

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

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

July 1, 2015 – December 31, 2015

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PREFACE

This is the eighty-second volume of issuances (1–415) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 2015, to December 31, 2015.

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).

The Commission also may appoint Administrative Law Judges pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Michael M. Gibson
Dr. Gary S. Arnold

In the Matter of

Docket No. IA-14-025-EA
(ASLBP No. 14-932-02-EA-BD01)
(Enforcement Action)

JAMES CHAISSON

July 2, 2015

In this proceeding regarding a challenge by hearing requestor James Chaisson to a July 2014 NRC Staff enforcement order that, among other things, would have imposed significant restrictions on Mr. Chaisson's ability to engage in NRC-licensed radiographic activities, pursuant to 10 C.F.R. § 2.338(i) the Licensing Board grants a joint motion by the parties to approve their June 2015 revised settlement agreement and terminate the proceeding.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(FORM OF SETTLEMENT)

NRC regulations, specifically section 2.338 of Title 10 of the *Code of Federal Regulations*, encourage "[t]he fair and reasonable settlement of issues proposed for litigation" in NRC adjudicatory proceedings, with the strictures that govern such settlements set forth in the balance of section 2.338. Thus, subsection (g) outlines the form for such settlements: "A settlement 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. It must be signed by the consenting parties or their authorized representatives." 10 C.F.R. § 2.338(g).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(CONTENT OF SETTLEMENT AGREEMENT)**

In addition, subsection (h) of section 2.338 states that a proposed settlement agreement must contain the following items:

- (1) An admission of all jurisdictional facts;
- (2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise contest the validity of the consent order;
- (3) A statement that the order has the same force and effect as an order made after full hearing; and
- (4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

Id. § 2.338(h).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(SETTLEMENT APPROVAL PROCESS)**

Finally, subsection (i) of section 2.338 describes the settlement agreement approval process: “Following issuance of a notice of hearing, a settlement must be approved by the presiding officer . . . to be binding in the proceeding. The presiding officer . . . may order the adjudication of the issues that the presiding officer . . . finds is required in the public interest. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement . . . must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission’s review in accordance with § 2.341.” *Id.* § 2.338(i).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
 (“DUE WEIGHT” TO BE GIVEN STAFF’S POSITION CONCERNING
 SETTLEMENT IN ENFORCEMENT PROCEEDING)**

Regarding section 2.338(i)’s direction that in an enforcement proceeding “due weight” must be given to the Staff’s position, the Commission’s decision in the *Sequoyah Fuels Corp.* proceeding indicates that while the Staff’s position “is not itself dispositive of whether an enforcement agreement should be approved,” the regulatory instruction to accord that position “due weight” nonetheless is “dispositive proof of the importance of the Staff’s views.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
("PUBLIC INTEREST" INQUIRY IN APPROVING SETTLEMENT)**

The Commission has noted that "[i]n any pending proceeding [in which presiding officer approval of a settlement agreement is required], the presiding officer's approval of settlement is a matter that must give due consideration to the public interest." *Id.* (quoting *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)) (footnote omitted). The Commission then went on to explain that this "public interest" inquiry requires the presiding officer to consider: "(1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation." *Id.* at 209 (footnote omitted).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
("PUBLIC INTEREST" INQUIRY INTO RISKS AND BENEFITS OF
FURTHER LITIGATION)**

Regarding the first of the *Sequoyah Fuels Corp.* "public interest" criteria, i.e., the risks and benefits of further litigation for both parties, as is pertinent in this instance, in assessing this factor, *id.*, the Commission focused on "(1) the likelihood (or uncertainty) of success at trial, (2) the range of possible recovery . . . , and (3) the complexity, length, and expense of continued litigation."

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(LICENSING BOARD JURISDICTION)**

Absent some future directive from the Commission, a licensing board ruling approving a settlement agreement and terminating a proceeding also terminates the board's jurisdiction over the parties' agreement. Nonetheless, if in the future, after seeking a reasonable accommodation with the Staff, the hearing requestor has a concern about how some aspect of a settlement agreement is being implemented or enforced, that concern can be brought to the attention of the Commission, which retains supervisory authority over the parties' agreement. *See Eastern Testing & Inspection, Inc.*, LBP-96-11, 43 NRC 279, 282 n.1 (1996) (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 517 (1980)).

**RULES OF PRACTICE: DISMISSAL OF PROCEEDINGS
(DISMISSAL “WITH PREJUDICE”)**

A “with prejudice” termination designation in an enforcement proceeding means that the Staff would effectively be barred from filing any new enforcement claim against the subject of the challenged enforcement order based on the subject matter that was the focus of that order. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50 (1999) (with prejudice termination bars “the relitigation of similar issues”).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(LICENSING BOARD AUTHORITY TO AMEND AGREEMENT)**

As is the case with the federal courts, a licensing board’s authority under section 2.338(i) is to approve or reject a settlement agreement, and so a board cannot amend the agreement without the consent of the parties. *See Eastern Testing*, LBP-96-11, 43 NRC at 282 n.1 (citing cases).

**MEMORANDUM AND ORDER
(Approving Settlement Agreement and
Terminating Proceeding)**

Pending before the Licensing Board in this 10 C.F.R. Part 2, Subpart B enforcement proceeding is an April 17, 2015 motion filed jointly by hearing requestor James Chaisson and the NRC Staff asking that the Board approve a settlement agreement between the parties and, as a consequence, terminate this proceeding. *See* Joint Motion to Approve Settlement Agreement and Terminate Proceeding (Apr. 17, 2015) at 1 [hereinafter Joint Motion]. As the June 30, 2015 revised version of the settlement agreement indicates, the agreement would replace a July 11, 2014 enforcement order entered by the Staff.¹ *See* Notification of Revised Settlement Agreement (July 1, 2015), Attach. A, at 6 (Settlement Agreement Between U.S. Nuclear Regulatory Commission and James P. Chaisson (June 30, 2015)) [hereinafter Revised Settlement Agreement]. For the reasons set forth below, pursuant to 10 C.F.R. § 2.338(i), we grant the parties’ joint motion, approve the revised June 30, 2015 settlement agreement, a copy of which is attached to this Order as Appendix A, and, accordingly, terminate this case.

¹For reasons that are outlined in Section II.B, *infra*, the April 14, 2015 initial version of the parties’ settlement agreement that was submitted with their April 17 motion was revised and resubmitted to the Board on July 1, 2015. *See* Notification of Revised Settlement Agreement (July 1, 2015) at 1 [hereinafter Revised Settlement Agreement Notification].

I. BACKGROUND

Based on Mr. Chaisson's alleged failure to comply with certain provisions of a September 10, 2012 Staff confirmatory order, the Staff's July 2014 enforcement order would have, among other things, imposed significant restrictions on Mr. Chaisson's ability to engage in NRC-licensed radiographic activities. *See* In the Matter of James Chaisson, 79 Fed. Reg. 42,057, 42,058 (July 18, 2014); *see also* Mr. James Chaisson; Confirmatory Order (Effective Immediately), 77 Fed. Reg. 58,587 (Sept. 21, 2012). On August 4, 2014, Mr. Chaisson submitted a pro se hearing request challenging the Staff's July 2014 enforcement order. *See* E-mail from James Chaisson to NRC Hearing Docket (Aug. 4, 2014). Following the August 13 establishment of this Board, *see* James Chaisson; Establishment [o]f Atomic Safety [a]nd Licensing Board, 79 Fed. Reg. 49,104 (Aug. 19, 2014),² the Staff in its August 15 answer agreed with Mr. Chaisson that he was entitled to a hearing, *see* NRC Staff Answer to Request for Hearing (Aug. 15, 2014) at 1. Subsequent to an August 26 teleconference with the parties, *see* Tr. at 1-103, the Board issued a September 8 hearing notice and initial scheduling order granting Mr. Chaisson's hearing request, *see* LBP-14-11, 80 NRC 125, 128 (2014). In that order, the Board also directed the Staff and Mr. Chaisson to discuss the possibility of settlement and report back to the Board regarding their efforts. *See id.* at 133.

On October 10, 2014, the parties requested the appointment of a settlement judge. *See* Report of Consultation Between the Parties (Oct. 10, 2014) at 2; *see also* Licensing Board, Request for Appointment of Settlement Judge (Oct. 15, 2014) at 1 (unpublished). Acting pursuant to 10 C.F.R. § 2.338(b)(1), on October 17 the Atomic Safety and Licensing Board Panel's Chief Administrative Judge appointed Administrative Judge Paul Ryerson to act as the settlement judge in this proceeding. *See* Licensing Board Panel Order (Appointment of Settlement Judge) (Oct. 17, 2014) at 1 (unpublished). Thereafter, while the Board proceeded with the steps to conduct an evidentiary hearing regarding Mr. Chaisson's challenges to the Staff's July 2014 enforcement order, *see* Licensing Board Memorandum and Order (Tentative Schedule for Evidentiary Hearing) (Mar. 31, 2015), App. A (unpublished), the parties, with the assistance of Judge Ryerson, worked to reach a mutually acceptable agreement settling this proceeding. Those efforts ultimately were fruitful, as evidenced by the above-referenced April 17, 2015 joint motion. *See* Joint Motion, Attach. A (Settlement Agreement Between U.S. Nuclear Regulatory Commission and James P. Chaisson (April 14, 2015)) [hereinafter Initial Settlement Agreement].

²When this Board was initially constituted, Administrative Judge Alex Karlin was appointed as Board chairman. *See* 79 Fed. Reg. at 49,104. Subsequently, the Board was reconstituted with Administrative Judge G. Paul Bollwerk, III, as the chairman. *See* James Chaisson; Notice of Atomic Safety and Licensing Board Reconstitution, 80 Fed. Reg. 10,165 (Feb. 25, 2015).

In mid-April 2015, in accordance with its responsibility under section 2.338(i) to review and, if appropriate, approve the parties' agreement, the Board unsuccessfully attempted on several occasions to convene a telephone conference with the parties to discuss the agreement. *See* Licensing Board Memorandum (Advising the Parties About Planned Teleconference) (Apr. 15, 2015) at 1-2 (unpublished); Licensing Board Memorandum and Order (Rescheduling Telephone Conference) (Apr. 21, 2015) at 1-2 (unpublished); Licensing Board Memorandum and Order (Rescheduling Prehearing Conference and Suspending Evidentiary Hearing Schedule) (Apr. 29, 2015) at 1-2 (unpublished) [hereinafter Draft Chart Issuance]. The Board also circulated to the parties for their review a draft chart that outlined the various provisions of the settlement agreement in a way that the Board suggested Mr. Chaisson might find easier to track. *See* Draft Chart Issuance, Attach. A. The Board's proposed teleconference ultimately had to be delayed, however, because of Mr. Chaisson's unavailability.³

When a telephone conference was finally convened on June 10, the Board discussed with the parties a number of items relating to the settlement agreement, including the agreement's compliance with the requirements of section 2.338(h) regarding settlement agreement contents; the accuracy of the Board's draft chart outlining the agreement's terms that previously had been provided to the parties for their review; the differences between various provisions of the agreement and the Staff's July 2014 enforcement order; and the impacts upon the agreement, if any, of recent legal difficulties encountered by Mr. Chaisson. *See* Tr. at 260-348. As a result of that conference, on July 1, 2015, the parties submitted a June 30 revised version of the settlement agreement for the Board's consideration, *see* Revised Settlement Agreement Notification at 1, which is the version we review in this decision.

II. ANALYSIS

A. Standards Governing the Approval of Settlement Agreements

NRC regulations, specifically section 2.338 of Title 10 of the *Code of Federal*

³The reasons for this delay are outlined in a series of Board issuances. *See* Licensing Board Memorandum and Order (Requesting Staff Report Regarding Joint Settlement Agreement) at 1 (May 4, 2015) (unpublished); Licensing Board Memorandum (Acknowledging Receipt of E-Mail Message) at 1-2 (May 7, 2015) (unpublished); Licensing Board Memorandum and Order (Requesting Additional Information Regarding Mr. Chaisson's Status) (May 19, 2015) at 1-2 (unpublished); Licensing Board Memorandum and Order (Proposed Schedule for Telephone Conference and Denying NRC Staff Request to Make Enforcement Order Effective) (May 22, 2015) at 1-2 (unpublished); Licensing Board Memorandum and Order (Scheduling Teleconference and Requesting Information Regarding Settlement Agreement) (June 4, 2015) at 1 (unpublished) [hereinafter Teleconference Scheduling Order].

Regulations, encourage “[t]he fair and reasonable settlement of issues proposed for litigation” in NRC adjudicatory proceedings, with the strictures that govern such settlements set forth in the balance of section 2.338. Thus, subsection (g) outlines the form for such settlements:

A settlement 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. It must be signed by the consenting parties or their authorized representatives.

10 C.F.R. § 2.338(g). In addition, subsection (h) states that a proposed settlement agreement must contain the following items:

- (1) An admission of all jurisdictional facts;
- (2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise contest the validity of the consent order;
- (3) A statement that the order has the same force and effect as an order made after full hearing; and
- (4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

Id. § 2.338(h). Finally, and particularly pertinent to the Board’s consideration of the parties’ pending joint motion, subsection (i) describes the settlement agreement approval process:⁴

⁴In this regard, section 5 of the revised settlement agreement also indicates that “the agreement is contingent upon approval by the Board pursuant to 10 C.F.R. § 2.203.” Revised Settlement Agreement at 5. Section 2.203, which is one of the enforcement-related provisions of 10 C.F.R. Part 2, Subpart B, has the title “Settlement and compromise” and states:

At any time after the issuance of an order designating the time and place of hearing in a proceeding to modify, suspend, or revoke a license or for other action, the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty. The stipulation or compromise shall be subject to approval by the designated presiding officer or, if none has been designated, by the Chief Administrative Law Judge, according due weight to the position of the staff. The presiding officer, or if none has been designated, the Chief Administrative Law Judge, may order such adjudication of the issues as he may deem to be required in the public interest to dispose of the proceeding. If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding.

10 C.F.R. § 2.203. Section 2.203 was adopted in 1962 as part of a major revision of the Atomic Energy Commission’s rules of practice, *see* 27 Fed. Reg. 377, 380 (Jan. 13, 1962), and, other than minor amendments in 1963 and 1971, *see* 28 Fed. Reg. 10,151, 10,153 (Sept. 17, 1963) (changing reference to “decision and order” in last sentence to read “decision or order”); 36 Fed. Reg. 16,894, 16,895,

(Continued)

Following issuance of a notice of hearing, a settlement must be approved by the presiding officer . . . to be binding in the proceeding. The presiding officer . . . may order the adjudication of the issues that the presiding officer . . . finds is required in the public interest. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement . . . must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

Id. § 2.338(i).

And regarding section 2.338(i)'s direction that in an enforcement proceeding, such as this one, "due weight" must be given to the Staff's position, the Commission's decision in the *Sequoyah Fuels Corp.* proceeding indicates that while the Staff's position "is not itself dispositive of whether an enforcement agreement should be approved," the regulatory instruction to accord that position "due weight" nonetheless is "dispositive proof of the importance of the Staff's views." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997). The Commission, however, also noted that "[i]n any pending proceeding [in which presiding officer approval of a settlement agreement is required], the presiding officer's approval of settlement is a matter that must give due consideration to the public interest." *Id.* (quoting *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)) (footnote omitted). The Commission then went on to explain that this "public interest" inquiry requires the presiding officer to consider:

- (1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable;
- (2) whether the terms of the settlement appear incapable of effective implementation and enforcement;
- (3) whether the settlement jeopardizes the public health and safety; and
- (4) whether the settlement approval process deprives interested parties of meaningful participation.

Id. at 209 (footnote omitted).

With these standards in mind, we undertake our section 2.338(i) review of the parties' June 30 revised settlement agreement, the terms of which are described in Section II.B, below.

16,896 (Aug. 26, 1971) (adding references to "or the compromise of a civil penalty" and "compromise" to encompass civil penalty settlements), remains essentially unchanged. It seems apparent, however, that the substantive aspects of section 2.203 were incorporated into (and so superseded by) the dictates of section 2.338(i) when that provision was adopted as part of the Commission's 2004 comprehensive Part 2 rewrite. *See* Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004) ("Section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement (10 CFR 2.203, 2.759, 2.1241).").

B. NRC Staff/Chaisson Settlement Agreement

As we noted in Section I, above, the June 2015 revised settlement agreement between the parties is the culmination of a Staff enforcement process that included a September 2012 confirmatory order, which itself was the product of mediation between Mr. Chaisson and the Staff,⁵ as well as a July 2014 order that reflected the Staff's apparent conviction that Mr. Chaisson had failed to abide by the terms of the September 2012 confirmatory order. The September 2012 and July 2014 enforcement orders each contained provisions that imposed three sets of requirements:

(1) for a specified period of time, a ban on Mr. Chaisson engaging in NRC-licensed activities, including performing, supervising, or assisting in any industrial radiographic operations for an NRC licensee or for an Agreement State licensee with authority to conduct operations in NRC jurisdiction pursuant to the reciprocity provisions of 10 C.F.R. § 150.20;

(2) for a specified period of time following the ban in paragraph (1) above, limited work restrictions that (a) required Mr. Chaisson to notify NRC Region IV each time he accepted employment with an NRC licensee or would be working in an NRC jurisdiction for an Agreement State licensee under reciprocity, (b) prohibited Mr. Chaisson from working in an NRC jurisdiction for an NRC licensee or an Agreement State licensee in a supervisory position, including as an area supervisor or as a radiation safety officer (RSO), and (c) required Mr. Chaisson prior to starting work to provide a copy of the enforcement order to an NRC licensee or an Agreement State licensee working in an NRC jurisdiction under reciprocity; and

(3) additional mandates regarding (a) "individual training," which included completing a 40-hour formal RSO training course, and (b) "Staff review," which required Mr. Chaisson to provide to NRC Region IV an article or presentation demonstrating his understanding of the importance of NRC regulations related to public health and safety or the common defense and security.

Compare 77 Fed. Reg. at 58,587, *with* 79 Fed. Reg. at 42,058-60. The June 30 revised settlement agreement presented for the Board's approval contains essentially these same elements, although the details vary somewhat from the Staff's

⁵Following the entry of an initial enforcement order by the Staff on May 15, 2012, a mediation process was instituted at Mr. Chaisson's request, which resulted in the September 2012 confirmatory order. *See* 77 Fed. Reg. at 58,587; *see also* Mr. James Chaisson; Order Prohibiting Involvement in NRC-Licensed Activities, 77 Fed. Reg. 30,332 (May 22, 2012).

previous orders, as was discussed during the June 10 teleconference and is outlined below.

So, for instance, the revised settlement agreement, like the September 2012 and July 2014 orders, states that Mr. Chaisson is precluded from performing work as a radiographer for an NRC licensee or for an Agreement State licensee while in NRC jurisdiction under reciprocity. The revised settlement agreement, however, would apply this ban only until Mr. Chaisson has complied with the agreement's requirements concerning individual training and Staff review, provisions which are similar to terms in the September 2012 and July 2014 orders, along with an added "shadowing" requirement.⁶ Also, under the revised agreement, Mr. Chaisson may work in an NRC-regulated jurisdiction as a radiographer's assistant — something he could not do under the September 2012 and July 2014 orders — so long as he is under the supervision of a certified radiographer.⁷ *See Revised Settlement Agreement at 1; see also Tr. at 278-79.*

Further, with respect to the individual training prerequisite to Mr. Chaisson being able to work again as a radiographer, as was the case with the Staff's September 2012 and July 2014 orders, Mr. Chaisson must take a 40-hour course designed for qualifying as an RSO that must include (either as part of, or separately from, the formal RSO course) training regarding the security requirements of 10 C.F.R. Part 37 associated with Category 1 and 2 quantities of radioactive materials.⁸ *See Revised Settlement Agreement at 2; see also Tr. at 287-92.* The revised agreement's Staff review prerequisite provision states that Mr. Chaisson must meet with Staff personnel at the NRC's Arlington, Texas Region IV office, or another agreed location, to review and discuss the importance of compliance

⁶The revised agreement does not provide any deadline by which Mr. Chaisson must comply with these individual training, Staff review, and shadowing requirements. This seems logical because, as a prerequisite to the Staff's removing the ban on Mr. Chaisson working as a radiographer in NRC jurisdiction or for an Agreement State licensee while in NRC jurisdiction under reciprocity, these terms provide an ample compliance incentive for Mr. Chaisson. *See Tr. at 279-81.*

⁷As was explained during the June 10 teleconference, *see Tr. at 279*, under the terms of the revised settlement agreement Mr. Chaisson will be able to act in accordance with the 10 C.F.R. Part 34 definition of a "Radiographer's Assistant," which "means any individual who under the direct supervision of a radiographer, uses radiographic exposure devices, sealed sources or related handling tools, or radiation survey instruments in industrial radiography." 10 C.F.R. § 34.3.

⁸During the June 10 teleconference, the Staff indicated that an additional requirement for a 40-hour training course on nondestructive testing (NDT) per 10 C.F.R. § 34.43 that was part of both the 2012 and 2014 orders was dropped. The Staff explained that it took this action because, in the interim, Mr. Chaisson had obtained a radiography card from the State of Oklahoma, which the Staff deemed sufficiently similar to the previously required NDT training to show Mr. Chaisson's technical competency in this area. *See Tr. at 287-88.*

with NRC regulations, with an emphasis on industrial radiography.⁹ *See* Revised Settlement Agreement at 1; *see also* Tr. at 281-82. Finally, the revised agreement declares that as a prerequisite to regaining radiographer status, Mr. Chaisson also must “‘shadow’ and observe” an NRC-preapproved RSO for a minimum of 40 hours as the RSO performs radiation safety program oversight duties for a radiography company.¹⁰ Revised Settlement Agreement at 2. This includes shadowing the RSO as he/she performs three particular types of audits: (1) audits of at least three different crews performing work activities in the field at a temporary job site; (2) an audit of a storage location for radiography cameras and the security systems at the storage location; and (3) an audit of a security system for radiography trucks.¹¹ *See id.*; *see also* Tr. at 292-304.

Besides imposing a ban on working as a radiographer and the three prerequisites for removing that prohibition, the revised agreement, like the 2012 and 2014 Staff orders, also describes several limited work restrictions. Thus, until April 18,

⁹ Under the settlement agreement, the NRC’s Region IV office is to be the default location for this single meeting between the Staff and Mr. Chaisson, *see* Revised Settlement Agreement at 1, but when questioned during the June 10 teleconference the parties indicated that it is their expectation that the meeting will take place in the vicinity of Mr. Chaisson’s home in Utah. *See* Tr. at 282-85. During the telephone conference, the Staff also stated that while it contemplates that the parties will exchange a premeeting agenda to provide a structure for their discussions, this session is intended to allow for a somewhat more open discourse as compared to the format of the meeting required under the Staff’s July 2014 order. *See* Tr. at 282. Mr. Chaisson indicated that he preferred a face-to-face meeting with the Staff to what he was required to do under the September 2012 confirmatory order because that would avoid any issues about document receipt (as arose under the September 2012 order’s requirement that he provide the Staff with an article). *See* Tr. at 285-86.

¹⁰ Although the settlement agreement does not say anything specific about the timing of a request by Mr. Chaisson for preapproval, during the June 10 teleconference the parties indicated it was their expectation that a request made a week prior to the time Mr. Chaisson wished to engage in shadowing would allow the Staff to provide him with a timely response concerning the acceptability of the designated RSO. *See* Tr. at 292-93, 295. Additionally, the Staff stated that the RSO being shadowed did not necessarily have to be based in a state under NRC jurisdiction, whose RSO certification would have been granted under NRC regulations, but could be someone who was certified as an RSO through an Agreement State process. *See* Tr. at 294-95.

¹¹ During the June 10 teleconference, the Staff advised the Board that these three specified audit activities correspond to areas that were the subject of Staff concern relative to Mr. Chaisson’s past activities that caused him to run afoul of NRC restrictions. *See* Tr. at 296-97. For his part, Mr. Chaisson indicated that he did not anticipate any issues with being able to shadow an RSO while auditing these activities as they are items that are audited on a monthly basis in most instances. *See* Tr. at 298. Additionally, the Staff stated that an audit condition such as this one has been used previously with productive results and that, while the agreement does not contain any time frame within which Mr. Chaisson must notify the Staff that he has completed this auditing requirement, it once again would be in his interest to act promptly since this is a prerequisite to having the Staff lift the ban on Mr. Chaisson serving as a radiographer. *See* Tr. at 302-03; *see also supra* note 6.

2018,¹² Mr. Chaisson (1) must notify NRC Region IV each time he accepts employment with an NRC licensee or would be working in an NRC jurisdiction for an Agreement State licensee; (2) cannot work in an NRC jurisdiction for an NRC licensee or for an Agreement State licensee (a) in a supervisory position, including as an area supervisor, (b) as an RSO, or (c) in a provision not found in the September 2012 or July 2014 orders, as an industrial radiographic operations instructor;¹³ and (3) prior to starting work, must provide a copy of the settlement agreement to an NRC licensee or to an Agreement State licensee working in NRC jurisdiction. *See* Revised Settlement Agreement at 3-4; *see also* Tr. at 308-22. Finally, in an apparent first-of-a-kind provision, *see* Tr. at 307, the agreement states that for 3 years after the settlement agreement's date, Mr. Chaisson is to provide a report to the Staff each quarter summarizing his engagement in NRC-licensed activities, which is to include an overview of the activities completed during the last quarter and a write-up regarding his known or intended work

¹² Under the initial version of the settlement agreement, the date governing the limited work restriction provisions would have been 3 years from April 14, 2015, the effective date of the agreement. *See* Initial Settlement Agreement at 1, 6. Acting on the Board's post-teleconference request to consider what the date governing these restrictions should be under the revised settlement agreement, *see* Licensing Board Memorandum (Regarding Effective Date for Provisions of Revised Settlement Agreement) (June 11, 2015) at 1-2 (unpublished), the parties indicated in the June 30 revised settlement agreement that the date governing the limited work restriction provisions would remain April 14, 2015. *See* Revised Settlement Agreement at 3 (limited work restrictions continue until April 18, 2018).

¹³ Relative to this restriction, the April 2015 original agreement referenced an "instructor of industrial radiographic operations," Initial Settlement Agreement at 4, which the Staff declared during the June 10 teleconference was added to the agreement as a result of a question from a potential employer about whether, under the prohibited positions language of the Staff's July 2014 order, Mr. Chaisson could act as a trainer. *See* Tr. at 309-10. Mr. Chaisson, however, advised the Board and the Staff that a radiography company with which he recently had been in contact about possible work had, after reading the initial April 2015 settlement agreement, advised him that this clause might be an impediment to Mr. Chaisson being offered work. According to Mr. Chaisson, the problem involved the designation in some jurisdictions of a radiographer as a "trainer" to the degree that, based on experience, the individual is qualified to provide in-the-field instruction to level 1, or "greenhorn," radiologists. *See* Tr. at 310-13. The Staff responded with an offer to redraft this portion of the agreement to clarify the language and so alleviate this issue in a way that was acceptable to Mr. Chaisson and committed to the Board that it would provide a revised agreement, executed by both parties and containing the amended language. *See* Tr. at 314-21. As a consequence, the June 30 revised agreement has the following additional proviso:

This restriction does not apply to the circumstances where Mr. Chaisson performs work as a radiographer (following successful completion of the requirement of Section 1 of this Settlement Agreement) with the support of a radiographer's assistant. Nothing in this settlement agreement prohibits an Agreement State licensee from listing Mr. Chaisson as "trainer" on its license, subject to the requirements of the Agreement State.

Revised Settlement Agreement at 4.

projections/locations for the next quarter.¹⁴ *See* Revised Settlement Agreement at 3; *see also* Tr. at 304-08.

In addition to the above-described work restrictions, the revised settlement agreement also has a penalty clause and a provision regarding requests for extension, relaxation, or rescission of any of the settlement agreement's provisions. Under the terms of the penalty clause, if Mr. Chaisson does not abide by any of the agreement's requirements, fails to submit a timely request for an extension/relaxation/rescission of those requirements, or does not comply with NRC requirements/regulations/license conditions while engaged in NRC-licensed activities as defined in the agreement, the Staff may issue an order prohibiting him from engaging in NRC-licensed activities for a period up to a lifetime ban.¹⁵ *See* Revised Settlement Agreement at 4-5. Further, the extension/relaxation/rescission clause states that while the Staff (more specifically, the Director of the NRC Office of Enforcement) may relax or rescind any of the settlement agreement's provisions upon a showing of good cause by Mr. Chaisson, such an extension/relaxation/rescission request by Mr. Chaisson (1) must be submitted, in writing, by mail or e-mail prior to the expiration of any of the applicable deadlines

¹⁴ In this regard, the agreement defines "NRC-licensed activities" as including "those activities that are conducted pursuant to a specific or general license issued by the NRC (e.g., industrial radiographic operations conducted pursuant to 10 C.F.R. Part 34), and activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20." Revised Settlement Agreement at 3. Additionally, although the revised settlement agreement does not specify a time for Mr. Chaisson's first quarterly report, the parties indicated that, assuming a Board ruling on their joint motion on or about June 30, 2015, the first quarterly report, covering Mr. Chaisson's activities during July-September 2015 and his planned activities during October-December 2015, would be due to the Staff via e-mail on or before September 30, 2015. *See* Tr. at 304-05. We would assume that the Board's issuance of this decision contemporaneously with the July 1 filing of the parties' June 30 revised agreement would fulfill this condition, making Mr. Chaisson's first report due on September 30, 2015.

¹⁵ In the initial agreement, there was no provision explicitly defining the period during which this provision could be employed by the Staff as the basis for an enforcement order directed to Mr. Chaisson. *See* Initial Settlement Agreement at 3. During the June 10 teleconference, in response to a Board question about the duration of this provision, the Staff indicated that this section's effective period would be either the 3-year restriction period applicable to the limited work restrictions under section 2 of the agreement or the time required for Mr. Chaisson to complete the requirements to get out from under the work restriction in the agreement's section 1, whichever comes later. *See* Tr. at 323. The Staff also agreed to incorporate language to this effect into the revised agreement that the parties already had committed to prepare to clarify the scope of the initial agreement's 3-year restriction on Mr. Chaisson acting as an industrial radiographic operations trainer. *See* Tr. at 324-25; *see also supra* note 13. Thus, the revised agreement now states that the penalty provision "shall remain in effect until completion of the requirements in Section 1 of this Settlement Agreement, or until the expiration of the restrictions in Section 2 of this Settlement Agreement, whichever is later." Revised Settlement Agreement at 5.

under the agreement;¹⁶ and (2) will not be considered by the Staff if submitted after a deadline has expired.¹⁷ *See id.* at 5.

C. Board Determination

1. Settlement Agreement's Content

In applying the standards set forth in Section II.A, above, to determine the efficacy of the revised settlement agreement described in Section II.B,¹⁸ we look first to section 2.338(h), which outlines the specific matters the agreement must address. In response to Board questions during the June 10 teleconference, the parties indicated that those requirements were fulfilled as follows:¹⁹

(1) The “admission of all jurisdictional facts” required by section 2.338(h)(1) is found in the “whereas” clauses in the introduction to the agreement. *See Tr.* at 273; *see also* Revised Settlement Agreement at 1.

(2) The “express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise contest the validity of the consent order” mandated by section 2.338(h)(2) is found in section 7 of the agreement, entitled “Waiver.” *See Tr.* at 274; *see also* Revised Settlement Agreement at 6.

(3) The “statement that the order has the same force and effect as an order made after full hearing” needed under section 2.338(h)(3) is found in section 5

¹⁶The revised settlement agreement contains a provision that provides Mr. Chaisson with detailed correspondence and telephone contact information for the NRC Staff. *See id.* at 5-6.

¹⁷Relative to extending any of the deadlines in the settlement agreement, Mr. Chaisson acknowledged during the teleconference that this provision makes it clear that he must, in all instances, request permission prior to the deadline rather than seeking post-deadline forgiveness. *See Tr.* at 326-27. At the same time, while the revised agreement states that the Staff “will” not consider any extension/relaxation/recision request submitted after a deadline expires, Revised Settlement Agreement at 5, we presume that the Staff retains the discretion to waive a deadline in the event of some extraordinary event, such as a health issue, that precludes Mr. Chaisson from submitting the request on a timely basis.

¹⁸Although medical issues previously required Mr. Chaisson to take pain medication, he assured the Board during the June 10 teleconference that he was no longer on that medication and was in control of his faculties, both at the time the settlement agreement was signed and during the teleconference. *See Tr.* at 265-67. Additionally, Mr. Chaisson indicated that he had read the April 2015 agreement before signing it and was fully aware of its contents. *See Tr.* at 271.

¹⁹While the Staff provided the specific references to the settlement agreement provisions that it asserted fulfilled the requirements of section 2.338(h), Mr. Chaisson stated that he agreed with the Staff's designations. *See Tr.* at 274-75.

of the agreement, entitled “Board Approval.” *See* Tr. at 274; *see also* Revised Settlement Agreement at 5.

(4) The “statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order” required by section 2.338(h)(4) is also found in section 5 of the agreement, entitled “Board Approval.” *See* Tr. at 274; *see also* Revised Settlement Agreement at 5.

After reviewing those provisions of the revised settlement agreement, we conclude that the above-referenced sections fulfill the requirements of section 2.338(h).

2. Settlement Agreement and the Public Interest

We turn next to the four standards outlined in the Commission’s *Sequoyah Fuels Corp.* decision that a licensing board is to consider in evaluating the “public interest” when reviewing a settlement agreement under section 2.338(i). Regarding the first of those criteria, i.e., the risks and benefits of further litigation for both parties, as is pertinent in this instance, in assessing this factor in *Sequoyah Fuels Corp.*, CLI-97-13, 46 NRC at 209, the Commission focused on “(1) the likelihood (or uncertainty) of success at trial, (2) the range of possible recovery . . . , and (3) the complexity, length, and expense of continued litigation.” Looking to those matters here, even putting aside Mr. Chaisson’s pro se status, based on the information (albeit non-evidentiary information) in the record of this proceeding regarding the claims against him, Mr. Chaisson’s challenge to the Staff’s July 2014 order faced an uphill battle. At the same time, over the Staff’s objection, the Board ruled that during the hearing, evidence could be presented regarding the potentially significant questions of (1) whether the September 2012 confirmatory order accurately reflected the parties’ agreement; and (2) the validity of the Staff’s previous findings of “deliberate misconduct” as a basis for the Staff’s July 2014 enforcement order. *See* LBP-14-11, 80 NRC at 131-32. Thus, both sides had considerable litigation risks, making a settlement a reasonable choice for both. Further, regarding possible “recovery,” as compared to the previous Staff enforcement orders, the revised settlement agreement does contain some provisions that provide Mr. Chaisson with a more flexible compliance opportunity. But the revised agreement also retains the major requirements of the previous Staff orders and, in fact, adds some new strictures. Again, this suggests that the settlement was a reasonable outcome for both parties, particularly given that each faced the expense of a possible 2-day evidentiary hearing requiring, in the Staff’s case, travel to Utah by counsel and witnesses. In sum, the parties’ individual interests were well served by the settlement agreement, which avoids the litigation risks posed by this proceeding while affording both the benefit of a set of mutually

agreeable restrictions on Mr. Chaisson's radiographic activities for an appropriate period of time.

Under the second *Sequoyah Fuels Corp.* element, the Board must consider whether the terms of the settlement can be effectively implemented and enforced. Based on our review of the revised settlement agreement's provisions and the parties' answers to the Board's questions during the June 10 teleconference, the revised settlement satisfies this factor as well, as is demonstrated in the parties' responses regarding the agreement's individual training, Staff review, shadowing, quarterly reporting, and penalty clause provisions. *See supra* notes 8-17.

The third *Sequoyah Fuels Corp.* component is whether the settlement jeopardizes the public health and safety. Our review of the revised agreement's provisions and the parties' responses to our June 10 teleconference questions leads us to conclude that the agreement is fully consistent with the agency's mission of protecting the public health and safety. The agreement retains the requirements found in the September 2012 and July 2014 enforcement orders that for a specified period — now 3 years — Mr. Chaisson must (1) notify the Staff promptly when he accepts employment with an NRC licensee; (2) notify the Staff prior to working in an NRC jurisdiction with an Agreement State licensee; and (3) prior to starting employment, provide a copy of the revised settlement agreement to both NRC licensees and Agreement State licensees acting under 10 C.F.R. § 150.20. To be sure, the restriction in the prior enforcement orders on Mr. Chaisson "assisting" in radiographic operations in NRC jurisdiction has been removed to permit him to act as a radiographer's assistant in NRC jurisdiction. But during that activity Mr. Chaisson must be under the supervision of a certified radiographer. Moreover, Mr. Chaisson cannot act as an unsupervised radiographer until he fulfills the Staff review, individual training, and shadowing requirements in the revised settlement agreement and, in any event, cannot perform in a supervisory, RSO, or industrial radiographic operations instructor position until mid-April 2018. Additionally, the Staff has tailored the agreement's shadowing condition to address the particular issues that precipitated the Staff's initiation of an enforcement action against Mr. Chaisson. Further, the Staff has imposed a new quarterly reporting requirement that will permit the Staff to monitor Mr. Chaisson's radiographic activities on a regular basis through mid-April 2018. We thus find nothing in the agreement that is inconsistent with the Staff's responsibility to see that, in instances when Mr. Chaisson is performing radiographic operations, the public health and safety are not jeopardized.²⁰

²⁰ Also regarding this health and safety finding, as was discussed during the June 10 teleconference, *see* Tr. at 327-37, beginning in mid-May 2015 Mr. Chaisson was briefly incarcerated as a result of a state misdemeanor criminal conviction. The Staff maintained that while such a circumstance, and the need to report it, would be a matter of concern under the disclosure requirements of the regulatorily
(Continued)

The final *Sequoyah Fuels Corp.* standard concerns whether the settlement approval process deprives interested parties of meaningful participation. We note initially that, in contrast to the *Sequoyah Fuels Corp.* proceeding, this is not an instance when other intervenors or interested participants have come forward to assert that they might be impacted by the terms of the revised settlement agreement. See *Sequoyah Fuels Corp.*, CLI-97-13, 46 NRC at 222-23. Despite the Federal Register notice indicating that a hearing request could be submitted by “any other person adversely affected” by the Staff’s July 2014 enforcement order, 79 Fed. Reg. at 42,060, the only participant in this proceeding is Mr. Chaisson, who fully supports the Board’s approval of the revised settlement agreement. Accordingly, our approval of the revised settlement agreement will not deprive any interested party of meaningful participation in this proceeding.

We thus conclude that all of the four *Sequoyah Fuels Corp.* “public interest” factors support approval of the revised settlement agreement.

3. Board Approval Determination

Giving due weight to the Staff’s position that the June 30, 2015 revised settlement agreement should be approved pursuant to the dictates of section 2.338(i), and finding that (1) the revised agreement’s contents comply with the requirements of section 2.338(h); and (2) pursuant to section 2.338(i), the public interest does not require any issues to be adjudicated to dispose of this proceeding, the Board determines that the parties’ revised settlement agreement should be approved and that this proceeding should be terminated.²¹

Additionally, as an aid to the parties (and particularly Mr. Chaisson) in carrying out the terms of the revised settlement agreement, we attach as Appendix B to this Memorandum and Order the previously described chart, *see supra* p. 6, that outlines the revised agreement’s provisions.

mandated personnel program of any NRC or Agreement State licensee with whom Mr. Chaisson might be employed, the subject offense has no relevance to the Board’s section 2.338(i) approval finding regarding the parties’ settlement agreement. We endorse the Staff’s position, given the infraction has neither any relationship to any radiographic activities that Mr. Chaisson already has performed nor to any that he might perform in the future.

²¹ During the June 10 telephone conference we observed that, absent some future directive from the Commission, a Board ruling approving the revised settlement agreement and terminating this proceeding would also terminate the Board’s jurisdiction over the parties’ agreement. See Tr. at 342-44. Nonetheless, if in the future, after seeking a reasonable accommodation with the Staff, Mr. Chaisson has a concern about how some aspect of the revised settlement agreement is being implemented or enforced, he can bring that concern to the attention of the Commission, which retains supervisory authority over the parties’ revised agreement. See *Eastern Testing & Inspection, Inc.*, LBP-96-11, 43 NRC 279, 282 n.1 (1996) (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 517 (1980)).

III. CONCLUSION

Based on our review of the terms of the June 30, 2015 revised settlement agreement provided by James Chaisson and the Staff, and after giving due weight to the position of the Staff regarding the revised settlement agreement, we conclude that the revised settlement agreement both meets the content requirements of section 2.338(h) and is consistent with the public interest. Therefore, in accordance with section 2.338(i), we approve the revised agreement and terminate this proceeding.

For the foregoing reasons, it is, this second day of July 2015, ORDERED that

1. The April 17, 2015 joint motion of James Chaisson and the Staff is *granted* and we *approve* the parties' June 30, 2015 revised settlement agreement and *terminate* this proceeding, with prejudice.²²
2. In accordance with 10 C.F.R. §§ 2.338(i), 2.341(a)(2), this issuance will constitute a final decision of the Commission 120 days from the date of issuance, i.e., on *Friday, October 30, 2015*, unless a petition for review is filed in accordance with 10 C.F.R. § 2.341 or the Commission directs otherwise.²³ Any party wishing to file a petition for review on the grounds specified in 10 C.F.R. § 2.341(b)(4) must do so within twenty-five (25) days after service of this issuance. The filing of a petition for review is mandatory for a party to have exhausted its administrative remedies before seeking judicial review. Within twenty-five (25) days after service of a petition for review, parties to the proceeding may file an answer supporting or opposing Commission review. Any petition for review and

²² As was noted by the Staff during the June 10 teleconference, *see* Tr. at 338, the “with prejudice” designation requested by the parties, *see* Revised Settlement Agreement at 5, means that the Staff would effectively be barred from filing any new enforcement claim against Mr. Chaisson based on the subject matter that was the focus of the 2012 and 2014 enforcement orders. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50 (1999) (with prejudice termination bars “the relitigation of similar issues”).

²³ As is the case with the federal courts, our authority under section 2.338(i) is to approve or reject a settlement agreement, and so we cannot amend the agreement without the consent of the parties. *See Eastern Testing*, LBP-96-11, 43 NRC at 282 n.1 (citing cases). That circumstance, along with the parties' joint motion requesting Board approval of their agreement, suggests that, as a practical matter, no petition for review is likely to be filed challenging this issuance. Nevertheless, by its terms section 2.341 affords either party the opportunity to contest any portion of this decision, and so we provide notice regarding the section 2.341 review process.

any answer shall conform to the requirements of 10 C.F.R. § 2.341(b)(2)-(3).

THE ATOMIC SAFETY AND
LICENSING BOARD²⁴

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Michael M. Gibson
ADMINISTRATIVE JUDGE

Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 2, 2015

²⁴ In addition to being served by e-mail, a copy of this Memorandum and Order is being sent today to Mr. Chaisson by overnight express service at his home address in Orem, Utah.

APPENDIX A

**SETTLEMENT AGREEMENT BETWEEN
U.S. NUCLEAR REGULATORY COMMISSION
AND
JAMES P. CHAISSON**

Whereas, on July 11, 2014, the U.S. Nuclear Regulatory Commission (NRC) Staff issued an Order (Prohibiting Involvement in NRC-licensed Activities) banning Mr. James P. Chaisson from engaging in any licensed activities for a period of three years;

Whereas, on August 4, 2014, Mr. James P. Chaisson filed a request for hearing challenging the NRC Staff's issuance of the July Order;

Whereas, both the NRC Staff and Mr. Chaisson wish to enter into a settlement agreement to resolve the matters referenced by rescinding the July Order and withdrawing the request for hearing;

Therefore, on this 30th date of June, 2015, the NRC Staff and Mr. James Chaisson agree to the following terms and conditions:

1. **Work Restriction (Contingent on Completion of Certain Requirements)**
 - a. Mr. Chaisson may continue to perform work as a radiographer's assistant. However, Mr. Chaisson is prohibited from performing work as a radiographer while in NRC jurisdiction (*i.e.*, Mr. Chaisson must always be under the supervision of a certified radiographer) until he successfully completes the following requirements:
 - i. Mr. Chaisson shall meet, in person, with NRC Staff representatives to review and discuss the importance of compliance with NRC regulations with an emphasis on industrial radiography. The location of this meeting shall be the Region IV office in Arlington, Texas, or at an alternate location agreed to by Mr. Chaisson and the NRC Staff. The meeting will be held on a mutually agreed upon date.
 - ii. Mr. Chaisson must complete a 40-hour formal training course designed for qualifying radiation safety officers, or demonstrate that he has done so within the past 18 months from the date of this Settlement Agreement. The course must include training on the security requirements of Title 10 Code of Federal Regulations (C.F.R.) Part 37, "Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material." If the radiation

safety officer training course does not include instruction on NRC security requirements, Mr. Chaisson must attend a separate course on the requirements of 10 C.F.R. Part 37. Within 10 days of completion of the training course(s), Mr. Chaisson shall provide a copy of the course completion certificates, or similar proof of attendance, by mail to the Director, Division of Nuclear Materials Safety, NRC Region IV.

- iii. Mr. Chaisson must “shadow” and observe a radiation safety officer (RSO) for a minimum of 40 hours as the RSO performs his oversight of the radiation safety program for a radiography company. Prior to shadowing an RSO, Mr. Chaisson must request and receive NRC approval of the RSO he proposes to observe. Mr. Chaisson must send his request by e-mail [EA-14-222@nrc.gov] or by mail to the Director, Division of Nuclear Materials Safety, NRC Region IV. At a minimum, Mr. Chaisson’s observations of the RSO must include conducting audits of: (1) at least three different crews performing work activities in the field at a temporary jobsite; (2) a storage location for radiography cameras and the security systems at the storage location; and (3) a security system for radiography trucks. Upon completion of the observations listed above, Mr. Chaisson must notify the Director, Division of Nuclear Materials Safety, NRC Region IV, by e-mail or in writing, of the dates that the shadowing observations occurred as well as the details of the observations.

2. Limited Work Restrictions

- a. The following restrictions shall persist from the date of this settlement agreement until April 14, 2018:
 - i. Mr. Chaisson shall contact NRC Region IV, via e-mail [EA-14-222@nrc.gov] once per quarter regarding his engagement in NRC-licensed activities and provide a brief summary of these activities. The summary shall include an overview of activities completed within the previous quarter and identification of known or intended work projections and locations for the next quarter. NRC-licensed activities include those activities that are conducted pursuant to a specific or general license issued by the NRC (e.g., industrial radiographic operations conducted pursuant to 10 C.F.R. Part 34), and activities of Agreement

State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

- ii. Mr. Chaisson shall notify the Director, Division of Nuclear Materials Safety, NRC Region IV, via e-mail [EA-14-222@nrc.gov], of any employment with an NRC licensee, within 3 days of each acceptance of employment with each NRC licensee.
- iii. Mr. Chaisson shall notify the Director, Division of Nuclear Materials Safety, NRC Region IV, via e-mail [EA-14-222@nrc.gov], prior to working in NRC jurisdiction during employment with an Agreement State licensee that provides notification to the NRC of its intent to perform work in NRC jurisdiction. Mr. Chaisson's notification must be separate and apart from the notification provided by the agreement state licensee, and must include the dates and specific location where Mr. Chaisson will be conducting NRC-licensed activities. The notification must be made at least 3 days prior to working in NRC jurisdiction.
- iv. Mr. Chaisson must provide, at least 3 days prior to starting work with any NRC licensee, a copy of this settlement agreement to the licensee. This includes Agreement State licensees who conduct activities pursuant to the authority granted by 10 C.F.R. § 150.20.
- v. Mr. Chaisson is prohibited from working for any NRC licensee (or an Agreement State licensee performing work in NRC jurisdiction under reciprocity) while in NRC jurisdiction in the following capacities:
 1. Manager, Area Supervisor, any other position providing supervision or oversight of industrial radiographic operations;
 2. Radiation Safety Officer; and
 3. Instructor of industrial radiographic operations.

This restriction does not apply to the circumstance where Mr. Chaisson performs work as a radiographer (following the successful completion of the requirements in Section 1 of this Settlement Agreement) with the support of a radiographer's assistant. Nothing in this settlement agreement prohibits an Agreement State licensee from listing Mr. Chaisson as a "trainer" on its license, subject to the requirements of the Agreement State.

3. Penalties

- a. If Mr. Chaisson fails to abide by the requirements listed above (or submit a timely request for an extension, relaxation, or rescission of these requirements), or otherwise fails to comply with NRC requirements, regulations, or license conditions while engaged in NRC-licensed activities (as defined in section 2.a.i, above), the NRC may issue an order prohibiting him from engaging in all NRC-licensed activities for a period up to a lifetime ban. This provision shall remain in effect until completion of the requirements in Section 1 of this Settlement Agreement, or until the expiration of the restrictions in Section 2 of this Settlement Agreement, whichever is later.

4. Requests for Extension, Relaxation, and Rescission

- a. The Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, may relax or rescind any provisions of this settlement agreement upon a showing of good cause by Mr. Chaisson. Mr. Chaisson must send any relaxation or rescission requests, in writing, to the Director, Office of Enforcement, Washington, DC 20555, or by e-mail [EA-14-222@nrc.gov] prior to the expiration of a deadline listed above. The NRC Staff will not consider any requests for extension, relaxation, or rescission of any requirements submitted after the expiration of a deadline.

5. Board Approval

- a. The parties will submit this Settlement Agreement to the Atomic Safety and Licensing Board Panel assigned to this proceeding with a joint motion requesting approval of the settlement and termination of the proceeding with prejudice based on the resolution of matters in this Settlement Agreement. This Settlement Agreement will become effective upon its execution by both parties; however, the agreement is contingent upon approval by the Board pursuant to 10 C.F.R. § 2.203. Upon approval by the Board, this Settlement Agreement will have the same force and effect as an Order made after a full hearing.

6. Correspondence and Telephone Contact with NRC

- a. All written notifications required in this settlement agreement shall be addressed and mailed to the Director, Division of Nuclear Materials Safety, U.S. Nuclear Regulatory Commission, Region IV, 1600 E. Lamar Blvd., Arlington, Texas 76011-4511. Telephone contact with the Director, Division of Nuclear Materials Safety must be made

by calling 817-200-1106. E-mail contact with the NRC should be sent to: EA-14-222@nrc.gov. Facsimile contact should be sent to 817-200-1188.

7. Waiver

- a. The parties agree to waive any and all rights to challenge, contest, or seek judicial review of the validity of the Board Order entered into in accordance with this Settlement Agreement.

8. Rescission of July 18, 2014 Order

- a. In consideration of the above, complete with the agreement and signature of Mr. Chaisson, the NRC Staff agrees to withdraw the July 18, 2014 enforcement order.

IN WITNESS WHEREOF, the parties have executed this agreement as of the last date written below.

[signature] 6-29-15
James P. Chaisson Date

[signature] 6-30-15
Patricia K. Holahan Date
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission

APPENDIX B

Summary of June 30, 2015 NRC Staff/James Chaisson Settlement
Agreement Terms

1. *Work Restriction Pending Completion of Certain Requirements.* While in NRC jurisdiction, James Chaisson is restricted to performing work as a radiographer’s assistant (i.e., he is not to perform work as a radiographer and must perform his work under the supervision of a certified radiographer) until he successfully completes the following three requirements:

a. *Meeting with NRC Staff Regarding Compliance with NRC Regulations:* Mr. Chaisson must meet in person with NRC Staff representatives at the Region IV office in Arlington, Texas, or a mutually agreed alternative location, to review and discuss the importance of compliance with NRC regulations, with an emphasis on industrial radiography.

b. *Training:* Mr. Chaisson must complete a 40-hour formal training course designed for radiation safety officer (RSO) qualification (or demonstrate he has done so within the past 18 months (i.e., on or after December 30, 2013)) that includes training on security requirements in 10 C.F.R. Part 37.

If the RSO course does not include NRC security requirements instruction, Mr. Chaisson must attend a separate course on Part 37 requirements.

Post-training Notification Requirement: Within 10 days of completing the training course(s),

c. *Observation:* Mr. Chaisson must “shadow” and observe an RSO for a minimum of 40 hours as the RSO performs radiation program safety oversight for a radiography company. At a minimum, observations must include the RSO conducting audits of (1) at least three different crews performing field work activities at temporary jobsite(s); (2) a radiography camera storage location, including the storage location security system; and (3) a radiography truck security system.

Observation Preapproval Requirement: Prior

Mr. Chaisson must mail a copy of the course completion certificate(s) (or similar proof of attendance) to the Director, Division of Nuclear Safety, NRC Region IV (per the address in Section 5, below).

to RSO shadowing, Mr. Chaisson must request and receive NRC approval of the RSO he proposes to observe by sending an e-mail or mail request to the Director, Division of Nuclear Safety, NRC Region IV (per the addresses in Section 5, below).

Post-observation Notification

Requirement:

Upon completing the above-listed observations, Mr. Chaisson must notify the Director, Division of Nuclear Safety, NRC Region IV, by e-mail or in writing (per the addresses in Section 5, below) of the dates of, and details about, the observations.

2. *Limited Work Restrictions:* For the period through April 14, 2018, James Chaisson is subject to the following five restrictions:

a. *Quarterly Activity Summary:* Once during each quarter of the year (i.e., January-March, April-June, July-September, October-December), Mr. Chaisson must contact NRC Region IV via e-mail (per the address in Section 5, below), and provide a brief summary of his engagement in NRC-licensed activities that (1) includes an overview of the activities he completed during the previous quarter; and (2) identifies known or intended work projections and locations for the next quarter.

Definition of "NRC-licensed activities": Those activities (1) that are conducted pursuant to an NRC-issued specific or general license (e.g.,

industrial radiographic operations conducted pursuant to 10 C.F.R. Part 34); or (2) of Agreement State licensees conducted pursuant to 10 C.F.R. § 150.20.

b. *Prior Notification of Employment with NRC Licensee:* Mr. Chaisson must notify the Director, Division of Nuclear Safety, NRC Region IV, via e-mail (per the address in Section 5, below) of any employment with an NRC licensee.

Notification Timing: Notification to the Director, Division of Nuclear Safety, NRC Region IV, must be given within 3 days of accepting such employment.

c. *Notification of Employment Prior to Working in NRC Jurisdiction with Agreement State Licensee:* Mr. Chaisson must notify the Director, Division of Nuclear Safety, NRC Region IV, via e-mail (per the address in Section 5, below) prior to working in NRC jurisdiction when he is employed by an Agreement State licensee that notifies NRC of its intent to perform work in NRC jurisdiction.

Notification Requirements: Mr. Chaisson's notification to the Director, Division of Nuclear Safety, NRC Region IV, must (1) be separate and apart from the NRC notification provided by the Agreement State licensee; and (2) include the dates and specific locations where Mr. Chaisson will be conducting NRC-licensed activities.

Notification Timing: Notification to the Director, Division of Nuclear Safety, NRC Region IV, must be given at least 3 days prior to working in NRC jurisdiction.

d. *Prior Notification to NRC or Agreement State Licensee About Settlement Agreement:* Prior to starting work, Mr. Chaisson must provide a copy of the June 30, 2015 settlement agreement to any NRC licensee or any Agreement State licensee that conducts activities pursuant to 10 C.F.R. § 150.20.

Notification Timing: Notification to an NRC or Agreement State licensee must be given at least 3 days prior to starting work for an NRC or Agreement State licensee.

e. *Prohibition on Working in Certain Capacities:* Mr. Chaisson is prohibited from working while in NRC jurisdiction for (1) an NRC licensee; or (2) an Agreement State licensee performing work in NRC jurisdiction under reciprocity, in the following capacities:

1. Manager, Area Supervisor, any other position providing supervision or oversight of industrial radiographic operations;
2. RSO; and
3. Instructor of industrial radiographic operations.

This restriction does not apply to the circumstances where Mr. Chaisson performs work as a radiographer (following successful completion of the requirements in Section 1 above) with the support of a radiographer's assistant. Nothing in the settlement agreement prohibits an Agreement State licensee from listing Mr. Chaisson as "trainer" on its license, subject to the requirements of the Agreement State.

3. *Penalties:* James Chaisson's failure to (1) abide by any of the requirements listed above, including submitted a timely request for extension, relaxation, or recession of those requirements per the provision below; or (2) comply with NRC requirements, regulations, or license conditions while engaged in NRC-licensed activities (per the definition in Section 2.a, above) allows the NRC to issue an order prohibiting him from engaging in all NRC-licensed activities for a period up to a lifetime ban. This provision shall remain in effect until completion of the requirements in Section 1, above, or until the expiration of the restrictions in Section 2, above, whichever is later.

4. *Requests to Extend, Relax, or Rescind Settlement Agreement Provisions:* Upon a showing of good cause by James Chaisson, the Director, NRC Office of Enforcement, may extend, relax, or rescind any settlement agreement provision.

Transmitting Extension, Relaxation, or Rescission Request: A request to extend, relax, or rescind must be in writing and must be sent by e-mail or mail to the Director, NRC Office of Enforcement (per the addresses in Section 5, below).

Timing of Extension, Relaxation, or Rescission Request: A request to extend, relax, or rescind will not be considered if received by the NRC Staff after the deadline involved.

5. *Contact Information:*

E-Mail (in all instances): EA-14-222@nrc.gov

Mail:

To Director, Division of Nuclear Materials Safety, NRC Region IV:
Director
Division of Nuclear Materials Safety
U.S. Nuclear Regulatory Commission, Region IV
1600 E. Lamar Blvd.
Arlington, Texas 76011-4511

To Director, NRC Office of Enforcement:
Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Telephone: Contact Director, NRC Region IV Division of Nuclear Materials
Safety, at 817-200-1106

Facsimile: 817-200-1188

Cite as 82 NRC 31 (2010)

DD-15-7

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

**Docket Nos. 50-361
50-362
(License Nos. NPF-10,
NPF-15)**

**SOUTHERN CALIFORNIA EDISON
COMPANY
(San Onofre Nuclear Generating
Station, Units 2 and 3)**

July 28, 2015

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

[Editor's Note: On July 28, 2015, the NRC issued a Final Director's Decision. Subsequently, the NRC identified portions of the decision that required clarification regarding the scope of the petition and the decision. Accordingly, on October 2, 2015, the Director's Decision was revised and that version of DD-15-7 will appear in the October 2015 *Issuances*.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 40-8943-OLA
(License Renewal)

CROW BUTTE RESOURCES, INC.
(In Situ Leach Facility, Crawford,
Nebraska)

August 6, 2015

INTERLOCUTORY REVIEW

Board's order denying Petitioner a stay of the effectiveness of renewed license did not threaten Petitioner with immediate, irreparable, and serious harm because the renewed license did not change the status quo. Therefore, immediate Commission review was not warranted.

INTERLOCUTORY REVIEW

Board's order denying Petitioner a stay of the effectiveness of renewed license did not threaten Petitioner with immediate, irreparable, and serious harm because Petitioner had not substantiated its claim of immediate harm to cultural resources with particularity, nor had it substantiated its claim that continued operations would contaminate the Petitioner's drinking water. Therefore, immediate Commission review was not warranted.

INTERLOCUTORY REVIEW

Board's ruling admitting new contentions did not have a pervasive and unusual

effect on the basic structure of the proceeding. Mere expansion of issues for litigation does not warrant immediate Commission review. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 136-37 (2009); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008) (“[T]he broadening of issues for hearing caused by the Board’s admission of a contention that the applicant opposes does not constitute a ‘pervasive and unusual effect on the litigation.’”); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994).

INTERLOCUTORY REVIEW

Claim that the Board expanded the issues for litigation by raising matters *sua sponte* did not show a pervasive and unusual effect on the basic structure of the proceeding. Therefore, immediate Commission review was not warranted.

MEMORANDUM AND ORDER

This decision addresses three petitions for review relating to the license renewal proceeding for the Crow Butte Resources, Inc. materials license for its *in situ* uranium recovery site near Crawford, Nebraska. The Oglala Sioux Tribe has petitioned for review of the Atomic Safety and Licensing Board’s ruling denying a stay of the issuance of a renewed license.¹ Crow Butte and the NRC Staff have both petitioned for review of the Board’s order admitting new and amended contentions sponsored by the Tribe and another intervenor group, known as the Consolidated Intervenors (together, Intervenors).² For the reasons stated below, we deny review of all three petitions.

I. BACKGROUND

This licensing proceeding began in November 2007, when Crow Butte filed an application to renew the license for its *in situ* uranium recovery site and

¹ LBP-15-2, 81 NRC 48 (2015); *see* Petition for Review (Feb. 16, 2015) (Tribe Petition).

² LBP-15-11, 81 NRC 401 (2015); *see* Petition for Interlocutory Review of LBP-15-11 (Mar. 25, 2015) (Crow Butte Petition); NRC Staff Petition for Review of LBP-15-11 (Apr. 10, 2015) (Staff Petition). Consolidated Intervenors include Beatrice Long Visitor Holy Dance, Joe American Horse, Sr., Debra White Plume, Loretta Afraid of Bear Cook, Afraid of Bear/Cook Tiwahe, American Horse Tiospaye, and Owe Aku/Bring Back the Way.

processing center.³ Crow Butte's previous license was set to expire in February 2008. The Board granted Intervenor's hearing requests in November 2008.⁴ Both Crow Butte and the Staff appealed the Board's decision allowing intervention.⁵ We affirmed the Board's decision in part and reversed it in part, narrowing the issues for hearing.⁶

The Staff proceeded with its review of the application. In October 2011, the Board brought to our attention repeated slips in the Staff's schedule for issuance of its Environmental Assessment.⁷ In response, we directed the Staff to devote sufficient resources to complete its review in a timely manner.⁸ The Staff's Safety Evaluation Report was released in 2012 and revised in August 2014.⁹ In compliance with the National Environmental Policy Act of 1969 (NEPA), the Staff finalized its Environmental Assessment in October 2014.¹⁰ Shortly thereafter, the Staff issued the renewed license and provided the required notice to the Board and the parties.¹¹

Intervenor's sought to stay the effectiveness of the renewed license.¹² Both the

³ Application for 2007 License Renewal USNRC Source Materials License SUA-1534 Crow Butte License Area (Nov. 2007) (ADAMS Accession No. ML073480264).

⁴ LBP-08-24, 68 NRC 691, 698 (2008).

⁵ NRC Staff's Notice of Appeal of LBP-08-24, Licensing Board's Order of November 21, 2008, and Accompanying Brief (Dec. 10, 2008); Crow Butte Resources' Notice of Appeal of LBP-08-24 (Dec. 10, 2008).

⁶ CLI-09-9, 69 NRC 331, 366 (2009).

⁷ LBP-11-30, 74 NRC 627 (2011).

⁸ CLI-12-4, 75 NRC 154, 158 (2012) (quoting *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Facility), CLI-09-1, 69 NRC 1, 5 (2009)).

⁹ See Safety Evaluation Report (Revised), License Renewal of the Crow Butte Resources ISR Facility, Dawes County, Nebraska, Materials License No. SUA-1534 (Aug. 15, 2014) (ADAMS Accession No. ML14149A433) (Safety Evaluation Report); Safety Evaluation Report, License Renewal of the Crow Butte Resources ISR Facility, Dawes County, Nebraska, Materials License No. SUA-1534 (Dec. 28, 2012) (ADAMS Accession No. ML103470470).

¹⁰ Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (Oct. 2014) (ADAMS Accession No. ML14288A517) (Environmental Assessment). See generally 42 U.S.C. § 4322; 10 C.F.R. §§ 51.25, 51.30.

¹¹ Crow Butte Resources, Inc., Materials License No. SUA-1534 (Nov. 5, 2014) (ADAMS Accession No. ML13324A101); see Letter from Simon, Marcia J., counsel for the NRC Staff, to the Administrative Judges and Parties (Nov. 6, 2014) (advising parties of issuance of renewed license). NRC regulations authorize the Staff to issue the license when it has completed its review during the pendency of a hearing as long as it provides the Board and parties notice and an "explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter." 10 C.F.R. § 2.1202(a).

¹² Application of the Oglala Sioux Tribe for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213 (Nov. 11, 2014) (Tribe's Stay Application); Consolidated Intervenor's Application for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213 (Nov. 14, 2014) (Consolidated Intervenor's Stay Application).

Tribe and Consolidated Intervenors (which includes members of the Tribe) argued that operations at the facility threatened to damage the Tribe's cultural resources and that contamination of surface waters endangered the tribal members' health.¹³ The Board declined to issue a stay.¹⁴

In January 2015, both the Tribe and Consolidated Intervenors submitted new and amended contentions challenging the Environmental Assessment.¹⁵ The Tribe and Consolidated Intervenors submitted fourteen substantially identical contentions; the Board considered them as joint contentions.¹⁶ Crow Butte opposed all of the proposed contentions as untimely and on other grounds.¹⁷ The Staff also opposed all of the proposed new contentions, save one.¹⁸ The Board admitted some of the new contentions (as limited) and rejected the others as untimely or unsupported, as described in more detail below. Nine contentions are set for hearing the week of August 24, 2015.¹⁹

II. DISCUSSION

A. Standard of Review

Each of the petitions for review now pending before us challenges an interlocutory, or nonfinal, Board order. We generally disfavor interlocutory review.²⁰

¹³Tribe's Stay Application at 7, Consolidated Intervenors' Stay Application at 4-5.

¹⁴LBP-15-2, 81 NRC 48.

¹⁵See Consolidated Intervenors' New Contentions Based on the Final Environmental Assessment (October 2014) (Jan. 5, 2015) (Consolidated Intervenors' EA Contentions); The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014) (Jan. 5, 2015) (Tribe's EA Contentions); see also Order (Granting Intervenors' Unopposed Motion for Extension of Time to File New/Amended Contentions) (Nov. 24, 2014) (unpublished).

¹⁶The Tribe also proposed a "Contention F" claiming there is no federal jurisdiction over the Crow Butte site. Tribe's EA Contentions at 4. The Board rejected Contention F. See LBP-15-11, 81 NRC at 411.

¹⁷Crow Butte Resources' Response to Proposed New Contentions Based on Final Environmental Assessment (Jan. 30, 2015), at 5-6. Crow Butte and the Staff did not object to "migration" of the existing contentions. LBP-15-11, 81 NRC at 410 (citing Tr. at 605).

¹⁸See NRC Staff's Combined Answer to New Contentions Filed by Consolidated Intervenors and the Oglala Sioux Tribe (Jan. 30, 2015). The Staff initially did not oppose EA Contention 13, concerning endangered species consultation with the Fish and Wildlife Service. *Id.* at 62. The Board found EA Contention 13 to be moot because the consultation process was completed prior to its ruling. See LBP-15-11, 81 NRC at 406, 444-46.

¹⁹See *id.*, 81 NRC at 451; Order (Setting Schedule Through Evidentiary Hearing and Providing Case Management Information) (Mar. 25, 2015) (unpublished) (Scheduling Order).

²⁰*Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 811-12 (2011); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

The fact that a Board may have made an incorrect legal ruling typically does not warrant interlocutory review because such rulings can be reviewed on appeal from partial initial decisions or a final decision.²¹ We will consider taking discretionary interlocutory review where the requesting party shows that the Board's ruling:

- (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.²²

We have repeatedly rejected petitions for review challenging interlocutory Board rulings admitting contentions,²³ rejecting contentions,²⁴ or related to the summary disposition thereof.²⁵

B. The Tribe's Petition for Review of Decision Denying a Stay (LBP-15-2)

The Tribe argued before the Board that the issuance of Crow Butte's renewed license was "premature and defective" because no hearing on the Tribe's contentions has taken place and that the Tribe was therefore denied due process.²⁶

²¹ *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 209-10 (2011); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

²² 10 C.F.R. § 2.341(f).

²³ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008) ("[T]he broadening of issues for hearing caused by the Board's admission of a contention that the applicant opposes does not constitute a 'pervasive and unusual effect on the litigation.'"); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001); *Rancho Seco*, CLI-94-2, 39 NRC at 94.

²⁴ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54-55 (2013) (Board's rejection of contention, where petition had other contentions pending for hearing, did not constitute serious and irreparable harm or affect the structure of the proceeding in a pervasive or unusual manner).

²⁵ *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251, 256 n.24 (2011) ("[T]he expansion of issues for litigation that results [from admission of a contention or denial of motion for summary disposition] does not have a 'pervasive and unusual effect' on the litigation."); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33-35 (2008); *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63.

²⁶ Tribe's Stay Application at 2 (unnumbered). The Tribe also claimed that issuing the license before the hearing violated its treaty rights and territorial integrity, denied it equal protection and an adequate remedy, and violated the federal government's trust responsibility to the Tribe. *Id.* at 2-3.

The Tribe's stay application addressed the four factors relevant to a stay motion described in our regulations.²⁷ The Tribe claimed that it would suffer irreparable injury because Crow Butte's continued operations could endanger "spiritual, cultural, and natural resources of the Tribe and the health of its people" through "continuing contamination of the ground and surface water resources through spills, leaks and excursions from the facility and the continuing theft and conversion of the lands and natural resources of the Tribe."²⁸ Addressing the other stay factors, the Tribe argued that it would prevail on the merits of its contentions and that the public interest favored preserving the status quo.²⁹ The Tribe also argued that because Crow Butte's license has been in timely renewal, Crow Butte would not be harmed by waiting for an evidentiary hearing and final Board decision.³⁰ The Tribe therefore requested that the Board stay the renewed license until after the hearing at the earliest.³¹

The Board determined that Intervenor had not made the requisite showing for a stay, which it observed is an "extraordinary remedy" and rarely granted in NRC practice.³² The Board accorded the greatest weight to the first stay factor: whether there would be irreparable injury to the requester, and that the irreparable injury must be "imminent," "certain," and "great."³³ The Board found that although damage to cultural resources would be irreparable if it were to occur, Intervenor had not specifically shown that such damage was either imminent or certain.³⁴ Similarly, the Board found that Intervenor had not sufficiently substantiated their claim that harm from water contamination was "imminent, certain, and great."³⁵

²⁷ 10 C.F.R. § 2.1213(d). The four factors to be weighed in considering a stay of Staff action are (1) potential for "irreparable" injury to the requestor, (2) the likelihood that the requestor will prevail on the merits, (3) the potential harm to other parties, and (4) the public interest. *See also* 10 C.F.R. § 2.342(e) (similar factors applicable when the Commission or presiding officer is asked to stay the effectiveness of a presiding officer's decision or action during the pendency of an appeal).

²⁸ Tribe's Stay Application at 7.

²⁹ *Id.* at 8.

³⁰ *Id.* Under the timely renewal principle, if a licensee submits a renewal application within the time provided in the regulation, the license is deemed to continue until a final decision is made on the application: "Each specific license expires at the end of the day on the expiration date stated in the license *unless* the licensee has filed an application for renewal . . . not less than 30 days before the expiration date stated in the existing license." 10 C.F.R. § 40.42(a) (emphasis added). Our regulation is based on the Administrative Procedure Act, 5 U.S.C. § 558(c).

³¹ Tribe's Stay Application at 8, 4. Consolidated Intervenor made substantially the same arguments in their application for a stay; they have not petitioned for review. Consolidated Intervenor's Stay Application at 1, 4-5.

³² LBP-15-2, 81 NRC at 53 (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005)).

³³ *Id.* at 54.

³⁴ *Id.* at 55-56.

³⁵ *Id.* at 56-57.

The Board went on to hold that, having shown no irreparable injury, Intervenor could only meet the stay standards if they could demonstrate a “virtual certainty” of success on the merits.³⁶ But the Board found that Intervenor had made only “general claims” that did not present a compelling case at that point in time.³⁷ Because the two most important considerations did not weigh in Intervenor’s favor, the Board concluded that it need not reach the other two factors — potential harm to the other parties and where the public interest lies.³⁸

The Board also reasoned that staying the effectiveness of the renewed license could not redress the claimed harms. The Board noted that even if it stayed the effectiveness of the renewed license, Crow Butte’s operations could continue under the previous license, as that license still would be in timely renewal. As a result, the Board reasoned that a stay “would have no practical effect.”³⁹

We consider the Tribe’s petition under our interlocutory review standard because neither the Staff’s issuance of the license nor the Board’s denial of a stay of the effectiveness of that license constitutes final agency action.⁴⁰ In its petition, the Tribe makes several claims of Board error, but as discussed below, we need not reach those that go beyond the threshold issue relating to the need for interlocutory review.

We find that the Tribe has not demonstrated that the Board’s decision to allow the renewed license to take effect threatens the Tribe with “immediate and serious irreparable impact,” or has a “pervasive and unusual effect” on the proceeding. We therefore deny review. In so doing, however, we address the Tribe’s arguments to the extent that our interlocutory review standard is coextensive with the most important stay factor — whether the petitioner has demonstrated immediate, irreparable injury.⁴¹

The Tribe principally argues that the license was issued prior to completion

³⁶ *Id.* at 58 (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 57.

⁴⁰ See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320-21 (1998) (considering a petition for interlocutory review of a board order denying a stay motion under the criteria in section 2.341(f)(2)). The Staff and Crow Butte both oppose review of the Board’s order. NRC Staff’s Answer to the Oglala Sioux Tribe’s Petition for Review of LBP-15-2 (Mar. 13, 2015) (Staff Answer); Crow Butte Resources’ Response Opposing Petition for Review of LBP-15-2 (Mar. 13, 2015) (Crow Butte Answer).

⁴¹ Compare 10 C.F.R. § 2.341(f)(2)(i) (the Commission may grant interlocutory review if the issue for which the party seeks review “threatens the party adversely affected by it with immediate and serious irreparable impact” which could not be alleviated through an appeal at the end of the case) with 10 C.F.R. § 2.1213(d)(1) (whether a stay requestor “will be irreparably injured unless a stay is granted”).

of the NEPA process, and that this in itself constitutes “irreparable harm.” It argues that that the Staff acted on incomplete information and without public participation in violation of NEPA.⁴² The Tribe claims in particular that the Staff should have held public scoping meetings and should have circulated the draft Environmental Assessment for public comment.⁴³ Related to its claim that the procedural harm is “irreparable,” the Tribe argues that issuance of the license gives Crow Butte a “vested” interest in the new license and shifts the burden of proof to the Tribe to show that the license should be revoked.⁴⁴

The Tribe’s claims do not warrant immediate review under either ground provided in our regulation. Immediate, irreparable harm is not presumed by a NEPA violation, even assuming such a violation has occurred — an issue we need not reach.⁴⁵ Further, we find that allowing the renewed license to take effect does not impair the Tribe’s procedural rights and thereby does not affect the “basic structure of the proceeding in a pervasive or unusual manner.”⁴⁶ The purpose of the upcoming evidentiary hearing is to evaluate the merits of the Tribe’s claims. Depending upon the results of the hearing, the license may be revoked, conditioned, or modified, as appropriate.⁴⁷ If the Board’s findings after the evidentiary hearing affect the Staff’s conclusions in the Environmental Assessment, then those conclusions would have to be revisited.⁴⁸ The evidentiary hearing therefore provides the Tribe with the opportunity to fully pursue its admitted NEPA contentions.

