges by the Department of Justice. Tr. at 2075. Such waiting might in certain instances serve the public purpose of avoiding interfering with a potential criminal case. But that purpose is not facially so significant (and in the situation here was not seen as so germane to this proceeding<sup>17</sup>) as to justify, without explanation, allowing to remain at his post in

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<sup>16</sup>On that score, with the exception of the cited twenty-six words, the Staff’s accusations elsewhere in the Order concern *past* activities and in no way allude to any then-*ongoing* or potential *future* misconduct on Mr. Geisen’s part. Again, perhaps the matter seemed obvious to everyone on the Staff. But persuasive reasons must nonetheless be articulated. After all, the relevant regulation (10 C.F.R. § 2.202(c)(2)(i)) goes on to provide that a *challenge* to immediate effectiveness “must state with particularity the reasons why” the Order is unsound — and one can readily anticipate the Staff’s response if the reasons provided by the challenger (*see* note 12, above) were framed as briefly and generically as were the Staff’s here.

<sup>17</sup>*See In re Geisen*, LBP-06-13, 63 NRC 523, 537-41, 548-56 (2006), *aff’d*, CLI-06-19, 64 NRC 9 (2006). *But see In re Geisen*, CLI-07-6, 65 NRC 112 (2007). *See also In re Siemaszko*, above, note 14, where Judge McDade, with 30 years of experience representing the Government on matters at the intersection of criminal and civil enforcement, noted the absence there, too, of any factors that would

(Continued)

the interim — apparently to great public detriment if the Enforcement Order’s protective sanctions are to be given any credence — a nuclear plant employee who was allegedly an imminent threat to public health and safety.

### C. Not Considering Lesser Measures

As mentioned before, I recognize the importance of the Staff’s vital task of protecting the public health and safety by vigorously pursuing wrongdoers and preventing them from causing additional problems while litigation is pending. But apparently no one even considered whether those aims could have been achieved while simultaneously protecting all or some of Mr. Geisen’s employment interests.

Had this alternative been considered judiciously and a thoughtful process brought to bear, any number of measures might have been developed that would have sufficed to achieve the Staff’s purposes in the interim while ameliorating Mr. Geisen’s injury until adjudication was complete. For the reasons set forth below, I respectfully urge the Commission to instruct the Staff to consider future “career death sentence” enforcement matters with the sensitivity and caution justified — and required — by the punishment it has in mind to impose. I also suggest to future litigants and Boards that the matter discussed below (pp. 805-07) be given serious consideration in reviewing any immediately effective sanctions.

Our justice system abides by principles and operates under measures that seek in a coherent fashion to *balance* the exercise of authority and the enjoyment of liberty.<sup>18</sup> Here, the Staff might have sought to balance its *authority* and need to

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interfere with the criminal prosecution if discovery in the civil enforcement matter went forward; *but see In re Siemaszko*, CLI-06-12, 64 NRC 495 (2006).

<sup>18</sup>This jurisprudential notion was discussed by retired Supreme Court Justice David Souter in remarks recently made at Harvard Law School. As Justice Souter explained:

I don’t know of any formula in advance that says, “Liberty always wins” or “Authority always wins.” Either one would be an anathema.

That’s why I espouse the common law method, which gets down to the nitty-gritty factual issues. To provide a premise for deciding which of the competing principles has the better argument in any given case. The notion of a Constitution in which we want it both ways is sensible by accepting the proposition that *we can’t have it both ways all the way, but we can have it both ways partially on each side. . . .*

[W]hat we cannot forget is that we do not have, *we are not intended to have, a system in which, as it were, the coherence of values allows for the development of any one value necessarily as far as it can logically go, because there is usually a legitimate competitor somewhere, and we cannot lose sight of that.* And the value of coherence in a system, or coherence in a given body of doctrinal development has always got to admit that the door is open, or we wouldn’t have a serious case.

A Conversation with Justice Souter at Harvard Law School’s Constitution Day Event (Sept. 9, 2009) (emphasis added) (transcribed from website audio).

protect public health and safety pending a hearing with the competing need to preserve, as well as possible, Mr. Geisen's *freedom* to pursue his career *prior* to having his responsibility and punishment adjudicated.

For guidance, the Staff might have sought instruction from one aspect of the practices followed in connection with the grant of bail pending trial in criminal cases (which concededly is inapplicable to civil enforcement matters but which might nonetheless offer some constructive guidance). Specifically, to succeed in imposing pretrial detention because the accused is a "danger to the community," *the Government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably assure the community's safety.* 18 U.S.C. § 3142(c), (f). *See also United States v. Salerno*, 481 U.S. 739, 751-52 (1987).

As to that point, we suggested at the hearing that the Staff investigators might have approached Mr. Geisen's then-current employer to see if there were a way to allow him to continue working, under some sort of increased scrutiny, while this proceeding was under way. Tr. at 2272.<sup>19</sup> The answer we received was that approaching his employer would have violated Mr. Geisen's right to privacy (Tr. at 2273, 2278), a right which the Staff apparently thought more important to protect than Mr. Geisen's right to earn a living. I believe that this unwillingness at least to consider whether possible alternatives might be developed is plain wrong, both as a matter of elemental justice and in light of the steps the Government is required to take in the analogous bail situation just discussed.

Some lesser process than what is required to deny bail may well be legitimate here, where the freedom involved is not that of avoiding imprisonment but "only" the Constitutionally protected right to work in a chosen profession.<sup>20</sup> But recognizing that "something less" may suffice is not an acknowledgment that "nothing at all" will do. Instead, I believe that, whether by approaching his employer in advance, or by crafting an Enforcement Order that set out flexible conditions to be finalized later with employer cooperation, the enforcement authorities, and their counsel, should have attempted to develop measures that would have achieved balance and coherence, i.e., by keeping Mr. Geisen in

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<sup>19</sup> *See also* Transcript of Initial Pre-Hearing Conference (Mar. 22, 2006) at 49-50, where the Board inquired as to whether Mr. Geisen might hold a position in the industry that would result in a lesser adverse interim impact upon him directly, but also preserve the values in which the Staff was trying to protect.

<sup>20</sup> *See Geisen*, LBP-06-13, 63 NRC at 547 n.89, citing *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring) (noting that the "right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence" and that it "is a large ingredient in the civil liberty of the citizen"), and 557 n.118, citing *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable Governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment").

his job while protecting the community in which he was working, just as the Staff apparently had done via maintaining awareness of his situation during the preceding 28 months it took to reach its decision. Tr. at 2277.

That this notion of developing protective conditions is not fanciful is confirmed by the Government's recently-demonstrated ability, in the parallel criminal case, to come up with a condition to impose upon Mr. Geisen were the District Court to permit him to return to his job. To be sure, that Court's recent ruling<sup>21</sup> flatly rejected (at 4) the Government's proposed condition — that Mr. Geisen “notify any NRC personnel he comes into contact with of the fact of his felony convictions.” But the salient point is this: we learned that the Government indeed had the wherewithal to suggest such a condition (albeit a then-misguided one) at the *end* of the case. *This surely teaches that the Government also has the capability* — if it cares to exercise it — *to suggest appropriate conditions* under which a person like Mr. Geisen, or any future targets, might be allowed to keep a job at the *outset* of a case.

### III. CONCLUSION

How this situation could be avoided in the future might require careful analysis of the practical workings of the relevant regulations allowing a sanction to be immediately effective, so as to balance in each proceeding the agency's acknowledged need for emergency authority to ban imminent threats from the workplace with the target's right to pursue a career without unjustified interference. What also might be needed is to require, when an immediately effective ban is under consideration, that the Staff make available the preenforcement procedures (favored also by the Dissent, *see* note 11, above) that the evidence revealed it sometimes invokes but chose not to utilize here.

Importantly, the agency ought also to be prepared to develop and to impose conditions protective of public health and safety that, while somewhat limiting the target's freedom of activity, would in appropriate cases preserve a target's freedom of employment pending litigation. This would negate any inference that interim immediately effective measures are being imposed illegitimately, to punish the target for perceived *prior* misconduct, rather than appropriately, to protect the public from potential *future* misconduct during the litigation.

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<sup>21</sup> While the drafting of these additional views was nearing completion, we were informed that the District Court had granted relief from the job-ban terms of the probation initially imposed in the criminal case (relief that the District Judge had indicated at the outset could well be forthcoming, as the Board Decision had noted (*see* 70 NRC at 689). Memorandum Opinion and Order, *United States v. Geisen*, No. 3:06 CR 712 (N.D. Ohio, Dec. 2, 2009).

In short, I respectfully suggest, once again, that the Commission might wish to undertake to reform the agency's application of its regulations.<sup>22</sup>

Michael C. Farrar  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 11, 2009

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<sup>22</sup> See *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 497-508 (2008) (concurring opinion).

## **Dissenting Opinion of Judge E. Roy Hawkens**

This enforcement proceeding raises two issues: (1) whether, as charged in the January 2006 Enforcement Order, Mr. Geisen knowingly provided the NRC Staff with information regarding the Davis-Besse reactor vessel head that was not complete or accurate in material respects; and (2) whether the 5-year sanction imposed by the Enforcement Order is reasonable. Contrary to the Majority Decision, I believe both issues should be resolved in the affirmative.

Regarding the first issue, Mr. Geisen *concedes* that information he provided to the NRC between September and November 2001 was materially incomplete and inaccurate. He argues, however, that he did not *know* the information was materially incomplete and inaccurate when it was provided to the NRC. I am constrained to reject Mr. Geisen's argument for two alternative reasons. First, in my judgment, Mr. Geisen's criminal conviction for *knowingly* providing the NRC with materially incomplete and inaccurate information precludes him, pursuant to the collateral estoppel doctrine, from relitigating the issue of whether he had the requisite knowledge (*infra* Part I). Second, even if the doctrine of collateral estoppel does not apply, I believe the NRC Staff showed by a preponderance of the evidence that Mr. Geisen had the requisite knowledge (*infra* Part II).

Regarding the second issue, given the gravity and circumstances of Mr. Geisen's offense, I conclude the 5-year sanction was reasonable and should be sustained (*infra* Part III).

I therefore respectfully dissent from the Majority Decision.

### **I. THE COLLATERAL ESTOPPEL DOCTRINE ESTABLISHES THAT MR. GEISEN *KNOWINGLY* PROVIDED THE NRC WITH MATERIALLY FALSE INFORMATION**

#### **A. The Four Elements for Applying Collateral Estoppel Are Satisfied**

The collateral estoppel doctrine "precludes the relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies" (*Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977)). The doctrine is grounded on "considerations of economy of judicial time and [the] public policy favoring the establishment of certainty in legal relations" (*Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948)). The doctrine also promotes the compelling public interest in "preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results" (*Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 330 (9th Cir.

1995) (quoting 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4403 (2d ed. 1987)). *Accord Gilbert v. Ferry*, 413 F.3d 578, 580 (6th Cir. 2005) (“purposes of collateral estoppel are to shield litigants (and the judicial system) from the burden of re-litigating identical issues and to avoid inconsistent results”).

The following four elements must be satisfied before a tribunal may apply collateral estoppel:

- i. the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
- ii. determination of the issue must have been necessary to the outcome of the prior proceeding;
- iii. the party against whom estoppel is sought (or its privy) must have had a full opportunity to litigate the issue in the prior proceeding; and
- iv. the prior proceeding must have resulted in a final judgment on the merits.

*See Hamilton’s Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007); *accord Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff’d*, ALAB-575, 11 NRC 14 (1980).

The NRC Staff argues that Mr. Geisen’s conviction in October 2007 in the U.S. District Court for the Northern District of Ohio for “knowingly” providing materially incomplete and inaccurate information to the NRC Staff triggers the collateral estoppel doctrine and precludes him from now arguing that he did not “knowingly” provide the NRC with materially incomplete and inaccurate information in Davis-Besse’s Serial Letter 2744 of October 2001. I agree.

By way of background, on January 4, 2006, the NRC issued an immediately effective Enforcement Order that barred Mr. Geisen from engaging in NRC-licensed activities for 5 years. *See Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)* (Jan. 4, 2006) [hereinafter Enforcement Order]. This sanction was based on the NRC’s conclusion (*id.* at 6) that between September and November 2001 Mr. Geisen knowingly provided the NRC with written and oral information regarding the Davis-Besse reactor pressure vessel head that was materially incomplete and inaccurate, in violation of 10 C.F.R. § 50.5(a)(2).<sup>1</sup>

Shortly thereafter, on January 19, 2006, a Grand Jury in the Northern District of Ohio returned a five-count criminal indictment against Mr. Geisen. Like the Enforcement Order, the indictment charged that between September and November 2001 Mr. Geisen knowingly provided the NRC with written and oral

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<sup>1</sup> Section 50.5(a)(2) proscribes a person from “[d]eliberately submit[ting] to the NRC . . . information that the person . . . knows to be incomplete or inaccurate in some respect material to the NRC” (10 C.F.R. § 50.5(a)(2)).

information regarding the Davis-Besse reactor pressure vessel head that was materially incomplete and inaccurate. *See* Attachment 1 to NRC Staff Motion for Collateral Estoppel (Nov. 17, 2008).

The criminal charges against Mr. Geisen were tried before a jury in October 2007. Mr. Geisen did not dispute that the information submitted to the NRC regarding the Davis-Besse reactor vessel head was materially incomplete and inaccurate. Nor did he dispute that he received and read numerous e-mails, correspondence, and other documents that arguably put him on notice that the information submitted to the NRC was materially incomplete and inaccurate. Rather, he argued he did not pay sufficient attention to those communications and, in any event, he did not then construe them in a way that gave him knowledge.

The trial lasted 11 days. During the recitation of jury instructions, the district court (Judge David A. Katz) explained that “the term ‘knowingly and willfully’ requires proof that the defendant made a statement or caused a statement to be made, with the knowledge that it was false with the intent to deceive” (Criminal Trial Transcript [hereinafter Trial Tr.] at 2236, *United States v. Geisen*, No. 3:06CR712 (N.D. Ohio)). The district court also granted the prosecution’s request to give the jury a “deliberate ignorance” instruction. Pursuant to that instruction, the jury was instructed it could find that Mr. Geisen had knowledge if it were “convinced [beyond a reasonable doubt] that [he] deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements” (Trial Tr. at 2238).

On October 30, 2007, the jury rendered a general verdict<sup>2</sup> finding Mr. Geisen guilty of three of the five counts. First, the jury found him guilty of Count 1, which charged that Mr. Geisen between September 4, 2001, and November 14, 2001, “did knowingly and willfully conceal and cover up, and cause to be concealed and covered up, . . . material facts . . . [concerning] the condition of Davis-Besse’s reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head” (Attachment 1 to NRC Staff Motion for Collateral Estoppel at 6). Second, the jury found Mr. Geisen guilty of Count 3, which charged that he “did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2741 [dated October 30, 2001], knowing that it contained . . . material statements, which were fraudulent,” concerning the Davis-Besse reactor

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<sup>2</sup> As relevant here, a general verdict is one where the jury renders a conviction without distinguishing the theory on which the conviction is based. In contrast, a special verdict is one where the jury answers specific questions submitted to it, thus enabling the court to determine the theory underlying the conviction. *See* Fed. R. Civ. P. 49.



vessel head (*id.* at 11).<sup>3</sup> Finally, the jury found Mr. Geisen guilty of Count 4, which charged that he “did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2744 [dated October 30, 2001], knowing that it contained . . . material statements, which were fraudulent,” concerning the Davis-Besse reactor vessel head (*id.* at 12).<sup>4</sup>

Mr. Geisen has appealed his conviction to the U.S. Court of Appeals for the Sixth Circuit (*United States v. Geisen*, No. 08-3655 (6th Cir.)), and his appeal is pending.

I agree with the NRC Staff that Mr. Geisen’s conviction on Counts 1, 3, and 4 for “knowingly” providing the NRC with materially incomplete and inaccurate information satisfies the four elements for applying collateral estoppel, thus precluding him from now arguing that he did not “knowingly” provide the NRC with materially incomplete and inaccurate information in Serial Letter 2744.

First, the precise issue raised in the instant case — i.e., whether Mr. Geisen “knowingly” provided the NRC with information that was materially incomplete and inaccurate — was raised and actually litigated in the criminal trial. The jury found Mr. Geisen guilty of “knowingly” providing materially incomplete and inaccurate information to the NRC (Trial Tr. at 2569).

The second element for applying collateral estoppel is likewise satisfied, because the jury’s determination that Mr. Geisen “knowingly” provided the NRC with materially incomplete and inaccurate information was necessary to the outcome of the criminal trial. As indicated in the indictment (Attachment 1 to NRC Staff Motion for Collateral Estoppel), “knowledge” was a necessary element for each of the charged offenses and, accordingly, Mr. Geisen could not have been convicted absent the jury’s determination that he acted with “knowledge.”

The third element is also satisfied. Mr. Geisen not only had a full opportunity at the 11-day criminal trial to litigate whether he had the requisite knowledge, he fully availed himself of that opportunity. Mr. Geisen was represented by experienced attorneys who skillfully and zealously — albeit unsuccessfully —

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<sup>3</sup> Although Serial Letter 2741 was not referenced in the Enforcement Order, materially false statements contained in that Serial Letter are identical to materially false statements contained in Serial Letter 2744, which was referenced in the Indictment (Count 4) and the Enforcement Order. *See* NRC Staff Exh. 77 at 9-10.

<sup>4</sup> The jury did *not* convict Mr. Geisen on the following two Counts: (1) Count 2, which charged that Mr. Geisen “did knowingly and willfully make [and] use . . . a false writing, that is, a letter to the [NRC] identified as Serial Letter 2735 [dated October 17, 2001]” (Attachment 1 to NRC Staff Motion for Collateral Estoppel at 10); and (2) Count 5, which charged that Mr. Geisen “did knowingly and willfully cause others to make and use a false writing, that is, a letter to the [NRC] identified as Serial Letter 2745 [dated November 1, 2001]” (*id.* at 14). The NRC Staff explains (*infra* Part I.B.1) that the jury’s verdict means it found the evidence showed beyond a reasonable doubt that, subsequent to October 17, Mr. Geisen knew his representations to the NRC were materially incomplete or inaccurate.

endeavored to cast doubt on the Government’s claim that Mr. Geisen acted with knowledge. *See, e.g.*, NRC Staff Exh. 71 (transcript of Mr. Geisen’s testimony at criminal trial); Trial Tr. at 2426-63 (transcript of closing argument at Mr. Geisen’s criminal trial).

Finally, the fourth element for applying collateral estoppel is satisfied because Mr. Geisen’s criminal trial resulted in a final judgment on the merits. That Mr. Geisen has appealed his conviction to the U.S. Court of Appeals for the Sixth Circuit does not alter this conclusion. In the collateral estoppel context, “[t]he law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court’s holding” (*Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) (quoting *SSIH Equipment S.A. v. U.S. International Trade Commission*, 718 F.2d 365, 370 (Fed. Cir. 1983)).<sup>5</sup>

In sum, the collateral estoppel doctrine applies here and mandates the conclusion that Mr. Geisen “knowingly” provided materially incomplete and inaccurate information to the NRC. Indeed, because the standard of proof is much higher in a criminal proceeding (beyond a reasonable doubt) than in this administrative

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<sup>5</sup>This is not to say that the outcome of an appeal of a judgment underlying the application of collateral estoppel is irrelevant to the doctrine’s application. For example, if a tribunal were to render an adverse ruling against a party based exclusively on the collateral estoppel doctrine, and if the underlying judgment on which the tribunal relied were subsequently reversed in a manner that cast doubt on the tribunal’s application of collateral estoppel, the party against whom collateral estoppel had been applied would be entitled to file a timely motion with the tribunal seeking appropriate relief in light of the new, appellate development. *See Davis-Besse*, ALAB-378, 5 NRC at 560-61.

The Majority Decision relies on the pendency of Mr. Geisen’s criminal appeal as a basis to refrain, as a matter of discretion, from applying collateral estoppel (pp. 712-15). This is error. Where, as here, the four elements for applying collateral estoppel are satisfied, and no “overriding” public policy consideration dictates against its application, this Board should not withhold the application of collateral estoppel as a discretionary matter. *See Davis-Besse*, ALAB-378, 5 NRC at 563 n.7. The Majority Decision’s contrary conclusion subverts the “public policy favoring establishment of certainty in legal relations” (*Sunnen*, 333 U.S. at 597), and it generates “corrosive disrespect” for adjudicative tribunals where, as here, the identical issue is “twice litigated to inconsistent results” (*Clements*, 69 F.3d at 330). The Majority Decision attempts to justify its exercise of discretion by arguing that its decision will end the delays that have “been inequitably borne . . . through Mr. Geisen’s long-standing inability to obtain a ruling on whether he can return to his chosen career” (p. 714). The Majority ignores that Mr. Geisen had a remedy for promptly challenging the immediately effective aspect of the Enforcement Order, but he elected not to avail himself of that remedy (*infra* note 45). He was then convicted of a crime that is identical to a charge in the Enforcement Order which, at the least, provides “substantial assurance that the [Enforcement Order was] not baseless or unwarranted” (*Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240 (1988)). Under these circumstances, the Majority’s characterization of the delays borne by Mr. Geisen as *inequitable* is not tenable. In any event, equity is not served, nor is discretion permissibly exercised, by a collateral estoppel analysis that, like the Majority’s analysis, fails to adhere to governing legal principles and case law.

enforcement proceeding (preponderance of the evidence), Mr. Geisen's criminal conviction *a fortiori* compels the conclusion here that he had knowledge.

**B. Mr. Geisen's Arguments Against Applying Collateral Estoppel  
Lack Merit**

Mr. Geisen argues that collateral estoppel does not apply here for two independent reasons: (1) the jury rendered inconsistent verdicts on the issue of knowledge; and (2) the jury might have convicted him based on a deliberate ignorance theory, and if it did, the verdict did not include a knowledge component that satisfies the NRC's regulatory standard in 10 C.F.R. § 50.5(a)(2). Neither argument has merit.

***1. The Jury Did Not Render Inconsistent Verdicts***

Mr. Geisen argues that the collateral estoppel doctrine does not apply here, because the jury rendered inconsistent verdicts regarding whether he had knowledge, and collateral estoppel cannot be applied in light of this inconsistency. More specifically, Mr. Geisen points out that the jury acquitted him on Count 5, which charged that he "knowingly" made a false statement through the submission of Serial Letter 2745, which included the assertion that "during 10 RFO, in spring of 1996, the entire head was visible so 100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head." See Opposition of David C. Geisen to NRC Staff's Motion for Collateral Estoppel at 3 (Nov. 26, 2008) [hereinafter Geisen Nov. 2008 Opposition]. The language of this charge, for which he was acquitted, was identical to language used in earlier Serial Letters that formed the basis of charges in Counts 3 and 4 for which he was convicted. Mr. Geisen argues that the jury's decision to acquit on Count 5 but to convict on Counts 3 and 4 cannot be rationally reconciled, and the jury's irrational resolution of this issue cannot provide the basis for collateral estoppel (*id.* at 3-4).

Contrary to Mr. Geisen's understanding, there is no irrationality or inconsistency in the verdicts rendered by the jury.

At the outset, it must be emphasized that the jury — insofar as it found Mr. Geisen guilty on Counts 1, 3, and 4 — necessarily made a factual determination that Mr. Geisen "knowingly" provided the NRC Staff with information that was materially incomplete and inaccurate. There is nothing ambiguous about that conclusion, and the jury's decision to acquit Mr. Geisen on Count 5 must be considered in that light.

So considered, the jury's verdicts are easily reconciled. Serial Letter 2745 contained Davis-Besse's probabilistic risk assessment, which apprised the NRC Staff of the risk significance of possible undetected CRDM nozzle cracks that could lead to loss-of-coolant accidents, core damage, and radioactive release.

Because the NRC Staff made the undisputed representation to this Board that the district court restricted the prosecution from presenting evidence or argument to the jury explaining the basis of Serial Letter 2745 (NRC Staff Motion for Collateral Estoppel at 20), it might reasonably be concluded that the jury felt it did not have enough evidence to satisfy the reasonable doubt standard for rendering a guilty verdict on Count 5. Additionally, the statement in Serial Letter 2745 that contained the materially incomplete and inaccurate information was located under the heading “Assumptions,” so it might reasonably be concluded that the jury did not treat the statement as a factual assertion that would warrant a conviction. Either of these reasons standing alone, and certainly both of them considered together, demonstrates the error of Mr. Geisen’s assertion that the jury rendered irrational or inconsistent verdicts that preclude the application of collateral estoppel.

To be sure, it is possible for a jury to render verdicts that *cannot* be reconciled, and in such a case, “principles of collateral estoppel — which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict — are no longer useful” (*United States v. Powell*, 469 U.S. 57, 68 (1984)). But a tribunal ought not blithely conclude that a jury acted irrationally. An approach that uncritically attributed irrational behavior to a jury would fly in the face of a fundamental tenet of our jury system that assumes the jury complies with the instructions provided by the trial court. *See United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995). Moreover, such an approach would be in tension with the principle that a tribunal, when considering the applicability of collateral estoppel, may not look behind the decision to determine “whether its findings of fact and conclusions of law were well founded” (*Davis-Besse*, ALAB-378, 5 NRC at 562).

Here, there is no question that the NRC Staff (the party moving for collateral estoppel) established that the jury — insofar as it found Mr. Geisen guilty on Counts 1, 3, and 4 — necessarily made a factual determination that would bar a retrial on the issue of knowledge. That the jury acquitted Mr. Geisen on Count 5 does not impugn that conclusion, because the acquittal may reasonably be reconciled with the convictions.

The jury’s decision to acquit Mr. Geisen on Count 2 can likewise be reconciled with its decision to convict him on Counts 1, 3, and 4. The verdicts can reasonably be understood to mean that the jury was not convinced beyond a reasonable doubt that Mr. Geisen knew, *prior to October 17, 2001*, that the representations he was making to the NRC contained information that was materially incomplete or inaccurate. Rather, the “evidence presented at trial showed a crescendo of knowledge attributable to Mr. Geisen” such that a reasonable juror would have found that, *subsequent to October 17, 2001*, he *knew* his representations to the NRC contained information that was materially incomplete or inaccurate (NRC Staff Motion for Collateral Estoppel at 20-21).

## **2. *A Conviction Based on Deliberate Ignorance Is Not a Bar to Collateral Estoppel***

Mr. Geisen also argues that the collateral estoppel doctrine does not apply here because the district court gave the jury a “deliberate ignorance” instruction that, he claims, permitted the jury to convict him for negligence, not knowledge.<sup>6</sup> Because the jury rendered a general verdict (*see supra* note 2) that might have been based on either a “knowledge” theory or a “deliberate ignorance” theory, Mr. Geisen argues that the Board cannot be certain the jury necessarily found he acted with knowledge and, accordingly, he is not precluded by collateral estoppel from relitigating whether he acted knowingly (Geisen Nov. 2008 Opposition at 5).

Mr. Geisen’s argument reflects a fundamental misunderstanding of the “deliberate ignorance” theory. To the extent the jury convicted Mr. Geisen based on deliberate ignorance, it necessarily found he acted knowingly, not negligently.

In this regard, it is important to recognize that “knowledge” is an essential element of each Count in the Indictment (Attachment 1 to NRC Staff Motion for Collateral Estoppel). The district court emphasized this point in its instructions to the jury, advising them that: (1) a conviction on any Count required a finding that Mr. Geisen acted “knowingly and willfully” (Trial Tr. at 2333, 2335); and (2) the term “knowingly and willfully” required proof beyond a reasonable doubt that Mr. Geisen caused the false statement to be made “with the knowledge it was false and with the intent to deceive” (*e.g.*, Trial Tr. at 2334).

Stating that it “want[ed] to explain something about proving a defendant’s knowledge” (Trial Tr. at 2338), the district court instructed the jury on “deliberate ignorance” as follows:

No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that a defendant deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements . . . . But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements and that the defendant deliberately closed

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<sup>6</sup>Courts employ several phrases interchangeably with “deliberate ignorance,” including “willful blindness” and “deliberate shutting of the eyes.” *See* Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2257 n.2 (1993). The district court here employed the phrase “deliberate ignorance,” which is likewise used in the Sixth Circuit Criminal Pattern Jury Instructions, ch. 2.09.

his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict.

Trial Tr. at 2338-39.<sup>7</sup>

Based on the above instruction, if the jury found Mr. Geisen was “deliberately ignorant,” the conviction was — *as a matter of law* — based on a finding that Mr. Geisen had “knowledge.” Restated, if Mr. Geisen was convicted for “deliberate ignorance,” the jury concluded the evidence showed beyond a reasonable doubt that Mr. Geisen had *knowledge* of a “high probability that the submissions and presentations to the NRC concealed material facts or included false statements” (Trial Tr. at 2339) and he thus acted *knowingly*. See *United States v. Heredia*, 483 F.3d 913, 922 n.13 (9th Cir. 2007) (*en banc*) (deliberate ignorance “is tantamount to knowledge”); *United States v. Guerrero*, 114 F.3d 332, 344 n.12 (1st Cir. 1997) (same).

The conclusion that a finding of “deliberate ignorance” is a proxy for a finding of “knowledge” is supported by the definition of “knowledge” in the Model Penal Code, which has guided the Supreme Court in determining the intended scope of the word “knowing” in the criminal context. See, e.g., *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969). The definition of knowledge in the Model Penal Code states that “[w]hen knowledge of the existence of a particular fact is an element of an offense, such *knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist*” (*ibid.*) (quoting Model Penal Code § 2.02(7) (1962) (emphasis added)). That the deliberate ignorance instruction, unlike the Model Penal Code definition of knowledge, does not contain the phrase “unless [the defendant] actually believes [the fact] does not exist,” does not alter the conclusion that a finding of deliberate ignorance is equivalent to a finding of knowledge, because the deliberate ignorance theory “focuses on defendant’s actual beliefs and actions” (*Heredia*, 483 F.3d at 919 n.6). Thus, a defendant who actually believes a fact does *not* exist despite a high probability of its existence would not be guilty of deliberate ignorance pursuant to either the good-faith belief exception (*supra* note 7) or the “[c]arelessness,

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<sup>7</sup>Notably, the district court instructed the jury that if Mr. Geisen acted in “good faith,” he was not guilty of criminal conduct (Trial Tr. at 2238). The district court explained:

A person who acts . . . on a belief of an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct . . . [T]he term good faith . . . encompasses, among other things, a belief or opinion honestly held . . . . The burden of proving good faith does not rest with the defendants because the defendants do not have any obligation to prove anything in this case.

Trial Tr. at 2337-38. Thus, the jury was well aware it must acquit if it believed Mr. Geisen’s actions were the result of an honest mistake in judgment or an honest error in management.

or negligence, or foolishness” exceptions (Trial Tr. at 2339), which were both explained in the jury instructions.

Although the Majority Decision disagrees with the above analysis (p. 721 n.89), it errs in rejecting it, because it is an analysis that is (1) guided by Supreme Court precedent and the Model Penal Code, and (2) mandated by the plain language of the jury instructions.

Thus, for purposes of applying collateral estoppel here, it matters not if the jury concluded Mr. Geisen had actual knowledge to a 100% certainty, or if it concluded pursuant to the deliberate ignorance theory that he had knowledge to a high probability of certainty. Consistent with Supreme Court precedent (*Leary*, 395 U.S. at 46 n.93) and the Model Penal Code, either conclusion means the jury found he acted “knowingly” — that is, he acted “with the knowledge [the representations were] false” (Trial Tr. at 2334), which satisfies the element of knowledge the NRC Staff must show in this proceeding and precludes Mr. Geisen from relitigating the issue of knowledge.<sup>8</sup>

Mr. Geisen’s assertion that a conviction based on deliberate ignorance could have been based on negligence rather than knowledge is negated by the district court’s instruction to the jury that “[c]arelessness, or negligence, or foolishness on [Mr. Geisen’s] part is not the same as knowledge and is not enough to convict” (Trial Tr. at 2339; *see also supra* note 7). The Sixth Circuit repeatedly has recognized that the plain language of the Sixth Circuit Pattern Jury Instruction on deliberate ignorance (which the district court gave in this case) “forecloses the possibility” that a jury will “convict on the basis of negligence” (*United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995)). As the *en banc* Ninth Circuit stated, a “jury is presumed to follow the instructions given to it, and we see no reason to fear that juries will be less able to do so when trying to sort out a criminal defendant’s state of mind than any other issue” (*Heredia*, 483 F.3d at 923) (internal citation omitted). *See also id.* at 924 (“Recklessness or negligence never comes into play

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<sup>8</sup> As the *en banc* Ninth Circuit recently explained in *Heredia*, the “deliberate ignorance instruction defines when an individual has sufficient information so that he can be deemed to ‘know’ something” (483 F.3d at 920 n.10) — namely, when the evidence shows beyond a reasonable doubt that the individual had knowledge of a critical fact to a high probability of certainty. To be sure, the knowledge component of the deliberate ignorance theory is slightly less than knowledge to a 100% certainty in that the defendant “does not take the final step to confirm that knowledge” (*ibid.*), or the prosecutor’s case is based on circumstantial evidence that precludes establishing defendant’s knowledge to a 100% certainty (*United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004)). This difference, however, does not alter the fact that deliberate ignorance in the criminal context is “tantamount to knowledge” (483 F.3d at 922 n.13), and is sufficient to satisfy the requirement for knowledge in the instant case. The Majority Decision’s contrary view cannot be reconciled with Supreme Court precedent or the Model Penal Code, both of which recognize that a person has knowledge if he or she “is aware of a high probability of its existence, unless he [or she] actually believes that it does not exist” (*Leary*, 395 U.S. at 46 n.93) (quoting Model Penal Code § 2.02(7) (1962)).

[in the deliberate ignorance instruction], and there is little reason to suspect that juries will import these concepts . . . into their deliberations”).

More fundamentally, deliberate ignorance is “categorically different from negligence or recklessness” (*Heredia*, 483 F.3d at 918 n.4). A deliberately ignorant defendant is one who was aware of the high probability of a critical fact, but deliberately ignored that probability. In sharp contrast, a reckless defendant “is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; [and] a negligent defendant is one who should have had similar suspicions but, in fact, did not” (*ibid.*). Deliberate ignorance thus is materially different from negligence and recklessness, because the latter two theories “require[] a consciousness of something far less than . . . probability” (Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2239 (1993)).

Nor is there merit to Mr. Geisen’s assertion that a conviction for deliberate ignorance is effectively a conviction for careless disregard which, he argues, would not satisfy the intentional component of the NRC’s “deliberate misconduct” standard. *See* David Geisen’s Response to the Board’s Questions at 6-7 (Feb. 9, 2009). First, this assertion disregards the district court’s instruction that the jury could not convict Mr. Geisen of acting knowingly based on deliberate ignorance if it found his actions resulted from “[c]arelessness, or negligence, or foolishness” (Trial Tr. at 2339). Second, and in any event, a deliberately ignorant defendant deliberately engages in misconduct *despite* knowing to a “high probability” of certainty that the action is wrongful (*ibid.*); in other words, although the defendant is deemed to know the critical facts underlying the misconduct, he or she “deliberately ignor[es]” those facts and proceeds to act wrongfully (Trial Tr. at 2338). As the *en banc* Ninth Circuit held, a conviction based on deliberate ignorance requires a finding that a defendant acted deliberately, and a “deliberate action is one that is ‘[i]ntentional; premeditated; fully considered’” (*Heredia*, 483 F.3d at 920) (quoting *Black’s Law Dictionary* 459 (8th ed. 2004)). A conviction based on deliberate ignorance thus satisfies the intentional component of the NRC’s deliberate misconduct standard.

The Majority Decision observes that the deliberate ignorance instruction has its most frequent usage in drug possession cases, where the defendant purports not to know, for example, what is in a package the defendant has been asked to deliver (p. 719). The Majority Decision suggests that exporting the instruction to nondrug cases, as was done in Mr. Geisen’s criminal proceeding, is ill-advised and may create a serious danger of confusing the jury (*ibid.*). The Majority’s concern is insubstantial. First, deliberate ignorance “is tantamount to knowledge” (*Heredia*, 483 F.3d at 922 n.13), a principal distinction being that courts generally refer to *actual* knowledge as knowledge derived from direct evidence, whereas knowledge based on the deliberate ignorance theory is derived from circumstantial evidence. *See Carney*, 387 F.3d at 449 (“if direct proof existed [of the defendant’s guilt] . . . ,



no need for any ‘deliberate ignorance’ instruction would have arisen”); *see also* Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2239 n.40 (1993). Thus, where — as in Mr. Geisen’s criminal proceeding — the prosecution must rely on circumstantial evidence to establish a defendant’s knowledge, the use of a deliberate ignorance instruction is unexceptional and entirely proper. Indeed, contrary to the Majority’s intimation, the deliberate ignorance instruction is given in myriad nondrug cases. *See, e.g., United States v. Ross*, 502 F.3d 521 (6th Cir. 2007) (bank fraud); *United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007) (mail fraud, wire fraud, and money laundering); *United States v. Beaty*, 245 F.3d 617 (6th Cir. 2001) (illegal gambling business); *United States v. Monus*, 128 F.3d 376 (6th Cir. 1998) (fraud, money laundering, and conspiracy). In any event, for present purposes, this Board is *required* to conclude the jury understood the trial court’s instructions and rendered well-founded findings of fact in compliance with those instructions. *See, e.g., Heredia*, 483 F.3d at 923-24; *Mari*, 47 F.3d at 785; *Davis-Besse*, ALAB-378, 5 NRC at 562. As the Majority Decision correctly observes, whether jury confusion was a problem in Mr. Geisen’s criminal proceeding is “a matter for the Sixth Circuit on direct appeal” (p. 720).<sup>9</sup>

### C. Waiver Does Not Foreclose the Application of Collateral Estoppel

Before ending the discussion on collateral estoppel, it is necessary to consider if — because the NRC Staff ultimately declined to take a position on whether collateral estoppel would apply to a conviction based on deliberate ignorance — the principle of waiver operates to foreclose applying collateral estoppel if the jury convicted Mr. Geisen based on deliberate ignorance. Although Mr. Geisen did not advance a waiver argument (*see* David Geisen’s Response to the Board’s Questions at 7 n.4 (Feb. 9, 2009)), I address it in the interest of analytical completeness. I conclude, based on compelling case law, that waiver does not foreclose the application of collateral estoppel.

Preliminarily, I note that during the course of this proceeding, the NRC Staff changed its position regarding the applicability of collateral estoppel to the

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<sup>9</sup>The Majority Decision errs in suggesting (p. 720) that subsequent Sixth Circuit precedent undermines the court’s holding in *Mari* that the deliberate ignorance instruction is sufficient to “foreclose[ ] the possibility” of error due to jury confusion (47 F.3d at 785). The Sixth Circuit cases listed above in text all cite *Mari* with approval. The single Sixth Circuit case cited by the Majority Decision (p. 720 n.85) is unreported, fails even to mention *Mari*, and — as a panel decision as opposed to an *en banc* decision — cannot overturn *Mari*’s holding in any event. In short, the decision in *Mari* regarding the adequacy and effectiveness of the deliberate ignorance instruction is binding precedent that will govern the Sixth Circuit’s resolution of Mr. Geisen’s criminal appeal, and it should likewise guide this Board in our resolution of this case. The Majority Decision’s contrary view is legal error.

deliberate ignorance theory. Prior to the evidentiary hearing, the Staff took the position that the level of knowledge necessary to show deliberate misconduct pursuant to 10 C.F.R. § 50.5(a)(2) materially exceeds the level of knowledge necessary for a criminal conviction under the deliberate ignorance theory and, accordingly, collateral estoppel would *not* apply if the jury — in rendering a general verdict (*supra* note 2) — convicted Mr. Geisen based on a finding of deliberate ignorance (NRC Staff Motion for Collateral Estoppel at 23). The Staff nevertheless urged this Board to apply collateral estoppel because, according to the Staff, this Board could reasonably conclude the jury convicted Mr. Geisen based on a finding of actual knowledge, not on a finding of deliberate ignorance.<sup>10</sup>

After the evidentiary hearing, this Board entertained further briefing and oral argument on collateral estoppel. At that juncture, the NRC Staff changed its position. It refrained from arguing that collateral estoppel would not apply to a conviction based on deliberate ignorance, arguing that because the record in the criminal case pointed to a conviction based on actual knowledge, the issue of whether collateral estoppel would apply to a conviction based on deliberate ignorance was “academic” and need not be addressed (Enforcement Proceeding Tr. at 2397). On that point, the record is clear: the Staff ultimately declined to take a position on whether collateral estoppel would apply to a conviction based on the deliberate ignorance theory.<sup>11</sup>

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<sup>10</sup>For the reasons discussed *supra* Part I.B.2, the NRC Staff was wrong as a matter of law in its belief that the knowledge component under section 50.5(a)(2) is materially different than the knowledge component for a criminal conviction under the deliberate ignorance theory. Knowledge based on deliberate ignorance (i.e., knowledge to a high degree of probability) is “tantamount to [actual] knowledge” (*Heredia*, 483 F.3d at 922 n.13) — they are two sides of the same coin, with the deliberate ignorance theory generally being used to establish a defendant’s knowledge in cases where the prosecutor’s case is based on circumstantial evidence that may not establish actual knowledge to a 100% certainty (*Carney*, 387 F.3d at 449). Thus, ironically, had the NRC Staff advanced a collateral estoppel argument based on deliberate ignorance, that argument would have been identical to the Staff’s collateral estoppel argument based on actual knowledge, which the parties fully briefed and argued.

<sup>11</sup>During oral argument on March 3, 2009, in response to the Board’s question “are you disavowing the applicability of collateral estoppel to the deliberate ignorance theory, or are you not taking a position,” the NRC Staff answered “[w]e’re not taking a position” (Enforcement Proceeding Tr. at 2397). Under further questioning from the Board, the NRC Staff confirmed that, in this case, it was “unwilling to take a position” on the applicability of collateral estoppel to the deliberate ignorance theory (*id.* at 2398). *See also* NRC Staff Response to Board Questions at 3 (Jan. 30, 2009) (“Because the application of collateral estoppel is premised upon a review of the factual record, it is not possible to definitively answer the question of whether collateral estoppel under the deliberate ignorance instruction can be applied to this proceeding. However, the Board need not reach that question since the evidence at the criminal trial unequivocally established that Mr. Geisen had [actual] knowledge . . . and that a reasonable jury would have so based its verdict.”).

(Continued)

My waiver analysis is based on the Staff's final litigation position — or, more precisely — its litigation *nonposition* regarding collateral estoppel. As is now shown, the NRC Staff's refusal to take a position on the applicability of collateral estoppel to deliberate ignorance does not trigger the principle of waiver to foreclose applying collateral estoppel here.

In *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 329-30 (9th Cir. 1995), the Ninth Circuit held that a party's failure to advance a collateral estoppel argument does not perforce trigger the waiver principle, thus precluding a tribunal from applying collateral estoppel. Rather, a tribunal retains discretion to overlook waiver in the collateral estoppel context, and its exercise of discretion should be based on a balancing of the relevant public and private interests (*ibid.*). *Accord Gilbert v. Ferry*, 413 F.3d 578, 580 (6th Cir. 2005) (Sixth Circuit cites *Clements* with approval and exercises discretion to overlook waiver in collateral estoppel context). Applying that approach here, on one side of the scale is the compelling public interest in “preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results” (*Clements*, 69 F.3d at 330) (quoting 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4403 (2d ed. 1987)). The private interest on the other side of the scale is the prejudice a litigant would suffer by being barred from relitigating the relevant issue — an interest that is insubstantial here, where Mr. Geisen had a “full and fair opportunity to

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As shown by the above record excerpts, the Majority Decision fails fairly to characterize the record when it avers (pp. 716-18) the NRC Staff did not ultimately decline to take a position on the applicability of collateral estoppel to the deliberate ignorance theory. Nor is there merit to the Majority Decision's assertion that “even if the Staff had changed its position [and declined to take a position regarding the applicability of collateral estoppel to deliberate ignorance], it would have come too late to be allowable” (p. 717). As the Majority Decision acknowledges, issues relating to collateral estoppel were “the subject of post-trial briefing and argument” (p. 711). Because this issue remained alive and subject to critical evaluation by the Board and the parties throughout this proceeding, the NRC Staff's decision to shift its position after the evidentiary hearing was not out of time. Finally, there is no merit to the Majority Decision's assertion that allowing the Staff to change its position on this legal issue after the evidentiary hearing would be “unfair to Mr. Geisen, whose evidentiary presentations had been tailored to the Staff's original theory” (p. 717). In this regard, the Majority Decision states that the “entire basis” of Mr. Geisen's defense was to establish he “actually believe[d] that” the information he was submitting was true” (p. 721 n.90). In other words, Mr. Geisen's evidentiary presentations were tailored to undermining the Staff's effort to show he *knew* the information submitted to the NRC was materially incomplete and inaccurate. Of course, this was also the entire basis of Mr. Geisen's defense at his criminal proceeding, and the jury rejected it. In any event, the determinative point is that because deliberate ignorance “is tantamount to knowledge” (*Heredia*, 483 F.3d at 922 n.13), Mr. Geisen's defense for purposes of applying collateral estoppel was unaffected by the Staff's post-trial decision to refrain from taking a position on the legal issue as to the applicability of collateral estoppel to the deliberate ignorance theory. Mr. Geisen therefore cannot legitimately claim that the Staff's changed position works an unfairness, and — to his credit — he did not advance such an argument.

actually litigate the issue [in the criminal proceeding] and did in fact litigate it” (*ibid.*).

Because Mr. Geisen fully litigated the issue of knowledge in the criminal proceeding (*supra* Parts I.A and I.B), he has no legitimate basis to claim he will be unfairly prejudiced by the application of collateral estoppel. Accordingly, the principle of waiver may be overlooked here, because a surpassing public interest favors applying collateral estoppel, and no countervailing interest militates against its application.

Even if — as the Majority Decision incorrectly contends — the NRC Staff had affirmatively argued throughout this proceeding that collateral estoppel would not apply if Mr. Geisen’s conviction had been grounded on the deliberate ignorance theory, this Board would not have been precluded from concluding that Mr. Geisen is collaterally estopped from relitigating the issue of knowledge. This is so because: (1) the NRC Staff consistently argued that collateral estoppel applies if Mr. Geisen’s conviction was based on a finding of knowledge; and (2) the legal issue of whether the jury convicted him based on a finding of knowledge was fully briefed, including the issue of whether deliberate ignorance is a proxy for knowledge. Neither this Board, nor the Commission, is constrained in the resolution of legal issues by a party’s misunderstanding of the law, provided the opposing party is not unfairly prejudiced. Hence, the NRC Staff’s erroneous understanding of the knowledge component of the deliberate ignorance theory (*see supra* note 10), which in turn shaped the Staff’s erroneous argument that the knowledge component of the deliberate ignorance theory did not satisfy the knowledge component of the Commission’s deliberate misconduct standard, did not preclude this Board from concluding, based on its analysis of relevant precedent, that Mr. Geisen’s conviction (regardless of the underlying theory) was grounded on a finding of knowledge. From that conclusion, it follows — as a matter of law — that collateral estoppel precludes Mr. Geisen from relitigating the issue of knowledge in this case.

The Majority Decision’s concern (pp. 725 n.103, 792-93 n.176) that applying collateral estoppel here will unfairly prejudice Mr. Geisen and improperly alter the nature of the charges in the Enforcement Order is insubstantial. As shown above, the conclusion that the knowledge component of the deliberate ignorance theory is the functional equivalent of actual knowledge is consistent with Supreme Court precedent, the Model Penal Code, and the plain language of the jury instructions. The Majority Decision’s dramatic declaration that this Dissent weaves a legal theory that is “wrong as to Mr. Geisen’s rights, and . . . is wrong as to a judge’s role” (p. 793) is thus an empty pronouncement, “full of sound and fury, signifying nothing” (William Shakespeare, *Macbeth* act 5, sc. 5).

**II. ALTERNATIVELY, A PREPONDERANCE OF RECORD  
EVIDENCE SHOWS THAT MR. GEISEN KNOWINGLY  
PROVIDED THE NRC WITH MATERIALLY FALSE  
INFORMATION**

Even if the collateral estoppel doctrine did not apply, I would sustain the charge in the Enforcement Order, because a preponderance of the evidence shows Mr. Geisen acted knowingly when he provided the NRC with materially incomplete and inaccurate information regarding the scope and efficacy of the Davis-Besse nozzle inspections. That Mr. Geisen had such knowledge is based on an abundance of record evidence that Mr. Geisen concedes he read, closely reviewed, discussed, or approved.<sup>12</sup>

Before reviewing that evidence, it is instructive to examine Mr. Geisen's background, which reveals he is a highly educated individual who, at all relevant times, had broad knowledge and experience in the operation and management of nuclear power plants.

Upon graduating from Marquette University in 1982 with a degree in Civil Engineering, Mr. Geisen was commissioned as a Naval Officer and selected for the Naval Nuclear Power Program (Enforcement Proceeding Tr. [hereinafter Tr.] at 1536). He was on active duty for 6 years, serving on a nuclear-powered submarine for 4 of those years (Tr. at 1536, 1538).

When he left the Navy in 1988, Mr. Geisen began work at Davis-Besse as a systems engineer in the Mechanical Systems group, where from 1988 to 1994 he had primary responsibility for the reactor coolant pumps and also had responsibility for certain containment-related components (Tr. at 1536, 1539).

From 1994 to 1996, Mr. Geisen was in the Senior Reactor Operation (SRO) program, training to become a reactor operator supervisor (Tr. at 1539-40). During that training, he learned "how the plant operates system by system . . . learning how to operate the plant and going through all the evolutions of basically becoming a control room operator" (Tr. at 1539-40).<sup>13</sup>

From 1996 to 2000, Mr. Geisen served as a Davis-Besse supervisor in the Electrical and Controls Group within Systems Engineering (Tr. at 1540).

In March 2000, Mr. Geisen became the Davis-Besse Design Basis Engineering Manager, which required him to manage about forty-two employees in the following five subgroups: nuclear engineering, mechanical design, instrumentation

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<sup>12</sup> Although the knowledge component of the NRC's "deliberate misconduct" standard would be satisfied by an evidentiary showing that Mr. Geisen had knowledge to a high probability of certainty (*see supra* Part I.B.2), I find the NRC Staff showed by a preponderance of the evidence that Mr. Geisen had knowledge to a 100% certainty (*see infra* Parts II.B and II.C).

<sup>13</sup> In 1995, Mr. Geisen earned a Master's Degree in Business Administration from Bowling Green State University (Tr. at 1537).

and electrical design, procurement engineering, and computer systems engineering (Tr. at 1548-53). At the same time, Mr. Geisen became a member of the Davis-Besse Project Review Group (PRG), which is a manager-level group that reviews, prioritizes, and recommends funding for proposed projects (Tr. at 1556-57). Mr. Geisen also became a member of the Davis-Besse Babcock & Wilcox Owner's Group (B&WOG) Steering Committee, which reviews input from various B&WOG working groups and makes recommendations to the B&WOG Executive Committee regarding the priority and funding of projects proposed by the working groups (Tr. at 1021, 1590).

During Davis-Besse's 12th refueling outage (RFO), which occurred in the Spring of 2000, Mr. Geisen served for about 2½ weeks as the engineering representative in Outage Central, where he acted as the point-of-contact for all engineering matters relating to the outage (Tr. at 1560-62). Prior to Davis-Besse entering its 12th RFO, Mr. Geisen received continuing training on the Boric Acid Corrosion Control (BACC) Program (*see* Staff Exh. 79 at 11-12, 40-41; Tr. at 1939), so he knew that if Davis-Besse represented it could view the reactor vessel head using the BACC Program, that meant it had "remove[d] the boron at least sufficiently enough to evaluate the base metal" (Tr. at 1939). *Accord ibid.* (Mr. Geisen acknowledges an inspection performed pursuant to the BACC Program means the inspector is "able to access [the] bare metal of the reactor vessel head").

In short, the record shows Mr. Geisen was a highly knowledgeable member of the Davis-Besse managerial team. His education and experience rendered him eminently capable of recognizing and understanding safety-sensitive information.<sup>14</sup>

Mr. Geisen nevertheless argues he was unaware the information he submitted to the NRC between September and November 2001 was materially incomplete and inaccurate. The Majority Decision accepts this argument, rendering a conclusion that, in my view, attributes profound negligence to Mr. Geisen. I do not believe the record supports that conclusion.

Rather, as shown below, I believe a preponderance of the evidence supports the conclusion that Mr. Geisen had the requisite knowledge to support the charge in the Enforcement Order because: (1) he *knew* Davis-Besse had an obligation to provide safety-sensitive information to the NRC regarding recent

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<sup>14</sup>The Majority Decision incorrectly asserts that during the 1996, 1998, and 2000 RFOs, "Mr. Geisen's responsibilities at Davis-Besse were entirely unrelated to the reactor vessel head" (p. 731). In fact, Mr. Geisen's collateral duties as the Davis-Besse Design Basis Engineering Manager in the Spring of 2000 (*infra* Part II.B.1), as well as his duties while serving in Outage Central during the 2000 RFO (*infra* Part II.B.2), included dealing with engineering issues related to the reactor vessel head (Tr. at 1562-63). In any event, Mr. Geisen is charged with knowingly providing the NRC with materially incomplete and inaccurate information in the Fall of 2001. That he had such knowledge is based on an overwhelming amount of record evidence that Mr. Geisen concedes he read, closely reviewed, discussed, or approved in 2000 and 2001. *See infra* Parts II.B.1 and II.B.2.

nozzle inspections, including a description of any limitations on accessibility that would impede visual inspections (*infra* Part II.A); (2) he *knew* the ability to inspect the nozzles visually was impeded due to Davis-Besse's inspection technique *and* due to substantial boron deposits on the reactor head (*infra* Parts II.B.1 and II.B.2); and (3) he nevertheless *knowingly* provided the NRC with material misrepresentations relating to inspection impediments and inspection results, because providing complete and accurate information regarding the inspections would have jeopardized Davis-Besse's ability to continue operating without interruption until its next scheduled RFO in Spring 2002 (*infra* Part II.C). The charge in the Enforcement Order should therefore be sustained.<sup>15</sup>

**A. Mr. Geisen Knew the August 2001 NRC Bulletin Required Davis-Besse to Submit Safety-Sensitive Information Regarding the Scope and Efficacy of Past Nozzle Inspections**

On August 3, 2001, the NRC sent Bulletin 2001-01 to all holders of operating licenses for pressurized water nuclear power reactors (PWRs), including Davis-Besse. Notably, this was the first Bulletin issued by the NRC since 1997 (Tr. at 1203). Mr. Geisen acknowledged the NRC's issuance of a Bulletin is a "significant event[ ]" (Tr. at 1813). He confirmed he "read the Bulletin from front to back" (Tr. at 1823) because, given its safety significance, he felt obliged to "become knowledgeable about" it (Tr. at 1813; *accord, e.g.*, Tr. at 1878 (Mr. Geisen acknowledges he "understood what the Bulletin was asking")).<sup>16</sup>

The Bulletin was triggered by the recent discovery at Oconee Nuclear Station Unit 2 of circumferential cracking in control rod drive mechanism (CRDM) nozzles, which "raised concerns about the potential safety implications and prevalence of cracking in [vessel head penetration (VHP)] nozzles in [other plants]" (NRC Staff Exh. 8 at 1). Circumferential cracking in these nozzles creates a grave safety concern due to the "potential for rapidly propagating failure of CRDM nozzles and control rod ejection, causing a loss-of-coolant accident" (*id.* at 6).<sup>17</sup>

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<sup>15</sup> Mr. Geisen concedes he provided the NRC with information that was materially incomplete and inaccurate (*see* NRC Staff Exh. 77). The sole issue here — as in his criminal trial — is whether he *knew* the information was materially incomplete and inaccurate at the time it was submitted to the NRC.

<sup>16</sup> Bulletins are the most significant of the NRC Staff's generic communications. They require responses from the licensees, and the NRC Staff evaluates each response to determine whether regulatory action is needed for the individual plant or for the industry (Tr. at 1201, 1202).

<sup>17</sup> There is no question that Mr. Geisen understood the severe risk to safety posed by the circumferential cracking of a nozzle. As he testified, this type of crack "obviously creates a huge safety concern from the standpoint that you've got this potential for a [loss-of-coolant accident]" (Tr. at 1811).

The discovery at Oconee revealed that a significant nozzle crack can develop and propagate with very little evidence of boric acid — as little as about 1 cubic inch (Tr. at 1208). The Bulletin advised licensees that the “presence of circumferential cracking at [Oconee], where only a small amount of boric acid residue indicated a problem, calls into question the adequacy of current visual examinations for detecting either axial or circumferential cracking in VHP nozzles” (NRC Staff Exh. 8 at 4).

Accordingly, the purpose of the Bulletin was to determine the status of CRDM nozzle inspections in every PWR plant, because the NRC did not have sufficient knowledge of the adequacy of previous or prospective inspections (Tr. at 1205). The Bulletin expressed special concern about whether licensees’ past nozzle inspections were impeded in any way that might impair the ability to detect small boric acid deposits that would be indicative of nozzle leakage evidencing circumferential cracking (Tr. at 1210). The Bulletin stated: “This is especially significant if prior existing boric acid deposits on the RPV head mask the identification of new deposits. Also, the presence of insulation on the RPV or other impediments might restrict an effective visual examination” (NRC Staff Exh. 8 at 4). The Bulletin therefore directed use of the following conservative approach for conducting nozzle inspections: “[B]oric acid deposits that cannot be dispositioned as coming from another source should be considered, as a conservative assumption, to be from VHP nozzles” (NRC Staff Exh. 8 at 4).

Thus, absent an ability to conclude definitively that a boric acid deposit was attributable to a source other than nozzle leakage, the licensee should assume the deposit was caused by a leaking nozzle and take appropriate corrective action.<sup>18</sup> Pursuant to this conservative approach, a licensee could not conclude that a known leaking flange was responsible for a boric acid deposit near a nozzle, and thus rule out the possibility of nozzle leakage, because flange leakage and nozzle leakage might exist simultaneously, and the former might mask the latter. *See* NRC Staff Exh. 8 at 7 (“An inability to provide assurance of a detectable residual deposit or to discriminate prior existing boric acid deposits caused by non-safety-significant sources from boric acid deposits caused by CRDM nozzle cracking could limit the effectiveness of visual examinations”). Hence, whenever boric acid deposits were found, further action would be required to identify the source.<sup>19</sup>

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<sup>18</sup> Boric acid deposits from a source other than a leaking nozzle — for example, from a leaking flange — tend to be light, snowflake-like deposits with low density that do not adhere to the vessel head and, thus, could be vacuumed or blown away with low-pressure air (Tr. at 1212-14, 1457). The Bulletin contemplated that boric acid deposits lacking these characteristics — e.g., deposits that were popcorn-like, or heavy, or nonwhite, or dense, or that adhered to the head — would trigger further action, such as volumetric examinations. *See* Tr. at 1211-12.

<sup>19</sup> As the Bulletin emphasized, “[o]ne aspect of conducting effective visual examinations that is  
(Continued)



The Bulletin classified plants in three different categories based on their susceptibility to circumferential cracking — high, moderate, and low — and each category imposed different requirements (NRC Staff Exh. 8 at 7-8; Tr. at 869-70). For plants, like Davis-Besse, in the high-susceptibility category, licensees were required to perform a “qualified visual examination of 100% of the VHP nozzles” to look for evidence of leakage that might be attributable to nozzle cracking (NRC Staff Exh. 8 at 8; *see also* NRC Staff Exh. 9 at 1; Tr. at 1206). The Bulletin admonished that:

the effectiveness of the qualified visual examination should not be compromised by the presence of insulation, existing deposits on the RPV head, or other factors that could interfere with the detection of leakage. Absent the use of a qualified visual examination, a qualified volumetric examination of 100% of the VHP nozzles (with a demonstrated capability to reliably detect cracking on the OD of a VHP nozzle) may be appropriate to provide evidence of the structural integrity of the VHP nozzles.

NRC Staff Exh. 8 at 8.

A “qualified visual examination” has two requirements (NRC Staff Exh. 8 at 8; Tr. at 1227): (1) the ability to view the nozzle-to-head interface on the reactor head to detect the existence of small boric acid deposits; and (2) a gap analysis that demonstrates a sufficient gap between the nozzle and the vessel head so a nozzle leak (if one existed) would manifest itself by depositing boric acid on the head. If either requirement was not satisfied, the inspection of a nozzle would not properly be characterized as a qualified examination, because it would not suffice to demonstrate the absence of nozzle leakage. *See* Tr. at 1230.

The Bulletin required licensees to provide to the NRC Staff within 30 days:

a description of the VHP nozzle and RPV head inspections (type, scope, qualification requirements, and acceptance criteria) that have been performed at your plant(s) in the past 4 years, and the findings. *Include a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual examinations.*

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common to all PWR plants is the need to successfully distinguish boric acid deposits originating with VHP nozzle cracking from deposits that are attributable to other sources” (NRC Staff Exh. 8 at 5). Because significant circumferential cracking may be revealed by the “presence of relatively small amounts of boric acid deposits . . . [there is an increased] need for more effective inspection methods to detect the presence of degradation in CRDM nozzles before the nozzle integrity is compromised” (*id.* at 6). The NRC Staff’s expert, Dr. Allen Hiser, testified that the conservative approach to addressing this concern was to assume all nozzles had leaks until you could verify each nozzle had a clean visual examination (Tr. at 1452).

NRC Staff Exh. 8 at 11 (emphasis added). Mr. Geisen testified he understood the Bulletin as requiring licensees to inspect each nozzle “on a per joint basis, and you’re trying to get a full 360-degree view of every single nozzle” (Tr. at 1820-22; *see also* Tr. at 1977). Further, he testified he knew that “neither one of [Davis-Besse’s] previous two inspections [in 1998 and 2000] would have met that qualification” (Tr. at 1821; *see also* Tr. at 1992).

Finally, the Bulletin stated that if the licensee had not recently performed a qualified visual examination, it must perform one before December 31, 2001, or “provide [its] basis for concluding that the regulatory requirements . . . will continue to be met until the inspections are performed” (NRC Staff Exh. 8 at 12).

**B. Mr. Geisen Knew That Davis-Besse’s Performance of Past Nozzle Inspections Was Impeded by Its Inspection Technique and by Significant Boron Deposits**

The Enforcement Order charges Mr. Geisen with knowingly providing the NRC with materially incomplete and inaccurate information between September and November 2001 relating to the scope and efficacy of Davis-Besse’s recent nozzle inspections (Enforcement Order at 14). In particular, Mr. Geisen is charged with falsely representing that Davis-Besse visually inspected all of the reactor head nozzles, that these inspections revealed no nozzle had leakage evidencing nozzle cracking and, accordingly, that Davis-Besse need not shut down by December 31, 2001, to further examine its nozzles for circumferential cracking (*id.* at 8-14). Contrary to Mr. Geisen’s assertion, the record shows he was well aware that Davis-Besse could not truthfully represent that its nozzle inspections sufficed to rule out nozzle cracking, because he *knew* the following impediments prevented Davis-Besse from visually inspecting all the nozzles in compliance with the Bulletin: (1) Davis-Besse employed a camera-on-a-stick inspection technique, which prevented access to at least nine of the reactor’s sixty-nine nozzles (i.e., 14% of the nozzles); and (2) Davis-Besse’s reactor head had significant and extensive boric acid deposits, which would have masked evidence of nozzle leakage for a substantial additional number of nozzles.<sup>20</sup>

**1. Mr. Geisen Knew That Davis-Besse’s Camera-on-a-Stick Inspection Technique Prevented Inspecting Nozzles at the Top of the Head**

Davis-Besse conducted visual inspections of the nozzles using a camera

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<sup>20</sup> The sixty-nine nozzles on the reactor head are arranged essentially as four concentric rings of sixty-eight nozzles surrounding a central nozzle (NRC Staff Exh. 7). The outer (first) ring has twenty-four nozzles, the second ring has twenty nozzles, the third ring has sixteen nozzles, and the fourth ring has eight nozzles (*ibid.*).

attached to the end of a rigid pole inserted at the bottom of the head through small openings called “mouse holes” (Tr. at 855-56, 867, 898-99). Due to the curved reactor vessel head and the limited access allowed by the small mouse holes, the camera-on-a-stick inspection technique did not allow the inspector to point the camera downward to view the nozzle-to-head interface for the nozzles on the top of the head (Tr. at 899-901). Hence, the camera-on-a-stick inspection technique prevented Davis-Besse from inspecting, at a minimum, the nine nozzles at the top of the reactor head. *See* Tr. at 899-901; NRC Staff Exh. 69 (pictorial representation of nozzles that could not be viewed in 1996 using the camera-on-a-stick inspection technique). Additionally, insulation located about 2 inches above the head hindered the ability to inspect the top nozzles (Tr. at 1822).

An abundant amount of evidence supports the conclusion that Mr. Geisen was aware that the camera-on-a-stick inspection technique used at Davis-Besse significantly impeded the performance of nozzle inspections of the type contemplated by the August 2001 Bulletin.<sup>21</sup> As early as 1994, a Davis-Besse modification request sought to cut large access holes in the service structure to allow greater access to the head (NRC Staff Exh. 16 at 166). This modification was necessary because — as reported by the individual who conducted the 1996 head inspection during the 10th RFO — the “extent of the inspection was limited to approximately 50 to 60% of the head area because of the restrictions imposed by the location and size of the mouse holes” (*id.* at 160; *accord* Tr. at 1031). The need for the modification was reiterated in 1997 by Davis-Besse supervisory officials, who recognized the need to “enlarge the inspection holes to permit inspection of . . . the CRDM nozzle penetrations of the head. Additionally, holes will be needed for access to the upper part of the head” (NRC Staff Exh. 16 at 163). The limited accessibility not only prevented inspection of a significant portion of the head using the camera-on-a-stick inspection technique, it prevented removal of all the boric acid deposits (as will be discussed in greater detail *infra* Part II.B.2). *See* NRC Staff Exh. 16 at 155, 157, 160; NRC Staff Exh. 79 at 183. The modification request was approved in 1998 and scheduled to be implemented in 2002 during the 13th RFO (NRC Staff Exh. 16 at 166).<sup>22</sup>

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<sup>21</sup> Mr. Geisen conceded he was aware these impediments prevented a full head inspection (Tr. at 1616, 1822-23, 1959, 1970). Indeed, he testified that after receiving the August 2001 Bulletin he “didn’t view the camera on a stick as even a viable option anymore . . . [because it] was too difficult to get the camera to the top of the head” (Tr. at 1880).

<sup>22</sup> Davis-Besse officials delayed implementing the modification until 2002, because they believed the risk of damage to the head or the nozzles was acceptably low (e.g., NRC Staff Exh. 16 at 154, 156, 166). Unfortunately, this belief became an unshakable mindset among Davis-Besse managers, including Mr. Geisen. *See, e.g.*, NRC Staff Exh. 31 at 3; NRC Staff Exh. 63; NRC Staff Exh. 71 at 1982. Notably, Mr. Geisen testified that, in retrospect, he believes Davis-Besse employees suffered

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In 2000, Mr. Geisen became aware of this scheduled modification for two reasons: (1) as Design Basis Engineering Manager, he had responsibility for this modification (Tr. at 1801, 1802-03); and (2) as a member of the PRG, he periodically reviewed the modification schedule (Tr. at 1557). Mr. Geisen testified he knew the modification was necessary because “they couldn’t get to the entire head using a camera on a stick through a [mouse] hole” (Tr. at 1959).

Mr. Geisen’s knowledge that access to the top of the reactor head was limited was reinforced by an April 29, 2000 issue of the Davis-Besse newsletter (Geisen Exh. 18), which addressed the difficulty in accessing and cleaning boric acid deposits at the top of the reactor head. The newsletter stated in pertinent part: “Due to a history of leaking Control Rod Drive Mechanism (CRDM) flanges on the Reactor Head, boric acid has built up in this area. Access to this area is very difficult due to the construction of the Service Structure surrounding the area” (*ibid.*). Mr. Geisen testified that it was his practice to read the newsletter the same day it issued (Tr. at 1587, 1847), and he understood this newsletter to state that access to the top of the vessel head was hindered by the mouse holes as well as the service structure (Tr. at 1848).

Mr. Geisen’s knowledge of the head inspection impediments was further reinforced by a memorandum dated July 12, 2001, which he received from one of his subordinates, Mr. Goyal, containing lessons learned for Davis-Besse regarding the performance of nozzle inspections (NRC Staff. Exh. 33).<sup>23</sup> One of the lessons identified in the memorandum (*id.* at 1) was that “[s]ervice structure access is needed in order to clean and inspect the head. (Note Davis-Besse does not have service structure holes).” Significantly, Mr. Geisen testified that this lesson would not have been new information to him (Tr. at 1860). He also testified he had taken steps to purchase a robotic rover for the 13th RFO to replace the camera-on-a-stick technique which, he said, would have obviated the need for the service structure

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from “technical arrogance” insofar as they attributed boric acid deposits solely to flange leakage and tended to ignore that the deposits may also be attributable to another source, such as nozzle cracking (NRC Staff Exh. 79 at 77). Of course, by ignoring that boric acid deposits might be attributable to nozzle cracking, Mr. Geisen acted in patent derogation of the NRC Bulletin (NRC Staff Exh. 8 at 4, 8, 11), a document he conceded he read in its entirety and understood (Tr. at 1823, 1878).

The Majority Decision appears to excuse Mr. Geisen’s material misrepresentations to the extent they represented a “mindset at Davis-Besse . . . that these deposits were indeed caused by flange leakage” (p. 748 n.133). But the fact that Mr. Geisen was convinced that the deposits were caused by flange leakage does not give him license — in disregard of the explicit directions in the NRC Bulletin — to provide the NRC with materially incomplete and inaccurate information regarding the scope and efficacy of the Davis-Besse nozzle inspections.

<sup>23</sup> This memorandum was characterized as a “trip report.” Pursuant to company policy, an employee who wished to be paid for travel expenses following a business trip was required to submit a trip report describing the trip’s business-related goals and achievements (Tr. at 1076-77). Mr. Geisen testified he received about three to four trip reports each month, and it was his practice to read all of them (Tr. at 1600).

access holes (Tr. at 1614-16). This demonstrates he was aware of the limitations posed by Davis-Besse's inspection technique of inserting a camera on a stick through the mouse holes.

On August 11, 2001, Mr. Geisen received an e-mail from Mr. Goyal detailing a meeting he attended to discuss the steps to be taken for preparing Davis-Besse's response to the NRC Bulletin (NRC Staff Exh. 36). The e-mail states: "It was pointed out that we can not clean our head thr[ough] the mouse holes and Andrew Siemaszko is requesting 3 large holes be cut in the Service Structure for viewing and cleaning" (*ibid.*). Mr. Geisen testified that he already knew about the request for cutting additional access holes in the Service Structure (Tr. at 1633), and this e-mail told him that with the mouse holes that were currently in place "[Davis-Besse was not] able to get enough access to clean the head" (Tr. at 1879). In other words, this e-mail informed Mr. Geisen, once again, that the Davis-Besse reactor head could *not* be fully cleaned — and thus *had not previously* been fully cleaned — through the existing mouse holes. Moreover, Mr. Geisen acknowledged that, after receipt of this e-mail and in light of the NRC Bulletin, he "knew" Davis-Besse's camera-on-a-stick inspection method "was no longer an option" because "[i]t was too difficult to get the camera up to the top of the head" through the existing mouse holes (Tr. 1879-80). Mr. Geisen thus correctly acknowledged that the August 11 e-mail was a "warning" that Davis Besse's inspection technique created an impediment to compliance with the NRC Bulletin (Tr. at 1874).

The foregoing evidence reveals that Mr. Geisen *knew* Davis-Besse's camera-on-a-stick inspection technique — which was employed during the 10th, 11th, and 12th RFOs — impeded effective nozzle inspections and, indeed, precluded the ability to inspect the nine nozzles at the top of the head (*see* Tr. at 899; *supra* note 21). He thus *knew* that at least 14% of the nozzles had not been inspected. *Cf.* NRC Staff Exh. 16 at 160 (modification request, which was under Mr. Geisen's cognizance, states that head inspection is "limited to approximately 50 to 60% of the head area because of the restrictions imposed by the location and size of the mouse holes"); *accord* Tr. at 1031.

The Majority Decision erroneously states that Mr. Geisen "was not aware that [the camera-on-a-stick inspection technique] physically precluded the ability to view all the nozzles" (p. 745). This statement is explicitly contradicted by Mr. Geisen's own testimony:

Question: [Y]ou knew the access holes were being requested in that modification because they couldn't get to the entire head using a camera on a stick through a weep hole. Isn't that correct?

Mr. Geisen: Correct.

Question: So you knew that it was not possible to see 100 percent of the head in 1996 [using the camera-on-a-stick technique]. Isn't that correct?

Mr. Geisen: I would say that's correct the way that's worded.

Tr. at 1959.

The Majority Decision's attempt to dismiss the above incriminating testimony is unpersuasive and unavailing (pp. 746-47). The above questions and answers went to the heart of a critical issue in this case. It is not plausible to conclude that Mr. Geisen misunderstood the questions or was unaware of the consequence of his answers. Nor is it plausible to conclude that Mr. Geisen's answers can be interpreted in any manner except that he "*knew* the access holes were being requested" because Davis-Besse "couldn't get to the entire head using a camera on a stick through a weep hole," and he "knew that it was not possible to see 100 percent of the head in 1996" using the camera-on-a-stick inspection technique (Tr. at 1959). The Majority Decision's contrary conclusion is clear error.

Nor is there merit to the Majority Decision's suggestion that Mr. Geisen was unaware that Davis-Besse used a camera-on-a-stick technique to inspect the head. In this regard, the Majority Decision states that "in 2000, [Mr. Geisen] . . . believed that a 'boroscope-type camera' was used instead [of a camera on a stick], affording much greater flexibility" (p. 746). Because the Enforcement Order charged Mr. Geisen with making material misrepresentations in 2001, Mr. Geisen's putative belief in 2000 regarding Davis-Besse's use of a boroscope-type camera is not relevant here unless that belief carried over to 2001. And the record shows that it did not. Rather, as Mr. Geisen himself testified, at the relevant time in 2001, he believed Davis-Besse "us[ed] a camera on the stick" to perform its prior inspections (Tr. at 1616). This fact is confirmed by his purchase of a robotic rover for the 13th RFO (Tr. at 1614-16), which would not have been necessary if Davis-Besse had been using a flexible boroscope-type camera that was capable of inspecting the entire head.

## ***2. Mr. Geisen Also Knew That Nozzle Inspections Were Impeded by Large Boric Acid Deposits***

Boric acid deposits on the reactor head also impeded nozzle inspections. The 1998 and 2000 inspections performed during the 11th and 12th RFOs showed massive accumulations of boric acid, which Davis-Besse employees concluded — erroneously and in derogation of the NRC Bulletin (*supra* note 22) — came exclusively from flange leakage (NRC Staff Exh. 81). These large boric acid deposits not only prevented the camera from inspecting the nozzle-head interface for small, popcorn-like deposits that would have signified nozzle leakage, they physically blocked the camera from penetrating into inspection areas during the

12th RFO (NRC Staff Exh. 77 at 4; Tr. 901). Ample evidence shows that Mr. Geisen knew this fact prior to the first NRC submission relevant to this case in September 2001.

During the 12th RFO — which occurred in Spring 2000 — Mr. Geisen replaced another Davis-Besse official in Outage Central approximately 3.5 weeks into the 6-week outage (Tr. at 1561-62). Outage Central served as the communication hub for the outage, and it consisted of about sixteen to eighteen people with assigned positions from every major work group within the station (Tr. at 1560-61). Mr. Geisen functioned as the engineering point of contact in Outage Central. Any engineering issue that arose while Mr. Geisen was on shift came to him, and he would (1) determine who would receive the assignment, (2) contact the appropriate group, and (3) endeavor to keep the schedule on track. *See* Tr. at 1562-64.

While working in Outage Central, Mr. Geisen closely reviewed two related Condition Reports (CRs) written in April 2000: (1) CR 2000-1037, which addressed the accumulation of boric acid deposits on the head and around the nozzle penetrations (NRC Staff Exh. 18); and (2) CR 2000-0782, which identified leaking flanges as the likely cause of the deposits and discussed corrective action to repair the flanges (NRC Staff Exh. 19).<sup>24</sup>

CR 2000-1037 identified a “problem” in the form of “[l]arge deposits of boron [that] have accumulated on the . . . Reactor Vessel Head” (NRC Staff Exh. 18 at 2357). The CR explained that the “[i]nitial Reactor Vessel Head inspection conducted on 4/5/2000 revealed an accumulation of boron on the Southeast Reactor head flange between the head and the studs. Boric acid deposits were ‘lava like’ and originate from the ‘mouse holes’ and CRD flanges” (*ibid.*). The CR indicated these boric acid deposits were incompatible with the requirement to perform nozzle inspections, because “to perform required inspections, the nozzles as well as the penetrations must be free of boron deposits” (*id.* at 2358). The CR attributed the deposits to CRD flange leakage, and it recommended that the head be cleaned using pressurized, heated, demineralized water (*id.* at 2359-60). Because Mr. Geisen signed this CR and authorized the use of pressurized, heated, demineralized water to remove the boric acid deposits from the head — which was an unconventional cleaning method (*see infra* text accompanying notes 26-27) — there is no question he knew that “large,” “lava-like” deposits of boric acid on the reactor head prevented the proper inspection of nozzle penetrations during the 12th RFO. *See id.* at 2357; *see also* Tr. at 1834 (Mr. Geisen concedes he read CR 2000-1037 “with some care”).

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<sup>24</sup> CRs are generated when a plant problem is discovered (Tr. at 1022). Mr. Geisen acknowledged he reviewed both CR 2000-1037 and CR 2000-0782 during the 12th RFO (Tr. at 1571-72), and the record confirms his knowledge of the information contained in both CRs. *See* NRC Staff Exh. 18 at 2361; NRC Staff Exh. 79 at 50.

Mr. Geisen's familiarity with CR 2000-0782 likewise made him knowledgeable about the substantial accumulation of boric acid deposits on the reactor head. The CR described the boric acid deposits as follows:

The leakage [from the mouse holes] is red/brown in color. The leakage is worst on the east side [mouse] holes. The worst leakage from one of the [mouse] holes is approx[imately] 1.5 inches thick on the side of the head and pooled on top of the flange . . . The total estimated quantity of leakage through the [mouse] holes and resting on the flange is approx[imately] 15 gallons . . . Preliminary inspection of the head through the [mouse] holes indicates clumps of Boric Acid are present on the east and south sides.

NRC Staff Exh. 19 at 1772. *See also id.* at 1774 (describing "accumulation of boron on the Southeast Reactor head flange between the head and the studs [as] 'lava like'"); *id.* at 1776 (describing boric acid deposits as "red/brown deposits" representing "[h]eavy leakage from head [mouse] holes").

Notably, in discussing CR 2000-0782 at the evidentiary hearing, Mr. Geisen addressed the meaning of "lava-like" deposits, stating that the description indicates boric acid was "flowing out of the mouse holes, and it was of a thick consistency" (Tr. at 1842). He further testified that the boric acid made its way to the reactor head by "flow[ing] down the sides of the CRDM [nozzles]" (Tr. at 1843). Of course, if — as Mr. Geisen stated — the boric acid flowed down the side of the CRDM nozzles, boric acid deposits would accumulate around the base of the nozzles, obscuring the nozzle-head interface. This conclusion is confirmed by the seven pictures that were attached to CR 2000-0782 showing the lava-like deposits that flowed from the mouse holes (Attachment to NRC Staff Exh. 19). These pictures would have put even a casual observer on notice that the large and extensive boric acid deposits posed a serious impediment to nozzle inspections.

Mr. Geisen conceded as much during the evidentiary hearing. He testified that during the 12th RFO when he served in Outage Central (Spring of 2000) he saw what was referred to in this hearing as the "Red Photo." *See* NRC Staff Exh. 66. He described it as "ugly" (Tr. at 1844), stating that lava-like deposits were "[o]bviously . . . coming from the head" (Tr. at 1845), and "there is no reason to expect that you can have a photo like this and have a clean head" (Tr. at 1846). *See also* NRC Staff Exh. 79 at 38-39 (Mr. Geisen testifies that "[i]t was clearly obvious based on [the] picture . . . [that leakage out of the mouse holes] was significantly worse than what we had seen in past outages."); *id.* at 39 (Mr. Geisen testifies that "in looking at the pictures, it's obvious we have gotten a lot more



boron. I had never seen a picture like this before. So therefore, to me, it was clearly . . . worse than it was”).<sup>25</sup>

That Mr. Geisen knew the boric acid deposits impeded nozzle inspections is further confirmed by his active participation in a meeting with a group of engineers in Outage Central during the 12th RFO to determine how the reactor head should be cleaned (Tr. at 1567-69). Mr. Geisen knew head cleaning normally was performed using a vacuum and, on occasion, using rods that were manually pushed through the mouse holes to break up clumps of boron (Tr. at 1840). But this conventional cleaning method was not sufficient to clean the large accumulation of boric acid deposits found on the head during the 12th RFO, which consisted of residual boron deposits from the 10th and 11th RFOs, coupled with the large buildup of boron that accumulated between the 11th and 12th RFOs.<sup>26</sup> As Mr. Geisen testified, in considering how to approach the head cleaning challenge during the 12th RFO, his “frame of reference” was that “I’ve got debris up there [on the reactor head] that impedes me doing an inspection next time around. Let’s get it off” (NRC Staff Exh. 79 at 64). Mr. Geisen thus knew that substantial boric acid deposits impeded past head inspections, and he approved the use of pressurized, heated water to clean the head in an effort to remove that impediment (Tr. at 1571, 1589; NRC Staff Exh. 79 at 53-54, 58).<sup>27</sup>

On June 27, 2001, Mr. Geisen reviewed and approved an intra-company memorandum that addressed the nozzle leakage and circumferential cracking at other plants, and that also considered whether Davis-Besse should perform a head inspection if the plant were to shut down prior to the 13th RFO (NRC Staff Exh. 31). The memorandum stated that “[l]arge boron leakage from a CRDM flange . . . did not permit the detailed inspection of CRDM nozzles” during the 12th RFO (*id.* at 2), but it nevertheless recommended deferring further nozzle inspections

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<sup>25</sup> Testimony of two Staff witnesses, Dr. Allen Hiser (Tr. at 1289) and Mr. John Martin (Tr. at 1521), confirmed that an engineer with Mr. Geisen’s training and experience would have understood that the Red Photo indicated an excessive amount of boric acid had accumulated on the reactor head.

<sup>26</sup> Mr. Geisen testified as follows (NRC Exh. 79 at 183):

Question: Following each RFO, was it your understanding that the head had been completely cleaned?

Mr Geisen: No. No. Following 10 RFO and 11 RFO, I knew that the deposits had been left on the head and that our mechanical cleaning was not as successful as we wanted it to be. That’s what drove us to do the water cleaning in 12 RFO.

<sup>27</sup> Mr. Geisen learned no later than August 11, 2001, that Davis-Besse’s effort to clean the head fully during the 12th RFO was not successful. On that date, he received an e-mail from Mr. Goyal stating that “we can not clean our head thr[ough] the mouse holes and Andrew Siemaszko is requesting 3 large holes be cut in the Service Structure for viewing and cleaning” (NRC Staff Exh. 36). On September 14, 2001, he once again received notice that the head had not been successfully cleaned via a report by Mr. Gibbs noting that “boric acid crystal deposits of considerable depth” were left on the top of the head after the 12th RFO (NRC Staff Exh. 44 at 1; *see also infra* note 37).

until the 13th RFO, because “[t]here is no short-term safety issue associated with the CRDM nozzle cracking” (*id.* at 3). This document represented an engineering evaluation of a safety-related plant condition that required managerial approval (Tr. at 1102). Mr. Geisen provided the managerial review and approval signature (NRC Staff. Exh. 31 at 4), signifying he read it “carefully” and understood that the large accumulation of boric acid deposits prevented the detailed inspection of CRDM nozzles (Tr. at 1868, 1869).<sup>28</sup>

On July 10, 2001, Mr. Geisen was copied on an e-mail from Mr. Goyal to Mr. Siemaszko entitled “Plant-specific data verification” (NRC Staff Exh. 32). In the e-mail, Mr. Goyal stated that an attached Table containing nozzle-inspection information must be corrected, because it “currently shows 100% inspection which is not correct because of the large boric acid deposits on the head very few CRDMs could be inspected. Also the table shows under ‘Result’ no leakage detected. This will need to be modified” (*id.* at 1). Mr. Geisen testified that the e-mail told him that “*only a small number of CRDMs could be inspected*” during the 12th RFO, and that the inspection “*wasn’t even close to 100 percent*” (Tr. at 1871) (emphasis added).<sup>29</sup>

On August 17, 2001, Mr. Geisen was copied on an e-mail from Mr. Goyal to two employees at Framatome regarding Davis-Besse’s response to the NRC Bulletin (NRC Staff Exh. 39). In the e-mail, Mr. Goyal asked (*ibid.*) whether it is “possible to go back to 1998 that is when a good head exam was done with no nozzle leakage (meaning not taking any credit for 2000 inspection).” Mr. Geisen testified this e-mail would not have caused him any concern, because he already knew at that time that several flanges at the top of the head had leaked (Tr. at 1634-35). In other words, he already knew substantial boric acid deposits hindered the ability to conduct nozzle inspections during the 12th RFO.

Finally, Mr. Geisen admits he saw videos that were taken of the Davis-Besse reactor head inspections during the 10th, 11th, and 12th RFOs, but states he did not see them until early October 2001 (prior to October 11) when he spent approximately an hour reviewing the methodology Mr. Siemaszko used in preparing a nozzle-by-nozzle table of inspection results requested by the NRC (Tr. 1693-94, 1696-98; NRC Staff Exh. 79 at 113-14).<sup>30</sup> According to notes prepared

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<sup>28</sup> Notably, Mr. Geisen testified that the statements in the June 27, 2001 memorandum regarding the large accumulation of boric acid deposits and the inability to conduct a detailed inspection of nozzles during the 12th RFO came as no surprise to him, because he already knew the condition of the head from the Red Photo and other reports he had received (*see* Tr. at 1870).

<sup>29</sup> Mr. Geisen testified he received between fifteen and forty e-mails each day, and he further testified it was his practice to read them all, regardless of whether he was the principal recipient or a copied recipient (Tr. at 1866-67).

<sup>30</sup> In October 2002, Mr. Geisen testified he “viewed portions of [the] ’96, the 1998 and 2000” video  
(*Continued*)

by Mr. Jack Martin during his 2002 investigatory interview with Mr. Geisen, however, Mr. Geisen stated he reviewed the videos in August 2001 (Staff Exh. 63; Tr. at 1483). I found Mr. Martin to be a credible witness, and I credit his testimony that Mr. Geisen said he saw the videos in August 2001. These videos (NRC Staff Exh. 81) would have provided Mr. Geisen with first-hand knowledge that nozzle inspections during the 10th RFO (1996), 11th RFO (1998), and 12th RFO (2000) were significantly impeded by the camera-on-a-stick inspection technique as well as accumulations of boric acid deposits.<sup>31</sup>

Even if, however, I were to credit Mr. Geisen's testimony that he first saw the videos in early October 2001 during his meeting with Mr. Siemaszko, my conclusion that the NRC Staff satisfied its burden of proof would remain unchanged. I conclude Mr. Geisen would then have reviewed closely all three inspection videos in light of (1) his knowledge of the NRC Staff's keen interest in Davis-Besse's nozzle inspections, (2) his knowledge of the safety-significance of the issue, and (3) his supervisory responsibility (*infra* Part II.C) for the nozzle tables. That review would forcefully have *confirmed* Mr. Geisen's already-existing knowledge that significant impediments hampered the nozzle inspections, and such confirmation would have occurred prior to (1) his oral misrepresentations to the NRC on October 11 and November 9, 2001, and (2) his written representations to the NRC Staff on October 17 and 30, 2001. *See infra* Part II.C.

The Majority Decision erroneously describes Mr. Martin's notes as a "pillar[ ]" on which this Dissent and the Enforcement Order rely for their "ultimate support" (pp. 787-88). As shown above, even if I were to disregard Mr. Martin's notes and credit Mr. Geisen's testimony that he first saw the videos in early October 2001, I would still sustain the Enforcement Order. Counsel for the NRC Staff likewise explained that Mr. Martin's notes were not critical to the Enforcement Order. In this regard, counsel stated: "[W]e have, I believe, an overwhelming case, even putting aside that Martin testimony. In fact, I think that we have an overwhelming case establishing that Mr. Geisen knew about the impediments to inspections and that he knew about the existence of boron on the head from many, many sources" (Tr. at 2353). I agree.

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inspections with Mr. Siemaszko (NRC Staff Exh. 79 at 145). I credit that testimony rather than his subsequent testimony averring that he did not see all three videos, because the former testimony was closer in time to the relevant event.

<sup>31</sup> On the 12th RFO inspection video, Davis Besse workers can be heard to say: "this area is majorly affected by boric acid" (NRC Staff Exh. 81, time stamp 8:26; Tr. at 921); "the bottom could not be seen because it's covered in boric acid" (*id.*, time stamp 10:56; Tr. at 922); "lava-like configuration" (*id.*, time stamp 14:38; Tr. at 922); "the camera is stuck and a piece of boron came upon us" (*id.*, time stamp 17:28; Tr. at 925). *See also* NRC Staff Exh. 74 at 1317 (Mr. Geisen's supervisor, Mr. Moffitt, testifies he was "shocked" by the 1996 video of the 10th RFO because, contrary to what Davis-Besse represented to the NRC, the reactor head "was not essentially clean").

In sum, an overwhelming volume of persuasive evidence supports the conclusion that Mr. Geisen knew, at times relevant to this proceeding, that the camera-on-a-stick inspection technique and pervasive boric acid deposits prevented Davis-Besse from performing adequate nozzle inspections. Unfortunately, as will now be shown, Mr. Geisen knowingly provided the NRC with materially incomplete and inaccurate information regarding the inspections.<sup>32</sup>

**C. Because Mr. Geisen *Knowingly* Provided the NRC with Materially False Information Relating to Inspection Impediments and Inspection Results, the Charge in the Enforcement Order Must Be Sustained**

As shown *supra* Part II.A, Mr. Geisen *knew* the August 2001 NRC Bulletin: (1) raised safety-sensitive concerns about the possible existence of circumferential nozzle cracking that could lead to a loss-of-coolant accident; (2) placed Davis-Besse in the category of plants most susceptible to nozzle cracking; and (3) required Davis-Besse to either (i) perform a qualified visual examination of 100% of its nozzles by December 31, 2001, employing a conservative assumption that boric acid deposits were to be attributed to nozzle leakage unless they could

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<sup>32</sup>Mr. Geisen argues that the NRC Staff did not prove he had knowledge, but instead improperly endeavored to impute his subordinates' knowledge to him. *See* Post-Trial Brief of David Geisen with Proposed Findings of Fact and Conclusions of Law at 2-3 (Jan. 30, 2009) [hereinafter Geisen January 2009 Post-Trial Brief]. This argument is insubstantial. As shown *supra* Parts II.B.1 and II.B.2, an abundant volume of probative evidence — which, by Mr. Geisen's own concession, he read, closely reviewed, discussed, or approved — supports the conclusion he *knew* the Davis-Besse nozzle inspections were impeded by the camera-on-a-stick inspection technique and by the extensive deposits of boric acid.

The Majority Decision — relying on a “knowledge hierarchy” of its own making (pp. 707-09) — concludes that Mr. Geisen would not have remembered the contents of many of the e-mails and trip reports he received discussing the significant impediments that hindered Davis-Besse's performance of nozzle inspections. But the Majority Decision's analysis neglects to acknowledge that Mr. Geisen's knowledge of the impediments was also informed by memorable documents, pictures, and events that commanded his attention, including: (1) CR 2000-0782, which described large, “lava-like” boric acid deposits on the reactor head, and which included graphic photographs of the deposits; (2) Mr. Geisen's discussion with engineers in Outage Central during the 12th RFO to determine how to clean the reactor head; (3) CR 2000-1037, which Mr. Geisen signed to authorize an unconventional method to clean the boric acid deposits on the reactor head; (4) the “Red Photo,” which depicted an unforgettable image of boric acid deposits on the reactor head that Mr. Geisen described as “ugly” and, in his experience, unprecedented; (5) Mr. Geisen's “careful[ ]” managerial review of, and signature on, a June 2001 intra-company memorandum that stated large boric acid deposits prevented a detailed nozzle inspection during the 12th RFO; and (6) Mr. Geisen's review of inspection videos taken during the 10th, 11th, and 12th RFOs. When *all* the evidence is objectively and cumulatively assessed through the prism of the Majority Decision's “knowledge hierarchy,” one is left with the conviction that Mr. Geisen *knew* the information he provided to the NRC was materially incomplete and inaccurate.

reliably be attributed to another source, or (ii) otherwise provide a basis for concluding regulatory requirements would continue to be met. The Bulletin emphasized that the “effectiveness of the qualified visual examination should not be compromised by the presence of insulation, existing deposits on the RPV head, or other factors that could interfere with the detection of leakage” (NRC Staff Exh. 8 at 8). Further, the Bulletin required a description of the nozzle inspections that had been performed in the past 4 years, including a “description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual examinations” (*id.* at 11).<sup>33</sup>

As shown *supra* Part II.B.1, Mr. Geisen *knew* Davis-Besse’s camera-on-a-stick inspection technique precluded qualified visual inspections for, at the very least, the nozzles at the top of the head constituting 14% of the ninety-six nozzles. And as shown *supra* Part II.B.2, Mr. Geisen also *knew* the head had not been effectively cleaned prior to the 12th RFO, and the residual boron remaining from the 10th and 11th RFOs, combined with the extensive additional deposits that formed between the 11th and 12th RFOs, prevented visual inspections of a significant additional number of nozzles. As Mr. Geisen himself stated, he received an e-mail in July 2001 telling him that, due to large and extensive boron deposits, “only a small number of CRDMs could be inspected” during the 12th RFO, and the inspection “wasn’t even close to 100 percent” (Tr. at 1871). *Accord, e.g.*, NRC Staff Exh. 31 at 2 (Mr. Geisen provides managerial review and approval signature for a June 2001 intra-company memorandum stating that “[l]arge boron leakage from a CRDM flange . . . did not permit the detailed inspection of CRDM nozzles” during the 12th RFO).

Mr. Geisen nevertheless repeatedly provided the NRC Staff with materially incomplete and inaccurate information regarding nozzle-inspection impediments and their impact on Davis-Besse’s ability to perform qualified nozzle inspections.

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<sup>33</sup> The Majority Decision avers that Mr. Geisen is not blameworthy for the material misrepresentations to the NRC regarding *past* nozzle inspections, because he believed the “information requested by the Bulletin was forward-looking” (p. 703-04; *see also* p. 750 n.138). Such a conclusion is clear error for two reasons. First, it cannot be reconciled with the plain language of the Bulletin, which required licensees to provide a description of nozzle inspections conducted in the past 4 years, including a “description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual inspections” (NRC Staff Exh. 8 at 11). Second, it cannot be reconciled with Mr. Geisen’s testimony that, in light of the Bulletin’s safety significance, he read it “from front to back” and “understood what the Bulletin was asking” (Tr. at 1823, 1878; *see also* Tr. at 1820-22). The Majority’s conclusion that Mr. Geisen interpreted the Bulletin as generally requesting *forward-looking* information means Mr. Geisen *misunderstood* the Bulletin, which conflicts with his testimony that he “understood” it (Tr. at 1878). Additionally, the Majority’s conclusion conflicts with Mr. Geisen’s testimony that he understood the “Bulletin was asking for inspection *history*” (Tr. at 1813) (emphasis added). I am unwilling to interpret Mr. Geisen’s understanding of the Bulletin in a manner that is at war with Mr. Geisen’s own testimony.

It is not difficult to ascertain the reason underlying Mr. Geisen's material misrepresentations to the NRC. The August 2001 Bulletin effectively presented Davis-Besse with an ultimatum: either demonstrate that circumferential nozzle cracking was not a concern, or shut down the plant before the end of the year for a full nozzle inspection (*see* NRC Staff Exh. 8 at 12; NRC Staff Exh. 46). The Bulletin emphasized the importance of a qualified visual inspection of 100% of the nozzles to make the requisite demonstration (NRC Staff Exh. 8 at 8). But this was a demonstration Davis-Besse could not make. As Mr. Geisen knew in the Fall of 2001, Davis-Besse had not performed a "qualified visual inspection during any of [the three previous] outages" (Tr. at 1992; *see also* Tr. at 1821). Moreover, Davis-Besse had postponed until 2002 the modification of the head service structure that was needed to permit a full inspection and cleaning of the head (*see supra* note 22). In 2000, Davis-Besse had found large and extensive boric acid deposits on the head that impeded nozzle inspections (*see supra* Part II.B.2). If these inspection impediments had been revealed to the NRC, Davis-Besse would have been at serious risk of a regulatory shut down in December 2001, which was several months before the next scheduled RFO in Spring 2002. This presented an extremely unwelcome prospect for Davis-Besse managers due to the significant costs that would be incurred for an unscheduled shut down, especially in December (Tr. at 1905).<sup>34</sup>

Despite the failure to perform a qualified visual inspection on all the nozzles, Davis-Besse managers, including Mr. Geisen, were confident about the plant's ability to operate safely until the next scheduled RFO (*supra* note 22), and they were determined to instill the same confidence in the NRC (NRC Staff Exh. 71 at 1981-82). To this end, Mr. Geisen resorted to dissembling to the NRC, making material misrepresentations about the scope and adequacy of nozzle inspections while endeavoring to persuade the NRC, through the use of a crack-growth-rate analysis, that the plant could safely operate beyond the end of the year until the next scheduled RFO in Spring 2002.

Mr. Geisen's misrepresentations to the NRC began with Davis-Besse's submission of Serial Letter 2731 on September 4, 2001 (NRC Staff Exh. 9), which was Davis-Besse's first response to the August 2001 Bulletin. Although Mr. Geisen did not participate in drafting Serial Letter 2731, he reviewed and approved the final copy on August 28, 2001, and he signed the "Green Sheet" in his capacity as Design Basis Manager, signifying the letter was "technically accurate" (NRC Staff Exh. 10 at 6-7; Tr. at 1900-01, 1903; Staff Exh. 71 at 1971). Two days later, on August 30, 2001, Mr. Geisen again reviewed and approved Serial Letter 2731,

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<sup>34</sup>When a nuclear plant shuts down, it must purchase electricity from another source to ensure consumers' power needs are met. This is costly, and it is especially expensive during the Summer and Winter seasons when, respectively, air-conditioning and heating loads are high. *See* NRC Staff Exh. 71 at 1975-77.

and he signed the Green Sheet on behalf of his boss, Mr. Moffitt, signifying the letter was “technically accurate.” *See* NRC Staff Exh. 10 at 6-7; Tr. at 1639-40.<sup>35</sup>

In fact, Serial Letter 2731 — like all the Davis-Besse serial letters admitted into evidence in this Enforcement Proceeding — was a blend of truth, obfuscation, and falsehood. It contained material misrepresentations that were crafted with the goal of persuading the NRC to allow Davis-Besse to continue operating beyond the end of the year and until the 13th RFO. The inaccuracies and omissions in the letter were evident to Mr. Geisen based on his knowledge of the nozzle-cracking issue and his knowledge of the impediments to Davis-Besse’s performance of visual nozzle inspections. First, the September 4 letter stated that the insulation at the top of the head “does not impede visual inspection [of the nozzles]” (Attachment 1 to NRC Staff Exh. 9 at 2). *Accord ibid.* (“A gap exists between the RPV head and the insulation, the minimum gap being at the dome center of the RPV head where it is approximately 2 inches, and does not impede a qualified visual inspection”). Mr. Geisen knew the insulation — coupled with Davis-Besse’s camera-on-a-stick inspection technique — had impeded visual inspection of the nozzles for the past three RFOs, and he thus knew this statement was false. *See, e.g.,* Tr. at 1616, 1822-23, 1959; *supra* Part II.B.1. Second, although the letter acknowledged that “some accumulation of boric acid” was found on the vessel head and nozzles during the 12th RFO (Attachment 1 to NRC Staff Exh. 9 at 3), it failed to disclose that the extensive boric acid deposits were “large” and “lava-like” (NRC Staff Exh. 18 at 2357), or that they were “red/brown deposits” representing “heavy leakage from head [mouse] holes” (NRC Staff Exh. 19 at 1776). Mr. Geisen worked in Outage Central during the 12th RFO, during which time he saw the Red Photo and reviewed the relevant Condition Reports describing the large-scale accumulation of boric acid on the head (*supra* text accompanying notes 24-25), and he thus knew the statement in the letter was materially incomplete and falsely minimized the nature and extent of boric acid deposits. Third, the letter falsely implied that Davis-Besse performed a full “bare metal” inspection during the 11th and 12th RFOs in compliance with the BACC Program (Attachment 1 to

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<sup>35</sup>The Majority Decision asserts that the Green Sheet instructions, properly interpreted, did not make Mr. Geisen culpable for materially incomplete and inaccurate representations relating to nozzle inspections, because he “was not ‘the’ manager responsible for the letter’s technical accuracy” regarding such information (p. 730; *see also* p. 702). Mr. Geisen did not share the Majority Decision’s narrow interpretation of the Green Sheet instructions. He understood that “all” Green Sheet signatories who occupy director or management positions are responsible for the completeness and accuracy of information in the correspondence (Tr. at 1902). In any event, Mr. Geisen’s responsibilities were not defined solely by the Green Sheet instructions; they were also defined by unambiguous regulations, which — as he knew — required him to provide the NRC with “complete and accurate” information (Tr. at 1901). *Accord ibid.* (Mr. Geisen acknowledges that if a reviewing manager “saw something [in Serial Letter 2731] that was inaccurate or incomplete,” the manager could not, consistent with his legal responsibilities, sign the Green Sheet).

NRC Staff Exh. 9 at 2). Mr. Geisen knew the extensive and large accumulation of boric acid deposits precluded the performance of such inspections (*supra* Part II.B.2). Fourth, the letter suggested that Davis-Besse performed a qualified visual inspection of the nozzles and was able to rule out the possibility of nozzle leakage that would have evidenced nozzle cracking (Attachment 1 to NRC Staff Exh. 9 at 3). But Mr. Geisen knew Davis-Besse's camera-on-a-stick inspection technique precluded inspecting the nozzles on top of the head and, additionally, the large, lava-like accumulation of boric acid precluded the ability to rule out nozzle leakage on a significant additional number of nozzles.<sup>36</sup> Fifth, the letter falsely reported that a qualified visual inspection during the 13th RFO "will not be compromised due to any preexisting boric acid crystal deposits" (Attachment 1 to NRC Staff Exh. 9 at 5). Mr. Geisen knew, however, that Davis-Besse's efforts to clean the head fully during the 12th RFO were not successful and, accordingly, that residual boric acid deposits would significantly compromise a qualified visual inspection during the next RFO (*supra* note 27). Finally, Mr. Geisen's own testimony forcefully confirms he signed the Green Sheet despite knowing that Serial Letter 2731 contained materially incomplete information:

Question: So you signed off on the Green Sheet. And you knew that boric acid from flanges was an impediment to inspection, and it doesn't say that there?

Mr. Geisen: That's correct.

NRC Staff Exh. 71 at 1972-73. In short, I find a preponderance of the evidence supports the conclusion that Mr. Geisen signed the Green Sheet attesting that Serial Letter 2731 was technically accurate, when in fact he *knew* the letter contained materially incomplete and inaccurate information

On September 28, 2001, after the NRC determined that Davis-Besse's Serial Letter 2731 was not adequately responsive to the August 2001 Bulletin, the NRC's Associate Director of Project Licensing and Technical Analysis, Dr. Brian Sheron, telephoned Davis-Besse's Chief Nuclear Officer, Bob Saunders, strongly advising that Davis-Besse shut down the reactor plant prior to December 31, 2001

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<sup>36</sup>The letter stated that the 12th RFO inspection revealed "[n]o visible evidence of nozzle leakage" (Attachment 1 to NRC Staff Exh. 9 at 3). Further, the letter stated that the 1998 and 2000 inspection videotapes of the RPV head had been reviewed to "re-confirm the indications of boron leakage experienced at [Davis-Besse] were not similar to the indications seen at [Oconee] . . . ; i.e., was not indicative of RPV nozzle leakage. This review determined that indications such as those that would result from RPV head penetration leakage were not evident" (*ibid.*). But, as Mr. Geisen knew, these statements were incomplete, misleading, and contrary to the directive in Bulletin 2001-01, because any such review could not definitively attribute the boron deposits to flange leakage and thereby rule out the possibility of nozzle leakage.



to inspect the nozzles. *See* NRC Staff Exh. 46; NRC Staff Exh. 71 at 1974; NRC Staff Exh. 79 at 163; Tr. at 1693.

Dr. Sheron's telephone call prompted a strong reaction among Davis-Besse managers (Tr. at 1905), because the possibility that Davis-Besse might be ordered to shut down prior to the next scheduled RFO was not a welcome prospect (*supra* note 34). From this point forward, Mr. Geisen became the spokesperson for Davis-Besse on matters relating to the nozzle inspections. *See* NRC Staff Exh. 74 at 1228-29. As Mr. Geisen's supervisor (Mr. Moffitt) testified, this was a matter over which Mr. Geisen ultimately took "ownership" (*id.* at 1240).

On October 3, 2001, Mr. Geisen and other Davis-Besse representatives participated in a telephone conference with NRC representatives to discuss Serial Letter 2731.<sup>37</sup> Mr. Geisen *knowingly* made material misrepresentations to the NRC during the call. First, he told the NRC that, with the exception of five to six nozzles near the center of the head that were obscured by boric acid deposits, "100 percent of the [reactor vessel] head was inspected which included the CRD housing to head interfaces" (NRC Staff Exh. 52 at 1; *see also* NRC Staff Exh. 51 at 1). Mr. Geisen knew this statement was inaccurate because Davis-Besse's camera-on-a-stick inspection technique, coupled with the existence of extensive boric acid deposits on large portions of the reactor vessel head, prevented Davis-Besse from inspecting far more than five to six nozzles (*see supra* Parts II.B.1 and II.B.2). Indeed, Mr. Geisen testified he knew in mid-August 2001 that the "2000 inspection wasn't a thorough, 100 percent inspection because [he] knew there was flange leakage" (NRC Staff Exh. 71 at 1967). Second, in discussing Davis-Besse's confidence level in differentiating between flange leakage and nozzle leakage, Mr. Geisen represented that Davis-Besse had an 80% confidence level in its conclusion from the 12th RFO inspection that the boric acid deposits were not from nozzle leakage (NRC Staff Exh. 51 at 1). Mr. Geisen had no basis for this inaccurate statement, because the extensive lava-like boric acid deposits

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<sup>37</sup>Notably, prior to the October 3 telephone conference, Mr. Geisen received a copy of the "Gibbs Report" (NRC Staff Exh. 44), which was a short report dated September 14, 2001 written by a Davis-Besse consultant at the request of Mr. Geisen's supervisor (Tr. at 1887, 1890, 1892-93). As relevant here, the Gibbs Report put Davis-Besse officials on notice that Davis-Besse incorrectly represented in its response to NRC Bulletin 2001-01 that "the top head visual inspections would not be compromised [in the 13th RFO] due to any pre-existing boric acid crystal deposits" (NRC Staff Exh. 44 at 1). This representation was inaccurate, indicated the Gibbs Report, because "on completion of 12 RFO, the Reactor Vessel did have boric acid crystal deposits of considerable depth left in the center top area of the head, since cleaning of this area at that time was not successful in removing all the deposits (partly due to limited access)" (*ibid.*). The Gibbs Report thus reinforced Mr. Geisen's knowledge that past inspections had been impeded due to difficulty in inspection access and the existence of boric acid deposits. *Cf.* NRC Staff Exh. 75 at 844 (Mr. Gibbs testified that a purpose of his letter was to express concern that the "actual conditions [of the reactor head] had not been communicated" to the NRC by Davis-Besse, and "you could draw a conclusion that [statements in Serial Letter 2731] potentially were misleading").

found around many nozzles during the 12th RFO would have masked any small boric acid deposits at the nozzle-head interface that would have been indicative of nozzle leakage (*see supra* Part II.B.2).

At the conclusion of the October 3 telephone conference, Davis-Besse agreed to provide the NRC with a nozzle-by-nozzle table of inspection results. Mr. Geisen was tasked with overseeing the preparation of this table, and he, in turn, assigned the job of preparing the table to Mr. Siemaszko (Tr. at 1690, 1692; NRC Staff Exh. 52 at 1; NRC Staff Exh. 71 at 1910-11; NRC Staff Exh. 74 at 1229). Mr. Geisen was also tasked with overseeing the development of a crack-growth-rate analysis to support Davis-Besse's argument for continuing operation until the 13th RFO (Tr. at 1690). Regarding the latter task, Mr. Geisen testified of the need to "really get [the crack-growth-rate analysis] moving because we felt that was going to be our argument going forward" (*ibid.*) — and it was. Going forward, Mr. Geisen's representations to the NRC emphasized that the crack-growth-rate model justified continuing plant operations until the 13th RFO. Unfortunately, his representations regarding the scope and efficacy of Davis-Besse's nozzle inspections continued to contain material omissions and inaccuracies that were likewise designed to justify continuing plant operations until the 13th RFO.

Mr. Geisen's next misrepresentations to the NRC occurred on October 11, 2001, when he and several other Davis-Besse managers traveled to NRC Headquarters to meet with the NRC Commissioners' Technical Advisors (TAs) to present a safety basis to allow operation of the plant until the 13th RFO. *See* NRC Staff Exh. 77 at 4. At this meeting, Mr. Geisen presented a slide stating that Davis-Besse "[c]onducted and recorded video inspections of the head during 11 RFO (April 1998) and 12 RFO (April 2000) . . . . No head penetration leakage was identified" (NRC Staff Exh. 55 at 6). Another slide he presented stated "[a]ll CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 11 RFO or 12 RFO" (*id.* at 7). Taken together, these statements falsely affirmed that — based on inspections conducted during the 11th and 12th RFOs — Davis-Besse verified the absence of popcorn-type boron deposits evincing nozzle leakage on *all* nozzles. Mr. Geisen knew this representation was false. In particular, he knew, contrary to his representation, that: (1) it was *impossible* to view "all CRDM penetrations" during the 11th and 12th RFOs due to the camera-on-a-stick inspection technique used at Davis-Besse (*supra* Part II.B.1); and (2) it was *impossible* to *verify* all CRDM penetrations to be free from popcorn-type deposits, because a significant number of nozzles could not be seen due to the inspection technique (*ibid.*), and the heavy boric acid

deposits on many other nozzles covered and obscured any popcorn-type deposits (*supra* Part II.B.2).<sup>38</sup>

Shortly after the meeting on October 11, 2001, Mr. Siemaszko gave Mr. Geisen the nozzle-by-nozzle table for the 1998 and 2000 inspections (NRC Staff Exh. 11; Tr. at 1720-21). Mr. Geisen testified that upon reviewing the table — which indicated that only fifty of sixty-nine nozzles (72%) were viewed during the 11th RFO, and only forty-five of sixty-nine nozzles (65%) were viewed during the 12th RFO (Attachment 1 to NRC Staff Exh. 11 at 2) — he realized his representations to the Commissioners' TAs on October 11 regarding the scope and efficacy of the nozzle inspections were false (Tr. at 1945-46).<sup>39</sup> Mr. Geisen informed his supervisor, Mr. Moffitt, and the Davis-Besse Regulatory Affairs Manager that he had provided inaccurate information to the TAs that needed to be corrected (Tr. at 1946). As a result, Davis-Besse managers drafted Serial Letter 2735 (Tr. at 1721, 1946). On October 17, Mr. Geisen reviewed Serial Letter 2735 and signed the Green Sheet, signifying he verified the technical accuracy of the letter (NRC Staff Exh. 12; Tr. at 1642). On the same day, Davis-Besse sent the letter to the NRC.<sup>40</sup>

Because a principal purpose of Serial Letter 2735 allegedly was to correct the material misrepresentation Mr. Geisen made to the TAs on October 11, one might reasonably assume he would have subjected the letter to meticulous review, accepting nothing less than scrupulous accuracy. Unfortunately, Mr. Geisen vouched for the technical accuracy of the letter knowing it contained material inaccuracies. First, Serial Letter 2735 falsely stated that Davis-Besse's reviews of the videotapes of the 12th RFO inspection "corroborates the previous statements

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<sup>38</sup> Moreover, as Mr. Geisen himself conceded, when he made the "strong claim" to the TAs that the CRDM "penetrations were verified to be free from popcorn [deposits]," Mr. Siemaszko "hadn't finished his nozzle-by-nozzle review of the tapes" from the 11th and 12th RFOs (NRC Staff Exh. 71 at 1989-90).

<sup>39</sup> Upon reviewing the nozzle-inspection tables for the 11th and 12th RFOs, Mr. Geisen directed Mr. Siemaszko to create a nozzle-inspection table for the 10th RFO (NRC Staff Exh. 71 at 1920).

<sup>40</sup> Mr. Geisen asserts that his efforts to have his misrepresentation to the TAs corrected demonstrates that his misrepresentations were inadvertent (Geisen January 2009 Post-Trial Brief at 30). But, as discussed *infra* in text, his overall conduct — including his subsequent material misrepresentations to the NRC — belies that assertion. Notably, Serial Letter 2735 nowhere acknowledges that Mr. Geisen provided the Commissioners' TAs with materially false information. Rather, it purports to be "provid[ing] updated and additional information in support of the basis for the continued safe operation of the Davis-Besse Nuclear Power Station (DBNPS) until its next scheduled refueling outage commencing in March 2002" (NRC Staff Exh. 11 at 1). In other words, this letter was part of the continuing effort by Davis-Besse managers, including Mr. Geisen, to mislead the NRC regarding the scope and efficacy of the nozzle inspection, while endeavoring at the same time to convince the NRC that "there is reasonable assurance that [Davis-Besse] will continue to operate safely to the next refueling outage scheduled for March 2002" (*id.* at 2). The Majority Decision's contrary conclusion (pp. 765-69) cannot plausibly be reconciled with the evidence.

and conclusions stated in letter Serial Number 2731 that the results of this review did not identify any boric acid crystal deposits that would have been attributed to leakage from the CRDM nozzle penetrations, but were indicative of CRDM flange leakage” (Attachment 1 to NRC Staff Exh. 11 at 3). Mr. Geisen *knew* the large and extensive boric acid deposits that encrusted many nozzles precluded ruling out the existence of nozzle leakage (*see supra* Part II.B.2). Second, the letter falsely said that the inspections performed during the 10th, 11th, and 12th RFOs had been done in accordance with the BACC Program (Attachment 1 to NRC Staff Exh. 11 at 2). Mr. Geisen *knew* this statement was inaccurate, because he knew that compliance with the BACC Program required access to the bare metal of the reactor head (Tr. at 1938-39), but boric acid deposits precluded access to extensive areas of the reactor head (*see supra* Part II.B.2). Third, the letter falsely said that during the 10th RFO, “the entire [reactor pressure vessel] head was inspected” (Attachment 2 to NRC Staff Exh. 11 at 2)<sup>41</sup> — in other words, “every nozzle was visualized” (Tr. at 1953). Mr. Geisen *knew* this statement was inaccurate, because he knew the camera-on-a-stick inspection technique precluded the possibility of inspecting the nozzles at the top of the head (*see supra* Part II.B.1). Fourth, the letter stated that the reactor pressure vessel head was cleaned during the 12th RFO “to the extent possible to provide a clean head for evaluating future inspection results” (Attachment 1 to NRC Staff Exh. 11 at 2), thus suggesting that a qualified visual inspection of all nozzles could be conducted during the next RFO. But Mr. Geisen *knew* the head had not been fully cleaned during the 12th RFO and, accordingly, a qualified visual inspection of all nozzles would not be possible (*supra* notes 27 and 37). Finally, the letter said that “results from previous inspections of the CRDM nozzle penetrations provide reasonable assurance for the continued safe operation of [Davis-Besse] until the next refueling outage in March 2002” (Attachment 1 to NRC Staff Exh. 11 at 3). Although Mr. Geisen might have believed the Davis-Besse crack-growth-rate analyses provided reasonable assurance that Davis-Besse could safely operate until the next RFO (Tr. at 1690), he *knew* such a conclusion could not be based on the “results of previous [nozzle] inspections,” because those inspections had been impeded by massive boric acid deposits and the camera-on-a-stick inspection technique (*supra* Parts II.B.1 and II.B.2).

On October 30, 2001, Davis-Besse submitted Serial Letter 2744 to the NRC Staff (NRC Staff Exh. 13). This letter was a follow-up to a commitment made on October 24 by Davis-Besse to provide the NRC Staff with pictorial documentation of the visual inspections of the reactor pressure vessel head performed during the 10th, 11th, and 12th RFOs (*id.* at 1). Mr. Geisen helped prepare this submission, having written captions to the attached photographs (Tr. at 1963) and the note to

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<sup>41</sup> Mr. Geisen actually wrote this statement (Tr. at 1952).

the nozzle-by-nozzle tables attached to the letter (Tr. at 1960-61).<sup>42</sup> Moreover, he signed the Green Sheet for the letter in his capacity as Design Basis Manager, signifying the letter was technically accurate (NRC Staff Exh. 14). But the letter contained material misrepresentations. In a continuing effort to prevent the NRC Staff from requiring Davis-Besse to shut down before the end of the year to perform nozzle inspections, Serial Letter 2744 once again misrepresented the scope and efficacy of the inspections performed during the 10th, 11th, and 12th RFOs. For example, the letter asserted that the inspections “consisted of a whole head visual inspection of the RPV head in accordance with the . . . [BACC] Program” (NRC Staff Exh. 13 at 2), but Mr. Geisen *knew* these inspections had not been conducted in accordance with the BACC Program, which requires a bare metal inspection that was impossible to perform due to the extensive accumulation of boric acid deposits (*supra* Part II.B.2; NRC Staff Exh. 74 at 1317). Additionally, although the letter stated that twenty-four of the sixty-nine nozzles were obscured by boric acid deposits during the 12th RFO, it asserted that Davis-Besse’s review of the videotapes taken during the inspection “did not identify any boric acid crystal deposits that would have been attributed to leakage from the CRDM nozzle penetrations, but were indicative of CRDM flange leakage” (NRC Staff Exh. 13 at 2). The apparent purpose of this sentence was, of course, to persuade the NRC Staff that Davis-Besse’s most recent inspection ruled out the possibility of nozzle leakage. But Mr. Geisen *knew* it was impossible to rule out the possibility of nozzle leakage, because evidence of such leakage (in the form of small, popcorn-like deposits) would have been hidden by the large accumulation of lava-like deposits on the reactor head that obscured over one-third of the nozzles (*supra* Part II.B.2).

Finally, the record shows Mr. Geisen knowingly provided materially incomplete information to the NRC on November 9, 2001 during a meeting of the Advisory Committee on Reactor Safeguards (ACRS). At that meeting, in the context of discussing Davis-Besse’s use of the 1996 nozzle inspection as the baseline for the crack-growth-rate analysis, an ACRS member asked, “What was the extent of the [1998 and 2000] inspection[s]?” (NRC Staff Exh. 59 at 397). Mr. Geisen responded that the 1996 inspection video provided the best baseline for the crack-growth-rate analysis because it presented the best view of the head, whereas the videos from the 1998 and 2000 inspections were “looking for the impact of boric acid leakage from leaky flanges” and, accordingly, in “many cases, the camera angle was looking upwards” rather than down toward the nozzles (*id.* at 398). At the evidentiary hearing, Mr. Geisen conceded his statement to the

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<sup>42</sup>The note composed by Mr. Geisen on the table stated that “[i]n 1996 during the 10 RFO, 100% of nozzles were inspected by visual examination” (NRC Staff Exh. 13). This was a material misrepresentation because, as Mr. Geisen knew (Tr. at 1959; *supra* Part II.B.1), the top nozzles could not be inspected with Davis-Besse’s camera-on-a-stick inspection technique.

ACRS was incomplete, because he failed to disclose that the 1998 and 2000 inspections were “extremely limited” due to the boron deposits and Davis-Besse’s use of the camera-on-a-stick inspection technique (Tr. at 1973). He testified, however, that he was unaware his statement to the ACRS was incomplete when he made it (*ibid.*). For the reasons discussed *supra* Parts II.B.1 and II.B.2, I find that, contrary to Mr. Geisen’s assertion, he *knew* in November 2001 that his statement to the ACRS was incomplete. Because Mr. Geisen stipulated that the NRC considered his statement to the ACRS in determining whether to allow Davis-Besse to continue uninterrupted operations until its next scheduled RFO in March 2002 (NRC Staff Exh. 77 at 2, 10-11; *see* Tr. at 2106), I conclude his November statement constituted yet another example of Mr. Geisen providing the NRC with materially incomplete information.

In sum, I find a preponderance of the evidence supports the conclusion that Mr. Geisen *knowingly* provided the NRC Staff with materially incomplete and inaccurate information regarding the scope and efficacy of the Davis-Besse nozzle inspections. In particular, the evidence establishes that Mr. Geisen: (1) *knew* the August 2001 NRC Bulletin required Davis-Besse either to verify it had performed a qualified visual inspection of 100% of the nozzles within the past 4 years, or to be prepared to shut down by December 31, 2001 to examine the nozzles; (2) *knew* Davis-Besse had not performed a qualified visual inspection of 100% of the nozzles within the past 4 years, because Davis-Besse’s camera-on-a-stick inspection technique made it impossible to visualize the nozzles at the top of the reactor head, and the existence of extensive boric acid deposits prevented the inspection of numerous additional nozzles; and (3) *knowingly* provided the NRC Staff with materially misleading information relating to nozzle inspections, while endeavoring to persuade the NRC Staff through the use of a crack-growth-rate analysis that the reactor could operate safely until March 2002.

The Majority Decision attempts to diminish the persuasive impact of the evidence by examining it piece-by-piece and concluding that no single piece, viewed in isolation, suffices to establish that Mr. Geisen had the requisite knowledge (*e.g.*, pp. 736-51). Such an analysis is, in my view, an inconsequential exercise in setting up and knocking down straw men. It ignores the “simple fact[ ] of evidentiary life” that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it” (*Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987)). Applying that principle here, the evidence presented by the NRC Staff must be viewed *in its totality* against the backdrop of: (i) Mr. Geisen’s extensive experience in the operation and management of reactor plants (*supra* Part II); (ii) his admitted knowledge as to the content, requirements, and importance of the NRC Bulletin (*supra* Part II.A); and (iii) his admission that he read, carefully reviewed, discussed, or approved the relevant evidence (*supra* Parts II.B.1 and II.B.2). So viewed, the evidence establishes that Mr. Geisen *knew* the representations to the NRC were materially incomplete and inaccurate.

The Majority Decision also attempts to minimize the probative value of the evidence by repeatedly observing that Mr. Geisen did not view it as alarming or as portending pressure boundary leakage. *See, e.g.*, p. 732 (Mr. Geisen not “alarm[ed]” by Condition Reports describing “large” boric acid deposits on reactor head); pp. 733-34 (Red Photo did “not create any alarm or strike [Mr. Geisen] as a warning that any pressure boundary leakage issue existed”); p. 738 (Mr. Geisen did not view the “memorandum, . . . e-mails, or trip reports [as] . . . alarming”). Of course, whether Mr. Geisen was *alarmed* by the evidence is beside the point. The issue is not whether he knew of warnings that suggested pressure boundary leakage; rather, the dispositive issue is whether he knew, between September and November 2001, of impediments that limited Davis-Besse’s ability in the previous 4 years to access the bare metal of the reactor head for purposes of conducting a qualified visual examination of 100% of the nozzles. The NRC Staff showed by a preponderance of the evidence that the latter issue must be resolved in the affirmative.

I do not doubt Mr. Geisen genuinely believed the crack-growth-rate analysis provided a legitimate basis for concluding the reactor could operate safely until the next scheduled RFO. But this case forcefully shows the potentially disastrous consequences that can result when a licensed entity, or an employee of a licensed entity, essentially seeks to arrogate the regulatory oversight responsibility of the NRC Staff by knowingly failing to provide the NRC Staff with materially complete and accurate information. Mr. Geisen’s material misrepresentations to the NRC Staff directly contributed to the Staff’s decision to allow Davis-Besse to continue operations beyond December 31, 2001, thus permitting Davis-Besse to operate with primary coolant leakage from nozzle cracking, causing severe reactor head corrosion that, in turn, posed a real and imminent risk of a “control rod ejection, causing a loss-of-coolant accident” (NRC Staff Exh. 8 at 6). The charge in the Enforcement Order should therefore be sustained.<sup>43</sup>

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<sup>43</sup>The Majority Decision — observing that the Dissent “uses adverbial advocacy to apparent great effect” (p. 788) — proceeds to characterize the Dissent’s conclusions as, variously, “rank,” “raw,” “broad,” and “unjustified” speculation (pp. 789-91). Although the Dissent’s conclusions are, in the main, confirmed by Mr. Geisen’s own incriminating testimony, it is to be acknowledged that the charges in the Enforcement Order were based largely on circumstantial evidence. The Majority Decision concedes that circumstantial evidence “can be compelling” (p. 785), but it nevertheless asserts that the *absence* of direct incriminating evidence in this case “speaks loudly” in support of the conclusion that Mr. Geisen did not engage in deliberate misconduct (*ibid.*). Unlike the Majority Decision, I decline to employ an evidentiary rule that attributes special weight to the *absence* of evidence, relying instead on the voluminous and compelling circumstantial evidence of record as viewed through the lens of Mr. Geisen’s inculpatory testimony. When that evidence is examined dispassionately, reasonably, and cumulatively, it “speaks loudly” in support of the charges in the Enforcement Order. In my judgment, the Majority’s contrary view is clear error.

### III. A 5-YEAR SANCTION IS REASONABLE GIVEN THE GRAVITY AND CIRCUMSTANCES OF MR. GEISEN'S MISCONDUCT

Mr. Geisen also challenges the NRC Staff's imposition of a sanction that bars him from involvement in NRC-licensed activities for 5 years. His challenge does not proceed from the premise that he engaged in deliberate misconduct. Rather, he argues that a 5-year ban is unjustified because: (1) he did not engage in deliberate misconduct; and (2) in any event, the NRC Staff's investigative conduct was not compatible with due process principles, resulting in an unsupported Enforcement Order. *See* Geisen January 2009 Post-Trial Brief at 42-47. I reject the first argument for the reasons discussed *supra* Part II.C. I likewise reject the second argument, because the record reveals no deficiency in the NRC Staff's investigative conduct that approaches a due process violation. Even if a flawed investigation had given rise to an arbitrary and unsupported Enforcement Order, Mr. Geisen had a full and fair opportunity during this Board's 5-day evidentiary hearing to make that showing. This he failed to do. Rather, the NRC Staff showed the charge of wrongdoing in the Enforcement Order was supported by a preponderance of the evidence (*supra* Part II.C).

Thus, the salient question is whether Mr. Geisen's deliberate misconduct warrants a 5-year sanction. The analytic tools for resolving this question are located in the NRC Enforcement Policy (NRC Staff Exh. 1), which provides that a sanction for deliberate misconduct by an unlicensed individual is determined by applying (1) four factors to assess the safety significance of the misconduct, and (2) nine factors to assess mitigating or aggravating circumstances. *See id.* at 8, 40-41.<sup>44</sup>

Guided by the Enforcement Policy, I conclude that a preponderance of the evidence establishes that the imposition on Mr. Geisen of a 5-year ban from involvement in NRC-licensed activities is reasonable and should be sustained.<sup>45</sup>

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<sup>44</sup> The Enforcement Policy is a guidance document (*Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 218 n.176 (2004)), and NRC Staff offices may deviate from it "as appropriate under the circumstances of a particular case" (NRC Staff Exh. 1 at 3).

<sup>45</sup> The Enforcement Order made the 5-year ban immediately effective. The Majority Decision states the immediately effective aspect of the Enforcement Order worked an injustice, barring an innocent man from working in his chosen field of employment before allowing him to adjudicate the validity of the Enforcement Order (pp. 778-80). It bears emphasizing, however, that NRC regulations, 10 C.F.R. § 2.202(c)(2)(i), gave Mr. Geisen the opportunity to challenge the immediately effective aspect of the Enforcement Order at the outset of this proceeding, followed by the availability of prompt judicial review. Section 2.202(c)(2)(i) on its face appears to provide litigants with a meaningful opportunity to test immediately effective Enforcement Orders against the standard in *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240 (1988), which held that where, as here, the government has

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### A. Mr. Geisen's Misconduct Resulted in a Severe Safety Violation

Pursuant to the Enforcement Policy, safety violations have four levels of severity, with Level I violations being the most severe (NRC Staff Exh. 1 at 12). The following four factors provide guidance for assessing the safety significance of a violation (*id.* at 9-10): (1) actual safety consequences; (2) potential safety consequences; (3) impact on the NRC's ability to perform its regulatory function; and (4) any willful aspects of the violation. Applying these four factors, the NRC Staff concluded that Mr. Geisen's misconduct constitutes a Level I safety violation. I agree.

Regarding the first and second factors, although Mr. Geisen's misconduct did

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deprived an individual of a property interest without a hearing, the government must be prepared to show an "important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted." Mr. Geisen elected not to invoke section 2.202(c)(2)(i) to challenge the immediate effectiveness of the Enforcement Order.

Although Mr. Geisen's failure to invoke 2.202(c)(2)(i) relieved this Board of the need to resolve whether the NRC could (i) demonstrate a sufficiently "important government interest" to impose a prehearing deprivation (*Mallen*, 486 U.S. at 240), or (ii) provide "substantial assurance that the deprivation [was] not baseless or unwarranted" (*ibid.*), the record appears to provide at least *prima facie* support for an affirmative resolution of both issues, which likely explains Mr. Geisen's decision not to seek section 2.202(c)(2)(i) relief. First, with regard to the former issue, it must be acknowledged that the NRC has a compelling interest in nuclear reactor safety and effective nuclear reactor regulation, and this proceeding implicates these concerns (*infra* Parts III.A and III.B). Second, with regard to the latter issue, as mentioned *supra* Part I.A, within 2 weeks of the NRC Staff's issuance of the Enforcement Order, a Grand Jury returned a criminal indictment against Mr. Geisen based on essentially the same facts underlying the Enforcement Order. As the Supreme Court recognized in *Mallen*, "[t]he returning of the indictment establishes that an independent body has determined that there is probable cause to believe that [the individual] has committed a crime punishable by imprisonment for a term in excess of one year. . . . [This] finding . . . by an independent body demonstrates that the [deprivation] is not arbitrary" (486 U.S. at 244). Moreover, the *Mallen* Court observed that in circumstances where the criminal trial precedes the enforcement proceeding, the defendant has not perforce been deprived of due process. Rather, the criminal trial provides an additional forum to litigate the factual underpinnings of the administrative sanction. "If [the defendant] . . . is convicted, the [administrative sanction] is further supported" (*id.* at 247).

I nevertheless note that, in the unique facts of this case, it appears the NRC Staff had ample time prior to issuance of the immediately effective Enforcement Order to accord Mr. Geisen "some form of [predeprivation] hearing" (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)). When the NRC Staff can, consistent with its duty to protect public health and safety, accord some form of predeprivation hearing, such a course of action is advisable in light of the important "private interest in retaining employment" and the fact that such a proceeding provides "some opportunity for the employee to present his side of the case" (*id.* at 543). As the *Loudermill* Court explained, providing predeprivation "notice and informal hearing permit[s] the [employee] to give his version of the events [and] provide[s] a meaningful hedge against erroneous action" (*id.* at 543 n.8) (quoting *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975)).

not have an actual safety consequence,<sup>46</sup> the inaccurate and incomplete information he provided to the NRC — i.e., misrepresenting the scope and efficacy of Davis-Besse’s nozzle inspections — materially contributed to the NRC’s decision to allow Davis-Besse to operate for an additional 2 1/2 months with nozzle cracking, resulting in severe reactor head corrosion that posed a serious threat of a control rod ejection and a loss-of-coolant accident. *See* NRC Staff Exh. 8 at 13; Tr. at 853, 1811, 2105-06. This condition posed a potential safety consequence that was dangerous in the extreme, thus warranting a safety violation classification at the highest severity level.

Third, the fact that Mr. Geisen’s violation adversely impacted the NRC’s ability to perform its regulatory function likewise supports classifying the safety violation at the highest severity level. It must be emphasized that the NRC’s performance of its regulatory function — that is, its ability to “protect health” and “minimize danger to life or property” (42 U.S.C. § 2201.b) — is largely dependent on accurate self-reporting by licensed entities and their employees. Mr. Geisen’s misrepresentations plainly impaired the NRC’s performance of that function, because: (1) the underlying issue involved a safety-sensitive matter; (2) the misleading information provided by Mr. Geisen was material to the NRC’s decision to allow Davis-Besse to operate in an unsafe manner and in violation of licensing conditions — i.e., with a cracked nozzle and reactor coolant system boundary leakage — for an extended period of time; and (3) Mr. Geisen occupied a managerial position of significant authority and influence, and he is therefore held to a high standard. *See* NRC Staff Exh. 1 at 9, 43-44.

Finally, willful — i.e., deliberate — violations cannot be tolerated by the NRC, whose regulatory effectiveness depends on the integrity and candor of licensed entities and their employees. The severity of Mr. Geisen’s wrongdoing is enhanced by the fact that he repeatedly misled the NRC, thus providing further support for classifying his misconduct as a Level I safety violation. *See* NRC Staff Exh. 1 at 10.

## **B. Mr. Geisen’s Deliberate Misconduct Involved Aggravating Circumstances That Warrant a 5-Year Sanction**

The Enforcement Policy provides nine factors that are considered when determining what sanction to impose on an unlicensed person.<sup>47</sup> These factors are (NRC Staff Exh. 1 at 41):

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<sup>46</sup> Actual safety consequences, within the meaning of the NRC Enforcement Guide, include such events as a release of radiation, personnel radiation exposure, accidental criticality, core damage, loss of a significant safety barrier, and loss of radioactive material. *See* NRC Staff Exh. 1 at 9.

<sup>47</sup> The types of sanctions the NRC may impose on unlicensed individuals include: (1) notices of  
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1. The level of the individual within the organization.
2. The individual's training, experience, and knowledge of the potential consequences of the misconduct.
3. The safety consequences of the misconduct.
4. The degree of supervision of the individual, i.e., how closely the individual is monitored, and the likelihood of detecting the misconduct.
5. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
6. Who identified the misconduct.
7. The degree of management culpability.
8. The benefit to the wrongdoer.
9. The employer's response, i.e., whether disciplinary action is taken.

I find six of the nine factors establish aggravating circumstances that support the 5-year sanction imposed on Mr. Geisen.

The first aggravating factor is Mr. Geisen's level within the organization (NRC Staff Exh. 1 at 41). The NRC places a higher level of responsibility and accountability on individuals as they advance within a licensed organization, because such individuals have the opportunity to influence others, to affect the way others view the need to comply with NRC requirements, and to represent the licensee before the NRC. *See* Tr. at 2022-23. As the Manager of Design Basis Engineering at Davis-Besse, Mr. Geisen directly supervised about forty-two individuals and represented Davis-Besse before the NRC (Tr. at 1553-54, 2104).<sup>48</sup> His level within the organization is thus an aggravating factor. That other high-ranking individuals in the organization may share culpability with Mr. Geisen does not absolve him or mitigate his wrongdoing.

The second aggravating factor is Mr. Geisen's training and experience, as well as his knowledge of the potential consequences of the wrongdoing (NRC Staff Exh. 1 at 41). Mr. Geisen was a highly knowledgeable engineer with substantial training and experience in matters relating to reactor safety and the Davis-Besse BACC Program (NRC Staff Exh. 79 at 40-41). He understood the serious safety significance of nozzle cracking (Tr. at 1806-08, 1813), and he also knew the

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violation; (2) letters of reprimand; and (3) orders prohibiting involvement in NRC-licensed activities for a specified period of time (normally not to exceed 5 years), or until certain conditions are satisfied. *See* NRC Staff Exh. 1 at 41-42; Tr. at 2019.

<sup>48</sup>Mr. Geisen assumed the lead role for Davis-Besse in providing information to the NRC concerning nozzle inspections. *See, e.g.*, NRC Staff Exh. 74 at 1228-29, 1240. He was thus personally responsible for the misinformation he provided relating to those inspections. *See, e.g.*, Tr. at 1923, 1927.

critical importance of providing complete and accurate information to the NRC (Tr. at 1900-01). Hence, his training, experience, and knowledge of the potential consequences of his wrongdoing combine to constitute an aggravating factor.

The third aggravating factor is the safety consequence, both actual and potential, of Mr. Geisen's misconduct (NRC Staff Exh. 1 at 41; Tr. at 2110). As a result of his wrongdoing, the Davis-Besse plant was permitted to operate for an additional 2 1/2 months with undetected nozzle cracking and accompanying primary coolant leakage that caused severe reactor head corrosion (Tr. at 2105-06, 2110). This posed a potential consequence of a control rod ejection and a loss-of-coolant accident, which is a grave aggravating factor that warrants a heightened sanction.

The fourth aggravating factor is that Mr. Geisen was not closely supervised (NRC Staff Exh. 1 at 41), and he was thus situated to engage in deliberate misconduct without the supervisory oversight that may have prevented his wrongdoing (Tr. at 2112, 2115). That Mr. Geisen took advantage of his unsupervised position to knowingly provide materially incomplete and inaccurate information to the NRC is an aggravating factor that warrants a heightened sanction.

The fifth aggravating factor is Mr. Geisen's failure to accept responsibility for his deliberate misconduct (NRC Staff Exh. 1 at 41). Although Mr. Geisen acknowledges he made material misrepresentations to the NRC (NRC Staff Exh. 77), and although he expresses remorse about the consequences of his conduct (Tr. at 2119-20), he never admitted he engaged in deliberate wrongdoing (Tr. at 2119). His failure in this regard militates in favor of a heightened sanction.

The sixth aggravating factor warranting a heightened sanction is that the NRC, rather than Mr. Geisen, identified the wrongdoing (NRC Staff Exh. 1 at 41).<sup>49</sup>

The final three factors were *not* aggravating circumstances that supported an enhanced sanction, because: (1) no significant degree of management culpability was associated with Mr. Geisen's misconduct (Tr. at 2128-29);<sup>50</sup> (2) no discernible benefit accrued to Mr. Geisen as a result of his wrongdoing (Tr. at 2111-12); and (3) Davis-Besse took disciplinary steps against Mr. Geisen when it learned of his wrongdoing (Tr. at 2119).

Placing the nine factors on a scale, I conclude that the six aggravating factors

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<sup>49</sup> As discussed *supra* note 40, although Mr. Geisen told his supervisor, Mr. Moffitt, and the Davis-Besse Regulatory Affairs Manager that he had provided inaccurate information to the Commissioners' TAs on October 11, 2001, that needed to be corrected, he thereafter improperly vouched for the technical accuracy of the so-called corrective letter (Serial Letter 2735), which itself contained material inaccuracies, and he continued thereafter to provide the NRC with materially misleading information (*supra* Part II.C).

<sup>50</sup> In this regard, the record does *not* show that Mr. Geisen's wrongdoing resulted from inadequate training, *nor* does it show that Davis-Besse directed or encouraged Mr. Geisen to engage in deliberate misconduct. *Cf.* NRC Staff Exh. 1 at 39 (listing examples of management failures that may underlie regulatory violations committed by individuals).

significantly outweigh the three nonaggravating factors, thus supporting the imposition of an enhanced sanction.<sup>51</sup>

The NRC Staff, quite understandably, views the deliberate submission of a materially false statement as an “egregious violation[ ]” (NRC Staff Exh. 1 at 43). Here, Mr. Geisen’s deliberate and repeated submissions to the NRC of materially false statements regarding a safety-sensitive matter that resulted in a Level I safety violation constituted an egregious violation that warrants the imposition of a 5-year sanction.

#### IV. CONCLUSION

For the foregoing reasons, I conclude — in disagreement with the Majority Decision — that ample evidence supports both the charge in the Enforcement Order and the 5-year sanction.

I nevertheless close this Dissenting Opinion by expressing the view that, based on this record, Mr. Geisen possesses creditable attributes that render him competent to resume work in the nuclear-licensed industry upon expiration of the 5-year sanction imposed by the Enforcement Order. His motivation and dedication are illustrated by his honorable service as a Naval Officer aboard a nuclear ballistic missile submarine, culminating in his qualification as a Naval Nuclear Engineer (NRC Staff Exh. 79 at 8). After leaving the military, he continued working in the nuclear engineering field, accepting employment at Davis-Besse where he progressively attained positions of higher responsibility. Aside from the incident at issue in this enforcement proceeding, the record supports the conclusion that Mr. Geisen was, by all accounts, a knowledgeable, industrious, and dependable manager (*e.g.*, NRC Staff Exh. 74 at 1214, 1265-66, 1301). These laudable qualities made him a valued employee in the nuclear-licensed industry subsequent to the Davis-Besse incident.<sup>52</sup> Even after issuance of the Enforcement Order, Mr. Geisen’s talents were recognized in the nuclear-licensed industry, as evidenced by a letter he received from Dominion Energy inviting him to ““contact [Dominion

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<sup>51</sup> In my view, the following aggravating factors merit special weight: Mr. Geisen’s high level within the Davis-Besse organization, the grave safety consequence of his wrongdoing, and his knowledge of the potential consequence of his wrongdoing. *Cf.* Tr. at 2259 (Mr. James Luehman, former Deputy Director of the NRC Office of Enforcement, testified that common factors in enforcement cases involving 5-year bans are the wrongdoer’s high level in the organization and the extreme safety significance of the misconduct).

<sup>52</sup> Mr. Geisen left Davis-Besse in October 2002 (Tr. at 1776). In January 2003, he accepted a job as Nuclear Oversight Engineer at Dominion Energy’s Kewaunee Nuclear Power Plant, where he worked until January 2006 when the immediately effective Enforcement Order issued (Tr. at 1778-79). For the 3 years that Mr. Geisen worked at the Kewaunee Plant, no question arose about the quality or integrity of his work (Tr. at 1779).

Energy Kewaunee, Inc.] to discuss the possibility of future re-employment' once he regained the legal status necessary to work there again." *In the Matter of David Geisen*, LBP-06-13, 63 NRC 523, 565 (2006) (Concurring Opinion of Judge Hawkens) (quoting Letter from Lori J. Armstrong, Director Nuclear Engineering, Dominion Energy Kewaunee, Inc., to David Geisen (Feb. 16, 2006)); *see also* Tr. at 1780.

To be sure, Mr. Geisen's misconduct in the instant case was serious, which is why the NRC imposed a severe sanction. Based on this record, however, it may reasonably be concluded that the misconduct was out of character and that, upon expiration of the sanction, Mr. Geisen has the capacity to resume working in the nuclear-licensed industry, if he wishes to return to it. *Cf.* Tr. at 716 (counsel for the NRC Staff states that a felony conviction is not an "automatic bar" to employment in the nuclear-licensed industry).



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

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

**In the Matter of**

**Docket Nos. 52-012-COL  
52-013-COL**

**SOUTH TEXAS PROJECT NUCLEAR  
OPERATING COMPANY  
(South Texas Project, Units 3  
and 4)**

**September 23, 2009**

**RULES OF PRACTICE: APPEALS, INTERLOCUTORY**

**APPELLATE REVIEW: INTERVENTION RULINGS**

Section 2.311(d) of 10 C.F.R. permits an aggrieved litigant to seek interlocutory review of an order granting a petition to intervene, and/or request for hearing, on the question as to whether the request for hearing or petition to intervene should have been wholly denied.

**RULES OF PRACTICE: APPEALS, INTERLOCUTORY**

**APPELLATE REVIEW: INTERVENTION RULINGS**

A necessary prerequisite for an appeal taken pursuant to 10 C.F.R. § 2.311 is that the Board rule on all pending contentions first.

**RULES OF PRACTICE: APPEALS, INTERLOCUTORY**

**APPELLATE REVIEW: INTERVENTION RULINGS**

Where petitioners filed new contentions in advance of a board ruling on initial



intervention petitions, no appeal under 10 C.F.R. § 2.311 lies until the board acts on all contentions.

## MEMORANDUM AND ORDER

This matter involves the application of South Texas Project Nuclear Operating Company (STPNOC) for combined licenses (COLs) that would authorize STPNOC to construct and operate two new units on its South Texas site, located in Matagorda County, Texas. On August 27, 2009, the Atomic Safety and Licensing Board in this matter issued a decision on standing and contention admissibility, in which it granted the intervention petition of three organizations — the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen (together, Intervenors). The Board determined that each of the Intervenors established representational standing to intervene as of right, and it ruled on the admissibility of nineteen of twenty-eight proposed contentions, admitting one.<sup>1</sup> The Board did not address the nine remaining contentions, stating its intent to issue a subsequent order addressing their admissibility.<sup>2</sup> STPNOC has requested that the Commission extend the deadline to appeal the Board's decision in LBP-09-21, until such time as the Board has ruled on all pending contentions.<sup>3</sup> As discussed below, we deny STPNOC's request. Because the Board's decision in LBP-09-21 is not yet ripe for appeal, an extension is not needed.