⁴²Tribe Petition at 7-11.

⁴³*Id.* at 9.

⁴⁴*Id.* at 14.

⁴⁵*See Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) (rejecting the argument that “the procedural violation of NEPA resulting from issuance of a defective [environmental impact statement] establishes irreparable injury” in itself); *see also Hydro Resources*, CLI-98-8, 47 NRC at 322 (claim of violation of the National Historic Preservation Act (NHPA) did not in itself establish “irreparable harm” warranting interlocutory review).

⁴⁶The Tribe’s NEPA-related arguments are new on appeal; we decline to consider new arguments that the Board did not have the opportunity to consider. *See* 10 C.F.R. § 2.341(b)(5); *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

⁴⁷*See* 10 C.F.R. § 2.1210(c)(3) (providing that the initial decision shall include the additional staff actions necessary if inconsistent with prior staff action approving or denying the application); *see also, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 236-38 (2006) (issuance of power uprate license amendment in advance of hearing did not deprive intervenor of hearing rights because the license amendment may be revoked or conditioned after hearing); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 121-22 (2009) (adjudicatory proceeding on license amendment was not terminated by issuance of the amendment).

⁴⁸*See, e.g., Pa’ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 81 (2010) (affirming Board’s decision directing Staff to consider an additional alternative in its analysis).

The procedural rules governing this proceeding authorize the Staff to issue the license immediately upon completion of its review even where a hearing is pending.⁴⁹ The Tribe is mistaken that this authorization shifts the burden of proof; regardless of the issuance of the license, the burden remains on the applicant, and, with respect to NEPA compliance, on the Staff.⁵⁰ Nor are we persuaded that the issuance of the license bestows a vested interest on Crow Butte. Both the Staff and Crow Butte represent that the renewed license does not authorize any new or different activities than did the previous license and in fact imposes additional restrictions on Crow Butte's activities.⁵¹ In addition, as noted above, the license may be altered as a result of the evidentiary hearing.⁵²

The Tribe's claims concerning scoping and public participation do not articulate immediate, irreparable harm.⁵³ But in any case, the Staff's issuance of the license after completing its own review does not deprive the Tribe of its right to be heard in this matter. The Tribe has taken advantage of the opportunity to make its concerns known to the Staff, first in filing contentions on Crow Butte's environmental report and, later, by filing contentions on the Staff's Environmental Assessment.

⁴⁹ 10 C.F.R. § 2.1202(a). Because the Subpart L rules governing this proceeding expressly authorize the issuance of the license before hearing, the Tribe's suggestion that this practice is inappropriate *per se* constitutes an attack on the regulation itself, which is not allowed in an individual adjudication in the absence of a waiver. *See* 10 C.F.R. § 2.335.

⁵⁰ 10 C.F.R. § 2.325; *see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, ALAB-697, 16 NRC 1265, 1271 (1982).

⁵¹ Staff Answer at 13 ("the new license provides the same protections for cultural resources as the previous license, and imposes stricter license conditions related to groundwater protection than the previous license"); Crow Butte Answer at 9 & n.32 ("The renewed license also does not authorize any new or different activities," and in fact imposes "additional, more stringent requirements" on Crow Butte).

⁵² 10 C.F.R. § 2.1210(c)(3).

⁵³ We make no judgment on the merits of the Tribe's arguments to the extent that they concern pending contentions. We observe, however, that no scoping process was done because our rules do not require it. Scoping is the first step in the preparation of an environmental impact statement, but because the Environmental Assessment resulted in a "finding of no significant impact," a full environmental impact statement was found to be unnecessary. 10 C.F.R. § 51.26. As far as public comment, while our regulations permit the Staff to publish a draft finding of no significant impact for public comment, it is not required in all cases. 10 C.F.R. § 51.33. This approach is consistent with Council on Environmental Quality regulations. 40 C.F.R. § 1501.4(e)(2). Several courts of appeal, including the D.C. Circuit, have agreed that NEPA does not require the circulation of a draft environmental assessment in all cases. *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010); *Bering Strait Citizens v. U.S. Army Corps of Engineers*, 524 F.3d 398, 952 (9th Cir. 2008); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army*, 398 F.3d 1235, 1240 (1st Cir. 2005); *Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996); *see also Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013) (observing that NEPA "afford[s] agencies considerable discretion to decide the extent to which . . . public involvement is 'practicable.'").

The Tribe's petition for review does not expressly address the harm that it originally asserted in its stay application — that is, damage to cultural resources and contamination of groundwater.⁵⁴ We briefly consider the issue nonetheless and find that the Tribe did not articulate irreparable harm to such resources. With respect to the claimed harms to cultural resources, in order to show imminent, irreparable harm the Tribe would need to describe with specificity the resources and the manner in which they are threatened.⁵⁵ The Tribe's stay application only generally asserted that "spiritual, cultural, and natural resources" were at risk from Crow Butte's continuing operations, and its petition for review offers no elaboration on this claim.⁵⁶ Likewise, with respect to the Tribe's claim that continuing operations could lead to contamination of the Tribe's drinking water, the Tribe offered only general assertions that Crow Butte's continuing operations are harming it. It has not shown that this harm is "imminent" — or even that it is likely to occur prior to the hearing or prior to the Board's final decision.

In sum, the Tribe has not demonstrated entitlement to a stay or to interlocutory review because it has not demonstrated imminent irreparable harm.

C. Petitions for Review Related to New and Amended Contentions (LBP-15-11)

1. Board's Ruling on New Contentions Based on the Environmental Assessment

In LBP-15-11, the Board ruled on Intervenor's proposed new and amended contentions based on the Staff's Environmental Assessment.⁵⁷ The Board "migrated" four of the original environmental contentions that had been admitted at the outset of this proceeding.⁵⁸ It admitted all or parts of nine contentions (consolidating the admissible parts of two proposed contentions into one new

⁵⁴Tribe's Stay Application at 7.

⁵⁵*Hydro Resources*, CLI-98-8, 47 NRC at 322.

⁵⁶The Tribe's Stay Application asserted that "[t]he license issuance puts spiritual, cultural, and natural resources of the Tribe and the health of its people at risk of further destruction by Licensee's continuing operation and construction activities that may [continue] contamination of the ground and surface water resources through spills, leaks, and excursions from the facility." Tribe's Stay Application at 7. The Tribe's petition for review only mentions cultural or natural resources in the context of relating the arguments before and rulings of the Board. *See* Petition for Review at 4, 6.

⁵⁷*See* Environmental Assessment and Finding of No Significant Impact; Issuance, 79 Fed. Reg. 64,629 (Oct. 30, 2014).

⁵⁸LBP-15-11, 81 NRC at 406, 409-10. As the Board explained, a contention "migrates" when a licensing board construes a contention challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without the petitioner amending the contention. *Id.* at 409-10 & n.38 (citing *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 470-71 (2012)).

contention and merging the admissible portions of three more contentions into one of the “migrated” contentions).⁵⁹ The Board rejected five new contentions in their entirety.⁶⁰ Of particular significance to Crow Butte’s petition, the Board rejected all or parts of four contentions as untimely, because the Tribe and Consolidated Intervenors did not show “good cause” why the contentions could not have been raised earlier.⁶¹ All told, nine contentions have been admitted in the proceeding.⁶²

Crow Butte claims that five of these contentions, and parts of a sixth, should not have been admitted because they were proposed too late.⁶³ The Staff also petitioned for review on different grounds, arguing that the Board introduced issues into the litigation that were not advanced by either intervenor. Intervenors oppose review with respect to both petitions.⁶⁴

2. Crow Butte Has Not Met the Standard for Interlocutory Review

Crow Butte argues that the Board erroneously considered the release of the Environmental Assessment as the trigger date for assessing the timeliness of new contentions and thereby disregarded the requirement that new contentions be submitted in a “timely fashion based on the availability” of the information on which they are based.⁶⁵ Crow Butte claims that some of the newly admitted contentions are based on information that became available during the 7-year period between the time Crow Butte submitted its application and the issuance of the Environmental Assessment.⁶⁶

⁵⁹ *Id.* at 406.

⁶⁰ *Id.*

⁶¹ The Board rejected proposed EA Contention 4 (Baseline Water Quality) and EA Contention 8 (Air Quality Impacts) in their entirety as untimely. *See* LBP-15-11, 81 NRC at 418-19, 429. It also rejected portions of EA Contention 6 (Water Quality Impacts) and EA Contention 12 (Air Emissions and Liquid Waste) as untimely. *See id.* at 426, 437.

⁶² *See id.* at 451 (summary of admitted contentions). In March 2015, Consolidated Intervenors moved to admit additional contentions concerning new proposed Environmental Protection Agency regulations relating to uranium and thorium tailings, but the Board found that none of the proposed contentions were admissible. *See* LBP-15-15, 81 NRC 598 (2015).

⁶³ Crow Butte Petition at 1. Crow Butte challenges the Board’s ruling with respect to EA Contentions “1, 3, 5, 6, 9, 12 and 14.” But proposed EA Contention 3 was admitted only in part, and merged into the previously admitted Contention D, and the Board found that any admissible claim in EA Contention 5 was already encompassed in Contention D. *See* LBP-15-11, 81 NRC at 417, 424, 449.

⁶⁴ *See* Consolidated Intervenors’ and Oglala Sioux Tribe’s Joint Response to Applicant’s Petition for Interlocutory Review (Apr. 20, 2015); Consolidated Intervenors’ and Oglala Sioux Tribe’s Joint Response to NRC Staff’s Petition for Interlocutory Review (May 5, 2015).

⁶⁵ 10 C.F.R. § 2.309(c).

⁶⁶ For example, Crow Butte argues that the Board should not have admitted a narrow portion of proposed EA Contention 12 that challenges the Environmental Assessment’s lack of discussion of

(Continued)

Crow Butte argues that interlocutory review is appropriate because the Board's decision "affects the basic structure of the proceeding in a pervasive and unusual manner."⁶⁷ It also notes that two other uranium recovery proceedings involving the same parties are currently pending before two other boards, and claims that this Board's contention admissibility rulings could provide the foundation for those boards to improperly admit untimely contentions.⁶⁸ Crow Butte asks that we reverse and remand the contentions to the Board for further consideration of whether the challenged contentions should have been raised earlier.⁶⁹

We find that the Board decision does not "[affect] the basic structure of the proceeding in a pervasive and unusual manner." First, it is well established that a board's contention admissibility rulings do not affect the basic structure of the proceeding in a pervasive and unusual manner such that immediate review is appropriate.⁷⁰ The Board's ruling in LBP-15-11 simply expands the issues for a hearing that will take place in any case, which does not merit interlocutory review.⁷¹ Further, the possibility that the Board may have made an erroneous ruling in admitting a contention does not warrant interlocutory review.⁷²

Second, Crow Butte's claim that the Board's decision potentially affects a "broad class" of contentions mischaracterizes the decision. The Board did not find, as a general matter, that any contention based on an environmental assessment would be timely; indeed, the Board rejected several proposed new environmental contentions as untimely.⁷³ Rather, the Board considered the timeliness of each contention in its decision and specifically noted that Intervenor's are "not allowed to postpone filing a contention challenging [publicly available information or analysis] until the NRC Staff issues some document 'that collects, summarizes,

the potential impact of a tornado on air emissions from the facility. Crow Butte argues that even though the Environmental Assessment does not discuss impacts from a tornado, Intervenor's could have challenged the Safety Evaluation Report, which stated that Crow Butte's emergency plan for tornados is adequate. See Crow Butte Petition at 8 n.19 (challenging LBP-15-11, 81 NRC at 437 (citing Safety Evaluation Report at 158, § 7.3.5)).

⁶⁷ Crow Butte Petition at 13.

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 3 (citing 10 C.F.R. § 2.341(f)(2)(ii) (interlocutory review at request of a party)).

⁷⁰ *Pilgrim*, CLI-08-2, 67 NRC at 35; *Seabrook*, CLI-13-3, 77 NRC at 54-55; see also *Haddam Neck*, CLI-01-25, 54 NRC at 374; *Rancho Seco*, CLI-94-2, 39 NRC at 94.

⁷¹ See, e.g., *Levy County*, CLI-11-10, 74 NRC at 256 n.24 ("expansion of issues for litigation . . . does not have a 'pervasive and unusual effect' on the litigation" (citing *Haddam Neck*, CLI-01-25, 54 NRC at 374, and *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63)).

⁷² *Rancho Seco*, CLI-94-2, 39 NRC at 94; *Private Fuel Storage*, CLI-01-1, 53 NRC at 5; *Sequoyah Fuels*, CLI-94-11, 40 NRC at 61.

⁷³ The Board rejected as untimely Proposed EA Contention 4 (Baseline Water Quality) and EA Contention 8 (Air Quality Impacts) in their entirety, and portions of EA Contention 6 (Water Quality Impacts) and EA Contention 12 (Air Emissions and Liquid Waste). See LBP-15-11, 81 NRC at 418-19, 426, 429, 437.

and places into context the facts supporting that contention.’’⁷⁴ The Board found that in particular situations, the release of the Staff’s environmental review document may be the first opportunity for a petitioner to question the accuracy of the Staff’s environmental analysis.⁷⁵ While we do not address the validity of the Board’s individual timeliness determinations here, we do not find the sweeping determination that Crow Butte asserts would rise to the level of a “pervasive and unusual” effect on the structure of this proceeding — or others.

Finally, we note that Crow Butte has not been prejudiced by Intervenor’s filing of new contentions late in the licensing process. The Board’s decision to admit the contentions will not significantly delay the conclusion of this proceeding. Our rules of practice provide that an evidentiary hearing on environmental contentions may not take place prior to completion of the Staff’s review.⁷⁶ After the Staff released the Environmental Assessment, the Board issued scheduling orders and set hearing-related deadlines in accordance with our model milestones in preparation for the evidentiary hearing now set for August.⁷⁷ Even had Intervenor’s proposed their contentions earlier, the hearing could not take place until the Staff’s environmental review was complete. In sum, we find that Crow Butte’s petition does not identify a basis for interlocutory review of this matter. For the reasons discussed above, we deny Crow Butte’s petition for review of LBP-15-11.

⁷⁴ *Id.* at 409 (quoting *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)).

⁷⁵ *Id.* at 408 (citing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008)).

⁷⁶ See Final Rule: “Changes to the Adjudicatory Process,” 69 Fed. Reg. at 2187 (explaining that hearings on environmental contentions must be delayed until after the Staff issues its environmental review document: “the staff may not be in a position to provide testimony or take a final position on some issues until these documents have been completed. This may be the case in particular with regard to the NRC staff’s environmental evaluation”); *id.* at 2202 (explaining difference between safety and environmental contentions with respect to burden of proof); see also 10 C.F.R. § 2.332(d) (“Where an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS.”).

⁷⁷ See Order (Scheduling Filing of New/Amended Contentions and Requesting Proposed Evidentiary Hearing Dates) (Oct. 28, 2014); see also Scheduling Order; see also 10 C.F.R. Part 2, App. B, “Model Milestones to Be Used by a Presiding Officer as a Guideline in Developing a Hearing Schedule for the Conduct of an Adjudicatory Proceeding in Accordance with 10 CFR 2.332.” According to the model milestones, an evidentiary hearing should begin 175 days after the release of the Staff’s environmental review document. Although the Board granted an unopposed motion extending the time to file new or amended contentions by 40 days, it asked the parties to agree on a time for the hearing to start “no sooner than April 20, 2015” — 175 days exactly following the Environmental Assessment’s October 27, 2014 release.

3. *The Staff Has Not Met the Standard for Interlocutory Review*

The Staff has petitioned separately for review of LBP-15-11 and argues that the Board erred in admitting portions of several proposed new and amended contentions, thereby expanding the issues for hearing. Acknowledging that the mere expansion of issues for hearing generally does not qualify for interlocutory Commission review, the Staff contends that the Board raised several issues on its own initiative and that such Board action “affects the basic structure of the proceeding in a pervasive and unusual manner.”⁷⁸

The Staff claims that the Board fundamentally expanded the scope of the hearing by adding bases to three contentions and by failing to narrow a fourth. First, the Staff argues that the Board improperly introduced the issue of whether the Staff should have performed a new baseline groundwater quality assessment into contentions that had been pending in the proceeding since 2008.⁷⁹ Second, the Staff argues that the Board erroneously interjected the issue of cumulative impacts from Crow Butte’s three proposed expansion sites into an environmental justice contention that had not specifically raised cumulative impacts.⁸⁰ Third, the Staff argues that in admitting EA Contention 14, which claims that the Environmental Assessment did not adequately consider impacts from earthquakes, the Board itself suggested that earthquakes centered outside Nebraska’s borders could be material.⁸¹ Finally, the Staff argues that the Board erred in admitting EA Contention 1 by failing to specify its admissible bases.⁸²

The Staff cites Commission case law for the proposition that a Board may not supply its own bases for a contention, but it offers no support for its claim that

⁷⁸ Staff Petition at 1, 4.

⁷⁹ *Id.* at 7-10. The Board rejected as untimely EA Contention 4, which advocated a new baseline groundwater quality study, but the Board observed that “the information presented in support of EA Contention 4 might well be relevant to already-admitted Contentions C and D . . . [and] Contention F.” *See* LBP-15-11, 81 NRC at 419.

⁸⁰ Staff Petition at 11. The Board rejected most of proposed EA Contention 10 (which argued that the Environmental Assessment failed to consider cumulative impacts) because it found the Environmental Assessment had discussed cumulative impacts in every respect except for environmental justice. The Board added the environmental justice element to Contention D, which had been admitted at the outset of the proceeding. LBP-15-11, 81 NRC at 433.

⁸¹ Staff Petition at 11-12. Intervenors specifically cited two 2011 earthquakes that were felt in Crawford, Nebraska, but which were centered outside Nebraska and were not discussed in the Environmental Assessment. *See* LBP-15-11, 81 NRC at 446-48.

⁸² Staff Petition at 13-14. Proposed EA Contention 1 argued that the Environmental Assessment failed to adequately describe historic and cultural resources on the site, and proposed EA Contention 2 argued that the Staff had failed to adequately consult with the Tribe concerning cultural resources. Following a discussion wherein the Board found certain claims inadmissible (such as claim that the Staff must complete an Environmental Impact Statement) it combined proposed EA Contentions 1 and 2 into a single contention. LBP-15-11, 81 NRC at 411-15.

this particular error would “affect the structure of the proceeding in a pervasive or unusual manner.”⁸³ The Staff does not explain why litigating the contentions as admitted (that is, the Staff asserts, with bases supplied by or not specified by the Board) would affect the “basic structure” of the proceeding any differently than litigating other contentions.

As we stated above, the mere expansion of issues for hearing resulting from a board’s assertedly erroneous ruling does not constitute a “pervasive and unusual effect” on the proceeding.⁸⁴ We do not find that the Staff’s claims of error warrant interlocutory review.⁸⁵

III. CONCLUSION

For the foregoing reasons, we *deny* all three petitions for interlocutory review of the Board’s decisions in LBP-15-2 and LBP-15-11.

IT IS SO ORDERED.⁸⁶

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of August 2015.

⁸³ See Staff Petition at 12 (citing CLI-09-9, 69 NRC at 355, and *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 348 (2012)).

⁸⁴ See *Levy County*, CLI-11-10, 74 NRC at 256 n.24; *Pilgrim*, CLI-08-2, 67 NRC at 35; *Haddam Neck*, CLI-01-25, 54 NRC at 374; *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63; *Rancho Seco*, CLI-94-2, 39 NRC at 94.

⁸⁵ The Staff also argues that the Board “broadened the proceeding” in two respects not related to LBP-15-11; these arguments are now moot. The Staff essentially argues that during a teleconference, the Board suggested to Intervenors that they should file new proposed contentions with respect to new proposed Environmental Protection Agency rules on health standards for uranium and thorium milling and with respect to Endangered Species Act concurrence letters that the Staff had just received. Staff Petition at 5-6 (citing Tr. at 598-99, 868-69). Although Intervenors proposed contentions concerning the EPA health standards, the Board rejected them. LBP-15-15, 81 NRC at 610-17. Intervenors did not propose a contention related to the Endangered Species Act concurrences.

⁸⁶ Chairman Burns did not participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

Docket No. 50-443-LR
(ASLBP No. 10-906-02-LR-BD01)

NEXTERA ENERGY SEABROOK, LLC
(Seabrook Station, Unit 1)

August 5, 2015

Friends of the Coast and the New England Coalition; NextEra Energy Seabrook, LLC; and the NRC Staff moved the Board to accept a settlement agreement in this license renewal proceeding for Seabrook Station, Unit 1. On August 8, 2013, pursuant to 10 C.F.R. § 2.338(i), this Board approved the settlement, under which the parties agreed that additional analysis in the Final Supplemental Environmental Impact Statement (FSEIS) would be sufficient to address the only contention remaining in this proceeding. On July 29, 2015, the NRC Staff complied with the Board's order to submit a letter identifying that relevant analysis following issuance of the FSEIS. Accordingly, this order dismisses the sole remaining contention per the parties' agreement and terminates the proceeding.

MEMORANDUM AND ORDER
(Dismissing Contention 4D and Terminating the Proceeding)

The background of this license renewal proceeding for Seabrook Station, Unit 1, is set forth in previous orders of this Board and of the Commission.¹

¹See, e.g., LBP-11-2, 73 NRC 28, 34-37 (2011), *aff'd in part and rev'd in part*, CLI-12-5, 75 (Continued)

This order concerns Contention 4D, in which Friends of the Coast and the New England Coalition (FOTC/NEC) challenged the reasonableness of the atmospheric dispersion model used in the Severe Accident Mitigation Alternatives analysis portion of NextEra Energy Seabrook, LLC's (NextEra) license renewal application.² The Board admitted this contention on February 15, 2011, and the Commission affirmed that decision.³

On August 8, 2013, NextEra, FOTC/NEC, and the NRC Staff moved for an order approving settlement of Contention 4D and for a second order to dismiss Contention 4D after publication of the Final Supplemental Environmental Impact Statement (FSEIS).⁴ This Board approved the parties' settlement and directed the NRC Staff to "submit a letter to the Board, identifying the portions of the FSEIS in which it analyzes the CALMET sensitivity, the treatment of uncertainty and offsetting conservatisms in NextEra's analysis" as soon as the FSEIS was completed.⁵ The Board stated that "[s]even days after receipt of this letter, [it would] issue a further order dismissing Contention 4D without further motion."⁶

Seven days ago, the NRC Staff submitted the requisite letter informing the Board and the parties of issuance of the FSEIS and identifying the portions that address Contention 4D.⁷ Accordingly, Contention 4D is *dismissed*.⁸

There being no remaining admitted contention, this adjudicatory proceeding concerning NextEra's application to renew the operating license for Seabrook Station, Unit 1 is *terminated*. Under the Settlement Agreement, the parties may petition for review of this order only to the extent that it is not "fully consistent

NRC 301, 349 (2012); Licensing Board Memorandum and Order (Granting Summary Disposition of Contention 4B) (Aug. 12, 2013) (unpublished); Licensing Board Memorandum and Order (Denying Motion to File a New Contention Concerning Nuclear Waste) (Sept. 9, 2014) (unpublished).

² Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions (Oct. 21, 2010) at 47-61.

³ LBP-11-2, 73 NRC at 69-73, *aff'd*, CLI-12-5, 75 NRC at 327-29.

⁴ See Joint Motion for Approval of Settlement and Dismissal of FOTC/NEC Contention 4D at Ex. A, Settlement Agreement Among FOTC/NEC, NextEra Energy Seabrook, LLC, and the Staff of the US Nuclear Regulatory Commission Regarding Contention 4D (Aug. 8, 2013) [hereinafter Settlement Agreement]. The Settlement Agreement is attached as Attachment A.

⁵ Licensing Board Memorandum and Order (Approving Settlement of Contention 4D) (Aug. 12, 2013) at 1-2 (unpublished).

⁶ *Id.* at 2.

⁷ Letter from Anita Ghosh, Counsel for NRC Staff, to the Board (July 29, 2015).

⁸ The Board is aware that FOTC/NEC has moved the Commission to order the NRC Staff to release the FSEIS as a draft or supplement and provide another comment period because of the 4-year gap between the public comment period and the issuance of the FSEIS. Motion to Withhold or Withdraw Final Environmental Impact Statement Pending Renewed Opportunity for Comment (July 28, 2015). This motion does not change the NRC Staff's obligations under the Settlement Agreement or the Board's enforcement of that agreement. The Commission has the power to reopen this proceeding if necessary.

with each provision of this Settlement Agreement.”⁹ Any petition for review of this Memorandum and Order must be filed within twenty-five (25) days after this order is served.¹⁰

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 5, 2015

⁹ Attach. A, Settlement Agreement at 54 ¶7 (“With regard to this Settlement Agreement, NextEra, the NRC Staff, and FOTC/NEC expressly waive any and all further procedural steps before the Board or any right to challenge or contest the validity of any order entered by that Board on Contention 4D in accordance with this Settlement. The Parties also expressly waive all rights to seek judicial review or otherwise to contest the validity of any order entered by the Board on Contention 4D, so long as such order is fully consistent with each provision of this Settlement Agreement.”).

¹⁰ 10 C.F.R. § 2.341(b).

ATTACHMENT A

**SETTLEMENT AGREEMENT AMONG
FRIENDS OF THE COAST/THE NEW ENGLAND COALITION,
NEXTERA ENERGY SEABROOK, LLC, AND THE
STAFF OF THE U.S. NUCLEAR REGULATORY COMMISSION
REGARDING CONTENTION 4D**

This Settlement Agreement is made and entered into as of August 7, 2013 by and among the Friends of the Coast and the New England Coalition (“FOTC/NEC”), NextEra Energy Seabrook, LLC (NextEra), a Delaware limited liability company, and the Staff of the U.S. Nuclear Regulatory Commission (“NRC Staff”) hereinafter referred to collectively as “Parties.”

WHEREAS, NextEra submitted a License Renewal Application (“LRA”) dated May 25, 2010, to the U.S. Nuclear Regulatory Commission (“NRC”) seeking renewal of its license to operate Seabrook Station, Unit 1 (“the Plant”);

WHEREAS, on October 21, 2010, FOTC/NEC petitioned to intervene as a party in the NRC proceeding to renew the operating license of the Plant, and raised a contention relating to the reasonableness of the atmospheric dispersion model utilized in NextEra’s Severe Accident Mitigation Alternatives (“SAMA”) analysis (“FOTC/NEC Contention 4D”);

WHEREAS, by Memorandum and Order dated February 15, 2011, the Atomic Safety and Licensing Board (the “Board”) admitted FOTC/NEC as a party to the license renewal proceeding and admitted FOTC/NEC Contention 4D for litigation;

WHEREAS NextEra filed a motion for summary disposition of FOTC/NEC Contention 4D on May 10, 2013, which included the results of an analysis using an alternative meteorological model (“the CALMET sensitivity”) and a Statement of Material Facts;

WHEREAS, the NRC Staff and FOTC/NEC filed answers to NextEra’s Motion on July 15 and July 16, 2013, both admitting 21 of the 23 material facts from NextEra’s Statement of Material Facts, including that NextEra’s atmospheric dispersion model is reasonable for a SAMA analysis, but arguing that NextEra should have evaluated the impact of uncertainty in addition to the results of the CALMET sensitivity in determining whether additional SAMAs may be potentially cost beneficial;

WHEREAS, the NRC Staff explained that using NextEra’s previously submitted estimates of uncertainty (“the uncertainty factor”), 15 additional SAMAs might be identified as being potentially cost-beneficial based on the CALMET

sensitivity, including the following SAMAs: 13, 24, 44, 55, 56, 77, 96, 108, 109, 147, 163, 167, 168, 169, and 170;

WHEREAS, NEI-05-01, the NRC-endorsed guidance document for performing SAMA analyses, states that “[a] discussion of [core damage frequency] uncertainty, and conservatisms in the SAMA analysis that off-set uncertainty, should be included” in a SAMA analysis and that “[i]f SAMAs appear cost-beneficial in the sensitivity results, discussion of conservatisms in the analysis, (e.g., conservatisms in cost estimates discussed in Section 7.2), and their impact on the results may be appropriate”;

WHEREAS, the NRC Staff is currently preparing the Final Supplemental Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Seabrook Station (NUREG-1437, Supplement 46) (“FSEIS”);

NOW, THEREFORE, in consideration of the premises and mutual promises herein, NextEra, the NRC Staff and FOTC/NEC agree as follows:

1. The NRC Staff will include an analysis of the CALMET sensitivity in the FSEIS, and identify the SAMAs (13, 24, 44, 55, 56, 77, 96, 108, 109, 147, 163, 167, 168, 169, and 170) that might be considered potentially cost beneficial if the CALMET sensitivity were added to NextEra’s uncertainty factor.
2. The NRC Staff’s FSEIS will also analyze conservatisms in NextEra’s SAMA analysis and the extent to which such conservatisms may off-set the uncertainty factor, in accordance with 10 C.F.R. Part 51.
3. Consideration of conservatism offsetting uncertainty, comparison of the CALMET sensitivity with the uncertainty factor, or other considerations, may result in some or all of the SAMAs identified in Paragraph 1 as no longer being considered potentially cost-beneficial in the NRC’s FSEIS. FOTC/NEC will not challenge the NRC Staff’s disposition in the FSEIS, or make any further claims in the proceeding regarding, any of the SAMAs identified in Paragraph 1.
4. FOTC/NEC consents to the dismissal of Contention 4D effective seven (7) days after issuance of the FSEIS, with the CALMET sensitivity, uncertainty factor and off-setting conservatism evaluated to the sole satisfaction of the NRC Staff, and agrees to take such other actions as may be reasonably necessary to obtain its dismissal.
5. Upon issuance of the FSEIS, the NRC Staff will submit a letter to the Board, identifying the portions of the FSEIS in which it analyzes the CALMET sensitivity, the treatment of uncertainty and off-setting conservatisms in NextEra’s analysis.
6. The Parties agree to file a joint motion seeking a Consent Order from the Board approving this Settlement Agreement, relieving the parties from

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of

**Docket Nos. 52-040-COL
52-041-COL
(ASLBP No. 10-903-02-COL-BD01)**

**FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 6 and 7)**

August 21, 2015

In this combined license (COL) proceeding, the Intervenor move for leave to file a new contention challenging the adequacy of the discussion of mitigation measures in the NRC Staff's Draft Environmental Impact Statement (DEIS). The Board denies the motion, concluding that the proffered contention is not admissible because (1) contrary to the Intervenor's assertion, the DEIS need not include the Army Corps of Engineers' Clean Water Act § 404 permit analysis in order to satisfy the procedural requirements of the National Environmental Policy Act (NEPA); and (2) the Intervenor fails to identify any specific deficiency in the DEIS's discussion of proposed mitigation measures.

**RULES OF PRACTICE: CONTENTIONS (NEW OR AMENDED;
ADMISSIBILITY)**

An intervenor who moves to file a new contention must demonstrate good cause for proffering the contention after the initial deadline for the filing of contentions.

See 10 C.F.R. § 2.309(c)(1). In addition to being timely, the proposed new contention must satisfy the six-factor contention admissibility standard in 10 C.F.R. § 2.309(f)(1).

**NATIONAL ENVIRONMENTAL POLICY ACT (NEPA):
INDEPENDENT INQUIRY BY FEDERAL AGENCY**

An agency cannot relinquish its NEPA responsibility to evaluate environmental impacts by relying on expected compliance with another agency's environmental standards. *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971).

**NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): NRC
RESPONSIBILITIES**

Because NEPA and the Clean Water Act are different statutes using different standards to achieve different goals, NEPA cannot reasonably be interpreted to require that the NRC delay issuance of a DEIS until the Army Corps of Engineers (Corps) completes its substantive review under the Clean Water Act. See *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1152 (9th Cir. 1997). Accordingly, a contention based solely on the assertion that a DEIS is deficient unless it includes the Corps' 404 Permit Review is not admissible for failing to raise a material issue pursuant to 10 C.F.R. § 2.309(f)(1)(iv).

**NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): NRC
RESPONSIBILITIES (MITIGATION MEASURES)**

Although NEPA requires "that an EIS contain a detailed discussion of possible mitigation measures," it "does not mandate particular results" and, accordingly, does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51, 353 (1989).

RULES OF PRACTICE: CONTENTIONS (GENUINE DISPUTE)

An intervenor's challenge to the adequacy of the NRC Staff's review of mitigation measures fails to raise a genuine dispute with a DEIS pursuant to 10 C.F.R. § 2.309(f)(1)(vi) when an intervenor fails to (1) allege a deficiency in the analytic methodology for assessing mitigation; (2) identify a deficiency in the discussion of proposed mitigation measures; or (3) articulate how the DEIS's analysis of mitigation proposals lacked an adequate assessment of effectiveness.

MEMORANDUM AND ORDER
(Denying Joint Intervenors' Motion to Admit New Contention)

Southern Alliance for Clean Energy, National Parks Conservation Association, Dan Kipnis, and Mark Oncavage (collectively, Joint Intervenors) move for leave to file a new contention in this proceeding involving the combined license (COL) application of Florida Power & Light Company (FPL) for Turkey Point Units 6 and 7.¹ Joint Intervenors' proffered contention challenges the adequacy of the discussion of mitigation measures in the NRC Staff's Draft Environmental Impact Statement (DEIS). For the reasons discussed below, we conclude that the proffered contention is not admissible, and we therefore deny Joint Intervenors' motion.

I. BACKGROUND

On February 28, 2011, we granted Joint Intervenors' original request to intervene in this Turkey Point Units 6 and 7 COL proceeding, admitting one of their then-proffered contentions.² In May 2012, we admitted an amended version of Joint Intervenors' contention,³ and in August 2012, we reformulated it to eliminate an issue rendered moot by FPL's curative action.⁴ Joint Intervenors' Contention 2.1, as amended and reformulated, is now the sole contention pending before the Board.⁵

In February 2015, the NRC Staff published the DEIS for Turkey Point Units 6 and 7.⁶ The NRC served as the lead agency in the document's development, and the United States Army Corps of Engineers (Corps) was a cooperating agency. *See* DEIS at 10-3.⁷ The Staff's "preliminary recommendation to the Commission

¹ *See* Joint Intervenors' Motion for Leave to File a New Contention Concerning the NRC's Reliance on Speculative Mitigation Measures and Failure to Adequately Examine the Effectiveness of These Proposed Mitigation Measures in the Draft Environmental Impact Statement for the Turkey Point Nuclear Power Plant Units 6 & 7 (Apr. 13, 2015) [hereinafter Joint Intervenors' Motion].

² *See* LBP-11-6, 73 NRC 149, 251-52 (2011).

³ *See* LBP-12-9, 75 NRC 615, 629 (2012).

⁴ *See* Licensing Board Memorandum and Order (Granting in Part and Denying in Part Motion for Summary Disposition of Amended Contention 2.1) at 10 (Aug. 30, 2012) (unpublished).

⁵ *See* LBP-15-19, 81 NRC 815, 822 (2015).

⁶ Division of New Reactor Licensing, Office of New Reactors, Environmental Impact Statement for [COLs] for Turkey Point Nuclear Plant Units 6 and 7 Draft Report for Comment, NUREG-2176 (Feb. 2015) (ADAMS Accession Nos. ML15055A103 and ML15055A109) [hereinafter DEIS].

⁷ Participation by the Corps as a cooperating agency arose from FPL's request, incident to its Turkey Point COL application, for a Department of Army "permit pursuant to Section 404 of the Clean Water Act."
(Continued)

related to the environmental aspects of [FPL's COL request] is that the COLs should be issued." *Id.* at 10-27. The Staff explained that its recommendation included the following considerations:

(1) the [Environmental Report (ER)] submitted by FPL; (2) consultation with Federal, State, Tribal, and local agencies; (3) the review team's^[8] own independent review; (4) the staff's consideration of public scoping comments; and (5) the assessments summarized in this EIS, including the potential mitigation measures identified in the ER and the EIS.

Id. at 10-28 (citation omitted).

On April 13, 2015, Joint Intervenors moved for leave to file a new contention challenging the discussion of mitigation measures in the DEIS. *See* Joint Intervenors' Motion at 1. Because Joint Intervenors initially proffered nine contentions, and the Board denied admission of a tenth in 2013,⁹ we will refer to this proposed new contention as "Contention 11." Contention 11 alleges that the proposed mitigation measures are too speculative and that the DEIS does not adequately examine their effectiveness, in violation of the National Environmental Policy Act (NEPA). *See* Joint Intervenors' Motion at 1-2.

On May 8, 2015, FPL and the NRC Staff each filed answers opposing Joint Intervenors' motion.¹⁰ On May 15, 2015, Joint Intervenors filed their reply.¹¹

On July 16, 2015, this Board heard oral argument on the admissibility of Contention 11.¹²

Act and Section 10 of the Rivers and Harbors Act of 1899 to authorize certain construction activities potentially affecting waters of the United States." DEIS at xxxii; *see also id.* at 10-1 to 10-3. Because the Corps plans to adopt the EIS in its record of decision, it seeks to ensure to the maximum extent practicable that the information in the DEIS will be adequate to fulfill its regulatory requirements for resolving FPL's request. *See id.* at 10-3.

⁸The NRC, its contractors, and the Corps constitute the "review team" referenced in the DEIS. *See* DEIS at iii.

⁹*See* Licensing Board Memorandum and Order (Denying Without Prejudice Joint Intervenors' Motion to Admit New Contention) (Mar. 28, 2013) (unpublished).

¹⁰*See* FPL's Answer Opposing Joint Intervenors' Motion to File New Contention (May 8, 2015) [hereinafter FPL Answer]; NRC Staff Answer to [Motion] (May 8, 2015) [hereinafter NRC Staff Answer].

¹¹*See* Reply by Joint Intervenors to Oppositions by FPL and NRC Staff to Motion to Admit New Contention Regarding NRC's Reliance on Speculative Mitigation Measures and Failure to Adequately Examine the Effectiveness of These Proposed Mitigation Measures in the [DEIS] for Turkey Point Units 6 & 7 (May 15, 2015) [hereinafter Joint Intervenors' Reply].

¹²*See* Licensing Board Notice and Order (Scheduling and Providing Instructions for Oral Argument) at 2 (July 2, 2015) (unpublished); Transcript, "Atomic Safety and Licensing Board Panel Hearing [in the Matter of] Florida Power & Light Company" at 305-413 (July 16, 2015) [hereinafter Tr.].

II. CONTENTION ADMISSIBILITY STANDARDS

An intervenor who moves to file a new contention must demonstrate good cause for proffering the contention after the initial deadline for the filing of contentions. *See* 10 C.F.R. § 2.309(c)(1).¹³ In addition to being timely, the proposed new contention must satisfy the six-factor contention admissibility standard in 10 C.F.R. § 2.309(f)(1), which states, in relevant part, that a petitioner 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. 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.

10 C.F.R. § 2.309(f)(1).¹⁴

The Commission has emphasized that the contention admissibility standard is "strict by design."¹⁵ Failure to comply with any of its requirements renders a contention inadmissible.¹⁶

¹³ Because we conclude *infra* Part III.B that Contention 11 fails to satisfy the contention admissibility standard in 10 C.F.R. § 2.309(f)(1), we do not consider whether it is timely under section 2.309(c)(1).

¹⁴ To satisfy section 2.309(f)(1)(vi), a petitioner must show that a genuine dispute exists on a material issue of law or fact relating to the application. In this case, Joint Intervenors challenge the NRC's DEIS, which is the applicable environmental document at this stage of the proceedings.

¹⁵ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001); *see also* *USEC Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC 433, 437 (2006).

¹⁶ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

III. ANALYSIS

A. The Parties' Positions on Contention 11

In Contention 11, Joint Intervenors allege that:

The DEIS for Turkey Point Units 6 & 7 does not comply with NEPA because its determination of the project's environmental impacts, rejection of other project alternatives, and staff's recommendation that the COL be issued, are based on impermissibly speculative mitigation measures, the effectiveness of which have not been adequately evaluated.

Joint Intervenors' Motion at 2. According to Joint Intervenors, instead of adequately considering mitigation measures and assessing their effectiveness, the DEIS improperly defers to a not-yet-completed review the Corps is conducting pursuant to its Clean Water Act (CWA) 404 permit analysis. *See id.* at 4. Joint Intervenors argue that, to satisfy NEPA's requirements, the NRC Staff must either (1) include the Corps' 404 permit analysis in the DEIS, or (2) conduct a more thorough analysis of mitigation measures. *See id.* at 6.

The NRC Staff and FPL argue that Contention 11 must be rejected because it fails to satisfy the admissibility criteria in section 2.309(f)(1). *See* NRC Staff Answer at 6-15; FPL Answer at 18-32. Additionally, FPL argues that Contention 11 must be rejected on grounds of untimeliness and collateral estoppel. *See* FPL Answer at 15-17, 23-24.

B. Licensing Board Ruling on Contention 11

We deny admission of Contention 11 because it fails to satisfy 10 C.F.R. § 2.309(f)(1) in two respects. First, as we show *infra* Part III.B.1, Contention 11 fails to raise a material issue as required by 10 C.F.R. § 2.309(f)(1)(iv) because, contrary to Joint Intervenors' assertion, the DEIS need not include the Corps' CWA 404 permit analysis in order to satisfy NEPA. Second, as we show *infra* Part III.B.2, Contention 11 fails to demonstrate a genuine dispute with the DEIS as required by 10 C.F.R. § 2.309(f)(1)(vi) because, although Joint Intervenors claim that the NRC did not adequately review FPL's proposed mitigation plan, they fail to identify any specific deficiency in the DEIS, relying instead on unsupported claims that the NRC merely accepted FPL's proposals at face value.¹⁷

¹⁷ Because we conclude that Contention 11 fails to satisfy the admissibility criteria in section 2.309(f)(1), we do not address FPL's alternative arguments that Contention 11 must be rejected on grounds of untimeliness and collateral estoppel. *See supra* Part III.A.

1. Joint Intervenors' Assertion That the DEIS Is Deficient Unless It Includes the Corps' 404 Permit Review Does Not Raise a Material Issue

When a proposed project, such as Turkey Point Units 6 and 7, would cause the discharge of dredged or fill material into wetlands, an applicant must seek a permit from the Corps under section 404 of the CWA. *See* 33 U.S.C. § 1344; *see also* DEIS at 1-5 to 1-9; *supra* note 7. Pursuant to the CWA, before being granted a 404 permit, an applicant must demonstrate to the Corps that it has taken “all appropriate and practicable steps to avoid and minimize adverse impacts.” 33 C.F.R. § 332.1(c)(2). If impacts are unavoidable, the applicant shall provide mitigation measures that “must be, to the extent practicable, sufficient to replace lost aquatic resource functions.” *Id.* § 332.3(f)(1); *see generally* *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004) (discussing section 404 permit process).

According to Joint Intervenors, the NRC Staff abdicated its NEPA responsibilities by issuing the DEIS before the Corps completed its 404 permit review. *See* Joint Intervenors' Motion at 6-7. In support of their argument, Joint Intervenors cite *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), for the proposition that, as the lead agency responsible for drafting the DEIS, the NRC Staff's “attempt to rely entirely on the environmental judgments of [the Corps] is in fundamental conflict with the basic purpose of NEPA.” Tr. at 317; *see also* Joint Intervenors' Motion at 6-7.

Joint Intervenors are correct that, under *Calvert Cliffs*, an agency cannot relinquish its NEPA responsibility to evaluate environmental impacts by relying on expected compliance with the environmental standards of another agency. *See* 449 F.2d at 1122-23. In *Calvert Cliffs*, the Atomic Energy Commission (AEC) adopted a rule that excluded certain environmental impacts from its NEPA consideration and “defer[red] totally” to environmental quality standards devised and administered by other agencies. *Id.* at 1122. The court held that this rule violated NEPA, which “mandates a case-by-case balancing judgment” by the federal agency conducting the NEPA review. *Id.* at 1123. “Certification by another agency that its own environmental standards are satisfied,” held the court, “involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem” without considering the broad range of environmental concerns and considerations mandated by NEPA. *Id.* The court in *Calvert Cliffs* thus struck down the AEC's rule, holding that it constituted an impermissible abdication of the AEC's NEPA responsibilities. *See id.* at 1123, 1124.

Joint Intervenors' reliance on *Calvert Cliffs*, however, is misplaced. Unlike *Calvert Cliffs*, the NRC here did not abdicate its responsibility to evaluate environmental impacts and proposed mitigation measures associated with the

license application. Rather, the DEIS includes a discussion and assessment of the project's (1) impacts on terrestrial and wetland resources, *see* DEIS at 4-39 to 4-51; and (2) potential mitigation measures for terrestrial and wetland resources. *See id.* at 4-69 to 4-75. The DEIS also refers to the "independent" evaluation of "the review team,"¹⁸ while noting that the conclusions made do not rely on the Corps' 404 permit review. *See, e.g., id.* at 4-75; *see also id.* at 10-28. In short, because the NRC Staff did not "defer totally" to the Corps' 404 permit review to justify the conclusions in the DEIS, 449 F.2d at 1122, the comparison to *Calvert Cliffs* is inapt.¹⁹

Nor is there merit to Joint Intervenors' related assertion that, under NEPA, the NRC Staff's mitigation assessment in the DEIS is deficient as a matter of law until the Corps completes its 404 permit review under the CWA. *See* Joint Intervenors' Motion at 4-7; *see also* Tr. at 334-37. NEPA and the CWA are different statutes using different standards to achieve different goals. As described above, the 404 permit review process authorizes the Corps to impose *substantive* requirements on a permit applicant to prevent environmental impacts (i.e., avoidance, minimization, and required compensatory mitigation). In contrast, NEPA imposes *procedural* requirements on an agency to *consider* mitigation options, but "[it] does not mandate particular results." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As the Tenth Circuit explained, "[w]hile the CWA imposes substantive restrictions on agency action, NEPA imposes procedural requirements aimed at integrating 'environmental concerns . . . into the very process of agency decision-making.'" *Greater Yellowstone Coal.*, 359 F.3d at 1273-74. It follows that NEPA cannot reasonably be interpreted to require that the NRC delay issuance of the DEIS until the Corps completes its substantive review under the CWA.

Finally, not only do *Calvert Cliffs* and NEPA fail to support Joint Intervenors'

¹⁸ At different points, *see, e.g.*, DEIS at 4-75, the DEIS attributes the DEIS's conclusions either to the NRC Staff alone or to the "review team," which includes both the NRC Staff and the Corps as a cooperating agency. *See supra* note 8. Whatever role the Corps played in drafting the DEIS, the Board treats all of these statements as attributable to the NRC Staff in determining the adequacy of the Staff's NEPA review.

¹⁹ At oral argument, counsel for the NRC Staff reiterated what the DEIS states: namely, that the Staff conducted an independent review of FPL's proposed mitigation measures. *See, e.g.*, Tr. at 351-52 (counsel represents that the NRC Staff conducted an "independent evaluation" of environmental impacts and mitigation measures); *id.* at 353 (referring to Table 4-11, which is located on page 4-71 of the DEIS, counsel represents that the NRC Staff "reviewed that mitigation plan in depth").

Of course, counsel's representations at oral argument are not "evidence" of how thoroughly the NRC Staff reviewed FPL's proposed mitigation measures. But the above representations are consistent with the DEIS's statement that the Staff conducted an "independent" review of the mitigation measures, *see* DEIS at 4-75, which Joint Intervenors have not rebutted, other than to assert, without support, that the Staff accepted those measures at face value. *See infra* Part III.B.2.

argument that the DEIS is deficient until completion of the Corps' 404 permit review, that argument is inconsistent with case law that affirmatively recognizes that the 404 permit review can permissibly be conducted after issuance of an FEIS. See *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1152 (9th Cir. 1997). That the 404 permit review is conducted after issuance of the FEIS does not impact an agency's duty under NEPA; rather, it "serves to highlight the distinction between [NEPA] and the [CWA]: the former is procedural and is simply not as demanding as the CWA on the issue of wetlands." *Id.*; see also *Webster v. U.S. Department of Agriculture*, 685 F.3d 411, 433 (4th Cir. 2012) (holding that NEPA is not violated when an agency issues a supplemental environmental impact statement before the Corps completes a section 404 permit review).²⁰

In sum, to the extent that Joint Intervenors ground Contention 11 on the argument that the DEIS is inadequate solely because it does not include the results of the Corps' 404 permit review, they fail to raise an issue material to the determinations the NRC must make, as required by 10 C.F.R. § 2.309(f)(1)(iv).²¹

2. Joint Intervenors' Challenge to the Adequacy of the NRC Staff's Review of Mitigation Measures Fails to Raise a Genuine Dispute

NEPA requires an agency's DEIS to "contain a detailed discussion of possible mitigation measures." *Methow Valley*, 490 U.S. at 351. Although NEPA does not require the DEIS to include a fully formulated or adopted mitigation plan, see *id.* at 353, its discussion must provide "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id.* After all, "the very purpose of NEPA's requirement that an EIS be prepared . . . is to obviate the need for . . . speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action." *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982).

²⁰ Cf. *Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073, 1089 (9th Cir. 2013) ("[W]hen the agency otherwise complied with NEPA's requirement of a reasonably thorough [mitigation] analysis," there is "no error in the [agency's] reliance on § 404's substantive requirements as mitigation measures" even though the section 404 permit review is not yet complete.).

²¹ At oral argument, Joint Intervenors appeared to argue that the NRC's Memorandum of Understanding (MOU) with the Corps requires that the 404 permit be completed before issuance of an FEIS. Tr. at 324-25. This argument is untimely because it was raised for the first time at oral argument. See *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). Even if the argument were timely, however, we would reject it, because Joint Intervenors' interpretation of the MOU is not a tenable reading of the document's language. See [MOU] Between [Corps] and [NRC] on Environmental Reviews Related to the Issuance of Authorizations to Construct and Operate Nuclear Power Plants at 7-8 (Sept. 12, 2008) (ADAMS Accession No. ML082540354).

Guided by the above principles, we conclude that Joint Intervenor’s challenge to the adequacy of the NRC Staff’s discussion of mitigation measures fails to raise a genuine dispute with the DEIS.

Joint Intervenor’s first argument is that the DEIS’s discussion of mitigation measures is inadequate because it “merely lists ‘potential’ and ‘possible’ mitigation measures” without identifying “what combination or suite of measures will be implemented.” Joint Intervenor’s Motion at 3-4. This argument is flawed for two reasons.²² First, Joint Intervenor’s error is a legal matter in asserting that the DEIS must identify the specific mitigation measures that will be implemented. NEPA requires “that an EIS contain a detailed discussion of *possible* mitigation measures.” *Methow Valley*, 490 U.S. at 351 (emphasis added). It “does not mandate particular results” and, accordingly, does not “demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.” *Id.* at 350, 353. Second, Joint Intervenor’s error is a factual matter in alleging that the DEIS merely discusses “possible” mitigation measures. This assertion ignores that the Florida Department of Environmental Protection issued final Conditions of Certification (COC)²³ to FPL on May 19, 2014, and — as the DEIS states — the COC is “binding.” DEIS at 1-2, 4-1, 10-1. The COC incorporates FPL’s Mitigation Plan²⁴ and specifically requires that FPL provide mitigation in accordance with that Plan.²⁵ Hence, contrary to Joint Intervenor’s assertion, there is no question that FPL must implement mitigation measures consistent with its Mitigation Plan pursuant to the COC, which is “binding.” *Id.*²⁶

Joint Intervenor’s second argument is that the DEIS is inadequate because the analysis of proposed mitigation measures is “speculative [insofar as it] accept[s] the calculations of the applicant essentially at face value and [without an] independent review.” Tr. at 342; *see also* Joint Intervenor’s Motion at 5, 8. As mentioned earlier, however, the DEIS discusses the proposed mitigation measures, *see* DEIS at 4-69 to 4-75, and states explicitly that the NRC Staff conducted an

²² As an initial matter, contrary to Joint Intervenor’s assertion, *see* Joint Intervenor’s Motion at 4-5, the DEIS’s discussion of proposed mitigation measures bears no resemblance to the perfunctory “mere listing” that the court in *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998), found to be insufficient under NEPA.

²³ *See* Conditions of Certification, [FPL], Turkey Point Plant Units 6 & 7, PA 03-45A3 (May 19, 2014) [hereinafter COC], available at http://publicfiles.dep.state.fl.us/Siting/Outgoing/Web/Certification/pa03_45_2014_units6_7.pdf.

²⁴ *See* Turkey Point Units 6 & 7, Wetlands Mitigation Plan Rev. 2 (July 2011) (ADAMS Accession No. ML12269A222) [hereinafter Mitigation Plan].

²⁵ *See* COC at 34, 87; *see also* FPL Answer at 6-7.

²⁶ Notably, the COC not only requires FPL to implement the measures in its Mitigation Plan, it also provides for additional mitigation requirements. *See* FPL Answer at 6 & n.19. The Corps is also empowered to require additional compensatory mitigation pursuant to its section 404 review. *See* DEIS at 4-73.

“independent evaluation” of those measures. *Id.* at 4-75.²⁷ At oral argument, the Staff confirmed that they independently evaluated the proposed mitigation measures, *see* Tr. at 351, 352, asserting that they “reviewed all of the inputs to the [Uniform Mitigation Assessment Method (UMAM)] code and also the [Wetland Assessment Technique for Environmental Review (W.A.T.E.R.)] code . . . and they found those inputs reasonable and appropriate.” *Id.* at 354.²⁸ Joint Intervenor do not point to any specific deficiency in the DEIS’s discussion of proposed mitigation measures, nor do they provide any reason to question the DEIS’s statement that the Staff “independent[ly] evaluat[ed]” those measures. DEIS at 4-75. Joint Intervenor’s assertion thus fails to give rise to a genuine dispute regarding the adequacy of the Staff’s review of mitigation measures.

Finally, Joint Intervenor argue that the DEIS is inadequate because the closest the DEIS comes to discussing the effectiveness of the mitigation proposals is to include mitigation units that the applicant calculated using UMAM. *See* Joint Intervenor’s Motion at 5.²⁹ Joint Intervenor assert that the DEIS fails to explain how and why the proposed measures “will adequately offset projected wetland loss” or “why the expected 1:1 mitigation ratio is adequate.” *Id.* Joint Intervenor do not dispute the analytical approach of the UMAM and W.A.T.E.R. methods for calculating wetland losses and offsetting mitigation credits, *see* Tr. at 333-34,³⁰

²⁷ The DEIS at 4-75 states (emphasis added):

Based on the review team’s independent evaluation of the Turkey Point project, including the ER, the [Site Certification Application], FPL’s responses to NRC’s [Requests for Additional Information], the identified mitigation measures and [best management practices], and consultation with other Federal, State, and County regulatory agencies, the review team concludes that the impacts of preconstruction and construction activities on terrestrial ecological resources (including wetlands and threatened and endangered species) would be MODERATE.

²⁸ UMAM is a comprehensive methodology embedded in the Florida Administrative Code, Chapter 62-345, that “provides standardized methods for assessing wetland ecological function, the loss thereof, and the amount of mitigation to offset this loss.” DEIS at 4-70. UMAM “quantifies wetland quality or health through evaluation of several variables, including location and landscape, water environment, and community structure.” Mitigation Plan at 8. W.A.T.E.R. is a similar “procedure for evaluating functional loss and lift for wetlands in southeast Florida.” DEIS at 4-71. The UMAM and W.A.T.E.R. methods reflect the Corps’ preferred approach to compensatory mitigation under the CWA, *see* 33 C.F.R. § 332.1(f)(1), and counsel for FPL represents that both UMAM and W.A.T.E.R. are “federal-approved methodologies.” Tr. at 390; *see also id.* at 388-94 (discussing history and applicability of UMAM and W.A.T.E.R.); Mitigation Plan at 8-11 (discussing UMAM and W.A.T.E.R.).

²⁹ Joint Intervenor do not mention the degree to which mitigation units calculated using the W.A.T.E.R. methodology amount to a discussion of effectiveness. Because there appears to be little difference between the UMAM and W.A.T.E.R. methods, *see* Tr. at 390-92; *supra* note 28, we assume that Joint Intervenor’s arguments apply to both.

³⁰ To the extent any of Joint Intervenor’s arguments can be interpreted as alleging deficiencies in the UMAM and W.A.T.E.R. methods, the challenge fails to satisfy 10 C.F.R. § 2.309(f)(1)(v) due to the lack of alleged facts or expert opinions. *See* Tr. at 333.

but they allege that “a ratio greater than [1:1] may be necessary depending on the method of mitigation.” *Id.* at 339. This argument misapprehends the manner by which the UMAM and W.A.T.E.R. methods measure environmental impacts on wetlands and the effectiveness of mitigation measures. These methods measure “wetland *functional* change,”³¹ which goes beyond mere loss or gain of wetland acreage. *See supra* note 28. The DEIS thus evaluates FPL’s mitigation proposals using UMAM and W.A.T.E.R. to determine that the loss of wetland function is being replaced with an equivalent amount of functional lift at a ratio of 1:1. *See* DEIS at 4-71 to 4-72.

In sum, Joint Intervenors’ arguments in support of Contention 11’s admissibility fail to articulate how the DEIS’s analysis of mitigation proposals is speculative or lacks an adequate assessment of effectiveness. Joint Intervenors thus fail to present a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi).

* * * * *

As discussed above, we decline to admit Contention 11 due to Joint Intervenors’ failure to satisfy the admissibility criteria in section 2.309(f)(1)(iv) and (vi). In doing so, however, we note that the NRC Staff could have drafted the DEIS in such a way as to more clearly indicate the line between FPL’s mitigation proposals and the NRC’s analysis of those proposals, and in particular, its independent analysis of the UMAM and W.A.T.E.R. calculations. Although the Staff might have felt that the fact that it had engaged in a thorough review was obvious, *see* Tr. at 352, Joint Intervenors’ confusion appears to confirm the Holmesian adage that “[t]here is nothing more deceptive than an obvious fact.”³² Clarifying edits by the Staff to the FEIS prior to its publication may provide the public with a clearer understanding of the nature and extent of the Staff’s NEPA review.

IV. CONCLUSION

For the foregoing reasons, we *deny* Joint Intervenors’ motion for leave to admit a new contention based on the NRC Staff’s DEIS.

This Memorandum and Order is subject to interlocutory review in accordance with the provisions of 10 C.F.R. § 2.341(f)(2). A petition for review that meets the requirements of section 2.341(f)(2) must be filed within twenty-five (25) days of service of this Memorandum and Order, pursuant to 10 C.F.R. § 2.341(b)(1).

³¹ *See* DEIS at 4-71 (Table 4-11) (emphasis added); *see also* Mitigation Plan at 8-11; Tr. at 387-89.

³² Arthur Conan Doyle, *The Adventure of the Boscombe Valley Mystery*, in *The Adventures of Sherlock Holmes* 76, 80 (Barnes & Noble, Inc. 2009) (1892).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 21, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

Docket No. 50-271-LA-3
(ASLBP No. 15-940-03-LA-BD01)

ENERGY NUCLEAR VERMONT
YANKEE, LLC, and ENERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power
Station)

August 31, 2015

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (“Entergy”) seek a license amendment request (“LAR”) to replace certain site-specific license conditions on the decommissioning trust fund for Vermont Yankee Nuclear Power Station with the regulatory requirements of 10 C.F.R. § 50.75(h). On April 20, 2015, the State of Vermont, represented by the Vermont Department of Public Service, proffered four contentions challenging this LAR. Among other arguments, Vermont asserts that the license condition requiring a 30-day notice for withdrawals from the decommissioning trust fund remains necessary in light of Entergy’s alleged plans to spend the fund on impermissible expenses and also argues that the LAR is incomplete because it does not discuss a related exemption request that would allow Entergy to use the decommissioning trust fund for spent fuel management. Vermont moved to file a new contention on July 6 based on the NRC Staff’s decision to grant Entergy’s exemption request. In this Memorandum and Order, the Board concludes that two of Vermont’s five contentions are admissible because the State has proffered sufficient support to show that Entergy’s expenses contravene the regulations and has also raised

a valid legal contention challenging the failure of the LAR to discuss directly relevant exemptions that would only go into effect if the LAR were approved. The Board therefore grants Vermont's hearing request.

RULES OF PRACTICE: STANDING

A state government has automatic standing to challenge a nuclear power reactor's license amendment request when the facility is located within the boundaries of the state.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.75(h)(1)(iv))

Under 10 C.F.R. § 50.75(h)(1)(iv), the decommissioning trust fund can be used only for decommissioning expenses, defined in 10 C.F.R. § 50.2 as activities to remove a facility from service safely and reduce residual radioactivity at the site.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.2)

The decommissioning trust fund cannot be used for spent fuel expenses under NRC regulations because spent fuel management is not a decommissioning activity.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.9)

Because applicants must provide information that is complete and accurate in all material respects, a claim that a LAR contains incomplete and incorrect statements is within the scope of a license amendment proceeding.

RULES OF PRACTICE: CHALLENGE TO COMMISSION REGULATIONS

The claim that a LAR would conflict with applicable NRC regulations if granted is not an impermissible challenge to the regulations themselves.

LICENSE AMENDMENT PROCEEDINGS: SCOPE

Although the merits of an exemption request are outside the scope of a license amendment proceeding, a Board may appropriately consider citations to documents that an applicant filed with the NRC, such as an exemption request, as factual support for a contention.

RULES OF PRACTICE: CHALLENGE TO REGULATORY EXEMPTIONS

Exemption-related issues are within the scope of a license amendment proceeding when the exemptions are directly dependent on a LAR and will go into effect only if the LAR is approved.

RULES OF PRACTICE: CONTENTIONS (FACTUAL SUPPORT)

The NRC Staff's ongoing enforcement of regulations and license conditions does not trigger hearing rights, but petitioners may challenge the correctness of a statement in the LAR related to compliance if that challenge is supported by sufficient documentary evidence.

LICENSE AMENDMENT PROCEEDINGS: SCOPE

Allegations that an applicant will violate state law are not within the scope of a license amendment proceeding.

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

A contention raises a material issue if there is some significant link between the claimed deficiency and the agency's ultimate determination whether granting the LAR will adequately protect the health and safety of the public and the environment.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.75(h)(5))

There is no time restriction on when a licensee can seek to amend license conditions relating to its decommissioning trust fund that existed before promulgation of 10 C.F.R. § 50.75(h), but those amendments must bring the license into compliance with 10 C.F.R. § 50.75(h).

RULES OF PRACTICE: CHALLENGE TO REGULATORY EXEMPTIONS

The merits of an NRC Staff decision to grant an exemption request are outside the scope of a license amendment proceeding.

REGULATIONS: INTERPRETATION (10 C.F.R. § 51.53(d))

Under 10 C.F.R. § 51.53(d), an applicant need not submit an environmental

report until the final stage of decommissioning as part of its license termination plan.

RULES OF PRACTICE: TIMELINESS

The purpose of the timeliness rules is not to trap petitioners into a no-win situation where a contention is called premature if filed in the original petition and untimely if petitioners wait for a potential event to actually transpire.

LICENSE AMENDMENT PROCEEDINGS: SCOPE

A contention that a LAR is incorrect and incomplete is squarely within the scope of a license amendment proceeding under 10 C.F.R. § 2.309(f)(1)(iii) because the regulations are clear that the applicant must fully describe the changes desired in the LAR and that the LAR must be complete and accurate in all material respects.

RULES OF PRACTICE: LEGAL CONTENTIONS

When there is no factual dispute between the parties on a matter, a Board may decide the legal issues on the basis of briefs and oral argument.

**MEMORANDUM AND ORDER
(Granting Petition to Intervene and Hearing Request)**

The State of Vermont, represented by the Vermont Department of Public Service, challenges a license amendment request (“LAR”) filed by Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together “Entergy”), to replace certain license conditions on the decommissioning trust fund for Vermont Yankee Nuclear Power Station with similar regulatory requirements.¹ Because Vermont has standing,² submitted a timely petition, and has proffered two admissible contentions, the Board grants Vermont’s hearing request.

¹ State of Vermont’s Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) [hereinafter “Petition”].

² Vermont has standing because Vermont Yankee is “located within the boundaries of the State” and “no further demonstration of standing is required.” 10 C.F.R. § 2.309(h)(2).

I. BACKGROUND

On September 4, 2014, Entergy submitted a LAR to replace plant-specific license conditions related to its decommissioning trust fund with “substantially similar” regulatory requirements.³ The current plant-specific license conditions were imposed when the Commission approved Entergy’s license transfer application in May 2002 and include the requirement to provide a 30-day notice before disbursing funds to allow the NRC the opportunity to reject a proposed expense.⁴

In its LAR, Entergy asserts that these conditions are no longer necessary in light of the decommissioning fund requirements in 10 C.F.R. § 50.75(h)(1)-(4), which were promulgated in December 2002 and govern reporting and recordkeeping rules for decommissioning trusts.⁵ Because Vermont Yankee’s license conditions predate the issuance of 10 C.F.R. § 50.75(h), the plant was grandfathered and allowed to keep its existing license conditions.⁶ However, if Entergy amends any of its license conditions related to the decommissioning trust fund, from that point forward Entergy must comply with all of the requirements of 10 C.F.R. § 50.75(h).⁷

Under 10 C.F.R. § 50.75(h)(1)(iv), the decommissioning trust fund can be used only for decommissioning expenses,⁸ defined as activities to remove a facility from service safely and reduce residual radioactivity at the site.⁹ Under that same regulation, the licensee must provide a 30-day notice for all withdrawals other than ordinary administrative expenses to operate the fund. Those notices are no longer required, however, once decommissioning has begun and withdrawals

³ Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Proposed Change No. 310 Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, Attach. 1, at 2 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) [hereinafter “LAR”].

⁴ *Id.* at 1; *see* Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269, 36,270 (May 23, 2002).

⁵ LAR, Attach. 1, at 2-6; *see also* Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002).

⁶ 10 C.F.R. § 50.75(h)(5).

⁷ *Id.*

⁸ 10 C.F.R. § 50.75(h)(1)(iv) (“Disbursements or payments from the trust . . . are restricted to decommissioning expenses or transfer to another financial assurance method acceptable under paragraph (e) of this section until final decommissioning has been completed.”).

⁹ 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 — (1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license.”); *see also* 10 C.F.R. § 50.82(a)(8)(i)(A) (“Decommissioning trust funds may be used by licensees if . . . [t]he withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2.”).

are made under 10 C.F.R. § 50.82(a)(8). Instead of providing notice before each decommissioning expense, the licensee submits a decommissioning cost estimate and timeline, called a Post Shutdown Decommissioning Activities Report (“PSDAR”), and annual reports on expenditures.¹⁰ In addition to these reporting requirements, under 10 C.F.R. § 50.82(a)(8) a licensee cannot “reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise” and the licensee must maintain its ability to “complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license.”¹¹

According to Entergy’s PSDAR, the company intends to spend \$817 million on “license termination” activities, \$368 million on spent fuel management, and \$57 million for site restoration,¹² for a total cost of \$1.2 billion. As of August 2014, the decommissioning trust fund held \$653 million.¹³ Entergy predicts that accumulated interest will generate enough money for all costs by the mid-2060s.¹⁴ If any money is left over at the end of decommissioning, 55% of it is to be returned to benefit the ratepayers of Vermont who paid into the fund.¹⁵

Because spent fuel management is not a decommissioning activity,¹⁶ not all of Entergy’s planned expenditures are allowable under NRC regulations. In addition to the LAR now before the Board, on January 6, 2015, Entergy submitted a request to the NRC Staff for three regulatory exemptions from 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A) to allow the plant to use the decommissioning fund to manage its spent fuel and also to eliminate the 30-day-notice requirement that would otherwise apply to nondecommissioning expenses, such as spent fuel management.¹⁷ The NRC Staff granted Entergy’s exemption requests

¹⁰ 10 C.F.R. § 50.82(a)(8)(iii)-(v).

¹¹ 10 C.F.R. § 50.82(a)(8)(i)(B)-(C).

¹² Vermont Yankee Nuclear Power Station, Post Shutdown Decommissioning Activities Report, at 9, tbl. 2.2 (Dec. 2, 2014) (ADAMS Accession No. ML14357A110) [hereinafter “PSDAR”].

¹³ *Id.* at 4.0.

¹⁴ *Id.* at 2.1.3.

¹⁵ Petition at 11 (citing Attach. 2, Master Trust Agreement, Exs. D & E).

¹⁶ 10 C.F.R. § 50.75(c) & n.1 (stating that the minimum amounts required for decommissioning trust funds “are based on activities related to the definition of ‘Decommission’ in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license.”).

¹⁷ Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) [hereinafter “Exemption Request”].

on June 17, 2015,¹⁸ agreeing with Entergy that the fund has, or will have, enough money to pay for both spent fuel management and decommissioning and that providing 30-day notice of planned spent fuel cost disbursements is unnecessary to ensure adequate funds.¹⁹ The NRC Staff concluded that the exemptions were categorically excluded from environmental review as administrative changes that did not increase the risk of public radiation exposure.²⁰

Although the NRC Staff made all three of the requested exemptions effective immediately, only the exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), relating to the withdrawal of spent fuel expenses, has an immediate effect.²¹ Entergy's current license conditions require 30-day notification for all expenses (decommissioning or other) and a licensee cannot be exempted from license conditions.²² An NRC licensee requires a license amendment to modify license conditions.²³ The two exemptions from 10 C.F.R. § 50.75(h)(1)(iv) — which allow Entergy to use the decommissioning trust fund for spent fuel management without providing a 30-day notification — have no practical effect because, unless the LAR is approved, 10 C.F.R. § 50.75(h) does not currently apply to Entergy. The NRC Staff's decision granting Entergy's exemption requests does not acknowledge the exemptions' reliance on this LAR (which was filed 4 months before the exemption requests).²⁴

The NRC Staff accepted the LAR for review and informed the public of the opportunity to petition for a hearing in a *Federal Register* notice on February 17, 2015.²⁵ The Secretary of the Commission referred Vermont's timely petition to the Atomic Safety and Licensing Board Panel,²⁶ and this Licensing Board was

¹⁸ Letter from James Kim, Project Manager, Plant Licensing IV-2 and Decommissioning Transition Branch, Division of Operating Reactor Licensing to Site Vice President (June 17, 2015) (ADAMS Accession No. ML15128A219).

¹⁹ *Id.*, Encl. 1, at 5.

²⁰ *Id.*, Encl. 1, at 9 (citing 10 C.F.R. § 51.22(c)(25)).

²¹ *Id.*, Encl. 1, at 11; *see* 80 Fed. Reg. 35,992, 35,995 (June 23, 2015); *see id.* at 35,993 (“The requested exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow ENO to use a portion of the funds from the Trust for irradiated fuel management without prior notice to the NRC . . .”).

²² *See GE-Hitachi Global Laser Enrichment LLC* (GLE Commercial Facility), LBP-12-21, 76 NRC 218, 240 (2012) (“[I]n a limited number of appropriate circumstances the Staff may exempt an applicant from *regulatory* requirements . . .”) (emphasis added).

²³ 10 C.F.R. § 50.90.

²⁴ It is curious that the NRC Staff would approve a request to exempt a licensee from regulations which do not apply to the licensee (until the LAR is approved). It is even more curious that the NRC Staff purports to make such an exemption effective immediately.

²⁵ Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359-60 (Feb. 17, 2015).

²⁶ Memorandum from Annette Vietti-Cook, Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge (Apr. 30, 2015) (ADAMS Accession No. ML15120A477).

established on May 1, 2015.²⁷ Entergy and the NRC Staff submitted answers opposing Vermont's April 20 hearing request on May 15,²⁸ and Vermont filed its reply to those responses on May 22, 2015.²⁹ The Board heard oral argument regarding the admissibility of Vermont's four contentions on July 7, 2015.³⁰

On July 6, 2015, Vermont moved for leave to file a new contention and to add the NRC Staff's approval of the exemptions as an additional factual basis to support admission of three of Vermont's previously filed contentions.³¹ Entergy and the NRC Staff submitted answers on July 31, 2015, opposing admission of the new contention and the addition of the new factual basis,³² to which Vermont submitted a reply on August 7.³³

The NRC Staff has not completed its review of the LAR. At oral argument the NRC Staff stated that "it has not yet determined in this case whether [the Staff's environmental review] will be accomplished through an environmental assessment or through a categorical exclusion."³⁴ The NRC Staff also stated that the granted exemptions do not factor into the LAR review.³⁵

II. DISCUSSION

The Board evaluates contentions under the six requirements of 10 C.F.R. § 2.309(f)(1). In the context of a license amendment proceeding an admissible contention must (i) provide a specific statement of the issue of law or fact to be raised; (ii) explain briefly the basis for the contention; (iii) show that the issue

²⁷ Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 26,301 (May 7, 2015).

²⁸ Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request (May 15, 2015) [hereinafter "Entergy's Answer"]; NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015) [hereinafter "NRC Staff's Answer"].

²⁹ The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015) [hereinafter "Reply"].

³⁰ Tr. at 1-78.

³¹ State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015) [hereinafter "Vermont's New Contention"].

³² Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015) [hereinafter "Entergy's Answer to New Contention"]; NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions (July 31, 2015) [hereinafter "Staff's Answer to New Contention"].

³³ State of Vermont's Reply in Support of Motion for Leave to File a New Contention and Add Bases and Support to Existing Contentions (Aug. 7, 2015) [hereinafter "New Contention Reply"].

³⁴ Tr. at 66.

³⁵ Tr. at 25.

is within the scope of the license amendment proceeding; (iv) demonstrate that the issue is material to the findings the NRC must make to support the LAR; (v) state concisely the alleged facts or expert opinions that support its position on the issue; and (vi) show that a genuine dispute exists with Entergy on a material issue of law or fact, with reference to the disputed portion of the LAR.³⁶

Because the scope of license amendment proceedings is limited to the LAR, petitioners typically cannot challenge a Commission regulation³⁷ or seek a hearing on the merits of an exemption request.³⁸ However, there is no such restriction on raising an exemption-related issue if it is directly related to the LAR.³⁹ As the Commission has explained, an exemption “cannot remove a matter germane to a licensing proceeding from consideration in a hearing, assuming an interested party raises an admissible contention thereon.”⁴⁰

A. Contention I

1. Summary of the Parties’ Arguments

Vermont first contends that:

Entergy’s LAR involves a potential significant safety and environmental hazard, fails to demonstrate that it is in compliance with 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82[(a)](8)(i)(B) and (C), and fails to demonstrate that there will be reasonable assurance of adequate protection for the public health and safety as required by section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)) if the proposed amendment is approved.⁴¹

Entergy states in its LAR that it “has elected to subject its decommissioning trust agreement to the regulatory requirements for decommissioning trust funds that

³⁶ 10 C.F.R. § 2.309(f)(1); *see FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395-96 (2012).

³⁷ 10 C.F.R. § 2.335(a) (“[N]o rule or regulation of the Commission, or any provision thereof . . . is subject to attack . . . in any adjudicatory proceeding subject to [10 C.F.R. Subpart 2]” except as provided by the waiver provision in 10 C.F.R. § 2.335(b)); *see Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 385-88 (2012).

³⁸ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 94-98 (2000) (“Congress intentionally limited the opportunity for a hearing to certain designated agency actions — that do not include exemptions.”); *see* 42 U.S.C. § 2239(a)(1)(A).

³⁹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 n.3 (2001); *see also Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (ruling that an exemption request was subject to a hearing where the plant already had a license and was seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal).

⁴⁰ *Private Fuel Storage*, CLI-01-12, 53 NRC at 467.

⁴¹ Petition at 3.

are specified in 10 CFR 50.75(h).⁴² The State takes exception to this and argues that Entergy's statement is incorrect because it plans to use the decommissioning trust fund for nondecommissioning expenses that are not allowed under 10 C.F.R. § 50.75(h)(1)(iv).⁴³

First, Vermont asserts there are six expenses that do not qualify as decommissioning costs because they do not reduce radiological contamination at the site: (1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of nonradiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof.⁴⁴ Based on these allegedly improper expenses, the State asserts that there is a serious risk that the company will run out of money before it finishes decontaminating the site — exactly the sort of risk that the agency's decommissioning trust fund regulations are intended to prevent.⁴⁵ Accordingly, the State argues that the 30-day-notice requirement remains necessary to give the NRC the opportunity to reject the allegedly improper withdrawals before they occur.⁴⁶

Vermont next alleges that Entergy's claim in the LAR that it will comply with the decommissioning trust requirements of 10 C.F.R. § 50.75(h) is erroneous because that regulation allows disbursements without notice only for withdrawals under 10 C.F.R. § 50.82.⁴⁷ Under 10 C.F.R. § 50.82(a)(8)(i)(B), licensees cannot make withdrawals that would “reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise.” According to Vermont, Entergy has not shown that it has considered such potential expenses, including indefinite storage of spent fuel and groundwater remediation.⁴⁸

As factual support for this contention, Vermont attaches declarations from two state employees who allege significant omissions in Entergy's decommissioning cost estimate.⁴⁹ Anthony Leshinskie, the State Nuclear Engineer and Decommissioning Coordinator, asserts that Entergy has not demonstrated that it could

⁴² LAR, Attach. 1, at 1.

⁴³ Petition at 3-6.

⁴⁴ *Id.* at 9-10 (citing PSDAR, App. C, tbl. C, lines 1a.2.22, 1b.2.22, 1a.2.23, 1a.2.27, 1a.4.1, 1a.4.2, 2b.1.4). These costs are listed in the PSDAR, not the LAR, but Vermont argues that the PSDAR, the exemptions, and the license amendment are so “inextricably intertwined” that they can only be understood in combination. Petition at 6, 20-24.

⁴⁵ Petition at 1, 5.

⁴⁶ *Id.* at 5-6.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 5, 22-23 (citing 10 C.F.R. § 50.82(a)(8)(i)(B)-(C)).

⁴⁹ *Id.* at 7; *see also* Declaration of Anthony R. Leshinskie (Apr. 20, 2015) [hereinafter “Leshinskie Decl.”]; Declaration of William Irwin (Apr. 20, 2015) [hereinafter “Irwin Decl.”].

continue storing spent fuel on site if the Department of Energy fails to provide a storage site by 2052 (which is when the PSDAR assumes all spent fuel will be removed).⁵⁰ Dr. William Irwin, a health physicist and the Radiological and Toxicological Sciences Program Chief at the Vermont Department of Health, opines that the cost estimates fail to explain how Entergy will provide money to remediate soil and groundwater issues, such as recently discovered strontium-90 leaks.⁵¹ Given these alleged omissions, the State argues that the 30-day notification associated with the denial of the LAR would ensure that the fund is spent in ways that provide adequate assurance of public health and safety.⁵²

In response, Entergy and the NRC Staff argue that Vermont's contention impermissibly challenges the agency's regulations because 10 C.F.R. § 50.75(h) allows Entergy to make its withdrawals through 10 C.F.R. § 50.82(a)(8) in lieu of providing a 30-day notice for decommissioning expenditures.⁵³ Entergy and the NRC Staff also assert that Vermont's contention raises issues tied to the exemptions and the PSDAR that are beyond the scope of this license amendment proceeding, which solely concerns approval of the LAR.⁵⁴ Both the NRC Staff and Entergy argue that Entergy's future compliance with the regulations is not within the scope of this proceeding because it is a decommissioning oversight matter.⁵⁵ Finally, Entergy argues that Vermont has not provided sufficient factual support to demonstrate a genuine dispute with the LAR.⁵⁶ The company argues that the State's contention is actually a challenge to the PSDAR and exemptions, not the LAR.⁵⁷

Vermont replies that it is challenging Entergy's plan to contravene the regulations, not the regulations themselves.⁵⁸ The State likewise maintains that the Board should not ignore the obvious real-world consequences of approving the LAR, as demonstrated by the plans laid out in Entergy's exemption request and PSDAR.⁵⁹

2. The Board's Ruling

The Board concludes that this contention is admissible because Vermont has

⁵⁰ Leshinskie Decl. at 3.

⁵¹ Irwin Decl. at 3-5.

⁵² Petition at 17.

⁵³ Entergy's Answer at 14-16; NRC Staff's Answer at 27-29.

⁵⁴ Entergy's Answer at 17-19; NRC Staff's Answer at 30-33, 35-36.

⁵⁵ Entergy's Answer at 17; NRC Staff's Answer at 56 n.261; Tr. at 47, 52.

⁵⁶ Entergy's Answer at 20-26.

⁵⁷ *Id.*

⁵⁸ Reply at 2-3.

⁵⁹ *Id.* at 5-7.

satisfied all six admissibility criteria of 10 C.F.R. § 2.309(f)(1). The first two criteria require little discussion. Per 10 C.F.R. § 2.309(f)(1)(i), Vermont has provided a specific statement of its contention.⁶⁰ To explain the legal foundation of its contention, Vermont has pointed to 10 C.F.R. § 50.75(h), 10 C.F.R. § 50.82(a)(8), and the Atomic Energy Act of 1954.⁶¹ This brief explanation of the rationale underlying the contention is sufficient to satisfy 10 C.F.R. § 2.309(f)(1)(ii).⁶²

a. Scope of the Proceeding

With respect to scope, the Board concludes that Vermont’s contention is not a challenge to the decommissioning trust fund regulations, nor does it raise impermissible oversight issues. Vermont’s claim that Entergy’s LAR contains incomplete and incorrect statements concerning its use of the trust fund is within the scope of this license amendment proceeding as defined in the notice of opportunity to request a hearing.⁶³ As that hearing notice states, Entergy seeks to remove license conditions on the basis that the company “has elected to subject its decommissioning trust agreement to the regulatory requirements for decommissioning trust funds that are specified in 10 CFR 50.75(h).”⁶⁴ In its challenge to the LAR, Vermont argues that Entergy’s current decommissioning plans *contradict* this statement because they are not for uses permitted under 10 C.F.R. § 50.75(h) and thus Entergy’s proposed license amendment is in contravention of 10 C.F.R. § 50.75(h).⁶⁵ Because applicants must provide information that is complete and accurate in all material respects,⁶⁶ Vermont’s argument that Entergy’s statements are erroneous is within the scope of the proceeding.

(i) CHALLENGE TO THE REGULATIONS

Vermont’s contention is not a challenge to the regulations because, as the State explains, its argument concerns “the application of NRC regulations in this

⁶⁰ Petition at 3.

⁶¹ *Id.* at 3-7; see 42 U.S.C. § 2232(a).

⁶² See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 99-100 (2009).

⁶³ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 291 (2008).

⁶⁴ 80 Fed. Reg. at 8359.

⁶⁵ Petition at 6; 10 C.F.R. § 50.75(h)(5) (“If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.”).

⁶⁶ 10 C.F.R. § 50.9(a); see *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 207-08 (2007) (“We consider our current regulatory approach, of relying on our licensees to submit complete and accurate information, and auditing that information as appropriate, to be entirely consistent with sound regulatory practice.”).

particular instance,”⁶⁷ not a generic challenge to the regulations. Vermont asserts that Entergy’s LAR is neither correct nor complete insofar as Entergy purportedly intends to use the decommissioning fund for nondecommissioning expenses and fails to account for unforeseen expenses.⁶⁸ These alleged deficiencies concern 10 C.F.R. § 50.75(h)(1)(iv), which limits the fund to decommissioning-only expenses,⁶⁹ and 10 C.F.R. § 50.82(a)(8)(i)(B) and (C), which require the licensee to ensure that the site can be safely maintained and decommissioned, even in the face of unexpected costs.⁷⁰ Far from being a challenge to the regulations, the State is in fact arguing that Entergy’s LAR, “if granted, would conflict with applicable NRC regulations.”⁷¹

Vermont is correct that challenging a licensee’s compliance with a regulation is not a challenge to the regulation itself. While it is true that section 50.75(h)(1)(iv) does not require a 30-day notice for decommissioning withdrawals made under section 50.82(a)(8), we understand Vermont’s argument to be that the license amendment should be rejected, and the current notice requirement left in place, “[i]n light of stated indications by Entergy that it intends to try to use the [Nuclear Decommissioning Trust] Fund for expenses that are not allowed under applicable NRC regulations.”⁷² The State argues that “while the NRC might generally allow elimination of 30-day notice requirements at other plants, it should not be allowed when a plant is on the record stating an intention to make improper withdrawals from the decommissioning trust fund, as is the case here.”⁷³ Vermont may rely on alleged inaccuracies and omissions in the LAR to challenge the LAR and to maintain the existing license conditions.

(ii) THE PSDAR AND EXEMPTIONS

The Board next determines that we may appropriately consider Vermont’s citations to the PSDAR and the exemptions as factual support for Vermont’s

⁶⁷ Reply at 1 (emphasis removed).

⁶⁸ Petition at 3-6; Reply at 4-7.

⁶⁹ See *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 308 n.52 (2000) (“Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2.”).

⁷⁰ 10 C.F.R. § 50.82(a)(8)(i)(B); see *USEC Inc.* (American Centrifuge Plant), LBP-07-6, 65 NRC 429, 451 (2007) (explaining that NRC requires a contingency factor for decommissioning funds to “provide for unforeseen events that may happen during operations or decommissioning that could increase the overall costs of this activity.”); see also Office of Nuclear Regulatory Research, NRC, *Assuring the Availability of Funds for Decommissioning Nuclear Reactors*, Regulatory Guide 1.159, at 11 (rev. 2 Oct. 2011) (ADAMS Accession No. ML112160012).

⁷¹ Petition at 2.

⁷² *Id.* at 3.

⁷³ Reply at 3.

allegation that Entergy plans to spend trust fund money on nondecommissioning expenses and has not demonstrated how it will account for unforeseen expenses. Vermont is not asking the Board to hold a hearing on the merits of the PSDAR or the exemption requests, but instead to view both as “stated indications” of Entergy’s intention to depart from its regulatory obligations with respect to the decommissioning fund.⁷⁴

We see no prohibition from considering the information contained in the PSDAR to the extent it relates to Entergy’s intentions. The PSDAR notifies the NRC and Vermont of Entergy’s plans and is a key part of the decommissioning regulations. Section 50.75(h)(1)(iv) allows a licensee to disburse funds without prior notice only if those expenditures comply with section 50.82; that section, in turn, requires Entergy to provide a PSDAR with “a description of the planned decommissioning activities along with a schedule for their accomplishment.”⁷⁵ Furthermore, Entergy cannot deviate from the PSDAR without first notifying the NRC and Vermont.⁷⁶ Given that the PSDAR is intended to provide notice to the public regarding decommissioning plans at Vermont Yankee,⁷⁷ Vermont may appropriately rely on it as an indication of Entergy’s plans.

Likewise, the Board may consider Vermont’s references to the exemptions as additional factual support for Vermont’s contention without addressing the merits of the NRC Staff’s decision to allow Entergy to use the decommissioning trust fund for spent fuel management.⁷⁸ Vermont alleges that the purpose of the LAR makes sense only within the context of the related exemption request and the PSDAR.⁷⁹ First, Entergy submitted a LAR that would remove its current 30-day-notice license condition and subject its license to the regulatory requirements of 10 C.F.R. § 50.75(h). Four months later, Entergy requested an exemption from 10 C.F.R. § 50.75(h)(1)(iv). As Vermont states, “[t]he LAR purports to be substituting *all* of 50.75(h) for the current provisions in the Vermont Yankee

⁷⁴ Petition at 3; *see id.* at 9-10; Reply at 6 (“[T]he State’s evidence in fact shows that Entergy is on record — both in its PSDAR filing and in statements to the media — that it intends to use the nuclear decommissioning trust fund in ways that the State believes to be unlawful.”); *cf. Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-15-18, 81 NRC 793, 799 (2015) (explaining that Vermont in that case challenged “the adequacy of Entergy’s exemption request and associated analyses”).

⁷⁵ 10 C.F.R. § 50.82(a)(4)(i).

⁷⁶ *Id.* § 50.82(a)(7).

⁷⁷ *See* Final Rule: “Radiological Criteria for License Termination,” 62 Fed. Reg. 39,058, 39,076 (July 21, 1997).

⁷⁸ Because the NRC’s decision to grant the exemptions is a matter of public record, we take notice that the exemptions have now been approved. *See* 10 C.F.R. § 2.337(f); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74-75 (1991).

⁷⁹ Petition at 1-2; Reply at 5.

license. In truth, the LAR is directly connected to an effort by Entergy to substitute only *part* of 50.75(h) for the current license provisions.”⁸⁰

The NRC Staff insists that the exemptions should be considered entirely separate because one of the exemptions has an effect independent of the LAR.⁸¹ However, this is not an explanation for why the Board should ignore that two of the granted exemptions are completely dependent on the LAR. These two exemptions from 10 C.F.R. § 50.75(h)(1)(iv) cannot take effect unless and until the LAR is approved. These exemptions are precisely the sort of directly related and dependent exemption-related issues that are within the scope of a license amendment proceeding, as the Commission explained in *Private Fuel Storage*.⁸² In that case, an exemption from seismic planning regulations would go into effect only if the license was granted;⁸³ here, the exemptions from 10 C.F.R. § 50.75(h)(1)(iv) will go into effect only if the LAR is approved. The Commission has never instructed its licensing boards to ignore reality. Because granting the LAR would immediately cause the directly related exemptions to go into effect, we conclude that this contention and its reference to exemption-related issues are within the scope of this proceeding.

(iii) OVERSIGHT ISSUES

Entergy and the NRC Staff assert that Vermont seeks to raise compliance issues that are part of NRC’s enforcement powers, and are thus not a challenge to the LAR.⁸⁴ Commission precedent is clear that the NRC Staff’s ongoing enforcement of regulations and license conditions does not trigger hearing rights.⁸⁵ However, petitioners may challenge the correctness of a statement in the LAR that the applicant will comply with the regulations, if that challenge is supported by

⁸⁰ Reply at 9.

⁸¹ Tr. at 72-73; *see also* Tr. at 21, 50-51.

⁸² *Private Fuel Storage*, CLI-01-12, 53 NRC at 466-67; *see Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974) (“We will not close our eyes to the fact that this proceeding, though separate from the earlier ones for some purposes, is merely another round in a continuing controversy as to whether the licensee can be reasonably expected to comply with our quality assurance regulations.”).

⁸³ Letter from Mark S. Delligatti, Senior Project Manager, Licensing Section, Spent Fuel Project Office, to John D. Parkyn, Chairman, Private Fuel Storage, L.L.C. (Sept. 29, 2000) (ADAMS Accession No. ML003755630) (“[T]here is a sufficient basis to grant an exemption to 10 CFR 72.102(f) at the time a license is issued for the Facility. Please note that the exemption will only be issued if the license is granted.”).

⁸⁴ Tr. at 47, 52.

⁸⁵ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC 729, 735 (2015) (explaining why Staff oversight is not a de facto license amendment subject to a hearing); *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015) (same).

documentary evidence.⁸⁶ If a petitioner can provide a “sound basis” to dispute compliance-related statements in the LAR, then the contention is within the scope of the proceeding.⁸⁷

It is clear to this Board that Vermont is neither challenging the adequacy of the decommissioning fund nor urging the Board to step in to prevent allegedly improper expenditures. Rather, Vermont argues that Entergy’s plans demonstrate why the 30-day notice (which gives the NRC an opportunity to reject an expense before it is made) remains necessary.⁸⁸ As the NRC explained when it promulgated regulations that do not require notice for withdrawals made under 10 C.F.R. § 50.82(a)(8), “[t]he function of these procedural and administrative changes is merely to facilitate the orderly conduct of the licensee’s business and to insure that information needed by the Commission to perform its regulatory functions is readily available.”⁸⁹ Based on its allegations that Entergy’s plans conflict with the regulations, Vermont argues that this justification for removing the 30-day notice is no longer applicable and would deprive the NRC of the chance to stop improper withdrawals before they occur.⁹⁰

Licensing boards may not assume that a licensee intends to contravene NRC regulations,⁹¹ but that is not the case here.⁹² Rather, Entergy’s LAR purportedly rests on a promise of planned compliance with those regulations that, Vermont

⁸⁶ See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000) (“Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations.”).

⁸⁷ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 344 (2002) (“But [the] license application itself states that, after license transfer, there will be no operational changes and essentially no staff or management changes. [The petitioner] has not provided a sound basis to dispute the information provided in the application. Accordingly, we decline to admit this issue. We also note that the NRC has regulations requiring specific staffing levels and qualifications for the key positions necessary to operate a plant safely. We will not assume that licensees will contravene our regulations.” (footnotes omitted)).

⁸⁸ Petition at 4; Reply at 5.

⁸⁹ Proposed Rule: “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments,” 45 Fed. Reg. 13,739, 13,745 (Mar. 3, 1980); see also Final Rule, 49 Fed. Reg. 9352, 9367 (Mar. 12, 1984).

⁹⁰ Petition at 5-6.

⁹¹ See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 178 & n.53 (2014) (declining to assume “ulterior motive” behind license amendment); *U.S. Army* (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 454 n.39 (2006) (“Intervenor references no instance in which the Licensee failed to comply with NRC regulations, nor does it state any facts to contradict the Licensee’s stated intention — which has been accepted by the Staff — to submit to the Staff a decommissioning plan within 5 years.”).

⁹² See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 938-42 (2008) (admitting contention that applicant had inadequately described aging management plan by relying on a promise of compliance with NRC orders instead of describing the plan).

maintains, is contradicted by Entergy's own publicly stated post-LAR plans. Thus, Vermont's allegations contradicting Entergy's claims in its LAR are within the scope of the proceeding because the challenge pertains directly to the LAR (which removes the 30-day-notice requirement based on a decision to replace the preexisting conditions with the regulations), not to general oversight matters. Accordingly, Vermont's contention that Entergy's plans contradict its promised compliance in the LAR is an issue within the scope of this proceeding.

(iv) ISSUES OUTSIDE THE SCOPE

Finally, as part of this contention, Vermont also raises several issues that are not admissible because they are outside the scope of this proceeding. First, Vermont's allegations that Entergy will violate state law or breach the master trust agreement are not within the scope of this license amendment proceeding.⁹³ If Entergy ultimately seeks to amend the master trust agreement that governs its decommissioning trust fund, the company must do so through a separate process, not a LAR.⁹⁴ Likewise Vermont's assertion that Entergy is breaking promises it made to Vermont during the license transfer and state litigation is also outside the scope of this proceeding. Matters within the purview of the Vermont Public Service Board are outside the jurisdiction of this licensing board, which is limited to considering only the LAR and NRC regulations.⁹⁵ Finally, the merits of the exemption request itself are also outside the scope of this proceeding.⁹⁶ The Board will consider the PSDAR and exemption request only insofar as they can serve as factual support for Vermont's challenge to Entergy's planned uses for the decommissioning trust fund. In no event will the Board consider any arguments regarding the correctness of the NRC Staff's decision to grant those exemptions.

b. Materiality

The Board next concludes that Vermont has demonstrated that its contention is relevant to the findings NRC must make before approving the LAR because, in order to approve the license amendment, the NRC Staff must find that Entergy's

⁹³ Petition at 11-17; *see PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104-07 (2007) (explaining that alleged violations of state law are outside the scope of, and not material to, an adjudicatory proceeding).

⁹⁴ Petition, Attach. 2, Master Trust Agreement at 19.

⁹⁵ *Id.* at 7-8; *see Susquehanna*, CLI-07-25, 66 NRC at 104-07.

⁹⁶ Procedurally, this issue would have been much simpler if Entergy had submitted its LAR and exemption request together, in which case both would have been subject to a hearing request. *See Metropolis Works*, CLI-13-1, 77 NRC at 10 (“[W]hen a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well.”).

LAR is in accordance with 10 C.F.R. § 50.75(h).⁹⁷ “Materiality” requires a petitioner to show why the alleged error or omission is of possible significance to the grant or denial of a pending license application.⁹⁸ This means that there must be some significant link between the claimed deficiency and the agency’s ultimate determination whether granting the LAR will adequately protect the health and safety of the public and the environment.⁹⁹ In this case, the significant link between the claimed deficiency and the agency’s determination is Entergy’s statement in its LAR that “[t]his license condition is no longer needed, based on the provisions of 10 CFR 50.75(h) and [Entergy’s] decision to comply with that section’s decommissioning trust agreement requirements.”¹⁰⁰ Vermont argues that Entergy’s stated intentions do not comply with those requirements (for which it has already received a partial exemption).¹⁰¹ This raises a material question concerning the LAR.

Vermont’s arguments concerning 10 C.F.R. § 50.82 are also material to the NRC Staff’s consideration of the LAR because elimination of the 30-day-notice requirement rests on disbursements being made under section 50.82(a)(8).¹⁰² If, as Vermont alleges, Entergy’s planned disbursements are not in accordance with 10 C.F.R. § 50.82(a)(8), then all of the disbursements from the fund would require the 30-day notice that Entergy’s LAR seeks to eliminate.¹⁰³ These allegations therefore raise material concerns about the option in the LAR that allows Entergy to make its disbursements under section 50.82(a)(8).¹⁰⁴ The Board “makes threshold decisions on materiality on a case-by-case basis, given the nature of the issue and the record presented before the Board.”¹⁰⁵ In this case, Vermont’s allegation that Entergy’s plans are incompatible with section 50.82(a)(8) goes to the heart of the LAR,

⁹⁷ 10 C.F.R. § 50.75(h)(5).

⁹⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179, *aff’d*, CLI-98-13, 48 NRC 26 (1998).

⁹⁹ *Id.* at 180.

¹⁰⁰ LAR, Attach. 1, at 6.

¹⁰¹ Petition at 3; Tr. at 11-12.

¹⁰² 10 C.F.R. § 50.75(h)(1)(iv) (“After decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8), no further notification need be made to the NRC.”); *see* Petition at 5 (“[E]ven if Entergy were allowed to rely on 10 C.F.R. § 50.75(h), it could not avoid the 30 day notice requirement because it has not shown that it is in compliance with 10 C.F.R. §§ 50.82(a)(8)(i)(B) and (C).”).

¹⁰³ Vermont’s argument is that retaining the 30-day-notice provision is important because if that 30-day provision stays in effect then (1) Entergy would continue to give the appropriate notice regarding expenses which are not decommissioning-related (as defined by section 50.2) consistent with sections 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A), and (2) the NRC Staff would have the opportunity to deny any expenses that did not meet the section 50.2 definition of decommissioning expenses. Petition at 5-6.

¹⁰⁴ LAR, Attach. 1, at 4.

¹⁰⁵ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 329 (2012).

which removes the 30-day notice based on an assurance that the license conditions will be replaced by sections 50.75(h) and 50.82(a)(8). The correctness of that assurance is a genuine concern relative to the appropriateness of the LAR, and therefore the Board concludes that Vermont has shown the materiality of its contention.¹⁰⁶

c. Factual Support

Vermont presents essentially two lines of factual support for this contention: one concerning plans to use the fund for nondecommissioning expenses and the other regarding potential unforeseen costs. The Board addresses each in turn.

(i) NONDECOMMISSIONING EXPENSES

First, Vermont has identified documents and sources — primarily the PSDAR and a news article — indicating that Entergy plans to spend the trust fund on nondecommissioning costs that are not part of the granted exemptions.¹⁰⁷ Vermont points to six line items in the PSDAR that, it alleges, are nondecommissioning costs for which Entergy intends to use the decommissioning fund: (1) a settlement agreement payment, (2) emergency preparedness costs, (3) shipment of nonradiological asbestos waste, (4) insurance, (5) property taxes, and (6) replacement of a bituminous roof.¹⁰⁸ Vermont argues that these expenditures are not legitimate decommissioning costs because they “do not reduce radiological contamination at the site.”¹⁰⁹

Regarding emergency planning costs, Vermont points to its comments on the PSDAR for further elaboration: “Expenses for emergency preparedness do not reduce radiological contamination at the site and are thus not proper uses of the [Trust] Fund. Entergy would therefore need an exemption (which has neither been requested nor granted) before it could withdraw [Trust] Funds for emergency preparedness expenses.”¹¹⁰ Vermont alleges that Entergy is improperly planning to use the fund to pay for legal costs as well. According to a news article cited by Vermont, Entergy’s spokesman said that legal costs from Vermont’s challenge to Entergy’s reduction in emergency planning are “part of our decommission[ing]

¹⁰⁶ See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 922-23 (2009) (explaining materiality of applicant’s compliance with NRC regulations).

¹⁰⁷ Petition at 9-10; Reply at 6.

¹⁰⁸ Petition at 9-10 (citing PSDAR, App. C, tbl. C, lines 1a.2.22, 1b.2.22, 1a.2.23, 1a.2.27, 1a.4.1, 1a.4.2, 2b.1.4).

¹⁰⁹ *Id.* at 10.

¹¹⁰ Petition, Attach. 1, at 37 n.9.

costs” and “is money that’s going to be coming from [the] trust fund.”¹¹¹ The article paraphrases him as explaining that “[b]ecause the plant is no longer generating revenue, [the spokesman] said any legal costs the company incurs will come out of the decommissioning trust fund.”¹¹²

These citations support Vermont’s contention that approval of the LAR would prevent the State from objecting to improper expenditures before they occur by removing the current 30-day notice requirement.¹¹³ Notwithstanding the granted exemptions, the decommissioning-only limitation on funds imposed by 10 C.F.R. § 50.75(h)(1)(iv) and § 50.82(a)(8)(i)(A) remains in place for all nondecommissioning costs other than “trust fund disbursements for irradiated fuel management activities.”¹¹⁴ This contention raises health and environmental concerns about the license amendment because the decommissioning fund exists to ensure that companies will be able to decontaminate the site.¹¹⁵ As Vermont states, “[a]ssuring adequate funds for a reactor owner to meet its decommissioning obligations is part of the bedrock on which NRC has built its judgment of reasonable assurance of adequate protection for the public health and safety and protection of the environment.”¹¹⁶ The Board concludes that Vermont has provided sufficient factual support to challenge the correctness of Entergy’s statement in the LAR that the company will comply with 10 C.F.R. § 50.75(h), which forms the basis for removing the 30-day notice requirement. These allegations provide the “sound basis” and documentary support required to support a contention asserting that a licensee will contravene the NRC’s regulations.¹¹⁷

(ii) UNFORESEEN EXPENSES

Next, the State points to groundwater remediation and indefinite storage of spent fuel as two major costs not contemplated by Entergy, and thus asserts that the lack of 30-day notice in the LAR conflicts with Entergy’s regulatory duty to provide notice for any withdrawal not made in accordance with 10 C.F.R. § 50.82(a)(8).¹¹⁸ As factual support, Vermont relies on the recent discovery of

¹¹¹ Petition at 10 (quoting John Herrick, *State appeals decision on Vermont Yankee emergency monitoring*, Vt. Digger (Feb. 26, 2015, 6:49 PM), <http://vtdigger.org/2015/02/26/state-appeals-decision-on-vermont-yankee-emergency-monitoring/>).

¹¹² *Id.*

¹¹³ *Id.* at 5-6.

¹¹⁴ Exemption Request at 1.

¹¹⁵ Petition at 1; see *Metropolis Works*, CLI-13-1, 77 NRC at 6; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 256 (1996) (“[C]laimed deficiencies in a decommissioning plan must have health and safety significance in order to be admissible.”).

¹¹⁶ Petition at 1.

¹¹⁷ *Diablo Canyon*, CLI-02-16, 55 NRC at 344; *Oyster Creek*, CLI-00-6, 51 NRC at 207.

¹¹⁸ Petition at 5.

strontium-90, a decay product of nuclear fission, in the groundwater near Vermont Yankee.¹¹⁹ Vermont notes that, because the PSDAR was written before this discovery, it does not account for the potential cost of soil or groundwater remediation.¹²⁰ In developing the decommissioning cost estimate, Entergy concluded that such remediation was unnecessary because “only tritium had migrated into the groundwater” and tritium decays quickly into non-radioactive helium.¹²¹ The PSDAR does not account for the possibility of strontium-90 leaks.

Vermont asserts that this omission could have expensive consequences for decommissioning based on the expert opinion of Dr. Irwin, a health physicist. He opines that “[m]any long-lived radionuclides are likely to be found in soils and groundwater far from the small excavation made to repair the leaks that likely allowed reactor condensate to enter into the site soils for many years.”¹²² And based on his knowledge of similar radionuclide discoveries at Maine Yankee, Connecticut Yankee, and Yankee Rowe during their decommissioning, Dr. Irwin alleges that “[t]he presence of strontium-90 or other long-lived radionuclides could greatly increase the costs of decommissioning and site restoration.”¹²³ Furthermore, he explains that “[t]he recent discovery of strontium-90 in groundwater raises additional concerns regarding soil contamination that may enter the groundwater and move in a way that threatens public health, safety, and the environment.”¹²⁴

Dr. Irwin questions whether Entergy has accounted for these types of unforeseen costs, noting that “Entergy’s Decommissioning Cost Estimate only addresses so-called contingencies that are ‘almost certain to occur.’”¹²⁵ Contrary to the company’s cost estimate, Dr. Irwin asserts that “[a]ctual contingencies — such as the discovery of strontium-90 and other radionuclides in places not previously thought to be contaminated — have historically led to enormous escalations in decommissioning costs.”¹²⁶ Thus he argues that Entergy has not shown that it has considered potential cost increases given the company’s decision to classify “the discovery of unexpected levels of contaminants, [and] contamination in

¹¹⁹ *Id.* at 22 (citing Vermont Department of Health Communications Office, Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee (Feb. 9, 2015), http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx).

¹²⁰ *Id.*

¹²¹ *Id.* (citing PSDAR, Site Specific Decommissioning Cost Estimate, at 3.4.9).

¹²² Irwin Decl. at 4.

¹²³ *Id.* at 5.

¹²⁴ *Id.* at 11.

¹²⁵ *Id.* at 7 (quoting PSDAR, Site Specific Decommissioning Cost Estimate at xii (“The cost elements in the estimate are based on ideal conditions; therefore, the types of unforeseeable events that are almost certain to occur in decommissioning, based on industry experience, are addressed through a percentage contingency applied on a line-item basis.”)).

¹²⁶ *Id.* at 8.

places not previously expected,” as a “financial risk” that is not included in the decommissioning cost estimate.¹²⁷ Insofar as any such withdrawals fail to satisfy 10 C.F.R. § 50.82(a)(8), they would require a 30-day notice.

Though the NRC Staff describes Vermont’s claims about strontium-90 as “speculative,”¹²⁸ we conclude that they are adequately supported by references to water monitoring conducted by the Vermont Department of Public Health and an expert opinion.¹²⁹ While strontium-90 is currently present at the site at levels below the Environmental Protection Agency’s limits, Vermont questions whether additional leaks of strontium-90 or other radionuclides are the type of unforeseen expense for which Entergy must prepare.

As the Commission has explained, “[a] licensee could satisfy this [unforeseen expense] criterion by demonstrating that it has sufficient funds in either its decommissioning fund or other available funds to maintain the status quo at the facility, that is, maintain safety in the defueled, shutdown condition.”¹³⁰ Contrary to the NRC Staff’s argument that the regulations concern safe storage of spent fuel, not groundwater remediation,¹³¹ keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility.¹³² Given the demonstrated existence of these leaks, Vermont has provided sufficiently supported expert opinion to show at the contention admissibility stage why this inadvertent release of radionuclides is enough of a risk to public health and safety to warrant “merits” consideration as an unforeseen expense.¹³³

Finally, Vermont asserts that Entergy’s assumptions about the long-term storage of spent fuel fail to demonstrate how the company will ensure “the availability of funds to ultimately release the site and terminate the license.”¹³⁴ The PSDAR assumes that the Department of Energy “will begin to take irradiated

¹²⁷ *Id.* (citing PSDAR, Site Specific Decommissioning Cost Estimate at 3.3.2).

¹²⁸ NRC Staff’s Answer at 43, 47.

¹²⁹ According to his curriculum vitae, Dr. Irwin is a certified health physicist with education and work experience in radiological and toxicological sciences. Petition, Attach., Curriculum Vitae of William E. Irwin (undated). We conclude that Dr. Irwin has enough knowledge in the subject area to proffer an expert opinion for the purposes of determining contention admissibility. See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 40-41 (2010).

¹³⁰ Use of Decommissioning Trust Funds Before Decommissioning Plan Approval; Draft Policy Statement, 59 Fed. Reg. 5216, 5217 (Feb. 3, 1994) (“It should be noted that this criterion is also pertinent to the normal, end-of-life decommissioning; licensees are to accommodate the possibility of unforeseen occurrences by providing for contingencies.”).

¹³¹ NRC Staff’s Answer at 45.

¹³² See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 264-65 (2007) (explaining that exposure below regulatory limits did not harm the public).

¹³³ Irwin Decl. at 3-8; see *Yankee Nuclear*, CLI-96-7, 43 NRC at 256.

¹³⁴ Petition at 5 (quoting 10 C.F.R. § 50.82(a)(8)(i)(C)).

fuel from Vermont Yankee by 2026, [and] that all irradiated fuel will be eliminated from the Vermont Yankee site by 2052.”¹³⁵ Given ongoing litigation on this issue and “NRC’s explicit recognition in [the Continued Storage] Rule that spent fuel may be stored indefinitely at each reactor site,” Dr. Irwin opines that Entergy’s cost estimate is deficient “because it fails to explain how it would address the contingency of indefinite onsite storage, including all safety and environmental concerns regarding transferring fuel into new dry casks every 100 years.”¹³⁶

This argument concerning Entergy’s alleged failure to demonstrate the financial ability to store spent fuel indefinitely provides additional factual support for Vermont’s contention. As the NRC Staff acknowledges, the potential consequences of insufficient offsite storage for spent fuel was precisely one of the unforeseen conditions that 10 C.F.R. § 50.82(a)(8)(i)(B) was promulgated to address.¹³⁷ And Vermont has correctly noted that the indefinite storage of spent fuel onsite is a very possible outcome, as demonstrated by the assumptions underlying the Continued Storage Rule.¹³⁸ Together, this information provides sufficient support for Vermont’s assertion that Entergy’s plans in the LAR contravene the applicable regulations and justify keeping in place the current 30-day notice requirement.

d. Genuine Dispute

By identifying and adequately supporting its contention that Entergy’s plans for the trust fund contradict its promise in the LAR to follow 10 C.F.R. § 50.75(h), Vermont has demonstrated a genuine dispute with the applicant.¹³⁹ The State adequately challenges the representations of compliance in the LAR on the two bases discussed in the factual support section: first, that the LAR’s statement that Entergy has decided to comply with 10 C.F.R. § 50.75(h) conflicts with the company’s plans for the trust fund,¹⁴⁰ and second, that the LAR’s deletion of the 30-day notice is incompatible with the requirement that withdrawals account for

¹³⁵ *Id.*; see PSDAR, Site Specific Decommissioning Cost Estimate at 2.2.

¹³⁶ Irwin Decl. at 3.

¹³⁷ NRC Staff’s Answer at 45 (citing 59 Fed. Reg. at 5217).

¹³⁸ Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,245 (Sept. 19, 2014).

¹³⁹ See Final Rule: “Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (“The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.” (emphasis added) (quoting *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980))).

¹⁴⁰ 10 C.F.R. § 50.75(h)(1)(iv).

“unforeseen conditions or expenses” or otherwise ensure the “availability of funds to ultimately release the site.”¹⁴¹

This is a valid contention. Contrary to Entergy’s argument, the LAR does not simply delete several license conditions.¹⁴² Rather, the LAR deletes those license conditions and replaces them with the requirements for decommissioning trust funds: “After decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8), no further notification need be made to the NRC.”¹⁴³ The Commission’s generic determination that the 30-day notice is unnecessary for public health and safety rests on the assumption that the regulatory provisions as a whole provide adequate assurance of public health and safety.¹⁴⁴ Vermont’s allegations that Entergy’s plans contravene those regulations, in particular the regulatory requirement to provide notice of the planned use of decommissioning trust funds for nondecommissioning activities, go to the heart of whether this LAR can be approved and thus challenge the material accuracy of the LAR.¹⁴⁵

Although Entergy states that it “has elected to subject its decommissioning trust agreement to the regulatory requirements for decommissioning trust funds that are specified in 10 CFR 50.75(h),”¹⁴⁶ the LAR’s summary is limited to explaining how the existing license conditions “are addressed in the regulations.”¹⁴⁷ Nowhere does the LAR discuss in practical, real-world terms how Entergy will follow the regulations, particularly in light of its granted exemptions. Normally this would not be an issue because the Board does not assume that licensees will fail to comply with the regulations in the absence of documentary support,¹⁴⁸ but Vermont has provided that support here in the form of an official filing with the NRC, a spokesman’s statements concerning nondecommissioning expenses, and an expert opinion on the likelihood of cost overruns.¹⁴⁹ Vermont’s factual allegations and documentary support satisfy the requirement of demonstrating a genuine dispute concerning the completeness and correctness of the LAR and

¹⁴¹ Petition at 5 (quoting 10 C.F.R. § 50.82(a)(8)(i)(B)-(C)); *see* 10 C.F.R. § 2.309(f)(1)(i)-(ii).

¹⁴² *See* Entergy Answer at 16, 19.

¹⁴³ 10 C.F.R. § 50.75(h)(1)(iv).

¹⁴⁴ *See* 67 Fed. Reg. at 78,336 (explaining Commission’s view that 30-day notice is unnecessary because it “duplicate[s] [the] notification requirements at § 50.82”).

¹⁴⁵ *See* Petition at 2, 6-7; Reply at 5-7.

¹⁴⁶ LAR, Attach. 1, at 1.

¹⁴⁷ *Id.* at 3-6.

¹⁴⁸ *Oyster Creek*, CLI-00-6, 51 NRC at 207 (“Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations.”).

¹⁴⁹ Petition at 9-10.

whether the LAR will ensure adequate protection of public health and safety.¹⁵⁰ Accordingly, this contention is admissible.

Any hearing will be limited to the necessity of a 30-day notice requirement in light of the specific factual issues that Vermont's petition alleges will reduce the fund to such an extent that the plant cannot be maintained in a safe condition, i.e., (1) the six line items from the PSDAR that Vermont alleges to be nondecommissioning costs,¹⁵¹ (2) the legal costs associated with Entergy's reduction in emergency planning,¹⁵² and (3) the potential for unforeseen costs associated with radionuclide releases and indefinite storage of spent fuel.¹⁵³ The parties' evidence will center on the actions these line items entail, on whether Entergy does in fact intend to use the decommissioning fund for the line items and legal costs, and on the magnitude of potential expenses associated with radionuclide releases and indefinite storage of spent fuel at Vermont Yankee. All other issues, including the sufficiency of the decommissioning fund itself, are outside the scope of this proceeding.

B. Contention II

Vermont next contends that "Entergy's proposed amendment is untimely."¹⁵⁴ The State argues that when 10 C.F.R. § 50.75(h) went into effect in 2003, Entergy had a choice at that time either (1) to keep its current license conditions or (2) to bring its license into compliance with section 50.75(h).¹⁵⁵ Because Entergy chose to maintain its license conditions for 12 years, Vermont argues that the company is now time-barred from taking advantage of the reduced requirements of section 50.75(h).¹⁵⁶

This contention is not admissible because there is no time limit on when a licensee such as Entergy can seek an amendment to the license conditions relating to its decommissioning trust fund.¹⁵⁷ In 10 C.F.R. § 50.75(h)(5), the NRC stated that:

¹⁵⁰ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 381-82 (2005) ("We find that the Board had a sufficient basis to find that Petitioner had made the showing required to indicate an inquiry in depth was warranted and admit such a contention, even though this may have been a close question.").

¹⁵¹ Petition at 9-10.

¹⁵² *Id.* at 10.

¹⁵³ *Id.* at 5, 22-23.

¹⁵⁴ *Id.* at 17.

¹⁵⁵ *Id.* at 19-20.

¹⁵⁶ *Id.*

¹⁵⁷ See Direct Final Rule: "Minor Changes to Decommissioning Trust Fund Provisions," 68 Fed. Reg. 65,386, 65,387 (Nov. 20, 2003) (noting the "intent of the Commission that individual licensees should have the option of retaining their existing license conditions.").

The provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning trust agreements, so long as the licensee does not elect to amend those license conditions. If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.¹⁵⁸

The plain language of this text does not impose a time restriction on when a licensee can seek amendment of the conditions of its decommissioning trust fund. It merely states that those amendments, whenever they occur, must bring the license into compliance with 10 C.F.R. § 50.75(h).

C. Contention III

Vermont's third contention concerns the relationship between this LAR and Entergy's related exemption request:

Entergy's proposed amendment must be considered in conjunction with a directly related exemption request because if the exemption request is granted there will not be reasonable assurance of adequate protection of the public health and safety as required by section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)).¹⁵⁹

Vermont argues that the Board should consider whether Entergy is requesting the LAR to seek a regulatory exemption that would allow it to use the trust fund for nondecommissioning expenses.¹⁶⁰ As things now stand, Entergy would not be able to seek an exemption from the current license conditions because only regulations, not license conditions, are subject to the exemption process.¹⁶¹ But, according to Vermont, "[t]he exemption request presumes the LAR will be granted, and then asks for an exemption from the very regulations Entergy is relying on in this LAR."¹⁶²

As the Board explained above, we will consider the exemption request as a document supporting Vermont's factual assertions. However, unlike Contention I, Vermont argues here that Entergy's exemption request does not provide adequate assurance of public safety. As expressed by Vermont, this issue is outside the

¹⁵⁸ 10 C.F.R. § 50.75(h)(5).

¹⁵⁹ Petition at 20.

¹⁶⁰ *Id.*

¹⁶¹ See 10 C.F.R. § 50.12(a) ("The Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of the regulations.").

¹⁶² Petition at 24.

scope of this proceeding because it concerns the merits of the exemption requests (and their subsequent approval).¹⁶³ Whether the NRC Staff was correct to grant the exemption request is not an issue for this Board to decide.¹⁶⁴

D. Contention IV

Vermont's fourth contention concerns the necessity of conducting an environmental review under the National Environmental Policy Act ("NEPA"):

The proposed amendment should be denied because Entergy has not submitted an environmental report as required by 10 C.F.R. §§ 51.53(d) and 51.61 and it has not undergone the required NRC Staff environmental review pursuant to 10 C.F.R. §§ 51.20, 51.70 and 51.101 and, despite Entergy's claim to the contrary, is not categorically excluded from that review under 10 C.F.R. § 51.22(c).¹⁶⁵

Vermont argues that Entergy's LAR is more than simply a request to change recordkeeping or administrative procedures — both of which are categorically excluded from environmental review under 10 C.F.R. § 51.22(c)(10)(ii). Instead, Vermont asserts that what is at stake here are the potential environmental effects of running out of money needed to decommission the site.¹⁶⁶ The State asserts that Entergy is unlawfully segmenting its decommissioning plans into smaller steps to avoid the comprehensive environmental review required by NEPA.¹⁶⁷ Furthermore, Vermont argues that these changes, when considered together, go beyond mere recordkeeping because the current notification process allows the NRC and Vermont to ensure that the fund will be used to protect the environment.¹⁶⁸

The NRC Staff argues that Entergy does not need to submit an environmental report until the company submits its license termination plan at the end of decommissioning.¹⁶⁹ At oral argument the NRC Staff stated that "it has not yet determined in this case whether [the Staff's environmental review] will be accomplished through an environmental assessment or through a categorical exclu-

¹⁶³ See *Private Fuel Storage*, CLI-01-12, 53 NRC at 463 (explaining that exemptions "ordinarily do not trigger hearing rights" when "[a]n already-licensed facility [is] asking for relief from performing a duty imposed by NRC regulations"); *Vt. Yankee*, LBP-15-18, 81 NRC at 799 (declining to review "the adequacy of Entergy's exemption request and associated analyses").

¹⁶⁴ The fact that NRC Staff has now granted the exemptions does not change our analysis of this contention or Contention IV. See Vermont's New Contention at 7.

¹⁶⁵ Petition at 26.

¹⁶⁶ *Id.* at 27.

¹⁶⁷ *Id.* at 28-31.

¹⁶⁸ *Id.* at 27; Reply at 17.

¹⁶⁹ NRC Staff's Answer at 54.

sion.”¹⁷⁰ Entergy asserts that the LAR is merely administrative in nature, and thus categorically excluded from any NEPA review under 10 C.F.R. § 51.22(c)(10)(ii), which covers changes to “recordkeeping, reporting, or administrative procedures or requirements.”¹⁷¹

Although Vermont challenges the absence of an environmental report from Entergy, the State has not pointed to any regulation that requires one. Under 10 C.F.R. § 51.53(d), an applicant need not submit an environmental report until the final stage of decommissioning as part of its license termination plan.¹⁷²

To the extent that Vermont is challenging the NRC Staff’s environmental analysis, this contention is premature. The NRC Staff informed us at oral argument that they have not yet completed their environmental analysis.¹⁷³ If Vermont seeks to challenge the NRC Staff’s environmental analysis (which may come in the form of a categorical exclusion), the State may file a timely motion to add a new contention once that analysis is complete.¹⁷⁴ We instruct the NRC Staff to inform the other parties and the Board when this analysis is finished.

E. Contention V

1. Summary of the Parties’ Arguments

After the NRC Staff granted Entergy’s exemption request, Vermont moved for leave to file a new contention concerning the material accuracy of the LAR. Vermont’s new contention reads as follows:

The license amendment request should be denied because it is no longer accurate within the meaning of 10 C.F.R. §§ 50.9 and 50.90, does not meet the requirements of 10 C.F.R. § 50.75(h)(5), and because Entergy is no longer in compliance with other provisions of 10 C.F.R. §§ 50.75(h) and 50.82(a)(8)(i)(a).¹⁷⁵

Vermont argues that the new contention is timely because it was filed 10 days after

¹⁷⁰ Tr. at 66.

¹⁷¹ Entergy Answer at 38-42; NRC Staff’s Answer at 49-50; *see* Proposed Rule: “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments,” 45 Fed. Reg. 13,739, 13,745 (Mar. 3, 1980) (“The function of these procedural and administrative changes is merely to facilitate the orderly conduct of the licensee’s business and to insure that information needed by the Commission to perform its regulatory functions is readily available.”); Final Rule, 49 Fed. Reg. 9352, 9367 (Mar. 12, 1984).

¹⁷² Although Vermont invokes 10 C.F.R. § 51.61 in this contention, it is irrelevant here because Entergy is not submitting an application for an independent spent fuel storage installation.

¹⁷³ Tr. at 66.

¹⁷⁴ *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350-51 (2009).

¹⁷⁵ Vermont’s New Contention at 4.

the *Federal Register* notice informing the public that the NRC Staff had granted Entergy's exemption requests.¹⁷⁶ Based on the granted exemptions, Vermont argues that Entergy's LAR is not complete and accurate in all material respects: "Entergy asserts that the LAR, if approved, will be in compliance with the terms of 10 C.F.R. § 50.75(h). However, in light of the recently approved exemption granted to Entergy, the LAR will no longer be in compliance with all the provisions of that section, but rather has been exempted from them."¹⁷⁷ Vermont asserts that this statement is material because 10 C.F.R. § 50.75(h)(5) "allows substitution of the regulatory requirement for the license provisions only when they are substantially identical."¹⁷⁸ In this instance, the substituted license provisions are not similar, according to the State, because the granted exemptions have removed a significant component of Entergy's obligations under these regulations.¹⁷⁹

Entergy and the NRC Staff assert that the new contention is untimely because Vermont was aware of the substance of the exemption request at the time the State filed its petition.¹⁸⁰ Given that the approved exemptions do not differ from the requested ones, they argue that the act of granting them is not new or material information.¹⁸¹ Both also challenge Vermont's motion on admissibility grounds, arguing that the exemptions are a separate and independent process that is beyond the scope of the proceeding,¹⁸² and immaterial to information that the NRC Staff will consider when reviewing the LAR.¹⁸³ Entergy argues that the contention is an impermissible challenge to the regulations because 10 C.F.R. § 50.75(h)(5) does not contain "any requirement to consider exemptions from Section 50.75(h) that would be applied only after the LAR is granted."¹⁸⁴ The NRC Staff adds that the exemptions play no role in the safety evaluation of the LAR because the NRC Staff "will only evaluate the exchange of the [Vermont Yankee] decommissioning trust license condition provisions for the decommissioning trust regulations, *in their entirety*."¹⁸⁵ As the NRC Staff stated at oral argument, the Staff reviews the LAR "just to see that the correct license conditions in the license are deleted and that the correct regulatory provisions from the regulations are assumed by the licensee."¹⁸⁶

¹⁷⁶ *Id.* at 2-3.

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.* at 6.

¹⁷⁹ *Id.*

¹⁸⁰ Entergy's Answer to New Contention at 7-9; Staff's Answer to New Contention at 15-19.

¹⁸¹ Entergy's Answer to New Contention at 8-9; Staff's Answer to New Contention at 15-16.

¹⁸² Entergy's Answer to New Contention at 11-12; Staff's Answer to New Contention at 22.

¹⁸³ Entergy's Answer to New Contention at 15; Staff's Answer to New Contention at 20-21.

¹⁸⁴ Entergy's Answer to New Contention at 15-16.

¹⁸⁵ Staff's Answer to New Contention at 21.

¹⁸⁶ Tr. at 25.

Vermont replies that “[t]he *request* for an exemption is different from the *granting* of an exemption,” making its new contention timely.¹⁸⁷ The State maintains that approval of the exemptions is material and within scope because the Board must “look at what regulatory regime actually applies if the LAR is granted.”¹⁸⁸

2. *The Board’s Ruling*

a. *Timeliness*

As an initial matter, the Board concludes that Vermont’s contention is timely because the NRC Staff’s decision to grant the exemptions was new and material information. Although the substance of the exemption request has been available since January, that information is only relevant to the substantive merits of the exemption request, which Vermont is not challenging here. The State’s argument focuses on how the approval of the exemptions “creates a markedly different factual picture than the one presented in the LAR.”¹⁸⁹ When Vermont filed its petition on April 20, 2015, it would have been impossible to predict if and when the exemptions would be granted.¹⁹⁰ Indeed, *had* Vermont proposed this exact contention in its original petition, Entergy and the NRC Staff would have been justified in calling it premature.¹⁹¹ The NRC Staff’s approval of the exemption request is a new fact that was “previously unavailable” at the time Vermont filed its petition.¹⁹²

The purpose of the timeliness rules is not to trap petitioners into a no-win situation where a contention is called premature if filed in the original petition and untimely if petitioners wait for a potential event to actually transpire.¹⁹³

¹⁸⁷ New Contention Reply at 3.

¹⁸⁸ *Id.* at 8.

¹⁸⁹ Vermont’s New Contention at 3.

¹⁹⁰ Even the NRC Staff was unable to explain why the exemptions were granted before the LAR. Tr. at 40 (“[T]he staff has a number of activities that they are currently engaged in and their work progresses as best it can given the inputs that they get from various office[s] and for, you know, a lot of reasons activities get delayed somewhat.”).

¹⁹¹ See *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167-68 (2011) (explaining that requests for a generic NEPA analysis were premature because the NRC evaluation of the Fukushima Dai-ichi events was still ongoing).

¹⁹² See *Pa’ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 87-88 (2010) (explaining that contention was timely because it relied on testimony marking the “first time” the NRC Staff had addressed the impacts of transportation accidents at the site).

¹⁹³ See *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 86-88 (2013) (concluding that a contention was timely where NRC Staff argued that it was

(Continued)

The goal is an efficient hearing process that considers factual issues when they become available; thus the proper time to submit a new contention is when new facts emerge.¹⁹⁴ Here, the fact underlying Vermont's new contention (that the exemptions had been approved) did not occur until June 23, 2015. Vermont filed the new contention 10 days after the NRC published notice of the exemptions in the *Federal Register*. This was a reasonable amount of time for action.¹⁹⁵

b. Admissibility

Applying the six admissibility criteria of 10 C.F.R. § 2.309(f)(1), the Board concludes that Contention V is admissible as a legal contention. Initially we note that, as was the case with its Contention I, Vermont has supplied a specific statement of its contention and explained its basis in 10 C.F.R. §§ 50.9 and 50.90.¹⁹⁶ Below we consider the other four contention admissibility factors outlined in section 2.309(f)(1).

(i) SCOPE

As we discussed in Contention I,¹⁹⁷ Vermont's argument that the LAR is incorrect and incomplete is squarely within the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii) because the regulations are clear that the applicant must "fully describ[e] the changes desired" in the LAR,¹⁹⁸ and that the LAR must be "complete and accurate in all material respects."¹⁹⁹ It is true that Vermont relies on the exemptions as a factual predicate for its challenge, but that does

filed too late and the applicant argued it was filed too early); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 503-05 (2008) (Farrar J., concurring) (describing prematurity/belatedness dilemma where a petitioner filing a contention about an expected event "will be told it is premature, on the ground that the problem it portends has not yet been realized. If, on the other hand, they do not file it, they will later be told they are too late, on the ground that the earlier document should have served to trigger their action.").

¹⁹⁴ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005) ("By their nature, the timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted.").

¹⁹⁵ *Pa'ina*, CLI-10-18, 72 NRC at 87 (finding 30 days to be a reasonable deadline); see 10 C.F.R. § 2.306(a) (excluding holidays and weekends from the date calculation).

¹⁹⁶ Vermont's New Contention at 4; see 10 C.F.R. § 2.309(f)(1)(i)-(ii).

¹⁹⁷ See *supra* Section II.A.2.a.

¹⁹⁸ 10 C.F.R. § 50.90.

¹⁹⁹ *Id.* § 50.9(a); see *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 283-84 (2008).

not turn its dispute over the LAR's accuracy into a challenge to the merits of the exemptions.²⁰⁰

Nor is this contention a challenge to the regulations, as Entergy suggests.²⁰¹ Entergy argues that the company "seeks to do only what has been approved by the Commission through rulemaking."²⁰² But Vermont's allegation is that Entergy has provided incorrect information in its application — something that is prohibited by NRC regulations.²⁰³ In particular, Vermont disputes the overarching statement in the LAR that "[t]he provisions in 10 CFR 50.75(h) include substantially similar decommissioning trust requirements as those found in [Vermont Yankee] [Operating] License Condition 3.J."²⁰⁴ Vermont asserts that this statement is materially wrong: "Entergy explicitly describes its LAR as replacing existing license conditions with regulations that are 'substantially similar.' This is empirically false. If this LAR is granted, Entergy's current license conditions will not be replaced with similar provisions because Entergy has been exempted from them."²⁰⁵ An argument about the correctness of statements in the LAR is not a challenge to the regulations. While the Board takes no position on the merits of Vermont's claim that these statements are false, we agree with Vermont that an applicant must describe the changes desired by noting planned exemptions directly relevant to the LAR.²⁰⁶

(ii) MATERIALITY

The extent to which 10 C.F.R. § 50.75(h) actually applies to Vermont Yankee depends on both the LAR and the exemptions.²⁰⁷ The Board thus agrees with Vermont that the approval of the exemptions is material to the Staff's LAR review process and its resulting findings. First, 10 C.F.R. § 50.75(h) applies to Vermont Yankee only if the LAR is granted. Second, if Entergy's LAR is

²⁰⁰ See *supra* Section II.A.2.a(ii).

²⁰¹ Entergy's Answer to New Contention at 15-16.

²⁰² *Id.* at 15.

²⁰³ See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC 654, 668 n.31 (2011).

²⁰⁴ Vermont's New Contention at 6 (citing LAR, Attach. 1, at 2).

²⁰⁵ New Contention Reply at 8 (citing LAR, Attach. 1, at 2) (footnote omitted).

²⁰⁶ Unlike the dispute in *Diablo Canyon* over updating an environmental report with information that was previously unknown to the applicant, see LBP-11-32, 74 NRC at 668 & n.31, Vermont alleges here that the LAR and exemptions were both known to Entergy as part of its concerted effort to remove the licensing conditions and parts of 10 C.F.R. § 50.75(h). See Petition at 6-7; see also Tr. at 11 ("Entergy could have said directly in its LAR what it was planning to do and the State then would have had a right to a hearing on whether Entergy's proposal would adequately protect public health, safety and the environment. But Entergy did not do that. Instead, Entergy chose to submit an application that is missing critical information.").

²⁰⁷ Vermont's New Contention at 4; see 10 C.F.R. § 2.309(f)(1)(iv).

granted, the exemptions from 10 C.F.R. § 50.75(h)(1)(iv) take immediate effect, allowing Entergy to make \$225 million in withdrawals for spent fuel management without providing advance notice.²⁰⁸ The LAR and exemptions each provide some changes on their own, but only the two interacting together allow Entergy to use the decommissioning fund for spent fuel management without providing 30-day notices for its expenditures,²⁰⁹ as shown in this diagram:

	Exemptions Granted	Exemptions Not Granted
LAR Approved	- Entergy may use fund for spent fuel management ²¹⁰	- Entergy cannot use fund for spent fuel management
	- Entergy need not provide 30-day notice for decommissioning or spent fuel expenses	- Entergy need not provide 30-day notice for decommissioning expenses
LAR Not Approved	- Entergy may use fund for spent fuel management	- Entergy cannot use fund for spent fuel management
	- Entergy must provide 30-day notice for decommissioning and spent fuel expenses	- Entergy must provide 30-day notice for decommissioning expenses

Because the NRC Staff plans to review the exemptions and LAR separately,²¹¹ it appears the NRC Staff will examine the safety implications of each separate request without considering the interactions between the two.²¹² The NRC Staff asserts information about the exemptions is immaterial because it plans to review

²⁰⁸ The Board disagrees with Entergy that this amount of money — which represents over a third of the decommissioning fund’s current balance and nearly one-fifth of total projected expenditures for shutting down Vermont Yankee — can be described as a “narrow” exemption. *See* Tr. 30-31.

²⁰⁹ *See* Tr. at 40 (“We [Entergy] have an exemption that’s sitting there not applicable to anything. When the thing, meaning the license amendment, if and when it comes into being, then the exemption will apply to it.”).

²¹⁰ This chart describes regulatory obligations. The Board takes no position on whether Entergy would be allowed to make spent fuel payments under the current Master Trust Agreement because that agreement is outside the scope of this proceeding.

²¹¹ Staff’s Answer to New Contention at 24 (“[F]or the two requests, two different and unrelated safety findings have to be made.”).

²¹² Tr. at 50-51 (“The staff is treating these as two separate actions.”).

the LAR as if 10 C.F.R. § 50.75(h) applied in its entirety.²¹³ But, in fact, this is an outcome that cannot occur because the exemptions have already been granted and are effective immediately.²¹⁴ The NRC Staff’s assertion that 10 C.F.R. § 50.75(h) applies in its entirety (on the theory that an exemption does not actually remove the regulation) elevates form over substance by ignoring the actual, substantive effect of the granted exemptions.²¹⁵ As Vermont argues, “all parties to this proceeding know full well what happens if the Board grants this LAR — the current license conditions will not be replaced with requirements from 50.75(h).”²¹⁶ We agree with Vermont that its contention is material because it concerns the real-world consequences of approving the LAR.²¹⁷

Requiring the LAR to describe the desired changes in light of the granted exemptions provides the agency with the complete and accurate information the NRC Staff needs to review the LAR. This obligation to fully describe the desired changes is not a mere technicality. As the courts have long explained, those “dealing with their government must turn square corners.”²¹⁸ If the LAR discussed the exemptions, as Vermont argues it must,²¹⁹ then the NRC Staff would have the information necessary to review both together and consider whether the current license conditions should be replaced by 10 C.F.R. § 50.75(h) as exempted. Based on the significant connection between the LAR and the regulations as exempted, Vermont has sufficiently shown that the existence of the exemptions is “material to the findings the NRC must make to support the action that is involved in the proceeding.”²²⁰

(iii) FACTUAL SUPPORT

As we explain more fully below, this contention frames a legal dispute over the meaning of 10 C.F.R. § 50.75(h)(5)’s direction that a “license amendment

²¹³ Staff’s Answer to New Contention at 24.

²¹⁴ To whatever degree the mere pendency of Entergy’s exemption requests would have failed to support a contention like the one proffered by the State, the NRC Staff’s grant of those exemptions seemingly removes any question about whether their effect needs to be considered as part of the LAR review process.

²¹⁵ See *Levy County*, CLI-10-2, 71 NRC at 36-38 (declining to elevate form over substance with respect to precise wording of petitioners’ contention).

²¹⁶ New Contention Reply at 8; see also Tr. at 30, 75 (referring to the granted exemptions as the “elephant in the closet.”).

²¹⁷ See *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982) (“[M]ateriality depends on whether the information is capable of influencing the decisionmaker — not on whether the decisionmaker would, in fact, have relied on it.”).

²¹⁸ See *Gilmore v. Lujan*, 947 F.2d 1409, 1412 (9th Cir. 1991) (quoting *Rock Island, Arkansas, & Louisiana Railway Co. v. United States*, 254 U.S. 141, 143 (1920)).

²¹⁹ Vermont’s New Contention at 4-6; New Contention Reply at 7-11.

²²⁰ 10 C.F.R. § 2.309(f)(1)(iv).

shall be in accord with the provisions of paragraph (h) of this section.” Vermont nonetheless provides a factual framework for this legal contention in its assertion that the LAR is incorrect because Entergy’s statements contradict the practical effects of the granted exemptions.²²¹ Vermont summarizes its factual challenge as follows:

Entergy cannot deny that its LAR explicitly represents that “[t]he provisions in 10 CFR 50.75(h) include substantially similar decommissioning trust requirements as those found in [Vermont Yankee] [Operating] License Condition 3.J.” Far from an off-hand remark, that is the entire thrust of this LAR. The explicit statement about 50.75(h) being “substantially similar” is followed by multiple references to where specific license conditions are “addressed” by the regulations. This culminates in a three-and-a-half page table illustrating where each specific license condition is “addressed” by a specific regulation. Entergy asserted that the LAR involved only “administrative changes to the license that will be consistent with the NRC’s regulations at 10 CFR 50.75(h)” and that “[t]he proposed amendment is confined to administrative changes for providing consistency with existing regulations.” As the State’s motion explains, now that the exemption has been granted, these representations are inaccurate. Entergy’s license conditions will not be replaced by “substantially similar decommissioning trust requirements.”²²²

This explanation is adequate for the purposes of contention admissibility.²²³ By pointing to the exemptions and the LAR, Vermont has adequately supported its statement that the LAR is legally deficient in light of the granted exemptions.²²⁴

(iv) GENUINE DISPUTE

Finally, the Board concludes that Vermont has identified a genuine legal dispute concerning the accuracy of the LAR and the requirements of 10 C.F.R. § 50.75(h)(5). That dispute is whether a license amendment can “be in accordance with the provisions of paragraph (h) of [10 C.F.R. § 50.75]”²²⁵ where a plant is already exempt from two provisions of 10 C.F.R. § 50.75(h)(1)(iv). Because this

²²¹ Vermont’s New Contention at 3 (citing LAR, Attach. 1, at 4).

²²² New Contention Reply at 9-10 (citing LAR, Attach. 1, at 2-8) (footnotes omitted).

²²³ See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 221 (2011) (“[T]he evaluation of a contention that is performed at the contention admissibility stage should not be confused with the evaluation that is later conducted at the merits stage of a proceeding. At the contention admissibility stage, a Board evaluates whether a petitioner has provided sufficient support to justify admitting the contention for further litigation. The facts and issues raised in a contention are not ‘in controversy’ and subject to a full evidentiary hearing unless the proposed contention is admitted.”).

²²⁴ See 10 C.F.R. § 2.309(f)(1)(v).

²²⁵ 10 C.F.R. § 50.75(h)(5).

challenge has not arisen before, neither the Commission nor any licensing board has had the opportunity to interpret the meaning of 10 C.F.R. § 50.75(h)(5). This is a legal issue for the Board to address.²²⁶

Relying on *Massachusetts v. NRC*, the NRC Staff argues that exemptions do not actually modify the regulations because the ability to request an exemption is part of the regulations themselves.²²⁷ But *Massachusetts v. NRC* concerned a temporary exemption, and the court clearly stated that “[t]his is not a situation in which the NRC permanently exempted the licensee from following a specific license requirement.”²²⁸ Here, by contrast, Entergy seeks to replace specific license conditions with permanent exemptions from the regulations, which is the precise situation that the court distinguished in *Massachusetts v. NRC*. And even more notably, the regulations at issue are not part of the regulatory requirements that apply under Entergy’s current operating license. Entergy is not “operating in accordance with its unaltered license” by “chang[ing] which rule applie[s] for a brief period of time.”²²⁹ Entergy is instead amending its license to place the plant under the force of regulations from which it will — immediately and permanently — become partially exempt without addressing this in the LAR.²³⁰

Entergy maintains that this contention does not demonstrate a genuine dispute, arguing that “[t]he LAR is independent and separate from *how the regulations are applied*, which is addressed by the regulations themselves as exempted.”²³¹ But this argument runs counter to the reality that the regulations and exemptions both depend on approval of the LAR. If Entergy “fully describe[d] the changes desired” (i.e., deletion of the license conditions and application of the regulations as exempted), the LAR would not “be in accordance with” 10 C.F.R. § 50.75(h). We agree with Vermont that “[w]hen the exemption was granted, the situation presented in Entergy’s LAR — a one-for-one swap of its license conditions for regulations — moved from being hypothetical to being *counterfactual*.”²³² This

²²⁶ *U.S. Department of Energy (High-Level Waste Repository)*, CLI-09-14, 69 NRC 580, 590 (2009).

²²⁷ Staff’s Answer to New Contention at 24-25 (citing *Massachusetts v. NRC*, 878 F.2d 1516, 1519, 1521 (1st Cir. 1989); *Zion*, CLI-00-5, 51 NRC at 94-98 (ruling that an exemption did not modify the license because the ability to request an exemption is part of the license itself)).

²²⁸ *Massachusetts v. NRC*, 878 F.2d at 1521.

²²⁹ *Id.*

²³⁰ This decision does not consider whether the reasoning of the Commission’s *Private Fuel Storage* and *Metropolis Works* decisions would extend to a licensee who sought exemptions after receiving approval of a LAR that made the license subject to 10 C.F.R. § 50.75(h). Entergy elected to request exemptions from 10 C.F.R. § 50.75(h) during the pendency of its LAR before the NRC Staff. Because Entergy chose this route, its exemptions raise material questions directly connected to an agency licensing action.

²³¹ Entergy’s Answer to New Contention at 11.

²³² New Contention Reply at 12.

serious legal question about what the LAR actually does demonstrates a genuine dispute and shows that an “inquiry in depth” is warranted.²³³

Because there does not appear to be a factual dispute between the parties on this matter, the Board intends to decide the legal issues on the basis of briefs and oral argument. The primary issue for briefing will be whether a LAR is “in accordance with the provisions of paragraph (h) of [10 C.F.R. § 50.75]”²³⁴ where a plant is already exempt from two provisions of 10 C.F.R. § 50.75(h)(1)(iv). Briefing schedules will be set out in a subsequent order. The Board recognizes that a decision on the legal question presented in Contention V may obviate the need for a hearing on the closely related factual matters raised in Contention I. Accordingly, after ruling on Contention V, the Board intends to provide the parties with an opportunity to move for summary disposition.

III. ORDER

For the reasons described above, the Board *grants* the hearing request and *admits* Contentions I and V. The Board denies the request with respect to the admission of Contentions II, III, and IV.

An appeal of this Memorandum and Order may be filed within 25 days of service of this decision by filing a notice of appeal and an accompanying supporting brief under 10 C.F.R. § 2.311(b). Any party opposing an appeal may file a brief in opposition. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(3).

²³³ See *Yankee*, CLI-05-15, 61 NRC at 381; see also *High-Level Waste Repository*, CLI-09-14, 69 NRC at 590.

²³⁴ 10 C.F.R. § 50.75(h)(5).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 31, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.
ENTERGY NUCLEAR FITZPATRICK, LLC
(James A. FitzPatrick Nuclear Power
Plant)

Docket No. 50-333
(License No. DPR-59)

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

Docket No. 50-293
(License No. DPR-35)

ENTERGY NUCLEAR OPERATIONS, INC.
ENTERGY NUCLEAR VERMONT
YANKEE, LLC
(Vermont Yankee Nuclear Power
Station)

Docket No. 50-271
(License No. DPR-28)

August 27, 2015

By electronic transmission dated March 18, 2013, Mr. Timothy Judson, President of Citizens Awareness Network, filed a 10 C.F.R. § 2.206 petition, on behalf of the Alliance for a Green Economy, Citizens Awareness Network, Pilgrim Watch, and Vermont Citizens Action Network (hereafter, referred to as “the Petitioners”). The petition was supplemented on April 23, May 7, June 28, July 22, October 16, November 13, November 27, and December 2, 2013; October 20, 2014; and January 27, 2015. The Petitioners requested that the NRC take the following actions: (1) suspend operations at James A. FitzPatrick Nuclear Power Plant (FitzPatrick) and Vermont Yankee Nuclear Power Station (Vermont Yankee); (2) investigate whether Entergy Nuclear Operations, Inc. (ENO, the Licensee) possesses sufficient funds to cease operations and decom-

mission FitzPatrick and Vermont Yankee, per 10 C.F.R. § 50.75, “Reporting and Recordkeeping for Decommissioning Planning,” and (3) investigate ENO’s current financial qualifications per 10 C.F.R. § 50.33(f)(5) to determine whether the Licensee remains qualified to continue operating Pilgrim Nuclear Power Station (Pilgrim).

The final Director’s Decision (DD) on this petition was issued on August 27, 2015. The final DD responds to the Petitioners’ requested actions as follows: (1) denied the Petitioners’ request to shut down Fitzpatrick because the NRC Staff has determined ENO is operating FitzPatrick and Vermont Yankee in a safe manner (ENO permanently ceased power operations at VY in December 2014); (2) determined that no further investigation into ENO’s financial status is necessary to ensure public health, safety, and the environment because the NRC Staff has independently determined that both Fitzpatrick and Vermont Yankee have sufficient funding available for decommissioning, and (3) granted the Petitioners’ request to examine whether ENO is financially qualified to operate Pilgrim. The NRC Staff reviewed information submitted by ENO related to its financial qualifications and found that the Licensee’s current financial condition is adequate and allows for the continued safe operation at Pilgrim. The NRC Staff also determined that ENO remains financially qualified to hold the operating authority under the Pilgrim license.

DIRECTOR’S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By electronic transmission dated March 18, 2013 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13079A022), Mr. Timothy Judson, President of Citizens Awareness Network, filed a petition under Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, “Requests for Action Under This Subpart,” on behalf of the Alliance for a Green Economy, Citizens Awareness Network, Pilgrim Watch, and Vermont Citizens Action Network (hereafter, referred to as “the Petitioners”). The petition was supplemented on April 23, May 7, June 28, July 22, October 16, November 13, November 27, and December 2, 2013; October 20, 2014; and January 27, 2015 (ADAMS Accession Nos. ML13133A161, ML13135A001, ML13184A109, ML13205A251, ML13294A400, ML13335A002, ML14016A361, ML15027A458, ML15027-A462, and ML15039A011, respectively).

The petition and supplements are available at the U.S. Nuclear Regulatory Commission (NRC or the Commission) Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first

floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. Persons without access to ADAMS or who have problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1-800-397-4209, or 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

The Petitioners requested that the NRC take enforcement action to: (1) suspend operations at James A. FitzPatrick Nuclear Power Plant (FitzPatrick) and Vermont Yankee Nuclear Power Station (Vermont Yankee); (2) investigate whether Entergy Nuclear Operations, Inc. (ENO, the Licensee¹), possesses sufficient funds to cease operations and decommission FitzPatrick and Vermont Yankee per Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 50.75, "Reporting and Recordkeeping for Decommissioning Planning;" and (3) investigate ENO's current financial qualifications per 10 C.F.R. § 50.33(f)(5) to determine whether the Licensee remains qualified to continue operating Pilgrim Nuclear Power Station (Pilgrim). The Petitioners assert that ENO no longer meets the financial qualifications requirements to possess the licenses and operate FitzPatrick, Pilgrim, and Vermont Yankee in accordance with 10 C.F.R. § 50.33(f)(2) and 10 C.F.R. § 50.80(b)(1)(i).

The Petitioners met with the Office of Nuclear Reactor Regulation Petition Review Board (PRB) on May 7, 2013, to clarify the basis for the petition. The transcript of this meeting (ADAMS Accession No. ML13135A001) was treated as a supplement to the petition.

In its August 7, 2013 (ADAMS Accession No. ML13154A313), acknowledgment letter, the NRC Staff informed the Petitioners that their request for immediate actions to suspend operations at FitzPatrick and Vermont Yankee was denied.

The NRC employs multiple engineered barriers and several levels of reactor oversight in NRC regulations that provides reasonable assurance of adequate protection of public health and safety and the environment. Emergent safety concerns are promptly identified and assessed through the NRC's Reactor Oversight Process (ROP). The ROP requires that licensees take prompt corrective action to resolve identified safety concerns. In addition, permanent onsite resident inspectors monitor the day-to-day operations at the plants, which provides an additional assurance of safe operation.

¹ The licensee is the licensed operator of FitzPatrick, Pilgrim, and Vermont Yankee. FitzPatrick is owned by Entergy Nuclear FitzPatrick, LLC (ENF). Pilgrim is owned by Entergy Nuclear Generation Company (ENGC or Entergy Nuclear). Vermont Yankee is owned by Entergy Nuclear Vermont Yankee, LLC (ENVY). Entergy Nuclear, ENF, and ENVY are licensee/owners. Entergy Corporation is the parent company of all the licensees.