### I. DISCUSSION

At the conclusion of LBP-09-21, the Board included the following instruction:

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.<sup>368</sup>

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<sup>368</sup> Appeals relative to this ruling need to be made on a timely basis in accordance with 10

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<sup>1</sup> LBP-09-21, 70 NRC 581 (2009).

<sup>2</sup> *Id.* at 588. *See generally* Petition for Intervention and Request for Hearing (Apr. 21, 2009).

<sup>3</sup> *See* STP Nuclear Operating Company's Unopposed Request for an Extension to Appeal LBP-09-21 (Sept. 2, 2009) at 3 (Extension Request).

C.F.R. § 2.311. There will be a separate order with the decision on contentions 8-16, and that order will contain separate appeals rights.<sup>4</sup>

Under the Board's instruction, appeals were due September 8, 2009. To permit our studied consideration of STPNOC's extension request, the Secretary tolled the running of the time for STPNOC to file a notice of appeal of LBP-09-21.<sup>5</sup>

At issue is the applicability of 10 C.F.R. § 2.311(d)(1) in the circumstances we find here — where a Board has ruled only partially on an initial petition to intervene. The rule permits an aggrieved litigant to seek interlocutory review of an order granting a petition to intervene, and/or request for hearing, on the question as to “[w]hether the request for hearing or petition to intervene should have been wholly denied.” By its terms, the rule provides an exception to our general policy limiting interlocutory review, and permits an appeal of a Board's ruling on contention admissibility only in two identified circumstances. One of these occurs when a Board grants a petition to intervene following consideration of the full petition.<sup>6</sup>

We addressed similar factual circumstances in a 2004 *Catawba* decision.<sup>7</sup> There, we dismissed as premature an appeal of a Licensing Board decision that granted a hearing request, but constituted only a partial ruling on the intervention petition because it left unaddressed a group of proposed contentions. In so doing, we interpreted 10 C.F.R. § 2.714a(c) (now 10 C.F.R. § 2.311(d)(1))<sup>8</sup> as follows:

[T]o be appealable under section 2.714a(c), the disputed order must dispose of the *entire petition* so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner.<sup>9</sup>

With respect to a license applicant appealing under this section, we clarified:

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<sup>4</sup> LBP-09-21, 70 NRC at 638 & n.368.

<sup>5</sup> See Order (Sept. 4, 2009) (unpublished).

<sup>6</sup> See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) (observing that 10 C.F.R. § 2.714a (now 10 C.F.R. § 2.311) “allows a party to appeal a ruling on contentions *only if* (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied”) (emphasis added).

<sup>7</sup> See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004).

<sup>8</sup> See Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2218 (Jan. 14, 2004) (“Table 2 — Cross-References Between Old Provisions of Subpart G and New Subpart C”).

<sup>9</sup> *Catawba*, CLI-04-11, 59 NRC at 207 (emphasis added).

“[T]he applicant must contend that, *after considering all pending contentions*, the Board has erroneously granted a hearing to the petitioner.”<sup>10</sup>

The *Catawba* decision reflects our stance on appeals filed pursuant to 10 C.F.R. § 2.311(d)(1); a necessary prerequisite for an appeal taken pursuant to that section is that the Board rule on “all pending contentions” first. For this reason, STPNOC’s extension request is denied. STPNOC may pursue an appeal of the Board’s decision in LBP-09-21 under section 2.311(d) after the Board has ruled on the balance of Intervenors’ pending contentions.

An additional matter merits special mention. STPNOC’s request encompasses seven supplemental contentions recently filed by Intervenors and currently pending before the Board.<sup>11</sup> STPNOC specifically requests that it be permitted to file any section 2.311(d) appeal following the Board’s decision on the last of the *now-pending* contentions, which would include the Board’s decision (or decisions) on Intervenors’ new contentions. As a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311. Rather, challenges to Board rulings on late-filed contentions normally fall under our rules for interlocutory review.<sup>12</sup> In this case, however, we are presented with an unusual situation. Here, Intervenors filed new contentions based on a supplement to the COL application, in advance of a full Board ruling on the original contentions.<sup>13</sup> Hence, those new contentions remain pending, along with the original nine contentions that the Board has not yet addressed. In these circumstances, no appeal under section 2.311 lies until the Board acts on all contentions, both the original and the newly filed ones. This understanding of our appellate jurisdiction under section 2.311 promotes judicial economy and efficiency by permitting the

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<sup>10</sup> *Id.* at 208 (emphasis added). In addition, we cited with approval earlier decisions of the Atomic Safety and Licensing Appeal Board involving attempted appeals of incomplete Licensing Board rulings. *See id.* at 209 & n.15 (citing *Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863 (1980); *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978)). In those cases, the Appeal Board declined to entertain appeals by license applicants challenging partial Board rulings. In both cases, the Licensing Boards had not yet ruled on proposed contentions.

<sup>11</sup> *See* Intervenors’ Contentions Regarding Applicant’s Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) (Aug. 14, 2009). This filing, which is based on a May 2009 supplement to STPNOC’s COL application, contains protected information, and was filed with the Board pursuant to a protective order governing such information. *See* Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished) (providing for access to the subject material, and setting a schedule for submission of new contentions and responses thereto) (Protective Order).

<sup>12</sup> *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006) (regarding appeal of LBP-06-11); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001); 10 C.F.R. § 2.341(f).

<sup>13</sup> *See* LBP-09-21, 70 NRC 594-96 & n.59. *See generally* Protective Order.

filing of a single appeal, rather than piecemeal challenges, addressing the Board's rulings on all pending contentions.

In short, now that we have clarified how Section 2.311 applies in the unusual setting here, there is no reason to extend the appeal deadline, as STPNOC requests. That deadline has not yet arrived.

## II. CONCLUSION

For the reasons set forth above, STPNOC's Extension Request is *denied*. Consistent with this opinion, an appeal filed by STPNOC pursuant to 10 C.F.R. § 2.311(d)(1) will be considered timely if it is filed within 10 days of the final Board ruling on the admissibility of all contentions that are currently pending in this matter.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 23d day of September 2009.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

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

**In the Matter of**

**Docket No. 30-36974-ML**  
**(Materials License Application)**

**PA'INA HAWAII, LLC**

**September 23, 2009**

**MEMORANDUM AND ORDER**

Before us is a motion by the Applicant, Pa'ina Hawaii, LLC, to transfer this case from the Board to the Commission itself.<sup>1</sup> Pa'ina's motion complains of Board "inaction" and requests that we take the case from the Board and "thereafter adjudicate this matter to completion."<sup>2</sup> Given that the Board recently issued an Initial Decision resolving all of the contentions in this case,<sup>3</sup> we can discern no compelling reason to take the extraordinary action of stepping in at this late stage to take up the case ourselves. The parties have the opportunity to petition for review of the Board's rulings.<sup>4</sup> Pa'ina's motion to transfer the case to us therefore is *denied*.

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<sup>1</sup> See Applicant Pa'ina Hawaii, LLC's Motion to Transfer Case to Nuclear Regulatory Commission (July 24, 2009).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> See Initial Decision (Ruling on Concerned Citizens of Honolulu Amended Contentions 3, 4, and 5) (Aug. 27, 2009) (unpublished).

<sup>4</sup> See 10 C.F.R. § 2.341(b). Recently, the Secretary of the Commission stated that because Intervenor Concerned Citizens of Honolulu (Concerned Citizens) has filed before the Board a motion to clarify or reconsider the Board's August 27, 2009 Initial Decision, no petitions for review of the Board's Initial Decision need be filed until 15 days after the Board's ruling on the Concerned Citizens motion. See Order (Sept. 11, 2009) (unpublished).

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 23d day of September 2009.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Michael M. Gibson**, Chairman  
**Dr. Gary S. Arnold**  
**Dr. Randall J. Charbeneau**

**In the Matter of**

**Docket Nos. 52-012-COL  
52-013-COL  
(ASLBP No. 09-885-08-COL-BD01)**

**SOUTH TEXAS PROJECT NUCLEAR  
OPERATING COMPANY  
(South Texas Project, Units 3  
and 4)**

**September 29, 2009**

This 10 C.F.R. Part 52 proceeding concerns the application of South Texas Project Nuclear Operating Co. (STP or the Applicant) which has applied to the Nuclear Regulatory Commission (NRC) for two combined operating licenses (COL) under 10 C.F.R. Part 52 that would authorize STP to construct and to operate two new units employing the Advanced Boiling Water Reactor (ABWR) certified design on its South Texas site, located in Matagorda County, Texas. Having previously ruled on a petition filed jointly by Petitioners, in LBP-09-21, and having found standing on behalf of Petitioners and one admissible contention, the Licensing Board now rules on the remaining contentions. Of the remaining nine contentions, the Licensing Board finds that four are admissible.

**RULES OF PRACTICE: CONTENTIONS (SPECIFICITY)**

The NRC's pleading rules require merely that a petitioner provide a simple



nexus between the contention and the referenced factual or legal support. *See* 10 C.F.R. § 2.309(f)(1)(v). They require nothing more.

#### **ENVIRONMENTAL REPORT: CONSIDERATIONS**

A fully adequate ER is a prerequisite to issuance of a COL. *See* 10 C.F.R. § 51.45(b) (“The environmental report shall . . . discuss the following considerations: (1) The impact of the proposed action on the environment. Impacts shall be discussed in proportion to their significance”).

#### **NEPA: CLEAN WATER ACT (OTHER AGENCY AUTHORITY)**

Section 1371(c)(2) of 33 U.S.C. provides that “[n]othing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to . . . authorize any Federal agency . . . to review any effluent limitation or other requirement established pursuant to [the Clean Water Act] . . . ; or . . . authorize any such agency to impose any effluent limitation other than” those set by the Environmental Protection Agency or a state agency that has been delegated such authority — which here means the TCEQ. This is a clear federal prohibition on the NRC regulating effluent discharges subject to TPDES permit limits or mandating that TCEQ adopt discharge limitations different than those TCEQ deems appropriate.

#### **ENVIRONMENTAL REPORT: OTHER AGENCY AUTHORITY (OVERLAP)**

Even if this contention concerned subject matter regulated by another governmental agency, such as TCEQ, the issue before us is whether the ER must analyze the environmental impacts of unregulated seepage from the MCR into adjacent groundwater. Section 51.71(d) n.3 and Part 51, Appendix A, § 5, of 10 C.F.R. mandate that the NRC Staff address such matters in its EIS, *see also Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834-36 (D.C. Cir. 1972); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), 70 NRC 51, 86 (2009), and concomitantly, that Applicant address such potentially adverse environmental effects in its ER, *cf.* 10 C.F.R. §§ 51.45(b)(2), 51.41, and 51.45(b)(3).

#### **RULES OF PRACTICE: NOTICE OF HEARING (SCOPE)**

The law has been clear for some time that “the scope of an adjudicatory hearing is specified by the Notice of Hearing.” *PPL Bell Bend, LLC* (Bell Bend Nuclear

Power Plant), LBP-09-18, 70 NRC 385, 431 (2009) (citing *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)). See also *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP 88-10A, 27 NRC 452, 463 (1988) (citing *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980) (“the scope of the contention is bounded by the scope of the notice of hearing”). Here, the Notice of Hearing establishes that the permissible scope of the hearing is confined solely to the application. See [STP], Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009). See also *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

#### **NEPA: CLEAN WATER ACT (OTHER AGENCY AUTHORITY)**

Section 1371(c)(2) of 33 U.S.C. of the Clean Water Act expressly prohibits an agency such as the NRC from using NEPA to impose additional effluent limitations on Applicant’s wastewater discharges to surface waters. Section 1371(c)(2) does not affect the permissible reach of the NRC’s NEPA obligations with respect to discharges to groundwater. Section 1371(c)(2) provides that nothing in NEPA shall be deemed to “authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.” The reach of “this chapter” of the Clean Water Act is confined to navigable waters, which do not even encompass all surface waters. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). Certainly, the Clean Water Act does not authorize regulation of discharges to groundwater. *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977). This is the case even if such groundwater is adjacent to navigable water. See *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 709 (9th Cir. 2009).

#### **RULES OF PRACTICE: CONTENTIONS (MATERIAL)**

The word “material” appears in two separate places in the NRC pleading requirements. One requires a petitioner to demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding. The second requires a petitioner to provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. This second requirement is not a second hurdle of materiality a petitioner must meet, but rather reiterates that a petitioner must demonstrate that its dispute is “material” under the first requirement. Thus, a contention is admissible if it

raises a genuine dispute that is material to the findings the NRC must make to support the action involved. 10 C.F.R. § 2.309(f)(1)(iv).

#### **RULES OF PRACTICE: CONTENTIONS (GENUINE DISPUTE)**

Litigation over the term “genuine” is not easy to find, but a dispute that is not genuine would be one that would be contrived, and hence not justiciable. “[A] justiciable controversy must involve adverse parties representing a true clash of interests. The questions raised must be ‘presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.’” *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-17, 62 NRC 77, 91 (2005) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

#### **NEPA: REQUIREMENTS**

NEPA does not command one outcome over another; it merely requires that the proposed action and alternatives to such proposed action be examined. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“NEPA itself does not mandate particular results, but simply prescribes the necessary process”). It is important to keep in mind that “10 C.F.R. § 2.309(f)(2) recognizes that, when NRC issues the EIS, petitioners have the opportunity to file a second wave of environmental contentions. Such new contentions focus on the adequacy of the NRC Staff’s EIS (or EA) under NEPA.” *Levy County*, LBP-09-10, 69 NRC at 88.

### **MEMORANDUM AND ORDER (Ruling on Admissibility of Contentions 8-16)**

On August 27, 2009, this Board issued a Memorandum and Order<sup>1</sup> [hereinafter August 27, 2009 Order] ruling on the standing of three Petitioners and the admissibility of nineteen of their twenty-eight proffered contentions. In that August 27, 2009 Order we also described the background of this proceeding and the standards that govern the admissibility of contentions. We ruled that all three Petitioners had standing, that eighteen of their contentions were inadmissible, that one contention (Contention 21) was admissible, and that Petitioners would be admitted as parties to this contested proceeding.

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<sup>1</sup> Licensing Board Order (Ruling on Standing and Admissibility of Certain Contentions), LBP-09-21, 70 NRC 581 (2009).

Having addressed Contentions 1-7 and 17-28 in our August 27, 2009 Order, we now address Contentions 8-16. For the reasons set forth below, we conclude that among the remaining nine contentions, Petitioners have proffered four admissible contentions, specifically Contentions 8, 9, 14, and 16, as well as Contention 21, which was admitted by our August 27, 2009 Order, and that Petitioners may litigate these contentions in this proceeding.

## **I. ANALYSIS AND RULINGS ON THE ADMISSIBILITY OF CONTENTIONS**

### **1. Contention 8**

Petitioners state in Contention 8:

The COLA is inadequate because it fails to analyze fully the radiological hazards that will occur from operation of the STP Units 3 and 4 nuclear plants based on discharge of water that contains radioactive particulates to the Main Cooling Reservoir (MCR).<sup>2</sup>

Contention 8 encompasses a wide range of topics related to alleged radioactive hazards associated with the planned operation of STP Units 3 and 4. First, Petitioners characterize the MCR as an unlicensed radioactive waste disposal facility that, upon receiving effluent from STP Units 3 and 4, would cause the uncontrolled release of radioactive material.<sup>3</sup> Petitioners claim one of Applicant's own reports<sup>4</sup> establishes that (1) "the MCR is contaminated by plant wastes that, at a minimum, include tritium and cobalt-58 and cobalt-60"; (2) "most years the tritium radioactivity in surface water exceeds 10,000 pCi/KG"; and (3) "[t]ritium is a pernicious problem for STP" based on current monitoring for tritium discharges into the MCR from STP Units 1 and 2.<sup>5</sup> Petitioners also claim the ER indicates that tritium has been detected in surface water, the MCR pressure relief wells, and the "shallow aquifer groundwater beneath and around the plants."<sup>6</sup> One

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<sup>2</sup> See Petition for Intervention and Request for Hearing (Apr. 21, 2009) at 32 [hereinafter Petition].

<sup>3</sup> *Id.* at 33.

<sup>4</sup> At various locations in their petition, Petitioners refer to this 2007 Annual Environmental Operating Report as the "STP 2007 Environmental Operating Report," the "2007 STPNOC Radiological Operating Report" and the "2007 STP Radiological Environmental Operating Report." The precise name of this report appears to be "STP 2007 Annual Operating Report for STP Units 1 and 2."

<sup>5</sup> Petition at 32 (citing STP 2007 Annual Operating Report for STP Units 1 and 2 at 6-7, 6-8, Figure 6-9).

<sup>6</sup> *Id.* at 32-33 (citing ER pp. 2.3.3-2 and 2.3.3-4).

of Petitioners' experts, Arjun Makhijani, Ph.D., has asserted that there are health concerns related to tritium exposure.<sup>7</sup>

Additionally, Petitioners express concern that solids containing radioactive isotopes, including cobalt-58 and cobalt-60, have been detected in the MCR sediment. In support of this contention, Petitioners offer the opinion of another expert, George Rice [hereinafter Rice Report], who claims that "[t]ritium contaminated groundwater could also migrate with off-site radiological consequences."<sup>8</sup> Petitioners also contend that, although operation of STP Units 3 and 4 will increase the levels of particulate radioactive contaminants in the MCR, the COLA allegedly does not address the potential for release of radioactive material from the MCR.<sup>9</sup>

Petitioners further maintain that a possible embankment failure could produce adverse impacts downstream of the MCR:

There is no discussion in the [ER] of any contingencies for embankment failure or the environmental and public health consequences if radioactive laden sediment is transported downstream as a result. The embankment that forms the MCR is a man-made structure that presumably has a useful life. However, while the Applicant acknowledges the radiological impact of the deposition of tritium and radioactive particulate matter in the MCR, there is no attempt to analyze the environmental or public health impacts of this circumstance.<sup>10</sup>

Petitioners contend that a failure of the embankment would immediately release radioactive sediment and water to the downstream environment, and that the ER does not discuss consequent mortality and morbidity impacts.<sup>11</sup>

Finally, Petitioners state that Applicant mistakenly assumes the MCR will always have an adequate inflow of water.<sup>12</sup> If inadequate inflow were to occur, Petitioners assert there could be several significant negative impacts.<sup>13</sup> These alleged adverse impacts of low inflow include: (1) inadequate dilution of tritium sufficient to avoid "excessive tritium levels";<sup>14</sup> and (2) the MCR sediment could

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<sup>7</sup> Petition at 32 (citing Arjun Makhijani et al., *Nuclear Wastelands: A Global Guide to Nuclear Weapons Production and Its Health Effects* (1995) at 97).

<sup>8</sup> Petition at 33 (citing Declaration by George Rice, Groundwater Hydrologist, Potential for Groundwater Contamination at the South Texas Project Nuclear Power Plant (Apr. 21, 2009)).

<sup>9</sup> Petition at 32-33.

<sup>10</sup> *Id.* at 34.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 35.

become dried and the resulting particulate radioactive material could become windborne and pose a radiological hazard to downwind populations.<sup>15</sup>

Applicant opposes admission of this contention on the ground that Petitioners' claims "lack adequate factual, documentary, and expert support,<sup>16</sup> and fail to establish the existence of a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi)."<sup>17</sup> Applicant also disputes Petitioners' claim that the MCR is an unlicensed radioactive waste disposal facility, and claims Petitioners are wrong as a matter of law.<sup>18</sup> Applicant also claims the ER asserts that STP Units 3 and 4 will comply with the limits for "liquid radioactive effluents" in NRC regulations.<sup>19</sup> Applicant further maintains that Petitioners fail to dispute ER § 6.2.6, which specifically discusses Applicant's tritium monitoring and concludes that the "average annual tritium concentrations observed in the MCR" are within the NRC, EPA, and State of Texas limits.<sup>20</sup>

Applicant argues that Petitioners' quote from the STP 2007 Annual Environmental Operating Report for STP Units 1 and 2 does not support Petitioners' claim regarding cobalt-58 and cobalt-60 in MCR sediment.<sup>21</sup> Instead, Applicant asserts that this quoted language was taken out of context and that the complete quote<sup>22</sup>

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<sup>15</sup> *Id.* at 34.

<sup>16</sup> In this regard, Applicant makes the same strained interpretation of NRC's pleading rules that NRC Staff made. *See* August 27, 2009 Order at 71 n.94. As we noted there, the NRC's pleading rules require merely that a petitioner provide a simple nexus between the contention and the referenced factual or legal support. *See* 10 C.F.R. § 2.309(f)(1)(v). They require nothing more.

<sup>17</sup> *See* [STP's] Answer Opposing Petition for Intervention and Request for Hearing (May 18, 2009) at 32 [hereinafter STP Answer].

<sup>18</sup> STP Answer at 33.

<sup>19</sup> *Id.* Applicant provides a detailed summary of its monitoring program with respect to STP Units 3 and 4. Applicant explains:

The Liquid Waste Management System (LWMS) for STP Units 3 and 4 is designed to ensure that potentially radioactive liquids are not discharged to the environment unless they have first been monitored and confirmed to be within acceptable limits. Applicant uses a Radiological Environmental Monitoring Program (REMP) to ensure that the plant is operated within its design parameters and that offsite doses are as low as reasonably achievable. The REMP also ensures that radioactive materials that are released from the plant do not re-concentrate in the environment and are as modeled in the Off-site Dose Calculation Manual (ODCM).

*Id.* at 33 (internal citations omitted).

<sup>20</sup> STP Answer at 34.

<sup>21</sup> *Id.* at 34-35.

<sup>22</sup> *Id.* at 34-35 (citing to pages 6-7 and 6-8 of the 2007 Annual Environmental Operating Report for STP Units 1 and 2:

Bottom sediment samples are taken from the Main Cooling Reservoir each year. Figure 6-6 shows the positive results from two plant-produced radioactive materials, Cobalt-58 and Cobalt-60. The Cobalt-58 and Cobalt-60 inventory in the reservoir has decreased since 1992

(Continued)

does not support Petitioners' assertion. To the contrary, Applicant maintains that most samples have yielded results that are below the level of detection for cobalt-58 and cobalt-60.

Applicant maintains that "Petitioners have offered no support for their allegations that the MCR embankment could fail, that the MCR could dry up, or that groundwater beneath the MCR may become contaminated."<sup>23</sup> Concerning the alleged potential failure of the MCR embankment, Applicant refers to section 2.4S4.1.2 of the Final Safety Analysis Report (FSAR) in support of its assertion that failure of the MCR embankment is not a credible event.<sup>24</sup> Applicant further objects to this contention on the ground that Petitioners have failed to provide any alleged facts or expert opinion that "either wind-blown or water-borne sediment would pose a significant environmental impact that needs to be discussed in the ER."<sup>25</sup>

NRC Staff also opposes admission of this contention because "it lacks adequate factual or expert support and fails to demonstrate the existence of a genuine dispute with the applicant on a material issue of law or fact."<sup>26</sup> NRC Staff claims that Petitioners, in citing to the Rice Report for the assertion that tritium-contaminated groundwater will migrate, fail to dispute Applicant's compliance with regulatory dose limits.<sup>27</sup> In this regard, NRC Staff notes that the "concentration of tritium alleged by the Petitioners to be present in the MCR is well below the regulatory limits found in 10 C.F.R. §§ 20.1301 and 20.1302."<sup>28</sup> NRC Staff also claims that 42 U.S.C. § 2021b, referenced by Petitioners, "addresses disposal of low-level radioactive wastes, not control of liquid effluent releases" and further disputes that the MCR is a disposal facility requiring a license.<sup>29</sup> NRC Staff disputes Petitioners' assertion that radioactive material could be released from the MCR either by embankment failure or by dry lake bed conditions, arguing the "likelihood and consequences posed by Petitioners are not adequately supported by facts or expert opinion."<sup>30</sup>

The Board concludes this contention is admissible in part and inadmissible in

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because of equipment installed to reduce radioactive effluents. The amount of Cobalt-58 has decreased below levels that can be reliably detected. The concentration of Cobalt-60 in the reservoir bottom sediment samples varies and this year could not be detected.).

<sup>23</sup> STP Answer at 38.

<sup>24</sup> *Id.* at 37.

<sup>25</sup> *Id.* at 38.

<sup>26</sup> NRC Staff's Answer to Petition for Intervention and Request for Hearing (May 18, 2009) at 37 [hereinafter Staff Answer].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 37 n.20.

<sup>29</sup> *Id.* at 38.

<sup>30</sup> *Id.*

part. It is inadmissible insofar as Petitioners assert safety claims, but admissible insofar as Petitioners assert environmental claims. With respect to Petitioners' safety claims, Petitioners have neither alleged how the COLA fails to include specific safety-related information that NRC regulations require, nor alleged that the COLA fails to meet a relevant NRC safety standard.<sup>31</sup> Accordingly, we conclude that these claims are inadmissible under 10 C.F.R. § 2.309(f)(1)(iv). Petitioners have failed to demonstrate that these issues are material to the findings the NRC must make with respect to the safety of STP Units 3 and 4.

With respect to Petitioners' environmental claims, Petitioners have alleged that Applicant has failed to address the environmental impacts associated with an increase of radionuclides in the MCR attributable to the operation of STP Units 3 and 4.<sup>32</sup> FSAR Table 12.2-22 lists likely releases of radioactive isotopes from STP Units 3 and 4, which suggests it is likely that concentrations of radionuclides in the MCR will increase. Although discharges are to be controlled and the MCR is to be monitored to control concentrations of radionuclides, Petitioners allege that the ER fails to identify the potential environmental impacts of increased radionuclides in the MCR. Petitioners have identified these possible environmental impacts to include: increased concentrations of radionuclides in the sediment of the MCR,<sup>33</sup> in the shallow groundwater adjacent to the MCR,<sup>34</sup> in the watercourse that receives discharges from the MCR, the Colorado River,<sup>35</sup> and in the MCR itself.<sup>36</sup>

As narrowed,<sup>37</sup> this contention is both within scope and addresses a material issue that Applicant must address in its ER. Accordingly, the Board concludes this part of the contention is admissible, and will be admitted in the narrowed form

The Environmental Report fails to analyze the environmental impacts associated with the increase in radionuclide concentration in the MCR due to operation of STP Units 3 & 4.

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<sup>31</sup> Moreover, Applicant has provided numerous references to licensing documents demonstrating that radionuclides in the MCR will be controlled and monitored to ensure they will remain below applicable NRC safety levels. *See, e.g.*, Tr. at 122 (stating that Table 12.2-22 "identifies the annual release in curies per year and the concentration of that release" for each isotope).

<sup>32</sup> Petition at 34.

<sup>33</sup> *Id.* at 33-34.

<sup>34</sup> *Id.* at 34.

<sup>35</sup> *Id.* at 35.

<sup>36</sup> *Id.* at 32, 34.

<sup>37</sup> *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 222 (2009) ("Although we are not required to narrow contentions to make them acceptable, we may do so" (citing *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979))).



## 2. *Contention 9*

Petitioners state in Contention 9:

Increasing Levels of Groundwater Tritium. The Environmental Report fails to predict or evaluate the effects of increasing groundwater tritium concentrations.<sup>38</sup>

In support of their claim that levels of tritium are increasing in groundwater under or adjacent to the STP site, Petitioners refer to the opinion of one of their experts, D. Lauren Ross, P.E., Ph.D. [hereinafter Ross Report], who interprets data from the ER, Table 2.3.3-6.<sup>39</sup> Noting that tritium emits low-energy beta radiation and that the EPA drinking water limit is 20,000 picocuries per liter, Dr. Ross asserts that “[t]ritium has been detected in two of the pressure relief wells that collect water leaking from the unlined bottom of the MCR.”<sup>40</sup> Dr. Ross further claims that “[c]oncentrations of tritium have increased in both wells over the original monitoring levels”<sup>41</sup> and that with the addition of proposed STP Units 3 and 4, “tritium concentrations in MCR and in the wastewater that is leaking through its unlined bottom are likely to increase.”<sup>42</sup> Petitioners assert that the ER fails to consider this increase.<sup>43</sup>

For several reasons, Applicant objects to admission of this contention. First, Applicant asserts that the Ross Report alone is insufficient to warrant admission of the contention.<sup>44</sup> Second, Applicant contends that the Ross Report fails to include any reasoned basis to support its allegation that tritium levels would increase with the operation of proposed STP Units 3 and 4.<sup>45</sup> Third, Applicant maintains that Petitioners have failed to demonstrate that “the alleged increase in tritium levels would be significant or that it would affect any finding that the NRC must make to issue COLs for STP Units 3 and 4.”<sup>46</sup>

NRC Staff also objects to the admission of this contention on grounds similar to those that Applicant has raised. NRC Staff contends that Petitioners fail to

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<sup>38</sup> Petition at 35.

<sup>39</sup> *Id.* (citing to Dr. Ross’s expert report, Water Quality and Quantity Impacts from Proposed South Texas Plant Expansion (Apr. 2009) at 5 [hereinafter Ross Report]).

<sup>40</sup> Ross Report at 5 (citing ER Table 2.3.3-6, page 2.3.3-19-20).

<sup>41</sup> Ross Report at 5.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.*; see also Tr. at 157-58.

<sup>44</sup> STP Answer at 39-40.

<sup>45</sup> *Id.* at 40.

<sup>46</sup> *Id.* at 40-41.

provide any facts to support this contention or to dispute portions of the COLA that discuss the very concerns raised in this contention.<sup>47</sup>

The Board concludes that Contention 9 is admissible. Petitioners assert that the operation of proposed STP Units 3 and 4 will increase tritium concentrations in groundwater and that the ER has failed to consider impacts and mitigative measures of the alleged increase. Data from the pressure relief wells<sup>48</sup> document tritium concentrations in water that is seeping from the MCR to adjacent groundwater. Although Applicant claims, citing FSAR § 12.2.2.5, that the ABWR is designed not to release radioactive liquid effluent during normal operation, in fact FSAR Table 12.2-22 presents average annual liquid releases and includes entries for tritium activity and concentration. Petitioners contend these incremental tritium releases will increase concentrations in the MCR and in leakage to groundwater. Applicant has not provided references to provisions in the ER that address the effects of increased tritium releases to groundwater.

We conclude that Petitioners' assertion that the ER must address the potential effects of increased tritium releases to groundwater establishes an admissible contention of omission. Petitioners have provided a specific statement of the issue and have provided a brief explanation of the basis. Given that a fully adequate ER is a prerequisite to issuance of a COL, this issue is both material and within the scope of these proceedings.<sup>49</sup> Accordingly, the Board admits this contention.

### 3. *Contention 10*

Petitioners state in Contention 10:

The Main Cooling Reservoir (MCR) will be in a near-state of design basis flood level with operation of all four plants. The reactor buildings, buildings, ultimate heat sink water storage basins, and the residual service water pump houses are below the design basis flood level and vulnerable to flooding.<sup>50</sup>

Petitioners claim ER § 5.3.1 indicates the addition of STP Units 3 and 4 will raise the operating water level in the MCR from 47 ft above mean sea level (MSL) to 49 ft MSL.<sup>51</sup> At the same time, Petitioners note ER § 2.3.1.1.3<sup>52</sup> indicates the

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<sup>47</sup> Staff Answer at 39-40.

<sup>48</sup> See ER § 2.3.3; Ross Report at 6.

<sup>49</sup> See 10 C.F.R. § 51.45(b) ("The environmental report shall . . . discuss the following considerations: (1) The impact of the proposed action on the environment. Impacts shall be discussed in proportion to their significance").

<sup>50</sup> Petition at 36.

<sup>51</sup> *Id.*

<sup>52</sup> See ER § 2.3.1-5.

design basis flood (DBF)<sup>53</sup> for the MCR is 48.5 ft MSL. Based on these two assertions, Petitioners conclude “the MCR will be in a near DBF level the entire time that all four units would be operational . . . [causing] Units 3 and 4 [to be] particularly vulnerable because significant parts of the units are below 48.5 MSL.”<sup>54</sup>

Petitioners’ concern focuses on the possibility that a breach of the embankment of the MCR would cause parts of STP Units 3 and 4 to be underwater. In support of this claim, Petitioners refer to FSAR § 2.4S.10,<sup>55</sup> which Petitioners maintain sets flood protection requirements for “watertight structures and openings for plant and equipment below 48.5 feet MSL.”<sup>56</sup> From this, Petitioners conclude “the fact that the MCR will be above the DBF elevation when all four units are operational means that much of the plant and equipment related to Units 3 and 4 will be in a continual state of vulnerability due to flooding.” Accordingly, Petitioners seek to require Applicant to assess “whether an MCR DBF of 48.5 feet mean sea level (MSL) puts the units in an unreasonably vulnerable status due to flooding.”<sup>57</sup>

Applicant asserts that, in a letter dated February 23, 2009, it provided the NRC with a revised “analysis of flooding from a breach of the MCR,”<sup>58</sup> and that this analysis establishes that STP Units 3 and 4 would withstand a design basis flood.<sup>59</sup> This included an amendment to the COLA that lowered the DBF from 48.5 to 40 ft MSL, which Applicant claims means that all pieces of equipment below that level would be specifically outfitted to withstand a flood at that depth.<sup>60</sup> Applicant further argues that this contention is inadmissible inasmuch as Petitioners failed to challenge Applicant’s updated information that was submitted on February 23, 2009.<sup>61</sup>

NRC Staff also claims this contention is inadmissible because Petitioners have failed to provide adequate support for their claim that “the MCR will be in a near DBF level the entire time that all four units would be operational.”<sup>62</sup> NRC Staff

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<sup>53</sup> The design basis flood is the magnitude of the flood event that is used to evaluate safety structures, systems, and components important to safety during facility design. *See* 10 C.F.R. Part 50, App. A, Criterion 2.

<sup>54</sup> Petition at 36; *see also* Tr. at 163-64.

<sup>55</sup> Petition at 36. Petitioners refer as well to FSAR § 2.4S.2.

<sup>56</sup> Petition at 36

<sup>57</sup> *Id.* at 37.

<sup>58</sup> STP Answer at 43-44.

<sup>59</sup> *See id.* at 44-45. As a consequence, Applicant claims that STP Units 3 and 4 could withstand a worst-case breach of the MCR embankment measuring 417 ft wide and creating a maximum flood level of 38.5 ft, where the level in the Main Cooling Reservoir was 50.9 ft. Tr. at 167-69.

<sup>60</sup> Applicant asserted during oral argument that this equipment is actually flood-proofed to 50 ft. Tr. at 176.

<sup>61</sup> STP Answer at 45.

<sup>62</sup> Staff Answer at 41 (quoting Petition at 36).

argues that Petitioners' assertions regarding the possibility of flood conditions at STP Units 3 and 4 is based on a misapprehension that the DBF level of 48.5 ft is the level at which MCR flooding would occur. Instead, NRC Staff maintains that the DBF level reflects the "level of flooding the site [is] anticipated to sustain if there was a breach of the embankment, not the level at which the MCR would flood."<sup>63</sup> Stated otherwise, NRC Staff claims this contention is based on Petitioners' misunderstanding of information contained in the FSAR, and consequently, it should be rejected.<sup>64</sup>

We conclude this contention is inadmissible. At oral argument, Petitioners noted their confusion surrounding this contention.<sup>65</sup> Although some of Petitioners' confusion was understandably caused by their contention being framed around the prior version of the FSAR (without Petitioners having the benefit of Applicant's February 23, 2009 supplemental information), the fundamental problem is Petitioners' misunderstanding of what is considered a DBF.<sup>66</sup> Petitioners drafted this contention assuming, incorrectly, that the DBF was the level at which there would be flooding of the MCR, rather than flooding of Units 3 and 4 due to a breach of the MCR embankment. We find this contention fails to create a genuine material dispute.<sup>67</sup> *See* 10 C.F.R. § 2.309(f)(1)(vi).

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<sup>63</sup> Staff Answer at 41-42 (citing FSAR 2.4S.2); *see also* Tr. at 164.

<sup>64</sup> Staff Answer at 42.

<sup>65</sup> *See* Tr. at 179-82.

<sup>66</sup> *See* Tr. at 165-66, 178.

<sup>67</sup> *See* 10 C.F.R. § 2.309(f)(1)(vi). Given that the updated version of the FSAR, which, although publicly available, was not easily accessible to Petitioners, we are concerned about confusion, brought to our attention during oral argument, regarding whether all relevant documents were available to Petitioners. We encourage NRC Staff to provide more guidance to Petitioners in this proceeding, and to other petitioners in future proceedings, about how to access publicly available documents in the docket. *See* Tr. at 165-83; 264-66. The NRC maintains an extensive website to aid the public in accessing NRC and Applicant documents. However, NRC Staff suggested during oral argument that the documents on this website do not encompass the entire universe of "available" documents in legal proceedings. In order to avoid such confusion in the future, we suggest the NRC clarify how the public can access any and all documents that will have possible relevance in adjudicatory proceedings. When the NRC creates pathways to obtain documents on its public website, it is unfair to assert later, not only that there are relevant documents the NRC failed to place on its public website, but that a contention might be denied admission precisely because a user of the NRC's public website failed to find it — through no fault of that user. In the instant case, however, the failure of NRC Staff to post the February 23, 2009 letter did not prejudice Petitioners because, as noted in the preceding text, there were separate grounds for dismissing this contention. At a minimum, NRC Staff might consider a disclaimer on the website that there may be documents not on the website, but available through ADAMS, that may be relevant.

#### 4. *Contention 11*

Petitioners state in Contention 11:

The COLA is inadequate because it assumes there will be an adequate supply of fresh water for purposes of plant operations. This assumption is faulty because of the failure of the STP Environmental Report to analyze impacts of global warming on rainfall and the hydrological cycle.<sup>68</sup>

Petitioners contend that “global warming and its impacts on rainfall are better understood now and must be considered in the context of determining whether adequate water resources will be available for nuclear power plant operations.”<sup>69</sup> Petitioners assert that global warming impacts will affect the water available for plant operations and that “compromised water resources should be considered from a quantitative perspective and a temperature-sensitive analysis since plant operations are dependent on a narrow band of temperatures for plant operations.”<sup>70</sup>

In addition to the claim that Applicant has made an inadequate assessment of global warming impacts on water supplies and water resources, including regional waterways and local aquifers, Petitioners assert additional issues with the COLA resulting from the impacts of climate change. First, Petitioners assert that a protracted drought could lead to drying of the MCR and that winds might disperse radioactively contaminated sediment.<sup>71</sup> Accordingly, Petitioners assert that the COLA erroneously fails to include a “complete radiological profile of the existing sediment in the MCR and an analysis of the cumulative radiological impacts expected from operations on it from STP Units 3 and 4.”<sup>72</sup> Second, Petitioners assert that protracted drought, seismic activity, or other natural events could impact the structural integrity of the MCR embankment, and that the COLA should consider downstream impacts from radioactive sediment, including mortality and morbidity, due to embankment failure.<sup>73</sup>

Petitioners also allege that, “given the very long term nature of the radiological hazard,” the COLA should include an analysis of the management and security for post-license responsibility for the MCR.<sup>74</sup> Petitioners contend the COLA should include “an analysis of pollution impacts downstream from water contaminated by chemical treatment,” and an analysis of the “differential impact of treatment of

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<sup>68</sup> Petition at 37.

<sup>69</sup> *Id.* at 37; Tr. at 184.

<sup>70</sup> Petition at 38.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

100 percent of the water effluent versus the lesser amount of treatment proposed by the Applicant.”<sup>75</sup>

With respect to the issues involving regional waterways and local aquifers, Petitioners assert that “[t]he COLA should also consider whether regional waterways will be impacted in terms of water quantity and quality by the use of vast quantities of water for Units 3 and 4.”<sup>76</sup> Finally, Petitioners contend that the “COLA should contain an analysis of the production of heat energy emitted into the atmosphere and water by STP Units 3 and 4 in terms of contributions to global warming.”<sup>77</sup>

Applicant opposes admission of the contention, claiming it “lack[s] adequate factual, documentary, and expert support, and fail[s] to establish the existence of a genuine dispute on a material issue of law or fact.”<sup>78</sup> Disputing Petitioners’ global warming claims, Applicant argues that Petitioners have failed to provide any support for their allegation that global warming will create protracted drought conditions and/or compromised water resources.<sup>79</sup> Applicant claims that Petitioners have failed to dispute or even to acknowledge specific sections of the ER that deal with water availability and precipitation trends.<sup>80</sup> Applicant asserts other licensing boards have rejected similar contentions.<sup>81</sup>

NRC Staff also objects to admission of this contention, claiming it is unsupported and fails to raise a genuine dispute with the application.<sup>82</sup> NRC Staff objects to Petitioners’ list of issues it claims Applicant should include in its COLA because Petitioners fail to provide any legal authority mandating Applicant to address these issues.<sup>83</sup> NRC Staff also takes issue with the lack of references or other factual support for Petitioners’ contention.<sup>84</sup>

The Board concludes Contention 11 is inadmissible because Petitioners have failed to allege facts or expert opinion sufficient to demonstrate there is a genuine dispute with the Application. Although the primary assertion of Contention 11 is based on the premise that “impacts from global warming will include

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 39.

<sup>77</sup> *Id.* at 39-40.

<sup>78</sup> STP Answer at 46. The NRC’s pleading rules require merely that a petitioner provide a simple nexus between the contention and the referenced factual or legal support. *See* 10 C.F.R. § 2.309(f)(1)(v). They require nothing more. *See* note 16, *supra*.

<sup>79</sup> STP Answer at 47.

<sup>80</sup> *Id.* at 48; Tr. at 184-85, 187-89.

<sup>81</sup> STP Answer at 48-49.

<sup>82</sup> Staff Answer at 43. In fact, based on the information Applicant provided, NRC Staff claimed that it will consider global warming as part of its environmental analysis. Tr. at 191.

<sup>83</sup> Staff Answer at 44.

<sup>84</sup> *Id.* at 45-47.

protracted drought that may seriously compromise water resources required for plant operations,”<sup>85</sup> Petitioners have failed to raise a genuine dispute with any portion of the Application. Instead, Petitioners merely cite to portions of the ER that discuss surface water use during operating conditions (ER § 5.2.2.1), plant water use and water availability (ER § 5.2.1), and drought information for the STP region (ER § 2.3.1). As noted by Applicant, “Contention 11 fails to controvert the very portions of the ER that directly address water availability and precipitation trends.”<sup>86</sup>

We conclude that Petitioners fail to controvert sections of the ER that discuss relevant monthly flow data of the Colorado River, historic droughts, local precipitation, and plant water supply (including under drought conditions).<sup>87</sup> Instead, Petitioners’ sole grounds for asserting this contention are: (1) that NRC’s rules should require all applicants to address climate change more extensively than is current practice, (2) that Applicant should perform analysis not only based on historical data but also on worst-case scenarios regarding water availability, and (3) that Applicant erroneously relied on Table S-3 in estimating zero greenhouse gas emissions because even the NRC Staff recognizes that there are greenhouse emissions associated with the uranium fuel cycle. As explained below, even if Petitioners were correct about all three of these points, they have failed to create a genuine dispute with the COLA.

With respect to the additional items in Petitioners’ Contention 11, all duplicate safety claims in Contention 8 that we concluded were not admissible are also inadmissible here. These include Petitioners’ claim that the MCR could become dry, thereby dispersing radioactively contaminated sediments into the environment, and Petitioners’ claim that if the MCR embankment failed there might be downstream radiation safety hazards.<sup>88</sup> Petitioners have neither alleged how the COLA fails to include specific safety-related information that NRC regulations require, nor alleged that the COLA fails to meet a relevant NRC safety standard. Accordingly, we conclude that this claim is inadmissible under 10 C.F.R. § 2.309(f)(1)(iv) because Petitioners have failed to demonstrate that these issues

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<sup>85</sup> Petition at 38.

<sup>86</sup> STP Answer at 48.

<sup>87</sup> On a similar global warming contention in the *William States Lee* COL proceeding, petitioners there also failed to address the portions of that Application that discussed climate variations, which the Board found fatal to their contention. That Board held that a petitioner was obligated to “‘read the pertinent portions of the license application . . . state the applicant’s position and the petitioner’s opposing view,’ and explain why it disagrees with the Applicant.” *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 446 (2008) (quoting Final Rule: “Rules of Practice for Domestic Licensing Proceedings, Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)).

<sup>88</sup> See Petition at 34.

are material to the findings the NRC must make with respect to the safety of STP Units 3 and 4.

Petitioners claim that the COLA must include analysis of downstream impacts from water contaminated through chemical treatment.<sup>89</sup> However, there is ample discussion in the ER of wastewater treatment and potential impacts from these discharges, none of which Petitioners challenge. As noted by Applicant, the wastewater treatment system is described in ER § 3.3.2, effluents containing chemicals or biocides are described in ER § 3.6.1, chemical impacts are described in ER § 5.2.3, and impacts of discharges to water are described in ER § 5.5.1.1. Likewise, although Petitioners claim that potential impacts on regional water systems<sup>90</sup> should be considered in the COLA, in fact Applicant addresses these in sections of the ER that discuss the potential impacts and conclude such impacts would be small.<sup>91</sup>

Finally, we conclude that Petitioners have failed to allege facts or expert opinion in support of their claim that the nuclear power plant operations (thermal emissions) contribute to global warming and should be considered in the COLA. While Petitioners assert that roughly two-thirds of the energy that a nuclear power plant generates is released to the environment as heat, this does not contradict Applicant's discussion in ER §§ 3.4 (cooling system) and 5.3.3 (impacts associated with heat dissipation system). Again, Petitioners neither cite nor dispute these parts of the ER, nor do they identify and dispute other parts of the COLA with regard to thermal emissions, and so we conclude this contention is inadmissible for failure to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

## 5. *Contention 12*

Petitioners state in Contention 12:

Insufficient TPDES Permit Effluent Limits. The proposed Texas Pollution Discharge Elimination Permit fails to establish necessary effluent limits for the range of toxic and harmful chemicals that have been documented to be present or are possibly present in the power plant effluent.<sup>92</sup>

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<sup>89</sup> *Id.* at 39.

<sup>90</sup> Petitioners claim these impacts would include increases in salt content of waterways, local aquifers, and drinking wells; coastal environmental impacts including freshwater flow into the Gulf affecting lagoons, estuaries, and wetlands, as well as salinity patterns, nutrients, and dissolved oxygen levels; and such biological impacts as eutrophication, productivity, and sediment impacts. *See id.* at 39.

<sup>91</sup> *See* ER § 2.4.2 (aquatic ecosystems), §§ 3.3 and 3.4 (plant water needs and operation of the cooling system), and § 5.3 (potential impacts to aquatic systems).

<sup>92</sup> Petition at 40.



Petitioners claim factual support for this contention in the Ross Report.<sup>93</sup> While all parties agree with Dr. Ross that “[w]astewater discharges from the STP facility are regulated by a Texas Pollution Discharge Elimination System (TPDES) permit issued by the Texas Commission on Environmental Quality [TCEQ],”<sup>94</sup> both Applicant and the NRC Staff dispute her assertion that this permit fails to encompass the “parameters of significant concern associated with the proposed wastewater discharges.”<sup>95</sup> In addition to listing in a table the specific constituents that she opines belong in the permit,<sup>96</sup> Dr. Ross claims that the permit fails to require

monitoring for total dissolved solids or specific conductance, even though the specific conductance (a measure of total dissolved solids) of the MCR water is the condition that determines whether blowdown is necessary. The permit does not limit either the concentration or mass of metals other than iron or copper that would be expected in metal cleaning waste. The only limit on organic or hydrocarbon waste is a limit on oil and grease, which is an insensitive and imprecise measure of many chemicals of concern potentially present in the reactor wastewater.<sup>97</sup>

Dr. Ross faults ER § 3.6-1 for claiming that discharges of biocides or chemical additives would be regulated under the parameters of the TPDES permit; instead, Dr. Ross asserts that this permit fails to impose specific effluent limitations on the discharges of these constituents.<sup>98</sup> Likewise, Dr. Ross maintains Applicant improperly claims its discharges of radioactive constituents comply with the TPDES permit because “the terms of the [TPDES] permit ignore radioactive characteristics.”<sup>99</sup>

Applicant asserts this contention is inadmissible because the Ross Report “does not provide a sufficient basis for admission of this contention.”<sup>100</sup> Moreover, Applicant contends that effluent limits of the TPDES permit are outside the permissible scope of this proceeding and that “[t]he NRC does not have any authority to determine the terms to be included in a discharge permit.”<sup>101</sup> Applicant

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<sup>93</sup> *Id.* at 40 (citing Ross Report at 7).

<sup>94</sup> Ross Report at 7.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Id.* (internal footnote omitted).

<sup>98</sup> *Id.* at 8.

<sup>99</sup> *Id.* at 8-9.

<sup>100</sup> STP Answer at 57.

<sup>101</sup> *Id.*

further argues the Commission has previously rejected a similar claim that NRC regulations require such discharge permits of their licensees.<sup>102</sup>

NRC Staff likewise asserts this contention is outside the permissible scope of this proceeding because it challenges the TPDES permit limits.<sup>103</sup> NRC Staff maintains that “[w]hen water quality decisions have been made by a State pursuant to the Clean Water Act<sup>[104]</sup> and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA’s<sup>[105]</sup> considered decisions at face value.”<sup>106</sup>

We conclude Contention 12 is inadmissible. Section 1371(c)(2) of 33 U.S.C. provides that “[n]othing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to . . . authorize any Federal agency . . . to review any effluent limitation or other requirement established pursuant to [the Clean Water Act] . . . ; or . . . authorize any such agency to impose any effluent limitation other than” those set by the Environmental Protection Agency or a state agency that has been delegated such authority — which here means TCEQ. Petitioners have failed to offer any legal support under the Atomic Energy Act of 1954 (AEA)<sup>107</sup> or 10 C.F.R. Part 50 or 52 contradicting this clear federal prohibition on the NRC regulating effluent discharges subject to TPDES permit limits or mandating that TCEQ adopt discharge limitations different than those TCEQ deems appropriate. Accordingly, this contention fails to satisfy the requirements of 10 C.F.R § 2.309(f)(1)(iii) and so is not admissible.

## 6. Contention 13

Petitioners state in Contention 13:

Reliance on Dilution to Achieve Discharge Standards. The Environmental Report discusses the importance of dilution of nuclear power plant wastewater to meet

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<sup>102</sup> *Id.* at 57-58 (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 (2004)).

<sup>103</sup> Staff Answer at 48-49 (citing 33 U.S.C § 1371(c)(2)).

<sup>104</sup> See 33 U.S.C. §§ 1251-1387.

<sup>105</sup> NRC Staff’s erroneous reference to EPA instead of to TCEQ is inconsequential here. Although EPA was originally invested with responsibility to administer the National Pollutant Discharge Elimination System (NPDES) permit program of the Clean Water Act, it has since delegated that responsibility to the state of Texas, which administers it through the TCEQ. The program in Texas is called the Texas Pollutant Discharge Elimination System (TPDES). Accordingly, references to EPA with respect to the NPDES program in Texas can be deemed to be references to its delegated agent, TCEQ and to TPDES. See 33 U.S.C. § 1342(b) and 40 C.F.R. Part 123.

<sup>106</sup> Staff Answer at 48 (citing *Carolina Power & Light Co.* (H. B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 561-62 (1979)).

<sup>107</sup> 42 U.S.C. §§ 2011-2297.

discharge standards, but neglects to evaluate the relationship between a slightly larger effective Main Cooling Reservoir volume and the additional waste loads from doubling the electrical generation capacity.<sup>108</sup>

In support of this contention, Petitioners refer to the Ross Report,<sup>109</sup> wherein Dr. Ross criticizes Applicant's claim, in ER § 10.1.2.3, that STP Units 3 and 4 will have small impacts on water quality or aquatic biota due to the dilution, which primarily comes from the large volume of the MCR.<sup>110</sup> Dr. Ross further states:

The Environmental Report provides no quantification of the change in waste discharge loads from the proposed addition of two nuclear reactor power plants. It also fails to address the consequences of these load increases into a system with only a small change in the dilution factor. Without this information it is impossible to assess potential environmental impacts of the proposed expansion.<sup>111</sup>

Applicant challenges Petitioners' claims. First, Applicant asserts that the pleading of this contention is deficient because Petitioners provide no amplification of this contention other than to refer to the Ross Report. Second, Applicant claims this contention is inadmissible for failure to raise a material issue because, Applicant argues, the Ross Report erroneously states the ER used a dilution factor of 10;<sup>112</sup> Applicant maintains it instead employed no specific dilution factor.<sup>113</sup> Accordingly, Applicant asserts the Ross Report's conclusion that the small dilution factor will be unable to meet the discharge standards is based "on a basic misunderstanding of the ER and apparently a lack of review of the entire ER."<sup>114</sup> In particular, Applicant claims that the Ross Report fails to dispute ER § 5.3.2.<sup>115</sup> Applicant would have it that ER § 5.3.2 explains that, even with the addition of STP Units 3 and 4, the facility will experience the same amount of dilution that it currently achieves with only STP Units 1 and 2 operating and that "[t]he amount of dilution that could be achieved for two-unit operation will also be achieved for four-unit operation because the same discharge system will be used."<sup>116</sup> Therefore, Applicant claims this contention should be rejected as inadmissible.<sup>117</sup>

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<sup>108</sup> Petition at 40.

<sup>109</sup> *Id.* (citing the Ross Report at 9).

<sup>110</sup> Ross Report at 9.

<sup>111</sup> *Id.*

<sup>112</sup> STP Answer at 58-59.

<sup>113</sup> *Id.* at 59 n.227.

<sup>114</sup> *Id.* at 59.

<sup>115</sup> *Id.* at 59-61.

<sup>116</sup> *Id.* at 59-60.

<sup>117</sup> *Id.* at 60-61.

NRC Staff also asserts that it cannot determine what Petitioners are attempting to litigate with this contention, stating “it appears to be a contention of omission, alleging that the ER has omitted information regarding a ‘relationship between a slightly larger effective [MCR] volume and the additional waste loads from doubling the electrical generation capacity.’”<sup>118</sup> However, insofar as Petitioners claim this to be an omission, NRC Staff maintains that Petitioners have failed to provide any support for the assertion that this information is legally required to be addressed in the COLA.<sup>119</sup> NRC Staff further points out that any claim involving discharges regulated by the TPDES permit must be rejected as outside the scope of the NRC’s regulatory authority.<sup>120</sup> Accordingly, NRC Staff asserts this contention is inadmissible for failing to comply with 10 C.F.R. § 2.309(f)(1).<sup>121</sup>

Petitioners err in asserting that Applicant’s ER fails to address the effect of increased waste loading associated with Units 3 and 4 on water quality and aquatic biota. To the contrary, the ER does address the effects of increased discharge and dilution on the watercourse that receives discharges from the MCR, the Colorado River.<sup>122</sup> We thus agree with Applicant and the NRC Staff that Petitioners’ assertions are insufficient to create a genuine dispute. Accordingly, we conclude this contention is inadmissible for failure to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

## 7. *Contention 14*

Petitioners state in Contention 14:

Unregulated Wastewater Discharge. A regulatory loophole has allowed a primary discharge of wastewater from the existing facility to be unregulated. The proposed expansion would be operated under the same regulatory framework. The harm caused by this regulatory failure will be magnified by the proposed addition of two additional nuclear powered generating plants.<sup>123</sup>

In support of this contention, Petitioners refer to the Ross Report,<sup>124</sup> which states, in pertinent part:

An estimated 5,700 acre-feet per year leaks through the unlined bottom of the MCR

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<sup>118</sup> Staff Answer at 49 (quoting Petition at 40).

<sup>119</sup> Staff Answer at 50.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 49.

<sup>122</sup> See ER § 5.3-17, -18, -19; STP Answer at 59-61.

<sup>123</sup> Petition at 40.

<sup>124</sup> *Id.* (citing Ross Report at 9).

into the underlying Gulf Coast Chicot Aquifer and approximately 68% of the leaked water is recovered by pumping pressure relief wells and discharging the pumped water into surface water drainage. Leaked water from the MCR that isn't removed by the relief wells migrates underground to seep into adjacent surface water bodies, into pumped wells, or into the Gulf of Mexico estuary system.<sup>125</sup>

Dr. Ross claims that “this leaked water through the bottom of the MCR has been the single significant wastewater discharge for the entire facility . . . [and that] [f]ailure to monitor and regulate leakage through the MCR reservoir bottom constitutes a failure to protect groundwater and surface water from plant operations.”<sup>126</sup> Dr. Ross suggests this alleged failure to protect ground and surface water from the current discharges originating with STP Units 1 and 2 will become worse when proposed STP Units 3 and 4 commence operations because all four units will discharge into the MCR.<sup>127</sup>

Applicant claims this contention fails to satisfy numerous requirements of section 2.309(f)(1),<sup>128</sup> and further asserts that it cannot determine the issue that Petitioners seek to litigate in this contention.<sup>129</sup> Applicant contends, on the one hand, that any challenge to an alleged “regulatory loophole,” is actually an impermissible challenge to NRC rules that cannot be litigated in this proceeding.<sup>130</sup> On the other hand, Applicant claims that there is no “regulatory loophole” as alleged by Petitioners because “[a]n applicant for a TPDES permit must provide sufficient information about existing or planned impoundments so that TCEQ [the regulatory authority] can determine necessary requirements.”<sup>131</sup> Applicant claims this Board lacks jurisdiction to address Petitioners’ concern that “water that seeps through the bottom of the MCR is not regulated by the TPDES permit,” because the “NRC has no authority to require the State of Texas to regulate such seepage.”<sup>132</sup> Applicant also asks this Board to reject Petitioners’ claim that tritium has been detected in onsite wells.<sup>133</sup>

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<sup>125</sup> Ross Report at 9 (internal footnote omitted).

<sup>126</sup> Ross Report at 10; Tr. at 234.

<sup>127</sup> Ross Report at 9.

<sup>128</sup> STP Answer at 61-62.

<sup>129</sup> *Id.* at 62.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 62 n.238.

<sup>132</sup> STP Answer at 63.

<sup>133</sup> *Id.* at 64. Applicant also maintains that Petitioners have failed to dispute ER § 6.2.6, which addresses historical tritium monitoring with respect to Units 1 and 2. *Id.* at 64 n.246. This argument misses the mark. Petitioners raise a different issue in this contention, namely whether Applicant must analyze the additive impact of Units 3 and 4 on concentrations of contaminants in shallow groundwater as a result of seepage from the MCR. That issue is not addressed in ER § 6.2.6.

NRC Staff asserts that, to the extent this contention seeks to dispute the terms and conditions of the TPDES permit, it is outside the scope of the proceeding.<sup>134</sup>

We admit Contention 14 in narrowed form. First, we reject Applicant's argument that this contention is beyond the permissible scope of this proceeding. Even if this contention concerned subject matter regulated by another governmental agency, such as TCEQ, the issue before us is whether the ER must analyze the environmental impacts of unregulated seepage from the MCR into adjacent groundwater.<sup>135</sup> Section 51.71(d) n.3 and Part 51, Appendix A, § 5 of 10 C.F.R. mandate that the NRC Staff address such matters in its EIS,<sup>136</sup> and concomitantly, that Applicant address such potentially adverse environmental effects in its ER.<sup>137</sup>

While Petitioners' pleading of this contention is certainly not a model of clarity, at this stage of this proceeding, Applicant's claim — that it was surprised, and so prejudiced, by Petitioners' poor draftsmanship — rings hollow. The law has been clear for some time that "the scope of an adjudicatory proceeding is specified by the Notice of Hearing."<sup>138</sup> Here, the Notice of Hearing establishes that the permissible scope of the hearing is confined solely to the application.<sup>139</sup> Accordingly, the fair reading of this contention is that Petitioners' claims must concern the alleged failure of Applicant to address this issue in its ER. As another Board recently observed "[b]ecause the ER is the only environmental document available when NRC issues its notice of opportunity to request a hearing, initial

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<sup>134</sup> Staff Answer at 51. However, during oral argument, NRC Staff conceded that even where such discharge limitations are the exclusive province of another agency, this does not affect the NRC's obligations under NEPA to study the quality of the water in the pressure relief wells and the environmental impacts of discharges from such wells. Tr. at 244.

<sup>135</sup> Although Applicant's Answer rejects Petitioners' claim that tritium has been detected in onsite wells, its own ER suggests that at least as late as 2005, there was tritium detected in those onsite wells. See ER Table 2.3.3-6. In any event, there is at least a dispute between the parties with respect to the meaning of the data in this table. That dispute can be resolved subsequently through a motion for summary disposition or on the basis of the information provided at an evidentiary hearing. But it is a merits dispute — not a pleading defect.

<sup>136</sup> See also *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834-36 (D.C. Cir. 1972); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86 (2009).

<sup>137</sup> Cf. 10 C.F.R. §§ 51.45(b)(2), 51.41, and 51.45(b)(3).

<sup>138</sup> *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 431 (2009) (citing *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)). See also *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP 88-10A, 27 NRC 452, 463 (1988) (citing *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980) ("the scope of the contention is bounded by the scope of the notice of hearing")).

<sup>139</sup> See [STP], Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009). See also *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

contentions necessarily focus on the adequacy of the applicant's ER under Part 51."<sup>140</sup>

Secondly, we reject Applicant's argument that its TPDES permit establishes effluent limitations on seepage from the MCR into the shallow groundwater. To the contrary, all of the outfalls where TCEQ requires Applicant to monitor releases refer either to direct discharges to Texas surface waters or into the MCR itself.<sup>141</sup> Applicant's TCEQ permit contemplates no monitoring points for seepage from the MCR into the adjacent shallow groundwater.<sup>142</sup> In fact, during oral argument, it became clear that Applicant has collected no data on the constituents of this groundwater.<sup>143</sup>

Applicant claims that the NRC cannot address — by EIS or otherwise — this wastewater seepage from the MCR because of 33 U.S.C. § 1371(c)(2).<sup>144</sup> To the contrary, that provision of the Clean Water Act expressly prohibits an agency such as the NRC from using NEPA to impose additional effluent limitations on Applicant's wastewater discharges to surface waters. Section 1371(c)(2) does not affect the permissible reach of the NRC's NEPA obligations with respect to discharges to groundwater.<sup>145</sup> Accordingly, Contention 14 is admitted insofar as it complains that the ER fails to analyze adequately the environmental impacts of unregulated seepage from the MCR into the adjacent shallow groundwater.

## 8. *Contention 15*

Petitioners state in Contention 15:

Unevaluated Reduction in Surface Water Flow. The Environmental Report fails to

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<sup>140</sup> *Levy County*, LBP-09-10, 70 NRC at 88.

<sup>141</sup> Ross Report at 7, Table 2.

<sup>142</sup> *Id.* at 10.

<sup>143</sup> Tr. at 251-52.

<sup>144</sup> See STP Answer at 63 n.243. Applicant has mischaracterized the issues this contention implicates. Applicant argues the "NRC has no authority to require the State of Texas to regulate such seepage." *Id.* at 63. We are not concerned here with the relative powers of federal and state agencies; rather, we are addressing only whether NRC rules obligate Applicant to address certain potentially adverse environmental impacts in its ER.

<sup>145</sup> Section 1371(c)(2) of 33 U.S.C. provides that nothing in NEPA shall be deemed to "authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter." The reach of "this chapter" of the Clean Water Act is confined to navigable waters, which do not even encompass all surface waters. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). Certainly, the Clean Water Act does not authorize regulation of discharges to groundwater. *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977). This is the case even if such groundwater is adjacent to navigable water. See *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 709 (9th Cir. 2009).

evaluate the effect of Colorado River withdrawals of up to 48% of the river flow on the river and estuary resources. The Environmental Report fails to demonstrate the availability of necessary surface water from the Colorado River during drought conditions. The Environmental Report also fails to evaluate the effect of increased groundwater withdrawals on flow in adjacent streams and rivers including the Colorado River.<sup>146</sup>

This contention addresses two separate but closely related environmental concerns: the direct effects of STP Units 3 and 4 on surface water flow and the effects of increased groundwater withdrawals on surface water flow. In support of this contention, Petitioners refer to the Ross Report,<sup>147</sup> which, according to Petitioners, identifies four specific omissions from the ER. First, Dr. Ross states “[t]he Environmental Report fails to discuss . . . whether the backup volume can be delivered reliably to this downstream location on the Colorado River at a sufficient flow to be useable during drought conditions.”<sup>148</sup> Second, Dr. Ross contends the ER fails to address the “environmental affects [*sic*] during conditions when water withdrawal for the nuclear power plants is a significant fraction of the total river flow.”<sup>149</sup> In this regard, Dr. Ross contends there are numerous examples under Applicant’s current operating configuration for STP Units 1 and 2 where Applicant withdrew a “significant fraction” of the total Colorado River flow — so that the addition of STP Units 3 and 4 will only exacerbate this withdrawal rate. Third, Dr. Ross opines that adding two units will result in “doubling of the surface water demand”<sup>150</sup> and claims that the ER has failed to consider this.<sup>151</sup> Finally, Dr. Ross claims that, because of this strain on surface water, Applicant must of necessity turn to groundwater, that the groundwater table will be lowered through “increased pumping to meet the water needs of the proposed nuclear power plant expansion,” and that such environmental effects have not been accounted for in the ER.<sup>152</sup>

Applicant claims the Ross Report does not adequately support this contention.<sup>153</sup> First, Applicant disputes the Ross Report’s claims with respect to water withdrawal, backup water supply, and surface water flow. Second, Applicant claims Dr. Ross fails to specify any potential adverse environmental effects of

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<sup>146</sup> Petition at 41.

<sup>147</sup> *Id.* at 41 (citing Ross Report at 11).

<sup>148</sup> Ross Report at 11.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 13-14.

<sup>153</sup> STP Answer at 65.



obtaining cooling water in drought conditions.<sup>154</sup> Specifically, Applicant contends that Petitioners have failed to show there would be any adverse environmental impact if backup water were unavailable during drought conditions.<sup>155</sup> Moreover, Applicant asserts that the ER addresses the very concerns that Dr. Ross raises,<sup>156</sup> and that Petitioners have failed to provide any legal requirement obligating Applicant to provide any additional information.<sup>157</sup>

NRC Staff contends that Petitioners have failed to provide any legal or regulatory support that would mandate an analysis of the environmental impacts of Applicant's water use, thereby failing to raise a genuine dispute with the COLA.<sup>158</sup> NRC Staff argues that several sections of Applicant's ER, as well as Applicant's responses to NRC Staff requests for additional information (RAIs), address current water use, water use during drought, and water use permitting limits, all of which NRC Staff asserts Petitioners have failed to dispute.<sup>159</sup> NRC Staff also maintains that Petitioners failed to discuss the diversion limits set forth in ER page 2.3.2-3 and groundwater limitations set forth in ER §§ 2.3.1.2.4.3 and 5.2.2.2.<sup>160</sup>

We conclude this contention is inadmissible. Petitioners' complaints regarding water use fail to acknowledge, let alone dispute, Applicant's extended discussion of water use, including the impacts to groundwater and surface waters, in the ER.<sup>161</sup> Petitioners have likewise failed to provide any legal or factual support for their claim that the relevant analysis in the ER is incorrect. With respect to Petitioners' claim that the COLA contains critical omissions, Petitioners' contention fails to raise a genuine dispute with the application, and so we conclude it is inadmissible under 10 C.F.R. § 2.309 (f)(1)(vi).

## 9. Contention 16

Petitioners state in Contention 16:

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<sup>154</sup> *Id.* at 65-67.

<sup>155</sup> *Id.* at 68. Applicant cites to the Wastewater Management Plan of the Lower Colorado River Association that evaluated "all four of the STP units and concluded that it would not require any water from storage during most of the critical drought period." *Id.* at 68 n.258.

<sup>156</sup> *Id.* at 69 (citing ER §§ 2.3.2, 3.3, 4.2.2, 5.2.2, and 6.3).

<sup>157</sup> STP Answer at 69-70.

<sup>158</sup> Staff Answer at 53-54.

<sup>159</sup> *Id.* at 54. We note that NRC Staff also objects to assertions made in the Ross Report, claiming they are unsupported, fail to indicate any effects in the licensing proceeding, and fail to provide any regulatory authority. *Id.* at 55-56.

<sup>160</sup> *Id.*

<sup>161</sup> See ER §§ 2.3.2, 3.3, 4.2.2, 5.2.2, 6.3, and 10.1.

Unevaluated Reduction in Groundwater Supply for Adjacent Landowners. The Environmental Report fails to provide adequate information regarding the effect of the expansion on the availability of groundwater from the regional Gulf Coast Aquifer. A determination of key information necessary for an analysis of impact is deferred to a later detailed engineering phase. Information provided in the Environmental Report underestimates the predicted effect of the proposed expansion on groundwater availability to wells on adjacent property.<sup>162</sup>

In support of this contention, Petitioners refer to the Ross Report,<sup>163</sup> where Dr. Ross challenges Applicant's assumptions regarding the "predicted drop in groundwater levels."<sup>164</sup> Contrary to Applicant's position, Dr. Ross claims:

Estimated groundwater use would more than double from an average of 798 gallons per minute for the existing facility over the last five years, to a projected level of 2040 gallons per minute for all four nuclear power generating plants. The current permit allows an average pumping rate of 1,860 gallons per minute.<sup>165</sup>

In addition, Dr. Ross faults Applicant's assertion in the ER that the evaluation of groundwater availability will not be addressed until after Applicant has completed "detailed engineering."<sup>166</sup>

Applicant argues this contention fails to raise a genuine dispute with the COLA. Applicant also asserts that Dr. Ross has taken out of context its statement in the ER that it will postpone the evaluation of groundwater availability until it can be addressed later "as part of detailed engineering."<sup>167</sup> Applicant claims that, in several places in the ER,<sup>168</sup> it has addressed groundwater issues pertinent to this contention, and further claims that Petitioners have not attempted to controvert the discussions in those sections of the ER.<sup>169</sup> Applicant further asserts that Petitioners fail to demonstrate the materiality of their assertions.<sup>170</sup> In support of its assertion that Petitioners' contention is "not material," Applicant disputes Petitioners' assertion — that withdrawal of additional groundwater might create a significant environmental problem — on the ground that the lower aquifer does

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<sup>162</sup> Petition at 41.

<sup>163</sup> *Id.* at 41 (citing the Ross Report at 14).

<sup>164</sup> Ross Report at 14.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (quoting ER § 2.3.1-22).

<sup>167</sup> STP Answer at 71-72.

<sup>168</sup> *Id.* at 72-74 (citing ER §§ 2.3.1-22, 5.2.2.2, and 10.5S.2); Tr. at 70-75.

<sup>169</sup> STP Answer at 74 (citing ER §§ 5.2.2.2 and 10.5S.2).

<sup>170</sup> STP Answer at 74. NRC Staff made a similar claim that this contention is inadmissible as it fails to provide any support for its assertions and does not raise a material dispute with the application. Staff Answer at 58-60.

not support drinking water wells within 3 miles of the plant, and the closest well (located over 1 mile away) is used for watering livestock.<sup>171</sup>

Moreover, Applicant maintains that the relevant inquiry is not whether additional groundwater will be available but “whether additional wells will be needed.”<sup>172</sup> During oral argument, Applicant asserted that either it might need a small increase in its current groundwater withdrawal permit (which currently is based on the needs of only STP Units 1 and 2), or it might be able to avoid amending that permit by implementing water conservation measures in the plant and obtaining additional makeup water from the Main Cooling Reservoir.<sup>173</sup>

Initially, the NRC Staff asserted in its Answer that Petitioners were wrong in their claim that Applicant would be withdrawing groundwater in excess of its permitted amount of 3,000 acre-feet per year.<sup>174</sup> However, NRC Staff later concluded that Petitioners might be correct. In a letter dated June 19, 2009,<sup>175</sup> NRC Staff indicated that Applicant, in ER Table 5.10-1, appears to be retaining the option of increasing its groundwater pumping beyond its permitted amount:

STPNOC will apply to the Coastal Plains Groundwater Conservation District for an increase in the site’s current groundwater permit from 3000 acre-feet per year to 3500 acre-feet per year up to the current permitted limit with the remainder of the water requirements met by water from the Main Cooling Reservoir (MCR).<sup>176</sup>

NRC Staff indicated that it is issuing an RAI to clarify this issue.<sup>177</sup>

We conclude Contention 16 is admissible. Applicant does not dispute that the ER has only analyzed the impacts from pumping groundwater at the current permitted level, not at the increased withdrawal rate that STP Units 3 and 4 may require. Petitioners claim that Applicant is obligated to analyze the impacts of pumping groundwater at this higher level<sup>178</sup> — which Applicant has unequivocally stated it might choose to do. Although Applicant argues that Petitioners’ contention is not “material,” Applicant’s argument misses the point. The word “material” appears in two separate places in the NRC pleading requirements. One requires a petitioner to demonstrate that the issue raised

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<sup>171</sup> Tr. at 271-72.

<sup>172</sup> STP Answer at 73. This is a distinction without a difference. If Applicant needs more groundwater than it currently is permitted to withdraw, it will need to apply for additional permits — the practical effect of which is to enable Applicant to withdraw more groundwater.

<sup>173</sup> Tr. at 270-71.

<sup>174</sup> Staff Answer at 58-60.

<sup>175</sup> See Letter from Counsel for NRC Staff, Jessica Bielecki (June 19, 2009).

<sup>176</sup> *Id.* (citing ER Table 5.10-1 (internal quotations and emphasis omitted)).

<sup>177</sup> *Id.*

<sup>178</sup> See Ross Report at 14.

is material to the findings the NRC must make to support the action that is involved in the proceeding. The second requires a petitioner to provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. This second requirement is not a second hurdle of materiality a petitioner must meet, but rather reiterates that a petitioner must demonstrate that its dispute is “material” under the first requirement. Thus, a contention is admissible if it raises a genuine<sup>179</sup> dispute that is material to the findings the NRC must make to support the action involved.<sup>180</sup>

In several places in its ER, Applicant has made clear that it holds open the option to withdraw more groundwater than it is currently permitted to withdraw:

- FSAR § 2.4S.12.3.3 addresses obtaining ground water during outages: “[p]eak demand for outages could be met by increasing the permitted groundwater allotment for short-term uses.”
- ER § 5.2.1 states: “STPNOC is currently evaluating the possibility of permitting and installing additional groundwater wells at the STP site.”
- ER § 5.2.2.2 states: “STPNOC is currently evaluating the possibility of permitting and installing additional groundwater wells at the STP site.”
- ER § 10.5S.2.2 states: “The groundwater use requirements for the operation of STP 3 & 4 and STP 1 & 2 could be more than the withdrawal rate permitted by the CPGCD. STPNOC is currently evaluating the possibility of permitting and installing additional groundwater wells at the STP site.”

Applicant’s representation that it may withdraw additional groundwater makes the contention material to this proceeding.

The sole issue before us, then, is simply whether the ER must analyze the environmental impacts of groundwater withdrawal in excess of Applicant’s currently permitted amount, a realistic possibility — as Applicant has conceded. NEPA does not command one outcome over another;<sup>181</sup> it merely requires that

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<sup>179</sup> Litigation over the term “genuine” is not easy to find, but a dispute that is not genuine would be one that would be contrived, and hence not justiciable. “[A] justiciable controversy must involve adverse parties representing a true clash of interests. The questions raised must be ‘presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.’” *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-17, 62 NRC 77, 91 (2005) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

<sup>180</sup> 10 C.F.R. § 2.309(f)(1)(iv).

<sup>181</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“NEPA itself does not mandate particular results, but simply prescribes the necessary process”).

the proposed action and alternatives to such proposed action be examined.<sup>182</sup> Therefore, Contention 16 is admitted in part to address whether the ER has adequately considered the environmental impact of the possible withdrawal of additional groundwater in excess of that authorized by the current permits.

## II. CONCLUSION

Having previously found standing on the part of Petitioners, and having admitted one additional contention in our August 27, 2009 Order, we conclude that the requested hearing in this proceeding should be granted and a total of five contentions heard.

## III. ORDER

A. Petitioners SEED, Public Citizen, and the South Texas Association for Responsible Energy having been admitted as parties in this proceeding, their Petition for Intervention and Request for Hearing is granted in part and denied in part. A hearing is GRANTED with respect to their Contentions 8, 9, 14, and 16, and 8, 9, 14, and 16 are limited as follows:

Contention 8. The Environmental Report fails to address adequately the environmental impacts associated with the increase in radionuclide concentration in the MCR due to operation of STP Units 3 & 4.

Contention 9. The Environmental Report fails to address the environmental impacts associated with the increase in radionuclide concentration in the MCR due to operation of STP Units 3 & 4.

Contention 14. The Environmental Report fails to analyze the environmental impacts of unregulated seepage from the MCR into the adjacent shallow groundwater.

Contention 16. The Environmental Report fails to consider adequately the environmental impact of the possible withdrawal of additional groundwater in excess of that authorized by the current permits.

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<sup>182</sup> Although Petitioners' challenge at this point is to the adequacy of Applicant's ER under 10 C.F.R. Part 51, it is important to keep in mind that "10 C.F.R. § 2.309(f)(2) recognizes that, when NRC issues the EIS, petitioners have the opportunity to file a second wave of environmental contentions. Such new contentions focus on the adequacy of the NRC Staff's EIS (or EA) under NEPA." *Levy County*, LBP-09-10, 70 NRC at 88.

B. All other contentions are inadmissible and will not be litigated in this proceeding, except for Contention 21, which was admitted under our August 27, 2009 Order.

C. Regarding the conduct of the hearing in this proceeding, as Petitioners have not requested that the hearing be conducted under 10 C.F.R. Part 2, Subpart G, we ORDER that the proceeding be conducted under the procedures set forth at 10 C.F.R. Part 2, Subparts C and L.

D. In October 2009, the Licensing Board will issue an order scheduling an initial scheduling conference pursuant 10 C.F.R. § 2.332(a), during which the parties will address relevant scheduling matters in the proceeding. Thereafter, the Board will issue an Order setting forth a schedule of further proceedings in this matter. Prior to such time, the parties shall confer in the interest of reaching consensus on scheduling matters and submitting a joint proposal to the Board for its consideration.

E. This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311(d)(1) and the Commission's order on September 23, 2009. *See* CLI-09-18, 70 NRC 859 (2009).

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Michael M. Gibson, Chairman  
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Dr. Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
September 29, 2009



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Eric J. Leeds, Director

In the Matter of

Docket No. 50-315  
(License No. DPR-58)

INDIANA MICHIGAN POWER  
COMPANY  
(Donald C. Cook Nuclear Plant,  
Unit 1)

September 4, 2009

On December 16, 2008, the Union of Concerned Scientists (UCS) requested pursuant to 10 C.F.R. § 2.206 that the NRC issue a Demand for Information requiring the I&M (the Licensee) to docket the following four pieces of information at least 30 days before restarting the Donald C. Cook Nuclear Plant, Unit 1 (CNP-1) reactor from its current outage: (1) the vibration levels experienced in the control room, turbine building, and other structures during the event of September 20, 2008; (2) the vibration levels assumed in these locations during the safe-shutdown earthquake (SSE); (3) in locations where the vibration levels during the September 2008 event exceeded the vibration levels assumed for the SSE, the extent of piping, pipe supports, and other items replaced or repaired as a result of potential stress damage and the bases for not replacing other structures, systems, and components exposed to loading greater than the SSE; and (4) in locations where the vibration levels during the September 2008 event did not exceed the vibration levels assumed for the SSE, the extent of measures taken to protect against spurious equipment operation and the bases for concluding that the as-left configuration will not pose a public health hazard in event of an SSE.

The Petitioner stated that the September 20, 2008, main turbine generator failure event caused significant vibration levels that resulted in the spurious operation of standby equipment and may have contributed to a breach that seriously impaired the fire protection system. The Petitioner requested the information, in part, to ensure that the Licensee applied the proper lessons learned



from the event to future operation of the CNP-1 reactor. The petition further stated that without this information, the NRC cannot be assured that the public is adequately protected from the significant adverse safety implications resulting from an SSE at CNP-1 that causes the spurious actuation of equipment.

On January 21, 2009, the NRC accepted the petition for review pursuant to 10 C.F.R. § 2.206.

In a letter dated May 12, 2009, the Licensee addressed the four parts of the Petitioner's request for information. The Licensee concluded that the condition of structures, systems, and components will not pose a hazard to public health and safety in the event of an SSE following return to service of CNP-1.

The final Director's Decision (DD) was issued on September 4, 2009. The final DD addresses the Petitioner's requested actions as follows. The NRC technical staff reviewed the details in the Licensee's response and other docketed information (e.g., Licensee Event Report 315/2008-006-01 and NRC Special Inspection Team Report 05000315/2008009; 05000316/2008009) associated with the event. The Staff concluded that public health and safety were not affected by the event, nor would they be affected by a similar event in the future. The Staff also found the Licensee's event response and corrective actions to be reasonable and technically sound.

Accordingly, the NRC denied the Petitioner's request to issue a Demand for Information from the Licensee prior to the restart of CNP-1.

## **DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**

### **I. INTRODUCTION**

By letter to R. W. Borchardt, Executive Director for Operations for the U.S. Nuclear Regulatory Commission (NRC), dated December 16, 2008 (Agency-wide Documents Access and Management System (ADAMS) Accession No. ML083640201), Mr. David Lochbaum (the Petitioner), on behalf of the Union of Concerned Scientists (UCS), filed a petition pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.) § 2.206, "Requests for action under this subpart." Mr. Lochbaum subsequently informed the NRC in a letter dated February 2, 2009 (ADAMS Accession No. ML090370688), that Dr. Edwin Lyman would represent UCS as the new point of contact for the petition.

Publicly available records will be accessible from the ADAMS Electronic Reading Room on the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the ref-

erence staff in the NRC Public Document Room by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

#### **A. Action Requested**

The Petitioner requested that the NRC issue a demand for information requiring the Indiana Michigan Power Company (the Licensee) to docket the following four pieces of information at least 30 days before restarting the Donald C. Cook Nuclear Plant, Unit 1 (CNP-1) reactor from its current outage:

- (1) The vibration levels experienced in the control room, turbine building, and other structures during the event on September 20, 2008;
- (2) The vibration levels assumed in these locations during a safe shutdown earthquake (SSE);
- (3) In locations where the vibration levels during the September 2008 event exceeded the vibration levels assumed for the SSE, the extent of piping, pipe supports, and other items replaced or repaired because of potential stress damage and the bases for not replacing other structures, systems, and components (SSCs) exposed to greater than the SSE loading; and
- (4) In locations where the vibration levels during the September 2008 event did not exceed the vibration levels assumed for the SSE, the extent of measures taken to protect against spurious equipment operation and the bases for concluding that the as-left configuration will not pose a public health hazard in the event of an SSE.

#### **B. Petitioner's Bases for the Requested Action**

The petitioner stated that the September 20, 2008, event caused significant vibration levels that resulted in the spurious operation of standby equipment and that may have contributed to a breach that seriously impaired the fire protection system. The Petitioner based the request for information, in part, on a need for the Licensee to apply the proper lessons from the event to the future operation of the CNP-1 reactor. The Petitioner stated that, without this information, the NRC cannot be assured that the public is adequately protected from the significant adverse safety implications that would result from an SSE at CNP-1 that causes the spurious actuation of equipment. The Petitioner provided the additional details given below regarding the bases for seeking the actions described in the previous section.

Item (1) requests information on the magnitude of vibration levels throughout the plant during the September 2008 event. The magnitude of the motion in

the turbine building and control room should be determined. Since the turbine building and control room are physically attached to other structures, the Licensee should also quantify the motion in these other structures.

Item (2) requests that the above information be put into the proper design- and licensing-basis context by documenting the magnitude of vibration levels assumed for the SSE. The Petitioner requested this information to provide the framework to determine whether the CNP-1 design and licensing bases bound the magnitude of that event.

Item (3) requests the identification of those SSCs that may have been damaged by exposure to vibration levels above those assumed in the design analyses and procurement specifications that were either replaced or repaired, or that were evaluated such that the as-left configuration provides reasonable assurance that this equipment can perform all required safety functions during and after all design- and licensing-basis events.

Item (4) requests assurance that, if vibration levels were less than those for an SSE, the Licensee would evaluate any equipment that operated spuriously during the event to determine the consequences and implications if actual vibration levels had been higher than those assumed in the SSE. The information would document protective measures (e.g., hardware or procedures) applied against spurious equipment operation or the evaluations concluding that spurious equipment operation has no adverse safety implications.

### **C. Determination for NRC Review Under 10 C.F.R. § 2.206**

On January 21, 2009, the NRC Petition Review Board (PRB) convened to discuss the petition under consideration and determine whether it met the criteria for further review under the 10 C.F.R. § 2.206 process. The PRB comprised NRC technical and enforcement staff and legal counsel, and it was chaired by an NRC senior-level manager. The PRB determined that the petition under consideration met the criteria established in NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions," dated October 25, 2000, for acceptance into the 10 C.F.R. § 2.206 process.

The NRC discussed this conclusion with the Petitioner during a telephone conversation on January 27, 2009. The Petitioner stated during this conversation that he did not need a public meeting to address the PRB. In a letter dated March 6, 2009 (ADAMS Accession No. ML090370035), the NRC informed the Petitioner that the PRB had approved the petition request and that it was referring the issues in the petition to the Office of Nuclear Reactor Regulation for appropriate action.

The agency issued a proposed director's decision on July 2, 2009 (ADAMS Accession No. ML091610073), and sent a copy to the Petitioner and the Licensee for comment. The NRC Staff did not receive any comments on the proposed director's decision.

## II. DISCUSSION

### A. Background

On September 20, 2008, the CNP-1 main turbine failed because the design of the blade-rotor system did not provide an adequate stress margin in at least three low-pressure turbine blades. The blades ultimately exceeded their stress threshold and suffered high-cycle fatigue cracking. As a result, control room turbine vibration monitors indicated high-high vibration levels on all main turbine supervisory instrumentation vibration points. Numerous alarms were also received on components in the condensate and feedwater systems. The event produced noticeable ground and building vibrations both at and near the plant.

Control room operators initiated a reactor shutdown, entered the reactor trip response emergency operating procedure, and opened the main condenser vacuum breakers to stop main turbine rotation. All reactor safety systems operated as designed, and no unexpected safety-related system actuations occurred. The reactor protection system actuated to fully insert all control rods. The auxiliary feedwater system initiated and functioned as required. Steam generator atmospheric relief valves were operated to remove decay heat.

A hydrogen fire occurred concurrent with the event, originating from below the CNP-1 turbine and main generator. A portion of the main generator cooling system, which uses hydrogen, failed and hydrogen was released. Several fire protection sprinkler systems automatically actuated, and operators manually actuated a turbine water spray system to assist in controlling the fire. The onsite fire brigade responded to the fire. The Licensee also requested offsite fire protection assistance, but it was not needed to extinguish the fire. The fire was extinguished within 30 minutes.

A section of the fire protection system's yard loop piping failed early in the event, resulting in the loss of at least 544,000 gallons of water from the north fire water storage tank. Initially, control room operators and fire brigade personnel were not aware of this failure. Although only one fire pump was necessary to supply flow for the fire protection systems that had actuated, all three fire pumps (one electric and two diesel driven) started as a result of the break in order to maintain system pressure. Control room operators received a low fire protection header pressure alarm and directed fire brigade personnel to investigate. Fire brigade personnel discovered that all three fire pumps were operating without water and determined that the aligned fire water storage tank was empty. After consulting with the control room operators, fire brigade personnel shut down all three fire pumps. Both diesel-driven pumps showed evidence of overheating, with one damaged beyond repair. The pipe break was isolated to permit recovery of the fire protection system. It was subsequently discovered that operations and

fire brigade personnel did not initially recognize that there was a pipe break until they attempted to refill the fire protection system.

#### **B. Licensee Event Report**

The Licensee provided details of the September 20, 2008, event in Licensee Event Report (LER) 315/2008-006-01, "Manual Reactor Trip Due to Main Turbine High Vibrations," dated November 13, 2008 (ADAMS Accession No. ML083370197), in accordance with 10 C.F.R. § 50.73, "Licensee Event Report System." The LER documented the details of the event; provided an analysis of the event, including estimated change in conditional core damage probability; and provided a list of corrective actions.

The LER stated that the Licensee performed extensive inspections to identify and document damage to plant equipment resulting from the event. The results of the inspections identified no significant damage to safety-related SSCs. The Licensee determined that all plant systems necessary to shut down the unit and remove decay heat performed as designed, and that the event did not represent a significant increase in overall risk. The Licensee also determined that the trip event and response resulted in a change in conditional core damage frequency of  $7.811\text{E-}07$ , which represents a nominal increase in plant risk from expected plant performance consistent with NRC Inspection Manual Chapter 0308, "Reactor Oversight Process (ROP) Basis Document," dated November 8, 2007, and Regulatory Guide 1.174, "An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant Specific Changes to the Licensing Basis," Revision 1, issued November 2002.

#### **C. Special Inspection**

The NRC initiated a special inspection in accordance with Inspection Procedure 93812, "Special Inspection," issued July 25, 2008, based on the risk and deterministic criteria established in NRC Management Directive 8.3, "NRC Incident Investigation Program," dated March 27, 2001, and Inspection Procedure 71153, "Followup of Events and Notices of Enforcement Discretion," dated February 12, 2008, and on the equipment performance problems associated with the event. The Special Inspection Team (SIT) evaluated the facts and circumstances surrounding the September 20, 2008, turbine high-vibration event and the resulting failure of the fire protection system. The team detailed the results of the inspection in "D.C. Cook Nuclear Power Plant, Units 1 and 2, NRC Special Inspection Team Report 05000315/2008009; 05000316/2008009," dated January 23, 2009 (ADAMS Accession No. ML090260032).

The SIT made one finding of very low significance (a Green finding as

determined using NRC Inspection Manual Chapter 0609, "Significance Determination Process," dated August 5, 2008) related to the Licensee's failure to have appropriate procedures for control room operator actions associated with a response to a fire protection alarm panel. The lack of guidance contributed to the operators' inability to diagnose the fire protection system failure as evidenced by the simultaneous operation of all three fire pumps. This contributed to operators not recognizing a break in the fire protection system header outside the turbine building. The Licensee entered the issue into its corrective action program and has subsequently revised procedures determined to have been either lacking or insufficient to cope with the event.

The SIT reviewed the Licensee's plans and actions for assessing the impact that the event had on the SSCs at CNP-1. The SIT held discussions with site engineering staff, reviewed Licensee action plans for evaluating the condition of SSCs in the turbine building, reviewed in-process results from the Licensee's reviews, and evaluated the methods for tracking identified deficiencies.

The SIT noted that the Licensee developed an action plan to assess the impact of the event on plant systems. The action plan was broken down by discipline (e.g., structural integrity (civil engineering), piping integrity, and electrical), and the turbine building was inspected by dividing it into areas using preexisting structural column designations. The corrective action program was used to track identified deficiencies. The Licensee response letter dated May 12, 2009 (ADAMS Accession No. ML091420327), contains specific details of the inspection findings.

In an effort to quantify the magnitude of the vibration, the SIT discussed with the Licensee the response of the site's seismic monitoring equipment. As described in section 2.5 of the Updated Final Safety Analysis Report (UFSAR), a ground acceleration of 0.2g (acceleration equivalent to 20% of that caused by the force of gravity) is assumed in the design of SSCs required to safely shut down the reactor and for the operability of engineered safety features systems following an SSE. Other major plant structures are designed for a maximum horizontal ground acceleration of 0.10g, that of the operating-basis earthquake (OBE). Two types of seismic monitoring equipment are available: (1) a recorder with a trip setpoint to turn the unit on and (2) peak recording accelerographs (tape plates/scratch gauges), which are passive devices without setpoints. A seismic event at 0.02g, in either the horizontal or vertical direction, triggers the recording devices. The Licensee indicated that the recording devices did not start during the event, thus indicating that the vibration levels did not exceed 0.02g and, therefore, never approached the seismic levels of either the OBE or the SSE. The Licensee response letter further discusses the design and operation of the seismic monitoring equipment.

#### **D. Licensee Response Letter**

In a letter dated May 12, 2009 (ADAMS Accession No. ML091420327), the Licensee responded to the Petitioner's requests for information.

In response to item (1), the Licensee noted that vibration levels experienced in the control room, turbine building, and other structures were not measured or recorded during the event. The seismic triggers are actuated at a setpoint of 0.02*g*. One seismic trigger is located in a blockhouse in the 345-kilovolt switchyard, located several hundred yards from the turbine building. The other seismic trigger is located in the bottom of the CNP-1 containment. Since neither seismic trigger activated, the recording equipment of the seismic instrumentation system did not actuate.

The Licensee provided information regarding peak acceleration or peak displacement recorders installed on selected structures throughout the plant to aid in the characterization of a seismic event. None of these recorders are located in the turbine building and they do not have a means of recording the time of the disturbance; therefore, the Licensee stated that the recorders would not be expected to provide any characterization of vibration levels experienced during the event.

Based on this information, the Licensee concluded that the ground acceleration at the containment building was below 0.02*g*.

In response to item (2), the Licensee noted that in section 2.5 of the CNP UFSAR, a ground acceleration of 0.20*g* is assumed in the design of SSCs required to safely shut down the reactor and for the operability of engineered safety features systems. Other major structures are designed for a maximum horizontal ground acceleration of 0.10*g*.

Based on this information and the response to item (1) above, the magnitude of vibration resulting from this event was clearly below the threshold actuation setpoint for seismic instrumentation located in other structures. Therefore, the level of vibration experienced by these structures is lower than design-basis accelerations.

In response to item (3), the Licensee noted that there was no evidence that the vibration levels experienced by safety-related SSCs during the event exceeded those assumed for the SSE.

The Licensee's assessment team evaluated the damage associated with the event. The team performed extensive inspections of the turbine building structures and equipment. The assessment team concluded that the event did not degrade the structural elements of the turbine building. The event did result in significant damage to the main turbine rotors and bearings, as well as the turbine casing and hoods, and in localized damage to the concrete and grout of the main turbine foundation in areas that interface with the turbine hoods. The Licensee stated that it would complete repairs to these structures before returning CNP-1 to service.

In response to item (4), the Licensee concluded that spurious equipment operation occurring during the event was directly attributable to the vibrations associated with the main turbine failure. The only equipment that operated spuriously was associated with balance-of-plant systems and not with functions required to ensure public health and safety. Plant systems necessary to shut down the unit and remove decay heat operated as designed.

Based on this information, the Licensee concluded that the condition of SSCs will not pose a hazard to public health and safety in the event of an SSE following the return to service of CNP-1.

#### **E. Regulatory Evaluation**

The NRC Staff reviewed the Petitioner's request for specific information from the Licensee relating to the main turbine vibration event. The Staff also reviewed the Licensee's response to the four items identified in the petition. In its clarification of the first item, the Petitioner requested a value for the vibration levels experienced in the control room and turbine building during the event. The assertion is that the turbine building and control room structures are physically attached to other structures. The Staff notes that this assertion is inaccurate because the turbine building does not have a common foundation with other structures. There is a physical gap (i.e., rattle-space) between the turbine building and adjacent structures, so that the buildings will not affect each other if lateral sway occurs during a design-basis seismic event. Although steamline piping is connected to the turbine building, the ability of this piping to transmit major vibrations from the turbine building to adjacent buildings is fairly limited, because of its stiffness and mass characteristics, compared to the connected structure. Without a common foundation between the turbine building and another structure, the only mode for transmitting major vibration would be through the soil medium. Since none of the seismic monitors were activated during the event, it is evident that the vibration traveling through the soil was of such low magnitude that it did not challenge the design basis or affect the safety function of any plant safety-related equipment.

The NRC Staff viewed the impact of the turbine vibration on adjacent safety-related structures as having minimal effect, but this should not be construed as implying that the vibration level experienced by the turbine building and equipment located inside the turbine building was insignificant. The magnitude of the vibration imparted on the turbine building as a result of the event is unquantifiable and cannot be correlated to a postulated seismic design-basis event. Therefore, a realistic quantification of the magnitude of vibration from the event can only be inferred from the damage observed by the assessment team; this is discussed in the Licensee's letter responding to the Petitioner's request.

Considering the findings resulting from the Licensee assessment team's exten-



sive inspection, in addition to those of the NRC special inspection and followup inspections, the Staff concludes that the concerns in the Petitioner's request are not credible for two reasons. First, the Petitioner made an erroneous assumption in quantifying the magnitude of vibration from the event by presuming that seismic monitoring instrumentation is present in all the affected buildings. Second, the Petitioner incorrectly assumed that the turbine and control buildings are physically connected to other safety-related structures, and that these structures and their housed equipment may have experienced vibration levels approaching the design-basis SSE for the plant.

### III. CONCLUSION

The Petitioner raised potential safety concerns related to the September 20, 2008, main turbine failure at CNP-1. The Petitioner requested that the Licensee address concerns related to actual or potential seismic issues resulting from the excessive vibration experienced during the event. The Petitioner asked that the Licensee respond to specific concerns related to the plant's future ability to operate safely as a result of the event, and that the response be docketed at least 30 days before restart. The Licensee voluntarily provided a response that has been docketed and made publicly available.

The NRC technical staff reviewed the Licensee's response and other docketed information associated with the event. The NRC Staff concludes that public health and safety were not affected by the event, nor would they be affected by a similar event in the future.

Furthermore, the NRC has found the Licensee's event response and corrective actions to be reasonable and technically sound.

Based on the above, the Office of Nuclear Reactor Regulation has concluded that future operation of CNP-1 provides reasonable assurance of the continued protection of public health and safety. There were no violations associated with the event. The Licensee's corrective actions in response to the event appear appropriate. No further action is required.

As provided in 10 C.F.R. § 2.206(c), the Staff will file a copy of this Director(s) Decision 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

Eric J. Leeds, Director  
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,  
this 4th day of September 2009.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

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

**In the Matter of**

**Docket No. 52-016-COL**  
**(Combined License Application)**

**CALVERT CLIFFS 3 NUCLEAR  
PROJECT, LLC, and UNISTAR  
NUCLEAR OPERATING  
SERVICES, LLC**  
**(Calvert Cliffs Nuclear Power  
Plant, Unit 3)**

**October 13, 2009**

**CONTENTIONS: ADMISSIBILITY, STANDARD OF REVIEW**

The Commission will reject any contention that does not satisfy its deliberately strict contention admissibility requirements. The Commission gives substantial deference to its boards' determinations on threshold issues like standing and contention admissibility, and will affirm decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion.

**STANDING TO INTERVENE**

To demonstrate standing to intervene, the Commission's rules require a petitioner to state, and our boards to assess, the nature of the petitioner's right under the Atomic Energy Act, the National Environmental Policy Act, or other statute governing the proceeding, to be made a party; the nature and extent of the petitioner's property, financial, or other interest; and the possible effect of the outcome of the proceeding on the petitioner's interest. In assessing whether a petitioner has standing the Commission has long applied contemporaneous

judicial concepts of standing, but the Commission is not strictly bound by judicial standing doctrines.

#### **STANDING TO INTERVENE, PROXIMITY PRESUMPTION**

We generally require the elements of the judicial concept of standing, that is, the requirement for a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute, to be pled with specificity. But in certain circumstances — such as construction permit and operating license proceedings for power reactors — the Commission recognizes a “proximity,” or geographic, presumption. In such proceedings, the Commission presumes that a petitioner has standing to intervene if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor. In practice, the Commission has found standing based on this proximity presumption if a petitioner (or a representative of a petitioner organization) resides within approximately 50 miles of the facility in question.

#### **STANDING TO INTERVENE, PROXIMITY PRESUMPTION**

The Commission’s 50-mile “proximity presumption” is simply a shortcut for determining standing in certain cases. The presumption rests on the Commission’s finding, in construction permit and operating license cases, that persons living within the roughly 50-mile radius of the facility face a realistic threat of harm if a release from the facility of radioactive material were to occur.

#### **FOREIGN OWNERSHIP**

The analysis of compliance with section 103d of the Atomic Energy Act is a function performed by the NRC Staff as part of its evaluation of the combined license application. The Commission’s guidance directs the NRC Staff to consider an applicant to be foreign owned, controlled, or dominated whenever 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. The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant’s stock. Rather, these percentages must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares. Where the ownership interest is less than 100%,

although the analytical focus remains on safeguarding security and the national defense, a variety of factors are given further consideration: the extent of the proposed partial ownership of the reactor; whether the applicant is seeking authority to operate the reactor; whether the applicant has interlocking directors or officers and details concerning the relevant companies; whether the applicant would have access to any restricted data; and details concerning ownership of the foreign parent company.

## MEMORANDUM AND ORDER

Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Applicants), filed an application for a combined license (COL) for one U.S. Evolutionary Power Reactor (U.S. EPR) to be placed at the existing Calvert Cliffs site in Lusby, Calvert County, Maryland. Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens' Alliance for Renewable Energy Solutions (collectively, Joint Intervenors), filed a joint petition to intervene, proposing seven contentions.<sup>1</sup> The Atomic Safety and Licensing Board admitted Joint Intervenors' Contention 1 as pled, Contention 7 as narrowed by the Board, and Contention 2 in part. The Board declined to admit the balance of Contention 2 and all of Contentions 3, 4, 5, and 6.<sup>2</sup> Applicants appeal the Board's decision, arguing that the petition should have been wholly denied.<sup>3</sup> Joint Intervenors oppose the appeal.<sup>4</sup>

For the reasons provided below, we decline to overturn the Board's rulings with respect to Joint Intervenors' standing. Further, we affirm the Board's decision to admit Contention 1 and Contention 7 as narrowed by the Board. The Board recently granted a motion for summary disposition of Contention 2;<sup>5</sup> therefore the

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<sup>1</sup> Petition to Intervene in Docket No. 52-016, Calvert Cliffs[ ]3 Nuclear Power Plant Combined Construction and License Application (Nov. 19, 2008) (Joint Petition). *See also* Resubmission by Joint Petitioners of Petition to Intervene in Docket No. 52-016, Calvert Cliffs[ ]3 Nuclear Power Plant Combined Construction and License Application (Mar. 19, 2009).

<sup>2</sup> LBP-09-4, 69 NRC 170 (2009). *See also* Order (Correcting Errors in March 24, 2009 Order) (Apr. 14, 2009) (unpublished).

<sup>3</sup> Applicants' Notice of Appeal of LBP-09-[4] (Apr. 3, 2009), and Applicants' Brief in Support of Appeal from LBP-09-[4] (Apr. 3, 2009) (Applicants' Appeal).

<sup>4</sup> Joint Intervenors['] Response Brief to Applicant's Brief in Support of Appeal from LBP-09-[4] (Apr. 17, 2009) (Joint Intervenors' Response).

<sup>5</sup> Memorandum and Order (Granting Motion for Summary Disposition of Contention 2), LBP-09-15, 70 NRC 198 (2009). *See also* Order (Denying Motion for Reconsideration of Board Order of July 30, 2009) (Oct. 7, 2009) (unpublished).

question of the admissibility of Contention 2 is now moot and we do not address it in today's decision.

## I. ANALYSIS AND DISCUSSION

Our contention admissibility “requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.”<sup>6</sup> Under our rules:

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) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.<sup>7</sup>

“We give ‘substantial deference’ to our boards’ determinations on threshold issues, such as standing and contention admissibility,”<sup>8</sup> and we will affirm “decisions on the admissibility of contentions where the appellant ‘points to no error of law or abuse of discretion.’”<sup>9</sup> In this case, we find ourselves in agreement with the Licensing Board’s decision on the standing and contention admissibility questions.

### A. Standing

In this combined license proceeding, section 189a(1)(A) of the Atomic Energy

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<sup>6</sup> *USEC Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC 433, 437 (2006).

<sup>7</sup> 10 C.F.R. § 2.309(f)(1).

<sup>8</sup> *AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-06-24, 64 NRC 111, 121 (2006).

<sup>9</sup> *American Centrifuge*, 63 NRC at 439 n.32, citing *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3)*, CLI-04-36, 60 NRC 631, 637 (2004).

Act of 1954, as amended (AEA), requires us to hold a hearing “upon the request of any person whose interest may be affected by the proceeding,” and to allow that person to intervene.<sup>10</sup> In determining whether a person is an “interested person” for the purposes of a section 189a(1)(A) standing determination, we are not strictly bound by judicial standing doctrines.<sup>11</sup>

To demonstrate standing to intervene, our rules require a petitioner to state, and our boards to assess, the nature of the petitioner’s right under the AEA, the National Environmental Policy Act (NEPA), or other statute governing the proceeding, to be made a party; the nature and extent of the petitioner’s property, financial, or other interest; and the possible effect of the outcome of the proceeding on the petitioner’s interest.<sup>12</sup> In assessing whether a petitioner has standing, we have long applied contemporaneous “judicial concepts of standing.”<sup>13</sup> This is true with respect to the requirement for a “concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision,” where the injury is “to an interest arguably within the zone of interests protected by the governing statute.”<sup>14</sup> We generally require these elements to be pled with specificity. But in certain circumstances — such as construction permit and operating license proceedings for power reactors — we recognize a “proximity,” or geographic, presumption. In such proceedings, we presume that a petitioner has standing to intervene if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor.<sup>15</sup> In practice, we have found standing based on this “proximity presumption”

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<sup>10</sup> AEA § 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A). See 10 C.F.R. § 2.309(a), (d).

<sup>11</sup> *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) (finding that an administrative agency may establish “administrative standing” criteria that are less rigorous than those for “judicial standing”).

<sup>12</sup> See 10 C.F.R. § 2.309(d)(1).

<sup>13</sup> See, e.g., *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

<sup>14</sup> *Perry*, 38 NRC at 92. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).

<sup>15</sup> See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150, *aff’d on other grounds*, CLI-01-17, 54 NRC 3 (2001) (applying proximity presumption in reactor operating license renewal proceeding); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974) (applying proximity presumption in reactor operating license proceeding); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973) (considering proximity presumption in construction permit proceeding).



if a petitioner (or a representative of a petitioner organization) resides within approximately 50 miles of the facility in question.<sup>16</sup>

In their pleadings before the Board, Applicants argued that Joint Intervenors lacked standing to pursue their claims.<sup>17</sup> On appeal, Applicants renew their standing arguments. In brief, they would have us abandon the “proximity presumption” as “no longer valid under modern standing jurisprudence.”<sup>18</sup> In addition, Applicants argue in favor of requiring a direct connection between the redress applicable should the petitioners prevail on the merits of any given contention and the “injury in fact” basis for petitioners’ standing.<sup>19</sup> On both counts, we see no reason to depart from our traditional approach.

As to the “proximity presumption,” according to Applicants, “relatively recent developments in judicial concepts of standing dictate a significantly increased level of scrutiny and an increased showing necessary to establish standing.”<sup>20</sup> To support this statement, Applicants principally rely on cases dating from the early 1980s to the mid-1990s.<sup>21</sup> Applicants rely particularly on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* provides a reasonably concise statement<sup>22</sup> of the conceptual framework used to analyze standing (injury in fact, causal connection, and redress by a favorable decision). The NRC uses the same three-part analytical framework in analyzing standing.<sup>23</sup>

Notably, *Lujan* itself recognized a form of proximity presumption when it acknowledged that persons living adjacent to federally licensed facilities need not

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<sup>16</sup> See, e.g., *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (observing that an individual’s claim of residence within 50 miles of the plant might entitle him to a presumption of standing based on his proximity in a reactor construction permit or operating license proceeding).

<sup>17</sup> Joint Intervenors’ standing demonstrations rely on the proximity to the facility of member and organizational staff residences and organizational places of business. See Joint Intervenors’ Petition at 1-4.

<sup>18</sup> Applicants’ Appeal at 12.

<sup>19</sup> See, e.g., *id.* at 17-18.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 6-10.

<sup>22</sup> In *Lujan*, the Court summarized as follows:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” . . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” 504 U.S. at 560-61 (citations omitted, other alterations in original).

<sup>23</sup> See *Perry*, 38 NRC at 92, excerpted *supra*.

satisfy ordinary standing requirements to challenge the federal license.<sup>24</sup> At the NRC, our 50-mile “proximity presumption” is simply a shortcut for determining standing in certain cases. The presumption rests on our finding, in construction permit and operating license cases, that persons living within the roughly 50-mile radius of the facility “face a realistic threat of harm” if a release from the facility of radioactive material were to occur.<sup>25</sup> As the Board aptly put it:

[T]he “common thread” in the [NRC] decisions applying the 50-mile presumption “is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials.” The NRC’s regulations also recognize that an accidental release has potential effects within a 50-mile radius of a reactor. The Commission . . . has applied its expertise and concluded that persons living within a 50-mile radius of a proposed new reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility. . . . The nontrivial increased risk constitutes injury-in-fact, is traceable to the challenged action (the NRC’s licensing of a new nuclear reactor), and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners.<sup>26</sup>

Like the Board, we see no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC’s proximity presumption.<sup>27</sup> In any event, as the Board observed, Applicants have not provided — either before the Board, or on appeal — information to refute the basis of the presumption, such as evidence to show that the effects of an accidental release from the proposed Calvert Cliffs plant would be limited to a shorter distance from the facility.

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<sup>24</sup> See *Lujan*, 504 U.S. at 572 n.7.

<sup>25</sup> LBP-09-4, 69 NRC at 183.

<sup>26</sup> *Id.*, 69 NRC at 182-83, citing *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993), 10 C.F.R. § 50.33(g), and 10 C.F.R. Part 50, Appendix I, § II.D.

<sup>27</sup> LBP-09-4, 69 NRC at 182. But even if our “proximity presumption” is viewed as more lenient than judicial standing requirements, we may choose to retain it. See *Envirocare v. NRC*, *supra* note 11. Applicants cite the recently decided *Summers* case, in which the Supreme Court ruled, among other things, that several organizations seeking to challenge regulations of the U.S. Forest Service failed to demonstrate standing where they did not demonstrate a “concrete application” of the regulations that “threaten[ed] imminent harm” to their interests. *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1150 (2009). In contrast with the *Summers* case, where the majority found that vague intentions to visit the affected area are insufficient to show standing, in our case we have actual residences and places of business located sufficiently close to the site to qualify for standing under the presumption that they lie within the reactor’s potential zone of danger (should an accident occur). In any event, we look to judicial standing doctrines simply as guidance, and as a useful barometer of standing jurisprudence, but, as stated above, we are not strictly bound by the rules applicable to Article III courts. Our 50-mile presumption has proved a workable standard for decades, and we see no reason to abandon it today.

We therefore reject Applicants' standing arguments and find that the Board correctly applied the proximity presumption.<sup>28</sup>

## **B. Contention Admissibility**

### ***1. Contention 1***

The Board admitted Contention 1 as originally submitted by the Joint Intervenors:

Contrary to the Atomic Energy Act [(AEA)] and NRC Regulations, Calvert Cliffs[ ]3 would be owned, dominated and controlled by foreign interests.<sup>29</sup>

Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC, are the co-applicants for the COL. As described in the application, Calvert Cliffs 3 Nuclear Project, LLC, is an indirect subsidiary of UniStar Nuclear Energy, LLC. UniStar Nuclear Energy, LLC, in turn, is owned by Constellation New Nuclear, LLC, and EDF Development, Inc. Constellation New Nuclear, LLC, is part of Constellation Energy Group, Inc., while EDF Development, Inc. is an indirect subsidiary of Électricité de France, SA. UniStar Nuclear Operating Services, LLC, similarly is an indirect subsidiary of UniStar Nuclear Energy, LLC.<sup>30</sup> Joint Intervenors argued, based on ownership percentages gleaned from

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<sup>28</sup> Likewise, we decline to impose the "contention-based standing" concept that Applicants advocate in this proceeding. *See* Applicants' Appeal at 8 n.7, 17-18, 22, 26-27. As the Board suggests in its standing ruling, so long as either denial of a license or issuance of a decision mandating compliance with legal requirements would alleviate a petitioner's potential injury, then under longstanding NRC jurisprudence the petitioner may prosecute any admissible contention that could result in the denial or in the compliance decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *cf. Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 339-41 (2009).

<sup>29</sup> Joint Petition at 5.

<sup>30</sup> The application and revisions to the application are available at <http://www.nrc.gov/reactors/new-reactors/col/calvert-cliffs.html>. Details of the corporate structure are included in Part 1 of the application, specifically, Part 1 of Revision 3 to the application. *See also* Calvert Cliffs Nuclear Power Plant, Inc., Calvert Cliffs Nuclear Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Notice of Consideration of Approval of Application Regarding Proposed Restructuring and of Direct Transfer of Licenses Pursuant to 10 CFR 50.80 and 10 CFR 72.50, and of Approval of Conforming License Amendments Pursuant to 10 CFR 50.90 and 10 CFR 72.56 and Opportunity for a Hearing, 74 Fed. Reg. 21,413 (May 7, 2009). *See also Constellation Energy Nuclear Group, LLC, EDF Development, Inc., Calvert Cliffs Nuclear Power Plant, Inc., Calvert Cliffs Nuclear Power Plant, LLC* (Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, and Calvert Cliffs Independent Spent Fuel Storage Installation), Order Approving Application Regarding Proposed Corporate Restructuring and Approving Conforming Amendments (Oct. 9, 2009), 74 Fed. Reg. 53,770-72 (Oct. 20, 2009) (also available at ADAMS Accession No. ML092570583).

Constellation Energy Group, LLC, Securities and Exchange Commission filings<sup>31</sup> that Applicants are majority-owned and dominated by a foreign corporation and a foreign government. Specifically, Joint Intervenors stated that Calvert Cliffs 3 Nuclear Project, LLC, is a wholly owned subsidiary of UniStar Nuclear, LLC, which is owned 50% by Constellation Energy and 50% by Électricité de France (EDF) and EDF is 84.85% owned by the French government. Joint Intervenors noted additionally that EDF has a 9.51% ownership interest in Constellation Energy and that AREVA, the company that designed and proposes to build the proposed reactor, is a French company that is 80% owned by the French government.

As further evidence of foreign domination, Joint Intervenors pointed out that EDF, the source of the bulk of UniStar's capitalization, wields additional power simply because it has more than three times the revenue of Constellation Energy.<sup>32</sup> Based on all of these factors, Joint Intervenors argued that the application must be denied because Calvert Cliffs 3 "would be owned, controlled and dominated by a foreign corporation and foreign government,"<sup>33</sup> in contravention of section 103d of the AEA.<sup>34</sup>

Section 103d provides, in pertinent part:

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. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Joint Intervenors also argued that our regulation implementing this statutory provision will be contravened. That regulation, 10 C.F.R. § 50.38, provides:

Any 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.

Applicants challenge the bases for Joint Intervenors' Contention 1, arguing that Joint Intervenors' premise that 50% foreign ownership requires an automatic finding of foreign "control or domination" is incorrect, and that even if the

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<sup>31</sup> Joint Petition at 6 nn.1 & 2, 7 n.3.

<sup>32</sup> *Id.* at 6-8.

<sup>33</sup> *Id.* at 6 (emphasis in original).

<sup>34</sup> 42 U.S.C. § 2133(d).

premise were valid, the argument “that EDF actually controls more than 50% of UniStar as a result of its additional 9.51% ownership interest in Constellation Energy Group” is not.<sup>35</sup> Applicants argue that Joint Intervenors failed to explain the relevance of market capitalization or relative revenues of the two parent companies to the analysis of foreign control or domination. Applicants argue additionally that Joint Intervenors failed to challenge the pertinent sections of the application (such as section 1.4 of Revision 3) that contain the Applicants’ discussion of corporate governance and control measures — measures Applicants say are designed to ensure that “the Applicants will not be owned, dominated, or controlled by foreign interests within the meaning of the Atomic Energy Act.”<sup>36</sup> As a result, Applicants request that “the proposed contention [ ] be rejected for failure to establish that relief could be granted based on EDF’s participation alone, and for failure to demonstrate any genuine dispute regarding governance and control of the [A]pplicants.”<sup>37</sup> Joint Intervenors counter that these arguments go to the merits of the contention rather than to its admissibility. Joint Intervenors argue in particular that they “did address Revision 3 in the February 20, 2009[,] pre-hearing conference, where [they] noted that Revision 3 does not alter the fundamental underpinning of [the] contention and would be more appropriately considered at the evidentiary stage” of the proceeding.<sup>38</sup> For the reasons provided below, we agree with Joint Intervenors.

The analysis of compliance with section 103d of the AEA is a function performed by the NRC Staff as part of its evaluation of the COL application. Our guidance directs the NRC Staff to consider an applicant “to be foreign owned, controlled, or dominated whenever 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.”<sup>39</sup> We have “not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant’s stock.”<sup>40</sup> Rather, these percentages “must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues

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<sup>35</sup> Applicants’ Appeal at 14.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.* at 17. Applicants reiterate, in their discussion of each contention, their view that Joint Intervenors lack standing because the injuries they assert for standing — risk of accidental release of radiation and water contamination — do not relate to foreign ownership and control. We decline to overturn the Board’s admissibility ruling on that basis. *See* Section I.A, *supra*.

<sup>38</sup> Joint Intervenors’ Response at 10-11.

<sup>39</sup> Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999).

<sup>40</sup> *Id.*

and what rights may be associated with certain types of shares.”<sup>41</sup> Where the ownership interest is less than 100%, although the analytical focus remains on safeguarding security and the national defense,<sup>42</sup> a variety of factors are given further consideration:

(1) the extent of the proposed partial ownership of the reactor; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies; (4) whether the applicant would have any access to restricted data; and (5) details concerning ownership of the foreign parent company.<sup>43</sup>

Joint Intervenors’ contention relates to matters the Staff will consider in performing its section 103d analysis. These matters are clearly in dispute given the nature of Applicants’ objections, which we find address the merits of the contention rather than its admissibility. As the Board correctly found:

Joint Petitioners have established a genuine dispute with the Application. Though Applicant[s] [are] correct in [their] assertion that there is no threshold above which a foreign entity is assumed to control and dominate a corporation, this policy only establishes that a foreign entity cannot be denied a license based on percentage of ownership *per se*. NRC case law and precedent do not prohibit considering the percentage of foreign ownership as one element in [the] NRC’s overall analysis and finding of whether or not the foreign entity is a threat to the national defense and security of the United States. Joint Petitioners’ assertion that EDF’s large ownership interest indicates control and domination of Applicant[s] is undeniably a dispute with Applicant[s’] argument that safeguards delineated in the Application negate control and domination. This issue raises a dispute of material fact with the Application. To what extent EDF actually exercises control and domination over Applicant[s], and whether adequate safeguards are indeed in place to negate this influence, goes to the merits of the case and is not appropriate to decide at the contention admissibility stage.<sup>44</sup>

We affirm the Board’s decision to admit Contention 1.

## 2. *Contention 7*

The Board limited Joint Intervenors’ Contention 7, which, as originally formulated, read:

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> LBP-09-4, 69 NRC at 195 (internal citations omitted).

UniStar Nuclear Operating Service's (UniStar) application to build and operate Calvert Cliffs Nuclear Power Plant Unit 3 violates the National Environmental Policy Act by failing to address the environmental impacts of the waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment. UniStar's environmental report does not address the environmental, environmental justice, health, safety, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.<sup>45</sup>

The Board found Contention 7 inadmissible to the extent that it related to licensing of a low-level waste disposal site under 10 C.F.R. Part 61 or presented a challenge to Table S-3.<sup>46</sup> The Board admitted the contention to the extent that it asserts that the discussion of low-level radioactive waste management in the Environmental Report (ER) does not reflect the realities of the partial closure of the Barnwell facility. In particular, the ER contains no discussion of any plan to manage Class B and C radioactive waste and thus "fails to accurately describe the proposed action and its impact on the environment."<sup>47</sup> As narrowed by the Board, the admitted contention states:

The ER for [Calvert Cliffs 3] is deficient in discussing its plans for management of Class B and [Class] C wastes. In light of the current lack of a licensed offsite disposal facility, and the uncertainty of whether a new disposal facility will become available during the license term, the ER must either describe how Applicant[s] will store Class B and C wastes onsite and the environmental consequences of extended onsite storage, or show that Applicant[s] will be able to avoid the need for extended onsite storage by transferring [their] Class B and C wastes to another facility licensed for the storage of [low-level radioactive waste].<sup>48</sup>

The Board characterized the narrowed contention as an admissible "contention of omission." As such, in the Board's view, the contention "adequately describes the information that should have been included in the ER"<sup>49</sup> and "adequately identified the legal basis of the contention by alleging that such disclosure is required by NEPA."<sup>50</sup> The Board found further that the contention is within the scope of the proceeding because it challenges the legal sufficiency of the ER and

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<sup>45</sup> Joint Petition at 47.

<sup>46</sup> Table S-3 is codified in 10 C.F.R. § 51.51.

<sup>47</sup> LBP-09-4, 69 NRC at 226.

<sup>48</sup> *Id.* at 224.

<sup>49</sup> *Id.* at 225.

<sup>50</sup> *Id.*

is material to compliance with NEPA, our NEPA-implementing regulations, and ultimately, to the NRC's compliance with NEPA.<sup>51</sup>

Applicants argue that Contention 7 is essentially the same as a contention we excluded from consideration in the *Bellefonte*<sup>52</sup> COL case because the contentions cited the same sections of the respective environmental reports, referred to corresponding sections of the respective final safety analysis reports, and raised challenges to Table S-3. In *Bellefonte* we found that the Board erred in admitting the contention because the contention constituted a collateral attack on our regulations, which cannot be made absent a waiver.<sup>53</sup> Applicants urge the same treatment here. But in this proceeding, unlike in the *Bellefonte* case, the Board explicitly — and properly — excluded improper regulatory challenges to 10 C.F.R. Part 61 and to Table S-3. Contention 7, as admitted, is not identical to the contention we rejected in *Bellefonte* and Applicants' reasoning does not apply.

Contention 7 differs from the contention in the *Bellefonte* case in another important way. In *Bellefonte* we noted the brevity of the intervenor's argument.<sup>54</sup> Here, Joint Intervenors, in our view, provided sufficient detail on the environmental impact information claimed to have been omitted from the application to enable the Board to make a reasonable determination to admit the contention.<sup>55</sup>

Applicants maintain that “there is no requirement that an applicant specify precisely how low-level waste will be managed,”<sup>56</sup> and argue that Joint Intervenors provide no support for their assertion that failure to discuss onsite storage violates safety, security, and NEPA requirements. However, the Board limited the contention to NEPA considerations, and as the Board found, Joint Intervenors adequately identified the legal basis of the contention, arguing that disclosure of the environmental and public health consequences of extended onsite storage is required by NEPA (and implicitly by the NRC's NEPA regulations, 10 C.F.R. Part 51), given the plausible scenario whereby the low-level waste storage capacity at the site will be exceeded.<sup>57</sup>

Applicants complain that neither Joint Intervenors nor the Board cite any regulatory requirement that the ER include a “feasible plan” for the disposition of low-level radioactive waste, and assert that an expansion of the capacity for storing low-level waste, if necessary, would entail a separate licensing action. Applicants also argue that Joint Intervenors' assumption that the lack of a licensed

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<sup>51</sup> *Id.* at 225-26.

<sup>52</sup> *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68 (2009).

<sup>53</sup> See 10 C.F.R. § 2.335(a), (b).

<sup>54</sup> *Bellefonte*, CLI-09-3, 69 NRC at 74 n.25.

<sup>55</sup> Joint Petition at 48-52.

<sup>56</sup> Applicants' Appeal at 25.

<sup>57</sup> See LBP-09-4, 69 NRC at 225.



low-level waste disposal facility means the waste would have to remain onsite is incorrect because, for example, the waste could be transferred to a treatment facility, which would then have responsibility for disposing of the waste. Neither of these arguments is persuasive.

The contention, as admitted, asserts that Applicants failed to address potential environmental consequences, omitting information that must be included in the ER pursuant to 10 C.F.R. Part 51, in section 51.45(b) and (e). Applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement (potentially requiring a license amendment) might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed now.<sup>58</sup> And the Staff's environmental analysis must assess the COL application itself, not hypothetical solutions. As the Board states, it may be that an adequate plan to transfer low-level radioactive waste to a particular treatment facility would resolve the issue.<sup>59</sup> However, this is a contention of omission, and the COL application does not reflect such transfer plans.<sup>60</sup> In any event, a merits argument such as this cannot dispose of the contention at this stage of the proceeding.

We find that the Board did not err in admitting this contention, as narrowed.<sup>61</sup>

## II. CONCLUSION

For the foregoing reasons, we *affirm* the Board's decision to admit Contention 1 and Contention 7 as narrowed by the Board.

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<sup>58</sup> See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006); 10 C.F.R. Part 51, Subpart A, Appendix A, § 7.

<sup>59</sup> LBP-09-4, 69 NRC at 229 n.197.

<sup>60</sup> *Id.* at 227.

<sup>61</sup> Applicants reiterate that Joint Intervenors lack standing, because their asserted bases for standing do not relate to harm stemming from storage of low-level radioactive waste on the *Calvert Cliffs* site. Applicants' Appeal at 26-27. Joint Intervenors counter that a favorable outcome on this contention would result in an improved low-level waste program, which would "reduce the likelihood of accidental radioactive releases and contamination of water resources — the very issues on which Joint Intervenors have asserted standing." Joint Intervenors' Response at 20. Although we reject Applicants' argument, see Section I.A, *supra*, it is not at all clear, if we considered contention-based standing, that Joint Intervenors would not have standing to pursue this contention.

IT IS SO ORDERED.

For the Commission

ANDREW L. BATES *for*  
ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 13th day of October 2009.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

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

**In the Matter of**

**Docket Nos. 52-018-COL  
52-019-COL  
(Combined License Application)**

**DUKE ENERGY CAROLINAS, LLC  
(William States Lee III Nuclear  
Station, Units 1 and 2)**

**In the Matter of**

**Docket Nos. 52-014-COL  
52-015-COL**

**TENNESSEE VALLEY AUTHORITY  
(Bellefonte Nuclear Power Plant,  
Units 3 and 4)**

**November 3, 2009**

**REFERRED RULINGS**

The Commission will review referred rulings only if the referral “raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.” 10 C.F.R. § 2.341(f)(1); *see Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 72 (2009). *See also* 10 C.F.R. § 2.323(f) (the presiding officer may refer a ruling to the Commission if, in the judgment of the presiding officer, “prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity”). Referred rulings were not reviewed because contentions were

rejected by the Board due to legal insufficiency. Therefore, early Commission review would not advance the orderly disposition of either proceeding.

## MEMORANDUM AND ORDER

The Atomic Safety and Licensing Boards in the captioned combined license (COL) proceedings have referred to the Commission two contention admissibility rulings concerning the consideration in COL applications of certain environmental impacts relevant to greenhouse gas emissions. As discussed below, we decline to review the referred rulings.

### I. BACKGROUND

These proceedings relate to the COL applications filed by the Tennessee Valley Authority (TVA), seeking authorization to construct and operate two new nuclear reactor units (proposed Units 3 and 4) at its Bellefonte site in Alabama, and by Duke Energy Carolinas, LLC (Duke), seeking authorization to construct and operate two new nuclear reactor units at its Lee site in South Carolina.

In the *Bellefonte* proceeding, three organizations jointly petitioned to intervene.<sup>1</sup> On September 12, 2008, the Licensing Board issued LBP-08-16 which, among other things, found that two petitioners had demonstrated standing and had submitted four wholly or partially admissible contentions. Based on these findings, the Board admitted them as parties to the proceeding.<sup>2</sup>

In proposed contention NEPA-M,<sup>3</sup> the Joint Petitioners asserted omissions in TVA's COL application, arguing that TVA failed to include in its environmental report (1) "an analysis of the emission of [g]reenhouse gases in the process of the production of raw materials and components, and the transportation of these materials and components and the construction processes required to build

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

<sup>2</sup> LBP-08-16, 68 NRC 361 (2008). In LBP-08-16, the Board also referred to us its ruling admitting two contentions pertaining to the disposal of low-level radioactive waste (Contentions NEPA-G and FSAR-D). The Board further suggested that we consider instituting a "low-level waste confidence" rulemaking proceeding. *Id.*, 68 NRC at 415. We recently declined that referral, reversing the Board's admission of both contentions and declining to accept the Board's rulemaking suggestion. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68 (2009). The Board's rulings admitting two other contentions, NEPA-B and NEPA-N, are not at issue here.

<sup>3</sup> Supplement to Petition of June 6, 2008 Providing Alphanumeric Designation of Contentions (June 26, 2008) at 5; Bellefonte Petition at 81-84.

Bellefonte 3 [and] 4”); and (2) an analysis of greenhouse gas emissions associated with each step in the uranium fuel cycle, including reprocessing.<sup>4</sup> The *Bellefonte* Board found the contention, framed as a contention of omission, to be inadmissible because the application did in fact contain a discussion of greenhouse gas emissions.<sup>5</sup> Nevertheless, the Board referred the question whether the Applicant had adequately accounted for the environmental effects of the “carbon footprint” associated with construction and operation of the new reactors for our consideration. The Board observed that COL applicants continue to rely on “greenhouse gas avoidance” as an environmental benefit of nuclear power plant operation, and noted the “apparent failure” of Table S-3<sup>6</sup> to account for the release values for greenhouse gases such as carbon dioxide.<sup>7</sup> The Board reasoned that it is “conceivable” that an admissible contention regarding analysis of greenhouse gas and “carbon footprint” impacts relative to other baseload power sources will be proffered in the future, and that the Commission may wish to consider the potential generic significance of the issue to, *inter alia*, other COL proceedings.<sup>8</sup>

In the *Lee* case, the Blue Ridge Environmental Defense League (BREDL) petitioned to intervene.<sup>9</sup> Just 10 days after the *Bellefonte* Board issued LBP-08-16, the *Lee* Board issued LBP-08-17, in which it ruled that, although BREDL had demonstrated standing to intervene in the proceeding, it had not proffered an admissible contention.<sup>10</sup> Among others, the Board was presented with BREDL Contention 2, a “carbon footprint” contention substantively identical to the one proffered by the Joint Petitioners in the *Bellefonte* proceeding.<sup>11</sup> Specifically, BREDL asserted omissions from the COL application, arguing that Duke “fail[ed] to include any discussion of Green House Gas emissions or ‘Carbon Foot-Print’

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<sup>4</sup> Bellefonte Petition at 82-83.

<sup>5</sup> LBP-08-16, 68 NRC at 418-19, citing section 10.3.1.3 and Table 10.3-1 of the Applicant’s Environmental Report, regarding the avoidance of greenhouse gases as a benefit of the Bellefonte facilities relative to other baseload energy sources. *See* 10 C.F.R. § 2.309(f)(1)(vi).

<sup>6</sup> 10 C.F.R. § 51.51(b) (“Table of Uranium Fuel Cycle Environmental Data”). As stated in 10 C.F.R. § 51.51(a), each environmental report prepared for the combined license stage of a light-water cooled nuclear power reactor must take Table S-3 as the basis for evaluating the contribution of the environmental effects of the fuel cycle (uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials, and low- and high-level waste management related to fuel cycle activities) to the environmental costs of licensing the reactor.

<sup>7</sup> LBP-08-16, 68 NRC at 419.

<sup>8</sup> *Id.*

<sup>9</sup> Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 27, 2008) (*Lee* Petition).

<sup>10</sup> LBP-08-17, 68 NRC 431 (2008). BREDL did not appeal the Board’s decision.

<sup>11</sup> *Lee* Petition at 11-14.

in its environment[al] report.”<sup>12</sup> The *Lee* Board rejected BREDL Contention 2, again framed as a contention of omission, for failure to articulate a genuine dispute on a material issue of law or fact, noting that several sections of Duke’s environmental report addressed hydrocarbon and other emissions.<sup>13</sup> Because the *Bellefonte* Board had referred to us its ruling on the issue, the *Lee* Board also referred its ruling on BREDL Contention 2 to us on grounds of “fairness and efficiency.”<sup>14</sup> We consider both referred rulings today.

## II. DISCUSSION

Our rules of practice provide that we will review referred rulings only if the referral “raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”<sup>15</sup> In this case, we decline to review the referred rulings, because we find that their consideration would not advance the orderly disposition of either proceeding.

As discussed above, the *Bellefonte* and *Lee* Boards rejected the proposed “carbon footprint” contention on the ground that the petitioners failed to satisfy the contention admissibility requirements with respect to that contention. We understand the referral, however, to concern principally the suggestion that the Commission may wish to address the policy issue of whether, and how, COL applicants and the agency should address the environmental analysis of greenhouse gas and carbon footprint impacts relative to nuclear and other baseload power sources. Indeed, the bases for the Boards’ rulings on the contentions do not necessarily implicate the general policy issue. At the same time, we recognize the likelihood that the issue will continue to be raised in other licensing proceedings, and COL proceedings in particular. In these circumstances, we decline to undertake the review of the specific referred rulings on the admissibility of the contentions in the *Bellefonte* and *Lee* proceedings, but we provide the following guidance.

The Staff has already considered “carbon footprint” impacts in a recent environmental review. The draft supplemental environmental impact statement for the combined license application for the proposed North Anna Power Station Unit 3

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<sup>12</sup> *Id.* at 12.

<sup>13</sup> LBP-08-17, 68 NRC at 444; *see* 10 C.F.R. § 2.309(f)(1)(vi).

<sup>14</sup> *Id.*, 68 NRC at 445.

<sup>15</sup> 10 C.F.R. § 2.341(f)(1); *Bellefonte*, CLI-09-3, 69 NRC at 72. *See* 10 C.F.R. § 2.323(f) (the presiding officer may refer a ruling to the Commission if, in the judgment of the presiding officer, “prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity”).

includes a section on greenhouse gas impacts.<sup>16</sup> We do not find it necessary or appropriate to opine on the adequacy of that or any other facility environmental review in the context of this adjudication. However, because the Staff is currently addressing the emerging issues surrounding greenhouse gas emissions in environmental reviews required for the licensing of nuclear facilities, we believe it is prudent to provide the following guidance to the Staff. We expect the Staff to include consideration of carbon dioxide and other greenhouse gas emissions in its environmental reviews for major licensing actions under the National Environmental Policy Act. The Staff's analysis for reactor applications should encompass emissions from the uranium fuel cycle as well as from construction and operation of the facility to be licensed. The Staff should ensure that these issues are addressed consistently in agency NEPA evaluations and, as appropriate, update Staff guidance documents to address greenhouse gas emissions.

### III. CONCLUSION

For the reasons set forth above, we *decline* to review the Boards' referred rulings as to Contention NEPA-M and BREDL Contention 2. We also provide guidance to the Staff relating to its continued consideration of carbon dioxide and other greenhouse gas emissions in major licensing actions under the National Environmental Policy Act.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 3d day of November 2009.

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<sup>16</sup> NUREG-1917, "Draft Supplemental Environmental Impact Statement for the Combined License (COL) for North Anna Power Station Unit 3" (Dec. 2008), § 5.11, Global Warming, Climate Change, and Greenhouse Gas Impacts.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

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

**In the Matter of**

**Docket No. 52-033-COL**

**DETROIT EDISON COMPANY**  
**(Fermi Nuclear Power Plant,**  
**Unit 3)**

**November 17, 2009**

**RULES OF PRACTICE: APPEALS**

The Commission's rules of practice provide for an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of whether a request for hearing or petition to intervene should have been wholly denied.

**INTERVENTION RULINGS: STANDARD OF REVIEW**

The Commission will defer to the Board's rulings on standing unless the appeal points to an error of law or abuse of discretion.

**MEMORANDUM AND ORDER**

This proceeding concerns the application of the Detroit Edison Company (Detroit Edison) for a combined license (COL) to construct and operate one Economic Simplified Boiling Water Reactor at the Fermi nuclear power plant site in Monroe County, Michigan. On August 10, 2009, Detroit Edison timely

filed a notice of appeal and supporting brief<sup>1</sup> challenging the Board's decision granting the request for hearing and petition to intervene jointly filed by several petitioners (Petitioners).<sup>2</sup> Detroit Edison argues that the Board erred in finding that the Petitioners had standing to intervene, and accordingly, asserts that the Board's decision should be reversed. It does not challenge the Board's rulings on contention admissibility. Both the NRC Staff and Petitioners timely filed responses in opposition to Detroit Edison's appeal.<sup>3</sup>

Our rules of practice provide for an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of "[w]hether the request for hearing or petition to intervene should have been wholly denied."<sup>4</sup> We will defer to the Board's rulings on standing, however, unless the appeal points to an error of law or abuse of discretion.<sup>5</sup>

We find no error in the Board's standing determination. The appeal encompasses arguments that are substantively similar to those made by a different applicant on appeal of a licensing board's standing and contention admissibility ruling in the *Calvert Cliffs* COL proceeding.<sup>6</sup> In sum, Detroit Edison claims that application of the 50-mile proximity presumption for the standing inquiry in Commission adjudicatory proceedings is inconsistent with contemporaneous judicial concepts of standing developed in precedent from Article III courts.<sup>7</sup> We recently issued a decision in *Calvert Cliffs* that rejected the similar arguments made here.<sup>8</sup> As we explained in that decision, "we see no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC's proximity presumption."<sup>9</sup> For the reasons provided in our *Calvert Cliffs* decision, we *deny* Detroit Edison's appeal and *affirm* the Board's decision in LBP-09-16.

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<sup>1</sup> Applicant's Notice of Appeal of LBP-09-16, Applicant's Brief in Support of Appeal from LBP-09-16 (Aug. 10, 2009) (Detroit Edison Appeal).

<sup>2</sup> LBP-09-16, 70 NRC 227 (2009).

<sup>3</sup> NRC Staff Brief in Opposition to the Applicant's Appeal from LBP-09-16 (Aug. 20, 2009); Reply of Petitioners in Opposition to DTE's Appeal LBP-09-16 (Aug. 20, 2009).

<sup>4</sup> 10 C.F.R. § 2.311(d)(1).

<sup>5</sup> See *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

<sup>6</sup> Compare Detroit Edison Appeal at 4-12, with Applicant's Notice of Appeal of LBP-09-04 (Apr. 3, 2009) (Docket No. 52-016-COL) at 5-13.

<sup>7</sup> See Detroit Edison Appeal at 6.

<sup>8</sup> *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911 (2009).

<sup>9</sup> *Id.* at 917.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 17th day of November 2009.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

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

**In the Matter of**

**Docket No. IA-05-052**

**DAVID GEISEN**

**November 17, 2009**

**STAY OF EFFECTIVENESS: IRREPARABLE HARM**

Whether the party seeking a stay faces potentially irreparable harm is the most important factor considered in the Commission's determination whether to grant a stay.

**STAY OF EFFECTIVENESS: IRREPARABLE HARM**

The possibility that the prevailing party would use the Board's order in his favor to persuade a District Court to reconsider part of the penalty imposed on him in a parallel criminal proceeding did not constitute "immediate, irreparable harm" to the NRC Staff.

**STAY OF EFFECTIVENESS: LIKELIHOOD OF SUCCESS ON THE MERITS**

Party seeking a stay did not show an "overwhelming" probability of success on the merits of its appeal sufficient to overcome its lack of showing of irreparable harm.

## MEMORANDUM AND ORDER

The NRC Staff has requested that we stay the effectiveness of the Atomic Safety and Licensing Board's Initial Decision<sup>1</sup> setting aside the enforcement order that is at issue in this proceeding, pending our action on the Staff's petition for review of the Initial Decision.<sup>2</sup>

In deciding whether to grant a stay, we consider the following factors:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm the other parties; and
- (4) Where the public interest lies.<sup>3</sup>

As the Staff observes, irreparable injury is the most important of the four factors.<sup>4</sup> The Staff's claim of irreparable injury arises principally from the fact that, if the Initial Decision is not stayed, then Mr. Geisen will request that the U.S. District Court reconsider its sentence in the parallel criminal case.<sup>5</sup> The Staff argues that the consideration by the court of the "flawed" initial decision will constitute improper "interference with the district court's deliberations," and will harm the Staff's continuing interest in ensuring that the 5-year employment ban imposed on Mr. Geisen remains in force for its full term.<sup>6</sup> The Staff also cites

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<sup>1</sup> LBP-09-24, 70 NRC 676 (2009). The Board ruled in Mr. Geisen's favor in a split decision. Chief Judge Hawkens dissented, finding in favor of the Staff.

<sup>2</sup> NRC Staff's Application for a Stay of the Effectiveness of LBP-09-24 Pending Commission Review (Sept. 21, 2009) (Stay Application). Mr. Geisen opposes the Stay Application. *See* David Geisen's Answer Opposing the Staff's Application for a Stay of the Effectiveness of LBP-09-24 Pending Commission Review (Oct. 6, 2009) (Geisen Answer).

<sup>3</sup> 10 C.F.R. § 2.342(e).

<sup>4</sup> *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) ("A party seeking a stay must show it faces imminent, irreparable harm that is both 'certain and great'").

<sup>5</sup> In May 2008, a jury in the U.S. District Court for the Northern District of Ohio found Mr. Geisen guilty in a parallel criminal case. LBP-09-24, 70 NRC at 688 n.13). The court sentenced Mr. Geisen to 3 years' probation, and also prohibited him from employment in the nuclear industry during the period of probation (ending May 1, 2011). *Id.* At Mr. Geisen's sentencing hearing, Judge Katz indicated that, if the NRC adjudication found in Mr. Geisen's favor, the court would be open to reconsidering the employment ban. *See* Transcript of Criminal Case Sentencing at 30:4-16 (May 1, 2008) (appended to Geisen Answer as Attachment 1). After the Board majority ruled in Mr. Geisen's favor, Mr. Geisen's counsel notified the court that he would request the federal ban be lifted if we do not stay the effectiveness of the Board's ruling. *See* Letter from R. Hibey to the Honorable David A. Katz (appended to Stay Application as Attachment 1).

<sup>6</sup> Stay Application at 7.

its continuing interest in ensuring the employment ban imposed on Mr. Geisen remains in force for its full term.<sup>7</sup> In our view, the Staff has not demonstrated that it will be irreparably harmed if the Initial Decision is immediately effective. Even if the court lifts Mr. Geisen’s employment ban, should the Staff ultimately prevail in its petition for review, the agency’s employment ban would be reinstated. In addition, that the district court will agree to lift the employment ban it imposed as part of Mr. Geisen’s sentence is neither certain nor imminent.<sup>8</sup>

The Staff argues that we have “left open the possibility” that an overwhelming showing of likelihood on the merits can overcome a “weak showing” of irreparable harm.<sup>9</sup> Even if this were so, we are unable to find that the Staff has demonstrated with “virtual certainty” that it will prevail on the merits of its petition for review.<sup>10</sup> The parties’ appellate briefs highlight a number of sharply contested legal and factual determinations, and are underlain by carefully crafted, lengthy, and detailed opinions by the Board majority and Chief Judge Hawkens.

Consideration of the remaining stay factors does not tip the balance in the Staff’s favor. The Staff says little regarding the potential harm to Mr. Geisen if a stay is granted, observing only that, as long as Mr. Geisen remains under the district court’s 3-year debarment, a stay will not result in substantial harm to him.<sup>11</sup> However, as Mr. Geisen points out, a stay of effectiveness of the Board’s order would preclude him from petitioning the district court for relief from a condition of his sentence.<sup>12</sup> In our view, this factor weighs in Mr. Geisen’s favor. Finally, with respect to where the public interest lies, we agree with the Staff that it is unquestionably in the public interest to ensure that NRC regulations are followed. Even assuming this factor weighs in favor of the Staff, however, it does not outweigh our determinations with respect to the other three factors.

The Staff’s Stay Application is *denied*.

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<sup>7</sup> *Id.*

<sup>8</sup> See Transcript of Criminal Case Sentencing at 30:5-13 (“if Mr. Geisen, for instance, were to be reinstated by the NRC and had the opportunity for reemployment . . . [the Court would] hold a hearing to consider that . . . request”).

<sup>9</sup> Stay Application at 8-9 (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 719 (2005); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma, Site), CLI-94-9, 40 NRC 1, 7 (1994)).

<sup>10</sup> See *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 7 (citing *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)).

<sup>11</sup> Stay Application at 9.

<sup>12</sup> Geisen Answer at 4 n.7. The Staff counters that, if a stay is not granted and Mr. Geisen seeks reconsideration of his sentence based on the Initial Decision, the outcome of reconsideration is uncertain, thus detracting from a finding that Mr. Geisen would be harmed. Stay Application at 9 n.31. But this observation serves principally to counteract the Staff’s argument, discussed *supra*, that it would be immediately and irreparably injured by allowing Mr. Geisen to use the Initial Decision to seek relief before the District Court.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 17th day of November 2009.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Lawrence G. McDade**, Chairman  
**Dr. Paul B. Abramson**  
**Dr. Gary Arnold**

**In the Matter of**

**Docket No. 50-391-OL**  
**(ASLBP No. 09-893-01-OL-BD01)**

**TENNESSEE VALLEY AUTHORITY**  
**(Watts Bar Nuclear Plant, Unit 2)**

**November 19, 2009**

In this proceeding arising from the license application of the Tennessee Valley Authority (TVA or Applicant) to operate a second nuclear power reactor at the Watts Bar Nuclear Plant (WBN Unit 2), the Licensing Board — ruling on a petition to intervene jointly filed by five organizations — concludes that one petitioner which has received an extension of time within which to file a petition to intervene demonstrated standing, filed a timely petition to intervene, and proffered admissible contentions, and was admitted as a party to the proceeding; and that the other four petitioners did not file timely petitions and did not demonstrate that their late intervention should be permitted.