The NRC Staff also informed the Petitioners of the PRB's final recommendation to accept the petition for review because it met the criteria in Management Directive 8.11, "Review Process for 10 C.F.R. 2.206 Petitions," Section III.C, "Criteria for Reviewing Petitions Under 10 C.F.R. 2.206."

By letter dated June 2, 2014 (ADAMS Accession No. ML13357A024), the NRC Staff issued a request for voluntary information to ENO in accordance with Management Directive 8.11. Specifically, the NRC Staff requested additional information related to ENO's 10-Q quarterly report dated November 7, 2013, which was filed with the U.S. Securities and Exchange Commission (SEC) on FitzPatrick and Pilgrim revenues. By letter dated July 24, 2014 (ADAMS Accession No. ML14212A050), ENO provided a response and the PRB considered the information in its evaluation of the petition.

II. DISCUSSION

A. Regulatory Background

Section 182a of the Atomic Energy Act of 1954, as amended (AEA), provides that: "Each application for a license . . . shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license." The NRC's regulations in 10 C.F.R. § 50.33(f) govern financial qualification reviews of license applications for the construction or operation of nuclear power plants. The NRC Staff reviews the financial qualification for each applicant for construction permits, operating licenses,² and license transfers. An applicant must demonstrate to the Commission that its financial qualifications are sufficient to carry out the activities for which the permit or license is sought.

The regulations in 10 C.F.R. § 50.33(f)(2) require the *operating license applicant* to submit information that demonstrates that the applicant possesses, or has reasonable assurance of obtaining, the funds necessary to cover estimated operating costs for the period of the license. The applicant must submit estimates for total annual operating costs for each of the first 5 years of operation of their facilities and provide the source(s) of funds to cover operating costs. The NRC Staff follows the process described in Revision 1 of NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommission Funding Assurance," to perform its financial qualification review.

² An electric utility applicant for a license to operate a utilization facility of the type described in 10 C.F.R. § 50.21(b) or § 50.22, "Class 103 Licenses; for Commercial and Industrial Facilities," is exempt from a financial qualifications review.

The NRC does not regulate or provide oversight of commerce, and does not review commercial activities and decisions of its licensees unless such actions may impact safety. However, the NRC Staff does employ a process of monitoring licensees by screening trade papers, industry newsletters, and various public sources for business, finance, and economic news throughout the terms of their licenses for any indications that they may not have sufficient financial resources to operate their plants safely. The regulations in 10 C.F.R. § 50.33(f)(5) give the NRC the authority to:

request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds. . . . This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility.

Information gathered is used to provide NRC regional management with situational awareness in performing inspections and evaluating inspection findings, and to inform discussions between NRC management and licensees. Ultimately, the NRC's primary tool for evaluating and ensuring safe operations at nuclear power reactors is through its inspection and enforcement programs.

The NRC reviews license transfer applications, governed by 10 C.F.R. 50.80, "Transfer of Licenses." This process consists of assuring that the new licensed entity has the capability to meet the financial qualification requirements, applicable to decommissioning funding assurance, and any other technical qualification aspects of NRC regulations.

The NRC also reviews methods of providing decommissioning funding required of license applicants and licensees. Decommissioning a facility or site safely removes it from service and reduces residual radioactivity to a level that permits (1) the release of the property for unrestricted use and termination of the license, or (2) the release of the property under restricted conditions and termination of the license. The costs of spent fuel management, site restoration, and other costs not related to decommissioning are not included in the financial assurance for decommissioning for nuclear reactors.

Decommissioning funding assurance for nuclear power plants is governed by 10 C.F.R. § 50.33(k), 10 C.F.R. § 50.75, "Reporting and Recordkeeping for Decommissioning Planning," and 10 C.F.R. § 50.82, "Termination of License," in a three-stage process. First, 10 C.F.R. § 50.33(k) requires licensees to submit, with each application for a production or utilization facility, a report as described in 10 C.F.R. § 50.75, including a certification specifying how financial assurance for decommissioning will be provided. Second, 10 C.F.R. § 50.75(c)(2) requires licensees to adjust annually the amount of decommissioning funding assurance using an amount equal to or greater than the formula amount in 10 C.F.R. § 50.75(c). The regulations at 10 C.F.R. § 50.75(f)(1) requires the status of decommissioning

funds to be reported to the NRC at least once every 2 years. Third, 10 C.F.R. § 50.75(f) also requires that 2 years before permanent cessation of operations, a licensee must submit a preliminary decommissioning cost estimate that includes, *inter alia*, a plan for adjusting decommissioning funds to demonstrate that funds will be available when needed to cover decommissioning costs. The regulations in 10 C.F.R. § 50.82(a)(4)(i) require a licensee to submit a post-shutdown decommissioning activities report before or within 2 years following permanent cessation of operations. The report:

must contain a description of the planned decommissioning activities along with a schedule for their accomplishment, a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements, and a site-specific DCE [decommissioning cost estimate], including the projected cost of managing irradiated fuel.

The NRC Staff analyzes biennial decommissioning funding reports to determine that sufficient funding for radiological decommissioning of a facility will be available at the time of permanent termination of operations. The NRC takes appropriate actions to address decommissioning funding shortfalls on a case-by-case basis. These NRC Staff actions include discussions with a licensee to develop a plan of action to resolve a decommissioning funding shortfall. Because a shortfall in decommissioning funding does not affect safe operations of a nuclear plant, the NRC provides a licensee time to resolve a shortfall.³ However, adequate decommissioning funding is important to ensure a plant is decommissioned safely and without the expenditure of public funds. For this reason, the NRC monitors the status of decommissioning funds and, when necessary, requires additions to decommissioning trust funds through parent company guarantees, cash deposits, or other methods permitted under 10 C.F.R. § 50.75(e)(1) or with the approval of the Commission.

B. Entergy Nuclear Operations Inc.'s (ENO's) Financial Qualification

The regulations in 10 C.F.R. § 50.80, stipulate that NRC approval is required for transfer of control of the ownership and/or operating authority responsibilities within the facility operating license. The NRC approved the transfer of operating authority to ENO for FitzPatrick, Pilgrim, and Vermont Yankee. As a result of its review, the NRC Staff determined that ENO is financially qualified to hold

³ See VR-SECY-11-0133 — “Options to Evaluate Requests to Use Discounted Parent Company Guarantees to Assure Funding of Decommissioning Costs for Power Reactors” (February 27, 2012) (ADAMS Accession No. ML12058A179).

the operating authority under the licenses for FitzPatrick, Pilgrim, and Vermont Yankee. The following table provides a summary of the NRC Staff’s conclusions regarding ENO’s financial qualification to hold the operating authority for each facility license.

Facility	NRC Staff’s Conclusion
FitzPatrick ⁴	<p>According to the application, Entergy Nuclear FitzPatrick, as the proposed owner of FitzPatrick, has committed to assume full financial responsibility for funding the safe operation of the plant. The application states that ENO will operate FitzPatrick at cost and Entergy Nuclear FitzPatrick will reimburse ENO for its costs of operation under the terms of an operating agreement. Since the NRC Staff has determined that Entergy Nuclear FitzPatrick is financially qualified under 10 C.F.R. § 50.33(f) to hold the license for the FitzPatrick plant, the Staff concludes that ENO has satisfied applicable financial qualification requirements and that there are no financial qualification issues with regard to ENO.</p>
Pilgrim ⁵	<p>The application represents that under the Operating Agreement included as part of the application, ENG C [Entergy Nuclear Generation Company] will continue to provide all funds to ENO for the safe operation and maintenance of Pilgrim Station, including the funds necessary to ensure the ability of ENO to comply with the facility operating license, technical specifications, materials license, and commitments to the NRC. ENG C will continue to be responsible for all financial protection as required by 10 C.F.R. Part 140, “Financial Protection Requirements and Indemnity Agreements,” and site insurance coverage as required by 10 C.F.R. § 50.54(w), “Conditions of Licenses.”</p> <p>The Staff’s analysis of the data supplied indicates that ENG C</p>

⁴Order Approving Transfer of License from the Power Authority of the State of New York to Entergy Nuclear FitzPatrick, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (TAC No. MA8949) dated November 9, 2000 (ADAMS Accession No. ML003768011).

⁵Order Approving the Transfer of Operating Authority Under Facility Operating License and Transfer of Materials License for Pilgrim Nuclear Power Station from Entergy Nuclear Generation Company to Entergy Nuclear Operations, Incorporated (TAC No. MD2843), dated March 15, 2002 (ADAMS Accession No. ML013410065).

and, in turn, ENO have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license.

The NRC Staff finds that ENO is financially qualified to hold the operating authority under the Pilgrim station license.

Vermont Yankee⁶ According to the application, ENO will operate VY [Vermont Yankee] at cost and be reimbursed by Entergy Nuclear VY for such costs pursuant to the terms of an operating agreement that was submitted with the application. In essence, while ENO may be nominally responsible for costs, Entergy Nuclear VY will have the full financial responsibility for funding the safe operation of the facility. The Staff has determined that Entergy Nuclear VY is financially qualified to hold the license as the owner of the facility, in that sources of revenues to cover estimated costs are identified. In addition, the existence of the cost pass-through contract provides reasonable assurance that ENO will obtain the funds necessary for the estimated operation costs for the license period. For these reasons, the Staff concludes that ENO is financially qualified to hold the operating authority under the license.

As previously stated, once the NRC Staff determines that an applicant is financially qualified to conduct the activities under the license, the NRC conducts ongoing reviews of a licensee by screening various public sources for business, finance, and economic news throughout the terms of the license for any indications that the licensee may not have sufficient financial resources to operate their plants safely. ENO remains financially qualified to hold the operating authority under the licenses for FitzPatrick and Pilgrim. Vermont Yankee has permanently ceased operations.

C. Evaluation of ENO's Financial Condition

By letter dated June 2, 2014 (ADAMS Accession No. ML13357A024), the PRB sent a request for voluntary information to ENO on its current financial status. The NRC Staff asked ENO to: (1) provide updated cost and revenue

⁶ Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (TAC No. MB3154) dated May 17, 2002 (ADAMS Accession No. ML020390198).

projections and cash-flow statements for FitzPatrick and Pilgrim, (2) confirm that certain contingency commitments were still in effect for FitzPatrick and Pilgrim, (3) update its response to an earlier request for additional information concerning impairment for Vermont Yankee disclosed in a November 2012, 10-Q filing to the SEC, and (4) provide the current operating agreements and/or intracorporate arrangements among and between FitzPatrick, Pilgrim, Vermont Yankee, and ENO related to financing the operating and maintenance costs for NRC-licensed activities (ADAMS Accession No. ML072220219).⁷

By letter dated July 24, 2014 (ADAMS Accession No. ML14212A050), ENO asserted that it believes the 2.206 petition does not provide a basis for an inquiry into cost and revenue projections or cash-flow statements for FitzPatrick and Pilgrim. The Licensee, however, explained that the revenues for FitzPatrick and Pilgrim reported to the SEC, as “Entergy Wholesale Commodities” in the Entergy Corporation’s 10-K filings, demonstrate positive revenues and net income for wholesale electricity since Entergy Corporation began reporting on wholesale electricity costs.

The Licensee also indicated that corporate revenues from other ENO sources are available, if needed, to cover operational expenses at FitzPatrick and Pilgrim. In addition, ENO indicated that Entergy Nuclear FitzPatrick, LLC (ENF), and ENG C have credit support agreements or parent guarantees in place to provide adequate funds for operations at both FitzPatrick and Pilgrim, as discussed below. The Licensee stated that “[ENF and ENG C] have never needed to draw, nor actually drawn, upon the funds provided by these agreements.”

The Licensee confirmed that FitzPatrick’s License Condition 2.G is in effect and is guaranteed by Entergy Global, LLC (formerly Entergy Global Investments, Inc.), and Entergy International Ltd., LLC. FitzPatrick’s License Condition 2.G states the following:

ENF and ENO shall take no action to cause Entergy Global Investments, Inc. or Entergy International Ltd. LLC, or their parent companies, to void, cancel, or modify the \$70 million contingency commitment to provide funding for the facility as represented in the application for approval of the transfer of the facility license from PASNY [Power Authority of the State of New York] to ENF and ENO, without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

The Licensee also confirmed that Pilgrim’s License Condition J.4 is in effect and is guaranteed by Entergy International Ltd., LLC. Pilgrim’s License Condition J.4 provides the following:

Entergy Nuclear shall have access to a contingency fund of not less than fifty

⁷ ENO referred to these agreements in its July 30, 2007, license transfer application.

million dollars (\$50m) for payment, if needed, of Pilgrim operating and maintenance expenses, the cost to transition to decommissioning status in the event of a decision to permanently shut down the unit, and decommissioning costs. Entergy Nuclear will take all necessary steps to ensure that access to these funds will remain available until the full amount has been exhausted for the purposes described above. Entergy Nuclear shall inform the Director, Office of Nuclear Regulation, in writing, at such time that it utilizes any of these contingency funds.

After evaluating this additional information provided by ENO, the NRC Staff continues to believe that ENO has access to funding to safely operate FitzPatrick and Pilgrim.

D. Evaluation of ENO's Decommissioning Funding Status Reports

The NRC Staff analyzed the 2013 decommissioning funding status reports for FitzPatrick, Pilgrim, and Vermont Yankee and concluded that all three facilities met the minimum financial assurance requirements of 10 C.F.R. § 50.75(c) — no decommissioning fund shortfalls were reported. SECY-13-0105, "Summary Findings Resulting from the Staff Review of the 2013 Decommissioning Funding Status Reports for Operating Power Reactor Licensees" (ADAMS Accession Nos. ML13266A084 and ML13266A089), provides a summary of the NRC Staff's analysis of all decommissioning funds, including the FitzPatrick, Pilgrim, and Vermont Yankee funds.

By letter dated March 30, 2015 (ADAMS Accession No. ML15092A141), ENO submitted its biennial decommissioning funding status report for FitzPatrick, Pilgrim, and Vermont Yankee. The NRC is currently reviewing these reports.

E. Addressing Other Issues Raised by the Petitioners

1. FitzPatrick Unplanned Power Changes

The NRC Staff has not identified any operational issues at FitzPatrick that raise questions about the ability of the plant to operate safely. Unplanned power changes caused by main condenser tube leaks were reported by ENO in January 2013. The NRC Staff analyzed the main condenser tube leakage issues and the resulting power changes at Fitzpatrick and found no safety concerns. The Licensee has replaced the circulating water tubes with titanium tubes in the main condenser. The NRC Staff evaluated the plant modification and no findings were identified as noted in the NRC Integrated Inspection Report 05000333/2014005, dated February 6, 2015 (ADAMS Accession No. ML15037A280). This plant modification represents a significant capital project, which further demonstrates

ENO's financial capability and willingness to allocate funds for the purchase of equipment to maintain safe operations at FitzPatrick.

2. *Safety-Conscious Work Environment (SCWE)*

In its November 13, 2013, supplement, the Petitioners provided news articles reporting that the Licensee planned to lay off employees at Pilgrim. The Petitioners expressed concern that the Pilgrim SCWE could be affected by a potential workforce reduction.

As part of the ROP, the NRC determines whether a substantive crosscutting issue (human performance, problem identification and resolution, and SCWE) exists at each operating reactor during the NRC Staff's mid-cycle and end-of-cycle assessments. If the NRC determines that a substantive crosscutting issue exists, the NRC Staff summarizes the issue and the necessary actions to resolve the issue in an assessment letter to the Licensee.

As part of the problem identification and resolution biennial baseline inspection, the NRC Staff assesses the Licensee's SCWE. In the most recent 95002 inspection at Pilgrim in May 2015, there were no SCWE concerns identified. Based on the interviews the inspectors conducted over the course of the inspection, observations of plant activities, reviews of individual corrective action program and employee concerns program issues, the inspectors did not identify any indications that site personnel were unwilling to raise safety issues nor did they identify any conditions that could have had a negative impact on the site's SCWE. As noted in Inspection Report 05000293/2014008, the NRC Staff did not identify any evidence of an unacceptable SCWE at Pilgrim or significant challenges to the free flow of information. The NRC Staff also assessed the SCWE at FitzPatrick and Vermont Yankee. As noted in Inspection Report 05000333/2014009, the inspectors "found no evidence of significant challenges to FitzPatrick's safety conscious work environment. Based on the team's observations, FitzPatrick staff is willing to raise nuclear safety concerns through at least one of the several means available." Also, the inspectors "did not identify any indications that site personnel were unwilling to raise safety issues nor did they identify any conditions that could have had a negative impact on Vermont Yankee's safety conscious work environment," as stated in Inspection Report 05000271/2013008.

3. *Vermont Yankee Shutdown*

By letter dated December 19, 2014 (ADAMS Accession No. ML14357A110), the Licensee submitted the post-shutdown decommissioning activities report (PSDAR) for Vermont Yankee, in accordance with 10 C.F.R. § 50.82(a)(4)(i). The PSDAR contains: (1) a description and schedule of the planned decommissioning

activities, (2) a discussion on the environmental impacts of decommissioning, (3) a site-specific decommissioning cost estimate, and (4) a settlement agreement between ENO, ENVY, and the State of Vermont. Although the NRC's regulations do not require formal NRC Staff approval of the PSDAR, the NRC Staff is currently reviewing the PSDAR to ensure that it meets the content requirements of 10 C.F.R. § 50.82(a)(4)(i).

By letter dated January 12, 2015 (ADAMS Accession No. ML15013A426), the Licensee provided certifications to the NRC that (1) power operations at Vermont Yankee were permanently ceased effective December 29, 2014, and (2) spent reactor fuel has been permanently removed from the Vermont Yankee reactor vessel and placed in the spent fuel pool.

III. CONCLUSION

The Petitioners requested an immediate suspension of operations at FitzPatrick and Vermont Yankee to protect the public health and safety. Subsequent to the Petitioners' request, ENO permanently shut down Vermont Yankee. As previously stated, the NRC relies on multiple engineered barriers and several levels of reactor oversight that are in NRC regulations to provide reasonable assurance of adequate protection of public health and safety and the environment. Emergent safety concerns are promptly identified and assessed through the NRC's ROP. The ROP requires that licensees take prompt corrective action to resolve identified safety concerns. In addition, permanent onsite NRC resident inspectors monitor the day-to-day operations at the plants, which provide an additional assurance of safe operation. FitzPatrick was found to be operating safely and additional actions are not required for the protection of public health and safety and the environment. Therefore, the Petitioners' request to shut down FitzPatrick was denied.

The Petitioners also requested an investigation to determine whether ENO possesses sufficient funds to cease operations and decommission FitzPatrick and Vermont Yankee in accordance with 10 C.F.R. § 50.75. The NRC Staff's review of the 2013 Biennial Decommissioning Funding Status Report determined that ENO provided reasonable assurance that sufficient funding for radiological decommissioning of FitzPatrick and Vermont Yankee will be available for the decommissioning process. The Licensee has permanently ceased power operations at Vermont Yankee, partly because ENO deemed it uneconomic to continue operations. Because the NRC Staff has independently determined that both Fitzpatrick and Vermont Yankee have sufficient funding available for decommissioning, the NRC Staff finds that no further investigation into ENO's financial status is necessary to ensure the protection of the public health and safety and the environment.

Finally, the Petitioners requested an investigation of ENO's current financial qualifications to determine whether the Licensee remains financially qualified to continue operations at Pilgrim, in accordance with 10 C.F.R. § 50.33(f)(5). As discussed above, the NRC does not routinely review the financial qualifications of power reactor licensees after the issuance of an operating license. However, the NRC does employ a process of monitoring licensees throughout the terms of their licenses for any indications that they may not have sufficient financial resources to operate their plants safely. Additionally, the NRC Staff conducts financial qualification reviews of license transfers to ensure that the new licensees meet NRC requirements. The regulations in 10 C.F.R. § 50.33(f)(5) allow the NRC Staff to request a licensee to submit more detailed information concerning its financial arrangements and funding. The Petitioners' request to examine whether ENO is financially qualified to operate Pilgrim was granted.

The NRC Staff requested additional financial information on the adequacy of Pilgrim's operational funding. The Licensee responded that, in accordance with License Condition J.4, access to \$50 million is available to maintain safe operations at Pilgrim and Entergy International, Ltd., is the guarantor of this sum. The NRC Staff reviewed the information provided by ENO and found that the Licensee's current financial condition is adequate and allows for the continued safe operation at Pilgrim.

By Order dated March 15, 2002, the NRC Staff noted that ENGC would continue providing all funds to ENO for the safe operation and maintenance of Pilgrim, and concluded that ENO is financially qualified to hold the operating authority under the Pilgrim license. The Licensee, ENO, remains financially qualified to hold the operating authority under the Pilgrim license.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

M. Evans for
William M. Dean, Director,
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 27th day of August 2015.

ATTACHMENT 1

**COMMENTS RECEIVED FROM THE PETITIONERS
ALLIANCE FOR A GREEN ECONOMY
CITIZENS AWARENESS NETWORK
PILGRIM WATCH
VERMONT CITIZENS ACTION NETWORK
BY LETTER DATED APRIL 27, 2015
(ADAMS Accession No. ML15128A023)**

Comment 1 — Proposed Director’s Decision Misrepresents and Ignores Requested Actions

The proposed decision misrepresents and improperly circumscribes the first request made in the March 18 petition: the immediate suspension of the licenses for FitzPatrick and Vermont Yankee.

Response

The proposed director’s decision repeated the Petition Review Board’s (PRB’s) final conclusion, as reflected in the August 7, 2013, acknowledgment letter. It states:

On April 8, 2013, the PRB met internally to discuss your request for immediate action. On April 15, 2013, the Office of Nuclear Reactor Regulation (NRR) petition manager informed you of the PRB’s decision to deny the request for immediate action, concluding that Entergy’s financial situation does not pose an immediate danger to public health and safety and the environment.

No further actions were needed. No changes were made to the final director’s decision as a result of this comment.

Comment 1.a

NRC must undertake an investigation of the safety-conscious work environment and quality assurance and quality control programs at Vermont Yankee, FitzPatrick, and Pilgrim.

Response

As stated in the proposed director’s decision,

As part of the problem identification and resolution biennial baseline inspection, the NRC staff assesses the SCWE. In current and past inspection reports, the NRC staff found no evidence of an unacceptable SCWE at Pilgrim and no significant challenges to the free flow of information.

This statement is also true for FitzPatrick and Vermont Yankee. In the event that an issue is identified, the quality assurance and control, as it relates, would be assessed. The final director's decision was modified to include the U.S. Nuclear Regulatory Commission (NRC) Staff's assessment of FitzPatrick's and Vermont Yankee's SCWE.

Comment 1.b

NRC's investigation of Entergy's financial qualifications must include a detailed audit of planned and anticipated capital expenditures at each of the reactors, as well as a cost and amortization schedule for each capital project.

Response

The NRC Staff determined that this action was not needed.

The NRC Staff reviewed the information provided by the Licensee to evaluate ENO's financial condition. The NRC Staff found that adequate financial resources are available to ENO to continue safe operation.

No changes were made to the final director's decision as a result of this comment.

Comment 1.c

NRC [should] incorporate performance data in [the] financial qualifications investigation for FitzPatrick and Pilgrim to determine whether there is a causal or compounding relationship between Entergy's economic considerations and operational problems.

Response

The NRC Staff determined that this action was not needed.

The NRC Staff reviewed the information provided by the Licensee to evaluate ENO's financial condition. As described in the proposed director's decision, the NRC Staff found that adequate financial resources are available to ENO to continue safe operation.

No changes were made to the final director's decision as a result of this comment.

Comment 1.d

NRC [should] obtain detailed information from Entergy regarding all of its corporate entities and incorporate it in the investigation of the licensees' financial qualifications, and to make such information available to the public.

Response

As stated in the proposed director's decision, the Licensee identified ENO's sources for corporate revenues to cover operation expenses at FitzPatrick (Entergy Global, LLC and Entergy International Ltd., LLC — \$70 million) and Pilgrim (Entergy International Ltd., LLC — \$50 million).

No changes were made to the final director's decision as a result of this comment.

Comment 1.e

Include analysis of internal financial transactions and cash flows among Entergy subsidiaries in the investigation of the licensees' financial qualifications.

Response

The NRC Staff determined that this action was not needed.

The NRC Staff reviewed the information provided by the Licensee to evaluate ENO's financial condition. As described in the proposed director's decision, the NRC Staff found that adequate financial resources are available to ENO to continue safe operation.

No changes were made to the final director's decision as a result of this comment.

Comment 2 — Proposed Director's Decision Fails to Address Evidence Submitted by Petitioners

The proposed decision's acceptance of the information on Entergy Wholesale Commodities business unit in the 10K SEC filings is completely immaterial to the licensees' financial qualifications and represents a refusal on the part of NRC to conduct a meaningful investigation of the petition.

Response

The NRC Staff reviews the financial qualifications for each applicant for construction permits, operating licenses, and license transfers. The NRC Staff determined that ENO is financially qualified to operate FitzPatrick in November 2000, Pilgrim in March 2002, and Vermont Yankee in May 2002. The Licensee remains financially qualified.

The NRC does not regulate or provide oversight of commerce, and does not review commercial activities and decisions of its licensees unless such actions may impact safety. However, the NRC Staff does conduct ongoing reviews of all licensees by screening trade papers, industry newsletters, and various public sources for business, finance, and economic news.

The Licensee stated that the Entergy Wholesale Commodities segment has reported positive revenues and net income for FitzPatrick and Pilgrim since the 2013 10-K and first-quarter 10-Q filings made with the SEC. To further demonstrate that adequate funds are available to safely operate FitzPatrick and Pilgrim, the Licensee also stated that substantial credit support agreements or parent guarantees are in place and funds have never been drawn upon.

The NRC Staff reviewed the information provided by the Licensee to evaluate ENO's financial condition. The NRC Staff found that adequate financial resources are available to ENO to safely operate FitzPatrick and Pilgrim.

The final director's decision was modified to make the clarification that the NRC Staff evaluated ENO's financial condition.

Comment 3 — Proposed Director's Decision Fails to Evaluate Substantive Issues

By limiting the scope of the review to a small handful of narrowly proscribed examples of our concerns, [the] NRC has ignored not just the substantive evidence Petitioners presented, but the substantive analysis that demonstrates the need for NRC to deviate from its standard regulatory practice to address significant safety issues arising from changing real-world conditions affecting the licensees.

Response

The NRC Staff regulates its licensees within its authority. The NRC Staff's regulatory evaluation is performed in accordance with NRC-approved guidance, based on the NRC regulations.

No changes were made to the final director's decision as a result of this comment.

Comment 4 — Proposed Decision Represents Failure to Comply with Atomic Energy Act

The proposed director's decision denies our request for enforcement action on a regulatory theory that contradicts the agency's application of 10 CFR 50.33 and the Atomic Energy Act.

Response

The Atomic Energy Act of 1954 (the Act), as amended, empowers the NRC to establish by rule or order, and to enforce, such standards to govern civilian use of nuclear materials and facilities, as "the Commission may deem necessary or desirable in order to protect health and safety and minimize danger to life or property."

For operating license applications, the Act requires that each applicant provide information necessary to decide the technical and financial qualifications of the applicant, as deemed appropriate by the Commission. The NRC's regulations in 10 C.F.R. § 50.33, "Contents of Applications; General Information," provide the required information needed in the application. The NRC Staff reviews the financial qualifications for each applicant for construction permits, operating licenses, and license transfers.

The Petitioners did not provide evidence that proves that (1) ENO is not in compliance with the NRC regulations, or that (2) ENO's financial situation poses a danger to public health and safety and the environment. Therefore, the NRC Staff is fulfilling its duty to comply with the Act by not executing an enforcement-related action against FitzPatrick and Pilgrim operating licenses.

Comment 4.a

The petitioners have provided material and substantive information meeting a higher standard of evidence than NRC deemed necessary to warrant the issuance of the March 20 RAI [request for additional information issued to Vermont Yankee]. It is therefore inexplicable that NRC would not conduct an analysis of that evidence in reviewing our petition, and that it would not warrant the issuance of substantive RAIs to Entergy, rather than the mere request for voluntary information issued in June 2014.

Response

The March 20, 2013, RAI (ADAMS Accession No. ML13077A206) issued to Vermont Yankee, while in operation, was in support of an internal NRC Staff review, unrelated to your petition. In support of the PRB's review of your petition,

similar questions were issued to Entergy in regard to FitzPatrick and Pilgrim. The content of the questions was within the purview of the NRC regulatory framework. However, while the 2.206 petition review process allows the NRC Staff to request supporting information from the Licensee, it does not require a response. Any information provided by the Licensee is provided voluntarily.

No changes were made to the final director's decision as a result of this comment.

Comment 4.b

Judge Rosenthal challenged NRC staff's assertions that the 2.206 process affords members of the public a meaning[ful] avenue for obtaining substantive relief for concerns about nuclear safety and licensee compliance with the regulations. Based on a review of information on 2.206 petition cases presented by NRC staff at the judge's request, ALJ Rosenthal concluded that the evidentiary record indicates that NRC has provided little or no reason for the public to have confidence that the 2.206 [process] is likely to provide substantive relief.

Response

Judge Rosenthal's opinion was not shared by the majority of the Atomic Safety and Licensing Board. In *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments*, LBP-12-14, 76 NRC 1, 8 n.36 (2012) (ADAMS Accession No. ML12192A239), it states, "Judges Hawkens and Baratta find that the record before the Board falls far short of rebutting the presumption that 10 C.F.R. § 2.206 is a meaningful avenue for seeking administrative relief."

Additionally, in *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 179 (2014) (ADAMS Accession No. ML14353-A114), the Commission stated that the 2.206 "process provides stakeholders a forum to advance [their] concerns and [to] obtain full or partial relief, or written reasons why the requested relief is not warranted. And as we have explained, we consider a section 2.206 petition a meaningful vehicle through which the public may seek review of safety-related concerns."

The NRC regulations in 10 C.F.R. § 2.802 offer the opportunity for any interested party to file a petition for rulemaking. No changes were made to the final director's decision as a result of this comment.

Comment 5 — Citizens Awareness Network Response Concerning Proposed Director's Decision on Issues Pertaining to Vermont Yankee

In terms of the shuttering and decommissioning of Vermont Yankee, the Agency's

generic approach to determine Entergy's financial qualifications to operate and decommission Vermont Yankee is incomprehensible.

Response

The NRC Staff determined that ENO was financially qualified to operate Vermont Yankee in May 2002. However, as of December 29, 2014, Vermont Yankee permanently ceased power operations.

As discussed in the proposed director's decision, the March 29, 2013 (ADAMS Accession No. ML13092A121), decommissioning funding status report for Vermont Yankee was analyzed by the NRC Staff using the governing regulations. The Staff concluded that Vermont Yankee met the minimum financial assurance requirements in 10 C.F.R. § 50.75(c) — no decommissioning fund shortfalls were reported. By letter dated March 30, 2015 (ADAMS Accession No. ML15092A141), ENO submitted its biennial decommissioning funding status report for Vermont Yankee. It is currently under review.

No changes were made to the final director's decision as a result of this comment.

Comment 6 — Alliance for a Green Economy Response Concerning Proposed Director's Decision on Issues Pertaining to FitzPatrick

The NRC Directors decision did not address our concerns that Entergy is not financially qualified to operate FitzPatrick.

Response

In its November 9, 2000 (ADAMS Accession No. ML003768011) safety evaluation of the FitzPatrick operating license transfer, the NRC Staff stated:

According to the application, Entergy Nuclear FitzPatrick, as the proposed owner of FitzPatrick, has committed to assume full financial responsibility for funding the safe operation of the plant. . . . Since the NRC staff has determined above that Entergy Nuclear FitzPatrick is financially qualified under 10 CFR 50.33(f) to hold the license for the FitzPatrick plant, the staff concludes that ENO has satisfied applicable financial qualification requirements. . . .

The NRC Staff determined that ENO is financially qualified. The NRC does not routinely review the financial qualification of power reactor licensees after the issuance of an operating license. However, the NRC Staff requested additional financial information from ENO on the adequacy of operational funding. The NRC Staff reviewed the information provided by the Licensee to evaluate ENO's

financial condition. The NRC Staff found that adequate financial resources are available to ENO to continue safe operation.

No changes were made to the final director's decision as a result of this comment.

Comment 6.a

In the proposed Directors Decision, [the] NRC claims it “employs multiple engineered barriers and multiple levels of reactor oversight that are in NRC regulations to provide reasonable assurance of adequate protection of public and health and safety and the environment. Emergent safety concerns are promptly identified and assessed through the NRC’s Reactor Oversight Process (ROP). The ROP requires that licensees take prompt corrective action to resolve identified safety concerns.”

Yet, in the case of FitzPatrick’s condenser, the emergent safety concern was not corrected promptly. The NRC also failed to investigate the root cause of this issue to identify whether it resulted from Entergy’s suspected violation of the financial qualifications regulation.

Response

The NRC Staff analyzed the main condenser tube leakage issues and the resulting power changes at Fitzpatrick and found no safety concerns. Although the condenser is not a safety-related component, the Licensee replaced the main condenser tubes, which is a significant capital project. Regarding NRC financial regulations governing operations, such requirements exist and must be met by nonutility applicants only at the time of initial application and at the time of license transfer. As such, FitzPatrick was not in violation of any such financial qualification requirements. Therefore, an enforcement-related action authority does not exist.

No changes were made to the final director's decision as a result of this comment.

Comment 7 — Pilgrim Watch Response Concerning Proposed Director’s Decision on Issues Pertaining to Pilgrim

NRC failed to perform its statutory duty to protect public health and safety by assuring Entergy is financially qualified. We request NRC to go back to the drawing board and gather the facts necessary to provide assurance of Entergy’s financial qualifications to operate and decommission Pilgrim Station safely and provide those facts in its decision.

Response

The Act empowers the NRC to establish by rule or order, and to enforce, such standards to govern civilian use of nuclear materials and facilities, as “the Commission may deem necessary or desirable in order to protect health and safety and minimize danger to life or property.”

For operating license applications, the Act requires that each applicant provide information necessary to decide the technical and financial qualifications of the applicant, as deemed appropriate by the Commission. The NRC Staff reviews the financial qualifications for each applicant for construction permits, operating licenses, and license transfers.

In the NRC March 15, 2002 (ADAMS Accession No. ML013410065) safety evaluation of the Pilgrim operating license transfer, it states:

the NRC staff finds that ENO is financially qualified to hold the operating authority under the Pilgrim Station license.

The NRC Staff determined that ENO is financially qualified. There are no ongoing financial requirements that ENO must meet.

Additionally, the NRC Staff reviewed the information provided by the Licensee to evaluate ENO’s financial condition. The NRC Staff found that adequate financial resources are available to ENO to continue safe operation.

As stated in the proposed director’s decision:

The NRC staff analyzes biennial decommissioning funding reports to determine that sufficient funding for radiological decommissioning of a facility will be available at the time of permanent termination of operations.

The March 29, 2013 (ADAMS Accession No. ML13092A121), decommissioning funding status report for Pilgrim was analyzed by the NRC Staff using the governing regulations. The NRC Staff concluded that Pilgrim met the minimum financial assurance requirements in 10 C.F.R. § 50.75(c) — no decommissioning fund shortfalls were reported. By letter dated March 29, 2015 (ADAMS Accession No. ML15092A141), ENO submitted its biennial decommissioning funding status report for Pilgrim. It is currently under review.

ATTACHMENT 2

COMMENTS RECEIVED FROM THE STATE OF NEW YORK OFFICE OF THE ATTORNEY GENERAL BY LETTER DATED APRIL 29, 2015

Comment 1 — Inadequate and Defective Process

NRC's processing of the petitioners' claims in this proceeding has been inadequate and defective.

Response

The 10 C.F.R. § 2.206 process is a public process. Any member of the public is afforded the opportunity through this process to seek enforcement action against an NRC licensee or certificate holder. The NRC Staff conducted its review of the petition within its regulatory authority and in accordance with NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions." No changes were made to the final director's decision as a result of this comment.

Comment 1.a

Two Senators have asked NRC to explain the delay. Specifically on November 14, 2013 Senators Markey and Sanders wrote to the NRC Chairman However, NRC has not answered the Senators' questions.

Response

In a letter dated May 22, 2014, then-Chairman Allison M. Macfarlane responded to Senators Markey and Sanders.

Comment 2 — Issues Not Addressed

The Proposed Decision does not address the current financial qualifications of Entergy to operate and decommission nuclear power plants.

The Proposed Decision does not address the current financial qualifications of Entergy to manage spent nuclear fuel.

The Proposed Decision does not address the current financial qualifications of Entergy to restore power plant sites.

Response

Once the NRC Staff determines that an applicant is financially qualified to conduct the activities under the license, the Staff conducts ongoing reviews of all licensees by screening various public sources for business, finance, and economic news throughout the terms of the license for any indications that the Licensee may not have sufficient financial resources to operate their plants safely. Additionally, the NRC Staff's review of a license transfer application, governed by 10 C.F.R. § 50.80, "Transfer of Licenses," consists of assuring that the new licensed entity has the capability to meet the financial qualifications and decommissioning funding, and technical qualification aspects of the NRC regulations.

The NRC Staff determined that ENO is financially qualified to operate FitzPatrick in November 2000, Pilgrim in March 2002, and Vermont Yankee in May 2002. The Licensee remains financially qualified.

The NRC Staff reviewed ENO's financial conditions. In accordance with 10 C.F.R. § 50.33(f)(5), the NRC may request information about a licensee's financial arrangements and status of funds. However, while the 2.206 petition review process allows the NRC Staff to request supporting information from the licensee, it does not require a response. Any information provided by the licensee is provided voluntarily.

The NRC Staff issued questions to the Licensee on the adequacy of FitzPatrick's and Pilgrim's operational funding. The NRC Staff reviewed the information provided by ENO and found that the Licensee's current financial condition is adequate to continue safe operation at FitzPatrick and Pilgrim. Ultimately, the NRC's primary tool for evaluating and ensuring safe operations at nuclear power reactors is through its inspection and enforcement programs.

SECY-13-0105 (ADAMS Accession Nos. ML13266A084 and ML13266A089) provides a summary of the NRC Staff's analysis of the 2013 decommissioning funding status reports, including the FitzPatrick, Pilgrim, and Vermont Yankee funds. The NRC Staff concluded that all three facilities met the minimum financial assurance requirements of 10 C.F.R. § 50.75(c) — no decommissioning fund shortfalls were reported. The costs of spent fuel management, site restoration, and other costs not related to decommissioning are not included in the financial assurance for decommissioning for nuclear reactors.

By letter dated March 29, 2015 (ADAMS Accession No. ML15092A141), ENO submitted its biennial decommissioning funding status report for FitzPatrick, Pilgrim, and Vermont Yankee. The reports are currently under NRC review.

Vermont Yankee has permanently shut down. The Licensee submitted the Post-Shutdown Decommissioning Activities Report (PSDAR) for Vermont Yankee, in accordance with 10 C.F.R. § 50.82(a)(4)(i). The PSDAR contains (1) a description and schedule of the planned decommissioning activities, (2) a discussion on the environmental impacts of decommissioning, (3) a site-specific decommissioning

cost estimate, and (4) a settlement agreement between ENO, ENVY, and the State of Vermont. Although the NRC's regulations do not require formal NRC Staff approval of the PSDAR, the NRC Staff is currently reviewing the PSDAR to ensure that it meets the content requirements of 10 C.F.R. § 50.82(a)(4)(i).

No changes were made to the final director's decision as a result of this comment.

Comment 2.a

The Proposed Decision does not address Entergy Corporation's change of the legal nature of its subsidiary that owns Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Indian Point 2, LLC.

Response

This action was not within the Petition Review Board's scope of review. No changes were made to the final director's decision as a result of this comment.

Comment 3 — Unsupported Conclusions

The record does not support a conclusion that Entergy Nuclear Operations is financially qualified to operate the FitzPatrick Nuclear Power Plant or Pilgrim Nuclear Power Station.

The record does not substantiate the proposed conclusion that the FitzPatrick or Pilgrim facilities have the financial qualifications to operate.

Entergy Corporation's Submissions to the U.S. Securities and Exchange Commission do not substantiate ENO's current financial qualifications to operate the FitzPatrick or Pilgrim nuclear power plants.

Response

Once the NRC Staff determines that an applicant is financially qualified to conduct the activities under the license, the Staff conducts ongoing reviews of all licensees by screening trade papers, industry newsletters, and various public sources for business, finance, and economic news throughout the terms of the license for any indications that the licensees may not have sufficient financial resources to operate their plants safely. The NRC Staff determined that ENO is financially qualified to operate FitzPatrick in November 2000 and Pilgrim in March 2002. The Licensee remains financially qualified. The NRC Staff's

conclusions regarding ENO's financial qualifications for FitzPatrick and Pilgrim facilities are provided on pages 8 and 9 of the director's decision.

No changes were made to the final director's decision as a result of this comment.

Comment 4 — New Information

The Federal Energy Regulatory Commission's April 14, 2015 Order instituting an examination of a proposed subsidy to support continued operation of the Ginna Nuclear Power Plant raises questions about the profitability of the FitzPatrick Nuclear Power Plant.

Response

NRC regulations do not prohibit a nuclear power plant from operating at a financial loss. Unless there is evidence of a nexus between safety and financial qualifications or conditions of a license, NRC enforcement-related action authority does not exist.

No changes were made to the final director's decision as a result of this comment.

Comment 4.a

In recent days, Entergy has withdrawn lines of credit for Vermont Yankee.

Response

The NRC Staff found that there was no longer a need to provide lines of credit for operations and operational maintenance costs and that ENO has provided adequate assurance that funds will be available for radiological decommissioning and spent fuel management. Therefore, in the NRC letter dated April 16, 2015 (ADAMS Accession No. ML15097A361), the NRC Staff concluded that it has no objection to the Licensee's request for consent to cancel the two lines of credit.

No changes were made to the final director's decision as a result of this comment.

ATTACHMENT 3

**COMMENTS RECEIVED FROM THE LICENSEE
ENERGY NUCLEAR OPERATIONS, INC.
BY LETTER DATED APRIL 23, 2015
(ADAMS ACCESSION NO. ML15113B268)**

Comment 1

The proposed decision on page 6 states the “most recent decommissioning funding status reports for FitzPatrick, Pilgrim and Vermont Yankee were submitted by March 31, 2013.” Since then, on March 30, 2015, ENO submitted updated decommissioning funding status reports for FitzPatrick, Pilgrim and Vermont Yankee (Accession No. ML15092A141). Those reports, again, demonstrate that all three facilities met the minimum financial assurance requirements of 10 CFR 50.75(c), and no decommissioning shortfalls were reported.

Response

The March 30, 2015, decommissioning funding status reports for FitzPatrick, Pilgrim, and Vermont Yankee are currently under NRC review. The final director’s decision was modified to include this statement.

Cite as 82 NRC 134 (2010)

DD-15-9

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

**Docket Nos. 50-338
50-339
(License Nos. NPF-4,
NPF-7)**

**VIRGINIA ELECTRIC AND POWER
COMPANY
(North Anna Power Station,
Units 1 and 2)**

August 21, 2015

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

[**Editor's Note:** On August 21, 2015, the NRC issued a Final Director's Decision. Subsequently, the NRC identified portions of the final DD on the Petitioners' concern regarding long-term storage of spent fuel in the spent fuel pool at North Anna 1 and 2 and at the North Anna ISFSI that required clarification. Accordingly, on October 30, 2015, the Director's Decision was revised and that version of DD-15-9 will appear in the October 2015 *Issuances*.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-341-LR

DTE ELECTRIC COMPANY
(Fermi Nuclear Power Plant,
Unit 2)

September 8, 2015

CONTENTIONS, ADMISSIBILITY

The Commission's contention admissibility rules are designed to ensure that only focused, well-supported issues are admitted for hearing.

CONTENTIONS, ADMISSIBILITY

Contentions must be set forth with particularity and must meet all six contention admissibility factors.

STANDARD OF REVIEW

The Commission will defer to licensing board rulings on standing and contention admissibility absent error of law or abuse of discretion.

CONTENTIONS, ADMISSIBILITY

LICENSING BOARDS, AUTHORITY

Although boards have some discretion to reformulate or narrow contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding, this authority is not without limit. A licensing board, for example,

may not supply information that is lacking in a contention that otherwise would be inadmissible.

RULES OF PRACTICE: REPLY BRIEFS

Although a petitioner may respond to the legal or logical arguments presented in the answers to its hearing request, a petitioner may not use its reply to raise new issues for the first time.

RULES OF PRACTICE: TIMELINESS

The Commission requires adherence to the deadlines and procedures in the rules so that the other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information. For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier.

CONTENTIONS, ADMISSIBILITY

LICENSING BOARDS, AUTHORITY

Although licensing boards are expected to review the relevant documents to determine whether the arguments presented by the litigants are properly supported, a board may not substitute its own support for a contention or make arguments for the litigants that were never made by the litigants themselves.

MEMORANDUM AND ORDER

DTE Electric Company has appealed the Atomic Safety and Licensing Board's ruling in LBP-15-5, which admitted three contentions for hearing in this license renewal proceeding.¹ For the reasons set forth below, we reverse the Board's contention admissibility decision and direct the Board to terminate the proceeding.

I. BACKGROUND

On April 24, 2014, DTE Electric Company filed an application to renew the

¹ Applicant's Notice of Appeal of LBP-15-5 (Mar. 3, 2015); Applicant's Brief in Support of Appeal of LBP-15-5 (Mar. 3, 2015) (Appeal).

operating license for Fermi Nuclear Power Plant, Unit 2, for an additional 20 years.² Unit 2 is the only reactor currently in operation on the Fermi site. Its operating license expires on March 20, 2025.

The NRC Staff accepted DTE's license renewal application for review and published notice of its docketing decision in the *Federal Register*, along with an opportunity for interested persons to request a hearing on the application.³ Three environmental groups — Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario, and Beyond Nuclear (collectively, Joint Petitioners) — together filed a request for hearing with four proposed contentions challenging DTE's application.⁴ Another environmental group, Citizens Resistance at Fermi 2 (CRAFT), filed a separate request for hearing with fourteen proposed contentions.⁵ DTE and the Staff opposed the requests for hearing; although they did not challenge the Petitioners' standing, they argued that the Petitioners had not raised an admissible contention.⁶ After hearing oral argument on contention admissibility, the Board granted both hearing requests and admitted a portion of Joint Petitioners' Contention 4 and portions of CRAFT Contentions 2 and 8.⁷ DTE's appeal followed.⁸

² See DTE Electric Company; Fermi 2, 79 Fed. Reg. 34,787 (June 18, 2014).

³ *Id.*

⁴ Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear (Aug. 18, 2014) (Joint Petitioners' Hearing Request).

⁵ Citizens' Resistance at Fermi 2 (CRAFT) Petition for Leave to Intervene and Request for a Public Hearing upon DTE Electric's Request of 20-Year License Extension for the Enrico Fermi 2 Nuclear Reactor (Aug. 18, 2014; corrected Sept. 3, 2014) (CRAFT Hearing Request).

⁶ DTE Electric Company Answer Opposing Petitions to Intervene and Requests for Hearing (Sept. 12, 2014) at 1 (DTE Answer); NRC Staff's Answer to Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear (Sept. 12, 2014) at 1; NRC Staff's Answer to Citizens' Resistance at Fermi 2 (CRAFT) Petition for Leave to Intervene and Request for Public Hearing (Sept. 12, 2014) at 1. Joint Petitioners and CRAFT filed replies in support of their hearing requests. Intervenors' Combined Reply in Support of Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear (Sept. 19, 2014); Combined Reply of Citizens' Resistance at Fermi 2 (CRAFT) to NRC Staff and DTE Electric Co. Answers to CRAFT's Petition for Leave to Intervene and Request for a Public Hearing (Sept. 19, 2014) (CRAFT Reply).

⁷ LBP-15-5, 81 NRC 249, 307-08 (2015). Judge Arnold provided a separate opinion explaining that he agreed with the Board's ruling except as to the admission of CRAFT Contention 2. *Id.* at 310-13 (Arnold, J., dissenting).

⁸ Our rules provide an appeal as of right on the question whether a request for hearing should have been wholly denied. 10 C.F.R. § 2.311(d)(1). DTE's appeal falls squarely within this rule.

II. DISCUSSION

Our contention admissibility rules are designed to ensure that only focused, well-supported issues are admitted for hearing. Contentions must be set forth with particularity and must meet all six contention admissibility factors.⁹ For each contention, the petitioner shall:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of its basis . . . ;
- (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 which support the . . . 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 . . . 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[, with] 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.¹⁰

We will defer to licensing board rulings on standing and contention admissibility absent error of law or abuse of discretion.¹¹

DTE argues that the Board erred in admitting the Petitioners' three contentions for hearing and asks us to reverse the Board's decision.¹² Joint Petitioners and CRAFT oppose DTE's appeal and urge us to affirm the Board's decision.¹³ We find that the Board erred in admitting Joint Petitioners' Contention 4B and CRAFT Contentions 2 and 8. We address each contention in turn.¹⁴

⁹ *Id.* § 2.309(f)(1).

¹⁰ *Id.* § 2.309(f)(1)(i)-(vi).

¹¹ *See, e.g., Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009).

¹² Appeal at 1.

¹³ Combined Answer Brief of Petitioners in Opposition to DTE Appeal of LBP-15-5 (Mar. 30, 2015) at 15.

¹⁴ DTE does not challenge the Board's decision on either Joint Petitioners' or CRAFT's standing to intervene. *See* Appeal at 1.

A. Joint Petitioners' Contention 4B

In Contention 4, as originally proposed, Joint Petitioners asserted that DTE's license renewal application lacked a sufficient analysis of "mutually initiating/exacerbating radiological catastrophes" involving the transmission corridor between Fermi Unit 2 and the now recently licensed, but as yet unconstructed, Fermi Unit 3.¹⁵ They asserted that the "cumulative impacts associated with" proposed Fermi Unit 3 and its anticipated common transmission corridor must be considered as part of the severe accident mitigation alternatives (SAMA) analysis prepared for the Fermi Unit 2 license renewal application.¹⁶ Although SAMA analyses are conducted as part of the agency's environmental review under the National Environmental Policy Act (NEPA), Joint Petitioners' contention combined safety and environmental concerns, calling into question the ability of both units to survive a prolonged loss of power.¹⁷

In support of their contention, Joint Petitioners referenced, among other things,

¹⁵ Joint Petitioners' Hearing Request at 35 ("Fermi 2 and Fermi 3's safety and environmental risks due to common mode failures, and the potential for mutually initiating/exacerbating radiological catastrophes[] involving the common Transmission Corridor (TC) shared by both units' reactors and pools, have been inadequately addressed in DTE's Fermi 2 License Renewal Application (LRA) and Environmental Report (ER). Also, the cumulative impacts associated with the proposed new Fermi 3 reactor cannot be excluded from DTE's Fermi 2 LRA and ER as 'remote' or 'speculative,' for it is DTE's own proposal, and is advanced in the Fermi 3 [combined license] proceeding. Such environmental and safety analysis is required on this unique local problem specific to Fermi 2 and 3. It can, and must, be dealt with in Severe Accident Mitigation Alternatives (SAMA) analyses, and must be treated as Category 2 Issues in NRC's forthcoming Draft Supplemental Environmental Impact Statement (DSEIS), as required by NEPA and the AEA."). Category 2 issues are environmental issues the agency considers on a site-specific basis under the National Environmental Policy Act (NEPA) for license renewal. Category 1 issues are those environmental issues that the agency has resolved generically and therefore does not consider in specific license renewal proceedings. 10 C.F.R. Part 51, Subpart A, App. B, tbl. B-1.

¹⁶ *Id.* We require license renewal applicants to provide a consideration of alternatives to mitigate severe accidents in their license renewal application "[i]f the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment." 10 C.F.R. § 51.53(c)(3)(ii)(L). SAMA analyses are conducted for the purposes of the NRC's environmental review under NEPA; they are not safety analyses. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 322 (2012) ("The SAMA analysis is a site-specific analysis focusing on potential additional mitigation measures that could be implemented to *further* reduce severe accident risk (probability or consequences). The analysis by practice has been a cost-benefit analysis, examining whether particular hardware or procedural changes may be cost-beneficial to implement, given the degree of risk reduction that reasonably could be expected from the change."). For a detailed discussion of the conduct of SAMA analyses in NRC license renewal proceedings, see *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39 (2012).

¹⁷ See Joint Petitioners' Hearing Request at 40-43.

accounts of the March 11, 2011, Fukushima Dai-ichi nuclear accident in Japan.¹⁸ Joint Petitioners also listed a selection of DTE's SAMA candidates and asserted that the implementation costs for those SAMAs are "relatively low" and "minimal" compared to DTE's daily profits from electricity sales and the potential human and economic costs from an accident at Fermi Unit 2.¹⁹

The Board divided Contention 4 into two parts. Part "A" tracked the text of the contention as proposed in Joint Petitioners' hearing request and described above.²⁰ The Board found this portion of the contention inadmissible.²¹ For part "B" of the contention, the Board extracted a portion of Joint Petitioners' reference to the Fukushima Dai-ichi accident, where, as part of its support for Contention 4 overall, Joint Petitioners hypothesized that an accident at Fermi Unit 2 or Fermi Unit 3 could lead to the evacuation of the entire Fermi site.²² The Board observed that "a fission product release from Fermi 2 would adversely impact the operation of Fermi 3, thereby increasing the total costs resulting from a release from Unit 2" and reformulated the contention to read:

The Fermi 2 Severe Accident Mitigation Alternatives analysis fails to evaluate the impact that a severe accident at Fermi 2 would have on the operation of the proposed nearby Fermi 3.²³

The Board admitted the contention as reformulated.²⁴

On appeal, DTE argues that Contention 4B should not have been admitted for several reasons.²⁵ But in what we find to be the strongest argument for reversal,

¹⁸ *See id.* at 42-46.

¹⁹ *Id.* at 53.

²⁰ LBP-15-5, 81 NRC at 268 (majority opinion).

²¹ *Id.* at 270-72. Because the Board declined to admit part A, we do not discuss it further here.

²² *Id.* at 272 (citing Joint Petitioners' Hearing Request at 38).

²³ *Id.* at 273.

²⁴ *Id.* at 277.

²⁵ In particular, DTE asserts that Joint Petitioners "never claimed that DTE overlooked any potential SAMAs (cost-beneficial or otherwise) relevant to offsite or onsite power" and that they failed to challenge DTE's conclusion that the SAMA candidates evaluated in the Environmental Report were not cost-beneficial. Appeal at 5. In addition, DTE asserts that the contention fails to demonstrate a genuine dispute because Joint Petitioners did not explain how an accident at Unit 2 would impact Unit 3 and, in turn, the SAMA analysis in DTE's license renewal application. *Id.* at 7 & n.18. DTE also argues that "the premise underlying the contention is too speculative to meet the standards for admissibility" because the timing of the construction of Fermi Unit 3 is not settled. *Id.* at 6. Since the filing of DTE's appeal, the Staff has issued the combined license for Fermi Unit 3. *See DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-13, 81 NRC 555, 589 (2015) (authorizing issuance of the combined license). Nevertheless, as DTE represented at the uncontested hearing on that application, the timing of construction is still uncertain. Transcript of Mandatory
(Continued)

DTE asserts that the Board improperly supplemented Joint Petitioners' claims to admit the contention.²⁶ DTE argues that the Board made the argument for Joint Petitioners that additional SAMA candidates could become cost-beneficial after factoring in the costs of any impacts to Fermi Unit 3 from an accident originating at Fermi Unit 2.²⁷ DTE also argues that the Board, "without any support or reference to the contention itself," hypothesized that it would be "genuinely plausible" for two particular SAMA candidates to more than triple in benefit relative to their cost, thus making them cost-beneficial.²⁸

We agree that the Board erred in admitting Joint Petitioners' Contention 4B. Comparing Joint Petitioners' contention as originally proposed to the Board's formulation, we find that the arguments on which the Board relied in admitting Contention 4B originated with the Board rather than Joint Petitioners. Although boards have some discretion to reformulate or narrow contentions "to eliminate extraneous issues or to consolidate issues for a more efficient proceeding," this authority is not without limit.²⁹ A licensing board, for example, may not supply information that is lacking in a contention that otherwise would be inadmissible.³⁰

Here, the Board exceeded its authority when it reformulated Joint Petitioners' Contention 4B. The Board selected text from Joint Petitioners' discussion of Contention 4 that, similar to the evacuation contemplated during the Fukushima accident, "[a] large-scale radioactivity release" from the Fermi Unit 2 reactor or spent fuel pool or Fermi Unit 3 reactor or spent fuel pool "could well lead to the evacuation of the entire Fermi nuclear power plant site — of the workforces for both plants, and even of emergency responders (such as firefighters, or military personnel) brought in from offsite to deal with a disaster."³¹ But Joint Petitioners did not provide any nexus between this statement and any deficiencies in DTE's SAMA analysis, which would have been necessary to establish a genuine dispute for an admissible contention.³² Rather, in context, the statement is provided as support for Joint Petitioners' argument that the transmission lines connecting the units to the grid, whether they are considered "offsite" or "onsite," could lead to

Hearing at 209-10 (attached as Appendix B to Order of the Secretary (Adopting Proposed Transcript Corrections and Admitting Post-Hearing Exhibits) (Mar. 9, 2015) (unpublished) (ADAMS Accession No. ML15068A411)).

²⁶ Appeal at 8-10.

²⁷ *Id.* at 8.

²⁸ *Id.* at 9.

²⁹ *Crow Butte*, CLI-09-12, 69 NRC at 552-53 (internal quotation marks omitted).

³⁰ *Id.* at 552-53, 565-66.

³¹ LBP-15-5, 81 NRC at 272 (quoting Joint Petitioners' Hearing Request at 38).

³² See 10 C.F.R. § 2.309(f)(1)(vi); *Seabrook*, CLI-12-5, 75 NRC at 323-24.

a common accident scenario between Fermi Unit 2 and proposed Fermi Unit 3.³³ We find nothing in Joint Petitioners' hearing request that would justify making the evacuation issue a stand-alone contention.

As DTE points out, the Board itself supplied the reasoning that because an accident at Fermi Unit 2 would impact Fermi Unit 3, "DTE should have evaluated the adverse impacts on the operation of Fermi 3 as costs averted by SAMAs that would reduce the risk of a severe accident at Fermi 2 or the consequences of such an accident."³⁴ Then the Board, again on its own initiative, selected certain SAMA candidates whose implementation DTE had rejected because their costs outweighed their benefits.³⁵ The Board concluded that "[i]t is genuinely plausible, given the moderate costs of . . . [these SAMAs], that . . . the costs averted [from a fission product release at Fermi Unit 2] would increase to the point that one or both of those SAMAs would become cost-beneficial."³⁶ Although Joint Petitioners had listed these SAMAs in their hearing request as part of a larger list of candidates that they deemed related to their transmission-corridor/loss-of-power contention, they did not identify a specific deficiency in DTE's SAMA analysis or argue that such a deficiency, once corrected, would tip the balance in favor of finding the listed SAMAs cost-beneficial.³⁷

Rather, Joint Petitioners asserted that the costs of the rejected SAMA candidates are minimal compared to DTE's daily profits from its electricity sales and the potential human and economic costs from an accident at Fermi Unit 2.³⁸ But Joint Petitioners' conclusory statements do not amount to a challenge to the SAMA analysis.³⁹ First, with regard to the cost-benefit balance in the SAMA analysis, DTE's profits are immaterial. The cost of implementing a particular mitigation measure compared to the risk averted from its implementation is what determines

³³ See Joint Petitioners' Hearing Request at 38. At oral argument, Joint Petitioners maintained that their contention related to the loss of offsite power along a shared transmission corridor. See Oral Argument Transcript at 84, 91 (Tr.). The evacuation issue was raised during Board questioning, but even then, Joint Petitioners linked the issue to the transmission corridor. See *id.* at 94-95, 98-99, 107, 113-15.

³⁴ LBP-15-5, 81 NRC at 273. Although the Board attributes this statement to Joint Petitioners, see *id.*, the Board does not reference Joint Petitioners' hearing request, nor do we find this argument in Joint Petitioners' contention.

³⁵ *Id.* at 277.

³⁶ *Id.*

³⁷ See Joint Petitioners' Hearing Request at 49-54.

³⁸ *Id.* at 53.

³⁹ See *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 conclusory statement that an envisioned SAMA 'would not pose a great challenge' is insufficient."); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 363 (2001) (finding that "highly generalized" arguments "do not come close to meeting our contention rule").

whether a mitigation measure is cost-beneficial.⁴⁰ Second, Joint Petitioners must, at a minimum, provide “factual or expert basis for why the proposed changes in the analysis are warranted (e.g., why the inputs or methodology used is unreasonable, and the proposed changes or methodology would be more appropriate),” and their generalized reference to the potential human and economic costs from an accident at Fermi Unit 2 falls short of the support necessary for a SAMA contention.⁴¹ Joint Petitioners did not engage, with any specificity, the economic consequences of an accident at Fermi Unit 2 already considered in DTE’s SAMA analysis.⁴² Therefore, Joint Petitioners’ Contention 4B (were we to consider it a stand-alone contention without the Board’s amplifications) failed to demonstrate a genuine dispute with the SAMA analysis provided in DTE’s Environmental Report.⁴³ Consequently, it should not have been admitted.

B. CRAFT Contention 2

We find that the Board also improperly supplemented the remaining contentions it admitted in LBP-15-5. In Contention 2, CRAFT questioned whether the Staff had adequately notified area Indian Tribes and First Nations, including the Walpole Island First Nation, of the license renewal proceeding for Fermi Unit 2.⁴⁴ Without this notice, CRAFT asserted, these Tribes and First Nations might

⁴⁰ See *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 706-07 (2012) (“By NRC practice to date, the SAMA analysis has been a quantitative cost-benefit analysis, assessing whether the cost of implementing a specific enhancement outweighs its benefit.”).

⁴¹ *Seabrook*, CLI-12-5, 75 NRC at 323-24.

⁴² See *id.* at 323 (“We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely ‘suggestions’ of other ways an analysis could have been done, or other details that could have been included. SAMA adjudications would prove endless if hearings were triggered merely by suggested alternative inputs and methodologies that conceivably could alter the cost-benefit conclusions.”).

⁴³ See 10 C.F.R. § 2.309(f)(1)(vi); cf. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 577 (1975) (“In sum, we think the Board was wrong to strain to discern the outlines of any contention in a petition as amorphous as this one.”).

⁴⁴ CRAFT Hearing Request at 9-10 (“While it appears that NRC notified a number of Native American tribes across Michigan, as far away as Wisconsin and even Oklahoma, about the environmental scoping public comment opportunity for the proposed extension of the Fermi 2 nuclear reactor license, it seems that NRC did not notify numerous Native American tribes, bands, and First Nations in the area of concern. Likewise, it is unclear that NRC adequately notified even the aforementioned tribes in Michigan, Wisconsin, and Oklahoma of their rights to intervene with contentions in that proceeding, in addition to their opportunity to provide public comments during the environmental scoping proceedings; it seems clear that the tribes, bands, and First Nations not notified of their environmental scoping public comment opportunity were also not informed of their right to intervene against extending Fermi 2’s license. . . . [T]ribes cannot intervene . . . if NRC fails to inform

(Continued)

not have been aware of the opportunity to request a hearing on DTE's license renewal application or the opportunity to participate in the scoping process for the Staff's environmental review.⁴⁵ CRAFT therefore requested that the Board require the Staff to "notify the tribes of their rights and opportunity [to request a hearing], and provide them at least sixty days in which to submit . . . contentions" and "at least sixty days to submit public comments" for the environmental scoping process.⁴⁶

As DTE points out, the contention that the Board admitted in LBP-15-5 differed significantly from the one that CRAFT originally proposed.⁴⁷ Based on information that CRAFT raised for the first time in its reply — a letter from the Chief of the Walpole Island First Nation that cited its members' active fishing and harvesting of resources in close proximity to Fermi Unit 2 and CRAFT's statement that it disagreed with the environmental justice conclusions in DTE's Environmental Report⁴⁸ — the Board, with Judge Arnold dissenting, held that Contention 2 raised an admissible challenge to DTE's discussion of subsistence fishing in the Fermi site vicinity.⁴⁹ The Board also noted that CRAFT had included a preface for all of its contentions, which among other things, asserted that there were "material deficiencies" in DTE's license renewal application "that could significantly jeopardize (impact) public health and safety."⁵⁰ According to the Board, this statement, along with an additional reference to the Walpole Island

them of the proceeding, and their opportunity and right to petition for leave to intervene and submit official contentions. Many tribal members had no idea their tribal governments were allowing the contamination of the lands they are guaranteed to hunt, fish, and gather food forevermore. These tribal members allow CRAFT to represent them in this proceeding.").

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 12.

⁴⁷ *See* Appeal at 13-17.

⁴⁸ *See* CRAFT Reply at 21-23; Miskokomon, Dan, Chief, Walpole Island First Nation, Letter to Allison M. Macfarlane, NRC (Sept. 22, 2014) (ADAMS Accession No. ML14265A490) (requesting "an opportunity to thoroughly review the license renewal process to ensure that . . . [the First Nation's] rights are protected") (Miskokomon Letter). The Staff filed a motion to strike portions of CRAFT's reply, including the new environmental justice issue in CRAFT Contention 2. *See* NRC Staff Motion to Strike Portions of CRAFT's Reply (Oct. 2, 2014) at 4-5, Attachment 1. DTE supported the Staff's motion; CRAFT opposed it, claiming that its new arguments fell within the scope of its original contention and DTE's and the Staff's answers. DTE Electric Company Response in Support of NRC Staff Motion to Strike Portions of CRAFT's Reply (Oct. 14, 2014) at 2; CRAFT Reply to NRC Staff Motion to Strike (Oct. 10, 2014) at 1-2. The Board denied the Staff's motion to strike CRAFT's environmental justice claim because it found that CRAFT's arguments "legitimately amplif[ied]" the "subsistence consumption" issue in CRAFT Contention 2. LBP-15-5, 81 NRC at 285. As discussed further below, however, we disagree with the Board's determination.

⁴⁹ LBP-15-5, 81 NRC at 280-82; *id.* at 310-13 (Arnold, J., dissenting). CRAFT also asserted at oral argument that its original contention, which asserted that the Walpole Island First Nation had been excluded from the proceeding, implied an environmental justice component. Tr. at 197.

⁵⁰ LBP-15-5, 81 NRC at 280 (majority opinion) (quoting CRAFT Hearing Request at 3).

First Nation’s consumption of food obtained near the Fermi site, supported the admission of a narrowed contention that asserted:

The [Environmental Report] failed to consider whether members of the Walpole Island First Nation would be negatively affected by the renewal of the Fermi 2 operating license due to impacts on tribal hunting and fishing rights, especially with respect to the potential consumption of contaminated foods.⁵¹

We find that the Board in this instance improperly reformulated CRAFT Contention 2. The Board’s decision turned CRAFT’s “notification” contention, which requested relief in the form of additional time for the Walpole Island First Nation and other Tribes and First Nations in the vicinity of the Fermi site to propose contentions and to comment on the scoping for the Staff’s environmental review, into a “subsistence consumption contention” that challenged the Environmental Report’s consideration of impacts to the Walpole Island First Nation’s food supply from the renewal of DTE’s operating license for Unit 2. But CRAFT’s statement of its contention, its requested relief, and the supporting statements, all pointed to a contention regarding the Staff’s purported failure to notify area Tribes and First Nations of the license renewal proceeding — a claim that the Board dismissed as inadmissible.⁵² We give some leeway to pro se litigants in our adjudicatory proceedings, but even though CRAFT is not represented by counsel, the Board

⁵¹ *Id.* at 282. Judge Arnold disagreed with the Board’s admission of Contention 2; in his view, the Board majority “crossed an ill-defined line and improperly assembled a contention from bits and pieces taken from . . . [CRAFT’s hearing request and reply].” *Id.* at 310 (Arnold, J., dissenting).

⁵² *Id.* at 279-80 (majority opinion). At oral argument, CRAFT reiterated that Contention 2 was focused on notification. *See* Tr. at 191-92. Moreover, in response to prompts during Board questioning, CRAFT did not raise a specific challenge to DTE’s license application. *See id.* at 193-94 (“JUDGE SPRITZER: If we had such a hearing, what precise arguments would you present on behalf of your members who are also members of the Walpole Nation? MS. COLLINS: That their lives and livelihood are endangered, would be further endangered. That this is a violation of international law and international treaty rights. And that they need to be a full partner in the hearings, not just us, not just CRAFT representing a few of their members.”). At oral argument CRAFT also indicated, in response to Board questioning, that the Walpole Island First Nation is aware of the *Fermi* license renewal proceeding. *Id.* at 192. In addition, the Staff referred to the letter it received from the Chief of the Walpole Island First Nation and explained that the Staff’s response, among other things, provided background on the license renewal application review process and invited the Walpole Island First Nation to comment on the Staff’s draft supplemental environmental impact statement. *Id.* at 204-05; *see also* Miskokomon Letter; Dean, William M., NRC, Letter to Dan Miskokomon, Chief, Walpole Island First Nation (Oct. 31, 2014) (ADAMS Accession No. ML14295A239) (responding to Miskokomon Letter).

should not have read into CRAFT's petition a different challenge from the one CRAFT presented in Contention 2.⁵³

The Board also improperly bolstered the admitted contention with CRAFT's argument made on reply concerning DTE's environmental justice discussion.⁵⁴ Although a petitioner may respond to the legal or logical arguments presented in the answers to its hearing request, a petitioner may not use its reply to raise new issues for the first time.⁵⁵ We require adherence to the deadlines and procedures in our rules so that the other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information.⁵⁶

⁵³ See *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) (noting that although "a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, . . . the board cannot do so by ignoring the [contention admissibility] requirements" and emphasizing that "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions"); cf. *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) ("[T]he lenient treatment generally accorded to pro se litigants has limits."); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. . . . At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant."). We are unpersuaded by the Board's determination that the preface to CRAFT's contentions provided the necessary context to establish a substantive component to Contention 2. LBP-15-5, 81 NRC at 286-88. This agency has long recognized that contentions must be pled with sufficient specificity to put opposing parties on notice of which claims they will actually have to defend. *Wolf Creek*, ALAB-279, 1 NRC at 576. The preface contained general and unparticularized references to "health and safety significance" and "material deficiencies" in the Environmental Report. Such statements would not satisfy our rule that contentions be pled with specificity. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 391 (2012). Therefore the material in the preface to CRAFT's contentions would not have put a reasonable participant on notice that despite Contention 2's repeated reference to inadequate notification, it also contained a substantive challenge regarding hunting and fishing rights.

⁵⁴ The Board also held that as reformulated, "Contention 2 would remain viable even had [the Board] granted the Staff's motion to strike" because CRAFT's reference to environmental justice "merely amplified the subsistence consumption issue initially raised in Contention 2." LBP-15-5, 81 NRC at 285-86. As discussed above, however, the Board's reasoning is flawed because Contention 2, as originally proposed, did not raise a subsistence-consumption issue but instead focused on notice.

⁵⁵ *Crow Butte*, CLI-09-12, 69 NRC at 568; *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); see also Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

⁵⁶ Cf. *Wolf Creek*, ALAB-279, 1 NRC at 576 ("The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being [sought]."). That said, we recognize that certain contentions may be premature if raised at the outset of a proceeding, including, for example, contentions that challenge

(Continued)

For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier.⁵⁷

Here, CRAFT's environmental justice concerns were not timely raised.⁵⁸ Therefore, the Board should have applied the standards in 10 C.F.R. § 2.309(c) to determine whether CRAFT had demonstrated good cause for its late filing.⁵⁹ The Board abused its discretion when it refocused CRAFT Contention 2 with the new material raised in CRAFT's reply. CRAFT Contention 2, as reformulated by the Board, is inadmissible.

C. CRAFT Contention 8

In Contention 8, CRAFT challenged several aspects of DTE's SAMA analysis, but the Board found support for, and admitted, a narrowed portion of the contention regarding the adequacy of DTE's population estimates for determining the economic cost of a severe accident at Fermi Unit 2.⁶⁰ CRAFT argued that "[p]roper inputs specific to the Fermi site indicate a far larger affected area — potentially including the densely populated centers of Metro Detroit [(Michigan)],

the Staff's consultation with affected Indian Tribes under the National Historic Preservation Act. *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350-51 (2009) ("[W]hether and how the Staff fulfills its . . . [consultation] obligations are issues that could form the basis for a new contention . . ."). Such a contention might appropriately be made in a timely fashion after the Staff issues its draft environmental impact statement. *See* 10 C.F.R. § 2.309(c); *Crow Butte*, CLI-09-9, 69 NRC at 351.

⁵⁷ *See, e.g., Crow Butte*, CLI-09-12, 69 NRC at 548-49, 568-70.

⁵⁸ Compare CRAFT Hearing Request at 9-13, with CRAFT Reply at 21-23. Even were we to read CRAFT Contention 2 in the most favorable light, we do not agree that the environmental justice issue was implied by CRAFT's claim that the Walpole Island First Nation was excluded from the proceeding. *See* Tr. at 197. Our contention requirements require a level of specificity beyond mere "notice pleading." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003) (instructing that the contention pleading standards "require petitioners to plead specific grievances, not simply to provide general 'notice pleadings'"). CRAFT's original contention did not point to any specific grievance with the environmental justice discussion provided in DTE's Environmental Report. *See* CRAFT Hearing Request at 9-13. Nor did CRAFT articulate a "disproportionately high and adverse impact" to the Walpole Island First Nation. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 369, 371 (2015).

⁵⁹ *See Crow Butte*, CLI-09-12, 69 NRC at 568-69. In any event, based on our review of the record, this new claim would not have met the timeliness standards because CRAFT could have raised its environmental justice concerns when it filed its initial petition. *See* 10 C.F.R. § 2.309(c)(1); *Crow Butte*, CLI-09-12, 69 NRC at 568-69. In 2012, we consolidated our timeliness requirements in one section, section 2.309(c). Final Rule: "Amendments to Adjudicatory Process Rules and Related Requirements," 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012).

⁶⁰ *See* CRAFT Hearing Request at 25-28; LBP-15-5, 81 NRC at 297.