**RULES OF PRACTICE: STANDING TO INTERVENE**

Pursuant to 10 C.F.R. § 2.309(d)(ii)-(iv), a petitioner seeking to establish standing to intervene in an NRC proceeding must provide information in the petition including (1) the nature of the petitioner's right to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that might be issued in the proceeding on the petitioner's interest.



**RULES OF PRACTICE: STANDING TO INTERVENE  
(ORGANIZATIONAL STANDING)**

To demonstrate standing, an organization seeking to intervene in a proceeding must allege that the challenged action will cause a cognizable injury to the organization's interests or to the interests of one or more of its members.

**RULES OF PRACTICE: STANDING TO INTERVENE  
(ORGANIZATIONAL STANDING)**

If an organization seeks to intervene as a representative of its members, it must identify at least one member by name and address, show that member would have standing in his or her own right, and demonstrate that the member has authorized the organization to intervene on his or her behalf.

**RULES OF PRACTICE: STANDING TO INTERVENE  
(PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)**

In the context of an operating license proceeding the NRC applies a proximity presumption, under which a petitioner who lives within 50 miles of a nuclear power reactor is presumed to have standing without the need specifically to plead injury, causation, and redressability.

**RULES OF PRACTICE: NONTIMELY INTERVENTION**

Pursuant to the 10 C.F.R. Part 2 regulations, a licensing board may consider contentions submitted after the initial 60-day filing deadline under two sets of circumstances. Section 2.309(f)(2) allows contentions to be filed after the initial 60-day deadline if the petitioner shows 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
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Otherwise, pursuant to 10 C.F.R. § 2.309(c), petitions and contentions filed after the initial 60-day deadline are admissible only upon a balancing of the following factors:

- (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.

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)**

Of the 10 C.F.R. § 2.309(c)(1) factors, good cause for the failure to file on time is the most important. Absent good cause, a petitioner's demonstration on the other factors must be "compelling."

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)**

Where petitioners failed to file on time or seek an extension because they had not yet decided whether to seek to intervene, such indecision does not constitute good cause.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)**

For a contention to be admissible, under 10 C.F.R. § 2.309(f)(1), it must (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised 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, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes or, where the

application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

**RULES OF PRACTICE: CONTENTIONS (BASIS)**

A petitioner must provide some sort of minimal basis indicating the potential validity of the contention.

**RULES OF PRACTICE: CONTENTIONS (BASIS)**

Because the reach of a contention necessarily hinges upon its terms and its stated bases, the brief explanation helps define the scope of the contention.

**RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)**

The scope of a proceeding is defined in the Commission's initial hearing notice and order referring the proceeding to the Licensing Board. Contentions that fall outside the scope of the proceeding must be rejected.

**RULES OF PRACTICE: CONTENTIONS (MATERIALITY)**

In order 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. In other words, the petitioner must show that the subject matter of the contention could impact the grant or denial of the license application at issue in the proceeding.

**RULES OF PRACTICE: CONTENTIONS (MATERIALITY)**

“Materiality” requires a showing that the alleged error or omission is of possible significance to the result of the proceeding, i.e., that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment.

**RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)**

It is the petitioner's obligation to present the factual and expert support for its contention. Failure to do so requires that the contention be rejected. Mere notice pleading is insufficient. A petitioner's issue will be ruled inadmissible

if the petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation. Likewise, providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention.

**RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)**

If a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner or supply information that is lacking.

**RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)**

Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.

**RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)**

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits. The petitioner does not have to prove its contention at the admissibility stage. The contention admissibility threshold is also less than is required at the summary disposition stage. Nevertheless, while a Board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner, a petitioner must provide some support for his or her contention, in the form of either facts or expert testimony.

**RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)**

A contention must show that a genuine dispute exists on a material issue of law or fact 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. Any contention that fails to directly controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.

**RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)**

With limited exceptions no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding. Thus, a contention that attacks applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected. Similarly, the NRC's adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction that regulatory policy should take.

**NEPA: RULE OF REASON**

The requirements of NEPA and, by extension, the NRC's regulations implementing NEPA (10 C.F.R. Part 51) are subject to a rule of reason, and only reasonably foreseeable environmental impacts must be addressed.

**OPERATING LICENSE: ENVIRONMENTAL ISSUES (SCOPE)**

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)**

Section 51.53(b) of 10 C.F.R. establishes the requirements for an applicant's submission of environmental information at the operating license stage. Pursuant to this regulation, the applicant must submit a document denominated as the "Supplement to Applicant's Environmental Report — Operating License Stage." In this document

the applicant shall discuss the same matters described in §§ 51.45, 51.51, and 51.52 [which would have been initially discussed in the ER at the construction permit stage], but only to the extent that they differ from those discussed or reflect new information . . . .

The clear intent of this provision is to avoid duplication and to highlight new information. However, this regulation specifies limitations on this general requirement. It goes on to state that:

No discussion of need for power, or of alternative energy sources . . . is required in this report [the Supplement to Applicant's Environmental Report — Operating License Stage].

Since an OL applicant is thus not obligated to include any discussion of the need for power or of alternative energy sources in its application for an operating license, a challenge to the adequacy of the applicant's discussion of these issues is not within the scope of the proceeding.

**RULES OF PRACTICE: CONTENTIONS (AMENDMENT)**

In order for the Board to allow a petitioner to amend a contention, the petitioner must demonstrate that the information upon which the amended contention is based was not previously available, is materially different from information previously available, and that the amended contention has been submitted in a timely fashion.

**RULES OF PRACTICE: CONTENTIONS (NEW INFORMATION)**

The standard for whether information is new is whether the information was available to the public, not whether the petitioner has recently become aware of its availability.

**RULES OF PRACTICE: CONTENTIONS (SCOPE)**

At the contention admissibility stage of the proceedings, the Board admits “contentions,” not “bases.”

**MEMORANDUM AND ORDER  
(Granting Petition to Intervene)**

**I. INTRODUCTION**

This proceeding arises from an updated application pursuant to 10 C.F.R. Part 50 by the Tennessee Valley Authority (TVA) for an operating license (OL) for a second nuclear reactor at the Watts Bar Nuclear Plant (WBN) in Rhea County, Tennessee.<sup>1</sup> Pending before the Board is a Petition to Intervene and Request for Hearing<sup>2</sup> jointly filed by five organizations in response to a Notice of Opportunity for Hearing issued on May 1, 2009.<sup>3</sup> The Petitioners in this proceeding are Southern Alliance for Clean Energy (SACE), Tennessee Environmental Council (TEC), We the People (WTP), the Sierra Club, and Blue Ridge Environmental

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<sup>1</sup> TVA originally filed an OL application for WBN Unit 2 on June 30, 1976; however, construction of the unit was never completed. TVA filed an update to the OL application on March 4, 2009. *See* Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350 (May 1, 2009).

<sup>2</sup> Petition to Intervene and Request for Hearing (July 13, 2009) [hereinafter Petition].

<sup>3</sup> 74 Fed. Reg. at 20,350.

Defense League (BREDL).<sup>4</sup> TVA and the NRC Staff filed Answers addressing the Petition.<sup>5</sup> The Petitioners filed a Reply to TVA's and the Staff's Answers.<sup>6</sup> On September 3, 2009, SACE filed a Motion for Leave to Amend Contention 7, along with an Amended Contention 7.<sup>7</sup> TVA and the NRC Staff filed Responses in Opposition to the Motion on September 8, and September 10, 2009, respectively.<sup>8</sup> In addition, on September 28, 2009, TVA and the NRC Staff filed Answers to the Amended Contention.<sup>9</sup> SACE filed a Reply to TVA's and the NRC Staff's Answers to the Amended Contention on October 5, 2009.<sup>10</sup>

In order to intervene as a party in a NRC adjudicatory proceeding, a petitioner must (1) establish standing, and (2) proffer at least one admissible contention.<sup>11</sup> For the reasons discussed below, we grant the Request for Hearing submitted on behalf of SACE, which has demonstrated standing and submitted two admissible contentions (SACE Contentions 1 and 7) in a Petition that was timely filed. We deny the Request for Hearing submitted on behalf of TEC, WTP, the Sierra Club, and BREDL because the Petition to Intervene that was submitted on their behalf was not filed within the applicable deadline and they have not submitted adequate justification to allow consideration of a nontimely Petition to Intervene.

## II. STANDING ANALYSIS

### A. Standards Governing Standing

Pursuant to 10 C.F.R. § 2.309(d)(ii)-(iv), a petitioner seeking to establish

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<sup>4</sup> Petition at 1.

<sup>5</sup> [TVA]'s Answer Opposing the [SACE] et al., Petition to Intervene and Request for Hearing (Aug. 7, 2009) [hereinafter TVA Answer]; NRC Staff's Answer to Petition to Intervene and Request for Hearing (Aug. 7, 2009) [hereinafter Staff Answer].

<sup>6</sup> Petitioners' Reply to NRC Staff's and [TVA]'s Answers to Petition to Intervene and Request for Hearing (Aug. 14, 2009) [hereinafter Reply].

<sup>7</sup> Petitioners' Motion for Leave to Amend [Co]ntention 7 Regarding TVA Aquatic Study (Sept. 3, 2009) [hereinafter Motion to Amend]; Petitioners' Amended Contention 7 Regarding TVA Aquatic Study (Sept. 3, 2009) [hereinafter Amended Contention 7].

<sup>8</sup> [TVA]'s Response in Opposition to Petitioners' Motion for Leave to Amend Contention 7 Regarding TVA Aquatic Study (Sept. 8, 2009) [hereinafter TVA Response to Motion to Amend]; NRC Staff's Response in Opposition to Motion for Leave to Amend Contention 7 Regarding TVA Aquatic Study (Sept. 10, 2009) [hereinafter Staff Response to Motion to Amend].

<sup>9</sup> [TVA]'s Response in Opposition to Petitioners' Amended Contention 7 Regarding TVA Aquatic Study (Sept. 28, 2009) [hereinafter TVA Answer to Amended Contention 7]; NRC Staff's Answer to Petitioners' Amended Contention 7 Regarding TVA Aquatic Study (Sept. 28, 2009) [hereinafter Staff Answer to Amended Contention 7].

<sup>10</sup> Petitioners' Reply to Responses of NRC Staff and [TVA] to Petitioners' Amended Contention 7 (Oct. 5, 2009) [hereinafter Reply to Amended Contention 7].

<sup>11</sup> 10 C.F.R. § 2.309(a).

standing to intervene in an NRC proceeding must provide information in the petition including (1) the nature of the petitioner's right to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that might be issued in the proceeding on the petitioner's interest. Additionally, the NRC generally follows judicial concepts of standing, which require a petitioner to "(1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision," commonly referred to as "'injury in fact,' causality and redressability."<sup>12</sup>

To demonstrate standing, an organization seeking to intervene in a proceeding must allege that the challenged action will cause a cognizable injury to the organization's interests or to the interests of its members.<sup>13</sup> If the organization seeks to intervene as a representative of its members, it must identify at least one member by name and address, show that member would have standing in his or her own right, and demonstrate that the member has authorized the organization to intervene on his or her behalf.<sup>14</sup>

In addition, in the context of an operating license proceeding the NRC applies a proximity presumption, under which a petitioner who lives within 50 miles of a nuclear power reactor is presumed to have standing without the need specifically to plead injury, causation, and redressability.<sup>15</sup>

## **B. Board Rulings on Standing**

With its Petition to Intervene, SACE submitted declarations from two of its members who live within 50 miles of the proposed facility which authorized SACE to represent their interests in this proceeding,<sup>16</sup> and neither TVA nor the NRC Staff contest SACE's standing.<sup>17</sup> Given the declarations submitted, and the

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<sup>12</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (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)).

<sup>13</sup> *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 52 (2007).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 181-86 (2009); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 378 (2008); see also *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (observing that the proximity presumption applies in proceedings for nuclear power plant "construction permits, operating licenses, or significant amendments thereto").

<sup>16</sup> Petition, Attach. 1 at unnumbered pp. 1-2, Declaration of Standing of Sandra Kurtz (June 16, 2009) & Declaration of Standing of Louise Gorenflo (June 26, 2009).

<sup>17</sup> TVA Answer at 8; Staff Answer at 9.



proximity presumption applicable in proceedings relating to nuclear power plant operating licenses, we find that SACE has established standing to intervene in this proceeding. We do not address the standing of the other petitioners, TEC, WTP, the Sierra Club, and BREDL, because a timely Petition to Intervene was not submitted on their behalf.

### III. LATE FILING ANALYSIS

#### A. Standards Governing Late Filing

Pursuant to the 10 C.F.R. Part 2 regulations, we may consider contentions submitted after the initial 60-day filing deadline under two sets of circumstances. Section 2.309(f)(2) allows contentions to be filed after the initial 60-day deadline if the petitioner shows 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
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.<sup>18</sup>

Otherwise, pursuant to 10 C.F.R. § 2.309(c), petitions and contentions filed after the initial 60-day deadline are admissible only upon a balancing of the following factors:

- (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

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<sup>18</sup> 10 C.F.R. § 2.309(f)(2)(i)-(iii).

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.<sup>19</sup>

The Commission has indicated that, of the 10 C.F.R. § 2.309(c)(1) factors, good cause for the failure to file on time is the most important.<sup>20</sup> Absent good cause, a petitioner's "demonstration on the other factors must be 'compelling.'"<sup>21</sup>

## **B. Board Ruling on Motion to Permit Late Filing<sup>22</sup>**

SACE requested and was granted an extension to file a petition by July 14, 2009.<sup>23</sup> However, the request for an extension did not state, or otherwise indicate, that any party in addition to SACE was seeking an extension.<sup>24</sup> Likewise, the Commission Order granting the extension was not general in nature but was directed only to SACE.<sup>25</sup>

Both TVA and the NRC Staff argue that, because the extension applied only to SACE, the other Petitioners, to whom the Commission Order granting the extension did not expressly apply and who did not address the factors set forth in NRC's regulations governing late-filed contentions in the Petition to Intervene,<sup>26</sup> are impermissibly late and should not be admitted as parties to this proceeding.<sup>27</sup> Additionally, TVA argues that TEC, WTP, Sierra Club, and BREDL should not be admitted as parties because no individual, including counsel for SACE, has filed a Notice of Appearance on their behalf and has thus been authorized to appear on their behalf in this proceeding.<sup>28</sup>

In their Reply, the Petitioners concede that the hearing request is not timely

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<sup>19</sup> *Id.* § 2.309(c)(1)(i)-(viii).

<sup>20</sup> *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005); *see also Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

<sup>21</sup> *Millstone*, CLI-05-24, 62 NRC at 565; *see also Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-74 (1992).

<sup>22</sup> In the Motion to Permit Late Addition of Co-Petitioners only the section 2.309(c) factors are addressed. Accordingly, the Board has not analyzed the section 2.309(f)(2) factors in ruling on the Co-Petitioners' Motion.

<sup>23</sup> [SACE]'s Request for Extension of Time to Submit Hearing Request/Petition to Intervene (June 16, 2009) [hereinafter SACE Extension Request]; Order of the Secretary (Granting [SACE]'s Request for Extension of Time) (June 24, 2009) (unpublished) [hereinafter Extension Order].

<sup>24</sup> SACE Extension Request.

<sup>25</sup> Extension Order.

<sup>26</sup> 10 C.F.R. § 2.309(c).

<sup>27</sup> Staff Answer at 13; TVA Answer at 17.

<sup>28</sup> TVA Answer at 17-18.

with respect to TEC, WTP, Sierra Club, and BREDL.<sup>29</sup> However, the Petitioners' Reply references a Motion that asks the Board to permit the late addition of those groups to SACE's timely petition and admit them as parties to the proceeding.<sup>30</sup> In the Motion, the Petitioners assert that they satisfy the factors set forth in 10 C.F.R. § 2.309(c) relating to the acceptance of nontimely petitions to intervene.<sup>31</sup> They claim to satisfy the good cause requirement because TEC, WTP, Sierra Club, and BREDL had the same reasons for needing additional time that SACE had, and because counsel for the Petitioners overlooked the need to request an expansion of the scope of the extension granted to SACE under the pressure of preparing the Petition to Intervene.<sup>32</sup> They assert that the factors concerning the nature and extent of their right to be made parties to the proceeding, the nature and extent of their interest in the proceeding, and the possible effect on them of any order in the proceeding favor their admission to the proceeding for the reasons asserted in the Petition.<sup>33</sup> They also assert that they will have no other means of protecting their interests because methods do not exist under NRC regulations that would allow them to participate in licensing proceedings, that SACE will not adequately represent their interests if it is later forced to withdraw from the proceeding, that their participation merely as Co-Petitioners on a Petition that has already been submitted will not affect the breadth or length of the proceeding, and that they have assisted and will assist in developing a sound record by co-sponsoring the contentions that have already been filed and coordinating with SACE in the future development of testimony and/or legal briefs on any admitted contentions, for example, by contributing local environmental and economic knowledge to help develop proffered Contentions 4 and 7.<sup>34</sup>

While SACE presented a credible case for an extension of time, its Co-Petitioners did not demonstrate good cause for failing to file their Request for Hearing or a Motion for an Extension of Time within the established deadline. Petitioners candidly state that they did not join SACE in seeking an extension because at the time the extension was requested they had not yet decided whether to join SACE in the Petition to Intervene.<sup>35</sup> Such indecision does not constitute good cause for failure to file a timely petition. Further, having failed to demonstrate good cause for the late filing, the Board does not find that the other section

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<sup>29</sup> Reply at 2.

<sup>30</sup> *Id.*

<sup>31</sup> Motion to Permit Late Addition of Co-Petitioners to [SACE]'s Petition to Intervene and Admit Them as Intervenor (Aug. 14, 2009) at 2 [hereinafter Motion for Late Admission of Co-Petitioners].

<sup>32</sup> Motion for Late Admission of Co-Petitioners at 2.

<sup>33</sup> *Id.* at 3 (citing 10 C.F.R. § 2.309(c)(1)(ii)-(iv)).

<sup>34</sup> *Id.* at 3-4 (citing 10 C.F.R. § 2.309(c)(1)(v)-(vii)).

<sup>35</sup> *Id.* at 2.

2.309(c)(1) factors are so compelling that we should entertain their nontimely Petition.

All of the Co-Petitioners have the same rights under the Act to be made a party to this proceeding, and the same interests in this proceeding, as does SACE. Further, admitting the Co-Petitioners as parties will not broaden or delay the proceeding. Nevertheless, these factors are insufficient, absent a demonstration of good cause for their late filing, to justify our admitting them as parties to this proceeding.

Co-Petitioners state that SACE could withdraw from this proceeding and, if it did so, there would be no existing party to protect Co-Petitioners interests (section 2.309(c)(1)(vi)).<sup>36</sup> While the withdrawal of SACE from this proceeding is a possibility, the abandonment of its status in this proceeding, after taking the effort to request an extension of time and then filing a professional, and well-supported Petition to Intervene, is far too speculative to carry much weight in the Board's decision.

Co-Petitioners also argue that they would be able to assist in developing a sound record (section 2.309(c)(viii)) by coordinating with SACE on the development of testimony and legal briefs by contributing their knowledge of local environmental and economic conditions to the development of Petitioners' case.<sup>37</sup> They do not, however, explain how their knowledge of these facts is superior to, or even different from, that of SACE or why, if they are not admitted as parties, they could not, nevertheless, provide such services to SACE.

Therefore, after balancing all of the section 2.309(c)(1) factors, we *deny* the Motion to Permit Late Addition of Co-Petitioners to SACE's Petition to Intervene and do not extend to them party status in this proceeding.

#### IV. CONTENTION ANALYSIS

##### A. Standards Governing Contention Admissibility

For a contention to be admissible, under 10 C.F.R. § 2.309(f)(1), it must (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised 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, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to

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<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Id.* at 4.

rely at hearing; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes or, where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.<sup>38</sup>

The purpose of the contention admissibility rules is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”<sup>39</sup> 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.”<sup>40</sup> The Commission has emphasized that the contention admissibility rules are “strict by design.”<sup>41</sup> Failure to comply with any of the requirements is grounds for dismissal of a contention.<sup>42</sup>

These requirements have been further explained through the Commission’s case law, as summarized below.

### ***1. Brief Explanation of the Basis for the Contention***

Section 2.309(f)(1)(ii) requires a “brief explanation of the basis for the contention” as a prerequisite to contention admissibility. The Commission has explained that “a petitioner must provide some sort of minimal basis indicating the potential validity of the contention.”<sup>43</sup> Because “[t]he reach of a contention

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<sup>38</sup> 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>39</sup> Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 61 (2008); *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. AEC*, 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).

<sup>40</sup> 69 Fed. Reg. at 2202.

<sup>41</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *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)).

<sup>42</sup> 69 Fed. Reg. at 2221; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004); *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, 155-56 (1991).

<sup>43</sup> Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

necessarily hinges upon its terms and its stated bases,”<sup>44</sup> the brief explanation helps define the scope of the contention.<sup>45</sup>

## **2. *Within the Scope of the Proceeding***

A petitioner must also demonstrate that the “issue raised in the contention is within the scope of the proceeding.”<sup>46</sup> The scope of a proceeding is defined in the Commission’s initial hearing notice and order referring the proceeding to the Licensing Board.<sup>47</sup> Contentions that fall outside the scope of the proceeding must be rejected.<sup>48</sup>

## **3. *Materiality***

In order 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.”<sup>49</sup> In other words, the petitioner must show that “the subject matter of the contention would impact the grant or denial of the license application at issue in the proceeding.”<sup>50</sup> “Materiality” requires a showing that the alleged error or omission is of possible significance to the result of the proceeding,<sup>51</sup> i.e., that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment.<sup>52</sup>

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<sup>44</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004).

<sup>45</sup> *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009) (citing *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)).

<sup>46</sup> 10 C.F.R. § 2.309(f)(1)(iii).

<sup>47</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

<sup>48</sup> *Indian Point*, LBP-08-13, 68 NRC at 62; *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

<sup>49</sup> 10 C.F.R. § 2.309(f)(1)(iv).

<sup>50</sup> *Indian Point*, LBP-08-13, 68 NRC at 62.

<sup>51</sup> *Id.* (citing *Portland Cement Association. v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied sub nom. *Portland Cement Corp. v. Administrator, Environmental Protection Agency*, 417 U.S. 921 (1974)).

<sup>52</sup> *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 315 (2008); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), rev’d in part on other grounds, CLI-96-7, 43 NRC 235 (1996).

#### 4. Concise Allegation of Supporting Facts or Expert Opinion

Contentions must be accompanied 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.”<sup>53</sup> It is the petitioner’s obligation to present the factual and expert support for its contention.<sup>54</sup> Failure to do so requires that the contention be rejected.<sup>55</sup>

Thus, “[m]ere ‘notice pleading’ is insufficient. A petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”<sup>56</sup> Likewise, providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention.<sup>57</sup> Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner or supply information that is lacking.<sup>58</sup> Additionally, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.<sup>59</sup>

However, determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.<sup>60</sup> The petitioner does not have to prove its contention at the admissibility stage.<sup>61</sup> The contention admissibility threshold is also less than is required at the

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<sup>53</sup> 10 C.F.R. § 2.309(f)(1)(v).

<sup>54</sup> *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, and *aff’d in part*, CLI-95-12, 42 NRC 111 (1995).

<sup>55</sup> *Vogtle*, LBP-07-3, 65 NRC at 253; *Palo Verde*, CLI-91-12, 34 NRC at 155.

<sup>56</sup> *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)); *see also Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007).

<sup>57</sup> *Indian Point*, LBP-08-13, 68 NRC at 63; *Fansteel*, CLI-03-13, 58 NRC at 204.

<sup>58</sup> *Georgia Tech*, LBP-95-6, 41 NRC at 305. *See also Crow Butte*, CLI-09-12, 69 NRC at 552-53; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

<sup>59</sup> *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 917 (2008); *Yankee Nuclear*, LBP-96-2, 43 NRC at 90.

<sup>60</sup> *Indian Point*, LBP-08-13, 68 NRC at 63; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

<sup>61</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004); *North Anna*, LBP-08-15, 68 NRC at 335.

summary disposition stage.<sup>62</sup> Nevertheless, while a “Board may appropriately view [p]etitioners’ support for its contention in a light that is favorable to the [p]etitioner,”<sup>63</sup> a petitioner must provide some support for his or her contention, either in the form of facts or expert testimony.

In short, the information, facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that the petitioner does indeed supply adequate support for the contention.<sup>64</sup> But at the contention admissibility stage, all that is required is that the petitioner provide an expert opinion or “some alleged fact, or facts, in support of its position.”<sup>65</sup>

### **5. *Genuine Dispute Regarding Specific Portions of Application***

A contention must “show that a genuine dispute exists . . . on a material issue of law or fact” 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.<sup>66</sup> Any contention that fails to directly controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.<sup>67</sup>

### **6. *Challenges to NRC Regulations***

In addition to the 10 C.F.R. § 2.309(f)(1) contention admissibility rules, with limited exceptions “no rule or regulation of the Commission . . . is subject to

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<sup>62</sup> 10 C.F.R. § 2.710(d)(2). “[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.” 54 Fed. Reg. at 33,171.

<sup>63</sup> *Palo Verde*, CLI-91-12, 34 NRC at 155; *see also Oyster Creek*, CLI-09-7, 69 NRC at 275.

<sup>64</sup> *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); *see also USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006).

<sup>65</sup> 54 Fed. Reg. at 33,170; *see also Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 750 (2005). “This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” 54 Fed. Reg. at 33,170.

<sup>66</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>67</sup> *Vogtle*, LBP-07-3, 65 NRC at 254; *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).



attack . . . in any adjudicatory proceeding.”<sup>68</sup> Thus, a contention that attacks applicable statutory requirements or represents a challenge to the basic structure of the Commission’s regulatory process must be rejected.<sup>69</sup> Similarly, the NRC’s adjudicatory process is not the proper venue for the evaluation of a petitioner’s own view regarding the direction that regulatory policy should take.<sup>70</sup>

## **B. Board Rulings on Contention Admissibility**

### ***1. Contention 1: Failure to List and to Discuss Compliance with Required Federal Permits, Approvals, and Regulations***

SACE asserts that TVA failed to report in its Final Supplemental Environmental Impact Statement (FSEIS)<sup>71</sup> related to the updated OL application for WBN Unit 2 “all Federal permits, licenses, approvals, and other entitlements which must be obtained in connection with the proposed action” and failed to include a “discussion of the status of compliance with applicable environmental quality standards and requirements including . . . thermal and other water pollution limitations or requirements which have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection.”<sup>72</sup> In support of this contention, SACE provides two examples of permits that it alleges TVA should have discussed, but failed to discuss, in the FSEIS: (1) an interagency agreement among TVA, the U.S. Army Corps of Engineers (USACE), the U.S. Department of Energy (DOE), the U.S. Environmental Protection Agency (EPA), and the Tennessee Department of Health and Environment (TDHE) concerning contaminated sediment in the Watts Bar Reservoir;<sup>73</sup> and (2) TVA’s National Pollution Discharge Elimination System (NPDES) permit from the Tennessee

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<sup>68</sup> 10 C.F.R. § 2.335(a); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (“The NRC has long prohibited the use of adjudicatory proceedings to challenge the terms of regulations”); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

<sup>69</sup> *Indian Point*, LBP-08-13, 68 NRC at 64; *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).

<sup>70</sup> *LES*, LBP-04-14, 60 NRC at 55 (citing *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33).

<sup>71</sup> [TVA], Final Supplemental Environmental Impact Statement, Completion and Operation of Watts Bar Nuclear Plant Unit 2 (June 2007) (ADAMS Accession No. ML080510469) [hereinafter FSEIS]. *See also* WBN Unit 2 Severe Accident Management Alternatives Analysis (Jan. 21, 2009) (ADAMS Accession No. ML090360589) [hereinafter FSEIS SAMA Analysis].

<sup>72</sup> Petition at 6-7 (citing 10 C.F.R. §§ 51.53(b), 51.45(d)).

<sup>73</sup> Petition, Attach. 2, Interagency Agreement, Watts Bar Reservoir Permit Coordination (Feb. 28, 1991) [hereinafter Interagency Agreement].

Department of Environment and Conservation (TDEC), which expired 2 years ago and has not been reissued.<sup>74</sup>

SACE states that TVA was required to discuss the Interagency Agreement in its EIS because WBN Unit 2 is within the geographical area covered by the agreement and would involve a fixed water intake for an industrial or commercial purpose, an activity which SACE represents is within the review process established by the agreement.<sup>75</sup> SACE also states that TVA is bound by the terms of an expired NPDES permit and that the Applicant must, therefore, describe the terms of the permit, the status of the reissuance application, and whether it is in compliance with the terms of the expired permit.<sup>76</sup> SACE also notes that “[t]here may be other federal permits, approvals, and environmental quality standards applicable to WBN Unit 2 of which Petitioners are unaware” that are not, but should be, discussed in the FSEIS.<sup>77</sup>

Both TVA and the NRC Staff oppose the admission of this contention. Both argue that 10 C.F.R. § 51.45(d) does not require TVA to discuss the Interagency Agreement.<sup>78</sup> According to TVA, the agreement by its own terms only applies to TVA where activities requiring permit authorization from USACE (i.e., construction activities within 500 feet of the reservoir) are involved.<sup>79</sup> TVA also represents that WBN Unit 2 would not affect the amount of water withdrawn from the portions of the Tennessee River covered by the agreement and that the Petitioner ignores the discussion in section 2.1 of the FSEIS indicating that no work would need to be done on the supplemental condenser cooling water system (SCCW) intake structure, the only intake structure located within the area covered by the agreement.<sup>80</sup> Thus, TVA asserts, proposed Contention 1 is not supported by facts or expert opinion, fails to show a genuine dispute on a material issue of law or fact, and is outside the scope of the proceeding, contrary to 10 C.F.R. §§ 2.309(f)(1)(v), (vi), and (iii).<sup>81</sup>

The NRC Staff emphasizes that the Interagency Agreement applies “only to the issues associated with the contaminated or potentially contaminated sediments resulting from the DOE Operations at Oak Ridge, Tennessee” and asserts that the Petitioner, in failing to show how the agreement is required to be discussed in the FSEIS, fails to demonstrate a genuine dispute on a material issue of law.<sup>82</sup>

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<sup>74</sup> Petition at 7-8.

<sup>75</sup> *Id.* at 8.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See* TVA Answer at 21; Staff Answer at 15.

<sup>79</sup> TVA Answer at 21.

<sup>80</sup> *Id.* at 21-22.

<sup>81</sup> *Id.* at 23.

<sup>82</sup> Staff Answer at 15 (quoting Interagency Agreement at 2).

With regard to TVA's expired NPDES permit, both TVA and the NRC Staff point to sections of the FSEIS that discuss the permit and assert that the Petitioner has failed to raise a genuine dispute on a material issue of fact.<sup>83</sup> TVA also argues that the Petitioner has failed to provide supporting facts for this portion of the contention.<sup>84</sup>

Additionally, both TVA and the NRC Staff state that the Petitioner's reference to other permits that might have been omitted from the FSEIS either fails to demonstrate a genuine dispute with the FSEIS or does not constitute a specific statement of the issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(i).<sup>85</sup>

In its Reply, SACE argues that the Interagency Agreement is triggered by the presence of the SCCW intake structure within the area governed by the agreement, even if operation of WBN Unit 2 will not increase the fixed water intake.<sup>86</sup> Furthermore, it asserts that TVA has not shown that any review of the SCCW has ever taken place as required under the agreement, and that TVA's own statements in the FSEIS contradict its argument that operation of WBN Unit 2 will not actually affect the fixed water intake.<sup>87</sup> SACE also asserts that the FSEIS references to the NPDES permit consist of (1) the permit's effective and expiration dates, listed in the "References" section, and (2) "vague passing references to the permit, with no actual discussion or analysis of the permit's terms or limitations, nor any real explanation of how TVA is in compliance with those limits."<sup>88</sup> Finally, in response to TVA's and the NRC Staff's assertions that the reference to other possible permits is too nonspecific or speculative, SACE argues that it is not its burden to identify the specific permits, licenses, or approvals TVA must obtain.<sup>89</sup>

*Board Ruling on the Admissibility of Contention 1 (Listing and Discussion of Permits)*

The Board concludes that Contention 1 is *admissible*.

In order for the Board to find Contention 1 admissible, we must conclude that the Petitioners have raised a genuine issue concerning TVA's compliance with the mandate of section 51.45(d). That regulation requires that TVA list in the license application all federal permits, licenses, approvals, and other entitlements that must be obtained in connection with the issuance of an operating license for a

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<sup>83</sup> See TVA Answer at 23-26; Staff Answer at 15-16.

<sup>84</sup> TVA Answer at 25-26.

<sup>85</sup> Staff Answer at 16; TVA Answer at 19 n.104.

<sup>86</sup> Reply at 4.

<sup>87</sup> *Id.* at 4-5.

<sup>88</sup> *Id.* at 5-6.

<sup>89</sup> *Id.* at 6.

second nuclear reactor at the Watts Bar Nuclear Plant and adequately discuss the status of its compliance with applicable environmental quality standards and all applicable zoning and land-use regulations and thermal and other water pollution limitations or requirements that have been imposed by federal, state, regional, and local agencies having responsibility for environmental protection. In support of this contention, SACE discusses two items which it urges should have been, but were not, listed and discussed in TVA's FSEIS, an Interagency Agreement and an NPDES permit. SACE also alleged that there were additional unspecified permits that should have been listed and discussed by TVA in its EIS.<sup>90</sup> As explained below, we find that only the allegation regarding the additional, unspecified and unlisted permits supports the admission of this contention.

The purpose of the Interagency Agreement cited by SACE is to coordinate "permitting and other use authorization activities"<sup>91</sup> among the participating agencies. Under this agreement, the parties thereto were obligated to establish a working group to develop a screening list of permitted actions that characterized the level of sediment disturbance each such activity would have within the covered geographical area. Thereafter, those actions characterized as causing either marginal or potentially major sediment disturbance would be subject to a case-by-case review prior to a final decision on the action by USACE or TVA.<sup>92</sup>

This Interagency Agreement is not, in our judgment, a federal permit, license, approval, or other entitlement as those terms are used in section 51.45(d). The Agreement does not limit action by TVA; it only provides that, in certain specific circumstances which are not applicable here, TVA will contact the other participating agencies in order to obtain their views.<sup>93</sup> Nothing on the face of this agreement suggests that it obligates TVA to seek approval from USACE or any other agency for any action associated with Watts Bar Unit 2.

In addition, even if this Interagency Agreement were viewed as a required approval pursuant to section 51.45(d), SACE has not alleged facts or proffered expert opinion that would tend to show that the proposed action, the granting of the OL, is within the scope of the Interagency Agreement. TVA represents that it is not undertaking any action that would affect fixed water intakes from those areas of the Watts Bar Reservoir governed by the Interagency Agreement. It further represents that it is not undertaking any activity that would require approval from USACE.<sup>94</sup> More specifically, TVA represents that any modification to the SCCW

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<sup>90</sup> Petition at 8.

<sup>91</sup> Interagency Agreement at 2.

<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.* at 4-5.

<sup>94</sup> TVA Answer at 21.

system would be limited to installed plant systems and would not change the volume of water delivered and removed by the SCCW system.<sup>95</sup>

SACE has not presented any factual contradiction or rebuttal to these representations. Instead, SACE argues that TVA's operation of a second reactor at Watts Bar "could result in the disturbance, resuspension, removal and/or disposal of contaminated sediments or potentially contaminated sediments in the Watts Bar Reservoir."<sup>96</sup> What SACE does not do is allege facts that would tend to show that TVA's representations are not accurate or that TVA's operation of a second reactor at the Watts Bar site could, in fact, result in the disturbance, resuspension, removal, and/or disposal of contaminated sediments or potentially contaminated sediments in the Watts Bar Reservoir covered by the Agreement.<sup>97</sup> Accordingly, SACE has not established that the proposed action is within the purview of the Interagency Agreement, and thus has not raised a genuine dispute with the application on this point.

With regard to the NPDES permit, section 3.1.2 of TVA's FSEIS contains a discussion of TVA's compliance with the NPDES permit, and SACE has not demonstrated why the discussion in TVA's FSEIS does not satisfy the Applicant's obligation to discuss this permit pursuant to section 51.45(d).

With regard to other permits, however, while SACE's speculation that there may be other unlisted permits of which it is unaware would generally be too ephemeral to raise a genuine dispute on a material issue of fact, in this case, SACE's claim is buttressed by TVA's FSEIS which concedes that there are other applicable permits and approvals<sup>98</sup> but does not identify them or discuss the current compliance status.<sup>99</sup>

Accordingly, we view Contention 1 as an adequately supported contention of omission and hold that it is *admissible*.

## 2. *Contention 2: Inadequate SAMA Uncertainty Analysis*

The Petitioner asserts that the calculation of risk-weighted consequences of

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<sup>95</sup> *Id.* at 22.

<sup>96</sup> Reply at 4 (quoting Interagency Agreement at 2, 11).

<sup>97</sup> We also note that the Interagency Agreement is only applicable to those portions of Watts Bar Reservoir which may potentially be subject to sediment contamination by the DOE operation at Oak Ridge. Interagency Agreement at 3.

<sup>98</sup> FSEIS at 10-11.

<sup>99</sup> TVA's FSEIS references a final supplemental environmental review (FSER) completed in June 1995. [TVA], Supplemental Environmental Review, Final, Operation of Watts Bar Nuclear Plant (June 1995), *available at* <http://www.tva.gov/environment/reports/wattsbar2/related.htm>. That document lists more than a dozen permits, all of which expired more than a decade ago. *Id.* at 6. We are offered no information or discussion regarding their current status. Likewise, we are not told whether additional environmental requirements have been imposed in the past 15 years.

severe accidents that forms a part of TVA's Severe Accident Mitigation Alternatives (SAMA) analysis is flawed because, despite TVA's statement in its FSEIS that it used "the 95th percentile PRA [probabilistic risk assessment] results in place of the mean PRA results," it did not use 95th percentile values for Level 3 PRAs.<sup>100</sup> Specifically, the Petitioner mentions meteorological conditions and radionuclide release fractions as two parameters that TVA did not adequately assess for uncertainty in its SAMA analysis.<sup>101</sup> As a result, claims SACE, TVA's calculated consequence values are at least three or four times lower than they would have been had TVA consistently used 95th percentile PRAs, leading TVA to reject SAMAs that would be cost-effective if its costs were compared to the higher consequences.<sup>102</sup>

TVA and the NRC Staff assert that Contention 2 is inadmissible for failure to provide factual or expert support as required under 10 C.F.R. § 2.309(f)(1)(v) and failure to show a genuine dispute as required under 10 C.F.R. § 2.309(f)(1)(vi).<sup>103</sup> Both TVA and the NRC Staff emphasize that SACE has not pointed to a regulatory requirement to use 95th percentile values of radionuclide release fractions or meteorological conditions in PRA calculations.<sup>104</sup> TVA argues that NEPA does not require consideration of worst-case or highly speculative scenarios.<sup>105</sup> TVA and the NRC Staff also both state that the report by Dr. Edwin S. Lyman, on which the Petitioner relies to support Contention 2, was not attached to the petition, and both argue that, even if it were attached, SACE has not explained how the report, which is a study of the Indian Point facility, is relevant to Watts Bar.<sup>106</sup>

TVA maintains that Dr. Lyman's declaration in support of the Petition merely endorses the assertions set out in the petition instead of providing additional information and is therefore deficient. TVA also argues that because it followed approved NRC methodology in performing its PRA calculations, Contention 2 is an improper challenge to agency regulations. Additionally TVA asserts that the Petitioner has provided no contrary analysis to the one in TVA's FSEIS with regard to meteorological uncertainty and argues that radionuclide release fractions, which are part of the Level 2 and not Level 3 PRA analysis, cannot form an appropriate basis for Contention 2, which challenges the Level 3 analysis.<sup>107</sup>

In its Reply, SACE emphasizes that TVA itself stated that use of 95th percentile values in its SAMA analysis would be a "reasonably accurate means of evaluating

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<sup>100</sup> Petition at 9-10.

<sup>101</sup> *Id.* at 9.

<sup>102</sup> *Id.* at 11-12.

<sup>103</sup> TVA Answer at 29; Staff Answer at 18, 20.

<sup>104</sup> TVA Answer at 41-42; Staff Answer at 18.

<sup>105</sup> TVA Answer at 33-34.

<sup>106</sup> *Id.* at 35-37; Staff Answer at 19-20.

<sup>107</sup> TVA Answer at 34-35, 39, 41-42.

the impact of uncertainty in the PRA model used to assess the SAMA alternatives” and asserts that TVA stated in the FSEIS that it in fact had used 95th percentile values throughout its PRA uncertainty analysis.<sup>108</sup> Thus, SACE argues, TVA contradicts itself in the FSEIS discussion of SAMA analyses and fails to explain why it did not use 95th percentile values in considering Level 3 uncertainties.<sup>109</sup> The Petitioner also argues that 95th percentile values are reasonable and not worst-case results because 5% of consequence outcomes would be more severe; that because the MACCS2 code considers worst-case results, it uses considerably larger values; and that 95th percentile values for Level 3 PRAs are no more speculative than 95th percentile values for Level 1 and 2 PRAs, which TVA used.<sup>110</sup> Additionally, the Petitioner argues that TVA’s and the NRC Staff’s claims that Dr. Lyman’s declaration concerning Indian Point is irrelevant to WBN Unit 2 are contradicted by TVA’s own use of meteorological data from the Vogtle and Wolf Creek license renewal applications in its SAMA analysis, and that data from another Vogtle SAMA analysis (for the Vogtle ESP) actually supports SACE’s position that use of 95th percentile meteorological data “would result in greater consequences by a factor of three or four.”<sup>111</sup> Finally, SACE addresses the arguments concerning the expert support for Contention 2. First, it argues that this Board should follow the Yucca Mountain boards’ decision to admit contentions supported by declarations, like the one from Dr. Lyman, that endorse the contentions without providing separate facts or opinions. Second, SACE argues that it was not required to attach Dr. Lyman’s Indian Point report because Dr. Lyman’s opinion offered in this proceeding is sufficient to support the contention without including the facts or opinions (including the Indian Point report) underlying that opinion and that, in any case, TVA and the NRC Staff are already familiar with the report.<sup>112</sup>

*Board Ruling on the Admissibility of Contention 2 (SAMA — Uncertainty Analysis)*

The Board concludes that Contention 2 is *not admissible*.

SACE cites to “NEPA and 10 C.F.R. § 51.53(b) with respect to consideration of alternatives to mitigate the consequences of severe accidents” as the bases for its contention.<sup>113</sup> Section 51.53(b) of 10 C.F.R. requires that “the applicant shall discuss the same matters described in §§ 51.45, 51.51, and 51.52, but only to the

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<sup>108</sup> Reply at 7-8.

<sup>109</sup> *Id.* at 8-10.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> *Id.* at 11-12.

<sup>112</sup> *Id.* at 12-14.

<sup>113</sup> Petition at 9.

extent that they differ from those discussed or reflect new information in addition to that discussed in the final environmental impact statement prepared by the Commission in connection with the construction permit.” Section 51.45(c) states: “[t]he environmental report must include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects.”<sup>114</sup> The requirements of NEPA and, by extension, the NRC’s regulations implementing NEPA (10 C.F.R. Part 51) are subject to a “rule of reason,” and only reasonably foreseeable environmental impacts must be addressed.<sup>115</sup>

Because SAMA had apparently not been addressed in the environmental documents associated with the construction permit for WBN Unit 2, the NRC Staff requested that TVA

provide an analysis of alternatives available for preventing or mitigating adverse environmental effects of severe accidents for WBN Unit 2. The analysis should be consistent in scope and content with severe accident mitigation alternative analyses provided in support of recent license renewal applications, and should consider risks from both internal and external events.<sup>116</sup>

The NRC Staff did not further direct TVA as to how it should conduct this analysis, and thus did not establish a legal requirement regarding how the analysis of alternatives must be performed. We conclude that, consistent with 10 C.F.R. § 51.45(c), the Applicant is only required to provide an analysis that “considers and balances . . . alternatives available for reducing or avoiding adverse environmental effects.”<sup>117</sup>

Regarding SACE’s claim that the uncertainty evaluation should consider “the spread in both the meteorological variations and the radionuclide release fractions” at the 95th percentile,<sup>118</sup> as noted by TVA, “the Petitioners cite to no regulation or NRC guidance document that requires or even advises that meteorological uncertainty should be evaluated in the specific manner advocated by Dr.

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<sup>114</sup> Although the SAMA methodology is available to provide the required analysis, neither NEPA nor NRC regulations require that the 10 C.F.R. § 51.45(c) analysis be performed using the SAMA methodology.

<sup>115</sup> See *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973).

<sup>116</sup> Letter from Joseph F. Williams, NRC Office of Nuclear Reactor Regulation, to Ashok Batnagar, Sr. Vice President of Nuclear Generation Development and Construction, TVA (June 3, 2008) at 2-3 (ADAMS Accession No. ML081210270) [hereinafter Staff Letter].

<sup>117</sup> 10 C.F.R. § 51.45(c).

<sup>118</sup> Petition at 12.



Lyman,”<sup>119</sup> nor does Petitioner cite to any “regulation or NRC guidance document that requires or even advises that uncertainty in radiological release fractions should be evaluated using the 95th percentile of the uncertainty distributions for these values.”<sup>120</sup>

On the contrary, as also noted by TVA, “the Nuclear Energy Institute (‘NEI’) has developed an industry template (NEI 05-01, Revision A), for completing SAMA analyses that ‘relies upon NUREG/BR-0184 regulatory analysis techniques,’”<sup>121</sup> and “[t]he Staff has endorsed NEI 05-01, Revision A. TVA prepared its WBN Unit 2 SAMA analysis in accordance with NEI 05-01, Revision A.”<sup>122</sup>

As explained by the Applicant:

NEI 05-01 does not recommend the evaluation of uncertainties in meteorological conditions or radionuclide release fractions in this manner, as advocated by Petitioners, nor are these parameters included among the recommended sensitivity analyses in NEI 05-01. Instead, with respect to meteorological conditions, NEI 05-01 provides that applicants should “[e]xplain why the data set and data period are representative and typical,” and suggests that it would be appropriate for applicants to choose, from a series of annual meteorological data sets, to use the single year with the highest does [*sic*] consequences. TVA’s SAMA Analysis uses this conservative approach.<sup>123</sup>

The Petitioners have not indicated how, in following the guidance provided in NEI-05-01, TVA failed to perform a reasonable SAMA uncertainty analysis with regard to meteorological or radionuclide release fraction values.

SACE’s second major claim regarding the sufficiency of TVA’s SAMA analysis made by SACE is that “if the full uncertainty distribution for the Level 3 consequence calculation were evaluated, considering the spread in both the meteorological variations and the radionuclide release fractions, it is clear that the 95th percentile values would be at least an additional order of magnitude greater than the values computed with the mean CDF, LERF, meteorological conditions and release fractions.”<sup>124</sup> This claim indicates a misunderstanding on the part of the Petitioner as to the use of the uncertainty analysis. As the NRC Staff notes, “[i]t is the Commission’s policy that PRA evaluations done in

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<sup>119</sup> TVA Answer at 28.

<sup>120</sup> *Id.* at 29.

<sup>121</sup> *Id.* at 31.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 32.

<sup>124</sup> Petition at 12.

support of regulatory decisions should be as realistic as practicable.”<sup>125</sup> SAMA results are therefore based on the best-estimate PRA results. Sensitivity analyses, including uncertainty evaluations, are only used to “[e]valuate how changes in SAMA analysis assumptions would affect the cost-benefit analysis.”<sup>126</sup> Thus, SACE has failed to support its claim that using 95th percentile values in a SAMA uncertainty analysis would affect the accident consequences analysis used to select cost-beneficial SAMA alternatives.

The final major claim made by SACE is that “[t]he increase in the value of mitigation measures would not only change the outcome for all Phase 2 SAMAs rejected by TVA but would also likely render many of the rejected Phase 1 SAMAs suitable for more detailed evaluation.”<sup>127</sup> However, this also is an incorrect interpretation of the SAMA analysis process. Guidance on use of uncertainty evaluations states, “[I]f [rejected] SAMAs appear cost-beneficial in the sensitivity results, discussion of conservatism in the analysis . . . and their impact on the results may be appropriate.”<sup>128</sup> That is, contrary to Petitioner’s assertions, previously rejected SAMAs do not become cost-beneficial on the basis of uncertainty analysis. Rather, a rejected SAMA that “appear[s]” cost-beneficial due to uncertainty evaluation may justify adding a discussion of conservatism in the SAMA report. Thus, even if all of Petitioner’s other claims were correct, consideration of the full range of uncertainties would not affect the selection of cost-effective SAMA alternatives. This contention therefore does not establish that it is “material to the findings the NRC must make.”<sup>129</sup>

Because SACE Contention 2 does not satisfy the requirements of 10 C.F.R. § 2.309 (f)(1)(iv), (v), and (vi), it is *not admissible*.

### ***3. Contention 3: Inadequate Consideration of Severe Accident Mitigation Alternatives with Respect to AC Backup for Diesel Generators***

This contention has evolved from Commission reports concerning the potential for early containment failure due to hydrogen explosions during a severe accident

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<sup>125</sup> Staff Response at 18 n.9 (citing Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities; Final Policy Statement, 60 Fed. Reg. 42,622, 42,629 (Aug. 16, 1995)). Notably, this same reference states the reason for using “PRA and associated analyses” is “to reduce unnecessary conservatism associated with current regulatory requirements, regulatory guides, license commitments, and staff practices” such as Petitioners seem to want added to the SAMA analysis. *Id.* at 42,628.

<sup>126</sup> Severe Accident Mitigation Alternatives (SAMA) Analysis, Guidance Document, NEI 05-01, at 30 (rev. A Nov. 2005) (ADAMS Accession No. ML060530203) [hereinafter NEI 05-01].

<sup>127</sup> Petition at 12.

<sup>128</sup> NEI 05-01 at 30.

<sup>129</sup> 10 C.F.R. § 2.309(f)(1)(iv).

in an ice condenser containment pressurized water reactor (such as WBN Unit 2). More specifically, it addresses the potential failure of hydrogen igniters, which are intended to prevent such hydrogen explosions, during a station blackout (SBO).<sup>130</sup> According to SACE, despite Commission findings that voluntary actions taken at TVA's other ice condenser plants would be sufficient to ensure operability of the hydrogen igniters, subsequent reports "raise doubts about the effectiveness of the voluntary measures that TVA has implemented at these reactors."<sup>131</sup> Thus, SACE argues, TVA's SAMA analysis for WBN Unit 2, which relies on similar voluntary commitments to conclude that no SAMAs are warranted, fails to comply with NEPA and 10 C.F.R. § 51.53(b).<sup>132</sup>

TVA and the NRC Staff both assert that this contention is inadequately supported and thus fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).<sup>133</sup> TVA argues that Dr. Lyman's declaration that he is responsible for the facts and opinion in the petition provides insufficient support, that the Petitioner mischaracterizes the contents of the WBN Unit 1 and Sequoyah reports on which it relies to support the contention, and that the Petitioner cannot show that any implementation errors at those other facilities would be repeated at WBN Unit 2.<sup>134</sup> TVA also asserts that the Petitioner's references to the reports fail to raise a genuine dispute and thus fail to meet 10 C.F.R. § 2.309(f)(1)(vi).<sup>135</sup>

The NRC Staff also argues that the inspection reports do not support the Petitioner's position for the same reasons given by TVA.<sup>136</sup> In addition, the NRC Staff asserts that the inspection reports demonstrate that the performance of the hydrogen igniters is an issue to be addressed through NRC's inspection program and is therefore not a material issue for an OL proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iv), and that Contention 3 seeks to impose new requirements on applicants and licensees and is therefore an impermissible challenge to the agency's regulations, in violation of 10 C.F.R. § 2.335(a).<sup>137</sup>

In its Reply, SACE first responds to the NRC Staff's materiality and regulatory challenge arguments by clarifying that Contention 3 is a NEPA contention alleging an inadequate alternatives evaluation.<sup>138</sup> SACE then reiterates its allegation that TVA's SAMA analysis fails to discuss the relative risks associated with the use of the backup diesel generator selected by TVA and alternative methods of providing

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<sup>130</sup> See Petition at 13-14.

<sup>131</sup> *Id.* at 14-15.

<sup>132</sup> *Id.* at 12, 15-16.

<sup>133</sup> TVA Answer at 44-47; Staff Answer at 22.

<sup>134</sup> TVA Answer at 44-47.

<sup>135</sup> *Id.* at 47.

<sup>136</sup> Staff Answer at 22.

<sup>137</sup> *Id.* at 22-23.

<sup>138</sup> Reply at 14.

backup power to the hydrogen igniters, including “mandatory dedication of the power supply, independence of the backup power supply to the igniters from backup power to other systems, and seismic qualification.”<sup>139</sup>

*Board Ruling on the Admissibility of Contention 3 (SAMA — Backup Diesel Generators)*

The Board concludes that Contention 3 is *not admissible*.

Petitioner represents that both WBN Unit 1 and TVA’s Sequoyah nuclear facility have had reliability issues associated with the backup supply of AC power for their hydrogen igniters and speculate similar problems at WBN Unit 2. In support of this claim, we are referred by SACE to NRC inspection reports.<sup>140</sup> These reports, however, do not support the admissibility of this contention.

Specifically, in the WBN Unit 1 report it was noted that “all necessary cables and fittings were pre-staged . . . [t]raining on the actions necessary to provide backup power to the igniters was included in the licensee’s B.5.b training . . . the 2MW Diesel Generator was tested by a regularly scheduled preventive maintenance.”<sup>141</sup> Furthermore, the inspection concluded that an appropriate timeline for providing power to the hydrogen igniters could be met.<sup>142</sup>

The Sequoyah report did document a “Green finding” but concluded that enforcement action was not warranted because the “finding does not involve a violation of regulatory requirements and has very low safety significance.”<sup>143</sup> Moreover, according to the NRC report, “[u]pon identification of the performance deficiency, the licensee took immediate corrective action and issued a procedure change form to correct the omission in the procedure.”<sup>144</sup>

There is no information in either of these two inspection reports that demonstrates the backup diesel generator system used at WBN Unit 1 or the Sequoyah Nuclear Plant is not reliable or that the estimate of reliability of the proposed system at WBN Unit 2 is inaccurate.

Finally, although SACE asserts that TVA “should be required to conduct a

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<sup>139</sup> *Id.* at 14-15.

<sup>140</sup> Letter from Eugene F. Guthrie, Chief, Reactor Projects Branch 6, to William Campbell, Chief Nuclear Officer and Executive Vice President, TVA (Aug. 7, 2008) (ADAMS Accession No. ML082210342) [hereinafter Watts Bar Unit 1 Inspection Report]; Letter from Eugene F. Guthrie, Chief, Reactor Projects Branch 6, to Preston D. Swafford, Chief Nuclear Officer and Executive Vice President, TVA (May 1, 2009) (ADAMS Accession No. ML091210186) [hereinafter Sequoyah Inspection Report].

<sup>141</sup> Watts Bar Unit 1 Inspection Report at 24-25.

<sup>142</sup> *Id.* at 24.

<sup>143</sup> Sequoyah Inspection Report at 25.

<sup>144</sup> *Id.* at 24.

Phase 2 analysis of a range of measures for ensuring the reliability of its alternate power supply, including mandatory dedication of backup diesel generators, independence of the backup power supply to the igniters from backup power to other systems, and seismic qualification,”<sup>145</sup> such assertions are bare, lacking entirely in support. While the Petitioner suggests a need for “mandatory dedication” and/or “independence of the backup power supply,” it explains neither why it believes the proposed backup-to-backup diesel generators are not dedicated to the purpose of supplying power to the hydrogen igniters, nor why they are not an independent supply of the requisite power. Nor does the Petitioner explain why, other than a misapprehension of the cited incident reports (which, as we have noted, fail to support Petitioner’s proposition), these particular backup diesel generators are insufficient to satisfy the very purpose for which the NRC has approved them. Additionally, neither of these propositions is supported by the affidavit of the Petitioner’s expert. These assertions therefore fail to satisfy the requirements of section 2.309(f)(1)(iv), (v), and (vi).

Petitioner alleges that TVA’s SAMA analysis is insufficient to determine whether the alternative power supply for the hydrogen igniter will be effective and reliable, and whether the benefits of a more robust backup power supply would be cost-beneficial. SACE then goes on to argue that TVA should have considered such issues as the mandatory dedication of the power supply and the independence of the backup power supply to the igniters from backup power from other systems.<sup>146</sup> As pled, this constitutes a contention of omission. However, a properly pled contention of omission must challenge a specific portion of the application and provide a basis for demonstrating the alleged deficiency.<sup>147</sup> In this case, the Petitioner has failed to carry this burden. For example, in TVA’s SAMA analysis the reduction of hydrogen detonation potential is addressed by TVA in SAMA numbers 108 and 109.<sup>148</sup> But SACE does not even cite, let alone analyze,

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<sup>145</sup> Petition at 13.

<sup>146</sup> *Id.* at 16.

<sup>147</sup> 10 C.F.R. § 2.309(f)(1)(vi); *see also Vogtle*, LBP-07-3, 65 NRC at 254 (“Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed”); *PFS*, CLI-04-22, 60 NRC at 135-36 (upholding rejection of contention of omission where applicant’s environmental report and safety analysis report contained the information petitioners asserted was not discussed and petitioners failed to address those portions of the application); *Rancho Seco*, LBP-93-23, 38 NRC at 247-48 (rejecting contention asserting no discussion of matters that were in fact addressed throughout environmental assessment).

<sup>148</sup> We note that on January 21, 2009, TVA submitted to the Commission Attachment 1, Final Watts Bar Unit 2 SAMA Report. This report, *inter alia*, described 283 SAMAs, including many that addressed options that could increase the availability of onsite emergency power, *see e.g.*, FSEIS SAMA Analysis at 76-80 (SAMAs 1 through 26), and others that addressed alternatives to reduce the potential for hydrogen detonation, *see id.* at 97 (SAMAs 108 and 109). SACE offers no analysis of the SAMAs or explains why any additional analysis is necessary or appropriate.

deficiencies with these SAMAs. Likewise, TVA's SAMAs 1 through 26 address alternatives to increase the availability of backup power that are not addressed by Petitioner.<sup>149</sup> In short, Petitioner has not raised a genuine dispute with TVA's application, which renders this contention inadmissible.

SACE was also obligated to provide support for its claim "that there is a genuine *material* dispute — that is, a dispute that could lead to a different conclusion on potential cost-beneficial SAMAs."<sup>150</sup> It failed to do so. SACE's Petition fails to provide even a ballpark figure for the cost of implementing any proposed alternatives.<sup>151</sup>

In Contention 3, SACE also asserts that "[TVA] should examine a reasonable range of measures for ensuring the reliability of the alternate power supply to the hydrogen igniters."<sup>152</sup> Thereafter, in its Reply, SACE clarified that through this contention it is alleging that, in order to satisfy NEPA, TVA's SAMA analysis must provide a comparison of alternatives to the use of a backup diesel generator to supply power for the hydrogen igniters.<sup>153</sup>

Accordingly, the Petitioner is attempting to put at issue in the NEPA context the scenario addressed in GSI-189, in which the Commission considered the susceptibility of ice condenser and Mark III containments to early failure from hydrogen combustion during a severe accident to be a very low-probability event.<sup>154</sup> Contention 3 thus has at its root the premise that alternatives to the implementation of an additional backup diesel generator to further protect against the consequences of severe accidents must be considered under NEPA.<sup>155</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009).

<sup>151</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 12 (2002) ("Without any notion of cost, it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration. The Commission is unwilling to throw open its hearing doors to Petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions about the ease and viability of their proposed SAMA").

<sup>152</sup> Petition at 16.

<sup>153</sup> Reply at 15.

<sup>154</sup> In GSI-189, the Commission considered this scenario on an industry-wide basis and, even though it was determined to be a low-probability event, ultimately urged licensees to consider (and implement) plant modifications to mitigate its potential. Resolution of Generic Safety Issues, NUREG-0933 (Aug. 2008), sec. 3, New Generic Issues, Issue 189: Susceptibility of Ice Condenser and Mark III Containments to Early Failure from Hydrogen Combustion During a Severe Accident (Rev. 1), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0933/sec3/189r1.htm>.

<sup>155</sup> The construction permit for WBN Unit 2 predates GSI-189; however, as part of the SAMA analysis for the OL application, TVA noted that it intended to implement a backup power supply for the WBN Unit 2 hydrogen igniters. See FSEIS SAMA Analysis at 97 (SAMA 108). The implementation

(Continued)

As explained above, SACE Contention 3 was not adequately supported by the Petitioner and, therefore, the following analysis is not essential to our conclusion that this contention is inadmissible. In addition, the issue discussed below was not analyzed by the parties in their pleadings. However, this contention touches on an issue (whether, and if so, to what extent, there is an obligation under NEPA to examine severe accidents such as the one postulated in GSI-189) on which Commission guidance appears conflicted. Specifically, the question raised is whether severe accidents are, by their nature and classification by the NRC, so remote and speculative that NEPA does not require their consideration.

In denying a petition for rulemaking submitted by the Nuclear Energy Institute the Commission stated that “the NRC must continue to consider SAMAs for issuance of a new or renewed operating license for a power reactor in order to meet its responsibilities under the National Environmental Policy Act (NEPA) . . . .”<sup>156</sup> However, the NEPA requirement to consider alternatives to the proposed action is governed by the “rule of reason” applicable to all NEPA-required alternatives analyses,<sup>157</sup> and does not extend to events that are remote and speculative.<sup>158</sup> In contrast with its statement in NEI, the Commission’s expressed view regarding its NEPA responsibilities is that (the agency’s environmental review . . . need only account for those [impacts] that have some likelihood of occurring or are reasonably foreseeable”;<sup>159</sup> that “low probability is the key to applying NEPA’s rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated”;<sup>160</sup> and that “[i]f the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law.”<sup>161</sup>

The remote and speculative nature of an event should be distinguished from the risk of that event. Whether an event or a “scenario” is remote and speculative is simply a question of its probability of occurrence, while “risk,” which the Commission discussed in NEI, is the product obtained by multiplying the probability

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and performance in existing plants of this backup-to-backup power supply, approved by the NRC as a voluntary measure in response to GSI-189, is, according to the NRC Staff, examined and enforced by the NRC Staff as part of the current licensing basis of those plants. Staff Answer at 22.

<sup>156</sup> 66 Fed. Reg. 10,834, 10,834 (Feb. 20, 2001).

<sup>157</sup> *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

<sup>158</sup> *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333 (1990); *Yankee Nuclear*, LBP-96-2, 43 NRC at 88-90, *aff’d in part, and rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996); *Calvert Cliffs*, LBP-09-4, 69 NRC at 208.

<sup>159</sup> *LES*, LBP-06-8, 63 NRC at 258-59, *citing Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005); *see also Shoreham*, ALAB-156, 6 at 831.

<sup>160</sup> *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129 (1990).

<sup>161</sup> *Vermont Yankee*, CLI-90-4, 31 NRC 333.

of occurrence by the consequences of the event or scenario. Thus an event could be of exceedingly low probability but have enormous consequences and therefore the “risk,” as the term is used in NRC consideration of severe accidents, could be significant.

The Court of Appeals for the Ninth Circuit interpreted the CEQ regulations to the effect that NEPA requires dealing with uncertainties by inclusion in an “EIS [of] ‘a summary of existing credible scientific evidence . . . relevant to evaluating the reasonabl[y] foreseeable significant adverse impacts’ . . . [regarding] those events with potential catastrophic consequences ‘even if their probability is low.’” This statement, however, is qualified by the following language: “provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.”<sup>162</sup>

Furthermore, in *Private Fuel Storage (PFS)* the Commission, ruling on the agency’s NEPA responsibilities regarding terrorist attacks, noted that under NEPA it looks to the “‘reasonably foreseeable’ impacts of simply licensing the facility,” not the “‘reasonably foreseeable’ effects of a successful [terrorist] attack.”<sup>163</sup> Accordingly, applying the reasoning articulated by the Commission in *PFS*, the question here is whether severe accidents which give rise to SAMAs are the reasonably foreseeable results “of simply licensing the facility.”

Supporting the view that severe accidents by their very nature are remote and speculative is the fact that the NRC distinguishes them from those events that must be accommodated by the plant design (“design basis events”). This distinction is of longstanding import, being, for example, the sole subject of the Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants.<sup>164</sup> In this policy statement, the Commission described severe accidents as being “beyond the substantial coverage of design basis events.”<sup>165</sup>

Therefore, SAMA analysis goes beyond the design basis, seeking mechanisms and potential plant modifications not mandatorily incorporated in plant design, but which, if implemented, could reduce the consequences of severe accidents. Here the Commission has arguably used its discretion to advance the public health and safety beyond those required by statute, and beyond the examinations required under NEPA, to implement additional measures to “reduce the chances of occurrence of a severe accident.”<sup>166</sup> The instant circumstance is analogous to that

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<sup>162</sup> *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1033 (9th Cir. 2006).

<sup>163</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 353 (2002).

<sup>164</sup> 50 Fed. Reg. 32,138 (Aug. 8, 1985).

<sup>165</sup> *Id.* at 32,139. Design Basis Events are defined in 10 C.F.R. § 50.49(b)(1) to be those “conditions of normal operation, including anticipated operational occurrences, *design basis accidents*, external events, and natural phenomena *for which the plant must be designed* . . .” 10 C.F.R. § 50.49(b)(1)(ii).

<sup>166</sup> 50 Fed. Reg. at 32,139.



of the Commission's exercise of its discretion to implement additional protective measures against aircraft impingement that it deemed beyond the design basis threat,<sup>167</sup> a determination that the Court of Appeals for the Ninth Circuit agreed was an exercise of the NRC's discretionary authority and not within the explicit requirements of the AEA.<sup>168</sup>

The aggregate Large Early Release Frequency (LERF) for all severe accidents at WBN Unit 2 is estimated in the application to be  $3.8 \times 10^{-7}/\text{yr}$ .<sup>169</sup> This appears to be in line with the Commission's guidance in PFS to the effect that the agency uses a threshold probability for design basis events of 1 in 10 million for nuclear power plants.<sup>170</sup> Furthermore, any single specific accident, such as the station blackout raised in this contention, will have a much smaller LERF. Severe accidents that are beyond design basis events have such low probability as to not be "credible" events.<sup>171</sup> This low level of likelihood is in the range at which it is appropriate to consider whether the remote and speculative exception for events which must be analyzed under NEPA is applicable.<sup>172</sup>

It is reasonable to question whether the "rule of reason," which limits the breadth of NEPA evaluations, should eliminate any requirement for alternatives analysis in respect of severe accidents by the Commission in fulfilling its NEPA obligations. We recognize that the Commission has made the determination that it should perform SAMA analysis, but it may well be doing so under its authority to protect the public health and safety and the environment, not because NEPA requires it to do so. This view of the Commission's policy regarding analysis of severe accidents would reconcile any apparent discrepancy with its policy respecting beyond design basis threats.

However, since this complicated issue was not addressed by the parties and its resolution is not necessary to our conclusion that SACE Contention 3 is *not admissible*, its resolution must await another day and a more appropriate vehicle for its analysis.

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<sup>167</sup> Consideration of Aircraft Impacts for New Nuclear Power Reactors, 74 Fed. Reg. 28,112, 28,112 (June 12, 2009).

<sup>168</sup> *Public Citizen v. NRC*, No. 07-71868, slip op. at 9615, 9633 (9th Cir. July 24, 2009) (noting that the NRC is not required to regulate to prevent "each and every" such event or require (absolute protection) but rather it "permits acceptance of some level of risk"). The NRC's regulations incorporate this precept, requiring nuclear plant designs to guard against reasonably foreseeable events and conditions but treating certain remote and speculative events as outside the scope of the design requirements.

<sup>169</sup> FSEIS SAMA Analysis at 31.

<sup>170</sup> PFS, CLI-01-22, 54 NRC at 259.

<sup>171</sup> *See id.*

<sup>172</sup> This situation will become compounded as more advanced designs, which have used risk assessment insights, drive down their projected LERFs even further.

#### **4. Contention 4: Inadequate Discussion of Need for Power and Energy Alternatives**

The Petitioner argues that TVA has failed to demonstrate any need for the electric power that would be generated by WBN Unit 2.<sup>173</sup> Citing a report prepared by Dr. Arjun Makhijani, SACE asserts that (1) TVA's energy demand projections are based on outdated studies; (2) TVA relies inconsistently on its own 1995 Integrated Resource Plan and Environmental Impact Statement (1995 IRP), which excluded WBN Unit 2 from its "preferred portfolio" of 1995-2020 energy options; (3) TVA fails to justify its rejection of the planning process established in the 1995 IRP; (4) TVA's FSEIS does not analyze the effects of the current economic downturn; (5) TVA's FSEIS does not adequately discuss alternative energy sources or energy efficiency; (6) TVA needs to provide a more detailed alternatives analysis because it cannot rely on the EIS from the 1995 IRP while rejecting its conclusions; (7) TVA's FSEIS mistakenly assumes that only coal or nuclear can supply baseload power; and (8) an IRP revision process that is currently ongoing must be completed before TVA can adequately analyze the need for power and power alternatives.<sup>174</sup>

TVA attacks each basis for this contention separately. In response to the Petitioner's claim that TVA relies on outdated studies and inappropriately relies on its 1995 IRP EIS, TVA argues that SACE mischaracterizes the need for power analysis in the 2007 FSEIS for WBN Unit 2, which, it represents, not only references but also updates the earlier environmental documents. Accordingly, TVA argues that the Petitioner has failed to raise a genuine dispute with TVA's need for power analysis.<sup>175</sup> TVA further argues that, in line with the *Vogtle* board's decision on a similar contention, the fact that an IRP revision process has been instituted does not support a claim that the FSEIS is inadequate because of its reliance on earlier studies.<sup>176</sup> Additionally, TVA asserts that SACE has not shown how the current economic recession is material to the long-term need for power in light of the inherent uncertainties in predicting future energy demand, contrary to 10 C.F.R. § 2.309(f)(1)(iv).<sup>177</sup> Likewise, TVA argues that SACE has not shown how a more pessimistic economic prediction than TVA's own low-growth and no-growth scenarios would impact the analysis, particularly in light of TVA's other goals of "additional fuel diversity, operating flexibility, and a lower delivered cost of power," thus failing to raise a genuine dispute.<sup>178</sup> In

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<sup>173</sup> Petition at 16.

<sup>174</sup> *Id.* at 17-21.

<sup>175</sup> TVA Answer at 58-59.

<sup>176</sup> *Id.* at 60 (citing *Vogtle*, LBP-07-3, 65 NRC at 272).

<sup>177</sup> *Id.* at 63-64.

<sup>178</sup> *Id.* (quoting FSEIS at 15).

response to the Petitioner's arguments concerning alternatives to nuclear power, TVA lists a number of sections of the FSEIS discussing alternatives that it asserts the Petitioner has ignored and argues that the 1995 IRP did include an option to complete WBN Unit 2 if nuclear performance improved.<sup>179</sup> Accordingly, TVA asserts that its decision to operate WBN Unit 2 is consistent with the IRP and TVA could rely on the analysis in the IRP EIS.<sup>180</sup> Thus, TVA argues that the Petitioner has not raised a genuine dispute.<sup>181</sup> Finally, TVA asserts that SACE has not provided adequate factual support for its claim that wind energy should have been analyzed as an alternative to baseload nuclear energy because the documents it relies on do not show that wind can have a capacity factor high enough for a baseload generation source.<sup>182</sup>

The NRC Staff also opposes the admission of Contention 4 on the grounds that it is outside the scope of, and not material to, an OL proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv).<sup>183</sup> The NRC Staff notes that no discussion of need for power or alternative energy sources is required in a supplemental environmental report at the OL stage under 10 C.F.R. § 51.53(b) or in a final supplemental environmental impact statement under 10 C.F.R. § 51.95(b), and argues that a contention challenging a need for power or energy alternatives analysis at the OL stage is thus outside the scope of the proceeding and not material to the findings the Board must make in the proceeding.<sup>184</sup> The NRC Staff also asserts that the Petitioner's raising this contention without seeking a waiver under 10 C.F.R. § 2.335(b) constitutes an impermissible challenge to Commission regulations, specifically 10 C.F.R. § 51.53(b).<sup>185</sup> Additionally, the NRC Staff addresses the Petitioner's argument, based on the licensing board's ruling in the *Vogtle* ESP proceeding, that TVA opened the door to the admissibility of Contention 4 by including need for power and energy alternatives analyses in its FSEIS. The NRC Staff argues that because of the difference in procedural posture between an ESP and an OL proceeding, where the ESP petitioner runs the risk of waiving a future COL-stage contention if it does not raise the contention at the ESP stage, the *Vogtle* ruling is not applicable to this proceeding.<sup>186</sup>

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<sup>179</sup> *Id.* at 65-67.

<sup>180</sup> *Id.* at 67.

<sup>181</sup> *Id.* at 66-67.

<sup>182</sup> *Id.* at 67-68. TVA also asserts that the Petitioners' alternatives argument is outside the scope of the proceeding but does not appear to explain why it would be outside the scope of the proceeding. *See id.* at 68.

<sup>183</sup> Staff Answer at 23-24.

<sup>184</sup> *Id.* at 24-25.

<sup>185</sup> *Id.* at 25-26.

<sup>186</sup> *Id.* at 26-27.

In its Reply, SACE first addresses the NRC Staff's argument that 10 C.F.R. § 51.53(b) excludes need for power and alternative energy source analyses from the scope of an OL proceeding. SACE argues that a portion of section 51.53(b) provides for consideration of new information or matters that differ from those discussed at the construction permit stage, and asserts that it is therefore not precluded under NEPA or section 51.53(b) from challenging TVA's analysis of any changed circumstances since the EIS for the WBN Unit 2 construction permit was prepared.<sup>187</sup> Next, SACE responds to TVA's assertion that the 2007 FSEIS updates the 1995 IRP by arguing that, while the FSEIS includes updated data points, it relies on the analyses from the IRP and that, in any event, SACE has also challenged the economic forecasts in the FSEIS for failing to consider the long-term effects of the current economic downturn and projecting only through 2015.<sup>188</sup> The Petitioner then argues that the *Vogtle* board's ruling (that a pending new demand study does not create an admissible contention) is inapplicable to this contention because the Petitioner here has specifically argued, with the support of expert opinion, that the FSEIS is inadequate.<sup>189</sup> In response to TVA's position that unpredictability in demand forecasts precludes the Petitioner from asserting the need for a longer-term forecast, SACE states that its claim is based on TVA's own financial statements in the current economic downturn, together with its past overestimation of future demand.<sup>190</sup> According to SACE, its claim is also supported by pending legislation that could further impact energy demand, and the contention is therefore specific and supported, unlike similar contentions that have been rejected in other proceedings.<sup>191</sup> In response to TVA's reference to its low- and no-growth scenarios, SACE emphasizes that it wants a negative-growth scenario to be included in the need analysis. It argues that this scenario would be material because the current economic downturn is likely to have long-term effects that would be different from those predicted under the low- and no-growth scenarios.<sup>192</sup> SACE then notes that it is challenging the other goals TVA claims will be achieved by WBN Unit 2. It argues that efficiency and alternative energy sources, which it claims TVA has not adequately analyzed, could also achieve fuel diversity and operating flexibility and that decreasing power costs would occur from WBN Unit 2 only if energy demand increases, which SACE considers a "very questionable assumption."<sup>193</sup> Along these same lines, the Petitioner argues that TVA overlooked the combination of wind power with compressed air storage

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<sup>187</sup> Reply at 15-16.

<sup>188</sup> *Id.* at 16-17.

<sup>189</sup> *Id.* at 17.

<sup>190</sup> *Id.* at 18-19.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 19-20.

<sup>193</sup> *Id.* at 20.

and a small natural gas unit. SACE claims that the reports it cites in support of this contention in fact indicate that the combination of wind, compressed air, and natural gas could provide baseload capacity.<sup>194</sup> Finally, SACE argues that the deference that NRC has given to business choices of other applicants applies only to private businesses and not to a federal agency like TVA.<sup>195</sup>

*Board Ruling on the Admissibility of Contention 4 (Need and Alternatives)*

The Board concludes that Contention 4 is *not admissible*.

At this stage in this proceeding, the Petitioner has the opportunity to challenge the adequacy of TVA's application for an operating license for the proposed Unit 2 at the Watts Bar Nuclear Plant. The adequacy of that application must be determined by reference to the regulations promulgated by the Commission to ensure that it has adequate information on which to evaluate the safety and environmental impact of the proposed action. With regard to environmental impact, the Commission promulgated 10 C.F.R. Part 51, which contains the environmental protection regulations applicable to the Commission's licensing and related regulatory functions. In promulgating these regulations, the Commission expressly stated that it was its intention to implement section 102(2) of NEPA.<sup>196</sup>

While the Commission has authority to regulate many different types of activity, it does not treat all proposed actions the same. The Commission does not, and need not, require the same environmental information in an application for an operating license that it does in an application for a construction permit (CP) or a combined license (COL).

Specifically, 10 C.F.R. § 51.53(b) establishes the requirements for an applicant's submission of environmental information at the operating license stage. Pursuant to that regulation, the applicant must submit a document denominated as the "Supplement to Applicant's Environmental Report — Operating License Stage." In this document

the applicant shall discuss the same matters described in §§ 51.45, 51.51, and 51.52 [which would have been initially discussed in the ER at the construction permit stage], but only to the extent that they differ from those discussed or reflect new information . . .<sup>197</sup>

The clear intent of this provision is to avoid duplication and to highlight new

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<sup>194</sup> *Id.* at 20-21.

<sup>195</sup> *Id.* at 21-22.

<sup>196</sup> 10 C.F.R. § 51.1(a).

<sup>197</sup> *Id.* § 51.53(b).

information. However, this regulation then specifies limitations on this general requirement. It goes on to state that:

No discussion of need for power, or of alternative energy sources . . . is required in this report [the Supplement to Applicant's Environmental Report — Operating License Stage].<sup>198</sup>

Since TVA was thus not obligated to include any discussion of the need for power or of alternative energy sources in its application for an operating license, a challenge to the adequacy of TVA's discussion of these issues is not within the scope of this proceeding at this point. Accordingly, we cannot admit this contention.<sup>199</sup>

Admittedly, the fact pattern presented here, where construction of the facility is suspended for more than a quarter century, is unusual and not anticipated or discussed by the regulations. Therefore, the Commission might well decide that a full discussion of the need for power and of alternative energy sources should be incorporated into the final environmental impact statement.<sup>200</sup> But at this stage of this proceeding, absent an adequately supported request to waive the application of this rule pursuant to 10 C.F.R. § 2.335, the Board is bound by section 51.53(b) and, even in light of the unusual circumstances of this case, this contention cannot be admitted.

**5. *Contention 5: Inadequate Basis for Confidence in Availability of Spent Fuel Repository and Safe Means of Interim Spent Fuel Storage***

This contention alleges deficiencies in the Commission's Proposed Waste Confidence Decision and Proposed Spent Fuel Storage Rule.<sup>201</sup> SACE argues that the Commission has "no technical basis for a finding of reasonable confidence that spent fuel can and will be safely disposed of at some time in the future," thus undermining both the Commission's stated policy and 10 C.F.R. Part 51, Table S-3's assumption of no radioactive release from a spent fuel repository.<sup>202</sup> The Petitioner therefore "seeks to enforce, in this specific proceeding, the NRC's commitment that 'it would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.* § 2.309(f)(1)(iii).

<sup>200</sup> *See id.* § 51.95(b).

<sup>201</sup> Petition at 21; Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008); Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

<sup>202</sup> Petition at 24-25.

of safely.’’<sup>203</sup> Conceding that this contention challenges a generic rule, SACE nonetheless asks this Board to admit the contention and hold it in abeyance “in order to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding.”<sup>204</sup>

Both TVA and the NRC Staff oppose this contention as an inadmissible challenge to the Commission’s waste policy rule and ongoing waste policy rulemaking.<sup>205</sup> The NRC Staff also asserts that, as a challenge on a generic issue, the contention is outside the scope of this proceeding and that, because SACE failed to attach expert declarations that it claimed to rely on to support the contention, it failed to allege adequate facts or expert support for the contention to be admissible.<sup>206</sup>

Additionally, both TVA and the NRC Staff oppose the Petitioner’s request to have the contention admitted and held in abeyance, asserting that there is no legal basis for admitting and holding in abeyance an otherwise inadmissible contention.<sup>207</sup> TVA also asserts that the contention should not be referred to the Commission because the Petitioner does not show how the contention “raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”<sup>208</sup>

In its Reply, SACE does not dispute TVA’s and the NRC Staff’s arguments against the admissibility of Contention 5. Instead, it states that it is raising the issue in order to preserve it for appeal.<sup>209</sup>

#### *Board Ruling on Contention 5 (Spent Fuel Storage)*

The Board concludes that Contention 5 is *not admissible*.

As the Petitioner concedes,<sup>210</sup> this contention challenges an ongoing rulemaking (the Proposed Waste Confidence Decision and the Proposed Spent Fuel Storage Rule). Commission precedent holds that a contention challenging the subject matter of a pending rulemaking is inadmissible.<sup>211</sup> Additionally, we note that a number of licensing boards have recently found contentions similar to Contention

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<sup>203</sup> *Id.* at 22 (quoting 73 Fed. Reg. at 59,552).

<sup>204</sup> *Id.* at 23-24.

<sup>205</sup> TVA Answer at 70-71; Staff Answer at 28-30.

<sup>206</sup> Staff Answer at 30-31.

<sup>207</sup> TVA Answer at 71-72; Staff Answer at 31.

<sup>208</sup> TVA Answer at 72-73 (quoting 10 C.F.R. § 2.341(f)(1)).

<sup>209</sup> Reply at 22.

<sup>210</sup> *Id.*

<sup>211</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)).

5 inadmissible as challenges to a Commission rule or rulemaking.<sup>212</sup> Contention 5 also challenges Table S-3 of 10 C.F.R. § 51.51.<sup>213</sup> A contention that directly challenges a Commission rule is inadmissible pursuant to 10 C.F.R. § 2.335(a).

The Petitioner asks in the alternative that the Board either admit the contention and hold it in abeyance or refer it to the Commission.<sup>214</sup> We know of no authority that authorizes a licensing board to admit and hold in abeyance an otherwise inadmissible contention. Nor do we find, pursuant to 10 C.F.R. § 2.341(f)(1), that our ruling on Contention 5 “raises significant and novel legal or policy issues” or that referring the contention to the Commission “would materially advance the orderly disposition of the proceeding.” Thus, the Board *denies* SACE’s request to either hold Contention 5 in abeyance or refer it to the Commission.

**6. Contention 6: TVA’s EIS Fails to Satisfy the Requirements of NEPA Because It Does Not Contain an Adequate Analysis of the Environmental Effects of the Impact of a Large, Commercial Aircraft into the Watts Bar Nuclear Plant**

Citing the Commission’s recent Power Reactor Security Rule<sup>215</sup> and Aircraft Impacts Rule,<sup>216</sup> SACE asserts that aircraft attacks are reasonably foreseeable and that NEPA therefore requires an analysis of the environmental impacts of such attacks.<sup>217</sup> Though SACE acknowledges that aircraft attacks are discussed in TVA’s FSEIS, it claims that “TVA . . . attempts to downplay its NEPA obligations because ‘[t]he likelihood of [an attack] occurring is . . . remote in light of today’s heightened security awareness.’”<sup>218</sup> The Petitioner also argues that TVA improperly relied on a generic conclusion by the Electric Power Research Institute (EPRI) that aircraft crashes would not result in radionuclide releases from existing reactors<sup>219</sup> and that TVA’s description of potential mitigation measures in case of a terrorist attack consists of no more than “vague, generic claims about the

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<sup>212</sup> See, e.g., *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 249-52 (2009); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4) (Ruling on Request to Admit New Contention) at 11-12 (Apr. 29, 2009) (unpublished); *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3) (Order Denying Motion to Admit Proposed Contention Nine) at 2-3, 6-7 (June 2, 2009) (unpublished).

<sup>213</sup> Petition at 21.

<sup>214</sup> *Id.* at 23-24.

<sup>215</sup> Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009).

<sup>216</sup> Consideration of Aircraft Impacts for New Nuclear Power Reactors, 74 Fed. Reg. at 28,112.

<sup>217</sup> Petition at 27-29.

<sup>218</sup> *Id.* at 29 (quoting FSEIS at 75).

<sup>219</sup> *Id.* at 29-30.



steps it has taken since September 11th to prepare for a terrorist attack.”<sup>220</sup> Thus, SACE asserts, TVA’s analysis of the environmental impacts from an aircraft attack is inadequate to satisfy NEPA.

Both TVA and the NRC Staff assert that this contention is foreclosed by Commission case law. The NRC Staff represents that “[b]oards are required to follow Commission decisions that NEPA-terrorism contentions are inadmissible unless the proposed licensing action occurs within the Ninth Circuit’s jurisdiction.”<sup>221</sup> TVA states that, as a matter that has already been considered by the Commission, the issue of whether the Ninth Circuit’s ruling in *San Luis Obispo Mothers for Peace* requiring consideration of terrorist attacks under NEPA applies to NRC proceedings in other jurisdictions cannot be reconsidered by a licensing board.<sup>222</sup> Both TVA and the NRC Staff also note that the United States Court of Appeals for the Third Circuit has recently upheld the Commission’s position that terrorist attacks are not reasonably foreseeable so as to require analysis under NEPA.<sup>223</sup> The NRC Staff adds that the recent Power Reactor Security Rule and Aircraft Impact Rule also do not support the Petitioner’s position because those are security rules, which do not speak to foreseeability from a NEPA standpoint, and because the Aircraft Impact Rule defines aircraft impacts as beyond design basis events, which, by definition, excludes them from the category of reasonably foreseeable events.<sup>224</sup>

In its Reply, SACE concedes that the Commission does not require consideration of terrorist attacks as part of an environmental review.<sup>225</sup> As with Contention 5, SACE states that it is raising the issue in this contention in order to preserve it for appeal.<sup>226</sup>

#### *Board Ruling on Contention 6 (Possible Aircraft Impacts)*

The Board concludes that Contention 6 is *not admissible*.

The Commission has ruled that NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews.<sup>227</sup> Notwithstanding the Ninth Circuit’s ruling in *Mothers for Peace*, the Commission held in

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<sup>220</sup> *Id.* at 30.

<sup>221</sup> Staff Answer at 33.

<sup>222</sup> TVA Answer at 76-77.

<sup>223</sup> *Id.* at 77; Staff Answer at 33.

<sup>224</sup> Staff Answer at 34-36.

<sup>225</sup> Reply at 23.

<sup>226</sup> *Id.*

<sup>227</sup> See *PFS*, CLI-02-25, 56 NRC at 357; accord *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-31 (2007); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146-47 (2007).

*Oyster Creek* and *Grand Gulf* that, outside the Ninth Circuit,<sup>228</sup> it will continue to follow prior agency precedent by excluding terrorist attacks from the scope of NEPA reviews.<sup>229</sup> Other licensing boards faced with similar contentions have rejected them as outside the scope of a licensing proceeding.<sup>230</sup> SACE does not dispute that this contention would be inadmissible under Commission precedent. Instead, it states that it disagrees with the Commission's interpretation of NEPA.<sup>231</sup> But "the adjudicatory process [before this Board] is not the proper venue for a petitioner to set forth any contention that merely addresses his or her own view regarding the direction regulatory policy should take."<sup>232</sup>

The Petitioner also cites the Commission's recent Power Reactor Security Rule<sup>233</sup> and Aircraft Impacts Rule<sup>234</sup> as support for Contention 6.<sup>235</sup> But neither of these rules is NEPA-based, nor do they address Commission precedent excluding terrorist attacks from the scope of the agency's NEPA reviews. Thus, these rules do not support SACE's contention.

The Board therefore finds Contention 6 *not admissible* because it raises issues that are outside the scope of this proceeding.

#### **7. Contention 7: Inadequate Consideration of Aquatic Impacts**

This contention challenges the reasonableness of, and the adequacy of support for, TVA's conclusion that the cumulative impacts on aquatic ecology from WBN Unit 2 will be insignificant.<sup>236</sup> Specifically, the Petitioner asserts that: (1) TVA's assessment that the Tennessee River ecosystem is currently in good health is erroneous; (2) TVA "relies on outdated and inadequate data to predict the effects

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<sup>228</sup> The Watts Bar facility, which is located in Tennessee, is in the Sixth Circuit. See U.S. Courts, the Federal Judiciary, <http://www.uscourts.gov/courtlinks/>.

<sup>229</sup> *Oyster Creek*, CLI-07-8, 65 NRC at 128-29; *Grand Gulf*, CLI-07-10, 65 NRC at 146. As the NRC Staff points out, Staff Answer at 33, the United States Court of Appeals for the Third Circuit has upheld the Commission's interpretation. See *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009).

<sup>230</sup> See *Vogtle*, LBP-07-3, 65 NRC at 269 & n.16; *Bellefonte*, LBP-08-16, 68 NRC at 394; *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 566-69 (2008); *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 100-05 (2009).

<sup>231</sup> Reply at 23.

<sup>232</sup> *LES*, LBP-04-14, 60 NRC at 55 (citing *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33).

<sup>233</sup> 74 Fed. Reg. 13,926 (revising 10 C.F.R. Part 73 and creating 10 C.F.R. § 50.54(hh)). This new rule does not address the analysis of aircraft impact.

<sup>234</sup> *Id.* at 28,112. Although this rule requires analysis of aircraft impact it excludes reactors whose construction permits were issued prior to July 13, 2009. See 10 C.F.R. § 50.150(a)(3).

<sup>235</sup> Petition at 27.

<sup>236</sup> *Id.* at 31.

of WBN Unit 2’s cooling system on fish, mussels, and other aquatic organisms,” specifically with respect to entrainment, impingement, and thermal impacts from the intake and discharge structures; and (3) TVA fails to address adequately the impacts of other power facilities on the Tennessee River ecosystem.<sup>237</sup> The Petitioner claims that, contrary to TVA’s conclusions, the health of the Tennessee River ecosystem is in decline, and, in particular, TVA’s characterization of the mussel population health as “excellent” is incorrect.<sup>238</sup> SACE claims that the data TVA relied on for its entrainment analysis fails to take into account uneven ichthyoplankton distribution across time and space and that TVA did not conduct a follow-up survey to investigate the cause of an increased impingement level in an earlier survey. SACE further claims that TVA’s conclusions regarding thermal impacts fail to consider (1) the acknowledged need to relocate mussels from the vicinity of the Supplemental Condenser Cooling Water System (SCCW) discharge, (2) spatial and temporal distribution of ichthyoplankton, (3) characteristics of the thermal plume and mixing zone, (4) temperatures at the core of the thermal plume, (5) the effects of high temperatures on fish eggs and larvae, and (6) the impacts of a potential overflow of hot water from the holding ponds.<sup>239</sup> Finally, SACE claims that TVA has not adequately addressed the cumulative impacts of WBN Unit 2 in combination with impoundments and other industrial facilities, including both fossil fuel and nuclear power plants, in the region.<sup>240</sup>

Both TVA and the NRC Staff address each of the Petitioner’s bases for this contention separately. TVA characterizes the first basis, regarding the current health of the Tennessee River ecosystem, as a demand for additional studies that does not explain why such additional studies would be required. TVA argues that Contention 7 is thus similar to contentions that were rejected in the *Vogtle* and *Bellefonte* proceedings.<sup>241</sup> According to TVA, the contention fails to raise a genuine dispute.<sup>242</sup> The NRC Staff asserts that the Petitioner fails to allege how TVA’s analysis, as described in the FSEIS, was incorrectly done or how any required steps were omitted, thus failing to raise a genuine dispute with TVA’s application.<sup>243</sup>

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<sup>237</sup> *Id.* at 32-36.

<sup>238</sup> *Id.* at 32-33.

<sup>239</sup> *Id.* at 33-36.

<sup>240</sup> *Id.* at 36.

<sup>241</sup> TVA Answer at 81-82 (citing *Vogtle*, LBP-07-3, 65 NRC at 255-57; *Bellefonte*, LBP-08-16, 68 NRC at 398-402).

<sup>242</sup> *Id.*

<sup>243</sup> Staff Answer at 39-40. On the topic of mussels, the NRC Staff notes that populations in different locations were given different scores so that some were actually identified to be in “poor” health, in addition to the ones in “good” or “excellent” health. *Id.* at 39.

On the second basis, alleging that the Applicant relied on “outdated and inadequate data” to analyze cooling system impacts on aquatic organisms, TVA notes the Tennessee Department of Environment and Conservation (TDEC) approved its 1996-97 impingement and entrainment monitoring program and that TDEC determined that the WBN Condenser Cooling Water System (CCW) is the best technology available to minimize certain adverse environmental impacts, including entrainment.<sup>244</sup> TVA argues that SACE has not explained “why the Board should question” these findings by TDEC and that a draft EPA guidance document suggesting the need for more detailed studies does not raise a genuine dispute on this point.<sup>245</sup> TVA also points to various sections of the FSEIS addressing entrainment, impingement, and thermal impact data and argues that the Petitioner ignores or mischaracterizes the information in the FSEIS and other application-related documents, particularly TVA’s 1996-97 impingement and entrainment study.<sup>246</sup> In the context of thermal impacts, TVA argues that SACE has not explained how the additional data it seeks would significantly impact TVA’s analysis.<sup>247</sup> TVA also argues that the Petitioner’s holding pond overflow scenario is speculative and would, in any case, be limited by TVA’s NPDES permit.<sup>248</sup> The NRC Staff asserts that the second basis does not support admission of Contention 7 because it merely seeks additional site-specific data without explaining how TVA’s analysis was erroneous or how the new data would affect TVA’s conclusions.<sup>249</sup>

TVA asserts that the third basis for Contention 7, alleging an inadequate analysis of impacts from other facilities on the Tennessee River, also fails to raise a genuine dispute. TVA states that this claim by SACE misses the mark because the FSEIS does discuss the impact of other facilities in the context of the current conditions of the river and because the Petitioner cites neither a requirement for an individual analysis of each facility nor any potential synergistic effects between WBN Unit 2 and any other facility that would suggest that such an analysis would be required.<sup>250</sup> The NRC Staff also emphasizes the lack of any allegedly “unconsidered cumulative effect” and argues that Contention 7 is inadmissible under this basis because it lacks specific support.<sup>251</sup> The NRC Staff also points to the fact that SACE has not discussed the FSEIS sections addressing cumulative

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<sup>244</sup> TVA Answer at 84.

<sup>245</sup> *Id.* at 84-85.

<sup>246</sup> *Id.* at 82-83, 85-90.

<sup>247</sup> *Id.* at 90.

<sup>248</sup> *Id.*

<sup>249</sup> Staff Answer at 40-42.

<sup>250</sup> TVA Answer at 91-93 (citing *Calvert Cliffs*, LBP-09-4, 69 NRC at 201-05).

<sup>251</sup> Staff Answer at 43. The NRC Staff also cites *Calvert Cliffs* as addressing a similar claim to that raised by SACE in Contention 7. *Id.*

impacts and, as a result, it argues that SACE has not raised a genuine dispute.<sup>252</sup> In addition, the NRC Staff states that the actions requested by the Petitioner are outside the scope of NEPA, “which is limited to inquiry, not action.”<sup>253</sup>

In its Reply, SACE begins by noting that the *Vogtle* and *Bellefonte* boards admitted portions of contentions that were similar to SACE Contention 7 and held that the description of the aquatic baseline could be relevant to portions of the contentions that were admitted.<sup>254</sup> Additionally, SACE argues that, unlike the *Bellefonte* petitioners, it has challenged specific portions of TVA’s FSEIS.<sup>255</sup> The Petitioner next asserts that Dr. Young’s declaration supports its position that more site-specific studies are needed concerning the health of the ecosystem and that TVA and the staff “flyspeck” Dr. Young’s evidence concerning current ecosystem health in their answers, supporting the existence of a genuine dispute.<sup>256</sup> SACE also argues that it has shown, through the declaration of Dr. Young, that TVA’s alleged misuse of data is material by alleging that misuse led TVA to underestimate environmental impacts of the operation of WBN Unit 2.<sup>257</sup> In response to the NRC Staff’s argument that TVA may rely on older data, the Petitioner asserts that changed circumstances since those studies were performed, especially the operation of WBN Unit 1, indicate that the studies do not reflect current conditions, and TVA has not shown that it “carefully considered the appropriateness of using such outdated data” or that new data would be difficult to collect.<sup>258</sup> On the topic of mussels, SACE points out that, although different classifications are assigned to mussels at different points along the river, the health of the population closest to the WBN Unit 2 intake and discharge structures is described in the FSEIS as excellent.<sup>259</sup> In response to TVA’s citation of the 1996-97 entrainment and impingement study, the Petitioner asserts that this study is not discussed or even identified as entrainment- or impingement-related in the FSEIS and that information that TVA has submitted does not discuss fish density for purposes of entrainment analyses or adequately explain an observed peak in impingement during a 2005-2007 survey.<sup>260</sup> Additionally, SACE argues that TVA’s expired NPDES permit, which included an impingement and entrainment monitoring program, does not preclude the Petitioner’s current challenge<sup>261</sup> and that draft

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<sup>252</sup> *Id.* at 44.

<sup>253</sup> *Id.*

<sup>254</sup> Reply at 23-24.

<sup>255</sup> *Id.* at 24.

<sup>256</sup> *Id.* at 24-25.

<sup>257</sup> *Id.* at 26.

<sup>258</sup> *Id.* at 26-28.

<sup>259</sup> *Id.* at 28.

<sup>260</sup> *Id.* at 28-32.

<sup>261</sup> *Id.* at 28.

EPA guidance calling for direct monitoring of entrainment impacts at intakes can be used to support the reasonableness of the Petitioner's position that site-specific entrainment data should have been collected.<sup>262</sup> Finally, regarding thermal impacts, SACE asserts that TVA's discussion of temperature measurements does not show that TVA has studied the environmental impacts of the thermal discharges and that the NPDES permit, which limits only the "end-of-pipe" outfall temperature, does not prevent higher temperature discharges to the river from holding pond overflow.<sup>263</sup>

As noted above,<sup>264</sup> on September 3, 2009, SACE filed a Motion for Leave to Amend Contention 7, along with an Amended Contention 7.<sup>265</sup> TVA and the NRC Staff filed Responses in Opposition to the Motion on September 8, and September 10, 2009, respectively.<sup>266</sup> In addition, on September 28, 2009, TVA and the NRC Staff filed an Answer to the Amended Contention.<sup>267</sup> SACE filed a Reply to TVA's and the NRC Staff's Answers on October 5, 2009.<sup>268</sup>

In the document submitted as Amended Contention 7 the Petitioner did not make any changes to Contention 7 itself.<sup>269</sup> Rather, SACE sought to amend the basis for Contention 7 in response to TVA's 1998 Aquatic Study.<sup>270</sup> In the amended contention/basis SACE argues that, even though the Aquatic Study shows that TVA did take direct measurements of entrainment, the Aquatic Study is inadequate to support TVA's conclusion of no significant entrainment impacts because (1) the study shows a 1997 entrainment rate of 17.65%, which is significant; (2) TVA did not monitor entrainment for an adequate amount of time, in terms of both number of years and amount of time in each year; and (3) the study is outdated in light of a decline in aquatic health since the study was concluded.<sup>271</sup> With regard to impingement, SACE again argues that the Aquatic Study is obsolete.<sup>272</sup> In addition, SACE asserts that the Aquatic Study supports its original argument that the aquatic health of the Tennessee River is in decline because the study contains information indicating a decline in mussel health.<sup>273</sup> SACE asserts that it should be permitted to amend Contention 7 because

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<sup>262</sup> *Id.* at 29-30.

<sup>263</sup> *Id.* at 32-33.

<sup>264</sup> *Supra* p. 946.

<sup>265</sup> Motion to Amend; Amended Contention 7.

<sup>266</sup> TVA Response to Motion to Amend; Staff Response to Motion to Amend.

<sup>267</sup> TVA Answer to Amended Contention 7; Staff Answer to Amended Contention 7.

<sup>268</sup> Reply to Amended Contention 7.

<sup>269</sup> Amended Contention 7 at 3.

<sup>270</sup> *Id.* at 3.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 3-4.

<sup>273</sup> *Id.* at 4.

it meets the contention amendment standards of 10 C.F.R. § 2.309(f)(2). SACE argues that (1) TVA's references to the Aquatic Study in its answer to SACE's original petition constitute information that was not previously available; (2) that information is materially different from information that was previously available; and (3) SACE filed the amended contention within 30 days of TVA's filing its answer.<sup>274</sup>

TVA and the NRC Staff both oppose the motion on the ground that SACE does not meet the requirements of 10 C.F.R. § 2.309(f)(2) because the 1998 Aquatic Study was previously available.<sup>275</sup> Both TVA and the NRC Staff assert that the FSEIS identifies the Aquatic Study by its full title, "Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation," and that SACE should, therefore, have realized during its preparation of Contention 7 that the document contained relevant information.<sup>276</sup> Additionally, TVA and the NRC Staff note that TVA provided SACE with other documents at SACE's request but that SACE never requested a copy of the Aquatic Study.<sup>277</sup>

In their September 28, 2009 answers, TVA and the NRC Staff both assert that Amended Contention 7 also does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).<sup>278</sup> Initially, TVA asserts that the amended contention "retracts substantial portions of Petitioners' original claims [i.e., the alleged lack of any direct entrainment monitoring], rendering those claims moot."<sup>279</sup> TVA then argues that SACE's new bases either are inadequately supported or fail to raise a genuine dispute. With regard to entrainment, TVA asserts three deficiencies in Amended Contention 7. First, TVA asserts that SACE's expert, Dr. Young, incorrectly calculated the entrainment percentage from the Aquatic Study and therefore does not create a genuine dispute on the significance of the entrainment levels.<sup>280</sup> Second, TVA notes that Dr. Young does not claim that any peak egg or larval densities were actually missed, but only that they might have been missed, by the April-to-June monitoring periods and that Dr. Young's assumption that monitoring in the first year did not begin until late May is incorrect.<sup>281</sup> Third, TVA claims that SACE fails to support the proposition that the aquatic health of the Tennessee River is in decline and that SACE therefore fails to support the proposition that the Aquatic Study is outdated in light of

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<sup>274</sup> Motion to Amend at 2-3.

<sup>275</sup> TVA Response to Motion to Amend at 5; Staff Response to Motion to Amend at 1, 4.

<sup>276</sup> TVA Response to Motion to Amend at 4; Staff Response to Motion to Amend at 4.

<sup>277</sup> TVA Response to Motion to Amend at 4; Staff Response to Motion to Amend at 4-5.

<sup>278</sup> TVA Answer to Amended Contention 7 at 2; Staff Response to Amended Contention 7 at 1-2.

<sup>279</sup> TVA Answer to Amended Contention 7 at 4-5.

<sup>280</sup> *Id.* at 6-7.

<sup>281</sup> *Id.* at 8-9.

that decline.<sup>282</sup> With respect to impingement, TVA again asserts that SACE fails to support the proposition that the Aquatic Study is outdated and additionally asserts that SACE has not identified where TVA extrapolates from impingement data to determine entrainment impacts as alleged by Dr. Young.<sup>283</sup> Finally, TVA asserts that SACE has not supported its claim that the Aquatic Study shows a decline in aquatic health because it does not allege that the decrease in mussel populations between 1996 and 1997 observed in the study is outside the typical range of year-to-year variation or indicate how operation of WBN Unit 1 could have affected mussel health in the area.<sup>284</sup>

The NRC Staff opposes the admission of Amended Contention 7 as failing to raise a genuine dispute because NEPA only requires updating old data when the data's validity is thrown into question and SACE. By failing to support its claim that the aquatic health of the Tennessee River has declined, the Staff argues, the amended contention has not thrown into question the validity of the data submitted by TVA and, accordingly, has not raised a genuine question regarding the validity of the Aquatic Study.<sup>285</sup>

In its Reply, SACE first argues that its Motion to Amend Contention 7 is timely because despite the FSEIS's listing of the Aquatic Study as a reference, "nothing in the FSEIS establishes that the study in fact formed the basis for TVA's conclusions concerning aquatic impacts," and TVA in fact "erroneously cited a completely different study in the 'Aquatic Ecology' section of the FSEIS."<sup>286</sup> SACE then presents a rebuttal to TVA's and the NRC Staff's admissibility arguments concerning Amended Contention 7. With respect to the entrainment rates from the Aquatic Study, SACE asserts that neither the study nor TVA's Answer provides "original source data" or shows how those data were used to reach the conclusions in the study, and thus, the "discrepancy" Dr. Young identified is not resolved.<sup>287</sup> Next, SACE asserts that Amended Contention 7 raises a genuine dispute with TVA with regard to duration of entrainment and impingement sampling because (1) it is Dr. Young's expert opinion that TVA should have had longer sampling periods in order to identify potential peak egg and larvae populations; (2) TVA's own environmental documents indicate that water temperature, which varies at the WBN site, affects the timing of spawning; (3) TVA does not explain "how it conclusively established that the dates of peak density of fish eggs and larvae in 1996 and 1997 were in June" when sampling

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<sup>282</sup> *Id.* at 9-10.

<sup>283</sup> *Id.* at 11.

<sup>284</sup> *Id.* at 12-13.

<sup>285</sup> Staff Answer to Amended Contention 7 at 3-6.

<sup>286</sup> Reply to Amended Contention 7 at 2.

<sup>287</sup> *Id.* at 2-3.



only took place from April through June; and (4) TVA's records show that WBN Unit 1 did not operate at full capacity in April and most of May 1996.<sup>288</sup>

SACE also argues that the NRC Staff is incorrect in asserting that the data in the FSEIS do not show a significant decline in the health of the river and that its questioning of the current validity of the Aquatic Study raises a genuine dispute because Dr. Young's expert opinion offers several reasons for doubting the reliability of the data.<sup>289</sup> Finally, SACE asserts that it has raised a genuine dispute concerning thermal impacts on mussels because (1) it has pointed out that TVA's own statements in the Aquatic Study indicate a significant decline in mussel population downstream but not upstream of WBN between 1996 and 1997 and (2) TVA merely shows that sampling factors *might* have resulted in the apparent 35% decline in mussel population between 1996 and 1997 and thus does not rebut the possibility of an actual decline caused by operation of WBN Unit 1.<sup>290</sup>

*Board Ruling on the Admissibility of Contention 7 (Aquatic Impacts)*

The Board *denies* SACE's Motion to Amend Contention 7 but concludes that Contention 7 is *admissible* as originally presented.

In order for the Board to allow SACE to amend Contention 7, the Petitioner must demonstrate that the information upon which the amended contention is based was not previously available, is materially different from information previously available, and that the amended contention has been submitted in a timely fashion.<sup>291</sup> As the NRC Staff points out, the standard is whether the information was available to the public, not whether the Petitioner has recently found it.<sup>292</sup> We conclude that this information was available when the original Petition to Intervene was submitted, and we also conclude that it is not *materially* different from other information that was available.

We note that, at this stage of the proceedings, we admit "contentions," not "bases."<sup>293</sup> Furthermore, we conclude that the information contained in TVA's 1998 Aquatic Study is within the scope of the contention as originally drafted, which challenged the adequacy and accuracy of TVA's analysis of the impacts that the operation of Watts Bar Unit 2 could have on the surrounding aquatic

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<sup>288</sup> *Id.* at 3-4.

<sup>289</sup> *Id.* at 5-6.

<sup>290</sup> *Id.* at 6-7.

<sup>291</sup> 10 C.F.R. § 2.309(f)(2).

<sup>292</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009).

<sup>293</sup> *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 147 (2006).

ecology. Accordingly, while finding this previously available study allowed SACE to correct a factual error contained in its argument, the contention remains essentially unchanged.

Accordingly, Petitioner's Motion to Amend Contention 7 is *denied*. However, even without the amendment we find that Contention 7 is *admissible*.

We find that SACE has raised a genuine issue with regard to the accuracy of TVA's characterization of the current aquatic environment in the vicinity of the Watts Bar facility and the adequacy of TVA's analysis of the impact that the operation of Unit 2 could have on the surrounding aquatic environment.

In support of this contention SACE presents a detailed declaration from Dr. Shawn Young, an expert in fisheries biology. In that declaration he offers his expert opinion that "the health of the Tennessee River ecosystem . . . is damaged, fragile, and quite vulnerable."<sup>294</sup> He notes that many fish and mussel populations "are greatly reduced from their historical numbers" and further notes that "in the upper-basin, 15 fish species are federally listed as endangered or threatened."<sup>295</sup> Based on the data he has reviewed, Dr. Young opines that TVA inaccurately characterizes the current aquatic health of the Tennessee River as good and "fails to identify and discuss an alarming trend of declining fish species in the Chickamauga Reservoir."<sup>296</sup>

Likewise, Dr. Young offers his expert opinion that TVA's conclusion regarding potential impacts of entrainment and impingement is misleading because it relied primarily on data generated more than 30 years ago, before Watts Bar Unit 1 became operational.<sup>297</sup> While TVA notes that it has provided some post-operational data (1998 SCCW EA<sup>298</sup>) we believe that Dr. Young's expert evaluation of TVA's 2007 FSEIS is sufficient to raise a genuine issue of material fact regarding the adequacy of the support for and the accuracy of TVA's conclusion regarding the impact of entrainment and impingement on the aquatic organisms in the Tennessee River.

Finally, Dr. Young challenges TVA's conclusion that the thermal impacts from the operation of Watts Bar Unit 2 would have an "insignificant" impact on the aquatic environment.<sup>299</sup> He notes that, in his opinion as an expert fisheries biologist, TVA lacks adequate data on which to reach such a conclusion. He

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<sup>294</sup> Petition, Attach. 6, Declaration of Shawn Paul Young, Ph.D. at 4 (July 11, 2009) [hereinafter Young Declaration].

<sup>295</sup> *Id.* at 5-6.

<sup>296</sup> *Id.* at 6-7.

<sup>297</sup> *Id.* at 12-16.

<sup>298</sup> [TVA], Watts Bar Nuclear Plant Supplemental Condenser Cooling Water Project, Environmental Assessment (Aug. 1998), *available at* <http://www.tva.gov/environment/reports/wattsbar2/related/aug-1998.pdf>.

<sup>299</sup> Young Declaration at 16.

notes, *inter alia*, that TVA: (1) does not provide data on spatial and temporal distribution of ichthyoplankton in relation to thermal mixing zones; (2) fails to account for the fact that the size and temperature profile of the mixing zone varies with dam discharge; (3) fails to evaluate the effects of discharge temperature on fish eggs and larvae; (4) relies on the temperature at the edges of the thermal discharge plume to evaluate impact on aquatic organisms.<sup>300</sup>

While Dr. Young may be misinterpreting the data submitted by TVA, at this stage of the proceeding we are deciding only contention admissibility. The purpose of the hearing will be to take testimony from experts presented by both sides, weigh the evidence, and thereby ensure that an informed decision is made.

Petitioner has met its burden of demonstrating the existence of genuine material issues of fact and has, accordingly, presented an admissible contention.

## V. CONCLUSION

The Southern Alliance for Clean Energy has established standing and has submitted admissible contentions. Accordingly, SACE's Request for Hearing is *Granted*. The Tennessee Environmental Council, We the People, the Sierra Club, and Blue Ridge Environmental Defense League did not submit a timely Petition to Intervene and, accordingly their Request for Hearing is *Denied*.

In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be filed within ten (10) days after it is served.

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<sup>300</sup> *Id.* at 16-18.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>301</sup>

Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson  
ADMINISTRATIVE JUDGE

Dr. Gary Arnold  
ADMINISTRATIVE JUDGE

Rockville, MD  
November 19, 2009

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<sup>301</sup> A copy of this Order was sent this date by the agency's E-filing system to: (1) Counsel for the NRC Staff; (2) Counsel for TVA; and (3) Diane Curran and Matthew Fraser as Counsel for the Petitioners.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Ronald M. Spritzer**, Chairman  
**Dr. Richard F. Cole**  
**Dr. Alice C. Mignerey**

**In the Matter of**

**Docket No. 52-017-COL**  
**(ASLBP No. 08-863-01-COL)**  
**(Combined License Application)**

**VIRGINIA ELECTRIC AND POWER**  
**COMPANY d/b/a DOMINION**  
**VIRGINIA POWER and OLD**  
**DOMINION ELECTRIC COOPERATIVE**  
**(North Anna Power Station,**  
**Unit 3)**

**November 25, 2009**

In this Combined License Proceeding, Intervenor filed a new contention challenging the Applicant's new plan for the onsite storage of low-level radioactive waste. The Licensing Board ruled that the new contention was timely and admitted it in part.

**RULES OF PRACTICE: NEW CONTENTIONS; NONTIMELY CONTENTIONS**

Several Licensing Boards have recognized a dichotomy between "new" contentions filed under section 2.309(f)(2) and "nontimely" contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information ("new" contentions) to make the same showing as intervenors who have simply

delayed filing their contentions until after expiration of the regulatory deadline (“nontimely” contentions). Simply put, “[i]f a contention satisfies the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii), then, by definition, it is *not* subject to 10 C.F.R. § 2.309(c) which specifically applies to ‘nontimely filings.’” *Energy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573 n.14 (2006) (emphasis in original).

**RULES OF PRACTICE: COMBINED LICENSE (MATERIAL ISSUES)**

The adequacy of a COL applicant’s plan for the storage and management of LLRW is a material issue in a COL proceeding.

**PART 61 LAND DISPOSAL: SCOPE**

Part 61 does not apply to onsite facilities where a licensee plans on storing its own low-level radioactive waste prior to eventual disposal offsite; it only governs land disposal facilities receiving waste from others.

**RULES OF PRACTICE: NEW CONTENTIONS (DEADLINES)**

Thirty days is a reasonable limit for fulfilling the timing requirement of 10 C.F.R. § 2.309(f)(2)(iii) because of “the significant effort involved in (a) identifying new information, (b) assembling the required expertise, and then (c) drafting a contention that satisfies 10 C.F.R. § 2.309(f)(1).” *Vermont Yankee*, LBP-06-14, 63 NRC at 574.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)**

To satisfy 10 C.F.R. § 2.309(f)(1)(iv)’s materiality requirements for contentions of omission, there must be some significant link between the claimed deficiency and the agency’s ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment.

**RULES OF PRACTICE: BURDEN OF PROOF**

The proponent of a contention is not required to prove its case on the merits at the contention admissibility stage.

**RULES OF PRACTICE: CONTENTIONS (COMBINED LICENSE)**

Section 2.309(f)(1)(vi) of 10 C.F.R. requires that the proponent of a contention identify the specific parts of the COLA it disputes and show that resolution of those disputes is material to the licensing decision.

**RULES OF PRACTICE: CONTENTIONS (BASIS IN NRC REGULATORY REQUIREMENTS)**

An admissible contention may not be based solely on a general allegation that an applicant's Safety Analysis Report contains an unsubstantiated claim of conservatism. Such allegations, "without specific ties to NRC regulatory requirements or to safety in general . . . do not provide adequate support demonstrating the existence of a genuine dispute of fact or law with respect to the . . . application." *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009).

**COMBINED LICENSES: CONTENTS OF APPLICATION**

If an applicant has underestimated radioactive waste volumes, this raises the question whether the applicant will "control[] and limit[] radioactive effluents and radiation exposures within the limits set forth in [10 C.F.R. Part 20]." 10 C.F.R. § 52.79(a)(3).

**COMBINED LICENSES: CONTENTS OF APPLICATION;  
TECHNICAL REQUIREMENTS**

The Commission has recently held that 10 C.F.R. § 52.79(a)(3) "sets no quantity or time restrictions relative to onsite storage of . . . [low level radioactive] waste" in an applicant's Final Safety Analysis Report. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC 33, 36 (2009). Rather, the information required in this part of the application is largely dependent on the individual applicant's plans. *Id.* at 37.

**MEMORANDUM AND ORDER  
(Admitting Contention 10 in Part)**

This proceeding concerns the Combined License (COL) Application filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion or Applicant) for a nuclear reactor,

North Anna Unit 3, to be located at the North Anna Power Station in Louisa County, Virginia. Before the Board is the Motion of the Blue Ridge Environmental Defense League (BREDL) to admit new Contention 10, which challenges the adequacy of the storage plan Dominion submitted concerning its management of Low-Level Radioactive Waste (LLRW).

On November 26, 2007, pursuant to Subpart C of 10 C.F.R. Part 52, Dominion filed a COL Application (COLA) to construct and operate an Economic Simplified Boiling Water Reactor at its existing North Anna Power Station site.<sup>1</sup> On March 10, 2008, the NRC published a notice of opportunity for hearing on the COLA, requiring that any contentions be filed within 60 days.<sup>2</sup> On May 9, 2008, BREDL submitted a Petition to Intervene and Request for Hearing, which included eight contentions.<sup>3</sup> The NRC Staff and Dominion each filed Answers opposing the Petition,<sup>4</sup> and BREDL replied.<sup>5</sup> The Board conducted a prehearing teleconference on July 2, 2008, to hear legal argument on the admissibility of BREDL's contentions. The Board issued a Memorandum and Order on August 15, 2008, in which it found that BREDL has standing, admitted BREDL's first contention in part, determined that BREDL's remaining contentions were inadmissible, admitted BREDL as a party, and granted BREDL's request for a hearing.<sup>6</sup>

Contention 1 alleged that the Applicant should have explained its current plan for the management of LLRW given the lack of an offsite disposal facility.<sup>7</sup> We construed Contention 1 as a "contention of omission, i.e., one that claims, in the words of 10 C.F.R. § 2.309(f)(1)(vi), "the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief.""<sup>8</sup> We partially admitted the contention on that basis.<sup>9</sup>

On May 21, 2009, Dominion provided the NRC with "Submission 4 of

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<sup>1</sup> See Dominion Virginia Power; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760 (Mar. 10, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (May 9, 2008) [hereinafter Petition].

<sup>4</sup> NRC Staff Answer to "Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League" (June 3, 2008); Dominion's Answer Opposing Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 3, 2008).

<sup>5</sup> Reply of the Blue Ridge Environmental Defense League to Dominion Virginia Power and NRC Staff Answers to Our Petition for Intervention and Request for Hearing (June 11, 2008).

<sup>6</sup> LBP-08-15, 68 NRC 294, 337-38 (2008).

<sup>7</sup> *Id.* at 312-13.

<sup>8</sup> *Id.* at 313-14 (quoting *Pa'ina Hawaii, LLC*, LBP-06-12, 63 NRC 403, 413 (2006), *petition for reconsideration denied*, CLI-06-25, 64 NRC 128 (2006) (dismissing applicant's appeal as untimely)).

<sup>9</sup> *Id.* at 314.



the North Anna 3 Combined License Application.”<sup>10</sup> The Submission contained changes to the COLA that Dominion stated “describe [its] plan for on-site management of Class B and C low-level radioactive waste in the event an offsite facility is not available to accept such waste.”<sup>11</sup> This plan, which we shall refer to as Dominion’s “Storage Plan,” included a revised section 11.4.1 of the Final Safety Analysis Report (FSAR) explaining that:

The Radwaste Building provides storage space sized to hold the total combined volume of packaged Class A, B, and C low-level radioactive waste estimated to be generated during six months of plant operations. Such waste is normally promptly disposed of at licensed offsite processing and disposal facilities. In the event that an offsite facility is not available to accept Class B and C waste, the Radwaste Building waste storage space has been configured to accommodate at least 10 years of packaged Class B and C waste and approximately three months (up to three shipments) of packaged Class A waste, considering routine operations and anticipated operational occurrences. This Class B and C waste storage capacity is based on a conservative estimate of the annual generation of low-level waste, without credit for potential waste minimization techniques and methods other than dewatering. In the event that an offsite facility is not available to accept Class B and C waste, a waste minimization plan will also be implemented. This plan will consider strategies to reduce generation of Class B and C waste, including reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point of generation segregation techniques. Good fuel performance will also reduce fission products in reactor and spent fuel pool water, and hence the volume of Class B and C waste generated. Implementation of these techniques could substantially extend the capacity of the Class B and C storage area in the Radwaste Building. If additional storage capacity for Class B and C waste is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A.<sup>12</sup>

The Storage Plan also included revisions to other sections of the FSAR,

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<sup>10</sup>Letter from Eugene S. Grecheck, Vice-President of Nuclear Dev., Dominion Energy, Inc., to U.S. Nuclear Regulatory Comm’n (May 21, 2009) at 1 (ADAMS Accession No. ML0915206360).

<sup>11</sup>*Id.* An NRC document explains:

Per 10 CFR 61.55, LLRW is classified as Class A, B, or C. Class A waste makes up approximately 99 percent of the LLRW and has the lowest level of radioactivity. Class A waste usually consists of slightly contaminated paper products and clothing, rags, mops, equipment and tools, and filters with low levels of radioactivity. While Class B and C waste makes up approximately one percent of the LLRW, it has a higher level of radioactivity. Class B and C usually consist of materials such as filters, resins, and irradiated hardware.

NRC Regulatory Issue Summary 2008-32, Interim Low Level Radioactive Waste Storage at Reactor Sites (Dec. 30, 2008) at 1-2 (ADAMS Accession No. ML082190768).

<sup>12</sup>FSAR, Rev. 2, § 11.4.1 at 11-7 to 11-8.

including the description of the Container Storage Subsystem<sup>13</sup> and the Departures Report.<sup>14</sup> After submitting this new information, Dominion moved to dismiss Contention 1 as moot.<sup>15</sup> In response, BREDL argued that Dominion “still lacks a realistic, specific low-level radioactive waste management plan in its Final Safety and Analysis Report” and asserted that it could file a new or amended contention concerning that issue.<sup>16</sup> BREDL informed the Board that it intended “to submit a new modified contention with supporting expert opinion regarding low-level radioactive waste management at the proposed North Anna Unit 3 before June 26, 2009.”<sup>17</sup> BREDL submitted its new contention (Contention 10) on June 26, 2009.<sup>18</sup> In Contention 10, BREDL disputes the adequacy of Dominion’s plan for the management of Class B and C wastes in the absence of an offsite disposal facility.

Because the COLA now includes a plan for the management of Class B and C wastes in the absence of an offsite disposal facility, we dismissed Contention 1 as moot.<sup>19</sup> We made clear, however, that the dismissal of Contention 1 would not terminate this case and thus expressly retained jurisdiction to decide whether to admit Contention 10.<sup>20</sup> We now resolve that issue by admitting one aspect of Contention 10 and dismissing the remainder.

## I. ANALYSIS

In order to decide whether to admit Contention 10, we must first consider its timeliness, given that it was filed after the May 10, 2008 deadline for filing contentions.<sup>21</sup> If it was timely filed, we must decide whether Contention 10 meets the admissibility criteria of 10 C.F.R. § 2.309(f)(1).

### A. Timeliness

BREDL argues that Contention 10 is based upon new information materially different than information previously available, and that therefore it may be filed

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<sup>13</sup> *Id.*, § 11.4.2.2.4 at 11-9.

<sup>14</sup> *Id.*, Part 7 at 1-1 to 1-3.

<sup>15</sup> Dominion’s Motion to Dismiss BREDL’s Contention 1 as Moot (June 1, 2009) at 1.

<sup>16</sup> Intervenor’s Reply to Motion to Dismiss (June 11, 2009) at 2.

<sup>17</sup> *Id.* at 2-3.

<sup>18</sup> BREDL had previously filed a Motion to Submit New Contention on June 8, 2009.

<sup>19</sup> Licensing Board Order (Denying Contention 1 as Moot) (Aug. 19, 2009) at 3-4.

<sup>20</sup> *Id.* See 10 C.F.R. § 2.318(a).

<sup>21</sup> See 73 Fed. Reg. at 12,761.

as a new contention under 10 C.F.R. § 2.309(f)(2).<sup>22</sup> The NRC Staff agrees that Contention 10 is timely insofar as it challenges the adequacy of the new LLRW storage plan, but the Applicant argues that Contention 10 is untimely under both section 2.309(f)(2) and section 2.309(c).<sup>23</sup> We agree with BREDL and the NRC Staff that Contention 10 is timely under section 2.309(f)(2) to the extent it challenges the adequacy of the new LLRW storage plan. We reject as untimely those aspects of Contention 10 that merely reargue issues already decided by the Board, without identifying any new information relevant to those issues.

### ***1. Regulatory Background***

Under 10 C.F.R. § 2.309(f)(2), a new contention such as Contention 10 may be filed after the initial docketing “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
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.<sup>24</sup>

The Commission has explicitly stated that its requirements for filing both new and nontimely contentions are “stringent.”<sup>25</sup> Nevertheless, several Licensing Boards have recognized a dichotomy between “new” contentions filed under section 2.309(f)(2) and “nontimely” contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information (“new” contentions) to make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline (“nontimely” contentions).<sup>26</sup> Simply put, “[i]f a contention satisfies the timeliness requirement of

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<sup>22</sup> See Intervenor’s Reply to Motion to Dismiss at 2.

<sup>23</sup> NRC Staff’s Answer to Intervenor’s Amended Contention Ten (July 21, 2009) at 4-6 [hereinafter NRC Staff’s Answer]; Dominion’s Answer Opposing BREDL’s Contention 10 (July 21, 2009) at 1 [hereinafter Dominion’s Answer].

<sup>24</sup> 10 C.F.R. § 2.309(f)(2).

<sup>25</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009) (citations omitted).

<sup>26</sup> See, e.g., *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee  
(Continued)

10 C.F.R. § 2.309(f)(2)(iii), then, by definition, it is *not* subject to 10 C.F.R. § 2.309(c) which specifically applies to ‘nontimely filings.’”<sup>27</sup>

This proposition finds further support where the original contention is a contention of omission. The Commission has held that “[w]here 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 Staff in a draft EIS, the contention is moot.”<sup>28</sup> Thus, in these situations, “[i]ntervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information.”<sup>29</sup> Therefore,

if . . . previously unavailable and material information, which raises for the first time a material new contention, becomes available, and if an existing party asserts that new and material contention in a timely fashion, and the contention otherwise satisfies the requirements of 10 C.F.R. § 2.309(f)(1), then that contention is to be admitted, without being required to jump through the eight additional hoops for “nontimely” contentions under 10 C.F.R. § 2.309(c).<sup>30</sup>

Indeed, at the contention admissibility stage of this case, we held that “[i]f the Applicant cures the omission, the contention will become moot. Then, [the Intervenor] must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by the Applicant.”<sup>31</sup>

## 2. *The Parties’ Positions*

BREDL claims that Contention 10 is a “new” contention under 10 C.F.R. § 2.309(f)(2). First, BREDL claims that Contention 10 is based on newly available information, namely Dominion’s amended COLA.<sup>32</sup> As the factual basis for this new proposed contention, BREDL claims that: (1) Dominion has still not provided a viable LLRW disposal plan; (2) “Dominion’s amended FSAR is ambiguous and in fact does not add any new information to refute BREDL’s original contention”; and (3) “the evidence clearly shows that the Applicant’s

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Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 n.21 (2005).

<sup>27</sup> *Vermont Yankee*, LBP-06-14, 63 NRC at 573 n.14 (emphasis in original).

<sup>28</sup> *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).

<sup>29</sup> *Id.* The *McGuire/Catawba* decision interpreted the pre-2004 precursor to the current 10 C.F.R. § 2.309, section 2.714. See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2217 (Jan. 14, 2004).

<sup>30</sup> *Vermont Yankee*, LBP-06-14, 63 NRC at 574.

<sup>31</sup> LBP-08-15, 68 NRC at 317-18.

<sup>32</sup> Intervenor’s Amended Contention Ten (June 26, 2009) at 2, 10.

volume estimates for radioactive waste storage are in fact too small, and not at all the conservative estimates they attempt to portray.”<sup>33</sup> Therefore, BREDL concludes, Contention 10 is based on the newly available information found in the amended COLA and thus fulfills 10 C.F.R. § 2.309(f)(2).<sup>34</sup>

Dominion argues that BREDL’s Contention 10 is untimely because it was not filed within 10 days of receipt of Dominion’s amended COLA pursuant to 10 C.F.R. § 2.323(a).<sup>35</sup> Moreover, Dominion reasons, BREDL has not shown cause, justification, or precedent why BREDL should have needed a full month to file its new contention under 10 C.F.R. § 2.309(f)(2)(iii).<sup>36</sup> Finally, according to Dominion, two out of three claims in BREDL’s Contention 10 are “not based on any new information in the amended COLA” because Contention 10 “alleged the exact same issue, even using the same language, in Contention 1,” and does not address any “new information, . . . nor . . . make any new claims” on the amended COLA.<sup>37</sup> Therefore, Dominion concludes, BREDL’s Contention 10 does not satisfy 10 C.F.R. § 2.309(f)(2).<sup>38</sup>

The NRC Staff responds that BREDL’s Contention 10 does meet 10 C.F.R. § 2.309(f)(2)’s requirements and is thus timely.<sup>39</sup>

### 3. Analysis

We begin with the requirement that “information upon which the amended or new contention is based . . . [must] not [have been] previously available.”<sup>40</sup> Here, BREDL is responding to Dominion’s recent revisions to the COLA that provide a new storage plan for the management of LLRW. BREDL asserts that the plan is inadequate in several respects.<sup>41</sup> The Board concludes that because the new information that forms the basis for BREDL’s Contention Ten did not exist until shortly before BREDL filed the contention,<sup>42</sup> it clearly was “previously unavailable” to BREDL for the purposes of 10 C.F.R. § 2.309(f)(2)(i).

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<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> Dominion’s Answer at 11.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 11-12.

<sup>39</sup> NRC Staff’s Answer at 4-6.

<sup>40</sup> 10 C.F.R. § 2.309(f)(2)(i).

<sup>41</sup> Intervenor’s Amended Contention Ten at 1-3.

<sup>42</sup> Dominion’s Amended COLA was filed on June 1, 2009, almost 10 months after this Board admitted Contention 1 in August 2008 and more than 1 year after BREDL filed its initial petition in May 2008.

The second requirement is that “[t]he information upon which the amended or new contention is based . . . [be] materially different than information previously available.”<sup>43</sup> We agree with the Staff that Contention 10 meets the standards of section 2.309(f)(2)(ii) to the extent that it addresses the adequacy of Dominion’s new storage plan for Class B and C wastes.<sup>44</sup> The Board previously ruled that Dominion’s plan for the storage of those wastes is material to the NRC’s decision to issue the COL. We stated that “[i]f Dominion is unable to find a replacement for the Barnwell facility, Class B and C waste from Unit 3 will have to be stored at the site, and Dominion’s plan for providing extended onsite storage will be material to the determinations the NRC Staff must make under [10 C.F.R.] Parts 20 and 30.”<sup>45</sup> We also noted that 10 C.F.R. § 52.79(a)(3) requires the COLA to explain “[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter.”<sup>46</sup> The Commission has recently ruled that this regulation requires a COL applicant to explain how it “intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20. This includes, but is not limited to, low-level radioactive waste handling and storage.”<sup>47</sup> In that decision, the Commission upheld another board’s decision to admit a LLRW contention it described as “substantively identical” to the previously admitted LLRW contention in this case.<sup>48</sup> We therefore see no reason to depart from our previous conclusion that the adequacy of a COL applicant’s plan for the storage and management of LLRW is a material issue in a COL proceeding.

Not only is the adequacy of Dominion’s new plan a material issue, but the new plan adds information that is “different than information previously available.”<sup>49</sup> Under the new plan, Dominion will provide at least 10 years of onsite storage capacity for Class B and C wastes. Under the COLA prior to the recent amendment, however, Dominion assumed that Class B and C wastes would be sent to an offsite disposal facility, and it therefore intended to provide only 6 months of storage capacity.<sup>50</sup> Thus, BREDL’s challenge to the new plan is based

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<sup>43</sup> 10 C.F.R. § 2.309(f)(2)(ii).

<sup>44</sup> See NRC Staff’s Answer at 5-6.

<sup>45</sup> LBP-08-15, 68 NRC at 315.

<sup>46</sup> *Id.* at 315-16 (citing 10 C.F.R. § 52.79(a)(3)).

<sup>47</sup> *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC 33, 37 (2009).

<sup>48</sup> *Id.* at 38.

<sup>49</sup> 10 C.F.R. § 2.309(f)(2)(ii).

<sup>50</sup> LBP-08-15, 68 NRC at 318-19.

on new information that is material to the NRC's licensing decision, and the new contention accordingly satisfies section 2.309(f)(2)(ii).

We agree with the Staff, however, that several portions of Contention 10 "simply restate allegations that the Intervenor unsuccessfully advanced earlier in this proceeding."<sup>51</sup> BREDL's allegations that Dominion must obtain a permit under 10 C.F.R. Part 61 for the disposal of LLRW at the North Anna site are neither new nor based on new information. Rather, they restate allegations that the Board has already determined to be inadmissible.<sup>52</sup> We ruled that, "[e]ven assuming arguendo that Dominion might someday require a permit under Part 61 for a disposal facility, that issue is too speculative at present and is therefore not 'material to the findings the NRC must make to support the action that is involved in' the present proceeding."<sup>53</sup> No new facts have arisen to change the Board's original analysis of this portion of Contention 1. Moreover, the Commission recently affirmed another ruling dismissing this portion of an equivalent contention, stating that "Part 61 is inapplicable here because it applies only to land disposal facilities that *receive* waste from others, not to onsite facilities such as Bellefonte's where the licensee intends to *store* its own low-level radioactive waste."<sup>54</sup>

BREDL's allegation that Dominion lacks a viable plan for the management of Greater than Class C Waste is also neither new nor based upon new information.<sup>55</sup> In our earlier ruling, we noted that the disposal of Greater than Class C Waste is the responsibility of the federal government, and therefore disposal of such waste would not be directly affected by the partial closure of the Barnwell facility. We therefore focused upon BREDL's allegations concerning Class B and C Waste.<sup>56</sup> We admitted Contention 1 only on the basis that Dominion had failed to explain its plan for the management of Class B and C Waste in the absence of a disposal facility; we made no equivalent ruling concerning Greater than Class C Waste.<sup>57</sup> BREDL has not pointed to any new information in the amended COLA concerning the management of Greater than Class C Waste. Contention 10 is timely under section 2.309(f)(2)(i) and (ii) only to the extent it challenges the adequacy of Dominion's new plan for the onsite storage of Class A, B, and C wastes. Given that the new plan does not concern Dominion's management of Greater than Class C Waste, BREDL has provided no basis for revisiting that issue.

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<sup>51</sup> NRC Staff's Answer at 6 (citing Intervenor's Amended Contention Ten at 2, 5, 8-9).

<sup>52</sup> LBP-08-15, 68 NRC at 316-17; *accord Bellefonte*, LBP-08-16, 68 NRC at 414.

<sup>53</sup> LBP-08-15, 68 NRC at 317 (quoting 10 C.F.R. § 2.309(f)(1)(iv)).

<sup>54</sup> *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 73 (2009) (emphasis in original).

<sup>55</sup> See Intervenor's Amended Contention Ten at 2, 5, 8.

<sup>56</sup> LBP-08-15, 68 NRC at 313 n.86.

<sup>57</sup> *Id.* at 320-21.

For those aspects of Contention 10 that do challenge the adequacy of Dominion's new plan, and which therefore satisfy the first two requirements of section 2.309(f)(2), the final requirement is that "[t]he amended or new contention . . . [must be] submitted in a timely fashion based on the availability of the subsequent information."<sup>58</sup> BREDL filed Contention 10 within 30 days of receiving Dominion's revisions to the FSAR.<sup>59</sup> The Board's scheduling order did not provide a specific due date for new contentions. Instead, it stated that for deadlines not specifically listed, "including the filing of any late-filed contentions, the Board will, absent compelling circumstances, expect compliance with applicable model milestones for hearings conducted under 10 C.F.R. Part 2, Subpart L."<sup>60</sup> The model milestones do not directly address the specific situation presented here, but they do provide that late-filed contentions based on the Safety Evaluation Report and any necessary National Environmental Policy Act document should be filed within 30 days of the issuance of those documents.<sup>61</sup> Moreover, although Dominion argues that we should apply the 10-day limitation on filing motions,<sup>62</sup> we concur with other Licensing Boards that have imposed a longer timeliness deadline due to the challenges involved in filing a new or amended contention.<sup>63</sup> Those Boards have concluded that 30 days is a reasonable limit for fulfilling the timing requirement of section 2.309(f)(2)(iii) because of "the significant effort involved in (a) identifying new information, (b) assembling the required expertise, and then (c) drafting a contention that satisfies 10 C.F.R. § 2.309(f)(1)."<sup>64</sup> Therefore, we find BREDL's Contention 10 timely under 10 C.F.R. § 2.309(f)(2)(iii).

Because the aspects of Contention 10 that challenge the adequacy of Dominion's new LLRW management plan fulfill each of the requirements of 10 C.F.R. § 2.309(f)(2), there is no need to analyze those aspects of the contention under 10 C.F.R. § 2.309(c). However, the aspects of Contention 10 that attempt to reargue (1) the need for a disposal permit, and (2) that Dominion lacks a viable plan for the management of Greater than Class C Waste, are not based upon new information and therefore may not be admitted under section 2.309(f)(2). BREDL has not argued that those allegations satisfy the criteria of section 2.309(c). Accordingly, we will not consider those allegations further.

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<sup>58</sup> 10 C.F.R. § 2.309(f)(2)(iii).

<sup>59</sup> BREDL states that it received Revision 2 to the FSAR on May 27, 2009. Intervenor's Motion to Submit New Contention (June 8, 2009) at 1. BREDL filed Contention 10 on June 26, 2009.

<sup>60</sup> Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) at 2.

<sup>61</sup> See 10 C.F.R. Part 2, App. B.

<sup>62</sup> See Dominion's Answer at 11.

<sup>63</sup> See, e.g., *Vermont Yankee*, LBP-06-14, 63 NRC at 574.

<sup>64</sup> *Vermont Yankee*, LBP-06-14, 63 NRC at 574. See also *Shaw AREVA MOX Services*, LBP-07-14, 66 NRC at 210 n.95.



## **B. Admissibility of Contention 10 under 10 C.F.R. § 2.309(f)(1)**

We next review those aspects of Contention 10 that challenge the adequacy of Dominion's new management plan for Class A, B, and C wastes to determine whether they satisfy the contention admissibility requirements of section 2.309(f)(1).

### **1. BREDL's Allegations**

We first summarize the allegations of Contention 10 that we understand to challenge the adequacy of Dominion's Storage Plan. BREDL alleges generally that Dominion

fails to offer a viable plan for how to dispose of [Class B and C wastes] . . . generated in the course of operations, closure and post closure of North Anna Unit 3 and fails to address how NRC regulations for the disposal of so called "low level" radioactive waste will be met in the absence of a disposal facility.<sup>65</sup>

BREDL then identifies specific deficiencies in Dominion's plan. BREDL alleges that "while achieving so-called improvements in some aspects of storage duration, the Applicant has definitely reduced other storage durations from Unit 3's original design basis."<sup>66</sup> BREDL notes that, in order to provide additional storage capacity for Class B and C wastes, Dominion has reduced the available storage capacity for Class A waste from 6 to 3 months of waste.<sup>67</sup> BREDL and its expert Arnold Gundersen interpret this update to Dominion's FSAR as "[r]obbing Peter to pay Paul," since

[i]n order to meet its goal to assure NRC that there is space to store Class B and C material for ten years, the *Applicant has correspondingly reduced its design basis for storage of Class A material from 6 months to 3 months* . . . [on] the assumption that a storage facility of some sort will quickly be made available for the Class A waste, all the while assuming that no such facility exists for both Class B and C waste.<sup>68</sup>

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<sup>65</sup> Intervenor's Amended Contention Ten at 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 5 (quoting Intervenor's Amended Contention Ten, Declaration of Arnold Gundersen Supporting Blue Ridge Environmental Defense League's Contentions (June 26, 2009) at 3 [hereinafter Gundersen Decl.]).

<sup>68</sup> *Id.* at 6 (quoting Gundersen Decl. at 3-4) (emphasis in original).

BREDL alleges this is inconsistent with the NRC's requirement that the COLA be based upon conservative assumptions.<sup>69</sup>

Second, according to BREDL, "reliable scientific data and [the] historical record . . . suggests [*sic*] that fuel failures in this new reactor design are more likely and that more radioactive material will be present in the reactor coolant and spent fuel pool, not less as the Applicant attempts to persuade."<sup>70</sup> Thus, BREDL maintains that a new reactor design such as North Anna Unit 3 is likely to generate more Class B and C wastes, not less, as Dominion claims in its Storage Plan.

Finally, BREDL alleges that the increased storage capacity Dominion has provided for Class B and Class C radioactive waste is still insufficient. BREDL says that Dominion has provided storage capacity for the estimated amount of such waste that would be generated during 10 years of operation, but the reactor operating license for Unit 3 will be for 40 years.<sup>71</sup> Thus, under BREDL's interpretation, the COLA still fails to explain how Dominion will provide for an additional 30 years of Class B and C radioactive waste if an offsite disposal facility remains unavailable during the license term.

## **2. Analysis Under 10 C.F.R. § 2.309(f)(1)**

### **a. 10 C.F.R. § 2.309(f)(1)(i) through (iv)**

We find that the allegations summarized above satisfy the requirement that the contention provide a specific statement of the legal or factual issues to be raised.<sup>72</sup> BREDL has also provided an adequate explanation of the legal and factual basis of its claims that Dominion's new LLRW management plan is inadequate.<sup>73</sup> The factual basis of the new contention is primarily set forth in the Declaration of Arnold Gundersen, which was incorporated at length in Contention 10. As to the legal basis, BREDL explains that the NRC's Part 52 regulations require Dominion to address "the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter."<sup>74</sup> BREDL alleges that Dominion's plan fails to demonstrate compliance with the radiation protection standards of Part 20 and also the design objectives set forth in 10 C.F.R. Part 50, Appendix I.

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<sup>69</sup> *Id.* at 6-7 (quoting Gundersen Decl. at 4).

<sup>70</sup> *Id.* at 2.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> 10 C.F.R. § 2.309(f)(1)(i).

<sup>73</sup> *Id.* § 2.309(f)(1)(ii).

<sup>74</sup> *Id.* § 52.79(a)(3).

We find that Contention 10 is within the scope of this proceeding, as required by section 2.309(f)(1)(iii), because it challenges the sufficiency of Dominion's Application under Part 52 for a COL for North Anna Unit 3.<sup>75</sup>

To satisfy section 2.309(f)(1)(iv), 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,"<sup>76</sup> that is to say, the subject matter of the contention must impact the grant or denial of a pending license application.<sup>77</sup> "Materiality" requires the petitioner to show why the alleged error or omission is of possible significance to the result of the proceeding.<sup>78</sup> This means that there must be some significant link between the claimed deficiency and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment.<sup>79</sup>

We have previously determined that Dominion's plan for LLRW storage at the North Anna site is "material to the findings the NRC must make to support the action that is involved in the proceeding."<sup>80</sup> And, as explained above, our previous holding is consistent with the Commission's recent decision concerning a LLRW contention in another COL case. We therefore conclude that Contention 10, to the extent it presents a genuine dispute with the adequacy of Dominion's Storage Plan, is material to the NRC's determination whether Dominion will adequately protect public health and safety and the environment.

*b. 10 C.F.R. § 2.309(f)(1)(v)*

Section 2.309(f)(1)(v) requires that BREDL provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support Contention 10 and upon which BREDL intends to rely at the hearing. Explaining the level of support necessary for an admissible contention, the Commission observed:

Although [the contention admissibility rule] imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. . . . Nor does [the rule] require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need

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<sup>75</sup> See LBP-08-15, 68 NRC at 314-15.

<sup>76</sup> 10 C.F.R. § 2.309(f)(1)(iv).

<sup>77</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff'd as to other matters*, CLI-98-13, 48 NRC 26 (1998).

<sup>78</sup> *Id.* at 179.

<sup>79</sup> *Id.* at 179-80.

<sup>80</sup> LBP-08-15, 68 NRC at 315 (quoting 10 C.F.R. § 2.309(f)(1)(iv)).

not proffer facts in “formal affidavit or evidentiary form,” sufficient “to withstand a summary disposition motion.” . . . On the other hand, a petitioner “must present sufficient information to show a genuine dispute” and reasonably “indicating that a further inquiry is appropriate.”<sup>81</sup>

BREDL has provided the required concise statement and supporting references.<sup>82</sup> The first of BREDL’s specific issues criticizes Dominion’s plan to reduce the storage space for Class A waste in order to provide storage for up to 10 years of Class B and C wastes, if an offsite disposal facility for Class B and C wastes is not available when North Anna Unit 3 begins operation. That Dominion intends to take such action is not in dispute. Section 11.4.1 of the FSAR, as revised in the Storage Plan, explains that Dominion will reconfigure its LLRW storage facility in the manner BREDL alleges if an offsite disposal facility is not available for Class B and C wastes. The issue in dispute is not what Dominion intends to do, but the safety consequences, if any, of that action. We address that issue below.