Ann Arbor [(Michigan)], Monroe [(Michigan)], Toledo [(Ohio)], and Windsor [(Ontario, Canada)],” which “would result in longer evacuation times and greater costs and consequences.”⁶¹ The Board understood “CRAFT to argue that these cities were excluded unreasonably from the SAMA analysis, leading DTE to ‘drastically undercount[] the costs of a [s]evere [a]ccident.’”⁶²

In its answer before the Board, DTE explained that the population within 50 miles of the Fermi site was considered in the SAMA analysis, “including Detroit, Ann Arbor, Monroe, and Toledo.”⁶³ DTE also asserted at oral argument that its SAMA analysis “modeled the population within 50 miles irrespective of . . . whether that location was within the United States or Canada or the Walpole Island.”⁶⁴ But because DTE did not specifically mention Windsor, Ontario, in its answer or at oral argument, the Board concluded that CRAFT’s concerns about the adequacy of DTE’s population inputs were justified.⁶⁵ The Board also reviewed the Environmental Report and concluded that the document contradicted “DTE’s assurances that Canadians living within 50 miles of Fermi 2 were included in the SAMA analysis.”⁶⁶ In particular, the Board referenced a separate chapter of the Environmental Report that listed cities within a 50-mile radius of the Fermi site with a population greater than 100,000 and noted the absence of any Canadian cities on that list.⁶⁷ Comparing CRAFT’s population argument to a contention that was admitted in the *Indian Point* license renewal proceeding, the *Fermi* Board concluded that CRAFT Contention 8 was “equally admissible” because it argued “that DTE failed to consider the costs and consequences of a severe accident on the population of Windsor in the SAMA analysis.”⁶⁸ The Board reformulated the contention to state that:

⁶¹ CRAFT Hearing Request at 27.

⁶² LBP-15-5, 81 NRC at 296 (first alteration in original).

⁶³ DTE Answer at 43.

⁶⁴ Tr. at 210.

⁶⁵ See LBP-15-5, 81 NRC at 297-98.

⁶⁶ *Id.* at 297.

⁶⁷ *Id.* at 297-98.

⁶⁸ *Id.* at 298 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-10-13, 71 NRC 673, 686-87 (2010); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 112-13 (2008)). In *Indian Point*, the petitioner asserted that the applicant underestimated the population projections used in the SAMA analysis in part through failure to consider certain U.S. Census estimates and non-resident populations (tourists and commuters). See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246, 475-76 (2013). After the hearing, the *Indian Point* Board found reasonable the SAMA analysis’s population projections in the Staff’s supplemental environmental impact statement and resolved the contention in favor of the Staff. See *id.* at 484. As we discuss below, however, the Board’s comparison of this contention with the contention admitted in *Indian Point* is inapposite because the Board inappropriately supplemented Contention 8.

[t]he SAMA cost-benefit calculation is incorrect and thus inadequate because it did not properly account for the Canadian population within the 50-mile affected area of a [s]evere [a]ccident.⁶⁹

On appeal, DTE argues that the Board incorrectly assumed that the Canadian population was omitted from DTE's SAMA analysis.⁷⁰ DTE reiterates that its SAMA analysis accounted for the population within 50 miles of the Fermi site and emphasizes that it accounted for increases in population through tourism data from Michigan and Ohio in the United States, as well as Ontario, Canada, which, according to DTE, "establish[es] that the entire population within 50 miles of the site — including the Canadian population — was considered in the SAMA analysis."⁷¹ Because the contention incorrectly asserts that this information is omitted, DTE argues that CRAFT Contention 8 as reformulated by the Board fails to establish a genuine dispute with the license renewal application.⁷² We find that CRAFT has not raised a genuine dispute with DTE's application and therefore the contention, as reformulated by the Board, is inadmissible.⁷³

CRAFT did not identify any specific portion of the Environmental Report to support its claims regarding the treatment of the Canadian population in the SAMA analysis. Further, the Board improperly bolstered CRAFT's contention by referencing additional sections of the Environmental Report not cited by CRAFT to suggest that the SAMA analysis inappropriately discounted the Canadian population. Similar to our findings above with regard to Joint Petitioners' Contention 4B and CRAFT Contention 2, we find that the Board abused its discretion when it supplemented the support for CRAFT Contention 8 with additional references to the Environmental Report. Although our boards are expected to review the relevant documents to determine whether the arguments presented by the litigants are properly supported, the Board may not substitute its own support for a contention or make arguments for the litigants that were never made by the litigants themselves.⁷⁴ CRAFT Contention 8, as reformulated by the Board, is inadmissible.

⁶⁹ LBP-15-5, 81 NRC at 298.

⁷⁰ Appeal at 22.

⁷¹ *Id.* at 21-22.

⁷² *Id.* at 22.

⁷³ See 10 C.F.R. § 2.309(f)(1)(vi).

⁷⁴ See *Crow Butte*, CLI-09-9, 69 NRC at 353-54 (reviewing the underlying support for a contention and noting that the board appropriately did not weigh the evidence, but rather "determine[d] whether the contention was supported and raised a genuine dispute material to, and within the scope of, the proceeding"); *Crow Butte*, CLI-09-12, 69 NRC at 565-71 (finding board error in the reformulation of contentions with arguments not originally raised by petitioners).

III. CONCLUSION

For the reasons set forth above, we *reverse* the Board's ruling in LBP-15-5 and *direct* the Board to terminate the proceeding.

IT IS SO ORDERED.

For the Commission

RICHARD J. LAUFER
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September 2015.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-391-OL

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant,
Unit 2)

September 24, 2015

REVIEW, DISCRETIONARY

The Commission will grant a petition for review at its discretion, giving due weight to the existence of a substantial question with respect to one or more of the considerations listed in 10 C.F.R. § 2.341(b)(4).

MOTIONS TO REOPEN

Motions to reopen the record in Commission adjudicatory proceedings are governed by 10 C.F.R. § 2.326. The Commission's case law interpreting 10 C.F.R. § 2.326 makes clear that the regulations place an intentionally heavy burden on parties seeking to reopen the record.

MOTIONS TO REOPEN

A motion to reopen will not be granted unless the movant satisfies all three of the criteria listed in 10 C.F.R. § 2.326(a) and the motion is accompanied by an affidavit that satisfies 10 C.F.R. § 2.326(b).

RULES OF PRACTICE: CHALLENGE TO REGULATIONS

Section 2.335(a) of 10 C.F.R. prohibits challenges to our rules and regulations in the context of adjudicatory proceedings.

SUSPENSION OF PROCEEDING

The Commission considers suspension of licensing proceedings a “drastic” action that is not warranted absent immediate threats to public health and safety or other compelling reason.

MEMORANDUM AND ORDER

Southern Alliance for Clean Energy (SACE) has filed a petition for review of LBP-15-14, in which the Atomic Safety and Licensing Board denied SACE’s motion to reopen the record in this proceeding on the Tennessee Valley Authority’s (TVA’s) application for an operating license for Watts Bar Unit 2.¹ For the reasons set forth below, we deny the petition for review.

I. BACKGROUND

SACE’s motion to reopen the record cites the March 12, 2012 request for information to all power reactor licensees and holders of construction permits in active or deferred status, issued by the Staff pursuant to 10 C.F.R. § 50.54(f). The request for information was issued in response to the agency’s evaluation of events leading to the Fukushima Dai-ichi accident of March 2011.² Regarding seismic and flooding hazards,³ the request for information described a two-phase

¹ Southern Alliance for Clean Energy’s Petition for Review of LBP-15-14 Denying Admission of a New Contention Concerning TVA’s Failure to Comply with 10 C.F.R. § 50.34(b)(4) (May 18, 2015) (SACE Petition for Review); *see* LBP-15-14, 81 NRC 591 (2015).

² Leeds, Eric J., Director, Office of Nuclear Reactor Regulation, and Johnson, Michael R., Director, Office of New Reactors, Letter to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status (Mar. 12, 2012) (ADAMS Accession No. ML12053A340) (Request for Information).

³ *See* “Proposed Orders and Requests for Information in Response to Lessons Learned from Japan’s March 11, 2011, Great Tohoku Earthquake and Tsunami,” Commission Paper SECY-12-0025 (Feb. 17, 2012) (ADAMS Accession No. ML12039A111); Staff Requirements — SECY-12-0025 — Proposed Orders and Requests for Information in Response to Lessons Learned from Japan’s March 11, 2011, Great Tohoku Earthquake and Tsunami (Mar. 9, 2012) (ADAMS Accession No. ML120690347); *see* (Continued)

approach for hazard evaluation: the Staff first requested that licensees submit to the Staff reevaluations of seismic and flooding hazards at their sites. The letter then stated that the Staff would implement the second phase by determining the need for additional regulatory actions based on the information submitted.⁴

TVA submitted its seismic hazard reevaluation and screening for Watts Bar Nuclear Plant on March 31, 2014.⁵ Based on this submission, the Staff determined that Watts Bar Units 1 and 2 would require additional seismic risk evaluation.⁶ In response, TVA submitted an Expedited Seismic Evaluation Process Report for Watts Bar on December 30, 2014, concluding that no modifications or additional regulatory commitments were necessary.⁷

The Board had terminated this adjudicatory proceeding on September 9, 2014, following resolution of the last contested issue.⁸ On February 5, 2015, SACE filed motions to reopen the record and for leave to file a new contention based on the information contained in TVA's Expedited Seismic Report.⁹ TVA and

also Staff Requirements — SECY-11-0137 — Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ADAMS Accession No. ML113490055) (SRM-SECY-11-0137).

⁴ Request for Information at 4-5.

⁵ Tennessee Valley Authority, "Tennessee Valley Authority's Seismic Hazard and Screening Report (CEUS Site), Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendation 2.1 of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (Mar. 31, 2014) (ADAMS Accession No. ML14098A478) (TVA Seismic Hazard Report).

⁶ Leeds, Eric J., Director, Office of Nuclear Reactor Regulation, Letter to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status (May 9, 2014), at 5 (ADAMS Accession No. ML14111A147) (Leeds Letter). Watts Bar and several other plants were "screened in" and directed to complete further seismic evaluations based on a higher reevaluated seismic hazard.

⁷ Tennessee Valley Authority, "Tennessee Valley Authority's Watts Bar Nuclear Plant Expedited Seismic Evaluation Process Report (CEUS Sites) Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendation 2.1 of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (Dec. 30, 2014) (ADAMS Accession No. ML14365A072) (Expedited Seismic Report).

⁸ LBP-14-13, 80 NRC 142 (2014). We have authorized the Director of the Office of Nuclear Reactor Regulation (NRR) to issue the full-power operating license for Watts Bar 2 if the Director of NRR determines "that the applicable findings may be made and that the proceeding is uncontested." Staff Requirements — SECY-15-0068 — Watts Bar Nuclear Plant, Unit 2 — Review Status and Authority of the Director of the Office of Nuclear Reactor Regulation for Operating License Issuance (May 26, 2015) (ADAMS Accession No. ML15146A213). The Staff's work regarding these findings is ongoing.

⁹ Southern Alliance for Clean Energy's Motion to Reopen the Record (Feb. 5, 2015; corrected Feb. 6, 2015) (Motion to Reopen); Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4) (Feb. 5, 2015; corrected Feb. 6, 2015) (Motion for Leave to File New Contention).

the NRC Staff opposed both motions.¹⁰ In its proposed new contention, SACE asserted that “TVA’s Final Safety Analysis Report . . . is deficient under 10 C.F.R. § 50.34(b)(4) because it does not include the information provided in TVA’s [December] 30, 2014 Expedited Seismic Evaluation Process . . . Report for Watts Bar Nuclear Plant.”¹¹

The Board denied SACE’s motion to reopen the record, finding that SACE did not satisfy the requirements for reopening set forth in our rules of practice.¹² SACE has now petitioned for our review of the Board’s decision. The NRC Staff and TVA oppose SACE’s petition.¹³

II. DISCUSSION

A. Standard of Review

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to one or more of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which we may deem to be in the public interest.¹⁴

¹⁰ NRC Staff’s Answer to Southern Alliance for Clean Energy’s Motion for Leave to File a New Contention (Mar. 3, 2015) (Staff’s Answer Opposing SACE’s Motion for New Contention); Tennessee Valley Authority’s Answer Opposing Southern Alliance for Clean Energy’s Motion for Leave to File a New Contention (Mar. 3, 2015) (TVA’s Answer Opposing SACE’s Motion for New Contention); NRC Staff’s Answer to Southern Alliance for Clean Energy’s Motion to Reopen the Record (Feb. 18, 2015) (Staff’s Answer Opposing SACE’s Motion to Reopen); Tennessee Valley Authority’s Answer Opposing Southern Alliance for Clean Energy’s Motion to Reopen the Record (Feb. 17, 2015) (TVA’s Answer Opposing SACE’s Motion to Reopen).

¹¹ Motion for Leave to File a New Contention at 1.

¹² LBP-15-14, 81 NRC at 596. In so holding, the Board declined to address the merits of SACE’s motion for leave to file a new contention. *Id.*

¹³ NRC Staff Answer Opposing the Southern Alliance for Clean Energy Petition for Review of Board Decision LBP-15-14 (June 12, 2015) (Staff’s Opposition to SACE Petition); Tennessee Valley Authority’s Answer Opposing Southern Alliance for Clean Energy’s Petition for Review of LBP-15-14 (June 12, 2015) (TVA’s Opposition to SACE Petition).

¹⁴ 10 C.F.R. § 2.341(b)(4).

SACE argues that the Board’s decision raises “important issues of law and policy.”¹⁵

As discussed below, we find that SACE has not raised a substantial question that merits review. SACE has not identified any error in the Board’s application of our reopening standards to its motion to reopen the record.

B. Reopening Standards

Motions to reopen the record in our adjudicatory proceedings are governed by 10 C.F.R. § 2.326, which states the following:

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

Our case law interpreting section 2.326 makes clear that the regulations place an intentionally heavy burden on parties seeking to reopen the record.¹⁶ The rule reflects the importance of finality in adjudicatory proceedings.¹⁷ As we have noted, “the burden of satisfying the reopening requirements is a heavy one,” and

¹⁵ SACE Petition for Review at 1. Although SACE does not specify the subsection on which it bases its request for review, we presume it intended to rely upon section 2.341(b)(4)(iii).

¹⁶ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009)).

¹⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-55 (1978)).

it rests with the party moving to reopen.¹⁸ To this end, “a motion to reopen will not be granted unless the movant satisfies all three of the criteria listed in 10 C.F.R. § 2.326(a) and [the motion] is accompanied by an affidavit that satisfies 10 C.F.R. § 2.326(b).”¹⁹ We have previously explained that “[w]e consider reopening the record for any reason to be ‘an ‘extraordinary’ action.’”²⁰ Courts of appeal have consistently upheld our reopening standards, noting that “[a]gencies are permitted to impose requirements or thresholds for parties seeking to reopen a closed record”²¹ and acknowledging that these criteria may be “exacting.”²²

C. Analysis

In examining whether SACE’s motion to reopen the record satisfied the requirements of section 2.326, the Board found that SACE’s motion to reopen was timely filed.²³ But the Board determined that SACE had not fulfilled the remaining requirements of section 2.326(a) because it neither addressed a significant safety or environmental issue nor demonstrated the likelihood of a materially different result upon consideration of its proposed new contention.²⁴ Additionally, the Board found that the affidavit that SACE submitted with its motion to reopen the record did not meet the requirements set forth in section 2.326(b).²⁵ As discussed below, SACE has not raised a substantial question with respect to the Board’s ruling.

SACE does not argue that the Board erroneously applied the reopening standards to its motion in its petition for review. Instead, SACE focuses its argument

¹⁸ *Oyster Creek*, CLI-09-7, 69 NRC at 287 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)).

¹⁹ *Id.*

²⁰ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337-38 (2011) (citing Final Rule: “Criteria for Reopening Records in Formal Licensing Proceedings,” 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

²¹ *Massachusetts v. NRC*, 708 F.3d 63, 75 n.18 (1st Cir. 2013) (citing *Vt. Yankee*, 435 U.S. at 554-55 (1978)); see also *New Jersey Environmental Federation v. NRC*, 645 F.3d 220, 233 (3d Cir. 2011) (“We have upheld the motion to reopen standard and deferred to the NRC’s application of its rules, so long as it is reasonable.”); *Oystershell Alliance v. NRC*, 800 F.2d 1201, 1207 (D.C. Cir. 1986) (“In examining petitioners’ plea to reopen the record, we rely on the same court-sanctioned test applied by the Commission . . .”).

²² *N.J. Envtl. Fed’n*, 645 F.3d at 234.

²³ LBP-15-14, 81 NRC at 595 n.30; see 10 C.F.R. § 2.326(a)(1).

²⁴ LBP-15-14, 81 NRC at 595.

²⁵ *Id.* at 596. SACE has not challenged the Board’s determination that its affidavit does not comply with section 2.326(b). Because a party must meet all of the section 2.326 requirements to reopen the record, the motion to reopen could have been deemed insufficient for this reason alone.

on the reopening standards themselves, asserting that “the Board imposed a burden that was greater than what the law required for the contention submitted by SACE.”²⁶ SACE argues that the Board should have required it to demonstrate only that the information was pertinent, but it does not explain why it believes the reopening standards are inapplicable to its motion.²⁷ SACE also argues that by requiring it to meet the reopening standards, the Board “erroneously shifted the burden of proof from TVA to SACE.”²⁸ But the moving party properly bears the burden of meeting the reopening standards.²⁹

In requiring SACE to meet the reopening standards set forth in section 2.326, the Board complied with our rules of practice and procedure. Section 2.335(a) of our regulations prohibits challenges to our rules and regulations in the context of adjudicatory proceedings.³⁰ By arguing that it should have been allowed to meet a lesser standard when moving to reopen the record, SACE impermissibly challenges the reopening standard.

SACE also argues that the Board disregarded its concerns about the Staff’s review of TVA’s responses to the request for information regarding seismic hazards post-Fukushima. SACE expresses concern that the Staff, in reviewing these responses, will apply an “imminent risk standard,” which SACE believes will result in a less rigorous review of the information than would be performed if review of the report were conducted as part of the Staff’s review of the Watts Bar 2 operating license application.³¹ In support of this assertion, SACE cites a letter from William M. Dean, Director, Office of Nuclear Reactor Regulation, to SACE’s counsel.³² SACE seems to infer from Mr. Dean’s letter that “imminent risk” is a standard against which the Staff evaluates updated seismic hazard information from licensees. But taken in context, the phrase “imminent risk” reflects the NRC’s determination that, post-Fukushima, continued operation of

²⁶ SACE Petition for Review at 6.

²⁷ *Id.* at 5.

²⁸ *Id.* at 7.

²⁹ TVA retains the burden of proof on the question whether the license should be issued, pursuant to 10 C.F.R. § 2.325. See *Oyster Creek*, CLI-09-7, 69 NRC at 269 (citing *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983)).

³⁰ Section 2.335 permits parties to petition for a waiver or exception from this prohibition. But SACE has not petitioned for a waiver or exception.

³¹ SACE Petition for Review at 7.

³² *Id.* (citing Dean, William M., Director, Office of Nuclear Reactor Regulation, NRC, Letter to Ms. Diane Curran, c/o Southern Alliance for Clean Energy (Nov. 21, 2014) (ADAMS Accession No. ML14267A466) (Dean Letter) (“However, the NRC also concluded that continued plant operation and licensing activities, including the review of the Watts Bar Unit 2 operating license application, can continue because these actions do not pose an imminent risk to public health and safety.”). The Dean Letter was prepared in response to concerns expressed by SACE (similar to those raised in its motion to reopen) to then-Chairman Allison Macfarlane.

U.S. nuclear plants and continued licensing activities pose no imminent risk to public health and safety.³³ The letter does not indicate that the Staff would apply an “imminent risk standard” in assessing the seismic hazard information itself. Indeed, the Staff has stated that it will make a “final determination regarding the *adequacy* of any plant’s calculated hazard [,] will continue its review of the submitted seismic hazard reevaluations,”³⁴ and “will determine if safe operation requires additional regulatory action.”³⁵

In its holding on this point, the Board focused on the fact that SACE does not demonstrate the likelihood of a materially different result if the Staff evaluates the Expedited Seismic Report in the context of post-Fukushima actions versus the licensing process.³⁶ It concluded that the benefits of including information found in the Expedited Seismic Report in the Final Safety Analysis Report were speculative and lacked factual support.³⁷ On appeal, SACE does not claim any error in the Board’s analysis of whether SACE had demonstrated that consideration of its proposed contention would likely lead to a materially different result. Therefore, we find that SACE does not raise a substantial question meriting review.

Finally, SACE asserts that the Board’s decision raises the overarching legal and policy question of whether it is permissible for the Staff to issue the Watts Bar 2 operating license before completing its assessment of TVA’s Expedited Seismic Report.³⁸ We have explicitly addressed this point and allow the Staff to issue operating licenses — provided all requisite findings are made — before it completes post-Fukushima regulatory activities.³⁹ Further, we have noted that in general, “[w]e consider suspension of licensing proceedings a ‘drastic’ action that is not warranted absent ‘immediate threats to public health and safety,’ or other compelling reason.”⁴⁰ Specifically in the context of the NRC’s post-Fukushima activities, we observed that “nothing learned to date requires immediate cessation

³³ See *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 161 (2011) (“[N]othing we have learned to date [with respect to the Fukushima accident] puts the continued safety of our currently operating regulated facilities . . . into question. Similarly, nothing learned to date requires immediate cessation of our review of license applications or proposed reactor designs.”).

³⁴ Leeds Letter at 6 (emphasis added).

³⁵ Dean Letter at 2.

³⁶ LBP-15-14, 81 NRC at 595-96.

³⁷ *Id.*

³⁸ SACE Petition for Review at 8.

³⁹ *Callaway*, CLI-11-5, 74 NRC at 166 (“Even for the licenses that the NRC issues before completing its review [of hazards like those that damaged the reactors at the Fukushima site], any new Fukushima-driven requirements can be imposed later, if necessary, to protect the public health and safety.”) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 383-84 (2001)).

⁴⁰ *Id.* at 158 (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008)).

of our review of license applications”⁴¹ SACE has not articulated a reason to revisit these determinations. In sum, SACE does not articulate a substantial question for review. We therefore deny the petition for review.⁴²

Our denial of SACE’s petition for review does not suggest that we take lightly the ongoing review of seismic issues at the Watts Bar site. The Staff is addressing post-Fukushima regulatory seismic activities for all reactor licensees and applicants, including TVA, through a process that we have approved.⁴³ We are confident that the Staff will fully address seismic safety requirements for Watts Bar 2 as part of that review. SACE, and indeed any member of the public, will have the opportunity for additional participation if the Watts Bar 2 licensing basis is updated by amendment after the Staff issues the operating license.⁴⁴

III. CONCLUSION

For the foregoing reasons, we *deny* the petition for review.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
This 24th day of September 2015.

⁴¹ *Id.* at 161.

⁴² SACE also requests that we reconsider our direction to the Staff to use the Watts Bar Unit 1 design basis “as the reference basis for the review and licensing of [Watts Bar] Unit 2.” Staff Requirements — SECY-07-0096 — Possible Reactivation of Construction and Licensing Activities for the Watts Bar Nuclear Plant Unit 2 (July 25, 2007) (ADAMS Accession No. ML072060688); *see* SACE Petition for Review at 9 n.5. We decline to take this action. “[E]xternal entit[ies are not] entitled to seek revisions to a Commission direction to the NRC Staff contained in an SRM.” *U.S. Department of Energy* (High-Level Waste Repository), CLI-14-1, 79 NRC 1, 3-4 (2014).

⁴³ *See* SRM-SECY-11-0137; Staff Requirements — SECY-11-0124 — Recommended Actions to Be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ADAMS Accession No. ML112911571); Dean Letter at 1.

⁴⁴ *See* Dean Letter at 2 (“If the licensing basis is updated by amendment after the Watts Bar 2 operating license is issued as a result of the NRC’s assessment of seismic . . . hazard reevaluations, the public will have an opportunity to comment and request a hearing.”).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary Arnold
Nicholas G. Trikouros

In the Matter of

Docket No. 50-341
(ASLBP No. 14-933-01-LR-BD01)

DTE ELECTRIC COMPANY
(Fermi Nuclear Power Plant,
Unit 2)

September 11, 2015

ORDER
(Terminating Proceeding)

In CLI-15-18, the Commission reversed the Board's decision admitting three contentions and directed the Board to terminate this adjudicatory proceeding regarding license renewal for the Fermi Nuclear Power Plant, Unit 2.¹ Accordingly, this adjudicatory proceeding is *terminated*.

¹ CLI-15-18, 82 NRC 135, 150 (2015).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary Arnold
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 11, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu

In the Matter of

Docket No. 50-247-LA
(ASLBP No. 15-942-06-LA-BD01)

ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Unit 2)

September 25, 2015

Entergy Nuclear Operations, Inc. filed a license amendment request to reduce the frequency of the reactor containment Integrated Leak Rate Test (ILRT) conducted at Indian Point Nuclear Generating Station, Unit 2 from once every 10 years to once every 15 years permanently. The State of New York petitioned to intervene, contending that (1) the requested amendment poses a significant health and safety hazard to the public; and (2) Entergy and the NRC Staff failed to perform allegedly required environmental reviews of the amendment request. The Board concludes that New York fails to proffer an admissible contention and denies its petition.

**REGULATIONS: INTERPRETATION (10 C.F.R. PART 50,
APPENDIX J)**

Appendix J requires that licensees conduct periodic containment leakage tests to provide assurance that (1) leakage from the containment, including components that penetrate the containment, does not exceed the allowable leakage rates specified in the technical specifications; and (2) the containment will perform its

design function following an accident up to and including the plant design-basis accident. *See* 10 C.F.R. Part 50, App. J, Option B, § I.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 50, APPENDIX J)

The containment leakage tests required by Appendix J consist of (1) Type A tests, or ILRTs, that measure the containment's total leakage rate; (2) Type B pneumatic tests that detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries (other than valves); and (3) Type C pneumatic tests that measure containment isolation valve leakage rates. *See* 10 C.F.R. Part 50, App. J, Option B, §§ III.A and III.B.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 50, APPENDIX J)

Of the containment leakage tests, Type B and C tests assure that containment penetrations are essentially leak tight, while Type A tests measure the containment system's overall leakage rate, thereby enabling a licensee to verify the leakage integrity of the containment liner.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 50, APPENDIX J)

The acceptance criteria for Type A tests embodied in the technical specification leakage limits are established to ensure that, in the event of a design-basis accident, the dose received by a member of the general public will not exceed the limits in 10 C.F.R. Part 100. *See* 10 C.F.R. Part 50, App. J, Option B, § II.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.58)

The "no significant hazards consideration" determination is a determination that, if reached by the NRC, permits it to make an authorized license amendment effective immediately pursuant to 10 C.F.R. § 50.58(b)(5), rather than awaiting the outcome of an adjudicatory challenge. As explained by the Commission, it "is a procedural device to determine when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 6 n.3 (1986); *see also* 10 C.F.R. § 50.91 (discussing process for making the no significant hazards consideration determination).

RULES OF PRACTICE: PETITION TO INTERVENE

Before a Licensing Board may grant a timely filed petition to intervene, it must conclude that the petitioner has (1) established standing; and (2) proffered at least one admissible contention. *See* 10 C.F.R. § 2.309(a).

RULES OF PRACTICE: STANDING

Where a State seeks to participate as a party in a proceeding pertaining to a “utilization facility . . . located within [its boundaries] . . . no further demonstration of standing is required.” 10 C.F.R. § 2.309(h)(2).

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

To be admissible, a contention must satisfy the six-factor admissibility test in 10 C.F.R. § 2.309(f)(1). The Commission has stressed that the contention admissibility standard is “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

REGULATIONS: INTERPRETATION (10 C.F.R. PART 50, APPENDIX J)

No “historical event” criterion exists within the “performance criteria” specified in Appendix J, Option B concerning the frequency for performing containment ILRTs. *See* 10 C.F.R. Part 50, App. J, Option B, §§ II and III.

RULES OF PRACTICE: CHALLENGE TO COMMISSION REGULATIONS

A petitioner’s attempt to graft a “historical event” criterion onto the “performance criteria” specified in Appendix J, Option B is an impermissible challenge to Commission regulations pursuant to 10 C.F.R. § 2.335(a), which, *inter alia*, bars contentions that seek to impose a requirement beyond those imposed by a Commission regulation. *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 & n.88 (2012).

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.58)

Pursuant to 10 C.F.R. § 50.58(b)(6), apart from discretionary review by the Commission, the NRC Staff’s no significant hazards consideration determination under section 50.92(c) — whose sole effect is to permit the Staff to make an

authorized license amendment immediately effective despite the pendency of an adjudication — may not be contested. Issues regarding when an authorized license amendment should become effective are irrelevant to a proceeding that involves a challenge to the merits of a license amendment request. Hence, the adequacy of the no significant hazards consideration determination, in addition to being immune from challenge pursuant to section 50.58(b)(6), is not material to, or within the scope of, the proceeding.

RULES OF PRACTICE: CONTENTIONS (10 C.F.R. § 2.309(f)(1)(iv) AND (vi))

Simply referencing a study without explaining the information’s significance relative to the alleged defect does not establish a contention’s materiality as is required by 10 C.F.R. § 2.309(f)(1)(iv), nor does it establish a genuine dispute of fact as is required by 10 C.F.R. § 2.309(f)(1)(vi).

REGULATIONS: INTERPRETATION (10 C.F.R. § 51.22)

Section 51.22 identifies categories of actions that are exempt from NEPA review because the NRC has made a generic finding that the “actions do[] not individually or cumulatively have a significant effect on the human environment.” 10 C.F.R. § 51.22(a). Section 51.22(c)(9), in turn, establishes a categorical exemption for the issuance of a reactor license amendment that changes a requirement, provided that: “(i) The amendment or exemption involves no significant hazards consideration; (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and (iii) There is no significant increase in individual or cumulative occupational radiation exposure.” *Id.* § 51.22(c)(9).

REGULATIONS: INTERPRETATION (10 C.F.R. § 51.22)

The Staff’s no significant hazards consideration determination in section 51.22(c)(9)(i) may not be contested pursuant to 10 C.F.R. § 51.58(b)(6).

REGULATIONS: INTERPRETATION (10 C.F.R. § 51.22)

A petitioner with supporting facts may seek review of a section 51.22(c)(9) determination by at least two methods: (1) challenging either of the findings made under section 51.22(c)(9)(ii) or (iii); and (2) if the requirements of section 51.22(c)(9) are satisfied, by showing the existence of “special circumstances”

pursuant to 10 C.F.R. § 51.22(b) that would justify excepting a proposed license amendment from the categorical exclusion of section 51.22(c).

RULES OF PRACTICE: SCOPE OF ARGUMENTS

It is well established in NRC proceedings that a reply brief cannot introduce new issues or expand the scope of arguments advanced in the original petition; rather, a reply brief must focus on the actual or logical arguments presented in the original petition or raised in answers to it.

MEMORANDUM AND ORDER (Denying New York's Petition to Intervene)

Pending before this Licensing Board is the State of New York's petition to intervene,¹ which seeks to challenge a license amendment request (LAR) submitted by Entergy Nuclear Operations, Inc. (Entergy) for Indian Point Nuclear Generating Station, Unit 2.² For the reasons discussed below, we conclude that New York fails to proffer an admissible contention and, accordingly, we deny its petition.

I. BACKGROUND

In its petition to intervene, New York proffers two contentions challenging Entergy's request to amend its operating license for Indian Point Unit 2 to reduce permanently the frequency of the reactor containment Integrated Leak Rate Test (ILRT) from once every 10 years to once every 15 years. *See* New York Petition at 5, 20. To provide context for New York's contentions, we first discuss containment leakage tests and inspections as they relate to Indian Point Unit 2, and we then recount the procedural history of this case.

¹ *See* State of New York Petition to Intervene and Request for Hearing (May 18, 2015) [hereinafter New York Petition].

² *See* Letter from Lawrence Coyle, Site Vice President, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, NL-14-128 (Dec. 9, 2014) (ADAMS Accession No. ML14353A015) [hereinafter LAR].

A. Containment Leakage Tests and Inspections as They Relate to Indian Point Unit 2

1. Containment Leakage Tests

The containment system is defined as “the principal barrier, after the reactor coolant pressure boundary, to prevent the release of quantities of radioactive material that would have a significant radiological effect on the health of the public.” 10 C.F.R. Part 50, App. J, Option B, § II. The Indian Point Unit 2 containment system is a steel-lined reinforced concrete vertical cylinder with a flat base mat and hemispherical dome that completely encloses the reactor and reactor coolant system. The containment pressure boundary consists of the steel-lined containment structure, containment access penetrations, and other process piping and electrical penetrations.³

Pursuant to 10 C.F.R. § 50.54(o), “[p]rimary reactor containments . . . shall be subject to the requirements set forth in [A]ppendix J to [10 C.F.R. Part 50].” Appendix J requires that licensees conduct periodic containment leakage tests to provide assurance that (1) leakage from the containment, including components that penetrate the containment, does not exceed the allowable leakage rates specified in the technical specifications; and (2) the containment will perform its design function following an accident up to and including the plant design-basis accident. *See* 10 C.F.R. Part 50, App. J, Option B, § I; LAR, Attach. 1, at 1.

The containment leakage tests required by Appendix J consist of (1) Type A tests, or ILRTs, that measure the containment’s total leakage rate;⁴ (2) Type B pneumatic tests that detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries (other than valves); and (3) Type C pneumatic tests that measure containment isolation valve leakage rates. *See* 10 C.F.R. Part 50, App. J, Option B, §§ III.A and III.B. Type B and C tests assure that

³ *See* Entergy’s Answer Opposing State of New York’s Petition to Intervene and Request for Hearing at 6 (June 12, 2015) [hereinafter Entergy Answer]; *see also* New York Petition at 12-13.

⁴ The Type A test, or ILRT, measures the total leakage rate from all potential leakage paths, including containment liner welds, valves, fittings, and components that penetrate the containment. *See* 10 C.F.R. Part 50, App. J, Option A, § II. This test involves pressurizing the containment atmosphere to a specified test pressure for a sufficient duration to determine what the containment leakage would be under design-basis accident conditions. The acceptance criteria for Type A tests embodied in the technical specification leakage limits are established to ensure that, in the event of a design-basis accident, the dose received by a member of the general public will not exceed the limits in 10 C.F.R. Part 100. *See* Entergy Answer at 8 n.32; Letter from Patrick D. Milano, NRC Office of Nuclear Reactor Regulation (NRR), to Michael R. Kansler, Entergy, Encl. 2, at 1 (Safety Evaluation by [NRR] Related to Amendment No. 232 to Facility Operating License No. DPR-26 Entergy Nuclear Operations, Inc. Indian Point Nuclear Generating Unit No. 2 (Aug. 5, 2002)) (ADAMS Accession No. ML021860178) [hereinafter 2002 Safety Evaluation]; *see also infra* note 9 (discussing leakage rate acceptance criterion).

containment penetrations are essentially leak tight, while Type A tests measure the containment system's overall leakage rate, thereby enabling a licensee to verify the leakage integrity of the containment liner. *See* LAR, Attach. 1, at 1.⁵

Prior to 1995, licensees were required to perform three Type A tests in every 10-year period.⁶ In 1995, however, the NRC amended Appendix J to provide a performance-based option, i.e., Option B, for containment leakage testing requirements. *See* Final Rule, 60 Fed. Reg. at 49,495. This performance-based option allows licensees with a satisfactory Type A test performance history (i.e., two consecutive, successful Type A tests) to reduce the test frequency of Type A testing from three tests in 10 years to one test in 10 years. *See* LAR, Attach. 1, at 2. This reduction in the testing frequency permitted by Option B was based on risk assessments conducted by the NRC and EPRI that showed the "risk increase associated with extending the ILRT surveillance interval was very small." 2008 Final Safety Evaluation at 2. In this regard, the NRC Staff found that Type B and C tests can detect over 97% of containment leakages, and "[o]f the 97 percent, virtually all leakages are identified by [Type C testing] of containment isolation valves." Final Rule, 60 Fed. Reg. at 49,499.⁷

In August 1996, Entergy requested to amend its license to implement the performance-based testing schedule in Option B for Indian Point Unit 2. *See* LAR, Attach. 1, at 2. In April 1997, the NRC approved Entergy's request, thereby authorizing Entergy to reduce the frequency of Type A testing for Unit 2 from three tests in 10 years to one test in 10 years. *See id.*; *see also* 2002 Safety Evaluation at 4.

In August 2002, the NRC approved Entergy's 2001 license amendment request to extend the Type A testing interval for Indian Point Unit 2 on a one-time basis from 10 years to 15 years. *See* 2002 Safety Evaluation at 13-14; LAR, Attach. 1, at 2.⁸

⁵ *See also* Final Safety Evaluation by [NRR], Nuclear Energy Institute (NEI) Topical Report (TR) 94-01, Rev. 2, "Industry Guideline for Implementing Performance-Based Option of 10 C.F.R. Part 50, Appendix J" and Electric Power Research Institute (EPRI) Report No. 1009325, Rev. 2, Aug. 2007, "Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals," at 1 (June 25, 2008) (ADAMS Accession No. ML081140105) [hereinafter 2008 Final Safety Evaluation].

⁶ *See* Final Rule: "Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors," 60 Fed. Reg. 49,495, 49,499 (Sept. 26, 1995) [hereinafter Final Rule].

⁷ *See also* 2002 Safety Evaluation at 3; NRC Staff's Answer to "State of New York Petition to Intervene and Request for Hearing" at 10 (June 12, 2015) [hereinafter NRC Staff Answer].

⁸ Underlying this extension was a project begun by NEI in 2001 to justify further reduction of the Type A testing frequency from one test in 10 years to as low as one test in 20 years based on performance history and risk insights. *See* 2008 Final Safety Evaluation at 2. Pursuant to NEI's direction, EPRI developed interim guidance for creating uniform risk assessments to support a one-time extension of the Type A test from a 10-year to a 15-year interval. NEI disseminated

(Continued)

Consistent with the August 2002 license amendment, Entergy conducted its most recent Type A test for Unit 2 in 2006. *See* LAR, Attach. 1, at 5. Entergy conducted previous Type A tests in 1991, 1987, 1984, and 1979. *See id.* at 5-6. All Type A test results have been below the containment leakage rate acceptance limit of $1.0 L_a$. *See id.*⁹

Thereafter, in a June 2008 Final Safety Evaluation, *see supra* note 5, the NRC Staff accepted the methodology in NEI 94-01, Rev. 2, and EPRI TR-1009325, Rev. 2, for referencing by licensees who sought to amend their licenses to extend permanently the Type A testing interval to 15 years, provided that the prescribed conditions set forth in the Final Safety Evaluation are satisfied. *See* 2008 Final Safety Evaluation at 19-20. As the Staff concluded, the “testing methodology . . . and the modified testing frequencies . . . serve[] to ensure continued leakage integrity of the containment structure. Type B and Type C testing ensures that individual penetrations are essentially leak tight. . . [and] aggregate Type B and Type C leakage rates support the leakage tightness of primary containment by minimizing potential leakage paths.” *Id.* at 20.¹⁰

2. Containment Inspections

In addition to establishing containment leak testing requirements, Appendix J requires periodic visual inspections of the accessible interior and exterior surfaces of the containment system to identify structural deterioration that may affect containment integrity. *See* 10 C.F.R. Part 50, App. J, Option B, § III.A; LAR, Attach. 1, at 10. Periodic inspections of interior and exterior containment surfaces at Indian Point Unit 2 are also required by the Containment Inservice Inspection Plan to implement the requirements of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code). *See* LAR, Attach. 1, at 10.¹¹

the interim guidance to licensees in November 2001, and as of 2008, this guidance had been used as the technical basis to support a one-time Type A testing interval extension to 15 years at about seventy-five operating reactors. *See id.*

⁹ “The [overall integrated] leakage rate must not exceed the allowable leakage rate (L_a) with margin, as specified in the Technical Specifications.” 10 C.F.R. Part 50, App. J, Option B, § III.A. The relevant technical specification for Indian Point Unit 2 states that the “containment leakage rate acceptance criterion is $1.0 L_a$.” *See* NRC Staff Answer at 16 n.69; *see also* Entergy Answer at 27-28; 2002 Safety Evaluation at 4. The leakage rate acceptance limit, L_a , is based on minimizing leakage that would occur at the calculated peak containment internal pressure related to the design-basis loss-of-coolant accident. *See* 10 C.F.R. Part 50, App. J, Option B, § II.

¹⁰ *See also* 2008 Final Safety Evaluation at 10 (“[T]he impact of [permanently increasing the Type A testing frequency to 15 years] on the reliability/availability of the containment barrier will be small.”).

¹¹ Pursuant 10 C.F.R. § 50.55a(g)(4), entitled “Inservice inspection requirements for operating
(Continued)

As required by the inspection program for metal containments, the accessible surface area of the Indian Point Unit 2 liner is examined about every 3 1/3 years. *See* LAR, Attach. 1, at 10. Pursuant to the inspection program for concrete containments, the accessible surface area of the Unit 2 concrete containment is examined about every 5 years. *See id.* These inspections “play an important role in ensuring the leak tightness of containments between the [Type A tests].” 2008 Final Safety Evaluation at 9.

Inspection records for Indian Point Unit 2 indicate that all observed corrosion and degradation were either remediated or deemed not to impair the ability of the containment to perform its safety function. *See* LAR, Attach. 1, at 11-13.

B. Procedural History

On December 9, 2014, Entergy submitted a request to the NRC to amend the operating license for Indian Point Unit 2. *See* LAR at 1. Entergy seeks to revise Unit 2’s Technical Specification 5.5.14 to reduce the frequency for conducting the Type A test, or ILRT, of the primary reactor containment system from once every 10 years to once every 15 years on a permanent basis. *See id.*, Attach. 1, at 1. Entergy conducted the last Type A test in 2006; accordingly, the LAR, if granted, will postpone the next Type A test from 2016 to 2021. *See id.*, Attach. 1, at 3. Notably, Entergy seeks no change in the frequency of the Type B and C leakage tests, which will continue to be performed at least every 5 years. *See id.*, Attach. 1, at 3. Nor does it seek to change the frequency of containment visual inspections, which will continue to be conducted on the steel containment about every 3 1/3 years, and on the concrete containment every 5 years. *See id.*, Attach. 1, at 10.¹²

Notice of the LAR and the attendant opportunity to request a hearing to contest the proposed license amendment were published in the *Federal Register* on March 17, 2015.¹³ The Notice also announced the NRC Staff’s proposed

plants,” Indian Point Unit 2 must comply with ASME Boiler and Pressure Vessel Code Section XI, including Subsection IWE (metal containment inspections) and Subsection IWL (concrete containment inspections). The ASME Code requires visual inspections to identify possible damage or degradation, to evaluate whether component function has been impaired, and to effect appropriate repair or replacement activity. *See* NRC Staff Answer at 14 n.58.

¹²*See also* Transcript, “Entergy Nuclear Operations, Inc. Indian Point Nuclear Generating Station Unit 2” at 82 (July 30, 2015) [hereinafter Tr.].

¹³*See* Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 13,902, 13,905-06 (Mar. 17, 2015) [hereinafter Notice].

determination that the LAR involves a no significant hazards consideration under 10 C.F.R. § 50.92(c). *See* Notice, 80 Fed. Reg. at 13,906.¹⁴

On May 18, 2015, New York timely filed a petition to intervene, proffering two contentions in support of its claim that Entergy's LAR should be denied. First, New York proffers a safety contention, NYS-1, asserting that reducing the frequency of Type A testing from once in 10 years to once in 15 years poses a significant health and safety hazard to the public. *See* New York Petition at 5-20. Second, New York proffers an environmental contention, asserting that Entergy and the NRC Staff failed to perform environmental reviews for the LAR that are required by the National Environmental Policy Act (NEPA) and NRC regulations. *See id.* at 20-23.

On June 12, 2015, Entergy and the NRC Staff filed answers arguing that New York's petition should be denied for failure to proffer an admissible contention. *See* Entergy Answer at 14-38; NRC Staff Answer at 12-27. On June 19, 2015, New York filed a reply.¹⁵

On July 30, 2015, this Board held oral argument regarding the admissibility of New York's contentions.¹⁶

II. ANALYSIS

Before a Licensing Board may grant a timely filed petition to intervene, it must conclude that the petitioner has (1) established standing; and (2) proffered at least one admissible contention. *See* 10 C.F.R. § 2.309(a). New York satisfies the

¹⁴The "no significant hazards consideration" determination mentioned in the Notice is a determination that, if reached by the NRC, permits it to make an authorized license amendment effective immediately pursuant to 10 C.F.R. § 50.58(b)(5), rather than awaiting the outcome of an adjudicatory challenge. As explained by the Commission, it "is a procedural device to determine when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 6 n.3 (1986); *see also* 10 C.F.R. § 50.91 (discussing the process for making the no significant hazards consideration determination). A proposed amendment is eligible for a no significant hazards consideration determination if the NRC concludes the amendment would not:

- (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
- (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
- (3) Involve a significant reduction in a margin of safety.

10 C.F.R. § 50.92(c).

¹⁵ *See* State of New York Reply in Support of Petition to Intervene and Request for Hearing (June 19, 2015) [hereinafter New York Reply].

¹⁶ *See* Licensing Board Notice and Order (Scheduling and Providing Instructions for Oral Argument) (July 6, 2015) (unpublished); Tr. at 14-145.

first requirement. Pursuant to NRC regulation, where a State seeks to participate as a party in a proceeding pertaining to a “utilization facility . . . located within [its boundaries] . . . no further demonstration of standing is required.” 10 C.F.R. § 2.309(h)(2). Here, New York seeks to participate in a proceeding involving a nuclear generating unit that is located within the State’s boundaries (i.e., in Buchanan, New York). “[N]o further demonstration of standing is required.” *Id.*¹⁷

As discussed below, however, we conclude that neither of New York’s two proffered contentions satisfies the admissibility standard in 10 C.F.R. § 2.309(f)(1). We therefore deny New York’s petition to intervene.

A. Legal Standards for Contention Admissibility

To be admissible, a contention must satisfy the six-factor admissibility test in 10 C.F.R. § 2.309(f)(1), which requires that a petitioner:

- (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. 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.

The Commission has stressed that the contention admissibility standard is

¹⁷ Neither Entergy nor the NRC Staff contests New York’s standing. *See* Entergy Answer at 1-2; NRC Staff Answer at 4.

“strict by design.”¹⁸ Failure to comply with any of the requirements in section 2.309(f)(1) renders a contention inadmissible.¹⁹

B. Contention NYS-1 Is Not Admissible

1. New York’s Position on Contention NYS-1

Contention NYS-1 states as follows:

Entergy’s request to amend the Indian Point Unit 2 operating license and technical specification should be denied because it involves a significant safety and environmental hazard, fails to demonstrate that it complies with 10 C.F.R. §§ 50.40 and 50.92 or 10 C.F.R. 50, Appendix J, and fails to demonstrate that it will provide reasonable assurance of adequate protection for the public health and safety as required by Section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232[a]) if the proposed amendment to the operating license is approved.

New York Petition at 5.

In support of admitting Contention NYS-1, New York advances the following arguments. First, New York alleges that granting the LAR will threaten public safety in light of (1) the “specific history of structural and corrosive damage” to the containment; and (2) the containment’s “recent inspections that revealed significant corrosion and other wear.” New York Petition at 7-8. Second, New York asserts that granting the LAR will jeopardize public safety because recent Type A leak tests indicate that the containment liner is trending toward exceeding the leakage acceptance criteria by 2016, i.e., 5 years before the next Type A test would be performed if the LAR were granted. *See id.* at 8, 16-17. Third, the State argues that granting the LAR “poses a significant hazards consideration under 10 C.F.R. § 50.92(c).” *Id.* at 8. Finally, the State argues that the LAR is defective because it (1) improperly fails to address new, relevant seismic data; (2) improperly relies on a risk assessment that was based on the Surry reactor in rural Virginia, which has a population that is considerably less than the densely populated urban area where Indian Point Unit 2 is located; and (3) improperly relies on an allegedly flawed 2009 Severe Accident Mitigation Alternatives (SAMA) analysis. *See id.* at 15, 19-20.

¹⁸ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001); *accord USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006).

¹⁹ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

2. Board's Ruling on Contention NYS-1

As we explain below, none of the arguments advanced by New York in support of Contention NYS-1 renders it admissible.

First, according to New York, Entergy's LAR fails to comply with Option B in 10 C.F.R. Appendix J because it "fail[s] to consider the plant-specific history of the . . . containment liner," which New York describes as a "history of structural and corrosive damage" that is reflected in recent inspections. New York Petition at 6, 7-8.²⁰ This argument is factually and legally flawed. As a factual matter, New York errs in asserting that the LAR fails to address the plant-specific condition of the containment liner.²¹ As a legal matter, New York's argument is an improper attempt to graft a "historical event" criterion onto the "performance criteria" specified in Appendix J, Option B. *See* 10 C.F.R. Part 50, App. J, Option B, §§ II and III; *see also* Tr. at 128. Such an argument not only is barred by 10 C.F.R. § 2.335(a),²² it ignores the fact that the Commission was aware of containment degradation issues when it promulgated performance-based testing and subsequent regulations on visual inspections,²³ and despite such awareness, it placed no "historical event" restriction on reactors electing to comply with Appendix J through performance-based testing. *See* Tr. at 128-30.²⁴ Thus, to the extent that New York grounds Contention NYS-1 on this argument, it must be rejected for (1) failing to raise a genuine dispute on a material issue with the LAR, *see* 10 C.F.R. § 2.309(f)(1)(vi); and (2) raising an impermissible challenge to a

²⁰Regarding the containment's history, the State points to (1) a 1968 incident involving plate buckling, *see* New York Petition at 13; (2) a 1973 incident involving the breakage of a steam generator feedwater line, resulting in containment damage, *see id.* at 13-14; and (3) a 1980 containment flooding incident. *See id.* at 15. Regarding the results of recent inspections, New York states that "visual inspections of the . . . containment liner in 2008, 2012, and 2014 revealed numerous other signs of degradation, including corrosion, buckling of loose plates, and leaking water." *Id.* at 8.

²¹*See* LAR, Attach. 1, at 11-13 (stating that inspection records indicate that all observed corrosion or degradation either has been remediated or was deemed not to reduce the structural capacity of the containment to perform its safety function); Entergy Answer at 25.

²²Section 2.335(a) provides that, absent a waiver (which New York has not sought), "no rule or regulation of the Commission, or any provision thereof, . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to [10 C.F.R. Part 2]." 10 C.F.R. § 2.335(a). This rule applies, as well, to a contention that seeks to impose a requirement beyond those imposed by a Commission regulation. *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 & n.88 (2012).

²³*See* Codes and Standards for Nuclear Power Plants; Subsection IWE and Subsection IWL, 61 Fed. Reg. 41,303, 41,303 (Aug. 8, 1996).

²⁴*See also* 10 C.F.R. Part 50, App. J, Option B, § III.A ("A Type A test [under Option B] must be conducted . . . at a periodic interval based on the historical performance of the overall containment system . . ."); *id.* ("The test results must be compared with previous results to examine the performance history of the overall containment system . . .").

Commission regulation and, thus, falling outside the scope of the proceeding. *See id.* § 2.309(f)(1)(iii).

Contention NYS-1 fares no better under New York’s related argument that, in light of the corrosion in the containment liner caused by the history of damaging events, Entergy’s LAR threatens public health and safety in violation of the Atomic Energy Act and Commission regulations. *See* New York Petition at 8 (citing 42 U.S.C. § 2232(a) and 10 C.F.R. § 50.40). The documents on which New York relies actually contradict its assertion. Specifically, they indicate that (1) containment damage at Unit 2 has been remediated; (2) subsequent testing and inspection have proven acceptable; and (3) visual observations confirm no worsening of conditions.²⁵ This aspect of Contention NYS-1 is thus inadmissible for failure to show that a genuine dispute exists with the LAR. *See* 10 C.F.R. § 2.309(f)(1)(vi).²⁶

New York also argues that granting the LAR will jeopardize public safety because recent Type A tests reveal that leakage will likely exceed the acceptance criterion of 0.75 L_a by 2016, or 5 years before the next Type A test would be performed if the LAR were granted. *See* New York Petition at 8, 16-17. This argument reflects a fundamental misunderstanding of the acceptance criteria. As discussed *supra* note 9, the regulatory *limit* for Type A leakage — which is also referred to as the “as-found acceptance criterion” — is 1.0 L_a . *See* 2002 Safety Evaluation at 4. Restated, Type A leakage at Unit 2 “must not exceed” 1.0 L_a . 10 C.F.R. Part 50, App. J, Option B, § III.A. In contrast, the 0.75 L_a criterion cited by New York is referred to as the “as-left criterion,” *see* 2002 Safety Evaluation at 4, and there is no regulatory bar to exceeding that criterion

²⁵ *See, e.g.*, “Report on the Containment Building Liner Plate Buckle in the Vicinity of the Fuel Transfer Canal,” Indian Point Generating Station Unit No. 2, at 2, 8 (Jan. 1968) (ADAMS Accession No. ML093521587) (“[I]t is concluded that the integrity of the liner has not been violated.”); Letter from R.R. Maccary, Assistant Director for Engineering, to Donald J. Skovholt, Assistant Director for Operating Reactors at 1 (April 15, 1974) (ADAMS Accession No. ML093630690) [hereinafter AEC Recommendation] (“The applicant’s conclusion is that the damage to the liner has not impaired its integrity and that it can perform its function with an adequate margin of safety. We concur with this conclusion.”); 2002 Safety Evaluation at 8-9 (discussing the 1980 incident and concluding “that the structural integrity of the containment is acceptable because the remaining liner thickness is sufficient to withstand the loading associated with design-basis accident conditions”); LAR, Attach. 1, at 11-12 (stating that the degradation observed during inspections in 2008 and 2012 “were a repeat of previous inspections and were minor with no change and therefore acceptable.”); *see also* Entergy Answer at 25.

²⁶ New York attempts to distinguish Indian Point from other plants by pointing to a 1974 document in which the AEC Staff recommended increasing the frequency of leak-rate testing at Unit 2 due to the plant’s history of containment damage. *See* New York Petition at 7 (citing AEC Recommendation, Attach. at 4). New York overlooks that this hoary recommendation was never adopted by the AEC and was superseded by subsequent Commission assessments in 1997 and 2002 that authorized reducing the frequency of Type A testing at Unit 2. *See supra* Part I.A.1.

during plant operations; rather, it is a criterion that must be satisfied *prior* to a plant restart.²⁷ The “as-left criterion” is lower than the regulatory limit applicable to plant operations to “assure[] that there is margin for potential degradation that could increase the containment leakage rate before the next [Type A test] is performed.” RAI Response at 5. In short, to the extent that Contention NYS-1 claims that Entergy’s LAR must be rejected because the leakage will exceed 0.75 L_a by 2016, it is inadmissible for failing to raise a material issue. *See* 10 C.F.R. § 2.309(f)(1)(iv).²⁸

New York nevertheless attempts to ground Contention NYS-1 on a concern that recent Type A tests reveal a dangerous trend of containment liner degradation. *See* New York Petition at 17. The trend in recent integrated leak rate values was initially noted by the NRC Staff as the subject of an RAI to Entergy. *See* Entergy Answer at 26-27. Entergy responded that the integrated leak rate results do not necessarily reflect containment liner damage. Entergy explained that “[t]he ‘as found’ ILRT is the leakage from [1] the containment and [2] the Type B and C penetrations tested [during the Type A test] as well as [3] the leakage through the Type B and C penetrations that are not tested as part of the ILRT [i.e., those penetrations that are isolated].” RAI Response at 5. The ILRT leakage attributable to Type B and C penetrations, stated Entergy, “can vary from ILRT to ILRT depending on the systems that are vented, drained, and open to atmosphere for the ILRT.” *Id.*²⁹ Significantly, New York makes no effort to rebut Entergy’s explanation.

In any event, and dispositively, even if the apparent trend in Type A tests were extrapolated, it is undisputed that the leakage would *not* exceed the regulatory limit of 1.0 L_a during the 15-year period between consecutive Type A tests. *See* RAI Response at 5; *supra* note 28. New York’s contention is therefore inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) and (vi) because it lacks

²⁷ *See* Entergy Answer, Attach. 1, at 5 (Letter from Lawrence Coyle, Entergy, to NRC Document Control Desk, NL-15-068, Attach. 1, at 5 (June 8, 2015) (Response to Request for Additional Information [RAI] Regarding License Amendment to Permanently Extend the Frequency of the Containment Integrated Leak Rate Test [hereinafter RAI Response]; Tr. at 43, 47.

²⁸ Notably, New York does not claim, nor does the LAR indicate, that Type A leakage would exceed the regulatory limit of 1.0 L_a during plant operation. *See* RAI Response at 5. At oral argument, counsel for New York repeatedly asserted that the State “believes” that a reactor should not be permitted to operate with a containment leakage rate of 0.75 L_a . *See* Tr. at 47, 48, 137. New York’s “belief,” however, is not supported by alleged facts or expert opinion as required by 10 C.F.R. § 2.309(f)(1)(v), and, in any event, such an argument constitutes an impermissible challenge to a regulation. *See supra* note 22.

²⁹ *See also* Tr. at 96-97 (counsel for Entergy discusses factors that affect the integrated leak rate value, which include the number of Type B and C penetrations that are isolated, as well as the length of the test); Tr. at 120-21 (counsel for NRC Staff states that “when you subtract out the Type C leakage from the Type A test, you get a much [lower as-found Type A test result] than New York is asking you to believe exists for containment liner leakage”).

adequate support and fails to raise a genuine dispute on a material issue with the LAR.

New York also endeavors to support Contention NYS-1 by arguing that the LAR “poses a significant hazard[s] consideration under 10 C.F.R. § 50.92(c).” New York Petition at 8; *see supra* note 14 (discussing regulatory underpinning of Staff’s “no significant hazards consideration” determination). This argument is not litigable. Pursuant to 10 C.F.R. § 50.58(b)(6), apart from discretionary review by the Commission, the NRC Staff’s no significant hazards consideration determination under section 50.92(c) may not be contested.³⁰

New York’s remaining three arguments in support of Contention NYS-1 are also unavailing. First, citing revised seismic studies performed in response to the NRC’s post-Fukushima recommendation, New York asserts that “[r]ecent analysis of [Unit 2] reveals that it may be subjected to seismic events of greater intensity more frequently than thought” and that the LAR “fails to adequately consider [this] risk.” New York Petition at 10, 15-16. But simply referencing this study without explaining the information’s significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality, as is required by 10 C.F.R. § 2.309(f)(1)(iv).³¹ And by failing to explain how this information controverts the portion of the LAR that reviewed seismic impacts, *see* LAR, Attach. 3, at 5-27, New York fails to establish a genuine dispute of fact with the LAR, as is required by 10 C.F.R. § 2.309(f)(1)(vi).

Second, New York argues that the LAR improperly relies on a risk assessment that was based on the Surry reactor in rural Virginia, which has a population that is considerably less than the densely populated urban area where Indian Point Unit 2 is located. *See* New York Petition at 19. Contrary to New York’s argument, however, Entergy’s risk assessment explicitly accounts for Indian Point’s site-specific population. *See* LAR, Attach. 3, at 4-7 to 4-12, 5-6 to 5-13;

³⁰ Section 50.58(b)(6) states: “No petition or other request for review of or hearing on the staff’s significant hazards consideration determination will be entertained by the Commission. The staff’s determination is final, subject only to the Commission’s discretion, on its own initiative, to review the determination.” 10 C.F.R. § 50.58(b)(6); *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

As discussed *supra* note 14, consistent with section 50.58(b)(5), the sole effect of a no significant hazards consideration determination is to permit the Staff to make an authorized license amendment effective immediately, despite the pendency of an adjudication. Issues regarding when an authorized license amendment should become effective are irrelevant to this proceeding, which involves a challenge to the merits of Entergy’s LAR. Hence, the adequacy of the significant hazards consideration determination — in addition to being immune from challenge pursuant to section 50.58(b)(6) — is not material to, or within the scope of, this proceeding.

³¹ *See USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (“[A]n expert opinion [or otherwise] 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 . . .”).

Tr. at 91. And again, by not controverting this information, New York fails to establish a genuine dispute of fact with the LAR, as is required by 10 C.F.R. § 2.309(f)(1)(vi).

Finally, New York's assertion that the LAR improperly relies on a defective SAMA analysis is unavailing. New York claims that the SAMA analysis (1) "does not take into account the value of decontamination cost of offsite properties with iconic value"; (2) "artificially and improperly limits its scope to land and population only within 50 miles of the site"; and (3) "relied on [an outdated] dollar per person rem value of \$2,000." New York Petition at 20. Yet, New York fails to provide expert opinions or adequate facts in support of these alleged deficiencies, as required by 10 C.F.R. § 2.309(f)(1)(v). Nor does New York show how its claims relate to the assumptions and methodologies in the SAMA, much less create a genuine dispute on a material issue of fact or law with the LAR, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Contention NYS-1 is therefore not admissible.³²

C. Contention NYS-2 Is Not Admissible

1. New York's Position on Contention NYS-2

Contention NYS-2 states as follows:

Entergy's request to amend the Indian Point Unit 2 operating license and technical specification should be denied because Entergy has not submitted an Environmental Report as required by 10 C.F.R. § 51.53 and it has not undergone the required NRC Staff environmental review pursuant to 10 C.F.R. § 51.101 and, despite Entergy's claim to the contrary, the proposed amendment is not categorically exempt from that review under 10 C.F.R. § 51.22(c)(9).

New York Petition at 20.

³²New York also asserts that "Entergy's desire to reduce costs and maximize revenues . . . does not justify rolling back this important safety-related test." New York Petition at 10. This assertion, although correct, is quite beside the point, because Entergy does not seek to justify its LAR on economic grounds. *See* Entergy Answer at 35-36; NRC Staff Answer at 22. Rather, Entergy's risk assessment concludes that the risk of reducing the Type A test frequency to 15 years is no more than "small" in accordance with regulatory guidelines. *See* LAR, Attach. 1, at 15-16; *see also id.*, Attach. 3, at 7-1 to 7-2; Regulatory Guide 1.174, An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis at 17 (Rev. 2 May 2011) (ADAMS Accession No. ML100910006). Critically, the risk assessment accounts for the very dangers that New York asserts render Unit 2 ineligible for the LAR, including "the likelihood and risk implications of corrosion-induced leakage of the steel liners occurring and going undetected during the extended test interval . . ." LAR, Attach. 3, at 4-15. The impact of aging, concealed corrosion, and the effectiveness of visual inspections are all considered in the risk assessment. *See id.* New York fails to controvert this portion of the application.

In Contention NYS-2, New York argues that the LAR is not categorically exempt from environmental review pursuant to 10 C.F.R. § 51.22(c)(9), because it “involves a significant hazards consideration” that excludes it from categorical exemption pursuant to the criteria in section 51.22(c)(9)(i). *See* New York Petition at 21.³³ The “significant hazards consideration” associated with reducing the frequency of Type A testing, asserts New York, involves a significant increase in the consequences of an accident previously evaluated as well as a significant reduction in a margin of safety. *See id.* at 21-22.

2. *Board’s Ruling on Contention NYS-2*

As we discuss below, Contention NYS-2 is not admissible because it constitutes an impermissible challenge to the NRC Staff’s no significant hazards consideration determination. New York attempts to salvage Contention NYS-2 by advancing a new argument in its reply brief; however, we reject the new argument as untimely and unavailing.

Although the categorical exemption in section 51.22(c)(9) has several requirements that must be satisfied, *see supra* note 33, New York grounds Contention NYS-2 *solely* on the argument that Entergy’s LAR involves a “significant hazards consideration” in derogation of 10 C.F.R. § 51.22(c)(9)(i). *See* New York Petition at 21-22. As discussed *supra* note 30, however, the NRC Staff’s no significant hazards consideration determination may not be contested. *See* 10 C.F.R. § 50.58(b)(6). Contention NYS-2 is therefore not admissible.

In its reply brief, New York claims that it is not contesting the NRC Staff’s no significant hazards consideration determination, but instead is challenging “whether the Commission should ultimately make such a final determination.” New York Reply at 19. This argument ignores the broad and unqualified rule of unreviewability established by section 50.58(b)(6), which (1) authorizes the NRC to make no significant hazards consideration determinations; and (2) declares that such determinations are immune from “petition or other request for review . . .

³³ Section 51.22 identifies categories of actions that are exempt from NEPA review because the NRC has made a generic finding that the “actions do[] not individually or cumulatively have a significant effect on the human environment.” 10 C.F.R. § 51.22(a). Section 51.22(c)(9), in turn, establishes a categorical exemption for the issuance of a reactor license amendment that, like Entergy’s LAR, changes a surveillance requirement, provided that:

- (i) The amendment or exemption involves no significant hazards consideration;
- (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and
- (iii) There is no significant increase in individual or cumulative occupational radiation exposure.

Id. § 51.22(c)(9).

or hearing.” 10 C.F.R. § 50.58(b)(6). Accepting New York’s argument would require us to carve an exception into section 50.58(b)(6) that, ultimately, would swallow its rule of unreviewability. This we decline to do.

New York further argues that, as a policy matter, if the “no significant hazards consideration” determination is unreviewable, then the categorical exclusion of 10 C.F.R. § 51.22(c)(9) “becomes an unassailable substantive conclusion that Industry and the NRC Staff can employ to avoid environmental review of proposed actions.” New York Reply at 20. This argument is ineffectual. As the NRC Staff explains in its answer, “the Council on Environmental Quality’s regulations enacting NEPA explicitly recognize that a categorical exclusion is a generic finding that a category of actions do not individually or cumulatively have a significant effect on the human environment.” NRC Staff Answer at 26 (citing 40 C.F.R. § 1508.4); *accord Brodsky v. NRC*, 704 F.3d 113, 119-20 (2d Cir. 2013). Section 51.22 embodies the NRC’s generic finding, adopted in the context of a rulemaking proceeding, that the categorical exclusions listed therein involve actions that “do[] not individually or cumulatively have a significant effect on the human environment.” 10 C.F.R. § 51.22(a). New York thus errs in asserting that a categorical exclusion is a device for evading environmental review of proposed actions.

Nor is there merit to New York’s assertion that the unreviewability of the NRC Staff’s “no significant hazards consideration” determination has the impermissible effect of rendering the categorical exclusion determination of section 51.22(c)(9) “unassailable.” *See* New York Reply at 20. A petitioner with supporting facts may seek review of a section 51.22(c)(9) determination by at least two methods: (1) challenging either of the two additional findings made under section 51.22(c)(9)(ii) or (iii) that are necessary for a categorical exclusion determination; and (2) if the requirements of section 51.22(c)(9) are satisfied, by showing the existence of “special circumstances” pursuant to 10 C.F.R. § 51.22(b) that would justify excepting a proposed license amendment from the categorical exclusion of section 51.22(c). New York did not attempt the former, and, as we now show, although it attempted the latter, its attempt was untimely and, therefore, is unavailing.

New York argued for the first time in its reply brief that it seeks to challenge the NRC Staff’s “no significant hazards consideration” determination by invoking the exception in 10 C.F.R. § 51.22(b),³⁴ which “bestows upon any interested person the right to challenge the use of a categorical exclusion by presenting special

³⁴ Section 51.22(b) provides, in pertinent part, that an environmental review need not be performed for any action that falls within the list of categorical exclusions, “[e]xcept in special circumstances, as determined by the Commission upon its own initiative or upon request of any interested person.” 10 C.F.R. § 51.22(b).

circumstances.” New York Reply at 19 (quoting *Pa’ina Hawaii, LLC*, LBP-06-4, 63 NRC 99, 109 n.38 (2006)).

Assuming (without deciding) that the “special circumstances” exception in 10 C.F.R. § 51.22(b) allows a petitioner to challenge a “no significant hazards consideration” determination, it is well established in NRC proceedings that a reply brief cannot introduce new issues or expand the scope of arguments advanced in the original petition; rather, a reply brief must focus on the actual or logical arguments presented in the original petition or raised in answers to it.³⁵ This rule promotes adjudicative efficiency and also ensures fairness to other parties by putting them on sufficient notice as to what they must defend against.³⁶ Here, New York concedes that its original petition failed to cite section 51.22(b), much less to argue that “special circumstances” within the meaning of section 51.22(b) precluded the application of a categorical exclusion. *See* Tr. at 138-39. New York’s effort to do so in its reply brief is unjustifiably late and must be rejected.³⁷

Even if New York’s section 51.22(b) argument were timely and litigable, we still would find it to be insubstantial. In asserting that “special circumstances” exist within the meaning of section 51.22(b), New York relies on factual assertions underlying Contention NYS-1, namely, the “various historical degradation events . . . as well as the reactor’s location in the most densely populated part of the country.” New York Reply at 19. In the context of our Contention NYS-1 analysis, *supra* Part II.B.2, we concluded that those assertions failed to raise a genuine dispute of material fact or law with Entergy’s LAR. They gain no additional traction in New York’s effort to show that “special circumstances” justify excepting Entergy’s LAR from the categorical exclusion of section 51.22(c).

³⁵ *See DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 146 (2015); *see also U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009) (Commission declares that a petitioner “is confined to the contentions as initially filed and may not rectify its deficiencies through its reply brief”).

³⁶ *See Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (“Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.”); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) (“What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing . . .”).

³⁷ New York’s reliance on the decision in *Pa’ina Hawaii, LLC* is misplaced. *See* New York Reply at 19; Tr. at 75. In that case, the licensing board admitted contentions when the petitioner raised a *timely* argument affirmatively asserting that special circumstances existed under section 51.22(b) that precluded application of the categorical exclusion. *See Pa’ina Hawaii, LLC*, LBP-06-4, 63 NRC at 108, 112.

III. CONCLUSION

For the foregoing reasons, the Board *denies* New York's petition to intervene.

New York may file an appeal from this Memorandum and Order within twenty-five (25) days of service of this decision by filing a notice of appeal and an accompanying supporting brief pursuant to 10 C.F.R. § 2.311(b). Any party opposing an appeal may file a brief in opposition. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(3).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 25, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

**Docket Nos. 50-275
50-323**

(ASLBP No. 15-941-05-LA-BD01)

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)**

September 28, 2015

Petitioner alleges a *de facto* license amendment involving the operating licenses held by Pacific Gas and Electric Company for Diablo Canyon Nuclear Power Plant, Units 1 and 2. Because the NRC has neither granted PG&E greater authority than that provided by its existing licenses nor otherwise altered the terms of those licenses, the Board concludes Petitioner is not entitled to an opportunity to request a hearing pursuant to the Atomic Energy Act (AEA) § 189a.

LICENSE AMENDMENT, *DE FACTO*

AEA § 189a hearing rights may be triggered when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing. A *de facto* license amendment would exist, and hearing rights would be triggered, if the NRC were to grant a licensee “greater operating authority” or otherwise alter “the terms of the license” or permit the licensee to go

beyond its existing license authority. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996).

LICENSE AMENDMENT, *DE FACTO*

A *de facto* license amendment proceeding is not initiated merely because a licensee takes an action that requires some type of NRC approval, or because a licensee makes a change to its facility that is allowed under 10 C.F.R. § 50.59 without prior NRC approval.

ATOMIC ENERGY ACT: HEARING RIGHT

Speculative changes to a plant's licensing basis that may or may not occur do not constitute a proper ground on which to seek an adjudicatory hearing.

ATOMIC ENERGY ACT: HEARING RIGHT

Actions taken by a licensee under the authority of section 50.59 do not give rise to hearing rights under the AEA, but rather are monitored by the NRC Staff's inspections and oversight, which may be challenged only by a petition for enforcement pursuant to 10 C.F.R. § 2.206.

LICENSE AMENDMENT, *DE FACTO*

Staff oversight activities that ensure compliance with existing requirements do not constitute *de facto* license amendments. NRC inspection reports, even inspection reports documenting violations, are not *de facto* license amendments.

MEMORANDUM AND ORDER (Denying Petition to Intervene and Request for Hearing)

Before the Board, on referral by the Commission,¹ is a limited portion of a petition for intervention and request for hearing by Friends of the Earth (FOE) in what FOE characterizes as a *de facto* license amendment proceeding involving the operating licenses held by Pacific Gas & Electric Company (PG&E) for Diablo Canyon Nuclear Power Plant, Units 1 and 2.² Specifically, the Commission has

¹ See CLI-15-14, 81 NRC 729, 730 (2015).

² Petition to Intervene and Request for Hearing by Friends of the Earth (Aug. 26, 2014) (Petition).

referred the question of whether FOE has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act of 1954, as amended (AEA).³ Because we conclude that the NRC has neither granted PG&E greater authority than that provided by its existing licenses nor otherwise altered the terms of those licenses, we determine that FOE is not entitled to an opportunity to request a hearing pursuant to AEA § 189a.

I. BACKGROUND

As has been observed, “[s]eismology is an evolving science.”⁴ The history of the Diablo Canyon plant bears this out. In the nearly 50 years since construction began,⁵ two faults in close proximity to the plant have been discovered. The Hosgri Fault was identified during construction, and spurred extensive reanalysis and modifications of the plant’s design.⁶ The seismic safety of the plant was reviewed in a contested evidentiary hearing. The Licensing Board in that matter ruled, and the Atomic Safety and Licensing Appeal Board affirmed,⁷ that the Hosgri Fault had been adequately evaluated, and the plant’s safety reasonably assured, as the plant would conservatively withstand the potential effects of earthquakes associated with the Hosgri Fault.⁸

More recently, in 2008, the Shoreline Fault — which allegedly runs within a mere 300 meters of the plant’s intake structure⁹ — was identified. A preliminary assessment by the NRC Staff in 2009 found the plant safe,¹⁰ and a more detailed assessment in 2012 determined that “[t]he NRC’s conservative estimates for the potential ground motions from the Shoreline fault are at or below the ground motions for which the [Diablo Canyon plant] has been evaluated previously and

³ CLI-15-14, 81 NRC at 730.

⁴ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 913 (1981).

⁵ The construction permit for Unit 1 was issued in 1968 and for Unit 2 in 1970. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit 2), LBP-74-60, 8 AEC 277, 277-78 (1974). Operating licenses for Units 1 and 2 respectively were issued in 1984 and 1985. CLI-15-14, 81 NRC at 731.

⁶ *See* LBP-79-26, 10 NRC 453, 470, 501-05 (1979).

⁷ *Diablo Canyon*, ALAB-644, 13 NRC at 996. A small portion of the opinion, concerning an unrelated matter, i.e., security plan issues, was not affirmed. *Id.*

⁸ *See* LBP-79-26, 10 NRC at 478, 499.

⁹ Petition at 1.

¹⁰ NRC, Research Information Letter 09-001, Preliminary Deterministic Analysis of Seismic Hazard at Diablo Canyon Nuclear Power Plant from Newly Identified “Shoreline Fault” (Apr. 2009) (ADAMS Accession No. ML090330523).

demonstrated to have reasonable assurance of safety.”¹¹ Diablo Canyon’s seismic safety, like that of all nuclear power plants in the United States, is also being reviewed under the NRC’s post-Fukushima lessons learned and information-gathering process pursuant to 10 C.F.R. § 50.54(f), which authorizes the NRC to collect information from licensees “to determine whether or not the license should be modified, suspended, or revoked.”¹²

This is the context within which, on August 26, 2014, FOE filed its petition to intervene and request for hearing before the Commission. FOE alleges, *inter alia*, that the NRC Staff has permitted the Diablo Canyon reactors to operate outside their licensing basis, as FOE alleges the plant’s seismic design basis does not encompass the seismic risk associated with the Shoreline Fault, and that this alleged permission amends the license *de facto*.¹³ On October 6, 2014, PG&E, the NRC Staff,¹⁴ and the Nuclear Energy Institute (NEI), as an *amicus curiae*,¹⁵ filed briefs in opposition. FOE filed its reply on October 14, 2014.¹⁶

On May 21, 2015, the Commission referred a limited portion of FOE’s hearing request to the Atomic Safety and Licensing Board Panel.¹⁷ The scope of the

¹¹ NRC, Research Information Letter 12-01, Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone at xii (Sept. 2012) (ADAMS Accession No. ML121230035) (2012 Assessment).

¹² Letter from Joseph M. Sebrosky, Senior Project Manager, NRC, to Edward D. Halpin, Senior Vice President, PG&E, Diablo Canyon Power Plant, Unit Nos. 1 and 2 — NRC Review of Shoreline Fault at 1 (Oct. 12, 2012) (ADAMS Accession No. ML120730106); *see also* Letter from Eric J. Leeds and Michael R. Johnson, NRC, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, Request for Information Pursuant to Title 10 of the Code of Federal Regulations 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident (Mar. 12, 2012) (ADAMS Accession No. ML12053A340) (March 2012 Letter).

¹³ Petition at 29-70.

¹⁴ Pacific Gas and Electric Company’s Answer to Friends of the Earth Hearing Request (Oct. 6, 2014); NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth (Oct. 6, 2014) (NRC Staff Answer).

¹⁵ Nuclear Energy Institute Motion for Leave to File *Amicus Curiae* Brief (Oct. 6, 2014); *Amicus Curiae* Brief of the Nuclear Energy Institute in Response to Friends of the Earth Hearing Request (Oct. 6, 2014).

¹⁶ Friends of the Earth’s Reply to NRC Staff’s and Pacific Gas & Electric Company’s Answers and Proposed *Amicus Curiae* Nuclear Energy Institute’s Brief in Response to Petition to Intervene and Request for Hearing (Oct. 14, 2014) (Reply); *see also* Licensing Board Notice and Order (Scheduling Oral Argument) (June 2, 2015) at 3 (unpublished) (granting NEI’s Motion for Leave to File *Amicus Curiae*) (Scheduling Order).

¹⁷ CLI-15-14, 81 NRC at 730, 738. Some portions of the request were denied. Others, such as FOE’s underlying safety concerns, were referred to the Executive Director for Operations for consideration pursuant to 10 C.F.R. § 2.206. *Id.* at 730, 738. In response to the Commission’s referral, this Board was established on the same day by order of the Chief Administrative Judge. Licensing Board Order (Establishment of Atomic Safety and Licensing Board) (May 21, 2015) (unpublished).

referral is “limited to whether the NRC granted PG&E greater authority than that provided by its existing licenses or otherwise altered the terms of PG&E’s existing licenses, thereby entitling Friends of the Earth to an opportunity to request a hearing pursuant to AEA § 189a.”¹⁸

Supplemental briefs are also before the Board. In accordance with the Commission’s directive,¹⁹ the Board allowed²⁰ briefs by PG&E and the NRC Staff in response to an argument initially raised in FOE’s reply concerning PG&E’s Updated Final Safety Analysis Report (UFSAR) Revision 21.²¹ Also, in response to FOE’s motion to allow briefing concerning events that had taken place since its initial Petition to the Commission,²² the Board permitted short supplemental briefs, without ruling on “which (if any) intervening events might be relevant.”²³ Accordingly, FOE filed its supplemental brief on June 19, 2015,²⁴ and, on June 26, 2015, PG&E and the NRC Staff filed responses.²⁵ Oral argument was held in Rockville, Maryland, on July 9, 2015.²⁶

II. ANALYSIS

A. Standing

FOE alleges that it is a national nonprofit environmental organization.²⁷ It bases its claim to standing on the interests of five individual members, who allege that the operation of Diablo Canyon, without proper seismic analysis, risks harm to their personal health, safety, economic, aesthetic, and environmental interests.²⁸

¹⁸ CLI-15-14, 81 NRC at 734.

¹⁹ *Id.* at 735.

²⁰ Scheduling Order at 2.

²¹ Pacific Gas and Electric Company’s Supplemental Brief Regarding UFSAR Revision 21 (June 15, 2015). NRC Staff Answer to Friends of the Earth’s *De Facto* License Amendment Claims Related to PG&E’s Updated Final Safety Analy[s]is Report, Revision 21 (June 15, 2015).

²² Petitioner Friends of the Earth’s Motion to Allow Supplemental Briefing (June 5, 2015).

²³ Licensing Board Order (Allowing Supplemental Briefing) (June 12, 2015) (unpublished).

²⁴ Petitioner Friends of the Earth’s Supplemental Brief (June 19, 2015) (Supplemental Brief).

²⁵ Pacific Gas and Electric Company’s Response to FOE’s Supplemental Brief (June 26, 2015); NRC Staff Response to the Friends of the Earth’s Supplemental Brief (June 26, 2015) (NRC Staff Supplemental Response).

²⁶ Tr. at 1-130. Two days before the oral argument the Board received an unsolicited limited appearance statement from a former NRC Commissioner, Dr. Victor Gilinsky. The statement was accepted without opposition, but, in accordance with 10 C.F.R. § 2.315(a), Dr. Gilinsky’s statement is not “considered evidence in the proceeding.” See Licensing Board Order (Allowing Limited Appearance Statement of Dr. Gilinsky) (July 15, 2015) (unpublished).

²⁷ Petition at 71.

²⁸ *Id.* at 72-73.

The NRC Staff challenges FOE's standing; PG&E does not. The Staff argues that, even if there were a *de facto* license amendment proceeding to trigger the opportunity for a hearing under section 189a of the AEA, the alleged harm to FOE's members is too attenuated to establish standing.²⁹

Because we conclude that FOE fails to demonstrate the existence of a licensing action subject to AEA hearing rights, we need not address the issue of standing.³⁰

B. Timeliness and Scope

For similar reasons, the Board need not rule on whether FOE's petition is timely.³¹ The Board has concerns as to the timeliness of matters that were raised for the first time in FOE's Supplemental Brief — all of which took place before the Commission's referral and most of which could have been brought to the Commission's attention earlier.³²

Moreover, it is questionable whether — regardless of their timeliness — these subsequent events are within the scope of the Commission's limited referral.³³

²⁹ NRC Staff Answer at 43-47; *see also* Petition at 71-87.

³⁰ *See Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 333 (2015) (Commission did not reach standing question because it denied *de facto* license amendment petition on the merits).

³¹ *See id.* Again, the NRC Staff — but not PG&E — challenges the timeliness of FOE's original petition to the Commission. *See* Petition at 87-92 (arguing that the timeliness requirement of section 2.309(b) does not apply because no formal proceeding has been commenced, but that if the requirement does apply, that FOE has demonstrated "good cause" for the Commission to entertain an untimely petition); NRC Staff Answer at 47-48 (arguing that the Petition does not satisfy timeliness requirements as it is based on actions taken in 2012 and that the Petition is not based on new information).

³² At oral argument, FOE's counsel acknowledged that FOE had no real excuse for not bringing new developments to the Commission's attention during the almost 9-month period in which its Petition remained pending before the Commission. Tr. at 37-40. The NRC Staff appears to suggest that a petitioner is powerless to update its petition without going through the formality of filing "a new or amended contention or a separate petition to allow for the consideration of additional claims" — and satisfying both the late-filed criteria in 10 C.F.R. § 2.309(c) and the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). NRC Staff Supplemental Response at 7-8. The Board does not agree. There is a difference between asserting genuinely new arguments and alerting the tribunal to new, additional support for an existing argument. *Cf.* Fed. R. App. P. 28(j).

³³ *See, e.g.,* NRC Staff Supplemental Response at 2-6. Ironically, only Commissioner Svinicki — who dissented from referring FOE's petition to a Licensing Board — suggested that the Board's role would necessarily require expanding the record, rather than ruling solely on the grounds that FOE previously presented to the Commission. CLI-15-14, 81 NRC at 741 n.2 (Svinicki, Comm'r, concurring in part and dissenting in part) ("While I find that Friends of the Earth's hearing request lacks sufficient information to show a *de facto* license amendment, I recognize that the majority's referral will provide Friends of the Earth with a chance to develop its position further. Thus, should

(Continued)

Ultimately, however, it makes no difference. The Board concludes that none of the events on which FOE relies — in its Petition, in its Reply or in its Supplemental Brief — establishes that the NRC has granted a *de facto* license amendment in connection with the Diablo Canyon facility.

C. Contentions

In its Petition, FOE proffered two contentions.

Contention 1 states:

Because NRC is conducting a *de facto* license amendment proceeding that has significant safety implications, petitioner is entitled to a public hearing under section 189a of the Atomic Energy Act.³⁴

Contention 2 states:

NRC Staff's determination that the new seismic information, including the Shoreline Earthquake and its effect on the San Luis Bay and Los Osos Faults, is a lesser-included case within the Hosgri Earthquake is insuffic[i]ent to insure that Diablo Canyon is operating safely with an adequate margin of safety.³⁵

Contention 1 presents the same issue that the Commission has most clearly referred to the Board: that is, “whether Friends of the Earth has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act of 1954, as amended.”³⁶ There may be some question as to whether — if the Board were to rule in FOE's favor on this issue — the Commission intended for the Board to then address the admissibility of Contention 2.³⁷ Because we conclude that FOE has not established

the Commission be called upon to provide another ruling in this proceeding, the issue we consider then will be different than the one before us today. At that time, I will consider, afresh, the record as it exists, including the additional arguments and potential factual positions that will be developed as a result of this referral.”).

³⁴ Petition at 29.

³⁵ *Id.* at 47.

³⁶ CLI-15-14, 81 NRC at 730.

³⁷ *Compare id.* (“We refer a limited portion of the hearing request to the Atomic Safety and Licensing Board Panel to determine whether Friends of the Earth has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act of 1954, as amended (AEA).”), *with id.* at 735 (“[T]his referral includes such threshold issues as standing, timeliness, and *satisfaction of contention admissibility standards* in accordance with 10 C.F.R. § 2.309. [W]e direct the Board to rule on whether Friends of the Earth's hearing request should be granted” (emphasis added)).

an opportunity to request a hearing, however, we need go no further, and do not reach the admissibility of Contention 2.

Section 189a of the AEA requires the NRC to provide an opportunity for hearing “[i]n any proceeding under this [Act], for the granting, suspending, revoking, or amending of any license.”³⁸ Therefore, AEA § 189a hearing rights are triggered when a licensee submits a license amendment request to the NRC.

Additionally, the Commission has recognized — although it appears never to have actually confronted — other circumstances that might be tantamount to a license amendment. Hearing rights may also be triggered when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing. As the Commission has explained, a *de facto* license amendment would exist, and hearing rights would be triggered, if the NRC were to grant a licensee “greater operating authority” or otherwise alter “the terms of the license” or permit the licensee to go beyond its existing license authority.³⁹

Where, on the other hand, NRC approval does *not* permit a licensee to operate in any greater capacity than originally authorized and all relevant safety regulations and license terms remain applicable, NRC approval does not amend the license.⁴⁰ A *de facto* license amendment proceeding is not initiated merely because a licensee takes an action that requires some type of NRC approval,⁴¹ or

³⁸ 42 U.S.C. § 2239(a)(1)(A).

³⁹ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996). In applying this standard, as directed by the Commission, the Board attaches little if any significance to the fact that, after discovery of the Shoreline Fault, PG&E initially elected to seek a license amendment, but then withdrew that request. *See* Letter from James Becker, Site Vice President, PG&E, to NRC, License Amendment Request 11-05, “Evaluation Process for New Seismic Information and Clarifying the Safe Shutdown Earthquake” (Oct. 20, 2011) (ADAMS Accession No. ML11312A166); *see also* Letter from Barry Allen, Site Vice President, PG&E, to NRC, Withdrawal of License Amendment Request 11-05, “Evaluation Process for New Seismic Information and Clarifying the Safe Shutdown Earthquake” (Oct. 25, 2012) (ADAMS Accession No. ML12300A105). We are not persuaded by FOE’s argument that PG&E’s actions in this regard are probative of whether the NRC Staff eventually granted PG&E greater authority or otherwise altered the terms of PG&E’s licenses. *See* Petition at 34-38.

⁴⁰ *Perry*, CLI-96-13, 44 NRC at 328.

⁴¹ *See id.* at 321. Judicial case law provides several examples of NRC approvals that did not trigger section 189a hearing rights. *See, e.g., Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989) (NRC authorization to restart plant, following NRC Staff’s review of forty-seven ordered modifications, not a license amendment); *In re Three Mile Island Alert, Inc.*, 771 F.2d 720, 729-30 (3d Cir. 1985) (decision lifting license suspension and authorizing restart under stipulated conditions not a license amendment); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984) (lifting of a license suspension not a license amendment), *reh’g en banc on other grounds*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986).

because a licensee makes a change to its facility that is allowed under 10 C.F.R. § 50.59 without prior NRC approval.⁴²

Nor may a petitioner create a hearing opportunity merely by claiming that a facility is improperly *operating* outside its licensing basis. Such claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA § 189a.⁴³ For example, when a former NRC senior resident inspector at Diablo Canyon issued a Differing Professional Opinion (DPO) regarding PG&E's compliance with the plant's technical specifications, he recommended that the NRC initiate an "enforcement action" to address the alleged noncompliance.⁴⁴

The distinction between adjudicatory matters and regulatory oversight is especially important in the current environment. Following the Fukushima accident in Japan, the NRC Staff has asked for a seismic hazard reevaluation of *all* nuclear power reactors pursuant to 10 C.F.R. § 50.54(f). These reevaluations are not *de facto* license amendment proceedings because they do not amend any facility's license. Rather, they are requests for information to allow the NRC to determine whether, as to each facility, it should or should not require additional action. Imposing any such new requirements would involve separate regulatory action. As to any individual facility, the Commission might then determine that an order, license amendment, or rulemaking is necessary. At such time, the public would have an opportunity to participate in any such processes to the extent consistent with applicable NRC rules and precedent.

In both its initial Petition and in subsequent submissions, FOE points to several communications and events that allegedly support its claim that the NRC is conducting a *de facto* license amendment proceeding that entitles it to request a hearing now, rather than potentially at some future point. Because none involves the NRC's granting to PG&E greater authority than that provided by its existing licenses or otherwise altering their terms, none gives rise to hearing rights under AEA § 189a.

We consider each of FOE's arguments below.

First, FOE focuses on a March 12, 2012 request for information from the NRC Staff, pursuant to 10 C.F.R. § 50.54(f), that went to all nuclear power

⁴² *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101-02 (1994); *see infra* text accompanying notes 62-70.

⁴³ *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n.10 (2012) ("A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206." (citing *Yankee Nuclear*, CLI-94-3, 39 NRC at 101 n.7)).

⁴⁴ NRC, DPO Case File DPO-2013-002, Doc. 1, DPO Submittal at 1-2 (July 19, 2013) (ADAMS Accession No. ML14252A743). An independent review panel subsequently reviewed the DPO and determined that enforcement action was unwarranted. *Id.*, Doc. 8, DPO Appeal Decision at 4-5 (Sept. 9, 2014); *see also id.*, Doc. 4, DPO Decision at 1-2 (May 29, 2014).

plant licensees, including PG&E. FOE argues that, because that request allegedly directed PG&E to use “*specific* methodologies and assumptions to analyze new seismic data,” it effectively amended the terms of the Diablo Canyon licenses.⁴⁵ On the contrary, the Staff’s letter merely asked all nuclear power plant licensees (1) to evaluate, in light of the Fukushima accident in Japan, their plants’ seismic and flood design bases using updated analytical methods, and (2) to provide additional information to enable the NRC to determine whether *future* changes to any of the plants’ design bases might be warranted.⁴⁶

The Staff’s March 12, 2012 request expressly stated that the “evaluations associated with the requested information in this letter do not revise the design basis of the plant.”⁴⁷ Rather, the request contemplated that, for various plants, the licensees’ responses might (or might not) lead to further regulatory actions, such as orders, license amendments or rulemaking that might (or might not) trigger various forms of public participation at the appropriate time.⁴⁸ As the Commission recently instructed, speculative changes to a plant’s licensing basis that may or may not occur do not constitute a proper ground on which to seek an adjudicatory hearing.⁴⁹ The NRC Staff’s March 12, 2012 request for information does not constitute a *de facto* license amendment.⁵⁰

Second, FOE seeks to rely on Research Information Letter 12-01, which, in September 2012, documented the NRC Staff’s assessment of information concerning the newly discovered Shoreline Fault. FOE contends that the Staff’s analysis, which concluded that Diablo Canyon can operate safely despite the Shoreline Fault (by comparing the Shoreline Fault to the Hosgri Fault), in effect amended the Diablo Canyon licensing basis.⁵¹

Research Information Letter 12-01, however, did not alter the terms of the Diablo Canyon operating licenses or provide PG&E with greater operating authority. It reached no conclusions whatsoever regarding the Diablo Canyon operating licenses. Rather, it focused on determining whether the plant can operate safely in light of the risk posed by the Shoreline Fault.⁵² Neither the Staff’s comparison of

⁴⁵ Petition at 34. In fact, the Staff’s request showed some flexibility, stating that “[a]lternate approaches with appropriate justification will be considered.” March 2012 Letter at 3.

⁴⁶ *Id.* at 4-5.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 1.

⁴⁹ *Fort Calhoun*, CLI-15-5, 81 NRC at 338.

⁵⁰ In a different context, another Licensing Board also concluded that the Staff’s March 12, 2012 request for information did not constitute an “approval.” See *Union Electric Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 NRC 14, 34 (2012) (ruling that March 12, 2012 information request was not an “approval” that needed to be listed in applicant’s environmental report under 10 C.F.R. § 51.45(d)).

⁵¹ Petition at 42-43, 48-51.

⁵² 2012 Assessment at 95. As explained *infra*, the NRC Staff continues to study the seismic risks at
(Continued)

the Shoreline Fault to the Hosgri Fault nor the Staff's alleged understatement of the risk posed by the Shoreline Fault⁵³ amounted to a *de facto* license amendment. As the Commission recently observed, "if a hearing could be invoked each time the NRC engaged in oversight over or inquiry into plant conditions, the NRC's administrative process could be brought to a virtual standstill."⁵⁴

Moreover, Research Information Letter 12-01 could not have added the prior evaluation of the Hosgri Earthquake to the plant's seismic design basis because the Hosgri Earthquake has been an established part of the Diablo Canyon design basis since the facility began operation. The plant's capacity to withstand the Hosgri Earthquake was extensively litigated and resolved at the time of initial licensing.⁵⁵ Supplemental NRC safety evaluation reports further confirm that the Hosgri Earthquake is part of the plant's seismic design basis.⁵⁶ Because FOE concedes that the plant's licensing basis already permits the plant to operate in light of the seismic hazard posed by the Hosgri Fault — and the Staff found that the seismic hazard from the Shoreline Fault is bounded by that from the Hosgri Fault — FOE's hearing request fails to show that either PG&E's authority to operate the plant or the terms of its licenses have changed.⁵⁷

Third, as another instance where NRC Staff action allegedly amounted to a *de facto* license amendment, FOE points to an October 12, 2012 letter that summarized the conclusions of Research Information Letter 12-01 and requested that,

Diablo Canyon, an undertaking that may — or may not — eventually require PG&E to seek a license amendment, which would trigger AEA § 189a hearing rights at that time.

⁵³ Petition at 59-64.

⁵⁴ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 175 (2014).

⁵⁵ LBP-79-26, 10 NRC at 499; *Diablo Canyon*, ALAB-644, 13 NRC at 923.

⁵⁶ *See, e.g.*, Office of Nuclear Reactor Regulation (NRR), NRC, Safety Evaluation of the Diablo Canyon Nuclear Power Station Units 1 and 2, at 2-4 (Supp. 7 May 1978) (ADAMS Accession No. ML14279A129) ("Hosgri event (0.75g) [t]his is the basis that we have approved for use in the seismic reevaluation. . . . [W]e require that the plant design be shown to be adequate for the Hosgri event and the applicant is proceeding with the work necessary to demonstrate this."); NRR, NRC, Safety Evaluation Report, NUREG-0675, at 1-7 (Suppl. 34 June 1991) (ADAMS Accession No. ML14279A130) ("The Staff notes that the seismic qualification basis for Diablo Canyon will continue to be the original design basis plus the Hosgri evaluation basis, along with the associated analytical methods, initial conditions, etc."). *See also* PG&E, Diablo Canyon Power Plant, Units 1 and 2, Final Safety Analysis Report Update at 2.5-58 (Rev. 12 Sept. 1998) ADAMS Accession No. ML9810080139).

⁵⁷ FOE also claims that "the Hosgri Evaluation and the [Long Term Seismic Program] were . . . intended to be a one-time exception" from the plant's licensing basis, and did not change the seismic design basis. Petition at 20; Reply at 9. The statement on which FOE relies, however, pertains solely to the Long-Term Seismic Program, not the evaluation of the Hosgri Earthquake. *See* Petition at 20 n.51. Moreover, Research Information Letter 12-01 concluded that the seismic hazard by the Shoreline Fault was bounded by or equal to the hazard analyzed in *both* the Long Term Seismic Program and the Hosgri Evaluation. 2012 Assessment at 58.

for certain further seismic analysis, PG&E use the process identified in the Staff's March 12, 2012 request for information pursuant to 10 C.F.R. § 50.54(f).⁵⁸ As discussed, FOE has failed to show that either of these earlier two communications constituted *de facto* license amendments. For the same reasons, FOE fails to demonstrate that the Staff's October 12, 2012 letter, summarizing and elaborating on its earlier communications, expanded PG&E's operating authority or otherwise altered the terms of the Diablo Canyon operating licenses in any way.

Fourth, in its Reply, FOE claims that the NRC Staff's acceptance of PG&E's UFSAR Revision 21, in September 2013 (shortly after FOE's initial Petition had been filed with the Commission), also constituted a *de facto* license amendment because, allegedly, it too inappropriately moved the Hosgri Earthquake into the Diablo Canyon plant's existing seismic design basis.⁵⁹ FOE also argues that UFSAR Revision 21 amends the license in that it: (1) removes the Double Design Earthquake from the seismic design basis;⁶⁰ and (2) provides authorization to use new methods of analysis to demonstrate satisfaction of the seismic design basis, including probabilistic methods rather than deterministic methods.⁶¹

FOE's argument, however, misconstrues the significance of the Staff's "approval" of a UFSAR revision. Pursuant to 10 C.F.R. § 50.71(e), licensees must periodically submit an updated FSAR to the NRC to report "information and analyses submitted to the Commission by the . . . licensee or prepared by the . . . licensee pursuant to Commission requirement" since the previous update. But the agency does not review such submittals for accuracy; nor does it approve the analyses therein. Rather, as stated when section 50.71(e) was promulgated, the regulation "is only a reporting requirement."⁶² "[A]pprovals of license amendments and technical specification changes are independent of the FSAR updating process."⁶³ As the Commission explained when it promulgated the section 50.71(e) reporting requirement, "[s]ubmittal of updated FSAR pages does not constitute a licensing action but is only intended to provide information."⁶⁴

Such FSAR updates must reflect (1) changes a licensee has made through a license amendment request under 10 C.F.R. § 50.90 (which would have triggered an opportunity to request a hearing); and (2) certain changes that do not require a license amendment pursuant to 10 C.F.R. § 50.59. Actions taken by a licensee under the authority of section 50.59 do not give rise to hearing rights under the

⁵⁸ Petition at 34.

⁵⁹ Reply at 12-14.

⁶⁰ Tr. at 107.

⁶¹ Tr. at 109.

⁶² Final Rule: "Periodic Updating of Final Safety Analysis Reports," 45 Fed. Reg. 30,614, 30,615 (May 9, 1980).

⁶³ *Id.*

⁶⁴ *Id.*

AEA,⁶⁵ but rather are monitored by the NRC Staff's inspections and oversight, which may be challenged only by a petition for enforcement pursuant to 10 C.F.R. § 2.206.⁶⁶ Therefore, although the Staff reviews section 50.71(e) submissions for compliance with such administrative requirements as timeliness and content, the agency does not "approve" substantive changes, such as changes to a seismic analysis, as part of the section 50.71(e) process. Thus, UFSAR Revision 21 could not constitute a *de facto* amendment of the licenses for Diablo Canyon. If PG&E made any such reported changes without proper authorization or analysis, that would be a matter for NRC oversight, not for adjudication.⁶⁷

FOE's interpretation of the NRC Staff's "approval" of section 50.71(e) updates would lead to anomalous results. Under section 50.71(e), licensees must update their FSARs every 2 years.⁶⁸ If FOE were correct, then every 2 years the agency would "approve" all listed section 50.59 changes at a facility and the public would have an opportunity to request hearings on those "approvals." A fundamental purpose of section 50.59, however, is to permit licensees to make certain limited changes to their facilities *without* Commission approval.⁶⁹ Thus, FOE's interpretation directly conflicts with the Commission's clear admonition that a "member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206."⁷⁰ Moreover, because UFSARs that have been updated under section 50.71(e) must also list any license amendments that the agency has approved under section 50.90 within the preceding 2 years, FOE would apparently have the NRC "approve" all license amendments twice.

FOE has not demonstrated that the NRC Staff's "acceptance" of UFSAR Revision 21 plausibly constituted a *de facto* license amendment.

Fifth, in its Supplemental Brief,⁷¹ FOE points to the NRC Staff's December 2014 inspection report assessing PG&E's seismic operability determination after issuance of the September 2014 Seismic Imaging Project Report. As the Commission has explained, however, the NRC's inspection process is separate

⁶⁵ *Fort Calhoun*, CLI-15-5, 81 NRC at 337.

⁶⁶ See *San Onofre*, CLI-12-20, 76 NRC at 439 n.10 (citing *Yankee Nuclear*, CLI-94-3, 39 NRC at 101 n.7).

⁶⁷ *Id.*

⁶⁸ See 10 C.F.R. § 50.71(e)(4).

⁶⁹ Changes, Tests, and Experiments, 64 Fed. Reg. 53,582, 53,584 (Oct. 4, 1999).

⁷⁰ *Yankee Nuclear*, CLI-94-3, 39 NRC at 101 n.7.

⁷¹ As previously stated, there is substantial question whether any of the matters discussed in FOE's Supplemental Brief were timely raised or are within the scope of the Commission's referral. The Board need not decide these issues, however, because we conclude that none of the matters raised by FOE — in or after its initial Petition — constitute grounds for finding a *de facto* license amendment.

from its licensing process.⁷² Staff oversight activities that ensure compliance with existing requirements do not constitute *de facto* license amendments. Thus, NRC inspection reports, even inspection reports documenting violations, are not *de facto* license amendments.⁷³ The Commission has recognized this distinction in this very case, by referring FOE's safety claims to the Executive Director for Operations for consideration under 10 C.F.R. § 2.206.⁷⁴

Sixth, FOE focuses on a March 2015 seismic hazard report issued by PG&E in response to the NRC Staff's information request under section 50.54(f), which was part of the Commission's post-Fukushima review of all power reactors. The March seismic hazard report, by itself, cannot possibly grant a *de facto* license amendment for the simple reason that it was issued by PG&E. A licensee cannot grant itself a license amendment — *de facto* or otherwise.⁷⁵

Finally,⁷⁶ FOE points to the NRC Staff's May 13, 2015 letter responding to PG&E's March 2015 seismic hazard report, claiming that the letter "had the effect of augmenting the plain terms of the licenses' seismic design basis to include an extra-design basis [ground motion] response spectrum."⁷⁷ FOE claims that PG&E's March 2015 report shows that it cannot presently comply with conditions in the Diablo Canyon plant's operating licenses, and that the NRC Staff's May 13, 2015 letter granted PG&E additional operating authority because it "endorses" PG&E's plan to address this supposed noncompliance.⁷⁸

The Staff's May 13, 2015 letter was not a *de facto* license amendment. As previously explained, the Hosgri Earthquake is not an "extra-design basis" but is a part of the historic design basis. Furthermore, the letter merely confirmed that PG&E is following the 10 C.F.R. § 50.54(f) process that, as part of its ongoing oversight responsibilities, the Staff initiated with its request for information back

⁷² *St. Lucie*, CLI-14-11, 80 NRC at 174.

⁷³ *Fort Calhoun*, CLI-15-5, 81 NRC at 336-37.

⁷⁴ CLI-15-14, 81 NRC at 738.

⁷⁵ *See St. Lucie*, CLI-14-11, 80 NRC at 173 ("A licensee cannot amend the terms of its license unilaterally.")

⁷⁶ Although the Board does not take FOE to suggest that testimony before a Senate committee could somehow grant a license amendment, we have also considered FOE's argument that the testimony of Dr. Sam Blakeslee — a geophysicist and former California state senator who presented testimony in December 2014 to the United States Senate Committee on Environment and Public Works — describes the "significance of the Staff's willingness to allow PG&E free rein to substitute revised methods of analysis" in the Diablo Canyon UFSAR. Supplemental Brief at 16. Dr. Blakeslee's testimony demonstrates that he shares FOE's general concerns about the safe operation of Diablo Canyon; however, the Commission has not referred such concerns to this Board. It has referred FOE's concerns regarding operational safety to the NRC Executive Director for Operations to address as a request for enforcement action pursuant to 10 C.F.R. § 2.206. *See* CLI-15-14, 81 NRC at 736.

⁷⁷ Supplemental Brief at 6-7.

⁷⁸ *Id.* at 2.

in March 2012. Diablo Canyon’s seismic hazard reevaluation results, like those of certain other nuclear power plants, warranted additional analysis. The Staff’s May 13, 2015 letter confirmed the next steps in the post-Fukushima process: that is, that PG&E will submit further evaluations in 2017 for the NRC’s review. This ongoing process might — or might not — require PG&E to obtain a license amendment in the future. The mere possibility of a future license amendment, however, does not trigger a hearing opportunity today.⁷⁹

Ultimately, this Board must remain mindful of the “limited” scope of the Commission’s referral, which is to determine whether FOE has established a right to request a hearing under section 189a of the AEA. There are various other ways in which the public may participate in NRC activities. The Commission has directed the Staff to investigate FOE’s concerns regarding operational safety as though FOE had sought one such opportunity — a petition for enforcement pursuant to 10 C.F.R. § 2.206.⁸⁰ Additionally, the Commission has retained for itself the option of exercising its discretion to conduct an evidentiary hearing even though one is not required by the AEA.⁸¹

This Board is charged solely with determining whether, even though no license amendment has been formally approved by the NRC, FOE has nonetheless established a right to request an evidentiary hearing under section 189a of the AEA on the theory that a license amendment has been granted *de facto*. We conclude that FOE has established no such right.

III. ORDER

For the reasons stated, FOE’s petition to intervene and request for hearing is *denied*. In accordance with 10 C.F.R. § 2.311, any appeal to the Commission from

⁷⁹ *Fort Calhoun*, CLI-15-5, 81 NRC at 337.

⁸⁰ CLI-15-14, 81 NRC at 736.

⁸¹ *Id.* at 737-38.

this Memorandum and Order must be taken within twenty-five (25) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 28, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

Docket Nos. 50-250
50-251
(License Nos. DPR-31,
DPR-41)

FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

September 23, 2015

On July 18, 2014, as supplemented by e-mail and the transcripts from a teleconference on September 3, 2014 (Agencywide Documents Access and Management System (ADAMS) package Accession No. ML14202A521), Mr. Thomas Saporito (the Petitioner) of Saprodani Associates filed a petition under Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Requests for Action Under This Subpart." The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) take enforcement action against Florida Power & Light Company (FPL, the Licensee) related to the Turkey Point Nuclear Generating Plant, Units 3 and 4 (Turkey Point).

The Petitioner requested that the NRC suspend or revoke the licenses for Turkey Point, issue a violation with a civil penalty of \$1 million, and issue a confirmatory order that the plant stays in a cold shutdown mode until the Licensee completes an independent assessment (via a contractor) to assess, fully understand, and correct the root cause of the rise in ultimate heat sink (UHS) temperature; a comprehensive evaluation of all nuclear safety-related equipment and components that may have been affected; and an independent evaluation of all nuclear safety-related equipment and components that may have been affected. As the basis for his request, the Petitioner stated that operation at an UHS temperature

in excess of 100 degrees Fahrenheit would result in a loss of control of the reactors and an accident at the plant.

By letter dated January 30, 2015 (ADAMS Accession No. ML14349A597), the NRC accepted a portion of the petition for review in the 10 C.F.R. § 2.206 process and explained why the NRC did not accept the remaining portions of the petition for review under the 10 C.F.R. § 2.206 process. The portion of the petition that the NRC accepted for review under the 10 C.F.R. § 2.206 process was the Petitioner's request that the NRC take enforcement action until the Licensee completes an independent root-cause assessment for the rise in UHS temperature. The letter also states that the NRC Staff would determine the resolution of the petition after the NRC regional staff completes its inspection of the Licensee's root-cause assessment and associated corrective actions.

In Director's Decision DD-15-10, the Director of the Office of Nuclear Reactor Regulation denied the Petitioner's request. The NRC did not identify any inspection findings related to its review of the Licensee's root cause assessment for the UHS temperature. Therefore, the NRC did not have a basis for expanding its current level of regulatory oversight or for taking the Petitioner's requested enforcement actions against the Licensee. The NRC did not find that the continued operation of the plants would adversely affect the health and safety of the public. Therefore, the NRC denied the Petitioner's requested enforcement actions against the Licensee.

FINAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By electronic mail (e-mail) dated July 18, 2014, as supplemented by e-mail and the transcripts from a teleconference on September 3, 2014 (Agencywide Documents Access and Management System (ADAMS) package Accession No. ML14202A521), Mr. Thomas Saporito (the Petitioner) of Saprodani Associates filed a petition under Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Requests for Action Under This Subpart." The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) take enforcement action against Florida Power & Light Company (FPL, the Licensee) related to the Turkey Point Nuclear Generating Plant, Units 3 and 4 (Turkey Point).

In his e-mail dated July 18, 2014 (ADAMS Accession No. ML14202A520), the Petitioner requested that the NRC suspend or revoke the license for Turkey Point, issue a violation with a civil penalty of \$1 million, and issue a confirmatory order that the plant stays in a cold shutdown mode until the Licensee completes

an independent assessment (via a contractor) to assess, fully understand, and correct the root cause of the rise in ultimate heat sink (UHS) temperature; a comprehensive evaluation of all nuclear safety-related equipment and components that may have been affected; and an independent evaluation of all nuclear safety-related equipment and components that may have been affected. As the basis for his request, the Petitioner stated that operation at an UHS temperature in excess of 100 degrees Fahrenheit (°F) would result in a loss of control of the reactors and an accident at the plant.

On September 3, 2014, the Petitioner spoke with the NRC's Petition Review Board through a public and recorded telephone conference and provided additional information concerning his request. The transcripts for the telephone conference are located in ADAMS under Accession No. ML14266A123.

By letter dated January 30, 2015 (ADAMS Accession No. ML14349A597), the NRC notified the Petitioner that it acknowledged receiving his petition and accepted a portion of the petition for review in the 10 C.F.R. § 2.206 process and explained why the NRC did not accept the remaining portions of the petition for review under the 10 C.F.R. § 2.206 process. The portion of the petition that the NRC accepted for review under the 10 C.F.R. § 2.206 process was the Petitioner's request that the NRC take enforcement action until the Licensee completes an independent root-cause assessment for the rise in UHS temperature. The letter also states that the NRC Staff would determine the resolution of the petition after the NRC regional staff completes its inspection of the Licensee's root-cause assessment and associated corrective actions.

By letters to the Petitioner and Licensee dated July 27, 2015 (ADAMS Accession Nos. ML15162B048 and ML15162B050), the NRC issued the proposed director's decision (ADAMS Accession No. ML15162B053) for comment. The Petitioner provided comments by e-mail dated August 5, and August 12, 2015 (ADAMS Accession Nos. ML15237A170 and ML15229B009, respectively). The NRC's evaluation of the Petitioner's comments is provided in the attachment to this final director's decision.

II. DISCUSSION

As documented in section 4OA3.2 of the NRC's Integrated Inspection Report No. 05000250(251)/2014004, dated October 23, 2014 (ADAMS Accession No. ML14296A129), the NRC Staff opened an "unresolved item" that discusses the Staff's plans to inspect the Licensee's root cause of the UHS conditions and associated corrective actions. In March 2015, NRC Staff finished its inspection activities for this unresolved item, and documented the results in section 4OA3 of NRC's Integrated Inspection Report No. 05000250(251)/2015001, dated April 30, 2015 (ADAMS Accession No. ML15121A674).

On July 20, 2014, the Turkey Point UHS temperature exceeded the Technical Specifications (TSs) limit for the UHS temperature (100°F at that time). The Turkey Point TSs require that when the UHS temperature exceeds the limit, both units be in at least the hot standby mode of operation within 12 hours and in the cold shutdown mode of operation within the following 30 hours. The UHS temperature did not exceed 100 degrees for more than 12 hours at a time; therefore, the plant was not required to be in hot standby. The plant was not in a condition prohibited by TSs. The Licensee requested that the NRC exercise discretion not to enforce compliance with the required actions of the TSs. The Licensee stated that compliance with the TS requirements would result in the unnecessary shutdown of both units without a corresponding health and safety benefit, and operation of the units was essential for maintaining electrical grid voltage stability. The NRC granted verbal approval of the enforcement discretion on July 20, 2014 (ADAMS Accession Nos. ML14204A652 and ML14213A069). The enforcement discretion period ended when the NRC subsequently issued license amendments under exigent circumstances for Turkey Point on August 8, 2014 (ADAMS Accession No. ML14199A107). The amendments raised the TS temperature limit for the UHS from 100°F to 104°F. On September 18, 2014, the Licensee submitted Licensee Event Report (LER) 050002502014-004-00 (ADAMS Accession No. ML14280A484) for the UHS temperature exceeding the TS limit of 100°F.

The Licensee entered this event into its corrective action program and performed a root-cause evaluation. NRC's inspectors reviewed the Licensee's evaluation and the associated corrective actions taken and planned. The inspectors also reviewed Licensee performance attributes associated with supplying the NRC with complete and accurate information on the problem, reporting requirements, the root or any contributing causes, and planning or completion of identified corrective actions. The inspectors interviewed plant personnel and evaluated the Licensee's administration of this issue in accordance with its corrective action program as specified in Licensee procedures.

The inspectors also reviewed information associated with the Licensee's request for enforcement discretion to determine the accuracy and consistency of the Licensee's assertions, including the potential for low grid voltage that could have resulted from the shutdown of the two units. Factors other than generation load that could affect the cooling canal temperature (i.e., elevated algae levels and abnormally low rainfall) were also evaluated. During its review of the Licensee's request for enforcement discretion, the NRC Staff independently verified the Licensee's information on grid reliability with the North American Electric Reliability Corporation (NERC) and the Florida Reliability Coordinating Council (FRCC). NERC and FRCC confirmed the Licensee's information about the electrical grid conditions. The inspectors also verified the Licensee's implementation of the commitments and compensatory measures during the period of enforcement discretion, which included maintaining a third component cooling water (CCW)

heat exchanger in service; increasing the frequency of the CCW heat exchanger performance testing and cleaning; increasing CCW and UHS temperature monitoring, management oversight, and just-in-time operator training; and minimizing the performance of coincident risk-significant maintenance activities.

The NRC inspectors determined that the event was not reasonably within the Licensee's ability to foresee and prevent. The Licensee determined that high concentrations of algae combined with high summer temperatures and low rainfall conditions created unexpectedly high solar heating effects on the cooling canal system and determined these conditions to be a natural event. A root cause is the basic reason (e.g., hardware, process, or human performance) for a problem, which if corrected, will prevent recurrence of that problem. Although the low rainfall and algae presence were not within the Licensee's ability to foresee and prevent, the Licensee determined that the lack of monitoring the overall health of the cooling canal system and its impact on the UHS TS temperature limit was within its ability to correct and hence was the root cause. The inspectors found that the Licensee had identified and measured increased algae levels and water temperatures in the canal system dating back to the summer of 2013. The inspectors determined that the Licensee was aware of the canal system changes in 2013 and, at that time, the Licensee concluded the conditions would not affect the UHS temperature limit in the future. However, in the spring of 2014, the Licensee found that the algae and salinity concentrations in the canal system were increasing.

The Licensee determined that the increased salinity concentration enhanced algae growth in the canal. The Licensee performed a prompt operability evaluation focusing on CCW heat exchanger performance and concluded that the heat exchangers were operable with the elevated canal algae conditions. In June 2014, the Licensee initiated a chemical treatment project of the canal system in an attempt to reduce the algae concentration to reduce the solar heating effect on the UHS temperature before the late summer months. The project decreased algae concentrations slightly but was unsuccessful in limiting the solar heating effects. As a result, the cooling canal system experienced increased temperatures in July, and the Licensee requested enforcement discretion. The inspectors did not identify any trends not already identified by the Licensee. The inspectors did not identify any new issues during the review of the unresolved item and LER and closed these items in the inspection report.

The NRC inspectors did not identify any inspection findings in accordance with the NRC's Reactor Oversight Process. Therefore, the NRC did not have a basis for expanding its current level of regulatory oversight or for taking the Petitioner's requested enforcement actions against the Licensee.

III. CONCLUSION

The NRC does not have a technical or legal basis for taking the Petitioner's requested enforcement actions against the Licensee. The NRC did not find that the continued operation of the plants would adversely affect the health and safety of the public. Therefore, the NRC denies the Petitioner's requested enforcement actions against the Licensee.

As provided in 10 C.F.R. § 2.206(c), the NRC 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

William M. Dean, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 23d day of September 2015.

ATTACHMENT

COMMENTS RECEIVED FROM THE PETITIONER ON THE PROPOSED DIRECTOR'S DECISION DATED JULY 27, 2015

By letter dated July 27, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15162B048), the U.S. Nuclear Regulatory Commission (NRC) sent a copy of the proposed director's decision (ADAMS Accession No. ML15162B053) to Mr. Thomas Saporito (the Petitioner) for comment. By electronic mail dated August 5 and August 12, 2015 (ADAMS Accession Nos. ML15237A170 and ML15229B009, respectively), the Petitioner responded with comments. The NRC's responses to the Petitioner's comments follow.

Comment 1 (Summarized)

The Petitioner commented that the root cause for the algae growth cited in the NRC inspection report and referenced in the proposed director's decision was incorrect. The Petitioner commented that he provided the NRC with documents showing a significant increase in the ultimate heat sink (UHS) water temperature following the extended power uprate at Turkey Point Units 3 and 4. The Petitioner commented that the temperature increase was directly related to the extended power uprate and that the additional heat to the UHS from the extended power uprate was the likely cause of increased algae growth in the UHS.

Response

The NRC Staff acknowledges that power generation produces a thermal load (i.e., a heat discharge) to the UHS (i.e., the cooling canal system) and that since the extended power uprate, Turkey Point Units 3 and 4 have a higher heat discharge to the UHS. However, based on the NRC Staff's inspection of the root-cause evaluation for the cooling canal system conditions and review of the amount of heat discharge to the cooling canal system, the Staff did not find information that supported the Petitioner's assertion that the UHS conditions (i.e., algae growth and increased temperatures) were caused by the heat discharge from the extended power uprate of Turkey Point Units 3 and 4.

Turkey Point Units 3 and 4 share the site complex with two oil/natural gas-fired generating units (Units 1 and 2) and a combined-cycle gas-fired unit (Unit 5). Units 3 and 4 share the cooling canal system with Units 1 and 2. Prior to the extended power uprate, Units 3 and 4 produced an electrical power output of 775

megawatts electric (MWe) per unit. The extended power uprate increased this to 888 MWe per unit. Units 1 and 2 produce an electrical output of about 400 MWe per unit. However, since December 2010, the Licensee has operated Unit 2 in synchronous condenser mode and, therefore, this unit is producing significantly less heat discharge to the UHS than it did when operating as a power generator.

The Licensee calculated the heat discharge from the four units to the cooling canal system before and after the extended power uprate. The heat discharge to the cooling canal system from Units 1, 3, and 4 at post-extended power uprate operation was slightly less than the heat discharge to the cooling canal system from all four units prior to the extended power uprate because of the transition of Unit 2 to a synchronous condenser unit.

In its root-cause evaluation, the Licensee considered the thermal load to the CCS, canal level, algae, and salinity. From February 26, 2012, through September 5, 2012, Unit 3 was in a prolonged refueling outage for the extended power uprate installation. Unit 4 was in a prolonged refueling outage for the extended power uprate installation from November 5, 2012, through April 17, 2013. The Licensee's root-cause evaluation contains a graph that shows the cooling canal system temperature from November 2007 through November 2014. The graph also shows the cooling canal system temperatures during the prolonged outages for the extended power uprate installations and after Unit 2 ceased power generation. The graph shows that despite the reduced cooling burden of the Unit 2 synchronous generator mode of operation and the prolonged outages of Units 3 and 4, the cooling canal system temperatures did not have the expected corresponding decrease in temperature during the prolonged outages. The Licensee noted that instead, the cooling canal system temperature kept rising while one of the nuclear units was at 50% power and the fossil units were not generating power.

The Licensee's root-cause evaluation noted that an algal bloom occurred in August 2012, which was when Unit 3 was in an extended outage (i.e., during a period of less heat discharge than at full-power operation) and prior to operation of either unit at extended power uprate power levels. In addition, in the summer of 2012, the cooling canal system temperatures appeared to have reached a peak value similar to the peak values in the summers of 2008, 2009, 2010, and 2011, despite Unit 3 being in a prolonged outage. This information does not support the Petitioner's assertion that the algal bloom was caused by the heat discharge at extended power uprate operation.

In its root-cause evaluation, the Licensee concluded that while the thermal outputs of the plants contribute to the cooling canal system temperature, they are not the main cause of the cooling canal system conditions. The Licensee determined that high concentrations of algae combined with high summer temperatures and low rainfall conditions created unexpectedly high solar heating effects on the cooling canal system. Though thermal output may not be a main driver, the Licensee concluded in its root-cause evaluation that monitoring of thermal

output to UHS temperature could have been used as a trigger to investigate why the correlation was different from the expected temperatures, especially during the winter months when UHS temperatures were above normal. Based on the information it reviewed and the presence of other factors (e.g., the lower rainfall and its impact on salinity and algae) at the time of the cooling canal system temperature increase, the NRC Staff did not find evidence that confirmed the Petitioner's assertion that the heat discharge from the extended power uprate was the root cause of the algal growth.

A root cause is the basic reason (e.g., hardware, process, or human performance) for a problem, which if corrected, will prevent recurrence of that problem. The NRC did not identify any findings associated with the Licensee's determination that the root cause of the event was due to not having a program in place to monitor the overall health of the cooling canal system and its impact on the Technical Specifications UHS temperature limit. The NRC Staff continues to monitor the Licensee's corrective actions for addressing the root cause.

Comment 2 (Summarized)

Petitioner provided a hyperlink (<http://www.bloomberg.com/news/articles/2015-08-11/who-s-behind-the-96-million-shade-balls-they-just-rolled-into-l-a-s-reservoirs->) to an article that discussed a method for blocking sunlight and reducing evaporation in a reservoir. The Petitioner commented that the article may be of help to the Licensee for addressing the algal bloom in its UHS.

Response

The NRC continues to monitor the Licensee's progress in implementing its corrective actions for the UHS conditions and appreciates the Petitioner's interest in addressing the conditions of the UHS. As a matter of compliance with a particular license condition or rule, NRC Staff can refer to a regulatory guide that describes an acceptable (but not necessarily the only) method of achieving compliance. However, in other areas for which the NRC has not established an acceptable position on a matter, there may be a number of ways to correct issues. It is the Licensee's responsibility to decide how best to achieve compliance or correct any other issues relating to safe operation.

The NRC Staff has determined that the comments provided by the Petitioner did not provide any relevant additional information and support for the petition that had not already been considered. Thus, the comments did not change the conclusion of the proposed director's decision. The Final Director's Decision denies the Petitioner's request for enforcement action. The NRC appreciates the

Petitioner's comments and thanks the Petitioner for raising the concerns in the interest of protection of the health and safety of the public.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-271-LA

**ENTERGY NUCLEAR VERMONT
YANKEE, LLC, and ENTERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station)**

October 1, 2015

The Commission affirms an Atomic Safety and Licensing Board decision that denied a request for hearing and petition to intervene in this license amendment proceeding.

EMERGENCY RESPONSE

The Emergency Response Data System (ERDS) is a direct electronic data link between computer data systems used by licensees of operating reactors and the NRC Operations Center. The system is a method of transmitting to the NRC near real-time data from a licensee during an alert or higher emergency classification. The ERDS rule and its Statements of Consideration make clear that the rule is inapplicable to those nuclear power facilities that are permanently or indefinitely shut down.

EMERGENCY PLANS

Pursuant to 10 C.F.R. § 50.54(q)(3), licensees may make changes to an emergency plan without prior NRC approval if the licensee completes and retains an analysis demonstrating that the revised emergency plan satisfies a two-part test:

(1) the plan as changed must continue to meet the requirements in Part 50, Appendix E, and the standards in section 50.47(b); and (2) the changes must not reduce the effectiveness of the plan.

CONTENTIONS, ADMISSIBILITY

The NRC's contention admissibility rules are found in 10 C.F.R. § 2.309(f)(1). They are intentionally strict. For each contention, the petitioner must state the issue of law or fact to be raised or controverted and a brief explanation of the basis for the contention. Contentions cannot be based on speculation but must have some reasonably specific factual or legal basis. Our rules require a petitioner to state the alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely in litigating the contention at hearing.

CONTENTIONS, ADMISSIBILITY

The issue raised in a contention must fall within the scope of the proceeding and be material to the findings that the NRC must make. A contention, therefore, must provide sufficient information to show a genuine dispute with the applicant on a material issue of law or fact. A petitioner must refer to the specific portions of the application that the petitioner disputes, along with the supporting reasons for each dispute; or, if the petitioner believes that an application fails altogether to contain information required by law, the petitioner must identify each failure and provide supporting reasons for the petitioner's belief.

CONTENTIONS, ADMISSIBILITY

The Commission generally defers to Board decisions on contention admissibility unless it finds an error of law or abuse of discretion.

EMERGENCY RESPONSE

NRC generic communications regarding ERDS have been addressed to all holders of operating licenses for operating reactors, *except* those license holders that have ceased operations and have certified that fuel has been permanently removed from the reactor vessel. While the ERDS rule does not address the removal of ERDS, in practice the NRC has allowed licensees that have permanently defueled their reactors to remove ERDS.

EMERGENCY PLANS

Section 50.54(q)(3), by its own terms, allows a licensee to revise an emergency plan without prior NRC approval if the rule's screening criteria are met.

MEMORANDUM AND ORDER

The State of Vermont has appealed LBP-15-4,¹ an Atomic Safety and Licensing Board decision that denied the state's request for hearing and petition to intervene in this license amendment proceeding.² We affirm the Board's decision for the reasons we provide below.

I. BACKGROUND

A. The NRC's Emergency Response Data System

Because both Vermont's proffered contention and the Board's decision center on an NRC communications system called the Emergency Response Data System (ERDS), we begin with an overview of the ERDS and associated NRC regulations. ERDS is a "direct electronic data link between computer data systems used by licensees of operating reactors and the NRC Operations Center."³ The system is a method of "assembling and transmitting to the NRC near real time data from a licensee during an alert or higher emergency classification."⁴ ERDS automatically collects and transmits a "selected set of parametric reactor data"⁵ and supplements other communications methods (e.g., voice communication) between licensees and the NRC.⁶

Following the Three Mile Island accident in March 1979, the NRC sought to "improve the reliability and timeliness of data transmission and ensure that any

¹ 81 NRC 156 (2015).

² The State of Vermont's Notice of Appeal of Atomic Safety and Licensing Board's January 28, 2015 Memorandum and Order Denying the State's Request for Hearing and Petition to Intervene (Feb. 23, 2015); The State of Vermont's Brief in Support of Atomic Safety and Licensing Board's January 28, 2015 Memorandum and Order Denying the State's Request for Hearing and Petition to Intervene (Feb. 23, 2015) (Vermont Appeal).

³ See Final Rule: "Emergency Response Data System," 56 Fed. Reg. 40,178, 40,178 (Aug. 13, 1991) (ERDS Final Rule).

⁴ See *id.* at 40,180.

⁵ See *id.* at 40,182.

⁶ See *id.* at 40,178-79, 40,182-83.

reactor unit in distress can be suitably monitored.”⁷ ERDS began as a voluntary program among nuclear power reactor licensees — with about half of the then-operating reactor units participating — but in 1991 the NRC issued section VI to Appendix E, requiring participation in the program.⁸ The ERDS rule sought to assure that “a reliable and effective communication system” is “in place at operating power reactors” to “allow the NRC to monitor critical parameters during an emergency.”⁹ The NRC did not require licensees to monitor more parameters than were already being monitored at each facility, however.¹⁰ Nor has ERDS ever been intended to “portray every detail of a nuclear power reactor in an emergency situation.”¹¹ Licensees are required to activate ERDS “as soon as possible but not later than one hour after declaring an Emergency Class of alert, site area emergency, or general emergency.”¹²

In issuing the ERDS rule, the NRC required the participation of “all operating nuclear power facilities except Big Rock Point,” whose facility configuration did not “make available as transmittable data a sufficient number of parameters for effective participation.”¹³ Further, the ERDS rule itself and its Statement of Considerations make clear that the rule is inapplicable to those “nuclear power reactor facilities . . . that are permanently or indefinitely shut down.”¹⁴

The NRC allowed state governments to request an ERDS link from the NRC. Although it neither required nor solicited state participation in the ERDS, the NRC permitted states to establish an “ERDS interface” with the NRC through a Memorandum of Understanding.¹⁵ As relevant here, in 1997 Vermont and the NRC entered into a Memorandum of Understanding in which the NRC agreed to

⁷ See Proposed Rule: “Emergency Response Data System,” 55 Fed. Reg. 41,095, 41,098 (Oct. 9, 1990) (ERDS Proposed Rule).

⁸ See ERDS Final Rule, 56 Fed. Reg. 40,178; 10 C.F.R. Part 50, App. E, § VI; *see also* 10 C.F.R. § 50.72(a)(4) (specifying ERDS activation requirements).

⁹ ERDS Final Rule, 56 Fed. Reg. at 40,178.

¹⁰ *See id.* at 40,184; *see also* 10 C.F.R. Part 50, App. E, § VI.1 (“When selected plant data are not available on the licensee’s onsite computer system, retrofitting of data points is not required.”).

¹¹ *See* ERDS Final Rule, 56 Fed. Reg. at 40,179.

¹² 10 C.F.R. § 50.72(a)(4).

¹³ *See* ERDS Final Rule, 56 Fed. Reg. at 40,178.

¹⁴ *See id.*; *see also* 10 C.F.R. Part 50, App. E, § VI.2 (“Except for Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite hardware shall be provided at each unit by the licensee to interface with the NRC receiving system.”). The ERDS rule applies to reactor units shut down only temporarily for maintenance and those authorized only for fuel loading or low-power operations. *See* ERDS Final Rule, 56 Fed. Reg. at 40,178; ERDS Proposed Rule, 55 Fed. Reg. at 41,095-96.

¹⁵ *See* ERDS Final Rule, 56 Fed. Reg. at 40,180; Emergency Response Data System (ERDS) Implementation, NUREG-1394, Rev. 1 (June 1991), App. J at J-2.

provide Vermont with access to ERDS “data related to plant conditions during emergencies at commercial nuclear power plants in Vermont.”¹⁶

B. Procedural Background

1. Entergy’s License Amendment Request

This adjudicatory proceeding stems from Entergy’s request for an amendment to its license for the Vermont Yankee Nuclear Power Station. By letter dated March 24, 2014, Entergy proposed changes to the Site Emergency Plan to reduce the on-shift and Emergency Response Organization staffing.¹⁷ Entergy requested the amendment as part of its “transition from an operating facility to a permanently defueled facility.”¹⁸ Entergy explained that upon the docketing of certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, the Vermont Yankee license “will no longer authorize operation of the reactor or emplacement or retention of fuel into the reactor vessel.”¹⁹ Entergy described its proposed staffing reductions as “commensurate with the reduced spectrum of credible accidents in [a] permanently defueled condition.”²⁰

As part of its license amendment request, Entergy submitted an analysis evaluating whether the “proposed post-shutdown minimum on-shift staff” could “implement all emergency tasks.”²¹ The analysis assessed the adequacy of the proposed staffing to perform necessary emergency tasks in light of the reduced number of “postulated accidents that will be applicable in the permanently defueled condition.”²² For each of the various accident scenarios studied in the staffing analysis (e.g., fuel handling accident, general emergency with radioactive release beyond the site boundary, design-basis-threat ground assault), Entergy identified the tasks to be performed and the on-shift positions responsible for each task.²³ Where “multiple tasks were assigned to an individual in their role,” the analysis included Time Motion Studies evaluating “the timing of the tasks

¹⁶Notice, Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Vermont, 62 Fed. Reg. 6281, 6281-82 (Feb. 11, 1997).

¹⁷Wamser, Christopher J., Site Vice President, Entergy, Letter to U.S. NRC Document Control Desk (Mar. 24, 2014) (ADAMS Accession No. ML14085A257) (License Amendment Request).

¹⁸*Id.* at 1.

¹⁹*See id.*; *see also* 10 C.F.R. § 50.82(a)(2). The certifications have since been filed. *See* Wamser, Christopher J., Site Vice President, Entergy, Letter to U.S. NRC Document Control Desk, “Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel” (Jan. 12, 2015) (ADAMS Accession No. ML15013A426).

²⁰License Amendment Request at 1.

²¹*See id.*, Attach. 4, Analysis of Proposed Shutdown On-Shift Staffing at 4.

²²*See id.*

²³*See id.*, Attach. 4 at 17-45.

. . . to ensure that they could be performed by the individual in series within any specified time requirements.”²⁴

In evaluating whether the proposed on-shift staff adequately could perform the emergency tasks for each of the evaluated accident scenarios, Entergy identified those positions and tasks it considered no longer applicable to a facility with a permanently shutdown and defueled reactor.²⁵ Among these various identified tasks, Entergy explained that in a permanently shutdown and defueled condition the Vermont Yankee facility would not need to have an operational ERDS communications link to the NRC, and therefore the task of activating the ERDS link was not included in the staffing analysis as one of the on-shift crew tasks to be performed in an emergency.²⁶

The NRC Staff published a notice of Entergy’s license amendment request in the *Federal Register*, providing an opportunity to submit comments and to request a hearing.²⁷ Vermont filed comments on the proposed license amendment.²⁸ Subsequently, Vermont filed its request for hearing and petition to intervene.²⁹

2. Vermont’s Contention

Vermont proffered one contention for hearing. The contention did not address Entergy’s proposed changes in the on-shift or Emergency Response Organization staffing. Instead, Vermont focused on the assumption that “the ERDS link to the NRC will not be operational in the permanently shut down and defueled condition.”³⁰ Vermont’s contention sought continuation of the ERDS data link with the NRC or an alternate means of obtaining similar data. The contention in full reads as follows:

Entergy has failed to ensure a Radiological Monitoring System that will provide the information that the State needs to assess Vermont Yankee conditions as part of the State’s protective action decision-making process, and Entergy has thus failed to

²⁴ See *id.*, Attach. 4 at 10, 46-62.

²⁵ See *id.*, Attach. 4 at 7-8, 12-14.

²⁶ See *id.*, Attach. 4 at 8.

²⁷ See Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, Notice, 79 Fed. Reg. 42,539, 42,539-42, 42,546 (July 22, 2014).

²⁸ The Vermont Public Service Department filed two comments, both dated August 21, 2014 (Vermont Comment 1, ADAMS Accession No. ML14239A029; Vermont Comment 2, ADAMS Accession No. ML14239A030).

²⁹ Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Sept. 22, 2014; filed through the NRC’s E-Filing system Sept. 24, 2014) (Petition for Hearing); see also LBP-15-4, 81 NRC at 162-64 (declining to dismiss petition as untimely).

³⁰ See Petition for Hearing at 4.

demonstrate that its license amendment request (1) will not significantly reduce the margin of safety or significantly increase the consequences of an accident previously evaluated as required by 10 CFR § 50.92; (2) will provide adequate protection for the public health and safety as required by 10 CFR § 50.57(a)(3); and (3) will comply with the requirements of 10 CFR § 50.47 to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.³¹

Vermont claimed that while many of the parameters ERDS transmits would not be “needed once Vermont is in a permanently shut down and defueled condition, other ERDS parameters are still needed.”³² Vermont argued that “[w]ithout timely access to the spent fuel pool, radiological, and meteorological data” made available through ERDS to the state’s radiological response organizations, “the State would need significantly more time to obtain accurate data needed for State protective action recommendations.”³³ Vermont requested a hearing to “put forward testimonial evidence on the potential consequences of that delay.”³⁴

As set forth in its petition, Vermont seeks either that (1) “the ERDS link to the NRC be retained during Vermont Yankee’s permanently shut down and defueled period” or (2) “an alternate means similar to ERDS be made available to provide [an] equivalent Radiation Monitoring System, Meteorological information, and Containment parameters relevant to the spent fuel pool conditions for as long as fuel remains within the spent fuel pool.”³⁵

Both the Staff and Entergy opposed admission of Vermont’s contention on several grounds. Both claimed that the contention falls beyond the scope of the proposed license amendment.³⁶ Both also argued that the contention constitutes an impermissible challenge to the ERDS requirements in Appendix E to Part 50, which exempt permanently shutdown nuclear power facilities.³⁷ Entergy additionally claimed that the contention fails to raise a genuine material dispute with the application and lacks the necessary factual or expert support.³⁸ The Staff

³¹ See *id.* at 3-4.

³² See *id.* at 4.

³³ See *id.* at 5.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See NRC Staff’s Answer to Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 20, 2014) at 9-12, 14-15 (Staff Answer Before Board); Entergy’s Answer Opposing the State of Vermont’s Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 3, 2014) at 14-15 (Entergy Answer Before Board).

³⁷ See Staff Answer Before Board at 12-13; Entergy Answer Before Board at 15; 10 C.F.R. Part 50, App. E, § VI.2.

³⁸ See Entergy Answer Before Board at 15-18.

further argued that the contention is not material to the findings that the NRC must make on the license amendment.³⁹

3. *The Board's Conclusions in LBP-15-4*

Although the Board found that Vermont had submitted a timely petition and had standing to intervene, a Board majority found Vermont's contention inadmissible as a collateral challenge to an NRC regulation — specifically, the ERDS rule.⁴⁰ The Board found the relief Vermont sought to be “inconsistent” with the regulations regarding ERDS, which exempt “all nuclear power facilities that are shut down permanently” from the need to provide an ERDS interface with the NRC.⁴¹ In the Board's view, Vermont effectively seeks to impose on Entergy requirements “more stringent” than the ERDS regulations because Vermont seeks to require Entergy — even now that the Vermont Yankee reactor is permanently shut down and defueled — to maintain an ERDS link with the NRC or to “create another ERDS-like system.”⁴² In reaching its conclusions, the Board examined the language, regulatory history, and regulatory framework of the ERDS regulations.⁴³ The Board rejected Vermont's alternate interpretations of the ERDS rule exemption.⁴⁴

Judge Wardwell dissented. In his view, the “exemption clause” for shutdown power facilities in Appendix E, § VI.2 applied only to those “plants . . . already shut down at the time of the rulemaking and not to plants at which an ERDS was later installed” and that now are terminating operations.⁴⁵ He reasoned that the text in Appendix E only concerns “the initial installation, startup, operation, and maintenance of the ERDS,” not whether or when an installed system can be disconnected.⁴⁶ Judge Wardwell described the exemption as intended merely to exclude the then-shutdown plants, “whose spent fuel had been cooling . . . for a period of time,” from having to comply with the rule's mandate “to install, implement, and maintain an ERDS.”⁴⁷

³⁹ See Staff Answer Before Board at 15-16.

⁴⁰ See 10 C.F.R. § 2.335(a) (“no rule or regulation of the Commission . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding of this part”).

⁴¹ See LBP-15-4, 81 NRC at 167 (quoting 10 C.F.R. Part 50, App. E, § VI.2).

⁴² See *id.*

⁴³ See *id.* at 167-73.

⁴⁴ See *id.* at 167-72.

⁴⁵ See *id.* at 177 (Wardwell, J., dissenting) (concluding that, at a minimum, two interpretations of the exemption provision are possible).

⁴⁶ See *id.* at 182.

⁴⁷ See *id.* at 181.

Judge Wardwell therefore concluded that the exemption for plants “that are shutdown permanently or indefinitely” does not apply to Vermont Yankee or other plants with “previously installed” ERDS connections that now have terminated reactor operations permanently.⁴⁸ In turn, he concluded that Vermont’s contention does not challenge the ERDS rule.⁴⁹ Judge Wardwell went on to find Vermont’s contention otherwise admissible for hearing.⁵⁰

Both the majority and dissenting opinions address a recent NRC Staff-generated memorandum (referenced as the “Lewis Memorandum” or “Lewis Memo”) whose express intent was to clarify the ERDS requirements for those plants that have permanently ceased operations.⁵¹ Issued to the NRC regions, the Lewis Memorandum states that the Appendix E, § VI requirements involving ERDS do not apply to power reactor licensees that have submitted a certificate of permanent cessation of operation.⁵² The memorandum goes on to specify that a licensee of a permanently shutdown facility may “retire ERDS without prior NRC approval” if its emergency plan “does not describe ERDS or its use during an emergency.”⁵³ For those licensees whose emergency plan describes ERDS or its use during an emergency, the memorandum outlines a process for retiring ERDS. The memorandum states that such licensees “would need to process a change” to their emergency plans pursuant to 10 C.F.R. § 50.54(q)(3).⁵⁴

Section 50.54(q)(3) allows a licensee to make changes to an emergency plan without prior NRC approval if the licensee completes and retains an analysis demonstrating that the revised emergency plan satisfies a two-part test: (1) the plan as changed must continue to meet the requirements in Part 50, Appendix E and the standards in section 50.47(b); and (2) the changes must not reduce the effectiveness of the plan.⁵⁵ The Lewis Memorandum states that a licensee accordingly may, without NRC prior approval, revise its emergency plan to remove the reference to the ERDS data link to the NRC if the licensee performs the section 50.54(q)(3) screening analysis and concludes that the two-part test is satisfied. If a licensee concludes in its section 50.54(q)(3) analysis that a particular

⁴⁸ *See id.* at 188.

⁴⁹ *See id.*

⁵⁰ *See id.* at 190-91.

⁵¹ *See* Memorandum from Lewis, Robert J., Division of Preparedness and Response, Office of Nuclear Security and Incident Response, “Emergency Response Data System at Plants That Have Permanently Ceased Operations” (June 2, 2014) (ADAMS Accession No. ML14099A520) (Lewis Memorandum).

⁵² *See id.* at 1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ “Reduction in effectiveness” means a reduction in the “licensee’s capability to perform an emergency planning function in the event of a radiological emergency.” *See* 10 C.F.R. § 50.54(q)(1)(iv); *see also id.* § 50.54(q)(1)(iii).

change would reduce the effectiveness of an emergency plan, then the licensee cannot implement the change without prior NRC approval and must seek a license amendment to change the emergency plan.

In February 2015, while this case was pending, the NRC granted the license amendment (License Amendment 261), approving Entergy's proposed changes to the Vermont Yankee site emergency plan to reduce the on-shift and Emergency Response Organization staffing.⁵⁶ The Staff found that the proposed staffing changes met the emergency plan standards in 10 C.F.R. § 50.47(b) and the requirements in Appendix E to 10 C.F.R. Part 50 and also provide reasonable assurance that adequate protective measures "can and will be taken in the event of a radiological emergency, commensurate with the reduced spectrum of credible accidents in the permanently shutdown and defueled condition."⁵⁷

On February 23, 2015, Entergy submitted to the NRC a revised Vermont Yankee emergency plan (Revision 55).⁵⁸ Revisions included the on-shift and Emergency Response Organization staffing reductions authorized by License Amendment 261, as well as several emergency plan changes for which Entergy had performed a section 50.54(q)(3) screening analysis and concluded that they would not require prior NRC approval.⁵⁹ Retiring ERDS and removing ERDS from the emergency plan were among the emergency plan changes Entergy made pursuant to section 50.54(q)(3).⁶⁰

II. ANALYSIS

A. Timeliness

As an initial matter, Entergy opposes Vermont's appeal as untimely.⁶¹ The appeal was due on February 23, 2015.⁶² Vermont attempted to file its appeal approximately 30 minutes prior to the midnight deadline on February 23, 2015,

⁵⁶ See Kim, James, NRC, Letter to Entergy, "Vermont Yankee Nuclear Power Station — Issuance of Amendment to Renewed Facility Operating License Re: Changes to the Emergency Plan" (Feb. 4, 2015) (ADAMS Accession No. ML14346A065) (License Amendment).

⁵⁷ See *id.* at 22.

⁵⁸ See McKenney, Michael P., Emergency Planning Manager, Entergy, Letter (with attachments) to Document Control Desk, U.S. Nuclear Regulatory Commission, "Emergency Plan Change, Revision 55" (Feb. 23, 2015) (ADAMS Accession No. ML15076A074) (Revision 55 to EP).

⁵⁹ *Id.*

⁶⁰ See *id.*, Attach. 9.2, 10 CFR 50.54(q) Evaluation, Vermont Yankee ERDS (revised analysis dated Jan. 26, 2015), at 5-6 of 7.

⁶¹ See Entergy's Answer Opposing the State of Vermont's Appeal of Atomic Safety and Licensing Board's January 28, 2015 Memorandum and Order Denying the State's Request for Hearing and Petition to Intervene (Mar. 20, 2015) at 8-10 (Entergy Brief).

⁶² See LBP-15-4, 81 NRC at 176 (majority opinion); 10 C.F.R. § 2.311(b).

but encountered technical difficulties submitting its brief through the NRC's Electronic Information Exchange (EIE).⁶³ Vermont nonetheless sent a copy of its brief to the other participants by e-mail prior to the filing deadline. The next day Vermont obtained technical assistance from the NRC EIE Help Desk and was able to file its brief via the EIE.⁶⁴ Based on the affidavit of Vermont's counsel, we find that Vermont had good cause to believe its EIE connection to the NRC was in working order on the day its appeal was due and that Vermont otherwise acted in good faith and with reasonable diligence. The other litigants also were not prejudiced by the hours of delay in the EIE filing. We accept the appeal.

B. Contention Admissibility Requirements

A request for hearing must "set forth with particularity" the contentions a petitioner seeks to litigate.⁶⁵ The NRC's contention admissibility rules are found in 10 C.F.R. § 2.309(f)(1). They are intentionally strict. For each contention, the petitioner must state the issue of law or fact to be raised or controverted and a brief explanation of the basis for the contention.⁶⁶ Contentions cannot be based on speculation but must have "some reasonably specific factual or legal basis."⁶⁷ Our rules thus require a petitioner to state the alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely in litigating the contention at hearing.⁶⁸

The petition also must demonstrate that the issue raised in the contention falls within the scope of the proceeding and is material to the findings that the NRC must make.⁶⁹ A contention, therefore, must provide sufficient information to show a genuine dispute with the applicant on a material issue of law or fact.⁷⁰ A petitioner must refer to the specific portions of the application that the petitioner disputes, along with the supporting reasons for each dispute; or, if the petitioner believes that an application fails altogether to contain information required by law, the petitioner must identify each failure and provide supporting reasons for

⁶³ See Affidavit of Aaron Kisicki Regarding the Late Electronic Filing of the State of Vermont's February 23, 2015 Notice of Appeal and Supporting Brief (Feb. 24, 2015) at 1 (ADAMS Accession No. ML15055A276).

⁶⁴ *Id.* at 1-2.

⁶⁵ See 10 C.F.R. § 2.309(f)(1).

⁶⁶ *Id.* § 2.309(f)(1)(i)-(ii).

⁶⁷ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (citation omitted).

⁶⁸ 10 C.F.R. § 2.309(f)(1)(v).

⁶⁹ *Id.* § 2.309(f)(1)(iii)-(iv).

⁷⁰ *Id.* § 2.309(f)(1)(vi).

the petitioner’s belief.⁷¹ We generally defer to Board decisions on contention admissibility unless we find an error of law or abuse of discretion.⁷²

C. Admissibility of Vermont’s Contention

On appeal, Vermont challenges the Board’s interpretation of the ERDS regulations.⁷³ In particular, Vermont argues that the rule’s exemption for permanently shutdown nuclear power facilities “applied only to shut down plants as of 1991,” to exempt those plants from the requirement to install and implement ERDS.⁷⁴ Vermont argues that the ERDS regulations neither allow nor “even contemplate[] termination of the ERDS feed under any circumstances.”⁷⁵ Vermont therefore argues that the majority erred when it found Vermont’s contention a collateral attack on the ERDS regulations.⁷⁶ Vermont also argues that the Staff prematurely issued the license amendment without first reviewing Entergy’s section 50.54(q)(3) analysis on whether removing ERDS would reduce the effectiveness of Entergy’s emergency plan.⁷⁷ Entergy and the NRC Staff oppose the appeal.⁷⁸

1. Scope of the License Amendment Proceeding

Before turning to Vermont’s arguments on appeal, we first address a key issue that the Board majority did not reach — the limited scope of this proceeding. Both the Staff and Entergy’s primary argument in opposing Vermont’s contention before the Board was that the contention raises issues beyond the scope of this proceeding.⁷⁹ We agree.

In challenging Entergy’s license amendment application, Vermont seeks to have Vermont Yankee retain its “ERDS link to the NRC.”⁸⁰ Alternatively, Vermont seeks another “means similar to ERDS” that will provide data “equivalent” to the radiological, meteorological, and spent-fuel-pool-related data that Vermont

⁷¹ *Id.*

⁷² See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 397 (2012).

⁷³ See Vermont Appeal Brief at 5-11.

⁷⁴ See *id.* at 9-10.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 5, 16.

⁷⁷ See *id.* at 5, 17, 19.

⁷⁸ See Entergy Brief; NRC Staff’s Brief in Opposition to the State of Vermont’s Appeal of LBP-15-4 (Mar. 20, 2015) (Staff Brief).

⁷⁹ See, e.g., Staff Answer Before Board at 1, 9-12; Entergy Answer Before Board at 14-15.