BREDL has also provided support for its attack upon Dominion’s claim that the new reactor will provide increased fuel efficiency, and therefore generate less LLRW when compared to existing reactors. In support of this aspect of Contention 10, BREDL relies upon the declaration of Arnold Gundersen, who states that in his “35-years of engineering experience in the nuclear industry the history of new reactor designs has indicated that new fuel designs are less reliable and will leak more than current designs upon which the Applicant is attempting to make its storage volume assumptions.”<sup>83</sup> Mr. Gundersen also cites statements from a report prepared by the International Atomic Energy Agency (IAEA Report)<sup>84</sup> to support his position that “new fuel designs initially leak more than, not less than, the fuel for which the applicant has based its volume assumptions.”<sup>85</sup> BREDL has provided a concise statement of the expert opinion on which it relies and has thus satisfied 10 C.F.R. § 2.309(f)(1)(v).

The Staff nonetheless argues that the Gundersen declaration is insufficient to satisfy section 2.309(f)(1)(v). According to the Staff, Mr. Gundersen and BREDL incorrectly assume that Dominion has relied upon good fuel performance when Dominion claims that, using conservative estimates, the reconfigured Radwaste Building will accommodate 10 years of Class B and C wastes. The Staff contends

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<sup>81</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citations omitted); *see also Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

<sup>82</sup> 10 C.F.R. § 2.309(f)(1)(v).

<sup>83</sup> Intervenor’s Amended Contention Ten at 7 (quoting Gundersen Decl. at 4-5).

<sup>84</sup> International Atomic Energy Agency, Review of Fuel Failures in Water Cooled Reactors, IAEA Technical Reports Series No. 388 (1998).

<sup>85</sup> Intervenor’s Amended Contention Ten at 7 (quoting Gundersen Decl. at 5).

that “the material that the Intervenor provides does not, when read in its entirety and in context, support the propositions for which the Intervenor cites it.”<sup>86</sup> The Staff notes that the Storage Plan actually states that the “Class B and C waste storage capacity is based on a conservative estimate of the annual generation of low-level waste, without credit for potential waste minimization techniques and methods other than dewatering.”<sup>87</sup> Thus, Dominion did not in fact rely upon good fuel performance or other waste minimization techniques in claiming that the reconfigured Radwaste Building will accommodate 10 years of Class B and C wastes. The Staff emphasizes that “[t]he Intervenor’s inaccurate reading and presentation of the Applicant’s Storage Plan cannot serve as a litigable basis for a contention.”<sup>88</sup>

We agree with the Staff that, read in its entirety, Dominion’s Storage Plan does not rely on improved fuel efficiency to support the claim that, using conservative estimates, the reconfigured Radwaste Building will accommodate 10 years of Class B and C wastes. But, unlike the Staff, we do not understand Contention 10 to challenge only the Applicant’s claim that it made conservative assumptions in estimating the waste volumes that can be stored in the reconfigured Radwaste Building. Dominion’s Storage Plan contains three elements. The first is the reconfiguration of the Radwaste Building to increase the storage capacity for Class B and C wastes. The Storage Plan also describes various waste minimization techniques, including good fuel performance, and states that “[i]mplementation of these techniques could substantially extend the capacity of the Class B and C storage area of the Radwaste building.”<sup>89</sup> The Storage Plan further states that “[i]f additional storage capacity for Class B and C waste is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A.”<sup>90</sup> Thus, viewed as a whole, the Storage Plan explains how Dominion will manage Class B and C wastes onsite if no offsite disposal facility is available during the 40-year license term.

Because Dominion’s proposed waste minimization techniques, including good fuel performance, are part of its plan for managing Class B and C wastes in compliance with NRC regulations during the license term, the validity of Dominion’s claim that those techniques will in fact reduce the volume of Class B and C wastes is a material issue. And we understand Mr. Gundersen and BREDL to challenge directly Dominion’s claim that improved fuel performance will

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<sup>86</sup> NRC Staff’s Answer at 15.

<sup>87</sup> *Id.* at 16 (citing FSAR, Rev. 2, § 11.4.1 at 11-7).

<sup>88</sup> *Id.* at 16 (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300 (1995); *Yankee Nuclear*, LBP-96-2, 43 NRC at 90, *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)).

<sup>89</sup> FSAR, Rev. 2, § 11.4.1 at 11-7 to 11-8.

<sup>90</sup> *Id.* at 11-8.

reduce the volumes of Class B and C waste during the license term of North Anna Unit 3. BREDL's expert and Dominion clearly have a factual dispute concerning that question, and this aspect of Contention 10 may be admitted because it is material to the findings the NRC must make to grant the license.

The Staff also contends that BREDL has cited the IAEA Report in ways that are "selective and at times misleading."<sup>91</sup> The Staff notes that "[a] document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show."<sup>92</sup> The IAEA Report, however, was not merely quoted in Contention 10. Rather, it is also one of the sources relied upon by Mr. Gundersen in his declaration to support his conclusion that "new fuel designs are less reliable and will leak more than current designs upon which the Applicant is attempting to make its storage volume assumptions."<sup>93</sup> We agree with the Staff that the Gundersen Declaration, by selectively quoting the IAEA Report, makes the Report appear more supportive of Mr. Gundersen's opinion than it really is. For example, as noted by the Staff:

[T]he Intervenor quotes the IAEA Report as follows: "Failures or problems caused by the introduction of new or modified fuel designs and materials . . . did occur with partly high local failure rates or other severe consequences." Petition at 8. However, the actual sentence from the report reads "Failures or problems caused by the introduction of new or modified fuel designs and materials *have been infrequent but* did occur with partly high local failure rates (*e.g., by grid-rod fretting*) or other severe consequences (*e.g., degradation*). IAEA Report at 163 (emphasis added where key phrases are missing). The Intervenor's quotation leaves out important elements of the IAEA Report's content, most significantly the statement that the fuel failures in question occur infrequently. *Id.*<sup>94</sup>

However, we think the Staff's argument goes to the weight to be given to Mr. Gundersen's opinion on the merits of the contention, not to whether BREDL has satisfied the requirements of section 2.309(f)(1)(v). In this instance, the "document put forth by an intervenor as supporting the basis for [the] contention," and which is therefore "subject to scrutiny, both for what it does and does not show,"<sup>95</sup> is Mr. Gundersen's Declaration. On its face, Mr. Gundersen's Declaration supports BREDL's contention that Dominion has incorrectly claimed that new fuel designs will reduce Class B and C waste. The Staff does not argue otherwise. But the Staff would have us go beyond that level of scrutiny and

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<sup>91</sup> NRC Staff's Answer at 17.

<sup>92</sup> *Id.* (quoting *Yankee Nuclear*, LBP-96-2, 43 NRC at 90).

<sup>93</sup> Gundersen Decl. at 4-5.

<sup>94</sup> NRC Staff's Answer at 18.

<sup>95</sup> *Id.* at 17 (quoting *Yankee Nuclear*, LBP-96-2, 43 NRC at 90).

examine in detail one of the sources relied upon by Mr. Gundersen to determine whether his opinion is fully consistent with that source. We think such an attack upon one of the bases for an expert's opinion belongs at the merits stage of the proceeding. As previously noted, the proponent of a contention is not required to prove its case on the merits at the contention admissibility stage. BREDL has "'present[ed] sufficient information to show a genuine dispute' and reasonably 'indicating that a further inquiry is appropriate.'"<sup>96</sup>

To be sure, if Mr. Gundersen had relied on only one source and that source flatly contradicted his opinion or provided no support whatsoever, we might well find his Declaration insufficient to support Contention 10. However, while the IAEA Report does not support Mr. Gundersen's opinion as fully as his Declaration suggests, the Report provides some support for his views, and it certainly does not contradict his claim that new fuel designs are less reliable and will lead to leaks more than current designs do. Also, Mr. Gundersen has cited other bases for his opinion, including his own extensive professional experience. We therefore conclude that BREDL has provided an expert opinion that is sufficient, at this stage of the proceeding, to support its attack upon Dominion's claim of increased fuel efficiency.<sup>97</sup>

The last aspect of Contention 10 we must examine for compliance with section 2.309(f)(1)(v) is BREDL's claim that, while Dominion's Radwaste Building will be configured to accommodate "at least 10 years" of Class B and C wastes, the license for North Anna Unit 3 will be for 40 years.<sup>98</sup> There is no dispute that Dominion will if necessary reconfigure the Radwaste Building to accommodate 10 years of Class B and C wastes, not 40 years of such waste. The question presented by this aspect of Contention 10 is the safety significance, if any, of that decision, a question we address below.

We therefore conclude that BREDL's allegations satisfy the section 2.309(f)(1)(v) requirements.

*c. 10 C.F.R. § 2.309(f)(1)(vi)*

The final regulatory requirement is that BREDL provide sufficient information to show that it has a genuine dispute with Dominion concerning a material issue of

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<sup>96</sup> *Yankee Nuclear*, CLI-96-7, 43 NRC at 249 (1996) (citations omitted); *see also River Bend Station*, CLI-94-10, 40 NRC at 51.

<sup>97</sup> Our ruling on this point is consistent with the recent decision in *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 990 (2009) ("While Dr. Young may be misinterpreting the data submitted by TVA, at this stage of the proceeding we are deciding only contention admissibility. The purpose of the hearing will be to take testimony from experts presented by both sides, weigh the evidence, and thereby ensure that an informed decision is made").

<sup>98</sup> Intervenor's Amended Contention Ten at 6, 9.

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.<sup>99</sup> We have stated above that, as a general matter, the adequacy of Dominion’s new plan for the management of LLRW is material to the licensing decision. Section 2.309(f)(1)(vi) “is not a second hurdle of materiality [an Intervenor] must meet,”<sup>100</sup> but rather requires that the Intervenor identify the specific parts of the COLA it disputes and show that resolution of those disputes is material to the licensing decision.

We find that BREDL’s allegation concerning reduced space for Class A waste fails this test. BREDL has merely observed that, if an offsite facility is not available to accept Class B and C waste when North Anna Unit 3 begins operation, Dominion plans to reduce the storage space in its Radwaste Building for Class A waste to make additional space for Class B and C waste. BREDL characterizes this as “Robbing Peter to pay Paul.”<sup>101</sup> This is not enough to generate a genuine dispute with the Application on a material issue. BREDL fails to show how reducing the storage space for Class A waste would cause Dominion to run afoul of any applicable NRC regulation. The partial closure of the Barnwell facility deprived Dominion of an offsite disposal facility for its Class B and C waste, but BREDL has not claimed previously, nor does it contend now, that Dominion lacks an offsite disposal facility for Class A waste. According to revised FSAR § 11.4.1, Dominion’s Radwaste Building, even after reconfiguration, will provide storage space for up to three shipments of packaged Class A waste. Although the new plan reduces the storage capacity for Class A waste, substantial storage capacity remains, and BREDL has not alleged that this change will prevent Dominion from “controlling and limiting radioactive effluents and radiation exposures [from Class A waste] within the limits set forth in [10 C.F.R. Part 20].”<sup>102</sup>

This deficiency is not remedied by BREDL’s reference to the general NRC policy that the license application should be based upon conservative assumptions. In its recent ruling concerning contention admissibility in the High Level Waste Repository proceeding, the Commission concluded that the Board correctly rejected a contention alleging that the Safety Analysis Report contained an “unsubstantiated claim of conservatism.” This allegation, as well as other claims, “amount[ed] merely to [a] generalized assertion[ ], without specific ties to NRC regulatory requirements, or to safety in general. Such assertions do not provide adequate support demonstrating the existence of a genuine dispute of fact or law

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<sup>99</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>100</sup> *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-25, 70 NRC 867, 895 (2009).

<sup>101</sup> Intervenor’s Contention Ten at 6 (quoting Gundersen Decl. at 3-4).

<sup>102</sup> 10 C.F.R. § 52.79(a)(3).



with respect to the construction authorization application.”<sup>103</sup> Here, we also have a general allegation that the FSAR is insufficiently conservative concerning Class A waste, without any tie to either a specific regulatory requirement or to safety in general. We therefore will not admit this aspect of Contention 10.

On the other hand, BREDL’s challenge to Dominion’s claim of improved fuel efficiency is not limited to a general claim of lack of conservatism, but rather disputes the accuracy of a specific part of Dominion’s plan for the onsite management of Class B and C waste. BREDL has identified the part of Dominion’s FSAR in dispute and has provided the reasons supporting the dispute, as required by section 2.309(f)(1)(vi). Moreover, Dominion’s claim of improved fuel efficiency is part of Dominion’s attempt to show that, in the absence of an offsite disposal facility for Class B and C waste, it will manage those wastes onsite in compliance with NRC regulations. As BREDL points out, 10 C.F.R. § 52.79(a)(3) requires that Dominion explain “the kinds *and quantities* of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter.”<sup>104</sup> To comply with this regulation, the applicant’s explanation of the “kinds and quantities of radioactive materials expected to be produced in the operation” must of course be accurate. If BREDL is correct that Dominion has underestimated the amounts of Class B and C waste that will be produced because it has incorrectly assumed that increased fuel efficiency will reduce the volume of such waste, then BREDL might be able to show lack of compliance with the requirement that Dominion accurately explain the “quantities of radioactive materials expected to be produced in the operation” of North Anna Unit 3.<sup>105</sup> Furthermore, if Dominion has underestimated waste volumes, this raises the question whether Dominion will “control[ ] and limit[ ] radioactive effluents and radiation exposures within the limits set forth in [10 C.F.R. Part 20].”<sup>106</sup> Higher volumes of Class B and C waste than Dominion anticipates might lead to higher levels of radioactive effluents and associated radiation exposure. BREDL’s specific dispute with the COLA is therefore material to determining whether the COLA complies with NRC regulations.

To be sure, Dominion might be able to show that, even without improved fuel performance, it will be able to control and limit radioactive effluents and radiation exposures within the Part 20 limits. That question, however, goes to the merits. The possibility that Dominion will be able to make such a showing at a later stage

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<sup>103</sup> U.S. Department of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009).

<sup>104</sup> 10 C.F.R. § 52.79(a)(3) (emphasis added).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

of the proceeding does not preclude us from admitting this aspect of Contention 10.

Dominion argues that its “waste volume estimates are those provided in Table 11.4-2 of the ESBWR design certification document (‘DCD’),” and that therefore BREDL’s claim that it has underestimated waste volumes is in reality a challenge to the DCD.<sup>107</sup> We recognize that “any contention seeking to raise an issue on a design matter addressed in a design certification application should be resolved in the design certification rulemaking, not [in a] . . . COL proceeding.”<sup>108</sup> But we disagree with Dominion’s claim that BREDL is challenging the waste volume estimates in the DCD. On the contrary, Dominion’s claim that “[g]ood fuel performance will . . . reduce . . . the volume of Class B and C waste generated” appears in revised FSAR § 11.4, which begins by stating that “[t]his section of the referenced DCD is incorporated by reference *with the following departures and/or supplements.*” (Emphasis added.) Dominion then explains its plan for managing Class B and C waste in the absence of an offsite disposal facility, including the waste minimization plan that refers to good fuel performance and other waste minimization techniques. Thus, the waste minimization plan is either a departure from or supplement to the DCD, and challenges to that plan or any of its elements may properly be considered in a COL proceeding.

BREDL’s final claim is that, because the reactor’s proposed operating license is for 40 years but the period of waste generation that Dominion takes into account is only 10 years, “the length of time is inadequate for storage of Class B and Class C radioactive waste.”<sup>109</sup> Dominion argues that this assertion “fails to raise any genuine material issue,” given that BREDL fails to cite any NRC regulation that requires a storage plan for the life of the operating license.<sup>110</sup> Moreover, Dominion refers to the Commission’s decision in *Bellefonte*, which rejected a similar contention and “specifically noted that [the reactor in that case] would have two years of Class B and C storage space — an observation that belies any requirement for 40-year capacity.”<sup>111</sup> Dominion finds further support in Commission Guidance documents and Regulatory Issue Summaries that “contemplated five years of storage capacity” in order to “discourage longer term storage which might remove the incentive for development of new offsite facilities,” although Dominion does note that this 5-year limit was eventually removed.<sup>112</sup> Finally, Dominion claims that BREDL’s amended contention is

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<sup>107</sup> Dominion’s Answer at 10.

<sup>108</sup> *Id.* (citing Statement of Policy on Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)).

<sup>109</sup> Intervenor’s Amended Contention Ten at 9.

<sup>110</sup> Dominion’s Answer at 8.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 8 n.5.

inadequate because it does not address any of the specifics in Dominion's plan that call for building additional capacity for waste storage if needed.<sup>113</sup>

The NRC Staff also notes that "BREDL does not point to any NRC regulation that requires any specific duration for planning long-term storage."<sup>114</sup> NRC Staff maintains that because "Petitioners in NRC proceedings may not challenge the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations," BREDL is precluded from suggesting extra obligations on top of what the regulations already mandate for duration of storage.<sup>115</sup> The NRC Staff, like Dominion, notes that in *Bellefonte* the Commission rejected a LLRW contention challenging an applicant's 2-year plan for storing Class B and Class C waste.<sup>116</sup>

A proposed contention must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."<sup>117</sup> As another Licensing Board has held, a proposed "contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue" is subject to dismissal.<sup>118</sup> Thus, it is this Licensing Board's duty to determine whether BREDL's allegation of insufficient storage capacity successfully and directly controverts Dominion's application and/or correctly asserts that the application insufficiently addresses a relevant issue.

As we have explained, 10 C.F.R. § 52.79(a)(3) requires an application for a combined license to include in its final safety analysis report information on "[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." The Commission has recently held that this regulation "sets no quantity or time restrictions relative to onsite storage of . . . [low level radioactive] waste."<sup>119</sup> Rather, the information required in this part of the application is largely dependent on the individual applicant's plans.<sup>120</sup>

Dominion and NRC Staff are correct in pointing out that the Commission in *Bellefonte* rejected a contention based on inadequate storage plans for LLRW and

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<sup>113</sup> Dominion's Answer at 8-9.

<sup>114</sup> NRC Staff's Answer at 12.

<sup>115</sup> *Id.* (citations omitted).

<sup>116</sup> NRC Staff's Answer at 12 (citing *Bellefonte*, CLI-09-3, 69 NRC at 73-74 n.24).

<sup>117</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>118</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004).

<sup>119</sup> *Vogle*, CLI-09-16, 69 NRC at 36.

<sup>120</sup> *Id.* at 37.

that the plant in question had a storage capacity of 2 years' worth of LLRW.<sup>121</sup> However, the Commission, while mentioning the 2-year waste storage capacity, did not hold that a 2-year waste storage capacity should necessarily be deemed sufficient in future cases. Instead, the Commission merely cited the transcript of the oral argument in a footnote to demonstrate the inapplicability of this Licensing Board's contention admissibility decision in this case to the LLRW contention in *Bellefonte*.<sup>122</sup>

Moreover, in *Vogtle* the Commission recently upheld the admission of a LLRW contention despite a similar argument from the applicant based on *Bellefonte*.<sup>123</sup> The Commission explained that there is no regulatory maximum or minimum storage period for LLRW in a COLA.<sup>124</sup> Rather, "the required information is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures."<sup>125</sup> Thus, the Commission has neither enjoined petitioners from raising contentions based on insufficient storage capacity for LLRW nor identified any specific duration of storage capacity as sufficient in all cases.

We agree with Dominion, however, that BREDL's allegation of insufficient storage capacity is inadmissible because it does not controvert Dominion's plan to implement waste minimization techniques and build additional Class B and C waste storage capacity, if necessary, so that adequate storage capacity for those wastes will be available throughout the license term. The situation here is much like that in *Bell Bend*. As the Board in that case explained:

[T]he Bell Bend Application discusses the LLRW issue in detail and specifically states what "additional waste minimization measures" will be implemented "[i]n the event no offsite disposal facility is available to accept Class B and C waste from BBNPP when it commences operation." Further, PPL provides that if additional storage were necessary, it would build an additional storage facility in accordance

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<sup>121</sup> *Bellefonte*, CLI-09-3, 69 NRC at 73-74 n.24. Dominion concedes that the 5-year limit it cites on LLRW storage is no longer mandated. Dominion's Answer at 8 n.5.

<sup>122</sup> *Bellefonte*, CLI-09-3, 69 NRC at 73-74 n.24 (referencing LBP-08-15, 68 NRC at 318-19). The basis for the Commission's rejection of the LLRW contention in *Bellefonte* was that the contention there served as an impermissible collateral attack on NRC regulations in Table S-3. *Bellefonte*, CLI-09-3, 69 NRC at 75.

<sup>123</sup> *Vogtle*, CLI-09-16, 69 NRC at 37-38. The Commission in *Vogtle* found that the Licensing Board did not commit reversible error by admitting the contention based on LLRW storage duration since the NRC Staff itself had issued a Request for Additional Information on this very issue and thus this "conflict[s] with . . . [NRC Staff's] argument that the issue is immaterial to the findings that must be made on the application." *Id.* at 38. See also *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI 09-20, 70 NRC 911, 923 (2009) (also rejecting the argument that *Bellefonte* precluded admission of LLRW contention).

<sup>124</sup> *Vogtle*, CLI-09-16, 69 NRC at 36.

<sup>125</sup> *Id.* at 37.

with NRC guidelines. Such a facility, PPL states, would have “minimal” impacts and “would provide appropriate protection against releases, maintain exposures to workers and the public below applicable limits, and result in no significant environmental impact.” We fail to see any omission in the Application on the LLRW issue, nor have [Petitioners] shown that this plan is inadequate.<sup>126</sup>

Like the applicant in *Bell Bend*, Dominion states that, if necessary, “further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A.”<sup>127</sup> Thus, Dominion plans to provide additional waste storage capacity if the additional storage capacity provided in the Radwaste Building is exhausted.<sup>128</sup> BREDL’s Contention 10 does not acknowledge, much less identify, any deficiency in Dominion’s plan to provide additional capacity consistent with NRC requirements should that be necessary, nor does BREDL point to any unresolved safety question concerning such additional capacity.

We therefore hold that this aspect of Contention 10 is inadmissible because BREDL has failed to establish a genuine dispute of material fact with the COLA. As Dominion argues, this aspect of Contention 10 should be dismissed for “not directly controvert[ing] a position taken by the applicant in the license application.”<sup>129</sup>

## II. CONCLUSION

We admit Contention 10 insofar as it challenges Dominion’s claim that good fuel performance will reduce the volume of Class B and C waste. In all other respects, we do not admit Contention 10.

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<sup>126</sup> *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 411 (2009) (citations omitted).

<sup>127</sup> Revised FSAR § 11.4.1 at 11-8.

<sup>128</sup> Dominion’s Storage Plan does not expressly state, as did the application in *Bell Bend*, that there will be no significant environmental impact from the construction of new waste storage facilities. That distinction is immaterial, however, because we have previously ruled that the Final Environmental Impact Statement for Early Site Permit for the North Anna Unit 3 Site resolved the issue of the impact of the partial closure of the Barnwell facility upon the Site. Accordingly, the NEPA question may not be raised again in this COL proceeding. LBP-08-15, 68 NRC at 321-25.

<sup>129</sup> Dominion’s Answer at 8 n.4 (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007); *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462 (2006); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)).

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Ronald M. Spritzer, Chairman  
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

E. R. Hawkins for  
Dr. Alice C. Mignerey  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
November 25, 2009



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Paul S. Ryerson**, Chairman  
**Dr. Michael F. Kennedy**  
**Dr. Mark O. Barnett**

**In the Matter of**

**Docket No. 70-36-MLA**  
**(ASLBP No. 10-894-01-MLA-BD01)**  
**(License Amendment Request)**

**WESTINGHOUSE ELECTRIC**  
**COMPANY, LLC**  
**(Hematite Decommissioning**  
**Project)**

**December 3, 2009**

In this proceeding regarding the application by Westinghouse Electric Company for authorization to dispose of low-activity radioactive waste at the U.S. Ecology Inc. site near Grand View, Idaho, the Licensing Board rules that Citizens for a Clean Idaho, Inc. (CCI) did not demonstrate standing to participate as a party. Therefore, the Board denies CCI's request for hearing.

**RULES OF PRACTICE: REQUEST FOR HEARING**

Anyone who wishes to request a hearing concerning a proposed licensing action must (1) establish standing and (2) proffer at least one admissible contention.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING**

Pursuant to 10 C.F.R. § 2.309(d), a request for hearing must state: (1) the name, address, and telephone number of the requestor; (2) the nature of the requestor's



right under the governing statutes to be made a party to the proceeding; (3) the nature and extent of the requestor's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the requestor's interest.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING**

The Commission applies judicial concepts of standing, requiring anyone who requests a hearing to show that (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 statutes; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING  
(INJURY-IN-FACT)**

The requisite injury for standing may be either actual or threatened, but must nonetheless be concrete and particularized, not conjectural, or hypothetical.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING  
(DEMONSTRATING INJURY-IN-FACT BY GEOGRAPHICAL  
PROXIMITY)**

Although the Commission recognizes a 50-mile proximity presumption to establish standing in nuclear power reactor construction and operating license proceedings, in other cases, licensing boards must address standing on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.

**RULES OF PRACTICE: STANDING OF ORGANIZATIONS TO  
REQUEST A HEARING**

Organizations may demonstrate standing in either an organizational or representational capacity.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING  
(ORGANIZATIONAL)**

For organizational standing, an organization must, in its own right, satisfy the same requirements of injury, causation, and redressability as an individual.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING  
(REPRESENTATIONAL)**

For representational standing, an organization must (1) demonstrate that the licensing action in issue will affect at least one of its members; (2) identify that member by name and address; (3) show that it is authorized by that member to request a hearing on his or her behalf; (4) demonstrate that the member would qualify for standing in his or her own right; (5) show that the interests the organization seeks to protect are germane to its own purpose; and (6) show that neither the proffered contentions nor the requested relief would require an individual member to participate in the proceeding.

**RULES OF PRACTICE: STANDING TO REQUEST A HEARING  
(INJURY-IN-FACT)**

To state a sufficiently concrete and particularized injury-in-fact, a potential party must not merely repeat the language of 10 C.F.R. § 2.309(d), but rather must explain how the action in issue would adversely affect its interests. Absent an obvious potential for harm, it is a requestor's burden to show how harm will or may occur.

**MEMORANDUM AND ORDER  
(Ruling on Request for Hearing)**

Before the Board is a request for hearing filed by Citizens for a Clean Idaho, Inc. (CCI). CCI's hearing request concerns an application by Westinghouse Electric Co., LLC (Westinghouse) for a license amendment with regard to decommissioning activities at its Hematite facility, a former nuclear fuel fabrication facility in Festus, Missouri.<sup>1</sup>

CCI has not demonstrated standing to participate as a party, and therefore the Board denies its request for hearing.

**I. BACKGROUND**

Westinghouse holds a Nuclear Regulatory Commission (NRC) license autho-

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<sup>1</sup>Request for Alternate Disposal Approval and Exemptions for Specific Hematite Decommissioning Project Waste (License No. SNM-00033, Docket No. 070-00036) (ADAMS Accession No. ML091480071) (May 21, 2009) [hereinafter Westinghouse Application or Application].

rizing decommissioning activities at the Hematite facility.<sup>2</sup> On May 21, 2009, it sought an exemption under 10 C.F.R. § 20.2002 from the disposal site requirements of 10 C.F.R. §§ 30.3 and 70.3. The exemption would allow Westinghouse to dispose of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho, that is not licensed by the NRC. Specifically, the exemption would authorize Westinghouse to dispose of decommissioning waste from the Hematite facility — including special nuclear materials and byproduct material — at a U.S. Ecology Idaho, Inc. (USEI) facility. The USEI facility is an existing Resource Conservation and Recovery Act Subtitle C disposal facility that is regulated by the State of Idaho.<sup>3</sup>

According to the Application, the USEI waste facility has received over 2 million tons of low-activity radioactive material since 1998.<sup>4</sup> Westinghouse proposes to send to the facility approximately 50,000 additional tons of such waste.<sup>5</sup>

The nearest residence to the USEI facility is 1 mile away.<sup>6</sup> The nearest town is Grand View, Idaho (population 350), located 10.5 miles to the east.<sup>7</sup> CCI's address in Chester, Idaho, is approximately 300 miles away.<sup>8</sup>

The NRC accepted the Westinghouse Application for docketing on June 19, 2009, and published a hearing opportunity notice on July 6, 2009.<sup>9</sup> CCI filed a timely petition requesting a hearing on the Application on September 30, 2009.<sup>10</sup>

CCI describes itself as a “grassroots, community advocacy, non-profit organization representing the interests of more than one thousand Idaho citizens.”<sup>11</sup> Although it does not identify any such citizens by name, CCI alleges that it

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<sup>2</sup> See Notice of License Amendment Request of Westinghouse Electric Company LLC for Hematite Decommissioning Project, Festus, MO and Opportunity to Request a Hearing, 74 Fed. Reg. 31,994 (July 6, 2009).

<sup>3</sup> Westinghouse Application at 2-3.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> According to MapQuest, Chester is 308 miles from Grand View, by automobile. <http://www.mapquest.com/maps?1c=Chester&1s=ID&2c=Grand+View&2s=ID>.

<sup>9</sup> 74 Fed. Reg. at 31,994.

<sup>10</sup> Official Request for Hearing (Sept. 3, 2009) [hereinafter CCI Request]. Although dated September 3, 2009, CCI did not submit the CCI Request until September 30, 2009. In response to CCI's seeking an extension, the Commission extended the deadline for requesting a hearing by 30 days. Notice Extending the Deadline for Requesting a Hearing and Correcting Information Regarding the Procedure for Requesting a Hearing on a License Amendment Application Filed by Westinghouse Electric Company, LLC for the Hematite Decommissioning Project, Festus, MO, 74 Fed. Reg. 47,287 (Sept. 15, 2009).

<sup>11</sup> CCI Request at 2.

represents “extensive Idaho property owners, Idaho business owners, Idaho agricultural operators, and environmental stewards of the irreplaceable lands of the State of Idaho.”<sup>12</sup> CCI contends that approval of the Westinghouse Application could “forever harm” the property, financial, and other interests of such citizens, and that the combined value of such interests is “practically incalculable.”<sup>13</sup> CCI proffers seven contentions addressing various groundwater concerns.<sup>14</sup>

This Board was established to preside over the proceeding on October 9, 2009.<sup>15</sup> On October 26, 2009, Westinghouse and the NRC Staff filed timely answers opposing CCI’s request.<sup>16</sup> Each asserts that CCI has failed to demonstrate standing<sup>17</sup> or to proffer an admissible contention.<sup>18</sup> CCI did not file a reply.<sup>19</sup>

## II. ANALYSIS

Anyone who wishes to request a hearing concerning a proposed licensing action must (1) establish standing and (2) proffer at least one admissible contention.<sup>20</sup>

### A. Standards Governing Standing to Be a Party

Pursuant to 10 C.F.R. § 2.309(d), a request for hearing must state: (1) the name, address, and telephone number of the requestor; (2) the nature of the requestor’s right under the governing statutes to be made a party to the proceeding; (3) the nature and extent of the requestor’s property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the requestor’s interest.<sup>21</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* at 2-12.

<sup>15</sup> Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 53,522 (Oct. 19, 2009).

<sup>16</sup> Applicant’s Answer to Petition to Intervene (Oct. 26, 2009) [hereinafter Westinghouse Answer]; NRC Staff’s Response to Citizens for a Clean Idaho’s Hearing Request (Oct. 26, 2009) [hereinafter NRC Staff Answer].

<sup>17</sup> Westinghouse Answer at 12-17; NRC Staff Answer at 6-9.

<sup>18</sup> Westinghouse Answer at 17-32; NRC Staff Answer at 10-20.

<sup>19</sup> We do not speculate on why CCI failed to reply. *See* Letter from David A. Repka, Counsel for Westinghouse, to the Licensing Board (Nov. 10, 2009) (transmitting newspaper article implying that CCI may have ceased its activities). Because CCI’s request for hearing plainly must be denied on the basis of its own filing of record, we assume the organization’s continuing interest in this proceeding and have not asked CCI’s counsel to clarify its status. We note, however, that ethics rules in most jurisdictions require, and the Board expects, that counsel will promptly correct statements of material fact that are no longer true. *See* Model Rules of Prof’l Conduct R. 3.3 (2009).

<sup>20</sup> 10 C.F.R. § 2.309(a).

<sup>21</sup> *Id.* § 2.309(d)(1).

The Commission applies judicial concepts of standing,<sup>22</sup> requiring a requestor to show that (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];” (2) the injury is fairly traceable to the challenged action; and (3) “the injury is likely to be redressed by a favorable decision.”<sup>23</sup>

The requisite injury may be “either actual or threatened,”<sup>24</sup> but must nonetheless be “concrete and particularized,” not “conjectural, or hypothetical.”<sup>25</sup> Although the Commission recognizes a 50-mile proximity presumption to establish standing in proceedings concerning nuclear power reactor construction and operating licenses,<sup>26</sup> in other cases, licensing boards must address standing “on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”<sup>27</sup>

Organizations such as CCI may demonstrate standing in either an organizational or a representational capacity.<sup>28</sup> For organizational standing, the organization must, in its own right, satisfy the same requirements of injury, causation, and redressability as an individual.<sup>29</sup>

Alternatively, for representational standing, the organization must (1) demonstrate that the licensing action will affect at least one of its members; (2) identify that member by name and address; (3) show that it is authorized by that member to request a hearing on his or her behalf; (4) demonstrate that the member would qualify for standing in his or her own right; (5) show that the interests the organization seeks to protect are germane to its own purpose; and (6) show that neither the proffered contentions nor the requested relief would require an individual member to participate in the proceeding.<sup>30</sup>

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<sup>22</sup> See *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004); see also *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 182 (2007).

<sup>23</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

<sup>24</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)).

<sup>25</sup> *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (internal citation omitted; internal quotation marks omitted).

<sup>26</sup> See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009).

<sup>27</sup> *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995).

<sup>28</sup> See *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409, 411 (2007).

<sup>29</sup> See *id.* at 411.

<sup>30</sup> *Id.* at 409.

## B. Ruling on Standing

CCI has failed to demonstrate either organizational or representational standing.

First, CCI fails to show how the challenged action might cause injury to CCI's organizational interests.<sup>31</sup> CCI simply identifies itself as a "concerned Idaho citizen."<sup>32</sup> It claims that approval of the Westinghouse Application "could forever harm the property, financial, and other interests of CCI."<sup>33</sup> CCI also contends that approval might lead to "a significant . . . increase in future exemption requests of this type."<sup>34</sup>

Such claims do not state a sufficiently concrete and particularized injury-in-fact to establish standing. CCI's expressed concern that the requested exemption could "forever harm [CCI's] property, financial, and other interests" merely repeats the language of 10 C.F.R. § 2.309(d) and fails to explain, much less demonstrate, how approval of the Westinghouse Application would adversely affect CCI's interests. CCI's lack of specificity is especially troubling in light of the fact that its stated address is over 300 miles from the USEI site.<sup>35</sup> CCI makes no showing, for example, that its own property or staff could be threatened by the proposed storage of low-activity material at the USEI site. Indeed, CCI tells us nothing at all about its "property, financial, and other interests." Likewise, CCI's claim that approval of the Westinghouse request would likely lead to "a significant . . . increase in future exemption requests of this type" is far too speculative to demonstrate standing.<sup>36</sup>

Second, CCI has failed to demonstrate representational standing. CCI states that it "represent[s] the interests of more than one thousand Idaho citizens,"<sup>37</sup> but tells us nothing about them or how they will be injured if the requested exemption were granted. For example, CCI fails to identify by name and address a single

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<sup>31</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (injury-in-fact requires more than a general interest in preserving of the environment).

<sup>32</sup> See CCI Request at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 269-70 (2008) (no obvious potential for offsite consequences sufficient to establish organizational standing even though the organization's office was a mere 3 miles from the facility).

<sup>36</sup> See, e.g., *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001) (standing cannot be based on unfounded conjecture).

<sup>37</sup> CCI Request at 2.

member of its organization. Nor does CCI verify that any member has authorized CCI to request a hearing on that member's behalf.<sup>38</sup>

Thus, CCI has failed, by affidavit or otherwise, to set forth sufficient facts to demonstrate either organizational or representational standing. Absent an "obvious' potential for harm, it is a petitioner's burden to show how harm will or may occur."<sup>39</sup> CCI alleges injury to its own "property, financial, and other interests," as well as to those of its members, but it tells us nothing about its interests or those of its members, or how the interests of either might be injured if the NRC grants the exemption in issue.

### C. Contentions

As noted, CCI proffers seven contentions, all of which address how soil and groundwater conditions at the USEI site would interact with the introduction of additional waste materials from the Hematite facility.<sup>40</sup> Both Westinghouse and NRC Staff oppose the admissibility of these contentions, arguing that none satisfies the requirements of 10 C.F.R. § 2.309(f).

Because CCI has failed to demonstrate standing to be a party, the Board need not reach the issue of whether CCI's seven proffered contentions satisfy the requirements of 10 C.F.R. § 2.309(f)(1).

## III. CONCLUSION

CCI has not demonstrated standing to participate as a party in this proceeding. Therefore, CCI's request for hearing is *denied*.

In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

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<sup>38</sup> See, e.g., *Palisades*, CLI-07-18, 65 NRC at 409-10 (no representational standing where petitioner provided no supporting affidavits or other evidence that any member had authorized it to represent their interests in the proceeding).

<sup>39</sup> *Palisades*, CLI-08-19, 68 NRC at 260 (quoting *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005)).

<sup>40</sup> See CCI Request at 2-12.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy  
ADMINISTRATIVE JUDGE

E. R. Hawkens for  
Dr. Mark O. Barnett  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 3, 2009



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Thomas S. Moore**, Chairman  
**Paul S. Ryerson**  
**Richard E. Wardwell**

**In the Matter of**

**Docket No. 63-001-HLW**  
**(ASLBP No. 09-892-HLW-CAB04)**

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

**December 9, 2009**

**RULES OF PRACTICE: HLW REPOSITORY (CONTENTION  
ADMISSIBILITY)**

A legal issue contention need not satisfy all the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1).

**RULES OF PRACTICE: HLW REPOSITORY (CONTENTION  
ADMISSIBILITY)**

A legal issue contention is not required to provide “facts or expert opinions,” as called for in section 2.309(f)(1)(v).

**MEMORANDUM AND ORDER**  
**(Addressing Contentions Filed After Initial Petitions)**

On May 11, 2009, the Construction Authorization Boards (CABs or Boards) issued a ruling on the twelve timely filed intervention petitions in the above-

captioned proceeding.<sup>1</sup> On June 30, 2009, the Commission largely affirmed the Boards' ruling,<sup>2</sup> and on August 27, 2009, CAB-04 admitted two additional parties that had demonstrated subsequent compliance with the licensing support network (LSN) requirements.<sup>3</sup> To date, ten petitioners have been admitted as parties to this proceeding, with 296 admitted contentions among them. The instant order sets forth CAB-04's rulings on the admissibility of six additional contentions that were filed subsequent to the original petitions.

Two of these contentions (NEV-SAFETY-202 and -203) were filed in response to the NRC's final rule implementing the Environmental Protection Agency's (EPA) revised dose standard after 10,000 years.<sup>4</sup> Both contentions allege that DOE improperly excluded certain features, events, and processes (FEPs) from its post-10,000 analysis — namely, climate change and land-surface erosion. NEV-SAFETY-203, although styled as a contention, is actually a petition for waiver of an NRC rule, and is addressed in Part II of this Order.

Three contentions (NEV-SAFETY-204 and -205 and CLK-SAFETY-013) were filed in response to DOE's February 19, 2009 updates and supplements to the initial application.<sup>5</sup> All of these contentions allege problems related to DOE's Probabilistic Volcanic Hazard Analysis — Update (PVHA-U). Because CLK-SAFETY-013 is functionally equivalent to NEV-SAFETY-205, the two contentions are treated together.

Finally, Nevada filed one contention (NEV-SAFETY-206) in response to two documents made available on July 31, 2009, as part of DOE's LSN document collection supplementation.<sup>6</sup> This contention alleges that DOE's application inad-

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<sup>1</sup> LBP-09-6, 69 NRC 367 (2009).

<sup>2</sup> CLI-09-14, 69 NRC 580 (2009).

<sup>3</sup> CAB Order (Granting Party Status to the Native Community Action Council) (Aug. 27, 2009) (unpublished); CAB Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group) (Aug. 27, 2009) (unpublished).

<sup>4</sup> Implementation of a Dose Standard After 10,000 Years, 74 Fed. Reg. 10,811 (Mar. 13, 2009). *See* Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 63,029, 63,032 (Oct. 22, 2008) (stating that such contentions "will be deemed timely for admissibility purposes if filed within sixty days after the Federal Register publication of the NRC rules implementing the new EPA standards").

<sup>5</sup> Letter from William J. Boyle, Director, Regulatory Affairs Division, DOE Office of Technical Management, to NRC Document Control Desk (Feb. 19, 2009) (ADAMS Accession No. ML090700812). *See* CAB Order (Clarifying CAB Case Management Order #1) (March 13, 2009) at 2 (unpublished) (stating that "new or amended contentions arising from DOE's February 19, 2009 updates and supplements to DOE's initial application for construction authorization shall be deemed timely if filed within 30 days from the date of the CABs' initial order identifying the parties and admitted contentions").

<sup>6</sup> Condition Report Record Report for Unexpected Test Results — Residue on Subset of Alloy 22 Coupons (June 1, 2009) (LSN# DEN001614752); Condition Report Record Report for Unexpected Test Results — Heterogeneous Alloy 22 Oxide Thickness (June 26, 2009) (LSN# DEN001614731).

equately addresses generalized corrosion of Alloy-22 because it relies on flawed experimental data. In accordance with CAB Case Management Order #1, NEV-SAFETY-206 was submitted as an attachment to a motion for leave to file a new contention based on newly available information.

We turn now to the admissibility of the proffered contentions. Because the contention admissibility criteria are fully addressed in the CAB's earlier decision,<sup>7</sup> there is no need to repeat that discussion here.

## I. RULINGS ON CONTENTIONS

### A. NEV-SAFETY-202

NEV-SAFETY-202 asserts that "climate-change processes included as FEPs in the TSPA [total system performance assessment] for the first 10,000 years are neither carried forward for the next 990,000 years, as the rule requires, nor represented by NRC's specified deep percolation rate for that subsequent period."<sup>8</sup> According to Nevada, 10 C.F.R. § 63.342(c) should be construed so that climate change processes included as FEPs for the first 10,000-year period are carried forward for the post-10,000-year performance assessment, and not represented by the deep percolation flux that applies only to climate change FEPs excluded for the pre-10,000-year period.<sup>9</sup> In addition, Nevada faults DOE for neglecting to include the deep percolation rates established in the NRC's final rule, which are different from the rates set forth in the proposed rule.<sup>10</sup> Finally, Nevada, in effect, requests that the Board consider its contention as a rule waiver petition and certify it to the Commission pursuant to 10 C.F.R. § 2.335(d), should we construe section 63.342(c) to exclude climate change FEPs from the post-10,000-year assessment.<sup>11</sup>

DOE objects to the admission of NEV-SAFETY-202 on several grounds. First, DOE argues that the contention should be dismissed as untimely, because Nevada chose to proffer NEV-SAFETY-202 as a "new" contention, rather than an "amended" contention, as the notice of hearing requires under its "narrow exception to the late-filing rules."<sup>12</sup> Second, DOE disputes Nevada's interpretation

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<sup>7</sup> LBP-09-6, 69 NRC at 389-91.

<sup>8</sup> State of Nevada's New Contentions Based on Final NRC Rule (May 12, 2009) at 2 [hereinafter Final Rule Contentions].

<sup>9</sup> *Id.* at 2-3; Reply of the State of Nevada to NRC Staff's Answer to NEV-SAFETY 202 and 203 (July 3, 2009) at 3-4 [hereinafter Nevada Reply to NRC Staff Answer to Final Rule Contentions].

<sup>10</sup> Final Rule Contentions at 5.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> U.S. Department of Energy's Answer to State of Nevada's New Contentions Based on Final NRC Rule (July 2, 2009) at 3-5 [hereinafter DOE Answer to Final Rule Contentions].

of 10 C.F.R. § 63.342(c), insisting that the rule allows all climate change FEPs for the post-10,000-year TSPA to be limited to the analysis of a constant-in-time deep percolation rate regardless of the climate change FEPs evaluated for the first 10,000-year closure period.<sup>13</sup> Finally, DOE challenges Nevada’s request for a rule waiver, arguing that Nevada fails to satisfy the “special circumstances” requirement of section 2.335(b).<sup>14</sup>

The NRC Staff also objects to the admission of NEV-SAFETY-202, with one narrow exception. The Staff “does not oppose admission of NEV-SAFETY-202 insofar as it alleges that ‘DOE’s TSPA fails to include the deep percolation in NRC’s final rule, which is different from the one NRC proposed.’”<sup>15</sup>

DOE’s timeliness objection is easily dispatched because it is footed upon a crabbed interpretation of the Commission’s hearing notice. Contrary to DOE’s argument, a reasonable reading of the hearing notice provides for the proffering of new, as well as amended, contentions based upon the NRC’s final implementing regulations of the EPA’s standards for post-10,000-year repository performance. Although, as DOE argues, the text of the notice only explicitly mentions amended contentions,<sup>16</sup> DOE’s argument ignores the language of the Commission’s accompanying footnote that leaves no reasonable doubt that new contentions may also be filed.<sup>17</sup> Accordingly, NEV-SAFETY-202 satisfies the criteria for nontimely filings because it was filed within 60 days after publication of the final rule in the *Federal Register*, as the Commission specified.<sup>18</sup>

Regarding the contention itself, as presaged in our October 23, 2009 order, we admit NEV-SAFETY-202 solely as a legal issue contention.<sup>19</sup> As the Commission

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<sup>13</sup> *Id.* at 8-9.

<sup>14</sup> *Id.* at 14-20.

<sup>15</sup> NRC Staff Answer to State of Nevada’s New Contentions Based on Final NRC Rule (June 11, 2009) at 6 [hereinafter NRC Staff Answer to Final Rule Contentions].

<sup>16</sup> 73 Fed. Reg. at 63,032.

<sup>17</sup> *Id.* at 63,032 n.5. In that footnote, the Commission explained that it was dispensing with all but the good cause factor of the section 2.309(c)(2) criteria for late-filed contentions using, *inter alia*, the words “late-filed (or amended) contentions.” *Id.* If, as argued by DOE, the Commission meant to limit the reach of the hearing notice provision solely to amended contentions, its use of the above-quoted language would, at a minimum, be redundant, if not totally nonsensical. Without any limiting qualification regarding only amended contentions, the Commission further stated that:

It is obvious even now that promptly-filed and well-pled contentions based on new, previously unavailable NRC rules — rules that will govern important aspects of NRC’s safety review — must be admitted for hearing. There plainly would be “good cause” for filing such contentions late, and no conceivable justification for rejecting them at the threshold.

*Id.*

<sup>18</sup> *Id.* at 63,032.

<sup>19</sup> See CAB Order (Identifying Phase I Legal Issues for Briefing) (Oct. 23, 2009) at 1 (unpublished).

has confirmed,<sup>20</sup> a legal issue contention need not satisfy all the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1). For example, such a contention is not required to provide “facts or expert opinions,” as called for in section 2.309(f)(1)(v). Here, NEV-SAFETY-202 clearly satisfies all appropriate criteria for a legal issue contention. Neither DOE nor the NRC Staff disputes that Nevada has adequately stated the legal issue to be controverted and briefly explained the basis for the contention.<sup>21</sup> The legal issue clearly falls within the scope of this proceeding and is material to the findings the NRC must make, because it raises a question about DOE’s compliance with Part 63 — the NRC regulations applicable to the high-level waste proceeding.<sup>22</sup> Finally, the legal issue raises a genuine dispute with the application, because it challenges DOE’s performance assessment for the post-10,000-year period.<sup>23</sup>

Because we admit NEV-SAFETY-202 solely as a legal issue contention, at this time we need not reach the admissibility of the other factually based components of the contention or the alternative request for a waiver. The parties have been instructed to brief the legal issue raised in accordance with the schedule set for all other Phase I legal issues.<sup>24</sup>

## **B. NEV-SAFETY-204**

NEV-SAFETY-204 asserts that DOE’s description of its expert elicitation relating to a PVHA-U fails to comply with 10 C.F.R. § 63.21(c)(19) or the guidance of NUREG-1563, which DOE formally committed to follow.<sup>25</sup> Neither DOE nor the NRC Staff generally opposes the admission of this contention, although each objects to an argument included in the contention. DOE expresses concern that NEV-SAFETY-204 implicitly challenges the site selection process, noting that one expert on the elicitation panel suggested that the repository “would be more appropriately placed 20 kms to the east.”<sup>26</sup> The NRC Staff objects to Nevada’s suggestion that DOE must comply with NUREG-1563, since “NUREG-1563 is guidance and not a binding regulation” and DOE’s commitment to follow

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<sup>20</sup> CLI-09-14, 69 NRC at 590.

<sup>21</sup> 10 C.F.R. § 2.309(f)(1)(i), (ii); *see* DOE Answer to Final Rule Contentions at 7; NRC Staff Answer to Final Rule Contentions at 6.

<sup>22</sup> 10 C.F.R. § 2.309(f)(1)(iii), (iv).

<sup>23</sup> *Id.* § 2.309(f)(1)(vi).

<sup>24</sup> CAB Order (Identifying Phase I Legal Issues for Briefing) (Oct. 23, 2009) at 1 (unpublished).

<sup>25</sup> State of Nevada’s New Contentions Based on DOE’s February 19, 2009 License Application Update (June 8, 2009) at 2 [hereinafter Update Contentions].

<sup>26</sup> U.S. Department of Energy’s Answer to the State of Nevada’s and Clark County’s Late-Filed Contentions Related to the February 19, 2009 License Application Update (July 2, 2009) at 3 [hereinafter DOE Answer to Update Contentions].

NUREG-1563 “was applicable only to the period before DOE submitted the [license application].”<sup>27</sup>

NEV-SAFETY-204 satisfies all the admissibility criteria of 10 C.F.R. § 2.309(f)(1). Nevada adequately sets forth the issue involved and briefly explains the basis for the contention.<sup>28</sup> Nevada demonstrates that the contention raises a genuine, material dispute and falls within the scope of this proceeding because the results of the PVHA-U bear directly on the NRC’s decision whether to authorize construction at Yucca Mountain.<sup>29</sup> Additionally, Nevada provides a concise description of the facts supporting the contention — namely, the details of DOE’s agreement to implement NUREG-1563.<sup>30</sup> As to DOE’s objection, we fail to see how Nevada’s contention presents any challenge to the siting decision. Regarding the objection of the NRC Staff, the Staff is correct that NUREGs, in contrast to regulations, are not binding. In the instant case, however, where DOE has agreed to comply with NUREG-1563 through a Key Technical Issue agreement, DOE remains bound by this agreement, and that agreement is necessarily relevant to the license application’s subsequent regulatory compliance. Thus, we reject the arguments of both DOE and the NRC Staff and admit NEV-SAFETY-204.

### C. NEV-SAFETY-205 and CLK-SAFETY-013

Both NEV-SAFETY-205 and CLK-SAFETY-013 allege various deficiencies in the PVHA-U, which DOE relies on as the basis for calculating the probability of igneous events.<sup>31</sup> Specifically, the contentions identically assert that the PVHA-U “does not sufficiently integrate a comprehensive, self-consistent geologic model into probability calculations”; does “not adequately address alternative models, modern geophysical surveys, [and] the entire 11 million year history of volcanism in the Yucca Mountain area”; and does “not adequately consider the Greenwater Range near Death Valley as part of the volcanic field about Yucca Mountain.”<sup>32</sup>

DOE does not oppose the admissibility of these contentions, except to the extent they suggest that DOE must do more than merely “consider” alternative volcanic models. According to DOE, Nevada and Clark County acknowledge in their contentions that DOE’s experts specifically considered the model proposed by

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<sup>27</sup> NRC Staff Answer to New Contentions Filed by State of Nevada and Clark County (July 6, 2009) at 3-6 [hereinafter NRC Staff Answer to Update Contentions].

<sup>28</sup> 10 C.F.R. § 2.309(f)(1)(i), (ii).

<sup>29</sup> *Id.* § 2.309(f)(1)(iii), (iv), (vi).

<sup>30</sup> *Id.* § 2.309(f)(1)(v).

<sup>31</sup> Update Contentions at 13; Clark County, Nevada’s New Contention Arising from the Department of Energy’s February 19, 2009 License Application Update (June 10, 2009) at 2 [hereinafter Clark Contention].

<sup>32</sup> *Id.*

Dr. Eugene Smith.<sup>33</sup> Given that acknowledgment, DOE reads into the contentions a suggestion that “each expert on the elicitation panel must not only consider, but fully adopt, Dr. Smith’s theories in order for the results of the PVHA-U to be appropriate.”<sup>34</sup> To the extent that Nevada and Clark County make such an argument, DOE opposes it.

The NRC Staff does not oppose the admissibility of NEV-SAFETY-205 or CLK-SAFETY-013, except to the extent these contentions assert that “the PVHA-U does not adequately consider the entire 11 million year volcanic record of the Yucca Mountain region.”<sup>35</sup> According to the Staff, DOE did consider volcanic events for an 11-million-year period, but simply chose not to utilize the entire “look back” period.<sup>36</sup>

The Board admits both NEV-SAFETY-205 and CLK-SAFETY-013. As to DOE’s objection, we do not see anywhere in the contentions an “acknowledgment” that DOE considered Dr. Smith’s theories. Rather, the contentions of Nevada and Clark County merely state that Dr. Smith’s models “were presented” to DOE’s experts.<sup>37</sup> We fail to see how these contentions suggest or even allude to the need for the elicitation panel to fully adopt Dr. Smith’s theories in order for the PVHA-U results to be appropriate. In any event, the extent to which an expert panel must consider alternative models is not a consideration to be resolved at the contention admissibility stage.

As to the NRC Staff’s argument, Nevada states in its reply that the Staff’s argument refers to the wrong type of volcanism.<sup>38</sup> Indeed, while the Staff insists that DOE considered an 11-million-year history of *silicic* volcanism, the contentions actually fault DOE for its failure to consider the history of *basaltic* volcanism in the Yucca Mountain region. Thus, the NRC Staff’s objection raises no actual dispute with the contentions. Of course, even supposing the Staff had addressed the correct type of volcanism, the extent to which DOE’s experts must consider or analyze any particular kind of volcanic history also is not a matter for consideration at the contention admissibility stage.

Both NEV-SAFETY-205 and CLK-SAFETY-013 meet the admissibility criteria of 10 C.F.R. § 2.309(f)(1). Accordingly, we admit both contentions. Because the contentions are functionally equivalent, the contentions will be consolidated. The State of Nevada and Clark County should consult and agree as to which

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<sup>33</sup> DOE Answer to Update Contentions at 4.

<sup>34</sup> *Id.*

<sup>35</sup> NRC Staff Answer to Update Contentions at 8.

<sup>36</sup> *Id.* at 9.

<sup>37</sup> Update Contentions at 17; Clark Contention at 6.

<sup>38</sup> Reply of the State of Nevada to NRC Staff’s Answer to NEV-SAFETY 204 and 205 (July 13, 2009) at 7.

one of them will be the lead representative for the consolidated contentions and inform the Board of their agreement by Friday, January 8, 2010.

#### **D. NEV-SAFETY-206**

As previously noted, Nevada proffers NEV-SAFETY-206 as an attachment to a motion for leave to file a new contention based on newly available information.<sup>39</sup> Under 10 C.F.R. § 2.309(f)(2), before the Board can consider this new contention, Nevada must show that it (1) is based on information that “was not previously available”; (2) is based on information that “is materially different than information previously available”; and (3) “has been submitted in a timely fashion.” To satisfy these criteria, Nevada states that NEV-SAFETY-206 arises from information contained in two DOE condition reports (CRs) that were first made publicly available via the LSN on July 31, 2009.<sup>40</sup> According to Nevada, the information contained in these CRs suggests “deficiencies in DOE’s Alloy-22 corrosion testing” and is materially different from information that was previously available.<sup>41</sup> Finally, Nevada states that NEV-SAFETY-206 was filed within 30 days of the date on which the CRs first became available, and was therefore “submitted in a timely fashion.”<sup>42</sup> In addition, Nevada asserts that it “has made a sincere effort to contact the other parties in this proceeding regarding their objection or non-objection to the Motion” in accordance with 10 C.F.R. § 2.323(b).<sup>43</sup>

In objection to Nevada’s motion, DOE argues that NEV-SAFETY-206 is nontimely, because it arises from information that was available “long ago.”<sup>44</sup> Specifically, DOE contends that the “new” information contained in the CRs could have been deduced from eight separate documents made available on the LSN prior to July 31, 2009, including a 2007 report, a 2008 review, and various documents prepared in early 2009.<sup>45</sup> According to DOE, “these documents

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<sup>39</sup> State of Nevada’s Motion for Leave to File New Contention Based on Newly Available Information (Aug. 24, 2009) [hereinafter Motion for Leave]. As the CABs provided in their first case management order, “[a] petitioner or party that seeks to file a new or amended contention shall file an appropriate motion and the proposed contention simultaneously.” CAB Case Management Order #1 (Jan. 29, 2009) at 3 (unpublished).

<sup>40</sup> Motion for Leave at 1.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 2-3. The CABs provided in their first case management order that a motion for leave, accompanied by a proposed new contention, “shall be deemed timely under 10 C.F.R. § 2.309(f)(2) if filed within 30 days of the date when the new and material information on which it is based first became available.” CAB Case Management Order #1 (Jan. 29, 2009) at 3 (unpublished).

<sup>43</sup> Motion for Leave at 4.

<sup>44</sup> U.S. Department of Energy’s Answer Opposing State of Nevada’s Motion for Leave to File a New Corrosion Contention (Sept. 18, 2009) at 1.

<sup>45</sup> *Id.* at 3-10.



demonstrate that DOE observed and documented, in various publicly available documents, the contamination of Alloy-22 test coupons and test solutions and made that information publicly available on the LSN.”<sup>46</sup> Because Nevada’s contention is nontimely, DOE asserts, the Board should decline to grant Nevada’s motion for leave for not satisfying the criteria for nontimely contentions found in 10 C.F.R. § 2.309(c). The NRC Staff, on the other hand, does not object to Nevada’s motion, conceding that Nevada has satisfied all the criteria of 10 C.F.R. § 2.309(f)(2).<sup>47</sup> Similarly, the Staff does not object to the admission of the contention, conceding that it meets the admissibility requirements of 10 C.F.R. § 2.309(f)(1).<sup>48</sup>

The Board grants Nevada’s motion for leave to file the new contention. DOE’s objection — that the information underlying NEV-SAFETY-206 was available long before July 31, 2009 — reflects a misapprehension of Nevada’s contention. As Nevada states in its reply, “[t]he issue in NEV-SAFETY-206 is not the failure to adequately monitor or control some experimental studies, but the subsequent reliance on such studies to estimate *general corrosion* rates for use in support of the License Application.”<sup>49</sup> Although DOE points to various documents that purportedly “long ago” raised the issue of Alloy-22 contamination, none of these documents addresses general corrosion rates related to contamination, which is the subject of NEV-SAFETY-206. Thus, Nevada could not have proffered NEV-SAFETY-206 at any time before the two CRs became available on July 31, 2009.

The Board is not impressed with arguments suggesting that, in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance. As Nevada points out, “the significance of technical information or raw data in an LSN document is often not clear until a later time when DOE uses it for a particular purpose.”<sup>50</sup> We do not expect parties to demonstrate clairvoyance or an “encyclopedic knowledge”<sup>51</sup> of the LSN, and our rulings will reflect this view.

As to NEV-SAFETY-206 itself, the NRC Staff, as noted, does not object to its admissibility,<sup>52</sup> and DOE has neglected even to address its admissibility in its answer to Nevada’s motion for leave. As such, we have little difficulty

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

<sup>47</sup> NRC Staff’s Answer to the State of Nevada’s Motion for Leave to File New Contention and Proposed Contention Nevada Safety 206 (Sept. 11, 2009) at 4 [NRC Staff Answer to Motion].

<sup>48</sup> *Id.*

<sup>49</sup> Reply of the State of Nevada to DOE’s Answer Opposing Nevada’s Motion for Leave to File a New Corrosion Contention (Sept. 25, 2009) at 9.

<sup>50</sup> *Id.* at 13.

<sup>51</sup> *Id.*

<sup>52</sup> NRC Staff Answer to Motion at 4.

concluding that the contention satisfies all six criteria of 10 C.F.R. § 2.309(f)(1). Nevada provides an adequate statement of the issue and a brief explanation of the contention<sup>53</sup> — namely, that the application inadequately addresses generalized corrosion because it relies on flawed experimental data. Nevada raises a genuine, material dispute with the application by pointing to specific sections that allegedly fail to comply with the NRC’s requirements for conducting a post-closure performance assessment.<sup>54</sup> Nevada demonstrates that its contention falls within the scope of this proceeding, and it provides a concise statement of the facts supporting the contention.<sup>55</sup> Thus, Nevada has proffered an admissible contention.

## II. PETITION FOR WAIVER

As previously noted, NEV-SAFETY-203 is a petition for a rule waiver pursuant to 10 C.F.R. § 2.335. The Board has certain questions for the NRC Staff about the waiver petition filings. In lieu of holding oral argument to obtain answers to our questions, we instead address the following questions to the Staff. The Staff shall file written, fully supported answers to the questions by Monday, December 21, 2009. Should any party wish to respond to the Staff’s answers, it may file a fully supported response by Wednesday, December 30, 2009.

1. The authors of the NRC Staff’s affidavit assert that the information underlying the Stuewe model has “been available” for many years.<sup>56</sup> Yet the affiants do not state that the Commission was aware of that information or actually considered the Stuewe model when it conducted the rulemaking. What information, if any, in the rulemaking record before the Commission demonstrates that the Commission considered the Stuewe model or the data underlying that model? Where is any such information located?
2. The NRC Staff affiants point to statements in the published version of the Stuewe study that “undermine the presumed reliability of this model in determining erosion rates on Yucca Mountain itself.”<sup>57</sup> By raising questions about the model’s applicability, do these statements of limitation defeat Nevada’s *prima facie* showing under section 2.335(d)?

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<sup>53</sup> 10 C.F.R. § 2.309(f)(1)(i), (ii).

<sup>54</sup> *Id.* § 2.309(f)(1)(iv), (vi).

<sup>55</sup> *Id.* § 2.309(f)(1)(iii), (v).

<sup>56</sup> NRC Staff Answer to Final Rule Contentions, Attachment 2, Affidavit of Brittain Hill, Philip Justus, and Timothy McCartin ¶ 18.

<sup>57</sup> *Id.* ¶ 15.

Or, rather, do they raise a factual dispute between Nevada and the NRC Staff that cannot be reconciled on the basis of the waiver petition filings?

3. Even accepting the express limitations of the published Stuewe study,<sup>58</sup> does not Nevada adequately respond to those limitations when it points out that the Stuewe model “addresses erosion degrading the landscape by sub-horizontal eating back into the ridge and not a simple downward lowering?”<sup>59</sup>

### III. CONCLUSION

For the foregoing reasons, NEV-SAFETY-202, NEV-SAFETY-204, NEV-SAFETY-206, NEV-SAFETY-205, and CLK-SAFETY-013 are admitted, and the latter two contentions are consolidated. Pursuant to CAB Case Management Order #2, each of the foregoing contentions shall be included in Phase 1. Further, on or before December 21, 2009, the NRC Staff shall file answers to the Board’s questions in Part II. DOE and the State of Nevada may file any response to the Staff filing by December 30, 2009.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Paul S. Ryerson  
ADMINISTRATIVE JUDGE

Richard E. Wardwell  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 9, 2009

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<sup>58</sup> *Id.*

<sup>59</sup> Nevada Reply to NRC Staff Answer to Final Rule Contentions at 17.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alex S. Karlin**, Chairman  
**Dr. Anthony J. Baratta**  
**Dr. William M. Murphy**

**In the Matter of**

**Docket Nos. 52-029-COL  
52-030-COL  
(ASLBP No. 09-879-04-COL-BD01)  
(Combined License Application)**

**PROGRESS ENERGY FLORIDA, INC.  
(Levy County Nuclear Power  
Plant, Units 1 and 2)**

**December 29, 2009**

The Board denies Progress Energy Florida's Motion to compel disclosure of bases for expert opinions filed by Joint Intervenors.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 2.336(a)(1))**

**RULES OF PRACTICE: DISCOVERY; PRODUCTION OF DOCUMENTS**

10 C.F.R. § 2.336(a)(1) requires only the disclosure of the written "analysis or other authority," if any, that is extant and reasonably available to the party when the mandatory disclosure is made.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 2.336(a)(1))**

**RULES OF PRACTICE: DISCOVERY; PRODUCTION OF DOCUMENTS**

10 C.F.R. § 2.336(a)(1) creates no substantive criteria for the quality of the expert “analysis or other authority” that must be disclosed.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 2.336(a))**

**RULES OF PRACTICE: EVIDENCE; BURDEN OF GOING FORWARD**

10 C.F.R. § 2.336(a) simply governs the mandatory exchange of certain discovery information and documents and imposes no *evidentiary* hurdle or “burden of going forward” with the *evidence* that must be met in the mandatory disclosure.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 2.336(a)(1))**

The phrase “claims and contentions” as used in 10 C.F.R. § 2.336(a)(1) includes any assertion, statement, or argument, positive or negative, in support of an intervenor’s or applicant’s position, that is advanced by any party. It is not limited to the formal “contentions” that meet the criteria of 10 C.F.R. § 2.309(f)(1).

**ORDER**

**(Denying Motion to Compel Disclosure of Bases for Expert Opinion)**

On November 30, 2009, Progress Energy Florida, Inc. (Progress) filed a motion to compel the Nuclear Information and Resource Service, The Ecology Party of Florida, and The Green Party of Florida (collectively, Intervenors) to “supplement their initial disclosure with the [expert] analyses or other authority that provide bases for allegations in their Petition with regard to Contention 4 as admitted.”<sup>1</sup> The Intervenors and the NRC Staff oppose the motion.<sup>2</sup> They argue, *inter alia*, that 10 C.F.R. § 2.336(a)(1) does not require that Intervenors’ expert create a written analysis, but only mandates the disclosure of the written analysis or other

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<sup>1</sup> [Progress’] Motion to Compel Disclosure of Bases for Expert Opinion with Regard to Contention 4 (Nov. 30, 2009) at 1 (citation omitted) (Motion).

<sup>2</sup> Intervenors’ [sic] Response to Applicant’s Motion to Compel Disclosure of Bases for Expert Opinion With Regard to Contention 4 (Dec. 7, 2009) (Intervenors’ Answer); NRC Staff Response to the Applicant’s Motion to Compel Disclosure of Bases with Regard to Contention 4 (Dec. 10, 2009) (Staff Answer).

documentary authority, if any, that exists and is reasonably available at the time of the disclosure. Intervenors' Answer at 1-2, Staff Answer at 2-4. We agree.

Progress also contends that the duty to make mandatory disclosures under 10 C.F.R. § 2.336(a)(1) applies to parties who have "claims and contentions," and, therefore, it (1) applies only to intervenors, and (2) does not apply to applicants, such as Progress, because applicants supposedly have no "claims or contentions." Motion at 5-6 & n.9. We reject this claim as inconsistent with both the letter and spirit of the regulations. It would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings. *See* 10 C.F.R. §§ 2.336(g), 2.1203(d).

## I. BACKGROUND

On July 28, 2008, Progress submitted an application to the NRC for permission to construct and operate proposed Levy Nuclear Plant Units 1 and 2 at a site in Levy County, Florida. On February 6, 2009, Intervenors filed their petition to intervene, supported by a twenty-three page declaration by their expert, Dr. Sidney T. Bacchus.<sup>3</sup> On July 8, 2009, the Board granted the petition, ruling that Intervenors had shown standing and had presented three contentions that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1).<sup>4</sup> The Board also ruled that the 10 C.F.R. Part 2, Subpart L procedures are appropriate for each of the three contentions. *Id.* at 146.

Subsequently, the Board issued an initial scheduling order specifying that initial mandatory disclosures pursuant to 10 C.F.R. § 2.336 were due on September 1, 2009. Initial Scheduling Order (ISO), LBP-09-22, 70 NRC 640, 642 (2009). On that date the Intervenors made their mandatory disclosures.<sup>5</sup> Intervenors' Disclosure referenced the declaration by Dr. Bacchus and provided other authorities in support of Contention 4. In addition, Intervenors' Disclosure included an affidavit by their *pro se* representative that "this disclosure (including attachments A-F) is current as of August 31, 2009, that it is the result of an honest and good-faith effort . . . to catalogue and report the relevant documents and experts with whom we are working as of August 31, 2009." Intervenors' Disclosure at 1-2. Meanwhile, Progress stated that it is exempt from making initial disclosures under 10 C.F.R. § 2.336(a)(1). *See* Motion at 5 n.9, 6 n.14.

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<sup>3</sup> Petition to Intervene and Request for Hearing by The Green Party of Florida, The Ecology Party of Florida, and Nuclear Information and Resource Service (Feb. 6, 2009).

<sup>4</sup> LBP-09-10, 70 NRC 51 (2009).

<sup>5</sup> Co-Intervenors [sic] Mandatory Disclosure of Documents September 1, 2009, Levy County Units 1 & 2 (Intervenors' Disclosure) (Sept. 1, 2009).

On November 30, 2009, Progress filed the instant motion challenging the adequacy of Intervenor's Disclosure.<sup>6</sup> The Intervenor and the NRC Staff filed their answers on December 7, 2009, and December 10, 2009, respectively.

## II. ARGUMENTS OF THE PARTIES

The main thrust of Progress' argument is that the Intervenor's Disclosure failed to comply with 10 C.F.R. § 2.336(a)(1) "because no analysis or authority is provided with regard to certain specific conclusory opinions of their expert" concerning Contention 4. Motion at 1 (citation omitted). Progress states:

Unless analysis or other authority adequate to provide an evidentiary basis for the intervenor's expert opinion is provided [in the initial mandatory disclosure], the applicant cannot prepare a challenge to the reliability of an expert; [sic] and hence the expert's credibility. An expert's conclusory opinions as the sole disclosure is [sic] contrary to the Commission's expectations . . . .

*Id.* at 8-9. Progress argues that the disclosure of the twenty-three page declaration from Dr. Bacchus is insufficient and violates 10 C.F.R. § 2.336(a)(1) because it is missing "the analysis or other authority that provides evidentiary bases for Dr. Bacchus' opinion adequate to show the opinion is sufficiently reliable to meet the . . . Intervenor's burden of going forward." *Id.* at 12 (citation omitted). Progress cites several cases for the proposition that it is "entitled to discovery against intervenors in order to obtain the information necessary for the applicant to meet its burden of proof." *Id.* at 9.

Given that this is a case of first impression and that the Intervenor is *pro se*, the answer by the NRC Staff herein was most helpful. The Staff urged that the motion be "denied because there is no requirement that the Joint Intervenor disclose in the initial disclosures the bases for their expert opinion if [such a written report] does not yet exist." Staff Answer at 1. The NRC Staff asserts that 10 C.F.R. § 2.336(a)(1), which states that the mandatory disclosures must include "a copy of the analysis or other authority upon which [the expert witness] bases his or her opinion," must be read in conjunction with 10 C.F.R. § 2.336(c), which states that each party shall make its initial disclosures "based on the information and documentation *then reasonably available to it.*" *Id.* at 5 (emphasis in original). The Staff notes that when the Commission promulgated 10 C.F.R. § 2.336(a)(1), it stated that parties are required to disclose only "*existing reports* of their [expert's] opinions." *Id.* (emphasis in original) (citing Changes to Adjudicatory Process, 69

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<sup>6</sup>The deadline for motions challenging the adequacy of the initial disclosures was November 30, 2009. Licensing Board Order (Granting Motion for Extension of Time) (Oct. 27, 2009) (unpublished).

Fed. Reg. 2182, 2189 (Jan. 14, 2004)). The Staff also contrasts the mandatory disclosure requirement of 10 C.F.R. § 2.336(a)(1), which, it says, requires the disclosure of extant reports, with the mandatory disclosure provision of 10 C.F.R. § 2.704(b)(2) (for Subpart G proceedings), which affirmatively requires that each expert witness *create*, sign, and submit a written expert report. *Id.* at 7.

The NRC Staff rejects Progress' claim that the Intervenors have an evidentiary burden of going forward when they make their mandatory disclosures. *Id.* at 10. The Staff points out that while the Intervenors have the duty of going forward with affirmative evidence "at the hearing" and in the evidentiary filings "leading up to the hearing," there is no such requirement at the discovery stage, when the parties are merely exchanging information and documents *inter se*. *Id.* Similarly, the Staff rejects Progress' complaint that Dr. Bacchus' declaration must be excluded from the "record" as not "reliable" because, the Staff asserts, such concepts only apply "when a party submits evidence in this proceeding" and do not apply at the discovery stage. *Id.* The Staff says that if Progress believes that Dr. Bacchus' testimony or evidence is not reliable, then Progress "may move to exclude that testimony [or evidence] under Section 2.319 when it is presented." *Id.* at 11. The Staff concludes:

The Joint Intervenors, however, are not required to provide all of the background information they will eventually use at this point and they still have time before the hearing to discover further information to support any future testimony or exhibits. If any party attempts to include exhibits that were not disclosed in the mandatory disclosures, thus making it impossible for the other parties to examine the reliability of that information, then the Board may prohibit the admission of this new evidence into the record. 10 C.F.R. § 2.336(e)(2). This provision protects the parties from being surprised with new information at the eleventh hour.

*Id.*

The Intervenors raise similar themes in their answer. They argue that the motion should be denied because they (1) have provided Progress "with the analysis and authority as provided to this point by our expert," (2) have the "legal right to continue our investigation and develop the scientific basis of our position during the pendency of this matter," and (3) that they "understand our continuing legal obligations to supplement our response to discovery as we receive reports and additional scientific authority. . . ." Intervenors' Answer at 1-2. Intervenors assert that the mandatory discovery stage is not the proper forum for a challenge to the legal sufficiency of Intervenors' evidence, and that such issues are to be decided when Intervenors proffer their evidence at the hearing stage. *Id.* at 2. They state "[w]e find nowhere in 10 C.F.R. [ §§ ] 2.336(a)(1) a provision that compels specific information in initial mandatory disclosures as a 'burden for moving forward.'" *Id.*



Finally, given the sanctions associated with any failure to disclose the identity of a witness and his or her analysis or other authority, it is appropriate to address Progress' assertion that it is exempt from this aspect of mandatory disclosure. Specifically, Progress says that the mandatory duty to identify witnesses and to disclose their reports under 10 C.F.R. § 2.336(a)(1) is unilateral, applicable to intervenors but not to applicants. Motion at 5-6. Progress' exemption argument proceeds as follows: First, Progress points out that 10 C.F.R. § 2.336(a)(1) requires the disclosure of witnesses and related information only by parties with "claims or contentions." *Id.* at 5. Second, it says that "[g]enerally, the parties with claims or contentions will be intervenors, not applicants." *Id.* at 5 n.9. Third, "[w]here only one party has claims and contentions, the naming of expert witness [sic] and providing of their reports would be unilateral." *Id.* at 6 n.14.

The unstated premise in the foregoing syllogism is that the phrase "claims and contentions" is limited to formal contentions that are admitted under 10 C.F.R. § 2.309(f)(1). Progress also argues that exempting applicants from the duty to disclose their experts (but requiring intervenors to do so) is fair — "[r]equiring that intervenors have more disclosure obligations is appropriate given the information provided by the applicant in a docketed application." *Id.* at 6. Progress supports this claim with several cases that state that applicants are entitled to discovery concerning the foundation of the intervenors' contentions. *Id.* at 6 n.13.

Neither the NRC Staff nor the Intervenors respond directly to Progress' argument that because the application is publicly available, the applicant is exempt from the duty to disclose the identity of its witnesses under 10 C.F.R. § 2.336(a)(1). But both the Staff and the Intervenors reject the proposition that the pre-2004 case law (indicating that all parties are "entitled" to discovery in formal adjudications) is controlling in a post-2004 Subpart L proceeding and thus "entitles" the applicant to conduct discovery in an informal adjudication. Staff Answer at 8, Intervenors' Answer at 2-3. The Staff notes that "fundamental changes" have occurred in the hearing process since the cases cited by Progress were decided and concludes that these cases are no longer good law. Staff Answer at 8. Intervenors agree, stating that NRC's 2004 amendments to its adjudicatory hearing regulations "render[s] the cases cited obsolete. . . ." Intervenors' Answer at 3.

### III. ANALYSIS

Our analysis begins with the words of the regulation, which states, in pertinent part:

[A]ll parties . . . shall, within 30 days of the issuance of the order granting a request for hearing . . . disclose and provide: (1) The name and, if known, the address

and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion.

10 C.F.R. § 2.336(a)(1). The regulation goes on to state that “[e]ach party and the NRC staff shall make its initial disclosures under paragraphs (a) and (b) of this section, based on the information and documentation then reasonably available to it.” 10 C.F.R. § 2.336(c). The regulation adds that the duty of disclosure is “continuing” and requires that “any information or documents that are subsequently developed or obtained” be promptly disclosed. 10 C.F.R. § 2.336(d).

The plain language of the regulation makes it clear that 10 C.F.R. § 2.336(a)(1):

1. Applies to “all parties.”
2. Requires the disclosure of all witnesses, not just expert witnesses, “upon whose opinion the party bases its claims and contentions and may rely upon as a witness.”
3. Does not require the disclosure of a nonwitness (e.g., an expert that the party consulted, but does not intend to use as a witness).
4. Does not require that each witness generate an “analysis,” but rather calls for the disclosure of the “analysis *or other authority*” upon which the witness bases his or her opinion.
5. Does not set any substantive standard that the “analysis or other authority” must meet.
6. Does not require the disclosure of the name and telephone number of the witness, if this information is not known to the party.
7. Does not require the disclosure of “information and documentation” about the witness or his or her analysis or other authority if it is not then “reasonably available.”
8. Requires that initial disclosures be made “within 30 days of the order granting a request for hearing,” which is typically at least 18-24 months before the evidentiary hearing begins.
9. Requires that if, after the initial disclosure, a party subsequently develops or obtains additional information or documents that meet the requirements of 10 C.F.R. § 2.336(a)(1), then that party must promptly file a supplemental mandatory disclosure.

Other key points derive from the nature of the mandatory disclosures, the structure of the NRC regulations, and the operation of discovery principles in

general. First, mandatory disclosures, as required by 10 C.F.R. § 2.336, consist of an exchange of prescribed information and documents between the litigants, and do not need to be submitted to the Board. Second, mandatory disclosures, like all discovery exchanges, cover a vast array of information and documents that are not evidence and need not meet the requirements of admissible evidence. *See, e.g.*, 10 C.F.R. § 2.705(b)(1) (“It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”). Third, documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing.<sup>7</sup> Fourth, unless and until a document or information is proffered into evidence, there is no basis for a party to object that the information it received in a mandatory disclosure was unreliable or otherwise not admissible as evidence.<sup>8</sup> Fifth, if and when testimony or a document is proffered as evidence, a party may object thereto, and the Board will rule on the objection. LBP-09-22, 70 NRC at 655 (ISO II.J.3). Finally, we note that the mandatory disclosure requirements of 10 C.F.R. § 2.336 are not an opportunity to relitigate the admissibility of a contention, e.g., to relitigate whether the intervenor provided a “concise statement of the alleged facts or expert opinions” supporting the contention or whether the expert analysis provided in the mandatory disclosure is “conclusory.” 10 C.F.R. § 2.309(f)(1).

In light of the foregoing basic principles, Progress’ claim — that the initial disclosure by the Intervenor under 10 C.F.R. § 2.336(a)(1) must include an “analysis or other authority adequate to provide an evidentiary basis for the intervenors’ expert opinions,” sufficient to allow Progress to “prepare a challenge to the reliability of [the] expert,” (Motion at 8-9), and “adequate to show the opinion is sufficiently reliable to meet the . . . Intervenor’s burden of going forward,” (*id.* at 12) — is plainly incorrect. The language and structure of 10 C.F.R. § 2.336 make clear that initial disclosures occur very early in the proceeding, may be missing significant data (e.g., the address and phone number of the witness), need include only such information and documentation that is reasonably available at that time, and must be supplemented if and when a party subsequently develops or obtains additional information. In short, 10 C.F.R. § 2.336(a)(1) requires only the disclosure of any written “analysis or other authority” that is extant and reasonably available to the party when the initial disclosures are made. NRC stated this proposition when it issued this regulation: “Parties . . . are . . . required to exchange the identity of expert witnesses, as

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<sup>7</sup> *See* 10 C.F.R. § 2.1207(a)(1) (submission of initial written testimony with supporting affidavits) and LBP-09-22, 70 NRC at 654-55 (ISO II.J.1).

<sup>8</sup> *See* 10 C.F.R. § 2.319(e) (Boards are authorized to “[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative *evidence*” (emphasis added)).

well as *existing* reports of their opinions.” 69 Fed. Reg. at 2189 (citation omitted) (emphasis added).<sup>9</sup>

The stark contrast between the mandatory disclosure requirements of Subpart G and Subpart L confirms this conclusion. The “required disclosures” provision of Subpart G mandates the disclosure of the identity of expert witnesses and states:

[T]his disclosure *must be accompanied by a written report* prepared and signed by the witness, *containing: A complete statement of all opinions* to be expressed and the *basis and reasons* therefor; the *data* or other information considered by the witness in forming the opinions; any *exhibits* to be used as a summary of or support for the opinions; the *qualifications* of the witness, including a *list of all publications* authored by the witness within the preceding ten years; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

10 C.F.R. § 2.704(b)(2) (emphasis added). (This regulation is identical to Rule 26(a)(2) of the Federal Rules of Civil Procedure). One thing is clear. The mandatory disclosure requirements of 10 C.F.R. § 2.336(a)(1) contain no such provision.

In addition, as the Staff points out, Progress’ argument that the information and documents exchanged in the initial disclosures must meet some substantive criteria, e.g., must “provide an evidentiary basis” for a contention, must show that the expert’s opinion is “reliable” evidence, and/or must satisfy the Intervenors’ “burden of going forward” with the evidence, is completely misguided. First, the plain language of the regulation specifies no such requirements. Second, these concepts only apply to the presentation of *evidence* at the *evidentiary* hearing stage, and not to the exchange of discoverable information (which is not evidence) at the mandatory disclosure stage. Cases holding that a party is “entitled” to ask interrogatories or take depositions concerning the other party’s claims and contentions, while valid in formal adjudications where discovery is permitted (i.e., Subpart G and other pre-2004 proceedings), are invalid in informal adjudications, where such discovery is expressly prohibited. *See* 10 C.F.R. § 2.336(g), 2.1203(d).

Mandatory disclosure is not an opportunity to relitigate the admissibility of Contention 4. Progress challenged the sufficiency of Dr. Bacchus’ declaration earlier, at the contention admissibility stage. We rejected that challenge, found that the contention was sufficiently supported, and admitted it. LBP-09-10, 70 NRC at 99-100, 102-03. Progress is appealing the result. Applicant’s Notice

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<sup>9</sup> *See U.S. Department of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 392 (2008) (ruling that the initial mandatory disclosures in Subpart J only apply to extant documentary material).

of Appeal from LBP-09-10 (July 20, 2009). In addition, Progress will have the opportunity to challenge the sufficiency of Dr. Bacchus' opinion again later at the evidentiary hearing stage, when evidence is proffered and may be challenged. LBP-09-22, 70 NRC at 655 (ISO II.J.3). And Progress may even challenge Dr. Bacchus' opinion in the current stage, via a motion for summary disposition, *if* it can show that there is "no genuine issue as to any material fact and that [it] is entitled to a decision as a matter of law" as required by 10 C.F.R. § 2.710(d)(2). But, unless Progress is asserting that the Intervenors have failed to disclose all of the extant "analysis or other authority" that Dr. Bacchus is currently relying on and that is reasonably available to the Intervenors at this time,<sup>10</sup> then Progress' challenge to the sufficiency of the Intervenors' initial disclosures must be rejected.

We hold that the documents submitted by Intervenors as Dr. Bacchus' "analyses or other written authority," including her twenty-three page declaration, satisfy 10 C.F.R. § 2.336(a)(1). We further hold that this regulation creates no substantive criteria for the quality of the "analysis or other authority" that must be disclosed. Further, we rule that 10 C.F.R. § 2.336(a) simply governs the mandatory exchange of certain discovery information and documents and imposes no *evidentiary* hurdle or "burden of going forward" with the *evidence* that must be met in the initial disclosures.

Finally, we turn to Progress' startling assertion that it is exempt from the duty to disclose the identity of its witnesses and the "analysis or other authority" upon which they base their opinions. We reject Progress' claim (a word we use advisedly) that the phrase "claims and contentions" in 10 C.F.R. § 2.336(a)(1) must be read narrowly and applies only to intervenors and not to applicants. First, we conclude that the phrase "claims and contentions" should be read in its normal sense. A "claim" is "an assertion, statement, or implication." *Webster's Third New International Dictionary* (Unabridged) (1993). Likewise, a "contention" is simply "a point advanced or maintained in a debate or argument." *Id.* Notwithstanding

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<sup>10</sup>The duty to disclose applies to the *parties* and the NRC Staff ("[e]ach party and the NRC staff shall make its initial disclosures . . . based on the information and documentation then reasonably available to it." 10 C.F.R. § 2.336(c) (emphasis added)). But, as we see it, this obligation flows down to an individual who is retained to serve as an expert witness on behalf of a party. Thus, if the expert witness has "a copy of the analysis or other authority" upon which his or her opinion is based, *see* 10 C.F.R. § 2.336(a)(1), and it is extant and reasonably available to that witness and/or the party, then the mandatory disclosure should include that "analysis or other authority." We note that the phrase "other authority" does not require the production of an extensive library of articles or material only tangentially referenced by the expert, but only the authority substantially relied upon by the expert and likely to be proffered as a supporting exhibit at the hearing. Further, this duty is a continuing one and if an expert witness is subsequently selected, or any "analysis or other authority" is subsequently amended or newly developed, then this information must be promptly disclosed. 10 C.F.R. § 2.336(d). Finally, if the "other authority" that the expert is relying upon is already available to the opposing party and/or subject to copyright or other restrictions, then the parties may agree among themselves as to a reasonable method for disclosing it.

the fact that the term “contention” is used as a term of art elsewhere in the NRC regulations, in the context of 10 C.F.R. § 2.336(a)(1), the term “contention” means simply a point or argument asserted or advanced by a party — any party.<sup>11</sup> Applying these terms in context, it is clear that both applicants and intervenors make numerous “claims” and “contentions” in the course of the typical ASLBP adjudicatory hearings. For example, our ruling on the admissibility of contentions (LBP-09-10) described Progress as “claiming” a certain point or “contending” a certain position no less than ten times. This is the natural sense of these terms and the common parlance of our adjudications.

Second, even if the term “contention,” as used in 10 C.F.R. § 2.336(a)(1) must be read as pertaining only to formal contentions admitted under 10 C.F.R. § 2.309(f)(1), the other term in 10 C.F.R. § 2.336(a)(1), the term “claim,” is not so constrained, and can only be read in its normal sense. Thus, for example, Progress “claims” that its application is sufficient and complete. Progress “claims” that its environmental report is adequate. Progress “claims” that the ER has adequately discussed the problem of dewatering. Progress “claims” that the impact of salt drift is small. If it expects to proffer witnesses to support such claims, it must disclose their names, and their “analysis or other authority” pursuant to 10 C.F.R. § 2.336(a)(1), just as the Intervenors must.

This Board holds that the phrase “claims and contentions” as used in 10 C.F.R. § 2.336(a)(1), includes any assertion, statement, or argument, positive or negative, in support of an intervenor’s position or an applicant’s position, that is advanced by any party. It is not limited to the formal “contentions” that meet the strict criteria of, and are admitted under, 10 C.F.R. § 2.309(f)(1). Our interpretation is consistent with the language of 10 C.F.R. § 2.336(a), which states it applies to “all parties.” It is consistent with the Commission’s statements when the regulation was promulgated (e.g., specifying that the “parties” must “exchange” the identity of expert witnesses. 69 Fed. Reg. at 2189 (emphasis

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<sup>11</sup> It is a well-founded principle of statutory construction that the meaning of a word can vary, depending on the context in which it is used. The same word can have different meanings when it is used in different contexts in different parts of the same statute or regulation. “Since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption [that identical words in a statute always have identical meaning] readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent.” *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 400 (2002) (rules of statutory construction must be employed to give “each word Congress used a separate and distinct significance which is consistent with its ordinary meaning”); *Greenbaum v. U.S. Environmental Protection Agency*, 370 F.3d 527, 535-36 (6th Cir. 2004); *United States v. Alghazouli*, 517 F.3d 1179, 1187 (9th Cir. 2008); *United States v. Tobeler*, 311 F.3d 1201, 1206 (9th Cir. 2002).

added)). Certainly, this interpretation is consistent with the overarching goal of providing equitable treatment to all parties in our adjudications, by preventing one party from subjecting another to unfair surprise by withholding the identity of its witnesses, and the witnesses' analyses or other supporting authority, until the evidentiary hearing begins.<sup>12</sup>

As Progress has pointed out, this Board may impose sanctions "including dismissal of the specific contentions, dismissal of the adjudication, [or] dismissal of the application" for any continuing unexcused failure to make the required mandatory disclosures. 10 C.F.R. § 2.336(e)(1). These sanctions are available against any "party that fails to provide any document or witness name." 10 C.F.R. § 2.336(e)(2). We encourage both parties to comply with the mandatory disclosure responsibilities set forth above.

For the foregoing reasons, Progress' Motion to Compel Disclosure of Bases for Expert Opinion with Regard to Contention 4 is denied.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>13</sup>

Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta  
ADMINISTRATIVE JUDGE

Dr. William M. Murphy  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 29, 2009

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<sup>12</sup> It is worth noting that while section 2.336(a)(1) uses language that is somewhat different from Federal Rule of Civil Procedure 26(a)(1)(A), which is the apparent model for this NRC provision, thereby reflecting the distinctive procedural posture of NRC proceedings (i.e., "claims and contentions" in section 2.336(a)(1) versus "claims and defenses" in Fed. R. Civ. P. 26(a)(1)(A)), our interpretation of the NRC provision is fully consistent with the evenhanded approach to party disclosures taken in Rule 26(a)(1)(A).

<sup>13</sup> Copies of this Memorandum and Order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Progress Energy Florida, Inc. (2) Nuclear Information and Resource Service, The Green Party of Florida, and The Ecology Party of Florida; and (3) NRC Staff.

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- Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986), *aff'd*, [484 U.S. 1] (1987)  
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; LBP-09-15, 70 NRC 214 (2009)
- Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993)  
although the Commission is not strictly bound by mootness doctrine, the agency's adjudicatory tribunals have generally adhered to the principle; LBP-09-15, 70 NRC 209 (2009)  
the mootness doctrine derives from the Constitution's limitation of federal courts' jurisdiction to cases or controversies; LBP-09-15, 70 NRC 209 (2009)
- Airport Neighbors Alliance v. United States*, 90 F.3d 426, 432 (10th Cir. 1996)  
reasonable alternatives under NEPA do not include alternatives that are impractical, that present unique problems, or that cause extraordinary costs; LBP-09-16, 70 NRC 298 (2009)
- Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 406 n.28 (2004)  
it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders because such orders presumably enhance rather than diminish public safety; LBP-09-20, 70 NRC 578 n.67 (2009)
- Alfred J. Morabito* (Senior Operator License for Beaver Valley Power Station, Unit 1), CLI-88-4, 28 NRC 5, 6 (1988)  
unlike many cases in which a contention becomes moot, this is not an instance where an analysis of the merits would be an empty exercise; LBP-09-15, 70 NRC 212 (2009)  
where an applicant proposed that a senior reactor operator license be both issued and cancelled retroactively, the Commission declined to engage in such an empty exercise; LBP-09-14, 70 NRC 196 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006)  
challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 862 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006)  
contention admissibility rules are strict by design; LBP-09-26, 70 NRC 952 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006)  
the Commission gives substantial deference to a board's rulings on threshold issues such as standing and contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 35 (2009); CLI-09-20, 70 NRC 914 (2009); CLI-09-22, 70 NRC 933 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *aff'd sub nom., New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009)  
terrorism-related issues are outside the scope of NRC adjudications; LBP-09-17, 70 NRC 371, 381-82 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007)  
the Commission has declined to require the agency to consider terrorist threats outside the Ninth Circuit as part of the NEPA review process; LBP-09-10, 70 NRC 116 (2009); LBP-09-17, 70 NRC 343 (2009)

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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007), *aff'd sub nom., New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009)  
NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question; LBP-09-17, 70 NRC 382 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-31 (2007)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews outside the Ninth Circuit; LBP-09-26, 70 NRC 980, 981 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-34 (2007)  
licensing boards are required apply the Commission's directive that outside the Ninth Circuit, NEPA does not require the evaluation of the impact of terrorist attacks by aircraft or other means; LBP-09-18, 70 NRC 413 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007)  
NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities; CLI-09-15, 70 NRC 5 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009)  
a board may view petitioner's supporting information in a light favorable to petitioner, but petitioner (not the board) is required to supply all required elements for a valid intervention petition; LBP-09-10, 70 NRC 72 (2009)  
requirements for filing both new and nontimely contentions are stringent; LBP-09-27, 70 NRC 998 (2009)
- AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009)  
good cause for the failure to file on time is the most important of the late-filing factors; LBP-09-26, 70 NRC 949 (2009)
- AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 275 (2009)  
although a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner, the petitioner must provide some support for his or her contention, in the form of either facts or expert testimony; LBP-09-26, 70 NRC 955 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006)  
if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c) which specifically applies to nontimely filings; LBP-09-27, 70 NRC 998-99 (2009)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744-45 (2006)  
the first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. 2.309(f)(2)(iii) or nontimely under section 2.309(c); LBP-09-10, 70 NRC 138 (2009)
- Andrew Siemaszko*, CLI-06-12, 64 NRC 495 (2006)  
there were no factors that would interfere with the criminal prosecution if discovery in the civil enforcement matter went forward; LBP-09-24, 70 NRC 804-05 n.17 (2009)
- APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003)  
a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; LBP-09-16, 70 NRC 264 n.118 (2009)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)  
although a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner, the petitioner must provide some support for his or her contention, in the form of either facts or expert testimony; LBP-09-17, 70 NRC 328 (2009); LBP-09-26, 70 NRC 955 (2009)  
failure to present the factual and expert support for a contention requires that the contention be rejected; LBP-09-26, 70 NRC 954 (2009)

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- if petitioner fails 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-09-18, 70 NRC 404 (2009)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155-56 (1991)
- failure of a contention to meet any of the pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) precludes its admission; LBP-09-17, 70 NRC 324 (2009); LBP-09-21, 70 NRC 592 (2009); LBP-09-26, 70 NRC 952 (2009)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991)
- a contention must explain why the application is deficient through reference to specific portions of the application, and it must directly controvert a position taken by the applicant in the application; LBP-09-17, 70 NRC 327 (2009)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 401 (1991)
- petitioners are usually permitted to amend petitions containing curable defects and *pro se* petitioners are held to a less rigorous standard; LBP-09-18, 70 NRC 396-97 (2009)
- Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980)
- licensing boards review NRC Staff's enforcement order *de novo*; LBP-09-24, 70 NRC 706 (2009)
- Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81, *appeal dismissed*, CLI-93-9, 37 NRC 190 (1993)
- every petitioner bears the burden of demonstrating standing in order to participate in hearings before a licensing board; LBP-09-18, 70 NRC 400 (2009)
- Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993)
- the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 917 (2009)
- Bailey v. United States*, 516 U.S. 137, 145 (1995)
- in interpreting regulations, not only the bare meaning of the word but also its placement and purpose in the statutory scheme are considered; LBP-09-15, 70 NRC 216 n.56 (2009)
- Bellotti v. NRC*, 725 F.2d 1380, 1381 (1983)
- the Commission, rather than petitioner, holds the authority to define the scope of a proceeding; LBP-09-20, 70 NRC 575 (2009)
- where the notice of hearing limits the scope to whether the order should be sustained, petitioner's sole remedy is rescission of the order; LBP-09-20, 70 NRC 575 (2009)
- with respect to orders modifying a license, petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing; LBP-09-20, 70 NRC 575 (2009)
- Bellotti v. NRC*, 725 F.2d 1380, 1382 n.2 (1983)
- intervention petitioners who think an order modifying a license should not be sustained, but might want further corrective measures, are precluded from intervention; LBP-09-20, 70 NRC 575 (2009)
- Bellotti v. NRC*, 725 F.2d 1380, 1383 (1983)
- the Commission's power to define the scope of a proceeding will lead to the denial of intervention when the Commission amends a license to require additional or better safety measures; LBP-09-20, 70 NRC 578 n.67 (2009)
- Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987)
- individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it; LBP-09-24, 70 NRC 849 (2009)
- Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987)
- establishing a party's actual knowledge requires showing more than that a party had a suspicion that something was awry; LBP-09-24, 70 NRC 708 n.46 (2009)

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- Brown v. Navajo Regional Director*, 41 IBIA 314, 2005 I.D. LEXIS 99, at \*11 (Bureau of Indian Affairs, Dep't of Interior, Oct. 26, 2005)  
federal agencies, especially when acting through the adjudicatory process,) and state courts have recognized that similar policy considerations counsel against proceeding with an adjudication if there is no possibility of awarding the petitioner meaningful relief; LBP-09-14, 70 NRC 196 n.15 (2009)
- Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884)  
the right to follow any of the common occupations of life is an inalienable right that was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence and it is a large ingredient in the civil liberty of the citizen; LBP-09-24, 70 NRC 806 n.20 (2009)
- Business and Professional People for the Public Interest v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)  
the purpose of the contention admissibility rules is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-26, 70 NRC 952 (2009)
- California v. Federal Energy Regulatory Commission*, 329 F.3d 700, 707 (9th Cir. 2003)  
publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice; LBP-09-20, 70 NRC 570 (2009)
- California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1264 (D.C. Cir. 2008)  
federal recognition by the Bureau of Indian Affairs is a formal political act confirming a tribe's existence as a distinct political society and institutionalizing the government-to-government relationship between the tribe and the federal government; LBP-09-13, 70 NRC 185 n.30 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009)  
the Commission recognizes a 50-mile proximity presumption to establish standing in proceedings concerning nuclear power reactor construction and operating licenses; LBP-09-28, 70 NRC 1024 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009)  
there is no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC's proximity presumption; CLI-09-22, 70 NRC 933 (2009)
- Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI 09-20, 70 NRC 911, 923 (2009)  
the licensing board did not commit reversible error by admitting a contention based on low-level radioactive waste storage duration because the NRC Staff itself had issued a Request for Additional Information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 1015 n.123 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 181-86 (2009)  
under the proximity presumption, petitioner in an operating license proceeding who lives within 50 miles of a nuclear power reactor is presumed to have standing without the need specifically to plead injury, causation, and redressability; LBP-09-26, 70 NRC 947 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 183 (2009)  
a board is not at liberty to abandon the Commission's 50-mile proximity presumption; LBP-09-16, 70 NRC 242 (2009)  
NRC's proximity presumption does not disregard contemporaneous judicial concepts of standing, but rather the Commission applied its expertise to determine that persons living within a 50-mile radius of a nuclear reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility; LBP-09-16, 70 NRC 242 (2009)  
the nontrivial increased risk to persons living within a 50-mile radius of a nuclear reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; LBP-09-16, 70 NRC 242 (2009)

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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 187 (2009)  
favorable rulings on petitioners' NEPA contentions would ensure that procedures are observed that require adequate analysis of potential impacts to their members' health and safety and to the environment where the members reside; LBP-09-16, 70 NRC 243 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 199 (2009)  
a board can only decide whether or not a current funding proposal fulfills NRC requirements; LBP-09-18, 70 NRC 422 (2009)  
it is beyond the authority of a board to say which method applicant must use to fulfill the decommissioning funding assurance requirement; LBP-09-18, 70 NRC 422 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 200 (2009)  
it is beyond licensing board authority to require applicant to choose a particular method of decommissioning funding; LBP-09-15, 70 NRC 207 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 202 (2009)  
although applicant's description of existing water quality conditions did not separately evaluate the contributions of specific sources, it nonetheless formed an environmental baseline against which to measure the cumulative impact of the proposed new reactor; LBP-09-16, 70 NRC 247 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 203-05 (2009)  
the environmental baseline reflects the effects of all currently existing pollution sources in the relevant watershed, including contributions of all nuclear power plants, and petitioners failed to provide information indicating that this aggregate analysis was insufficient under NEPA; LBP-09-16, 70 NRC 248 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 208 (2009)  
the NEPA requirement to consider alternatives to a proposed action is governed by the rule of reason applicable to all NEPA-required alternatives analyses and does not extend to events that are remote and speculative; LBP-09-26, 70 NRC 970 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 217-18 (2009)  
a decision may be referred to the Commission if it raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; LBP-09-18, 70 NRC 407 (2009)  
an attack on the Commission's proximity presumption is rejected; LBP-09-18, 70 NRC 397 (2009)  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 337 (2009)  
contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 220-21 (2009)  
boards have authority to narrow low-level radioactive waste contentions; LBP-09-16, 70 NRC 253 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 220-31 (2009)  
contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 253 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 221 (2009)  
only the management of Class B and Class C wastes is properly the subject of a contention in a combined license proceeding; LBP-09-16, 70 NRC 254 (2009)  
Part 61 does not apply to onsite facilities where the licensee intends to store its own low-level radioactive waste; LBP-09-10, 70 NRC 121 n.57 (2009)



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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 222 (2009)  
although boards are not required to narrow contentions to make them acceptable, they may do so; LBP-09-25, 70 NRC 875 n.37 (2009)  
arguments premised on the prediction that someday a nuclear plant site will become a permanent storage or disposal facility for low-level radioactive waste are too speculative and therefore not material to the findings the NRC must make to support the action that is involved in the present proceeding; LBP-09-16, 70 NRC 255 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 224-25 (2009)  
an application's lack of consideration of any alternative to offsite disposal of low-level radioactive waste is a material issue for litigation; LBP-09-18, 70 NRC 424 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 226-27 (2009)  
low-level radioactive waste disposal contentions have been admitted when that issue was not sufficiently discussed in the applications and there was no mention of the closure of the Barnwell facility; LBP-09-18, 70 NRC 410-11 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-15, 70 NRC 198, 214-19 (2009)  
at the time the combined license application is submitted, applicant must specify the method for decommissioning funding assurance that it proposes to use and must show that the method satisfies the applicable financial test; LBP-09-18, 70 NRC 422 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-15, 70 NRC 198, 218-19 (2009)  
at the time the combined license application is submitted, it must identify the method of decommissioning funding assurance that the applicant proposes to use and to show that the method complies with any applicable financial test; LBP-09-18, 70 NRC 418 n.215 (2009)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-15, 70 NRC 198, 223 n.83 (2009)  
the role of a licensing board is to decide whether an applicant has supplied the requisite information to the NRC, and whether the petitioners have identified any defect in that information; LBP-09-18, 70 NRC 419 (2009)
- Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1123 (D.C. Cir. 1971)  
abdicated water quality effects entirely to other agencies' certifications subverts the special purpose of NEPA; LBP-09-16, 70 NRC 278 (2009)  
NRC is required to evaluate and balance both the claimed benefits and the environmental costs of a proposed new reactor; LBP-09-16, 70 NRC 301 (2009)
- Carolina Power & Light Co.* (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 561-62 (1979)  
when water quality decisions have been made by a state pursuant to the Clean Water Act and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value; LBP-09-25, 70 NRC 885 (2009)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 52 (2007)  
if an organization seeks to intervene as a representative of its members, it must identify at least one member by name and address, show that member would have standing in his or her own right, and demonstrate that the member has authorized the organization to intervene on his or her behalf; LBP-09-26, 70 NRC 947 (2009)  
to demonstrate standing, an organization seeking to intervene in a proceeding must allege that the challenged action will cause a cognizable injury to the organization's interests or to the interests of its members; LBP-09-26, 70 NRC 947 (2009)  
under the proximity presumption, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-09-18, 70 NRC 395 (2009)

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- Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863 (1980)  
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- Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)  
an agency cannot redefine the applicant's goals, and the EIS alternatives analysis should be based around the applicant's goals, including its economic goals; LBP-09-17, 70 NRC 379 (2009)  
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- Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004)  
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- City of Bridgeton v. Federal Aviation Administration*, 212 F.3d 448, 458 (8th Cir. 2000)  
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- City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994)  
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- City of New York v. U.S. Department of Transportation*, 715 F.2d 732, 742 (2d Cir. 1983)  
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- City of Shoreacres v. Waterworth*, 420 F.3d 440, 450 (5th Cir. 2005)  
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- Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 329-30 (9th Cir. 1995)  
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- Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 330 (9th Cir. 1995)  
the collateral estoppel doctrine promotes the compelling public interest in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; LBP-09-24, 70 NRC 809-10, 813 n.5, 822 (2009)
- Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)  
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- Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985)  
when the NRC Staff can, consistent with its duty to protect public health and safety, accord some form of predeprivation hearing, such a course of action is advisable in light of the important private interest in retaining employment and the fact that such a proceeding provides some opportunity for the employee to present his side of the case; LBP-09-24, 70 NRC 801 n.11, 852 n.45 (2009)
- Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 n.8 (1985)  
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)  
intervention petitioner must establish a concrete and particularized injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and is arguably within the zone of interests protected by the governing statute; CLI-09-20, 70 NRC 915 (2009); LBP-09-13, 70 NRC 176 (2009); LBP-09-16, 70 NRC 240 (2009)  
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1, 2, and 3), LBP-92-4, 35 NRC 114, 125-26 (1992)  
merely because a petitioner might have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings; LBP-09-18, 70 NRC 402 (2009)
- Clyde A. Wilson International Investigations, Inc. v. Travelers Insurance Co.*, 959 F. Supp. 756, 763 (S.D. Tex. 1997)  
one who signs a contract is presumed to know its contents; LBP-09-24, 70 NRC 708 n.47 (2009)
- Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948)  
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- Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986)  
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- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980)  
the scope of a contention is bounded by the scope of the notice of hearing; LBP-09-25, 70 NRC 889 n.138 (2009)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999)  
in demonstrating that a proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences, petitioner cannot rely on conclusory allegations about potential radiological harm, but must show how these various harms might result from the proposed action; LBP-09-20, 70 NRC 577 (2009)
- Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992)  
reasonable alternatives under NEPA do not include alternatives that are impractical, that present unique problems, or that cause extraordinary costs; LBP-09-16, 70 NRC 298 (2009)
- Conley v. Gibson*, 355 U.S. 41, 47 (1957)  
notice pleading is a broad standard requiring only a short and plain statement of the claim; LBP-09-17, 70 NRC 328 (2009)
- Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)  
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- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47 (2001)  
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- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-03-18, 58 NRC 262, 264 (2003)  
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- Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 142 (2001)  
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- Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)  
an independent spent fuel storage installation is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release; LBP-09-20, 70 NRC 577 (2009)  
an individual's claim of residence within 50 miles of a plant might entitle him to a presumption of standing based on his proximity in a reactor construction permit or operating license proceeding; CLI-09-20, 70 NRC 916 n.16 (2009)  
in proceedings other than for construction permits, operating licenses, or significant amendments thereto, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any obvious potential for offsite radiological consequences, as well as the nature of the proposed action and the significance of the radioactive source; LBP-09-20, 70 NRC 575 (2009)  
the Commission declined to adopt a proximity presumption in an independent spent fuel storage installation license transfer proceeding, where petitioner had not demonstrated that the mere transfer of the ISFSI somehow increased his risk of radiological harm; LBP-09-20, 70 NRC 577-78 (2009)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007)  
for representational standing, a member must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither the petitioner's contentions nor the requested relief must require an individual member to participate in the proceeding; LBP-09-16, 70 NRC 240 (2009); LBP-09-18, 70 NRC 395, 399 (2009); LBP-09-20, 70 NRC 575 (2009); LBP-09-21, 70 NRC 591 (2009); LBP-09-28, 70 NRC 1024 (2009)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409-10 (2007)  
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- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409, 411 (2007)  
for organizational standing, the organization must, in its own right, satisfy the same requirements of injury, causation, and redressability as an individual; LBP-09-28, 70 NRC 1024 (2009)  
organizations may demonstrate standing in either an organizational or a representational capacity; LBP-09-28, 70 NRC 1024 (2009)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411-12 (2007)  
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- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 412 n.37 (2007)  
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- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007)  
petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-09-26, 70 NRC 954 (2009)
- 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-09-17, 70 NRC 329 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009)  
the Commission gives substantial deference to a board's rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 35 (2009); CLI-09-22, 70 NRC 933 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 339 (2009)  
when denial of a license would alleviate a petitioner's asserted potential injury, any admissible contention with such a result can be prosecuted by a petitioner, regardless of whether that contention is directly related to that petitioner's articulated injury; LBP-09-16, 70 NRC 242 (2009)

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- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 339-41 (2009)  
as long as either denial of a license or issuance of a decision mandating compliance with legal requirements would alleviate a petitioner's potential injury, then under longstanding NRC jurisprudence the petitioner may prosecute any admissible contention that could result in the denial or in the compliance decision; CLI-09-20, 70 NRC 918 n.28 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 340 (2009)  
a nexus between the injury and the relief is required rather than a nexus between the claimed injury and the contention; LBP-09-16, 70 NRC 242 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 343 (2009)  
affidavits authorizing organizational representation are to be filed with specific reference to the proceeding in which standing is sought and providing the petitioners the opportunity to cure such defects in their affidavits; LBP-09-13, 70 NRC 182 n.26 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 345 (2009)  
a board's determination of standing does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-09-13, 70 NRC 177 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 352 (2009)  
at the contention admission stage, the Board simply has to find that each of the elements of contention admissibility is satisfied, and need not weigh the merits of petitioner's arguments; LBP-09-10, 70 NRC 86 n.28 (2009)  
petitioner must provide a concise statement of the alleged facts or expert opinion that support the contention, references to sources and documents on which the petitioner intends to rely, and sufficient information to show that a genuine dispute exists; LBP-09-10, 70 NRC 136 n.75 (2009)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 760 (2008)  
although a board in another materials license renewal proceeding allowed an Indian organization to participate in that proceeding as an interested Indian Tribe under 10 C.F.R. 2.315(c), that ruling is not binding on other boards; LBP-09-13, 70 NRC 187 n.33 (2009)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 (2009)  
the Commission upheld the licensing board's finding that the petitioner demonstrated good cause for its late filing; LBP-09-20, 70 NRC 572-73 (2009)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009)  
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009)  
boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-09-16, 70 NRC 256 (2009)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009)  
if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-09-26, 70 NRC 954 (2009)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009)  
because the reach of a contention necessarily hinges upon its terms and its stated bases, the brief explanation helps define the scope of the contention; LBP-09-26, 70 NRC 953 (2009)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 568 (2009)  
a reply cannot expand the scope of the arguments set forth in the original hearing request; LBP-09-16, 70 NRC 254 (2009)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 150 (1995)  
NUREGs are guidance documents, with no binding effect, but are entitled to special weight, such that it is appropriate to consider in evaluating contentions; LBP-09-17, 70 NRC 368 (2009)

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- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995)  
the fact that a combined license application is subject to, or even expected to, change does not make it legally deficient because the NRC follows a dynamic licensing process; LBP-09-10, 70 NRC 77 (2009)
- David B. Kuhl, II* (Denial of Senior Reactor Operator License), LBP-09-14, 69 NRC 193, 196 (2009)  
unlike many cases in which a contention becomes moot, this is not an instance where an analysis of the merits would be an empty exercise; LBP-09-15, 70 NRC 212 (2009)
- Deal v. United States*, 508 U.S. 129, 132 (1993)  
it is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used; LBP-09-15, 70 NRC 217 n.57 (2009)
- Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980)  
the National Environmental Policy Act applies to agencies of the federal government, not to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 87 (2009)
- Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988)  
intervention petitioner must be able to show how it would have personally suffered or will suffer a distinct and palpable harm that constitutes injury in fact; LBP-09-18, 70 NRC 400 (2009)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 769 (2004)  
controls that other countries may impose on mining and milling, and the impacts of such activities, are outside the scope of a combined license proceeding; LBP-09-17, 70 NRC 370 (2009)
- Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 84-85 (2009)  
applicant for a construction permit or a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-17, 70 NRC 334 (2009)
- Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 85 (2009)  
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- Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 249-52 (2009)  
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- Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978)  
the appeal board declined to entertain appeals by license applicants challenging partial board rulings; CLI-09-18, 70 NRC 861 n.10 (2009)
- District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980)  
the National Environmental Policy Act applies to agencies of the federal government, not to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 87 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)  
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- 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-09-26, 70 NRC 956 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009)  
the standard for amendment of a contention is whether the information was available to the public, not whether the petitioner has recently found it; LBP-09-26, 70 NRC 988 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008)  
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- 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)  
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 petitioner disagrees with the applicant; LBP-09-17, 70 NRC 327 (2009)  
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-09-17, 70 NRC 325 (2009); LBP-09-26, 70 NRC 952 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001)  
rules on contention admissibility are strict by design; LBP-09-10, 70 NRC 72 (2009); LBP-09-16, 70 NRC 244 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004)  
failure to comply with any of the pleading requirements is grounds for rejecting a contention;  
LBP-09-10, 70 NRC 73 (2009); LBP-09-26, 70 NRC 952 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004)  
the Commission will affirm decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion; CLI-09-20, 70 NRC 914 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 (2004)  
the Commission has previously rejected claims that NRC regulations require discharge permits of their licensees; LBP-09-25, 70 NRC 885 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005)  
good cause for the failure to file on time is the most important of the late-filing factors; LBP-09-26, 70 NRC 949 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005)  
good cause for late filing was shown where petitioners lacked constructive or actual notice before the filing deadline, and they filed as soon as possible thereafter; LBP-09-20, 70 NRC 573 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005)  
absent good cause, petitioner's demonstration on the other late-filing factors must be compelling;  
LBP-09-26, 70 NRC 949 (2009)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 n.60 (2005)  
publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice; LBP-09-20, 70 NRC 570 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 223-24 (2007)  
with regard to alternative sites for an early site permit, NRC Staff must evaluate both the methodology used by the applicant and the reasonableness of the potential sites identified by that method; LBP-09-19, 70 NRC 488 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 228-32 (2007)  
where the final environmental impact statement discussion of alternative sites was insufficient, the board independently reviewed the record on greenfield, competitors' brownfield, noncompetitors' brownfield, and applicant's other nuclear sites to conclude that the Staff's underlying alternative site review was adequate; LBP-09-19, 70 NRC 488 (2009)

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- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 231-32 (2007)  
brownfield sites owned by companies other than the applicant may reasonably be excluded as alternative sites; LBP-09-19, 70 NRC 496 n.18 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 232 (2007)  
applicant's initial consideration of DOE's Portsmouth, Ohio, and SRS sites as alternative sites was reasonable as part of its alternative site analysis for an early site permit; LBP-09-19, 70 NRC 496 n.18 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 232 n.94 (2007)  
noninclusion of DOE sites in alternative sites analysis that are far outside applicant's region of interest is reasonable; LBP-09-19, 70 NRC 496 n.18 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 237 & n.126 (2007)  
in evaluating early site permit applications, where detailed design information is not available, the Commission may defer resolution of severe accident mitigation alternatives until the construction permit or combined license stage; LBP-09-19, 70 NRC 536 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-69 (2004)  
challenges to the Waste Confidence Rule are prohibited by 10 C.F.R. 2.335; LBP-09-10, 70 NRC 114 (2009)  
contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)  
licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 115 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-70 (2004)  
the Waste Confidence Rule is applicable to all new reactor proceedings and contentions challenging the rule or seeking its reconsideration are inadmissible; LBP-09-17, 70 NRC 337 (2009); LBP-09-18, 70 NRC 406 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 559-60, *permit issuance authorized*, CLI-07-27, 66 NRC 215 (2007)  
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- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 588, 642 *permit issuance authorized*, CLI-07-27, 66 NRC 215 (2007)  
noninclusion of DOE sites in alternative sites analysis that are far outside applicant's region of interest is reasonable; LBP-09-19, 70 NRC 496 n.18 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 607 (2007)  
the environmental impact statement need not consider an infinite range of alternatives, only reasonable or feasible ones; LBP-09-21, 70 NRC 626 n.271 (2009)
- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 614 (2007)  
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- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 629, *permit issuance authorized*, CLI-07-27, 66 NRC 215 (2007)  
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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)  
if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-09-26, 70 NRC 954 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431 (2008)  
challenges to the Waste Confidence Rule are prohibited; LBP-09-10, 70 NRC 114 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 438 (2008)  
the proximity presumption applies to combined license proceedings; LBP-09-16, 70 NRC 240 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 438-39 (2008)  
under the proximity presumption, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-09-18, 70 NRC 395 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 444-45 (2008)  
contentions involving possible errors in Table S-3 have been referred to the Commission; LBP-09-21, 70 NRC 617 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 446 (2008)  
petitioner is obligated to read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-09-25, 70 NRC 882 n.87 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 456-57 (2008)  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 337 (2009)  
the Waste Confidence Rule applies to combined license proceedings; LBP-09-18, 70 NRC 407 (2009)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 457 (2008)  
licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 114 (2009)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004)  
an appeal was dismissed as premature because the board decision that granted a hearing request constituted only a partial ruling on the intervention petition because it left unaddressed a group of proposed contentions; CLI-09-18, 70 NRC 861 (2009)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 207 (2004)  
to be appealable, a disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner; CLI-09-18, 70 NRC 861 (2009)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208, 209 & n.15 (2004)  
with respect to an applicant's appeal under section 2.311(d)(1), applicant must contend that, after considering all pending contentions, the board has erroneously granted a hearing to the petitioner; CLI-09-18, 70 NRC 861-62 n.10 (2009)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 12 (2002)  
a contention that fails to provide even a ballpark figure for the cost of implementing any proposed severe accident mitigation alternatives is inadmissible because it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration; LBP-09-26, 70 NRC 969 n.151 (2009)

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- 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)  
because the reach of a contention necessarily hinges upon its terms and its stated bases, the brief explanation helps define the scope of the contention; LBP-09-26, 70 NRC 953 (2009)
- 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)  
submittal of the information by applicant is the basis for the finding of mootness of a contention, but the adequacy of the information submitted may be the subject of a new or amended contention; LBP-09-15, 70 NRC 211 (2009); LBP-09-21, 70 NRC 596 n.59 (2009)  
when a contention of omission encompasses issues that are addressed completely in materials the applicant subsequently files, the contention is rendered moot; LBP-09-15, 70 NRC 210 (2009); LBP-09-16, 70 NRC 245 (2009); LBP-09-21, 70 NRC 596 (2009); LBP-09-27, 70 NRC 999 (2009)  
where 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 Staff in a draft EIS, intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information; LBP-09-27, 70 NRC 999 (2009)
- 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)  
although technical perfection is not an essential element of contention pleading, the rules have nonetheless been held to bar contentions where petitioners have only what amounts to generalized suspicions, hoping to substantiate them later; LBP-09-17, 70 NRC 326 (2009); LBP-09-18, 70 NRC 404 (2009)
- 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)  
a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-17, 70 NRC 323 (2009)  
admission of new contentions under 10 C.F.R. 2.309(f)(2) does not run afoul of the Commission's aversion to petitioners who disregard NRC's timeliness requirements, nor does it allow petitioners to add new contentions that simply did not occur to them at the outset; LBP-09-10, 70 NRC 139 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)  
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; LBP-09-17, 70 NRC 325 n.47 (2009)  
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-09-17, 70 NRC 325 (2009)  
the strict contention rule serves multiple interests; LBP-09-17, 70 NRC 325 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999)  
rules on contention admissibility are strict by design; LBP-09-10, 70 NRC 72 (2009); LBP-09-16, 70 NRC 244 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)  
the contention requirements were never intended to be turned into a fortress to deny intervention; LBP-09-21, 70 NRC 602 n.94 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)  
issuance of requests for additional information does not alone establish deficiencies in an application; LBP-09-16, 70 NRC 270 n.134 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336-37 (1999)  
a request for additional information by NRC, in itself, does not constitute grounds for a contention; LBP-09-10, 70 NRC 144 (2009)

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- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336-39 (1999)  
NRC Staff issuance of a request for additional information does not alone establish deficiencies in an application, and intervention petitioner must do more than merely quote an RAI to justify admission of a contention; CLI-09-16, 70 NRC 38 n.25 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337 (1999)  
contentions are inadmissible if petitioners provides no analysis, discussion, or information on their own on any of the issues raised in Staff requests for additional information; LBP-09-10, 70 NRC 76 (2009); LBP-09-16, 70 NRC 271 n.135 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999)  
although technical perfection is not an essential element of contention pleading, the rules have nonetheless been held to bar contentions where petitioners have only what amounts to generalized suspicions, hoping to substantiate them later; LBP-09-17, 70 NRC 326 (2009); LBP-09-18, 70 NRC 404 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341-42 (1999)  
a contention must explain why the application is deficient through reference to specific portions of the application, and it must directly controvert a position taken by the applicant in the application; LBP-09-17, 70 NRC 327 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 342 (1999)  
petitioner is required to support its contentions with documents, expert opinion, or at least a fact-based argument; LBP-09-17, 70 NRC 329 (2009)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)  
contentions that attack a Commission rule, or seek to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-09-17, 70 NRC 338, 339, 340-41 (2009); LBP-09-18, 70 NRC 403 (2009); LBP-09-26, 70 NRC 978 (2009)  
if petitioners are dissatisfied with NRC's generic approach to the waste disposal issue, their remedy lies in the rulemaking process, not in a licensing proceeding; LBP-09-10, 70 NRC 116 n.52 (2009); LBP-09-16, 70 NRC 251 (2009); LBP-09-18, 70 NRC 408 n.127 (2009); LBP-09-21, 70 NRC 600 (2009)
- 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 in the Commission's initial hearing notice and order referring the proceeding to the Licensing Board; LBP-09-26, 70 NRC 953 (2009)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)  
much of the information in an applicant's environmental report is used in the draft environmental impact statement; LBP-09-16, 70 NRC 263 (2009)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 285 (1983)  
although NRC may require an applicant to submit certain information, the NRC cannot delegate its duty to comply with the National Environmental Policy Act to the applicant; LBP-09-10, 70 NRC 87 (2009)
- Eastern Testing & Inspection, Inc.*, LBP-96-11, 43 NRC 279, 282 n.1 (1996)  
when an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action; LBP-09-23, 70 NRC 668 n.27 (2009)
- Emery Mining Co. v. Secretary of Labor, Mine Safety & Health Administration*, 744 F.2d 1411, 1414 (10th Cir. 1984)  
courts must construe regulations in light of the statutes they implement, keeping in mind that where there is an interpretation of an ambiguous regulation that is reasonable and consistent with the statute, that interpretation is to be preferred; LBP-09-16, 70 NRC 261 (2009)
- EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-08-24, 68 NRC 491, 493 (2008)  
a facility that is licensed to receive only Class A low-level radioactive waste it is not pertinent to a contention regarding Class B and C waste; LBP-09-18, 70 NRC 423 n.250 (2009)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009)  
a genuine material dispute is one that could lead to a different conclusion on potential cost-beneficial severe accident mitigation alternatives; LBP-09-26, 70 NRC 969 (2009)

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- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 351-59 (2006)  
a detailed summary of relevant case law on contention admissibility is provided; LBP-09-17, 70 NRC 324 n.44 (2009)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 132 (2009)  
petitioners may request, and the Commission, in its discretion, may grant interlocutory review if it is shown that the issue threatens petitioners with immediate and serious irreparable impacts or affects the basic structure of the proceeding in a pervasive manner; LBP-09-10, 70 NRC 148 n.89 (2009)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 61 (2008)  
the purpose of the contention admissibility rules is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-26, 70 NRC 952 (2009)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008)  
contentions that fall outside the scope of the proceeding must be rejected; LBP-09-26, 70 NRC 953 (2009)  
materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-26, 70 NRC 953 (2009)  
petitioner must show that the subject matter of the contention would impact the grant or denial of the license application at issue in the proceeding; LBP-09-26, 70 NRC 953 (2009)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 63 (2008)  
determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits; LBP-09-26, 70 NRC 954 (2009)  
providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support admission of the contention; LBP-09-26, 70 NRC 954 (2009)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 64 (2008)  
a contention that attacks applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-09-26, 70 NRC 956 (2009)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 199 (2008)  
NEPA is the only legal grounds for an admissible contention relating to environmental justice issues; LBP-09-18, 70 NRC 430 (2009)  
to qualify as an environmental justice contention, the contention must show that the affected local population qualifies as a minority or low-income population; LBP-09-18, 70 NRC 430 (2009)
- Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 (2008)  
absent an obvious potential for harm, it is petitioner's burden to show how harm will or may occur; LBP-09-28, 70 NRC 1026 (2009)
- Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 269-70 (2008)  
no obvious potential for offsite consequences sufficient to establish organizational standing was shown even though the organization's office was a mere 3 miles from the facility; LBP-09-28, 70 NRC 1025 n.35 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)  
a party seeking a stay must show it faces imminent, irreparable harm that is both certain and great; CLI-09-23, 70 NRC 936 n.4 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 704-06 (2004)  
if no particular hearing procedure is compelled, the board must exercise its discretion and select the hearing procedure most appropriate for the newly admitted contentions; LBP-09-10, 70 NRC 146 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749 (2004)  
it is common for applicants to modify and amend their applications, often many times, and this does not, per se, render the application deficient; LBP-09-10, 70 NRC 77 (2009)

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- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 n.21 (2005)  
if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c) which specifically applies to nontimely filings; LBP-09-27, 70 NRC 998-99 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 128 (2006)  
to be sincere, movant should contact other parties sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question; LBP-09-22, 70 NRC 649 n.24 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006)  
the first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. 2.309(f)(2)(iii) or nontimely under section 2.309(c); LBP-09-10, 70 NRC 138 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006)  
if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c) which specifically applies to nontimely filings; LBP-09-27, 70 NRC 998-99 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006)  
thirty days is a reasonable limit for fulfilling the timing requirement of 10 C.F.R. 2.309(f)(2)(iii) because of the significant effort involved in identifying new information, assembling the required expertise, and then drafting a contention that satisfies 10 C.F.R. 2.309(f)(1); LBP-09-27, 70 NRC 1003 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 579 (2006)  
when information forming the foundation for a new or amended contention becomes available piecemeal over time, the admissibility decision turns on a determination about when, as a cumulative matter, the separate pieces of the information puzzle were sufficiently in place to make the particular concerns reasonably apparent; LBP-09-10, 70 NRC 143 n.82 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 146-52 (2006)  
a short discussion of the general admissibility criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi) is provided; LBP-09-9, 70 NRC 45 n.12 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 147 (2006)  
at the admission stage of the proceedings, boards admit contentions, not bases; LBP-09-26, 70 NRC 988 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 160 (2006), *aff'd*, CLI-07-3, 65 NRC 13, 17-18 (2007)  
contentions dealing with risks associated with the high-density storage and racking of spent nuclear fuel in pools encompass information and grounds characterized as a board as well trod, rather than new information; LBP-09-10, 70 NRC 143 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 179 (2006), *rev'd on other grounds*, CLI-07-16, 65 NRC 371, 381-85 (2007)  
while NEPA requires consideration of information regarding other regulatory requirements and permits, the fact that the applicant is subject to and complying with them does not obviate the NEPA mandate that the federal agency perform an EIS covering these topics; LBP-09-16, 70 NRC 279 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006)  
a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-17, 70 NRC 323 (2009)

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- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006), *aff'd*, CLI-07-3, 65 NRC 13 (2007)  
under Part 2, Subpart G procedures, parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the Board; LBP-09-10, 70 NRC 145 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 202 (2006), *aff'd*, CLI-07-3, 65 NRC 13 (2007)  
Subpart G procedures are used if the resolution of the contention meets specified criteria; LBP-09-10, 70 NRC 145 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 264 (2007)  
if CUFen metal fatigue analysis produces a value of greater than unity, then the analysis indicates that the component would be likely to develop metal fatigue cracks that might affect their function during the 20-year license renewal period of extended operation, and thus requires an aging management program; LBP-09-9, 70 NRC 43 n.4 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 265 n.5 (2007)  
the first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. 2.309(f)(2)(iii) or nontimely under section 2.309(c); LBP-09-10, 70 NRC 138 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266-67 (2007)  
a detailed analysis of the legal standards governing the admission of new contentions is provided; LBP-09-9, 70 NRC 45 n.11 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 272 (2007)  
the availability of Subpart G procedures under 10 C.F.R. 2.310(d) depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified, under 10 C.F.R. 2.336(a)(1), until after contentions are admitted; LBP-09-10, 70 NRC 147 n.88 (2009)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 824 (2008)  
to defer determining a significant safety issue until after the license has already been issued would impermissibly remove it from the opportunity to be reviewed in the hearing process; LBP-09-15, 70 NRC 222 (2009)
- Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999)  
because agencies are not constrained by Article III of the Constitution, nor are they governed by judicially created standing doctrines restricting access to federal courts, the criteria for establishing administrative standing may permissibly be less demanding than the criteria for judicial standing; CLI-09-20, 70 NRC 915 (2009); LBP-09-18, 70 NRC 397 (2009)  
even if NRC's proximity presumption is viewed as more lenient than judicial standing requirements, NRC may choose to retain it; CLI-09-20, 70 NRC 917 n.27 (2009)
- Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 75 (D.C. Cir. 1999)  
although the Commission commonly looks to Article III concepts for guidance, it is not required to automatically follow them in all respects because NRC proceedings are not subject to Article III; LBP-09-15, 70 NRC 210 (2009)
- Environmental Law & Policy Center v. NRC*, 470 F.3d 676, 683 (7th Cir. 2006)  
blindly adopting applicant's goals is a losing proposition because it does not allow for the full range of alternatives required by NEPA; LBP-09-10, 70 NRC 128 (2009); LBP-09-17, 70 NRC 379 (2009)  
NEPA requires an agency to exercise a degree of skepticism in dealing with the self-serving statements from the prime beneficiary of a project and to look at the general goal of the project, rather than only those alternatives by which a particular applicant can reach its own specific goals; LBP-09-10, 70 NRC 128 (2009); LBP-09-17, 70 NRC 379 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 39 (2005)  
when reviewing an early site permit application in an uncontested proceeding, licensing boards are to conduct a simple sufficiency review rather than a *de novo* review on both Atomic Energy Act and National Environmental Policy Act issues; LBP-09-19, 70 NRC 456 (2009)

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- when reviewing an early site permit application in an uncontested proceeding, licensing boards should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact; LBP-09-19, 70 NRC 456 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 39-40 (2005) a board's role in an early site permit proceeding is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-09-19, 70 NRC 457 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 44 (2005) with respect to certain NEPA findings, boards in early site permit proceedings are to make independent environmental judgments, though they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-09-19, 70 NRC 456 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 45 (2005) on baseline NEPA issues in early site permit cases, boards must reach their own independent determination, but should do so without second-guessing underlying technical or factual findings by the NRC Staff; LBP-09-19, 70 NRC 459 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005) the reasonableness of energy conservation as an alternative in light of the need for a large amount of baseload electric power is questioned; LBP-09-10, 70 NRC 132 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 807 (2005) applicant is not required to evaluate demand-side management as an alternative because it is not an alternative to the proposal to build new baseload power generation; LBP-09-21, 70 NRC 624 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006) applicant is not obliged to examine general efficiency or conservation proposals that would do nothing to satisfy the particular project's goals of producing baseload power; LBP-09-17, 70 NRC 377 (2009)
- applicant is required to evaluate only alternatives that support the purpose of the project; LBP-09-21, 70 NRC 623 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 810 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006) a solely wind- or solar-powered facility could not satisfy a project's purpose of providing baseload power; LBP-09-17, 70 NRC 377 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 21-22 (2006) in a mandatory hearing, a licensing board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-09-19, 70 NRC 456 (2009)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 246-47 (2004) a decision may be referred to the Commission if it raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; LBP-09-18, 70 NRC 407 (2009)
- contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-10, 70 NRC 114 (2009); LBP-09-17, 70 NRC 337 (2009)
- contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)
- licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 115 (2009)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005) in proceedings other than for construction permits, operating licenses, or significant amendments thereto, the Commission decides on a case-by-case basis whether the proximity presumption should

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- apply, taking into account any obvious potential for offsite radiological consequences, as well as the nature of the proposed action and the significance of the radioactive source; LBP-09-20, 70 NRC 575 (2009)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005)
- absent an obvious potential for harm, it is petitioner's burden to show how harm will or may occur; LBP-09-28, 70 NRC 1026 (2009)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005)
- in nonreactor cases, the potential for offsite consequences is not always clear, and thus the burden falls on petitioner to demonstrate that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-09-20, 70 NRC 577 (2009)
- Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977)
- the Clean Water Act does not authorize regulation of discharges to groundwater; LBP-09-25, 70 NRC 890 n.145 (2009)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 202 (2003)
- the Commission has long recognized the benefits of participation in NRC proceedings by representatives of interested states; LBP-09-16, 70 NRC 291 (2009)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
- a contention is inadmissible if intervenors offer no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-09-15, 70 NRC 224 (2009); LBP-09-16, 70 NRC 273, 290 (2009); LBP-09-17, 70 NRC 328 (2009); LBP-09-26, 70 NRC 954 (2009)
- although a petitioner does not have to prove its contention at the admissibility stage, mere notice pleading is insufficient; LBP-09-17, 70 NRC 328 (2009); LBP-09-18, 70 NRC 404 (2009)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003)
- providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention; LBP-09-26, 70 NRC 954 (2009)
- 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 explaining their significance, is inadequate to support the admission of the contention; LBP-09-17, 70 NRC 328 (2009); LBP-09-18, 70 NRC 404 (2009)
- Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240 (1988)
- conviction of a crime that is identical to a charge in an enforcement order provides substantial assurance that the enforcement order was not baseless or unwarranted; LBP-09-24, 70 NRC 813 n.5 (2009)
- where the government has deprived an individual of a property interest without a hearing, the government must be prepared to show an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted; LBP-09-24, 70 NRC 851-52 n.45 (2009)
- Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 244 (1988)
- returning of an indictment establishes probable cause to believe that the individual has committed a crime punishable by imprisonment for a term in excess of one year and demonstrates that the deprivation is not arbitrary; LBP-09-24, 70 NRC 852 n.45 (2009)
- Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 247 (1988)
- when the criminal trial precedes the enforcement proceeding, the defendant has not perforce been deprived of due process, but rather the criminal trial provides an additional forum to litigate the factual underpinnings of the administrative sanction and if the defendant is convicted, the administrative sanction is further supported; LBP-09-24, 70 NRC 852 n.45 (2009)
- Field v. Mans*, 516 U.S. 59, 68 n.7 (1995)
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- Flast v. Cohen*, 392 U.S. 83, 95 (1968)  
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- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP 88-10A, 27 NRC 452, 463 (1988)  
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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.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989)  
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991)  
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530 (1991)  
to establish organizational standing, an organization must demonstrate an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-13, 70 NRC 178 (2009)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990)  
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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)  
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001)  
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 149 (2001)  
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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150, *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001)  
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)  
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to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-13, 70 NRC 178 (2009)  
to establish standing petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-09-16, 70 NRC 240 (2009)  
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995)  
in nonreactor cases, the potential for offsite consequences is not always clear, and thus the burden falls on petitioner to demonstrate that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-09-20, 70 NRC 577 (2009)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995)  
in cases other than nuclear power reactor construction and operating licenses, licensing boards must address standing on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-09-28, 70 NRC 1024 (2009)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995)  
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300 (1995)  
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- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, and *aff'd in part*, CLI-95-12, 42 NRC 111 (1995)  
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- Gilbert v. Ferry*, 413 F.3d 578, 580 (6th Cir. 2005)  
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- Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992)  
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- Goehring v. United States*, 870 F. Supp. 106, 109 (D. Md. 1994)  
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- Goss v. Lopez*, 419 U.S. 565, 583-84 (1975)  
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- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 194 (2000)  
an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed, demonstrate that the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-09-13, 70 NRC 178 (2009)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)  
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- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)  
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- Greene v. McElroy*, 360 U.S. 474, 492 (1959)  
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- Groppi v. Leslie*, 404 U.S. 496, 504 n.8 (1972)  
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- GUARD v. NRC*, 753 F.2d 1144, 1146 (D.C. Cir. 1985)  
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- Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974)  
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- Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994)  
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- Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007)  
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- Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)  
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- Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979)  
an organization seeking representational standing on behalf of its members may meet the injury-in-fact requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding; LBP-09-16, 70 NRC 240 n.22 (2009); LBP-09-20, 70 NRC 574 n.43 (2009)
- Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980)  
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- Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)  
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- Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941)  
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- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121 (1998)  
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- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 269 (1998), *rev'd on other grounds*, CLI-98-16, 48 NRC 119 (1998)  
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- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998), *rev'd on other grounds*, CLI-98-16, 48 NRC 119 (1998)  
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- Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-17, 62 NRC 77, 91 (2005)  
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- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)  
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- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-33, 60 NRC 581, 596 (2004)  
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- Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 959 (1983)  
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- In re Campbell*, 628 F.2d 1260, 1262 (9th Cir. 1980)  
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- Independent Bankers Association of Georgia v. Board of Governors of Federal Reserve System*, 516 F.2d 1206, 1220 n.57 (D.C. 1975)  
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- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001)  
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- Iron Arrow Honor Society v. Heckler* 464 U.S. 67, 70 (1983) (per curiam)  
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- Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)  
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- Jones v. United States*, 527 U.S. 373, 389 (1999)  
statutory language must be read in context and a phrase gathers meaning from the words around it; LBP-09-15, 70 NRC 217 (2009)

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- Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)  
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- Kelley v. Selin*, 42 F.3d 1501, 1521 (6th Cir. 1995)  
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- Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)  
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- Kleppe v. Sierra Club*, 427 U.S. 390 (1976)  
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- Leary v. United States*, 395 U.S. 6, 46 n.93 (1969)  
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- Lewis v. United States*, 445 U.S. 55, 60 (1980)  
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- Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989)  
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- Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989)  
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- Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903)  
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- Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 831 (1973)  
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- Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973)  
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- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986)  
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- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991)  
the alternatives discussion in the environmental report or environmental impact statement need not include every possible alternative, but every reasonable alternative; LBP-09-16, 70 NRC 298 (2009); LBP-09-19, 70 NRC 488 (2009)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 195 (1991)  
licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 396 (2009)
- Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983)  
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-09-13, 70 NRC 176 (2009)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992)  
precedents for resolving issues concerning uranium enrichment licensing are provided; CLI-09-15, 70 NRC 17 (2009)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)  
precedents for resolving issues concerning uranium enrichment licensing are provided; CLI-09-15, 70 NRC 17 (2009)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 303 (1997)  
the purpose of financial qualification requirements of 10 C.F.R. 50.33(f) is to ensure the protection of public health and safety and the common defense and security and not to evaluate the financial wisdom of the proposed project; LBP-09-10, 70 NRC 83 (2009)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997)  
the 10 C.F.R. Part 70 financial criteria can be met by conditioning the materials license to require funding commitments to be in place prior to construction and operation; CLI-09-15, 70 NRC 18 (2009)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)  
precedents for resolving issues concerning uranium enrichment licensing are provided; CLI-09-15, 70 NRC 17 (2009)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998)  
the requirement to discuss alternatives in the environmental report parallels NEPA's requirement that an environmental impact statement provide a detailed statement of reasonable alternatives to a proposed action; LBP-09-16, 70 NRC 298 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004)  
although a licensing board will take into account any information from reply briefs that legitimately amplifies issues presented in the original petitions, it will not consider instances of what essentially constitute untimely attempts to amend the original petitions; LBP-09-17, 70 NRC 323 (2009)  
reply briefs that raise new issues must address the nontimely filing and new-contention factors in section 2.309(c) or (f)(2); LBP-09-17, 70 NRC 324 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)  
a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-17, 70 NRC 323 (2009)  
admission of new contentions under 10 C.F.R. 2.309(f)(2) does not run afoul of the Commission's aversion to petitioners who disregard NRC's timeliness requirements, nor does it allow petitioners to add new contentions that simply did not occur to them at the outset; LBP-09-10, 70 NRC 139 (2009)  
petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 323 n.41 (2009)  
under 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

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- 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-09-17, 70 NRC 325 n.50 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004)  
a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-17, 70 NRC 323 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)  
petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 323 n.41 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623-25 (2004)  
under 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, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-09-17, 70 NRC 325 n.50 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 625 (2004)  
although a licensing board will take into account any information from reply briefs that legitimately amplifies issues presented in the original petitions, it will not consider instances of what essentially constitute untimely attempts to amend the original petitions; LBP-09-17, 70 NRC 323 n.41 (2009)  
in an abundance of caution and in order to give petitioners every benefit of the doubt, the board considers whether any of the material at issue in a reply brief that would not constitute legitimate amplification might be admissible under the criteria of section 2.309(c) or (f)(2); LBP-09-17, 70 NRC 324 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC 22, 36 (2005)  
an approach that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy for disposition of depleted tails; CLI-09-15, 70 NRC 18 (2009)  
depleted uranium from an enrichment facility is appropriately classified as a low-level radioactive waste; CLI-09-15, 70 NRC 18 (2009)  
precedents for resolving issues concerning uranium enrichment licensing are provided; CLI-09-15, 70 NRC 17 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-17, 62 NRC 5 (2005)  
precedents for resolving issues concerning uranium enrichment licensing are provided; CLI-09-15, 70 NRC 17 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005)  
the agency's environmental review need only account for those impacts that have some likelihood of occurring or are reasonably foreseeable; LBP-09-26, 70 NRC 970 (2009)  
with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-09-26, 70 NRC 956 n.68 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006)  
applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed in an environmental report; CLI-09-20, 70 NRC 924 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 55 (2004)  
NRC's adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction that regulatory policy should take; LBP-09-26, 70 NRC 956, 981 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004)  
a proposed contention that fails to directly controvert the application or that mistakenly asserts the application does not address a relevant issue is subject to dismissal; LBP-09-27, 70 NRC 1014 (2009)  
the reach of a contention necessarily hinges upon its terms and its stated bases; LBP-09-26, 70 NRC 953 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004)  
although a licensing board will take into account any information from reply briefs that legitimately amplifies issues presented in the original petitions, it will not consider instances of what essentially constitute untimely attempts to amend the original petitions; LBP-09-17, 70 NRC 323 (2009)



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- reply briefs that raise new issues must address the nontimely filing and new-contention factors in section 2.309(c) or (f)(2); LBP-09-17, 70 NRC 324 (2009)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006)  
the requirements of NEPA and, by extension, NRC's regulations implementing NEPA are subject to a rule of reason, and only reasonably foreseeable environmental impacts must be addressed;  
LBP-09-26, 70 NRC 963, 970 (2009)
- Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973)  
in construction permit and operating license proceedings for power reactors, petitioner is presumed to have standing to intervene if petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm; CLI-09-20, 70 NRC 915 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)  
intervention petitioner must establish a concrete and particularized injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and is arguably within the zone of interests protected by the governing statute; CLI-09-20, 70 NRC 915 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)  
injury-in-fact is defined as an invasion of a legally protected interest that is concrete and particularized and actual or imminent; LBP-09-13, 70 NRC 176 (2009)  
to establish causation, petitioner must show that there is a causal connection between the injury and the conduct complained of; LBP-09-13, 70 NRC 176 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)  
an injury-in-fact must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-09-13, 70 NRC 176 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)  
the nontrivial increased risk to persons living within a 50-mile radius of a nuclear reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; LBP-09-16, 70 NRC 242 (2009)  
to establish standing in federal court, a party must show injury-in-fact, causation, and redressability; CLI-09-20, 70 NRC 916 (2009); LBP-09-13, 70 NRC 175-76 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)  
to establish standing petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-09-16, 70 NRC 240 (2009)  
when assessing whether an individual or organization has set forth a sufficient interest, the Commission has applied contemporaneous judicial concepts of standing; LBP-09-16, 70 NRC 240 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)  
persons living adjacent to federally licensed facilities need not satisfy ordinary standing requirements to challenge the federal license; CLI-09-20, 70 NRC 916-17 (2009)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992)  
because NEPA is a procedural statute, petitioners need not show that favorable rulings on their NEPA contentions will require denial of the license, but rather that favorable rulings will require that procedures intended for protection of their members' concrete interests will be observed; LBP-09-16, 70 NRC 243 n.33 (2009)
- Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987)  
care should be taken in dealing with judgments that are final, but still subject to direct review, so as to avoid the risks of denying relief on the basis of a judgment that is subsequently overturned;  
LBP-09-24, 70 NRC 713 (2009)
- Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007)  
carbon dioxide falls within the Clear Air Act's definition of air pollutants subject to EPA's regulatory authority; LBP-09-17, 70 NRC 363 (2009)
- Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497, 517-18 (2007)  
an alleged injury to health and safety, shared equally by many, can form the basis for standing;  
LBP-09-18, 70 NRC 399 (2009)