⁸⁰ See Petition for Hearing at 5.

states it was able to obtain through ERDS.⁸¹ Yet Entergy’s license amendment application did not include a request to terminate the Vermont Yankee ERDS link to the NRC. As Vermont itself acknowledges, the license amendment request “made no apparent change” to the section of the emergency plan that addressed the ERDS link and that specified the plant’s “continuous ERDS connection with the NRC Operations Center.”⁸² Nor did the NRC Staff’s issuance of the license amendment serve to allow Entergy to delete ERDS from its emergency plan or to remove the system. In granting the license amendment, the Staff made clear both that the license amendment request had *not* included a request to disconnect the ERDS link and that the Staff was *not* “providing prior approval for the removal of ERDS” at Vermont Yankee.⁸³

To be sure, Entergy deleted the reference to ERDS in the emergency plan and retired the Vermont Yankee ERDS — effective February 5, 2015 — but only after completing an analysis under section 50.54(q)(3).⁸⁴ In its analysis, Entergy concluded that (1) the applicable emergency plan regulations under 10 C.F.R. § 50.47(b) and Appendix E to Part 50 would continue to be met even without ERDS and (2) removing ERDS would not reduce the effectiveness of the Vermont Yankee emergency plan.⁸⁵ In short, the challenged license amendment did not affect the status of the ERDS link at Vermont Yankee.

The license amendment request does refer to ERDS, but solely in regard to the assumption that after the permanent shutdown of the reactor it would no longer be necessary for the on-shift staff to activate ERDS. Entergy sought the license amendment because it intended to cease reactor operations and defuel the reactor and accordingly all of Entergy’s proposed staff reductions relate to Vermont Yankee in a “permanently defueled condition.”⁸⁶ As such, the staffing analyses submitted with the request contained assumptions regarding the spectrum of credible accidents or events and the emergency tasks that would still be applicable — or no longer applicable — at a facility with a permanently shutdown and defueled reactor.⁸⁷ In this vein, Entergy assumed that maintaining the ERDS link would not be required at a permanently defueled facility and in turn that the specific on-shift staff “task of ERDS activation” would no longer be relevant.⁸⁸

⁸¹ *Id.* at 5.

⁸² *See* Vermont Appeal at 11 (citing section 7.10 of the Vermont Yankee emergency plan).

⁸³ *See* License Amendment, Attach., Safety Evaluation Related to Amendment No. 261 at 27 (responding to Vermont’s comments on proposed amendment).

⁸⁴ Entergy Brief at 6.

⁸⁵ *See* Revision 55 to EP, Attachment 9.2, Section 50.54(q) Evaluation (Jan. 26, 2015), at 5-6 of 7.

⁸⁶ *See* License Amendment Request, Cover Letter at 1.

⁸⁷ *See, e.g., id.*, Attach. 4 at 4-15.

⁸⁸ *See id.*, Attach. 4 at 8; *see also, e.g., id.* at 21, 27, 33, 39.

While Vermont took issue with Entergy's assumption that it could disconnect ERDS after ceasing operations and defueling, Vermont's contention did not challenge the proposed staffing reductions. Vermont's petition neither claimed that more on-shift positions would be necessary to allow for timely ERDS activation nor conversely, that without the automatic ERDS mode of data transmission more on-shift staff would be necessary to perform emergency tasks. In short, Vermont's contention did not seek to litigate the sufficiency of the proposed staffing reductions.

Vermont's subsequent efforts in its reply brief to tie its interest in the ERDS data to the proposed staffing in the license amendment were both late and unsupported.⁸⁹ Vermont neither explained nor otherwise supported claims that the proposed "on-shift staff reductions . . . can only be justified by the elimination of ERDS" or that the "staffing reductions proposed by Entergy will result in . . . the effective elimination of ERDS."⁹⁰ Additionally, Vermont provided no basis for its argument that the license amendment would "permit Entergy to discharge several employees whose training and experience are essential to ERDS operation."⁹¹

Notably, by its very nature ERDS does not require a dedicated "operator" for the duration of emergencies because the system automatically collects and transmits plant data; the "acquisition and transmission of data do not require human intervention after the system is activated."⁹² Moreover, Vermont Yankee's ERDS connection to the NRC was a continuous 24-hour connection and therefore the task of activating ERDS in an emergency would not have been necessary unless the system had become disconnected and needed to be reconnected. Regardless, Vermont's contention did not propose that merely to perform the single task of activating ERDS or the task of verifying that the ERDS connection was active would require more on-shift staff than proposed in the license amendment. Several different positions at Vermont Yankee could perform the "verification" of the ERDS connection to the NRC.⁹³ In fact, Entergy's counsel repeatedly stated that none of the labor reductions proposed in the license amendment depended on the elimination of ERDS, and that "Vermont Yankee does not require any staff . . .

⁸⁹ "In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

⁹⁰ See Vermont Reply Before Board at 2-3; see also *id.* at 6-7 ("the proposed staff reductions are premised upon the elimination of ERDS" and "the loss of ERDS . . . [is] a result of the proposed staffing reductions").

⁹¹ See *id.* at 14; see also Vermont Appeal at 16-17.

⁹² See ERDS Proposed Rule, 55 Fed. Reg. at 41,096. And the "task" of activating ERDS (referenced in the license amendment request) is not an extensive procedure; by regulation activation must be "performed as soon as possible" but at most within 1 hour of an emergency declaration. See 10 C.F.R. § 50.72(a)(4).

⁹³ See, e.g., Revision 55 to EP, ERDS Section 10 C.F.R. 50.54(q) Evaluation, Attach. 9.2 at 2 of 7.

to operate ERDS” during an emergency.⁹⁴ Vermont provided no facts or expert opinion to suggest otherwise.

Judge Wardwell, nonetheless, found the contention to be within the scope of the proceeding and concluded that the proposed reduced staffing levels “are, in part, directly related” to Entergy’s plans to remove ERDS.⁹⁵ Judge Wardwell based his view on Entergy counsel’s statement that it would cost an estimated \$680,000 for Entergy to maintain “all of the IT equipment and support personnel” necessary to continue the ERDS “technology infrastructure” until 2020 (when Entergy plans to transfer all of the fuel out of the spent fuel pool and into an Independent Spent Fuel Storage Installation (ISFSI)).⁹⁶ But equipment and personnel costs relating to testing, updating, and otherwise maintaining the ERDS hardware and software on a long-term basis are a different matter than the staffing levels necessary to respond in an emergency. And in any event, as noted above, the license amendment was not the basis for Entergy’s removal of ERDS at Vermont Yankee.

For the reasons outlined above, we agree with Entergy and the Staff that Vermont’s proffered contention does not (1) fall within the scope of this license amendment proceeding or (2) raise a genuine dispute on a material issue regarding the proposed staffing reductions in the application.⁹⁷ Indeed, even if the license amendment had been denied, Entergy still could have sought removal of ERDS through the section 50.54(q)(3) analysis process. Entergy could have performed its section 50.54(q)(3) analysis regarding the ERDS at any point after certifying that it had ceased operations and defueled the reactor, regardless of the timing of the license amendment request or its issuance.⁹⁸

⁹⁴ See *id.* at 35, 45; see also *id.* at 56 (“the staff that are being reduced[] have nothing to do with the operation of ERDS”).

⁹⁵ See LBP-15-4, 81 NRC at 190-91 (Wardwell, J., dissenting).

⁹⁶ See *id.* at 191 & n.68; Tr. at 38.

⁹⁷ See, e.g., Entergy Brief at 21-22, 23-24; Staff Brief at 9.

⁹⁸ Vermont’s petition also offered little support for its claims regarding the impact of the loss of ERDS data and the State’s need for near real-time data. With no further elaboration, the State indicated only that it would “need significantly more time to obtain accurate data” to make protective action recommendations. See Petition for Hearing at 5. The petition incorporated by reference public comments that the State Nuclear Engineer and Decommissioning Coordinator had submitted on the license amendment request. See Vermont Comment 1. These comments stated that while many ERDS parameters would no longer be relevant with the reactor shut down, many would still be meaningful; Vermont provided no specific examples or other description of potential harm. We therefore agree with the Staff that Vermont’s claims are “vague” and lacking in factual or expert support. See Staff Brief at 27-30; see also Entergy Brief at 22-23.

2. *The ERDS Rule Exception in Appendix E*

In addition to the conclusions reached above, we also agree in substantial part with the majority's reading of the ERDS rule exception. That is, to the extent that Vermont argues that the ERDS regulations require Entergy to maintain ERDS "until all spent fuel currently in the spent fuel pool is transferred to dry cask storage" or alternatively requires Entergy to "establish" a "comparable or better communication system with the State," we agree that Vermont misreads the ERDS requirements given the exception for shutdown facilities.⁹⁹ We need not reach all aspects of the majority and dissent's dispute over the ERDS rule, but focus on the points most relevant to Vermont's contention.

At issue is the ERDS rule exception in Appendix E for "nuclear power facilities that are shut down permanently or indefinitely."¹⁰⁰ Neither the rule itself nor its history defines what is meant by "shut down permanently." The Board rejected Vermont's interpretation that "permanently shut down" means a facility that has moved all of its spent fuel "from the fuel pool into the ISFSI pad offsite."¹⁰¹ The Board also rejected Vermont's arguments that the ERDS rule exception was intended as a "one-time" exception, applicable only to those facilities with permanently shutdown reactors when the NRC issued the rule in 1991.¹⁰² Rather, the Board read the exemption as applying to facilities that have permanently ceased reactor operations and permanently defueled their reactors.¹⁰³

Vermont claims that "there is no indication in the regulation that it was intended to allow licensees that had already set up an ERDS system to terminate its feed to the NRC upon achieving permanently defueled status."¹⁰⁴ We consider the exemption in light of the considerations that led to the rule. ERDS as a supplementary communications system was conceived in the wake of the Three Mile Island accident. The key concern behind ERDS was the NRC's ability (as part of its oversight and support role) to monitor a "reactor accident" — a "reactor unit in distress."¹⁰⁵ The rule history also stressed the need for accurate "near real-time data" to allow the NRC to have quick access to "key information about what is taking place at the reactor during an accident, particularly during the critical early hours."¹⁰⁶ ERDS is intended to help the NRC "provide the right

⁹⁹ See Vermont Appeal at 3; *see also id.* at 6-11.

¹⁰⁰ See 10 C.F.R. Part 50, App. E, § VI.2.

¹⁰¹ See Tr. at 22; LBP-15-4, 81 NRC at 168-70 (majority opinion).

¹⁰² See LBP-15-4, 81 NRC at 171.

¹⁰³ See *id.* at 169-70.

¹⁰⁴ See Vermont Appeal at 9-10.

¹⁰⁵ See ERDS Final Rule, 56 Fed. Reg. at 40,179, 40,182; ERDS Proposed Rule, 55 Fed. Reg. at 41,098.

¹⁰⁶ See ERDS Final Rule, 56 Fed. Reg. at 40,183.

recommendation at the right time . . . in the event of a reactor accident.”¹⁰⁷ As the Board describes, the history contains no mention of spent fuel pools.¹⁰⁸

Moreover, the NRC has not interpreted the rule as a one-time exception or special “waiver” applicable only to those plants that at the time still had spent fuel in pools but no longer had operating reactors. Subsequent NRC generic communications regarding ERDS have been addressed to all holders of operating licenses for nuclear power reactors, *except* those license holders that have “ceased operations” and “have certified that fuel has been permanently removed from the reactor vessel.”¹⁰⁹ And while the rule does not address the removal of ERDS, in practice the NRC has allowed licensees that have permanently defueled their reactors to remove ERDS, as the Staff described.¹¹⁰ Further, as the Staff noted in its brief, the plants that were shut down before the ERDS implementation deadline did not install ERDS though they stored spent fuel in their spent fuel pools for years after the ERDS implementation deadline.¹¹¹

Compared to a reactor accident, a spent fuel pool accident is a slower-moving event with far fewer parameters for a licensee to monitor, fewer kinds of potential accidents, and more time available to take mitigative and corrective actions. Moreover, without an operating reactor in the picture, the entire focus of the licensee’s staff can be on the spent fuel pool. And once a reactor has shut down, the potential for a release from a spent fuel pool will diminish with time as the decay heat of the fuel drops, given that no fresh spent fuel will be added to the pool. It is reasonable, therefore, to read the rule exemption as applying to facilities that have permanently shut down reactor operations and defueled their reactors, as the Board found.

To the extent, then, that Vermont argues that licensees with permanently shutdown and defueled reactors must maintain an ERDS for as long as their facilities still have fuel in a spent fuel pool, we agree with the Board that Vermont’s contention collaterally challenges the ERDS rule by seeking to impose more stringent requirements on non-operating plants than the rule intended.¹¹²

¹⁰⁷ See *id.* at 40,179.

¹⁰⁸ See LBP-15-4, 81 NRC at 168-69 (majority opinion).

¹⁰⁹ See NRC Regulatory Issue Summary 2009-13, “Emergency Response Data System Upgrade from Modem to Virtual Private Network Appliance” (Sept. 28, 2009), at 1 (ADAMS Accession No. ML092670124); NRC Information Notice 2008-15, “Emergency Response Data System Test Schedule Revised” (Aug. 12, 2008), at 1 (ADAMS Accession No. ML081900401).

¹¹⁰ See Staff Brief at 4-5.

¹¹¹ *Id.* at 3; see also LBP-15-4, 81 NRC at 168 n.68.

¹¹² See Vermont Appeal at 9 (questioning “whether plants that already have ERDS in place should be allowed . . . [to] eliminat[e] those systems”); *id.* at 11-12 (“Once the spent fuel is transferred to dry cask storage . . . access to ERDS data is no longer necessary”); *id.* at 17 (the “heart of the State’s contention” involves whether “NRC regulations . . . require continued use of ERDS at a defueled facility”).

Both the most plausible reading of the rule exemption and the rule's history (which focuses on timely information to monitor reactor accidents) do not support such an interpretation.

3. *The Section 50.54(q)(3) Process*

On appeal, Vermont asserts that its contention does not collaterally challenge the ERDS rule but instead addresses “when and how a licensee can terminate ERDS operation.”¹¹³ Specifically, Vermont states that its contention “draws attention to Entergy’s failure” to meet the threshold test in section 50.54(q)(3) for revising an emergency plan.¹¹⁴ Citing to the Lewis Memorandum and to section 50.54(q)(3), Vermont repeatedly stresses that Entergy cannot remove the ERDS provision in the emergency plan “unless and until” it “demonstrates” that ERDS “removal will not reduce the effectiveness” of the plan.¹¹⁵

All of the litigants, the Board majority, and Judge Wardwell agree that Entergy did not have the discretion to remove ERDS without first performing and meeting the two-part screening test in section 50.54(q)(3).¹¹⁶ In other words, all parties agree that Entergy could not terminate the ERDS link without first demonstrating that the removal of ERDS would not reduce the effectiveness of Vermont Yankee’s emergency plan.

As we earlier described, the Staff as a policy matter determined and recently clarified in the Lewis Memorandum that a section 50.54(q)(3) analysis should be completed to remove ERDS if the facility’s emergency plan includes ERDS, as Vermont Yankee’s plan did. This precaution is intended precisely to prevent a licensee from unilaterally removing ERDS when the licensee’s plan might rely on ERDS to provide “assessment data to the emergency response organization,” which the memorandum specifies is an emergency planning function.¹¹⁷ The Lewis Memorandum outlines that if an emergency plan refers to ERDS *at all* a licensee seeking to remove ERDS is expected to “perform and retain an analysis that concludes that the removal of ERDS is not a reduction in effectiveness” in the plan.¹¹⁸

In its appeal, Vermont does not dispute that Entergy may discontinue ERDS if it justifies through a section 50.54(q)(3) analysis that without ERDS the emergency planning requirements will still be met and that there will be no reduction in the

¹¹³ See *id.* at 16.

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 15; see also *id.* at 4-5, 12-16.

¹¹⁶ See, e.g., LBP-15-4, 81 NRC at 173; *id.* at 177-78, 186 (Wardwell, J., dissenting).

¹¹⁷ See Lewis Memorandum at 2.

¹¹⁸ See *id.*; see also Vermont Appeal at 19.

effectiveness of the emergency plan.¹¹⁹ At the time of the Board’s oral argument, Entergy had not yet completed its section 50.54(q)(3) analysis regarding ERDS.¹²⁰ But as we earlier noted, Entergy has since completed its analysis and provided it to both the NRC and to Vermont. Vermont therefore now has had the opportunity to review Entergy’s analysis, and it may challenge the accuracy and sufficiency of that analysis through an NRC section 2.206 petition, as we outline further below.

Although Vermont’s intervention petition did not refer to the section 50.54(q)(3) process, the State’s appeal now largely centers on it. Vermont’s main stated concern is whether Entergy adequately demonstrated that the emergency plan without the ERDS component meets emergency planning requirements and does not reduce the effectiveness of the plan.¹²¹ Vermont also claims that the Staff prematurely issued the license amendment on February 4, 2015, “despite no indication from Entergy that it had conducted the necessary § 50.54(q)(3)” analysis or “evidence that [the Staff] reviewed the impact of ERDS termination” on the plan’s effectiveness.¹²² Vermont’s appeal questions “whether the NRC was correct in granting” the license amendment without first reviewing the section 50.54(q)(3) analysis and “whether Entergy was allowed to apparently terminate” the ERDS “feed to the NRC prior to submission of the [section 50.54(q)] analysis for NRC staff review.”¹²³

We address these arguments in turn. First, as discussed above, the section 50.54(q)(3) analysis by its own terms allows a licensee to revise an emergency plan *without* prior NRC approval if the screening criteria are met. Once Entergy completed the analysis and concluded that the criteria were satisfied, it did not have to wait for NRC authorization to remove ERDS. Entergy was required to submit and did submit to the NRC a summary of its analysis (Entergy actually submitted the entire analysis) within 30 days of removing ERDS.

Second, as we earlier outlined, the license amendment did not authorize or cause the removal of ERDS. The section 50.54(q)(3) analysis therefore did not need to be submitted as part of the amendment request. And in any event, Vermont’s contention did not present a supported and material challenge to the license amendment, which only authorized particular staffing changes.¹²⁴

¹¹⁹ See Vermont Appeal at 4-5, 11-16.

¹²⁰ See, e.g., LBP-15-4, 81 NRC at 173 (majority opinion) (citing Tr. at 44).

¹²¹ See Vermont Appeal at 3-5, 12-17, 19. Vermont first referred to the section 50.54(q)(3) analysis in its reply brief before the Board. See Vermont Reply Before Board at 9-12. Vermont claimed that it was “likely that Entergy’s analysis, if done properly” would not satisfy the analysis’s two-part test. See *id.* at 12-13.

¹²² See *id.* at 4.

¹²³ See *id.* at 5.

¹²⁴ The Board also found Vermont’s arguments regarding the section 50.54(q)(3) analysis to be
(Continued)

Third, Vermont may challenge Entergy's section 50.54(q)(3) analysis. Entergy's analysis addresses whether the removal of ERDS (1) complies with emergency planning requirements in Appendix E and the planning standards in section 50.47(b); and (2) reduces the effectiveness of the Vermont Yankee emergency plan.¹²⁵ As part of its analysis, Entergy explains that it will continue to have plant data displayed on Plant Display System screens at various locations.¹²⁶ Entergy concludes that "the retirement of ERDS would not reduce the effectiveness of [Vermont Yankee's] ability to communicate plant data to State response organizations."¹²⁷ If in Vermont's view Entergy's analysis is incomplete, inaccurate, or otherwise does not satisfy the section 50.54(q)(3) two-part test, Vermont can challenge the analysis through our 10 C.F.R. § 2.206 petition process. As the Board noted, section 2.206 "provides a process for stakeholders 'to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted.'"¹²⁸

The Board also outlined other avenues Vermont can take, including contacting the Federal Emergency Management Agency (FEMA). Given that FEMA "takes the lead" in the oversight of offsite emergency planning and response,¹²⁹ Vermont may contact FEMA to "endeavor to show that, without ERDS-like data, the State's emergency plan is no longer adequate."¹³⁰

impermissibly late. See LBP-15-4, 81 NRC at 173-74. We agree. As the Board noted, petitioners cannot use a reply brief to introduce wholly "new arguments not presented in the initial petition." See *id.* at 174 n.103 (citing *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 476 (2006); *National Enrichment Facility*, CLI-04-25, 60 NRC at 224-25). We note, additionally, that Vermont's appeal fails to address or otherwise acknowledge the Board's rejection of the section 50.54(q)(3) claims as untimely.

¹²⁵ See Revision 55 to EP, Attachment 9.2, Vermont Yankee ERDS, 10 CFR 50.54(q) Evaluation, at 2-6 of 7.

¹²⁶ *Id.* at 2, 5-6 of 7.

¹²⁷ *Id.* at 6 of 7.

¹²⁸ LBP-15-4, 81 NRC at 175 (quoting *Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2)*, CLI-14-11, 80 NRC 167, 179 (2014)). Our decision today should not be interpreted as a review or endorsement of either the Lewis Memorandum or Entergy's section 50.54(q)(3) analysis. Here, no litigant contests the Lewis Memorandum's specific instruction that a licensee of a permanently shutdown facility that seeks to remove ERDS — and whose emergency plan includes ERDS — should perform and retain a section 50.54(q)(3) analysis that shows that the removal of ERDS will not reduce the effectiveness of the emergency plan.

¹²⁹ See Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission, 58 Fed. Reg. 47,996, 47,998 (Sept. 14, 1993), codified at Appendix A to 44 C.F.R. Part 353.

¹³⁰ See LBP-15-4, 81 NRC at 175. FEMA, in fact, already has expressed an interest in the ERDS issue at Vermont Yankee. FEMA observers of a Vermont Yankee Combined Functional Drill held in March 2015 specifically assessed "the impact of ERDS data not being directly forwarded to the State."

(Continued)

In sum, Vermont's concerns regarding ERDS do not give rise to an admissible contention appropriate for resolution in this license amendment proceeding. As the Board's decision outlined and our decision reiterates, Vermont has other avenues outside of this adjudication in which it can raise its concerns and pursue relief.

III. CONCLUSION

For the reasons given in this decision, we *affirm* the Board's ruling in LBP-15-4.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of October 2015.

See Coons, Albert, FEMA, E-mail to Richard Kinard, U.S. Nuclear Regulatory Commission (Mar. 19, 2015) (ADAMS Accession No. ML15097A528) (forwarding e-mail regarding FEMA observation of drill). In their view, the impact "will be minimal and will not affect reasonable assurance." *See id.* Although "[d]irect transmission [via] ERDS is more efficient," FEMA personnel concluded that the "state staff found viable methods to transmit the same data" and that during the drill "the state received access to all required information including full system parameter displays, meteorological data displays, radiation monitor displays" and "data obtained from Licensee dose assessment." *Id.* FEMA evaluators concluded that these methods "effectively supplanted the ERDS data stream." FEMA nonetheless intended to make recommendations to the state in regard to further improving its data transmission methods. *See id.* We intimate no view on the FEMA evaluators' conclusions regarding the impact of the removal of ERDS at Vermont Yankee. We note only that FEMA, in its oversight role over offsite emergency planning, specifically has sought to confirm that the removal of ERDS at Vermont Yankee will not affect a finding of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

Additional Views of Commissioner Baran

I concur in the Commission's decision that, as a legal matter, the Board is correct that the State of Vermont's contention is not admissible. I write separately to note that my agreement with the decision should not be read as an endorsement, as a policy matter, of the current ERDS regulation. I am sympathetic to the State of Vermont's view that licensees should maintain those aspects of ERDS that transmit spent fuel pool conditions or are relevant to a potential spent fuel pool accident until the spent fuel is removed from the pool or there is no reasonable risk of a zirconium fire. The NRC Staff is currently conducting a decommissioning rulemaking. During this effort, it would be useful for the Staff to seek public comment on whether section VI.2 of Appendix E should be revised, the potential costs of maintaining a reduced-scope ERDS after the shutdown of a reactor, and the potential benefits to state and local emergency preparedness programs of maintaining ERDS until all fuel is removed from the spent fuel pool.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

Docket No. 50-271-LA-3
(ASLBP No. 15-940-03-LA-BD01)

ENERGY NUCLEAR VERMONT
YANKEE, LLC, and ENERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power
Station)

October 15, 2015

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (“Entergy”), seek to withdraw the license amendment request (“LAR”) that formed the basis of this contested license amendment proceeding, which concerned disbursements and notifications for the decommissioning trust fund for Vermont Yankee Nuclear Power Station. The Board grants Entergy’s motion to withdraw the LAR without prejudice on the conditions that (1) Entergy must provide written notice to Vermont of any new LAR relating to the decommissioning trust fund at the time such application is submitted to the NRC and (2) Entergy must specify in its 30-day notice to the NRC if any proposed disbursement includes one of the six line items or legal expenses to which Vermont objected in its admitted contention.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.107)

Once a Board has issued a Notice of Hearing, voluntary withdrawal of the LAR

is subject to the Board's approval and under the terms prescribed by the presiding officer. These terms are set on a case-by-case basis, with any conditions on the withdrawal tailored to address the particular circumstances of that proceeding.

RULES OF PRACTICE: UNCONDITIONAL WITHDRAWAL

An applicant's unconditional withdrawal is generally appropriate if it would cause no prejudice to either the intervenors' or the public's interest.

RULES OF PRACTICE: DISMISSAL WITH PREJUDICE

A dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the LAR. The possibility of future litigation is not sufficient legal harm to justify a dismissal with prejudice.

RULES OF PRACTICE: WITHDRAWAL CONDITIONS

Where a withdrawal concerns a legal dispute that is not resolved by the withdrawal itself, a Board may take steps to ensure that the nonmoving party is not deprived of a chance to litigate that potentially meritorious issue in the future.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.323(c))

Under NRC regulations, a moving party has no right to reply and may be granted such permission only in compelling circumstances.

RULES OF PRACTICE: LEAVE TO REPLY

A party has not demonstrated compelling circumstances justifying a reply where that party could reasonably have anticipated the arguments to which it seeks leave to reply.

ORDER

**(Granting Motion to Withdraw LAR, Denying Motion for
Leave to File Reply, and Terminating Proceeding)**

On September 4, 2014, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together "Entergy"), filed a license amendment request ("LAR") to replace site-specific license conditions relating to the decommissioning trust fund for Vermont Yankee Nuclear Power Station with similar

regulatory requirements that were promulgated after the license conditions were imposed.¹ Entergy now moves to withdraw its LAR.² The NRC Staff and the State of Vermont, the intervenor in this license amendment proceeding,³ ask this Licensing Board⁴ to impose conditions on Entergy's withdrawal.⁵ Finding that two conditions are appropriate given the circumstances of this proceeding, the Board grants Entergy's motion to withdraw the LAR without prejudice on the conditions that (1) Entergy must provide written notice to Vermont of any new license amendment application relating to the decommissioning trust fund at the time such application is submitted to the NRC and (2) Entergy must specify in its 30-day notice to the NRC if any proposed disbursement includes one of the six line items⁶ or legal expenses⁷ to which Vermont objected in its admitted contention. The Board denies Entergy's motion for leave to file a reply because Entergy has not demonstrated the requisite compelling circumstances.⁸

I. BACKGROUND

This license amendment proceeding primarily involves a dispute between Entergy and Vermont over the necessity of a 30-day notice requirement for disbursements from the decommissioning trust fund and the connection between

¹Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Proposed Change No. 310 Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, Attach. 1, at 2 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) [hereinafter "LAR"].

²Entergy's Motion to Withdraw Its September 4, 2014 License Amendment Request (Sept. 22, 2015) [hereinafter "Motion to Withdraw"].

³LBP-15-24, 82 NRC 68, 71 (2015); *see* State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) [hereinafter "Petition"].

⁴Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 26,301, 26,301-02 (May 7, 2015).

⁵NRC Staff's Answer to Entergy's Motion to Withdraw (Oct. 2, 2015) at 17 [hereinafter "Staff's Response"]; State of Vermont's Response to Entergy's Motion to Withdraw (Oct. 2, 2015) at 13 [hereinafter "Vermont's Response"].

⁶The six line items are "(1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of nonradiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof." LBP-15-24, 82 NRC at 77.

⁷Vermont objected to legal expenses related to Vermont Yankee's emergency response preparedness. *Id.*; *see* Petition at 10 (citing Petition, Attach. 1, at 37 n.9 (Comments of the State of Vermont on the Post-Shutdown Decommissioning Activities Report (Mar. 6, 2015))).

⁸Entergy's Motion for Leave to File Reply and Reply in Support of Motion to Withdraw License Amendment Request (Oct. 13, 2015) [hereinafter "Motion for Leave to File Reply"]; *see* 10 C.F.R. § 2.323(c) ("The moving party has no right to reply, except as permitted by . . . the presiding officer. Permission may be granted only in compelling circumstances . . .").

the LAR and a related exemption request. Entergy's current license conditions regarding the Vermont Yankee decommissioning trust fund were imposed when the Commission approved Entergy's license transfer application in May 2002 and include a requirement to provide 30 days' notice before disbursing funds (other than administrative expenses for the fund itself) to afford the NRC an opportunity to review, and possibly reject, a particular proposed expense.⁹

In its LAR, Entergy sought to replace that 30-day notice requirement and other plant-specific license conditions with the decommissioning fund requirements in 10 C.F.R. § 50.75(h)(1)-(4), which were promulgated in December 2002 to govern reporting and recordkeeping rules for decommissioning trusts.¹⁰ If the LAR were approved, Entergy would no longer have to provide the 30-day notice to the Commission once it began decommissioning and started making withdrawals under 10 C.F.R. § 50.82(a)(8).¹¹

While the NRC Staff was reviewing the LAR, on January 6, 2015, Entergy submitted a request for exemptions from the decommissioning regulations.¹² Specifically, Entergy sought three regulatory exemptions from 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A) to allow it to use the decommissioning fund to manage its spent fuel and to eliminate the 30-day notice requirement that would otherwise apply to spent fuel management. Without an exemption from the NRC, Entergy would be prohibited from using the decommissioning fund for spent fuel management because it is not an allowable decommissioning expense under the regulations.¹³

The NRC Staff accepted Entergy's LAR for review and informed the public of the opportunity to petition for a hearing in a *Federal Register* notice on February 17, 2015.¹⁴ Vermont requested a hearing and proffered four contentions

⁹ LAR, Attach. 1, at 1; see Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269, 36,270 (May 23, 2002).

¹⁰ LAR, Attach. 1, at 2-6; see also Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,332 (Dec. 24, 2002).

¹¹ 10 C.F.R. § 50.75(h)(1)(iv).

¹² Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) [hereinafter "Exemption Request"].

¹³ 10 C.F.R. § 50.75(c) & n.1 (stating that the minimum amounts required for decommissioning trust funds "are based on activities related to the definition of 'Decommission' in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license"); see also 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 — (1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license.").

¹⁴ Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359-60 (Feb. 17, 2015).

challenging the LAR on April 20, 2015.¹⁵ Among other arguments, Vermont asserted that the 30-day notice remained necessary in light of Entergy's alleged plans to spend decommissioning trust funds on impermissible expenses and also argued that the LAR could only be understood in connection with the related exemption request.¹⁶ The Secretary of the Commission referred Vermont's timely petition to the Atomic Safety and Licensing Board Panel,¹⁷ and this Licensing Board was established on May 1, 2015.¹⁸ Entergy and the NRC Staff submitted answers opposing Vermont's hearing request on May 15,¹⁹ and Vermont filed its reply to those responses on May 22, 2015.²⁰

Before the Board held oral argument on the admissibility of Vermont's four contentions, the NRC Staff granted Entergy's exemption requests on June 17, 2015.²¹ The NRC Staff agreed with Entergy that the decommissioning fund has, or will have, sufficient funds to pay for both decommissioning and spent fuel management and that it was unnecessary for Entergy to provide a 30-day notice of its planned spent fuel management disbursements.²² The NRC Staff also concluded that the exemptions were categorically excluded from environmental review as administrative changes that did not increase the risk of public radiation exposure.²³

The NRC Staff made all three of the requested exemptions effective upon issuance.²⁴ However, only the exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), relating to the withdrawal of trust funds for spent fuel expenses, had an immediate effect.²⁵ Entergy's current license conditions require 30-day notification for all

¹⁵ Petition at 3, 17, 20, 26.

¹⁶ *Id.* at 3-6, 24-26.

¹⁷ Memorandum from Annette Vietti-Cook, Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge (Apr. 30, 2015) (ADAMS Accession No. ML15120A477).

¹⁸ 80 Fed. Reg. at 26,301-02.

¹⁹ Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request (May 15, 2015); NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015).

²⁰ The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015).

²¹ Letter from James Kim, Project Manager, Plant Licensing IV-2 and Decommissioning Transition Branch, Division of Operating Reactor Licensing to Site Vice President (June 17, 2015) (ADAMS Accession No. ML15128A219).

²² *Id.*, Encl. 1, at 5.

²³ *Id.*, Encl. 1, at 9 (citing 10 C.F.R. § 51.22(c)(25)).

²⁴ *Id.*, Encl. 1, at 11; *see* Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992, 35,995 (June 23, 2015).

²⁵ 80 Fed. Reg. at 35,993 ("The requested exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow [Entergy] to use a portion of the funds from the Trust for irradiated fuel management without prior notice to the NRC . . .").

withdrawals (decommissioning, spent fuel, or other), and the granted exemption for notification could not go into effect before the LAR was granted.²⁶ Thus, the two exemptions from 10 C.F.R. § 50.75(h)(1)(iv) — which allow Entergy to use the decommissioning trust fund for spent fuel management without a 30-day notice — will continue to have no effect because 10 C.F.R. § 50.75(h) does not apply to Entergy.²⁷

Shortly after the exemptions were granted, the Board heard oral argument on July 7, 2015, regarding the admissibility of Vermont's four contentions.²⁸ Meanwhile, on July 6, Vermont moved for leave to file a new contention — Contention V — and to add the NRC Staff's approval of the exemptions as an additional factual basis to support admission of three of Vermont's previously filed contentions.²⁹ Entergy and the NRC Staff submitted answers on July 31, 2015, opposing admission of the new contention and the addition of the new factual basis,³⁰ to which Vermont submitted a reply on August 7.³¹

On August 31, 2015, the Board granted Vermont's petition to intervene and admitted Contentions I and V.³² Contention I concerned the necessity of the 30-day notice in light of Vermont's factual allegations that Entergy could otherwise improperly reduce the fund to such an extent that the plant could not be maintained in a safe condition.³³ In particular, Vermont alleged that three different categories of planned expenses contravened the decommissioning regulations: (1) six line items in the Post Shutdown Decommissioning Activities Report,³⁴ (2) the legal costs associated with Entergy's reduction in emergency planning, and (3) the potential for unforeseen costs associated with radionuclide releases and indefinite

²⁶ A licensee cannot be "exempted" from license conditions without a license amendment modifying such conditions. *See* 10 C.F.R. § 50.90.

²⁷ In its letter to the NRC Staff, Entergy concurs that withdrawing the LAR "requires no changes to the exemptions from specific requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv)." Motion to Withdraw, Attach. A, at 1.

²⁸ Tr. at 1-78.

²⁹ State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015).

³⁰ Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015); NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions (July 31, 2015).

³¹ State of Vermont's Reply in Support of Motion for Leave to File a New Contention and Add Bases and Support to Existing Contentions (Aug. 7, 2015).

³² LBP-15-24, 82 NRC at 104.

³³ *Id.* at 90-92.

³⁴ Vermont Yankee Nuclear Power Station, Post Shutdown Decommissioning Activities Report, at 2.1.3, 4.0 (Dec. 2, 2014) (ADAMS Accession No. ML14357A110) [hereinafter "PSDAR"]; *see supra* note 6.

storage of spent fuel.³⁵ Contention V dealt with the correctness and completeness of the LAR, given that it did not mention the related exemption request,³⁶ as well as the legal issue of whether the LAR was “in accordance with the provisions of paragraph (h) of [10 C.F.R. § 50.75]” when the licensee was already exempt from two provisions of 10 C.F.R. § 50.75(h)(1)(iv).³⁷

The Board issued a Notice of Hearing³⁸ and, based on a conference call with the parties discussing scheduling matters,³⁹ provided an Initial Scheduling Order that set out a bifurcated hearing schedule for Contentions I and V.⁴⁰

II. ARGUMENTS

On September 22, 2015, Entergy moved to withdraw the LAR based on its determination “that maintaining the existing license conditions represents a manageable administrative burden and is allowed by the NRC regulations so long as [Entergy] does not elect to amend those license conditions, as set forth by the provisions of 10 C.F.R. § 50.75(h)(5).”⁴¹ Entergy argues that an unconditional withdrawal without prejudice is appropriate because the parties have not begun the process of mandatory disclosures or sustained a legal injury.⁴² The company adds that it “currently has no plans to reinitiate this license amendment proceeding at a future date.”⁴³

The NRC Staff “largely supports Entergy’s position that its Motion to Withdraw should be granted without conditions.”⁴⁴ However, to provide Vermont with adequate notice in the event of a future filing, the NRC Staff requests “that Entergy’s withdrawal be procedurally conditioned on notifying Vermont of its future submittal of any application substantively similar to the LAR that is the subject of this proceeding.”⁴⁵

Noting the amount of time and effort already dedicated to the issues in this proceeding, Vermont asks the Board to impose two substantive conditions:

- (1) The Board’s ruling on the admissibility of the State’s Contentions I and V in

³⁵ LBP-15-24, 82 NRC at 86-90 (citing Petition at 5-6, 9-10, 22-23).

³⁶ *Id.* at 101.

³⁷ *Id.* at 104.

³⁸ Licensing Board Notice of Hearing (Sept. 18, 2015) (unpublished).

³⁹ Tr. at 79-105.

⁴⁰ Licensing Board Initial Scheduling Order (Sept. 21, 2015) (unpublished).

⁴¹ Motion to Withdraw at 2-3.

⁴² *Id.* at 4-6.

⁴³ *Id.* at 5.

⁴⁴ Staff’s Response at 1-2.

⁴⁵ *Id.* at 17.

LBP-15-24 resolves the admissibility of those contentions with prejudice and the decision shall not be vacated; and

- (2) Entergy shall provide the State all supporting documentation for the specific expenses for which Entergy has filed 30-day notices from the Vermont Yankee Nuclear Decommissioning Trust Fund, and shall continue to provide that information for future withdrawals.⁴⁶

Vermont argues that a dismissal with prejudice is appropriate because “the admissibility of Contentions I and V have been extensively litigated and addressed by the Board’s decision.”⁴⁷ In particular, Vermont notes that Contention V was a legal argument that would have been resolved on the merits within the next several months.⁴⁸

With respect to the 30-day notice, Vermont argues that additional information about the withdrawals is appropriate because the State did not receive the benefit of mandatory disclosures.⁴⁹ Vermont also attached a recent notice to the NRC showing that Entergy is now providing less information about its withdrawals than when this proceeding began.⁵⁰ Whereas previous notices “confirmed . . . that the payments to be disbursed are for legitimate decommissioning and operational irradiated fuel management expenses,” the most recent notice includes no information about the purpose of the \$7 million withdrawal for September 2015.⁵¹ Vermont argues that this information is important to protect public safety and to prevent “potential loss or destruction of documents concerning Entergy’s use of the [Decommissioning Trust] Fund,” which the State asserts may be relevant to future litigation.⁵²

III. DISCUSSION

Because the Board issued a Notice of Hearing, withdrawal of the LAR “shall be on such terms as the presiding officer may prescribe.”⁵³ These terms

⁴⁶ Vermont’s Response at 3.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 5-6.

⁴⁹ *Id.* at 6-7.

⁵⁰ *Id.* at 7-8; *id.*, Attach. 1, at 1 (Letter from David Ryan, Managing Director, The Bank of New York Mellon, and Chris Wamser, Site Vice President, Entergy, to William M. Dean, Director, NRC Office of Nuclear Reactor Regulation (Sept. 14, 2015)).

⁵¹ *Id.*, Attach. 2, at 1 (Letter from David Ryan, Managing Director, The Bank of New York Mellon, and Chris Wamser, Site Vice President, Entergy, to William M. Dean, Director, NRC Office of Nuclear Reactor Regulation (Aug. 15, 2015)).

⁵² *Id.* at 9-11.

⁵³ 10 C.F.R. § 2.107(a); *see U.S. Department of Energy* (High-Level Waste Repository), LBP-10-11, (Continued)

are set on a case-by-case basis, with any conditions tailored to address the particular circumstances of that proceeding.⁵⁴ As the Commission has explained, an unconditional withdrawal is generally appropriate if it would cause no prejudice “to either the intervenors’ or the public’s interest.”⁵⁵

With respect to its first requested condition, Vermont has not demonstrated sufficient legal harm to justify the sanction of turning a voluntary withdrawal into a withdrawal with prejudice. Vermont’s primary concern is that, were Entergy to resubmit its LAR, the State would be forced to expend resources again to relitigate all of the admissibility issues that the Board previously addressed in LBP-15-24.⁵⁶ However, a dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the LAR.⁵⁷ That standard is not met here because the prospect of future litigation is not unusual — it is inherent in any dismissal without prejudice.⁵⁸ Moreover, Vermont’s admitted contentions focused on alleged deficiencies in this specific (and now withdrawn) LAR; whether a potential future LAR shares those same alleged deficiencies would require a new analysis.⁵⁹

Next, Vermont asks the Board to impose a condition requiring Entergy to provide “basic information about how Entergy is actually spending money from the [Decommissioning Trust] Fund,” as a substitute for the mandatory disclosure that would have occurred during this proceeding.⁶⁰ Vermont argues that the information Entergy provided in its current 30-day notice is too limited to allow the NRC Staff to ascertain whether the company is actually using the fund for legitimate decommissioning expenses.⁶¹

Vermont is essentially asking this Board to impose additional discovery activ-

71 NRC 609, 624 (2010) (“[S]ection 2.107 . . . clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances.”).

⁵⁴ See *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 & n.14 (1981); *Sequoyah Fuels Corp.*, LBP-93-25, 38 NRC 304, 315-16 (1993).

⁵⁵ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

⁵⁶ Vermont’s Response at 3-4.

⁵⁷ See *Yankee*, CLI-99-24, 50 NRC at 221-22; *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981).

⁵⁸ *Yankee*, CLI-99-24, 50 NRC at 222 n.3 (citing *North Coast*, ALAB-662, 14 NRC at 1145; *Fulton*, ALAB-657, 14 NRC at 979).

⁵⁹ See *Yankee*, CLI-99-24, 50 NRC at 222. Of course, a quick resubmission of this specific LAR without any change in circumstances would create the appearance of forum shopping. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 758-59 (1983) (recognizing the concern of avoiding the appearance of forum shopping).

⁶⁰ Vermont’s Response at 6-7.

⁶¹ *Id.* at 8 (“[I]t is the State’s position that both of these notices are deficient and do not comply with Entergy’s license requirements.”).

ities as a requirement of withdrawal. Most of this requested condition is too broad because it goes beyond the scope of the admitted contentions; “[d]iscovery, of course, is peculiarly related to particular proceedings and particular contentions.”⁶² In this proceeding, the relevant discovery primarily concerned the necessity of the 30-day notice given a disagreement between Vermont and Entergy over the definition of decommissioning as it relates to six specific line items in the Post Shutdown Decommissioning Activities Report and the legal costs associated with an earlier proceeding.⁶³ Those six line items are “(1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of nonradiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof.”⁶⁴ Although Entergy has stated in previous 30-day notices to the NRC that its disbursements are for “legitimate decommissioning” expenses,⁶⁵ this proceeding makes clear that Vermont and Entergy define the term differently.

In these specific circumstances, where a contention was admitted concerning expenses that are still part of Entergy’s decommissioning plans and Entergy has chosen to withdraw its licensing request in lieu of contesting the contention’s admissibility, the Board determines that it is appropriate to require Entergy to specify in its notice to the NRC when a proposed withdrawal includes one of the six line items or legal costs that were the factual basis of Contention I.⁶⁶ This condition directly relates to the genuine dispute underlying Contention I and is necessary because withdrawal of the LAR leaves Entergy and Vermont’s legal dispute over the definition of decommissioning unresolved.⁶⁷ The fact that Vermont may have to challenge the expenses again is not a legal harm, but not receiving notice of the expenses before they occur would create a legal harm by depriving Vermont of the chance to litigate this potentially meritorious issue. Thus, this narrowly tailored condition will afford Vermont an opportunity, if it chooses, to dispute a specific disbursement via a letter to the NRC or a petition under 10 C.F.R. § 2.206.

Finally, as the NRC Staff notes, allowing Entergy to withdraw its LAR without

⁶² *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 55 (1999).

⁶³ LBP-15-24, 82 NRC at 86-87; *see* Petition at 9-10.

⁶⁴ LBP-15-24, 82 NRC at 77.

⁶⁵ Vermont’s Response, Attach. 2, at 1.

⁶⁶ *See* LBP-15-24, 82 NRC at 77. Vermont has also expressed its concern that Entergy will use the decommissioning trust fund to pay the legal costs for this proceeding, but that issue was not part of Contention I, so it is not part of this condition.

⁶⁷ The purpose of the rule to dismiss proceedings on conditions is “primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.” *Sequoyah*, LBP-93-25, 38 NRC at 315 (quoting *Alamance Industries, Inc. v. Filene’s*, 291 F.2d 142, 146 (1st Cir. 1961)), *aff’d*, CLI-95-2, 41 NRC 179 (1995).

prejudice means that Vermont would have to request a hearing again if Entergy were to submit a similar LAR in the future. We agree with the NRC Staff that, in these circumstances, it is appropriate to ensure that Vermont receives notice of the LAR at the time of its submission so the State has a fair opportunity to relitigate the issues that were found admissible in LBP-15-24.⁶⁸ The NRC Staff suggests that this requirement should apply to any “substantively similar” LAR.⁶⁹ Given the specific issues raised in this proceeding, the Board defines “substantively similar” as an LAR relating to the decommissioning trust fund.⁷⁰ This definition is appropriate here because such an amendment would bring Entergy under the requirements of 10 C.F.R. § 50.75(h) and raise anew the legal issues admitted in Contention V.⁷¹ This condition does not impose any additional administrative burden because Entergy is already required by the regulations to notify Vermont of any request to amend the Vermont Yankee license.⁷²

IV. MOTION FOR LEAVE TO FILE REPLY

On October 13, 2015, Entergy moved for leave to file a reply in support of its motion to withdraw the LAR.⁷³ Under the regulations, Entergy has no right to reply and may be granted permission “only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.”⁷⁴ Here, Entergy asserts that it could not have reasonably anticipated the arguments raised in Vermont’s October 2, 2015 answer to the motion to withdraw because Vermont did not discuss those arguments with Entergy during the consultation process.⁷⁵

We are not persuaded that Entergy could not reasonably have anticipated Vermont’s arguments, nor has Entergy shown any other compelling circum-

⁶⁸ See *Energy Fuels Nuclear, Inc.*, LBP-95-20, 42 NRC 197, 198-99 (1995).

⁶⁹ Staff’s Response at 2.

⁷⁰ Because Vermont Yankee’s license conditions predate the issuance of 10 C.F.R. § 50.75(h), the plant has been allowed to keep its existing license conditions. See 10 C.F.R. § 50.75(h)(5). If Entergy amends any license conditions related to the decommissioning trust fund, however, from that point forward it will have to comply with all of the requirements of 10 C.F.R. § 50.75(h).

⁷¹ See LBP-15-24, 82 NRC at 104.

⁷² 10 C.F.R. § 50.91(b)(1) (“At the time a licensee requests an amendment, it must notify the State in which its facility is located of its request by providing that State with a copy of its application . . .”).

⁷³ Motion for Leave to File Reply at 1.

⁷⁴ 10 C.F.R. § 2.323(c).

⁷⁵ Motion for Leave to File Reply at 4 (“[T]he State did not provide any indication about what legal harm it would allege, how those proposed conditions would be ‘curative’ of the alleged legal harm, how the alleged legal harm is demonstrated in the record of this proceeding, or how the State would fulfill its ‘affirmative duty’ to make these demonstrations.”).

stances that would justify a reply. Entergy acknowledges that during consultation, Vermont “noted the possibility that the State would ask the Board to impose conditions requiring Entergy to provide substantial additional detail in its disbursement notifications to the NRC, and to provide the State with disclosures regarding all past and future trust fund disbursements despite withdrawal of the LAR, and to seek dismissal ‘with prejudice.’”⁷⁶ These are, in fact, the conditions that Vermont sought,⁷⁷ and an experienced litigator such as Entergy would surely expect the State to provide legal arguments in favor of those conditions and to challenge Entergy’s interpretation of the case law concerning unconditional withdrawal of an LAR.⁷⁸ Vermont candidly revealed its proposed conditions during the 10 C.F.R. § 2.323(b) consultations. Entergy cannot claim surprise when Vermont put forth arguments in support of its proposed conditions. We find that Entergy’s motion for leave to file a reply is without merit and is summarily *denied*.

V. ORDER

The Board *grants* Entergy’s motion to withdraw its LAR without prejudice, with the conditions that (1) Entergy must provide written notice to Vermont of any new license amendment application relating to the decommissioning trust fund at the time such application is submitted to the NRC and (2) Entergy must specify in its 30-day notice if the disbursement includes one of the six line items or legal expenses to which Vermont objected in its admitted contention. Accordingly, this license amendment proceeding is *terminated*.

Under 10 C.F.R. § 2.341(a), this Order shall constitute the final decision of the Commission 120 days from the date of issuance, unless within twenty-five (25) days a petition for review is filed in accordance with 10 C.F.R. § 2.341(b) or the Commission directs otherwise.

⁷⁶ *Id.* at 5.

⁷⁷ Vermont’s Response at 3.

⁷⁸ See *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 NRC 31, 34-35 (2014) (explaining that an experienced litigator should have expected that the NRC Staff might challenge its interpretation of an NRC regulation regarding appeals); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008) (“[T]he parties could reasonably anticipate the argument that [the petitioners’] contention was moot simply based on the Board’s request for an explanation of the significance of the [Request for Additional Information] Response.”).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 15, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

**Docket Nos. 50-275-LR
50-323-LR
(ASLBP No. 10-900-01-LR-BD01)**

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)**

October 21, 2015

Applicant moves for summary disposition regarding the sole remaining contention, a contention of omission, concerning its license renewal application to operate two reactors at the Diablo Canyon Nuclear Power Plant in San Luis Obispo, California, for an additional 20 years. Because the alleged omission has been cured, the Board (1) grants the motion for summary disposition; (2) rejects a motion to amend a proffered but inadmissible contention; and (3) terminates the case.

**NEPA: SEVERE ACCIDENT MITIGATION ALTERNATIVES
(SAMA)**

It is not enough to suggest a preferred method for performing a SAMA analysis. An intervenor must come forward with a plausible demonstration that the existing analysis is unreasonable and that any alleged deficiency would materially change conclusions regarding the cost-effectiveness of particular SAMAs.

LICENSING BOARD: SCHEDULING ORDER

The purpose of scheduling orders is to ensure proper case management, with the objective of expediting the disposition of the proceeding; establishing early and continuing control so that the proceeding will not be protracted because of lack of management; and discouraging wasteful prehearing activities.

LICENSING BOARD: SCHEDULING ORDER

Unless a schedule is so onerous or unfair that it deprives a party of procedural due process, “scheduling is a matter of Licensing Board discretion.” *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986). A Licensing Board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management.

MEMORANDUM AND ORDER (Denying Motion to File Amended Contention, Granting Summary Disposition, and Terminating Proceeding)

This proceeding concerns an application by Pacific Gas & Electric Company (PG&E) to renew its operating licenses for two nuclear power reactors at the Diablo Canyon Nuclear Power Plant located near San Luis Obispo, California.¹

Before the Board are motions (1) by intervenor San Luis Obispo Mothers for Peace (SLOMFP) to file an Amended Contention C,² and (2) by PG&E for summary disposition on Contention EC-1.³ For the reasons set forth below, we deny the first motion, grant the second, and — in the absence of any contention — terminate the proceeding.

¹The background of this proceeding is set forth in prior decisions of the Board and of the Commission. *See, e.g.*, LBP-10-15, 72 NRC 257, 273-75 (2010); CLI-11-11, 74 NRC 427, 429-31 (2011); LBP-15-6, 81 NRC 314, 316 (2015); Licensing Board Memorandum and Order (Denying Motions to File New Contentions) (Aug. 6, 2015) at 2-4 (unpublished) (August Order).

²San Luis Obispo Mothers for Peace’s Motion to File Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation) (July 31, 2015) (SLOMFP Motion).

³Pacific Gas and Electric Company’s Motion for Summary Disposition on Contention EC-1 (July 31, 2015).

I. BACKGROUND

On January 21, 2010, the NRC published a *Federal Register* notice of an opportunity for a hearing on PG&E's license renewal application.⁴ SLOMFP filed a timely petition to intervene, which the Board granted.⁵ After review by the Commission, one admitted contention — Contention EC-1 — remained.⁶ Contention EC-1 is a contention of omission that alleges PG&E failed, in the severe accident mitigation alternatives (SAMA) analysis required by 10 C.F.R. § 51.53(c)(3)(ii)(L), to discuss a recently discovered fault (the Shoreline Fault) located near the plant.⁷

Subsequently, both SLOMFP and another petitioner moved to admit additional contentions,⁸ which the Board rejected.⁹ Of especial relevance is SLOMFP's motion, filed April 15, 2015, to admit Contention C. Contention C alleged that — although PG&E's SAMA analysis now addressed the Shoreline Fault — its analysis still failed to *adequately* account for seismic hazards at the facility.¹⁰

On July 31, 2015, shortly before the Board ruled the original Contention C inadmissible,¹¹ SLOMFP moved to amend Contention C in response to PG&E's further updating its SAMA analysis.¹² On the same day, PG&E moved for summary disposition on the only admitted contention (Contention EC-1).

On August 13, 2015, the NRC Staff submitted a response supporting PG&E's summary disposition motion.¹³ On August 25, 2015, PG&E and the Staff submitted oppositions to SLOMFP's motion to amend Contention C.¹⁴ With the parties'

⁴ 75 Fed. Reg. 3493, 3493 (Jan. 21, 2010).

⁵ LBP-10-15, 72 NRC at 345.

⁶ CLI-11-11, 74 NRC at 437, 444, 452, 458.

⁷ *Id.* at 444; *see also* Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) at 8-20.

⁸ Friends of the Earth's Request for a Hearing and Petition to Intervene (Oct. 10, 2014); San Luis Obispo Mothers for Peace's Motion to File New Contentions Regarding Adequacy of Environmental Report for Diablo Canyon License Renewal Application (Apr. 6, 2015); San Luis Obispo Mothers for Peace's Motion to File New Contentions Regarding Adequacy of Severe Accident Mitigation Alternatives Analysis for Diablo Canyon License Renewal Application (Apr. 15, 2015) (Motion on Proposed Contentions C and D).

⁹ LBP-15-6, 81 NRC at 315; August Order at 1.

¹⁰ Motion on Proposed Contentions C and D at 2-15.

¹¹ August Order at 16-17.

¹² SLOMFP Motion at 1-2.

¹³ NRC Staff Answer to Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1 (Aug. 13, 2015) (NRC Staff Answer to PG&E's Motion).

¹⁴ Pacific Gas and Electric Company's Answer Opposing Proposed Amended Contention C (Aug. 25, 2015) (PG&E Answer to SLOMFP's Motion); NRC Staff Answer to San Luis Obispo Mothers for

(Continued)

consent, the Board allowed SLOMFP until September 14, 2015, to respond to PG&E's summary disposition motion and to reply in support of its motion to amend.¹⁵

II. ANALYSIS

A. Motion to File Amended Contention C

As SLOMFP acknowledges, "Amended Contention C is based to a significant extent on SLOMFP's original Contention C,"¹⁶ which the Board previously rejected as inadmissible.¹⁷ As first proffered, Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis) stated:

PG&E's SAMA Analysis (Appendix F of PG&E's Amended ER) is inadequate to satisfy the National Environmental Policy Act or NRC implementing regulation 10 C.F.R. § 51.53(c)(ii)(L) because PG&E's evaluation of potential mitigation measures is not based on a sufficiently rigorous or up-to-date analysis of seismic risks. As a result, PG&E's evaluation of the comparative costs and benefits of measures to prevent or mitigate the effects of a severe earthquake does not sufficiently credit the cost-effectiveness of mitigation measures.

While PG&E claims that the "results and insights" of its 2014 "interim" probabilistic risk analysis ("PRA") (labeled "DCO3") are "reasonable for the purposes of a SAMA analysis," by PG&E's own admission, DCO3 is only an "interim" PRA. In addition, it is not sufficiently rigorous or updated to support the SAMA analysis.

Nor does PG&E's promise to "update" the DCO3 with the "results" of its 2015 seismic hazards analysis cure the inadequacy of DCO3 to support PG&E's SAMA Analysis, because PG&E's 2015 seismic hazards analysis is also insufficiently rigorous and relies on outdated or unjustified methods and assumptions. Given the inadequacies of PG&E's seismic hazards analysis, to merely cite its "results" in a revised SAMA Analysis would not be sufficient to ensure the adequacy of the SAMA Analysis to evaluate potential mitigation measures for severe seismic

Peace's Motion to File Amended Contention C (Aug. 25, 2015) (NRC Staff Answer to SLOMFP's Motion).

¹⁵Licensing Board Order (Granting Unopposed Motion for Extension of Time) (Aug. 3, 2015) (unpublished) (Order Granting Extension of Time); Licensing Board Order (Granting Unopposed Motion for Extension of Time) (Aug. 25, 2015) (unpublished).

¹⁶San Luis Obispo Mothers for Peace's Reply to Oppositions to File Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation) (Sept. 14, 2015) at 1 (Reply).

¹⁷August Order at 16-17.

accidents. Instead, PG&E must cure the significant defects in the underlying data and analyses.¹⁸

As more fully explained in our August 6, 2015 Memorandum and Order, the Board determined that, for three separate and independent reasons, Contention C failed to satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

First, insofar as Contention C alleged deficiencies *per se* in the seismic reevaluation that PG&E submitted in a Part 50 process designed to consider the adequacy of the Diablo Canyon plant's current licensing basis, the Board ruled that a Part 54 license renewal proceeding is not a proper forum for litigation of section 50.54(f) licensing basis issues with no connection to any SAMA.¹⁹

Second, SLOMFP failed to make a plausible showing that PG&E's approach to SAMAs was not reasonable.²⁰ As the Commission has recognized, "[i]t will always be possible to envision and propose some alternate approach, some additional detail to include, some refinement."²¹ But that, without more, does not demonstrate a genuine dispute suitable for an evidentiary hearing, as required by 10 C.F.R. § 2.309(f)(1)(vi). The proper question, the Commission has stated, "is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA."²² "Unless a petitioner sets forth a supported contention pointing to an apparent *error or deficiency* that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing."²³

Third, although the purpose of SAMA analyses is to identify safety enhancements that would be cost-beneficial to adopt,²⁴ Contention C never addressed the potential impact of any particular seismic model change on the cost-benefit evaluations of the SAMAs that PG&E considered.²⁵ As the Commission has emphasized, the relevant issue "is whether any additional SAMA should have

¹⁸ Motion on Proposed Contentions C and D at 2-3 (internal citations omitted).

¹⁹ August Order at 16.

²⁰ *Id.*

²¹ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

²² *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 406 (2012) (citing *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012)). Although a SAMA analysis considers safety issues, it is in actuality an environmental review that must be judged under NEPA's "rule of reason" and not under the safety requirements of the Atomic Energy Act. See *Pilgrim*, CLI-12-15, 75 NRC at 706-07.

²³ *Davis-Besse*, CLI-12-8, 75 NRC at 407 (emphasis in original).

²⁴ See *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 290-91 (2010), *reconsideration denied*, CLI-10-15, 71 NRC 479 (2010).

²⁵ See August Order at 17.

been identified as potentially cost beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis.”²⁶

Amended Contention C states:

PG&E’s SAMA Analysis (Appendix F of PG&E’s Amended Environmental Report), as supplemented by the SHU-SAMA Evaluation, is inadequate to satisfy NEPA or NRC implementing regulation 10 C.F.R. § 51.53(c)(ii)(L) because PG&E’s evaluation of potential mitigation measures is not based on a sufficiently rigorous or up-to-date analysis of seismic risks. In addition, PG&E fails to take into account all relevant earthquake characteristics that could affect the SAMA analysis, even though PG&E’s seismic hazards analysis provides information about these characteristics. As a result of these deficiencies, PG&E’s evaluation of the comparative costs and benefits of measures to prevent or mitigate the effects of a severe earthquake does not sufficiently credit the cost-effectiveness of mitigation measures.

While PG&E claims that the “results and insights” of its 2014 “interim” probabilistic risk analysis (“PRA”) (labeled “DCO3”) are “reasonable for the purposes of a SAMA analysis[,]” by PG&E’s own admission, DCO3 is only an “interim” PRA. In addition, it is not sufficiently rigorous or updated to support the SAMA analysis.

Nor does PG&E’s recent “update” of the DCO3 with the “results” of its 2015 seismic hazards analysis cure the inadequacy of DCO3 to support PG&E’s SAMA Analysis, because PG&E’s 2015 seismic hazards analysis is also insufficiently rigorous and relies on outdated or unjustified methods and assumptions. Given the inadequacies of PG&E’s seismic hazards analysis, to merely cite its “results” in the SHU-SAMA Evaluation is not sufficient to ensure the adequacy of the SAMA Analysis to evaluate potential mitigation measures for severe seismic accidents. Instead, PG&E must cure the significant defects in the underlying data and analyses.

Finally, the SHU-SAMA Evaluation is unreasonably restricted to the consideration of the effects of spectral acceleration on the Diablo Canyon Nuclear Power Plant. The only information from the SSC or SHS Report that is presented in the SHU-SAMA Evaluation is a table showing seismic initiating event frequencies. The SHU-SAMA Evaluation fails to consider other measures of ground motion that could cause reasonably foreseeable adverse environmental impacts on Diablo Canyon that are more extreme than or different from the impacts of spectral acceleration. These factors include surface fault rupture, ground displacement, ground velocity, and duration of shaking.²⁷

Beyond recognizing that PG&E most recently updated its SAMA analysis on July 1, 2015, Amended Contention C differs from the original contention in one significant way. SLOMFP now alleges that PG&E unreasonably restricted its analysis to considering the effects of spectral acceleration. It contends that PG&E

²⁶ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009).

²⁷ SLOMFP Motion at 3-4 (internal citations and footnote omitted).

should also have analyzed other measures of ground motion, including surface fault rupture, ground displacement, ground velocity, and duration of shaking.

Amended Contention C fails to satisfy the admissibility criteria of 10 C.F.R. § 2.309(f)(1)²⁸ for essentially the same reasons as the original version.

First, insofar as “Amended Contention C is based to a significant extent on SLOMFP’s original Contention C,”²⁹ as SLOMFP itself recognizes, it suffers from identical deficiencies, which are addressed in the Board’s Memorandum and Order of August 6, 2015.³⁰

Second, insofar as Amended Contention C sets forth new allegations, it suffers from similar deficiencies. It is not enough to suggest a preferred method for performing a SAMA analysis. SLOMFP must come forward with a plausible demonstration that PG&E’s existing analysis is unreasonable. SLOMFP fails to allege that considering ground displacement, ground velocity, or shaking duration would materially change any conclusions regarding the cost-effectiveness of particular SAMAs.

Likewise, SLOMFP does not explain how incorporation of surface fault rupture into the SAMA analysis would make a material difference or how the analysis is unreasonable because PG&E did not consider it. On the contrary, SLOMFP fails to address PG&E studies that considered the potential for surface fault rupture and determined that “the ground at and near the [Diablo Canyon] site has not been displaced by faulting for at least 80,000 to 120,000 years.”³¹ Nor has SLOMFP shown how consideration of surface fault rupture would make a material difference in any SAMA analysis conclusions.

Amended Contention C is not admitted.³²

²⁸ Insofar as relevant, 10 C.F.R. § 2.309(f)(1) requires that, for each proffered contention, a petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised . . . ;
- (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 . . . ;
- (vi) . . . [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

²⁹ Reply at 1.

³⁰ August Order at 16-17.

³¹ PG&E, Diablo Canyon Power Plant Units 1 and 2, Final Safety Analysis Report Update, at 2.5-2 & 2.5-67 (Rev. 21 Sept. 2013) (ADAMS Accession No. ML15098A461).

³² PG&E and the NRC Staff also contend that Amended Contention C is not timely. PG&E Answer
(Continued)

B. Motion for Summary Disposition on Contention EC-1

Pursuant to 10 C.F.R. § 2.1205, PG&E moves for summary disposition on Contention EC-1. Contention EC-1 is a contention of omission alleging PG&E failed to address the Shoreline Fault in the SAMA analysis submitted as part of the initial renewal application for Diablo Canyon. Quite apart from the adequacy of PG&E's treatment of the Shoreline Fault in its updated SAMA analysis (discussed above), it is undisputed that PG&E's analysis no longer *omits* the Shoreline Fault. PG&E therefore asserts that Contention EC-1 is now moot.

The NRC Staff agrees.³³ In its decision concerning PG&E's appeal of the Board's initial contention admissibility ruling, it appears the Commission anticipated this very situation, and would agree as well: "If SLOMFP intends to challenge the adequacy of any information that PG&E provides in a revision or supplement to its license renewal application regarding the Shoreline Fault, it must submit a new or amended contention."³⁴ Plainly, Contention EC-1, as originally submitted, is now moot.

SLOMFP does not argue otherwise. Rather, it opposes summary disposition on Contention EC-1 solely on the ground that, as SLOMFP interprets the Second Revised Scheduling Order, PG&E's motion is allegedly premature. As SLOMFP would have it, the Board should defer dismissing EC-1 until after the Staff issues a draft supplemental environmental impact statement — presently expected in August 2016.³⁵ Despite the absence of any viable contention, SLOMFP would have the Board hold open this proceeding for nearly another year, at a minimum.

Such a construction of our scheduling orders is inconsistent with their purpose and contrary to the Commission's direction that a Licensing Board's "jurisdiction terminates when there are no longer any contested matters pending before it."³⁶ As stated at the outset of our Initial Scheduling Order, the purpose of scheduling orders is to ensure proper case management, with the objective of "[e]xpediting the disposition of the proceeding; [e]stablishing early and continuing control so

to SLOMFP's Motion at 10-12; NRC Staff Answer to SLOMFP's Motion at 14. Although submitted within 30 days of PG&E's updated SAMA analysis, consistent with the definition of "timely" in the Second Revised Scheduling Order issued on March 26, 2014, PG&E and the Staff nonetheless assert that the new arguments in Amended Contention C could have and should have been asserted earlier. Specifically, SLOMFP's claims concerning PG&E's alleged failure to consider additional measures of ground motion are not based on information that differed materially from information that was available before PG&E's most recent SAMA update. *See* 10 C.F.R. § 2.309(c)(1)(i)-(iii). Because the Board concludes that Amended Contention C is not admissible because of its failure to satisfy 10 C.F.R. § 2.309(f)(1), we need not rule on its timeliness.

³³NRC Staff Answer to PG&E's Motion at 4-5.

³⁴CLI-11-11, 74 NRC at 443 n.92.

³⁵San Luis Obispo Mothers for Peace's Response to Pacific Gas & Electric Company's Motion for Summary Disposition of Contention EC-1 (Sept. 14, 2015) at 2 n.1, 3-4.

³⁶*DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC 535, 564 n.46 (2015).

that the proceeding will not be protracted because of lack of management” and “[d]iscouraging wasteful prehearing activities.”³⁷

The purpose of scheduling orders is not to vest in any party a right to invoke their provisions to achieve the opposite of the Board’s intended objectives. Rather, unless a schedule is so onerous or unfair that it deprives a party of procedural due process, “scheduling is a matter of Licensing Board discretion.”³⁸ A Licensing Board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management.³⁹

The exercise of such discretion is especially appropriate here. SLOMFP’s suggestion that this adjudication should continue, while it is clear that no genuinely contested matter remains pending before the Board, runs directly counter to the Commission’s direction as to how its Licensing Boards should manage their cases.

Indeed, had PG&E not moved for summary disposition in these circumstances, in all likelihood the Board itself would have issued an order to show cause why Contention EC-1 should not now be dismissed as moot. SLOMFP requested and was allowed some 45 days in which to respond to PG&E’s motion for summary disposition.⁴⁰ SLOMFP has not been prejudiced in any way by having to address the mootness of Contention EC-1 in responding to PG&E’s motion, rather than in responding to the Board’s order to show cause.

PG&E’s motion for summary disposition on Contention EC-1 is granted.

III. ORDER

For the reasons stated:

1. SLOMFP’s motion to file Amended Contention C is *denied*.
2. PG&E’s motion for summary disposition on Contention EC-1 is *granted*.

³⁷ Licensing Board Order (Initial Scheduling Order) (Sept. 15, 2010) at 1 (unpublished) (quoting 10 C.F.R. § 2.332(c)).

³⁸ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

³⁹ *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 991 (1974) (“Of necessity, licensing boards must be vested with considerable latitude in determining the course of the proceedings which they are called upon to conduct. . . . We will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause.”).

⁴⁰ San Luis Obispo Mothers for Peace’s Unopposed Motion for Extension of Time (July 31, 2015); Order Granting Extension of Time at 2.

3. In the absence of any admitted or proffered contention, this proceeding is *terminated*.

In accordance with 10 C.F.R. § 2.341(b), any petition for review of this Memorandum and Order must be filed within twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 21, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

Docket Nos. 50-361
50-362
(License Nos. NPF-10,
NPF-15)

SOUTHERN CALIFORNIA
EDISON COMPANY
(San Onofre Nuclear Generating
Station, Units 2 and 3)

October 2, 2015

On June 18, 2012, the Petitioner filed a petition for intervention and hearing on behalf of Friends of the Earth, requesting the Nuclear Regulatory Commission (NRC) to order Southern California Edison (SCE) to submit a license amendment application for the design and installation of the San Onofre Nuclear Generating Station (SONGS), Units 2 and 3, replacement steam generators (SGs). As the basis for the petition request, the Petitioner stated that the Licensee violated Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 50.59, "Changes, tests, and experiments," when it replaced its SGs in 2010 and 2011 without first obtaining NRC approval of the design changes through a license amendment. In its November 8, 2012 Memorandum and Order, CLI-12-20, 76 NRC 437 (2012), on this matter, the Commission referred the portion of the petition that concerns the asserted 10 C.F.R. § 50.59 violation to the NRC's Office of the Executive Director for Operations for consideration under 10 C.F.R. § 2.206, "Request for action under this subpart." The Petitioner supplemented the petition by letters dated November 16, 2012, and February 6, 2013.

The NRC Staff determined that the Petitioner requested the NRC to order SCE to submit a license amendment application for the design and installation of the SONGS, Units 2 and 3, replacement SGs. The Petitioner also requested an

additional enforcement action that the NRC suspend SCE's licenses until they are amended.

On July 28, 2015, the NRC issued a final director's decision (DD). The decision stated that, because the request for the NRC to order the Licensee to submit a license amendment application for the design and installation of the replacement SGs and to suspend SCE's licenses until they are amended is moot, the Director of the Office of Nuclear Reactor Regulation (NRR) would not be instituting the proceeding Petitioner requested, either in whole, or in part.

Subsequently, the NRC identified portions of the DD that required clarification regarding the scope of the petition and the decision. Accordingly, on October 2, 2015, the DD was revised to clarify that the scope of the petition referred to the NRC Staff in CLI-12-20 includes the underlying question of whether the Licensee violated 10 C.F.R. § 50.59 when it replaced the SGs at SONGS, Units 2 and 3, without first obtaining a license amendment. The decision also addresses the Staff's resolution of this underlying question and the conclusion is updated to reflect the resolution of this underlying question. The revised DD also clarifies additional Staff activities associated with the SONGS SG event followup that support the Staff's conclusion regarding whether the Licensee violated 10 C.F.R. § 50.59 by replacing the SGs without a license amendment.

Notwithstanding the clarifications in the revised DD, the Director of NRR will not be instituting the requested proceeding.

REVISED DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated June 18, 2012 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12171A409), Friends of the Earth (the Petitioner) filed an intervention petition and hearing request, as well as a request for a stay of any decision to authorize restart of San Onofre Nuclear Generating Station (SONGS), Units 2 and 3, following the steam generator (SG) tube leak that led to the rapid shutdown of Unit 3 in January 2012. As part of its filing, the Petitioner argued that the Licensee violated Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 50.59, "Changes, tests, and experiments," when the SGs for SONGS, Units 2 and 3, were replaced in 2010 and 2011 without a license amendment.

In its November 8, 2012 Memorandum and Order, CLI-12-20, 76 NRC 437 (2012), on this matter (ADAMS Accession No. ML12313A118), the U.S. Nuclear Regulatory Commission (NRC or the Commission) referred the portion of the

June 18, 2012, petition that concerns the asserted 10 C.F.R. § 50.59 violation to the NRC's Office of the Executive Director for Operations for consideration as a petition under 10 C.F.R. § 2.206, "Request for action under this subpart."

The petition was supplemented by letters dated November 16, 2012, and February 6, 2013 (ADAMS Accession Nos. ML12325A748 and ML13109A075, respectively).

A. Actions Requested

Based on the Commission referral in CLI-12-20, the NRC Staff reviewed the June 18, 2012 petition and November 16, 2012 supplement to identify the Petitioner's requested enforcement-related actions applicable to the asserted 10 C.F.R. § 50.59 violation. The Staff determined that the Petitioner requested the NRC to order Southern California Edison (SCE or the Licensee) to submit a license amendment application for the design and installation of the SONGS, Units 2 and 3, replacement SGs. As the basis for the petition request, the Petitioner stated that the Licensee violated 10 C.F.R. § 50.59 when it replaced its SGs in 2010 and 2011 without first obtaining NRC approval of the design changes through a license amendment.

On January 16, 2013, the Petitioner met with the NRC's Petition Review Board (PRB) to clarify the bases for the petition. During the PRB meeting, the Petitioner requested an additional enforcement action that the NRC suspend SCE's licenses until they are amended.

The NRC treated the transcript of the PRB meeting (ADAMS Accession No. ML13029A643) as a supplement to the petition. The transcript is available for inspection at the NRC's Public Document Room (PDR), located at One White Flint North (O1F21), 11555 Rockville Pike (first floor), Rockville, MD 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC library 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 NRC's PDR reference Staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

The NRC's acknowledgment letter to the Petitioner, dated April 30, 2013 (ADAMS Accession No. ML13106A193), addressed the original June 18, 2012 petition referred to the NRC Staff in CLI-12-20, as supplemented by letter dated November 16, 2012; comments made during the January 16, 2013 PRB meeting; and by letter dated February 6, 2013. The November 16, 2012 and February 6, 2013 supplements did not request additional actions but did provide supporting information. In the acknowledgment letter, the NRC informed the Petitioner that the petition had been accepted for review under the 10 C.F.R. § 2.206 process. In this letter, the NRC stated that it would also consider the safety significance and

complexity of the information submitted on April 4, 2013 (ADAMS Accession No. ML13116A266), and that it would determine whether the new information should be consolidated with the existing petition. The April 4, 2013 letter included several assertions related to SCE's "[prior] knowledge regarding the defects in the RSG [replacement steam generator] design at the time it conducted its 50.59 evaluations." The letter requested no additional actions.