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- Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1273 (1983)  
when a Commission regulation permits the use of a particular analysis, a contention asserting that a different analysis or technique should be utilized is inadmissible because it indirectly attacks the Commission's regulations; LBP-09-16, 70 NRC 255 (2009)
- Meyer v. Strouse*, 221 A.2d 191, 192 (Pa. 1966)  
defendant's appeal of ouster from office of tax collector was dismissed as moot because during pendency of appeal, the term of office had expired; LBP-09-14, 70 NRC 196 n.15 (2009)
- Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973)  
the contention admissibility decision should not examine, under the guise of materiality or scope, whether the environmental impacts that petitioners allege have been omitted from the environmental report are indeed reasonable or significant, or whether an alternative that petitioners propound is reasonable; LBP-09-10, 70 NRC 86 n.29 (2009)
- Morgan v. United States*, 304 U.S. 1, 18-19 (1938)  
the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them; LBP-09-24, 70 NRC 793 n.176 (2009)
- National Credit Union Administration v. First National Bank*, 522 U.S. 479, 492 (1998)  
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue, and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-09-13, 70 NRC 176 (2009)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972)  
the NEPA requirement to consider alternatives to a proposed action is governed by the rule of reason applicable to all NEPA-required alternatives analyses; LBP-09-26, 70 NRC 970 (2009)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834-36 (D.C. Cir. 1972)  
in the context of NEPA, NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the permits and licenses issued by other governmental agencies; LBP-09-21, 70 NRC 594 n.36 (2009)  
Staff and applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater in their environmental impact statement and environmental report; LBP-09-25, 70 NRC 889 (2009)  
the fact that an agency other than NRC has jurisdiction to issue a permit concerning a certain environmental impact of the project does not mean that the subject may be excluded from the environmental report or environmental impact statement; LBP-09-10, 70 NRC 100 (2009); LBP-09-16, 70 NRC 278 (2009)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)  
an alternative need not be considered in detail if it is technologically unproven, unsafe, too costly, or otherwise impracticable; LBP-09-16, 70 NRC 299 n.211 (2009)
- Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 822 F.2d 104, 129 n.25 (D.C. Cir. 1987)  
the National Environmental Policy Act applies to agencies of the federal government, not to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 87 (2009)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews; CLI-09-15, 70 NRC 5 (2009); LBP-09-26, 70 NRC , 981 n.229 (2009)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 136-37 (3d Cir. 2009)  
a state challenge to NRC's conclusion with regard to terrorist attacks failed to demonstrate that the NRC could undertake a more meaningful analysis of the specific risks associated with an aircraft attack on a nuclear plant; LBP-09-10, 70 NRC 116 (2009)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 140 (3d Cir. 2009)  
NEPA does not require NRC to consider the environmental consequences of hypothetical terrorist attacks at NRC-licensed facilities; LBP-09-18, 70 NRC 412-13 (2009)

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- Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 59 NRC 333, 344 (1999)  
the Commission has long recognized the benefits of participation in NRC proceedings by representatives of interested states; LBP-09-16, 70 NRC 291 (2009)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), *remanded on other grounds sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979)  
although the Commission is not strictly bound by mootness doctrine, the agency's adjudicatory tribunals have generally adhered to the principle; LBP-09-15, 70 NRC 209 (2009)  
because NRC is not subject to the jurisdictional limitations placed on the federal courts by the case or controversy provision in Article III of the Constitution, there is no insuperable barrier to its rendition of an advisory opinion on issues that have been indisputably mooted by events occurring subsequent to licensing board decision; LBP-09-15, 70 NRC 210 (2009)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 55 (1978), *remanded on other grounds sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979)  
given the expectation that the same issue will arise in other proceedings, the board decides a legal issue on the timing of applicant's financial assurance; LBP-09-15, 70 NRC 212 (2009)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 917 (2008)  
any supporting material provided by petitioner, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-09-26, 70 NRC 954 (2009)
- Northern States Power Co.* (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978)  
any appeal by petitioners of the admitted contentions must abide the end of the case, i.e., wait approximately 2 or 3 years until the Staff issues the FSER and FEIS and the final disposition of the evidentiary hearing on the three admitted contentions; LBP-09-10, 70 NRC 147 n.89 (2009)
- Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006)  
judicial concepts of standing are generally followed in NRC proceedings; LBP-09-10, 70 NRC 69 (2009); LBP-09-18, 70 NRC 395 (2009)
- Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 164 (2006)  
a request for additional information by NRC, in itself, does not constitute grounds for a contention; LBP-09-10, 70 NRC 144 (2009)
- Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 750 (2005)  
at the contention admissibility stage, all that is required is that the petitioner provide an expert opinion or some alleged fact, or facts, in support of its position; LBP-09-26, 70 NRC 955 n.65 (2009)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141-42 (2007)  
licensing boards are required apply the Commission's directive that outside the Ninth Circuit, NEPA does not require the evaluation of the impact of terrorist attacks by aircraft or other means; LBP-09-18, 70 NRC 413 (2009)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 328, *aff'd*, CLI-06-17, 63 NRC 727 (2006)  
replies may provide only legitimate amplifications of the original contentions or a logical/legal response to the answers of the Staff and applicant; LBP-09-17, 70 NRC 323 (2009)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351 (2006)  
the most important showing that petitioners must make for admission of a late-filed contention is good cause, if any, for the failure to file on time; LBP-09-10, 70 NRC 144 (2009)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-63, *aff'd*, CLI-06-17, 63 NRC 727 (2006)  
a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-17, 70 NRC 323 (2009)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 362-363, *aff'd*, CLI-06-17, 63 NRC 727 (2006)  
the issue that generally arises under 10 C.F.R. 2.309(f)(1)(i) is whether a contention is stated with sufficient specificity; LBP-09-17, 70 NRC 326 (2009)

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- Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 866 (9th Cir. 2005)  
information that the environmental report provides must be accurate and up-to-date in order to support an agency's determination that a project will have no significant impact on the environment; LBP-09-16, 70 NRC 268 n.127 (2009)
- Otherson v. Department of Justice, Immigration & Naturalization Service*, 711 F.2d 267, 274 (D.C. Cir. 1983)  
a challenge is easily overcome by the board conducting a realistic and rational examination of the record in the criminal case to determine whether a reasonable jury could have grounded its verdict on any basis other than that asserted by the Staff as having been the controlling issue; LBP-09-24, 70 NRC 723 n.96(2009)  
to determine whether to apply collateral estoppel to a general verdict, a trial judge is to examine the record of the prior trial in detail to see if the jury might have disbelieved some aspects of the acts charged; LBP-09-24, 70 NRC 723 n.96 (2009)
- Pa'ina Hawaii, LLC*, CLI-06-18, 64 NRC 1, 7 (2006)  
although interested governmental entities would not have a formal role in a proceeding absent the admission of parties and contentions, boards expect that such entities would be kept appropriately apprised of the other participants' settlement efforts; LBP-09-23, 70 NRC 670 n.33 (2009)
- Pa'ina Hawaii, LLC*, LBP-06-12, 63 NRC 403, 413 (2006), *petition for reconsideration denied*, CLI-06-25, 64 NRC 128 (2006)  
contentions of omission claim that the application fails to contain information on a relevant matter as required by law and provides supporting reasons for the petitioner's belief; LBP-09-10, 70 NRC 123 (2009); LBP-09-16, 70 NRC 264 (2009); LBP-09-27, 70 NRC 995 (2009)
- Pa'ina Hawaii, LLC*, LBP-06-12, 63 NRC 403, 414 (2006)  
contentions that challenge the legal sufficiency of applicant's environmental report and final safety analysis report are within the scope of a combined proceeding; LBP-09-10, 70 NRC 124 (2009)  
if a contention makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue and raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance; LBP-09-16, 70 NRC 245 (2009)  
petitioner must show that information missing from a license application is required by the Commission's regulations; LBP-09-18, 70 NRC 431 (2009)  
pleading requirements of 10 C.F.R. 2.309(f)(1)(v) call for a recitation of facts or expert opinion supporting the issue raised, but are inapplicable to a contention of omission beyond identifying the regulatively required missing information; LBP-09-16, 70 NRC 244 (2009)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 343 n.53 (2002)  
ratepayer impacts are outside the scope of a combined license proceeding because the state, not the NRC, is charged with protecting ratepayers' interests; LBP-09-10, 70 NRC 80 (2009)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992)  
merely because a petitioner might have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings; LBP-09-18, 70 NRC 402 (2009)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 37 (1993)  
nonparty interested state status has been granted to state utility commissions; LBP-09-16, 70 NRC 291 n.190 (2009)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007)  
NRC Staff should base its environmental analysis of a potential terrorist attack on information available in agency records and other information on the design, mitigative, and security arrangements bearing on likely environmental consequences, consistent with the requirements of NEPA, the Ninth Circuit's decision, and the regulations for the protection of sensitive and safeguards information; CLI-09-15, 70 NRC 5-6 (2009)

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- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1 (2008)  
guidance on how NRC treats NEPA-terrorism contentions is provided; CLI-09-15, 70 NRC 6 (2009)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509 (2008); CLI-08-8, 67 NRC 193 (2008)  
guidance on how NRC treats NEPA-terrorism contentions is provided; CLI-09-15, 70 NRC 6 (2009)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 428, 429 (2002)  
a 17-mile proximity presumption was adopted in a case involving an application to construct and operate an ISFSI where all parties agreed that 17 miles was an appropriate radius upon which to presume standing; LBP-09-20, 70 NRC 578 (2009)
- Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)  
where all factors are met, the application of collateral estoppel by the subsequent tribunal is to some degree a discretionary matter; LBP-09-24, 70 NRC 712 n.59 (2009)
- Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-76-6, 9 NRC 291, 295-96 (1979)  
boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-09-10, 70 NRC 121 n.56 (2009); LBP-09-16, 70 NRC 256 (2009); LBP-09-25, 70 NRC 875 n.37 (2009)
- Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999)  
the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding; LBP-09-24, 70 NRC 813 (2009)
- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982)  
an alleged injury to health and safety, shared equally by many, can form the basis for standing; LBP-09-18, 70 NRC 399 (2009)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)  
the purpose of the contention admissibility rules is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-26, 70 NRC 952 (2009)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)  
a contention that attacks applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-09-26, 70 NRC 956 (2009)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33 (1974)  
contentions that attack applicable statutory requirements, challenge the basic structure of the NRC's regulatory process, or merely express generalized policy grievances are not appropriate for a licensing board hearing; LBP-09-18, 70 NRC 403 (2009)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)  
the contention requirements were never intended to be turned into a fortress to deny intervention; LBP-09-21, 70 NRC 602 n.94 (2009)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 n.33 (1974)  
NRC's adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction that regulatory policy should take; LBP-09-26, 70 NRC 956, 981 (2009)
- Portland Cement Association. v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom.*
- Portland Cement Corp. v. Administrator, Environmental Protection Agency*, 417 U.S. 921 (1974)  
materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-26, 70 NRC 953 (2009)
- Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)  
in assessing whether petitioner has standing, NRC has long applied contemporaneous judicial concepts of standing; CLI-09-20, 70 NRC 915 (2009); LBP-09-13, 70 NRC 175 (2009)

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- Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979)  
contentions that fall outside the scope of the proceeding must be rejected; LBP-09-26, 70 NRC 953 (2009)
- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)  
contentions that attack a Commission rule, or seek to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-09-18, 70 NRC 403 (2009); LBP-09-26, 70 NRC 978 (2009)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 411 (2009)  
where applicant provided a plan for storage of low-level radioactive waste, there is no litigable issue; LBP-09-27, 70 NRC 1015-16 (2009)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 431 (2009)  
the scope of an adjudicatory proceeding is specified by the notice of hearing; LBP-09-25, 70 NRC 889 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 107 (2007)  
whether other permits may be required from other agencies is outside the scope of NRC proceedings, and those concerns are properly raised before those respective permitting authorities; LBP-09-21, 70 NRC 594 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 296 (2007)  
a significant pattern of regular contacts within the 50-mile radius around the plant is sufficient to establish proximity-based standing; LBP-09-18, 70 NRC 401 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 302-12 (2007)  
a detailed summary of relevant case law on contention admissibility is provided; LBP-09-17, 70 NRC 324 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 19 (2007)  
a standing ruling in one proceeding is not dispositive of a determination in another proceeding with the same petitioner because the ruling was not the subject of appellate review; LBP-09-18, 70 NRC 401 (2009)  
the process of sifting and weighing participants' factual proffers often calls upon a board to make difficult choices, so that a petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself; LBP-09-18, 70 NRC 401-02 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 19 n.9 (2007)  
the better practice for a petitioner is to submit a fully developed showing regarding standing in each proceeding in which it seeks to intervene, regardless of whether it has previously been found to have standing relative to the facility that is the locus of the proceedings; LBP-09-18, 70 NRC 401 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 (2007)  
a significant pattern of regular contacts within the 50-mile radius around the plant is sufficient to establish proximity-based standing; LBP-09-18, 70 NRC 401 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 n.13 (2007)  
in seeking to establish standing in a licensing adjudication based on regular activities within a proximity zone, petitioner is best served by accurately delineating in as much detail as practicable the particulars associated with the proximity, timing, and duration of those activities; LBP-09-18, 70 NRC 402 n.88 (2009)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007)  
a contention should be dismissed if it does not directly controvert a position taken by the applicant in the license application; LBP-09-27, 70 NRC 1016 (2009)

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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999)  
petitioner's residence within a 50-mile radius of the proposed facility has established standing in his own right, and, accordingly, representational standing has been established through him; LBP-09-18, 70 NRC 399 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)  
a lack of specificity will be sufficient to reject a claim of standing; LBP-09-18, 70 NRC 402 n.85 (2009)  
the Commission gives substantial deference to a board's rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 35 (2009); CLI-09-22, 70 NRC 933 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)  
failure of a contention to meet any of the pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) precludes its admission; LBP-09-17, 70 NRC 324 (2009); LBP-09-21, 70 NRC 592 (2009); LBP-09-26, 70 NRC 952 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000)  
any appeal by petitioners of the admitted contentions must abide the end of the case, i.e., wait approximately 2 or 3 years until the Staff issues the FSER and FEIS and the final disposition of the evidentiary hearing on the three admitted contentions; LBP-09-10, 70 NRC 147 n.89 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001)  
challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 862 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 259 (2001)  
the agency uses a threshold probability for design basis events of 1 in 10 million for nuclear power plants; LBP-09-26, 70 NRC 972 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)  
NUREGs are guidance documents, with no binding effect, but are entitled to special weight, such that it is appropriate to consider in evaluating contentions; LBP-09-17, 70 NRC 368 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 265 (2001)  
the threshold probability for design basis events should be set at one in a million; LBP-09-17, 70 NRC 369 n.349 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 353 (2002)  
under NEPA the Commission looks to the reasonably foreseeable impacts of simply licensing the facility, not the reasonably foreseeable effects of a successful terrorist attack; LBP-09-26, 70 NRC 971 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 357 (2002)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews; LBP-09-26, 70 NRC 980 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 400 (2002)  
rules of statutory construction must be employed to give each word Congress used a separate and distinct significance that is consistent with its ordinary meaning; LBP-09-30, 70 NRC 1049 n.11 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 135-36 (2004)  
any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed; LBP-09-26, 70 NRC 968 n.147 (2009)

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- 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-09-18, 70 NRC 404 (2009); LBP-09-26, 70 NRC 954 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 146 (2006)  
in considering alternatives under NEPA, an agency must take into account the needs and goals of the parties involved in the application; LBP-09-10, 70 NRC 127 (2009); LBP-09-17, 70 NRC 379 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179, *aff'd as to other matters*, CLI-98-13, 48 NRC 26 (1998)  
"materiality" requires petitioner to show why the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-27, 70 NRC 1006 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff'd as to other matters*, CLI-98-13, 48 NRC 26 (1998)  
the subject matter of a contention must impact the grant or denial of a pending license application; LBP-09-27, 70 NRC 1006 (2009)  
there must be some significant link between the deficiency claimed in a contention and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment; LBP-09-27, 70 NRC 1006 (2009)
- 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-09-17, 70 NRC 326 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 173 (2002)  
in applying collateral estoppel principles, the question is not whether the subsequent tribunal believes that the prior tribunal correctly decided the issue at hand, but rather, if all factors of the doctrine are met, collateral estoppel comes into play; LBP-09-24, 70 NRC 711-12 n.58 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 182 (2002)  
an exception to the application of collateral estoppel occurs when broad public policy considerations or special public interest factors are involved such that an agency's need for flexibility outweighs the reasons underlying this repose doctrine so as to favor relitigation of a particular issue; LBP-09-24, 70 NRC 712 n.60 (2009)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 479 (2003)  
reasonable alternatives under NEPA do not include alternatives that are impractical, that present unique problems, or that cause extraordinary costs; LBP-09-16, 70 NRC 298 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008)  
a combined license applicant is authorized to reference an application for a design certification; LBP-09-10, 70 NRC 75-76 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 2-3 (2008)  
challenges to the Commission regulations regarding the design certification process are inadmissible; LBP-09-18, 70 NRC 414 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 67 NRC 1, 3-4 (2008)  
a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 269 (2009); LBP-09-18, 70 NRC 415 (2009)  
applicant for a construction permit or a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-17, 70 NRC 334 (2009)



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- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008)  
a contention asserting omissions from the combined license application that is not admissible need not be referred to the Staff and held in abeyance; LBP-09-10, 70 NRC 78 n.19 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 68 NRC 317, 322 (2009)  
for a contention to be held in abeyance, it must otherwise be admissible; LBP-09-18, 70 NRC 407 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324, 327 (2009)  
a contention asserting omissions from the combined license application that is not admissible need not be referred to the Staff and held in abeyance; LBP-09-10, 70 NRC 78 n.19 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 327 (2009), *remanding* LBP-08-21, 68 NRC 554, 561-64 (2008)  
the Commission directed the board to determine whether a contention concerning a certification application has been docketed but not granted was otherwise admissible under 10 C.F.R. 2.309(f)(1), in which case it might be held in abeyance and referred to the Staff; LBP-09-17, 70 NRC 334 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 566-69 (2008)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews outside the Ninth Circuit; LBP-09-26, 70 NRC 981 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 576 (2008)  
accuracy of an applicant's cost estimate is not material to the findings the NRC must make under NEPA; LBP-09-16, 70 NRC 298 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 586-87 (2008)  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 337 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 587 (2008)  
challenges to the Waste Confidence Rule are prohibited; LBP-09-10, 70 NRC 114 (2009)  
contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 587 n.35 (2008)  
licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 114 (2009)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-09-8, 69 NRC 736, 745 (2009)  
until the reactor design is certified and the rulemaking proceeding concluded, the design continues to change, creating potentially new safety and environmental concerns; LBP-09-18, 70 NRC 414 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 71-72 (2009)  
the six criteria that govern the admissibility of contentions are summarized; LBP-09-21, 70 NRC 592 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86 (2009)  
Staff and applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater in their environmental impact statement and environmental report; LBP-09-25, 70 NRC 889 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 87-88 (2009)  
NEPA has only a limited role to play in interpreting Part 51's requirements for the environmental report; LBP-09-16, 70 NRC 259 n.103 (2009)

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- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 88 (2009)  
because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, initial contentions necessarily focus on the adequacy of the applicant's ER under Part 51; LBP-09-25, 70 NRC 890 (2009)  
when NRC issues the environmental impact statement, petitioners have the opportunity to file a second wave of environmental contentions, which focus on the adequacy of the NRC Staff's EIS (or EA) under NEPA; LBP-09-25, 70 NRC 896 n.182 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 107-08 (2009)  
NEPA implicitly requires agencies to consider measures to mitigate environmental impacts; LBP-09-19, 70 NRC 536 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 121 (2009)  
boards have authority to narrow low-level radioactive waste contentions; LBP-09-16, 70 NRC 253 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 121-25 (2009)  
contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 253 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 126-28 (2009)  
although NRC does not consider Council on Environmental Quality pronouncements to be binding, they are entitled to substantial deference; LBP-09-17, 70 NRC 380 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 135 (2009)  
a contention is not admissible if it is not plausibly explained or supported by alleged facts; LBP-09-21, 70 NRC 634 (2009)  
because petitioners fail to create a genuine issue, the board need not resolve whether applicant's purpose is unreasonably narrow or whether a proposed alternative is so far beyond the realm of reason that it must be rejected out of hand; LBP-09-21, 70 NRC 625 (2009)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 145 (2009)  
a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts; LBP-09-22, 70 NRC 656 n.34 (2009)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)  
scope of an adjudicatory proceeding is specified by the notice of hearing, and contentions that raise matters outside that defined scope must be rejected; LBP-09-18, 70 NRC 431 (2009); LBP-09-25, 70 NRC 889 (2009)
- 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-09-17, 70 NRC 329 (2009)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989)  
petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions; LBP-09-10, 70 NRC 130 (2009)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982)  
a contention that attacks applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-09-26, 70 NRC 956 (2009)

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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982)  
determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits; LBP-09-26, 70 NRC 954 (2009)
- Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 2005 I.D. LEXIS 27, at \*4 (Bureau of Indian Affairs, Dep't of Interior, Mar. 7, 2005)  
the executive branch is not bound by the same constitutional constraints as Article III courts, but it has consistently followed the same principles of declining to consider moot cases, in the interest of administrative economy; LBP-09-14, 70 NRC 196 n.15 (2009)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)  
in determining whether intervention petitioner has established the necessary interest, licensing boards follow guidance found in judicial concepts of standing, as stated in federal court case law; LBP-09-13, 70 NRC 175 (2009); LBP-09-17, 70 NRC 321-22 n.30 (2009)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998)  
standing requires that a petitioner allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-09-13, 70 NRC 176 (2009)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 n.2 (1998)  
although the Commission commonly looks to Article III concepts for guidance, it is not required to automatically follow them in all respects because NRC proceedings are not subject to Article III; LBP-09-15, 70 NRC 210 (2009)
- Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979)  
licensing boards review NRC Staff's enforcement order *de novo* to determine on the basis of the hearing record whether the charges are sustained and the sanction imposed is warranted; LBP-09-24, 70 NRC 706 (2009)
- Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536-37 (1979)  
NRC Staff's role at a hearing in an enforcement proceeding is akin to that of a prosecutor, and it has the burden to prove its allegations by a preponderance of the reliable, probative, and substantial evidence; LBP-09-24, 70 NRC 706 (2009)
- Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222-23 (7th Cir. 1990)  
district court erred in using constructive knowledge because the law required actual knowledge; LBP-09-24, 70 NRC 708 n.46 (2009)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 334, 350 (1989)  
NEPA requires federal agencies to take a hard look at the environmental consequences of their actions; LBP-09-16, 70 NRC 287 (2009)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 334, 355-56 (1989)  
Council on Environmental Quality regulations are entitled to substantial deference; LBP-09-16, 70 NRC 260 n.104 (2009)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)  
NEPA itself does not mandate particular results, but simply prescribes the necessary process; LBP-09-25, 70 NRC 895 (2009)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989)  
NEPA implicitly requires that the environmental impact statement disclose mitigation measures; LBP-09-16, 70 NRC 259 (2009)
- Rochester Gas & Electric Corp.* (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233 (1983)  
licensing boards might have authority to order the renouncing of a licensing proceeding pending before it; LBP-09-23, 70 NRC 668 n.27 (2009)
- 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)  
any contention that fails to controvert the application directly, or that mistakenly asserts the application fails to address an issue that the application does address, is defective; LBP-09-18, 70 NRC 404 (2009); LBP-09-26, 70 NRC 955, 968 n.147 (2009); LBP-09-27, 70 NRC 1016 (2009)

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- San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 709 (9th Cir. 2009)  
the Clean Water Act does not authorize regulation of discharges to groundwater even if such groundwater is adjacent to navigable water; LBP-09-25, 70 NRC 890 n.145 (2009)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2005), *cert. denied*, 549 U.S. 1166 (2007)  
the Commission has declined to require the agency to consider terrorist threats outside the Ninth Circuit as part of the NEPA review process; LBP-09-10, 70 NRC 116 (2009)  
NRC and its licensees are required to address the environmental impacts of a successful terrorist attack on a nuclear plant; LBP-09-17, 70 NRC 381 (2009); LBP-09-18, 70 NRC 412 (2009)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1033 (9th Cir. 2006)  
NEPA requires dealing with uncertainties by inclusion in an environmental impact statement of a summary of existing credible scientific evidence relevant to evaluating the reasonably foreseeable significant adverse impacts regarding those events with potential catastrophic consequences, even if their probability is low; LBP-09-26, 70 NRC 971 (2009)  
the analysis of reasonably foreseeable significant adverse impacts regarding those events with potential catastrophic consequences must be supported by credible scientific evidence, must not be based on pure conjecture, and must be within the rule of reason; LBP-09-26, 70 NRC 971 (2009)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007)  
NEPA analysis performed as a result of an NRC licensing decision should consider the potential environmental consequences of a terrorist attack on the facility under review; CLI-09-15, 70 NRC 5 (2009)
- Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322, 326 (5th Cir. 1980)  
the National Environmental Policy Act applies to agencies of the federal government, not to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 87 (2009)
- Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 880 (1st Cir. 1978)  
there is no absolute right to cross-examination; LBP-09-10, 70 NRC 145 (2009)
- Sequoyah Fuels Corp.*, CLI-95-2, 41 NRC 179, 190 (1995)  
licensing board decisions have no precedential effect beyond the immediate proceeding in which they were issued; LBP-09-15, 70 NRC 212 (2009)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13-14 (2001)  
redressability requires petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-09-13, 70 NRC 177 (2009)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma, Site), CLI-94-9, 40 NRC 1, 7 (1994)  
for a party seeking a stay, an overwhelming showing of likelihood of success on the merits can overcome a weak showing of irreparable harm; CLI-09-23, 70 NRC 937 (2009)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)  
an organization seeking to establish representational standing must demonstrate that at least one of its members would be affected by the proposed action and identify that member by name and address and show that the member would have standing to intervene in its own right and that the identified member has authorized the organization to request a hearing on its behalf; LBP-09-16, 70 NRC 240 n.22 (2009); LBP-09-20, 70 NRC 574 (2009)  
the requisite injury to establish standing may be either actual or threatened but must nonetheless be concrete and particularized, not conjectural or hypothetical; LBP-09-28, 70 NRC 1024 (2009)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994)  
a board's determination of standing does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-09-13, 70 NRC 177 (2009)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)  
persons who reside or frequent the area within a 50-mile radius of the reactor are presumed to have standing to participate in a proceeding involving that reactor; LBP-09-17, 70 NRC 322 (2009)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), LBP-94-5, 39 NRC 54, 74, *aff'd*, CLI-94-12, 40 NRC 64 (1994)  
even in the absence of constructive notice, the possibility remains that a petitioner had actual notice of the right to request a hearing; LBP-09-20, 70 NRC 572 (2009)

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- where petitioner lacked constructive notice of the opportunity to request a hearing, the board ruled that petitioner acted reasonably when it filed its hearing request within 10 days of its receipt of actual notice; LBP-09-20, 70 NRC 572 (2009)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994)
- the benefit of the doubt should be given to the potential intervenor in order to prevent the dismissal of a petition due to inarticulate draftsmanship or procedural or pleading defects; LBP-09-18, 70 NRC 396 (2009)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 182 (2007)
- judicial concepts of standing are applied in NRC proceedings; LBP-09-28, 70 NRC 1024 (2009)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 183 (2007)
- if an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify that member by name and address, show that the member would have standing to intervene in his/her own right, and show that the identified member has authorized the organization to request a hearing on his/her behalf; LBP-09-16, 70 NRC 240 (2009)
- to demonstrate organizational standing, petitioner must show an injury in fact to the interests of the organization itself; LBP-09-16, 70 NRC 240 (2009); LBP-09-20, 70 NRC 574 (2009)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 192-93 (2007)
- the first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. 2.309(f)(2)(iii) or nontimely under section 2.309(c); LBP-09-10, 70 NRC 138 (2009)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007)
- if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c) which specifically applies to nontimely filings; LBP-09-27, 70 NRC 998-99 (2009)
- thirty days is a reasonable limit for fulfilling the timing requirement of 10 C.F.R. 2.309(f)(2)(iii) because of the significant effort involved in identifying new information, assembling the required expertise, and then drafting a contention that satisfies 10 C.F.R. 2.309(f)(1); LBP-09-27, 70 NRC 1003 (2009)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008)
- boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-09-16, 70 NRC 256 (2009)
- Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354-55 (1999)
- a lack of specificity will be sufficient to reject a claim of standing; LBP-09-18, 70 NRC 402 n.85 (2009)
- Shieldalloy Metallurgical Corp.* (Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, 352 (2007),  
*appeal denied*, CLI-07-20, 65 NRC 499 (2007)
- the issue that generally arises under 10 C.F.R. 2.309(f)(1)(i) is whether a contention is stated with sufficient specificity; LBP-09-17, 70 NRC 326 (2009)
- Sierra Club v. Morton*, 405 U.S. 727 (1972)
- to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-13, 70 NRC 178 (2009)
- Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)
- injury-in-fact to establish standing requires more than a general interest in preserving the environment; LBP-09-28, 70 NRC 1025 n.31 (2009)
- to establish organizational standing, petitioner must allege more than an injury to a cognizable interest; LBP-09-13, 70 NRC 191 (2009)
- Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)
- a broadly stated interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved; LBP-09-13, 70 NRC 178 (2009)

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- the injury-in-fact necessary to establish organizational standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-09-13, 70 NRC 178 (2009)
- Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478, 1485 (9th Cir. 1993)  
the National Environmental Policy Act applies to agencies of the federal government, not to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 87 (2009)
- Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 31 (3d Cir. 1995)  
a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; LBP-09-16, 70 NRC 264 n.118 (2009)
- Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997)  
blindly adopting applicant's goals is a losing proposition because it does not allow for the full range of alternatives required by NEPA; LBP-09-10, 70 NRC 128 (2009); LBP-09-17, 70 NRC 379 (2009)  
NEPA requires an agency to exercise a degree of skepticism in dealing with the self-serving statements from the prime beneficiary of a project and to look at the general goal of the project, rather than only those alternatives by which a particular applicant can reach its own specific goals; LBP-09-10, 70 NRC 128 (2009); LBP-09-17, 70 NRC 379 (2009)
- Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)  
petitioner must show that there is a causal connection between the injury and the conduct complained of; LBP-09-13, 70 NRC 176 (2009)
- Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)  
the reach of 33 U.S.C. § 1371(c)(2) is confined to navigable waters, which do not even encompass all surface waters; LBP-09-25, 70 NRC 890 n.145 (2009)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 100-05 (2009)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews outside the Ninth Circuit; LBP-09-26, 70 NRC 981 (2009)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 108-10 (2009)  
the reasonableness of energy conservation as an alternative in light of the need for a large amount of baseload electric power is questioned; LBP-09-10, 70 NRC 132 (2009)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 110 (2009)  
failure to provide facts or expert opinion sufficient to show that the environmental report disregarded a feasible alternative based on either wind power, solar power, or some combination of the two renders the contention inadmissible; LBP-09-16, 70 NRC 304 (2009)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 110-11 (2009)  
applicant is not required to examine all possible alternatives, but only those that can reasonably accomplish the applicant's purpose; LBP-09-10, 70 NRC 129 (2009)
- South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-25, 70 NRC 867, 895 (2009)  
section 2.309(f)(1)(vi) is not a second hurdle of materiality that an intervenor must meet, but rather requires that intervenor identify the specific parts of the combined license application that it disputes and show that resolution of those disputes is material to the licensing decision; LBP-09-27, 70 NRC 1011 (2009)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-07-24, 66 NRC 38, 38 & n.2 (2007)  
a decision dismissing the contested adjudication relating to a combined license has no impact on the subsequent need to conduct a mandatory hearing relating to a combined license application, over which the Commission would preside; LBP-09-23, 70 NRC 671 n.38 (2009)

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- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007)  
petitioner is obliged to present the factual and expert support for its contention, and failure to provide it requires that the contention be rejected; LBP-09-26, 70 NRC 954 (2009)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254 (2007)  
any contention that fails to directly controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed; LBP-09-26, 70 NRC 955, 968 n.147 (2009)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 267-68 (2007)  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-10, 70 NRC 114 (2009); LBP-09-17, 70 NRC 337 (2009)  
contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)  
licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 114-15 (2009)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 269 & n.16 (2007)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews outside the Ninth Circuit; LBP-09-26, 70 NRC 981 (2009)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 272 (2007)  
the fact that an Integrated Resource Plan revision process has been instituted does not support a claim that the final supplemental environmental impact statement is inadequate because of its reliance on earlier studies; LBP-09-26, 70 NRC 973 (2009)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-13, 69 NRC 575, 577 (2009)  
a contention asserting omissions from the combined license application that is not admissible need not be referred to the Staff and held in abeyance; LBP-09-10, 70 NRC 78 n.19 (2009)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33 (2009)  
contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 253 (2009)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC 33, 36 (2009)  
section 52.79(a)(3) sets no quantity or time restrictions relative to onsite storage of low-level radioactive waste; LBP-09-27, 70 NRC 1014 (2009)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC 33, 37 (2009)  
applicant must explain how it intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20, including, but not limited to, low-level radioactive waste handling and storage; LBP-09-27, 70 NRC 1001 (2009)  
the information required in a combined license application by section 52.79(a)(3) is largely dependent on the individual applicant's plans; LBP-09-27, 70 NRC 1014 (2009)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 69 NRC 33, 38 (2009)  
the licensing board did not commit reversible error by admitting a contention based on low-level radioactive waste storage duration because the NRC Staff itself had issued a Request for Additional Information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 1015 n.123 (2009)

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- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 149, *appeals denied*, CLI-09-16, 70 NRC 33 (2009)  
in assessing intervention petitions, licensing boards must determine whether standing elements are met even though there are no objections to petitioner's standing; LBP-09-23, 70 NRC 669 n.32 (2009)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 159-64 (2009)  
contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 253 (2009)
- Southern Pacific Communication Co. v. American Telephone & Telegraph Co.*, 740 F.2d 1011, 1018 (D.C. Cir. 1984)  
pendency of an appeal need not preclude reliance on the lower court's decision being appealed to estop relitigation of the same matter in another forum; LBP-09-24, 70 NRC 713 n.62 (2009)
- Spirit of the Sage Council v. Norton*, 411 F.3d 225, 230 (D.C. Cir. 2005) (citations omitted)  
the doctrines of standing, ripeness, and mootness all derive from the case or controversy requirement of Article III; LBP-09-15, 70 NRC 210 n.29 (2009)  
when a federal court dismisses a claim as moot and avoids any further consideration of the merits of that claim, it does so because the claim no longer satisfies the case or controversy requirement of Article III; LBP-09-15, 70 NRC 210 (2009)
- SSIH Equipment S.A. v. U.S. International Trade Commission*, 718 F.2d 365, 370 (Fed. Cir. 1983)  
the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding; LBP-09-24, 70 NRC 813 (2009)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)  
allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final SER is issued will serve to further the Commission's objective to ensure a fair, prompt, and efficient resolution of contested issues; CLI-09-15, 70 NRC 13 n.2 (2009)  
the Commission expects that the licensing board, NRC Staff, the applicant, and other parties will follow the applicable guidance; CLI-09-15, 70 NRC 12 (2009)  
this guidance is intended to improve the management and the timely completion of the proceeding and addresses hearing schedules, parties' obligations, contentions, and discovery management; CLI-09-15, 70 NRC 13 (2009)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998)  
a party is allowed to appeal a ruling on contentions only if the order wholly denies a petition for leave to intervene or a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied; CLI-09-18, 70 NRC 861 (2009)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981)  
the licensing board is required to use the applicable techniques specified in this guidance to ensure prompt and efficient resolution of contested issues; CLI-09-15, 70 NRC 13 (2009)
- Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998)  
the case or controversy requirement of Article III is rooted in the separation of powers; LBP-09-15, 70 NRC 210 n.30 (2009)
- Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998)  
when a claim becomes moot in federal court, the court loses jurisdiction to decide the merits of that claim; LBP-09-15, 70 NRC 210 (2009)
- Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)  
under judicial concepts of standing, a board considers 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-09-17, 70 NRC 321-22 n.30 (2009); LBP-09-20, 70 NRC 574 (2009); LBP-09-26, 70 NRC 947 (2009)
- Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980)  
if the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-09-16, 70 NRC 287 n.180 (2009)



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- Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1150 (2009)  
organizations seeking to challenge regulations of a government agency failed to demonstrate standing where they did not demonstrate a concrete application of the regulations that threatened imminent harm to their interests; CLI-09-20, 70 NRC 917 n.27 (2009)
- Sunderland v. United States*, 266 U.S. 226, 233 (1924)  
the Trust Responsibility requires federal agencies to take actions or refrain from taking actions in fulfillment of Congress's duty to protect the Indians; LBP-09-13, 70 NRC 189 (2009)
- Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957)  
it is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas; LBP-09-24, 70 NRC 798 n.5 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007)  
outside the Ninth Circuit, NEPA does not require NRC to consider the environmental consequences of hypothetical terrorist attacks at NRC-licensed facilities; LBP-09-18, 70 NRC 412 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146-47 (2007)  
licensing boards are required apply the Commission's directive that outside the Ninth Circuit, NEPA does not require the evaluation of the impact of terrorist attacks by aircraft or other means; LBP-09-18, 70 NRC 413 (2009); LBP-09-26, 70 NRC 980, 981 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 292 (2004)  
the adequacy of applicant's control room and equipment design radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a COLA or Standard Design Certification proceeding; LBP-09-10, 70 NRC 110 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 296-97 (2004)  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-10, 70 NRC 114 (2009); LBP-09-17, 70 NRC 337 (2009)  
contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)  
licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 115 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, 35, permit issuance authorized, CLI-07-14, 65 NRC 216 (2007)  
early site permit applications, as partial construction permit applications, are subject to the Atomic Energy Act hearing requirement, as well as all procedural requirements in 10 C.F.R. Part 2; LBP-09-19, 70 NRC 456 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, 88, permit issuance authorized, CLI-07-14, 65 NRC 216 (2007)  
NRC provides detailed guidance for Staff personnel reviewing the safety aspects of early site permit applications; LBP-09-19, 70 NRC 541 (2009)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, 90, permit issuance authorized, CLI-07-14, 65 NRC 216 (2007)  
items for which sufficient information is lacking at the early site permit stage of the licensing process may be subject to deferral for consideration at the combined license stage; LBP-09-19, 70 NRC 541 (2009)
- Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373, 1380 (D.C. Cir. 1979)  
the limitations imposed by article III on what matters federal courts may hear affect administrative agencies only indirectly; LBP-09-14, 70 NRC 195 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68 (2009)  
absent a waiver, a contention that constitutes a collateral attack on NRC regulations is inadmissible; CLI-09-20, 70 NRC 923 (2009)

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- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 70 n.2 (2009)  
the Commission may have more to offer regarding the need for a NEPA carbon footprint analysis in new reactor licensing proceedings; LBP-09-19, 70 NRC 495 n.17 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 72 (2009)  
the Commission will review referred rulings only if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; CLI-09-21, 70 NRC 930 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 73 (2009)  
Part 61 is inapplicable in a combined license proceeding because it applies only to land disposal facilities that receive waste from others, not to onsite facilities where licensee intends to store its own low-level radioactive waste; LBP-09-10, 70 NRC 121 (2009); LBP-09-27, 70 NRC 1002 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 73-74 n.24 (2009)  
the Commission rejected a low-level radioactive waste contention challenging applicant's 2-year plan for storing Class B and Class C waste; LBP-09-27, 70 NRC 1014 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 74-75 (2009)  
the extent to which a combined license application's environmental report must address the management of low-level wastes is discussed; LBP-09-10, 70 NRC 122 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 75 (2009)  
contentions that challenge 10 C.F.R. 51.51, Table S-3, are inadmissible because no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-09-10, 70 NRC 115, 122 (2009)  
licensing boards may not admit contentions that directly or indirectly challenges Table S-3; LBP-09-16, 70 NRC 255 (2009); LBP-09-18, 70 NRC 407 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 75 n.9 (2009)  
Table S-3 assumes that solid, low-level waste from reactors will be disposed of through shallow land burial, and concludes that this kind of disposal will not result in the release of any significant effluent to the environment; LBP-09-16, 70 NRC 255 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 75 n.30 (2009)  
Table S-3 assumes that solid, low-level waste from reactors will be disposed of through shallow land burial, and that this kind of disposal will not result in the release of any significant effluent to the environment; LBP-09-10, 70 NRC 122 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 76-77 (2009)  
questions of the safety and environmental impacts of onsite low-level waste storage are largely site- and design-specific, and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions; LBP-09-10, 70 NRC 122 (2009); LBP-09-16, 70 NRC 256 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 77 (2009)  
contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 253 (2009)  
even if the Commission had chosen to promulgate a low-level waste confidence rule, such a rule would not, if it followed the pattern of the high-level waste confidence rule, alter any requirements to consider in the adjudicatory proceeding the environmental impacts of waste storage during the term of the license; LBP-09-10, 70 NRC 122 (2009); LBP-09-16, 70 NRC 256 (2009)

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- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 77 n.42 (2009)
- contentions on information a COL applicant should supply in order to satisfy NRC regulations regarding the safety of long-term storage of low-level radioactive waste are application-specific and thus would benefit from further development by the board and the parties; CLI-09-16, 70 NRC 38 n.27 (2009)
  - in a future combined license proceeding, a petitioner could proffer an application-specific contention suitable for litigation on the subject of onsite storage of low-level radioactive waste; LBP-09-10, 70 NRC 122 (2009); LBP-09-16, 70 NRC 255 (2009)
  - power reactor licensees have safely stored and managed low-level radioactive waste under NRC oversight for years without the development of immediate safety problems or concerns; LBP-09-16, 70 NRC 253 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 378 (2008)
- the proximity presumption applies to combined license proceedings; LBP-09-16, 70 NRC 240 (2009)
  - under the proximity presumption, petitioner in an operating license proceeding who lives within 50 miles of a nuclear power reactor is presumed to have standing without the need specifically to plead injury, causation, and redressability; LBP-09-26, 70 NRC 947 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 378-80 (2008)
- under the proximity presumption, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-09-18, 70 NRC 395 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 394 (2008)
- NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews outside the Ninth Circuit; LBP-09-26, 70 NRC 981 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 399-400, 404, 407, 429 (2008)
- a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-17, 70 NRC 323 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 404 (2008)
- failure to provide facts or expert opinion sufficient to show that the environmental report disregarded a feasible alternative based on either wind power, solar power, or some combination of the two renders the contention inadmissible; LBP-09-16, 70 NRC 304 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 413-15 (2008), *rev'd*, CLI-09-3, 69 NRC 68, 78 (2009)
- contention focusing exclusively on regulations governing waste disposal is inadmissible; CLI-09-16, 70 NRC 35 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 414 (2008)
- Part 61 does not apply to onsite facilities where the licensee intends to store its own low-level radioactive waste; LBP-09-10, 70 NRC 121 n.57 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 415-16 (2008)
- contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 337 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 416 (2008)
- challenges to the Waste Confidence Rule are prohibited; LBP-09-10, 70 NRC 114 (2009)
  - licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 114 (2009)

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- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 418-20 (2008)  
contentions involving possible errors in Table S-3 have been referred to the Commission; LBP-09-21, 70 NRC 617 (2009)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 456-57 (2008); LBP-09-18, 70 NRC 406 (2009)  
contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 406 (2009)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 990 (2009)  
although an expert may be misinterpreting data submitted by applicant, this is not considered at the contention admissibility stage; LBP-09-27, 70 NRC 1010 n.97 (2009)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 218 n.176 (2004)  
sanction for deliberate misconduct by an unlicensed individual is determined by applying four factors to assess the safety significance of the misconduct and nine factors to assess mitigating or aggravating circumstances; LBP-09-24, 70 NRC 851 n.44 (2009)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-74 (1992)  
absent good cause, a petitioner's demonstration on the other late-filing factors must be compelling; LBP-09-26, 70 NRC 949 (2009)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)  
petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate because a petitioner's status can change over time and the bases for its standing in an earlier proceeding may no longer apply; LBP-09-18, 70 NRC 401 (2009)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993)  
the mootness doctrine derives from the Constitution's limitation of federal courts' jurisdiction to cases or controversies; LBP-09-15, 70 NRC 209 (2009)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 204 (1993)  
despite not being bound by the case or controversy requirement, common sense counsels against proceeding with an adjudication where no effective relief can be granted; LBP-09-14, 70 NRC 196 n.16 (2009)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)  
a contention should be dismissed if it does not directly controvert a position taken by the applicant in the license application; LBP-09-27, 70 NRC 1016 (2009)
- Textron Lycoming Reciprocating Engine Division, Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of America, International Union*, 523 U.S. 653, 657 (1998)  
the most natural way to read a provision that sets forth a general obligation followed by a set of specific requirements is that the specific requirements provide the details necessary to fulfilling the general obligation; LBP-09-15, 70 NRC 217 n.57 (2009)
- Tiger v. Western Investment Co.*, 221 U.S. 286 (1911)  
the Trust Responsibility requires federal agencies to take actions or refrain from taking actions in fulfillment of Congress's duty to protect the Indians; LBP-09-13, 70 NRC 189 (2009)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 560-61 (1977)  
if a tribunal were to render an adverse ruling against a party based exclusively on the collateral estoppel doctrine, which was subsequently reversed, the party against whom collateral estoppel had been applied would be entitled to file a timely motion with the tribunal seeking appropriate relief; LBP-09-24, 70 NRC 813 n.5 (2009)

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- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977)  
collateral estoppel is a form of issue preclusion that prevents the relitigation of issues of law or fact that have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies; LBP-09-24, 70 NRC 711, 809 (2009)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 562 (1977)  
a tribunal, when considering the applicability of collateral estoppel, may not look behind the decision to determine whether its findings of fact and conclusions of law were well founded; LBP-09-24, 70 NRC 815 (2009)  
tribunals are required to conclude that the jury understood the trial court's instructions and rendered well-founded findings of fact in compliance with those instructions; LBP-09-24, 70 NRC 820 (2009)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 562-63 (1977)  
collateral estoppel may be applied in administrative adjudicatory proceedings; LBP-09-24, 70 NRC 711 (2009)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 563 (1977)  
potentially duplicative and unnecessary litigation in the second forum does not take place while an appeal is pending, but if the appeal later proves successful, thus invalidating the original judgment upon which collateral estoppel had been based, then the litigation in the second forum is allowed to proceed; LBP-09-24, 70 NRC 713 (2009)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 563 n.7 (1977)  
overriding competing policy considerations can provide discretion to withhold the application of collateral estoppel; LBP-09-24, 70 NRC 712 n.60 (2009)  
where the four elements for applying collateral estoppel are satisfied, and no overriding public policy consideration dictates against its application, a board should not withhold the application of collateral estoppel as a discretionary matter; LBP-09-24, 70 NRC 813 n.5 (2009)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 563-64 & n.7 (1977)  
in applying collateral estoppel principles, the question is not whether the subsequent tribunal believes that the prior tribunal correctly decided the issue at hand, but rather, if all factors of the doctrine are met, collateral estoppel comes into play; LBP-09-24, 70 NRC 711-12 n.58 (2009)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 719 (2005)  
for a party seeking a stay, an overwhelming showing of likelihood on the merits can overcome a weak showing of irreparable harm; CLI-09-23, 70 NRC 937 (2009)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 392 (2008)  
the initial mandatory disclosures in Subpart J only apply to extant documentary material; LBP-09-30, 70 NRC 1047 n.9 (2009)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009)  
a generalized assertion, without specific ties to NRC regulatory requirements or to safety in general, does not provide adequate support demonstrating the existence of a genuine dispute of fact or law with respect to the construction authorization application; LBP-09-27, 70 NRC 111-12 (2009)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009)  
NRC rules permit contentions that raise issues of law as well as contentions that raise issues of fact; LBP-09-10, 70 NRC 86 n.30 (2009)  
the notice of hearing establishes that the permissible scope because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, initial contentions necessarily focus on the adequacy of the applicant's ER under Part 51; LBP-09-25, 70 NRC 889 n.139 (2009)
- U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004)  
in assessing whether petitioner has standing, NRC has long applied contemporaneous judicial concepts of standing; CLI-09-20, 70 NRC 915 (2009); LBP-09-28, 70 NRC 1024 (2009)

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- U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272-73 (2001)  
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue, and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-09-13, 70 NRC 176 (2009)
- Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984)  
NRC shall grant a hearing upon the request of any person whose interests may be affected by the proceeding and must grant such a hearing on any material contention; LBP-09-10, 70 NRC 77, 139 n.79 (2009)  
the hearing requirement of section 189(a) of the Atomic Energy Act has been interpreted to mean that the hearing must encompass all material factors bearing on the licensing decision; LBP-09-15, 70 NRC 221 (2009)
- United States v. Alghazouli*, 517 F.3d 1179, 1187 (9th Cir. 2008)  
rules of statutory construction must be employed to give each word Congress used a separate and distinct significance that is consistent with its ordinary meaning; LBP-09-30, 70 NRC 1049 n.11 (2009)
- United States v. Asubike*, 564 F.3d 59 (1st Cir. 2009)  
"deliberate ignorance" or "willful blindness" instruction has its place and sees frequent usage in drug possession cases where the defendant purports not to know, for example, what is in the package someone asked him to deliver in secretive fashion; LBP-09-24, 70 NRC 719 n.81 (2009)
- United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992)  
instruction to juries on deliberate ignorance or willful blindness can relieve the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt; LBP-09-24, 70 NRC 720 n.85 (2009)
- United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992)  
despite the cautionary disclaimer with an instruction to juries on deliberate ignorance or willful blindness, there is a possibility that the jury will be led to employ a negligence standard and convict a defendant on an impermissible ground; LBP-09-24, 70 NRC 720 n.85 (2009)  
there is no doubt that there was evidence of either actual knowledge or no knowledge on the defendant's part, but other evidentiary theories relating to deliberate ignorance were dismissed; LBP-09-24, 70 NRC 721 n.90 (2009)
- United States v. Beaty*, 245 F.3d 617 (6th Cir. 2001)  
where the prosecution must rely on circumstantial evidence to establish a defendant's knowledge, the use of a deliberate ignorance instruction is unexceptional and entirely proper and is given in illegal gambling business cases; LBP-09-24, 70 NRC 820 (2009)
- United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004)  
courts generally refer to actual knowledge as knowledge derived from direct evidence, whereas knowledge based on the deliberate ignorance theory is derived from circumstantial evidence; LBP-09-24, 70 NRC 819 (2009)  
the knowledge component of the deliberate ignorance theory is slightly less than knowledge to a 100% certainty where the prosecutor's case is based on circumstantial evidence that precludes establishing defendant's knowledge to a 100% certainty; LBP-09-24, 70 NRC 818 n.8, 821 n.10 (2009)
- United States v. Dawkins*, 562 F.2d 567, 569 (8th Cir. 1977)  
with respect to a prosecutor's role, government lawyers should understand and follow the venerable maxim that the government wins when justice is done; LBP-09-24, 70 NRC 799 n.8 (2009)
- United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 243 (1973)  
the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them; LBP-09-24, 70 NRC 792-93 n.176 (2009)
- United States v. Guerrero*, 114 F.3d 332, 344 n.12 (1st Cir. 1997)  
deliberate ignorance is tantamount to knowledge; LBP-09-24, 70 NRC 817 (2009)

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- United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (*en banc*)  
“deliberate ignorance” or “willful blindness” instruction has its place and sees frequent usage in drug possession cases where the defendant purports not to know, for example, what is in the package someone asked him to deliver in secretive fashion; LBP-09-24, 70 NRC 719 n.81 (2009)
- United States v. Heredia*, 483 F.3d 913, 918 n.4 (9th Cir. 2007) (*en banc*)  
a deliberately ignorant defendant is one who was aware of the high probability of a critical fact, but deliberately ignored that probability; LBP-09-24, 70 NRC 819 (2009)  
a negligent defendant is one who should have had similar suspicions but, in fact, did not; LBP-09-24, 70 NRC 819 (2009)  
a reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; LBP-09-24, 70 NRC 819 (2009)  
deliberate ignorance is categorically different from negligence or recklessness; LBP-09-24, 70 NRC 819 (2009)
- United States v. Heredia*, 483 F.3d 913, 919 n.6 (9th Cir. 2007) (*en banc*)  
a finding of deliberate ignorance is equivalent to a finding of knowledge, because the deliberate ignorance theory focuses on defendant’s actual beliefs and actions; LBP-09-24, 70 NRC 817 (2009)
- United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (*en banc*)  
a conviction based on deliberate ignorance requires a finding that a defendant acted deliberately, and a deliberate action is one that is intentional, premeditated, and fully considered; LBP-09-24, 70 NRC 819 (2009)
- United States v. Heredia*, 483 F.3d 913, 920 n.10 (9th Cir. 2007) (*en banc*)  
the deliberate ignorance instruction defines when an individual has sufficient information so that he can be deemed to know something; LBP-09-24, 70 NRC 818 n.8 (2009)  
the knowledge component of the deliberate ignorance theory is slightly less than knowledge to a 100% certainty in that the defendant does not take the final step to confirm that knowledge; LBP-09-24, 70 NRC 818 n.8 (2009)
- United States v. Heredia*, 483 F.3d 913, 922 n.13 (9th Cir. 2007) (*en banc*)  
deliberate ignorance is tantamount to knowledge; LBP-09-24, 70 NRC 817, 818 n.8, 819, 821 n.10, 822 n.11 (2009)
- United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (*en banc*)  
a jury is presumed to follow the instructions given to it, and there is no reason to fear that juries will be less able to do so when trying to sort out a criminal defendant’s state of mind than any other issue; LBP-09-24, 70 NRC 818 (2009)
- United States v. Heredia*, 483 F.3d 913, 923-24 (9th Cir. 2007) (*en banc*)  
tribunals are required to conclude that the jury understood the trial court’s instructions and rendered well-founded findings of fact in compliance with those instructions; LBP-09-24, 70 NRC 820 (2009)
- United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007) (*en banc*)  
recklessness or negligence never comes into play in the deliberate ignorance instruction, and there is little reason to suspect that juries will import these concepts into their deliberations; LBP-09-24, 70 NRC 818-19 (2009)
- United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995)  
a fundamental tenet of the jury system assumes that the jury complies with the instructions provided by the trial court; LBP-09-24, 70 NRC 815, 818, 820 (2009)  
the plain language of the Sixth Circuit Pattern Jury Instruction on deliberate ignorance forecloses the possibility that a jury will convict on the basis of negligence; LBP-09-24, 70 NRC 818 (2009)  
the warning to jurors that the added instruction on deliberate ignorance or willful blindness is not intended to allow them to base guilt on negligence or carelessness is sufficient to legitimize the instruction; LBP-09-24, 70 NRC 719 (2009)
- United States v. Monus*, 128 F.3d 376 (6th Cir. 1998)  
where the prosecution must rely on circumstantial evidence to establish a defendant’s knowledge, the use of a deliberate ignorance instruction is unexceptional and entirely proper and is given in fraud, money laundering, and conspiracy cases; LBP-09-24, 70 NRC 820 (2009)
- United States v. Navajo Nation*, 537 U.S. 488, 515 (2003)  
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- United States v. Olbres*, 61 F.3d 967, 971 (1st Cir. 1995)  
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- United States v. Orji-Nwosu*, 549 F.3d 1005 (5th Cir. 2008)  
“deliberate ignorance” or “willful blindness” instruction has its place and sees frequent usage in drug possession cases where the defendant purports not to know, for example, what is in the package someone asked him to deliver in secretive fashion; LBP-09-24, 70 NRC 719 n.81 (2009)
- United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007)  
where the prosecution must rely on circumstantial evidence to establish a defendant’s knowledge, the use of a deliberate ignorance instruction is unexceptional and entirely proper and is given in mail fraud, wire fraud, and money laundering cases; LBP-09-24, 70 NRC 820 (2009)
- United States v. Rayborn*, 491 F.3d 513, 521 (2007)  
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- United States v. Rivera*, 926 F.2d 1564, 1571 (11th Cir. 1991)  
the danger of instruction to juries on deliberate ignorance or willful blindness in an inappropriate case is that juries will convict on a basis akin to a standard of negligence; LBP-09-24, 70 NRC 720 n.85 (2009)
- United States v. Ross*, 502 F.3d 521 (6th Cir. 2007)  
where the prosecution must rely on circumstantial evidence to establish a defendant’s knowledge, the use of a deliberate ignorance instruction is unexceptional and entirely proper and is given in bank fraud cases; LBP-09-24, 70 NRC 820 (2009)
- United States v. Ross*, 502 F.3d 521, 528 (2007)  
the Sixth Circuit is increasingly focusing on problems caused when the evidence does not support the use of the deliberate ignorance charge; LBP-09-24, 70 NRC 719 n.82 (2009)
- United States v. Salerno*, 481 U.S. 739, 751-52 (1987)  
to succeed in imposing pretrial detention because the accused is a danger to the community, the government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably assure the community’s safety; LBP-09-24, 70 NRC 806 (2009)
- United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)  
given that the Oglala Lakota no longer own the land upon which ISL mines are located, it is plain that the mining operations are not occurring within the tribal boundaries; LBP-09-13, 70 NRC 184 (2009)
- United States v. Sioux Nation of Indians*, 448 U.S. 371, 382-83 (1980)  
the United States is no longer bound by the terms of the 1868 Fort Laramie Treaty; LBP-09-13, 70 NRC 187 (2009)
- United States v. Sioux Nation of Indians*, 448 U.S. 371, 410-12 (1980)  
Congress’s plenary power with respect to Native Americans entitles it to abrogate treaties with Native American nations; LBP-09-13, 70 NRC 187 n.32 (2009)
- United States v. Springer*, 262 Fed. Appx. 703, 706 (6th Cir. 2008)  
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- United States v. Tobeler*, 311 F.3d 1201, 1206 (9th Cir. 2002)  
rules of statutory construction must be employed to give each word Congress used a separate and distinct significance that is consistent with its ordinary meaning; LBP-09-30, 70 NRC 1049 n.11 (2009)
- United States v. Wasserson*, 418 F.3d 225, 237 (3rd Cir. 2005)  
deliberate ignorance instruction to juries must be tailored to avoid the implication that a defendant may be convicted simply because he or she should have known of the facts of which he or she was unaware; LBP-09-24, 70 NRC 720 n.85 (2009)
- United States v. Wilson*, 503 F.3d 195 (2d Cir. 2007)  
“deliberate ignorance” or “willful blindness” instruction has its place and sees frequent usage in drug possession cases where the defendant purports not to know, for example, what is in the package someone asked him to deliver in secretive fashion; LBP-09-24, 70 NRC 719 n.81 (2009)



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- United States v. Wofford*, 560 F.3d 341, 352 (5th Cir. 2009)  
where the *mens rea* required for conviction is that the defendant act knowingly or willfully, a deliberate ignorance instruction creates a risk that the jury might convict for negligence or stupidity, i.e., that the defendant should have been aware of the illegal conduct; LBP-09-24, 70 NRC 720 n.85 (2009)
- Upton v. Tribilcock*, 91 U.S. 45, 50 (1875)  
one who signs a contract is presumed to know its contents; LBP-09-24, 70 NRC 708 n.47 (2009)
- USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005)  
in source materials cases, petitioner has the burden to show a specific and plausible means of how proposed license activities may affect him or her; LBP-09-13, 70 NRC 177 (2009)  
no proximity presumption applies in source materials cases; LBP-09-13, 70 NRC 177 (2009)
- USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)  
contention admissibility requirements are deliberately strict and any contention that does not satisfy the requirements of 10 C.F.R. 2.309(f)(1) will be rejected; CLI-09-20, 70 NRC 914 (2009)
- USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006)  
the Commission will affirm decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion; CLI-09-20, 70 NRC 914 (2009)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)  
information, facts, and expert opinions provided by petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for the contention; LBP-09-26, 70 NRC 955 (2009)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462 (2006)  
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- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)  
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- USEC Inc.* (American Centrifuge Plant), CLI-07-5, 65 NRC 109 (2007)  
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- USEC Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596-97 (2005)  
in ruling on contention admissibility a board is not to look to the merits of the contention; LBP-09-17, 70 NRC 328 (2009)
- USEC Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 597 (2005), *aff'd*, CLI-06-10, 63 NRC 451 (2006)  
a bare assertion without the requisite support for claims is inadequate to support the admission of a contention; LBP-09-16, 70 NRC 273 (2009)  
mere mention of a document without providing its contents or an explanation of its significance cannot support admissibility of the contention; LBP-09-21, 70 NRC 602 n.94 (2009)  
presentation of excerpts from combined license application without further explanation does not provide sufficient support for a contention; LBP-09-16, 70 NRC 284 (2009)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978)  
not every conceivable alternative must be included in the environmental impact statement; LBP-09-17, 70 NRC 378 (2009)  
the concept of alternatives must be bounded by some notion of feasibility; LBP-09-17, 70 NRC 378 (2009)  
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- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978)  
the purpose of the contention admissibility rules is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-26, 70 NRC 952 (2009)
- Vermont Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519, 554 (1978)  
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- 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)  
information, facts, and expert opinions provided by petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for the contention; LBP-09-26, 70 NRC 955 (2009)  
the NEPA requirement to consider alternatives to a proposed action is governed by the rule of reason applicable to all NEPA-required alternatives analyses and does not extend to events that are remote and speculative; LBP-09-26, 70 NRC 970 (2009)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333 (1990)  
if the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law; LBP-09-26, 70 NRC 970 (2009)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129 (1990)  
low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-09-26, 70 NRC 970 (2009)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)  
an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed, demonstrate that the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-09-10, 70 NRC 115 (2009); LBP-09-13, 70 NRC 178 (2009)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294 (2008)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 303 (2008)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 312-14 (2008)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 313 n.86 (2008)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 313-21 (2008)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 314-15 (2008)  
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 315 (2008)  
a contention is material if it shows that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment; LBP-09-26, 70 NRC 953 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 316-17 (2008)  
contentions that challenge the legal sufficiency of applicant's environmental report and final safety analysis report are within the scope of a combined proceeding; LBP-09-10, 70 NRC 124 (2009)  
Part 61 does not apply to onsite facilities where the licensee intends to store its own low-level radioactive waste; LBP-09-10, 70 NRC 121 n.57 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 317 (2008)  
a contention of omission becomes moot if applicant cures the omission in its application; LBP-09-16, 70 NRC 245 (2009)  
arguments premised on the prediction that someday a nuclear plant site will become a permanent storage or disposal facility for low-level radioactive waste are too speculative and therefore not material to the findings the NRC must make to support the action that is involved in the present proceeding; LBP-09-16, 70 NRC 255 (2009)  
pleading requirements of 10 C.F.R. 2.309(f)(1)(v) call for a recitation of facts or expert opinion supporting the issue raised, but are inapplicable to a contention of omission beyond identifying the regulatively required missing information; LBP-09-16, 70 NRC 244 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 318 (2008)  
low-level radioactive waste disposal contentions have been admitted when that issue was not sufficiently discussed in the applications and there was no mention of the closure of the Barnwell facility; LBP-09-18, 70 NRC 410-11 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 335 (2008)  
petitioner does not have to prove its contention at the admissibility stage; LBP-09-26, 70 NRC 954 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 336-37 (2008)  
the Waste Confidence Rule is applicable to all new reactor proceedings, and contentions challenging the rule or seeking its reconsideration are inadmissible; LBP-09-17, 70 NRC 337 (2009); LBP-09-18, 70 NRC 406 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 337 (2008)  
challenges to the Waste Confidence Rule are prohibited; LBP-09-10, 70 NRC 114 (2009)  
licensing boards may not admit a contention that directly or indirectly challenges 10 C.F.R. 51.51, Table S-3; LBP-09-10, 70 NRC 114 (2009)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973)  
licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 396 (2009)
- Wagner v. City of Cleveland*, 574 N.E.2d 533, 536-37 (Ohio Ct. App. 1988)  
lower court's decision on a moot issue was found to be a vain act and a nullity; LBP-09-14, 70 NRC 196 n.15 (2009)

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- Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996)  
although NRC may require an applicant to submit certain information, the NRC cannot delegate its duty to comply with the National Environmental Policy Act to the applicant; LBP-09-10, 70 NRC 87 (2009)
- Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)  
courts must construe regulations in light of the statutes they implement, keeping in mind that where there is an interpretation of an ambiguous regulation that is reasonable and consistent with the statute, that interpretation is to be preferred; LBP-09-16, 70 NRC 261 (2009)
- Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994)  
redressability requires petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-09-13, 70 NRC 177 (2009)
- Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)  
under the rule of reason, the environmental impact statement need not consider an infinite range of alternatives, only reasonable or feasible ones; LBP-09-10, 70 NRC 127 (2009); LBP-09-17, 70 NRC 379 (2009); LBP-09-21, 70 NRC 626 n.271 (2009)
- Whitmore v. Arkansas*, 495 U.S. 149, 158-59 (1990)  
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-09-13, 70 NRC 176 (2009)
- Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)  
the requisite injury to establish standing may be either actual or threatened; LBP-09-28, 70 NRC 1024 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994)  
if the petitioner is an organization seeking to intervene in an NRC proceeding in its own right, it must allege that the challenged action will cause a cognizable injury to its interests or to the interests of its members; LBP-09-10, 70 NRC 115 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)  
as long as either denial of a license or issuance of a decision mandating compliance with legal requirements would alleviate a petitioner's potential injury, then under longstanding NRC jurisprudence the petitioner may prosecute any admissible contention that could result in the denial or in the compliance decision; CLI-09-20, 70 NRC 918 n.28 (2009)  
judicial concepts of standing require that a petitioner establish that it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute, that the injury can fairly be traced to the challenged action and that the injury is likely to be redressed by a favorable decision; LBP-09-10, 70 NRC 69 (2009); LBP-09-18, 70 NRC 395 (2009); LBP-09-28, 70 NRC 1024 (2009)  
once parties demonstrate that they have standing, the parties will then be free to assert any contention, which, if proved, will afford them the relief they seek; LBP-09-10, 70 NRC 69 (2009); LBP-09-16, 70 NRC 242 (2009); LBP-09-21, 70 NRC 592 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996)  
for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion, but must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-09-17, 70 NRC 328, 329 (2009); LBP-09-16, 70 NRC 290 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-95 (1998)  
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-13, 70 NRC 178 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998)  
NRC generally follows judicial concepts of standing, which require a petitioner to allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-09-26, 70 NRC 947 (2009)

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- the requisite injury to establish standing may be either actual or threatened; LBP-09-28, 70 NRC 1024 (2009)
- to establish standing, petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-09-16, 70 NRC 240 (2009); LBP-09-17, 70 NRC 321-22 n.30 (2009); LBP-09-20, 70 NRC 574 (2009)
- when assessing whether petitioner has set forth a sufficient interest to intervene, licensing boards apply judicial concepts of standing; LBP-09-16, 70 NRC 240 (2009); LBP-09-17, 70 NRC 321-22 n.30 (2009); LBP-09-20, 70 NRC 574 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998)
- to establish standing, petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-09-13, 70 NRC 176 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 203 (1998)
- an entity wishing to participate as a governmental body must demonstrate that it goes beyond an advisory role and exercises executive or legislative responsibilities; LBP-09-13, 70 NRC 186 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
- a contention is material if it shows that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment; LBP-09-26, 70 NRC 953 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 88-90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
- the NEPA requirement to consider alternatives to a proposed action is governed by the rule of reason applicable to all NEPA-required alternatives analyses and does not extend to events that are remote and speculative; LBP-09-26, 70 NRC 970 (2009)
- 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)
- a document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, for both what it does and does not show; LBP-09-27, 70 NRC 1009 (2009)
- petitioner's inaccurate reading and presentation of applicant's spent fuel storage plan cannot serve as a litigable basis for a contention; LBP-09-27, 70 NRC 1008 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996)
- although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner; LBP-09-27, 70 NRC 1006-07 (2009)
- for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion; LBP-09-27, 70 NRC 1006-07 (2009)
- petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-09-27, 70 NRC 1006-07, 1010 (2009)
- the contention admissibility rule does not require a petitioner to prove its case at the contention stage; LBP-09-27, 70 NRC 1006-07 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
- any material provided by petitioner in support of its contention, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-09-17, 70 NRC 328 (2009); LBP-09-21, 70 NRC 612 n.165 (2009); LBP-09-26, 70 NRC 954 (2009)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996)
- when information forming the foundation for a new or amended contention becomes available piecemeal over time, the admissibility decision turns on a determination about when, as a cumulative matter, the separate pieces of the information puzzle were sufficiently in place to make the particular concerns reasonably apparent; LBP-09-10, 70 NRC 143 n.82 (2009)
- Ziegler v. Connecticut General Life Insurance Co.*, 916 F.2d 548, 553 (9th Cir. 1990)
- inquiry into an individual's actual knowledge is entirely factual, requiring examination of the record; LBP-09-24, 70 NRC 708 (2009)

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- 10 C.F.R. Part 2  
parties are obligated to ensure that their arguments and assertions in their filings are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record; CLI-09-15, 70 NRC 16 (2009)  
the Commission expects that the licensing board, NRC Staff, the applicant, and other parties will follow the applicable requirements; CLI-09-15, 70 NRC 12 (2009)
- 10 C.F.R. 2.4  
a “potential party” is any person who intends or may intend to participate as a party by demonstrating standing and filing an admissible contention under section 2.309; CLI-09-15, 70 NRC 21-22 (2009)
- 10 C.F.R. 2.107(a)  
when applicant decides it no longer wishes to have the agency evaluate its application, the usual approach is for applicant to request that the agency permit it to withdraw its licensing request; LBP-09-23, 70 NRC 667 (2009)  
withdrawal of a license application is subject to such terms as the presiding officer may prescribe; LBP-09-23, 70 NRC 667 n.25 (2009)
- 10 C.F.R. 2.202(a)  
twenty days in which to request a hearing is the minimum required by the agency’s regulations for orders issued under this section; LBP-09-20, 70 NRC 571 (2009)
- 10 C.F.R. 2.202(a)(2)  
in addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well, all in 20 days, unless extended; LBP-09-24, 70 NRC 801 n.12 (2009)
- 10 C.F.R. 2.202(a)(3)  
when issuing an order modifying a license, the agency is required to inform the licensee or any other person adversely affected by the order of his or her right, within 20 days of the date of the order, or such other time as may be specified in the order, to demand a hearing; LBP-09-20, 70 NRC 571 n.27 (2009)
- 10 C.F.R. 2.202(c)(1)  
a hearing challenging an immediately effective enforcement order will be conducted expeditiously, giving due consideration to the rights of the parties; LBP-09-24, 70 NRC 687 n.4 (2009)
- 10 C.F.R. 2.202(c)(2)(i)  
a challenge to immediate effectiveness must state with particularity the reasons why the enforcement order is unsound; LBP-09-24, 70 NRC 804 n.16 (2009)  
in addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well; LBP-09-24, 70 NRC 801 n.12 (2009)  
the scope of early review of an enforcement order is severely limited and the order’s immediate effectiveness depriving the accused of the freedom to work pending trial is presumptively valid, placing the burden on the accused to demonstrate its invalidity; LBP-09-24, 70 NRC 801 (2009)  
the subject of an enforcement order has the right to challenge, on limited grounds, the immediate effectiveness of the order; LBP-09-24, 70 NRC 687 (2009)  
to successfully challenge an enforcement order’s target must show that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error; LBP-09-24, 70 NRC 801 (2009)

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- 10 C.F.R. 2.203  
settlement agreements become effective upon their execution by both parties, but agreements are contingent upon approval by the board; LBP-09-12, 70 NRC 166 (2009)
- 10 C.F.R. 2.206  
petitioner's request that NRC issue a demand for information to licensee regarding vibration levels prior to restart is denied; DD-09-2, 70 NRC 900-909 (2009)
- 10 C.F.R. 2.304(d)  
representations of a summary disposition movant are described; LBP-09-22, 70 NRC 652 (2009)
- 10 C.F.R. 2.309  
intervention petitions shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-09-15, 70 NRC 8 (2009)
- 10 C.F.R. 2.309(a)  
a petition for review and request for hearing must include a showing that the petitioner has standing; LBP-09-13, 70 NRC 175 (2009)  
any person or organization seeking to intervene in a licensing proceeding must establish standing and proffer at least one admissible contention that meets the requirements of section 2.309(f)(1); LBP-09-10, 70 NRC 69, 71 (2009); LBP-09-16, 70 NRC 243 (2009); LBP-09-17, 70 NRC 318 (2009); LBP-09-18, 70 NRC 394 (2009); LBP-09-26, 70 NRC 946 (2009); LBP-09-28, 70 NRC 1023 (2009)  
in ruling on a hearing request or intervention petition, licensing boards will determine whether petitioner has an interest affected by the proceeding; LBP-09-23, 70 NRC 669 (2009)  
NRC is required to hold a hearing upon the request of any person whose interest may be affected by the proceeding and to allow that person to intervene; CLI-09-20, 70 NRC 915 (2009)
- 10 C.F.R. 2.309(c)  
a motion and proposed contention filed later than 30 after the date when the new and material information on which it is based first becomes available shall be deemed nontimely; LBP-09-22, 70 NRC 647 (2009)  
for untimely new or amended contentions, the pleading shall include a motion for leave to file the contention and the support for the proposed new or amended contention showing that it satisfies section 2.309(f)(1); LBP-09-22, 70 NRC 647 (2009)  
petitions and contentions filed after the initial 60-day deadline are admissible only upon a balancing of eight factors; LBP-09-26, 70 NRC 948 (2009)  
the filing of late contentions is permitted if sufficient justification is provided; LBP-09-15, 70 NRC 211 (2009)  
the first step in assessing the admissibility of a new contention is to determine if it is timely or nontimely; LBP-09-10, 70 NRC 138 (2009)  
the most important of the eight factors is the first factor, a showing of good cause, if any, for the failure to file on time; LBP-09-10, 70 NRC 140 (2009)  
under 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, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-09-17, 70 NRC 325 n.50 (2009)
- 10 C.F.R. 2.309(c)(1)  
factors that must be addressed for nontimely intervention petitions, hearing requests, and contentions are set forth; LBP-09-20, 70 NRC 572-73 n.32 (2009)  
the most important showing that petitioners must make for admission of a late-filed contention is good cause, if any, for the failure to file on time; LBP-09-10, 70 NRC 144 (2009); LBP-09-26, 70 NRC 949 (2009)
- 10 C.F.R. 2.309(c)(1)(i)-(viii)  
nontimely petitions to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of eight factors; CLI-09-15, 70 NRC 9 (2009)
- 10 C.F.R. 2.309(c)(2)  
the Commission dispensed with all but the good cause factor for late-filed contentions; LBP-09-29, 70 NRC 1031 n.17 (2009)

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- 10 C.F.R. 2.309(d)  
a clause in a settlement agreement regarding standing does not apply to NRC Staff, nor would it bind a future licensing board to make any particular determination regarding whether any of the petitioners has established its standing, either as of right or as a matter of discretion; LBP-09-23, 70 NRC 669 (2009)  
intervention petitioner must be able to show how it would have personally suffered or will suffer a distinct and palpable harm that constitutes injury in fact; LBP-09-18, 70 NRC 400 (2009)  
NRC is required to hold a hearing upon the request of any person whose interest may be affected by the proceeding and to allow that person to intervene; CLI-09-20, 70 NRC 915 (2009)
- 10 C.F.R. 2.309(d)(1)  
a hearing request must state the name, address, and telephone number of the requestor, the nature of the requestor's right under the governing statutes to be made a party to the proceeding, the nature and extent of the requestor's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the requestor's interest; LBP-09-28, 70 NRC 1023 (2009)  
state and federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-09-15, 70 NRC 9 (2009)  
to demonstrate standing to intervene, petitioner must state, and boards must assess, the nature of petitioner's right under the governing statutes to be made a party, the nature and extent of petitioner's property, financial, or other interest, and the possible effect of the outcome of the proceeding on petitioner's interest; CLI-09-20, 70 NRC 915 (2009)  
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-13, 70 NRC 178 (2009)
- 10 C.F.R. 2.309(d)(1)(ii)-(iv)  
in ruling on a request for a hearing, boards should consider the nature of petitioner's right under the Atomic Energy Act or the National Environmental Policy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest; LBP-09-10, 70 NRC 69 (2009); LBP-09-13, 70 NRC 175 (2009); LBP-09-16, 70 NRC 239 (2009), 70 NRC 321-22 n.30 (2009); LBP-09-18, 70 NRC 394-95 (2009); LBP-09-20, 70 NRC 574 (2009); LBP-09-21, 70 NRC 590 (2009); LBP-09-26, 70 NRC 946-47 (2009)
- 10 C.F.R. 2.309(d)(2)  
a state, county, municipality, federally recognized Indian tribe, or agencies thereof may submit a petition to the Commission to participate as a party in a materials license proceeding; CLI-09-15, 70 NRC 9 (2009)
- 10 C.F.R. 2.309(d)(2)(i)  
an organization that is neither a federally recognized Indian tribe nor a local governmental body does not qualify for standing; LBP-09-13, 70 NRC 184 (2009)  
certain governmental entities are exempted from the requirement to show standing concerning activities that occur within their borders; LBP-09-13, 70 NRC 184 (2009)  
not all entities with governmental ties are entitled to participate in licensing proceedings as local governmental bodies; LBP-09-13, 70 NRC 186 (2009)  
the phrase "federally recognized Indian Tribe" was added to the regulation in order to comply with Executive Order 13,084; LBP-09-13, 70 NRC 184-85 (2009)
- 10 C.F.R. 2.309(d)(3)  
in ruling on hearing requests/intervention petitions, licensing boards will determine whether petitioner has an interest affected by the proceeding; LBP-09-23, 70 NRC 669 (2009)
- 10 C.F.R. 2.309(e)  
a clause in a settlement agreement regarding standing does not apply to NRC Staff, nor would it bind a future licensing board to make any particular determination regarding whether any of the petitioners has established its standing, either as of right or as a matter of discretion; LBP-09-23, 70 NRC 669 (2009)  
in ruling on discretionary intervention requests, licensing boards will consider and balance enumerated factors weighing in favor of and against allowing intervention; LBP-09-23, 70 NRC 669 (2009)



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- 10 C.F.R. 2.309(f)(1)
- a contention that fails to state an issue of law or fact and makes no attempt to comply with the contention pleading criteria is inadmissible; LBP-09-10, 70 NRC 78 (2009)
  - a legal issue contention need not satisfy all the contention admissibility criteria; LBP-09-29, 70 NRC 1032 (2009)
  - contention alleging that the threatened eastern fox snake inhabits the nuclear plant site and that construction activities for the new reactor will kill snakes, destroy their habitat, and might eliminate them from the area is within the scope of a combined license proceeding; LBP-09-16, 70 NRC 287 (2009)
  - contention asserting that DOE's description of its expert elicitation relating to a probabilistic volcanic hazard analysis update fails to comply with section 63.21(c)(19) or the NRC guidance document that DOE formally committed to follow, is admissible; LBP-09-29, 70 NRC 1034 (2009)
  - contention that the high-level waste application inadequately addresses generalized corrosion because it relies on flawed experimental data raises a genuine, material dispute with the application by pointing to specific sections that allegedly fail to comply with the NRC's requirements for conducting a post-closure performance assessment; LBP-09-29, 70 NRC 1036-37 (2009)
  - the determination of contention admissibility is not the time or place for broad policy arguments; LBP-09-10, 70 NRC 135 (2009)
  - the existence of a Staff request for additional information does not, by itself, constitute compliance with contention admissibility criteria, nor does it ensure the admission of a contention; LBP-09-10, 70 NRC 77 (2009)
  - the purpose of contention pleading requirements is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-10, 70 NRC 133 (2009)
  - the third step in determining the admissibility of any new contention is the requirement that it satisfy the six standards; LBP-09-10, 70 NRC 140 (2009)
  - to be admissible, contentions must satisfy six basic requirements; LBP-09-10, 70 NRC 71-72 (2009); LBP-09-21, 70 NRC 592 (2009)
  - to be admitted in a proceeding, a new contention must meet the new or amended contention requirements as well as the general contention admissibility requirements; LBP-09-9, 70 NRC 45 (2009)
  - to participate as a party in a combined license proceeding, intervention petitioner must not only establish standing, but must also proffer at least one admissible contention that meets the requirements of this section; LBP-09-16, 70 NRC 243 (2009)
  - with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-09-26, 70 NRC 955-56 (2009)
- 10 C.F.R. 2.309(f)(1)(i)
- contentions of omission must describe the information that should have been included in the environmental report and provide the legal basis that requires the omitted information to be included; LBP-09-16, 70 NRC 244 (2009)
  - the basic allegation that the environmental report does not comply with 10 C.F.R. Part 51 because it does not adequately address all indirect and cumulative environmental impacts that result from certain specified aspects of the proposed project provides a specific statement of the issue of law or fact to be raised or controverted; LBP-09-10, 70 NRC 101 (2009)
  - the issue that generally arises under this paragraph is whether a contention is stated with sufficient specificity; LBP-09-17, 70 NRC 326 (2009)
- 10 C.F.R. 2.309(f)(1)(i)-(vi)
- at the contention admissibility stage, a board merely decides whether the contentions meet the six pleading requirements; LBP-09-10, 70 NRC 86 (2009)
  - intervention petitioner for must establish standing and proffer at least one admissible contention that meets six requirements; LBP-09-18, 70 NRC 403 (2009); LBP-09-26, 70 NRC 951-52 (2009)
- 10 C.F.R. 2.309(f)(1)(ii)
- a brief explanation of the basis for the contention is required as a prerequisite to its admissibility; LBP-09-26, 70 NRC 952 (2009)
  - a brief explanation of the basis is an explanation of the rationale or theory of the contention; LBP-09-10, 70 NRC 100 (2009)

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- contentions of omission must describe the information that should have been included in the environmental report and provide the legal basis that requires the omitted information to be included; LBP-09-16, 70 NRC 244 (2009)
- petitioners' failure to explain or allege how or why a recirculation screen design is incomplete or the instrumentation and control design has a problem renders the contention inadmissible; LBP-09-10, 70 NRC 77 (2009)
- 10 C.F.R. 2.309(f)(1)(iii)
- assertions that building two new nuclear reactors in a troubled economy is fiscally irresponsible is outside the scope of a combined license proceeding; LBP-09-10, 70 NRC 82 (2009)
- by complying with the six contention requirements, an admissible contention must raise an issue that is both within the scope of the proceeding (normally defined by the hearing notice) and material to the findings the NRC must make to support the action involved; LBP-09-18, 70 NRC 403 (2009)
- challenges to 10 C.F.R. 51.51, Table S-3 are outside the scope of a combined license proceeding; LBP-09-10, 70 NRC 115 (2009); LBP-09-18, 70 NRC 407 (2009)
- claims related to the decommissioning of the facility are not currently ripe for review and are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 274 (2009)
- contentions that challenge the legal sufficiency of applicant's environmental report and final safety analysis report are within the scope of a combined license proceeding; LBP-09-10, 70 NRC 124 (2009)
- petitioner must demonstrate that the issue raised in the contention is within the scope of the proceeding; LBP-09-16, 70 NRC 244 (2009); LBP-09-17, 70 NRC 326 (2009); LBP-09-26, 70 NRC 953 (2009)
- petitioners' concerns regarding the applicant's commitments to relax conservatism in its laboratory testing and groundwater release analysis are in regard to the revised analysis to be submitted in response to the Staff RAI and therefore are dismissed as outside the scope of the proceeding; LBP-09-16, 70 NRC 274 (2009)
- releases from the nuclear fuel cycle in general, incidences of childhood cancers near nuclear power plants, and a request for the NRC to address radioactive releases from burning of coal at fossil fuel plants are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 285 (2009)
- revenue decoupling is a state regulatory matter that is outside of the scope of, and not material to, the NRC licensing process; LBP-09-10, 70 NRC 137 (2009)
- 10 C.F.R. 2.309(f)(1)(iv)
- arguments premised on the prediction that someday a nuclear plant site will become a permanent storage or disposal facility for low-level radioactive waste are too speculative and therefore not material to the findings the NRC must make to support the action that is involved in the proceeding; LBP-09-16, 70 NRC 255 (2009); LBP-09-27, 70 NRC 1002 (2009)
- petitioners must show that any issue raised in a contention has significance regarding the findings the NRC must make to support the action that is involved in the proceeding; LBP-09-17, 70 NRC 326-27 (2009); LBP-09-18, 70 NRC 403 (2009)
- releases from the nuclear fuel cycle in general, incidences of childhood cancers near nuclear power plants, and a request for the NRC to address radioactive releases from burning of coal at fossil fuel plants are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 285 (2009)
- revenue decoupling is a state regulatory matter that is outside of the scope of, and not material to, the NRC licensing process; LBP-09-10, 70 NRC 137 (2009)
- 10 C.F.R. 2.309(f)(1)(v)
- a bare assertion without the requisite support for claims is inadequate to support the admission of a contention; LBP-09-16, 70 NRC 273 (2009)
- a general assessment of radioactivity within waters of the Great Lakes Basin does not address specific issues with regard to the proposed reactor, and it does not provide any support for the petitioners' assertions needed to advance an admissible contention; LBP-09-16, 70 NRC 248-49 (2009)
- a legal issue contention is not required to provide facts or expert opinions; LBP-09-29, 70 NRC 1032 (2009)
- at the admissibility stage, petitioners are not required to support contentions by expert opinion, substantive affidavits, or evidence; LBP-09-10, 70 NRC 100 (2009)
- petitioner demonstrates a genuine dispute with the applicant on the adequacy of the water quality analysis; LBP-09-16, 70 NRC 278 (2009)

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petitioner is required merely provide a simple nexus between the contention and the referenced factual or legal support; LBP-09-21, 70 NRC 602 n.94 (2009); LBP-09-25, 70 NRC 873 n.16, 881 (2009)

petitioner is required to support its contentions with documents, expert opinion, or at least a fact-based argument; LBP-09-17, 70 NRC 328-29 (2009)

petitioner must provide a concise statement of the alleged facts or expert opinion that support the contention, references to sources and documents on which the petitioner intends to rely, and sufficient information to show that a genuine dispute exists; LBP-09-10, 70 NRC 136 n.75 (2009); LBP-09-16, 70 NRC 244 (2009); LBP-09-26, 70 NRC 954 (2009); LBP-09-27, 70 NRC 1006 (2009)

petitioners question the underlying analysis of fish kills in the environmental report as being outdated, but they fail to provide any information to show that the results of the study are no longer representative; LBP-09-16, 70 NRC 281 (2009)

pleading requirements call for a recitation of facts or expert opinion supporting the issue raised, but are inapplicable to a contention of omission beyond identifying the regulatively required missing information; LBP-09-16, 70 NRC 244 (2009)

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-09-26, 70 NRC 953 (2009)

10 C.F.R. 2.309(f)(1)(vi)

a contention must show that a genuine dispute exists on a material issue of law or fact with regard to the license application, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-09-26, 70 NRC 955 (2009)

a contention of omission claims that the application fails to contain information on a relevant matter as required by law and provides the supporting reasons for the petitioner's belief; LBP-09-10, 70 NRC 76, 123 (2009); LBP-09-16, 70 NRC 244, 264 (2009); LBP-09-27, 70 NRC 995 (2009)

a legal issue contention raises a genuine dispute with the application because it challenges DOE's performance assessment for the post-10,000-year period; LBP-09-29, 70 NRC 1032 (2009)

a properly pleaded contention of omission must challenge a specific portion of the application and provide a basis for demonstrating the alleged deficiency; LBP-09-26, 70 NRC 968 (2009)

at the admissibility stage, petitioners are not required to submit expert affidavits or evidence; LBP-09-10, 70 NRC 100 (2009)

contentions must be based on documents or other information available at the time the petition is to be filed, and must point out specifically where or how the combined license application is inadequate; LBP-09-10, 70 NRC 77 (2009)

if a contention makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue; LBP-09-16, 70 NRC 245 (2009)

information that a petitioner must provide in support of a contention in order to have it admitted for adjudication is described; LBP-09-17, 70 NRC 327 (2009)

petitioner demonstrates a genuine dispute with the applicant on the adequacy of the water quality analysis; LBP-09-16, 70 NRC 278 (2009)

petitioner must provide a concise statement of the alleged facts or expert opinion that support the contention, references to sources and documents on which the petitioner intends to rely, and sufficient information to show that a genuine dispute exists; LBP-09-10, 70 NRC 136 n.75 (2009)

petitioners' assertion that applicant's environmental report fails to include an analysis of the impacts of a governmental entity managing long-term storage of high-level waste onsite and cost quantifications of such management fails to create a genuine dispute that would warrant admission of the contention; LBP-09-21, 70 NRC 606 (2009)

petitioners' assertion that no exposure levels are safe is an impermissible challenge to the exposure limits set forth in the NRC's regulations; LBP-09-16, 70 NRC 285 (2009)

petitioners' failure to explain or allege how or why a recirculation screen design is incomplete or the instrumentation and control design has a problem renders the contention inadmissible; LBP-09-10, 70 NRC 77 (2009)

petitioners must show that any issue raised in a contention has significance regarding the findings the NRC must make to support the action that is involved in the proceeding; LBP-09-17, 70 NRC 326-27 (2009)

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- 10 C.F.R. 2.309(f)(2)
- a challenge to the environmental report is different from a challenge to the environmental impact statement; LBP-09-10, 70 NRC 88 (2009)
  - a contention is timely to the extent it challenges the adequacy of the new low-level radioactive waste storage plan, but untimely as to those aspects of the contention that merely reargue issues already decided by the board, without identifying any new information relevant to those issues; LBP-09-27, 70 NRC 998 (2009)
  - a motion for leave to file a new contention, accompanied by the proposed contention, shall be deemed timely if filed within 30 days of the date when the new and material information on which it is based first became available; LBP-09-29, 70 NRC 1035 n.42 (2009)
  - a new contention may be filed after the initial docketing with leave of the presiding officer upon a showing that the information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-27, 70 NRC 998 (2009); LBP-09-29, 70 NRC 1035 (2009)
  - contentions can only be founded on information that is available at the time the contention is to be filed; LBP-09-10, 70 NRC 139 (2009)
  - contentions challenging the combined license application must focus on the combined license application as it exists at that moment in time; LBP-09-10, 70 NRC 77 (2009)
  - for timely new or amended contentions, the pleading shall include a motion for leave to file the contention showing that it satisfies section 2.309(f)(1); LBP-09-22, 70 NRC 647 (2009)
  - if a party files a new contention within 30 days of the availability of the new information to that party, the contention will generally be considered timely; LBP-09-17, 70 NRC 330 n.76 (2009)
  - if a proposed new contention is not timely, then a second step occurs and its admissibility is governed by the eight-factor balancing specified in section 2.309(c); LBP-09-10, 70 NRC 140 (2009)
  - if applicant amends its combined license application by referencing a proposed revision to the standard design, then petitioners will be entitled to file new or amended contentions; LBP-09-10, 70 NRC 77 (2009)
  - if genuinely new information becomes available as a result of the waste confidence rulemaking proceeding that contravenes the combined license application, then petitioners may file a motion seeking the admission of a new or amended contention; LBP-09-10, 70 NRC 115 (2009); LBP-09-18, 70 NRC 408 (2009)
  - new contentions may be filed after the initial docketing, with leave of the presiding officer, and are evaluated under a three-factor test; LBP-09-10, 70 NRC 138 (2009)
  - petitioners are required to file contentions based on the documents in existence when the petition is filed, including the applicant's environmental report; LBP-09-16, 70 NRC 263 (2009)
  - petitioners are required to raise their NEPA contentions in response to the environmental report, rather than awaiting publication of the environmental impact statement; LBP-09-16, 70 NRC 263 (2009)
  - the filing of new or amended contentions based on new information is permitted if sufficient justification is provided; LBP-09-15, 70 NRC 211 (2009)
  - to amend a contention, petitioner must demonstrate that the information upon which the amended contention is based was not previously available and is materially different from information previously available, and that the amended contention has been submitted in a timely fashion; LBP-09-26, 70 NRC 988 (2009)
  - to be admitted in a proceeding, a new contention must meet the new or amended contention requirements as well as the general contention admissibility requirements; LBP-09-9, 70 NRC 45 (2009)
  - under 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, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-09-17, 70 NRC 325 n.50 (2009)
  - when information forming the foundation for a new or amended contention becomes available piecemeal over time, the admissibility decision turns on a determination about when, as a cumulative matter, the separate pieces of the information puzzle were sufficiently in place to make the particular concerns reasonably apparent; LBP-09-10, 70 NRC 142 n.82 (2009)

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- when NRC issues the environmental impact statement, petitioners have the opportunity to file a second wave of environmental contentions that focus on the adequacy of the NRC Staff's EIS environmental analysis under the National Environmental Policy Act; LBP-09-10, 70 NRC 88 (2009)
- within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 647 (2009)
- 10 C.F.R. 2.309(f)(2)(i)  
a proposed rulemaking and request for comments, do not, in and of themselves, constitute previously unavailable information that would entitle a party to file a new contention; LBP-09-10, 70 NRC 144 (2009)  
information upon which a amended or new contention is based must not have been previously available; LBP-09-27, 70 NRC 1000 (2009)
- 10 C.F.R. 2.309(f)(2)(i)-(iii)  
contentions may be filed after the initial 60-day deadline if the petitioner shows that the information on which the amended or new contention is based was not previously available and is materially different than information previously available; and the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-9, 70 NRC 45 (2009); LBP-09-26, 70 NRC 948 (2009)  
by definition, and through no fault or negligence of the petitioner, contentions admitted under this section are founded on material new information that was not available at the time when the petition was initially due; LBP-09-10, 70 NRC 139 (2009)
- 10 C.F.R. 2.309(f)(2)(ii)  
information upon which an amended or new contention is based must be materially different than information previously available; LBP-09-27, 70 NRC 1001 (2009)
- 10 C.F.R. 2.309(f)(2)(iii)  
a motion and proposed new contention shall be deemed timely if it is filed within 30 days of the date when the new and material information on which it is based first becomes available; LBP-09-22, 70 NRC 647 (2009)  
an amended or new contention must be submitted in a timely fashion based on the availability of the subsequent information; LBP-09-27, 70 NRC 1003 (2009)  
the first step in assessing the admissibility of a new contention is to determine if it is timely or nontimely; LBP-09-10, 70 NRC 138 (2009)  
thirty days is a reasonable limit for fulfilling the timing requirement of this section because of the significant effort involved in identifying new information, assembling the required expertise, and then drafting a contention that satisfies section 2.309(f)(1); LBP-09-27, 70 NRC 1003 (2009)
- 10 C.F.R. 2.309(g)  
a motion and proposed new contention may address the selection of the appropriate hearing procedure for the proposed new contention; LBP-09-22, 70 NRC 648 (2009)  
boards determine which hearing procedure to use on a contention-by-contention basis; LBP-09-10, 70 NRC 145 (2009)  
if petitioner relies upon 10 C.F.R. 2.310(d) in requesting a Subpart G proceeding, then petitioner must demonstrate, by reference to the contention, that its resolution necessitates resolution of material issues of fact relating to the occurrence of a past activity where the credibility of an eyewitness may reasonably be expected to be at issue and/or there are issues of the motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-09-10, 70 NRC 146 (2009)
- 10 C.F.R. 2.309(h)  
within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 647 n.21 (2009)
- 10 C.F.R. 2.309(h)(2)  
although NRC's rules of practice regarding motions do not provide for reply pleadings, the board presume that for a reply to be timely it would have to be filed within 7 days of the date of service of the response it is intended to address; LBP-09-22, 70 NRC 648 n.23 (2009)

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- 10 C.F.R. 2.310(a)  
upon admission of a contention the board must identify the specific hearing procedures to be used; LBP-09-10, 70 NRC 144-45 (2009)
- 10 C.F.R. 2.310(b)-(h)  
specific situations where a certain procedure is mandated or available are enumerated; LBP-09-10, 70 NRC 145-46 (2009)
- 10 C.F.R. 2.310(d)  
a motion and proposed new contention may address the selection of the appropriate hearing procedure for the proposed new contention; LBP-09-22, 70 NRC 648 (2009)  
boards determine which hearing procedure to use on a contention-by-contention basis; LBP-09-10, 70 NRC 145 (2009)  
if petitioner relies on this section in requesting a Subpart G proceeding, then petitioner must demonstrate, by reference to the contention, that its resolution necessitates resolution of material issues of fact relating to the occurrence of a past activity where the credibility of an eyewitness may reasonably be expected to be at issue and/or there are issues of the motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-09-10, 70 NRC 146 (2009); LBP-09-22, 70 NRC 646-47 (2009)
- 10 C.F.R. 2.310(h)(1)  
if the hearing on a contention is expected to take no more than 2 days to complete, the board can impose the Subpart N procedures for expedited proceedings with oral hearings; LBP-09-10, 70 NRC 145 n.85 (2009)
- 10 C.F.R. 2.311  
appeals of adverse decisions with respect to access to safeguards information must be made pursuant to this section; CLI-09-15, 70 NRC 26, 27 (2009)  
the right to interlocutory appeal of contention rulings allows applicant or NRC Staff to immediately appeal the admission of all of the contentions, but denies petitioners the right to immediately appeal the denial of any of the contentions; LBP-09-10, 70 NRC 147 n.89 (2009)  
where intervenors have filed new contentions based on a supplement to the COL application, in advance of a full board ruling on the original contentions, no appeal lies until the board acts on all contentions, both the original and the newly filed ones; CLI-09-18, 70 NRC 862 (2009)
- 10 C.F.R. 2.311(d)(1)  
an exception to the general policy limiting interlocutory review permits an appeal of a board's ruling on contention admissibility when a board grants a petition to intervene following consideration of the full petition; CLI-09-18, 70 NRC 861 (2009)  
there is an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of whether the request for hearing or petition to intervene should have been wholly denied; CLI-09-22, 70 NRC 933 (2009)  
to be appealable, a disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner; CLI-09-18, 70 NRC 861 (2009)  
with respect to an applicant's appeal, applicant must contend that, after considering all pending contentions, the board has erroneously granted a hearing to the petitioner; CLI-09-18, 70 NRC 861-62 (2009)
- 10 C.F.R. 2.315(a)  
any person who does not wish, or is not qualified, to become a party to the proceeding may request permission to make a limited appearance; CLI-09-15, 70 NRC 9 (2009)
- 10 C.F.R. 2.315(c)  
a state, county, municipality, federally recognized Indian tribe, or agencies thereof, may seek to participate in a hearing as a nonparty; CLI-09-15, 70 NRC 9 (2009)  
although interested governmental entities would not have a formal role in a proceeding absent the admission of parties and contentions, boards expect that such entities would be kept appropriately apprised of the other participants' settlement efforts; LBP-09-23, 70 NRC 670 n.33 (2009)  
the phrase "federally recognized Indian Tribe" was added to the regulation in order to comply with Executive Order 13,084; LBP-09-13, 70 NRC 184-85 (2009)

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- 10 C.F.R. 2.318(a)  
dismissal of one contention on mootness grounds would not terminate a case where the board had expressly retained jurisdiction to decide whether to admit another contention; LBP-09-27, 70 NRC 997 (2009)
- 10 C.F.R. 2.319  
boards have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay, and to maintain order; LBP-09-22, 70 NRC 640 (2009)  
cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.319(e)  
boards are authorized to restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence; LBP-09-30, 70 NRC 1046 (2009)
- 10 C.F.R. 2.319(f)  
given participants' settlement agreement, a board sees no cause for it to attempt to obtain Commission avowal of the renouncing process contemplated by the participants, either by way of a Staff inquiry made at the Board's direction or via a certified question; LBP-09-23, 70 NRC 668 n.27 (2009)  
licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration; CLI-09-15, 70 NRC 11 (2009)
- 10 C.F.R. 2.323  
within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 647 (2009)
- 10 C.F.R. 2.323(a)  
dispositive motions may be filed 20 days after the occurrence or circumstance from which the motion arises, rather than the 10-day time frame, provided that the moving party commences sincere efforts to contact and consult all other parties within 10 days of the occurrence or circumstance, and the accompanying certification so states; LBP-09-22, 70 NRC 652 (2009)  
motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected shall be filed within 10 days after the occurrence or circumstance from which the motion arises; LBP-09-22, 70 NRC 644 (2009)
- 10 C.F.R. 2.323(b)  
if the attorney or representative of a party is contacted pursuant to the consultation requirement, then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion; LBP-09-22, 70 NRC 649-50 (2009)  
it is inconsistent with the dispute avoidance/resolution purposes of this section, and thus insufficient, for the contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that it takes no position on the motion (or issues) and that it reserves the right to file a response to the motion when it is filed; LBP-09-22, 70 NRC 650 (2009)  
motions will be rejected if they do not include certification by the attorney or representative of the moving party that they have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in the motion, and to resolve those issues; LBP-09-22, 70 NRC 649 (2009)
- 10 C.F.R. 2.323(c)  
except for a motion to file a new or amended contention, or where there are compelling circumstances, movant has no right to reply to an answer or respond to a motion; LBP-09-22, 70 NRC 648 (2009)
- 10 C.F.R. 2.323(f)  
licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration; CLI-09-15, 70 NRC 11 (2009)  
the presiding officer may refer a ruling to the Commission if, in the judgment of the presiding officer, prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity; CLI-09-21, 70 NRC 930 n.15 (2009)

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- 10 C.F.R. 2.323(f)(1)  
a decision may be referred to the Commission if it raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; LBP-09-18, 70 NRC 407 (2009)
- 10 C.F.R. 2.325  
applicant, as the proponent of the license, bears the burden of proof; LBP-09-10, 70 NRC 101 (2009)
- 10 C.F.R. 2.332  
the licensing board is required to use the applicable techniques specified in this section to ensure prompt and efficient resolution of contested issues; CLI-09-15, 70 NRC 13 (2009)
- 10 C.F.R. 2.332(a)  
boards have an obligation to establish a case scheduling order, and to advise the Commission of any significant delay in meeting major activities set forth in the hearing schedule; CLI-09-17, 70 NRC 309 (2009)  
the initial scheduling order must be issued as soon as practicable after the request for hearing is granted; LBP-09-22, 70 NRC 640-41 (2009)
- 10 C.F.R. 2.332(c)(1)-(5)  
an initial scheduling order is designed to ensure proper case management of this proceeding; LBP-09-22, 70 NRC 640 (2009)
- 10 C.F.R. 2.332(d)  
commencement of evidentiary hearings on environmental issues is prohibited until after the final environmental impact statement is issued; LBP-09-22, 70 NRC 654 n.31 (2009)
- 10 C.F.R. 2.333  
the licensing board is required to use the applicable techniques specified in this section to ensure prompt and efficient resolution of contested issues; CLI-09-15, 70 NRC 13 (2009)
- 10 C.F.R. 2.334  
the licensing board is required to use the applicable techniques specified in this section to ensure prompt and efficient resolution of contested issues; CLI-09-15, 70 NRC 13 (2009)
- 10 C.F.R. 2.334(c)  
boards have an obligation to establish a case scheduling order, and to advise the Commission of any significant delay in meeting major activities set forth in the hearing schedule; CLI-09-17, 70 NRC 309 (2009)
- 10 C.F.R. 2.335  
absent an adequately supported request to waive the application of section 51.53(b), the board is bound by it; LBP-09-26, 70 NRC 977 (2009)  
challenges to the Waste Confidence Rule are prohibited; LBP-09-10, 70 NRC 113 (2009)  
contentions that attack a Commission rule, or seek to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-09-18, 70 NRC 403 (2009)  
in addressing a petition for a rule waiver, the board, in lieu of holding oral argument to obtain answers to its questions, poses questions for NRC Staff about the waiver petition; LBP-09-29, 70 NRC 1037 (2009)
- 10 C.F.R. 2.335(a)  
a contention that seeks to impose new requirements on applicants and licensees is an impermissible challenge to the agency's regulations; LBP-09-26, 70 NRC 966 (2009)  
a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 269 (2009); LBP-09-18, 70 NRC 415 (2009)  
absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; CLI-09-20, 70 NRC 923 (2009); LBP-09-10, 70 NRC 72-73, 144 n.84 (2009); LBP-09-16, 70 NRC 244 (2009); LBP-09-17, 70 NRC 326, 339 (2009); LBP-09-21, 70 NRC 599 (2009); LBP-09-26, 70 NRC 955-56 (2009)  
no rule or regulation of the Commission is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part; LBP-09-10, 70 NRC 114 (2009)  
petitioners' assertion that no exposure levels are safe is an impermissible challenge to the exposure limits set forth in the NRC's regulations; LBP-09-16, 70 NRC 284-85 (2009)



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- petitioners' claim that applicant must pursue the prepayment method for decommissioning conflicts with the NRC guidance and rules and so is outside the permissible scope of the COL proceeding; LBP-09-21, 70 NRC 630 (2009)
- the contention that applicant cannot pass a financial test because the parent company is already committed to providing funding for the decommissioning of another site is an impermissible challenge to NRC regulations; LBP-09-18, 70 NRC 419 (2009)
- 10 C.F.R. 2.335(b)
- absent a waiver, a contention that constitutes a collateral attack on NRC regulations is inadmissible; CLI-09-20, 70 NRC 923 (2009)
- to challenge a regulation, petitioner must submit a supporting affidavit setting forth with particularity the special circumstances that justify the waiver or exception requested; LBP-09-18, 70 NRC 407 (2009)
- 10 C.F.R. 2.336
- documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing; LBP-09-30, 70 NRC 1046 (2009)
- if and when testimony or a document is proffered as evidence, a party may object thereto, and the board will rule on the objection; LBP-09-30, 70 NRC 1046 (2009)
- it is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-09-30, 70 NRC 1046 (2009)
- mandatory disclosures required by this section consist of an exchange of prescribed information and documents between the litigants, and do not need to be submitted to the board; LBP-09-30, 70 NRC 1046 (2009)
- mandatory disclosures, like all discovery exchanges, cover a vast array of information, and documents that are not evidence need not meet the requirements of admissible evidence; LBP-09-30, 70 NRC 1046 (2009)
- the mandatory disclosure requirements are not an opportunity to relitigate the admissibility of a contention; LBP-09-30, 70 NRC 1046 (2009)
- unless and until a document or information is proffered into evidence, there is no basis for a party to object that the information it received in a mandatory disclosure was unreliable or otherwise not admissible as evidence; LBP-09-30, 70 NRC 1046 (2009)
- 10 C.F.R. 2.336(a)
- within 30 days of the board's ruling admitting contentions, the parties must automatically make certain mandatory disclosures; LBP-09-22, 70 NRC 642 (2009)
- 10 C.F.R. 2.336(a)(1)
- after the initial disclosure, if a party subsequently develops or obtains additional information or documents that meet the requirements of this section, then that party must promptly file a supplemental mandatory disclosure; LBP-09-30, 70 NRC 1045 (2009)
- disclosure of a nonwitness (e.g., an expert that the party consulted, but does not intend to use as a witness) is not required; LBP-09-30, 70 NRC 1045 (2009)
- disclosure of all witnesses is required, not just expert witnesses, upon whose opinion the party bases its claims and contentions and may rely upon as a witness; LBP-09-30, 70 NRC 1045 (2009)
- disclosure of information and documentation about the witness or his or her analysis or other authority if it is not then reasonably available is not required; LBP-09-30, 70 NRC 1045 (2009)
- disclosure of the name and telephone number of an expert witness, if this information is not known to the party, is not required; LBP-09-30, 70 NRC 1045 (2009)
- each witness is not required to generate an analysis, but rather must disclose the analysis or other authority upon which the witness bases his or her opinion; LBP-09-30, 70 NRC 1045 (2009)
- even if the term "contention," as used in this section must be read as pertaining only to formal contentions admitted under section 2.309(f)(1), the term "claim," is not so constrained, and can only be read in its normal sense; LBP-09-30, 70 NRC 1049 (2009)
- if the duty to make disclosures applied only to parties who have claims and contentions, it would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings; LBP-09-30, 70 NRC 1041 (2009)

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- initial disclosures must be made within 30 days of the order granting a request for hearing, which is typically at least 18-24 months before the evidentiary hearing begins; LBP-09-30, 70 NRC 1045 (2009)
- intervenor's expert is not required to create a written analysis, but only disclose the written analysis or other documentary authority, if any, that exists and is reasonably available at the time of the disclosure; LBP-09-30, 70 NRC 1040-41, 1044-45, 1046 (2009)
- mandatory disclosures by parties include the disclosure of the name of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion; LBP-09-22, 70 NRC 646 n.20 (2009); LBP-09-30, 70 NRC 1048 n.10 (2009)
- the mandatory disclosure requirement of this section is contrasted with the mandatory disclosure provision of 10 C.F.R. 2.704(b)(2); LBP-09-30, 70 NRC 1043 (2009)
- the phrase "claims and contentions" includes any assertion, statement, or argument, positive or negative, in support of an intervenor's position or an applicant's position, that is advanced by any party, and it is not limited to the formal "contentions" that meet the strict criteria of, and are admitted under, section 2.309(f)(1); LBP-09-30, 70 NRC 1049 (2009)
- the plain language of this regulation makes it clear that it applies to all parties; LBP-09-30, 70 NRC 1045 (2009)
- the term "contention" means simply a point or argument asserted or advanced by any party; LBP-09-30, 70 NRC 1049 (2009)
- there is no substantive standard that the analysis or other authority must meet; LBP-09-30, 70 NRC 1045 (2009)
- 10 C.F.R. 2.336(a)(3)
- parties and NRC Staff must provide a list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents; LBP-09-22, 70 NRC 643 (2009)
- 10 C.F.R. 2.336(b)
- discovery against NRC Staff is governed by this section; CLI-09-15, 70 NRC 12 (2009)
- NRC Staff shall comply with discovery requests no later than 30 days after the licensing board order admitting contentions and shall update the information at the same time as the issuance of the safety evaluation report or final environmental impact statement, and, subsequent to the publication of the SER and FEIS, as otherwise required by the Commission's regulations; CLI-09-15, 70 NRC 12 (2009)
- within 30 days of the board's ruling admitting contentions, NRC Staff must automatically make certain mandatory disclosures; LBP-09-22, 70 NRC 642 (2009)
- 10 C.F.R. 2.336(b)(5)
- parties and NRC Staff must provide a list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents; LBP-09-22, 70 NRC 643 (2009)
- 10 C.F.R. 2.336(d)
- if an expert witness is subsequently selected, or any analysis or other authority is subsequently amended or newly developed, then this information must be promptly disclosed; LBP-09-30, 70 NRC 1048 n.10 (2009)
- parties and the NRC Staff have a continuing duty to update their mandatory disclosures; LBP-09-22, 70 NRC 643 (2009)
- 10 C.F.R. 2.336(e)(1)
- a board may impose sanctions including dismissal of the specific contentions, dismissal of the adjudication, or dismissal of the application for any continuing unexcused failure to make the required mandatory disclosures; LBP-09-30, 70 NRC 1050 (2009)
- 10 C.F.R. 2.336(e)(2)
- if any party attempts to include exhibits that were not disclosed in the mandatory disclosures, thus making it impossible for the other parties to examine the reliability of that information, then the board may prohibit the admission of this new evidence into the record; LBP-09-30, 70 NRC 1043 (2009)
- sanctions are available against any party that fails to provide any document or witness name; LBP-09-30, 70 NRC 1050 (2009)

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- 10 C.F.R. 2.336(g)  
if the duty to make disclosures applied only to parties who have claims and contentions, it would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings; LBP-09-30, 70 NRC 1041 (2009)
- 10 C.F.R. 2.337(f)  
for purposes of the mandatory/uncontested portion of an ESP proceeding, the board takes official notice of these publicly available documents associated with the Staff's safety and environmental reviews; LBP-09-19, 70 NRC 454 n.5 (2009)
- 10 C.F.R. 2.338(e)  
given participants' settlement agreement, a board sees no cause for it to attempt to obtain Commission avowal of the renouncing process contemplated by the participants, either by way of a Staff inquiry made at the board's direction or via a certified question; LBP-09-23, 70 NRC 668 n.27 (2009)
- 10 C.F.R. 2.338(g)-(h)  
finding that a settlement agreement is consistent with the content and form requirements and is in the public interest, the board approves the agreement and terminates this contested hearing; LBP-09-23, 70 NRC 663 (2009)
- 10 C.F.R. 2.338(h)  
content of a settlement agreement in a contested proceeding is discussed; LBP-09-23, 70 NRC 670 (2009)
- 10 C.F.R. 2.338(i)  
a notice of hearing having been issued by the Commission in a COL proceeding, the board has jurisdiction to approve a settlement agreement; LBP-09-23, 70 NRC 670 n.34 (2009)  
finding that a settlement agreement is consistent with the content and form requirements and is in the public interest, the board approves the agreement and terminates this contested hearing; LBP-09-23, 70 NRC 663 (2009)
- 10 C.F.R. 2.340(f)  
an initial decision directing the issuance or amendment of a limited work authorization or an early site permit is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective; LBP-09-19, 70 NRC 460 (2009)
- 10 C.F.R. 2.341(a)(2)  
the *sua sponte* review process applies to a board's determinations on settlement agreements, and affords the Commission the opportunity to correct any participant or board misapprehensions regarding the renouncing process or any other items contemplated in the settlement agreement; LBP-09-23, 70 NRC 668 n.27 (2009)
- 10 C.F.R. 2.341(b)  
given that the board recently issued an Initial Decision resolving all of the contentions in the case, the Commission can discern no compelling reason to take the extraordinary action of stepping in at this late stage to take up the case, but parties will have the opportunity to petition for review of the board's rulings; CLI-09-19, 70 NRC 864 (2009)
- 10 C.F.R. 2.341(b)(1)  
filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review; LBP-09-9, 70 NRC 49 (2009)
- 10 C.F.R. 2.341(f)  
challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 862 (2009)
- 10 C.F.R. 2.341(f)(1)  
rulings may be referred to the Commission if they raise significant and novel legal or policy issues, the resolution of which would materially advance the orderly disposition of the proceeding; CLI-09-21, 70 NRC 930 (2009); LBP-09-16, 70 NRC 251 (2009); LBP-09-18, 70 NRC 407 (2009); LBP-09-26, 70 NRC 979 (2009)
- 10 C.F.R. 2.341(f)(2)  
petitioners may request, and the Commission, in its discretion, may grant interlocutory review if it is shown that the issue threatens petitioners with immediate and serious irreparable impacts or affects the basic structure of the proceeding in a pervasive manner; LBP-09-10, 70 NRC 147 n.89 (2009)

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- 10 C.F.R. 2.342(e)  
in deciding whether to grant a stay, the Commission considers whether the moving party has made a strong showing that it is likely to prevail on the merits, whether the party will be irreparably injured unless a stay is granted, whether the granting of a stay would harm the other parties, and where the public interest lies; CLI-09-23, 70 NRC 936 (2009)
- 10 C.F.R. 2.390(a)(1), (3), and (4)  
parties and NRC Staff must produce, as part of their mandatory disclosures, privilege logs covering documents claimed to qualify for protected status as security-related information or as proprietary documents; LBP-09-22, 70 NRC 643 (2009)
- 10 C.F.R. Part 2, Subpart G  
a completed Form SF-85, "Questionnaire for Non-Sensitive Positions" is required for each individual who would have access to safeguards information; CLI-09-15, 70 NRC 23 (2009)  
under these procedures, parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the board; LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.704(a) & (b)  
all parties, except NRC Staff, shall make the mandatory disclosures required within 45 days of the issuance of the licensing board order admitting contentions; CLI-09-15, 70 NRC 12 (2009)
- 10 C.F.R. 2.704(b)(2)  
for Subpart G proceedings, each expert witness is required to create, sign, and submit a written expert report; LBP-09-30, 70 NRC 1043 (2009)
- 10 C.F.R. 2.704(c)  
no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the NRC Staff shall make the required pretrial disclosures; CLI-09-15, 70 NRC 12 (2009)
- 10 C.F.R. 2.705(b)(1)  
it is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-09-30, 70 NRC 1046 (2009)
- 10 C.F.R. 2.705(c)(3)(iii)  
before the Office of Administration makes an adverse determination regarding a proposed recipient's trustworthiness and reliability for access to safeguards information, it must provide the proposed recipient with any records that were considered in the trustworthiness and reliability determination to provide an opportunity for the individual to correct or explain information; CLI-09-15, 70 NRC 26 (2009)
- 10 C.F.R. 2.705(c)(3)(iv)  
a requester may challenge an adverse determination with respect to access to safeguards information by filing a request for review; CLI-09-15, 70 NRC 26 (2009)
- 10 C.F.R. 2.709  
discovery against NRC Staff is governed by this section; CLI-09-15, 70 NRC 12 (2009)  
discovery against NRC Staff shall not commence until the issuance of the particular document, i.e., SER or EIS, unless the licensing board, in its discretion, finds that commencing discovery prior to issuance of those documents will expedite the hearing without adversely affecting the Staff's ability to complete its evaluation in a timely manner; CLI-09-15, 70 NRC 12 (2009)
- 10 C.F.R. 2.710  
the licensing board shall not entertain motions for summary disposition unless the board finds that such motions, if granted, are likely to expedite the proceeding; CLI-09-15, 70 NRC 16 (2009); LBP-09-22, 70 NRC 652 (2009)
- 10 C.F.R. 2.710(c)  
if it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the board may refuse the application for summary disposition or may order a continuance as may be necessary or just; LBP-09-22, 70 NRC 653 (2009)
- 10 C.F.R. 2.710(d)(2)  
a motion for summary disposition must be granted if the filings in the proceeding together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any

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- material fact and that the moving party is entitled to a decision as a matter of law; LBP-09-15, 70 NRC 212 n.36 (2009)
- applicant may challenge an expert opinion in the disclosure stage, via a motion for summary disposition, if it can show that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law; LBP-09-30, 70 NRC 1048 (2009)
- in an evidentiary hearing, the board may weigh competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where there is no genuine issue as to any material fact; LBP-09-22, 70 NRC 651 (2009)
- the contention admissibility threshold is less than is required at the summary disposition stage; LBP-09-26, 70 NRC 955 n.62 (2009)
- 10 C.F.R. 2.711(c)  
cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.715(c)  
nonparty interested state status has been granted to state utility commissions; LBP-09-16, 70 NRC 291 n.190 (2009)
- 10 C.F.R. 2.802  
the appropriate procedure to raise a challenge to NRC rules is to file a petition for rulemaking; LBP-09-17, 70 NRC 345-46 (2009)
- 10 C.F.R. Part 2, Subpart L  
under these informal procedures, discovery is prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336(f), (a), and (b) and the mandatory production of the hearing file under section 2.1203(a); LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.1203(a)  
in Subpart L proceedings, NRC Staff must produce a hearing file and make it available to all parties; LBP-09-22, 70 NRC 642 (2009)
- 10 C.F.R. 2.1203(c)  
NRC Staff has a continuing duty to update the hearing file; LBP-09-22, 70 NRC 643 (2009)
- 10 C.F.R. 2.1203(d)  
if the duty to make disclosures applied only to parties who have claims and contentions, it would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings; LBP-09-30, 70 NRC 1041 (2009)
- under Subpart L procedures, discovery is prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336(f), (a), and (b) and the mandatory production of the hearing file; LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.1204(b)  
no later than 30 days after service of materials, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plans; LBP-09-22, 70 NRC 656 (2009)
- under Subpart L, a party seeking to conduct cross-examination must file a written motion and obtain leave of the board; LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.1204(b)(3)  
boards may allow parties to conduct cross-examination in Subpart L proceedings; LBP-09-22, 70 NRC 651 (2009)
- 10 C.F.R. 2.1205  
in an evidentiary hearing, the board may weigh competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where there is no genuine issue as to any material fact; LBP-09-22, 70 NRC 651 (2009)
- 10 C.F.R. 2.1205(b)  
an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within 20 days after service of the motion; LBP-09-22, 70 NRC 653 (2009)

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- 10 C.F.R. 2.1205(c)  
to decide summary disposition motions in Subpart L proceedings, licensing boards apply the standards of Subpart G, which are set forth in 10 C.F.R. 2.710(d)(2); LBP-09-15, 70 NRC 211-12 n.36 (2009)
- 10 C.F.R. 2.1207(a)(1)  
documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing; LBP-09-30, 70 NRC 1046 (2009)
- 10 C.F.R. 2.1207(a)(2)  
no later than 20 days after service of materials, the parties and the NRC Staff shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis; LBP-09-22, 70 NRC 655 (2009)
- 10 C.F.R. 2.1207(a)(3)(i) and (ii)  
no later than 30 days after service of materials, all parties and NRC Staff shall file proposed questions for the board to consider propounding to the direct or rebuttal witnesses; LBP-09-22, 70 NRC 655 (2009)
- 10 C.F.R. 2.1207(b)(2)  
written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form; LBP-09-22, 70 NRC 654-55 (2009)
- 10 C.F.R. 2.1207(b)(6)  
in a Subpart L evidentiary hearing, the board may ask witnesses to appear in person and answer questions; LBP-09-22, 70 NRC 651 (2009)  
under Subpart L, the board has the principal responsibility to question the witnesses; LBP-09-10, 70 NRC 145 (2009)
- 10 C.F.R. 2.1208  
if the board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and will resolve that contention; LBP-09-22, 70 NRC 656 n.35 (2009)
- 10 C.F.R. 2.1400-.1407  
if the hearing on a contention is expected to take no more than 2 days to complete, the Board can impose the Subpart N procedures for expedited proceedings with oral hearings; LBP-09-10, 70 NRC 145 n.85 (2009)
- 10 C.F.R. 2.1402(b)  
the availability of Subpart G procedures under section 2.310(d) depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified, under section 2.336(a)(1), until after contentions are admitted; LBP-09-10, 70 NRC 147 n.88 (2009)
- 10 C.F.R. Part 2, Appendix B  
late-filed contentions based on the Safety Evaluation Report and any necessary National Environmental Policy Act document should be filed within 30 days of the issuance of those documents; LBP-09-27, 70 NRC 1003 (2009)
- 10 C.F.R. Part 2, Appendix B, § II  
initial scheduling order is to be issued within 55 days of board decision granting intervention and admitting contentions; LBP-09-22, 70 NRC 641 (2009)
- 10 C.F.R. 20.1003  
EPA has established radiation exposure standards under 40 C.F.R. Part 190, the applicability of which the Commission has acknowledged; LBP-09-19, 70 NRC 473 (2009)
- 10 C.F.R. 20.1101(b)  
licensee must use procedures and controls to reduce occupational doses and doses to members of the public to levels that are as low as reasonably achievable; CLI-09-16, 70 NRC 37 (2009)
- 10 C.F.R. 20.1201  
dose limits are established for safe levels of exposure from normal operation of a nuclear power plant to both workers and members of the public; LBP-09-16, 70 NRC 284 (2009)
- 10 C.F.R. 20.1201-.1208  
upper limitations on occupational doses are specified; CLI-09-16, 70 NRC 37 (2009)

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- 10 C.F.R. 20.1201-.1302  
numerical limits for radiation exposure, including occupational dose limits and radiation dose limits for members of the public, are provided; LBP-09-19, 70 NRC 473 (2009)
- 10 C.F.R. 20.1301  
dose limits are established for safe levels of exposure from normal operation of a nuclear power plant to both workers and members of the public; LBP-09-16, 70 NRC 284 (2009)
- 10 C.F.R. 20.1301(e)  
licensees subject to the provisions of EPA's generally applicable environmental radiation standards in 40 C.F.R. Part 190 shall comply with those standards; LBP-09-19, 70 NRC 474 (2009)
- 10 C.F.R. 20.1301-.1302  
dose limits for individual members of the public are specified; CLI-09-16, 70 NRC 37 (2009)
- 10 C.F.R. 20.1801  
licensee's onsite low-level radioactive waste storage facility must comply with requirements for security, occupational and public dose limits, and survey and monitoring, labeling, and reports and record retention; CLI-09-16, 70 NRC 37 n.20 (2009)
- 10 C.F.R. 20.2002  
applicant seeks an exemption from the disposal site requirements of 10 C.F.R. 30.3 and 70.3 to allow disposal of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho, that is not licensed by the NRC; LBP-09-28, 70 NRC 1022 (2009)
- 10 C.F.R. Part 20, Appendix B, tbl. 2  
if chelating agents are to be comingled in radioactive waste liquids or used to mitigate an accidental release, then they have to be specifically accounted for in the dose analyses; LBP-09-19, 70 NRC 545 (2009)
- 10 C.F.R. 30.9  
information submitted to an NRC inspector that is not complete and accurate in all material respects is a violation; LBP-09-12, 70 NRC 162-63 (2009)
- 10 C.F.R. 30.10  
information submitted to an NRC inspector that is not complete and accurate in all material respects is a violation; LBP-09-12, 70 NRC 163 (2009)
- 10 C.F.R. Part 30, Appendix A  
neither market capitalization nor share price are variables to be used in the financial test for decommissioning funding assurance; LBP-09-15, 70 NRC 207 (2009)
- 10 C.F.R. 40.32  
an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 19 (2009)
- 10 C.F.R. 40.42(a)(1)  
when a renewal application is timely filed, the license is automatically extended by operation of law until final agency action is taken on the renewal request; LBP-09-13, 70 NRC 174 (2009)
- 10 C.F.R. 50.2  
"decommission" means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license or release of the property under restricted conditions and termination of the license; LBP-09-15, 70 NRC 206 n.9 (2009)
- 10 C.F.R. 50.5  
engaging in deliberate misconduct that caused inaccurate and incomplete information to be provided to the NRC concerning conditions at a reactor resulted in debarment from licensed activities for 5 years; LBP-09-11, 70 NRC 156 (2009)
- 10 C.F.R. 50.5(a)(2)  
an employee of a licensee may not deliberately submit to the NRC information that he knows to be incomplete or inaccurate in some respect material to the NRC; LBP-09-24, 70 NRC 687, 707, 810 (2009)  
careless disregard in the execution of one's duties does not amount to deliberate misconduct or a violation; LBP-09-24, 70 NRC 707 (2009)

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- to prevail in establishing that the accused's actions constituted a violation, Staff must demonstrate by a preponderance of the evidence that the accused had actual knowledge of the information associated with his actions and that he deliberately acted contrary to that knowledge; LBP-09-24, 70 NRC 706 (2009)
- 10 C.F.R. 50.5(c)(1)  
deliberate misconduct refers to an intentional act or omission that the person knows would cause a licensee to be in violation of any rule; LBP-09-24, 70 NRC 707 (2009)
- 10 C.F.R. 50.9(a)  
a licensee employee who contributes to submission of information to the NRC that the employee knows is not complete or accurate in some material respect places the licensee in violation; LBP-09-24, 70 NRC 687, 707 (2009)
- 10 C.F.R. 50.10  
an early site permit applicant may request that a limited work authorization be issued in conjunction with the ESP; LBP-09-19, 70 NRC 456 (2009)
- 10 C.F.R. 50.10(a)(1)  
construction activities allowed under a limited work authorization are discussed; LBP-09-19, 70 NRC 498 (2009)
- 10 C.F.R. 50.10(a)(2)  
preconstruction activities that do not require NRC approval are discussed; LBP-09-19, 70 NRC 498 (2009)
- 10 C.F.R. 50.10(d)-(g)  
applicant is authorized to perform certain site preparation activities that would otherwise only be permitted following the issuance of a Part 50 construction permit or a Part 52 combined license; LBP-09-19, 70 NRC 498 (2009)
- 10 C.F.R. 50.10(d)(1)  
the holder of a limited work authorization is permitted to drive pilings, conduct subsurface preparations, place backfill, concrete, or permanent retaining walls within an excavation, and install the foundation; LBP-09-16, 70 NRC 292 (2009)
- 10 C.F.R. 50.10(d)(3)(i)  
a limited work authorization applicant must submit, as part of the safety analysis report for the LWA, design information related to activities within the scope of the requested LWA; LBP-09-19, 70 NRC 549 (2009)
- 10 C.F.R. 50.10(d)(3)(iii)  
a limited work authorization authorizes activities for which either a construction permit or combined license is otherwise required, but the LWA application must include a plan for site redress that provides for restoration if the project is cancelled, the LWA is revoked, or a construction permit or combined license is denied; LBP-09-19, 70 NRC 499 (2009)
- 10 C.F.R. 50.10(e)(1)(ii)  
boards are to determine whether the site redress plan will adequately redress the activities performed under a limited work authorization should the activities be terminated by either the holder of the LWA or by Commission denial of any corresponding early site permit or combined license; LBP-09-19, 70 NRC 459 (2009)
- 10 C.F.R. 50.10(e)(1)(iii)  
board authority to make findings on limited work authorizations is discussed; LBP-09-19, 70 NRC 459 (2009)
- 10 C.F.R. 50.10(f)  
any activities undertaken under a limited work authorization are entirely at the risk of the applicant; LBP-09-19, 70 NRC 557 n.33 (2009)
- 10 C.F.R. 50.33(f)  
applicant for a combined license is exempt from the obligation to provide an estimate of O&M costs; LBP-09-10, 70 NRC 82 (2009)  
the purpose of financial qualification requirements is to ensure the protection of public health and safety and the common defense and security and not to evaluate the financial wisdom of the proposed project; LBP-09-10, 70 NRC 83 (2009)



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- 10 C.F.R. 50.33(f)(3)  
to demonstrate financial qualification, applicant for a combined license must show that it possesses funds or has reasonable assurance of obtaining funds necessary to cover estimated construction and fuel cycle costs; LBP-09-10, 70 NRC 82 (2009)
- 10 C.F.R. 50.33(g)  
a combined license application must include emergency planning information for the emergency planning zone, generally consisting of an area within a 10-mile radius from the proposed reactor; LBP-09-10, 70 NRC 107 (2009)  
the adequacy of applicant's control room and equipment design radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a COLA or standard design certification proceeding; LBP-09-10, 70 NRC 112 (2009)  
the emergency planning zone is established based on safety considerations and is not intended for use as a boundary for assessing environmental impacts; LBP-09-16, 70 NRC 247 n.51 (2009)  
the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 917 (2009)
- 10 C.F.R. 50.33(k)(1)  
an application for a COL must include a report that indicates how reasonable assurance will be provided that funds will be available to decommission the facility; LBP-09-18, 70 NRC 417 (2009)  
applicant's decommissioning report must explain how reasonable assurance will be provided; LBP-09-15, 70 NRC 218 (2009)  
the combined license application must include information in the form of a report, as described in section 50.75, indicating how reasonable assurance will be provided that funds will be available to decommission the facility; LBP-09-15, 70 NRC 214 (2009)
- 10 C.F.R. 50.34  
a combined license application must include a safety analysis report that covers the design features that will mitigate the radiological consequences of accidents; LBP-09-10, 70 NRC 107 (2009)
- 10 C.F.R. 50.34a  
applicant is to describe equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences; LBP-09-19, 70 NRC 473 (2009)
- 10 C.F.R. 50.34a(a)  
a combined license application must include a description of equipment and measures taken to ensure that any exposures to radioactive materials such as low-level radioactive waste are kept as low as reasonably achievable, including a description of the provisions for storage of solid waste containing radioactive materials; LBP-09-10, 70 NRC 124 (2009)  
for applications filed after January 2, 1971, applicant must identify design objectives and means to maintain levels of radioactive effluents as low as is reasonably achievable; LBP-09-19, 70 NRC 473 (2009)
- 10 C.F.R. 50.34a(b)(3)  
a combined license application must include a description of equipment and measures taken to ensure that any exposures to radioactive materials such as low-level radioactive waste are kept as low as reasonably achievable, including a description of the provisions for storage of solid waste containing radioactive materials; LBP-09-10, 70 NRC 124 (2009)
- 10 C.F.R. 50.40(a)  
applications for nuclear power plants show that the issuance of the license would not be inimical to, and will provide adequate protection to, the health and safety of the public; LBP-09-10, 70 NRC 124 (2009)
- 10 C.F.R. 50.47(a)(1)(iii)  
if applicant submits a complete and integrated emergency plan in conjunction with an early site permit application, NRC Staff must find that the emergency plans provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-09-19, 70 NRC 510 (2009)

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- 10 C.F.R. 50.47(a)(2)  
FEMA's finding on emergency plans constitutes a rebuttable presumption on questions of adequacy and implementation capability in NRC licensing proceedings; LBP-09-19, 70 NRC 511 (2009)  
in its review of emergency plans, NRC Staff must take into account FEMA's findings; LBP-09-19, 70 NRC 511 (2009)
- 10 C.F.R. 50.47(b)  
NRC Staff's review of an integrated emergency plan focuses primarily on the applicant-prepared onsite provisions of the plans, which include the evacuation time estimate provided by applicant, and the inspections, tests, analyses, and acceptance criteria; LBP-09-19, 70 NRC 510 (2009)
- 10 C.F.R. 50.47(b)(5)  
procedures must be established to provide for early notification and clear instructions to the populace within the plume exposure pathway EPZ; LBP-09-16, 70 NRC 296 (2009)
- 10 C.F.R. 50.47(b)(10)  
potassium iodide distribution beyond the 10-mile EPZ is not necessary; LBP-09-16, 70 NRC 295 n.203 (2009)
- 10 C.F.R. 50.47(c)(2)  
the emergency planning zone is established based on safety considerations and is not intended for use as a boundary for assessing environmental impacts; LBP-09-16, 70 NRC 247 n.51 (2009)  
the plume exposure pathway emergency planning zone shall generally consist of an area covering a radius of about 10 miles; LBP-09-16, 70 NRC 296 (2009)
- 10 C.F.R. 50.47(d)  
NRC Staff's review of an integrated emergency plan focuses primarily on the applicant-prepared onsite provisions of the plans, which include the evacuation time estimate provided by applicant, and the inspections, tests, analyses, and acceptance criteria; LBP-09-19, 70 NRC 510 (2009)
- 10 C.F.R. 50.49(b)(1)(ii)  
"design basis events" are defined as those conditions of normal operation, including anticipated operational occurrences, design basis accidents, external events, and natural phenomena for which the plant must be designed; LBP-09-26, 70 NRC 971 n.165 (2009)
- 10 C.F.R. 50.54(hh)  
although analysis of aircraft impact is required, reactors whose construction permits were issued prior to July 13, 2009, are excluded and the rule is not NEPA-based; LBP-09-26, 70 NRC 981 n.233 (2009)  
to the extent that petitioners argue that the provisions of this section should be applied to dry cask storage, they may file a rulemaking petition with the Commission; LBP-09-17, 70 NRC 343 n.176 (2009)
- 10 C.F.R. 50.73  
licensee's report to NRC of a manual reactor trip due to main turbine high vibrations included the details of the event, provided an analysis of the event, including estimated change in conditional core damage probability, and provided a list of corrective actions; DD-09-2, 70 NRC 904 (2009)
- 10 C.F.R. 50.75  
the requirements of this section are intended to ensure that entities who construct and operate a nuclear power plant will have sufficient funds at the end of the operational life of the plant to complete the decommissioning of the plant; LBP-09-15, 70 NRC 219 (2009)
- 10 C.F.R. 50.75(a)  
decommissioning funding assurance is the process through which a combined license applicant assures the NRC that funds will be available to decommission a site or facility; LBP-09-15, 70 NRC 206 n.9 (2009)
- 10 C.F.R. 50.75(b)  
contents of the required report describing how reasonable assurance will be provided that funds will be available to decommission the facility are discussed; LBP-09-15, 70 NRC 214 (2009)
- 10 C.F.R. 50.75(b)(1)  
combined license applicants must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading; LBP-09-15, 70 NRC 215 (2009); LBP-09-18, 70 NRC 417 (2009); LBP-09-21, 70 NRC 630 (2009)

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- not only must the decommissioning report state the amount of financial assurance to be provided, but also that the amount of financial assurance will be covered by one or more of the funding methods identified in section 50.75(e) as acceptable to the NRC; LBP-09-15, 70 NRC 217 (2009)
- the decommissioning report must contain a certification that financial assurance for decommissioning will be provided in an amount not less than that calculated using the table found in section 50.75(c)(1), adjusted as required by section 50.75(c)(2); LBP-09-15, 70 NRC 215 (2009)
- 10 C.F.R. 50.75(b)(2)  
the amount of financial assurance must be adjusted annually, using a rate calculated pursuant to section 50.75(c)(2); LBP-09-15, 70 NRC 215 (2009)
- 10 C.F.R. 50.75(b)(3)  
applicant may choose one or more of the funding methods provided in section 50.75(e); LBP-09-18, 70 NRC 422 (2009)
- not only must the decommissioning report state the amount of financial assurance to be provided, but also an explanation of how that requirement will be fulfilled; LBP-09-15, 70 NRC 217 (2009)
- the amount of financial assurance must be covered by one or more of the funding methods identified in section 50.75(e) as acceptable to the NRC; LBP-09-15, 70 NRC 215 (2009)
- the fact that the Commission included language deferring the obligation that would otherwise apply to combined license applicants in section 50.75(b)(4), but included no equivalent provision in this section, confirms that the Commission did not intend to defer the requirement of this section until after the license is issued; LBP-09-15, 70 NRC 218 (2009)
- the requirement imposed upon combined license applicants by this section, which on its face applies concurrently with the duty to submit a decommissioning report, may not be deferred until after the COL is issued; LBP-09-15, 70 NRC 218 (2009)
- 10 C.F.R. 50.75(b)(4)  
a combined license applicant must obtain the financial instrument and submit a copy to the Commission as provided in section 50.75(e)(3); LBP-09-15, 70 NRC 215 (2009)
- the fact that the Commission included language deferring the obligation that would otherwise apply to combined license applicants in this section, but included no equivalent provision in section 50.75(b)(3), confirms that the Commission did not intend to defer the requirement of section 50.75(b)(3) until after the license is issued; LBP-09-15, 70 NRC 218 (2009)
- 10 C.F.R. 50.75(c)  
contention disputing the cost estimate for decommissioning is an indirect challenge to this regulation and therefore inadmissible; LBP-09-16, 70 NRC 255 (2009)
- 10 C.F.R. 50.75(e)  
a parent company guarantee, standing alone, is not a funding method identified in this section as acceptable to the NRC; LBP-09-15, 70 NRC 218 (2009)
- applicant may choose one or more of the funding methods provided in this section; LBP-09-18, 70 NRC 422 (2009)
- 10 C.F.R. 50.75(e)(1)  
funding for financial assurance for decommissioning must be covered by prepayment, an external sinking fund, or a surety method, insurance, or other guarantee including a parent company guarantee; LBP-09-15, 70 NRC 215 (2009); LBP-09-18, 70 NRC 417 (2009)
- 10 C.F.R. 50.75(e)(1)(ii)  
NRC will defer to state economic regulators where decommissioning funding is assured by the fact that any shortfall in decommissioning funds will be provided by ratepayers pursuant to state law; LBP-09-21, 70 NRC 629 (2009)
- 10 C.F.R. 50.75(e)(1)(iii)(B)  
a combined license application must provide reasonable assurance of adequate decommissioning funding, and this assurance must identify the method or methods of funding the applicant plans to use, and the assurance must provide the information required by this section if applicant plans to use a parent company guarantee; LBP-09-15, 70 NRC 213 (2009)
- a parent company guarantee is only an acceptable method of providing financial assurance if the guarantee and test are as contained in Appendix A to 10 C.F.R. Part 30; LBP-09-15, 70 NRC 215, 219 (2009); LBP-09-18, 70 NRC 418 (2009)

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- 10 C.F.R. 50.75(e)(3)  
applicant, 2 years before and 1 year before the scheduled date for the initial fuel loading, shall submit a report to NRC containing a certification updating the financial information, including a copy of the financial instrument to be used; LBP-09-15, 70 NRC 215 (2009); LBP-09-18, 70 NRC 418 (2009)  
final decommissioning financial assurance documents must be submitted to the NRC 30 days after the notification in the *Federal Register* pursuant to section 52.103(a) that licensee has set a date to load fuel; LBP-09-15, 70 NRC 216 (2009)  
with its final decommissioning financial assurance documents, licensee must submit a report containing a certification that financial assurance for decommissioning is being provided in an amount specified in the licensee's most recent updated certification, including a copy of the financial instrument obtained to satisfy the requirements of section 52.75(e); LBP-09-15, 70 NRC 216 (2009)
- 10 C.F.R. 50.75(f)(1)  
holder of a combined license must begin filing biannual reports on the status of decommissioning funding once the Commission has made a finding that all acceptance criteria in the license have been met; LBP-09-15, 70 NRC 219 (2009)
- 10 C.F.R. 50.80  
if, at some point in the future, applicant were to decide to change the ownership structure and to enter into a joint venture with another entity, its license would have to be amended to reflect this change; LBP-09-18, 70 NRC 428 (2009)
- 10 C.F.R. 50.81  
creditor interests are created in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-09-15, 70 NRC 19 (2009)  
creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, not covered by this section, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 19 (2009)
- 10 C.F.R. 50.82(a)(4)  
decommissioning plans are not required until the applicant files a post-shutdown decommissioning activities report, which is not due until 2 years before permanent cessation of operation; LBP-09-21, 70 NRC 621 (2009)  
decommissioning plans are provided in the post-shutdown phase of a plant; LBP-09-17, 70 NRC 372 (2009)
- 10 C.F.R. 50.150(a)(3)  
although analysis of aircraft impact is required, reactors whose construction permits were issued prior to July 13, 2009, are excluded and the rule is not NEPA-based; LBP-09-26, 70 NRC 981 (2009)
- 10 C.F.R. Part 50, Appendix A, Criterion 2  
the design basis flood is the magnitude of the flood event that is used to evaluate safety structures, systems, and components important to safety during facility design; LBP-09-25, 70 NRC 878 n.53 (2009)
- 10 C.F.R. Part 50, Appendix E, § IV.B  
emergency action levels are the criteria used to determine the notifications that need to be made to federal, state, and local authorities and to determine the appropriate protective responses to a particular set of emergency conditions; LBP-09-19, 70 NRC 510 (2009)
- 10 C.F.R. Part 50, Appendix E, § IV.D.2  
potassium iodide distribution beyond the 10-mile EPZ is not necessary; LBP-09-16, 70 NRC 295 n.203 (2009)
- 10 C.F.R. Part 50, Appendix I  
a combined license application must include a description of equipment and measures taken to ensure that any exposures to radioactive materials such as low-level radioactive waste are kept as low as reasonably achievable, including a description of the provisions for storage of solid waste containing radioactive materials; LBP-09-10, 70 NRC 124 (2009)
- 10 C.F.R. Part 50, Appendix I, § II.D  
the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either

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- denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 917 (2009)
- 10 C.F.R. Part 51  
an environmental report and an environmental impact statement for a materials license must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 17-18 (2009)
- in promulgating these regulations, the Commission's intention was to implement section 102(2) of NEPA; LBP-09-26, 70 NRC 976 (2009)
- the requirement that the environmental report cover all significant environmental impacts associated with a project is not limited to onsite environmental impacts; LBP-09-10, 70 NRC 88 (2009)
- 10 C.F.R. 51.1  
the regulations in Part 51 implement section 102(2) of the National Environmental Policy Act of 1969, as amended; LBP-09-16, 70 NRC 261 (2009)
- 10 C.F.R. 51.1(a)  
in promulgating Part 51, the Commission's intention was to implement section 102(2) of the National Environmental Policy Act; LBP-09-26, 70 NRC 976 (2009)
- 10 C.F.R. 51.14(b)  
in implementing NEPA, the NRC uses certain of the definitions provided in Council on Environmental Quality regulations; LBP-09-19, 70 NRC 463 (2009)
- 10 C.F.R. 51.20(b)(1)  
NRC Staff is required to prepare an environmental impact statement in connection with issuance of an early site permit; LBP-09-19, 70 NRC 463 (2009)
- 10 C.F.R. 51.23  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-10, 70 NRC 144 n.84 (2009)
- mere statements of government officials are insufficient to overturn this rule; LBP-09-21, 70 NRC 602 n.94 (2009)
- the Waste Confidence Rule applies to new or proposed reactors as well as existing reactors; LBP-09-10, 70 NRC 114 (2009)
- 10 C.F.R. 51.23(a)  
spent fuel can be stored safely onsite for at least 30 years beyond a plant's licensed life for operation; LBP-09-17, 70 NRC 343 (2009)
- the phrase "any reactor" includes new reactors; LBP-09-17, 70 NRC 340 (2009); LBP-09-21, 70 NRC 599 (2009)
- there is reasonable assurance that a geologic repository will be available by 2025 and that sufficient repository capacity will be available within 30 years beyond the licensed life to dispose of high-level waste and spent fuel generated by any reactor up to that time; LBP-09-10, 70 NRC 113 (2009); LBP-09-18, 70 NRC 406 (2009)
- 10 C.F.R. 51.23(b)  
applicant need not consider the environmental impacts of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations for the period following the term of the reactor combined license; LBP-09-21, 70 NRC 602 (2009)
- environmental reports and environmental impact statements for nuclear reactors are not required to discuss the environmental impacts of the spent nuclear fuel and high-level waste that they inevitably generate; LBP-09-10, 70 NRC 113, 114 (2009); LBP-09-17, 70 NRC 343 (2009); LBP-09-18, 70 NRC 406 (2009)
- 10 C.F.R. 51.30(d)  
design certification applicants are required to address severe accident mitigation design alternatives; LBP-09-19, 70 NRC 536 (2009)
- 10 C.F.R. 51.41  
applicant must address potentially adverse environmental effects in its environmental report; LBP-09-25, 70 NRC 889 (2009)

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- 10 C.F.R. 51.45  
indirect and cumulative impacts of the proposed project have been sufficiently alleged and supported to fairly raise the issue as to whether, under the rule of reason, they are significant enough to have been included in the environmental report; LBP-09-10, 70 NRC 104 (2009)  
the environmental report must cover all significant environmental impacts associated with the proposed project; LBP-09-10, 70 NRC 102 (2009)
- 10 C.F.R. 51.45(a)  
each application must be accompanied by an environmental report; LBP-09-10, 70 NRC 87 (2009)
- 10 C.F.R. 51.45(b)  
environmental reports must contain a description of the environment affected and discuss the impact of the proposed action on the environment; LBP-09-17, 70 NRC 368 (2009)  
the environmental report shall discuss the impacts of the proposed action on the environment in proportion to their significance; LBP-09-25, 70 NRC 877 n.49 (2009)
- 10 C.F.R. 51.45(b)(1)  
an environmental impact statement must provide a detailed statement concerning the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; LBP-09-10, 70 NRC 124 (2009); LBP-09-16, 70 NRC 258 (2009)  
the environmental report must discuss environmental impacts in proportion to their significance; LBP-09-10, 70 NRC 88 (2009)
- 10 C.F.R. 51.45(b)(1)-(3)  
the environmental report must contain a description of the proposed action, a statement of its purposes, and a discussion of the impacts, adverse environmental effects, and alternatives to the proposed action; LBP-09-10, 70 NRC 87-88 (2009)
- 10 C.F.R. 51.45(b)(1)-(5)  
the environmental report is required to address a list of environmental considerations that correspond to the environmental considerations that NEPA § 102(2)(C)(i)-(v) requires the agency to address in the environmental impact statement; LBP-09-16, 70 NRC 261-62 (2009)  
the environmental report must discuss each of the five subelements covered by NEPA § 102(2)(C); LBP-09-16, 70 NRC 263 (2009)
- 10 C.F.R. 51.45(b)(2)  
an environmental impact statement must provide a detailed statement concerning the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; LBP-09-10, 70 NRC 124 (2009); LBP-09-16, 70 NRC 258 (2009)  
the environmental report must discuss any adverse environmental effects that cannot be avoided should the proposal be implemented; LBP-09-16, 70 NRC 259 (2009); LBP-09-25, 70 NRC 889 (2009)
- 10 C.F.R. 51.45(b)(3)  
applicant must address potentially adverse environmental effects in its environmental report; LBP-09-25, 70 NRC 889 (2009)  
if the proposed siting of a plant slated for an early site permit involves unresolved conflicts concerning alternative uses of available resources, then this discussion must be sufficiently complete to allow the Staff to develop and to explore appropriate alternatives to the ESP pursuant to NEPA § 102(2)(E); LBP-09-19, 70 NRC 487 (2009)  
presentation of alternatives in an applicant's environmental report and in an NRC environment impact statement must be in comparative form; LBP-09-19, 70 NRC 487-88 (2009)  
the discussion of alternatives in the environmental report must be sufficiently complete to aid the Commission in developing and exploring appropriate alternatives pursuant to section 102(2)(E) of National Environmental Policy Act; LBP-09-10, 70 NRC 88, 131 (2009)
- 10 C.F.R. 51.45(b)(5)  
an environmental impact statement must provide a detailed statement concerning the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in

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- the proposed action should it be implemented; LBP-09-10, 70 NRC 124 (2009); LBP-09-16, 70 NRC 258 (2009)
- 10 C.F.R. 51.45(c)  
although the SAMA methodology is available to provide the required analysis, neither NEPA nor NRC regulations require that the analysis under this section be performed using the SAMA methodology; LBP-09-26, 70 NRC 956 (2009)  
the environmental report must include an analysis that considers and balances the effects of the proposed action and its alternatives, and the alternatives available for reducing or avoiding adverse environmental effects; LBP-09-10, 70 NRC 88, 108 (2009); LBP-09-19, 70 NRC 536 (2009); LBP-09-26, 70 NRC 963 (2009)
- 10 C.F.R. 51.45(d)  
in its application, applicant must list all federal permits, licenses, approvals, and other entitlements that must be obtained in connection with the issuance of an operating license for a second nuclear reactor and adequately discuss the status of its compliance with them; LBP-09-26, 70 NRC 956 (2009)  
the environmental report must enumerate the status of applicant's compliance with all other applicable regulatory requirements, licenses, and permits; LBP-09-10, 70 NRC 105 (2009)
- 10 C.F.R. 51.45(e)  
information submitted in the environmental report should not be confined to information supporting the proposed action but should also include adverse information; LBP-09-16, 70 NRC 258 (2009)
- 10 C.F.R. 51.50(b)  
applicant for an early site permit must to file an environmental report addressing the five factors of section 51.45(b)(1)-(5); LBP-09-19, 70 NRC 487 (2009)
- 10 C.F.R. 51.50(b)(1)  
applicant's environmental report must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 487 (2009)
- 10 C.F.R. 51.50(b)(2)  
the environmental report for an early site permit application may evaluate the environmental impacts of a reactor or reactors falling within the site characteristics and design parameters for the ESP application; LBP-09-19, 70 NRC 549 (2009)
- 10 C.F.R. 51.50(c)  
environmental reports are required for combined license applications, including those that reference a standard design certification; LBP-09-10, 70 NRC 88 (2009)
- 10 C.F.R. 51.50(c)(1)(i)  
if the application references an early site permit, applicant must demonstrate that the chosen design falls within the parameters specified in the ESP or, on the safety side, request a variance; LBP-09-19, 70 NRC 549 (2009)
- 10 C.F.R. 51.50(c)(2)  
environmental reports are required for combined license applications, including those that reference a standard design certification; LBP-09-10, 70 NRC 88 (2009)
- 10 C.F.R. 51.51  
applicant is required to take Table S-3 as the basis for evaluating the contribution of the environmental effects of management of high-level wastes related to uranium fuel cycle activities; LBP-09-21, 70 NRC 601 (2009)
- 10 C.F.R. 51.51(a)  
each environmental report prepared for the combined license stage must take Table S-3 as the basis for evaluating the contribution of the environmental effects of the fuel cycle to the environmental costs of licensing the reactor; CLI-09-21, 70 NRC 929 n.6 (2009)
- 10 C.F.R. 51.51, Table S-3  
both temporary and permanently committed land resources are specified as part of the uranium fuel cycle; LBP-09-21, 70 NRC 613 (2009)  
carbon dioxide emissions from the uranium fuel cycle are to be listed as zero; LBP-09-21, 70 NRC 616 (2009)  
contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-10, 70 NRC 144 n.84 (2009)

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- high-level and transuranic wastes are to be buried at a repository and no release to the environment is expected; LBP-09-10, 70 NRC 112 (2009)
- NRC regulations and the National Environmental Policy Act require consideration of all significant environmental impacts without distinguishing between onsite and offsite impacts; LBP-09-10, 70 NRC 103 (2009)
- 10 C.F.R. 51.51(b), Table S-3 n.1  
the table does not include health effects from the effluents described in the table, and that issue, as well as others specifically noted, may be the subject of litigation in individual licensing proceedings; LBP-09-16, 70 NRC 256 (2009)
- 10 C.F.R. 51.53(b)  
absent an adequately supported request to waive the application of this rule, the board is bound by it, even in light of the unusual circumstances of this case, this contention cannot be admitted; LBP-09-26, 70 NRC 977 (2009)  
applicant must submit a supplement to its environmental report at the operating license stage that discusses the same matters described in sections 51.45, 51.51, and 51.52, which would have been initially discussed in the environmental report at the construction permit stage, but only to the extent that they differ from those discussed or reflect new information; LBP-09-26, 70 NRC 976 (2009)  
no discussion of need for power or alternative energy sources is required in a supplemental environmental report at the operating license stage; LBP-09-26, 70 NRC 974 (2009)  
the clear intent of this section is to avoid duplication and to highlight new information; LBP-09-26, 70 NRC 976-77 (2009)
- 10 C.F.R. 51.53(d)  
decommissioning plans are provided in the post-shutdown phase of a plant; LBP-09-17, 70 NRC 372 (2009)
- 10 C.F.R. 51.55  
environmental reports are required for each application for a standard design certification; LBP-09-10, 70 NRC 88 (2009)
- 10 C.F.R. 51.55(a)  
design certification applicants are required to address severe accident mitigation design alternatives; LBP-09-19, 70 NRC 536 (2009)  
the environmental report associated with each application for a standard design certification must address the costs and benefits of severe accident design mitigation alternatives; LBP-09-10, 70 NRC 108 (2009)
- 10 C.F.R. 51.70(b)  
although the draft environmental impact statement may rely in part on the applicant's environmental report, Staff must independently evaluate and be responsible for the reliability of all information used in the DEIS; LBP-09-19, 70 NRC 463 (2009)
- 10 C.F.R. 51.71(d)  
NRC Staff's environmental impact statement prepared during review of an early site permit application must consider and weigh the environmental impacts of alternatives to the proposed action and alternatives available for reducing or avoiding adverse environmental effects; LBP-09-19, 70 NRC 488 (2009)
- 10 C.F.R. 51.71(d) n.3  
in the context of NEPA, NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the permits and licenses issued by other governmental agencies; LBP-09-21, 70 NRC 594 n.36 (2009)  
Staff and applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater in their environmental impact statement and environmental report; LBP-09-25, 70 NRC 889 (2009)  
the fact that an agency other than NRC has jurisdiction to issue a permit concerning a certain environmental impact of the project does not mean that the subject may be excluded from the environmental report or environmental impact statement; LBP-09-10, 70 NRC 100 (2009); LBP-09-16, 70 NRC 278 (2009)



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- 10 C.F.R. 51.73  
the draft environmental impact statement is distributed for public comment and, based on the comments received, a review of information provided by the applicant, and supplemental independent information and analysis, the Staff prepares and issues a final EIS; LBP-09-19, 70 NRC 463 (2009)
- 10 C.F.R. 51.75(b)  
content of Staff's draft environmental impact statement is discussed; LBP-09-19, 70 NRC 463 (2009)  
NRC Staff's environmental impact statement prepared during review of an early site permit application must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 488 (2009)
- 10 C.F.R. 51.75(c)(2)  
if a combined license application references a design certification, then the presiding officer shall not admit contentions concerning severe accident design mitigation alternatives unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification; LBP-09-10, 70 NRC 108 (2009)
- 10 C.F.R. 51.91  
the draft environmental impact statement is distributed for public comment and, based on the comments received, a review of information provided by the applicant, and supplemental independent information and analysis, the Staff prepares and issues a final EIS; LBP-09-19, 70 NRC 463 (2009)
- 10 C.F.R. 51.95  
decommissioning plans are provided in the post-shutdown phase of a plant; LBP-09-17, 70 NRC 372 (2009)
- 10 C.F.R. 51.95(b)  
no discussion of need for power or alternative energy sources is required in a final supplemental environmental impact statement at the operating license stage; LBP-09-26, 70 NRC 974 (2009)
- 10 C.F.R. 51.105(a)(1)-(4)  
environmental findings that a board must make to authorize issuance of an early site permit are described; LBP-09-19, 70 NRC 458 (2009)
- 10 C.F.R. 51.105(c)  
boards are to determine whether the site redress plan will adequately redress the activities performed under a limited work authorization should the activities be terminated by either the holder of the LWA or by Commission denial of any corresponding early site permit or combined license; LBP-09-19, 70 NRC 459 (2009)
- 10 C.F.R. 51.105(c)(3)  
although a presiding officer should issue a separate partial initial decision regarding a limited work authorization request, the board finds no practical or logical basis for separating its consideration of the adequacy of the LWA request from its determination regarding the early site permit with which it is associated; LBP-09-19, 70 NRC 504-05 n.32 (2009)
- 10 C.F.R. 51.107(a)  
the board recommends that the location of a new reactor within the emergency planning zone of an existing reactor be considered by the Commission or board when it conducts the mandatory review and hearing that must be held; LBP-09-10, 70 NRC 112 (2009)
- 10 C.F.R. 51.107(a)(3)  
NRC must analyze the need for additional power when it relies upon a benefit in performing the balancing of benefits and costs; LBP-09-16, 70 NRC 301-02 (2009)
- 10 C.F.R. 51.107(c)  
if a combined license application references a design certification, then the presiding officer shall not admit contentions concerning severe accident design mitigation alternatives unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification; LBP-09-10, 70 NRC 108 (2009)
- 10 C.F.R. Part 51, Subpart A, Appendix A, § 1(a)(5)  
an otherwise reasonable alternative will not be excluded from discussion solely on the ground that it is not within the jurisdiction of the NRC; LBP-09-10, 70 NRC 127 (2009); LBP-09-17, 70 NRC 379 (2009)  
environmental reports and environmental impact statements are required to consider all significant environmental impacts of a proposed project, even if the regulation of such impacts falls outside of

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- NRC's jurisdiction and lies with another agency; LBP-09-10, 70 NRC 100, 105 (2009); LBP-09-16, 70 NRC 278 (2009); LBP-09-21, 70 NRC 594 n.36 (2009)
- presentation of alternatives in an applicant's environmental report and in an NRC environment impact statement must be in comparative form; LBP-09-19, 70 NRC 487-88 (2009)
- Staff and applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater in their environmental impact statement and environmental report; LBP-09-25, 70 NRC 889 (2009)
- the environmental impact statement must identify and discuss all reasonable alternatives; LBP-09-17, 70 NRC 378 (2009)
- the NEPA alternatives analysis is the heart of the environmental impact statement; LBP-09-10, 70 NRC 126 (2009); LBP-09-16, 70 NRC 263 (2009); LBP-09-17, 70 NRC 378 (2009)
- 10 C.F.R. Part 51, Subpart A, Appendix A, § 7
- applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed in an environmental report; CLI-09-20, 70 NRC 924 (2009)
- 10 C.F.R. 52.1
- an early site permit is an approval for a nuclear plant site; LBP-09-19, 70 NRC 549 (2009)
- 10 C.F.R. 52.1(a)
- early site permit applications, as partial construction permit applications, are subject to the AEA hearing requirement, as well as all procedural requirements in 10 C.F.R. Part 2; LBP-09-19, 70 NRC 456 (2009)
- if granted, an early site permit evidences Commission approval of a site for one or more nuclear power facilities; LBP-09-19, 70 NRC 456 (2009)
- 10 C.F.R. 52.17(a)(1)(vi)
- applicant's site safety analysis report must include seismic and geologic characteristics of the proposed site with appropriate consideration of the most severe historical natural phenomena that have been reported for the site; LBP-09-19, 70 NRC 524 (2009)
- the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 482 (2009)
- 10 C.F.R. 52.17(a)(1)(ix)
- early site permit applicants must perform an evaluation and analysis of the postulated fission product release to evaluate the offsite radiological consequences; LBP-09-19, 70 NRC 473 (2009)
- early site permit applicants must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 535 (2009)
- early site permit applications must contain a description and safety assessment of the site that includes an analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under radiological consequence evaluation factors; LBP-09-19, 70 NRC 473 (2009)
- the site safety analysis report submitted with an early site permit application must contain a description and safety assessment of the site on which a facility is to be located; LBP-09-19, 70 NRC 482 (2009)
- 10 C.F.R. 52.17(a)(1)(ix) n.1
- in applicant's safety assessment, the fission product releases in question are associated with accidents that have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-19, 70 NRC 535 (2009)
- 10 C.F.R. 52.17(a)(1)(ix)(A)-(B)
- individuals located at the boundary of the exclusion area cannot be exposed to more than 25 rem total effective dose equivalent in any 2-hour period, and any individual located at the outer boundary of the low population zone cannot be exposed to more than 25 rem TEDE during the entire period of any radioactive release; LBP-09-19, 70 NRC 473 (2009)

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- 10 C.F.R. 52.17(b)(1)  
the site safety analysis report filed with an early site permit application must include information that identifies physical characteristics of the proposed site, such as egress limitations from the area surrounding the site, that could pose a significant impediment to the development of emergency plans; LBP-09-19, 70 NRC 507-08 (2009)
- 10 C.F.R. 52.17(b)(2)(i), (ii)  
an early site permit applicant has the option of either proposing a complete and integrated emergency plan or proposing major features of the emergency plan for review and approval by NRC, in consultation with the Department of Homeland Security; LBP-09-19, 70 NRC 508 (2009)
- 10 C.F.R. 52.17(b)(3)  
if applicant submits a complete and integrated emergency plan under section 52.17(b)(2)(ii), it must include in the early site permit application the proposed inspections, tests, and analyses that will be performed, and the acceptance criteria that are necessary and sufficient for the Commission's required findings for issuance of the ESP; LBP-09-19, 70 NRC 508, 554 (2009)
- 10 C.F.R. 52.17(b)(4)  
if applicant chooses to submit a complete and integrated emergency plan at the early site permit stage, applicant also is required to make a good-faith effort to obtain a certification from federal, state, and local governmental agencies with emergency planning responsibilities; LBP-09-19, 70 NRC 509 (2009)
- 10 C.F.R. 52.17(c)  
an early site permit applicant may request that a limited work authorization be issued in conjunction with the ESP; LBP-09-19, 70 NRC 456, 459 (2009)
- 10 C.F.R. 52.18  
NRC Staff must prepare an environmental impact statement during review of an early site permit application; LBP-09-19, 70 NRC 488 (2009)  
Staff is to review early site permit applications according to the applicable standards set out in 10 C.F.R. Part 50 and its appendices and 10 C.F.R. Part 100; LBP-09-19, 70 NRC 473 (2009)
- 10 C.F.R. 52.21  
early site permit applications, as partial construction permit applications, are subject to the AEA hearing requirement, as well as all procedural requirements in 10 C.F.R. Part 2; LBP-09-19, 70 NRC 456 (2009)
- 10 C.F.R. 52.24(a)  
prior to issuance of an early site permit, the findings required by 10 C.F.R. Part 51, Subpart A must be made; LBP-09-19, 70 NRC 458-59 (2009)
- 10 C.F.R. 52.24(a)(1)-(6)  
findings that a board must make for issuance of an early site permit are clarified; LBP-09-19, 70 NRC 457-58 (2009)
- 10 C.F.R. 52.24(a)(5)  
to grant an early site permit, the Commission must find that the proposed inspections, tests, analyses, and acceptance criteria, including any on emergency planning, are necessary and sufficient, within the scope of the ESP, to provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the Act, and the Commission's regulations; LBP-09-19, 70 NRC 554 (2009)
- 10 C.F.R. 52.24(a)(7)  
when an early site permit is issued with an associated limited work authorization, the board must find relative to the LWA that any significant adverse environmental impact resulting from activities requested under section 52.17(c) can be redressed; LBP-09-19, 70 NRC 459 n.8 (2009)
- 10 C.F.R. 52.24(a)(8)  
prior to issuance of an early site permit, the findings required by 10 C.F.R. Part 51, Subpart A must be made; LBP-09-19, 70 NRC 459 (2009)
- 10 C.F.R. 52.24(b)  
an early site permit specifies design parameters for the site; LBP-09-19, 70 NRC 549 (2009)  
any permit conditions imposed that are not met before a combined license referencing the early site permit is issued will attach to the COL; LBP-09-19, 70 NRC 547 (2009)

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- if the Commission decides to authorize issuance of an early site permit, the issued ESP must specify the site characteristics, design parameters, and terms and conditions of the ESP that the Commission deems appropriate; LBP-09-19, 70 NRC 458 (2009)
- 10 C.F.R. 52.24(c)  
if limited work authorization activities are approved by NRC in conjunction with an early site permit, the ESP as issued shall specify those authorized activities; LBP-09-19, 70 NRC 459-60 (2009)
- 10 C.F.R. 52.25  
a site redress plan remains in effect for an early site permit applicant even if the ESP with which the LWA is issued is not referenced in a construction permit or COL application during the period that the ESP remains valid; LBP-09-19, 70 NRC 499 (2009)
- 10 C.F.R. Part 52, Subpart B  
a combined license applicant may reference a certified reactor design for the facility it proposes to construct and operate; LBP-09-16, 70 NRC 238 (2009)
- 10 C.F.R. 52.47(a)(2)  
the safety analysis report component of an application for a standard design certification must analyze and address the problem of extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products; LBP-09-10, 70 NRC 107 n.43 (2009)
- 10 C.F.R. 52.47(a)(2)(iv) & n.3  
the safety analysis report must provide special attention to design features intended to mitigate the radiological consequences of accidents if there is a substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-10, 70 NRC 107 n.43 (2009)
- 10 C.F.R. 52.55(c)  
a design certification application may be referenced in the combined license application; LBP-09-10, 70 NRC 76 (2009); LBP-09-17, 70 NRC 332 (2009)  
a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 269 (2009); LBP-09-18, 70 NRC 415 (2009)  
applicant for a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-10, 70 NRC 76 (2009); LBP-09-16, 70 NRC 268 (2009); LBP-09-17, 70 NRC 334 (2009); LBP-09-18, 70 NRC 413, 414 (2009)
- 10 C.F.R. 52.73(a)  
at the COL stage, an applicant may reference both an early site permit and a standard design certification in its application; LBP-09-10, 70 NRC 76 (2009); LBP-09-19, 70 NRC 549 (2009)
- 10 C.F.R. 52.79(a)  
a combined license application must contain a final safety analysis report; LBP-09-10, 70 NRC 117 (2009)
- 10 C.F.R. 52.79(a)(1)(vi)  
the final safety analysis report of a combined license application must contain analysis of a severe accident involving a fission product release from the core into the containment including any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-10, 70 NRC 107 (2009)
- 10 C.F.R. 52.79(a)(1)(vi) n.5  
the fission product release assumed for the final safety analysis report is based on a major accident assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-10, 70 NRC 107 (2009)
- 10 C.F.R. 52.79(a)(3)  
a combined license application must describe the kinds and qualities of radioactive materials expected to be produced in the operation and the means for controlling and limiting the radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; CLI-09-16, 70 NRC 36-37 (2009); LBP-09-10, 70 NRC 124 (2009); LBP-09-27, 70 NRC 1001, 1005, 1012, 1014 (2009)  
although applicant's plan reduces the storage capacity for Class A waste, substantial storage capacity remains, and petitioner has not alleged that this change will prevent applicant from controlling and limiting radioactive effluents and radiation exposures from Class A waste within the limits set forth in 10 C.F.R. Part 20; LBP-09-27, 70 NRC 1011 (2009)

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- applicant must explain how it intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20, including, but not limited to, low-level radioactive waste handling and storage; LBP-09-27, 70 NRC 1001 (2009)
- applicant's explanation of the kinds and quantities of radioactive materials expected to be produced in the operation must be accurate; LBP-09-27, 70 NRC 1012 (2009)
- COL applicants are to consider long-term onsite low-level radioactive waste storage, but the regulation sets no quantity or time restrictions relative to onsite storage of such waste; CLI-09-16, 70 NRC 36 (2009)
- information to be included in the final safety analysis report is described; CLI-09-16, 70 NRC 35 (2009)
- this regulation sets no quantity or time restrictions relative to onsite storage of low level radioactive waste; LBP-09-27, 70 NRC 1014 (2009)
- 10 C.F.R. 52.79(b)(1)
- a combined license application referencing an early site permit must include a safety analysis report that either includes or incorporates by reference the ESP site safety analysis report and that contains additional information and analyses sufficient to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the ESP; LBP-09-19, 70 NRC 551 n.32 (2009)
- 10 C.F.R. 52.79(b)(1)-(2)
- if the application references an early site permit, the applicant must demonstrate that the chosen design falls within the parameters specified in the ESP or, on the safety side, request a variance; LBP-09-19, 70 NRC 549 (2009)
- 10 C.F.R. 52.80(a)
- a combined license application must include the proposed inspections, tests, and analyses, including those applicable to emergency planning, to be performed and the acceptance criteria that are necessary and sufficient to support the Commission's finding that a COL can be granted; LBP-09-19, 70 NRC 554 (2009)
- 10 C.F.R. 52.80(a)(3)
- if a combined license application references an early site permit with inspections, tests, analyses, and acceptance criteria or a standard design certification or both, the application may include a notification that a required inspection, test, or analysis in the ITAAC has been successfully completed and that the corresponding acceptance criterion has been met; LBP-09-19, 70 NRC 554 (2009)
- if applicant requests a Commission finding on the completion of inspections, tests, analyses, and acceptance criteria needed for issuance of a COL, the Commission is required to identify these ITAAC in the notice of hearing published in the *Federal Register* for the COL proceeding; LBP-09-19, 70 NRC 554 (2009)
- 10 C.F.R. 52.81
- applications for nuclear power plants show that the issuance of the license would not be inimical to, and will provide adequate protection to, the health and safety of the public; LBP-09-10, 70 NRC 124 (2009)
- 10 C.F.R. 52.85
- if applicant requests a Commission finding on the completion of inspections, tests, analyses, and acceptance criteria needed for issuance of a combined license, the Commission is required to identify these ITAAC in the notice of hearing published in the *Federal Register* for the COL proceeding; LBP-09-19, 70 NRC 554 (2009)
- 10 C.F.R. 52.97(a)(2)
- if the Commission finds that early site permit or design certification inspections, tests, analyses, and acceptance criteria have been met, those acceptance criteria will be deemed to be excluded from the combined license and from findings under section 52.103(g); LBP-09-19, 70 NRC 554 (2009)
- 10 C.F.R. 52.97(b)
- on issuance of a combined license, the Commission must identify any inspections, tests, analyses, and acceptance criteria that have not yet been met; LBP-09-19, 70 NRC 554 (2009)

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- 10 C.F.R. 52.99(a)  
no later than 1 year after issuance of the combined license or at the start of construction, whichever is later, the COL licensee must submit its schedule for completing the inspections, tests, or analyses and provide schedule updates; LBP-09-19, 70 NRC 554-55 (2009)
- 10 C.F.R. 52.99(e)(1)  
at appropriate intervals during the time between issuance of a combined license and the last date for submission of requests for hearing under section 52.103(a), NRC shall publish notices in the *Federal Register* of NRC Staff's determination of the successful completion of inspections, tests, and analyses; LBP-09-19, 70 NRC 555 (2009)
- 10 C.F.R. 52.99(e)(2)  
NRC must make publicly available any notifications from the COL licensee indicating that the licensee believes certain inspections, tests, analyses, and acceptance criteria have been met as well as any notifications that any uncompleted ITAAC will be met prior to operation; LBP-09-19, 70 NRC 555 (2009)
- 10 C.F.R. 52.103(a)  
an opportunity for hearing will be provided in the *Federal Register* notice of fuel loading, regarding whether inspections, tests, or analyses that have not been found to have been met under section 52.97(a)(2) prior to issuance of the COL; LBP-09-19, 70 NRC 555 (2009)  
COL applicants must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading; LBP-09-21, 70 NRC 630 (2009)  
prior to operation under a COL, a notice of intended operation will be published in the *Federal Register* not less than 180 days before the date scheduled for initial loading of fuel; LBP-09-19, 70 NRC 555 (2009)
- 10 C.F.R. 52.103(b)  
an opportunity for hearing will be provided in the *Federal Register* notice of fuel loading, regarding whether inspections, tests, or analyses that have not been found to have been met under section 52.97(a)(2) prior to issuance of the COL; LBP-09-19, 70 NRC 555 (2009)
- 10 C.F.R. 52.103(g)  
holder of a combined license must begin filing biannual reports on the status of decommissioning funding once the Commission has made a finding that all acceptance criteria in the license have been met; LBP-09-15, 70 NRC 219 (2009)
- 10 C.F.R. 52.104  
a combined license is issued for a period of 40 years; LBP-09-16, 70 NRC 265 (2009)
- 10 C.F.R. 52.109  
licensee remains authorized to own and possess the facility even after the operating license expires; LBP-09-17, 70 NRC 349 (2009)
- 10 C.F.R. 52.110(a)(1)  
if after public notice and review the NRC approves the decommissioning plan, licensee has 60 years to complete decommissioning; LBP-09-17, 70 NRC 373 (2009)
- 10 C.F.R. 52.110(b)  
licensee remains authorized to own and possess the facility even after the operating license expires; LBP-09-17, 70 NRC 349 (2009)
- 10 C.F.R. 52.110(c)  
if after public notice and review the NRC approves the decommissioning plan, licensee has 60 years to complete decommissioning; LBP-09-17, 70 NRC 373 (2009)
- 10 C.F.R. 52.110(d)  
decommissioning plans are not required until the applicant files a post-shutdown decommissioning activities report, which is not due until 2 years before permanent cessation of operation; LBP-09-17, 70 NRC 372 (2009); LBP-09-21, 70 NRC 621 (2009)
- 10 C.F.R. 52.110(d)(1)  
if after public notice and review the NRC approves the decommissioning plan, licensee has 60 years to complete decommissioning; LBP-09-17, 70 NRC 373 (2009)

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- 10 C.F.R. 52.110(i)  
when a nuclear power plant ceases operations, the owner must apply for a license to terminate, which cannot be granted until the NRC is satisfied that the plant has been properly dismantled and decommissioned so that residual radiation meets established rules, and that no spent fuel or high-level wastes would be onsite; LBP-09-21, 70 NRC 606 n.124 (2009)
- 10 C.F.R. 52.110(k)  
decommissioning is not complete, and an operating license cannot be terminated, in effect, until all spent fuel and high-level waste have been removed from the site; LBP-09-17, 70 NRC 348 (2009)
- 10 C.F.R. Part 52, Appendix D, § VI.B.7  
all environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's environmental assessment for a certified design are considered resolved; LBP-09-19, 70 NRC 536, 538 (2009)
- 10 C.F.R. 55.53(b)  
any senior reactor operator license is limited to the facility for which it is issued; LBP-09-14, 70 NRC 194-95, 196 (2009)
- 10 C.F.R. 55.53(e)  
no senior reactor operator license that petitioner might be awarded could be active, because (not having been at the facility for more than 6 months) petitioner could not have performed the functions of an operator or senior operator for the necessary minimum number of hours during each calendar quarter; LBP-09-14, 70 NRC 196 (2009)
- 10 C.F.R. 55.55(a)  
any senior reactor operator license automatically expires upon termination of employment with the facility licensee; LBP-09-14, 70 NRC 195, 196 (2009)
- 10 C.F.R. 61.1  
Part 61 only applies to the land disposal of radioactive waste received from others; LBP-09-10, 70 NRC 121 (2009)
- 10 C.F.R. 63.21(c)(19)  
contention asserting that DOE's description of its expert elicitation relating to a probabilistic volcanic hazard analysis update fails to comply with this section or the NRC guidance document that DOE formally committed to follow is admissible; LBP-09-29, 70 NRC 1032-33 (2009)
- 10 C.F.R. 70.22(a)(8), 70.23(a)(5)  
the 10 C.F.R. Part 70 financial criteria can be met by conditioning the materials license to require funding commitments to be in place prior to construction and operation; CLI-09-15, 70 NRC 18 (2009)
- 10 C.F.R. 70.23a  
a materials license hearing will be conducted for a fuel enrichment facility according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLI-09-15, 70 NRC 7 (2009)
- 10 C.F.R. 70.31  
an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 19 (2009)
- 10 C.F.R. 70.32(k)  
prior to commencement of operations of a fuel enrichment facility, NRC will verify through inspection that the facility has been constructed in accordance with the requirements of the license for such construction and operation; CLI-09-15, 70 NRC 6-7 (2009)
- 10 C.F.R. 70.44  
creditor interests may be created in special nuclear material; CLI-09-15, 70 NRC 19 (2009)
- 10 C.F.R. 72.210  
issuance of a combined license could be accompanied by a Part 72 general license, subject to certain conditions; LBP-09-21, 70 NRC 604 n.111 (2009)  
the assertion that the applicant might need to obtain a Part 72 license is irrelevant at the combined license stage, because a grant of the COL could be accompanied by grant of a Part 72 general license if applicant complies with certain conditions; LBP-09-21, 70 NRC 594 (2009)  
the Commission has issued a general license for the storage of spent fuel at an onsite independent spent fuel storage installation to all persons authorized to possess or operate nuclear power reactors under 10 C.F.R. Part 50 or Part 52; LBP-09-20, 70 NRC 567 (2009)

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- 10 C.F.R. 72.212(a)(2)  
issuance of a combined license could be accompanied by a Part 72 general license, subject to certain conditions; LBP-09-21, 70 NRC 604 n.111 (2009)  
the assertion that the applicant might need to obtain a Part 72 license is irrelevant at the combined license stage, because a grant of the COL could be accompanied by grant of a Part 72 general license if applicant complies with certain conditions; LBP-09-21, 70 NRC 594 (2009)
- 10 C.F.R. 73.2  
content of a statement that explains an individual's "need to know" safeguards information is described; CLI-09-15, 70 NRC 22-23 (2009)
- 10 C.F.R. 73.22  
prior to providing safeguards information to a requestor, the NRC Staff will conduct an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of this section; CLI-09-15, 70 NRC 25 (2009)
- 10 C.F.R. 73.22(b)  
for requests for access to safeguards information, if the NRC Staff determines that the requestor has satisfied its requirements, the Office of Administration will then determine, based upon completion of the background check, whether the proposed recipient is trustworthy and reliable; CLI-09-15, 70 NRC 25 (2009)
- 10 C.F.R. 73.22(b)(1)  
a completed Form FD-258 (fingerprint card), signed in original ink, and submitted in accordance with 10 C.F.R. 73.57(d) is required for access to safeguards information; CLI-09-15, 70 NRC 23 (2009)  
content of a statement that explains an individual's "need to know" safeguards information is described; CLI-09-15, 70 NRC 22-23 (2009)
- 10 C.F.R. 73.22(b)(2)  
a completed Form SF-85, "Questionnaire for Non-Sensitive Positions" is required for each individual who would have access to safeguards information; CLI-09-15, 70 NRC 23 (2009)
- 10 C.F.R. 73.59  
individuals requesting access to safeguards information who believe they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements should specifically state which exemption the requestor is invoking and explain the requestor's basis for believing that the exemption is applicable; CLI-09-15, 70 NRC 24 (2009)
- 10 C.F.R. 100.20(c)  
the Commission, in determining the acceptability of a site for a stationary power reactor, will consider the physical characteristics of the site, including seismology, meteorology, geology, and hydrology; LBP-09-19, 70 NRC 482 (2009)
- 10 C.F.R. 100.20(c)(3)  
a properly pleaded contention of omission contends that the combined license application does not present site-specific measurements of adsorption and retention coefficients; LBP-09-16, 70 NRC 272 (2009)  
in its review of early site permit applications, Staff must consider physical characteristics of the site, specifically noting that factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 473 (2009)
- 10 C.F.R. 100.23  
in providing information on seismic and geologic characteristics of a proposed site, applicants must conform to the requirements of this section; LBP-09-19, 70 NRC 524 (2009)
- 10 C.F.R. 150.20  
upon submitting for approval to work under a reciprocity agreement licensee will send a copy of the board order confirming the settlement agreement to the regulator processing the reciprocity application at least 2 weeks prior to engaging in activity authorized by the reciprocity agreement; LBP-09-12, 70 NRC 164-65 (2009)
- 25 C.F.R. 83.1  
the Bureau of Indian Affairs is required to publish its list of federally recognized Indian Tribes in the *Federal Register*; LBP-09-13, 70 NRC 185 (2009)
- 25 C.F.R. 83.7  
to qualify for recognition on the Bureau of Indian Affairs' list as an Indian tribe, a petitioning group must establish that it has historically been recognized as an American Indian entity since 1900, that it is



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- composed of a cohesive group of individuals that share a distinct community and an autonomous government, and that its members are descended from a historic Indian tribe or tribes; LBP-09-13, 70 NRC 185 (2009)
- 25 C.F.R. 83.7(f)  
membership of a petitioning Indian group must be composed principally of persons who are not members of any other acknowledged North American Indian tribe; LBP-09-13, 70 NRC 185 (2009)
- 36 C.F.R. 800.16(m)  
only Indian tribes that appear on the Department of the Interior's list of recognized tribes have consultation rights under the National Historic Preservation Act; LBP-09-13, 70 NRC 188 (2009)
- 40 C.F.R. 1502.14  
the environmental impact statement must identify and discuss all reasonable alternatives; LBP-09-17, 70 NRC 378 (2009)  
the NEPA alternatives analysis is the heart of the environmental impact statement; LBP-09-10, 70 NRC 126 (2009); LBP-09-16, 70 NRC 263 (2009); LBP-09-17, 70 NRC 378 (2009)
- 40 C.F.R. 1502.14(a)  
the reasonableness of energy conservation as an alternative in light of the need for a large amount of baseload electric power is questioned; LBP-09-10, 70 NRC 132 (2009)
- 40 C.F.R. 1502.14(c)  
the fact that an environmental impact is regulated by another federal agency or by a state does not justify the exclusion of the analysis in the applicant's environmental report or the NRC's environmental impact statement; LBP-09-10, 70 NRC 100 (2009); LBP-09-16, 70 NRC 278 (2009)
- 40 C.F.R. 1502.14(f), 1502.16(h), 1508.20  
Council on Environmental Quality regulations define the term "mitigation," and require that the environmental impact statement include appropriate mitigation measures; LBP-09-10, 70 NRC 108 (2009)
- 40 C.F.R. 1508.7  
Council on Environmental Quality regulations indeed define "direct and indirect" impacts and "cumulative" impacts and require that they be considered in the environmental impact statement; LBP-09-10, 70 NRC 84 n.27 (2009)  
"cumulative impact" is defined as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions; LBP-09-16, 70 NRC 248 (2009)  
cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; LBP-09-19, 70 NRC 463 (2009)  
direct environmental impacts are those caused by the federal action and occurring at the same time and place as that action; LBP-09-19, 70 NRC 463 (2009)  
experience with and information about past direct and indirect effects of individual past actions may be useful in illuminating or predicting the direct and indirect effects of a proposed action; LBP-09-16, 70 NRC 248 (2009)  
indirect environmental impacts are caused by the action at a later time or more distant place, yet are still reasonably foreseeable; LBP-09-19, 70 NRC 463 (2009)
- 40 C.F.R. 1508.8  
Council on Environmental Quality regulations indeed define "direct and indirect" impacts and "cumulative" impacts and require that they be considered in the environmental impact statement; LBP-09-10, 70 NRC 84 n.27 (2009)
- 40 C.F.R. 1508.25  
an agency environmental impact statement must consider direct, indirect, and cumulative impacts of an action; LBP-09-19, 70 NRC 463 (2009)

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- 18 U.S.C. § 3142(c), (f)  
to succeed in imposing pretrial detention because the accused is a danger to the community, the government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably ensure the community's safety; LBP-09-24, 70 NRC 806 (2009)
- Administrative Procedure Act, 5 U.S.C. § 556(d)  
a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts; LBP-09-10, 70 NRC 145 (2009); LBP-09-22, 70 NRC 656 n.34 (2009)  
NRC Staff's role at a hearing in an enforcement proceeding is akin to that of a prosecutor, and it has the burden to prove its allegations by a preponderance of the reliable, probative, and substantial evidence; LBP-09-24, 70 NRC 706 (2009)  
the standard for allowing the parties to conduct cross-examination is the same under Subparts G and L; LBP-09-10, 70 NRC 145 (2009)  
there is no absolute right to cross-examination; LBP-09-10, 70 NRC 145 (2009)
- Atomic Energy Act, 53  
issues of foreign involvement of a uranium enrichment facility applicant shall be determined pursuant to sections 57 and 69, not sections 103, 104, or 193(f); CLI-09-15, 70 NRC 19 (2009)
- Atomic Energy Act, 57  
an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 19 (2009)
- Atomic Energy Act, 63  
issues of foreign involvement of a uranium enrichment facility applicant shall be determined pursuant to sections 57 and 69, not sections 103, 104, or 193(f); CLI-09-15, 70 NRC 19 (2009)
- Atomic Energy Act, 69  
an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 19 (2009)
- Atomic Energy Act, 103(d), 42 U.S.C. § 2133(d)  
applications for nuclear power plants show that the issuance of the license would not be inimical to, and will provide adequate protection to, the health and safety of the public; LBP-09-10, 70 NRC 124 (2009)  
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; CLI-09-20, 70 NRC 919 (2009)
- Atomic Energy Act, 105  
an enrichment facility is not a production or utilization facility and, therefore, NRC does not have antitrust responsibilities for it; CLI-09-15, 70 NRC 19 (2009)
- Atomic Energy Act, 149  
a completed Form FD-258 (fingerprint card), signed in original ink, and submitted in accordance with 10 C.F.R. 73.57(d) is required for access to safeguards information; CLI-09-15, 70 NRC 23-24 (2009)
- Atomic Energy Act, 161b, 42 U.S.C. § 2201(b)  
NRC's performance of its regulatory function to protect health and minimize danger to life or property is largely dependent on accurate self-reporting by licensed entities and their employees; LBP-09-24, 70 NRC 853 (2009)

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- Atomic Energy Act, 182(a)  
applications for nuclear power plants show that the issuance of the license would not be inimical to, and will provide adequate protection to, the health and safety of the public; LBP-09-10, 70 NRC 124 (2009)
- Atomic Energy Act, 184  
creditor regulations in 10 C.F.R. 50.81 shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-09-15, 70 NRC 19 (2009)
- Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)  
a hearing must be granted in any licensing proceeding to any person whose interest may be affected by the proceeding; LBP-09-15, 70 NRC 221 (2009)  
intervention petitioner must be able to show how it would have personally suffered or will suffer a distinct and palpable harm that constitutes injury in fact; LBP-09-18, 70 NRC 400 (2009)
- Atomic Energy Act, 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A)  
if and when a combined license application is amended, petitioners must be given a fair opportunity to file new or amended contentions challenging these changes; LBP-09-10, 70 NRC 77 (2009)  
in determining whether a petitioner is an "interested person" for the purposes of a standing determination, NRC is not strictly bound by judicial standing doctrines; CLI-09-20, 70 NRC 915 (2009)  
NRC shall grant a hearing upon the request of any person whose interests may be affected by the proceeding; CLI-09-20, 70 NRC 915 (2009); LBP-09-10, 70 NRC 139 n.79 (2009); LBP-09-13, 70 NRC 175 (2009); LBP-09-16, 70 NRC 239 (2009); LBP-09-17, 70 NRC 321 (2009); LBP-09-20, 70 NRC 574 n.37 (2009); LBP-09-21, 70 NRC 590 (2009)  
NRC shall hold a hearing on each application under section 2133 or 2134(b) of this title for a construction permit for a facility; LBP-09-19, 70 NRC 456 (2009)
- Atomic Energy Act, 193  
a materials license hearing will be conducted for a fuel enrichment facility according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLI-09-15, 70 NRC 7 (2009)
- Atomic Energy Act, 193(c)  
prior to commencement of operations of a fuel enrichment facility, NRC will verify through inspection that the facility has been constructed in accordance with the requirements of the license for such construction and operation; CLI-09-15, 70 NRC 6-7 (2009)
- Atomic Energy Act, 274 c(b)(1)(D), 42 U.S.C. § 2021c(b)(1)(D)  
disposal of greater-than-Class-C waste is the responsibility of the federal government; LBP-09-16, 70 NRC 254 (2009)
- Clean Water Act, 33 U.S.C. § 1371(c)(2)  
nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to impose any effluent limitation other than those set by EPA or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 885, 890 (2009)  
the permissible reach of the NRC's NEPA obligations with respect to discharges to groundwater are not affected by this section; LBP-09-25, 70 NRC 890 (2009)
- Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998)  
"Indian tribe" is defined as an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994; LBP-09-13, 70 NRC 185 (2009)
- Federal Register Act, 44 U.S.C. § 1508  
agency notices must provide at least 15 days before the opportunity for a hearing is forfeited unless a shorter period is reasonable; LBP-09-20, 70 NRC 570 (2009)
- Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479(a)  
"Indian tribe" is defined as an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe; LBP-09-13, 70 NRC 185 (2009)  
the Bureau of Indian Affairs is required to publish its list of federally recognized Indian tribes in the *Federal Register*; LBP-09-13, 70 NRC 185 (2009)

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- National Environmental Policy Act, § 102(2)(C)  
agencies are required to consider measures to mitigate environmental impacts; LBP-09-10, 70 NRC 107-08 (2009); LBP-09-19, 70 NRC 535-36 (2009)  
an environmental impact statement must address alternatives to the proposed action; LBP-09-19, 70 NRC 487 (2009)
- National Environmental Policy Act, 42 U.S.C. § 4332(C)(i), (ii), (v)  
an environmental impact statement must provide a detailed statement concerning the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; LBP-09-16, 70 NRC 258 (2009)
- National Environmental Policy Act, 42 U.S.C. § 4332(C)(i)-(v)  
the environmental report is required to address a list of environmental considerations that correspond to the environmental considerations that NEPA requires the agency to address in the environmental impact statement; LBP-09-16, 70 NRC 262 n.109 (2009)
- National Environmental Policy Act, 42 U.S.C. § 4322(2)(C)(iii)  
although the applicant's goals are given substantial weight, NEPA does not allow the applicant to define its goals so narrowly as to unreasonably circumscribe the range of alternatives that must be considered under this section; LBP-09-17, 70 NRC 379 (2009)  
the requirement to discuss alternatives in the environmental report parallels NEPA's requirement that an environmental impact statement provide a detailed statement of reasonable alternatives to a proposed action; LBP-09-10, 70 NRC 126 (2009); LBP-09-16, 70 NRC 298 (2009)
- National Environmental Policy Act, 42 U.S.C. § 4322(2)(E)  
agencies must study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; LBP-09-10, 70 NRC 126 (2009)  
although the applicant's goals are given substantial weight, NEPA does not allow the applicant to define its goals so narrowly as to unreasonably circumscribe the range of alternatives that must be considered under this section; LBP-09-17, 70 NRC 379 (2009)
- Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, § 5, 104 Stat. 2834, 2835-36 (codified as amended at 42 U.S.C. § 2243)  
a materials license hearing will be conducted for a fuel enrichment facility according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLL-09-15, 70 NRC 7 (2009)
- U.S. Const. amend. VI  
as to criminal matters, an accused person is to be informed of the nature and cause of the accusation; LBP-09-24, 70 NRC 792-93 n.176 (2009)
- U.S. Const. art. III  
federal courts are constitutionally limited by the case or controversy requirement of Article III; LBP-09-14, 70 NRC 195 (2009)



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OTHERS**

- Black's Law Dictionary* 459 (8th ed. 2004)  
a conviction based on deliberate ignorance requires a finding that a defendant acted deliberately, and a deliberate action is one that is intentional, premeditated, and fully considered; LBP-09-24, 70 NRC 819 (2009)
- 13A Charles Alan Wright et al., *Federal Practice and Procedure* §3533.2 (2d ed. 1984)  
when a claim becomes moot, a decision on the merits may be appropriate if the same basic dispute is likely to recur in the future, unless it seems sufficient to await the event or better to defer to another court; LBP-09-15, 70 NRC 210 (2009)
- 18 Charles Alan Wright et al., *Federal Practice and Procedure* §4403 (2d ed. 1987)  
the collateral estoppel doctrine promotes the compelling public interest in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; LBP-09-24, 70 NRC 809-10, 822 (2009)
- 18A Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction* 2d §4433 (1981)  
a court inclined to apply collateral estoppel based on a judgment that is subject to appeal may want to avoid the question by staying the case pending the appeal; LBP-09-24, 70 NRC 713 (2009)
- Cohen's Handbook of Federal Indian Law* §3.02[3], at 138 (2005 ed.)  
federal recognition by the Bureau of Indian Affairs is a formal political act confirming a tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government; LBP-09-13, 70 NRC 185 (2009)
- Daniel R. Mendelker, *NEPA Law and Litigation* §§ 1.1, 8.18 (2d ed. 2008)  
the National Environmental Policy Act applies to agencies of the federal government, not apply to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 87 (2009)
- Fed. R. Civ. P. 11(b)  
representations of a summary disposition movant are described; LBP-09-22, 70 NRC 652 (2009)
- Fed. R. Civ. P. 16(b)(5)  
scheduling orders are to include provisions for disclosure of electronically stored information; LBP-09-22, 70 NRC 644 n.16 (2009)
- Fed. R. Civ. P. 26(a)(2)  
each expert witness is required to create, sign, and submit a written expert report; LBP-09-30, 70 NRC 1047 (2009)
- Fed. R. Civ. P. 26(b)(2)(B)  
parties need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost; LBP-09-22, 70 NRC 644 n.16 (2009)
- Fed. R. Civ. P. 49  
a special verdict is one where the jury answers specific questions submitted to it, thus enabling the court to determine the theory underlying the conviction; LBP-09-24, 70 NRC 722, 811 n.2 (2009)
- Fed. R. Civ. P. 56(f)  
if it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the board may refuse the application for summary disposition or may order a continuance as may be necessary or just; LBP-09-22, 70 NRC 653 (2009)

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### OTHERS

- Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2239 (1993)  
deliberate ignorance is materially different from negligence and recklessness, because the latter two theories require a consciousness of something far less than probability; LBP-09-24, 70 NRC 819 (2009)
- Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2239 n.40 (1993)  
courts generally refer to actual knowledge as knowledge derived from direct evidence, whereas knowledge based on the deliberate ignorance theory is derived from circumstantial evidence; LBP-09-24, 70 NRC 819-20 (2009)
- Model Penal Code § 2.02(7) (1962)  
when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist; LBP-09-24, 70 NRC 817, 818 (2009)
- Model Rules of Prof'l Conduct R. 3.3 (2009)  
ethics rules in most jurisdictions require, and the board expects, that counsel will promptly correct statements of material fact that are no longer true; LBP-09-28, 70 NRC 1023 n.19 (2009)
- Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881)  
the life of the law has not been logic, it has been experience; LBP-09-24, 70 NRC 719 (2009)
- 1A Sutherland, *Statutory Construction* § 31.06 (4th ed. 1984)  
interpretation of any regulation must begin with the language and structure of the provision itself; LBP-09-15, 70 NRC 215 (2009)
- 2A Sutherland, *Statutory Construction* § 46.06 (4th ed. 1984)  
in interpreting any regulation, the entirety of the provision must be given effect; LBP-09-15, 70 NRC 215 (2009)
- Webster's Third New International Dictionary* (Unabridged) (1993)  
a "claim" is an assertion, statement, or implication; LBP-09-30, 70 NRC 1048 (2009)

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### ABEYANCE OF CONTENTION

a contention asserting omissions from the combined license application that is not admissible need not be referred to the Staff and held in abeyance; LBP-09-10, 70 NRC 51 (2009)

for a contention to be held in abeyance, it must otherwise be admissible; LBP-09-18, 70 NRC 385 (2009)

### ABEYANCE OF PROCEEDING

request that a combined license application be held in abeyance until the design certification is completed must be denied; LBP-09-18, 70 NRC 385 (2009)

### ACCIDENTS

if chelating agents are to be comingled in radioactive waste liquids or used to mitigate an accidental release, then they have to be specifically accounted for in the dose analyses; LBP-09-19, 70 NRC 433 (2009)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-09-26, 70 NRC 939 (2009)

See also Design Basis Accident

### ACCIDENTS, LOSS-OF-COOLANT

in applicant's safety assessment, the fission product releases in question are associated with accidents that have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-19, 70 NRC 433 (2009)

### ACCIDENTS, SEVERE

a contention challenging the absence in the environmental report of consideration of impacts from a severe radiological accident at one unit on other collocated units is admitted; LBP-09-17, 70 NRC 311 (2009)

analysis of the postulated fission product release must be performed to evaluate the offsite radiological consequences of an accident; LBP-09-19, 70 NRC 433 (2009)

early site permit applicants must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)

in applicant's safety assessment, the fission product releases in question are associated with accidents that have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-19, 70 NRC 433 (2009)

individuals located at the boundary of the exclusion area cannot be exposed to more than 25 rem total effective dose equivalent in any 2-hour period, and any individual located at the outer boundary of the low population zone cannot be exposed to more than 25 rem TEDE during the entire period of any radioactive release; LBP-09-19, 70 NRC 433 (2009)

NRC safety regulations require that the combined license application address the mitigation and potential consequences of a beyond-design-basis accident; LBP-09-10, 70 NRC 51 (2009)

substantial damage is done to the reactor core whether or not there are serious offsite consequences; LBP-09-19, 70 NRC 433 (2009)

the final safety analysis report of a combined license application must contain analysis of a severe accident involving a fission product release from the core into the containment including any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-10, 70 NRC 51 (2009)



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the fission product release assumed for the final safety analysis report is based on a major accident assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-10, 70 NRC 51 (2009)

the safety analysis report component of an application for a Standard Design Certification must analyze and address the problem of extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products; LBP-09-10, 70 NRC 51 (2009)

this type of reactor accident is more severe than a design basis accident and results in substantial damage to the reactor core, whether or not there are serious offsite consequences; LBP-09-10, 70 NRC 51 (2009)

### ADJUDICATORY PROCEEDINGS

collateral estoppel may be applied in administrative adjudicatory proceedings; LBP-09-24, 70 NRC 676 (2009)

if petitioners are dissatisfied with NRC's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; LBP-09-18, 70 NRC 385 (2009)

NRC shall conduct a single hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility; CLI-09-15, 70 NRC 1 (2009)

the scope of proceedings is specified by the Notice of Hearing; LBP-09-25, 70 NRC 867 (2009)

with respect to a prosecutor's role, government lawyers should understand and follow the venerable maxim that the government wins when justice is done; LBP-09-24, 70 NRC 676 (2009)

See also Abeyance of Proceeding; Combined License Proceedings; Delay of Proceeding; Early Site Permit Proceedings; Enforcement Proceedings; Materials License Proceedings; Materials License Renewal Proceedings; Uranium Enrichment Facility Proceedings

### ADVISORY OPINIONS

because NRC is not subject to the jurisdictional limitations placed on federal courts by the case or controversy provision in Article III of the Constitution, there is no insuperable barrier to its rendition of an advisory opinion on issues that have been indisputably mooted by events occurring subsequent to a licensing board decision; LBP-09-15, 70 NRC 198 (2009)

### AFFIDAVITS

authorization for organizational representation is to be filed with specific reference to the proceeding in which standing is sought and petitioners given the opportunity to cure such defects in their affidavits; LBP-09-13, 70 NRC 168 (2009)

for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion, but must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-27, 70 NRC 992 (2009)

if it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party cannot, for reasons stated, present by affidavit, facts essential to justify the party's opposition, the board may refuse the application for summary disposition or may order a continuance as may be necessary or just; LBP-09-22, 70 NRC 640 (2009)

representational standing will not be granted where petitioner has provided no supporting affidavits or other evidence that any member has authorized it to represent their interests in the proceeding; LBP-09-28, 70 NRC 1019 (2009)

written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form; LBP-09-22, 70 NRC 640 (2009)

### AGING MANAGEMENT

if the cumulative usage factor environmental metal fatigue analysis produces a value of greater than unity, then the analysis indicates that the component would be likely to develop metal fatigue cracks that might affect their function during the 20-year license renewal period of extended operation, and thus requires an aging management program; LBP-09-9, 70 NRC 41 (2009)

### AIRCRAFT CRASHES

although analysis of aircraft impact is required, reactors whose construction permits were issued prior to July 13, 2009, are excluded, and the rule is not NEPA-based; LBP-09-26, 70 NRC 939 (2009)

### ALARA

a combined license application must include a description of equipment and measures taken to ensure that any exposures to radioactive materials such as low-level radioactive waste are kept as low as reasonably

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achievable, including a description of the provisions for storage of solid waste containing radioactive materials; LBP-09-10, 70 NRC 51 (2009)

for applications filed after January 2, 1971, applicant must identify design objectives and means to maintain levels of radioactive effluents as low as is reasonably achievable; LBP-09-19, 70 NRC 433 (2009)

licensee must use procedures and controls to reduce occupational doses and doses to members of the public to levels that are as low as reasonably achievable; CLI-09-16, 70 NRC 33 (2009)

### AMENDMENT

See License Amendments

### AMENDMENT OF CONTENTIONS

an amended or new contention must be submitted in a timely fashion based on the availability of the subsequent information; LBP-09-27, 70 NRC 992 (2009)

by definition, contentions admitted under 10 C.F.R. 2.309(f)(2)(i)-(iii) are timely because they are founded on material new information that was not available at the time when the petition was initially due; LBP-09-10, 70 NRC 51 (2009)

contentions may be filed after the initial 60-day deadline if petitioner shows that the information on which the amended or new contention is based was not previously available and is materially different than information previously available; and the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-26, 70 NRC 939 (2009)

for timely new or amended contentions, the pleading shall include a motion for leave to file the contention showing that it satisfies 10 C.F.R. 2.309(f)(1); LBP-09-22, 70 NRC 640 (2009)

if a combined license application is amended or material new information subsequently becomes available, petitioners must be given a fair opportunity to file new or amended contentions challenging these changes; LBP-09-10, 70 NRC 51 (2009)

if new information becomes available in the course of waste confidence rulemaking proceedings that contravenes the combined license application, petitioner may file a motion to admit a new or amended contention; LBP-09-18, 70 NRC 385 (2009)

petitioner must demonstrate that the information upon which the amended contention is based was not previously available and is materially different from information previously available, and that the amended contention has been submitted in a timely fashion; LBP-09-26, 70 NRC 939 (2009); LBP-09-27, 70 NRC 992 (2009)

petitions and contentions filed after the initial 60-day deadline are admissible only upon a balancing of eight factors of 10 C.F.R. 2.309(c); LBP-09-26, 70 NRC 939 (2009)

the filing of new or amended contentions based on new information is permitted if sufficient justification is provided; LBP-09-15, 70 NRC 198 (2009)

the standard for amendment of a contention is whether the information was available to the public, not whether the petitioner has recently found it; LBP-09-26, 70 NRC 939 (2009)

to be admitted in a proceeding, a new contention must meet the new or amended contention requirements as well as the general contention admissibility requirements; LBP-09-9, 70 NRC 41 (2009)

where 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 Staff in a draft EIS, intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information; LBP-09-27, 70 NRC 992 (2009)

### AMENDMENT OF HEARING REQUESTS

licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 385 (2009)

### ANTITRUST REVIEW

an enrichment facility is not a production or utilization facility and, therefore, NRC does not have antitrust responsibilities for it; CLI-09-15, 70 NRC 1 (2009)

### APPEALS

a court inclined to apply collateral estoppel based on a judgment that is subject to appeal may want to avoid the question by staying the case pending the appeal; LBP-09-24, 70 NRC 676 (2009)

any appeal by petitioners of the admitted contentions must abide the end of the case, i.e., wait approximately 2 or 3 years until the Staff issues the final safety evaluation report and final

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- environmental impact statement and the final disposition of the evidentiary hearing on the three admitted contentions; LBP-09-10, 70 NRC 51 (2009)
- care should be taken in dealing with judgments that are final, but still subject to direct review, so as to avoid the risks of denying relief on the basis of a judgment that is subsequently overturned; LBP-09-24, 70 NRC 676 (2009)
- pendency of an appeal need not preclude reliance on the lower court's decision being appealed to estop relitigation of the same matter in another forum; LBP-09-24, 70 NRC 676 (2009)
- potentially duplicative and unnecessary litigation in the second forum does not take place while an appeal is pending, but if the appeal later proves successful, thus invalidating the original judgment upon which collateral estoppel had been based, then the litigation in the second forum is allowed to proceed; LBP-09-24, 70 NRC 676 (2009)
- the Commission defers to a board's rulings on standing unless the appeal points to an error of law or abuse of discretion; CLI-09-22, 70 NRC 932 (2009)
- the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding; LBP-09-24, 70 NRC 676 (2009)
- there is an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of whether the request for hearing or petition to intervene should have been wholly denied; CLI-09-22, 70 NRC 932 (2009)
- APPEALS, INTERLOCUTORY**
- petitioners may request, and the Commission, in its discretion, may grant interlocutory review if it is shown that the issue threatens petitioners with immediate and serious irreparable impacts or affects the basic structure of the proceeding in a pervasive manner; LBP-09-10, 70 NRC 51 (2009)
- See also Review, Interlocutory
- APPELLATE REVIEW**
- a standing ruling in one proceeding is not dispositive of a determination in another proceeding with the same petitioner because the ruling was not the subject of appellate review; LBP-09-18, 70 NRC 385 (2009)
- an exception to the general policy limiting interlocutory review permits an appeal of a board's ruling on contention admissibility when a board grants a petition to intervene following consideration of the full petition; CLI-09-18, 70 NRC 859 (2009)
- filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review; LBP-09-9, 70 NRC 41 (2009)
- initial decisions are not effective until they are reviewed by the Commission; LBP-09-19, 70 NRC 433 (2009)
- the Commission gives substantial deference to a board's rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 33 (2009); CLI-09-20, 70 NRC 911 (2009)
- the section 2.341(a)(2) sua sponte review process that applies to a licensing board determination approving a settlement agreement affords the Commission the opportunity to correct any participant or board misapprehensions regarding the items contemplated in the settlement agreement; LBP-09-23, 70 NRC 659 (2009)
- to be appealable, a disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner; CLI-09-18, 70 NRC 859 (2009)
- where intervenors have filed new contentions based on a supplement to the COL application, in advance of a full board ruling on the original contentions, no appeal lies until the board acts on all contentions, both the original and the newly filed ones; CLI-09-18, 70 NRC 859 (2009)
- with respect to an applicant's appeal, applicant must contend that, after considering all pending contentions, the board has erroneously granted a hearing to the petitioner; CLI-09-18, 70 NRC 859 (2009)
- APPLICANTS**
- the National Environmental Policy Act applies only to NRC and not to the applicant; LBP-09-10, 70 NRC 51 (2009)
- the proponent of the license bears the burden of proof; LBP-09-10, 70 NRC 51 (2009)
- to demonstrate financial qualification, applicant for a combined license must show that it possesses funds or has reasonable assurance of obtaining funds necessary to cover estimated construction and fuel cycle costs; LBP-09-10, 70 NRC 51 (2009)

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with respect to an applicant's appeal, applicant must contend that, after considering all pending contentions, the board has erroneously granted a hearing to the petitioner; CLI-09-18, 70 NRC 859 (2009)

### ATOMIC ENERGY ACT

an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 1 (2009)

analysis of compliance with section 103d of the Atomic Energy Act is a function performed by the NRC Staff as part of its evaluation of the combined license application; CLI-09-20, 70 NRC 911 (2009)

creditor interests are created in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-09-15, 70 NRC 1 (2009)

creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 1 (2009)

in ruling on petitioner's standing, boards should consider the nature of petitioner's right under the Atomic Energy Act or the National Environmental Policy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest; LBP-09-13, 70 NRC 168 (2009)

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; CLI-09-20, 70 NRC 911 (2009)

NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; CLI-09-20, 70 NRC 911 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

NRC shall conduct a hearing on each application under 42 U.S.C. 2133 or 2134(b) for a construction permit for a facility; LBP-09-19, 70 NRC 433 (2009)

NRC shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility; CLI-09-15, 70 NRC 1 (2009)

severe accident mitigation alternatives analysis must be site specific and given careful consideration in order to comply with safety requirements; LBP-09-10, 70 NRC 51 (2009)

### BURDEN OF PERSUASION

absent an obvious potential for harm, it is a petitioner's burden to show how harm will or may occur; LBP-09-28, 70 NRC 1019 (2009)

boards may appropriately view petitioners' support for contentions in a light favorable to petitioners, but it is petitioners' burden to establish the admissibility of a contention; LBP-09-17, 70 NRC 311 (2009)

in source materials cases, petitioner has the burden to show a specific and plausible means of how proposed license activities may affect him or her; LBP-09-13, 70 NRC 168 (2009)

### BURDEN OF PROOF

although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner; LBP-09-27, 70 NRC 992 (2009)

applicant, as the proponent of the license, bears the burden of proof; LBP-09-10, 70 NRC 51 (2009)

in addition to having the burden on immediate effectiveness, the target of an enforcement order is expected to address the merits at the immediate effectiveness review as well; LBP-09-24, 70 NRC 676 (2009)

NRC Staff's role in an enforcement proceeding is akin to that of a prosecutor, and it has the burden to prove its allegations by a preponderance of the reliable, probative, and substantial evidence; LBP-09-24, 70 NRC 676 (2009)

to prevail in establishing that the accused's actions constituted a violation, Staff must demonstrate by a preponderance of the evidence that the accused had actual knowledge of the information associated with his actions and that he deliberately acted contrary to that knowledge; LBP-09-24, 70 NRC 676 (2009)

### CANCER

releases from the nuclear fuel cycle in general, incidences of childhood cancers near nuclear power plants, and a request for the NRC to address radioactive releases from the burning of coal at fossil fuel plants are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

## SUBJECT INDEX

### CASE MANAGEMENT

- allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final safety evaluation report is issued will serve to further the Commission's objective to ensure a fair, prompt, and efficient resolution of contested issues; CLI-09-15, 70 NRC 1 (2009)
- although a presiding officer should issue a separate partial initial decision regarding a limited work authorization request, the board finds no practical or logical basis for separating its consideration of the adequacy of the LWA request from its determination regarding the early site permit with which it is associated; LBP-09-19, 70 NRC 433 (2009)
- an initial scheduling order is designed to ensure proper case management; LBP-09-22, 70 NRC 640 (2009)
- boards have an obligation to establish a case scheduling order, and to advise the Commission of any significant delay in meeting major activities set forth in the hearing schedule; CLI-09-17, 70 NRC 309 (2009)
- boards have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay, and to maintain order; LBP-09-22, 70 NRC 640 (2009)
- if the board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and will resolve that contention; LBP-09-22, 70 NRC 640 (2009)
- in addressing a petition for a rule waiver, the board, in lieu of holding oral argument to obtain answers to its questions, poses questions for NRC Staff about the waiver petition; LBP-09-29, 70 NRC 1028 (2009)
- the initial scheduling order is to be issued within 55 days of the board decision granting intervention and admitting contentions; LBP-09-22, 70 NRC 640 (2009)
- the licensing board shall not entertain motions for summary disposition in a uranium enrichment facility proceeding unless the board finds that such motions, if granted, are likely to expedite the proceeding; CLI-09-15, 70 NRC 1 (2009); LBP-09-22, 70 NRC 640 (2009)
- to avoid unnecessary delays in a uranium enrichment facility proceeding, the licensing board should not routinely grant requests for extensions of time and should manage the schedule such that the overall hearing process is completed within 28-1/2 months; CLI-09-15, 70 NRC 1 (2009)

### CASE OR CONTROVERSY

- a justiciable controversy must involve adverse parties representing a true clash of interests and the questions raised must be presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; LBP-09-25, 70 NRC 867 (2009)
- although the Commission is not strictly bound by the mootness doctrine, the agency's adjudicatory tribunals have generally adhered to the principle; LBP-09-15, 70 NRC 198 (2009)
- the business of federal courts is restricted to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; LBP-09-14, 70 NRC 193 (2009)
- the mootness doctrine derives from the Constitution's limitation of federal courts' jurisdiction to cases or controversies; LBP-09-15, 70 NRC 198 (2009)
- this requirement of Article III is rooted in the separation of powers; LBP-09-15, 70 NRC 198 (2009)
- when a federal court dismisses a claim as moot and avoids any further consideration of the merits of that claim, it does so because the claim no longer satisfies the case or controversy requirement of Article III; LBP-09-15, 70 NRC 198 (2009)

### CERTIFICATION

- applicant, 2 years before and 1 year before the scheduled date for the initial fuel loading, shall submit a report to NRC containing a certification updating the financial information, including a copy of the financial instrument to be used; LBP-09-18, 70 NRC 385 (2009)
- for combined license applications, the report must contain a certification that financial assurance for decommissioning will be provided no later than 30 days after the Commission publishes notice in the *Federal Register* of the initial fuel load; LBP-09-18, 70 NRC 385 (2009)
- if applicant chooses to submit a complete and integrated emergency plan at the early site permit stage, applicant also is required to make a good-faith effort to obtain a certification from federal, state, and local governmental agencies with emergency planning responsibilities; LBP-09-19, 70 NRC 433 (2009)

## SUBJECT INDEX

licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration; CLI-09-15, 70 NRC 1 (2009)  
motions will be rejected if they do not include certification by the attorney or representative of the moving party that they have made a sincere effort to contact the other parties in the proceeding, to explain to them the factual and legal issues raised in the motion, and to resolve those issues; LBP-09-22, 70 NRC 640 (2009)

See also Design Certification

### CLASSIFIED INFORMATION

all decisions on questions of classification or declassification of information shall be made by appropriate classification officials in the NRC and are not subject to *de novo* review; CLI-09-15, 70 NRC 1 (2009)  
guidance governing the classification of information related to the design, construction, operation, and safeguarding of a uranium enrichment facility is described; CLI-09-15, 70 NRC 1 (2009)  
persons needing access to classified portions of a uranium enrichment facility license application will be required to have the appropriate security clearance for the level of classified information to which access is required; CLI-09-15, 70 NRC 1 (2009)

### CLIMATE CHANGE

contention alleging that the environmental report failed to address the alleged greenhouse gas and global climate disruption impacts resulting from prematurely killing trees is inadmissible; LBP-09-10, 70 NRC 51 (2009)

### COLLATERAL ESTOPPEL

a court inclined to apply collateral estoppel based on a judgment that is subject to appeal may want to avoid the question by staying the case pending the appeal; LBP-09-24, 70 NRC 676 (2009)  
a party's failure to advance a collateral estoppel argument does not perforce trigger the waiver principle, thus precluding a tribunal from applying collateral estoppel; LBP-09-24, 70 NRC 676 (2009)  
a tribunal, when considering the applicability of collateral estoppel, may not look behind the decision to determine whether its findings of fact and conclusions of law were well founded; LBP-09-24, 70 NRC 676 (2009)  
an exception to the application of collateral estoppel occurs when broad public policy considerations or special public interest factors are involved such that an agency's need for flexibility outweighs the reasons underlying this repose doctrine so as to favor relitigation of a particular issue; LBP-09-24, 70 NRC 676 (2009)  
application is appropriate in administrative adjudicatory proceedings; LBP-09-24, 70 NRC 676 (2009)  
boards have some leeway to consider the existence of other factors that could outweigh the jurisprudential reasons for applying the doctrine; LBP-09-24, 70 NRC 676 (2009)  
pendency of an appeal need not preclude reliance on the lower court's decision being appealed to estop relitigation of the same matter in another forum; LBP-09-24, 70 NRC 676 (2009)  
potentially duplicative and unnecessary litigation in the second forum does not take place while an appeal is pending, but if the appeal later proves successful, thus invalidating the original judgment upon which collateral estoppel had been based, then the litigation in the second forum is allowed to proceed; LBP-09-24, 70 NRC 676 (2009)  
questions over the equivalence of the "knowledge" standard that governed the jury and the standard applicable in the administrative proceeding can lead a board to exercise its discretion not to apply collateral estoppel; LBP-09-24, 70 NRC 676 (2009)  
the doctrine is grounded on considerations of economy of judicial time and the public policy favoring the establishment of certainty in legal relations; LBP-09-24, 70 NRC 676 (2009)  
the doctrine promotes the compelling public interest in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; LBP-09-24, 70 NRC 676 (2009)  
the possibility that the jury verdict was internally inconsistent can lead a board to exercise its discretion not to apply collateral estoppel; LBP-09-24, 70 NRC 676 (2009)  
this form of issue preclusion prevents the relitigation of issues of law or fact that have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies; LBP-09-24, 70 NRC 676 (2009)

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to determine whether to apply collateral estoppel to a general verdict, a trial judge is to examine the record of the prior trial in detail to see if the jury might have disbelieved some aspects of the acts charged; LBP-09-24, 70 NRC 676 (2009)

to preclude the relitigation of an issue, four factors must be present; LBP-09-24, 70 NRC 676 (2009) where all factors are met, the application of collateral estoppel by the subsequent tribunal is to some degree a discretionary matter; LBP-09-24, 70 NRC 676 (2009)

where the impact of delay is a concern, the desirability of avoiding any further delay in reaching a final merits determination can be a key discretionary factor counseling nonreliance upon the collateral estoppel principle, even if that doctrine otherwise appeared applicable; LBP-09-24, 70 NRC 676 (2009)

### COLOCATED UNITS

a contention challenging the absence in the environmental report of consideration of impacts from a severe radiological accident at one unit on other collocated units is admitted; LBP-09-17, 70 NRC 311 (2009)

### COMBINED LICENSE APPLICATION

a challenge to applicant's site-specific measurements of adsorption and retention coefficients relative to hydrological radionuclide transport is an admissible contention; LBP-09-16, 70 NRC 227 (2009)

a contention asserting that the COLA is incomplete because it incorporates by reference a standard design certification and a pending application for a revision to that certified design is inadmissible; LBP-09-10, 70 NRC 51 (2009)

a description of equipment and measures taken to ensure that any exposures to radioactive materials such as low-level radioactive waste are kept as low as reasonably achievable, including a description of the provisions for storage of solid waste containing radioactive materials is required; LBP-09-10, 70 NRC 51 (2009)

a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 227 (2009)

a report must be included that indicates how reasonable assurance will be provided that funds will be available to decommission the facility; LBP-09-18, 70 NRC 385 (2009)

agencies are to exercise a degree of skepticism in dealing with the self-serving statements from the prime beneficiary of a project and to look at the general goal of the project, rather than only those alternatives by which a particular applicant can reach its own specific goals; LBP-09-10, 70 NRC 51 (2009)

although petitioners need to explain how or why they disagree with statements in the application or environmental report, there is no presumption that statements and assessments in the application or ER are correct or accurate; LBP-09-10, 70 NRC 51 (2009)

an application's lack of consideration of any alternative to offsite disposal of low-level radioactive waste is a material issue for litigation; LBP-09-18, 70 NRC 385 (2009)

analysis of compliance with section 103d of the Atomic Energy Act is a function performed by the NRC Staff as part of its evaluation of the COLA; CLI-09-20, 70 NRC 911 (2009)

applicant for a construction permit or a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

applicant may not define the objectives of its action in terms so unreasonably narrow that only one alternative would accomplish the applicant's goals because this would make the agency's EIS alternatives analysis a foreordained formality; LBP-09-10, 70 NRC 51 (2009)

applicant may reference a design certification that the Commission has docketed but not granted; LBP-09-16, 70 NRC 227 (2009)

applicant may reference both an early site permit and a standard design certification in its application; LBP-09-19, 70 NRC 433 (2009)

applicant must include the proposed inspections, tests, and analyses, including those applicable to emergency planning, to be performed and the acceptance criteria that are necessary and sufficient to support the Commission's finding that a COL can be granted; LBP-09-19, 70 NRC 433 (2009)

applicant should explain its current plan for management of low-level radioactive waste, given the lack of an offsite disposal facility, and the potential environmental impact of retaining LLRW at the reactor site for an extended period; LBP-09-16, 70 NRC 227 (2009); LBP-09-27, 70 NRC 992 (2009)

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- applicants are to consider long-term onsite low-level radioactive waste storage, but 10 C.F.R. 52.79(a)(3) sets no quantity or time restrictions relative to onsite storage of such waste; CLI-09-16, 70 NRC 33 (2009)
- applicant's environmental report is required to analyze the alternatives available for reducing or avoiding adverse environmental effects; LBP-09-10, 70 NRC 51 (2009)
- applicants must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading; LBP-09-18, 70 NRC 385 (2009); LBP-09-21, 70 NRC 581 (2009)
- at the time the COLA is submitted, it must identify the method of decommissioning funding assurance that the applicant proposes to use and to show that the method complies with any applicable financial test; LBP-09-18, 70 NRC 385 (2009)
- because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, all initial contentions necessarily focus on the adequacy of the applicant's ER, but the public will have a new opportunity to file environmental contentions when the NRC Staff issues the environmental impact statement or environmental analysis; LBP-09-10, 70 NRC 51 (2009)
- because the requirement of 10 C.F.R. 50.75(b)(3) applies to the amount of financial assurance specified in the decommissioning report, it is readily apparent that the report must explain how that requirement will be fulfilled; LBP-09-15, 70 NRC 198 (2009)
- challenges to the Commission regulations regarding the design certification process are inadmissible; LBP-09-18, 70 NRC 385 (2009)
- each environmental report must take Table S-3 as the basis for evaluating the contribution of the environmental effects of the fuel cycle to the environmental costs of licensing the reactor; CLI-09-21, 70 NRC 927 (2009)
- electric utilities need not include operating and maintenance costs in their demonstration of financial qualifications; LBP-09-10, 70 NRC 51 (2009)
- emergency planning information for the emergency planning zone, generally consisting of an area with a 10-mile radius from the proposed reactor, must be included; LBP-09-10, 70 NRC 51 (2009)
- environmental reports and environmental impact statements must include an assessment of all environmental impacts and alternatives, even though NRC has no jurisdiction to regulate such impacts or jurisdiction to impose such alternatives; LBP-09-10, 70 NRC 51 (2009)
- focus of a contention must be on the COLA as it exists when the contention is filed and must point out an omission or deficiency with regard to the application as of that moment in time; LBP-09-10, 70 NRC 51 (2009)
- if a COLA is amended or material new information subsequently becomes available, petitioners must be given a fair opportunity to file new or amended contentions challenging these changes; LBP-09-10, 70 NRC 51 (2009)
- if new information becomes available in the course of waste confidence rulemaking proceedings that contravenes the COLA, petitioner may file a motion to admit a new or amended contention; LBP-09-18, 70 NRC 385 (2009)
- if the application references an early site permit, applicant must demonstrate that the chosen design falls within the parameters specified in the ESP or, on the safety side, request a variance; LBP-09-19, 70 NRC 433 (2009)
- if the environmental impact of mining activities is potentially significant, then the failure of the environmental report to disclose the location of the offsite mine does not immunize it from being the subject of a legitimate contention; LBP-09-10, 70 NRC 51 (2009)
- including language deferring the obligation that would otherwise apply to COL applicants in 10 C.F.R. 50.75(b)(4), but including no equivalent provision in section 50.75(b)(3), confirms that the Commission did not intend to defer the requirement of section 50.75(b)(3) until after the license is issued; LBP-09-15, 70 NRC 198 (2009)
- information in the form of a report, as described in 10 C.F.R. 50.75, indicating how reasonable assurance will be provided that funds will be available to decommission the facility must be included; LBP-09-15, 70 NRC 198 (2009)



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information on kinds and quantities of materials expected to be produced during plant operation and the means for controlling and limiting radioactive effluents and radiation exposures to comply with Part 20 limits must be included; CLI-09-16, 70 NRC 33 (2009)

information required in a COLA by section 52.79(a)(3) is largely dependent on the individual applicant's plans; LBP-09-27, 70 NRC 992 (2009)

NRC is required to consider measures to mitigate the environmental impacts of the project; LBP-09-10, 70 NRC 51 (2009)

NRC safety regulations require that applicant address the mitigation and potential consequences of a severe accident; LBP-09-10, 70 NRC 51 (2009)

NRC Staff issuance of a request for additional information does not alone establish deficiencies in an application, and intervention petitioner must do more than merely quote an RAI to justify admission of a contention; CLI-09-16, 70 NRC 33 (2009); LBP-09-10, 70 NRC 51 (2009)

Part 51 does not authorize NRC to regulate or enforce compliance with all other environmental laws and regulations; LBP-09-10, 70 NRC 51 (2009)

petitioner is obligated to read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-09-25, 70 NRC 867 (2009)

petitioners' claim that applicant must pursue the prepayment method for decommissioning conflicts with NRC guidance and rules and so is outside the permissible scope of the COL proceeding; LBP-09-21, 70 NRC 581 (2009)

reasonable assurance of adequate decommissioning funding must be provided, and this assurance must identify the method or methods of funding the applicant plans to use, and the assurance must provide the information required by 10 C.F.R. 50.75(e)(1)(iii)(B) if applicant plans to use a parent company guarantee; LBP-09-15, 70 NRC 198 (2009)

reference to an early site permit must include a safety analysis report that either includes or incorporates by reference the ESP site safety analysis report and that contains additional information and analyses sufficient to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the ESP; LBP-09-19, 70 NRC 433 (2009)

section 2.309(f)(1)(vi) is not a second hurdle of materiality that an intervenor must meet, but rather requires that intervenor identify the specific parts of the COLA that it disputes and show that resolution of those disputes is material to the licensing decision; LBP-09-27, 70 NRC 992 (2009)

severe accident mitigation alternatives analysis must be site specific and given careful consideration in order to comply with the Atomic Energy Act and the National Environmental Policy Act; LBP-09-10, 70 NRC 51 (2009)

the environmental report is required to address a list of environmental considerations that correspond to the environmental considerations that NEPA § 102(2)(C)(i)-(v) requires the agency to address in the environmental impact statement; LBP-09-16, 70 NRC 227 (2009)

the environmental report shall discuss the impacts of the proposed action on the environment in proportion to their significance; LBP-09-25, 70 NRC 867 (2009)

the fact that a COL is subject to, or even expected to, change does not make it legally deficient because NRC follows a dynamic licensing process; LBP-09-10, 70 NRC 51 (2009)

the final safety analysis report must contain analysis of a severe accident involving a fission product release from the core into the containment including any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-10, 70 NRC 51 (2009)

the requirement of Part 51 that the environmental report cover all significant environmental impacts associated with a project includes offsite as well as onsite impacts; LBP-09-10, 70 NRC 51 (2009)

the requirement that the designated amount of financial assurance be covered by an acceptable method arises concurrently with the requirement that the applicant submit a decommissioning report to NRC; LBP-09-15, 70 NRC 198 (2009)

when an applicant decides it no longer wishes to have the agency evaluate its application, the usual approach is for the applicant to request that the agency permit it to withdraw its licensing request; LBP-09-23, 70 NRC 659 (2009)

COMBINED LICENSE PROCEEDINGS

a decision dismissing the contested adjudication relating to a COL has no impact on the subsequent need to conduct a mandatory hearing relating to the COLA, over which the Commission would preside;

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LBP-09-23, 70 NRC 659 (2009)

adequacy of applicant's control room and equipment design for radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a combined license or standard design certification proceeding; LBP-09-10, 70 NRC 51 (2009)

assertion that applicant might need to obtain a Part 72 license is irrelevant, because a grant of the COL could be accompanied by grant of a Part 72 general license if the applicant complies with certain conditions; LBP-09-21, 70 NRC 581 (2009)

assertions that building two new nuclear reactors in a troubled economy is fiscally irresponsible is outside the scope of the proceeding; LBP-09-10, 70 NRC 51 (2009)

claims related to the decommissioning of the facility are not currently ripe for review and are outside the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009)

contention alleging that the environmental report failed to address the alleged greenhouse gas and global climate disruption impacts resulting from prematurely killing trees is inadmissible; LBP-09-10, 70 NRC 51 (2009)

contention alleging that the threatened eastern fox snake inhabits the nuclear plant site and that construction activities for the new reactor will kill snakes, destroy their habitat, and might eliminate them from the area is within the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009)

contention that concerns onsite and offsite impacts of active and passive dewatering associated with the proposed project satisfies the admissibility criteria; LBP-09-10, 70 NRC 51 (2009)

contentions on information a COL applicant should supply in order to satisfy NRC regulations regarding the safety of long-term storage of low-level radioactive waste are application-specific and thus would benefit from further development by the board and the parties; CLI-09-16, 70 NRC 33 (2009)

contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 385 (2009)

controls other countries may impose on mining and milling, and the impacts of such activities, are outside the scope of the proceeding; LBP-09-17, 70 NRC 311 (2009)

even assuming arguendo that applicant might someday require a permit under Part 61 for a disposal facility, that issue is too speculative at the combined license stage and is therefore not material to the findings the NRC must make to support the action that is involved in the COL proceeding; LBP-09-27, 70 NRC 992 (2009)

if a combined license application references a design certification, then the presiding officer shall not admit a contention concerning severe accident design mitigation alternatives unless the contention demonstrates that the site characteristics fall outside the site parameters in the standard design certification; LBP-09-10, 70 NRC 51 (2009)

if applicant requests a Commission finding on the completion of inspections, tests, analyses, and acceptance criteria needed for issuance of a COL, the Commission is required to identify these ITAAC in the notice of hearing published in the *Federal Register* for the proceeding; LBP-09-19, 70 NRC 433 (2009)

items for which sufficient information is lacking at the early site permit stage of the licensing process may be subject to deferral for consideration at the combined license stage; LBP-09-19, 70 NRC 433 (2009)

low-level radioactive waste disposal contentions have been admitted when that issue was not sufficiently discussed in the applications and there was no mention of the closure of the Barnwell facility; LBP-09-18, 70 NRC 385 (2009)

only the management of Class B and Class C wastes is properly the subject of a contention in a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

Part 61 is inapplicable in a combined license proceeding because it applies only to land disposal facilities that receive waste from others, not to onsite facilities where licensee intends to store its own low-level radioactive waste; LBP-09-27, 70 NRC 992 (2009)

petitioners' concerns regarding applicant's commitments to relax conservatisms in its laboratory testing and groundwater release analysis are in regard to the revised analysis to be submitted in response to the Staff request for additional information and therefore are dismissed as outside the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009)

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- portions of a contention that allege that the environmental report also failed to adequately address the zone of environmental impact, impact on listed species, and appropriate mitigation are admissible; LBP-09-10, 70 NRC 51 (2009)
- questions of the safety and environmental impacts of onsite low-level waste storage are largely site- and design-specific and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions; LBP-09-10, 70 NRC 51 (2009)
- questions of the safety and environmental impacts of onsite low-level waste storage are largely site- and design-specific, and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions; LBP-09-16, 70 NRC 227 (2009)
- ratepayer impacts are outside the scope of the proceeding because the state, not the NRC, is charged with protecting ratepayers' interests; LBP-09-10, 70 NRC 51 (2009)
- releases from the nuclear fuel cycle in general, incidences of childhood cancers near nuclear power plants, and a request for the NRC to address radioactive releases from the burning of coal at fossil fuel plants are outside the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009)
- request that a combined license application be held in abeyance until the design certification is completed must be denied; LBP-09-18, 70 NRC 385 (2009)
- revenue decoupling is a state regulatory matter that is outside the scope of, and not material to, the NRC licensing process; LBP-09-10, 70 NRC 51 (2009)
- Table S-3 does not include health effects from the effluents described in the table, and that issue may be the subject of litigation in individual licensing proceedings; LBP-09-16, 70 NRC 227 (2009)
- the Commission may have more to offer regarding the need for a NEPA carbon footprint analysis in new reactor licensing proceedings; LBP-09-19, 70 NRC 433 (2009)
- the environmental impacts related to storage of spent fuel under Part 72 have been generically evaluated under two previous rulemakings and the Commission's waste confidence proceedings, and thus need not be reassessed; LBP-09-21, 70 NRC 581 (2009)
- the fact that disposal of dredged or fill material in wetlands is regulated by the Environmental Protection Agency and the U.S. Army Corps of Engineers does not render a contention inadmissible; LBP-09-10, 70 NRC 51 (2009)
- the proximity presumption applies to hearings on combined licenses; LBP-09-16, 70 NRC 227 (2009)
- the Waste Confidence Rule is applicable to all new reactor proceedings and contentions challenging the rule or seeking its reconsideration are inadmissible; LBP-09-18, 70 NRC 385 (2009)
- whether other permits may be required from other agencies is outside the scope of NRC proceedings, and those concerns are properly raised before those respective permitting authorities; LBP-09-21, 70 NRC 581 (2009)
- COMBINED LICENSES**
- a COL is issued for a period of 40 years; LBP-09-16, 70 NRC 227 (2009)
- an opportunity for hearing will be provided in the *Federal Register* notice of fuel loading, regarding whether inspections, tests, or analyses that have not been found to have been met under 10 C.F.R. 52.97(a)(2) prior to issuance of the COL; LBP-09-19, 70 NRC 433 (2009)
- any permit conditions imposed that are not met before a combined license referencing the early site permit is issued will attach to the COL; LBP-09-19, 70 NRC 433 (2009)
- applicant must obtain the financial instrument for decommissioning funding and submit a copy to the Commission as provided in 10 C.F.R. 50.75(e)(3); LBP-09-15, 70 NRC 198 (2009)
- applicant who may apply for a construction permit under Part 50, or a COL under Part 52, may apply for an early site permit; LBP-09-19, 70 NRC 433 (2009)
- decommissioning plans are not required until the applicant files a post-shutdown decommissioning activities report, which is not due until 2 years before permanent cessation of operation; LBP-09-21, 70 NRC 581 (2009)
- funding for financial assurance for decommissioning must be covered by prepayment, an external sinking fund, or a surety method, insurance, or other guarantee including a parent company guarantee; LBP-09-18, 70 NRC 385 (2009)
- holder of a combined license must begin filing biannual reports on the status of decommissioning funding once the Commission has made a finding that all acceptance criteria in the license have been met; LBP-09-15, 70 NRC 198 (2009)

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if licensee changes its method of decommissioning funding assurance, the new method will also have to pass any applicable financial test; LBP-09-15, 70 NRC 198 (2009)

no later than 1 year after issuance of the COL or at the start of construction, whichever is later, the COL licensee must submit its schedule for completing the inspections, tests, or analyses and provide schedule updates; LBP-09-19, 70 NRC 433 (2009)

Part 61 only applies to the land disposal of radioactive waste received from other persons and is therefore inapplicable to the issue of low-level waste generated and managed onsite at the nuclear power plant; LBP-09-10, 70 NRC 51 (2009)

the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the COL; LBP-09-15, 70 NRC 198 (2009)

the parent company guarantee is based on a financial test and may only be used if the guarantee and test are as contained in Appendix A to 10 C.F.R. Part 30; LBP-09-18, 70 NRC 385 (2009)

the purpose of the financial qualification requirements of 10 C.F.R. 50.33(f) is to ensure the protection of public health and safety and the common defense and security, not to evaluate the financial wisdom of the proposed project; LBP-09-10, 70 NRC 51 (2009)

the requirements of 10 C.F.R. 50.75 are intended to ensure that entities who construct and operate a nuclear power plant will have sufficient funds at the end of the operational life of the plant to complete the decommissioning of the plant; LBP-09-15, 70 NRC 198 (2009)

the Waste Confidence Rule covers the storage of spent fuel in new or existing facilities; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

to demonstrate financial qualification, applicant must show that it possesses funds or has reasonable assurance of obtaining funds necessary to cover estimated construction and fuel cycle costs; LBP-09-10, 70 NRC 51 (2009)

**COMMON DEFENSE AND SECURITY**

an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 1 (2009)

creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 1 (2009)

**CONFIRMATORY ORDER**

it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders because such orders presumably enhance rather than diminish public safety; LBP-09-20, 70 NRC 565 (2009)

**CONSIDERATION OF ALTERNATIVES**

a rule of reason governs the agency's duty to identify and consider all reasonable alternatives under the National Environmental Policy Act; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-26, 70 NRC 939 (2009)

a solely wind- or solar-powered facility could not satisfy a project's purpose of providing baseload power; LBP-09-17, 70 NRC 311 (2009)

agencies are required to exercise a degree of skepticism in dealing with self-serving statements from the prime beneficiary of a project and to look at the general goal of the project, rather than only those alternatives by which a particular applicant can reach its own specific goals; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

agencies are required to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources and include a detailed statement of the alternatives to the proposed action in its environmental impact statement; LBP-09-10, 70 NRC 51 (2009); LBP-09-19, 70 NRC 433 (2009)

all reasonable alternatives to the site proposed for the early site permit are to be identified; LBP-09-19, 70 NRC 433 (2009)

although applicant's goals are given substantial weight, the National Environmental Policy Act does not allow applicant to define its goals so narrowly as to unreasonably circumscribe the range of alternatives that must be considered; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

an agency cannot redefine the applicant's goals, and the environmental impact statement alternatives analysis should be based around the applicant's goals, including its economic goals; LBP-09-17, 70 NRC 311 (2009)

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an environmental report and an environmental impact statement for a materials license must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 1 (2009)

an otherwise reasonable alternative will not be excluded from discussion in environmental impact statement solely on the ground that it is not within the jurisdiction of NRC; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

applicant is not obliged to examine general efficiency or conservation proposals that would do nothing to satisfy the particular project's goals of producing baseload power; LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

applicant is required to evaluate only alternatives that support the purpose of the project; LBP-09-21, 70 NRC 581 (2009)

applicant may not define the objectives of its action in terms so unreasonably narrow that only one alternative would accomplish the applicant's goals because this would make the agency's EIS alternatives analysis a foreordained formality; LBP-09-10, 70 NRC 51 (2009)

applicant's environmental report must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 433 (2009)

applicant's initial consideration of DOE's Portsmouth, Ohio, and SRS sites as alternative sites was reasonable as part of its alternative site analysis for an early site permit; LBP-09-19, 70 NRC 433 (2009)

because petitioners fail to create a genuine issue, the board need not resolve whether applicant's purpose is unreasonably narrow or whether a proposed alternative is so far beyond the realm of reason that it must be rejected out of hand; LBP-09-21, 70 NRC 581 (2009)

brownfield sites owned by companies other than the applicant may reasonably be excluded as alternative sites; LBP-09-19, 70 NRC 433 (2009)

failure to provide facts or expert opinion sufficient to show that the environmental report disregarded a feasible alternative based on either wind power, solar power, or some combination of the two renders a contention inadmissible; LBP-09-16, 70 NRC 227 (2009)

goals of a project's sponsor are given substantial weight in determining whether a NEPA alternative is reasonable; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

if the proposed siting of a plant slated for an early site permit involves unresolved conflicts concerning alternative uses of available resources, then this discussion must be sufficiently complete to allow the Staff to develop and to explore appropriate alternatives to the ESP pursuant to NEPA § 102(2)(E); LBP-09-19, 70 NRC 433 (2009)

no discussion of need for power or alternative energy sources is required in a supplemental environmental report at the operating license stage; LBP-09-26, 70 NRC 939 (2009)

noninclusion of DOE sites in alternative sites analysis that are far outside applicant's region of interest is reasonable; LBP-09-19, 70 NRC 433 (2009)

NRC Staff's environmental impact statement prepared during review of an early site permit application must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 433 (2009)

presentation of alternatives in an applicant's environmental report and in an NRC environment impact statement must be in comparative form; LBP-09-19, 70 NRC 433 (2009)

reasonable alternatives under the National Environmental Policy Act do not include alternatives that are impractical, that present unique problems, or that cause extraordinary costs; LBP-09-16, 70 NRC 227 (2009)

the concept of alternatives must be bounded by some notion of feasibility; LBP-09-17, 70 NRC 311 (2009)

the decision as to whether an alleged environmental impact or alternative is significant or reasonable is the merits of a NEPA contention and should not be adjudicated at the contention admissibility stage under the guise of materiality or scope; LBP-09-10, 70 NRC 51 (2009)

the discussion in the environmental report or environmental impact statement need not include every possible alternative, only reasonable alternative; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

the NEPA alternatives analysis is the heart of the environmental impact statement; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)

## SUBJECT INDEX

the reasonableness of energy conservation as an alternative in light of the need for a large amount of baseload electric power is questioned; LBP-09-10, 70 NRC 51 (2009)

the requirement to discuss alternatives in the environmental report parallels NEPA's requirement that an environmental impact statement provide a detailed statement of reasonable alternatives to a proposed action; LBP-09-16, 70 NRC 227 (2009)

where the final environmental impact statement discussion of alternative sites was insufficient, the board independently reviewed the record on greenfield, competitors' brownfield, noncompetitors' brownfield, and applicant's other nuclear sites to conclude that the Staff's underlying alternative site review was adequate; LBP-09-19, 70 NRC 433 (2009)

with regard to alternative sites for an early site permit, NRC Staff must evaluate both the process (i.e., methodology) used by the applicant and the reasonableness of the product (e.g., potential sites) identified by that process; LBP-09-19, 70 NRC 433 (2009)

### CONSTRUCTION

activities requiring a limited work authorization are the driving of piles, subsurface preparation, placement of backfill, concrete, or permanent retaining walls within an excavation, installation of foundations, or in-place assembly, erection, fabrication, or testing that are for safety-related structures, systems, or component; LBP-09-16, 70 NRC 227 (2009); LBP-09-19, 70 NRC 433 (2009)

activities that are not considered "construction" are site exploration, clearing, grading, or installation of environmental mitigation measures, erection of fences and other access control measures, excavation, erection of support buildings for use in connection with construction, building of service facilities, and procurement or offsite fabrication of facility components; LBP-09-19, 70 NRC 433 (2009)

applicant is authorized to perform certain site preparation activities that would otherwise only be permitted following the issuance of a Part 50 construction permit or a Part 52 combined license; LBP-09-19, 70 NRC 433 (2009)

boards are to determine whether the site redress plan will adequately redress the activities performed under a limited work authorization should the activities be terminated by either the holder of the LWA or by Commission denial of any corresponding early site permit or combined license; LBP-09-19, 70 NRC 433 (2009)

if limited work authorization activities are approved by NRC in conjunction with an early site permit, the ESP as issued shall specify those authorized activities; LBP-09-19, 70 NRC 433 (2009)

no later than 1 year after issuance of the combined license or at the start of construction, whichever is later, the COL licensee must submit its schedule for completing the inspections, tests, or analyses and provide schedule updates; LBP-09-19, 70 NRC 433 (2009)

### CONSTRUCTION PERMITS

a generalized assertion, without specific ties to NRC regulatory requirements or to safety in general, do not provide adequate support demonstrating the existence of a genuine dispute of fact or law with respect to the construction authorization application; LBP-09-27, 70 NRC 992 (2009)

although analysis of aircraft impact is required, reactors whose construction permits were issued prior to July 13, 2009, are excluded, and the rule is not NEPA-based; LBP-09-26, 70 NRC 939 (2009)

an applicant who may apply for a construction permit under Part 50, or a combined license under Part 52, may apply for an early site permit; LBP-09-19, 70 NRC 433 (2009)

### CONSULTATION DUTY

dispositive motions may be filed 20 days after the occurrence or circumstance from which the motion arises, rather than the 10-day time frame, provided that the moving party commences sincere efforts to contact and consult all other parties within 10 days of the occurrence or circumstance, and the accompanying certification so states; LBP-09-22, 70 NRC 640 (2009)

if the attorney or representative of a party is contacted pursuant to the consultation requirement, then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion; LBP-09-22, 70 NRC 640 (2009)

it is inconsistent with the dispute avoidance/resolution purposes of a section, and thus insufficient, for the contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that it takes no position on the motion (or issues) and that it reserves the right to file a response to the motion when it is filed; LBP-09-22, 70 NRC 640 (2009)

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motions will be rejected if they do not include certification by the attorney or representative of the moving party that they have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in the motion, and to resolve those issues; LBP-09-22, 70 NRC 640 (2009)

only Indian Tribes that appear on the Department of the Interior's list of recognized tribes have consultation rights under the National Historic Preservation Act; LBP-09-13, 70 NRC 168 (2009)  
to be sincere, movant should contact other parties sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question; LBP-09-22, 70 NRC 640 (2009)

### CONTAINMENT DESIGN

early site permit applicants must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)

### CONTEMPT

courts have been careful to strictly limit the exercise of summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge; LBP-09-24, 70 NRC 676 (2009)

### CONTENTIONS

a "contention of omission" is one that claims the application fails to contain information on a relevant matter as required by law and the supporting reasons for the petitioner's belief; LBP-09-16, 70 NRC 227 (2009); LBP-09-27, 70 NRC 992 (2009)

a brief explanation of the basis is an explanation of the rationale or theory of the contention; LBP-09-10, 70 NRC 51 (2009)

a motion and proposed new contention shall be deemed timely if it is filed within 30 days of the date when the new and material information on which it is based first becomes available; LBP-09-22, 70 NRC 640 (2009)

challenges to a combined license application must focus on the application as it exists when the contention is filed and must point out an omission or deficiency with regard to the application as of that moment in time; LBP-09-10, 70 NRC 51 (2009)

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, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-09-17, 70 NRC 311 (2009)

even if the term "contention," as used in 10 C.F.R. 2.336(a)(1) must be read as pertaining only to formal contentions admitted under section 2.309(f)(1), the term "claim," is not so constrained, and can only be read in its normal sense; LBP-09-30, 70 NRC 1039 (2009)

if the board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and will resolve that contention; LBP-09-22, 70 NRC 640 (2009)

NRC rules permit contentions that raise issues of law as well as contentions that raise issues of fact; LBP-09-10, 70 NRC 51 (2009)

once standing to intervene in the licensing process is established, petitioners will then be free to assert any contention, which, if proved, will afford them the relief they seek; LBP-09-21, 70 NRC 581 (2009)

petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 311 (2009)

the term "contention" in 10 C.F.R. 2.336(a)(1) means simply a point or argument asserted or advanced by any party; LBP-09-30, 70 NRC 1039 (2009)

when a contention of omission encompasses issues that are addressed completely in materials the applicant subsequently files, the contention is rendered moot; LBP-09-21, 70 NRC 581 (2009)

See also Abeyance of Contention; Amendment of Contentions

### CONTENTIONS, ADMISSIBILITY

a board ruling on a contention may be referred to the Commission if it raises significant and novel legal or policy issues or the referral would materially advance the orderly disposition of the proceeding; LBP-09-26, 70 NRC 939 (2009)

a challenge to applicant's site-specific measurements of adsorption and retention coefficients relative to hydrological radionuclide transport is an admissible contention; LBP-09-16, 70 NRC 227 (2009)

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- a combined license application's lack of consideration of any alternative to offsite disposal of low-level radioactive waste is a material issue for litigation; LBP-09-18, 70 NRC 385 (2009)
- a contention alleging that a license application omits material information becomes moot when the applicant cures the omission; LBP-09-15, 70 NRC 198 (2009)
- a contention asserting that an application is incomplete because it incorporates by reference a standard design certification and a pending application for a revision to that certified design is inadmissible; LBP-09-10, 70 NRC 51 (2009)
- a contention can be one of omission as well as one of inadequacy when it alleges that the environmental report is insufficient because it fails to discuss all aspects of a topic adequately; LBP-09-10, 70 NRC 51 (2009)
- a contention challenging the absence in the environmental report of consideration of impacts from a severe radiological accident at one unit on other collocated units is admitted; LBP-09-17, 70 NRC 311 (2009)
- a contention concerning environmental impacts of offsite mining is rejected because petitioner failed to support the allegations with information indicating that such impacts are even plausibly significant; LBP-09-10, 70 NRC 51 (2009)
- a contention is admissible if it raises a genuine dispute that is material to the findings the NRC must make to support the action involved; LBP-09-25, 70 NRC 867 (2009)
- a contention is material if it shows that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment; LBP-09-26, 70 NRC 939 (2009)
- a contention is not admissible if it is not plausibly explained or supported by alleged facts; LBP-09-21, 70 NRC 581 (2009)
- a contention is timely to the extent it challenges the adequacy of the new low-level radioactive waste storage plan, but untimely as to those aspects of the contention that merely reargue issues already decided by the board, without identifying any new information relevant to those issues; LBP-09-27, 70 NRC 992 (2009)
- a contention must explain why the application is deficient through reference to specific portions of the application, and it must directly controvert a position taken by the applicant in the application; LBP-09-17, 70 NRC 311 (2009)
- a contention must show that a genuine dispute exists on a material issue of law or fact with regard to the license application, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-09-26, 70 NRC 939 (2009)
- a contention of omission becomes moot if applicant cures the omission in its application; LBP-09-16, 70 NRC 227 (2009)
- a contention of omission claims that the application fails to contain information on a relevant matter as required by law and provides the supporting reasons for the petitioner's belief; LBP-09-16, 70 NRC 227 (2009)
- a contention should be dismissed if it does not directly controvert a position taken by the applicant in the license application; LBP-09-27, 70 NRC 992 (2009)
- a contention that fails to provide even a ballpark figure for the cost of implementing any proposed severe accident mitigation alternatives is inadmissible because it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration; LBP-09-26, 70 NRC 939 (2009)
- a contention that seeks to impose new requirements on applicants and licensees is an impermissible challenge to the agency's regulations; LBP-09-26, 70 NRC 939 (2009)
- a document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, for both what it does and does not show; LBP-09-27, 70 NRC 992 (2009)
- a finding that applicant has cured an omission does not preclude litigation concerning the adequacy of the information the applicant has supplied and intervenors must timely file a new or amended contention that addresses the factors in 10 C.F.R. 2.309(f)(1); LBP-09-15, 70 NRC 198 (2009)
- a general assessment of radioactivity within waters of the Great Lakes Basin does not address specific issues with regard to the proposed reactor, and it does not provide any support for petitioners' assertions; LBP-09-16, 70 NRC 227 (2009)
- a generalized assertion, without specific ties to NRC regulatory requirements or to safety in general, do not provide adequate support demonstrating the existence of a genuine dispute of fact or law with respect to the construction authorization application; LBP-09-27, 70 NRC 992 (2009)



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- a genuine material dispute is one that could lead to a different conclusion on potential cost-beneficial severe accident mitigation alternatives; LBP-09-26, 70 NRC 939 (2009)
- a justiciable controversy must involve adverse parties representing a true clash of interests and the questions raised must be presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; LBP-09-25, 70 NRC 867 (2009)
- a legal issue contention need not satisfy all the contention admissibility criteria; LBP-09-29, 70 NRC 1028 (2009)
- a legal issue contention raises a genuine dispute with the application, because it challenges DOE's performance assessment for the post-10,000-year period; LBP-09-29, 70 NRC 1028 (2009)
- a new safety contention can be filed, with leave of the board, on a showing that the new contention is based on information that was not previously available and is materially different from previously available information, and the new contention has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-9, 70 NRC 41 (2009)
- a nexus between the injury and the relief is required rather than a nexus between the claimed injury and the contention; LBP-09-16, 70 NRC 227 (2009)
- a party cannot satisfy the "not previously available" standard of 10 C.F.R. 2.309(f)(2)(i) by showing that, as a subjective matter, he or she only recently became aware of, or realized the significance of, public information that was previously available to all; LBP-09-10, 70 NRC 51 (2009)
- a properly pleaded contention of omission must challenge a specific portion of the application and provide a basis for demonstrating the alleged deficiency; LBP-09-26, 70 NRC 939 (2009)
- a proposed contention that fails to directly controvert the application or that mistakenly asserts the application does not address a relevant issue is subject to dismissal; LBP-09-27, 70 NRC 992 (2009)
- a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)
- absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; CLI-09-20, 70 NRC 911 (2009); LBP-09-10, 70 NRC 51 (2009)
- although a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner, the petitioner must provide some support for his or her contention, in the form of either facts or expert testimony; LBP-09-26, 70 NRC 939 (2009)
- although a board may deny certain portions of a multipart contention as outside the scope or too attenuated, applying all six criteria of 10 C.F.R. 2.309(f)(1) to each subpart of the contention is inappropriate; LBP-09-10, 70 NRC 51 (2009)
- although a licensing board will take into account any information from reply briefs that legitimately amplifies issues presented in the original petitions, it will not consider instances of what essentially constitute untimely attempts to amend the original petitions; LBP-09-17, 70 NRC 311 (2009)
- although a petitioner does not have to prove its contention at the admissibility stage, mere notice pleading is insufficient; LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)
- although an expert may be misinterpreting data submitted by applicant, this is not considered at the contention admissibility stage; LBP-09-27, 70 NRC 992 (2009)
- although boards are not required to narrow contentions to make them acceptable, they may do so; LBP-09-25, 70 NRC 867 (2009)
- although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner; LBP-09-27, 70 NRC 992 (2009)
- an exception to the general policy limiting interlocutory review permits an appeal of a board's ruling on contention admissibility when a board grants a petition to intervene following consideration of the full petition; CLI-09-18, 70 NRC 859 (2009)
- an expert opinion that merely states a conclusion (e.g., the application is deficient, inadequate, or wrong) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-09-16, 70 NRC 227 (2009)
- any contention that fails to controvert the application directly, or that mistakenly asserts the application fails to address an issue that the application does address, can be dismissed; LBP-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)

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any material provided by petitioner in support of its contention, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-09-17, 70 NRC 311 (2009); LBP-09-26, 70 NRC 939 (2009)

arguments premised on the prediction that someday a nuclear plant site will become a permanent storage or disposal facility for low-level radioactive waste are too speculative and therefore not material to the findings the NRC must make to support the action that is involved in a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

as long as either denial of a license or issuance of a decision mandating compliance with legal requirements would alleviate a petitioner's potential injury, then under longstanding NRC jurisprudence the petitioner may prosecute any admissible contention that could result in the denial or in the compliance decision; CLI-09-20, 70 NRC 911 (2009)

assertions that building two new nuclear reactors in a troubled economy is fiscally irresponsible is outside the scope of a combined license proceeding; LBP-09-10, 70 NRC 51 (2009)

at the admissibility stage, all that is required is that the petitioner provide an expert opinion or some alleged fact, or facts, in support of its position; LBP-09-26, 70 NRC 939 (2009)

at the admission stage of the proceedings, boards admit contentions, not bases; LBP-09-26, 70 NRC 939 (2009)

attacks on applicable statutory requirements, challenges to the basic structure of the NRC's regulatory process, or mere expression of generalized policy grievances are not appropriate for a licensing board hearing; LBP-09-18, 70 NRC 385 (2009)

because NEPA is a procedural statute, petitioners need not show that favorable rulings on their NEPA contentions will require denial of the license, but rather that procedures intended for protection of their members' concrete interests will be observed; LBP-09-16, 70 NRC 227 (2009)

because petitioners fail to create a genuine issue, the board need not resolve whether applicant's purpose is unreasonably narrow or whether a proposed alternative is so far beyond the realm of reason that it must be rejected out of hand; LBP-09-21, 70 NRC 581 (2009)

because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, initial contentions necessarily focus on the adequacy of the applicant's ER under Part 51; LBP-09-10, 70 NRC 51 (2009); LBP-09-25, 70 NRC 867 (2009)

because the reach of a contention necessarily hinges upon its terms and its stated bases, the brief explanation helps define the scope of the contention; LBP-09-26, 70 NRC 939 (2009)

before the board can consider a new contention, petitioner must show that it is based on information that was not previously available, is based on information that is materially different than information previously available, and has been submitted in a timely fashion; LBP-09-29, 70 NRC 1028 (2009)

boards have authority to narrow low-level radioactive waste contentions; LBP-09-16, 70 NRC 227 (2009)

boards may appropriately view petitioners' support for their contentions in a light favorable to petitioners, but it is petitioners' burden to establish the admissibility of contentions; LBP-09-17, 70 NRC 311 (2009)

boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-09-16, 70 NRC 227 (2009)

by complying with the six contention requirements, an admissible contention must raise an issue that is both within the scope of the proceeding (normally defined by the hearing notice) and material to the findings the NRC must make to support the action involved; LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

by definition, contentions admitted under 10 C.F.R. 2.309(f)(2)(i)-(iii) are timely because they are founded on material new information that was not available at the time when the petition was initially due; LBP-09-10, 70 NRC 51 (2009)

challenges to a Commission rule or that seek to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)

challenges to applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-09-16, 70 NRC 227 (2009)

challenges to Commission rules or regulations are inadmissible, unless a waiver is requested under 10 C.F.R. 2.335(b); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

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challenges to the Commission regulations regarding the design certification process are inadmissible; LBP-09-18, 70 NRC 385 (2009)

challenges to the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 311 (2009)

claims related to the decommissioning of the facility are not currently ripe for review and are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

contention admissibility requirements are deliberately strict and any contention that does not satisfy the requirements of 10 C.F.R. 2.309(f)(1) will be rejected; CLI-09-20, 70 NRC 911 (2009); LBP-09-26, 70 NRC 939 (2009)

contention alleging that the environmental report failed to address the alleged greenhouse gas and global climate disruption impacts resulting from prematurely killing trees is inadmissible; LBP-09-10, 70 NRC 51 (2009)

contention alleging that the threatened eastern fox snake inhabits the nuclear plant site and that construction activities for the new reactor will kill snakes, destroy their habitat, and might eliminate them from the area is within the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

contention asserting that DOE's description of its expert elicitation relating to a probabilistic volcanic hazard analysis update fails to comply with this section or the NRC guidance document that DOE formally committed to follow, is admissible; LBP-09-29, 70 NRC 1028 (2009)

contention disputing the cost estimate for decommissioning is an indirect challenge to 10 C.F.R. 50.75(c) and therefore inadmissible; LBP-09-16, 70 NRC 227 (2009)

contention in combined license proceeding focusing exclusively on regulations governing waste disposal is inadmissible; CLI-09-16, 70 NRC 33 (2009)

contention that concerns onsite and offsite impacts of active and passive dewatering associated with the proposed project satisfies the admissibility criteria; LBP-09-10, 70 NRC 51 (2009)

contention that the high-level waste application inadequately addresses generalized corrosion because it relies on flawed experimental data raises a genuine, material dispute with the application by pointing to specific sections that allegedly fail to comply with the NRC's requirements for conducting a post-closure performance assessment; LBP-09-29, 70 NRC 1028 (2009)

contentions must be accompanied 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 it intends to rely to support its position; LBP-09-10, 70 NRC 51 (2009); LBP-09-26, 70 NRC 939 (2009)

contentions of omission must describe the information that should have been included in the environmental report and provide the legal basis that requires the omitted information to be included; LBP-09-16, 70 NRC 227 (2009)

contentions on information a COL applicant should supply in order to satisfy NRC regulations regarding the safety of long-term storage of low-level radioactive waste are application-specific and thus would benefit from further development by the board and the parties; CLI-09-16, 70 NRC 33 (2009)

contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 227 (2009)

contentions that fall outside the scope of the proceeding must be rejected; LBP-09-26, 70 NRC 939 (2009)

controls other countries may impose on mining and milling, and the impacts of such activities, are outside the scope of a combined license proceeding; LBP-09-17, 70 NRC 311 (2009)

determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits; LBP-09-26, 70 NRC 939 (2009)

dismissal of one contention on mootness grounds would not terminate a case where the board had expressly retained jurisdiction to decide whether to admit another contention; LBP-09-27, 70 NRC 992 (2009)

each contention must assert an issue of law or fact that is within the scope of the proceeding and is material to the outcome of the licensing proceeding; CLI-09-15, 70 NRC 1 (2009)

environmental impacts of spent fuel storage are inadmissible in a combined license proceeding; LBP-09-18, 70 NRC 385 (2009)

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- failure of a contention to meet any of the requirements of 10 C.F.R. 2.309(f)(1) is grounds for its dismissal; CLI-09-15, 70 NRC 1 (2009); LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)
- failure to provide facts or expert opinion sufficient to show that the environmental report disregarded a feasible alternative based on either wind power, solar power, or some combination of the two renders the contention inadmissible; LBP-09-16, 70 NRC 227 (2009)
- for a contention of omission, petitioner's burden is to show the facts necessary to establish that the application omits information that should have been included; LBP-09-16, 70 NRC 227 (2009)
- for a contention to be held in abeyance, it must otherwise be admissible; LBP-09-18, 70 NRC 385 (2009)
- for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion, but must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-27, 70 NRC 992 (2009)
- for timely new or amended contentions, the pleading shall include a motion for leave to file the contention showing that it satisfies 10 C.F.R. 2.309(f)(1); LBP-09-22, 70 NRC 640 (2009)
- if a combined license application references a design certification, then the presiding officer shall not admit contentions concerning severe accident design mitigation alternatives unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification; LBP-09-10, 70 NRC 51 (2009)
- if a contention concerning a certification application that has been docketed but not granted is otherwise admissible under 10 C.F.R. 2.309(f)(1), it might be held in abeyance and referred to the Staff; LBP-09-17, 70 NRC 311 (2009)
- if a contention makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue; LBP-09-16, 70 NRC 227 (2009)
- if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c) which specifically applies to nontimely filings; LBP-09-27, 70 NRC 992 (2009)
- if a NEPA contention alleges that impacts or alternatives that are patently outside the realm of reason must be considered, then the contention should be denied for failure to demonstrate that the issue raised is within the legitimate scope of NEPA; LBP-09-10, 70 NRC 51 (2009)
- if a new contention is not timely, then its admissibility is evaluated under the eight-factor balancing test of 10 C.F.R. 2.309(c)(i)-(viii); LBP-09-10, 70 NRC 51 (2009)
- if a party files a new contention within 30 days of the availability of the new information, the contention will generally be considered timely; LBP-09-17, 70 NRC 311 (2009)
- if no expert opinion or supporting relevant documents are submitted with a contention, any fact-based argument that is provided must be reasonably specific, coherent, and logical, sufficient to show such a dispute and indicate the appropriateness of further inquiry; LBP-09-17, 70 NRC 311 (2009)
- if petitioner fails 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-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)
- if petitioners are dissatisfied with the Commission's generic approach to problems, their remedy lies in the rulemaking process, not in adjudication; LBP-09-16, 70 NRC 227 (2009)
- if the environmental impact of mining activities is potentially significant, then the failure of the environmental report for a combined license application to disclose the location of the offsite mine does not immunize it from being the subject of a legitimate contention; LBP-09-10, 70 NRC 51 (2009)
- in an abundance of caution and in order to give petitioners every benefit of the doubt, the board considers whether any of the material at issue in a reply brief that would not constitute legitimate amplification might be admissible under the criteria of 10 C.F.R. 2.309(c) or (f)(2); LBP-09-17, 70 NRC 311 (2009)
- in ruling on contention admissibility a board is not to look to the merits of the contention; LBP-09-17, 70 NRC 311 (2009)
- information, facts, and expert opinions provided by petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for the contention; LBP-09-26, 70 NRC 939 (2009)

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integration, consolidation, restatement, or collection of previously available information into a new document does not convert it into information that was not previously available within the meaning of 10 C.F.R. 2.309(f)(2)(i); LBP-09-10, 70 NRC 51 (2009)

issuance of a proposed rulemaking and request for comments does not, in itself, constitute information not previously available that entitles a party to file a new contention; LBP-09-10, 70 NRC 51 (2009)

issuance of requests for additional information does not alone establish deficiencies in the application; LBP-09-16, 70 NRC 227 (2009)

licensing boards may not admit a contention that directly or indirectly challenges Table S-3 of 10 C.F.R. 51.51; LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009)

low-level radioactive waste disposal contentions have been admitted when that issue was not sufficiently discussed in the applications and there was no mention of the closure of the Barnwell facility; LBP-09-18, 70 NRC 385 (2009)

materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-26, 70 NRC 939 (2009); LBP-09-27, 70 NRC 992 (2009)

mere mention of a document without providing its contents or an explanation of its significance cannot support admissibility of a contention; LBP-09-21, 70 NRC 581 (2009)

mere statements of government officials are insufficient to overturn 10 C.F.R. 51.23; LBP-09-21, 70 NRC 581 (2009)

NEPA is the only legal grounds for an admissible contention relating to environmental justice issues; LBP-09-18, 70 NRC 385 (2009)

new contention on the adequacy of consideration of the dissolved oxygen factor in the cumulative usage factor environmental analysis and use of inappropriate heat transfer equations was previously litigated and resolved and thus is not admissible; LBP-09-9, 70 NRC 41 (2009)

nontimely petitions to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of eight factors; CLI-09-15, 70 NRC 1 (2009)

nothing in the NRC case law or regulations requires, at the contention admissibility stage, that a contention be supported by an expert opinion, substantive affidavits, or evidence; LBP-09-10, 70 NRC 51 (2009)

NRC Staff issuance of a request for additional information does not alone establish deficiencies in an application, and intervention petitioner must do more than merely quote an RAI to justify admission of a contention; CLI-09-16, 70 NRC 33 (2009); LBP-09-10, 70 NRC 51 (2009)

NRC Staff issuance of a request for additional information does not immunize the combined license application from challenge; LBP-09-10, 70 NRC 51 (2009)

NRC's adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction that regulatory policy should take; LBP-09-26, 70 NRC 939 (2009)

only the management of Class B and Class C wastes is properly the subject of a contention in a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

organizations seeking to challenge regulations of a government agency failed to demonstrate standing where they did not demonstrate a concrete application of the regulations that threatened imminent harm to their interests; CLI-09-20, 70 NRC 911 (2009)

petitioner demonstrates a genuine dispute with the applicant on the adequacy of the water quality analysis; LBP-09-16, 70 NRC 227 (2009)

petitioner 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-09-17, 70 NRC 311 (2009)

petitioner does not have to prove its contention at the admissibility stage; LBP-09-26, 70 NRC 939 (2009)

petitioner is obligated to read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-09-17, 70 NRC 311 (2009); LBP-09-25, 70 NRC 867 (2009)

petitioner is required merely to provide a simple nexus between the contention and the referenced factual or legal support; LBP-09-21, 70 NRC 581 (2009); LBP-09-25, 70 NRC 867 (2009)

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petitioner must demonstrate that its contention is within the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

petitioner must include references to 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; LBP-09-21, 70 NRC 581 (2009)

petitioner must include sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of fact; LBP-09-10, 70 NRC 51 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-27, 70 NRC 992 (2009)

petitioner must provide a brief explanation of the basis for the contention; LBP-09-21, 70 NRC 581 (2009)

petitioner must provide a concise statement of the alleged facts or expert opinions that support its position on the issue and on which petitioner intends to rely at hearing, together with references to the specific sources and documents on which petitioner intends to rely to support its position on the issue; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-27, 70 NRC 992 (2009)

petitioner must provide a specific statement of the issue of law or fact to be raised or controverted; LBP-09-21, 70 NRC 581 (2009)

petitioner must show that information missing from a license application is required by the Commission's regulations; LBP-09-18, 70 NRC 385 (2009)

petitioner must show that the subject matter of the contention would impact the grant or denial of the license application at issue in the proceeding; LBP-09-26, 70 NRC 939 (2009)

petitioners' assertion that applicant's environmental report fails to include an analysis of the impacts of a governmental entity managing long-term storage of high-level waste onsite and cost quantifications of such management fails to create a genuine dispute; LBP-09-21, 70 NRC 581 (2009)

petitioners' assertion that no exposure levels are safe is an impermissible challenge to the exposure limits set forth in the NRC's regulations; LBP-09-16, 70 NRC 227 (2009)

petitioners' claim that applicant must pursue the prepayment method for decommissioning conflicts with NRC guidance and rules and so is outside the permissible scope of the COL proceeding; LBP-09-21, 70 NRC 581 (2009)

petitioners' concerns regarding the applicant's commitments to relax conservatism in its laboratory testing and groundwater release analysis are in regard to the revised analysis to be submitted in response to the Staff request for additional information and therefore are dismissed as outside the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009)

petitioner's inaccurate reading and presentation of applicant's spent fuel storage plan cannot serve as a litigable basis for a contention; LBP-09-27, 70 NRC 992 (2009)

petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only 'bare assertions and speculation; LBP-09-15, 70 NRC 198 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)

petitioners question the underlying analysis of fish kills in the environmental report as being outdated, but they fail to provide any information to show that the results of the study are no longer representative; LBP-09-16, 70 NRC 227 (2009)

petitioners who base their contentions on requests for additional information must provide analysis, discussion, or information of their own on the issues raised; LBP-09-16, 70 NRC 227 (2009)

pleading requirements call for a recitation of facts or expert opinion supporting the issue raised, but are inapplicable to a contention of omission beyond identifying the regulatively required missing information; LBP-09-16, 70 NRC 227 (2009)

portions of a contention that allege that the environmental report failed to adequately address the zone of environmental impact, impact on listed species, and appropriate mitigation are admissible; LBP-09-10, 70 NRC 51 (2009)

presentation of excerpts from combined license application without further explanation does not provide sufficient support for a contention; LBP-09-16, 70 NRC 227 (2009)

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providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention; LBP-09-26, 70 NRC 939 (2009)

questions on the safety and environmental impacts of onsite low-level waste storage are largely site- and design-specific and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009)

ratepayer impacts are outside the scope of a combined license proceeding because the state, not NRC, is charged with protecting ratepayers' interests; LBP-09-10, 70 NRC 51 (2009)

releases from the nuclear fuel cycle in general, incidences of childhood cancers near nuclear power plants, and a request for the NRC to address radioactive releases from the burning of coal at fossil fuel plants are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

replies may provide only legitimate amplifications of the original contentions or a logical/legal response to the answers of the Staff and applicant; LBP-09-17, 70 NRC 311 (2009)

reports before a board are subject to scrutiny both as to those portions that support an intervenor's assertion and those that do not; LBP-09-21, 70 NRC 581 (2009)

requirements for filing both new and nontimely contentions are stringent; LBP-09-27, 70 NRC 992 (2009)

revenue decoupling is a state regulatory matter that is outside the scope of, and not material to, the NRC licensing process; LBP-09-10, 70 NRC 51 (2009)

scope of an adjudicatory proceeding is specified by the notice of hearing, and contentions that raise matters outside that defined scope must be rejected; LBP-09-18, 70 NRC 385 (2009)

section 2.309(f)(1)(vi) is not a second hurdle of materiality that an intervenor must meet, but rather requires that intervenor identify the specific parts of the combined license application that it disputes and show that resolution of those disputes is material to the licensing decision; LBP-09-27, 70 NRC 992 (2009)

simply attaching materials or documents, without explaining their significance, is insufficient support for contention admission; LBP-09-18, 70 NRC 385 (2009)

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; LBP-09-17, 70 NRC 311 (2009)

stating that an allegation that some aspect of a license application is inadequate or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect; LBP-09-18, 70 NRC 385 (2009)

submittal of the information by applicant is the basis for the finding of mootness of a contention, but the adequacy of the information submitted may be the subject of a new or amended contention; LBP-09-21, 70 NRC 581 (2009)

Table S-3 does not include health effects from the effluents described in the table, and that issue may be the subject of litigation in the individual licensing proceedings; LBP-09-16, 70 NRC 227 (2009)

technical perfection is not an essential element of contention pleading, but the rules have nonetheless been held to bar contentions where petitioners have only what amounts to generalized suspicions, hoping to substantiate them later; LBP-09-17, 70 NRC 311 (2009)

terrorism-related issues are outside the scope of NRC adjudications; LBP-09-17, 70 NRC 311 (2009)

the admissibility decision sometimes turns on a determination about when, as a cumulative matter, separate pieces of the information puzzle were sufficiently in place to make the particular concerns reasonably apparent; LBP-09-10, 70 NRC 51 (2009)

the assertion that applicant might need to obtain a Part 72 license is irrelevant because a grant of the combined license could be accompanied by grant of a Part 72 general license if applicant complies with certain conditions; LBP-09-21, 70 NRC 581 (2009)

the Commission declined to review licensing board referred rulings because the contentions were rejected by the board due to legal insufficiency; CLI-09-21, 70 NRC 927 (2009)

the Commission dispensed with all but the good cause factor for late-filed contentions; LBP-09-29, 70 NRC 1028 (2009)

the Commission gives substantial deference to a board's rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 33 (2009); CLI-09-20, 70 NRC 911 (2009)

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the Commission has previously rejected claims that NRC regulations require discharge permits of their licensees; LBP-09-25, 70 NRC 867 (2009)

the Commission, rather than petitioner, holds the authority to define the scope of a proceeding; LBP-09-20, 70 NRC 565 (2009)

the contention admissibility rule does not require a petitioner to prove its case at the contention stage; LBP-09-27, 70 NRC 992 (2009)

the contention admissibility threshold is less than is required at the summary disposition stage; LBP-09-26, 70 NRC 939 (2009)

the contention requirements were never intended to be turned into a fortress to deny intervention; LBP-09-21, 70 NRC 581 (2009)

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-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)

the contention that applicant cannot pass a financial test because the parent company is already committed to providing funding for the decommissioning of another site is an impermissible challenge to NRC regulations; LBP-09-18, 70 NRC 385 (2009)

the decision as to whether an alleged environmental impact or alternative is significant or reasonable is the merits of a NEPA contention and should not be adjudicated at the contention admissibility stage under the guise of materiality or scope; LBP-09-10, 70 NRC 51 (2009)

the environmental baseline reflects the effects of all currently existing pollution sources in the relevant watershed, including contributions of all nuclear power plants, and petitioners failed to provide information indicating that this aggregate analysis was insufficient under NEPA; LBP-09-16, 70 NRC 227 (2009)

the environmental impacts related to storage of spent fuel under Part 72 have been generically evaluated under two previous rulemakings and the Commission's waste confidence proceedings, and thus need not be reassessed; LBP-09-21, 70 NRC 581 (2009)

the fact that a combined license application is subject to, or even expected to, change does not make it legally deficient, because NRC follows a dynamic licensing process; LBP-09-10, 70 NRC 51 (2009)

the fact that disposal of dredged or fill material in wetlands is regulated by the Environmental Protection Agency and the U.S. Army Corps of Engineers does not render a contention inadmissible; LBP-09-10, 70 NRC 51 (2009)

the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the combined license; LBP-09-15, 70 NRC 198 (2009)

the first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. 2.309(f)(2)(iii) or nontimely under section 2.309(c); LBP-09-10, 70 NRC 51 (2009)

the issue that generally arises under 10 C.F.R. 2.309(f)(1)(i) is whether a contention is stated with sufficient specificity; LBP-09-17, 70 NRC 311 (2009)

the licensing board did not commit reversible error by admitting a contention based on low-level radioactive waste storage duration because the NRC Staff itself had issued a request for additional information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 992 (2009)

the mandatory disclosure requirements are not an opportunity to relitigate the admissibility of a contention; LBP-09-30, 70 NRC 1039 (2009)

the public will have a new opportunity to file environmental contentions when the NRC Staff issues the environmental impact statement or environmental analysis; LBP-09-10, 70 NRC 51 (2009); LBP-09-25, 70 NRC 867 (2009)

the purpose of the contention admissibility rules is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-26, 70 NRC 939 (2009)

the requirement of 10 C.F.R. 2.309(f)(1)(ii) that the petition include a brief explanation of the basis for the contention requires an explanation of the rationale or theory of the contention; LBP-09-10, 70 NRC 51 (2009)

the scope of a proceeding is defined in the Commission's initial hearing notice and order referring the proceeding to the Licensing Board; LBP-09-25, 70 NRC 867 (2009); LBP-09-26, 70 NRC 939 (2009)

the six criteria that govern the admissibility of contentions are discussed; LBP-09-21, 70 NRC 581 (2009)



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- the strict contention rule serves multiple interests; LBP-09-17, 70 NRC 311 (2009)
- the subject matter of the contention must impact the grant or denial of a pending license application; CLI-09-15, 70 NRC 1 (2009); LBP-09-27, 70 NRC 992 (2009)
- the Waste Confidence Rule is applicable to all new reactor proceedings and contentions challenging the rule or seeking its reconsideration are inadmissible; LBP-09-18, 70 NRC 385 (2009)
- there must be some significant link between the deficiency claimed in a contention and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment; LBP-09-27, 70 NRC 992 (2009)
- 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-09-26, 70 NRC 939 (2009)
- to be admitted in a proceeding, a new contention must meet the new or amended contention requirements as well as the general contention admissibility requirements; LBP-09-9, 70 NRC 41 (2009)
- to challenge a regulation, petitioner must submit a supporting affidavit setting forth with particularity the special circumstances that justify the waiver or exception requested; LBP-09-18, 70 NRC 385 (2009)
- to qualify as an environmental justice contention, the contention must show that the affected local population qualifies as a minority or low-income population; LBP-09-18, 70 NRC 385 (2009)
- to the extent that petitioners argue that the provisions of 10 C.F.R. 50.54(hh) should be applied to dry cask storage, they may file a rulemaking petition with the Commission; LBP-09-17, 70 NRC 311 (2009)
- when a Commission regulation permits the use of a particular analysis, a contention asserting that a different analysis or technique should be utilized is inadmissible because it indirectly attacks the Commission's regulations; LBP-09-16, 70 NRC 227 (2009)
- when denial of a license would alleviate a petitioner's asserted potential injury, any admissible contention with such a result can be prosecuted by a petitioner, regardless of whether that contention is directly related to that petitioner's articulated injury; LBP-09-16, 70 NRC 227 (2009)
- when information becomes available piecemeal over time, and the foundation for a new contention does not become reasonably apparent until the last piece of information becomes available and falls into place, the test for good cause for late filing may be met; LBP-09-10, 70 NRC 51 (2009)
- where 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 Staff in a draft EIS, the contention is moot; LBP-09-27, 70 NRC 992 (2009)
- whether other permits may be required from other agencies is outside the scope of NRC proceedings, and those concerns are properly raised before those respective permitting authorities; LBP-09-21, 70 NRC 581 (2009)
- with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-09-26, 70 NRC 939 (2009)
- with respect to orders modifying a license, petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing; LBP-09-20, 70 NRC 565 (2009)
- CONTENTIONS, LATE-FILED**
- a contention is timely to the extent it challenges the adequacy of the new low-level radioactive waste storage plan, but untimely as to those aspects of the contention that merely reargue issues already decided by the board, without identifying any new information relevant to those issues; LBP-09-27, 70 NRC 992 (2009)
- a motion and proposed contention filed later than 30 days after the date when the new and material information on which it is based first becomes available shall be deemed untimely; LBP-09-22, 70 NRC 640 (2009)
- a motion and proposed new contention may address the selection of the appropriate hearing procedure for the proposed new contention; LBP-09-22, 70 NRC 640 (2009)
- a motion for leave to file a new contention, accompanied by the proposed contention, shall be deemed timely if filed within 30 days of the date when the new and material information on which it is based first became available; LBP-09-29, 70 NRC 1028 (2009)
- a new contention may be filed after the initial docketing with leave of the presiding officer upon a showing that the information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the

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availability of the subsequent information; LBP-09-26, 70 NRC 939 (2009); LBP-09-27, 70 NRC 992 (2009); LBP-09-29, 70 NRC 1028 (2009)

a party cannot satisfy the “not previously available” standard of 10 C.F.R. 2.309(f)(2)(i) by showing that, as a subjective matter, he or she only recently became aware of, or realized the significance of, public information that was previously available to all; LBP-09-10, 70 NRC 51 (2009)

absent good cause, petitioner’s demonstration on the other late-filing factors must be compelling; LBP-09-26, 70 NRC 939 (2009)

an amended or new contention must be submitted in a timely fashion based on the availability of the subsequent information; LBP-09-27, 70 NRC 992 (2009)

challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 859 (2009)

contentions based on the safety evaluation report and any necessary National Environmental Policy Act document should be filed within 30 days of the issuance of those documents; LBP-09-27, 70 NRC 992 (2009)

factors that must be addressed for nontimely intervention petitions, hearing requests, and contentions are set forth; LBP-09-20, 70 NRC 565 (2009)

for untimely new or amended contentions, the pleading shall include a motion for leave to file the contention and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. 2.309(f)(1); LBP-09-22, 70 NRC 640 (2009)

good cause for the failure to file on time is the most important of the late-filing factors; LBP-09-26, 70 NRC 939 (2009)

if a combined license application is amended or material new information subsequently becomes available, petitioners must be given a fair opportunity to file new or amended contentions challenging these changes; LBP-09-10, 70 NRC 51 (2009)

if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c) which specifically applies to nontimely filings; LBP-09-27, 70 NRC 992 (2009)

if a new contention is not timely, then its admissibility is evaluated under the eight-factor balancing test of 10 C.F.R. 2.309(c)(i)-(viii); LBP-09-10, 70 NRC 51 (2009); LBP-09-26, 70 NRC 939 (2009)

if a new contention is timely, then its admissibility is evaluated under the three-factor test of 10 C.F.R. 2.309(f)(2)(i)-(iii); LBP-09-10, 70 NRC 51 (2009)

if new information becomes available in the course of waste confidence rulemaking proceedings that contravenes a combined license application, petitioner may file a motion to admit a new or amended contention; LBP-09-18, 70 NRC 385 (2009)

issuance of a proposed rulemaking and request for comments do not constitute information not previously available that entitles a party to file a new contention; LBP-09-10, 70 NRC 51 (2009)

nontimely petitions to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of eight factors; CLI-09-15, 70 NRC 1 (2009)

reply briefs that raise new issues must address the late filing and new-contention factors in 10 C.F.R. 2.309(c) or (f)(2); LBP-09-17, 70 NRC 311 (2009)

requirements for filing both new and nontimely contentions are stringent; LBP-09-27, 70 NRC 992 (2009)

the admissibility decision sometimes turns on a determination about when, as a cumulative matter, separate pieces of the information puzzle were sufficiently in place to make the particular concerns reasonably apparent; LBP-09-10, 70 NRC 51 (2009)

the Commission dispensed with all but the good cause factor for late-filed contentions; LBP-09-29, 70 NRC 1028 (2009)

the filing of new or amended contentions based on new information is permitted if sufficient justification is provided; LBP-09-15, 70 NRC 198 (2009)

thirty days is a reasonable limit for fulfilling the timing requirement of 10 C.F.R. 2.309(f)(2)(iii) because of the significant effort involved in identifying new information, assembling the required expertise, and then drafting a contention that satisfies 10 C.F.R. 2.309(f)(1); LBP-09-27, 70 NRC 992 (2009)

to be admitted, a new contention must meet the new or amended contention requirements as well as the general contention admissibility requirements; LBP-09-9, 70 NRC 41 (2009)

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when information becomes available piecemeal over time, and the foundation for a new contention does not become reasonably apparent until the last piece of information becomes available and falls into place, the test for good cause for late filing may be met; LBP-09-10, 70 NRC 51 (2009)  
where petitioners failed to file on time or seek an extension because they had not yet decided whether to seek to intervene, such indecision does not constitute good cause; LBP-09-26, 70 NRC 939 (2009)

### CONTESTED LICENSE APPLICATIONS

a decision dismissing the contested adjudication relating to a combined license has no impact on the subsequent need to conduct a mandatory hearing relating to combined license application, over which the Commission would preside; LBP-09-23, 70 NRC 659 (2009)  
in uranium enrichment facility proceedings, a licensing board must determine in its initial decision whether the requirements of section 102(2)(A), (C), and (E) of the National Environmental Policy Act have been complied with in the proceeding; CLI-09-15, 70 NRC 1 (2009)  
in uranium enrichment facility proceedings, the licensing board shall make findings of fact and conclusions of law on admitted contentions; CLI-09-15, 70 NRC 1 (2009)

### CONTINUANCE

if it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the board may refuse the application for summary disposition or may order a continuance as may be necessary or just; LBP-09-22, 70 NRC 640 (2009)

### CONTROL ROOM

adequacy of applicant's design for radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a combined license or standard design certification proceeding; LBP-09-10, 70 NRC 51 (2009)

### CORROSION

contention that the high-level waste application inadequately addresses generalized corrosion because it relies on flawed experimental data raises a genuine, material dispute with the application by pointing to specific sections that allegedly fail to comply with the NRC's requirements for conducting a post-closure performance assessment; LBP-09-29, 70 NRC 1028 (2009)

### COST-BENEFIT ANALYSES

a contention that fails to provide even a ballpark figure for the cost of implementing any proposed severe accident mitigation alternatives is inadmissible because it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration; LBP-09-26, 70 NRC 939 (2009)  
if the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by the National Environmental Policy Act from deciding that other values outweigh the environmental costs; LBP-09-16, 70 NRC 227 (2009)  
NRC is required to evaluate and balance both the claimed benefits and the environmental costs of a proposed new reactor; LBP-09-16, 70 NRC 227 (2009)  
NRC must analyze the need for additional power when it relies on a benefit in performing the balancing of benefits and costs; LBP-09-16, 70 NRC 227 (2009)  
the environmental report associated with each application for a standard design certification must address the costs and benefits of severe accident design mitigation alternatives; LBP-09-10, 70 NRC 51 (2009)

### COSTS

accuracy of an applicant's estimate is not material to the findings the NRC must make under the National Environmental Policy Act; LBP-09-16, 70 NRC 227 (2009)  
parties need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost; LBP-09-22, 70 NRC 640 (2009)

See also Decommissioning Costs

### COUNCIL ON ENVIRONMENTAL QUALITY

although NRC does not consider CEQ pronouncements to be binding, they are entitled to substantial deference; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)  
CEQ regulations define "direct and indirect" impacts and "cumulative" impacts and require that they be considered in the environmental impact statement; LBP-09-10, 70 NRC 51 (2009)

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in implementing NEPA, the NRC uses certain of the definitions provided in CEQ regulations; LBP-09-19, 70 NRC 433 (2009)

### CREDIBILITY

Subpart G procedures focus on issues where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness; LBP-09-22, 70 NRC 640 (2009)

### CRIMINAL PROCEEDING

conviction of a crime that is identical to a charge in an enforcement order provides substantial assurance that the enforcement order was not baseless or unwarranted; LBP-09-24, 70 NRC 676 (2009)

“deliberate ignorance” or “willful blindness” instruction has its place and sees frequent usage in drug possession cases where the defendant purports not to know, for example, what is in the package someone asked him to deliver in secretive fashion; LBP-09-24, 70 NRC 676 (2009)

juries may be asked to provide a special verdict indicating in some fashion the legal theory it applied to reach any findings of guilt; LBP-09-24, 70 NRC 676 (2009)

the conclusion that a finding of deliberate ignorance is a proxy for a finding of knowledge is supported by the definition of knowledge in the Model Penal Code, which has guided the Supreme Court in determining the intended scope of the word “knowing” in the criminal context; LBP-09-24, 70 NRC 676 (2009)

the warning to jurors that the added instruction on deliberate ignorance or willful blindness is not intended to allow them to base guilt on negligence or carelessness is sufficient to legitimize the instruction; LBP-09-24, 70 NRC 676 (2009)

### CRIMINAL PROSECUTION

an accused person is to be informed of the nature and cause of the accusation; LBP-09-24, 70 NRC 676 (2009)

with respect to a prosecutor’s role, government lawyers should understand and follow the venerable maxim that the government wins when justice is done; LBP-09-24, 70 NRC 676 (2009)

### CROSS-EXAMINATION

a party to NRC proceedings is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts; LBP-09-10, 70 NRC 51 (2009); LBP-09-22, 70 NRC 640 (2009)  
boards may allow parties to conduct cross-examination in Subpart L proceedings; LBP-09-22, 70 NRC 640 (2009)

in Subpart G hearings, cross-examination occurs virtually automatically, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-09-10, 70 NRC 51 (2009)

no later than 30 days after service of materials, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plans; LBP-09-22, 70 NRC 640 (2009)

the substantive standard for allowing parties to conduct cross-examination is the same under 10 C.F.R. Part 2, Subparts G and L; LBP-09-10, 70 NRC 51 (2009)

under Subpart L, a party seeking to conduct cross-examination must file a written motion and obtain leave from the board; LBP-09-10, 70 NRC 51 (2009)

### CULTURAL RESOURCES

only Indian tribes that appear on the Department of the Interior’s list of recognized tribes have consultation rights under the National Historic Preservation Act; LBP-09-13, 70 NRC 168 (2009)

### CUMULATIVE IMPACTS ANALYSIS

although applicant’s description of existing water quality conditions did not separately evaluate the contributions of specific sources, it nonetheless formed an environmental baseline against which to measure the cumulative impact of the proposed new reactor; LBP-09-16, 70 NRC 227 (2009)

an agency environmental impact statement must consider direct, indirect, and cumulative impacts of an action; LBP-09-19, 70 NRC 433 (2009)

“cumulative impact” is defined as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions; LBP-09-16, 70 NRC 227 (2009)

the environmental baseline reflects the effects of all currently existing pollution sources in the relevant watershed, including contributions of all nuclear power plants, and petitioners failed to provide

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information indicating that this aggregate analysis was insufficient under the National Environmental Policy Act; LBP-09-16, 70 NRC 227 (2009)  
the environmental consequences of proposals being considered by an agency within a region must be considered together to determine the synergistic and cumulative environmental effects; LBP-09-16, 70 NRC 227 (2009)

### CUMULATIVE USAGE FACTOR

if CUF environmental metal fatigue analysis produces a value of greater than unity, then the analysis indicates that the component would be likely to develop metal fatigue cracks that might affect their function during the 20-year license renewal period of extended operation, and thus requires an aging management program; LBP-09-9, 70 NRC 41 (2009)  
new contention on the adequacy of consideration of the dissolved oxygen factor in the cumulative usage factor environmental analysis and use of inappropriate heat transfer equations was previously litigated and resolved and thus is not admissible; LBP-09-9, 70 NRC 41 (2009)

### DEADLINES

a motion for leave to file a new contention, accompanied by the proposed contention, shall be deemed timely if filed within 30 days of the date when the new and material information on which it is based first became available; LBP-09-22, 70 NRC 640 (2009); LBP-09-29, 70 NRC 1028 (2009)  
agency notices must provide at least 15 days before the opportunity for a hearing is forfeited unless a shorter period is reasonable; LBP-09-20, 70 NRC 565 (2009)  
although NRC's rules of practice regarding motions do not provide for reply pleadings, the board presumes that for a reply to be timely it would have to be filed within 7 days of the date of service of the response it is intended to address; LBP-09-22, 70 NRC 640 (2009)  
an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within 20 days after service of the motion; LBP-09-22, 70 NRC 640 (2009)  
COL applicants must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading; LBP-09-21, 70 NRC 581 (2009)  
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, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-09-17, 70 NRC 311 (2009)  
decommissioning plans are not required until the applicant files a post-shutdown decommissioning activities report, which is not due until 2 years before permanent cessation of operation; LBP-09-21, 70 NRC 581 (2009)  
dispositive motions may be filed 20 days after the occurrence or circumstance from which the motion arises, rather than the 10-day time frame, provided that the moving party commences sincere efforts to contact and consult all other parties within 10 days of the occurrence or circumstance, and the accompanying certification so states; LBP-09-22, 70 NRC 640 (2009)  
final decommissioning financial assurance documents must be submitted to the NRC 30 days after the notification in the *Federal Register* pursuant to section 52.103(a) that licensee has set a date to load fuel; LBP-09-15, 70 NRC 198 (2009)  
for an order issued under 10 C.F.R. 2.202, the time for filing a hearing request runs from the date of the order, not the date of publication of the order in the *Federal Register*; LBP-09-20, 70 NRC 565 (2009)  
if a party files a new contention within 30 days of the availability of the new information to that party, the contention will generally be considered timely; LBP-09-17, 70 NRC 311 (2009)  
initial disclosures must be made within 30 days of the order granting a request for hearing, which is typically at least 18-24 months before the evidentiary hearing begins; LBP-09-30, 70 NRC 1039 (2009)  
late-filed contentions based on the safety evaluation report and any necessary National Environmental Policy Act document should be filed within 30 days of the issuance of those documents; LBP-09-27, 70 NRC 992 (2009)  
motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected shall be filed within 10 days after the occurrence or circumstance from which the motion arises; LBP-09-22, 70 NRC 640 (2009)

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- no later than 20 days after service of materials, the parties and the NRC Staff shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis; LBP-09-22, 70 NRC 640 (2009)
- no later than 30 days after service of materials, all parties and NRC Staff shall file proposed questions for the board to consider propounding to the direct or rebuttal witnesses; LBP-09-22, 70 NRC 640 (2009)
- no later than 30 days after service of materials, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plans; LBP-09-22, 70 NRC 640 (2009)
- thirty days is a reasonable limit for fulfilling the timing requirement of 10 C.F.R. 2.309(f)(2)(iii) because of the significant effort involved in identifying new information, assembling the required expertise, and then drafting a contention that satisfies 10 C.F.R. 2.309(f)(1); LBP-09-27, 70 NRC 992 (2009)
- twenty days in which to request a hearing is the minimum required by the agency's regulations for orders issued under 10 C.F.R. 2.202(a); LBP-09-20, 70 NRC 565 (2009)
- when issuing an order modifying a license, the agency is required to inform the licensee or any other person adversely affected by the order of his or her right, within 20 days of the date of the order, or such other time as may be specified in the order, to demand a hearing; LBP-09-20, 70 NRC 565 (2009)
- within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 640 (2009)
- within 30 days of the board's ruling admitting contentions, the parties must automatically make certain mandatory disclosures; LBP-09-22, 70 NRC 640 (2009)

### DECISIONS

See Initial Decisions; Licensing Board Decisions; Partial Initial Decisions

### DECOMMISSIONING

- an operating license cannot be terminated, in effect, until all spent fuel and high-level waste has been removed from the site; LBP-09-17, 70 NRC 311 (2009)
- claims related to the decommissioning of the facility are not currently ripe for review and are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)
- "decommission" means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license or release of the property under restricted conditions and termination of the license; LBP-09-15, 70 NRC 198 (2009)
- if after public notice and review the NRC approves the decommissioning plan, licensee has 60 years to complete decommissioning; LBP-09-17, 70 NRC 311 (2009)
- when a nuclear power plant ceases operations, the owner must apply for a license to terminate, which cannot be granted until the NRC is satisfied that the plant has been properly dismantled and decommissioned so that residual radiation meets established rules and that no spent fuel or high-level wastes remains onsite; LBP-09-21, 70 NRC 581 (2009)

### DECOMMISSIONING COSTS

- contention disputing the cost estimate for decommissioning is an indirect challenge to 10 C.F.R. 50.75(c) and therefore inadmissible; LBP-09-16, 70 NRC 227 (2009)
- contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 227 (2009)

### DECOMMISSIONING FUNDING

- a board can only decide whether or not a current funding proposal fulfills NRC requirements; LBP-09-18, 70 NRC 385 (2009)
- a combined license applicant must obtain the financial instrument and submit a copy to the Commission as provided in 10 C.F.R. 50.75(e)(3); LBP-09-15, 70 NRC 198 (2009)
- a combined license application must provide the information required by 10 C.F.R. 50.75(e)(1)(iii)(B) if applicant plans to use a parent company guarantee; LBP-09-15, 70 NRC 198 (2009); LBP-09-18, 70 NRC 385 (2009)

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a parent-company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in 10 C.F.R. Part 30, Appendix A; LBP-09-15, 70 NRC 198 (2009)

acceptable methods include a sinking fund, prepayment of the entire decommissioning amount, and a surety method, insurance, or other guarantee method; LBP-09-15, 70 NRC 198 (2009)

applicant may choose one or more of the funding methods provided in 10 C.F.R. 50.75(e); LBP-09-18, 70 NRC 385 (2009)

applicant, 2 years before and 1 year before the scheduled date for the initial fuel loading, shall submit a report to NRC containing a certification updating the financial information, including a copy of the financial instrument to be used; LBP-09-18, 70 NRC 385 (2009)

at the time the combined license application is submitted, it must identify the method of decommissioning funding assurance that the applicant proposes to use and to show that the method complies with any applicable financial test; LBP-09-15, 70 NRC 198 (2009); LBP-09-18, 70 NRC 385 (2009)

because the requirement of 10 C.F.R. 50.75(b)(3) applies to the amount of financial assurance specified in the decommissioning report, it is readily apparent that the report must explain how that requirement will be fulfilled; LBP-09-15, 70 NRC 198 (2009)

combined license applicants must submit a decommissioning report containing a certification that the funding assurance will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* of its scheduled date for initial fuel loading; LBP-09-15, 70 NRC 198 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-21, 70 NRC 581 (2009)

decommissioning rules are designed to minimize the administrative effort of licensees and the Commission and to provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety; LBP-09-21, 70 NRC 581 (2009)

holder of a combined license must begin filing biannual reports on the status of decommissioning funding once the Commission has made a finding that all acceptance criteria in the license have been met; LBP-09-15, 70 NRC 198 (2009)

if licensee changes its method of decommissioning funding assurance, the new method will also have to pass any applicable financial test; LBP-09-15, 70 NRC 198 (2009)

it is beyond licensing board authority to require applicant to choose a particular method of decommissioning funding; LBP-09-15, 70 NRC 198 (2009)

neither market capitalization nor share price are variables to be used in the financial test for decommissioning funding assurance; LBP-09-15, 70 NRC 198 (2009)

NRC will defer to state economic regulators where decommissioning funding is assured by the fact that any shortfall in decommissioning funds will be provided by ratepayers pursuant to state law; LBP-09-21, 70 NRC 581 (2009)

petitioners' claim that applicant must pursue the prepayment method for decommissioning conflicts with the NRC guidance and rules and so is outside the permissible scope of a combined license proceeding; LBP-09-21, 70 NRC 581 (2009)

the amount of financial assurance must be adjusted annually, using a rate calculated pursuant to 10 C.F.R. 50.75(c)(2); LBP-09-15, 70 NRC 198 (2009)

the contention that applicant cannot pass a financial test because the parent company is already committed to providing funding for the decommissioning of another site is an impermissible challenge to NRC regulations; LBP-09-18, 70 NRC 385 (2009)

the fact that the Commission included language deferring the obligation that would otherwise apply to combined license applicants in 10 C.F.R. 50.75(b)(4), but included no equivalent provision in section 50.75(b)(3), confirms that the Commission did not intend to defer the requirement of section 50.75(b)(3) until after the license is issued; LBP-09-15, 70 NRC 198 (2009)

the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the combined license; LBP-09-15, 70 NRC 198 (2009)

the requirement that the designated amount of financial assurance be covered by an acceptable method arises concurrently with the requirement that the applicant submit a decommissioning report to NRC; LBP-09-15, 70 NRC 198 (2009)

the requirements of 10 C.F.R. 50.75 are intended to ensure that entities who construct and operate a nuclear power plant will have sufficient funds at the end of the operational life of the plant to complete the decommissioning of the plant; LBP-09-15, 70 NRC 198 (2009)

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### DECOMMISSIONING FUNDING PLANS

decommissioning funding assurance is the process through which a combined license applicant assures the NRC that funds will be available to decommission a site or facility; LBP-09-15, 70 NRC 198 (2009)  
funding for financial assurance for decommissioning must be covered by prepayment, an external sinking fund, or a surety method, insurance, or other guarantee including a parent company guarantee; LBP-09-18, 70 NRC 385 (2009)

the parent company guarantee is based on a financial test and may only be used if the guarantee and test are as contained in Appendix A to 10 C.F.R. Part 30; LBP-09-18, 70 NRC 385 (2009)

### DECOMMISSIONING PLANS

because the requirement of 10 C.F.R. 50.75(b)(3) applies to the amount of financial assurance specified in the decommissioning report, it is readily apparent that the report must explain how that requirement will be fulfilled; LBP-09-15, 70 NRC 198 (2009)

plans are not required until the applicant files a post-shutdown decommissioning activities report, which is not due until 2 years before permanent cessation of operation; LBP-09-21, 70 NRC 581 (2009)

the fact that the Commission included language deferring the obligation that would otherwise apply to combined license applicants in 10 C.F.R. 50.75(b)(4), but included no equivalent provision in section 50.75(b)(3), confirms that the Commission did not intend to defer the requirement of section 50.75(b)(3) until after the license is issued; LBP-09-15, 70 NRC 198 (2009)

### DEFINITIONS

a "claim" is an assertion, statement, or implication; LBP-09-30, 70 NRC 1039 (2009)

a "contention" is simply a point or argument asserted or advanced by any party; LBP-09-30, 70 NRC 1039 (2009)

a "contention of omission" is one that claims the application fails to contain information on a relevant matter as required by law and the supporting reasons for the petitioner's belief; LBP-09-16, 70 NRC 227 (2009); LBP-09-27, 70 NRC 992 (2009)

a "deliberately ignorant defendant" is one who was aware of the high probability of a critical fact, but deliberately ignored that probability; LBP-09-24, 70 NRC 676 (2009)

a "federally recognized Indian tribe" is one that is included on the Bureau of Indian Affairs' list of federally recognized Indian tribes published in the *Federal Register*; LBP-09-13, 70 NRC 168 (2009)

a "negligent defendant" is one who should have had similar suspicions but, in fact, did not; LBP-09-24, 70 NRC 676 (2009)

a "potential party" is any person who intends or may intend to participate as a party by demonstrating standing and filing an admissible contention under 10 C.F.R. 2.309; CLI-09-15, 70 NRC 1 (2009)

a "reckless defendant" is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; LBP-09-24, 70 NRC 676 (2009)

"collateral estoppel" is a form of issue preclusion that prevents the relitigation of issues of law or fact that have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies; LBP-09-24, 70 NRC 676 (2009)

"construction" does not include site exploration, clearing, grading, or installation of environmental mitigation measures, erection of fences and other access control measures, excavation, erection of support buildings for use in connection with construction, building of service facilities, and procurement or offsite fabrication of facility components; LBP-09-19, 70 NRC 433 (2009)

"constructive knowledge" is knowledge of facts sufficient to prompt an inquiry that would have uncovered misrepresentations and is not actual knowledge; LBP-09-24, 70 NRC 676 (2009)

"cumulative impact" is the effect on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions; LBP-09-16, 70 NRC 227 (2009)

"decommission" means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license or release of the property under restricted conditions and termination of the license; LBP-09-15, 70 NRC 198 (2009)

"deliberate misconduct" refers to an intentional act or omission that the person knows would cause a licensee to be in violation of any rule; LBP-09-24, 70 NRC 676 (2009)



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“design basis events” are those conditions of normal operation, including anticipated operational occurrences, design basis accidents, external events, and natural phenomena for which the plant must be designed; LBP-09-26, 70 NRC 939 (2009)

“direct environmental impacts” are those caused by the federal action, and occurring at the same time and place as that action; LBP-09-19, 70 NRC 433 (2009)

“emergency action levels” are the criteria used to determine the notifications that need to be made to federal, state, and local authorities and to determine the appropriate protective responses to a particular set of emergency conditions; LBP-09-19, 70 NRC 433 (2009)

“Indian tribe” is an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994; LBP-09-13, 70 NRC 168 (2009)

“indirect environmental impacts” are caused by the action at a later time or more distant place, yet are still reasonably foreseeable; LBP-09-19, 70 NRC 433 (2009)

“injury-in-fact” is an invasion of a legally protected interest that is concrete and particularized and actual or imminent; LBP-09-13, 70 NRC 168 (2009)

“severe accident” is a reactor accident more severe than a design basis accident, and it results in substantial damage to the reactor core, whether or not there are serious offsite consequences; LBP-09-10, 70 NRC 51 (2009); LBP-09-19, 70 NRC 433 (2009)

### DELAY OF PROCEEDING

where the impact of delay is a concern, the desirability of avoiding any further delay in reaching a final merits determination can be a key discretionary factor counseling nonreliance on the collateral estoppel principle even if that doctrine otherwise appeared applicable; LBP-09-24, 70 NRC 676 (2009)

### DELIBERATE MISCONDUCT

a conviction based on deliberate ignorance requires a finding that a defendant’s action is intentional, premeditated, and fully considered; LBP-09-24, 70 NRC 676 (2009)

a deliberately ignorant defendant is one who was aware of the high probability of a critical fact, but deliberately ignored that probability; LBP-09-24, 70 NRC 676 (2009)

an intentional act or omission that the person knows would cause a licensee to be in violation of any rule is considered deliberate misconduct; LBP-09-24, 70 NRC 676 (2009)

careless disregard in the execution of one’s duties does not amount to deliberate misconduct or a violation; LBP-09-24, 70 NRC 676 (2009)

causing inaccurate and incomplete information to be provided to the NRC concerning conditions at a reactor resulted in debarment from licensed activities for 5 years; LBP-09-11, 70 NRC 151 (2009)

constructive knowledge is knowledge of facts sufficient to prompt an inquiry that would have uncovered misrepresentations and is not actual knowledge; LBP-09-24, 70 NRC 676 (2009)

courts have been careful to strictly limit the exercise of summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge; LBP-09-24, 70 NRC 676 (2009)

establishing a party’s actual knowledge requires showing more than that a party had a suspicion that something was awry; LBP-09-24, 70 NRC 676 (2009)

inquiry into an individual’s actual knowledge is entirely factual, requiring examination of the record; LBP-09-24, 70 NRC 676 (2009)

the “deliberate ignorance” theory is not embraced within the “deliberate misconduct” standard that governs NRC proceedings; LBP-09-24, 70 NRC 676 (2009)

the conclusion that a finding of deliberate ignorance is a proxy for a finding of knowledge is supported by the definition of knowledge in the Model Penal Code, which has guided the Supreme Court in determining the intended scope of the word “knowing” in the criminal context; LBP-09-24, 70 NRC 676 (2009)

the danger of instruction to juries on deliberate ignorance or willful blindness in an inappropriate case is that juries will convict on a basis akin to a standard of negligence; LBP-09-24, 70 NRC 676 (2009)

the element of “actual knowledge” must be present to sustain a charge of deliberate misconduct under the NRC’s regulations; LBP-09-24, 70 NRC 676 (2009)

the knowledge component of the deliberate ignorance theory is slightly less than knowledge to a 100% certainty where the prosecutor’s case is based on circumstantial evidence that precludes establishing defendant’s knowledge to a 100% certainty; LBP-09-24, 70 NRC 676 (2009)

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to prevail in establishing that the accused's actions constituted a violation, Staff must demonstrate by a preponderance of the evidence that the accused had actual knowledge of the information associated with his actions and that he deliberately acted contrary to that knowledge; LBP-09-24, 70 NRC 676 (2009) when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist; LBP-09-24, 70 NRC 676 (2009)

where the record in an enforcement proceeding may be devoid of direct evidence to establish knowledge, the Staff may have to build its case upon circumstantial evidence alone; LBP-09-24, 70 NRC 676 (2009)

with the jury in a parallel criminal case not having been asked to render a special verdict, the general verdict provides the board insufficient guidance from which to determine whether the jury conviction was premised on actual knowledge or on deliberate ignorance; LBP-09-24, 70 NRC 676 (2009)

### DEMAND FOR INFORMATION

petitioner's request that NRC issue a demand for information to licensee regarding vibration levels prior to restart is denied; DD-09-2, 70 NRC 899 (2009)

### DEMAND-SIDE MANAGEMENT

applicant is not required to evaluate energy conservation as an alternative because it is not an alternative to the proposal to build new baseload power generation; LBP-09-10, 70 NRC 51 (2009); LBP-09-21, 70 NRC 581 (2009)

### DEPLETED URANIUM

an approach that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy for disposition of depleted tails; CLI-09-15, 70 NRC 1 (2009)

tails from an enrichment facility are appropriately classified as a low-level radioactive waste; CLI-09-15, 70 NRC 1 (2009)

### DESIGN BASIS ACCIDENT

nuclear reactors are required to be designed to withstand certain postulated events or accidents, which result in negligible offsite consequences because the reactor is designed to handle such events; LBP-09-10, 70 NRC 51 (2009)

### DESIGN BASIS EVENTS

the agency uses a threshold probability for design basis events of 1 in 10 million for nuclear power plants; LBP-09-26, 70 NRC 939 (2009)

the design basis flood is the magnitude of the flood event that is used to evaluate safety structures, systems, and components important to safety during facility design; LBP-09-25, 70 NRC 867 (2009)

the threshold probability for DBEs should be set at one in a million; LBP-09-17, 70 NRC 311 (2009)

these are defined as those conditions of normal operation, including anticipated operational occurrences, design basis accidents, external events, and natural phenomena for which the plant must be designed; LBP-09-26, 70 NRC 939 (2009)

### DESIGN CERTIFICATION

a contention asserting that a combined license application is incomplete because it incorporates by reference a standard design certification and a pending application for a revision to that certified design is inadmissible; LBP-09-10, 70 NRC 51 (2009)

a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009)

adequacy of applicant's control room and equipment design for radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a combined license or standard design certification proceeding; LBP-09-10, 70 NRC 51 (2009)

all environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's environmental assessment for a certified design are considered resolved; LBP-09-19, 70 NRC 433 (2009)

applicant for a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

applicants are required to address severe accident mitigation design alternatives; LBP-09-19, 70 NRC 433 (2009)

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at the combined license stage, applicant may reference both an early site permit and a standard design certification in its application; LBP-09-16, 70 NRC 227 (2009); LBP-09-19, 70 NRC 433 (2009)

challenges to the Commission regulations regarding the design certification process are inadmissible; LBP-09-18, 70 NRC 385 (2009)

if a contention concerning a certification application that has been docketed but not granted is otherwise admissible under 10 C.F.R. 2.309(f)(1), it might be held in abeyance and referred to the Staff; LBP-09-17, 70 NRC 311 (2009)

if the combined license application references an early site permit, applicant must demonstrate that the chosen design falls within the parameters specified in the ESP or, on the safety side, request a variance; LBP-09-19, 70 NRC 433 (2009)

severe accident mitigation design alternative issues are resolved for an application referencing a design control document if the specific site parameters are covered by the site parameters assumed in the DCD SAMDA analysis; LBP-09-19, 70 NRC 433 (2009)

the environmental report associated with each application for a standard design certification must address the costs and benefits of severe accident design mitigation alternatives; LBP-09-10, 70 NRC 51 (2009)

the safety analysis report component of an application for a standard design certification must analyze and address the problem of extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products; LBP-09-10, 70 NRC 51 (2009)

until the reactor design is certified and the rulemaking proceeding concluded, the design continues to change, creating potentially new safety and environmental concerns; LBP-09-18, 70 NRC 385 (2009)

### DESIGN

adequacy of applicant's control room and equipment design for radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a combined license or standard design certification proceeding; LBP-09-10, 70 NRC 51 (2009)

See also Containment Design

### DISCLOSURE

a board may impose sanctions including dismissal of the specific contentions, dismissal of the adjudication, or dismissal of the application for any continuing unexcused failure to make the required mandatory disclosures; LBP-09-30, 70 NRC 1039 (2009)

all parties, except NRC Staff, shall make the mandatory disclosures required within 45 days of the issuance of the licensing board order admitting contentions; CLI-09-15, 70 NRC 1 (2009)

content of a statement that explains an individual's "need to know" safeguards information is described; CLI-09-15, 70 NRC 1 (2009)

if an expert witness is subsequently selected, or any analysis or other authority is subsequently amended or newly developed, then this information must be promptly disclosed; LBP-09-30, 70 NRC 1039 (2009)

mandatory disclosures by parties include the disclosure of the name of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion; LBP-09-22, 70 NRC 640 (2009)

parties and NRC Staff must provide a list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents; LBP-09-22, 70 NRC 640 (2009)

parties and the NRC Staff have a continuing duty to update their mandatory disclosures; LBP-09-22, 70 NRC 640 (2009)

scheduling orders are to include provisions for disclosure of electronically stored information; LBP-09-22, 70 NRC 640 (2009)

within 30 days of the board's ruling admitting contentions, the parties must automatically make certain mandatory disclosures; LBP-09-22, 70 NRC 640 (2009)

### DISCOVERY

a board may impose sanctions including dismissal of the specific contentions, dismissal of the adjudication, or dismissal of the application for any continuing unexcused failure to make the required mandatory disclosures; LBP-09-30, 70 NRC 1039 (2009)

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- all parties, except NRC Staff, shall make the mandatory disclosures required within 45 days of the issuance of the licensing board order admitting contentions; CLI-09-15, 70 NRC 1 (2009)
- allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final safety evaluation report is issued will serve to further the Commission's objective to ensure a fair, prompt, and efficient resolution of contested issues; CLI-09-15, 70 NRC 1 (2009)
- applicant may challenge an expert opinion in the disclosure stage, via a motion for summary disposition, if it can show that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law; LBP-09-30, 70 NRC 1039 (2009)
- disclosure of a nonwitness (e.g., an expert that the party consulted, but does not intend to use as a witness) is not required; LBP-09-30, 70 NRC 1039 (2009)
- disclosure of the name and telephone number of an expert witness, if this information is not known to the party, is not required; LBP-09-30, 70 NRC 1039 (2009)
- documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing; LBP-09-30, 70 NRC 1039 (2009)
- if an expert witness has a copy of the analysis or other authority upon which his or her opinion is based, and it is extant and reasonably available to that witness and/or the party, then the mandatory disclosure should include that analysis or other authority; LBP-09-30, 70 NRC 1039 (2009)
- if any party attempts to include exhibits that were not disclosed in the mandatory disclosures, thus making it impossible for the other parties to examine the reliability of that information, then the board may prohibit the admission of this new evidence into the record; LBP-09-30, 70 NRC 1039 (2009)
- if the duty to make disclosures applied only to parties who have claims and contentions, it would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings; LBP-09-30, 70 NRC 1039 (2009)
- if, after the initial disclosure, a party subsequently develops or obtains additional information or documents that meet the requirements of this section, then that party must promptly file a supplemental mandatory disclosure; LBP-09-30, 70 NRC 1039 (2009)
- initial disclosures must be made within 30 days of the order granting a request for hearing, which is typically at least 18-24 months before the evidentiary hearing begins; LBP-09-30, 70 NRC 1039 (2009)
- intervenor's expert is not required to create a written analysis, but only disclose the written analysis or other documentary authority, if any, that exists and is reasonably available at the time of the disclosure; LBP-09-30, 70 NRC 1039 (2009)
- it is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-09-30, 70 NRC 1039 (2009)
- mandatory disclosures required by 10 C.F.R. 2.336 consist of an exchange of prescribed information and documents between the litigants, and do not need to be submitted to the board; LBP-09-30, 70 NRC 1039 (2009)
- mandatory disclosures, like all discovery exchanges, cover a vast array of information and documents that are not evidence and need not meet the requirements of admissible evidence; LBP-09-30, 70 NRC 1039 (2009)
- motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected shall be filed within 10 days after the occurrence or circumstance from which the motion arises; LBP-09-22, 70 NRC 640 (2009)
- parties need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost; LBP-09-22, 70 NRC 640 (2009)
- the mandatory disclosure requirements are not an opportunity to relitigate the admissibility of a contention; LBP-09-30, 70 NRC 1039 (2009)
- DISCOVERY AGAINST NRC STAFF**
- NRC Staff shall comply with discovery requests no later than 30 days after the licensing board order admitting contentions and shall update the information at the same time as the issuance of the safety evaluation report or final environmental impact statement, and, subsequent to the publication of the SER and FEIS, as otherwise required by the Commission's regulations; CLI-09-15, 70 NRC 1 (2009)

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### DISPUTE RESOLUTION

if the attorney or representative of a party is contacted pursuant to the consultation requirement, then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion; LBP-09-22, 70 NRC 640 (2009)

it is inconsistent with the dispute avoidance/resolution purposes of NRC regulations, and thus insufficient, for the contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that it takes no position on the motion (or issues) and that it reserves the right to file a response to the motion when it is filed; LBP-09-22, 70 NRC 640 (2009)

motions will be rejected if they do not include certification by the attorney or representative of the moving party that they have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in the motion, and to resolve those issues; LBP-09-22, 70 NRC 640 (2009)

to be sincere, movant should contact other parties sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question; LBP-09-22, 70 NRC 640 (2009)

### DOCUMENT PRODUCTION

each witness is not required to generate an analysis, but rather must disclose the analysis or other authority upon which the witness bases his or her opinion; LBP-09-30, 70 NRC 1039 (2009)

for Subpart G proceedings, each expert witness is required to create, sign, and submit a written expert report; LBP-09-30, 70 NRC 1039 (2009)

if an expert witness has a copy of the analysis or other authority upon which his or her opinion is based, and it is extant and reasonably available to that witness and/or the party, then the mandatory disclosure should include that analysis or other authority; LBP-09-30, 70 NRC 1039 (2009)

if, after the initial disclosure, a party subsequently develops or obtains additional information or documents that meet the requirements of this section, then that party must promptly file a supplemental mandatory disclosure; LBP-09-30, 70 NRC 1039 (2009)

intervenors' expert is not required to create a written analysis, but only disclose the written analysis or other documentary authority, if any, that exists and is reasonably available at the time of the disclosure; LBP-09-30, 70 NRC 1039 (2009)

it is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-09-30, 70 NRC 1039 (2009)

mandatory disclosures required by 10 C.F.R. 2.336 consist of an exchange of prescribed information and documents between the litigants, and do not need to be submitted to the board; LBP-09-30, 70 NRC 1039 (2009)

mandatory disclosures, like all discovery exchanges, cover a vast array of information and documents that are not evidence and need not meet the requirements of admissible evidence; LBP-09-30, 70 NRC 1039 (2009)

the mandatory disclosure requirements are not an opportunity to relitigate the admissibility of a contention; LBP-09-30, 70 NRC 1039 (2009)

### DOSE, RADIOLOGICAL

if chelating agents are to be comingled in radioactive waste liquids or used to mitigate an accidental release, then they have to be specifically accounted for in the dose analyses; LBP-09-19, 70 NRC 433 (2009)

licensee must use procedures and controls to reduce occupational doses and doses to members of the public to levels that are as low as reasonably achievable; CLI-09-16, 70 NRC 33 (2009)

### DOSE LIMITS

a combined license application must explain the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-09-27, 70 NRC 992 (2009)

individuals located at the boundary of the exclusion area cannot be exposed to more than 25 rem total effective dose equivalent in any 2-hour period, and any individual located at the outer boundary of the low population zone cannot be exposed to more than 25 rem TEDE during the entire period of any radioactive release; LBP-09-19, 70 NRC 433 (2009)

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- licensees subject to the provisions of EPA's generally applicable environmental radiation standards in 40 C.F.R. Part 190 shall comply with those standards; LBP-09-19, 70 NRC 433 (2009)
- limits for individual members of the public are specified in 10 C.F.R. 20.1301-20.1302; CLI-09-16, 70 NRC 33 (2009)
- numerical limits for radiation exposure, including occupational dose limits and radiation dose limits for members of the public, are provided; LBP-09-19, 70 NRC 433 (2009)
- petitioners' assertion that no exposure levels are safe is an impermissible challenge to the exposure limits set forth in the NRC's regulations; LBP-09-16, 70 NRC 227 (2009)
- the Commission has acknowledged applicability of EPA radiation exposure standards under 40 C.F.R. Part 190; LBP-09-19, 70 NRC 433 (2009)
- upper limitations on occupational doses are specified in 10 C.F.R. 20.1201-20.1208; CLI-09-16, 70 NRC 33 (2009)
- DRAFT ENVIRONMENTAL IMPACT STATEMENT**
- although the DEIS may rely in part on applicant's environmental report, Staff must independently evaluate and be responsible for the reliability of all information used in the DEIS; LBP-09-19, 70 NRC 433 (2009)
- content of Staff's DEIS is discussed; LBP-09-19, 70 NRC 433 (2009)
- DREDGING**
- the fact that disposal of dredged or fill material in wetlands is regulated by the Environmental Protection Agency and the U.S. Army Corps of Engineers does not render a contention inadmissible; LBP-09-10, 70 NRC 51 (2009)
- DRY CASK STORAGE**
- to the extent that petitioners argue that the provisions of 10 C.F.R. 50.54(hh) should be applied to dry cask storage, they may file a rulemaking petition with the Commission; LBP-09-17, 70 NRC 311 (2009)
- EARLY SITE PERMIT APPLICATION**
- a description and safety assessment of the site must include an analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under radiological consequence evaluation factors; LBP-09-19, 70 NRC 433 (2009)
- all reasonable alternatives to the site proposed for the early site permit are to be identified; LBP-09-19, 70 NRC 433 (2009)
- applicant may request that a limited work authorization be issued in conjunction with the ESP; LBP-09-19, 70 NRC 433 (2009)
- applicant must describe equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences; LBP-09-19, 70 NRC 433 (2009)
- applicant must file an environmental report, addressing the five factors of 10 C.F.R. 51.45(b)(1)-(5); LBP-09-19, 70 NRC 433 (2009)
- applicant must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)
- applicant's environmental report must include an analysis of alternatives available for reducing or avoiding adverse environmental effects; LBP-09-19, 70 NRC 433 (2009)
- as partial construction permit applications, ESP applications are subject to the Atomic Energy Act hearing requirement, as well as all procedural requirements in 10 C.F.R. Part 2; LBP-09-19, 70 NRC 433 (2009)
- for applications filed after January 2, 1971, applicant must identify design objectives and means to maintain levels of radioactive effluents as low as is reasonably achievable; LBP-09-19, 70 NRC 433 (2009)
- if applicant determines that there are physical characteristics that could pose a significant impediment to the development of emergency plans, the application must identify mitigation measures; LBP-09-19, 70 NRC 433 (2009)
- in its review, Staff must consider physical characteristics of the site, specifically noting that factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)

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- NRC provides detailed guidance for Staff personnel reviewing the safety aspects of applications; LBP-09-19, 70 NRC 433 (2009)
- NRC Staff is required to prepare an environmental impact statement in connection with issuance of an ESP; LBP-09-19, 70 NRC 433 (2009)
- NRC Staff's environmental impact statement prepared during review of an early site permit application must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 433 (2009)
- severe accident mitigation design alternative issues are resolved for an application referencing a design control document if the specific site parameters are covered by the site parameters assumed in the DCD SAMDA analysis; LBP-09-19, 70 NRC 433 (2009)
- Staff is to review ESP applications according to the applicable standards set out in 10 C.F.R. Part 50 and its appendices and 10 C.F.R. Part 100; LBP-09-19, 70 NRC 433 (2009)
- the Commission may defer resolution of severe accident mitigation alternatives until the construction permit or combined license stage; LBP-09-19, 70 NRC 433 (2009)
- the environmental report for an ESP application may evaluate the environmental impacts of a reactor or reactors falling within the site characteristics and design parameters for the ESP application; LBP-09-19, 70 NRC 433 (2009)
- the site safety analysis report filed with an early site permit application must include information that identifies physical characteristics of the proposed site, such as egress limitations from the area surrounding the site, that could pose a significant impediment to the development of emergency plans; LBP-09-19, 70 NRC 433 (2009)
- the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)
- with regard to alternative sites for an early site permit, NRC Staff must evaluate both the process (i.e., methodology) used by the applicant and the reasonableness of the product (e.g., potential sites) identified by that process; LBP-09-19, 70 NRC 433 (2009)
- EARLY SITE PERMIT PROCEEDINGS**
- all environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's environmental assessment for a certified design are considered resolved; LBP-09-19, 70 NRC 433 (2009)
- board authority to make findings on limited work authorizations is discussed; LBP-09-19, 70 NRC 433 (2009)
- environmental findings that a board must make to authorize issuance of an ESP are described; LBP-09-19, 70 NRC 433 (2009)
- for purposes of the mandatory/uncontested portion of an ESP proceeding, the board takes official notice of publicly available documents associated with the Staff's safety and environmental reviews; LBP-09-19, 70 NRC 433 (2009)
- in a mandatory hearing, a licensing board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-09-19, 70 NRC 433 (2009)
- items for which sufficient information is lacking at the ESP stage of the licensing process may be subject to deferral for consideration at the combined license stage of the process; LBP-09-19, 70 NRC 433 (2009)
- on baseline NEPA issues in early site permit cases, boards must reach their own independent determination, but should do so without second-guessing underlying technical or factual findings by the NRC Staff; LBP-09-19, 70 NRC 433 (2009)
- prior to issuance of an ESP, the findings required by 10 C.F.R. Part 51, Subpart A must be made; LBP-09-19, 70 NRC 433 (2009)
- safety findings that a board must make for issuance of an ESP are clarified; LBP-09-19, 70 NRC 433 (2009)
- when an ESP is issued with an associated limited work authorization, the board must find relative to the LWA that any significant adverse environmental impact resulting from activities requested under 10 C.F.R. 52.17(c) can be redressed; LBP-09-19, 70 NRC 433 (2009)

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when reviewing an ESP application in an uncontested proceeding, licensing boards are to conduct a simple sufficiency review rather than a *de novo* review on both Atomic Energy Act and National Environmental Policy Act issues; LBP-09-19, 70 NRC 433 (2009)

with respect to certain NEPA findings, boards in ESP proceedings are to make independent environmental judgments, though they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-09-19, 70 NRC 433 (2009)

### EARLY SITE PERMITS

a combined license application reference to an ESP must include a safety analysis report that either includes or incorporates by reference the ESP site safety analysis report and that contains additional information and analyses sufficient to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the ESP; LBP-09-19, 70 NRC 433 (2009)

a site redress plan remains in effect for an EST applicant even if the ESP with which the LWA is issued is not referenced in a construction permit or COL application during the period that the ESP remains valid; LBP-09-19, 70 NRC 433 (2009)

although a presiding officer should issue a separate partial initial decision regarding a limited work authorization request, the board finds no practical or logical basis for separating its consideration of the adequacy of the LWA request from its determination regarding the early site permit with which it is associated; LBP-09-19, 70 NRC 433 (2009)

an applicant who may apply for a construction permit under Part 50, or a combined license under Part 52, may apply for an ESP; LBP-09-19, 70 NRC 433 (2009)

an ESP is an approval for a nuclear plant site; LBP-09-19, 70 NRC 433 (2009)

an ESP specifies design parameters for the site; LBP-09-19, 70 NRC 433 (2009)

an initial decision directing the issuance or amendment of a limited work authorization or an early site permit is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective; LBP-09-19, 70 NRC 433 (2009)

any permit conditions imposed that are not met before a combined license referencing the ESP is issued will attach to the combined license; LBP-09-19, 70 NRC 433 (2009)

applicant has the option of either proposing a complete and integrated emergency plan or proposing major features of the emergency plan for review and approval by NRC, in consultation with the Department of Homeland Security; LBP-09-19, 70 NRC 433 (2009)

applicant is authorized to perform certain site preparation activities that would otherwise only be permitted following the issuance of a Part 50 construction permit or a Part 52 combined license; LBP-09-19, 70 NRC 433 (2009)

applicant may request that a limited work authorization be issued in conjunction with the ESP; LBP-09-19, 70 NRC 433 (2009)

applicant must perform an evaluation and analysis of the postulated fission product release to evaluate the offsite radiological consequences; LBP-09-19, 70 NRC 433 (2009)

applicant's environmental report must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 433 (2009)

applicant's initial consideration of DOE's Portsmouth, Ohio, and SRS sites as alternative sites was reasonable as part of its alternative site analysis; LBP-09-19, 70 NRC 433 (2009)

at the combined license stage, applicant may reference both an ESP and a standard design certification in its application; LBP-09-19, 70 NRC 433 (2009)

brownfield sites owned by companies other than applicant may reasonably be excluded as alternative sites; LBP-09-19, 70 NRC 433 (2009)

if applicant chooses to submit a complete and integrated emergency plan, applicant also is required to make a good-faith effort to obtain a certification from federal, state, and local governmental agencies with emergency planning responsibilities; LBP-09-19, 70 NRC 433 (2009)

if applicant submits a complete and integrated emergency plan in conjunction with an ESP application, NRC Staff must find that the emergency plans provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-09-19, 70 NRC 433 (2009)

if granted, an ESP evidences Commission approval of a site for one or more nuclear power facilities; LBP-09-19, 70 NRC 433 (2009)



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- if limited work authorization activities are approved by NRC in conjunction with an ESP, the ESP as issued shall specify those authorized activities; LBP-09-19, 70 NRC 433 (2009)
- if the combined license application references an ESP, applicant must demonstrate that the chosen design falls within the parameters specified in the ESP or, on the safety side, request a variance; LBP-09-19, 70 NRC 433 (2009)
- if the Commission decides to authorize issuance of an ESP, the issued ESP must specify the site characteristics, design parameters, and terms and conditions of the ESP that the Commission deems appropriate; LBP-09-19, 70 NRC 433 (2009)
- if the proposed siting of a plant slated for an ESP involves unresolved conflicts concerning alternative uses of available resources, then this discussion must be sufficiently complete to allow the Staff to develop and explore appropriate alternatives to the ESP pursuant to NEPA § 102(2)(E); LBP-09-19, 70 NRC 433 (2009)
- noninclusion of DOE sites in alternative site analysis that are far outside applicant's region of interest is reasonable; LBP-09-19, 70 NRC 433 (2009)
- preconstruction activities that do not require NRC approval are discussed; LBP-09-19, 70 NRC 433 (2009)
- the inspections, tests, analyses, and acceptance criteria associated with emergency planning reflect those aspects of the emergency plan that cannot be described or completed until the plant is further along in the licensing and construction process; LBP-09-19, 70 NRC 433 (2009)
- to grant an ESP, the Commission must find that the proposed inspections, tests, analyses, and acceptance criteria, including any on emergency planning, are necessary and sufficient, within the scope of the ESP, to provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the Act, and the Commission's regulations; LBP-09-19, 70 NRC 433 (2009)
- ECONOMIC EFFECTS**
  - assertions that building two new nuclear reactors in a troubled economy is fiscally irresponsible is outside the scope of a combined license proceeding; LBP-09-10, 70 NRC 51 (2009)
- ECONOMIC INJURY**
  - ratepayer impacts are outside the scope of a combined license proceeding because the state, not the NRC, is charged with protecting ratepayers' interests; LBP-09-10, 70 NRC 51 (2009)
- ECONOMIC ISSUES**
  - an agency cannot redefine the applicant's goals, and the EIS alternatives analysis should be based around the applicant's goals, including its economic goals; LBP-09-17, 70 NRC 311 (2009)
  - revenue decoupling is a state regulatory matter that is outside of the scope of, and not material to, the NRC licensing process; LBP-09-10, 70 NRC 51 (2009)
  - See also Costs; Financial Assurance; Financial Qualifications; Financial Resources
- EFFECTIVENESS**
  - initial decisions are not effective until they are reviewed by the Commission; LBP-09-19, 70 NRC 433 (2009)
  - See also Immediate Effectiveness
- ELECTRONIC FILING**
  - all participants in NRC proceedings must submit and serve all adjudicatory documents over the Internet or, in some cases, mail copies on electronic storage media; CLI-09-15, 70 NRC 1 (2009)
  - participants may not submit paper copies of their filings unless they seek a waiver; CLI-09-15, 70 NRC 1 (2009)
  - procedures for electronic filing and for obtaining waivers from e-filing requirements are described; CLI-09-15, 70 NRC 1 (2009)
- EMERGENCY ACTION LEVELS**
  - EALs are the criteria used to determine the notifications that need to be made to federal, state, and local authorities and to determine the appropriate protective responses to a particular set of emergency conditions; LBP-09-19, 70 NRC 433 (2009)
- EMERGENCY NOTIFICATION SYSTEM**
  - procedures must be established to provide for early notification and clear instructions to the populace within the plume exposure pathway emergency planning zone; LBP-09-16, 70 NRC 227 (2009)

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### EMERGENCY OPERATIONS FACILITY

construction activities associated with onsite emergency facilities necessary to comply with section 50.47 and 10 C.F.R. Part 50, Appendix E require a limited work authorization; LBP-09-19, 70 NRC 433 (2009)

### EMERGENCY PLANNING

a combined license application must include emergency planning information for the emergency planning zone, generally consisting of an area with a 10-mile radius from the proposed reactor; LBP-09-10, 70 NRC 51 (2009)

a combined license application must include the proposed inspections, tests, and analyses, including those applicable to emergency planning, to be performed and the acceptance criteria that are necessary and sufficient to support the Commission's finding that a COL can be granted; LBP-09-19, 70 NRC 433 (2009)

existence of another independent nuclear power plant within the 10-mile-radius emergency planning zone of a proposed new nuclear power plant is a significant factor for purposes of emergency planning for the new reactor; LBP-09-10, 70 NRC 51 (2009)

if an early site permit applicant determines that there are physical characteristics that could pose a significant impediment to the development of emergency plans, the application must identify measures that would mitigate or eliminate the significant impediment; LBP-09-19, 70 NRC 433 (2009)

procedures must be established to provide for early notification and clear instructions to the populace within the plume exposure pathway emergency planning zone; LBP-09-16, 70 NRC 227 (2009)

the site safety analysis report filed with an early site permit application must include information that identifies physical characteristics of the proposed site, such as egress limitations from the area surrounding the site, that could pose a significant impediment to the development of emergency plans; LBP-09-19, 70 NRC 433 (2009)

### EMERGENCY PLANNING ZONES

existence of another independent nuclear power plant within the 10-mile-radius emergency planning zone of a proposed new nuclear power plant is a significant factor for purposes of emergency planning for the new reactor; LBP-09-10, 70 NRC 51 (2009)

potassium iodide distribution beyond the 10-mile EPZ is not necessary; LBP-09-16, 70 NRC 227 (2009)  
procedures must be established to provide for early notification and clear instructions to the populace within the plume exposure pathway EPZ; LBP-09-16, 70 NRC 227 (2009)

the EPZ is established based on safety considerations and is not intended for use as a boundary for assessing environmental impacts; LBP-09-16, 70 NRC 227 (2009)

the plume exposure pathway EPZ shall generally consist of an area covering a radius of about 10 miles; LBP-09-16, 70 NRC 227 (2009)

### EMERGENCY PLANS

an early site permit applicant has the option of either proposing a complete and integrated emergency plan or proposing major features of the emergency plan for review and approval by NRC, in consultation with the Department of Homeland Security; LBP-09-19, 70 NRC 433 (2009)

content of a complete and integrated emergency plan is discussed; LBP-09-19, 70 NRC 433 (2009)

FEMA's finding on emergency plans constitutes a rebuttable presumption on questions of adequacy and implementation capability in NRC licensing proceedings; LBP-09-19, 70 NRC 433 (2009)

if applicant chooses to submit a complete and integrated emergency plan at the early site permit stage, applicant also is required to make a good-faith effort to obtain a certification from federal, state, and local governmental agencies with emergency planning responsibilities; LBP-09-19, 70 NRC 433 (2009)

if applicant submits a complete and integrated emergency plan in conjunction with an early site permit application, NRC Staff must find that the emergency plans provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-09-19, 70 NRC 433 (2009)

if applicant submits a complete and integrated emergency plan under section 52.17(b)(2)(ii), it must include in the ESP application the proposed inspections, tests, and analyses that will be performed, and the acceptance criteria that are necessary and sufficient for the Commission's required findings for issuance of the ESP; LBP-09-19, 70 NRC 433 (2009)

in its review of emergency plans, NRC Staff must take into account FEMA's findings; LBP-09-19, 70 NRC 433 (2009)

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NRC Staff's review of an integrated emergency plan focuses primarily on the applicant-prepared onsite provisions of the plans, which include the evacuation time estimate provided by applicant, and the inspections, tests, analyses, and acceptance criteria; LBP-09-19, 70 NRC 433 (2009)  
the inspections, tests, analyses, and acceptance criteria associated with emergency planning reflect those aspects of the emergency plan that cannot be described or completed until the plant is further along in the licensing and construction process; LBP-09-19, 70 NRC 433 (2009)

### EMERGENCY RESPONSE

emergency action levels are the criteria used to determine the notifications that need to be made to federal, state, and local authorities and to determine the appropriate protective responses to a particular set of emergency conditions; LBP-09-19, 70 NRC 433 (2009)

### EMPLOYMENT

the right to follow any of the common occupations of life is an inalienable right that was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence and it is a large ingredient in the civil liberty of the citizen; LBP-09-24, 70 NRC 676 (2009)  
where the government has deprived an individual of a property interest without a hearing, the government must be prepared to show an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted; LBP-09-24, 70 NRC 676 (2009)

### ENDANGERED SPECIES

contention alleging that the threatened eastern fox snake inhabits the nuclear plant site and that construction activities for the new reactor will kill snakes, destroy their habitat, and might eliminate them from the area is within the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)  
licensing boards lack the authority to require applicant to adopt additional mitigation measures for the protection of endangered or threatened species; LBP-09-16, 70 NRC 227 (2009)  
portions of a contention that allege that the environmental report failed to adequately address the zone of environmental impact, impact on listed species, and appropriate mitigation are admissible; LBP-09-10, 70 NRC 51 (2009)

### ENERGY EFFICIENCY

applicant is not obliged to examine general efficiency or conservation proposals that would do nothing to satisfy the particular project's goals of producing baseload power; LBP-09-17, 70 NRC 311 (2009)

### ENFORCEMENT ACTIONS

engaging in deliberate misconduct that caused inaccurate and incomplete information to be provided to the NRC concerning conditions at a reactor resulted in debarment from licensed activities for 5 years; LBP-09-11, 70 NRC 151 (2009)  
exercise of the power of compulsory process must be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas; LBP-09-24, 70 NRC 676 (2009)  
when the NRC Staff can, consistent with its duty to protect public health and safety, accord some form of predeprivation hearing, such a course of action is advisable in light of the important private interest in retaining employment and the fact that such a proceeding provides some opportunity for the employee to present his side of the case; LBP-09-24, 70 NRC 676 (2009)

### ENFORCEMENT ORDERS

a challenge to immediate effectiveness must state with particularity the reasons why the enforcement order is unsound; LBP-09-24, 70 NRC 676 (2009)  
a hearing challenging an immediately effective enforcement order will be conducted expeditiously, giving due consideration to the rights of the parties; LBP-09-24, 70 NRC 676 (2009)  
conviction of a crime that is identical to a charge in an enforcement order provides substantial assurance that the enforcement order was not baseless or unwarranted; LBP-09-24, 70 NRC 676 (2009)  
the subject of an enforcement order has the right to challenge, on limited grounds, the immediate effectiveness of the order; LBP-09-24, 70 NRC 676 (2009)  
upon submitting for approval to work under a reciprocity agreement licensee will send a copy of the board order confirming the settlement agreement to the regulator processing the reciprocity application at least 2 weeks prior to engaging in activity authorized by the reciprocity agreement; LBP-09-12, 70 NRC 159 (2009)

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### ENFORCEMENT PROCEEDINGS

a hearing challenging an immediately effective enforcement order will be conducted expeditiously, giving due consideration to the rights of the parties; LBP-09-24, 70 NRC 676 (2009)

boards should not be in the position of upholding Staff enforcement orders on legal theories that the Staff did not and does not embrace and in any event do not fit the circumstances of the case before them; LBP-09-24, 70 NRC 676 (2009)

in addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well; LBP-09-24, 70 NRC 676 (2009)

inquiry into an individual's actual knowledge is entirely factual, requiring examination of the record; LBP-09-24, 70 NRC 676 (2009)

licensing boards must be satisfied that the terms of a proposed agreement reflect a fair and reasonable resolution of the matter at hand and is in keeping with the objectives of NRC's enforcement policy and satisfies the requirements of 10 C.F.R. 2.338(g) and (h); LBP-09-11, 70 NRC 151 (2009)

licensing boards review NRC Staff's enforcement orders *de novo* to determine on the basis of the hearing record whether the charges are sustained and the sanction imposed is warranted; LBP-09-24, 70 NRC 676 (2009)

NRC Staff brings the charges that frame the board's review of enforcement orders; LBP-09-24, 70 NRC 676 (2009)

NRC Staff's role in an enforcement proceeding is akin to that of a prosecutor, and it has the burden to prove its allegations by a preponderance of the reliable, probative, and substantial evidence; LBP-09-24, 70 NRC 676 (2009)

providing predeprivation notice and informal hearing permits the employee to give his version of the events and provides a meaningful hedge against erroneous action; LBP-09-24, 70 NRC 676 (2009)

the scope of early review of an enforcement order is severely limited and the order's immediate effectiveness depriving the accused of the freedom to work pending trial is presumptively valid, placing the burden on the accused to demonstrate its invalidity; LBP-09-24, 70 NRC 676 (2009)

to prevail in establishing that the accused's actions constituted a violation, Staff must demonstrate by a preponderance of the evidence that the accused had actual knowledge of the information associated with his actions and that he deliberately acted contrary to that knowledge; LBP-09-24, 70 NRC 676 (2009)

to successfully challenge an enforcement order, the target must show that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error; LBP-09-24, 70 NRC 676 (2009)

where the record in an enforcement proceeding may be devoid of direct evidence to establish knowledge, the Staff may have to build its case upon circumstantial evidence alone; LBP-09-24, 70 NRC 676 (2009)

### ENVIRONMENTAL ASSESSMENT

all environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's EA for a certified design are considered resolved; LBP-09-19, 70 NRC 433 (2009)

### ENVIRONMENTAL EFFECTS

all significant environmental impacts and all reasonable alternatives should be considered for a combined license, but these are governed by the rule of reason; LBP-09-10, 70 NRC 51 (2009)

although applicant's description of existing water quality conditions did not separately evaluate the contributions of specific sources, it nonetheless formed an environmental baseline against which to measure the cumulative impact of the proposed new reactor; LBP-09-16, 70 NRC 227 (2009)

"cumulative impact" is defined as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions; LBP-09-16, 70 NRC 227 (2009)

cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; LBP-09-19, 70 NRC 433 (2009)

direct environmental impacts are those caused by the federal action, and occurring at the same time and place as that action; LBP-09-19, 70 NRC 433 (2009)

experience with and information about past direct and indirect effects of individual past actions may be useful in illuminating or predicting the direct and indirect effects of a proposed action; LBP-09-16, 70 NRC 227 (2009)

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if a NEPA contention alleges that impacts or alternatives that are patently outside the realm of reason must be considered, then the contention should be denied for failure to demonstrate that the issue raised is within the legitimate scope of NEPA; LBP-09-10, 70 NRC 51 (2009)

in the context of NEPA, NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the permits and licenses issued by other governmental agencies; LBP-09-21, 70 NRC 581 (2009)

indirect environmental impacts are caused by the action at a later time or more distant place, yet are still reasonably foreseeable; LBP-09-19, 70 NRC 433 (2009)

portions of a contention that allege that the environmental report failed to adequately address the zone of environmental impact, impact on listed species, and appropriate mitigation are admissible; LBP-09-10, 70 NRC 51 (2009)

severe accident mitigation alternatives analysis must be site specific and given careful consideration in order to comply with the National Environmental Policy Act; LBP-09-10, 70 NRC 51 (2009)

the decision as to whether an alleged environmental impact or alternative is significant or reasonable is the merits of a NEPA contention and should not be adjudicated at the contention admissibility stage under the guise of materiality or scope; LBP-09-10, 70 NRC 51 (2009)

the emergency planning zone is established based on safety considerations and is not intended for use as a boundary for assessing environmental impacts; LBP-09-16, 70 NRC 227 (2009)

the environmental baseline reflects the effects of all currently existing pollution sources in the relevant watershed, including contributions of all nuclear power plants, and petitioners failed to provide information indicating that this aggregate analysis was insufficient under NEPA; LBP-09-16, 70 NRC 227 (2009)

the environmental consequences of proposals being considered by an agency within a region must be considered together to determine the synergistic and cumulative environmental effects; LBP-09-16, 70 NRC 227 (2009)

the environmental report shall discuss the impacts of the proposed action on the environment in proportion to their significance; LBP-09-25, 70 NRC 867 (2009)

when an early site permit is issued with an associated limited work authorization, the board must find relative to the LWA that any significant adverse environmental impact resulting from activities requested under section 52.17(c) can be redressed; LBP-09-19, 70 NRC 433 (2009)

### ENVIRONMENTAL IMPACT STATEMENT

a detailed statement concerning the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented must be provided; LBP-09-16, 70 NRC 227 (2009)

agencies are required to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources and include a detailed statement of the alternatives to the proposed action; LBP-09-10, 70 NRC 51 (2009)

agencies are to exercise a degree of skepticism in dealing with the self-serving statements from the prime beneficiary of a project and to look at the general goal of the project, rather than only those alternatives by which a particular applicant can reach its own specific goals; LBP-09-10, 70 NRC 51 (2009)

all reasonable alternatives must be identified and discussed; LBP-09-17, 70 NRC 311 (2009); LBP-09-19, 70 NRC 433 (2009)

an agency cannot redefine the applicant's goals, and the alternatives analysis should be based around the applicant's goals, including its economic goals; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

an agency must consider direct, indirect, and cumulative impacts of an action; LBP-09-19, 70 NRC 433 (2009)

an assessment of all environmental impacts and alternatives must be included, even though NRC has no jurisdiction to regulate such impacts or jurisdiction to impose such alternatives; LBP-09-10, 70 NRC 51 (2009)

an EIS for a materials license must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 1 (2009)

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an EIS for an early site permit application must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 433 (2009)

an otherwise reasonable alternative will not be excluded from discussion solely on the ground that it is not within the jurisdiction of the NRC; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

applicant may not define the objectives of its action in terms so unreasonably narrow that only one alternative would accomplish the applicant's goals because this would make the agency's alternatives analysis a foreordained formality; LBP-09-10, 70 NRC 51 (2009)

applicant's environmental report is not the same as the NRC's EIS; LBP-09-10, 70 NRC 51 (2009)

because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, all initial contentions necessarily focus on the adequacy of the applicant's ER, but the public will have a new opportunity to file environmental contentions when the NRC Staff issues the EIS; LBP-09-10, 70 NRC 51 (2009); LBP-09-25, 70 NRC 867 (2009)

Council on Environmental Quality regulations define direct, indirect, and cumulative impacts and require that they be considered in the EIS; LBP-09-10, 70 NRC 51 (2009)

for purposes of the mandatory/uncontested portion of an ESP proceeding, the board takes official notice of publicly available documents associated with the Staff's safety and environmental reviews; LBP-09-19, 70 NRC 433 (2009)

NEPA § 102(2)(C)(ii) implicitly requires that the EIS disclose mitigation measures; LBP-09-16, 70 NRC 227 (2009)

no discussion of environmental impacts of spent fuel storage for the specified period is required in an environmental report or an environmental impact statement prepared in connection with the requested action; LBP-09-18, 70 NRC 385 (2009)

NRC is required to evaluate and balance both the claimed benefits and the environmental costs of a proposed new reactor; LBP-09-16, 70 NRC 227 (2009)

NRC must analyze the need for additional power when it relies upon a benefit in performing the balancing of benefits and costs; LBP-09-16, 70 NRC 227 (2009)

NRC Staff is required to prepare an EIS in connection with issuance of an early site permit; LBP-09-19, 70 NRC 433 (2009)

presentation of alternatives in an applicant's environmental report and in an NRC EIS must be in comparative form; LBP-09-19, 70 NRC 433 (2009)

Staff must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater; LBP-09-25, 70 NRC 867 (2009)

the analysis of reasonably foreseeable significant adverse impacts regarding those events with potential catastrophic consequences must be supported by credible scientific evidence, must not be based on pure conjecture, and must be within the rule of reason; LBP-09-26, 70 NRC 939 (2009)

the environmental report impact analysis must include sufficient data and the alternatives analysis must be sufficiently complete to aid the Commission in preparing the EIS; LBP-09-10, 70 NRC 51 (2009)

the environmental report is required to address a list of environmental considerations that correspond to the environmental considerations that NEPA § 102(2)(C)(i)-(v) requires the agency to address in the EIS; LBP-09-16, 70 NRC 227 (2009)

the fact that an environmental impact is regulated by another federal agency or by a state does not justify the exclusion of the analysis in NRC's EIS; LBP-09-16, 70 NRC 227 (2009)

the NEPA alternatives analysis to the proposed action is the heart of an EIS; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)

the requirement to discuss alternatives in the environmental report parallels NEPA's requirement that an EIS provide a detailed statement of reasonable alternatives to a proposed action; LBP-09-16, 70 NRC 227 (2009)

under NEPA the Commission looks to the reasonably foreseeable impacts of simply licensing the facility, not the reasonably foreseeable effects of a successful terrorist attack; LBP-09-26, 70 NRC 939 (2009)

under the rule of reason, the EIS need not consider an infinite range of alternatives, only reasonable or feasible ones; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

See also Draft Environmental Impact Statement; Final Environmental Impact Statement

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### ENVIRONMENTAL ISSUES

commencement of evidentiary hearings on environmental issues is prohibited until after the final environmental impact statement is issued; LBP-09-22, 70 NRC 640 (2009)

### ENVIRONMENTAL JUSTICE

contentions must show that the affected local population qualifies as a minority or low-income population; LBP-09-18, 70 NRC 385 (2009)

NEPA is the only legal grounds for an admissible contention relating to environmental justice issues; LBP-09-18, 70 NRC 385 (2009)

### ENVIRONMENTAL PROTECTION AGENCY

carbon dioxide falls within the Clear Air Act's definition of air pollutants subject to EPA's regulatory authority; LBP-09-17, 70 NRC 311 (2009)

licensees subject to the provisions of EPA's generally applicable environmental radiation standards in 40 C.F.R. Part 190 shall comply with those standards; LBP-09-19, 70 NRC 433 (2009)

nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to impose any effluent limitation other than those set by EPA or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 867 (2009)

the Commission has acknowledged applicability of EPA radiation exposure standards under 40 C.F.R. Part 190; LBP-09-19, 70 NRC 433 (2009)

when water quality decisions have been made by a state pursuant to the Clean Water Act and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value; LBP-09-25, 70 NRC 867 (2009)

### ENVIRONMENTAL REPORT

a contention challenging the absence in the ER of consideration of impacts from a severe radiological accident at one unit on other collocated units, supported by fact-based argument demonstrating a genuine dispute on a material issue and identifying supporting reasons for petitioners' belief, is admitted; LBP-09-17, 70 NRC 311 (2009)

a solely wind- or solar-powered facility could not satisfy a project's purpose of providing baseload power; LBP-09-17, 70 NRC 311 (2009)

although construction of the provisions of 10 C.F.R. Part 51 mandating the contents of applicant's ER may be informed by consideration of general National Environmental Policy Act principles, the Commission must look to the wording of the Part 51 regulations to determine if an ER is satisfactory or deficient; LBP-09-10, 70 NRC 51 (2009)

although the draft environmental impact statement may rely in part on applicant's ER, Staff must independently evaluate and be responsible for the reliability of all information used in the DEIS; LBP-09-19, 70 NRC 433 (2009)

an assessment of all environmental impacts and alternatives must be included, even though NRC has no jurisdiction to regulate such impacts or jurisdiction to impose such alternatives; LBP-09-10, 70 NRC 51 (2009)

an ER for a materials license must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 1 (2009)

applicant for an early site permit may evaluate the environmental impacts of a reactor or reactors falling within the site characteristics and design parameters for the ESP application; LBP-09-19, 70 NRC 433 (2009)

applicant for an early site permit must file an ER, addressing the five factors of 10 C.F.R. 51.45(b)(1)-(5); LBP-09-19, 70 NRC 433 (2009)

applicant is not obliged to examine general efficiency or conservation proposals that would do nothing to satisfy the particular project's goals of producing baseload power; LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

applicant is required to address a list of environmental considerations that correspond to the environmental considerations that NEPA § 102(2)(C)(i)-(v) requires the agency to address in the environmental impact statement; LBP-09-16, 70 NRC 227 (2009)

applicant is required to analyze the alternatives available for reducing or avoiding adverse environmental effects; LBP-09-10, 70 NRC 51 (2009)

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applicant is required to evaluate only alternatives that support the purpose of the project; LBP-09-21, 70 NRC 581 (2009)

applicant is required to take Table S-3 as the basis for evaluating the contribution of the environmental effects of management of high-level wastes related to uranium fuel cycle activities; LBP-09-21, 70 NRC 581 (2009)

applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater; LBP-09-25, 70 NRC 867 (2009)

applicant must include a description of the proposed action, a statement of its purposes, and a discussion of the impacts, adverse environmental effects, and alternatives to the proposed action; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

applicant must include an analysis of alternatives available for reducing or avoiding adverse environmental effects; LBP-09-19, 70 NRC 433 (2009)

applicant must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-09-19, 70 NRC 433 (2009)

applicant must submit a supplement to its ER at the operating license stage that discusses the same matters described in 10 C.F.R. 51.45, 51.51, and 51.52, which would have been initially discussed in the ER at the construction permit stage, but only to the extent that those matters differ from those discussed or reflect new information; LBP-09-26, 70 NRC 939 (2009)

applicant shall discuss the impacts of the proposed action on the environment in proportion to their significance; LBP-09-25, 70 NRC 867 (2009)

applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed in an environmental report; CLI-09-20, 70 NRC 911 (2009)

applicant's ER is not the same as the NRC's environmental impact statement; LBP-09-10, 70 NRC 51 (2009)

because petitioners fail to create a genuine issue, the board need not resolve whether applicant's purpose is unreasonably narrow or whether a proposed alternative is so far beyond the realm of reason that it must be rejected out of hand; LBP-09-21, 70 NRC 581 (2009)

because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, initial contentions necessarily focus on the adequacy of the applicant's ER under Part 51; LBP-09-10, 70 NRC 51 (2009); LBP-09-25, 70 NRC 867 (2009)

carbon dioxide emissions from the uranium fuel cycle are to be listed as zero; LBP-09-21, 70 NRC 581 (2009)

each application for a standard design certification must address the costs and benefits of severe accident design mitigation alternatives; LBP-09-10, 70 NRC 51 (2009)

each of the five subelements covered by NEPA § 102(2)(C) must be discussed; LBP-09-16, 70 NRC 227 (2009)

failure to provide facts or expert opinion sufficient to show that the environmental report disregarded a feasible alternative based on either wind power, solar power, or some combination of the two renders the contention inadmissible; LBP-09-16, 70 NRC 227 (2009)

if the environmental impact of mining activities is potentially significant, then the failure of the ER to disclose the location of the offsite mine does not immunize it from being the subject of a legitimate contention; LBP-09-10, 70 NRC 51 (2009)

information submitted in the ER should not be confined to information supporting the proposed action but should also include adverse information; LBP-09-16, 70 NRC 227 (2009)

information that the ER provides must be accurate and up-to-date in order to support an agency's determination that a project will have no significant impact on the environment; LBP-09-16, 70 NRC 227 (2009)

NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews; LBP-09-26, 70 NRC 939 (2009)

NEPA has only a limited role to play in interpreting Part 51's requirements for the ER; LBP-09-16, 70 NRC 227 (2009)

no discussion of any environmental impact of spent fuel storage for the period following the term of the reactor combined license is required; LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)



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- no discussion of need for power or alternative energy sources is required in a supplemental environmental report at the operating license stage; LBP-09-26, 70 NRC 939 (2009)
- petitioners' assertion that applicant's ER fails to include an analysis of the impacts of a governmental entity managing long-term storage of high-level waste onsite and cost quantifications of such management fails to create a genuine dispute; LBP-09-21, 70 NRC 581 (2009)
- petitioners question the underlying analysis of fish kills in the environmental report as being outdated, but they fail to provide any information to show that the results of the study are no longer representative; LBP-09-16, 70 NRC 227 (2009)
- presentation of alternatives in an applicant's ER and in an NRC environment impact statement must be in comparative form; LBP-09-19, 70 NRC 433 (2009)
- the alternatives discussion in the ER or environmental impact statement need not include every possible alternative, but every reasonable alternative; LBP-09-16, 70 NRC 227 (2009)
- the ER prepared for the combined license stage must take Table S-3 as the basis for evaluating the contribution of the environmental effects of the fuel cycle to the environmental costs of licensing the reactor; CLI-09-21, 70 NRC 927 (2009)
- the fact that an environmental impact is regulated by another federal agency or by a state does not justify the exclusion of the analysis from applicant's ER; LBP-09-16, 70 NRC 227 (2009)
- the impact analysis must include sufficient data and the alternatives analysis must be sufficiently complete to aid the Commission in preparing the environmental impact statement; LBP-09-10, 70 NRC 51 (2009)
- the requirement of Part 51 that the ER cover all significant environmental impacts associated with a project includes offsite as well as onsite impacts; LBP-09-10, 70 NRC 51 (2009)
- the requirement to discuss alternatives in the ER parallels NEPA's requirement that an environmental impact statement provide a detailed statement of reasonable alternatives to a proposed action; LBP-09-16, 70 NRC 227 (2009)
- ENVIRONMENTAL REVIEW**
- findings that a board must make to authorize issuance of an early site permit are described; LBP-09-19, 70 NRC 433 (2009)
- the agency's environmental review need only account for those impacts that have some likelihood of occurring or are reasonably foreseeable; LBP-09-26, 70 NRC 939 (2009)
- the Commission has declined to require the agency (outside of the Ninth Circuit) to consider terrorist threats as part of the NEPA review process; LBP-09-10, 70 NRC 51 (2009)
- EQUIPMENT, SAFETY-RELATED**
- applicant is to describe equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences; LBP-09-19, 70 NRC 433 (2009)
- ERROR**
- contentions involving possible errors in Table S-3 have been referred to the Commission; LBP-09-21, 70 NRC 581 (2009)
- the Commission will affirm decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion; CLI-09-20, 70 NRC 911 (2009)
- the licensing board did not commit reversible error by admitting a contention based on low-level radioactive waste storage duration because the NRC Staff itself had issued a request for additional information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 992 (2009)
- ETHICAL ISSUES**
- most jurisdictions require, and the board expects, that counsel will promptly correct statements of material fact that are no longer true; LBP-09-28, 70 NRC 1019 (2009)
- EVIDENCE**
- a jury may infer that a taxpayer read his return and knew its contents from the bare fact that he signed it under penalty of perjury; LBP-09-24, 70 NRC 676 (2009)
- an individual's later recall of the contents of any document will turn on the effort that the worker put into its creation or application, the need for the worker to have responded to the document, and the significance of the information in the document to those tasks assigned to the worker that are viewed as having higher priority or greater significance than others; LBP-09-24, 70 NRC 676 (2009)

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- boards are authorized to restrict irrelevant, immaterial, unreliable, duplicative, or cumulative evidence; LBP-09-30, 70 NRC 1039 (2009)
- documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing; LBP-09-30, 70 NRC 1039 (2009)
- if any party attempts to include exhibits that were not disclosed in the mandatory disclosures, thus making it impossible for the other parties to examine the reliability of that information, then the board may prohibit the admission of this new evidence into the record; LBP-09-30, 70 NRC 1039 (2009)
- individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it; LBP-09-24, 70 NRC 676 (2009)
- mandatory disclosures, like all discovery exchanges, cover a vast array of information and documents that are not evidence and need not meet the requirements of admissible evidence; LBP-09-30, 70 NRC 1039 (2009)
- not every document processed by an individual gets the same level of attention, but the degree of attention paid to a document initially can later be a strong determinant of the extent to which a person can later recall the contents of, and therefore can be said to have "knowledge" of, that particular document; LBP-09-24, 70 NRC 676 (2009)
- the overly simplistic view that "he saw it, so he knew it" is an analytical conundrum that cannot be the rule; LBP-09-24, 70 NRC 676 (2009)
- unless and until a document or information is proffered into evidence, there is no basis for a party to object that the information it received in a mandatory disclosure was unreliable or otherwise not admissible as evidence; LBP-09-30, 70 NRC 1039 (2009)
- where the record in an enforcement proceeding may be devoid of direct evidence to establish knowledge, the Staff may have to build its case upon circumstantial evidence alone; LBP-09-24, 70 NRC 676 (2009)
- EVIDENTIARY HEARINGS**
- a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts; LBP-09-22, 70 NRC 640 (2009)
- commencement of hearings on environmental issues is prohibited until after the final environmental impact statement is issued; LBP-09-22, 70 NRC 640 (2009)
- documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing; LBP-09-30, 70 NRC 1039 (2009)
- if the board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and will resolve that contention; LBP-09-22, 70 NRC 640 (2009)
- EXEMPTIONS**
- applicant seeks an exemption from the disposal site requirements of 10 C.F.R. 30.3 and 70.3 to allow disposal of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho, that is not licensed by the NRC; LBP-09-28, 70 NRC 1019 (2009)
- individuals requesting access to safeguards information who believe that they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements should specifically state which exemption the requestor is invoking and explain the requestor's basis for believing that the exemption is applicable; CLI-09-15, 70 NRC 1 (2009)
- EXTENSION OF TIME**
- petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 311 (2009)
- to avoid unnecessary delays in a uranium enrichment facility proceeding, the licensing board should not routinely grant requests for extensions of time and should manage the schedule such that the overall hearing process is completed within 28-1/2 months; CLI-09-15, 70 NRC 1 (2009)
- See also Deadlines
- FEDERAL EMERGENCY MANAGEMENT AGENCY**
- findings on emergency plans constitute a rebuttable presumption on questions of adequacy and implementation capability in NRC licensing proceedings; LBP-09-19, 70 NRC 433 (2009)
- in its review of emergency plans, NRC Staff must take into account FEMA's findings; LBP-09-19, 70 NRC 433 (2009)

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### FEDERAL REGISTER

prior to operation under a combined license, a notice of intended operation will be published not less than 180 days before the date scheduled for initial loading of fuel; LBP-09-19, 70 NRC 433 (2009)  
publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice; LBP-09-20, 70 NRC 565 (2009)

### FEDERAL WATER POLLUTION CONTROL ACT

nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to impose any effluent limitation other than those set by the Environmental Protection Agency or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 867 (2009)  
the reach of 33 U.S.C. § 1371(c)(2) is confined to navigable waters, which do not even encompass all surface waters; LBP-09-25, 70 NRC 867 (2009)  
when water quality decisions have been made by a state pursuant to the Clean Water Act and these decisions are raised in NRC licensing proceedings, the NRC is bound to take the Environmental Protection Agency's considered decisions at face value; LBP-09-25, 70 NRC 867 (2009)

### FIFTH AMENDMENT

carefully crafted restraints in the Constitution preserve freedom by curbing the exercise of power; LBP-09-24, 70 NRC 676 (2009)  
exercise of the power of compulsory process must be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas; LBP-09-24, 70 NRC 676 (2009)  
states can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened; LBP-09-24, 70 NRC 676 (2009)

### FILINGS

petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 311 (2009)  
See also Electronic Filing

### FINAL ENVIRONMENTAL IMPACT STATEMENT

commencement of evidentiary hearings on environmental issues is prohibited until after the FEIS is issued; LBP-09-22, 70 NRC 640 (2009)  
the draft environmental impact statement is distributed for public comment and, based on the comments received, a review of information provided by the applicant, and supplemental independent information and analysis, the Staff prepares and issues a final EIS; LBP-09-19, 70 NRC 433 (2009)  
where the discussion of alternative sites was insufficient, the board independently reviewed the record on greenfield, competitors' brownfield, noncompetitors' brownfield, and applicant's other nuclear sites to conclude that the Staff's underlying alternative site review was adequate; LBP-09-19, 70 NRC 433 (2009)

### FINAL SAFETY ANALYSIS REPORT

analysis of a severe accident involving a fission product release from the core into the containment including any fission product cleanup systems intended to mitigate the consequences of the accidents must be included; LBP-09-10, 70 NRC 51 (2009)  
information to be included is described; CLI-09-16, 70 NRC 33 (2009)  
the fission product release is based on a major accident assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-10, 70 NRC 51 (2009)

### FINALITY

the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding; LBP-09-24, 70 NRC 676 (2009)

### FINANCIAL ASSURANCE

a combined license applicant must obtain the financial instrument and submit a copy to the Commission as provided in 10 C.F.R. 50.75(e)(3); LBP-09-15, 70 NRC 198 (2009)

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- a parent-company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in 10 C.F.R. Part 30, Appendix A; LBP-09-15, 70 NRC 198 (2009)
- acceptable methods of decommissioning funding include a sinking fund, prepayment of the entire decommissioning amount, and a surety method, insurance, or other guarantee method; LBP-09-15, 70 NRC 198 (2009)
- holder of a combined license must begin filing biannual reports on the status of decommissioning funding once the Commission has made a finding that all acceptance criteria in the license have been met; LBP-09-15, 70 NRC 198 (2009)
- if licensee changes its method of decommissioning funding assurance, the new method will also have to pass any applicable financial test; LBP-09-15, 70 NRC 198 (2009)
- NRC will defer to state economic regulators where decommissioning funding is assured by the fact that any shortfall in decommissioning funds will be provided by ratepayers pursuant to state law; LBP-09-21, 70 NRC 581 (2009)
- Part 70 financial criteria can be met by conditioning the materials license to require funding commitments to be in place prior to construction and operation; CLI-09-15, 70 NRC 1 (2009)
- the amount for decommissioning funding must be adjusted annually, using a rate calculated pursuant to 10 C.F.R. 50.75(c)(2); LBP-09-15, 70 NRC 198 (2009)
- the requirements of 10 C.F.R. 50.75 are intended to ensure that entities who construct and operate a nuclear power plant will have sufficient funds at the end of the operational life of the plant to complete the decommissioning of the plant; LBP-09-15, 70 NRC 198 (2009)
- FINANCIAL ASSURANCE PLAN**
- a board can only decide whether or not a current funding proposal fulfills NRC requirements; LBP-09-18, 70 NRC 385 (2009)
- at the time the combined license application is submitted, it must identify the method of decommissioning funding assurance that the applicant proposes to use and to show that the method complies with any applicable financial test; LBP-09-15, 70 NRC 198 (2009); LBP-09-18, 70 NRC 385 (2009)
- applicant, 2 years before and 1 year before the scheduled date for the initial fuel loading, shall submit a report to NRC containing a certification updating the financial information, including a copy of the financial instrument to be used; LBP-09-18, 70 NRC 385 (2009)
- applicant may choose one or more of the funding methods provided in 10 C.F.R. 50.75(e); LBP-09-18, 70 NRC 385 (2009)
- final decommissioning financial assurance documents must be submitted to the NRC 30 days after the notification in the *Federal Register* pursuant to section 52.103(a) that licensee has set a date to load fuel; LBP-09-15, 70 NRC 198 (2009); LBP-09-21, 70 NRC 581 (2009)
- for combined license applications, the report must contain a certification that financial assurance for decommissioning will be provided no later than 30 days after the Commission publishes notice in the *Federal Register* of the initial fuel load; LBP-09-18, 70 NRC 385 (2009)
- if applicant plans to use a parent company guarantee for financial assurance of decommissioning funding, the assurance must provide the information required by 10 C.F.R. 50.75(e)(1)(iii)(B); LBP-09-15, 70 NRC 198 (2009)
- petitioners' claim that applicant must pursue the prepayment method for decommissioning conflicts with the NRC guidance and rules and so is outside the permissible scope of a combined license proceeding; LBP-09-21, 70 NRC 581 (2009)
- the parent company guarantee is based on a financial test and may only be used if the guarantee and test are as contained in Appendix A to 10 C.F.R. Part 30; LBP-09-18, 70 NRC 385 (2009)
- FINANCIAL QUALIFICATIONS**
- applicant for a combined license must show that it possesses funds or has reasonable assurance of obtaining funds necessary to cover estimated construction and fuel cycle costs; LBP-09-10, 70 NRC 51 (2009)
- electric utilities need not include operating and maintenance costs in their demonstration of financial qualifications in a combined license application; LBP-09-10, 70 NRC 51 (2009)
- it is beyond licensing board authority to require applicant to choose a particular method of decommissioning funding; LBP-09-15, 70 NRC 198 (2009)

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neither market capitalization nor share price are variables to be used in the financial test for decommissioning funding assurance; LBP-09-15, 70 NRC 198 (2009)

the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the combined license; LBP-09-15, 70 NRC 198 (2009)

the purpose of the requirements of 10 C.F.R. 50.33(f) is to ensure the protection of public health and safety and the common defense and security, not to evaluate the financial wisdom of the proposed project; LBP-09-10, 70 NRC 51 (2009)

### FINANCIAL RESOURCES

creditor interests are created in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-09-15, 70 NRC 1 (2009)

### FINDINGS OF FACT

environmental findings that a board must make to authorize issuance of an early site permit are described; LBP-09-19, 70 NRC 433 (2009)

to grant an early site permit, the Commission must find that the proposed inspections, tests, analyses, and acceptance criteria, including any on emergency planning, are necessary and sufficient, within the scope of the ESP, to provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the Act, and the Commission's regulations; LBP-09-19, 70 NRC 433 (2009)

when an early site permit is issued with an associated limited work authorization, the board must find relative to the LWA that any significant adverse environmental impact resulting from activities requested under 10 C.F.R. 52.17(c) can be redressed; LBP-09-19, 70 NRC 433 (2009)

### FLOOD PROTECTION

the design basis flood is the magnitude of the flood event that is used to evaluate safety structures, systems, and components important to safety during facility design; LBP-09-25, 70 NRC 867 (2009)

### FOREIGN OWNERSHIP

an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 1 (2009)

analysis of compliance with section 103d of the Atomic Energy Act is a function performed by the NRC Staff as part of its evaluation of the combined license application; CLI-09-20, 70 NRC 911 (2009)

creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 1 (2009)

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; CLI-09-20, 70 NRC 911 (2009)

the Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant's stock; CLI-09-20, 70 NRC 911 (2009)

### FUEL LOADING

prior to operation under a combined license, a notice of intended operation will be published in the *Federal Register* not less than 180 days before the date scheduled for initial loading of fuel; LBP-09-19, 70 NRC 433 (2009)

### GENERAL LICENSES

the assertion that applicant might need to obtain a Part 72 license is irrelevant because a grant of a combined license could be accompanied by grant of a Part 72 general license if applicant complies with certain conditions; LBP-09-21, 70 NRC 581 (2009)

the Commission has issued a general license for the storage of spent fuel at an onsite independent spent fuel storage installation to all persons authorized to possess or operate nuclear power reactors under 10 C.F.R. Part 50 or Part 52; LBP-09-20, 70 NRC 565 (2009)

### GENERIC ISSUES

if petitioners are dissatisfied with NRC's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; LBP-09-18, 70 NRC 385 (2009)

## SUBJECT INDEX

### GEOLOGIC CONDITIONS

applicant's site safety analysis report must include seismic and geologic characteristics of the proposed site with appropriate consideration of the most severe historical natural phenomena that have been reported for the site; LBP-09-19, 70 NRC 433 (2009)

in providing information on seismic and geologic characteristics of a proposed site, applicants must conform to the requirements of 10 C.F.R. 100.23; LBP-09-19, 70 NRC 433 (2009)

the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)

### GREENHOUSE GAS EMISSIONS

carbon dioxide emissions from the uranium fuel cycle are to be listed as zero; LBP-09-21, 70 NRC 581 (2009)

carbon dioxide falls within the Clear Air Act's definition of air pollutants subject to the Environmental Protection Agency's regulatory authority; LBP-09-17, 70 NRC 311 (2009)

contention alleging that the environmental report failed to address the alleged greenhouse gas and global climate disruption impacts resulting from prematurely killing trees is inadmissible; LBP-09-10, 70 NRC 51 (2009)

each environmental report prepared for the combined license stage must take Table S-3 as the basis for evaluating the contribution of the environmental effects of the fuel cycle to the environmental costs of licensing the reactor; CLI-09-21, 70 NRC 927 (2009)

the Commission may have more to offer regarding the need for a NEPA carbon footprint analysis in new reactor licensing proceedings; LBP-09-19, 70 NRC 433 (2009)

### GROUNDWATER CONTAMINATION

a challenge to applicant's site-specific measurements of adsorption and retention coefficients relative to hydrological radionuclide transport is an admissible contention; LBP-09-16, 70 NRC 227 (2009)

in its review of early site permit applications, Staff must consider physical characteristics of the site, specifically noting that factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)

petitioners' concerns regarding applicant's commitments to relax conservatism in its laboratory testing and groundwater release analysis are in regard to the revised analysis to be submitted in response to the Staff request for additional information and therefore are dismissed as outside the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009)

Staff and applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater in their environmental impact statement and environmental report; LBP-09-25, 70 NRC 867 (2009)

### HEALTH EFFECTS

Table S-3 does not include health effects from the effluents described in the table, and that issue may be the subject of litigation in individual licensing proceedings; LBP-09-16, 70 NRC 227 (2009)

### HEARING FILE

in Subpart L proceedings, NRC Staff must produce a hearing file and make it available to all parties; LBP-09-22, 70 NRC 640 (2009)

NRC Staff has a continuing duty to update the hearing file; LBP-09-22, 70 NRC 640 (2009)

### HEARING PROCEDURES

a motion and proposed new contention may address the selection of the appropriate hearing procedure for the proposed new contention; LBP-09-22, 70 NRC 640 (2009)

a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts; LBP-09-10, 70 NRC 51 (2009); LBP-09-22, 70 NRC 640 (2009)

boards must exercise their discretion and select the hearing procedure most appropriate for newly admitted contentions; LBP-09-10, 70 NRC 51 (2009)

circumstances where a particular hearing procedure is required are specified in 10 C.F.R. 2.310(b)-(k); LBP-09-10, 70 NRC 51 (2009)

cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-09-10, 70 NRC 51 (2009)

if no particular procedure is required, then the board may conduct the proceeding for a particular contention under Subpart L; LBP-09-10, 70 NRC 51 (2009)

## SUBJECT INDEX

in an evidentiary hearing, the board may weigh competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where there is no genuine issue as to any material fact; LBP-09-22, 70 NRC 640 (2009)

selection of hearing procedures for contentions at the outset of a proceeding is not immutable, because the availability of Subpart G procedures depends critically on the credibility of eyewitnesses, and the identity of such witnesses may not be known until after the contentions are admitted; LBP-09-10, 70 NRC 51 (2009)

the substantive standard for allowing parties to conduct cross-examination is the same under 10 C.F.R. Part 2, Subparts G and L; LBP-09-10, 70 NRC 51 (2009)

under 10 C.F.R. 2.309(g) and 2.310, the board determines which hearing procedure will be used (Subpart G or L) on a contention-by-contention basis; LBP-09-10, 70 NRC 51 (2009)

under Subpart L, a party seeking to conduct cross-examination must file a written motion and obtain leave from the board; LBP-09-10, 70 NRC 51 (2009)

### HEARING REQUESTS

a hearing request is timely when the petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice; LBP-09-20, 70 NRC 565 (2009)

a hearing request must state the name, address, and telephone number of the requestor, the nature of the requestor's right under the governing statutes to be made a party to the proceeding, the nature and extent of the requestor's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the requestor's interest; LBP-09-28, 70 NRC 1019 (2009)

anyone who wishes to request a hearing concerning a proposed licensing action must establish standing and proffer at least one admissible contention; LBP-09-28, 70 NRC 1019 (2009)

licensing boards will determine whether petitioner has an interest affected by the proceeding; LBP-09-23, 70 NRC 659 (2009)

twenty days in which to request a hearing is the minimum required by the agency's regulations; LBP-09-20, 70 NRC 565 (2009)

See also Amendment of Hearing Requests

### HEARING REQUESTS, LATE-FILED

a request is timely when petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice; LBP-09-20, 70 NRC 565 (2009)

factors that must be addressed for nontimely intervention petitions, hearing requests, and contentions are set forth; LBP-09-20, 70 NRC 565 (2009)

### HEARING RIGHTS

a hearing challenging an immediately effective enforcement order will be conducted expeditiously, giving due consideration to the rights of the parties; LBP-09-24, 70 NRC 676 (2009)

even in the absence of constructive notice, the possibility remains that a petitioner had actual notice of the right to request a hearing; LBP-09-20, 70 NRC 565 (2009)

NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; CLI-09-20, 70 NRC 911 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them; LBP-09-24, 70 NRC 676 (2009)

the subject of an enforcement order has the right to challenge, on limited grounds, the immediate effectiveness of the order and the promise of an expedited hearing; LBP-09-24, 70 NRC 676 (2009)

when the NRC Staff can, consistent with its duty to protect public health and safety, accord some form of predeprivation hearing, such a course of action is advisable in light of the important private interest in retaining employment and the fact that such a proceeding provides some opportunity for the employee to present his side of the case; LBP-09-24, 70 NRC 676 (2009)

## SUBJECT INDEX

### HIGH-LEVEL WASTE REPOSITORY APPLICATION

- a legal issue contention raises a genuine dispute with the application, because it challenges DOE's performance assessment for the post-10,000-year period; LBP-09-29, 70 NRC 1028 (2009)
- contention asserting that DOE's description of its expert elicitation relating to a probabilistic volcanic hazard analysis update fails to comply with NRC regulations or the guidance document that DOE formally committed to follow is admissible; LBP-09-29, 70 NRC 1028 (2009)
- contention that the application inadequately addresses generalized corrosion because it relies on flawed experimental data raises a genuine, material dispute with the application by pointing to specific sections that allegedly fail to comply with the NRC's requirements for conducting a post-closure performance assessment; LBP-09-29, 70 NRC 1028 (2009)

### HIGH-LEVEL WASTE REPOSITORY PROCEEDING

- the Commission dispensed with all but the good cause factor for late-filed contentions; LBP-09-29, 70 NRC 1028 (2009)

### IMMEDIATE EFFECTIVENESS

- a hearing challenging an immediately effective enforcement order will be conducted expeditiously, giving due consideration to the rights of the parties; LBP-09-24, 70 NRC 676 (2009)
- an initial decision directing the issuance or amendment of a limited work authorization or an early site permit is immediately effective upon issuance unless the presiding officer finds that good cause has otherwise been shown by a party; LBP-09-19, 70 NRC 433 (2009)
- immediately effective deprivation of the legally acknowledged right to pursue one's livelihood should not be imposed without the Staff having substantial reason to do so and explaining its reasons in advance and in some detail; LBP-09-24, 70 NRC 676 (2009)
- the subject of an immediately effective enforcement order has the right to challenge the immediate effectiveness and the promise of an expedited hearing; LBP-09-24, 70 NRC 676 (2009)
- to succeed in imposing pretrial detention because the accused is a danger to the community, the government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably assure the community's safety; LBP-09-24, 70 NRC 676 (2009)

### IMMEDIATE EFFECTIVENESS REVIEW

- to successfully challenge an enforcement order, the target must show that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error; LBP-09-24, 70 NRC 676 (2009)

### INCORPORATION BY REFERENCE

- a contention asserting that a combined license application is incomplete because it incorporates by reference a standard design certification and a pending application for a revision to that certified design is inadmissible; LBP-09-10, 70 NRC 51 (2009)
- applicant for a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

### INDEPENDENT SPENT FUEL STORAGE INSTALLATION

- an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release; LBP-09-20, 70 NRC 565 (2009)
- the Commission declined to adopt a proximity presumption in an ISFSI license transfer proceeding, where the petitioner had not demonstrated that the mere transfer of the ISFSI somehow increases his risk of radiological harm; LBP-09-20, 70 NRC 565 (2009)
- the Commission has issued a general license for the storage of spent fuel at an onsite ISFSI to all persons authorized to possess or operate nuclear power reactors under 10 C.F.R. Part 50 or Part 52; LBP-09-20, 70 NRC 565 (2009)

### INITIAL DECISIONS

- a licensing board decision directing issuance or amendment of a limited work authorization or an early site permit is immediately effective upon issuance unless the presiding officer finds that good cause has otherwise been shown by a party; LBP-09-19, 70 NRC 433 (2009)
- licensing board decisions are not effective until they are reviewed by the Commission; LBP-09-19, 70 NRC 433 (2009)
- See also Partial Initial Decisions



## SUBJECT INDEX

### INJURY IN FACT

- a board's determination of standing does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-09-13, 70 NRC 168 (2009)
- a broadly stated interest in a problem is not sufficient by itself to render the organization so adversely affected or aggrieved that standing will be granted; LBP-09-13, 70 NRC 168 (2009)
- a nexus between the injury and the relief is required rather than a nexus between the claimed injury and the contention; LBP-09-16, 70 NRC 227 (2009)
- an alleged injury to health and safety, shared equally by many, can form the basis for standing; LBP-09-18, 70 NRC 385 (2009)
- an independent spent fuel storage installation is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release; LBP-09-20, 70 NRC 565 (2009)
- an injury must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-09-13, 70 NRC 168 (2009)
- an organization seeking representational standing on behalf of its members may meet the injury-in-fact requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding; LBP-09-16, 70 NRC 227 (2009); LBP-09-20, 70 NRC 565 (2009)
- because NEPA is a procedural statute, petitioners need not show that favorable rulings on their NEPA contentions will require denial of the license, but rather that procedures intended for protection of their members' concrete interests will be observed; LBP-09-16, 70 NRC 227 (2009)
- in demonstrating that a proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences, petitioner cannot rely on conclusory allegations about potential radiological harm, but must show how these various harms might result from the proposed action; LBP-09-20, 70 NRC 565 (2009)
- in nonreactor cases, the potential for offsite consequences is not always clear, and thus the burden falls on petitioner to demonstrate that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-09-20, 70 NRC 565 (2009)
- injury-in-fact to establish standing requires more than a general interest in preserving of the environment; LBP-09-28, 70 NRC 1019 (2009)
- intervention petitioner must be able to show how it would have personally suffered or will suffer a distinct and palpable harm that constitutes injury in fact; LBP-09-18, 70 NRC 385 (2009)
- intervention petitioner must establish a concrete and particularized injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and is arguably within the zone of interests protected by the governing statute; CLI-09-20, 70 NRC 911 (2009); LBP-09-28, 70 NRC 1019 (2009)
- once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing; LBP-09-16, 70 NRC 227 (2009)
- redressability requires petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-09-13, 70 NRC 168 (2009)
- standing generally has been denied when the threat of injury is not concrete and particularized; LBP-09-13, 70 NRC 168 (2009)
- the Commission declined to adopt a proximity presumption in an independent spent fuel storage installation license transfer proceeding, where the petitioner had not demonstrated that the mere transfer of the ISFSI somehow increased his risk of radiological harm; LBP-09-20, 70 NRC 565 (2009)
- the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 911 (2009); LBP-09-16, 70 NRC 227 (2009)
- the requisite injury to establish standing may be either actual or threatened but must nonetheless be concrete and particularized, not conjectural or hypothetical; LBP-09-28, 70 NRC 1019 (2009)
- the Supreme Court has defined "injury in fact" as an invasion of a legally protected interest that is concrete and particularized and actual or imminent; LBP-09-13, 70 NRC 168 (2009)

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to assert an appropriate injury for organizational standing, an organization must demonstrate a palpable injury in fact to its organizational interests; LBP-09-13, 70 NRC 168 (2009)

to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue, and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-09-13, 70 NRC 168 (2009)

to establish organizational standing, the injury must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-09-13, 70 NRC 168 (2009)

when denial of a license would alleviate a petitioner's asserted potential injury, any admissible contention with such a result can be prosecuted by a petitioner, regardless of whether that contention is directly related to that petitioner's articulated injury; LBP-09-16, 70 NRC 227 (2009)

See also Economic Injury

### INTERESTED GOVERNMENTAL ENTITY

although interested governmental entities would not have a formal role in a proceeding absent the admission of parties and contentions, boards expect that such entities would be kept appropriately apprised of the other participants' settlement efforts; LBP-09-23, 70 NRC 659 (2009)

states do not need to address standing requirements if the facility is located within their boundaries; CLI-09-15, 70 NRC 1 (2009)

See also Local Governmental Bodies

### INTERESTED STATE PARTICIPATION

licensing boards have granted state agencies the right to participate in NRC proceedings as the state's representative; LBP-09-16, 70 NRC 227 (2009)

nonparty interested state status has been granted to state utility commissions; LBP-09-16, 70 NRC 227 (2009)

the Commission has long recognized the benefits of participation in NRC proceedings by representatives of interested states; LBP-09-16, 70 NRC 227 (2009)

### INTERVENTION

a state, county, municipality, federally recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as a party in a materials license proceeding; CLI-09-15, 70 NRC 1 (2009)

intervention petitioners who think an order modifying a license should not be sustained, but might want further corrective measures, are precluded from intervention; LBP-09-20, 70 NRC 565 (2009)

it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders because such orders presumably enhance rather than diminish public safety; LBP-09-20, 70 NRC 565 (2009)

NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-09-17, 70 NRC 311 (2009)

once parties demonstrate that they have standing, the parties will then be free to assert any contention, which, if proved, will afford them the relief they seek; LBP-09-10, 70 NRC 51 (2009)

petitioner must establish standing and proffer at least one admissible contention that meets the requirements of 10 C.F.R. 2.309(f)(1); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)

petitioner must file a written petition for leave to intervene in accordance with the requirements of 10 C.F.R. 2.309; CLI-09-15, 70 NRC 1 (2009)

the Commission's power to define the scope of a proceeding will lead to the denial of intervention when the Commission amends a license to require additional or better safety measures; LBP-09-20, 70 NRC 565 (2009)

when deciding whether to grant standing, licensing boards shall consider the nature of petitioner's right under the Atomic Energy Act to be made a party, the nature and extent of 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 petitioner's interest; LBP-09-17, 70 NRC 311 (2009)

where the notice of hearing limits the scope to whether the order should be sustained, petitioner's sole remedy is rescission of the order; LBP-09-20, 70 NRC 565 (2009)

### INTERVENTION, DISCRETIONARY

in ruling on discretionary intervention requests, licensing boards will consider and balance enumerated factors weighing in favor of and against allowing intervention; LBP-09-23, 70 NRC 659 (2009)

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### INTERVENTION PETITIONERS

licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 385 (2009)  
*pro se* petitioners are held to a less rigorous standard; LBP-09-18, 70 NRC 385 (2009)  
the benefit of the doubt should be given to the potential intervenor in order to prevent the dismissal of a petition due to inarticulate draftsmanship or procedural or pleading defects; LBP-09-18, 70 NRC 385 (2009)

### INTERVENTION PETITIONS

a board may view petitioner's supporting information in a light favorable to petitioner, but petitioner (not the board) is required to supply all required elements; LBP-09-10, 70 NRC 51 (2009)  
a petition for review and request for hearing must include a showing that the petitioner has standing; LBP-09-13, 70 NRC 168 (2009)  
for a request for hearing and petition to intervene to be granted, petitioner must establish that it has standing and propose at least one admissible contention; LBP-09-18, 70 NRC 385 (2009); LBP-09-10, 70 NRC 51 (2009)  
for an order issued under 10 C.F.R. 2.202, the time for filing a hearing request runs from the date of the order, not the date of publication of the order in the *Federal Register*; LBP-09-20, 70 NRC 565 (2009)  
in addition to setting forth with particularity petitioner's interest in the proceeding and how that interest may be affected by the results of the proceeding, petitioner must also include at least one contention meeting the requirements of 10 C.F.R. 2.309(f)(1); CLI-09-15, 70 NRC 1 (2009)  
licensing boards will determine whether petitioner has an interest affected by the proceeding; LBP-09-23, 70 NRC 659 (2009)  
petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 311 (2009)  
petitioner must state the nature of its right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of its property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on its interest; LBP-09-20, 70 NRC 565 (2009)

### INTERVENTION PETITIONS, LATE-FILED

a hearing request is timely when the petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice; LBP-09-20, 70 NRC 565 (2009)  
absent good cause, petitioner's demonstration on the other late-filing factors must be compelling; LBP-09-26, 70 NRC 939 (2009)  
factors that must be addressed for nontimely intervention petitions, hearing requests, and contentions are set forth; LBP-09-20, 70 NRC 565 (2009)  
good cause is the most significant of the late-filing factors in 10 C.F.R. 2.309(c); LBP-09-20, 70 NRC 565 (2009); LBP-09-26, 70 NRC 939 (2009)  
nontimely petitions to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of eight factors; CLI-09-15, 70 NRC 1 (2009)  
petitions and contentions filed after the initial 60-day deadline are admissible only upon a balancing of eight factors of 10 C.F.R. 2.309(c); LBP-09-26, 70 NRC 939 (2009)

### INTERVENTION RULINGS

a standing ruling in one proceeding is not dispositive of a determination in another proceeding with the same petitioner because the ruling was not the subject of appellate review; LBP-09-18, 70 NRC 385 (2009)  
an exception to the general policy limiting interlocutory review permits an appeal of a board's ruling on contention admissibility when a board grants a petition to intervene following consideration of the full petition; CLI-09-18, 70 NRC 859 (2009)  
any appeal by petitioners of the admitted contentions must abide the end of the case, i.e., wait approximately 2 or 3 years until the Staff issues its safety and environmental documents and the final disposition of the evidentiary hearing on the three admitted contentions; LBP-09-10, 70 NRC 51 (2009)

## SUBJECT INDEX

- boards should consider the nature of petitioner's right under the Atomic Energy Act or the National Environmental Policy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest; LBP-09-13, 70 NRC 168 (2009)
- challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 859 (2009)
- in assessing intervention petitions, licensing boards must determine whether standing elements are met even though there are no objections to petitioner's standing; LBP-09-23, 70 NRC 659 (2009)
- in determining whether a petitioner has established standing, boards are to construe the petition in favor of the petitioner; LBP-09-18, 70 NRC 385 (2009)
- in ruling on contention admissibility a board is not to look to the merits of the contention; LBP-09-17, 70 NRC 311 (2009)
- in ruling on discretionary intervention requests, licensing boards will consider and balance enumerated factors weighing in favor of and against allowing intervention; LBP-09-23, 70 NRC 659 (2009)
- petitioner is not required to prove its case at the contention admission stage; LBP-09-17, 70 NRC 311 (2009)
- the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-09-20, 70 NRC 911 (2009); CLI-09-22, 70 NRC 932 (2009)
- the process of sifting and weighing participants' factual proffers often calls upon a board to make difficult choices, so that a petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself; LBP-09-18, 70 NRC 385 (2009)
- there is an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of whether the request for hearing or petition to intervene should have been wholly denied; CLI-09-22, 70 NRC 932 (2009)
- to be appealable, a disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner; CLI-09-18, 70 NRC 859 (2009)
- where intervenors have filed new contentions based on a supplement to a combined license application, in advance of a full board ruling on the original contentions, no appeal lies until the board acts on all contentions, both the original and the newly filed ones; CLI-09-18, 70 NRC 859 (2009)
- with respect to an applicant's appeal, applicant must contend that, after considering all pending contentions, the board has erroneously granted a hearing to the petitioner; CLI-09-18, 70 NRC 859 (2009)
- IRREPARABLE INJURY**
- party seeking a stay did not show an overwhelming probability of success on the merits of its appeal sufficient to overcome its lack of showing of irreparable harm; CLI-09-23, 70 NRC 935 (2009)
- the possibility that the prevailing party would use the board's order in his favor to persuade a District Court to reconsider part of the penalty imposed on him in a parallel criminal proceeding did not constitute immediate, irreparable harm to the NRC Staff; CLI-09-23, 70 NRC 935 (2009)
- whether the party seeking a stay faces potentially irreparable harm is the most important factor considered in the Commission's determination whether to grant a stay; CLI-09-23, 70 NRC 935 (2009)
- JURISDICTION**
- the mootness doctrine derives from the Constitution's limitation of federal courts' jurisdiction to cases or controversies; LBP-09-15, 70 NRC 198 (2009)
- when a claim becomes moot in federal court, the court loses jurisdiction to decide the merits of that claim; LBP-09-15, 70 NRC 198 (2009)
- See also Licensing Boards, Jurisdiction; Nuclear Regulatory Commission, Jurisdiction
- JURY INSTRUCTION**
- instruction to juries on deliberate ignorance or willful blindness can relieve the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt; LBP-09-24, 70 NRC 676 (2009)
- instruction to juries on deliberate ignorance or willful blindness should be used with caution to avoid the possibility that the jury convict on the lesser standard that the defendant should have known his conduct was illegal; LBP-09-24, 70 NRC 676 (2009)

## SUBJECT INDEX

the danger of instruction to juries on deliberate ignorance or willful blindness in an inappropriate case is that juries will convict on a basis akin to a standard of negligence; LBP-09-24, 70 NRC 676 (2009)  
the deliberate ignorance instruction defines when an individual has sufficient information so that he can be deemed to know something; LBP-09-24, 70 NRC 676 (2009)  
the warning to jurors that the added instruction on deliberate ignorance or willful blindness is not intended to allow them to base guilt on negligence or carelessness is sufficient to legitimize the instruction; LBP-09-24, 70 NRC 676 (2009)

### JURY VERDICT

a fundamental tenet of the jury system assumes that the jury complies with the instructions provided by the trial court; LBP-09-24, 70 NRC 676 (2009)  
a special verdict is one where the jury answers specific questions submitted to it, thus enabling the court to determine the theory underlying the conviction; LBP-09-24, 70 NRC 676 (2009)

### LEAKAGE

early site permit applicants must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)

### LICENSE AMENDMENTS

if, at some point in the future, applicant were to decide to change the ownership structure and to enter into a joint venture with another entity, its license would have to be amended to reflect this change; LBP-09-18, 70 NRC 385 (2009)

### LICENSE CONDITIONS

creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 1 (2009)  
Part 70 financial criteria can be met by conditioning the materials license to require funding commitments to be in place prior to construction and operation; CLI-09-15, 70 NRC 1 (2009)

### LICENSE RENEWAL APPLICATIONS

when an application is timely filed, the license is automatically extended by operation of law until final agency action is taken on the renewal request; LBP-09-13, 70 NRC 168 (2009)

### LICENSE RENEWALS

new contention on the adequacy of consideration of the dissolved oxygen factor in the cumulative usage factor environmental analysis and use of inappropriate heat transfer equations was previously litigated and resolved and thus is not admissible; LBP-09-9, 70 NRC 41 (2009)

See also Materials License Renewal; Materials License Renewal Proceedings

### LICENSE TRANSFERS

the Commission declined to adopt a proximity presumption in an independent spent fuel storage installation license transfer proceeding, where the petitioner had not demonstrated that the mere transfer of the ISFSI somehow increased his risk of radiological harm; LBP-09-20, 70 NRC 565 (2009)

### LICENSEE EMPLOYEES

an employee who contributes to submission of information to the NRC that the employee knows is not complete or accurate in some material respect places the licensee in violation; LBP-09-24, 70 NRC 676 (2009)

deliberate submission to the NRC of information that an employee knows to be incomplete or inaccurate in some respect material to the NRC is a violation; LBP-09-24, 70 NRC 676 (2009)

### LICENSEES

a licensee employee who contributes to submission of information to the NRC that the employee knows is not complete or accurate in some material respect places the licensee in violation; LBP-09-24, 70 NRC 676 (2009)

licensee remains authorized to own and possess the facility even after the operating license expires; LBP-09-17, 70 NRC 311 (2009)

### LICENSES

See Combined Licenses; General Licenses; Materials Licenses; Operating Licenses; Senior Reactor Operator License

## SUBJECT INDEX

### LICENSING BOARD DECISIONS

decisions have no precedential effect beyond the immediate proceeding in which they were issued; LBP-09-15, 70 NRC 198 (2009)

See also Initial Decisions

### LICENSING BOARD ORDERS

the Commission gives substantial deference to a board's rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 33 (2009)

### LICENSING BOARDS

boards have an obligation to establish a case scheduling order, and to advise the Commission of any significant delay in meeting major activities set forth in the hearing schedule; CLI-09-17, 70 NRC 309 (2009)

### LICENSING BOARDS, AUTHORITY

a board can only decide whether or not a current funding proposal fulfills NRC requirements; LBP-09-18, 70 NRC 385 (2009)

a board may impose sanctions including dismissal of the specific contentions, dismissal of the adjudication, or dismissal of the application for any continuing unexcused failure to make the required mandatory disclosures; LBP-09-30, 70 NRC 1039 (2009)

a board's role in an early site permit proceeding is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-09-19, 70 NRC 433 (2009)

although a board in another materials license renewal proceeding allowed an Indian organization to participate in that proceeding as an interested Indian tribe under 10 C.F.R. 2.315(c), that ruling is not binding on other boards; LBP-09-13, 70 NRC 168 (2009)

although boards are not required to narrow contentions to make them acceptable, they may do so; LBP-09-25, 70 NRC 867 (2009)

any supporting material provided by petitioner, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-09-26, 70 NRC 939 (2009)

authority to make findings on limited work authorizations is discussed; LBP-09-19, 70 NRC 433 (2009)

boards are authorized to restrict irrelevant, immaterial, unreliable, duplicative, or cumulative evidence; LBP-09-30, 70 NRC 1039 (2009)

boards have authority to narrow low-level radioactive waste contentions; LBP-09-16, 70 NRC 227 (2009)

boards have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay, and to maintain order; LBP-09-22, 70 NRC 640 (2009)

boards lack the authority to require applicant to adopt additional mitigation measures for the protection of endangered or threatened species; LBP-09-16, 70 NRC 227 (2009)

boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-09-16, 70 NRC 227 (2009)

boards review NRC Staff's enforcement order *de novo* to determine on the basis of the hearing record whether the charges are sustained and the sanction imposed is warranted; LBP-09-24, 70 NRC 676 (2009)

if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-09-26, 70 NRC 939 (2009)

in a mandatory hearing, a board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-09-19, 70 NRC 433 (2009)

in an evidentiary hearing, the board may weigh competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where there is no genuine issue as to any material fact; LBP-09-22, 70 NRC 640 (2009)

## SUBJECT INDEX

it is beyond board authority to require applicant to choose a particular method of decommissioning funding; LBP-09-15, 70 NRC 198 (2009)

licensing boards shall not entertain motions for summary disposition, unless the board finds that such motions, if granted, are likely to expedite the proceeding; LBP-09-22, 70 NRC 640 (2009)

questions over the equivalence of the “knowledge” standard that governed the jury and the standard applicable in the administrative proceeding can lead a board to exercise its discretion not to apply collateral estoppel; LBP-09-24, 70 NRC 676 (2009)

the role of a board is to decide whether an applicant has supplied the requisite information to the NRC, and whether the petitioners have identified any defect in that information; LBP-09-18, 70 NRC 385 (2009)

when an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action; LBP-09-23, 70 NRC 659 (2009)

where all factors are met, the application of collateral estoppel by the subsequent tribunal is to some degree a discretionary matter; LBP-09-24, 70 NRC 676 (2009)

where the final environmental impact statement discussion of alternative sites was insufficient, the board independently reviewed the record on greenfield, competitors’ brownfield, noncompetitors’ brownfield, and applicant’s other nuclear sites to conclude that the Staff’s underlying alternative site review was adequate; LBP-09-19, 70 NRC 433 (2009)

### LICENSING BOARDS, JURISDICTION

a notice of hearing having been issued by the Commission in a combined license proceeding, the board has jurisdiction to approve a settlement agreement; LBP-09-23, 70 NRC 659 (2009)

dismissal of one contention on mootness grounds would not terminate a case where the board had expressly retained jurisdiction to decide whether to admit another contention; LBP-09-27, 70 NRC 992 (2009)

given that the board recently issued an initial decision resolving all contentions in the case, the Commission can discern no compelling reason to take the extraordinary action of stepping in at this late stage to take up the case, but parties will have the opportunity to petition for review of the board’s rulings; CLI-09-19, 70 NRC 864 (2009)

if a previously terminated contested hearing is subsequently renoticed, a new licensing board would need to be established to preside over the renoticed litigation; LBP-09-23, 70 NRC 659 (2009)

when an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action; LBP-09-23, 70 NRC 659 (2009)

### LICENSING PROCEEDINGS

although the Commission commonly looks to Article III concepts for guidance, it is not required to automatically follow them in all respects because NRC proceedings are not subject to Article III; LBP-09-15, 70 NRC 198 (2009)

FEMA’s finding on emergency plans constitutes a rebuttable presumption on questions of adequacy and implementation capability in NRC licensing proceedings; LBP-09-19, 70 NRC 433 (2009)

See also Combined License Proceedings; Early Site Permit Proceedings; Materials License Proceedings; Materials License Renewal Proceedings; Uranium Enrichment Facility Proceedings

### LIMITED APPEARANCE STATEMENTS

any person who does not wish, or is not qualified, to become a party to a materials license proceeding may request permission to make a limited appearance pursuant to the provisions of 10 C.F.R. 2.315(a); CLI-09-15, 70 NRC 1 (2009)

### LIMITED WORK AUTHORIZATION

a site redress plan remains in effect for an early site permit applicant even if the ESP with which the LWA is issued is not referenced in a construction permit or combined license application during the period that the ESP remains valid; LBP-09-19, 70 NRC 433 (2009)

activities constituting construction, and thus requiring an LWA, are the driving of piles, subsurface preparation, placement of backfill, concrete, or permanent retaining walls within an excavation, installation of foundations, or in-place assembly, erection, fabrication, or testing that are for safety-related structures, systems, or component; LBP-09-16, 70 NRC 227 (2009); LBP-09-19, 70 NRC 433 (2009)

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although a presiding officer should issue a separate partial initial decision regarding a limited work authorization request, the board finds no practical or logical basis for separating its consideration of the adequacy of the LWA request from its determination regarding the early site permit with which it is associated; LBP-09-19, 70 NRC 433 (2009)

an early site permit applicant may request that an LWA be issued in conjunction with the early site permit; LBP-09-19, 70 NRC 433 (2009)

an initial decision directing the issuance or amendment of a LWA or an early site permit is immediately effective upon issuance unless the presiding officer finds that good cause has otherwise been shown by a party; LBP-09-19, 70 NRC 433 (2009)

an LWA authorizes activities for which either a construction permit or combined license is otherwise required, but the LWA application must include a plan for site redress that provides for restoration if the project is cancelled, the LWA is revoked, or a construction permit or COL is denied; LBP-09-19, 70 NRC 433 (2009)

any activities undertaken under an LWA are entirely at the risk of the applicant; LBP-09-19, 70 NRC 433 (2009)

applicant must submit, as part of the safety analysis report for the LWA, design information related to activities within the scope of the requested LWA; LBP-09-19, 70 NRC 433 (2009)

board authority to make findings on LWAs is discussed; LBP-09-19, 70 NRC 433 (2009)

boards are to determine whether the site redress plan will adequately redress the activities should the activities be terminated by either the holder of the LWA or by Commission denial of any corresponding early site permit or combined license; LBP-09-19, 70 NRC 433 (2009)

construction activities allowed under an LWA are discussed; LBP-09-19, 70 NRC 433 (2009)

construction activities associated with onsite emergency facilities necessary to comply with 10 C.F.R. 50.47 and 10 C.F.R. Part 50, Appendix E are included; LBP-09-19, 70 NRC 433 (2009)

if LWA activities are approved by NRC in conjunction with an early site permit, the ESP as issued shall specify those authorized activities; LBP-09-19, 70 NRC 433 (2009)

preconstruction activities that do not require NRC approval are discussed; LBP-09-19, 70 NRC 433 (2009)

when an early site permit is issued with an associated LWA, the board must find relative to the LWA that any significant adverse environmental impact resulting from activities requested under 10 C.F.R. 52.17(c) can be redressed; LBP-09-19, 70 NRC 433 (2009)

### LOCAL GOVERNMENTAL BODIES

an entity wishing to participate as a governmental body must demonstrate that it goes beyond an advisory role and exercises executive or legislative responsibilities; LBP-09-13, 70 NRC 168 (2009)

if applicant chooses to submit a complete and integrated emergency plan at the early site permit stage, applicant also is required to make a good-faith effort to obtain a certification from federal, state, and local governmental agencies with emergency planning responsibilities; LBP-09-19, 70 NRC 433 (2009)

not all entities with governmental ties are entitled to participate in licensing proceedings as local governmental bodies; LBP-09-13, 70 NRC 168 (2009)

the fact that an ancestor of a member of the Oglala Delegation of the Great Sioux Nation Treaty Council signed several treaties with the United States more than 100 years ago does not establish that the delegation is a current and official successor to the delegation that signed such treaties, or that the delegation is a local governmental entity that currently exercises executive function; LBP-09-13, 70 NRC 168 (2009)

See also Interested Governmental Entity

### LOW-INCOME POPULATIONS

to qualify as an environmental justice contention, the contention must show that the affected local population qualifies as a minority or low-income population; LBP-09-18, 70 NRC 385 (2009)

### MANDATORY HEARINGS

a board's role in an early site permit proceeding is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-09-19, 70 NRC 433 (2009)



## SUBJECT INDEX

- a decision dismissing the contested adjudication relating to a combined license has no impact on the subsequent need to conduct a mandatory hearing relating to the COL application, over which the Commission would preside; LBP-09-23, 70 NRC 659 (2009)
  - a licensing board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-09-19, 70 NRC 433 (2009)
  - early site permit applications, as partial construction permit applications, are subject to the Atomic Energy Act hearing requirement, as well as all procedural requirements in 10 C.F.R. Part 2; LBP-09-19, 70 NRC 433 (2009)
  - for purposes of the mandatory/uncontested portion of an ESP proceeding, the board takes official notice of publicly available documents associated with the Staff's safety and environmental reviews; LBP-09-19, 70 NRC 433 (2009)
  - in uncontested proceedings, licensing boards do not conduct a *de novo* review of the application; CLI-09-15, 70 NRC 1 (2009)
  - in uranium enrichment facility proceedings, a licensing board must determine in its initial decision whether the requirements of section 102(2)(A), (C), and (E) of the National Environmental Policy Act have been complied with in the proceeding; CLI-09-15, 70 NRC 1 (2009)
  - in uranium enrichment facility proceedings, licensing boards must determine whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate; CLI-09-15, 70 NRC 1 (2009)
  - licensing boards must determine whether the applicant and record of the proceeding contain sufficient information to support license issuance; CLI-09-15, 70 NRC 1 (2009)
  - matters of fact and law to be considered in a uranium enrichment facility licensing proceeding are whether the application satisfies the applicable standards in 10 C.F.R. Parts 30, 40, and 70, and whether the requirements of the National Environmental Policy Act and the NRC's implementing regulations in 10 C.F.R. Part 51 have been met; CLI-09-15, 70 NRC 1 (2009)
  - safety findings that a board must make for issuance of an early site permit are clarified; LBP-09-19, 70 NRC 433 (2009)
  - the Commission shall hold a hearing on each application under the Atomic Energy Act, 42 U.S.C. 2133 or 2134(b), for a construction permit for a facility; LBP-09-19, 70 NRC 433 (2009)
  - when an early site permit is issued with an associated limited work authorization, the board must find relative to the LWA that any significant adverse environmental impact resulting from activities requested under 10 C.F.R. 52.17(c) can be redressed; LBP-09-19, 70 NRC 433 (2009)
  - when reviewing an early site permit application in an uncontested proceeding, licensing boards are to conduct a simple sufficiency review rather than a *de novo* review on both Atomic Energy Act and National Environmental Policy Act issues; LBP-09-19, 70 NRC 433 (2009)
  - with respect to certain NEPA findings, boards in early site permit proceedings are to make independent environmental judgments, though they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-09-19, 70 NRC 433 (2009)
- MATERIAL FALSE STATEMENTS**
- a person is proscribed from deliberately submitting to the NRC information that the person knows to be incomplete or inaccurate in some respect material to the NRC; LBP-09-24, 70 NRC 676 (2009)
- MATERIAL MISREPRESENTATIONS**
- a licensee employee who contributes to submission of information to the NRC that the employee knows is not complete or accurate in some material respect places the licensee in violation; LBP-09-24, 70 NRC 676 (2009)
  - engaging in deliberate misconduct that caused inaccurate and incomplete information to be provided to the NRC concerning conditions at a reactor resulted in debarment from licensed activities for 5 years; LBP-09-11, 70 NRC 151 (2009)
  - ethics rules in most jurisdictions require, and the board expects, that counsel will promptly correct statements of material fact that are no longer true; LBP-09-28, 70 NRC 1019 (2009)
  - for the decisions of the agency's dedicated regulators to be effective in protecting the public health and safety, there is no room for the submission of falsified information; LBP-09-24, 70 NRC 676 (2009)
  - information submitted to an NRC inspector that was not complete and accurate in all material respects is a violation; LBP-09-12, 70 NRC 159 (2009)

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### MATERIALITY

- a genuine material dispute is one that could lead to a different conclusion on potential cost-beneficial severe accident mitigation alternatives; LBP-09-26, 70 NRC 939 (2009)
- an admissible contention must show that the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-26, 70 NRC 939 (2009)
- by complying with the six contention requirements, an admissible contention must raise an issue that is both within the scope of the proceeding (normally defined by the hearing notice) and material to the findings the NRC must make to support the action involved; LBP-09-18, 70 NRC 385 (2009)
- if a contention makes a *prima facie* allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue; LBP-09-16, 70 NRC 227 (2009)
- petitioner must 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; LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-25, 70 NRC 867 (2009)
- petitioner must show that the subject matter of the contention would impact the grant or denial of the license application at issue in the proceeding; CLI-09-15, 70 NRC 1 (2009); LBP-09-26, 70 NRC 939 (2009); LBP-09-27, 70 NRC 992 (2009)
- petitioner must show why the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-27, 70 NRC 992 (2009)
- section 2.309(f)(1)(vi) is not a second hurdle of materiality that an intervenor must meet, but rather requires that intervenor identify the specific parts of the combined license application that it disputes and show that resolution of those disputes is material to the licensing decision; LBP-09-27, 70 NRC 992 (2009)
- the decision as to whether an alleged environmental impact or alternative is significant or reasonable is the merits of a NEPA contention and should not be adjudicated at the contention admissibility stage under the guise of materiality or scope; LBP-09-10, 70 NRC 51 (2009)
- the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the combined license; LBP-09-15, 70 NRC 198 (2009)
- there must be some significant link between the deficiency claimed in a contention and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment; LBP-09-26, 70 NRC 939 (2009); LBP-09-27, 70 NRC 992 (2009)

### MATERIALS LICENSE APPLICATIONS

- an environmental report and an environmental impact statement must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 1 (2009)

### MATERIALS LICENSE PROCEEDINGS

- a state, county, municipality, federally recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as a party in a uranium enrichment facility proceeding; CLI-09-15, 70 NRC 1 (2009)

### MATERIALS LICENSE RENEWAL

- when a renewal application is timely filed, the license is automatically extended by operation of law until final agency action is taken on the renewal request; LBP-09-13, 70 NRC 168 (2009)

### MATERIALS LICENSE RENEWAL PROCEEDINGS

- although a board in another materials license renewal proceeding allowed an Indian organization to participate in that proceeding as an interested Indian tribe under 10 C.F.R. 2.315(c), that ruling is not binding on other boards; LBP-09-13, 70 NRC 168 (2009)
- in source materials cases, petitioner has the burden to show a specific and plausible means of how proposed license activities may affect him or her; LBP-09-13, 70 NRC 168 (2009)
- standing based on proximity does not apply in source materials cases; LBP-09-13, 70 NRC 168 (2009)

### MATERIALS LICENSES

- creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 1 (2009)
- Part 70 financial criteria can be met by conditioning the license to require funding commitments to be in place prior to construction and operation; CLI-09-15, 70 NRC 1 (2009)

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### METAL FATIGUE

if the cumulative usage factor environmental analysis produces a value of greater than unity, then the analysis indicates that the component would be likely to develop metal fatigue cracks that might affect their function during the 20-year license renewal period of extended operation, and thus requires an aging management program; LBP-09-9, 70 NRC 41 (2009)

new contention on the adequacy of consideration of the dissolved oxygen factor in the cumulative usage factor environmental analysis and use of inappropriate heat transfer equations was previously litigated and resolved and thus is not admissible; LBP-09-9, 70 NRC 41 (2009)

### METEOROLOGICAL FACTORS

the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)

### MINING ACTIVITIES

a contention concerning environmental impacts of offsite mining is rejected because petitioner failed to support the allegations with information indicating that such impacts are even plausibly significant; LBP-09-10, 70 NRC 51 (2009)

controls other countries may impose on mining and milling, and the impacts of such activities, are outside the scope of a combined license proceeding; LBP-09-17, 70 NRC 311 (2009)

if the environmental impact of mining activities is potentially significant, then the failure of the environmental report for a combined license application to disclose the location of the offsite mine does not immunize it from being the subject of a legitimate contention; LBP-09-10, 70 NRC 51 (2009)

### MINORITIES

to qualify as an environmental justice contention, the contention must show that the affected local population qualifies as a minority or low-income population; LBP-09-18, 70 NRC 385 (2009)

### MISCONDUCT

See Deliberate Misconduct; Material Misrepresentations

### MODIFICATION ORDER

intervention petitioners who think an order modifying a license should not be sustained, but might want further corrective measures, are precluded from intervention; LBP-09-20, 70 NRC 565 (2009)

the Commission's power to define the scope of a proceeding will lead to the denial of intervention when the Commission amends a license to require additional or better safety measures; LBP-09-20, 70 NRC 565 (2009)

twenty days in which to request a hearing is the minimum required by the agency's regulations for orders issued under 10 C.F.R. 2.202(a); LBP-09-20, 70 NRC 565 (2009)

when issuing an order modifying a license, the agency is required to inform the licensee or any other person adversely affected by the order of his or her right, within 20 days of the date of the order, or such other time as may be specified in the order, to demand a hearing; LBP-09-20, 70 NRC 565 (2009)

where the notice of hearing limits the scope to whether the order should be sustained, petitioner's sole remedy is rescission of the order; LBP-09-20, 70 NRC 565 (2009)

with respect to orders modifying a license, petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing; LBP-09-20, 70 NRC 565 (2009)

### MOOTNESS

a contention alleging that a license application omits material information becomes moot when the applicant cures the omission; LBP-09-15, 70 NRC 198 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-27, 70 NRC 992 (2009)

although the Commission is not strictly bound by the mootness doctrine, the agency's adjudicatory tribunals have generally adhered to the principle; LBP-09-15, 70 NRC 198 (2009)

an appeal is moot where no effective relief can be granted to petitioners even if they were to prevail on their claim; LBP-09-14, 70 NRC 193 (2009)

because NRC is not subject to the jurisdictional limitations placed on the federal courts by the case or controversy provision in Article III of the Constitution, there is no insuperable barrier to its rendition of an advisory opinion on issues that have been indisputably mooted by events occurring subsequent to a licensing board decision; LBP-09-15, 70 NRC 198 (2009)

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boards may consider the merits of a contention that has become moot to the extent doing so will promote the fair and expeditious resolution of the case and there are no significant countervailing concerns; LBP-09-15, 70 NRC 198 (2009)

despite not being constitutionally limited by the case or controversy requirement of Article III, common sense counsels against proceeding with an adjudication where no effective relief can be granted; LBP-09-14, 70 NRC 193 (2009)

dismissal of one contention on mootness grounds would not terminate a case where the board had expressly retained jurisdiction to decide whether to admit another contention; LBP-09-27, 70 NRC 992 (2009)

the case or controversy jurisdictional limitation restricts the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; LBP-09-14, 70 NRC 193 (2009)

the executive branch is not bound by the same constitutional constraints as Article III courts, but it has consistently followed the same principles of declining to consider moot cases, in the interest of administrative economy; LBP-09-14, 70 NRC 193 (2009)

the mootness doctrine derives from the Constitution's limitation of federal courts' jurisdiction to cases or controversies; LBP-09-15, 70 NRC 198 (2009)

when a claim becomes moot, a decision on the merits may be appropriate if the same basic dispute is likely to recur in the future, unless it seems sufficient to await the event or better to defer to another court; LBP-09-15, 70 NRC 198 (2009)

when a claim becomes moot in federal court, the court loses jurisdiction to decide the merits of that claim; LBP-09-15, 70 NRC 198 (2009)

when a federal court dismisses a claim as moot and avoids any further consideration of the merits of that claim, it does so because the claim no longer satisfies the case or controversy requirement of Article III; LBP-09-15, 70 NRC 198 (2009)

### MOTIONS

if the attorney or representative of a party is contacted pursuant to the consultation requirement, then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion; LBP-09-22, 70 NRC 640 (2009)

it is inconsistent with dispute avoidance/resolution purposes, and thus insufficient, for a contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that it takes no position on the motion (or issues) and that it reserves the right to file a response to the motion when it is filed; LBP-09-22, 70 NRC 640 (2009)

motions will be rejected if they do not include certification by the attorney or representative of the moving party that they have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in the motion, and to resolve those issues; LBP-09-22, 70 NRC 640 (2009)

no later than 30 days after service of materials, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plans; LBP-09-22, 70 NRC 640 (2009)

to be sincere, movant should contact other parties sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question; LBP-09-22, 70 NRC 640 (2009)

### MOTIONS TO COMPEL

challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected shall be filed within 10 days after the occurrence or circumstance from which the motion arises; LBP-09-22, 70 NRC 640 (2009)

### NATIONAL ENVIRONMENTAL POLICY ACT

a rule of reason governs the agency's duty to identify and consider all reasonable alternatives; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

abdicated water quality effects entirely to other agencies' certifications subverts the special purpose of NEPA; LBP-09-16, 70 NRC 227 (2009)

accuracy of an applicant's cost estimate is not material to the findings the NRC must make under NEPA; LBP-09-16, 70 NRC 227 (2009)

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- agencies are required to consider measures to mitigate environmental impacts; LBP-09-19, 70 NRC 433 (2009)
- agencies are required to exercise a degree of skepticism in dealing with self-serving statements from the prime beneficiary of a project and to look at the general goal of the project, rather than only those alternatives by which a particular applicant can reach its own specific goals; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)
- agencies are required to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources and include a detailed statement of the alternatives to the proposed action in its environmental impact statement; LBP-09-10, 70 NRC 51 (2009)
- although analysis of aircraft impact is required, reactors whose construction permits were issued prior to July 13, 2009, are excluded, and the rule is not NEPA-based; LBP-09-26, 70 NRC 939 (2009)
- although applicant's goals are given substantial weight, applicant is not allowed to define its goals so narrowly as to unreasonably circumscribe the range of alternatives that must be considered; LBP-09-17, 70 NRC 311 (2009)
- although construction of the provisions of 10 C.F.R. Part 51 mandating the contents of applicant's environmental report may be informed by consideration of general NEPA principles, the Commission must look to the wording of the Part 51 regulations to determine if an ER is satisfactory or deficient; LBP-09-10, 70 NRC 51 (2009)
- although the methodology is available to provide the required analysis, neither NEPA nor NRC regulations require that the analysis under 10 C.F.R. 51.45(c) be performed using that methodology; LBP-09-26, 70 NRC 939 (2009)
- an agency cannot redefine the applicant's goals, and the EIS alternatives analysis should be based around the applicant's goals, including its economic goals; LBP-09-17, 70 NRC 311 (2009)
- an environmental impact statement must address alternatives to the proposed action; LBP-09-19, 70 NRC 433 (2009)
- an environmental impact statement must provide a detailed statement concerning the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; LBP-09-16, 70 NRC 227 (2009)
- an environmental report and an environmental impact statement for a materials license must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 1 (2009)
- an otherwise reasonable alternative will not be excluded from discussion in an environmental impact statement solely on the ground that it is not within the jurisdiction of the NRC; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)
- applicant is only required to provide an analysis that considers and balances alternatives available for reducing or avoiding adverse environmental effects; LBP-09-26, 70 NRC 939 (2009)
- applicant may not define the objectives of its action in terms so unreasonably narrow that only one alternative would accomplish the applicant's goals because this would make the agency's EIS alternatives analysis a foreordained formality; LBP-09-10, 70 NRC 51 (2009)
- applicants are not required to eliminate adverse environmental impacts; LBP-09-16, 70 NRC 227 (2009)
- applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed in an environmental report; CLI-09-20, 70 NRC 911 (2009)
- applicant's environmental report is required to analyze the alternatives available for reducing or avoiding adverse environmental effects; LBP-09-10, 70 NRC 51 (2009)
- applicants or licensees are not required to consider terrorist attacks as part of their environmental reviews; LBP-09-26, 70 NRC 939 (2009)
- because NEPA is a procedural statute, petitioners need not show that favorable rulings on their NEPA contentions will require denial of the license, but rather that procedures intended for protection of their members' concrete interests will be observed; LBP-09-16, 70 NRC 227 (2009)
- because the environmental report is the only environmental document available when NRC issues its notice of opportunity to request a hearing, all initial contentions necessarily focus on the adequacy of

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the applicant's ER, but the public will have a new opportunity to file environmental contentions when the NRC Staff issues the environmental impact statement or environmental analysis; LBP-09-10, 70 NRC 51 (2009)

courts have consistently interpreted NEPA as a procedural statute that requires disclosure and analysis of environmental impacts, not one that imposes substantive obligations for the protection of natural resources; LBP-09-16, 70 NRC 227 (2009)

environmental reports and environmental impact statements must include an assessment of all environmental impacts and alternatives, even though NRC has no jurisdiction to regulate such impacts or jurisdiction to impose such alternatives; LBP-09-10, 70 NRC 51 (2009)

federal agencies are required to take a hard look at the environmental consequences of their actions; LBP-09-16, 70 NRC 227 (2009)

findings that a board must make to authorize issuance of an early site permit are described; LBP-09-19, 70 NRC 433 (2009)

focus of this statute is on assessment, not regulation; LBP-09-10, 70 NRC 51 (2009)

for licensing decisions involving facilities located within the jurisdictional boundaries of the U.S. Court of Appeals for the Ninth Circuit, the NRC Staff will consider, as part of its NEPA analysis, the potential environmental consequences, if any, of a terrorist attack on the proposed facility; CLI-09-15, 70 NRC 1 (2009)

goals of a project's sponsor are given substantial weight in determining whether a NEPA alternative is reasonable; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

if a NEPA contention alleges that impacts or alternatives that are patently outside the realm of reason must be considered, then the contention should be denied for failure to demonstrate that the issue raised is within the legitimate scope of NEPA; LBP-09-10, 70 NRC 51 (2009)

if the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law; LBP-09-26, 70 NRC 939 (2009)

if the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-09-16, 70 NRC 227 (2009)

if the proposed siting of a plant slated for an early site permit involves unresolved conflicts concerning alternative uses of available resources, then this discussion must be sufficiently complete to allow the Staff to develop and to explore appropriate alternatives to the ESP pursuant to NEPA § 102(2)(E); LBP-09-19, 70 NRC 433 (2009)

in implementing NEPA, the NRC uses certain of the definitions provided in Council on Environmental Quality regulations; LBP-09-19, 70 NRC 433 (2009)

in ruling on petitioner's standing, boards should consider the nature of petitioner's right under the Atomic Energy Act or NEPA to be made a party to the proceeding, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest; LBP-09-13, 70 NRC 168 (2009)

in uranium enrichment facility proceedings, a licensing board must determine in its initial decision, whether the requirements of section 102(2)(A), (C), and (E) have been complied with; CLI-09-15, 70 NRC 1 (2009)

licensing boards are required to apply the Commission's directive that outside the Ninth Circuit, NEPA does not require the evaluation of the impact of terrorist attacks by aircraft or other means; LBP-09-10, 70 NRC 51 (2009); LBP-09-18, 70 NRC 385 (2009)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-09-26, 70 NRC 939 (2009)

NEPA is the only legal grounds for an admissible contention relating to environmental justice issues; LBP-09-18, 70 NRC 385 (2009)

NEPA itself does not mandate particular results, but simply prescribes the necessary process; LBP-09-25, 70 NRC 867 (2009)

nothing in NEPA shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to

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impose any effluent limitation other than those set by the Environmental Protection Agency or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 867 (2009)

NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the permits and licenses issued by other governmental agencies; LBP-09-21, 70 NRC 581 (2009)

NRC is required to consider measures to mitigate the environmental impacts of the project; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009)

on baseline issues in early site permit cases, boards must reach their own independent determination, but should do so without second-guessing underlying technical or factual findings by the NRC Staff; LBP-09-19, 70 NRC 433 (2009)

reasonable alternatives under NEPA do not include alternatives that are impractical, that present unique problems, or that cause extraordinary costs; LBP-09-16, 70 NRC 227 (2009)

severe accident mitigation alternatives analysis must be site specific and given careful consideration in order to comply with environmental requirements; LBP-09-10, 70 NRC 51 (2009)

the alternatives analysis is the heart of the environmental impact statement; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)

the alternatives discussion in the environmental report or environmental impact statement need not include every possible alternative, but every reasonable alternative; LBP-09-16, 70 NRC 227 (2009); LBP-09-21, 70 NRC 581 (2009)

the Commission may have more to offer regarding the need for a NEPA carbon footprint analysis in new reactor licensing proceedings; LBP-09-19, 70 NRC 433 (2009)

the concept of alternatives must be bounded by some notion of feasibility; LBP-09-17, 70 NRC 311 (2009)

the decision as to whether an alleged environmental impact or alternative is significant or reasonable is the merits of a NEPA contention and should not be adjudicated at the contention admissibility stage under the guise of materiality or scope; LBP-09-10, 70 NRC 51 (2009)

the environmental baseline reflects the effects of all currently existing pollution sources in the relevant watershed, including contributions of all nuclear power plants, and petitioners failed to provide information indicating that this aggregate analysis was insufficient; LBP-09-16, 70 NRC 227 (2009)

the environmental report is required to address a list of environmental considerations that correspond to the environmental considerations that NEPA § 102(2)(C)(i)-(v) requires the agency to address in the environmental impact statement; LBP-09-16, 70 NRC 227 (2009)

the environmental report's impact analysis must include sufficient data and the alternatives analysis must be sufficiently complete to aid the Commission in preparing the environmental impact statement; LBP-09-10, 70 NRC 51 (2009)

the requirement to discuss alternatives in the environmental report parallels NEPA's requirement that an environmental impact statement provide a detailed statement of reasonable alternatives to a proposed action; LBP-09-16, 70 NRC 227 (2009)

the requirements of NEPA and, by extension, NRC's regulations implementing NEPA are subject to a rule of reason, and only reasonably foreseeable environmental impacts must be addressed; LBP-09-26, 70 NRC 939 (2009)

the statute applies to agencies of the federal government, not to private parties such as applicants for NRC licenses; LBP-09-10, 70 NRC 51 (2009)

the statute has only a limited role to play in interpreting 10 C.F.R. Part 51's requirements for the environmental report; LBP-09-16, 70 NRC 227 (2009)

uncertainties are dealt with by inclusion in an environmental impact statement of a summary of existing credible scientific evidence relevant to evaluating the reasonably foreseeable significant adverse impacts regarding those events with potential catastrophic consequences even if their probability is low; LBP-09-26, 70 NRC 939 (2009)

under NEPA the Commission looks to the reasonably foreseeable impacts of simply licensing the facility, not the reasonably foreseeable effects of a successful terrorist attack; LBP-09-26, 70 NRC 939 (2009)

with respect to certain NEPA findings, boards in early site permit proceedings are to make independent environmental judgments, though they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-09-19, 70 NRC 433 (2009)

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### NATIONAL HISTORIC PRESERVATION ACT

only Indian tribes that appear on the Department of the Interior's list of recognized tribes have consultation rights under the National Historic Preservation Act; LBP-09-13, 70 NRC 168 (2009)

### NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

the Commission has previously rejected claims that NRC regulations require discharge permits of their licensees; LBP-09-25, 70 NRC 867 (2009)

### NATIVE AMERICANS

a "federally recognized Indian tribe" is one that is included on the Bureau of Indian Affairs' list of federally recognized Indian Tribes published in the *Federal Register*; LBP-09-13, 70 NRC 168 (2009)

a Native American group that has failed to establish that it is a federally recognized Indian tribe is denied standing based on its tribal status; LBP-09-13, 70 NRC 168 (2009)

although a board in another materials license renewal proceeding allowed an Indian organization to participate in that proceeding as an interested Indian Tribe under 10 C.F.R. 2.315(c), that ruling is not binding on other boards; LBP-09-13, 70 NRC 168 (2009)

Congress's plenary power with respect to Native Americans entitles it to abrogate treaties with Native American nations; LBP-09-13, 70 NRC 168 (2009)

federal recognition by the Bureau of Indian Affairs is a formal political act confirming a tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government; LBP-09-13, 70 NRC 168 (2009)

federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-09-15, 70 NRC 1 (2009)

"Indian tribe" is defined as an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994; LBP-09-13, 70 NRC 168 (2009)

membership of a petitioning Indian group must be composed principally of persons who are not members of any other acknowledged North American Indian tribe; LBP-09-13, 70 NRC 168 (2009)

only Indian tribes that appear on the Department of the Interior's list of recognized tribes have consultation rights under the National Historic Preservation Act; LBP-09-13, 70 NRC 168 (2009)

plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government; LBP-09-13, 70 NRC 168 (2009)

the fact that an ancestor of a member of the Oglala Delegation of the Great Sioux Nation Treaty Council signed several treaties with the United States more than 100 years ago does not establish that the delegation is a current and official successor of the delegation that signed such treaties, or that the delegation is a local governmental entity that currently exercises executive or; LBP-09-13, 70 NRC 168 (2009)

the Trust Responsibility requires federal agencies to take actions or refrain from taking actions in fulfillment of Congress's duty to protect the Indians; LBP-09-13, 70 NRC 168 (2009)

the United States is no longer bound by the terms of the 1868 Fort Laramie Treaty; LBP-09-13, 70 NRC 168 (2009)

to qualify for recognition on the Bureau of Indian Affairs' list as an Indian tribe, a petitioning group must establish that it has historically been recognized as an American Indian entity since 1900, that it is composed of a cohesive group of individuals that share a distinct community and an autonomous government, and that its members are descended from a historic Indian tribe or tribes; LBP-09-13, 70 NRC 168 (2009)

### NEED FOR POWER

NRC must analyze the need for additional power when it relies upon a benefit in performing the balancing of benefits and costs; LBP-09-16, 70 NRC 227 (2009)

### NEED TO KNOW

content of a statement that explains an individual's "need to know" safeguards information is described; CLI-09-15, 70 NRC 1 (2009)

### NEGLIGENCE

a "negligent defendant" is one who should have had suspicions but, in fact, did not; LBP-09-24, 70 NRC 676 (2009)



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- the danger of instruction to juries on deliberate ignorance or willful blindness in an inappropriate case is that juries will convict on a basis akin to a standard of negligence; LBP-09-24, 70 NRC 676 (2009)
- NOTICE OF HEARING**
- agency notices must provide at least 15 days before the opportunity for a hearing is forfeited unless a shorter period is reasonable; LBP-09-20, 70 NRC 565 (2009)
- an opportunity for hearing will be provided in the *Federal Register* notice of fuel loading, regarding whether inspections, tests, or analyses that have not been found to have been met under 10 C.F.R. 52.97(a)(2) prior to issuance of the combined license; LBP-09-19, 70 NRC 433 (2009)
- if applicant requests a Commission finding on the completion of inspections, tests, analyses, and acceptance criteria needed for issuance of a combined license, the Commission is required to identify these ITAAC in the notice of hearing published in the *Federal Register* for the COL proceeding; LBP-09-19, 70 NRC 433 (2009)
- the scope of a proceeding is defined in the Commission's initial hearing notice and order referring the proceeding to the licensing board; LBP-09-25, 70 NRC 867 (2009); LBP-09-26, 70 NRC 939 (2009)
- when a hearing notice has been issued, withdrawal of an application would be subject to such terms as the presiding officer may prescribe; LBP-09-23, 70 NRC 659 (2009)
- when issuing an order modifying a license, the agency is required to inform the licensee or any other person adversely affected by the order of his or her right, within 20 days of the date of the order, or such other time as may be specified in the order, to demand a hearing; LBP-09-20, 70 NRC 565 (2009)
- where the notice of hearing limits the scope to whether the order should be sustained, petitioner's sole remedy is rescission of the order; LBP-09-20, 70 NRC 565 (2009)
- with respect to orders modifying a license, petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing; LBP-09-20, 70 NRC 565 (2009)
- NOTIFICATION**
- a hearing request is timely when the petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice; LBP-09-20, 70 NRC 565 (2009)
- at appropriate intervals during the time between issuance of a combined license and the last date for submission of requests for hearing under 10 C.F.R. 52.103(a), NRC shall publish notices in the *Federal Register* of NRC Staff's determination of the successful completion of inspections, tests, and analyses; LBP-09-19, 70 NRC 433 (2009)
- emergency action levels are the criteria used to determine the notifications that need to be made to federal, state, and local authorities and to determine the appropriate protective responses to a particular set of emergency conditions; LBP-09-19, 70 NRC 433 (2009)
- even in the absence of constructive notice, the possibility remains that a petitioner had actual notice of the right to request a hearing; LBP-09-20, 70 NRC 565 (2009)
- prior to operation under a combined license, a notice of intended operation will be published in the *Federal Register* not less than 180 days before the date scheduled for initial loading of fuel; LBP-09-19, 70 NRC 433 (2009)
- publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice; LBP-09-20, 70 NRC 565 (2009)
- See also Emergency Notification System
- NRC GUIDANCE DOCUMENTS**
- although the severe accident mitigation alternatives methodology is available to provide the required analysis, neither NEPA nor NRC regulations require that the analysis under 10 C.F.R. 51.45(c) be performed using that methodology; LBP-09-26, 70 NRC 939 (2009)
- NRC provides detailed guidance for Staff personnel reviewing the safety aspects of early site permit applications; LBP-09-19, 70 NRC 433 (2009)
- NUREGs are guidance documents, with no binding effect, but are entitled to special weight, such that they are appropriate to consider in evaluating contentions; LBP-09-17, 70 NRC 311 (2009)
- NRC REVIEW**
- the agency's environmental review need only account for those impacts that have some likelihood of occurring or are reasonably foreseeable; LBP-09-26, 70 NRC 939 (2009)

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### NRC STAFF

in Subpart L proceedings, Staff must produce a hearing file and make it available to all parties; LBP-09-22, 70 NRC 640 (2009)

Staff has a continuing duty to update the hearing file; LBP-09-22, 70 NRC 640 (2009)

Staff's role in an enforcement proceeding is akin to that of a prosecutor, and it has the burden to prove its allegations by a preponderance of the reliable, probative, and substantial evidence; LBP-09-24, 70 NRC 676 (2009)

### NRC STAFF REVIEW

a board's role in an early site permit proceeding is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-09-19, 70 NRC 433 (2009)

although the draft environmental impact statement may rely in part on applicant's environmental report, Staff must independently evaluate and be responsible for the reliability of all information used in the DEIS; LBP-09-19, 70 NRC 433 (2009)

analysis of compliance with section 103d of the Atomic Energy Act is a function performed by the NRC Staff as part of its evaluation of the combined license application; CLI-09-20, 70 NRC 911 (2009)

at appropriate intervals during the time between issuance of a combined license and the last date for submission of requests for hearing under section 52.103(a), NRC shall publish notices in the *Federal Register* of NRC Staff's determination of the successful completion of inspections, tests, and analyses; LBP-09-19, 70 NRC 433 (2009)

factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)

if applicant submits a complete and integrated emergency plan in conjunction with an early site permit application, NRC Staff must find that the emergency plans provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-09-19, 70 NRC 433 (2009)

in a mandatory hearing, a licensing board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-09-19, 70 NRC 433 (2009)

in evaluating early site permit applications, where detailed design information is not available, the Commission may defer resolution of severe accident mitigation alternatives until the construction permit or combined license stage; LBP-09-19, 70 NRC 433 (2009)

in its review of early site permit applications, Staff must consider physical characteristics of the site, specifically noting that factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)

in its review of emergency plans, NRC Staff must take into account FEMA's findings; LBP-09-19, 70 NRC 433 (2009)

NRC provides detailed guidance for Staff personnel reviewing the safety aspects of early site permit applications; LBP-09-19, 70 NRC 433 (2009)

on baseline NEPA issues in early site permit cases, boards must reach their own independent determination, but should do so without second-guessing underlying technical or factual findings by the NRC Staff; LBP-09-19, 70 NRC 433 (2009)

review of an integrated emergency plan focuses primarily on the applicant-prepared onsite provisions of the plans, which include the evacuation time estimate provided by applicant, and the inspections, tests, analyses, and acceptance criteria; LBP-09-19, 70 NRC 433 (2009)

Staff is required to prepare an environmental impact statement in connection with issuance of an early site permit; LBP-09-19, 70 NRC 433 (2009)

Staff is to review early site permit applications according to the applicable standards set out in 10 C.F.R. Part 50 and its appendices and 10 C.F.R. Part 100; LBP-09-19, 70 NRC 433 (2009)

the draft environmental impact statement is distributed for public comment and, based on the comments received, a review of information provided by the applicant, and supplemental independent information and analysis, the Staff prepares and issues a final EIS; LBP-09-19, 70 NRC 433 (2009)

## SUBJECT INDEX

where the final environmental impact statement discussion of alternative sites was insufficient, the board independently reviewed the record on greenfield, competitors' brownfield, noncompetitors' brownfield, and applicant's other nuclear sites to conclude that the Staff's underlying alternative site review was adequate; LBP-09-19, 70 NRC 433 (2009)

with regard to alternative sites for an early site permit, NRC Staff must evaluate both the process (i.e., methodology) used by the applicant and the reasonableness of the product (e.g., potential sites) identified by that process; LBP-09-19, 70 NRC 433 (2009)

### NUCLEAR POWER PLANTS

existence of another independent nuclear power plant within the 10-mile-radius emergency planning zone of a proposed new nuclear power plant is a significant factor for purposes of emergency planning for the new reactor; LBP-09-10, 70 NRC 51 (2009)

### NUCLEAR REGULATORY COMMISSION

NEPA applies only to NRC and not to the applicant; LBP-09-10, 70 NRC 51 (2009)

### NUCLEAR REGULATORY COMMISSION, AUTHORITY

an administrative agency may establish administrative standing criteria that are less rigorous than those for judicial standing; CLI-09-20, 70 NRC 911 (2009)

an agency cannot redefine the applicant's goals, and the EIS alternatives analysis should be based around the applicant's goals, including its economic goals; LBP-09-17, 70 NRC 311 (2009)

even if NRC's proximity presumption is viewed as more lenient than judicial standing requirements, NRC may choose to retain it; CLI-09-20, 70 NRC 911 (2009)

given that the board recently issued an initial decision resolving all contentions, the Commission can discern no compelling reason to take the extraordinary action of stepping in at this late stage to take up the case, but parties will have the opportunity to petition for review of the board's rulings; CLI-09-19, 70 NRC 864 (2009)

nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to impose any effluent limitation other than those set by the Environmental Protection Agency or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 867 (2009)

the Commission retains its inherent supervisory authority over the uranium enrichment facility proceeding to provide additional guidance to the licensing board and participants and to resolve any matter in controversy itself; CLI-09-15, 70 NRC 1 (2009)

the Commission, rather than petitioner, holds the authority to define the scope of a proceeding; LBP-09-20, 70 NRC 565 (2009)

when water quality decisions have been made by a state pursuant to the Clean Water Act and these decisions are raised in NRC licensing proceedings, the NRC is bound to take the Environmental Protection Agency's considered decisions at face value; LBP-09-25, 70 NRC 867 (2009)

### NUCLEAR REGULATORY COMMISSION, JURISDICTION

although the Commission commonly looks to Article III concepts for guidance, it is not required to automatically follow them in all respects because NRC proceedings are not subject to Article III; LBP-09-15, 70 NRC 198 (2009)

an otherwise reasonable alternative will not be excluded from discussion in the environmental impact statement solely on the ground that it is not within the jurisdiction of the NRC; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)

because NRC is not subject to the jurisdictional limitations placed on the federal courts by the case or controversy provision in Article III of the Constitution, there is no insuperable barrier to its rendition of an advisory opinion on issues that have been indisputably mooted by events occurring subsequent to a licensing board decision; LBP-09-15, 70 NRC 198 (2009)

environmental reports and environmental impact statements must include an assessment of all environmental impacts and alternatives, even though NRC has no jurisdiction to regulate such impacts or jurisdiction to impose such alternatives; LBP-09-10, 70 NRC 51 (2009)

the fact that disposal of dredged or fill material in wetlands is regulated by the Environmental Protection Agency and the U.S. Army Corps of Engineers does not render a contention inadmissible; LBP-09-10, 70 NRC 51 (2009)

## SUBJECT INDEX

### OBJECTIONS

it is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-09-30, 70 NRC 1039 (2009)

unless and until a document or information is proffered into evidence, there is no basis for a party to object that the information it received in a mandatory disclosure was unreliable or otherwise not admissible as evidence; LBP-09-30, 70 NRC 1039 (2009)

### OFFICIAL NOTICE

for purposes of the mandatory/uncontested portion of an ESP proceeding, the board takes official notice of publicly available documents associated with the Staff's safety and environmental reviews; LBP-09-19, 70 NRC 433 (2009)

### OPERATING LICENSE APPLICATIONS

although analysis of aircraft impact is required, reactors whose construction permits were issued prior to July 13, 2009, are excluded, and the rule is not NEPA-based; LBP-09-26, 70 NRC 939 (2009)

applicant must submit a supplement to its environmental report at the operating license stage that discusses the same matters described in sections 51.45, 51.51, and 51.52, which would have been initially discussed in the environmental report at the construction permit stage, but only to the extent that those matters differ from those discussed or reflect new information; LBP-09-26, 70 NRC 939 (2009)

applicant must list all federal permits, licenses, approvals, and other entitlements that must be obtained in connection with the issuance of an operating license for a second nuclear reactor and adequately discuss the status of its compliance with them; LBP-09-26, 70 NRC 939 (2009)

### OPERATING LICENSES

licensee remains authorized to own and possess the facility even after the operating license expires; LBP-09-17, 70 NRC 311 (2009)

### ORDER

See Confirmatory Order; Enforcement Orders; Licensing Board Orders; Modification Order

### OWNERSHIP

See Foreign Ownership; Transfer of Ownership

### PARTIAL INITIAL DECISIONS

although a presiding officer should issue a separate partial initial decision regarding a limited work authorization request, the board finds no practical or logical basis for separating its consideration of the adequacy of the LWA request from its determination regarding the early site permit with which it is associated; LBP-09-19, 70 NRC 433 (2009)

### PARTIES

a "potential party" is any person who intends or may intend to participate as a party by demonstrating standing and filing an admissible contention under 10 C.F.R. 2.309; CLI-09-15, 70 NRC 1 (2009)

parties and NRC Staff must provide a list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents; LBP-09-22, 70 NRC 640 (2009)

parties and the NRC Staff have a continuing duty to update their mandatory disclosures; LBP-09-22, 70 NRC 640 (2009)

### PENALTIES

engaging in deliberate misconduct that caused inaccurate and incomplete information to be provided to the NRC concerning conditions at a reactor resulted in debarment from licensed activities for 5 years; LBP-09-11, 70 NRC 151 (2009)

### PERFORMANCE ASSESSMENT

a legal issue contention raises a genuine dispute with the application, because it challenges DOE's performance assessment for the post-10,000-year period; LBP-09-29, 70 NRC 1028 (2009)

contention that the high-level waste application inadequately addresses generalized corrosion because it relies on flawed experimental data raises a genuine, material dispute with the application by pointing to specific sections that allegedly fail to comply with the NRC's requirements for conducting a post-closure performance assessment; LBP-09-29, 70 NRC 1028 (2009)

## SUBJECT INDEX

### PERMIT CONDITIONS

any imposed conditions that are not met before a combined license referencing the early site permit is issued will attach to the COL; LBP-09-19, 70 NRC 433 (2009)

### PERMITS

an operating license application must list all federal permits, licenses, approvals, and other entitlements that must be obtained in connection with the issuance of an operating license for a second nuclear reactor and adequately discuss the status of its compliance with them; LBP-09-26, 70 NRC 939 (2009)  
in the context of NEPA, NRC is obligated to study matters that may be far afield of its primary mission, including the environmental impacts related to the permits and licenses issued by other governmental agencies; LBP-09-21, 70 NRC 581 (2009)

whether other permits may be required from other agencies is outside the scope of NRC proceedings, and those concerns are properly raised before those respective permitting authorities; LBP-09-21, 70 NRC 581 (2009)

See also Construction Permits; Early Site Permits

### PLEADINGS

more than mere notice pleading, which is a broad standard requiring only a short and plain statement of the claim, is required for contention admission; LBP-09-17, 70 NRC 311 (2009)

### POLICY

an exception to the application of collateral estoppel occurs when broad public policy considerations or special public interest factors are involved such that an agency's need for flexibility outweighs the reasons underlying this repose doctrine so as to favor relitigation of a particular issue; LBP-09-24, 70 NRC 676 (2009)

NRC's adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction that regulatory policy should take; LBP-09-26, 70 NRC 939 (2009)

### POTASSIUM IODIDE

distribution beyond the 10-mile emergency planning zone is not necessary; LBP-09-16, 70 NRC 227 (2009)

### PRECEDENTIAL EFFECT

a standing ruling in one proceeding is not dispositive of a determination in another proceeding with the same petitioner because the ruling was not the subject of appellate review; LBP-09-18, 70 NRC 385 (2009)

although a board in another materials license renewal proceeding allowed an Indian organization to participate in that proceeding as an interested Indian tribe under 10 C.F.R. 2.315(c), that ruling is not binding on other boards; LBP-09-13, 70 NRC 168 (2009)

licensing board decisions have no precedential effect beyond the immediate proceeding in which they were issued; LBP-09-15, 70 NRC 198 (2009)

### PREJUDICE

where the impact of delay is a concern, the desirability of avoiding any further delay in reaching a final merits determination can be a key discretionary factor counseling nonreliance upon the collateral estoppel principle even if that doctrine otherwise appears applicable; LBP-09-24, 70 NRC 676 (2009)

### PRESIDING OFFICER, AUTHORITY

although a presiding officer should issue a separate partial initial decision regarding a limited work authorization request, the board finds no practical or logical basis for separating its consideration of the adequacy of the LWA request from its determination regarding the early site permit with which it is associated; LBP-09-19, 70 NRC 433 (2009)

when a hearing notice has been issued, withdrawal of an application would be subject to such terms as the presiding officer may prescribe; LBP-09-23, 70 NRC 659 (2009)

### PRIVILEGE LOG

parties and NRC Staff must provide a list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents; LBP-09-22, 70 NRC 640 (2009)

### PRIVILEGED INFORMATION

motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected shall be filed within

## SUBJECT INDEX

10 days after the occurrence or circumstance from which the motion arises; LBP-09-22, 70 NRC 640 (2009)

### PRO SE LITIGANTS

boards hold *pro se* petitioners to a less rigorous standard; LBP-09-18, 70 NRC 385 (2009)

licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 385 (2009)

### PROBABILISTIC RISK ASSESSMENT

contention asserting that DOE's description of its expert elicitation relating to a probabilistic volcanic hazard analysis update fails to comply with NRC regulations or the NRC guidance document that DOE formally committed to follow is admissible; LBP-09-29, 70 NRC 1028 (2009)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-09-26, 70 NRC 939 (2009)

the safety analysis report component of an application for a Standard Design Certification must analyze and address the problem of extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products; LBP-09-10, 70 NRC 51 (2009)

### PROOF

See Burden of Proof

### PROXIMITY PRESUMPTION

a board is not at liberty to abandon the Commission's 50-mile proximity presumption; LBP-09-16, 70 NRC 227 (2009)

a significant pattern of regular contacts within the 50-mile radius around the plant is sufficient to establish proximity-based standing; LBP-09-18, 70 NRC 385 (2009)

even if NRC's proximity presumption is viewed as more lenient than judicial standing requirements, NRC may choose to retain it; CLI-09-20, 70 NRC 911 (2009)

in cases other than nuclear power reactor construction and operating licenses, licensing boards must address standing on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-09-28, 70 NRC 1019 (2009)

in construction permit and operating license proceedings for power reactors, petitioner is presumed to have standing to intervene if petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm; CLI-09-20, 70 NRC 911 (2009)

in proceedings other than for construction permits, operating licenses, or significant amendments thereto, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any obvious potential for offsite radiological consequences, as well as the nature of the proposed action and the significance of the radioactive source; LBP-09-20, 70 NRC 565 (2009)

living within 50 miles from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto without the need to specifically plead injury, causation, and redressability if the petitioner lives within 50 miles of the nuclear power reactor; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009); LBP-09-28, 70 NRC 1019 (2009)

no obvious potential for offsite consequences sufficient to establish organizational standing was shown even though the organization's office was a mere 3 miles from the facility; LBP-09-28, 70 NRC 1019 (2009)

NRC's proximity presumption does not disregard contemporaneous judicial concepts of standing, but rather the Commission applied its expertise to determine that persons living within a 50-mile radius of a nuclear reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility; LBP-09-16, 70 NRC 227 (2009)

petitioner's residence within a 50-mile radius of the proposed facility has established standing in his own right, and, accordingly, representational standing has been established through him; LBP-09-18, 70 NRC 385 (2009)

standing based of proximity does not apply in source materials cases; LBP-09-13, 70 NRC 168 (2009)

the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either

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- denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 911 (2009); LBP-09-16, 70 NRC 227 (2009)
- the presumption of standing applies to combined license proceedings; LBP-09-16, 70 NRC 227 (2009)
- the process of sifting and weighing participants' factual proffers often calls upon a board to make difficult choices, so that a petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself; LBP-09-18, 70 NRC 385 (2009)
- the proximity presumption applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-09-26, 70 NRC 939 (2009)
- there is no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC's proximity presumption; CLI-09-22, 70 NRC 932 (2009)
- PUBLIC INTEREST**
- an exception to the application of collateral estoppel occurs when broad public policy considerations or special public interest factors are involved such that an agency's need for flexibility outweighs the reasons underlying this repose doctrine so as to favor relitigation of a particular issue; LBP-09-24, 70 NRC 676 (2009)
- RADIATION CONTROL PROGRAM**
- a combined license application must explain the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-09-27, 70 NRC 992 (2009)
- applicant is to describe equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences; LBP-09-19, 70 NRC 433 (2009)
- applicant must describe equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences; LBP-09-19, 70 NRC 433 (2009)
- COL applications must include information on kinds and quantities of materials expected to be produced during plant operation and the means for controlling and limiting radioactive effluents and radiation exposures to comply with Part 20 limits; CLI-09-16, 70 NRC 33 (2009)
- for applications filed after January 2, 1971, applicant must identify design objectives and means to maintain levels of radioactive effluents as low as is reasonably achievable; LBP-09-19, 70 NRC 433 (2009)
- licensee must use procedures and controls to reduce occupational doses and doses to members of the public to levels that are as low as reasonably achievable; CLI-09-16, 70 NRC 33 (2009)
- RADIATION PROTECTION PROGRAM**
- a combined license application must include a description of equipment and measures taken to ensure that any exposures to radioactive materials such as low-level radioactive waste are kept as low as reasonably achievable, including a description of the provisions for storage of solid waste containing radioactive materials; LBP-09-10, 70 NRC 51 (2009)
- applicant must explain how it intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20, including, but not limited to, low-level radioactive waste handling and storage; LBP-09-27, 70 NRC 992 (2009)
- potassium iodide distribution beyond the 10-mile emergency planning zone is not necessary; LBP-09-16, 70 NRC 227 (2009)
- RADIATION SHIELDING**
- adequacy of applicant's control room and equipment design for radiological protections, in light of the fact that the reactor is proposed to be located within the EPZ of an existing reactor, is an issue that is appropriate in a combined license or standard design certification proceeding; LBP-09-10, 70 NRC 51 (2009)
- RADIOACTIVE EFFLUENTS**
- a challenge to applicant's site-specific measurements of adsorption and retention coefficients relative to hydrological radionuclide transport is an admissible contention; LBP-09-16, 70 NRC 227 (2009)
- a combined license application must explain the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and

## SUBJECT INDEX

- radiation exposures within the limits set forth in 10 C.F.R. Part 20; CLI-09-16, 70 NRC 33 (2009); LBP-09-27, 70 NRC 992 (2009)
- applicant is to describe equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences; LBP-09-19, 70 NRC 433 (2009)
- for applications filed after January 2, 1971, applicant must identify design objectives and means to maintain levels of radioactive effluents as low as is reasonably achievable; LBP-09-19, 70 NRC 433 (2009)
- Staff and applicant must address matters such as the environmental impacts of unregulated seepage into adjacent groundwater in their environmental impact statement and environmental report; LBP-09-25, 70 NRC 867 (2009)
- Table S-3 assumes that solid, low-level waste from reactors will be disposed of through shallow land burial, and concludes that this kind of disposal will not result in the release of any significant effluent to the environment; LBP-09-16, 70 NRC 227 (2009)
- RADIOACTIVE RELEASES**
- an independent spent fuel storage installation is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release; LBP-09-20, 70 NRC 565 (2009)
- analysis of a fission product release from an accident uses the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)
- early site permit applicants must perform an analysis of the postulated fission product release to evaluate the offsite radiological consequences; LBP-09-19, 70 NRC 433 (2009)
- if chelating agents are to be comingled in radioactive waste liquids or used to mitigate an accidental release, then they have to be specifically accounted for in the dose analyses; LBP-09-19, 70 NRC 433 (2009)
- in applicant's safety assessment, the fission product releases in question are associated with accidents that have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-19, 70 NRC 433 (2009)
- individuals located at the boundary of the exclusion area cannot be exposed to more than 25 rem total effective dose equivalent in any 2-hour period, and any individual located at the outer boundary of the low population zone cannot be exposed to more than 25 rem TEDE during the entire period of any radioactive release; LBP-09-19, 70 NRC 433 (2009)
- releases from the nuclear fuel cycle in general, incidences of childhood cancers near nuclear power plants, and a request for the NRC to address radioactive releases from the burning of coal at fossil fuel plants are outside the scope of a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)
- the fission product release assumed for the final safety analysis report is based on a major accident assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-10, 70 NRC 51 (2009)
- the safety analysis report component of an application for a Standard Design Certification must analyze and address the problem of extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products; LBP-09-10, 70 NRC 51 (2009)
- RADIOACTIVE WASTE**
- if chelating agents are to be comingled in radioactive waste liquids or used to mitigate an accidental release, then they have to be specifically accounted for in the dose analyses; LBP-09-19, 70 NRC 433 (2009)
- RADIOACTIVE WASTE, HIGH-LEVEL**
- applicant is required to take Table S-3 as the basis for evaluating the contribution of the environmental effects of management of high-level wastes related to uranium fuel cycle activities; LBP-09-21, 70 NRC 581 (2009)
- contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 227 (2009)
- disposal of greater-than-Class-C waste is the responsibility of the federal government; LBP-09-16, 70 NRC 227 (2009)



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- even assuming arguendo that applicant might someday require a permit under Part 61 for a disposal facility, that issue is too speculative at the combined license stage and is therefore not material to the findings the NRC must make to support the action that is involved in the COL proceeding; LBP-09-27, 70 NRC 992 (2009)
- Part 61 is inapplicable in a combined license proceeding because it applies only to land disposal facilities that receive waste from others, not to onsite facilities where licensee intends to store its own low-level radioactive waste; LBP-09-27, 70 NRC 992 (2009)
- petitioners' assertion that applicant's environmental report fails to include an analysis of the impacts of a governmental entity managing long-term storage of high-level waste onsite and cost quantifications of such management fails to create a genuine dispute; LBP-09-21, 70 NRC 581 (2009)
- there is reasonable assurance that a geologic repository will be available by 2025 and that sufficient repository capacity will be available within 30 years beyond the licensed life to dispose of high-level waste and spent fuel generated by any reactor up to that time; LBP-09-18, 70 NRC 385 (2009)
- RADIOACTIVE WASTE, LOW-LEVEL**
- a combined license application must include a description of equipment and measures taken to ensure that any exposures to radioactive materials such as LLRW are kept as low as reasonably achievable, including a description of the provisions for storage of solid waste containing radioactive materials; LBP-09-10, 70 NRC 51 (2009)
- a combined license application's lack of consideration of any alternative to offsite disposal of LLRW is a material issue for litigation; LBP-09-18, 70 NRC 385 (2009)
- a contention is timely to the extent it challenges the adequacy of the new LLRW storage plan, but untimely as to those aspects of the contention that merely reargue issues already decided by the board, without identifying any new information relevant to those issues; LBP-09-27, 70 NRC 992 (2009)
- applicant must explain how it intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20, including, but not limited to, LLRW handling and storage; LBP-09-27, 70 NRC 992 (2009)
- applicant seeks an exemption from the disposal site requirements of 10 C.F.R. 30.3 and 70.3 to allow disposal of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho, that is not licensed by the NRC; LBP-09-28, 70 NRC 1019 (2009)
- applicants' assertion that LLRW could be transferred to another licensee or that some other arrangement might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed in an environmental report; CLI-09-20, 70 NRC 911 (2009)
- arguments premised on the prediction that someday a nuclear plant site will become a permanent storage or disposal facility for low-level radioactive waste are too speculative and therefore not material to the findings the NRC must make to support the action that is involved in a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)
- boards have authority to narrow LLRW contentions; LBP-09-16, 70 NRC 227 (2009)
- combined license applicants are to consider long-term onsite LLRW storage, but 10 C.F.R. 52.79(a)(3) sets no quantity or time restrictions relative to onsite storage of such waste; CLI-09-16, 70 NRC 33 (2009); LBP-09-27, 70 NRC 992 (2009)
- combined license applicants should explain their current plan for management of LLRW, given the lack of an offsite disposal facility, and the potential environmental impact of retaining LLRW at the reactor site for an extended period; LBP-09-16, 70 NRC 227 (2009)
- depleted uranium from an enrichment facility is appropriately classified as a low-level radioactive waste; CLI-09-15, 70 NRC 1 (2009)
- licensee's onsite LLRW storage facility must comply with requirements for security, occupational and public dose limits, survey and monitoring, labeling, and reports and record retention; CLI-09-16, 70 NRC 33 (2009)
- Part 61 is inapplicable in a combined license proceeding because it applies only to land disposal facilities that receive waste from others, not to onsite facilities where licensee intends to store its own low-level radioactive waste; LBP-09-10, 70 NRC 51 (2009); LBP-09-27, 70 NRC 992 (2009)
- power reactor licensees have safely stored and managed LLRW under NRC oversight for years without the development of immediate safety problems or concerns; LBP-09-16, 70 NRC 227 (2009)
- questions of the safety and environmental impacts of onsite LLRW storage are largely site- and design-specific and appropriately decided in an individual licensing proceeding, provided that litigants

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proffer properly framed and supported contentions; CLI-09-16, 70 NRC 33 (2009); LBP-09-10, 70 NRC 51 (2009)

Table S-3 assumes that solid, low-level waste from reactors will be disposed of through shallow land burial, and concludes that this kind of disposal will not result in the release of any significant effluent to the environment; LBP-09-16, 70 NRC 227 (2009)

the licensing board did not commit reversible error by admitting a contention based on LLRW storage duration because the NRC Staff itself had issued a request for additional information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 992 (2009)

waste disposal contentions have been admitted when that issue was not sufficiently discussed in the applications and there was no mention of the closure of the Barnwell facility; LBP-09-18, 70 NRC 385 (2009)

### RADIOACTIVE WASTE DISPOSAL

a combined license application's lack of consideration of any alternative to offsite disposal of low-level radioactive waste is a material issue for litigation; LBP-09-18, 70 NRC 385 (2009)

a facility that is licensed to receive only Class A low-level radioactive waste is not pertinent to a contention regarding Class B and C waste; LBP-09-18, 70 NRC 385 (2009)

an approach that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy for disposition of depleted tails; CLI-09-15, 70 NRC 1 (2009)

applicant seeks an exemption from the disposal site requirements of 10 C.F.R. 30.3 and 70.3 to allow disposal of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho, that is not licensed by the NRC; LBP-09-28, 70 NRC 1019 (2009)

applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed in an environmental report; CLI-09-20, 70 NRC 911 (2009)

combined license applicants are to consider long-term onsite low-level radioactive waste storage, but 10 C.F.R. 52.79(a)(3) sets no quantity or time restrictions relative to onsite storage of such waste; CLI-09-16, 70 NRC 33 (2009)

contention in combined license proceeding focusing exclusively on regulations governing waste disposal is inadmissible; CLI-09-16, 70 NRC 33 (2009)

disposal of greater-than-Class-C waste is the responsibility of the federal government; LBP-09-16, 70 NRC 227 (2009)

if new information becomes available in the course of waste confidence rulemaking proceedings that contravenes a combined license application, petitioner may file a motion to admit a new or amended contention; LBP-09-18, 70 NRC 385 (2009)

low-level radioactive waste disposal contentions have been admitted when that issue was not sufficiently discussed in the applications and there was no mention of the closure of the Barnwell facility; LBP-09-18, 70 NRC 385 (2009)

Part 61 is inapplicable in a combined license proceeding because it applies only to land disposal facilities that receive waste from others, not to onsite facilities where licensee intends to store its own low-level radioactive waste; LBP-09-27, 70 NRC 992 (2009)

Table S-3 assumes that solid, low-level waste from reactors will be disposed of through shallow land burial, and concludes that this kind of disposal will not result in the release of any significant effluent to the environment; LBP-09-16, 70 NRC 227 (2009)

there is reasonable assurance that a geologic repository will be available by 2025 and that sufficient repository capacity will be available within 30 years beyond the licensed life to dispose of high-level waste and spent fuel generated by any reactor up to that time; LBP-09-18, 70 NRC 385 (2009)

### RADIOACTIVE WASTE MANAGEMENT

applicant is required to take Table S-3 as the basis for evaluating the contribution of the environmental effects of management of high-level wastes related to uranium fuel cycle activities; LBP-09-21, 70 NRC 581 (2009)

applicant must explain how it intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20, including, but not limited to, low-level radioactive waste handling and storage; LBP-09-27, 70 NRC 992 (2009)

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combined license applicants should explain their current plan for management of low-level radioactive waste, given the lack of an offsite disposal facility, and the potential environmental impact of retaining LLRW at the reactor site for an extended period; LBP-09-16, 70 NRC 227 (2009)

only the management of Class B and Class C wastes is properly the subject of a contention in a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

petitioners' assertion that applicant's environmental report fails to include an analysis of the impacts of a governmental entity managing long-term storage of high-level waste onsite and cost quantifications of such management fails to create a genuine dispute; LBP-09-21, 70 NRC 581 (2009)

### RADIOACTIVE WASTE STORAGE

a contention is timely to the extent it challenges the adequacy of the new low-level radioactive waste storage plan, but untimely as to those aspects of the contention that merely reargue issues already decided by the board, without identifying any new information relevant to those issues; LBP-09-27, 70 NRC 992 (2009)

arguments premised on the prediction that someday a nuclear plant site will become a permanent storage or disposal facility for low-level radioactive waste are too speculative and therefore not material to the findings the NRC must make to support the action that is involved in a combined license proceeding; LBP-09-16, 70 NRC 227 (2009)

contentions on information a combined license applicant should supply in order to satisfy NRC regulations regarding the safety of long-term storage of low-level radioactive waste are application-specific and thus would benefit from further development by the board and the parties; CLI-09-16, 70 NRC 33 (2009)

even assuming arguendo that applicant might someday require a permit under Part 61 for a disposal facility, that issue is too speculative at the combined license stage and is therefore not material to the findings the NRC must make to support the action that is involved in the COL proceeding; LBP-09-27, 70 NRC 992 (2009)

licensee's onsite low-level radioactive waste storage facility must comply with requirements for security, occupational and public dose limits, survey and monitoring, labeling, and reports and record retention; CLI-09-16, 70 NRC 33 (2009)

NRC regulations set no quantity or time restrictions relative to onsite storage of low-level radioactive waste; LBP-09-27, 70 NRC 992 (2009)

Part 61 only applies to the land disposal of radioactive waste received from other persons and is therefore inapplicable to the issue of low-level waste generated and managed onsite at the nuclear power plant; LBP-09-10, 70 NRC 51 (2009)

power reactor licensees have safely stored and managed low-level radioactive waste under NRC oversight for years without the development of immediate safety problems or concerns; LBP-09-16, 70 NRC 227 (2009)

questions of the safety and environmental impacts of onsite low-level waste storage are largely site- and design-specific and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009)

spent fuel can be stored safely onsite for at least 30 years beyond a plant's licensed life for operation; LBP-09-17, 70 NRC 311 (2009)

the licensing board did not commit reversible error by admitting a contention based on low-level radioactive waste storage duration because the NRC Staff itself had issued a request for additional information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 992 (2009)

See also Dry Cask Storage

### RADIOLOGICAL CONTAMINATION

a general assessment of radioactivity within waters of the Great Lakes Basin does not address specific issues with regard to the proposed reactor, and it does not provide any support for petitioners' assertions needed to advance an admissible contention; LBP-09-16, 70 NRC 227 (2009)

See also Groundwater Contamination

### RADIOLOGICAL EXPOSURE

combined license applications must include information on kinds and quantities of materials expected to be produced during plant operation and the means for controlling and limiting radioactive effluents and

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radiation exposures to comply with Part 20 limits; CLI-09-16, 70 NRC 33 (2009)

individuals located at the boundary of the exclusion area cannot be exposed to more than 25 rem total effective dose equivalent in any 2-hour period, and any individual located at the outer boundary of the low population zone cannot be exposed to more than 25 rem TEDE during the entire period of any radioactive release; LBP-09-19, 70 NRC 433 (2009)

licensees subject to the Environmental Protection Agency's generally applicable environmental radiation standards in 40 C.F.R. Part 190 shall comply with those standards; LBP-09-19, 70 NRC 433 (2009)

numerical limits for radiation exposure, including occupational dose limits and radiation dose limits for members of the public, are provided; LBP-09-19, 70 NRC 433 (2009)

petitioners' assertion that no exposure levels are safe is an impermissible challenge to the exposure limits set forth in the NRC's regulations; LBP-09-16, 70 NRC 227 (2009)

the Environmental Protection Agency has established radiation exposure standards under 40 C.F.R. Part 190, the applicability of which the Commission has acknowledged; LBP-09-19, 70 NRC 433 (2009)

**RADIONUCLIDE TRANSPORT**

factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)

in its review of early site permit applications, Staff must consider physical characteristics of the site, specifically noting that factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)

**RATEMAKING PROCESS**

ratepayer impacts are outside the scope of a combined license proceeding because the state, not the NRC, is charged with protecting ratepayers' interests; LBP-09-10, 70 NRC 51 (2009)

**REACTOR CORE**

in applicant's safety assessment, the fission product releases in question are associated with accidents that have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-19, 70 NRC 433 (2009)

**REACTOR DESIGN**

a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 227 (2009)

all environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's environmental assessment for a certified design are considered resolved; LBP-09-19, 70 NRC 433 (2009)

applicant for a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

at the combined license stage, applicant may reference both an early site permit and a standard design certification in its application; LBP-09-16, 70 NRC 227 (2009); LBP-09-19, 70 NRC 433 (2009)

design certification applicants are required to address severe accident mitigation design alternatives; LBP-09-19, 70 NRC 433 (2009)

if a contention concerning a certification application that has been docketed but not granted is otherwise admissible under 10 C.F.R. 2.309(f)(1), it might be held in abeyance and referred to the Staff; LBP-09-17, 70 NRC 311 (2009)

if the combined license application references an early site permit, applicant must demonstrate that the chosen design falls within the parameters specified in the ESP or, on the safety side, request a variance; LBP-09-19, 70 NRC 433 (2009)

nuclear reactors are required to be designed to withstand certain postulated events or accidents, which result in negligible offsite consequences because the reactor is designed to handle such events; LBP-09-10, 70 NRC 51 (2009)

request that a combined license application be held in abeyance until the design certification is completed must be denied; LBP-09-18, 70 NRC 385 (2009)

severe accident mitigation alternatives design analysis focuses on severe accident mitigation dealing with reactor design and hardware issues; LBP-09-10, 70 NRC 51 (2009)

severe accident mitigation design alternative issues are resolved for an application referencing a design control document if the specific site parameters are covered by the site parameters assumed in the DCD SAMDA analysis; LBP-09-19, 70 NRC 433 (2009)

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- until the reactor design is certified and the rulemaking proceeding concluded, the design continues to change, creating potentially new safety and environmental concerns; LBP-09-18, 70 NRC 385 (2009)
- REACTOR TRIP**
- licensee's report to NRC of a manual reactor trip due to main turbine high vibrations included the details of the event, provided an analysis of the event, including estimated change in conditional core damage probability, and provided a list of corrective actions; DD-09-2, 70 NRC 899 (2009)
- REBUTTABLE PRESUMPTION**
- FEMA's finding on emergency plans constitutes a rebuttable presumption on questions of adequacy and implementation capability in NRC licensing proceedings; LBP-09-19, 70 NRC 433 (2009)
- RECORD OF DECISION**
- documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing; LBP-09-30, 70 NRC 1039 (2009)
- REDRESSABILITY**
- a limited work authorization authorizes activities for which either a construction permit or combined license is otherwise required, but the LWA application must include a plan for site redress that provides for restoration if the project is cancelled, the LWA is revoked, or a construction permit or COL is denied; LBP-09-19, 70 NRC 433 (2009)
- a site redress plan remains in effect for an early site permit applicant even if the ESP with which the LWA is issued is not referenced in a construction permit or COL application during the period that the ESP remains valid; LBP-09-19, 70 NRC 433 (2009)
- as long as either denial of a license or issuance of a decision mandating compliance with legal requirements would alleviate a petitioner's potential injury, then under longstanding NRC jurisprudence the petitioner may prosecute any admissible contention that could result in the denial or in the compliance decision; CLI-09-20, 70 NRC 911 (2009)
- boards are to determine whether the site redress plan will adequately redress the activities performed under a limited work authorization should the activities be terminated by either the holder of the LWA or by Commission denial of any corresponding early site permit or combined license; LBP-09-19, 70 NRC 433 (2009)
- intervention petitioner must establish a concrete and particularized injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and is arguably within the zone of interests protected by the governing statute; CLI-09-20, 70 NRC 911 (2009)
- petitioner is required to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-09-13, 70 NRC 168 (2009)
- REFERRAL OF RULING**
- a board ruling on a contention may be referred to the Commission if it raises significant and novel legal or policy issues or the referral would materially advance the orderly disposition of the proceeding; LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)
- contentions involving possible errors in Table S-3 have been referred to the Commission; LBP-09-21, 70 NRC 581 (2009)
- REFERRED RULINGS**
- the Commission declined to review licensing board referred rulings because the contentions were rejected by the board due to legal insufficiency; CLI-09-21, 70 NRC 927 (2009)
- the Commission will review referred rulings only if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; CLI-09-21, 70 NRC 927 (2009)
- REGULATIONS**
- a contention that seeks to impose new requirements on applicants and licensees is an impermissible challenge to the agency's regulations; LBP-09-26, 70 NRC 939 (2009)
- a licensing board may not admit a contention that directly or indirectly challenges Table S-3 of 10 C.F.R. 51.51; LBP-09-16, 70 NRC 227 (2009)
- absent a waiver under 10 C.F.R. 2.335(b), contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; CLI-09-20, 70 NRC 911 (2009); LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)

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although NRC does not consider Council on Environmental Quality regulations to be binding, they are entitled to substantial deference; LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)

applicant seeks an exemption from the disposal site requirements of 10 C.F.R. 30.3 and 70.3 to allow disposal of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho, that is not licensed by the NRC; LBP-09-28, 70 NRC 1019 (2009)

challenges to the Commission regulations regarding the design certification process are inadmissible; LBP-09-18, 70 NRC 385 (2009)

contentions involving possible errors in Table S-3 have been referred to the Commission; LBP-09-21, 70 NRC 581 (2009)

decommissioning rules are designed to minimize the administrative effort of licensees and the Commission and to provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety; LBP-09-21, 70 NRC 581 (2009)

in implementing NEPA, the NRC uses certain of the definitions provided in Council on Environmental Quality regulations; LBP-09-19, 70 NRC 433 (2009)

Part 51 does not authorize NRC to regulate or enforce compliance with all other environmental laws and regulations; LBP-09-10, 70 NRC 51 (2009)

Staff is to review early site permit applications according to the applicable standards set out in 10 C.F.R. Part 50 and its appendices and 10 C.F.R. Part 100; LBP-09-19, 70 NRC 433 (2009)

to challenge a regulation, petitioner must submit a supporting affidavit setting forth with particularity the special circumstances that justify the waiver or exception requested; LBP-09-18, 70 NRC 385 (2009)

when a Commission regulation permits the use of a particular analysis, a contention asserting that a different analysis or technique should be utilized is inadmissible because it indirectly attacks the Commission's regulations; LBP-09-16, 70 NRC 227 (2009)

See also Rules of Practice

### REGULATIONS, INTERPRETATION

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; LBP-09-15, 70 NRC 198 (2009)

"any reactor" in 10 C.F.R. 51.23(a) applies to new reactors; LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

because a combined license is, in part, an operating license, 10 C.F.R. § 50.33(f) also applies to an application for a combined license; LBP-09-10, 70 NRC 51 (2009)

constructive knowledge is knowledge of facts sufficient to prompt an inquiry that would have uncovered misrepresentations and is not actual knowledge; LBP-09-24, 70 NRC 676 (2009)

courts must construe regulations in light of the statutes they implement, keeping in mind that where there is an interpretation of an ambiguous regulation that is reasonable and consistent with the statute, that interpretation is to be preferred; LBP-09-16, 70 NRC 227 (2009)

"deliberate misconduct" within the meaning 10 C.F.R. 50.5(a)(2) refers to an intentional act or omission that the person knows would cause a licensee to be in violation of any rule; LBP-09-24, 70 NRC 676 (2009)

even if the term "contention," as used in 10 C.F.R. 2.336(a)(1) must be read as pertaining only to formal contentions admitted under section 2.309(f)(1), the term "claim," is not so constrained, and can only be read in its normal sense; LBP-09-30, 70 NRC 1039 (2009)

interpretation must begin with the language and structure of the provision itself; LBP-09-15, 70 NRC 198 (2009)

NEPA has only a limited role to play in interpreting Part 51's requirements for the environmental report; LBP-09-16, 70 NRC 227 (2009)

not only the bare meaning of the word but also its placement and purpose in the statutory scheme are considered; LBP-09-15, 70 NRC 198 (2009)

organizations seeking to challenge regulations of a government agency failed to demonstrate standing where they did not demonstrate a concrete application of the regulations that threatened imminent harm to their interests; CLI-09-20, 70 NRC 911 (2009)

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Part 61 is inapplicable in a combined license proceeding because it applies only to land disposal facilities that receive waste from others, not to onsite facilities where licensee intends to store its own low-level radioactive waste; LBP-09-10, 70 NRC 51 (2009); LBP-09-27, 70 NRC 992 (2009)

section 2.309(f)(1)(vi) is not a second hurdle of materiality that an intervenor must meet, but rather requires that intervenor identify the specific parts of the combined license application that it disputes and show that resolution of those disputes is material to the licensing decision; LBP-09-27, 70 NRC 992 (2009)

section 52.79(a)(3) sets no quantity or time restrictions relative to onsite storage of low level radioactive waste; LBP-09-27, 70 NRC 992 (2009)

the “deliberate ignorance” theory is not embraced within the “deliberate misconduct” standard that governs NRC proceedings; LBP-09-24, 70 NRC 676 (2009)

the entirety of the provision must be given effect; LBP-09-15, 70 NRC 198 (2009)

the fact that the Commission included language deferring the obligation that would otherwise apply to COL applicants in 10 C.F.R. 50.75(b)(4), but included no equivalent provision in section 50.75(b)(3), confirms that the Commission did not intend to defer the requirement of section 50.75(b)(3) until after the license is issued; LBP-09-15, 70 NRC 198 (2009)

the most natural way to read a provision that sets forth a general obligation followed by a set of specific requirements is that the specific requirements provide the details necessary to fulfilling the general obligation; LBP-09-15, 70 NRC 198 (2009)

the plain language of 10 C.F.R. 2.336(a)(1) makes it clear that it applies to all parties; LBP-09-30, 70 NRC 1039 (2009)

the requirement that the designated amount of financial assurance be covered by an acceptable method arises concurrently with the requirement that the applicant submit a decommissioning report to NRC; LBP-09-15, 70 NRC 198 (2009)

the statement of considerations should be given special weight; LBP-09-15, 70 NRC 198 (2009)

the term “contention” in 10 C.F.R. 2.336(a)(1) means simply a point or argument asserted or advanced by any party; LBP-09-30, 70 NRC 1039 (2009)

under 10 C.F.R. 2.336(a)(1), intervenors’ expert is not required to create a written analysis, but only disclose the written analysis or other documentary authority, if any, that exists and is reasonably available at the time of the disclosure; LBP-09-30, 70 NRC 1039 (2009)

### REGULATORY GUIDES

NRC guidelines and regulatory guides are not legally binding on the Staff, the board, or the Commission; LBP-09-10, 70 NRC 51 (2009)

### REPLY BRIEFS

a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)

although a licensing board will take into account any information from reply briefs that legitimately amplifies issues presented in the original petitions, it will not consider instances of what essentially constitute untimely attempts to amend the original petitions; LBP-09-17, 70 NRC 311 (2009)

although NRC’s rules of practice regarding motions do not provide for reply pleadings, the board presumes that for a reply to be timely it would have to be filed within 7 days of the date of service of the response it is intended to address; LBP-09-22, 70 NRC 640 (2009)

filings that raise new issues must address the nontimely filing and new-contention factors in 10 C.F.R. 2.309(c) or (f)(2); LBP-09-17, 70 NRC 311 (2009)

in an abundance of caution and in order to give petitioners every benefit of the doubt, the board considers whether any of the material at issue in a reply brief that would not constitute legitimate amplification might be admissible under the criteria of section 2.309(c) or (f)(2); LBP-09-17, 70 NRC 311 (2009)

replies may provide only legitimate amplifications of the original contentions or a logical/legal response to the answers of the Staff and applicant; LBP-09-17, 70 NRC 311 (2009)

### REPLY TO ANSWER TO MOTION

except for a motion to file a new or amended contention, or where there are compelling circumstances, movant has no right to reply to an answer or respond to a motion; LBP-09-22, 70 NRC 640 (2009)

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within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 640 (2009)

### REPORTING REQUIREMENTS

licensee's report to NRC of a manual reactor trip due to main turbine high vibrations included the details of the event, provided an analysis of the event, including estimated change in conditional core damage probability, and provided a list of corrective actions; DD-09-2, 70 NRC 899 (2009)

### REQUEST FOR ACTION

petitioner's request that NRC issue a demand for information to licensee regarding vibration levels prior to restart is denied; DD-09-2, 70 NRC 899 (2009)

### REQUEST FOR ADDITIONAL INFORMATION

NRC Staff issuance of an RAI does not alone establish deficiencies in an application, and intervention petitioner must do more than merely quote an RAI to justify admission of a contention; CLI-09-16, 70 NRC 33 (2009); LBP-09-10, 70 NRC 51 (2009); LBP-09-16, 70 NRC 227 (2009)

petitioners who base their contentions on RAIs must provide analysis, discussion, or information of their own on the issues raised; LBP-09-16, 70 NRC 227 (2009)

the fact that Staff issues an RAI does not immunize the combined license application from challenge or bar the admission of a new contention on the same subject, provided the contention satisfies the criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi) and (f)(2) or (c); LBP-09-10, 70 NRC 51 (2009)

the licensing board did not commit reversible error by admitting a contention based on low-level radioactive waste storage duration because the NRC Staff itself had issued a request for additional information on this very issue and thus this conflicted with Staff's argument that the issue is immaterial to the findings that must be made on the application; LBP-09-27, 70 NRC 992 (2009)

### RESPONSES TO PETITIONS

an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within 20 days after service of the motion; LBP-09-22, 70 NRC 640 (2009)

no later than 20 days after service of materials, the parties and the NRC Staff shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis; LBP-09-22, 70 NRC 640 (2009)

within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 640 (2009)

### RESTART

petitioner's request that NRC issue a demand for information to licensee regarding vibration levels prior to restart is denied; DD-09-2, 70 NRC 899 (2009)

### REVIEW

a requester may challenge an adverse determination with respect to access to safeguards information by filing a request for review pursuant to 10 C.F.R. 2.311; CLI-09-15, 70 NRC 1 (2009)

all decisions on questions of classification or declassification of information shall be made by appropriate classification officials in the NRC and are not subject to *de novo* review; CLI-09-15, 70 NRC 1 (2009)

See also Antitrust Review; Appellate Review; Immediate Effectiveness Review; NRC Staff Review; Safety Review; Standard of Review

### REVIEW, INTERLOCUTORY

an exception to the general policy limiting interlocutory review permits an appeal of a board's ruling on contention admissibility when a board grants a petition to intervene following consideration of the full petition; CLI-09-18, 70 NRC 859 (2009)

challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 859 (2009)

See also Appeals, Interlocutory

### REVIEW, SUA SPONTE

the section 2.341(a)(2) process that applies to a licensing board determination approving a settlement agreement affords the Commission the opportunity to correct any participant or board misapprehensions regarding the items contemplated in the settlement agreement; LBP-09-23, 70 NRC 659 (2009)



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### RULE OF REASON

- all significant environmental impacts and all reasonable alternatives should be considered for a combined license, but these are governed by the rule of reason; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009)
- goals of the project sponsor are given substantial weight in determining whether an alternative is reasonable; LBP-09-10, 70 NRC 51 (2009)
- if a NEPA contention alleges that impacts or alternatives that are patently outside the realm of reason must be considered, then the contention should be denied for failure to demonstrate that the issue raised is within the legitimate scope of NEPA; LBP-09-10, 70 NRC 51 (2009)
- low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-09-26, 70 NRC 939 (2009)
- the environmental impact statement need not consider an infinite range of alternatives, only reasonable or feasible ones; LBP-09-21, 70 NRC 581 (2009)
- the requirements of NEPA and, by extension, NRC's regulations implementing NEPA are subject to a rule of reason, and only reasonably foreseeable environmental impacts must be addressed; LBP-09-26, 70 NRC 939 (2009)

### RULEMAKING

- a license application will not be held in abeyance until the design certification rulemaking is completed; LBP-09-16, 70 NRC 227 (2009)
- if new information becomes available in the course of waste confidence rulemaking proceedings that contravenes a combined license application, petitioner may file a motion to admit a new or amended contention; LBP-09-18, 70 NRC 385 (2009)
- if petitioners are dissatisfied with NRC's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009)
- issuance of a proposed rulemaking and requests for comments does not, in itself, constitute information not previously available that entitles a party to file a new contention; LBP-09-10, 70 NRC 51 (2009)
- licensing boards should not accept in individual license proceedings contentions which are, or are about to become, the subject of general rulemaking by the Commission; LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)
- to the extent that petitioners argue that the provisions of 10 C.F.R. 50.54(hh) should be applied to dry cask storage, they may file a rulemaking petition with the Commission; LBP-09-17, 70 NRC 311 (2009)

### RULES OF PRACTICE

- a board is not at liberty to abandon the Commission's 50-mile proximity presumption; LBP-09-16, 70 NRC 227 (2009)
- a board ruling on a contention may be referred to the Commission if it raises significant and novel legal or policy issues or the referral would materially advance the orderly disposition of the proceeding; LBP-09-26, 70 NRC 939 (2009)
- a board's determination of standing does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-09-13, 70 NRC 168 (2009)
- a brief explanation of the basis for the contention is required as a prerequisite to its admissibility; LBP-09-26, 70 NRC 939 (2009)
- a broadly stated interest in a problem is not sufficient by itself to render an organization so adversely affected or aggrieved that standing will be granted; LBP-09-13, 70 NRC 168 (2009)
- a contention can be one of omission as well as one of inadequacy when it alleges that the environmental report is insufficient because it fails to discuss all aspects of the topic adequately; LBP-09-10, 70 NRC 51 (2009)
- a contention is admissible if it raises a genuine dispute that is material to the findings the NRC must make to support the action involved; LBP-09-25, 70 NRC 867 (2009)
- a contention is material if it shows that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment; LBP-09-26, 70 NRC 939 (2009)

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- a contention is not admissible if it is not plausibly explained or supported by alleged facts; LBP-09-21, 70 NRC 581 (2009)
- a contention must explain why the application is deficient through reference to specific portions of the application, and it must directly controvert a position taken by the applicant in the application; LBP-09-17, 70 NRC 311 (2009)
- a contention must show that a genuine dispute exists on a material issue of law or fact with regard to the license application, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-09-26, 70 NRC 939 (2009)
- a contention of omission claims that the application fails to contain information on a relevant matter as required by law and provides the supporting reasons for the petitioner's belief; LBP-09-16, 70 NRC 227 (2009); LBP-09-27, 70 NRC 992 (2009)
- a contention that seeks to impose new requirements on applicants and licensees is an impermissible challenge to the agency's regulations; LBP-09-26, 70 NRC 939 (2009)
- a decision may be referred to the Commission if it raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; LBP-09-18, 70 NRC 385 (2009)
- a finding that applicant has cured an omission does not preclude litigation concerning the adequacy of the information the applicant has supplied and intervenors must timely file a new or amended contention that addresses the factors in 10 C.F.R. 2.309(f)(1); LBP-09-15, 70 NRC 198 (2009)
- a genuine material dispute is one that could lead to a different conclusion on potential cost-beneficial severe accident mitigation alternatives; LBP-09-26, 70 NRC 939 (2009)
- a hearing request is timely when petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice; LBP-09-20, 70 NRC 565 (2009)
- a hearing request must state the name, address, and telephone number of the requestor, the nature of the requestor's right under the governing statutes to be made a party to the proceeding, the nature and extent of the requestor's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the requestor's interest; LBP-09-28, 70 NRC 1019 (2009)
- a lack of specificity will be sufficient to reject a claim of standing; LBP-09-18, 70 NRC 385 (2009)
- a legal issue contention need not satisfy all the contention admissibility criteria; LBP-09-29, 70 NRC 1028 (2009)
- a licensing board may not admit a contention that directly or indirectly challenges Table S-3 of 10 C.F.R. 51.51; LBP-09-16, 70 NRC 227 (2009)
- a motion and proposed contention filed later than 30 days after the date when the new and material information on which it is based first becomes available shall be deemed untimely; LBP-09-22, 70 NRC 640 (2009)
- a motion for leave to file a new contention, accompanied by the proposed contention, shall be deemed timely if filed within 30 days of the date when the new and material information on which it is based first became available; LBP-09-29, 70 NRC 1028 (2009)
- a motion for summary disposition must be granted if the filings in the proceeding together with the statements of the parties and the affidavits, if any, 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; LBP-09-15, 70 NRC 198 (2009)
- a Native American group that has failed to establish that it is a federally recognized Indian tribe is denied standing based on its tribal status; LBP-09-13, 70 NRC 168 (2009)
- a new contention may be filed after the initial docketing with leave of the presiding officer upon a showing that the information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-27, 70 NRC 992 (2009)
- a nexus between the injury and the relief is required rather than a nexus between the claimed injury and the contention; LBP-09-16, 70 NRC 227 (2009)
- a party cannot satisfy the "not previously available" standard of 10 C.F.R. 2.309(f)(2)(i) by showing that, as a subjective matter, he or she only recently became aware of, or realized the significance of, public information that was previously available to all; LBP-09-10, 70 NRC 51 (2009)

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- a party seeking a stay must show that it faces imminent, irreparable harm that is both certain and great; CLI-09-23, 70 NRC 935 (2009)
- a petition for review and request for hearing must include a showing that the petitioner has standing; LBP-09-13, 70 NRC 168 (2009)
- a properly pleaded contention of omission must challenge a specific portion of the application and provide a basis for demonstrating the alleged deficiency; LBP-09-26, 70 NRC 939 (2009)
- a proposed contention that fails to directly controvert the application or that mistakenly asserts the application does not address a relevant issue is subject to dismissal; LBP-09-27, 70 NRC 992 (2009)
- a reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)
- a significant pattern of regular contacts within the 50-mile radius around the plant is sufficient to establish proximity-based standing; LBP-09-18, 70 NRC 385 (2009)
- a standing ruling in one proceeding is not dispositive of a determination in another proceeding with the same petitioner because the ruling was not the subject of appellate review; LBP-09-18, 70 NRC 385 (2009)
- absent a waiver under 10 C.F.R. 2.335(b), contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-21, 70 NRC 581 (2009)
- absent an obvious potential for harm, it is a petitioner's burden to show how harm will or may occur; LBP-09-28, 70 NRC 1019 (2009)
- absent good cause, petitioner's demonstration on the other late-filing factors must be compelling; LBP-09-26, 70 NRC 939 (2009)
- admissible contentions must include references to 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; LBP-09-21, 70 NRC 581 (2009)
- admissible contentions must provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact; CLI-09-15, 70 NRC 1 (2009); LBP-09-21, 70 NRC 581 (2009)
- although a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner, the petitioner must provide some support for his or her contention, in either the form of facts or expert testimony; LBP-09-26, 70 NRC 939 (2009)
- although a board may deny certain portions of a multipart contention as outside of the scope or too attenuated, applying all six criteria of 10 C.F.R. 2.309(f)(1) to each subpart of the contention is inappropriate; LBP-09-10, 70 NRC 51 (2009)
- although a licensing board will take into account any information from reply briefs that legitimately amplifies issues presented in the original petitions, it will not consider instances of what essentially constitutes untimely attempts to amend the original petitions; LBP-09-17, 70 NRC 311 (2009)
- although a petitioner does not have to prove its contention at the admissibility stage, mere notice pleading is insufficient; LBP-09-18, 70 NRC 385 (2009)
- although NRC does not consider Council on Environmental Quality regulations to be binding, they are entitled to substantial deference; LBP-09-10, 70 NRC 51 (2009)
- although the Commission commonly looks to Article III concepts for guidance, it is not required to automatically follow them in all respects because NRC proceedings are not subject to Article III; LBP-09-15, 70 NRC 198 (2009)
- although the Commission is not strictly bound by the mootness doctrine, the agency's adjudicatory tribunals have generally adhered to the principle; LBP-09-15, 70 NRC 198 (2009)
- although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner; LBP-09-27, 70 NRC 992 (2009)
- an alleged injury to health and safety, shared equally by many, can form the basis for standing; LBP-09-18, 70 NRC 385 (2009)

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an amended or new contention must be submitted in a timely fashion based on the availability of the subsequent information; LBP-09-27, 70 NRC 992 (2009)

an entity wishing to participate as a governmental body must demonstrate that it goes beyond an advisory role and exercises executive or legislative responsibilities; LBP-09-13, 70 NRC 168 (2009)

an exception to the general policy limiting interlocutory review permits an appeal of a board's ruling on contention admissibility when a board grants a petition to intervene following consideration of the full petition; CLI-09-18, 70 NRC 859 (2009)

an expert opinion that merely states a conclusion (e.g., the application is deficient, inadequate, or wrong) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-09-16, 70 NRC 227 (2009)

an injury in fact must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-09-13, 70 NRC 168 (2009)

an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed, demonstrate that the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

any appeal by petitioners of the admitted contentions must abide the end of the case, i.e., wait approximately 2 or 3 years until the Staff issues the FSEER and FEIS and the final disposition of the evidentiary hearing on the three admitted contentions; LBP-09-10, 70 NRC 51 (2009)

any contention that fails to controvert the application directly, or that mistakenly asserts the application fails to address an issue that the application does address, is defective; LBP-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)

any material provided by petitioner in support of its contention, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-09-17, 70 NRC 311 (2009); LBP-09-26, 70 NRC 939 (2009)

anyone who wishes to request a hearing concerning a proposed licensing action must establish standing and proffer at least one admissible contention; LBP-09-28, 70 NRC 1019 (2009)

at the admission stage of the proceedings, boards admit contentions, not bases; LBP-09-26, 70 NRC 939 (2009)

at the contention admissibility stage, all that is required is that the petitioner provide an expert opinion or some alleged fact, or facts, in support of its position; LBP-09-26, 70 NRC 939 (2009)

bare assertions without the requisite support for claims are inadequate to support the admission of a contention; LBP-09-16, 70 NRC 227 (2009)

because agencies are not constrained by Article III of the Constitution, nor are they governed by judicially created standing doctrines restricting access to federal courts, the criteria for establishing administrative standing may permissibly be less demanding than the criteria for judicial standing; LBP-09-18, 70 NRC 385 (2009)

because NEPA is a procedural statute, petitioners need not show that favorable rulings on their NEPA contentions will require denial of the license, but rather that procedures intended for protection of their members' concrete interests will be observed; LBP-09-16, 70 NRC 227 (2009)

because the reach of a contention necessarily hinges upon its terms and its stated bases, the brief explanation helps define the scope of the contention; LBP-09-26, 70 NRC 939 (2009)

before the board can consider a new contention, petitioner must show that it is based on information that was not previously available, is based on information that is materially different than information previously available, and has been submitted in a timely fashion; LBP-09-29, 70 NRC 1028 (2009)

boards may allow parties to conduct cross-examination in Subpart L proceedings; LBP-09-22, 70 NRC 640 (2009)

boards may appropriately view petitioners' support for their contentions in a light favorable to petitioners, but it is petitioners' burden to establish the admissibility of a contention; LBP-09-17, 70 NRC 311 (2009)

boards may consider the merits of a contention that has become moot to the extent doing so will promote the fair and expeditious resolution of the case and there are no significant countervailing concerns; LBP-09-15, 70 NRC 198 (2009)

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boards must exercise their discretion and select the hearing procedure most appropriate for newly admitted contentions; LBP-09-10, 70 NRC 51 (2009)

by complying with the six contention requirements, an admissible contention must raise an issue that is both within the scope of the proceeding (normally defined by the hearing notice) and material to the findings the NRC must make to support the action involved; LBP-09-18, 70 NRC 385 (2009)

by definition, contentions admitted under 10 C.F.R. 2.309(f)(2)(i)-(iii) are timely because they are founded on material new information that was not available at the time when the petition was initially due; LBP-09-10, 70 NRC 51 (2009)

challenges to board rulings on late-filed contentions normally fall under the rules for interlocutory review; CLI-09-18, 70 NRC 859 (2009)

circumstances in which a particular hearing procedure is required are specified in 10 C.F.R. 2.310(b)-(k); LBP-09-10, 70 NRC 51 (2009)

Commission rules bar contentions where petitioners have only what amounts to generalized suspicions, hoping to substantiate them later; LBP-09-18, 70 NRC 385 (2009)

contention admissibility requirements are deliberately strict and any contention that does not satisfy the requirements of 10 C.F.R. 2.309(f)(1) will be rejected; CLI-09-20, 70 NRC 911 (2009); LBP-09-10, 70 NRC 51 (2009); LBP-09-26, 70 NRC 939 (2009)

contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-09-16, 70 NRC 227 (2009)

contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 311 (2009)

contentions may be filed after the initial 60-day deadline if the petitioner shows that the information on which the amended or new contention is based was not previously available and is materially different than information previously available; and the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-26, 70 NRC 939 (2009)

contentions must be accompanied 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 it intends to rely to support its position; LBP-09-10, 70 NRC 51 (2009); LBP-09-26, 70 NRC 939 (2009)

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, or the contentions meet certain criteria for late-filed or new contentions based on information that is available only at a later time; LBP-09-17, 70 NRC 311 (2009)

contentions of omission must describe the information that should have been included in the environmental report and provide the legal basis that requires the omitted information to be included; LBP-09-16, 70 NRC 227 (2009)

contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 385 (2009)

contentions that attack applicable statutory requirements, challenge the basic structure of the NRC's regulatory process, or merely express generalized policy grievances are not appropriate for a licensing board hearing; LBP-09-18, 70 NRC 385 (2009)

contentions that fall outside the scope of the proceeding must be rejected; LBP-09-26, 70 NRC 939 (2009)

cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-09-10, 70 NRC 51 (2009)

despite not being constitutionally limited by the case or controversy requirement of Article III, common sense counsels against proceeding with an adjudication where no effective relief can be granted; LBP-09-14, 70 NRC 193 (2009)

determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits; LBP-09-26, 70 NRC 939 (2009)

early site permit applications, as partial construction permit applications, are subject to the Atomic Energy Act hearing requirement, as well as all procedural requirements in 10 C.F.R. Part 2; LBP-09-19, 70 NRC 433 (2009)

even if NRC's proximity presumption is viewed as more lenient than judicial standing requirements, NRC may choose to retain it; CLI-09-20, 70 NRC 911 (2009)

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every petitioner bears the burden of demonstrating standing in order to participate in hearings before a licensing board; LBP-09-18, 70 NRC 385 (2009)

except for a motion to file a new or amended contention, or where there are compelling circumstances, movant has no right to reply to an answer or respond to a motion; LBP-09-22, 70 NRC 640 (2009)

factors that must be addressed for nontimely intervention petitions, hearing requests, and contentions are set forth; LBP-09-20, 70 NRC 565 (2009)

failure of a contention to meet any of the pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) precludes its admission; CLI-09-15, 70 NRC 1 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)

for a contention of omission, petitioner's burden is to show the facts necessary to establish that the application omits information that should have been included; LBP-09-16, 70 NRC 227 (2009)

for a contention to be admissible, it must meet the six criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-09-26, 70 NRC 939 (2009)

for an admissible contention, petitioner must provide a concise statement of the alleged facts or expert opinion that support the petitioner's position; LBP-09-10, 70 NRC 51 (2009)

for an order issued under 10 C.F.R. 2.202, the time for filing a hearing request runs from the date of the order, not the date of publication of the order in the *Federal Register*; LBP-09-20, 70 NRC 565 (2009)

for an organization to establish standing, it must show either immediate or threatened injury to its organizational interests or to the interests of identified members; LBP-09-17, 70 NRC 311 (2009)

for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion, but must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate; LBP-09-16, 70 NRC 227 (2009); LBP-09-27, 70 NRC 992 (2009)

for organizational standing, the organization must, in its own right, satisfy the same requirements of injury, causation, and redressability as an individual; LBP-09-28, 70 NRC 1019 (2009)

for representational standing, an organization must demonstrate that the licensing action will affect at least one of its members, identify that member by name and address, show that it is authorized by that member to request a hearing on his or her behalf, demonstrate that the member would qualify for standing in his or her own right, show that the interests the organization seeks to protect are germane to its own purpose, and show that neither the proffered contentions nor the requested relief would require an individual member to participate in the proceeding; LBP-09-28, 70 NRC 1019 (2009)

for Subpart G proceedings, each expert witness is required to create, sign, and submit a written expert report; LBP-09-30, 70 NRC 1039 (2009)

for timely new or amended contentions, the pleading shall include a motion for leave to file the contention showing that it satisfies 10 C.F.R. 2.309(f)(1); LBP-09-22, 70 NRC 640 (2009)

for untimely new or amended contentions, the pleading shall include a motion for leave to file the contention and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. 2.309(f)(1); LBP-09-22, 70 NRC 640 (2009)

general environmental and policy interests are insufficient for organizational standing; LBP-09-20, 70 NRC 565 (2009)

good cause is the most significant of the late-filing factors in 10 C.F.R. 2.309(c); LBP-09-20, 70 NRC 565 (2009); LBP-09-26, 70 NRC 939 (2009)

having established proximity standing, petitioner need not separately establish the requisite injury, causation, and redressability elements; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

if a combined license application is amended or material new information subsequently becomes available, petitioners must be given a fair opportunity to file new or amended contentions challenging these changes; LBP-09-10, 70 NRC 51 (2009)

if a contention makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue; LBP-09-16, 70 NRC 227 (2009)

if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. 2.309(c), which specifically applies to nontimely filings; LBP-09-27, 70 NRC 992 (2009)

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- if a NEPA contention alleges that impacts or alternatives that are patently outside the realm of reason must be considered, then the contention should be denied for failure to demonstrate that the issue raised is within the legitimate scope of NEPA; LBP-09-10, 70 NRC 51 (2009)
- if a party files a new contention within 30 days of the availability of the information new to that party, the contention will generally be considered timely; LBP-09-17, 70 NRC 311 (2009)
- if an organization seeks to intervene as a representative of its members, it must identify at least one member by name and address, show that member would have standing in his or her own right, and demonstrate that the member has authorized the organization to intervene on his or her behalf; LBP-09-26, 70 NRC 939 (2009)
- if no expert opinion or supporting relevant documents are submitted with a contention, any fact-based argument that is provided must be reasonably specific, coherent, and logical, sufficient to show such a dispute and indicate the appropriateness of further inquiry; LBP-09-17, 70 NRC 311 (2009)
- if no particular procedure is required, then the board may conduct the proceeding for a particular contention under Subpart L; LBP-09-10, 70 NRC 51 (2009)
- if petitioner fails 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-09-18, 70 NRC 385 (2009); LBP-09-26, 70 NRC 939 (2009)
- if the attorney or representative of a party is contacted pursuant to the consultation requirement, then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion; LBP-09-22, 70 NRC 640 (2009)
- in a contested uranium enrichment facility proceeding, the licensing board shall make findings of fact and conclusions of law on admitted contentions; CLI-09-15, 70 NRC 1 (2009)
- in a Subpart L evidentiary hearing, the board may ask witnesses to appear in person and answer questions; LBP-09-22, 70 NRC 640 (2009)
- in assessing whether petitioner has standing, NRC has long applied contemporaneous judicial concepts of standing; CLI-09-20, 70 NRC 911 (2009)
- in construction permit and operating license proceedings for power reactors, petitioner is presumed to have standing to intervene if petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm; CLI-09-20, 70 NRC 911 (2009)
- in deciding whether to grant a stay, the Commission considers whether the moving party has made a strong showing that it is likely to prevail on the merits, whether the party will be irreparably injured unless a stay is granted, whether the granting of a stay would harm the other parties, and where the public interest lies; CLI-09-23, 70 NRC 935 (2009)
- in demonstrating that a proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences, petitioner cannot rely on conclusory allegations about potential radiological harm, but must show how these various harms might result from the proposed action; LBP-09-20, 70 NRC 565 (2009)
- in determining whether a petitioner has established standing, boards are to construe the petition in favor of the petitioner; LBP-09-18, 70 NRC 385 (2009); LBP-09-21, 70 NRC 581 (2009)
- in determining whether intervention petitioner has established the necessary interest, licensing boards follow the guidance found in judicial concepts of standing, as stated in federal court case law; LBP-09-17, 70 NRC 311 (2009)
- in determining whether petitioner is an "interested person" for the purposes of a standing determination, NRC is not strictly bound by judicial standing doctrines; CLI-09-20, 70 NRC 911 (2009)
- in nonreactor cases, the potential for offsite consequences is not always clear, and thus the burden falls on petitioner to demonstrate that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-09-20, 70 NRC 565 (2009)
- in proceedings involving nuclear power reactors, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within 50 miles of the nuclear power reactor; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)

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in proceedings other than for construction permits, operating licenses, or significant amendments thereto, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any obvious potential for offsite radiological consequences, as well as the nature of the proposed action and the significance of the radioactive source; LBP-09-20, 70 NRC 565 (2009); LBP-09-28, 70 NRC 1019 (2009)

in ruling on contention admissibility a board is not to look to the merits of the contention; LBP-09-17, 70 NRC 311 (2009)

information upon which an amended or new contention is based must not have been previously available; LBP-09-27, 70 NRC 992 (2009)

information upon which a amended or new contention is based must be materially different than information previously available; LBP-09-27, 70 NRC 992 (2009)

information, facts, and expert opinions provided by petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for the contention; LBP-09-26, 70 NRC 939 (2009)

injury-in-fact to establish standing requires more than a general interest in preserving the environment; LBP-09-28, 70 NRC 1019 (2009)

integration, consolidation, restatement, or collection of previously available information into a new document does not convert it into information that was not previously available within the meaning of 10 C.F.R. 2.309(f)(2)(i); LBP-09-10, 70 NRC 51 (2009)

interests that a representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the required relief must require an individual member to participate in the organization's legal action; LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009)

intervenors' expert is not required to create a written analysis, but only disclose the written analysis or other documentary authority, if any, that exists and is reasonably available at the time of the disclosure; LBP-09-30, 70 NRC 1039 (2009)

intervention petitioner must be able to show how it would have personally suffered or will suffer a distinct and palpable harm that constitutes injury in fact; LBP-09-18, 70 NRC 385 (2009)

intervention petitioner must establish a concrete and particularized injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and is arguably within the zone of interests protected by the governing statute; CLI-09-20, 70 NRC 911 (2009); LBP-09-28, 70 NRC 1019 (2009)

intervention petitioner must state the nature of its right to be made a party to the proceeding, the nature and extent of its property, financial, or other interest in the proceeding, and the possible effect of any decision or order that might be issued in the proceeding on its interest; LBP-09-26, 70 NRC 939 (2009)

intervention petitions must set forth with particularity petitioner's interest in the proceeding and how that interest may be affected by the results of the proceeding, and must also include at least one contention meeting the requirements of 10 C.F.R. 2.309(f)(1); CLI-09-15, 70 NRC 1 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

issuance of a proposed rulemaking and requests for comments does not, in itself, constitute information not previously available that entitles a party to file a new contention; LBP-09-10, 70 NRC 51 (2009)

it is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used; LBP-09-15, 70 NRC 198 (2009)

it is inconsistent with the dispute avoidance/resolution purposes of a section, and thus insufficient, for the contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that it takes no position on the motion (or issues and that it reserves the right to file a response to the motion when it is filed; LBP-09-22, 70 NRC 640 (2009)

judicial concepts of standing require that a petitioner establish that it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute, that the injury can fairly be traced to the challenged action, and that the injury is likely to be redressed by a favorable decision; LBP-09-18, 70 NRC 385 (2009)

judicial standing concepts are applied in NRC licensing proceedings; LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-26, 70 NRC 939 (2009); LBP-09-28, 70 NRC 1019 (2009)



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licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 385 (2009)

licensing boards may not admit contentions that directly or indirectly challenges Table S-3; LBP-09-18, 70 NRC 385 (2009)

licensing boards must consider the nature of petitioner's right under the Atomic Energy Act or the National Environmental Policy Act 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 decision or order that may be issued on the petitioner's interest; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

licensing boards should not accept in individual license proceedings contentions which are, or are about to become, the subject of general rulemaking by the Commission; LBP-09-21, 70 NRC 581 (2009)

mandatory disclosures required by 10 C.F.R. 2.336 consist of an exchange of prescribed information and documents between the litigants, and do not need to be submitted to the board; LBP-09-30, 70 NRC 1039 (2009)

materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-09-26, 70 NRC 939 (2009)

mere mention of a document without providing its contents or an explanation of its significance cannot support admissibility of the contention; LBP-09-21, 70 NRC 581 (2009)

mere statements of government officials are insufficient to overturn 10 C.F.R. § 51.23; LBP-09-21, 70 NRC 581 (2009)

more than mere notice pleading, which is a broad standard requiring only a short and plain statement of the claim, is required for contention admission; LBP-09-17, 70 NRC 311 (2009)

motions will be rejected if they do not include certification by the attorney or representative of the moving party that they have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in the motion, and to resolve those issues; LBP-09-22, 70 NRC 640 (2009)

no obvious potential for offsite consequences sufficient to establish organizational standing was shown even though the organization's office was a mere 3 miles from the facility; LBP-09-28, 70 NRC 1019 (2009)

no proximity presumption applies in source materials cases; LBP-09-13, 70 NRC 168 (2009)

untimely petitions to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of eight factors; CLI-09-15, 70 NRC 1 (2009)

not all entities with governmental ties are entitled to participate in licensing proceedings as local governmental bodies; LBP-09-13, 70 NRC 168 (2009)

nothing in the NRC case law or regulations requires, at the contention admissibility stage, that a contention be supported by an expert opinion, substantive affidavits, or evidence; LBP-09-10, 70 NRC 51 (2009)

NRC guidelines and regulatory guides are not legally binding on the Staff, the board, or the Commission; LBP-09-10, 70 NRC 51 (2009)

NRC's adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction that regulatory policy should take; LBP-09-26, 70 NRC 939 (2009)

NRC's proximity presumption does not disregard contemporaneous judicial concepts of standing, but rather the Commission applied its expertise to determine that persons living within a 50-mile radius of a nuclear reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility; LBP-09-16, 70 NRC 227 (2009)

once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing; LBP-09-16, 70 NRC 227 (2009); LBP-09-21, 70 NRC 581 (2009)

organizational standing requires the party to demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act; LBP-09-21, 70 NRC 581 (2009)

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organizations may demonstrate standing in either an organizational or a representational capacity; LBP-09-28, 70 NRC 1019 (2009)

persons who reside or frequent the area within a 50-mile radius of the reactor are presumed to have standing to participate in a proceeding involving that reactor; LBP-09-17, 70 NRC 311 (2009)

petitioner 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-09-17, 70 NRC 311 (2009)

petitioner does not have to prove its contention at the admissibility stage; LBP-09-26, 70 NRC 939 (2009)

petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate because a petitioner's status can change over time and the bases for its standing in an earlier proceeding may no longer apply; LBP-09-18, 70 NRC 385 (2009)

petitioner is not required to prove its case at the contention admission stage; LBP-09-17, 70 NRC 311 (2009)

petitioner is obligated to read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant; LBP-09-25, 70 NRC 867 (2009)

petitioner is required merely to provide a simple nexus between the contention and the referenced factual or legal support; LBP-09-21, 70 NRC 581 (2009); LBP-09-25, 70 NRC 867 (2009)

petitioner may have standing based on its geographic proximity to the proposed facility; LBP-09-18, 70 NRC 385 (2009)

petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions; LBP-09-17, 70 NRC 311 (2009)

petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-09-13, 70 NRC 168 (2009); LBP-09-26, 70 NRC 939 (2009)

petitioner must demonstrate that its contention is within the scope of the proceeding; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

petitioner must 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; LBP-09-17, 70 NRC 311 (2009); LBP-09-21, 70 NRC 581 (2009)

petitioner must include sufficient information in its contention to show that a genuine dispute exists with the applicant/licensee on a material issue of fact; LBP-09-10, 70 NRC 51 (2009); LBP-09-27, 70 NRC 992 (2009)

petitioner must provide a brief explanation of the basis for the contention; LBP-09-21, 70 NRC 581 (2009)

petitioner must provide a concise statement of the alleged facts or expert opinions that support its position on the issue and on which it intends to rely at hearing, together with references to the specific sources and documents on which it intends to rely to support its position on the issue; LBP-09-16, 70 NRC 227 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-27, 70 NRC 992 (2009)

petitioner must provide a specific statement of the issue of law or fact to be raised or controverted; LBP-09-21, 70 NRC 581 (2009)

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 petitioner disagrees with the applicant; LBP-09-17, 70 NRC 311 (2009)

petitioner must show that the subject matter of the contention would impact the grant or denial of the license application at issue in the proceeding; LBP-09-26, 70 NRC 939 (2009)

petitioner who might have had standing in an earlier proceeding will not automatically be granted standing in subsequent proceedings; LBP-09-18, 70 NRC 385 (2009)

petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-09-15, 70 NRC 198 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-26, 70 NRC 939 (2009)

petitioner's residence within a 50-mile radius of the proposed facility has established standing in his own right, and, accordingly, representational standing has been established through him; LBP-09-18, 70 NRC 385 (2009)

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petitions and contentions filed after the initial 60-day deadline are admissible only upon a balancing of eight factors of 10 C.F.R. 2.309(c); LBP-09-26, 70 NRC 939 (2009)

pleading requirements call for a recitation of facts or expert opinion supporting the issue raised, but are inapplicable to a contention of omission beyond identifying the regulatively required missing information; LBP-09-16, 70 NRC 227 (2009)

providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention; LBP-09-26, 70 NRC 939 (2009)

redressability requires petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-09-13, 70 NRC 168 (2009)

replies may provide only legitimate amplifications of the original contentions or a logical/legal response to the answers of the Staff and applicant; LBP-09-17, 70 NRC 311 (2009)

reply briefs that raise new issues must address the late-filing and new-contention factors in 10 C.F.R. 2.309(c) or (f)(2); LBP-09-17, 70 NRC 311 (2009)

representational standing will not be granted where petitioner has provided no supporting affidavits or other evidence that any member has authorized it to represent their interests in the proceeding; LBP-09-28, 70 NRC 1019 (2009)

requirements for filing both new and nontimely contentions are stringent; LBP-09-27, 70 NRC 992 (2009)

rulings may be referred to the Commission if they raise significant and novel legal or policy issues, the resolution of which would materially advance the orderly disposition of the proceeding; LBP-09-16, 70 NRC 227 (2009)

selection of hearing procedures for contentions at the outset of a proceeding is not immutable, because the availability of Subpart G procedures depends critically on the credibility of eyewitnesses, and the identity of such witnesses may not be known until after the contentions are admitted; LBP-09-10, 70 NRC 51 (2009)

simply attaching materials or documents, without explaining their significance, is insufficient support for contention admission; LBP-09-18, 70 NRC 385 (2009)

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; LBP-09-17, 70 NRC 311 (2009)

standing cannot be based on unfounded conjecture; LBP-09-28, 70 NRC 1019 (2009)

stating that an allegation that some aspect of a license application is inadequate or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect; LBP-09-18, 70 NRC 385 (2009)

substantial deference is given to boards' determinations on threshold issues, such as standing and contention admissibility; CLI-09-20, 70 NRC 911 (2009)

technical perfection is not an essential element of contention pleading, but the rules have nonetheless been held to bar contentions where petitioners have only what amounts to generalized suspicions, hoping to substantiate them later; LBP-09-17, 70 NRC 311 (2009)

the benefit of the doubt should be given to the potential intervenor in order to prevent the dismissal of a petition due to inarticulate draftsmanship or procedural or pleading defects; LBP-09-18, 70 NRC 385 (2009)

the better practice for an intervention petitioner is to submit a fully developed showing regarding standing in each proceeding in which it seeks to intervene, regardless of whether it has previously been found to have standing relative to the facility that is the locus of the proceedings; LBP-09-18, 70 NRC 385 (2009)

the Commission defers to a board's rulings on standing unless the appeal points to an error of law or abuse of discretion; CLI-09-20, 70 NRC 911 (2009); CLI-09-22, 70 NRC 932 (2009)

the Commission recognizes a 50-mile proximity presumption to establish standing in proceedings concerning nuclear power reactor construction and operating licenses; LBP-09-28, 70 NRC 1019 (2009)

the Commission will review referred rulings only if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; CLI-09-21, 70 NRC 927 (2009)

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- the Commission's power to define the scope of a proceeding will lead to the denial of intervention when the Commission amends a license to require additional or better safety measures; LBP-09-20, 70 NRC 565 (2009)
- the contention admissibility decision sometimes turns on a determination about when, as a cumulative matter, separate pieces of the information puzzle were sufficiently in place to make the particular concerns reasonably apparent; LBP-09-10, 70 NRC 51 (2009)
- the contention admissibility rule does not require a petitioner to prove its case at the contention stage; LBP-09-27, 70 NRC 992 (2009)
- the contention admissibility threshold is less than is required at the summary disposition stage; LBP-09-26, 70 NRC 939 (2009)
- the contention requirements were never intended to be turned into a fortress to deny intervention; LBP-09-21, 70 NRC 581 (2009)
- 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-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009)
- the decision as to whether an alleged environmental impact or alternative is significant or reasonable is the merits of a NEPA contention and should not be adjudicated at the contention admissibility stage under the guise of materiality or scope; LBP-09-10, 70 NRC 51 (2009)
- the fact that NRC Staff issues a request for additional information does not, per se, demonstrate that the combined license application is incomplete or ensure the admission of a new contention; LBP-09-10, 70 NRC 51 (2009)
- the fact that Staff issues a request for additional information does not immunize the combined license application from challenge or bar the admission of a new contention on the same subject, provided the contention satisfies the criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi) and (f)(2) or (c); LBP-09-10, 70 NRC 51 (2009)
- the filing of new or amended contentions based on new information is permitted if sufficient justification is provided; LBP-09-15, 70 NRC 198 (2009)
- the first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. 2.309(f)(2)(iii) or nontimely under section 2.309(c); LBP-09-10, 70 NRC 51 (2009)
- the injury-in-fact necessary to establish organizational standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-09-13, 70 NRC 168 (2009)
- the interests that a representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the required relief must require an individual member to participate in the organization's legal action; LBP-09-16, 70 NRC 227 (2009)
- the issue that generally arises under 10 C.F.R. 2.309(f)(1)(i) is whether a contention is stated with sufficient specificity; LBP-09-17, 70 NRC 311 (2009)
- the most natural way to read a provision that sets forth a general obligation followed by a set of specific requirements is that the specific requirements provide the details necessary to fulfilling the general obligation; LBP-09-15, 70 NRC 198 (2009)
- the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 911 (2009); LBP-09-16, 70 NRC 227 (2009)
- the possibility that the prevailing party would use the board's order in his favor to persuade a District Court to reconsider part of the penalty imposed on him in a parallel criminal proceeding did not constitute immediate, irreparable harm to the NRC Staff; CLI-09-23, 70 NRC 935 (2009)
- the process of sifting and weighing participants' factual proffers often calls upon a board to make difficult choices, so that a petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself; LBP-09-18, 70 NRC 385 (2009)
- the proximity presumption applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-26, 70 NRC 939 (2009)

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the purpose of the contention admissibility rules is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-09-26, 70 NRC 939 (2009)

the requirement of 10 C.F.R. 2.309(f)(1)(ii) that the petition include a brief explanation of the basis for the contention requires an explanation of the rationale or theory of the contention; LBP-09-10, 70 NRC 51 (2009)

the requisite injury to establish standing may be either actual or threatened but must nonetheless be concrete and particularized, not conjectural or hypothetical; LBP-09-28, 70 NRC 1019 (2009)

the scope of a proceeding is defined in the Commission's initial hearing notice and order referring the proceeding to the licensing board; LBP-09-26, 70 NRC 939 (2009)

the scope of an adjudicatory proceeding is specified by the Notice of Hearing; LBP-09-25, 70 NRC 867 (2009)

the six criteria that govern the admissibility of contentions are discussed; LBP-09-21, 70 NRC 581 (2009)

the standard for amendment of a contention is whether the information was available to the public, not whether the petitioner has recently found it; LBP-09-26, 70 NRC 939 (2009)

the strict contention rule serves multiple interests; LBP-09-17, 70 NRC 311 (2009)

the subject matter of a contention must impact the grant or denial of a pending license application; LBP-09-27, 70 NRC 992 (2009)

the substantive standard for allowing parties to conduct cross-examination is the same under 10 C.F.R. Part 2, Subparts G and L; LBP-09-10, 70 NRC 51 (2009)

there is an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of whether the request for hearing or petition to intervene should have been wholly denied; CLI-09-22, 70 NRC 932 (2009)

there is no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC's proximity presumption; CLI-09-22, 70 NRC 932 (2009)

to amend a contention, petitioner must demonstrate that the information upon which the amended contention is based was not previously available and is materially different from information previously available, and that the amended contention has been submitted in a timely fashion; LBP-09-26, 70 NRC 939 (2009)

to assert an appropriate injury for organizational standing, an organization must demonstrate a palpable injury in fact to its organizational interests; LBP-09-13, 70 NRC 168 (2009)

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-09-26, 70 NRC 939 (2009)

to be appealable, a disputed order must dispose of the entire petition so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner; CLI-09-18, 70 NRC 859 (2009)

to be sincere, movant should contact other parties sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question; LBP-09-22, 70 NRC 640 (2009)

to challenge a regulation, petitioner must submit a supporting affidavit setting forth with particularity the special circumstances that justify the waiver or exception requested; LBP-09-18, 70 NRC 385 (2009)

to demonstrate standing to intervene, petitioner must state, and boards must assess, the nature of petitioner's right under the governing statutes to be made a party, the nature and extent of petitioner's property, financial, or other interest, and the possible effect of the outcome of the proceeding on petitioner's interest; CLI-09-20, 70 NRC 911 (2009)

to demonstrate standing, an organization seeking to intervene in a proceeding must allege that the challenged action will cause a cognizable injury to the organization's interests or to the interests of its members; LBP-09-26, 70 NRC 939 (2009)

to establish causation, petitioner must show that there is a causal connection between the injury-in-fact and the conduct complained of; LBP-09-13, 70 NRC 168 (2009)

to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-20, 70 NRC 565 (2009)

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- to establish standing petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-20, 70 NRC 565 (2009)
- to establish standing, petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-09-13, 70 NRC 168 (2009)
- to intervene in NRC proceedings, petitioner must file a written petition for leave to intervene in accordance with the requirements of 10 C.F.R. 2.309; CLI-09-15, 70 NRC 1 (2009)
- to participate as a party in a licensing proceeding, petitioner must not only establish standing but must also proffer at least one admissible contention that meets the requirements of 10 C.F.R. 2.309(f)(1); LBP-09-16, 70 NRC 227 (2009); LBP-09-26, 70 NRC 939 (2009)
- to support their contentions, petitioners need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion; LBP-09-17, 70 NRC 311 (2009)
- under 10 C.F.R. 2.309(g) and 2.310, the board determines which hearing procedure will be used (Subpart G or L) on a contention-by-contention basis; LBP-09-10, 70 NRC 51 (2009)
- under Subpart L, a party seeking to conduct cross-examination must file a written motion and obtain leave from the board; LBP-09-10, 70 NRC 51 (2009)
- when a claim becomes moot, a decision on the merits may be appropriate if the same basic dispute is likely to recur in the future, unless it seems sufficient to await the event or better to defer to another court; LBP-09-15, 70 NRC 198 (2009)
- when a federal court dismisses a claim as moot and avoids any further consideration of the merits of that claim, it does so because the claim no longer satisfies the case or controversy requirement of Article III; LBP-09-15, 70 NRC 198 (2009)
- when denial of a license would alleviate a petitioner's asserted potential injury, any admissible contention with such a result can be prosecuted by a petitioner, regardless of whether that contention is directly related to that petitioner's articulated injury; LBP-09-16, 70 NRC 227 (2009)
- when information becomes available piecemeal over time, and the foundation for a new contention does not become reasonably apparent until the last piece of information becomes available and falls into place, the test for good cause for late filing may be met; LBP-09-10, 70 NRC 51 (2009)
- when NRC issues the environmental impact statement, petitioners have the opportunity to file a second wave of environmental contentions, which focus on the adequacy of the NRC Staff's EIS (or EA) under NEPA; LBP-09-25, 70 NRC 867 (2009)
- where 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 Staff in a draft EIS, intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information; LBP-09-27, 70 NRC 992 (2009)
- where intervenors have filed new contentions based on a supplement to the combined license application, in advance of a full board ruling on the original contentions, no appeal lies until the board acts on all contentions, both the original and the newly filed ones; CLI-09-18, 70 NRC 859 (2009)
- where petitioners failed to file on time or seek an extension because they had not yet decided whether to seek to intervene, such indecision does not constitute good cause; LBP-09-26, 70 NRC 939 (2009)
- whether the party seeking a stay faces potentially irreparable harm is the most important factor considered in the Commission's determination whether to grant a stay; CLI-09-23, 70 NRC 935 (2009)
- with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-09-26, 70 NRC 939 (2009)
- with respect to an applicant's appeal, applicant must contend that, after considering all pending contentions, the board has erroneously granted a hearing to the petitioner; CLI-09-18, 70 NRC 859 (2009)
- with respect to orders modifying a license, petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing; LBP-09-20, 70 NRC 565 (2009)
- within 25 days after service of a motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention, and within 7 days of service of the answer, the movant may file a reply; LBP-09-22, 70 NRC 640 (2009)
- RULES OF PROCEDURE**
- in Subpart L proceedings, NRC Staff must produce a hearing file and make it available to all parties; LBP-09-22, 70 NRC 640 (2009)

## SUBJECT INDEX

parties and the NRC Staff have a continuing duty to update their mandatory disclosures; LBP-09-22, 70 NRC 640 (2009)

scheduling orders are to include provisions for disclosure of electronically stored information; LBP-09-22, 70 NRC 640 (2009)

Subpart G procedures focus on issues where the credibility of an eyewitness and/or issues of motive or intent of the party or eyewitness may reasonably be expected to be at issue; LBP-09-22, 70 NRC 640 (2009)

See also Subpart G Procedures; Subpart L Procedures

### SAFEGUARDS INFORMATION

a completed Form FD-258 (fingerprint card), signed in original ink, and submitted in accordance with 10 C.F.R. 73.57(d) is required for access to SGI; CLI-09-15, 70 NRC 1 (2009)

a completed Form SF-85, "Questionnaire for Non-Sensitive Positions" is required for each individual who would have access to SGI; CLI-09-15, 70 NRC 1 (2009)

a requester may challenge an adverse determination with respect to access to safeguards information by filing a request for review; CLI-09-15, 70 NRC 1 (2009)

before an adverse determination on trustworthiness and reliability for access to SGI is made, the proposed recipient must be provided any records that were considered in the determination and given an opportunity to correct or explain the information; CLI-09-15, 70 NRC 1 (2009)

content of a statement that explains an individual's "need to know" safeguards information is described; CLI-09-15, 70 NRC 1 (2009)

if NRC Staff determines that the requestor has satisfied its requirements, the Office of Administration will then determine, based upon completion of the background check, whether the proposed recipient is trustworthy and reliable; CLI-09-15, 70 NRC 1 (2009)

individuals requesting access to safeguards information who believe they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements should specifically state which exemption the requestor is invoking and explaining the requestor's basis for believing that the exemption is applicable; CLI-09-15, 70 NRC 1 (2009)

prior to providing safeguards information to a requestor, the NRC Staff will conduct an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of this section; CLI-09-15, 70 NRC 1 (2009)

### SAFETY

severe accident mitigation alternatives analysis must be site specific and given careful consideration in order to comply with the Atomic Energy Act; LBP-09-10, 70 NRC 51 (2009)

### SAFETY ANALYSIS

early site permit applicants must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)

fission product releases are associated with accidents that have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products; LBP-09-19, 70 NRC 433 (2009)

### SAFETY ANALYSIS REPORT

a limited work authorization applicant must submit design information related to activities within the scope of the requested LWA; LBP-09-19, 70 NRC 433 (2009)

the SAR component of an application for a standard design certification must analyze and address the problem of extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products; LBP-09-10, 70 NRC 51 (2009)

the site SAR submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)

See also Final Safety Analysis Report

### SAFETY EVALUATION

early site permit applicants must perform an evaluation and analysis of the postulated fission product release to evaluate the offsite radiological consequences; LBP-09-19, 70 NRC 433 (2009)

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### SAFETY EVALUATION REPORT

for purposes of the mandatory/uncontested portion of an ESP proceeding, the board takes official notice of publicly available documents associated with the Staff's safety and environmental reviews; LBP-09-19, 70 NRC 433 (2009)

### SAFETY INFORMATION

early site permit applications must contain a description and safety assessment of the site that includes an analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under radiological consequence evaluation factors; LBP-09-19, 70 NRC 433 (2009)

### SAFETY ISSUES

a new safety contention can be filed, with leave of the board, on a showing that the new contention is based on information that was not previously available and is materially different from previously available information, and the new contention has been submitted in a timely fashion based on the availability of the subsequent information; LBP-09-9, 70 NRC 41 (2009)

power reactor licensees have safely stored and managed low-level radioactive waste under NRC oversight for years without the development of immediate safety problems or concerns; LBP-09-16, 70 NRC 227 (2009)

### SAFETY-RELATED

the design basis flood is the magnitude of the flood event that is used to evaluate safety structures, systems, and components important to safety during facility design; LBP-09-25, 70 NRC 867 (2009)

### SAFETY REVIEW

findings that a board must make for issuance of an early site permit are clarified; LBP-09-19, 70 NRC 433 (2009)

NRC provides detailed guidance for Staff personnel reviewing the safety aspects of early site permit applications; LBP-09-19, 70 NRC 433 (2009)

### SANCTIONS

a board may impose sanctions including dismissal of the specific contentions, dismissal of the adjudication, or dismissal of the application for any continuing unexcused failure to make the required mandatory disclosures; LBP-09-30, 70 NRC 1039 (2009)

a key factor in establishing the length of a potential employment ban is whether the subject has taken responsibility for his actions and expressed the appropriate remorse; LBP-09-24, 70 NRC 676 (2009)

a single charge, if serious enough, could justify a 5-year employment ban; LBP-09-24, 70 NRC 676 (2009)

carefully crafted restraints in the Constitution preserve freedom by curbing the exercise of power; LBP-09-24, 70 NRC 676 (2009)

courts have been careful to strictly limit the exercise of summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge; LBP-09-24, 70 NRC 676 (2009)

exercise of the power of compulsory process must be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas; LBP-09-24, 70 NRC 676 (2009)

immediately effective deprivation of the legally acknowledged right to pursue one's livelihood should not be imposed without the Staff having substantial reason to do so and explaining its reasons in advance and in some detail; LBP-09-24, 70 NRC 676 (2009)

states can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened; LBP-09-24, 70 NRC 676 (2009)

the appropriateness of a 5-year employment ban may not depend on a board's upholding all of the several charges and then imposing a multiyear ban on a sort of "1 year for each violation" approach; LBP-09-24, 70 NRC 676 (2009)

the target of an immediately effective enforcement order has the right to challenge the immediate effectiveness and the promise of an expedited hearing; LBP-09-24, 70 NRC 676 (2009)

to succeed in imposing pretrial detention because the accused is a danger to the community, the government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably ensure the community's safety; LBP-09-24, 70 NRC 676 (2009)



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where the government has deprived an individual of a property interest without a hearing, the government must be prepared to show an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted; LBP-09-24, 70 NRC 676 (2009)

### SCHEDULE, BRIEFING

allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final safety evaluation report is issued will serve to further the Commission's objective to ensure a fair, prompt, and efficient resolution of contested issues; CLI-09-15, 70 NRC 1 (2009)

### SCHEDULING

an initial scheduling order is designed to ensure proper case management of the proceeding; LBP-09-22, 70 NRC 640 (2009)

boards have an obligation to establish a case scheduling order, and to advise the Commission of any significant delay in meeting major activities set forth in the hearing schedule; CLI-09-17, 70 NRC 309 (2009)

no later than 1 year after issuance of the combined license or at the start of construction, whichever is later, the COL licensee must submit its schedule for completing the inspections, tests, or analyses and provide schedule updates; LBP-09-19, 70 NRC 433 (2009)

orders are to include provisions for disclosure of electronically stored information; LBP-09-22, 70 NRC 640 (2009)

the initial scheduling order is to be issued within 55 days of the board decision granting intervention and admitting contentions; LBP-09-22, 70 NRC 640 (2009)

### SECURITY

See Common Defense and Security

### SEISMIC ANALYSIS

applicant's site safety analysis report must include seismic and geologic characteristics of the proposed site with appropriate consideration of the most severe historical natural phenomena that have been reported for the site; LBP-09-19, 70 NRC 433 (2009)

in providing information on seismic and geologic characteristics of a proposed site, applicants must conform to the requirements of 10 C.F.R. 100.23; LBP-09-19, 70 NRC 433 (2009)

the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)

### SENIOR REACTOR OPERATOR LICENSE

license automatically expires upon termination of employment with the facility licensee; LBP-09-14, 70 NRC 193 (2009)

license is limited to the facility for which it is issued; LBP-09-14, 70 NRC 193 (2009)

no license that petitioner might be awarded could be active because (not having been at the facility for more than 6 months) petitioner could not have performed the functions of an operator or senior operator for the necessary minimum number of hours during each calendar quarter; LBP-09-14, 70 NRC 193 (2009)

where applicant had proposed that a senior reactor operator license be both issued and cancelled retroactively, the Commission declined to engage in such an empty exercise; LBP-09-14, 70 NRC 193 (2009)

### SETTLEMENT AGREEMENTS

a clause in a settlement agreement regarding standing does not apply to NRC Staff, nor would it bind a future licensing board to make any particular determination regarding whether any of the petitioners has established its standing, either as of right or as a matter of discretion; LBP-09-23, 70 NRC 659 (2009)

a notice of hearing having been issued by the Commission in a COL proceeding, the board has jurisdiction to approve a settlement agreement; LBP-09-23, 70 NRC 659 (2009)

finding that a settlement agreement is consistent with the content and form requirements and is in the public interest, the board approves the agreement and terminates this contested hearing; LBP-09-23, 70 NRC 659 (2009)

licensing boards must be satisfied that the terms of a proposed agreement reflect a fair and reasonable resolution of the matter at hand, are in keeping with the objectives of NRC's enforcement policy, and satisfy the requirements of 10 C.F.R. 2.338(g) and (h); LBP-09-11, 70 NRC 151 (2009); LBP-09-12, 70 NRC 159 (2009)

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the agreement becomes effective upon its execution by both parties, but the agreement is contingent upon approval by the board; LBP-09-12, 70 NRC 159 (2009)

the section 2.341(a)(2) sua sponte review process that applies to a licensing board determination approving a settlement agreement affords the Commission the opportunity to correct any participant or board misapprehensions regarding the items contemplated in the settlement agreement; LBP-09-23, 70 NRC 659 (2009)

upon submitting for approval to work under a reciprocity agreement licensee will send a copy of the board order confirming the settlement agreement to the regulator processing the reciprocity application at least 2 weeks prior to engaging in activity authorized by the reciprocity agreement; LBP-09-12, 70 NRC 159 (2009)

when an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action; LBP-09-23, 70 NRC 659 (2009)

### SETTLEMENT NEGOTIATIONS

although interested governmental entities would not have a formal role in a proceeding absent the admission of parties and contentions, boards expect that such entities would be kept appropriately apprised of the other participants' settlement efforts; LBP-09-23, 70 NRC 659 (2009)

### SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS

a contention that fails to provide even a ballpark figure for the cost of implementing any proposed SAMAs is inadmissible because it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration; LBP-09-26, 70 NRC 939 (2009)

although the methodology is available to provide the required analysis, neither NEPA nor NRC regulations require that the analysis under 10 C.F.R. 51.45(c) be performed using that methodology; LBP-09-26, 70 NRC 939 (2009)

analyses must be site specific and given careful consideration in order to comply with safety and environmental requirements; LBP-09-10, 70 NRC 51 (2009)

applicant's environmental report is required to analyze the alternatives available for reducing or avoiding adverse environmental effects; LBP-09-10, 70 NRC 51 (2009); LBP-09-19, 70 NRC 433 (2009); LBP-09-26, 70 NRC 939 (2009)

existence of another independent nuclear power plant within the 10-mile-radius emergency planning zone of a proposed new nuclear power plant is a significant factor for purposes of emergency planning for the new reactor; LBP-09-10, 70 NRC 51 (2009)

if the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law; LBP-09-26, 70 NRC 939 (2009)

in evaluating early site permit applications, where detailed design information is not available, the Commission may defer resolution of SAMAs until the construction permit or combined license stage; LBP-09-19, 70 NRC 433 (2009)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-09-26, 70 NRC 939 (2009)

NEPA implicitly requires agencies to consider measures to mitigate environmental impacts; LBP-09-10, 70 NRC 51 (2009); LBP-09-19, 70 NRC 433 (2009)

NEPA requires dealing with uncertainties by inclusion in an environmental impact statement of a summary of existing credible scientific evidence relevant to evaluating the reasonably foreseeable significant adverse impacts regarding those events with potential catastrophic consequences even if their probability is low; LBP-09-26, 70 NRC 939 (2009)

potential plant modifications as well as plant procedural changes or training program changes that can reduce the risks of severe accidents are considered; LBP-09-19, 70 NRC 433 (2009)

the analysis of reasonably foreseeable significant adverse impacts regarding those events with potential catastrophic consequences must be supported by credible scientific evidence, must not be not based on pure conjecture, and must be within the rule of reason; LBP-09-26, 70 NRC 939 (2009)

### SEVERE ACCIDENT MITIGATION ALTERNATIVES DESIGN ANALYSIS

all environmental issues concerning SAMDAs associated with the information in the NRC's environmental assessment for a certified design are considered resolved; LBP-09-19, 70 NRC 433 (2009)

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- design certification applicants are required to address SAMDAs; LBP-09-19, 70 NRC 433 (2009)
- early site permit applicants must submit a safety assessment that includes an analysis of a fission product release from an accident, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents; LBP-09-19, 70 NRC 433 (2009)
- if a combined license application references a design certification, then the presiding officer shall not admit contentions concerning SAMDAs unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification; LBP-09-10, 70 NRC 51 (2009)
- issues are resolved for an application referencing a design control document if the specific site parameters are covered by the site parameters assumed in the DCD SAMDA analysis; LBP-09-19, 70 NRC 433 (2009)
- the environmental report associated with each application for a standard design certification must address the costs and benefits of SAMDAs; LBP-09-10, 70 NRC 51 (2009)
- this analysis focuses on severe accident mitigation dealing with reactor design and hardware issues; LBP-09-10, 70 NRC 51 (2009)
- SITE CHARACTERIZATION**
- applicant's site safety analysis report must include seismic and geologic characteristics of the proposed site with appropriate consideration of the most severe historical natural phenomena that have been reported for the site; LBP-09-19, 70 NRC 433 (2009)
- in providing information on seismic and geologic characteristics of a proposed site, applicants must conform to the requirements of 10 C.F.R. 100.23; LBP-09-19, 70 NRC 433 (2009)
- the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)
- SITE HYDROLOGY**
- factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)
- in its review of early site permit applications, Staff must consider physical characteristics of the site, specifically noting that factors important to hydrological radionuclide transport must be obtained from onsite measurements; LBP-09-19, 70 NRC 433 (2009)
- the site safety analysis report submitted with an early site permit application must contain the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site; LBP-09-19, 70 NRC 433 (2009)
- SITE REMEDIATION**
- boards are to determine whether the site redress plan will adequately redress the activities performed under a limited work authorization should the activities be terminated by either the holder of the LWA or by Commission denial of any corresponding early site permit or combined license; LBP-09-19, 70 NRC 433 (2009)
- SITE RESTORATION**
- a limited work authorization authorizes activities for which either a construction permit or combined license is otherwise required, but the LWA application must include a plan for site redress that provides for restoration if the project is cancelled, the LWA is revoked, or a construction permit or COL is denied; LBP-09-19, 70 NRC 433 (2009)
- a site redress plan remains in effect for an early site permit applicant even if the ESP with which the LWA is issued is not referenced in a construction permit or COL application during the period that the ESP remains valid; LBP-09-19, 70 NRC 433 (2009)
- SITE SAFETY ANALYSIS REPORT**
- a combined license application reference to an early site permit must include an SSAR that either includes or incorporates by reference the ESP site safety analysis report and that contains additional information and analyses sufficient to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the ESP; LBP-09-19, 70 NRC 433 (2009)
- applicant must include seismic and geologic characteristics of the proposed site with appropriate consideration of the most severe historical natural phenomena that have been reported for the site; LBP-09-19, 70 NRC 433 (2009)

## SUBJECT INDEX

in providing information on seismic and geologic characteristics of a proposed site, applicants must conform to the requirements of 10 C.F.R. 100.23; LBP-09-19, 70 NRC 433 (2009)  
the SSAR filed with an early site permit application must include information that identifies physical characteristics of the proposed site, such as egress limitations from the area surrounding the site, that could pose a significant impediment to the development of emergency plans; LBP-09-19, 70 NRC 433 (2009)

### SITE SELECTION

all reasonable alternatives to the site proposed for the early site permit are to be identified; LBP-09-19, 70 NRC 433 (2009)  
applicant's initial consideration of DOE's Portsmouth, Ohio, and SRS sites as alternative sites was reasonable as part of its alternative site analysis for an early site permit; LBP-09-19, 70 NRC 433 (2009)  
brownfield sites owned by companies other than the applicant may reasonably be excluded as alternative sites; LBP-09-19, 70 NRC 433 (2009)  
exclusion of DOE sites in alternative sites analysis that are far outside applicant's region of interest is reasonable; LBP-09-19, 70 NRC 433 (2009)

### SITE SUITABILITY

existence of another independent nuclear power plant within the 10-mile-radius emergency planning zone of a proposed new nuclear power plant is a significant factor for purposes of emergency planning for the new reactor; LBP-09-10, 70 NRC 51 (2009)  
with regard to alternative sites for an early site permit, NRC Staff must evaluate both the process (i.e., methodology) used by the applicant and the reasonableness of the product (e.g., potential sites) identified by that process; LBP-09-19, 70 NRC 433 (2009)

### SPENT FUEL

there is reasonable assurance that a geologic repository will be available by 2025 and that sufficient repository capacity will be available within 30 years beyond the licensed life to dispose of high-level waste and spent fuel generated by any reactor up to that time; LBP-09-18, 70 NRC 385 (2009)

### SPENT FUEL STORAGE

contentions on the environmental impacts of spent fuel storage are inadmissible; LBP-09-18, 70 NRC 385 (2009)  
no discussion of any environmental impact of spent fuel storage for the period following the term of the reactor combined license is required in any environmental report or environmental impact statement prepared in connection with the requested action; LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)  
petitioner's inaccurate reading and presentation of applicant's spent fuel storage plan cannot serve as a litigable basis for a contention; LBP-09-27, 70 NRC 992 (2009)  
spent fuel can be stored safely onsite for at least 30 years beyond a plant's licensed life for operation; LBP-09-17, 70 NRC 311 (2009)  
the Commission has issued a general license for the storage of spent fuel at an onsite independent spent fuel storage installation to all persons authorized to possess or operate nuclear power reactors under 10 C.F.R. Part 50 or Part 52; LBP-09-20, 70 NRC 565 (2009)  
the environmental impacts related to storage of spent fuel under Part 72 have been generically evaluated under two previous rulemakings and the Commission's waste confidence proceedings, and thus need not be reassessed; LBP-09-21, 70 NRC 581 (2009)  
the Waste Confidence Rule covers the storage of spent fuel in new or existing facilities; LBP-09-10, 70 NRC 51 (2009)  
to the extent that petitioners argue that the provisions of 10 C.F.R. 50.54(hh) should be applied to dry cask storage, they may file a rulemaking petition with the Commission; LBP-09-17, 70 NRC 311 (2009)

See also Independent Spent Fuel Storage Installation

### STANDARD OF PROOF

constructive knowledge is knowledge of facts sufficient to prompt an inquiry that would have uncovered misrepresentations and is not actual knowledge; LBP-09-24, 70 NRC 676 (2009)

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instruction to juries on deliberate ignorance or willful blindness can relieve the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt; LBP-09-24, 70 NRC 676 (2009)

instruction to juries on deliberate ignorance or willful blindness should be used with caution to avoid the possibility that the jury convicts on the lesser standard that the defendant should have known his conduct was illegal; LBP-09-24, 70 NRC 676 (2009)

the danger of instruction to juries on deliberate ignorance or willful blindness in an inappropriate case is that juries will convict on a basis akin to a standard of negligence; LBP-09-24, 70 NRC 676 (2009)

the warning to jurors that the added instruction on deliberate ignorance or willful blindness is not intended to allow them to base guilt on negligence or carelessness is sufficient to legitimize the instruction; LBP-09-24, 70 NRC 676 (2009)

to prevail in establishing that the accused's actions constituted a violation, Staff must demonstrate by a preponderance of the evidence that the accused had actual knowledge of the information associated with his actions and that he deliberately acted contrary to that knowledge; LBP-09-24, 70 NRC 676 (2009)

to succeed in imposing pretrial detention because the accused is a danger to the community, the government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably ensure the community's safety; LBP-09-24, 70 NRC 676 (2009)

where the record in an enforcement proceeding may be devoid of direct evidence to establish knowledge, the Staff may have to build its case upon circumstantial evidence alone; LBP-09-24, 70 NRC 676 (2009)

### STANDARD OF REVIEW

a board's role in an early site permit proceeding is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-09-19, 70 NRC 433 (2009)

in a mandatory hearing, a licensing board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-09-19, 70 NRC 433 (2009)

in evaluating a petitioner's standing, boards are to construe the petition in favor of the petitioner; LBP-09-21, 70 NRC 581 (2009)

licensing boards review NRC Staff's enforcement orders *de novo* to determine on the basis of the hearing record whether the charges are sustained and the sanction imposed is warranted; LBP-09-24, 70 NRC 676 (2009)

on baseline NEPA issues in early site permit cases, boards must reach their own independent determination, but should do so without second-guessing underlying technical or factual findings by the NRC Staff; LBP-09-19, 70 NRC 433 (2009)

petitioners may request, and the Commission, in its discretion, may grant interlocutory review if it is shown that the issue threatens petitioners with immediate and serious irreparable impacts or affects the basic structure of the proceeding in a pervasive manner; LBP-09-10, 70 NRC 51 (2009)

reports before a board are subject to scrutiny both as to those portions that support an intervenor's assertion and those that do not; LBP-09-21, 70 NRC 581 (2009)

the Commission declined to review licensing board referred rulings because the contentions were rejected by the board due to legal insufficiency; CLI-09-21, 70 NRC 927 (2009)

the Commission gives substantial deference to a board's rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-09-16, 70 NRC 33 (2009); CLI-09-22, 70 NRC 932 (2009)

the Commission will review referred rulings only if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding; CLI-09-21, 70 NRC 927 (2009)

the scope of early review of an enforcement order is severely limited and the order's immediate effectiveness depriving the accused of the freedom to work pending trial is presumptively valid, placing the burden on the accused to demonstrate its invalidity; LBP-09-24, 70 NRC 676 (2009)

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- when reviewing an early site permit application in an uncontested proceeding, licensing boards are to conduct a simple sufficiency review rather than a *de novo* review on both Atomic Energy Act and National Environmental Policy Act issues; LBP-09-19, 70 NRC 433 (2009)
- where the final environmental impact statement discussion of alternative sites was insufficient, the board independently reviewed the record on greenfield, competitors' brownfield, noncompetitors' brownfield, and applicant's other nuclear sites to conclude that the Staff's underlying alternative site review was adequate; LBP-09-19, 70 NRC 433 (2009)
- with respect to certain NEPA findings, boards in early site permit proceedings are to make independent environmental judgments, though they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-09-19, 70 NRC 433 (2009)
- STANDING TO INTERVENE
- a board is not at liberty to abandon the Commission's 50-mile proximity presumption; LBP-09-16, 70 NRC 227 (2009)
- a board's determination of standing does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-09-13, 70 NRC 168 (2009)
- a clause in a settlement agreement regarding standing does not apply to NRC Staff, nor would it bind a future licensing board to make any particular determination regarding whether any of the petitioners has established its standing, either as of right or as a matter of discretion; LBP-09-23, 70 NRC 659 (2009)
- a lack of specificity will be sufficient to reject a claim of standing; LBP-09-18, 70 NRC 385 (2009)
- a petition for review and request for hearing must include a showing that the petitioner has standing; LBP-09-13, 70 NRC 168 (2009)
- a significant pattern of regular contacts within the 50-mile radius around the plant is sufficient to establish proximity-based standing; LBP-09-18, 70 NRC 385 (2009)
- a standing ruling in one proceeding is not dispositive of a determination in another proceeding with the same petitioner because the ruling was not the subject of appellate review; LBP-09-18, 70 NRC 385 (2009)
- absent an obvious potential for harm, it is a petitioner's burden to show how harm will or may occur; LBP-09-28, 70 NRC 1019 (2009)
- although a board in another materials license renewal proceeding allowed an Indian organization to participate in that proceeding as an interested Indian tribe under 10 C.F.R. 2.315(c), that ruling is not binding on other boards; LBP-09-13, 70 NRC 168 (2009)
- an administrative agency may establish administrative standing criteria that are less rigorous than those for judicial standing; CLI-09-20, 70 NRC 911 (2009)
- an alleged injury to health and safety, shared equally by many, can form the basis for standing; LBP-09-18, 70 NRC 385 (2009)
- an attack on the Commission's proximity presumption is rejected; LBP-09-18, 70 NRC 385 (2009)
- an entity wishing to participate as a governmental body must demonstrate that it goes beyond an advisory role and exercises executive or legislative responsibilities; LBP-09-13, 70 NRC 168 (2009)
- an injury in fact must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-09-13, 70 NRC 168 (2009)
- because agencies are not constrained by Article III of the Constitution, nor are they governed by judicially created standing doctrines restricting access to federal courts, the criteria for establishing administrative standing may permissibly be less demanding than the criteria for judicial standing; LBP-09-18, 70 NRC 385 (2009)
- even if NRC's proximity presumption is viewed as more lenient than judicial standing requirements, NRC may choose to retain it; CLI-09-20, 70 NRC 911 (2009)
- every petitioner bears the burden of demonstrating standing in order to participate in hearings before a licensing board; LBP-09-18, 70 NRC 385 (2009)
- having established proximity standing, petitioner need not separately establish the requisite injury, causation, and redressability elements; LBP-09-18, 70 NRC 385 (2009)
- in assessing intervention petitions, licensing boards must determine whether standing elements are met even though there are no objections to petitioner's standing; LBP-09-23, 70 NRC 659 (2009)
- in assessing whether petitioner has standing, NRC has long applied contemporaneous judicial concepts of standing; CLI-09-20, 70 NRC 911 (2009)

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in demonstrating that a proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences, petitioner cannot rely on conclusory allegations about potential radiological harm, but must show how these various harms might result from the proposed action; LBP-09-20, 70 NRC 565 (2009)

in determining whether a petitioner has established standing, boards are to construe the petition in favor of the petitioner; LBP-09-10, 70 NRC 51 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-21, 70 NRC 581 (2009)

in determining whether petitioner is an “interested person” for the purposes of a standing determination, NRC is not strictly bound by judicial standing doctrines; CLI-09-20, 70 NRC 911 (2009)

in nonreactor cases, the potential for offsite consequences is not always clear, and thus the burden falls on petitioner to demonstrate that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-09-20, 70 NRC 565 (2009)

in proceedings involving nuclear power reactors, the Commission has adopted a proximity presumption, whereby a petitioner who resides within 50 miles of the reactor is presumed to have standing without the need to plead injury, causation, and redressability; CLI-09-20, 70 NRC 911 (2009); LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

in proceedings other than for construction permits, operating licenses, or significant amendments thereto, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any obvious potential for offsite radiological consequences, as well as the nature of the proposed action and the significance of the radioactive source; LBP-09-20, 70 NRC 565 (2009); LBP-09-28, 70 NRC 1019 (2009)

in ruling on a request for a hearing, a licensing board is to consider the nature of petitioner’s right under the Atomic Energy Act or the National Environmental Policy Act to be made a party to the proceeding, the nature and extent of petitioner’s property, financial, or other interest in the proceeding, and the possible effect of any decision or order that may be issued in the proceeding on the petitioner’s interest; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009)

in source materials cases, petitioner has the burden to show a specific and plausible means of how proposed license activities may affect him or her; LBP-09-13, 70 NRC 168 (2009)

injury-in-fact is defined as an invasion of a legally protected interest which is concrete and particularized and actual or imminent; LBP-09-13, 70 NRC 168 (2009)

intervention petitioner must state the nature of its right to be made a party to the proceeding, the nature and extent of its property, financial, or other interest in the proceeding, and the possible effect of any decision or order that might be issued in the proceeding on its interest; LBP-09-26, 70 NRC 939 (2009)

judicial concepts of standing are generally followed in NRC proceedings; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-28, 70 NRC 1019 (2009)

judicial concepts of standing require that a petitioner establish that it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute, that the injury can fairly be traced to the challenged action and that the injury is likely to be redressed by a favorable decision; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

licensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-09-18, 70 NRC 385 (2009)

membership of a petitioning Indian group must be composed principally of persons who are not members of any other acknowledged North American Indian tribe; LBP-09-13, 70 NRC 168 (2009)

no proximity presumption applies in source materials cases; LBP-09-13, 70 NRC 168 (2009)

not all entities with governmental ties are entitled to participate in licensing proceedings as local governmental bodies; LBP-09-13, 70 NRC 168 (2009)

NRC generally follows judicial concepts of standing; LBP-09-26, 70 NRC 939 (2009)

## SUBJECT INDEX

NRC's proximity presumption does not disregard contemporaneous judicial concepts of standing, but rather the Commission applied its expertise to determine that persons living within a 50-mile radius of a nuclear reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility; LBP-09-16, 70 NRC 227 (2009)

once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing; LBP-09-16, 70 NRC 227 (2009)

organizations may demonstrate standing in either an organizational or a representational capacity; LBP-09-28, 70 NRC 1019 (2009)

petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate because a petitioner's status can change over time and the bases for its standing in an earlier proceeding may no longer apply; LBP-09-18, 70 NRC 385 (2009)

petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-09-20, 70 NRC 911 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-26, 70 NRC 939 (2009); LBP-09-28, 70 NRC 1019 (2009)

petitioner who might have had standing in an earlier proceeding will not automatically be granted standing in subsequent proceedings; LBP-09-18, 70 NRC 385 (2009)

redressability requires petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-09-13, 70 NRC 168 (2009)

standing cannot be based on unfounded conjecture; LBP-09-28, 70 NRC 1019 (2009)

standing generally has been denied when the threat of injury is not concrete and particularized; LBP-09-13, 70 NRC 168 (2009)

state and federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-09-15, 70 NRC 1 (2009)

substantial deference is given to boards' determinations on threshold issues, such as standing and contention admissibility; CLI-09-20, 70 NRC 911 (2009)

the better practice for an intervention petitioner is to submit a fully developed showing regarding standing in each proceeding in which it seeks to intervene, regardless of whether it has previously been found to have standing relative to the facility that is the locus of the proceedings; LBP-09-18, 70 NRC 385 (2009)

the Commission recognizes a 50-mile proximity presumption to establish standing in proceedings concerning nuclear power reactor construction and operating licenses; LBP-09-28, 70 NRC 1019 (2009)

the fact that an ancestor of a member of the Oglala Delegation of the Great Sioux Nation Treaty Council signed several treaties with the United States more than 100 years ago does not establish that the delegation is a current and official successor to the delegation that signed such treaties, or that the delegation is a local governmental entity that currently exercises executive authority; LBP-09-13, 70 NRC 168 (2009)

the nontrivial increased risk of living within 50 miles of a proposed reactor constitutes injury-in-fact, is traceable to the challenged action, and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners; CLI-09-20, 70 NRC 911 (2009); LBP-09-16, 70 NRC 227 (2009)

the process of sifting and weighing participants' factual proffers often calls upon a board to make difficult choices, so that a petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself; LBP-09-18, 70 NRC 385 (2009)

the proximity presumption applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-09-26, 70 NRC 939 (2009)

the requisite injury to establish standing may be either actual or threatened but must nonetheless be concrete and particularized, not conjectural or hypothetical; LBP-09-28, 70 NRC 1019 (2009)

there is no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC's proximity presumption; CLI-09-22, 70 NRC 932 (2009)

to demonstrate standing to intervene, petitioner must state, and boards must assess, the nature of petitioner's right under the governing statutes to be made a party, the nature and extent of petitioner's



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- property, financial, or other interest, and the possible effect of the outcome of the proceeding on petitioner's interest; CLI-09-20, 70 NRC 911 (2009)
- to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue, and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-09-13, 70 NRC 168 (2009)
- to establish causation, petitioner must show that there is a causal connection between the injury-in-fact and the conduct complained of; LBP-09-13, 70 NRC 168 (2009)
- to establish standing in federal court, a party must show injury-in-fact, causation, and redressability; LBP-09-13, 70 NRC 168 (2009)
- to establish standing, petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-09-13, 70 NRC 168 (2009)
- under the proximity presumption, petitioner in an operating license proceeding who lives within 50 miles of a nuclear power reactor is presumed to have standing without the need specifically to plead injury, causation, and redressability; LBP-09-26, 70 NRC 939 (2009)
- when denial of a license would alleviate a petitioner's asserted potential injury, any admissible contention with such a result can be prosecuted by a petitioner, regardless of whether that contention is directly related to that petitioner's articulated injury; LBP-09-16, 70 NRC 227 (2009)
- STANDING TO INTERVENE, ORGANIZATIONAL**
- a broadly stated interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved; LBP-09-13, 70 NRC 168 (2009)
- a Native American group that has failed to establish that it is a federally recognized Indian tribe is denied standing based on its tribal status; LBP-09-13, 70 NRC 168 (2009)
- an organization that is neither a federally recognized Indian tribe nor a local governmental body does not qualify for standing; LBP-09-13, 70 NRC 168 (2009)
- general environmental and policy interests are insufficient for organizational standing; LBP-09-20, 70 NRC 565 (2009)
- injury-in-fact to establish standing requires more than a general interest in preserving of the environment; LBP-09-28, 70 NRC 1019 (2009)
- no obvious potential for offsite consequences sufficient to establish organizational standing was shown even though the organization's office was a mere 3 miles from the facility; LBP-09-28, 70 NRC 1019 (2009)
- organizations seeking to challenge regulations of a government agency failed to demonstrate standing where they did not demonstrate a concrete application of the regulations that threatened imminent harm to their interests; CLI-09-20, 70 NRC 911 (2009)
- petitioner must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests or the interests of its members and that the injury is within the zone of interests protected by the National Environmental Policy Act or the Atomic Energy Act; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009)
- the injury-in-fact necessary to establish standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-09-13, 70 NRC 168 (2009)
- the organization must, in its own right, satisfy the same requirements of injury, causation, and redressability as an individual; LBP-09-28, 70 NRC 1019 (2009)
- STANDING TO INTERVENE, REPRESENTATIONAL**
- a member must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither the petitioner's contentions nor the requested relief must require an individual member to participate in the proceeding; LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009)
- affidavits authorizing organizational representation are to be filed with specific reference to the proceeding in which standing is sought and petitioners given the opportunity to cure such defects in their affidavits; LBP-09-13, 70 NRC 168 (2009)
- an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed, demonstrate that the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to

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request a hearing on behalf of that member; LBP-09-10, 70 NRC 51 (2009); LBP-09-13, 70 NRC 168 (2009); LBP-09-16, 70 NRC 227 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-20, 70 NRC 565 (2009); LBP-09-21, 70 NRC 581 (2009); LBP-09-26, 70 NRC 939 (2009); LBP-09-28, 70 NRC 1019 (2009)

### STATE GOVERNMENT

if applicant chooses to submit a complete and integrated emergency plan at the early site permit stage, applicant also is required to make a good-faith effort to obtain a certification from federal, state, and local governmental agencies with emergency planning responsibilities; LBP-09-19, 70 NRC 433 (2009)

### STATE REGULATORY REQUIREMENTS

nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to impose any effluent limitation other than those set by EPA or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 867 (2009)

when water quality decisions have been made by a state pursuant to the Clean Water Act and these decisions are raised in NRC licensing proceedings, the NRC is bound to take the Environmental Protection Agency's considered decisions at face value; LBP-09-25, 70 NRC 867 (2009)

### STATUTES

contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-09-16, 70 NRC 227 (2009); LBP-09-26, 70 NRC 939 (2009)

### STATUTORY CONSTRUCTION

a court should not adopt an interpretation that would render a statutory provision redundant or nonsensical; LBP-09-16, 70 NRC 227 (2009)

a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; LBP-09-16, 70 NRC 227 (2009)

each word that Congress used must be given a separate and distinct significance that is consistent with its ordinary meaning; LBP-09-30, 70 NRC 1039 (2009)

it is a fundamental principle that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used; LBP-09-15, 70 NRC 198 (2009)

not only the bare meaning of the word but also its placement and purpose in the statutory scheme are considered; LBP-09-15, 70 NRC 198 (2009)

since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption that identical words in a statute always have identical meaning readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent; LBP-09-30, 70 NRC 1039 (2009)

the most natural way to read a provision that sets forth a general obligation followed by a set of specific requirements is that the specific requirements provide the details necessary to fulfilling the general obligation; LBP-09-15, 70 NRC 198 (2009)

### STAY

a court inclined to apply collateral estoppel based on a judgment that is subject to appeal may want to avoid the question by staying the case pending the appeal; LBP-09-24, 70 NRC 676 (2009)

### STAY OF EFFECTIVENESS

a party seeking a stay must show that it faces imminent, irreparable harm that is both certain and great; CLI-09-23, 70 NRC 935 (2009)

in deciding whether to grant a stay, the Commission considers whether the moving party has made a strong showing that it is likely to prevail on the merits, whether the party will be irreparably injured unless a stay is granted, whether the granting of a stay would harm the other parties, and where the public interest lies; CLI-09-23, 70 NRC 935 (2009)

party seeking a stay did not show an overwhelming probability of success on the merits of its appeal sufficient to overcome its lack of showing of irreparable harm; CLI-09-23, 70 NRC 935 (2009)

the possibility that the prevailing party would use the board's order in his favor to persuade a District Court to reconsider part of the penalty imposed on him in a parallel criminal proceeding did not constitute immediate, irreparable harm to the NRC Staff; CLI-09-23, 70 NRC 935 (2009)

## SUBJECT INDEX

whether the party seeking a stay faces potentially irreparable harm is the most important factor considered in the Commission's determination whether to grant a stay; CLI-09-23, 70 NRC 935 (2009)

### SUBPART G PROCEDURES

cross-examination occurs virtually automatically, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-09-10, 70 NRC 51 (2009)

these procedures focus on issues where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness; LBP-09-22, 70 NRC 640 (2009)

### SUBPART G PROCEEDINGS

each expert witness is required to create, sign, and submit a written expert report; LBP-09-30, 70 NRC 1039 (2009)

### SUBPART L PROCEDURES

a board may ask witnesses to appear in person and answer questions; LBP-09-22, 70 NRC 640 (2009)

a party seeking to conduct cross-examination must file a written motion and obtain leave from the board; LBP-09-10, 70 NRC 51 (2009)

boards may allow parties to conduct cross-examination in Subpart L proceedings; LBP-09-22, 70 NRC 640 (2009)

NRC Staff must produce a hearing file and make it available to all parties; LBP-09-22, 70 NRC 640 (2009)

### SUBPART L PROCEEDINGS

each witness is not required to generate an analysis, but rather must disclose the analysis or other authority upon which the witness bases his or her opinion; LBP-09-30, 70 NRC 1039 (2009)

if the duty to make disclosures applied only to parties who have claims and contentions, it would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings; LBP-09-30, 70 NRC 1039 (2009)

### SUMMARY DISPOSITION

a motion must be granted if the filings in the proceeding together with the statements of the parties and the affidavits, if any, 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; LBP-09-15, 70 NRC 198 (2009)

an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within 20 days after service of the motion; LBP-09-22, 70 NRC 640 (2009)

applicant may challenge an expert opinion in the disclosure stage, via a motion for summary disposition, if it can show that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law; LBP-09-30, 70 NRC 1039 (2009)

if it appears from the affidavits of the opposing party that the opposing party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the board may refuse the application for summary disposition or may order a continuance as may be necessary or just; LBP-09-22, 70 NRC 640 (2009)

in an evidentiary hearing, the board may weigh competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where there is no genuine issue as to any material fact; LBP-09-22, 70 NRC 640 (2009)

motions may be filed 20 days after the occurrence or circumstance from which the motion arises, rather than the 10-day time frame, provided that the moving party commences sincere efforts to contact and consult all other parties within 10 days of the occurrence or circumstance, and the accompanying certification so states; LBP-09-22, 70 NRC 640 (2009)

representations of movant are described; LBP-09-22, 70 NRC 640 (2009)

the contention admissibility threshold is less than is required at the summary disposition stage; LBP-09-26, 70 NRC 939 (2009)

the licensing board shall not entertain motions for summary disposition unless the board finds that such motions, if granted, are likely to expedite the proceeding; CLI-09-15, 70 NRC 1 (2009); LBP-09-22, 70 NRC 640 (2009)

### SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

the fact that an Integrated Resource Plan revision process has been instituted does not support a claim that the final SEIS is inadequate because of its reliance on earlier studies; LBP-09-26, 70 NRC 939 (2009)

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### TERMINATION OF LICENSE

decommissioning is not complete, and an operating license cannot be terminated, in effect, until all spent fuel and high-level waste has been removed from the site; LBP-09-17, 70 NRC 311 (2009)  
when a nuclear power plant ceases operations, the owner must apply for a license to terminate, which cannot be granted until the NRC is satisfied that the plant has been properly dismantled and decommissioned so that residual radiation meets established rules, and that no spent fuel or high-level wastes would be onsite; LBP-09-21, 70 NRC 581 (2009)

### TERMINATION OF PROCEEDING

dismissal of one contention on mootness grounds would not terminate a case where the board had expressly retained jurisdiction to decide whether to admit another contention; LBP-09-27, 70 NRC 992 (2009)  
if a previously terminated contested hearing is subsequently renoticed, a new licensing board would need to be established to preside over the renoticed litigation; LBP-09-23, 70 NRC 659 (2009)  
when an adjudicatory proceeding has been terminated before a licensing board pursuant to a settlement agreement, the board loses its jurisdiction over, and thus its authority to act with respect to, that licensing action; LBP-09-23, 70 NRC 659 (2009)

### TERRORISM

for licensing decisions involving facilities located within the jurisdictional boundaries of the U.S. Court of Appeals for the Ninth Circuit, the NRC Staff will consider, as part of its NEPA analysis, the potential environmental consequences, if any, of a terrorist attack on the proposed facility to occur; CLI-09-15, 70 NRC 1 (2009)  
licensing boards are required to apply the Commission's directive that outside the Ninth Circuit, NEPA does not require the evaluation of the impact of terrorist attacks by aircraft or other means; LBP-09-10, 70 NRC 51 (2009); LBP-09-18, 70 NRC 385 (2009); LBP-09-17, 70 NRC 311 (2009)  
NEPA does not require applicants or licensees to consider terrorist attacks as part of their environmental reviews; LBP-09-26, 70 NRC 939 (2009)  
under NEPA the Commission looks to the reasonably foreseeable impacts of simply licensing the facility, not the reasonably foreseeable effects of a successful terrorist attack; LBP-09-26, 70 NRC 939 (2009)

### TESTIMONY

in a Subpart L evidentiary hearing, the board may ask witnesses to appear in person and answer questions; LBP-09-22, 70 NRC 640 (2009)  
rebuttal testimony shall be under oath or by affidavit so that it is suitable for being received into evidence directly, in exhibit form; LBP-09-22, 70 NRC 640 (2009)

### TOTAL EFFECTIVE DOSE EQUIVALENT

individuals located at the boundary of the exclusion area cannot be exposed to more than 25 rem total effective dose equivalent in any 2-hour period, and any individual located at the outer boundary of the low population zone cannot be exposed to more than 25 rem TEDE during the entire period of any radioactive release; LBP-09-19, 70 NRC 433 (2009)

### TRANSFER OF OWNERSHIP

if, at some point in the future, applicant were to decide to change the ownership structure and to enter into a joint venture with another entity, its license would have to be amended to reflect this change; LBP-09-18, 70 NRC 385 (2009)

### TREATIES

Congress's plenary power with respect to Native Americans entitles it to abrogate treaties with Native American nations; LBP-09-13, 70 NRC 168 (2009)  
the United States is no longer bound by the terms of the 1868 Fort Laramie Treaty; LBP-09-13, 70 NRC 168 (2009)

### TRUST RELATIONSHIP DOCTRINE

federal agencies are required to take actions or refrain from taking actions in fulfillment of Congress's duty to protect the Indians; LBP-09-13, 70 NRC 168 (2009)

### TURBINES

licensee's report to NRC of a manual reactor trip due to main turbine high vibrations included the details of the event, provided an analysis of the event, including estimated change in conditional core damage probability, and provided a list of corrective actions; DD-09-2, 70 NRC 899 (2009)

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### UNCONTESTED LICENSE APPLICATIONS

- for uranium enrichment facilities, licensing boards must determine whether NRC Staff's review of the application has been adequate to support the finding to be made by the Director of the Office of Nuclear Materials Safety and Safeguards; CLI-09-15, 70 NRC 1 (2009)
- in uranium enrichment facility proceedings, licensing boards must determine whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate; CLI-09-15, 70 NRC 1 (2009)
- licensing boards do not conduct a *de novo* review of the application; CLI-09-15, 70 NRC 1 (2009)
- licensing boards must determine whether the applicant and record of the proceeding contain sufficient information to support license issuance; CLI-09-15, 70 NRC 1 (2009)

### URANIUM

- See Depleted Uranium

### URANIUM ENRICHMENT FACILITIES

- an affirmative finding by the Commission that issuance of a license for a uranium enrichment facility will not be inimical to the common defense and security is required; CLI-09-15, 70 NRC 1 (2009)
- an enrichment facility is not a production or utilization facility and, therefore, NRC does not have antitrust responsibilities for it; CLI-09-15, 70 NRC 1 (2009)
- an environmental report and an environmental impact statement for a materials license must include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-09-15, 70 NRC 1 (2009)
- before a facility can be licensed, a hearing is required to be held on that license application; CLI-09-15, 70 NRC 1 (2009)
- creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-09-15, 70 NRC 1 (2009)
- depleted uranium from an enrichment facility is appropriately classified as a low-level radioactive waste; CLI-09-15, 70 NRC 1 (2009)

### URANIUM ENRICHMENT FACILITY PROCEEDINGS

- a licensing board must determine in its initial decision whether the requirements of section 102(2)(A), (C), and (E) of the National Environmental Policy Act have been complied with; CLI-09-15, 70 NRC 1 (2009)
- any person who does not wish, or is not qualified, to become a party to the proceeding may request permission to make a limited appearance pursuant to the provisions of 10 C.F.R. 2.315(a); CLI-09-15, 70 NRC 1 (2009)
- in a contested uranium enrichment facility proceeding, the licensing board shall make findings of fact and conclusions of law on admitted contentions; CLI-09-15, 70 NRC 1 (2009)
- in uncontested proceedings, licensing boards do not conduct a *de novo* review of the application; CLI-09-15, 70 NRC 1 (2009)
- in uncontested proceedings, licensing boards must determine whether NRC Staff's review of the application has been adequate to support the finding to be made by the Director of the Office of Nuclear Materials Safety and Safeguards; CLI-09-15, 70 NRC 1 (2009)
- in uncontested proceedings, licensing boards must determine whether the applicant and record of the proceeding contain sufficient information to support license issuance; CLI-09-15, 70 NRC 1 (2009)
- in uncontested proceedings, licensing boards must determine whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate; CLI-09-15, 70 NRC 1 (2009)
- matters of fact and law to be considered in a uranium enrichment facility licensing proceeding are whether the application satisfies the applicable standards in 10 C.F.R. Parts 30, 40, and 70, and whether the requirements of the National Environmental Policy Act and the NRC's implementing regulations in 10 C.F.R. Part 51 have been met; CLI-09-15, 70 NRC 1 (2009)
- the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the licensing board and participants and to resolve any matter in controversy itself; CLI-09-15, 70 NRC 1 (2009)
- the licensing board shall not entertain motions for summary disposition unless the board finds that such motions, if granted, are likely to expedite the proceeding; CLI-09-15, 70 NRC 1 (2009)

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to avoid unnecessary delays in the proceeding, the licensing board should not routinely grant requests for extensions of time and should manage the schedule such that the overall hearing process is completed within 28-1/2 months; CLI-09-15, 70 NRC 1 (2009)

### URANIUM FUEL CYCLE

both temporary and permanently committed land resources are specified as part of the uranium fuel cycle; LBP-09-21, 70 NRC 581 (2009)

carbon dioxide emissions are to be listed as zero; LBP-09-21, 70 NRC 581 (2009)

each environmental report prepared for the combined license stage must take Table S-3 as the basis for evaluating the contribution of the environmental effects of the fuel cycle to the environmental costs of licensing the reactor; CLI-09-21, 70 NRC 927 (2009)

### USEC PRIVATIZATION ACT

transfer of depleted tails to DOE for disposal constitutes a plausible strategy for disposition; CLI-09-15, 70 NRC 1 (2009)

### VIOLATIONS

a licensee employee who contributes to submission of information to the NRC that the employee knows is not complete or accurate in some material respect places the licensee in violation; LBP-09-24, 70 NRC 676 (2009)

an employee of a licensee may not deliberately submit to the NRC information that he knows to be incomplete or inaccurate in some respect material to the NRC; LBP-09-24, 70 NRC 676 (2009)  
careless disregard in the execution of one's duties does not amount to deliberate misconduct or a violation; LBP-09-24, 70 NRC 676 (2009)

deliberate misconduct refers to an intentional act or omission that the person knows would cause a licensee to be in violation of any rule; LBP-09-24, 70 NRC 676 (2009)

information submitted to an NRC inspector that was not complete and accurate in all material respects is a violation; LBP-09-12, 70 NRC 159 (2009)

### VOLCANOES

contention asserting that DOE's description of its expert elicitation relating to a probabilistic volcanic hazard analysis update fails to comply with this section or the NRC guidance document that DOE formally committed to follow, is admissible; LBP-09-29, 70 NRC 1028 (2009)

### WAIVER

a party's failure to advance a collateral estoppel argument does not perforce trigger the waiver principle, thus precluding a tribunal from applying collateral estoppel; LBP-09-24, 70 NRC 676 (2009)

### WAIVER OF RULE

absent a waiver, a contention that constitutes a collateral attack on NRC regulations is inadmissible; CLI-09-20, 70 NRC 911 (2009)

in addressing a petition for a rule waiver, the board, in lieu of holding oral argument to obtain answers to its questions, poses questions for NRC Staff about the waiver petition; LBP-09-29, 70 NRC 1028 (2009)

licensing boards may not admit any contention that challenges a Commission rule or regulation, unless a waiver is requested under 10 C.F.R. 2.335(b); LBP-09-10, 70 NRC 51 (2009); LBP-09-21, 70 NRC 581 (2009)

participants may not submit paper copies of their filings unless they seek a waiver; CLI-09-15, 70 NRC 1 (2009)

to challenge a regulation, petitioner must submit a supporting affidavit setting forth with particularity the special circumstances that justify the waiver or exception requested; LBP-09-18, 70 NRC 385 (2009)

### WASTE CONFIDENCE RULE

contentions challenging the Waste Confidence Rule are inadmissible; LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

contentions that concern greater-than-Class-C waste, seek to require a change to the decommissioning cost estimate, or constitute a challenge to Table S-3 of 10 C.F.R. 51.51 are inadmissible; LBP-09-16, 70 NRC 227 (2009)

if new information becomes available in the course of waste confidence rulemaking proceedings that contravenes a combined license application, petitioner may file a motion to admit a new or amended contention; LBP-09-18, 70 NRC 385 (2009)

## SUBJECT INDEX

NRC has made a generic determination that there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century with sufficient capacity for any reactor to dispose of the high-level waste that it generates; LBP-09-10, 70 NRC 51 (2009); LBP-09-18, 70 NRC 385 (2009)

regulations cover the storage of spent fuel in new or existing facilities; LBP-09-10, 70 NRC 51 (2009); LBP-09-17, 70 NRC 311 (2009); LBP-09-18, 70 NRC 385 (2009)

the environmental impacts related to storage of spent fuel under Part 72 have been generically evaluated under two previous rulemakings and the Commission's waste confidence proceedings, and thus need not be reassessed; LBP-09-21, 70 NRC 581 (2009)

### WASTE DISPOSAL

See Radioactive Waste Disposal; Radioactive Waste Management

### WATER

contention that concerns onsite and offsite impacts of active and passive dewatering associated with the proposed project satisfies the admissibility criteria; LBP-09-10, 70 NRC 51 (2009)

### WATER POLLUTION

a general assessment of radioactivity within waters of the Great Lakes Basin does not address specific issues with regard to the proposed reactor, and it does not provide any support for the petitioners' assertions needed to advance an admissible contention; LBP-09-16, 70 NRC 227 (2009)

the environmental baseline reflects the effects of all currently existing pollution sources in the relevant watershed, including contributions of all nuclear power plants, and petitioners failed to provide information indicating that this aggregate analysis was insufficient under NEPA; LBP-09-16, 70 NRC 227 (2009)

See also Groundwater Contamination

### WATER QUALITY

abdicated water quality effects entirely to other agencies' certifications subverts the special purpose of NEPA; LBP-09-16, 70 NRC 227 (2009)

although applicant's description of existing water quality conditions did not separately evaluate the contributions of specific sources, it nonetheless formed an environmental baseline against which to measure the cumulative impact of the proposed new reactor; LBP-09-16, 70 NRC 227 (2009)

nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency to review any effluent limitation or other requirement established pursuant to the Clean Water Act or to authorize any such agency to impose any effluent limitation other than those set by EPA or a state agency that has been delegated such authority; LBP-09-25, 70 NRC 867 (2009)

petitioner demonstrates a genuine dispute with the applicant on the adequacy of the water quality analysis; LBP-09-16, 70 NRC 227 (2009)

the reach of 33 U.S.C. § 1371(c)(2) is confined to navigable waters, which do not even encompass all surface waters; LBP-09-25, 70 NRC 867 (2009)

when decisions have been made by a state pursuant to the Clean Water Act and these decisions are raised in NRC licensing proceedings, the NRC is bound to take the Environmental Protection Agency's considered decisions at face value; LBP-09-25, 70 NRC 867 (2009)

### WETLANDS

the fact that disposal of dredged or fill material in wetlands is regulated by EPA and the U.S. Army Corps of Engineers does not render a contention inadmissible; LBP-09-10, 70 NRC 51 (2009)

### WITHDRAWAL

when a hearing notice has been issued, withdrawal of an application would be subject to such terms as the presiding officer may prescribe; LBP-09-23, 70 NRC 659 (2009)

when applicant decides it no longer wishes to have the agency evaluate its application, the usual approach is for the applicant to request that the agency permit it to withdraw its licensing request; LBP-09-23, 70 NRC 659 (2009)

when applicant withdraws an application, all agency consideration of the matter ends, including any Staff technical review and any adjudicatory proceeding, either as to contested matters raised by any intervenors or any uncontested/mandatory hearing that might be required; LBP-09-23, 70 NRC 659 (2009)

## SUBJECT INDEX

### WITNESSES

- in a Subpart L evidentiary hearing, the board may ask witnesses to appear in person and answer questions; LBP-09-22, 70 NRC 640 (2009)
- selection of hearing procedures for contentions at the outset of a proceeding is not immutable, because the availability of Subpart G procedures depends critically on the credibility of eyewitnesses, and the identity of such witnesses may not be known until after the contentions are admitted; LBP-09-10, 70 NRC 51 (2009)
- Subpart G procedures focus on issues where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness; LBP-09-22, 70 NRC 640 (2009)

### WITNESSES, EXPERT

- although an expert may be misinterpreting data submitted by applicant, this is not considered at the contention admissibility stage; LBP-09-27, 70 NRC 992 (2009)
- an expert opinion that merely states a conclusion (e.g., the application is deficient, inadequate, or wrong) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-09-16, 70 NRC 227 (2009)
- applicant may challenge an expert opinion in the disclosure stage, via a motion for summary disposition, if it can show that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law; LBP-09-30, 70 NRC 1039 (2009)
- disclosure of the name and telephone number of an expert witness, if this information is not known to the party, is not required; LBP-09-30, 70 NRC 1039 (2009)
- each witness is not required to generate an analysis, but rather must disclose the analysis or other authority upon which the witness bases his or her opinion; LBP-09-30, 70 NRC 1039 (2009)
- experience with and information about past direct and indirect effects of individual past actions may be useful in illuminating or predicting the direct and indirect effects of a proposed action; LBP-09-16, 70 NRC 227 (2009)
- for Subpart G proceedings, each expert witness is required to create, sign, and submit a written expert report; LBP-09-30, 70 NRC 1039 (2009)
- if an expert witness has a copy of the analysis or other authority upon which his or her opinion is based, and it is extant and reasonably available to that witness and/or the party, then the mandatory disclosure should include that analysis or other authority; LBP-09-30, 70 NRC 1039 (2009)
- if an expert witness is subsequently selected, or any analysis or other authority is subsequently amended or newly developed, then this information must be promptly disclosed; LBP-09-30, 70 NRC 1039 (2009)
- mandatory disclosures by parties include the disclosure of the name of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion; LBP-09-22, 70 NRC 640 (2009)





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BELL BEND NUCLEAR POWER PLANT; Docket No. 52-039-COL  
COMBINED LICENSE; August 10, 2009; MEMORANDUM AND ORDER (Ruling on Petitions to Intervene and Requests for Hearing); LBP-09-18, 70 NRC 385 (2009)

BELLEFONTE NUCLEAR POWER PLANT, Units 3 and 4; Docket Nos. 52-014-COL, 52-015-COL  
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DONALD C. COOK NUCLEAR PLANT, Unit 1; Docket No. 50-315  
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