On February 27, 2015, the NRC issued the proposed director's decision for comment to the Petitioner and the Licensee (ADAMS Accession Nos. ML-15020A121 and ML15020A165, respectively). The Petitioner provided comments in a response dated March 27, 2015 (ADAMS Accession No. ML15103A027). The NRC Staff's evaluation of these comments is provided as an attachment to this Director's Decision. In addition, the NRC forwarded the Petitioner's March 27, 2015, letter to the NRC's Office of the Inspector General (OIG), because it contained assertions of NRC Staff wrongdoing.

By letter dated March 25, 2015 (ADAMS Accession No. ML15089A045), the Licensee stated that it had no comments on the proposed director's decision. By letter dated April 3, 2015 (ADAMS Accession No. ML15097A011), the Licensee provided a response to the Petitioner's comments on the proposed director's decision. The NRC Staff reviewed the response from the Licensee and determined that because the Licensee's comments are direct rebuttals to the Petitioner's comments and raised no concerns with the proposed director's decision, no changes to the director's decision are required as a result of these comments.

On July 28, 2015, the NRC issued a director's decision (ADAMS Accession No. ML15183A164). Subsequently, the NRC identified portions of the director's decision that required clarification regarding the scope of the petition and the decision. Accordingly, Section I is revised to clarify that the scope of the petition referred to the Staff in CLI-12-20 includes the underlying question of whether the Licensee violated 10 C.F.R. § 50.59 when it replaced the SGs at SONGS, Units 2 and 3, without first obtaining a license amendment; Section II addresses the NRC Staff's resolution of this underlying question; and the conclusion in Section III is updated to reflect the resolution of this underlying question. Section II is also revised to clarify additional Staff activities associated with the SONGS SG event that support the Staff's conclusion regarding whether the Licensee violated 10 C.F.R. § 50.59 by replacing the SGs without a license amendment.

II. DISCUSSION

A. Disposition of the June 18, 2012 Petition

Under 10 C.F.R. § 2.206(b), the director of the NRC office with responsibility for the subject matter shall either institute the requested proceeding or shall

advise the person who made the request in writing that no proceeding will be instituted, in whole or in part, with respect to the request and the reason for the decision. Accordingly, the decision of the Director of the Office of Nuclear Reactor Regulation (NRR) is provided below.

As stated previously, the NRC accepted for review the petition requests for the NRC to order the Licensee to submit a license amendment application for the design and installation of the SONGS, Units 2 and 3, replacement SGs and to suspend SCE's licenses until they are amended. The SONGS, Units 2 and 3, reactors have been shut down since January 9, 2012, and January 31, 2012, respectively. On June 7, 2013, the Licensee verbally notified the NRC of its decision not to seek restart of SONGS, Units 2 and 3.

On June 12, 2013 (ADAMS Accession No. ML131640201), the Licensee provided the certifications required by 10 C.F.R. § 50.82(a)(1)(i) to the NRC Staff that SONGS, Units 2 and 3, had permanently ceased power operations. On June 28, 2013, and July 22, 2013 (ADAMS Accession Nos. ML13183A391 and ML13204A304, respectively), the Licensee provided certifications required by 10 C.F.R. § 50.82(a)(1)(ii) that all fuel had been permanently removed from the SONGS, Units 3 and 2, reactors, respectively. In accordance with 10 C.F.R. § 50.82(a)(2), upon docketing of these two certifications, the Licensee's 10 C.F.R. Part 50, "Domestic Licensing of Production and Utilization Facilities," licenses no longer authorize operation of the SONGS reactors or placement or retention of fuel into the reactor vessels. Accordingly, the Licensee is prohibited by regulation from restarting SONGS, Units 2 and 3, or loading fuel into the reactor vessels. Since the Licensee is prohibited from operating the reactors by 10 C.F.R. § 50.82(a)(2), there is no longer an open question whether action is needed to require the SONGS licenses to be amended to allow continued operation of the reactors with the replacement SGs. In addition, requiring the SONGS licenses to be amended for the replacement SGs would have no effect on the safe operation of the permanently shutdown and defueled facility. Thus, the Petitioner's request for the NRC to order the Licensee to submit a license amendment application for the design and installation of the SONGS, Units 2 and 3, replacement SGs and to suspend SCE's licenses until they are amended is moot.

Notwithstanding the determination that the Petitioner's requested enforcement actions are moot, the NRC Staff evaluated the underlying question referred by the Commission in CLI-12-20 concerning whether the Licensee violated 10 C.F.R. § 50.59 when it replaced its SGs in 2010 and 2011 without first obtaining NRC approval of the design changes through a license amendment. The NRC performed several inspections following the January 2012 SG leak at SONGS, including the review of the Licensee's 10 C.F.R. § 50.59 evaluations related to replacing the SGs.

On March 10, 2012, the NRC initiated an Augmented Inspection Team (AIT) reactive inspection, which assessed the circumstances surrounding the

primary-to-secondary leak and unexpected wear of tubes in the replacement SGs, and also assessed whether the Licensee appropriately reviewed the design changes in accordance with the requirements of 10 C.F.R. § 50.59. The AIT reviewed, in part, all of the design changes associated with the replacement SGs to determine whether the changes to the facility or procedures, as described in the updated final safety analysis report (UFSAR) had been reviewed and documented in accordance with 10 C.F.R. § 50.59 requirements. As documented in AIT Report 05000361/2012007 and 05000362/2012007, dated July 18, 2012 (ADAMS Accession No. ML12188A748), the AIT concluded that the SG major design changes were reviewed in accordance with the 10 C.F.R. § 50.59 requirements. However, the AIT identified ten unresolved items that warranted additional inspection and review to determine if performance deficiencies existed or if the issues constituted violations of NRC requirements, including one item associated with a change in the method of evaluation used for the SG stress analysis calculations.

A followup inspection of the unresolved issues identified by the AIT was conducted from August 20 to September 28, 2012. The AIT followup inspection report, dated November 9, 2012 (ADAMS Accession No. ML12318A342), closed eight of the ten unresolved items, including the item associated with a change in the method of evaluation as described in the UFSAR. The NRC determined that the 10 C.F.R. § 50.59 written evaluation for this change did not demonstrate that the new method had been approved by NRC for the intended application. The failure to provide an appropriate basis for the determination that the change in the method of evaluation did not require a license amendment prior to implementing the change constituted a violation of 10 C.F.R. § 50.59(d)(1). However, because the Licensee demonstrated that the method had been previously approved by the NRC for the intended application, the change did not require the Licensee to obtain a license amendment prior to implementing the change. The AIT followup inspection report concluded that because there was no reasonable likelihood that the change would have required NRC approval (i.e., a license amendment), the change was a minor violation of 10 C.F.R. § 50.59(d)(1).

Furthermore, since the petition was referred to the NRC Staff in CLI-12-20, the Staff and the NRC OIG have carried out additional activities related to the SONGS SG tube degradation event that addressed concerns similar to those raised by the Petitioner and other stakeholders on the NRC's response to the SONGS event, as well as with applicable NRC procedures and regulations. The PRB reviewed the findings and outcomes of each of these activities to determine their applicability to the concerns and actions requested in this petition.

In 2012, the NRC's Office of Investigations (OI) initiated an investigation (OI 4-2012-038) to determine if an SCE employee at SONGS willfully failed to provide complete and accurate information concerning the SONGS SG replacement to NRC inspectors. Based on the evidence developed during the investigation,

the allegation was not substantiated. The investigation was closed in May 2014. During the investigation, OI also developed and probed additional information related to SCE's reviews under 10 C.F.R. § 50.59. Subsequently, OI requested a technical review of the Licensee's 10 C.F.R. § 50.59 screenings and evaluations, which did not identify specific indications of wrongdoing. The PRB determined that the investigation and technical review did not identify any specific indications of wrongdoing related to 10 C.F.R. § 50.59 violations or determine that a license amendment was needed before SCE replaced the SONGS SGs.

In 2013, the NRC OIG initiated an event inquiry in response to concerns regarding the NRC's oversight of the replacement SGs at SONGS. The event inquiry examined the NRC's oversight of SCE's application of the 10 C.F.R. § 50.59 process for the replacement SGs at SONGS, Units 2 and 3. The OIG also sought to ascertain from NRC officials whether SONGS required a license amendment for the SG replacements and whether the problems at SONGS could have been identified through the NRC's license amendment review process. The OIG event inquiry report, "NRC Oversight of Licensee's Use of 10 C.F.R. § 50.59 Process to Replace SONGS' Steam Generators," dated October 2, 2014 (ADAMS Accession No. ML14276A478), included several findings related to the SONGS 10 C.F.R. § 50.59 evaluations. The PRB reviewed the OIG event inquiry report and determined that it identified 10 C.F.R. § 50.59 documentation shortcomings. Based on the NRC Staff's assessment of the potential shortcomings, the PRB concluded that additional Staff actions were not warranted to conclusively determine if the issues represented additional examples of 10 C.F.R. § 50.59 violations or would have required a license amendment prior to SCE replacing the SGs. The NRC Staff is addressing the issues in the OIG report as part of the SONGS lessons-learned effort discussed below.

On September 20, 2013, the NRC Staff issued NRC Inspection Reports 05000361/2012009 and 05000362/2012009 (ADAMS Accession No. ML13263A271), which documented the inspection of and findings associated with the Staff's review of SCE's confirmatory action letter response (ADAMS Accession No. ML12285A263) for Unit 2, dated October 3, 2012, and the two remaining open unresolved items identified in AIT Reports 05000361/2012007 and 05000362/2012007. The inspection was conducted December 3, 2012, through June 7, 2013, and identified, in part, performance deficiencies for the failure to verify the adequacy of the thermal-hydraulic and flow-induced vibration design of the replacement SGs for SONGS, Units 2 and 3, that occurred on January 28, 2008, and April 2, 2008, during the design phase of the replacement SGs. For Unit 2, the finding was determined to be of very low safety significance, because the Unit 2 SG tubes did not leak and continued to meet the required structural integrity criterion. The Unit 2 finding was dispositioned as Green and associated with a noncited violation of 10 C.F.R. Part 50, Appendix B, Criterion III, "Design Control."

On December 23, 2013, the NRC issued the Final Significance Determination of White Finding and Notice of Violation (ADAMS Accession No. ML13357-A058) for the Licensee's failure to verify the adequacy of the thermal-hydraulic and flow-induced vibration design of the Unit 3 replacement SGs, a violation of 10 C.F.R. Part 50, Appendix B, Criterion III, with an associated violation of Technical Specification 5.5.2.11, "Steam Generator (SG) Program," because of the loss of tube integrity on a Unit 3 SG. The NRC determined that the SONGS, Unit 3, SG tube leak and subsequent shutdown on January 31, 2012, were the result of this violation. In accordance with the NRC Enforcement Policy, this violation is considered an escalated enforcement action because it is associated with a White finding.

The PRB concluded that the inspection did not show that these or any other identified violations indicated that a license amendment was needed before SCE replaced the SONGS SGs.

On March 6, 2015, the NRC Staff issued a report, "Review of Lessons Learned from the San Onofre Steam Generator Tube Degradation Event" (ADAMS Accession No. ML15062A125), along with an accompanying White Paper, "10 C.F.R. § 50.59; the Process, Application to Substantial Modifications to Licensee Facilities, and NRC Staff Assessment of Licensee Implementation," dated February 25, 2015 (ADAMS Accession No. ML13066A237). The lessons-learned effort and the White Paper considered the 10 C.F.R. Part 50, Appendix B, Criterion III violations discussed above as part of an assessment of whether the 10 C.F.R. § 50.59 rule continues to be adequate for major or complex component replacements. Consistent with the September 20, 2013 inspection report, the lessons-learned report indicated that the SG tube degradation occurred as a result of issues introduced during the design phase that were unrecognized and thus were not considered in the Licensee's 10 C.F.R. § 50.59 evaluation. The lessons-learned report also noted that 10 C.F.R. § 50.59 is not a process for verifying design adequacy and that the required design control measures for verifying the adequacy of design are expected to be implemented before entering the 10 C.F.R. § 50.59 process. The report concludes that:

The 10 CFR 50.59 rule . . . and the results of the San Onofre 10 CFR 50.59 evaluation did not have any bearing on the underlying, unrecognized design control issue that actually caused the San Onofre steam generator tube leak event.

The lessons-learned effort also considered the 10 C.F.R. § 50.59 minor violation identified in the November 9, 2012 AIT followup inspection report, and the October 2, 2014 OIG event inquiry report, as part of an assessment of whether the NRC needs to provide additional 10 C.F.R. § 50.59 guidance and information. Although the lessons-learned report was issued after the proposed director's decision, the PRB reviewed the report and determined that it did not provide

any additional information or support for the petition that had not already been considered.

III. CONCLUSION

The Petitioner raised concerns about the validity of SCE's 10 C.F.R. § 50.59 evaluations for the SGs at SONGS, Units 2 and 3. The NRC evaluated the Petitioner's concerns, including the comments received from the Petitioner on the proposed director's decision.

Since the submittal of the initial petition and the subsequent supplements, SCE has submitted written certifications to the NRC in accordance with 10 C.F.R. § 50.82, "Termination of License," that it has permanently ceased power operations at SONGS, Units 2 and 3, and that fuel has been permanently removed from the reactor vessels. In accordance with 10 C.F.R. § 50.82, upon docketing these certifications, SCE is prohibited by regulation 10 C.F.R. § 50.82(a)(2) from operating SONGS, Units 2 and 3, or loading fuel into the reactor vessels. Thus, there is no longer a potential for the SONGS, Units 2 and 3, SGs to be operated, and the Petitioner's request for the NRC to order the Licensee to submit a license amendment application for the design and installation of the replacement SGs and to suspend SCE's licenses until they are amended is moot. In addition, the NRC Staff evaluated the underlying question referred by the Commission in CLI-12-20 concerning whether the Licensee violated 10 C.F.R. § 50.59 when it replaced its SGs without first obtaining NRC approval of the design changes through a license amendment. The Staff determined that the Licensee's conclusion that no license amendment was required was consistent with the requirements of 10 C.F.R. § 50.59. Based on the above, the Director of NRR will not be instituting the proceeding requested by the Petitioner, either in whole or in part.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

William M. Dean, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 2d day of October 2015.

Attachment: Resolution of Petitioner's Comments

ATTACHMENT

COMMENTS RECEIVED FROM THE PETITIONER ON THE PROPOSED DIRECTOR'S DECISION DATED FEBRUARY 27, 2015

The U.S. Nuclear Regulatory Commission (NRC) sent a copy of the proposed director's decision to Mr. Richard Ayres, representing Friends of the Earth (the Petitioner), for comment on February 27, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15020A167). The Petitioner responded with comments by letter from Mr. Damon Moglen dated March 27, 2015 (ADAMS Accession No. ML15103A027). The NRC's response to the comments received is provided below:

Comment 1 (summarized)

The Petitioner made several comments asserting that, in its proposed director's decision, the NRC did not address the original concerns of the petition, including (1) how such an abdication of responsibility was allowed to occur, and (2) what will be done in response? The Petitioner also commented that the statement that the issue is "moot" is insufficient, as is the proposed conclusion that the agency will not take action to address the problems with the Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 50.59, "Changes, tests, and experiments," and 10 C.F.R. § 2.206, "Requests for action under this subpart," processes. The Petitioner also commented that the NRC did not explain why closure of the reactors was sufficient instead of investigating and reforming the section 50.59 process.

Response

The fundamental issue in this case revolved around whether Southern California Edison's (SCE's) replacement of its steam generators (SGs) in 2010 and 2011, under 10 C.F.R. § 50.59, and subsequent operation until January 2012, without first obtaining NRC approval through a license amendment, was in violation of NRC regulations. As stated in Section I of the Director's Decision, the Petitioner requested that the NRC take enforcement action against SCE in the form of an NRC order that requires the Licensee to submit a license amendment application for the design and installation of the San Onofre Nuclear Generating Station (SONGS), Units 2 and 3, replacement SGs and suspend SCE's licenses until they are amended. Because SONGS is now permanently shut down — and will not restart — there is no reasonable expectation that the asserted violation will recur.

The regulation in 10 C.F.R. § 50.59(c)(2) requires a Licensee to obtain a license amendment under 10 C.F.R. § 50.90, “Application for Amendment of License, Construction Permit, or Early Site Permit,” before implementing a proposed change that meets any of the criteria in 10 C.F.R. § 50.59(c)(2)(i)-(viii). The effect of the relief requested by the Petitioner in the section 2.206 petition would have been that SCE would not restart the SONGS, Units 2 or 3, reactors and operate the replacement SGs without undergoing a review and subsequent approval of a license amendment by the NRC Staff. The permanent shutdown of Units 2 and 3 has eliminated any potential for additional effects of the asserted violation, as the reactors and the replacement SGs are prohibited from being operated. The effect of the permanent shutdown is the same result sought by the Petitioner.

In addition, requiring SCE’s licenses to be amended regarding the replacement SGs would have no impact on the safe operation of the permanently shutdown and defueled facility. Thus, the Director’s Decision concludes that the Petitioner’s request for the NRC to order the Licensee to submit a license amendment application for the design and installation of the replacement SGs and to suspend SCE’s licenses until they are amended is moot.

In response to these comments, the Director’s Decision has been revised to more clearly indicate the reasons why the requested actions are moot, and that related issues raised by the Petitioner and others that are not appropriate for review through the section 2.206 petition process, such as concerns related to NRC procedures or regulations, are addressed through other processes or programs. The Director’s Decision includes a summary of several of these other activities, some of which were still in progress when the proposed director’s decision was issued, and indicates where additional information on these activities can be obtained.

Comment 2 (summarized)

The Petitioner commented that when SCE sought bidders for the replacement steam generators (RSGs), it specified that the SGs should be designed and constructed such that no license amendment would be required under 10 C.F.R. § 50.59. The Licensee asked the supplier to, “guarantee in writing that the RSG design is licensable and provide all support necessary to achieve that end.” A design specification for the second SG required the supplier to provide “an engineering evaluation . . . justifying that the RSGs can be replaced under the provision of 10 CFR 50.59 (without prior NRC approval).”

Response

Following the January 2012 SONGS SG tube degradation event, there was public concern expressed about whether the Licensee decided to design the new

SGs so that they could be replaced under 10 C.F.R. § 50.59 to avoid scrutiny provided by NRC Staff review of a license amendment. In the March 6, 2015, “Review of Lessons Learned from the San Onofre Steam Generator Tube Degradation Event” (lessons-learned report) (ADAMS Accession No. ML15062A125), the NRC Staff evaluated whether it is acceptable for a Licensee to intentionally design a facility change such that it could be implemented under 10 C.F.R. § 50.59 without the need for prior NRC approval. The report concludes that such an approach does not represent a safety concern or a compliance concern. Page 16 of the report states, in part:

A change that conforms to the 10 CFR 50.59 criteria demonstrates the continued adequate protection of public health and safety due to the fact that it does not result in a more than minimal increase in the frequency or consequences of an accident or a system failure, does not affect fission product barrier limits, and does not involve a departure from the method of evaluation. The NRC-approved 10 CFR 50.59 guidance of NEI [Nuclear Energy Institute] 96-07, Revision 1 [“Guidelines for 10 CFR 50.59 Implementation,” dated November 17, 2000 (ADAMS Accession No. ML003771157)], Section 4.5, “Disposition of 10 CFR 50.59 Evaluations,” states that if a licensee determines that a proposed activity would require prior NRC approval, it has the option to “[r]edesign the proposed activity so that it may proceed without prior NRC approval.”

A Licensee’s decision to design RSGs so that they can be replaced without prior NRC approval would not avoid NRC oversight. The NRC provides oversight of plant modifications through the inspection process, regardless of whether a Licensee’s evaluation under 10 C.F.R. § 50.59 determines that prior NRC approval is required for the change. The NRC also periodically inspects Licensee implementation of the 10 C.F.R. § 50.59 process, as well as design and configuration control processes. The March 6, 2015 lessons-learned report discusses the NRC inspection activities and results associated with the replacement of the SONGS SGs and following the January 2012 SG tube degradation event. On June 27, 2008, SCE requested amendments to the SONGS, Units 2 and 3, licenses (NPF-10 and NPF-15, respectively) to support the replacement of its SGs. The NRC completed its review and approved the amendments on June 25, 2009, which modified the Unit 2 and 3 technical specifications to reflect revised SG inspection and repair criteria and revised peak containment post-accident pressures resulting from the planned installation of the replacement SGs.

No changes were made to the director’s decision as a result of this comment.

Comment 3 (summarized)

The Petitioner commented that both the NRC augmented inspection and SCE's investigation of the tube degradation at SONGS Units 2 and 3 identified fluid elastic instability as the immediate cause of the excessive tube wear but that neither determined the root cause of the premature and extensive tube degradation of the RSGs. The Petitioner further asserted that the NRC permitted the Licensee to design, construct, install, and operate defective SGs, and the NRC only came to recognize that there was a problem after there had been the release of radiation.

Response

As the comment indicated, the NRC Augmented Inspection Team (AIT) that was established following the January 2012 event initially identified design control issues associated with the thermal-hydraulic modeling of the SGs as the probable cause of the SG tube degradation. Followup inspections of the unresolved issues identified by the AIT identified violations of 10 C.F.R. Part 50, Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," Criterion III, "Design Control," for the failure to verify the adequacy of certain design features of the RSGs, which resulted in excessive and unexpected SG tube wear after one cycle of operation. Following the event, both SCE and the manufacturer of the RSGs (Mitsubishi Heavy Industries) initiated efforts to identify the root and contributing causes of the tube-to-tube wear that led to the event. Pages 24 and 25 of the March 6, 2015 lessons-learned report provide the following summary of their findings:

Southern California Edison (SCE) and the vendor (Mitsubishi Heavy Industries) determined [(ADAMS Accession No. ML12285A265)] that the mechanistic cause of the Unit 3 tube-to-tube wear was U-bend in-plane fluid-elastic instability associated with adverse thermal-hydraulic conditions in the steam generator, combined with a lack of effective in-plane tube support for the U-bends. Mitsubishi determined that the tube-to-anti-vibration bar contact forces used in the replacement steam generators were not high enough to prevent the in-plane motion, given the thermal-hydraulic conditions in the secondary side of the steam generators. Mitsubishi also found that its design models had not appropriately calculated the secondary side flow conditions for the design configuration of the San Onofre steam generators. As a result, there was significantly less margin to fluid-elastic instability in the actual steam generators than anticipated by the models.

Mitsubishi identified the root cause of the in-plane fluid-elastic instability of the tubes to be insufficient programmatic requirements for ensuring effective anti-vibration bar support that would prevent the in-plane fluid-elastic instability. The susceptibility to fluid-elastic instability was caused by the thermal-hydraulic condi-

tions that existed in certain parts of the San Onofre replacement steam generators during full power operations.

The NRC Staff reviewed the root and contributing causes and concluded that they were programmatically and technically reasonable.

The Petitioner's assertion that the NRC regulations allowed SCE to design, construct, install, and operate its RSGs without prior NRC approval, and that the NRC only became aware of the design issue after one of the Unit 3 SGs developed a leak that was detected by plant radiation alarms due to a release of radiation, is factually correct. However, before the January 2012 leak, the NRC had no reason to believe that the RSGs were defective or would fail prematurely. Regardless, these issues are outside the scope of the petition, and the NRC is otherwise taking actions to address these issues. The NRC Staff assessed the NRC's response to the event and potential enhancements to NRC processes and programs based on lessons learned from the event, and documented its recommendations in the March 6, 2015 lessons-learned report.

Specifically, the report states, in part:

At San Onofre, the NRC identified violations of 10 CFR Part 50, Appendix B, Criterion III, for the failure to verify the adequacy of the thermal-hydraulic and flow-induced vibration design of the San Onofre replacement steam generators, resulting in excessive and unexpected steam generator tube wear after one cycle of operation. The 10 CFR 50.59 rule, NEI 96-07, Revision 1, and the results of the San Onofre 10 CFR 50.59 evaluation did not have any bearing on the underlying, unrecognized design control issue that actually caused the San Onofre steam generator tube leak event.

In addition, Topic 3, "Steam Generator Technical Review," and Topic 8, "Vendor Inspection," of the report look at the technical aspects of the event and describe, in part, ongoing actions related to working with the nuclear industry and professional organizations to update standards and guidelines based on the experience at SONGS. The report also explores potential updates to the Reactor Oversight Process inspection procedures to flag major plant modifications that might require review and inspection by technical experts before operation.

As discussed in the response to Comment 1, the Director's Decision has been revised to more clearly identify the related issues that are outside of the scope of this petition, including the enforcement action associated with the RSGs described above.

Comment 4 (summarized)

The Petitioner commented that the proposed director's decision ignores the

conclusions in the NRC's Office of Inspector General (OIG) October 2, 2014 event inquiry report, "NRC Oversight of the Licensee's Use of 10 CFR 50.59 Process to Replace SONGS' Steam Generators," the majority of which led to 10 C.F.R. § 50.59 flaws and the need for a license amendment, and did not address the issue of whether SCE needed a license amendment to replace the SGs at SONGS, Units 2 and 3. In addition, the Petitioner noted that the OIG stated that a former NRC deputy regional administrator said that the Licensee should have applied for a license amendment because if it had, the RSGs would not have been approved. The Petitioner also stated that there was no conclusion reached on a violation despite evidence suggesting some Staff felt there should have been.

Response

The March 6, 2015 lessons-learned report describes the results of NRC inspections of SCE's 10 C.F.R. § 50.59 evaluation and whether SCE needed a license amendment to replace the SGs at SONGS Units 2 and 3, as follows:

In 2010 and 2011, Southern California Edison (SCE) installed replacement steam generators at San Onofre Units 2 and 3, respectively, following a 10 CFR 50.59 evaluation that concluded no license amendment would be required . . . except for the relevant technical specification changes related to steam generator inspection and tube repair criteria and changes to the peak containment post-accident pressure. In preparation for the steam generator replacements, the NRC inspectors reviewed the 10 CFR 50.59 evaluation performed on Unit 2 by SCE as part of a baseline inspection of plant modifications and as part of the focused steam generator replacement inspection [(ADAMS Accession Nos. ML093100051 and ML111300448)]. The inspection did not identify any issues with the licensee's 10 CFR 50.59 evaluation.

Following the January 2012 steam generator tube leak event, the NRC conducted additional inspections [(ADAMS Accession Nos. ML12188A748 and ML12318-A342)] at San Onofre, including a review of the event, a review of the steam generator replacement process, and another review of the 10 CFR 50.59 evaluations. As part of this additional inspection and technical review, several issues were raised, including some specific to the San Onofre 10 CFR 50.59 evaluation. . . .

OIG Issue #2 noted that the 2012 AIT review of the licensee's 10 CFR 50.59 evaluation did not document the answer to the question of whether a license amendment was required. The AIT review considered many issues, among which was whether or not the licensee correctly concluded that a license amendment was not required. The AIT and its followup inspections reviewed the licensee's 10 CFR 50.59 evaluations related to replacing the steam generators and determined that the licensee's conclusion that no license amendment was required was consistent with the requirements of 10 CFR 50.59.

The issues identified in the OIG report, including issues associated with NRC's

oversight of the 10 C.F.R. § 50.59 process at SONGS, were incorporated into the lessons-learned activity for appropriate response actions. The lessons-learned report also discussed the NRC Staff's consideration of varying NRC perspectives about the 10 C.F.R. § 50.59 process that OIG also highlighted in its report. To respond to this issue, the lessons-learned report identified actions to enhance training on the 10 C.F.R. § 50.59 process (e.g., the determination of whether a license amendment is required). Therefore, although not specifically identified in the lessons-learned report, the NRC Staff considered the perspectives of the former deputy regional administrator.

No changes were made to the Director's Decision as a result of this comment.

Comment 5 (summarized)

The Petitioner stated that it would continue to work with Senator Barbara Boxer and Senator Dianne Feinstein, who it said are concerned about the NRC's role in the "plant's demise" to ensure that this will not happen in the future.

Response

The NRC shares the concerns of the Petitioner and is taking steps to prevent a similar event from occurring in the future. As indicated in the March 6, 2015, lessons-learned report, the NRC Executive Director for Operations issued a March 20, 2014 tasking memorandum that directed the NRC Staff to evaluate the lessons learned from this event, apply appropriate process improvements, and clearly communicate the outcomes to all NRC stakeholders to improve NRC regulatory effectiveness and efficiency and meet the NRC's safety and security mission. The report identified seventeen actions across the eight topic areas identified in the tasking memorandum, and the NRC Staff is taking steps to implement these actions. The most substantial of these actions are in the technical areas related to the cause of the tube degradation and in the area of external communications. As discussed in the response to Comment 3, the report identified actions related to working with the nuclear industry and professional organizations to update standards and guidelines based on the experience at SONGS. In addition, several actions are focused on improving the communications related to complex, technical subjects to the public and other stakeholders.

No changes were made to the Director's Decision as a result of this comment.

Comment 6 (summarized)

The Petitioner provided several comments about the 2.206 review process, including the timeliness of the NRC's 2.206 review, the number of petition

managers assigned to the petition over the course of the petition review, and the NRC management's ownership of the proposed director's decision. The Petitioner also asked that the draft director's decision be rejected, proposing that the NRC rule on the information provided by the Petitioner and in accordance with the information in the OIG report.

Response

The issues associated with the SONGS SG tube degradation event were highly complex, requiring the involvement of individuals with expertise in multiple technical and regulatory disciplines. The NRC expended significant effort to assess the issues following the event, including immediately initiating an AIT reactive inspection to assess the circumstances surrounding the event, establishing dedicated teams of technical experts and inspectors to evaluate the Licensee's response to the event and corrective actions, and establishing a team to assess lessons learned from the NRC's response to the event. The effort also included NRC's Office of Investigations and OIG activities, as well as multiple public meetings conducted both near SONGS and at the NRC headquarters. Although the requested actions accepted for review under this 2.206 petition by the Petition Review Board (PRB) were only one part of the overall effort, the Petitioner raised some issues that touched on multiple aspects of the overall effort. The PRB did not complete its recommendations for the Director's Decision until after it was able to give due consideration to the information obtained from these other related activities. The final Director's Decision considered all available information, including the OIG report.

As recognized in the March 6, 2015 lessons-learned report, the NRC agrees that there are some improvements that can be made to NRC processes and programs based on lessons learned from the response to the SONGS event. The NRC is committed to addressing the recommendations and actions in this report, and to continue to improve its programs and processes to enhance its ability to carry out its safety mission.

To ensure the concerns related to the Staff's actions involving this 2.206 petition are given proper consideration, the NRC has also forwarded the Petitioner's comments to the OIG.

No changes were made to the Director's Decision as a result of this comment.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

Docket Nos. 50-338
50-339
(License Nos. NPF-4,
NPF-7)

VIRGINIA ELECTRIC AND
POWER COMPANY
(North Anna Power Station,
Units 1 and 2)

October 30, 2015

By letter dated October 20, 2011, Paul Gunter, Kevin Kamps, Thomas Saporito, Paxus Calta, Alex Jack, Scott Price, and John Cruickshank (Petitioners) filed a petition under Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Requests for Action Under This Subpart." The NRC Staff reviewed the petition and the Petitioners' supplemental correspondences on November 2, 2011, and December 15, 2011. The Petitioners requested in the petition that the NRC suspend the operating licenses for the North Anna Power Station, Units 1 and 2 (North Anna 1 and 2), until the completion of a set of activities described in the petition. On March 16, 2012, the NRC Staff acknowledged receiving the petition and stated that, under 10 C.F.R. § 2.206, out of the sixteen concerns presented, twelve concerns were accepted for review, and that the NRC intended to use the results of the Fukushima review to inform its final decision on whether to implement the requested actions.

The NRC Staff issued the partial director's decision (DD) on October 19, 2012. As detailed in the partial DD, the NRC's Office of Nuclear Reactor Regulation (NRR) decided to partially grant the Petitioners' request. As also detailed in the partial DD, eight of the accepted twelve concerns were closed. The remaining four concerns accepted for review were identified as those that may take longer than the target time frame for reaching a decision on a petition based on the fact

that they were undergoing NRC review as part of the agency's response to the Fukushima event in Japan.

On August 21, 2015, the NRC issued a final DD stating that the NRC had evaluated the Petitioner's remaining four concerns, including comments received on the April 17, 2015 proposed DD. Based upon the progress in responding to the Fukushima event since acceptance of the petition for review, the NRC Staff determined that these four remaining concerns have been adequately addressed. Therefore, the NRC decided to close the remaining four concerns.

Subsequently, the NRC identified portions of the final DD on the Petitioners' concern regarding long-term storage of spent fuel in the spent fuel pool at North Anna 1 and 2 and at the North Anna ISFSI that required clarification. Accordingly, the DD's response to that concern (Concern 8) has been revised to clarify the NRC's resolution of the concern. In addition, the responses to the other three concerns addressed in the DD (Concerns 7, 9, and 11) have been updated to reflect developments that have occurred since the August 21, 2015 issuance of the Director's Decision.

None of the above-described revisions or updates change the conclusion in the Director's Decision issued on August 21, 2015, that enforcement action is not warranted. Therefore, notwithstanding the clarifications in the revised DD, the Director of NRR will not be instituting the requested enforcement proceeding.

REVISED DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated October 20, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11293A116), Paul Gunter, Kevin Kamps, Thomas Saporito, Paxus Calta, Alex Jack, Scott Price, and John Cruickshank (Petitioners) filed a petition under Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Requests for Action Under This Subpart." Upon their request, the U.S. Nuclear Regulatory Commission (NRC, the Commission) added Eleanor Amidon, Erika Kretzmer, Lovell King II, David Levy, Hilary Boyd, G. Paul Blundell, Erica Gray, Edmund Frost, and Richard Ball to the list of Petitioners. The Petitioners requested in the petition that the NRC suspend the operating licenses for the North Anna Power Station, Units 1 and 2 (North Anna 1 and 2), until the completion of a set of activities described in the petition.

A letter dated November 2, 2011 (ADAMS Accession No. ML11308A027), and an e-mail message dated December 15, 2011 (ADAMS Accession No. ML12060A197), supplemented the petition. Two meetings with the NRC Petition

Review Board (PRB), held on December 12, 2011 (meeting transcript at ADAMS Accession No. ML12033A025), and February 2, 2012 (meeting transcript at ADAMS Accession No. ML12047A240) further supplemented the petition. Section II of this Director's Decision (DD) describes the bases for the request.

The PRB met on November 7, 2011, to discuss the petition, and it denied the petition's request for immediate action, because it identified no immediate safety concern to North Anna 1 and 2 and no undue risk to the health and safety of the public. The PRB concluded that the requirement "to demonstrate to the Commission that no functional damage has occurred from the August 23, 2011 earthquake to those features necessary for continued operation without undue risk to the health and safety of the public" already exists in Appendix A, "Seismic and Geologic Siting Criteria for Nuclear Power Plants," to 10 C.F.R. Part 100, "Reactor Site Criteria." The PRB communicated this decision to the Petitioners in an e-mail dated November 10, 2011, and the Petitioners requested an opportunity to address the PRB before its initial meeting to provide supplemental information for the PRB's consideration.

The Petitioners met with the PRB at a public meeting on December 12, 2011, to discuss the petition. The PRB met on January 9, 2012, to consider if it would accept or reject the petition based on the criteria in the NRC Staff's Management Directive (MD) 8.11, "Review Process for 10 CFR 2.206 Petitions" (ADAMS Accession No. ML041770328). The PRB made an initial recommendation to partially accept the petition based on the fact that some of the concerns identified in the petition met the criteria in MD 8.11, while other concerns did not. The PRB communicated its initial recommendation to the Petitioners in an e-mail dated January 19, 2012. The Petitioners received additional information about the PRB's recommendation through an e-mail dated January 30, 2012. During the public meeting held on December 12, 2011, the Petitioners requested a second opportunity to address the PRB at a public meeting. The Petitioners met with the PRB on February 2, 2012, to provide supplemental information in support of the petition request.

The PRB considered the results of these discussions, along with the additional information, in determining its final recommendation to partially accept the petition for review and in establishing the schedule for reviewing the petition. In an acknowledgment letter dated March 16, 2012 (ADAMS Accession No. ML12060A090), the NRC informed the Petitioners that it had partially accepted the petition for review under 10 C.F.R. § 2.206 and that the petition had been referred to the Office of Nuclear Reactor Regulation (NRR) for appropriate action. That partial DD addressed the concerns raised in the original petition, along with the additional concerns raised during the public meetings between the Petitioners and the PRB held on December 12, 2011, and February 2, 2012, and in the supplemental letter and e-mail message to the NRC dated November 2, 2011, and December 15, 2011, respectively.

The NRC has treated the transcripts of these meetings between the PRB and the Petitioners as supplements to the petition and made them available in ADAMS for inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, MD 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library section of the Web site at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems accessing the documents located in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail at pdr.resource@nrc.gov.

The NRC Staff sent a copy of the proposed partial DD to the Petitioners and to the Licensee for comment on July 10, 2012 (ADAMS Accession Nos. ML12165A208 and ML12165A209, respectively). The Licensee indicated by letter dated July 30, 2012 (ADAMS Accession No. ML12219A120), that it had no comments. By e-mail dated July 31, 2012 (ADAMS Accession No. ML12261A228), Paul Gunter and Kevin Kamps of Beyond Nuclear, one of the parties to the petition, sent comments on the proposed partial DD. By e-mail dated July 31, 2012 (ADAMS Accession No. ML12261A227), Scott Price of the Alliance for Progressive Values (APV), another party to the petition, indicated that the comments submitted by Beyond Nuclear "accurately describe[] APV's concerns as well" and restated the comments contained in the letter by Beyond Nuclear.

The NRC Staff issued the partial DD on October 19, 2012 (ADAMS Accession No. ML12262A156). As detailed in the partial DD, the NRR decided to partially grant the Petitioners' request. Twelve of the concerns were accepted for review by the NRC Staff. As detailed in the partial DD, eight of these concerns were closed. The remaining four concerns accepted for review were identified as those that may take longer than the target time frame for reaching a decision on a petition based on the fact they were undergoing NRC review as part of the agency's response to the Fukushima event in Japan.

The NRC Staff completed its activities as discussed in the Background section of this document before restart of North Anna 1 and 2 to ensure that, before resuming operations, the Licensee had demonstrated no functional damage from the August 23, 2011, earthquake had occurred to those features at North Anna 1 and 2 necessary for continued operation without undue risk to the health and safety of the public, consistent with the requirements of 10 C.F.R. Part 100, Appendix A, § V(a)(2).

The four remaining issues accepted for review by the NRC were incorporated into the Staff's review as part of the agency's response to the Fukushima event in Japan. The NRC Staff's response to these issues is provided in Section II of this DD.

On August 21, 2015, the NRC issued the final Director's Decision (ADAMS

Accession No. ML15175A465). Subsequently, the NRC identified portions of the Director's Decision on the long-term storage of spent fuel in the spent fuel pool (SFP) at North Anna 1 and 2 and at the North Anna independent spent fuel storage installation (ISFSI) that required clarification (identified as Concern 8 of the partial director's decision). Accordingly, the Decision's response to this concern has been revised to clarify the NRC's resolution of the matter. In addition, the responses to Concerns 7, 9, and 11 (as identified in the partial director's decision) have been updated to reflect developments that have occurred since the August 21, 2015 final Director's Decision issuance.

II. DISCUSSION

A. Background

On August 23, 2011, with North Anna 1 and 2 operating at 100% power, the site experienced ground motion from a seismic event (a magnitude 5.8 earthquake reported by the U.S. Geological Survey) in Mineral, Virginia, approximately 11 miles from the site. Shortly after the earthquake, both of the North Anna reactors tripped, and the station lost offsite power. After the earthquake, both units were stabilized, taken to a hot shutdown condition, and offsite power was restored. During the loss of offsite power, the four emergency diesel generators, along with the one alternate alternating current (AC) diesel generator, were activated to provide onsite AC power. Subsequent analysis indicated that the spectral and peak ground accelerations for the operating-basis earthquake (OBE) and design-basis earthquake for North Anna 1 and 2 were exceeded at certain frequencies for a short time.

The August 23, 2011 earthquake resulted in ground accelerations exceeding the OBE of North Anna 1 and 2. The requirements of 10 C.F.R. Part 100, Appendix A, § V(a)(2) required North Anna 1 and 2 to be shut down and to remain shut down until the Licensee for this plant demonstrated to the NRC that no functional damage occurred to those features necessary for continued operation without undue risk to the health and safety of the public.

Following the earthquake, the NRC dispatched an augmented inspection team (AIT) to North Anna 1 and 2 to better understand the event and the Licensee's response. The AIT's findings included the following: (1) operators responded to the event in accordance with established procedures and in a manner that protected public health and safety, (2) the ground motion from the earthquake exceeded the plant's licensed design basis, (3) no significant damage to the plant was identified, (4) safety system functions were maintained, and (5) some equipment issues were experienced. Overall, the AIT concluded that the event did not adversely impact the health and safety of the public. Safety limits were not approached and there was no measurable release of radioactivity associated with the event. The NRC

Staff published an inspection report summarizing the AIT findings October 31, 2011 (ADAMS Accession No. ML113040031).

To demonstrate that no functional damage occurred as a result of the earthquake and that it was safe to operate North Anna 1 and 2 without undue risk to the health and safety of the public, the Licensee performed a number of inspections, tests, and analyses to address the requirements of Appendix A to 10 C.F.R. Part 100. This demonstration also aligned with the guidance in the Electric Power Research Institute (EPRI) document NP-6695, "Guidelines for Nuclear Plant Response to an Earthquake." In Regulatory Guide (RG) 1.167, "Restart of a Nuclear Power Plant Shut Down by a Seismic Event," the NRC endorsed EPRI NP-6695, with exceptions, as an acceptable way of performing inspections and tests of nuclear power plant equipment and structures prior to restart of a plant that has been shut down by a seismic event. A letter from the Licensee dated September 17, 2011 (ADAMS Accession No. ML11262A151), described the Licensee's activities in support of the restart of North Anna 1 and 2 after the earthquake of August 23, 2011. In the letter, the Licensee enclosed its Restart Readiness Determination Plan for North Anna 1 and 2. (The Licensee later supplemented its plan numerous times in response to NRC requests for additional information issued to support the development of the NRC's independent technical evaluation.)

To further ensure compliance with regulatory requirements, the NRC issued Confirmatory Action Letter (CAL) No. 2-2011-001 to the Licensee of North Anna 1 and 2 on September 30, 2011 (ADAMS Accession No. ML11273A078), which confirmed the Licensee's commitment that the reactors at North Anna 1 and 2 would not be restarted until the NRC Staff had completed its review of the Licensee's demonstration to the Commission that no functional damage occurred to those features necessary for continued operation of North Anna 1 and 2, without undue risk to the health and safety of the public. In addition, the Licensee performed other testing and inspections not included in the NP-6695 guidelines, some of which it performed as a result of questions raised by the NRC Staff.

Following completion of the AIT inspection, the NRC sent another team of inspectors, the restart readiness inspection team (RRIT), to assess the Licensee's inspection program and readiness for restarting North Anna 1 and 2. The RRIT began its inspection on October 5, 2011. The RRIT followed Inspection Procedure 92702, "Followup on Traditional Enforcement Actions Including Violations, Deviations, Confirmatory Action Letters, Confirmatory Orders, and Alternative Dispute Resolution Confirmatory Orders." The following sources provided supplemental guidance to this inspection procedure: EPRI NP-6695; NRC RG 1.166, "Pre-Earthquake Planning and Immediate Nuclear Power Plant Operator Post-Earthquake Actions"; RG 1.167; the AIT inspection report dated October 31, 2011; and input from NRC subject-matter experts.

The objectives of the RRIT included the following: (1) assess the Licensee's

inspection process to ensure damage attributable to the event would be identified, (2) ensure the underlying causes of the dual-unit reactor trip and failure of the 2H diesel generator were properly identified and the appropriate corrective actions were assigned, (3) review how Licensee-identified issues were evaluated and dispositioned, (4) observe and review Licensee testing of plant systems and selected surveillance test data packages completed since the seismic event, (5) review the tracking and completion of the Licensee's committed actions, and (6) support a final determination as to the overall condition of the plant to support restart.

The RRIT completed its onsite inspection activities on October 14, 2011. They observed some earthquake-related damage to non-safety-related equipment at North Anna 1 and 2 (e.g., limited damage to main generator step-up transformer bushings); however, this damage was considered minor (i.e., it was not functional damage that would preclude safe operation of the facility). The NRC reviewed these issues through established Licensee and NRC processes to ensure they were adequately addressed without undue risk to the health and safety of the public.

The Licensee and the NRC Staff discussed the resolution of issues that the RRIT identified at an exit meeting held on November 7, 2011, that was documented in the RRIT's inspection report dated November 30, 2011 (ADAMS Accession No. ML113340345).

The RRIT concluded that the Licensee performed adequate inspections, walk-downs, and testing to ensure that the August 23, 2011, earthquake had not adversely affected safety-related structures, systems, and components (SSCs). The NRC's independent inspection of plant equipment, observation of selected surveillance testing, and its review of completed test data, calculations, root-cause evaluations, and other documents associated with the station's corrective action process and work order programs confirmed the Licensee's process to properly evaluate the operability and functionality of the plant's SSCs. The RRIT reviewed the unresolved items from the AIT and determined that the Licensee had completed the corrective actions necessary to support the restart of North Anna 1 and 2.

In addition to the onsite inspection activities, the NRC performed an independent technical evaluation of the information submitted by the Licensee to demonstrate that no functional damage occurred at North Anna 1 and 2 as a result of the August 23, 2011, earthquake. The regulatory requirements and guidance used in the NRC's independent technical evaluation of the Licensee's restart readiness determination included the following: (1) Appendix A of 10 C.F.R. Part 100, § V(a)(2); (2) the North Anna 1 and 2 Updated Final Safety Analysis Report (UFSAR); (3) Pre-Earthquake Planning and Immediate Nuclear Power Plant Operator Post-Earthquake Actions (RG 1.166); (4) Restart of a Nuclear Power Plant Shut Down by a Seismic Event (RG 1.167); (5) NRC Generic Letter (GL) 88-20, Supplement 4; "Individual Plant Examination of External Events

(IPEEE) for Severe Accident Vulnerabilities,” along with the Licensee’s response to GL 88-20, Supplement 4; (6) International Atomic Energy Agency Safety Reports Series No. 66, “Earthquake Preparedness and Response for Nuclear Power Plants”; and (7) NRC Inspection Manual, Part 9900, “Operability Determinations and Functionality Assessments for Resolution of Degraded or Nonconforming Conditions Adverse to Quality or Safety,” and the associated NRC Regulatory Issue Summary (RIS) 2005-20, Revision 1, “Revision to NRC Inspection Manual Part 9900 Technical Guidance, ‘Operability Determinations and Functionality Assessments for Resolution of Degraded or Nonconforming Conditions Adverse to Quality or Safety.’” In the summary of the independent technical evaluation issued November 11, 2011 (ADAMS Accession No. ML11308B406), the NRC Staff concluded that the Licensee acceptably demonstrated that no functional damage occurred at North Anna 1 and 2 to those features necessary for continued operation and that North Anna 1 and 2 could be operated without undue risk to the health and safety of the public.

Although the NRC Staff concluded that North Anna 1 and 2 could be safely restarted, the Licensee identified several activities (inspections and tests) that would be performed as part of the restart process. The NRC monitored the startup of North Anna 1 and 2 to confirm that the plant would be safely operated (see inspection report at ADAMS Accession No. ML113540520). In addition to these startup activities, the Licensee identified several long-term action items consistent with the guidance contained in the EPRI document NP-6695, “Guidelines for Nuclear Plant Response to an Earthquake” and changes to the North Anna 1 and 2 UFSAR. The NRC-issued CAL No. NRR-2011-002 on November 11, 2011 (ADAMS Accession No. ML11311A201) documents these actions, which are independent of the NRC’s conclusion that the Licensee demonstrated that no functional damage occurred to North Anna 1 and 2 and that the plant could be restarted safely.

The Licensee has completed all long-term actions identified in NRC CAL No. NRR-2011-002 dated November 11, 2011 (ADAMS Accession No. ML11311A201). The Licensee periodically provided summaries of the completed actions to the NRC. The final closure summaries of the remaining CAL items were provided on May 13, 2013 (ADAMS Accession No. ML13135A637).

B. Concerns Raised by the Petitioners and the Response by the NRC

The Petitioners raised a total of sixteen concerns in the petition dated October 20, 2011, and in supplements to the original petition. Of these sixteen concerns, twelve were accepted for review, as documented in the partial DD issued on October 19, 2012 (ADAMS Accession No. ML12262A156). The NRC Staff noted that this activity may take longer than the standard of 120 days for reaching a decision. The four concerns that were deferred for consideration by

that partial DD were to remain open and the NRC Staff provided periodic updates on the status of the 2.206 petition.

As the basis for this request, the Petitioners state several concerns which are summarized as follows:

- (1) Prior to the approval of restart for North Anna 1 and 2 after the earthquake of August 23, 2011, the Licensee should be required to obtain a license amendment from the NRC that reanalyzes and reevaluates the plant's design basis for earthquakes and for associated retrofits.
- (2) Prior to the approval of restart for North Anna 1 and 2 after the earthquake of August 23, 2011, the Licensee should be required to ensure that North Anna 1 and 2 are subjected to thorough inspections of the same level and rigor.
- (3) The Licensee should be required to reanalyze and requalify the adequacy and condition of the Lake Anna dam after the earthquake of August 23, 2011.
- (4) The Licensee should be required to reanalyze and reevaluate the North Anna ISFSI due to damage caused by the earthquake of August 23, 2011, and ensure that no threat is posed to public health and safety by its operation.
- (5) The Licensee should ensure the reliability and accuracy of the seismic instrumentation at North Anna 1 and 2.
- (6) The NRC Staff made hasty decisions about the restart of North Anna 1 and 2 and gave priority to economic considerations. The long-term action plan was not even complete before the NRC gave authorization to restart.
- (7) Regulatory commitments are an inadequate regulatory tool for ensuring that the critical long-term tasks identified in the NRC Staff's CAL dated November 11, 2011 (ADAMS Accession No. ML11311A201), are completed.
- (8) The NRC should provide greater access to certain documents concerning North Anna 1 and 2, which are stored at the University of Virginia.
- (9) The Licensee needs to address the possibility of both boildown and rapid draindown events at the North Anna 1 and 2 spent fuel pool.
- (10) The long-term storage of spent fuel in the spent fuel pool at North Anna 1 and 2 and at the North Anna ISFSI poses challenges to the public health and safety.

- (11) “Hardened onsite storage” strategies for spent fuel should be used at North Anna 1 and 2.
- (12) Concerns exist about age-related degradation at North Anna 1 and 2.
- (13) Concerns exist about the response of North Anna 1 and 2 to a prolonged station blackout.
- (14) The current emergency evacuation plans for North Anna 1 and 2 need to be revised to reflect the possible need to evacuate a larger area than that identified in the current emergency planning zone.
- (15) Concerns exist about damage to the structural integrity of the spent fuel pool structure at North Anna 1 and 2, as represented on pages 41 and 42 of the NRC Staff’s technical evaluation for the restart of North Anna 1 and 2, dated November 11, 2011 (ADAMS Accession No. ML11308B406).
- (16) There are concerns about lack of compliance at North Anna 1 and 2 with a public law requiring storage of potassium iodide in areas surrounding a nuclear reactor.

The NRC partially accepted the petition based on the fact that some of the concerns identified in the petition met the criteria from MD 8.11, while other concerns did not. Concerns numbered as 1, 2, 4-7, 9-11, and 13-15, above, were accepted for review while concerns numbered as 3, 8, 12, and 16, above, were not accepted for review. Additionally, it should be noted that concerns numbered as 9-11 and 13-15 were undergoing NRC review as part of the lessons learned from the Fukushima event. The PRB denied the request for immediate action because there was no immediate safety concern at North Anna 1 and 2 and no undue risk to the health and safety of the public. The PRB concluded that the requirement “to demonstrate to the Commission that no functional damage has occurred to those features necessary for continued operation without undue risk to the health and safety of the public” already exists in Appendix A, “Seismic and Geologic Siting Criteria for Nuclear Power Plants,” to 10 C.F.R. Part 100, “Reactor Site Criteria.”

The NRC Staff sent a copy of the proposed partial DD for comment on July 10, 2012 (ADAMS Accession Nos. ML12165A208 and ML12165A209). The Petitioners responded with comments on July 31, 2012 (ADAMS Accession Nos. ML12261A228 and ML12258A012), and the Licensee responded on July 30, 2012 (ADAMS Accession No. ML12219A120) that they did not have comments. The NRC Staff issued the partial DD on October 19, 2012 (ADAMS Accession No. ML12262A156). As detailed in the partial DD, the NRR decided to partially grant the Petitioners’ request.

As detailed in the partial DD, eight of these concerns were addressed. The remaining four concerns accepted for review were identified as those that may take longer than the target time frame for reaching a decision on a petition based

on the fact they were undergoing NRC review as part of the agency's response to the Fukushima event in Japan.

The remaining four concerns are summarized as follows:

- (1) The Licensee needs to address the possibility of both boildown and rapid draindown events at North Anna 1 and 2 spent fuel pool. (Concern Number 7 listed in Partial DD)
- (2) The long-term storage of spent fuel in the spent fuel pool at North Anna 1 and 2 and at the North Anna Independent Spent Fuel Storage Installations poses challenges to the public health and safety. (Concern Number 8 listed in Partial DD)
- (3) "Hardened onsite storage" strategies for spent fuel should be used at North Anna 1 and 2. (Concern Number 9 listed in Partial DD)
- (4) The current emergency evacuation plans for North Anna 1 and 2 need to be revised to reflect the possible need to evacuate a larger area than that identified in the current emergency planning zone. (Concern Number 11 in listed Partial DD)

After reviewing the NRC's progress in responding to the Fukushima event since acceptance of the petition for review, the NRC Staff has determined that these concerns have been adequately addressed.

The sections below discuss the four remaining Petitioners' concerns and the NRC's response:

Concern 7: The Licensee needs to address the possibility of both boildown and rapid draindown events at the North Anna 1 and 2 spent fuel pool.

NRC Decision

Concern 7 of this petition is within the scope of Recommendation 7 of the Near-Term Task Force (NTTF) report dated July 12, 2011 (ADAMS Accession No. ML11186A950). The Commission issued Order EA-12-049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events," on March 12, 2012 (ADAMS Accession No. ML12054A736), for beyond-design-basis external events. Such actions significantly enhance the margins of safety from extreme natural phenomena at commercial operating reactors in the United States.

This Order requires a three-phase approach for mitigating beyond-design-basis external events. The initial phase requires the use of installed equipment and resources to maintain or restore core cooling, containment, and SFP cooling

capabilities. The transition phase requires providing sufficient, portable, onsite equipment and consumables to maintain or restore these functions until they can be accomplished with resources brought from offsite. The final phase requires obtaining sufficient offsite resources to sustain those functions indefinitely. Additionally, this Order imposes requirements to maintain or restore SFP cooling capability through the use of self-powered portable pumps via multiple connection points, including connections diverse from the spent fuel deck, and ensures makeup independent of AC or direct current power.

Further, the NRC issued an Order EA-12-051, "Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation," on March 12, 2012 (ADAMS Accession No. ML12056A044), which requires the licensees to install instrumentation for observing the temperature and water level in the SFP, as well as radiation levels in the SFP area. The availability of these indications would enhance operator actions to mitigate any rapid boiling of water in the SFP and rapid draindown from the SFP.

North Anna 1 and 2 submitted its Overall Integrated Plan (ADAMS Accession No. ML13063A182) dated February 28, 2013, and three 6-month updates (ADAMS Accession No. ML13242A012, dated August 23, 2013; ADAMS Accession No. ML14069A012, dated February 27, 2014; and ADAMS Accession No. ML14251A024, dated August 28, 2014). The Licensee stated that based on the information available, they will be able to meet the requirements of the Order by following the revised milestone and associated target completion dates by April 2015. The NRC Staff performed an interim review of the Licensee's plan and issued Interim Staff Evaluation and Audit Report (ADAMS Accession No. ML12228A448), dated January 29, 2014, concluding that the Licensee has provided sufficient information to determine that there is reasonable assurance that the plan, when properly implemented, will meet NRC requirements. The Licensee confirmed (ADAMS Accession No. ML15149A143, dated May 19, 2015) that it has completed the NRC requirements of the Order and is in full compliance with the Order for North Anna Power Station, Units 1 and 2. The NRC plans to conduct a post-compliance inspection at North Anna in early 2016. Therefore, Concern 7 is resolved and will be closed.

Concern 8: The long-term storage of spent fuel in the spent fuel pool at North Anna 1 and 2 and at the North Anna ISFSI poses challenges to the public health and safety.

NRC Decision

It is unclear from the petition, as supplemented, whether the Petitioners' assertion that long-term storage of spent fuel poses challenges to the public health

and safety is generic or site-specific. To the extent that the Petitioners are asserting that long-term storage poses public health and safety challenges generically, they do not demonstrate that the requested enforcement action is warranted against North Anna. The NRC has determined that safe long-term storage of spent fuel is technically feasible, and that it will take appropriate rulemaking or enforcement action as specific issues arise in the future. In its Memorandum and Order denying petitions to suspend final reactor licensing decisions pending a “waste confidence safety finding” (*DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC 221, 241-42 (2015) (ADAMS Accession No. ML15057A261)), the Commission explained:

[O]ur statutory obligation to ensure the adequate protection of public health and safety encompasses an ongoing responsibility to regulate the continued storage of spent fuel, with or without a repository. Our long history with these issues (including our ability to adapt our regulatory processes based upon changing circumstances) continues to support our conclusion that safe, permanent disposal of spent nuclear fuel is technically feasible and that spent fuel can be safely stored until a repository becomes available, or indefinitely should such storage become necessary.

The NRC has an extensive history of ensuring that spent fuel stored in both pools and dry casks provides adequate protection of the public health and safety and the environment. The NRC ensures spent fuel safety through regulatory oversight (licensing and inspection) of licensees, considering relevant operating experience (domestic and international), and conducting studies of spent fuel safety. If any issues are identified that may challenge the safety of spent fuel, the NRC takes immediate action to ensure that safety is not compromised. The NRC has numerous requirements in place requiring effective protection against accidents that could affect the safe storage of spent fuel, which are inspected by the NRC routinely. Operating experience has shown that spent fuel pools (SFPs) have safely withstood challenging events, maintaining structural integrity and a large inventory of coolant to protect the stored fuel. Similarly, dry cask storage systems are designed to be passive systems (i.e., relying on natural air circulation for cooling) that are inherently robust, massive, and highly resistant to damage.

The NRC has completed several studies of SFP safety, appearing in NUREG-1353, “Regulatory Analysis for the Resolution of Generic Issue 82, ‘Beyond Design Basis Accidents in Spent Fuel Pools’”; NUREG-1738, “Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants”; and NUREG-2161, “Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling-Water Reactor.” All concluded that SFPs continue to provide adequate protection of public health and safety.

Following the accident at the Fukushima Dai-ichi Nuclear Power Plant in

Japan on March 11, 2011, the NRC conducted an evaluation to determine whether regulatory action should be taken to require the expedited transfer of spent fuel from spent fuel pools to dry cask storage at nuclear power plants in the United States. The NRC Staff's analysis in COMSECY-13-0030, "Staff Evaluation and Recommendation for Japan Lessons Learned Tier 3 Issue on Expedited Transfer of Spent Fuel" (ADAMS Accession No. ML13273A601) concluded that SFPs are very robust structures with large safety margins, and that regulatory actions to reduce the amount of fuel in the spent fuel pool were not warranted. The Commission subsequently approved the Staff's recommendation in Staff Requirements Memorandum (SRM)-COMSECY-13-0030, issued on May 23, 2014 (ADAMS Accession No. ML14143A360), concluding that in light of the low risk of accident for SFP storage, further regulatory action to require the expedited transfer of spent fuel to dry cask storage need not be pursued.

Additionally, in response to the Fukushima Dai-ichi accident, the NRC is currently implementing regulatory actions to further enhance reactor and SFP safety. On March 12, 2012, the Staff issued Order EA-12-051, "Issuance of Order to Modify Licenses with Regard to Reliable Spent Fuel Pool Instrumentation" (ADAMS Accession No. ML12054A679), which requires that licensees install reliable means of remotely monitoring wide-range SFP levels to support effective prioritization of event mitigation and recovery actions in the event of a beyond-design-basis external event. Although the primary purpose of the order was to ensure that operators were not distracted by uncertainties related to SFP conditions during the accident response, the improved monitoring capabilities will help in the diagnosis and response to potential losses of SFP integrity. As explained in response to the Petitioners' Concern 7, North Anna has confirmed that it is in compliance with Order EA-12-051. In addition, on March 12, 2012, the Staff issued Order EA-12-049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" (ADAMS Accession No. ML12054A735), which requires licensees to develop, implement, and maintain guidance and strategies to maintain or restore SFP cooling capabilities, independent of AC power, following a beyond-design-basis external event. These requirements ensure that a more reliable and robust mitigation capability is in place to address degrading conditions in SFPs if an emergency situation were ever to occur.

In SECY-15-0081, "Staff Evaluation of Applicability of Lessons Learned from the Fukushima Dai-ichi Accident to Facilities Other Than Operating Power Reactors" (ADAMS Accession No. ML15050A066), the NRC Staff conducted an evaluation of the safety of spent fuel dry storage systems that could be impacted by natural phenomena and other external events, including seismic events. The NRC Staff's assessment found that the NRC's existing regulatory framework ensures safe and secure storage designs and found no safety concerns associated with the designs of spent fuel storage systems.

To the extent that the Petitioners assert that long-term storage of spent fuel at the North Anna SFP and ISFSI poses site-specific public health and safety challenges, the Petitioners do not demonstrate that the requested enforcement action is warranted. The North Anna SFP and ISFSI are licensed by the NRC and subject to NRC inspection. Those inspections have not identified conditions that would warrant the Petitioners' requested enforcement action (*see, e.g.*, August 12, 2014 Integrated Inspection Report 2014003 (ADAMS Accession No. ML14224A152); November 10, 2014 Integrated Inspection Report 2014004 (ADAMS Accession No. ML14316A338); May 7, 2013 Integrated Inspection Report 05000338/2013002, 05000339/2013002, and 07200056/2013001 (ADAMS Accession No. ML13127A186)).

Through implementation of all these regulatory controls, the NRC has identified no conditions at North Anna to indicate that safe long-term storage of spent fuel at North Anna is not technically feasible. Nor has the NRC identified any conditions at North Anna that would call into doubt the NRC's ability to address any future issues as they arise, or the NRC's ability to adapt its regulatory process to changing circumstances in the form of rulemakings or orders. Nor does the petition, as supplemented, identify any such information. Therefore, Concern 8 is resolved and will be closed.

Concern 9: "Hardened onsite storage" strategies for spent fuel should be used at North Anna 1 and 2.

NRC Decision

This issue has been addressed by the NRC Staff's evaluation of a petition for rulemaking (PRM), PRM 72-6, "Petition for Rulemaking Submitted by C-10 Research and Education Foundation, Inc." Specifically, Petitioner Request 11 of PRM 72-6 requests the NRC to: (1) require Hardened On-Site Storage (HOSS) at all nuclear power plants as well as away-from-reactor dry cask storage sites; and (2) that all nuclear interim onsite or offsite dry cask storage installations or ISFSIs be fortified against attack. The status of the NRC's consideration of Petitioner Request 11 of PRM 72-6 can be found in the *Federal Register* Notice dated October 16, 2012 (77 Fed. Reg. 63,254) and at <http://www.regulations.gov> by searching NRC Docket ID NRC-2009-0558.

NRC has conducted considerable analyses regarding the safety of dry storage casks in use in the United States. The agency has consistently found that the robust nature of dry storage systems approved by the NRC under 10 C.F.R. Part 72 assures the protection of public health, safety, and security and therefore has not mandated HOSS. Nevertheless, the NRC has considered potential rulemaking regarding enhancements to the security of spent fuel dry storage

facilities (SRM-SECY-10-0114 and SRM-SECY-07-0148, ADAMS Accession Nos. ML103210025 and ML073530119, respectively). On September 11, 2015, the NRC Staff recommended to the Commission in COMSECY-15-0024 that this review be postponed 5 years, noting that the existing security requirements for ISFSIs, together with additional requirements in post-9/11 security orders, provide continued high assurance of adequate protection of public health and safety (ADAMS Accession No. ML15229A231). On October 6, 2015, the Commission approved the NRC Staff's recommendation and rescheduled the Staff's review of the technical basis for such a rulemaking to 2020 (ADAMS Accession No. ML15280A105). Because Concern 9 raises issues that are relevant to this rulemaking regarding enhancements to the security of spent fuel dry storage facilities, the NRC will address this item in the context of this proposed rule.

The NRC has determined that SFPs and dry casks both provide adequate protection of the public health and safety and the environment. Therefore, there is no safety or security reason to mandate earlier transfer of fuel. In a Staff Requirements Memorandum dated May 23, 2014 (ADAMS Accession No. ML14143A360), the Commission directed the NRC Staff, based on the Staff's recommendation, to cease activity on possible regulatory actions that would require the expedited transfer of spent fuel to dry storage casks. As part of that Staff Requirements Memorandum, the Commission also directed the Staff to provide an assessment of limited term operational vulnerabilities associated with SFPs. The NRC Staff completed that assessment and provided the results to the Commission on November 26, 2014, in SECY-14-0136 (ADAMS Accession No. ML14297A232). The NRC Staff concluded that SFPs are safe and secure, that no additional regulatory action is necessary at this time. Therefore, this concern will be closed.

Concern 11: The current emergency evacuation plans for North Anna 1 and 2 need to be revised to reflect the possible need to evacuate a larger area than that identified in the current emergency planning zone.

NRC Decision

In SECY-12-0095, "Tier 3 Program Plans and 6-Month Update in Response to Lessons Learned from Japan's March 11, 2011, Great Tohoku Earthquake and Subsequent Tsunami," dated July 13, 2012 (ADAMS Accession No. ML12208-A210), the NRC Staff determined that the existing basis for the emergency planning zone (EPZ) size remains valid including for response to multiunit events. This matter is being further discussed in a November 17, 2015 Commission meeting related to Fukushima lessons learned. After this meeting, the Commission

will make a determination as to how the Staff should proceed relative to any rulemaking or other activities in this area.

The Commission has found that the basis for the current size of the EPZs is valid for existing reactors and proposed new reactors. Furthermore, the Commission has reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at an existing nuclear power plant. For new reactors under construction and licensed to operate, the Commission has determined that subject to the required conditions and limitations of the full-power license, adequate protective measures can and will be taken in the event of a radiological emergency.

The NRC recently denied a similar petition for rulemaking (PRM-50-104), on April 9, 2014 (79 Fed. Reg. 19,501), requesting that the NRC amend its regulations that govern domestic licensing of production and utilization facilities to expand existing EPZs around nuclear power plants and create a new EPZ. In SECY-13-0135, "Denial of Petition for Rulemaking Requesting Amendments Regarding Emergency Planning Zone Size (PRM-50-104)," the Commission stated, in part, that

Nuclear power plant licensees; Federal, State, and local governments; and offsite response organizations perform comprehensive planning for these zones and routinely test and evaluate these plans through full participation exercises. The NRC concludes that emergency actions could be successfully carried out beyond the 10-mile EPZ for several reasons. The 10-mile emergency planning basis establishes an infrastructure similar to that used by other offsite response organizations, such as police and fire departments. The infrastructure consists of emergency organizations, communications capabilities, training, and equipment that can be used in the event of an accident at the facility. Coordination is enhanced by the practice of having offsite response organizations, which include local, State, and Federal responders, participate in training exercises with the licensee.

Therefore, the NRC Staff concluded that the current size of the EPZs is valid for existing reactors and that this concern can be closed.

On April 17, 2015 (ADAMS Accession No. ML15071A339), the NRC issued the proposed DD for comment to the Petitioners and the Licensee. The Petitioners provided comments in a response dated May 18, 2015 (ADAMS Accession No. ML15138A277), and the Licensee provided comments in a response dated May 20, 2015 (ADAMS Accession No. ML15147A517).

III. CONCLUSION

The NRC evaluated the Petitioner's concerns, including comments received on the proposed DD. Based on the above, NRC has decided to close the Petitioners'

request for the remaining four concerns. As provided in 10 C.F.R. § 2.206(c), a copy of this DD will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, this 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

William M. Dean, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 30th day of October 2015.

Attachment: Resolution of Comments

ATTACHMENT

COMMENTS RECEIVED FROM THE PETITIONER ON THE PROPOSED DIRECTOR'S DECISION DATED APRIL 17, 2015

The U.S. Nuclear Regulatory Commission (NRC) sent a copy of the proposed Director's Decision (DD) to Mr. Paul Gunter (the Petitioner) and the Licensee, for comment, on April 17, 2015 (Agencywide Documents Access and Management System (ADAMS) Package Accession No. ML15071A339). By e-mail dated May 18, 2015 (ADAMS Accession No. ML15138A277), the Petitioner provided comments on the proposed partial DD. The Licensee provided comments on May 20, 2015 (ADAMS Accession No. ML15147A517). The NRC's response to the comments is provided below:

Comment 1 — Received from Virginia Electric and Power Company (Dominion)

Dominion recommended that the following paragraph be added after the first paragraph at the top of page 10, which ends with the statement, "no functional damage occurred to North Anna 1 and 2 and that the plant could be restarted safely." "The Licensee has completed all long-term actions identified in NRC Confirmatory Action Letter (CAL) No. NRR-2011-002 dated November 11, 2011 (ADAMS Accession No. ML11311A201). The Licensee periodically provided summaries of the completed actions to the NRC. The final closure summaries of the remaining CAL items were provided on May 13, 2013, via letter Serial No. 13-143 (ADAMS Accession No. ML13135A637)".

Response

The NRC has revised the DD on page 10 to include the Licensee's recommended changes.

Comment 2 — Received from Petitioners

In summary, the Petitioners' comments reiterate that their overall concerns that were not initially accepted by the NRC should still be addressed by more thorough inspections and a formal public hearing. In particular, there have been a number of event reports since the restart of North Anna 1 and 2 that Petitioners remain concerned may be related by origin to damage sustained during the earthquake. The Petitioners cite excerpts from a number of reports, including

Independent Spent Fuel Storage Installation Annual Radioactive Effluent Release Report (ADAMS Accession No. ML15105A080), Technical Evaluation of Restart Readiness Determination Plan (ADAMS Accession No. ML11308B406), Onsite Audit Report Regarding Implementation of Mitigating Strategies and Reliable Spent Fuel Instrumentation related to orders EA-12-049 and EA-12-051 dated September 24, 2014 (ADAMS Accession No. ML14259A458), Event Notification Report, Annual Inspection Report, and the NRC Safety Evaluation for the approved relief request for Unit 2 (ADAMS Accession No. ML15023A219), since the restart that Petitioners remain concerned may be related by origin to damage sustained during the earthquake.

Response

The NRC's DD has adequately addressed the issues stated in the Petitioners' comments. The actions already taken by the NRC and described in the DD ensured adequate protection of public health and safety following the earthquake event. As discussed in the DD, the actions described will ensure the continued protection of the public health and safety. The NRC has concluded that no other actions, beyond the actions described in the DD, are needed.

The NRC appreciates the Petitioners' comments and thanks the Petitioners for raising the concerns in the interest of protection of the health and safety of the American people. Upon reviewing the comments received from the Petitioners, the Petition Review Board (PRB) concluded that the Petitioners did not raise any new or different concerns that were not already thoroughly evaluated and resolved by the PRB.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

**Docket Nos. 50-275-LR
50-323-LR**

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)**

November 9, 2015

STANDARD OF REVIEW

The Commission's standard of review is highly deferential; the Commission will not overturn a licensing board's ruling on threshold issues like intervention absent error of law or abuse of discretion.

CONTENTIONS, ADMISSIBILITY

For a successful intervention petition or request for hearing, a petitioner must, in addition to demonstrating standing, propose at least one contention that: (1) provides a specific statement of the issue of law or fact to be raised or controverted; (2) provides a brief explanation of its basis; (3) demonstrates that the issue raised is within the scope of the proceeding; (4) demonstrates that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provides a concise statement of the alleged facts or expert opinions that support the 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 petitioner intends to rely to support its position on the issue; and (6) provides sufficient information to show

that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with 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 contention must identify each failure and the supporting reasons for the petitioner's belief.

CONTENTIONS, ADMISSIBILITY

The Commission's contention admissibility requirements are strict by design; only focused, well-supported issues will be admitted for hearing.

CONTENTIONS, ADMISSIBILITY

The Commission's rules of practice also place limits on the types of issues a petitioner may raise. As relevant here, 10 C.F.R. § 2.335(a) prohibits challenges to an agency rule or regulation in an adjudicatory proceeding without a waiver of that rule or regulation.

WAIVER OF RULE

Because the Commission's rules were promulgated with the expectation that they will apply generically, rather than on a case-by-case basis, the Commission sets a high bar for waivers: a waiver request must demonstrate that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which it was adopted.

WAIVER OF RULE

To determine whether the waiver standard has been met, the Commission applies a four-factor test. The petitioner must demonstrate that: (i) the rule's strict application would not serve the purposes for which it was adopted; (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived; (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and (iv) waiver of the regulation is necessary to reach a significant safety or environmental problem.

CONTENTIONS, ADMISSIBILITY

Contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited by 10 C.F.R. § 2.335(a), are outside the scope of the proceeding.

LICENSE RENEWAL PROCEEDINGS

The Commission's license renewal regulations rely on the regulatory processes applicable to all currently operating reactors to address most safety and security issues, limiting license renewal proceedings to consideration of only certain issues related specifically to plant aging.

MEMORANDUM AND ORDER

Friends of the Earth has appealed the Atomic Safety and Licensing Board's ruling in LBP-15-6, in which the Board denied Friends of the Earth's petition to intervene and its related request to waive certain regulations that govern the scope of this license renewal proceeding.¹ For the reasons set forth below, we affirm the Board's ruling.

I. BACKGROUND

In November 2009, Pacific Gas and Electric Company (PG&E) applied to renew the operating licenses for Diablo Canyon Units 1 and 2 for an additional 20 years.² The NRC Staff docketed the application and provided an opportunity for interested persons to request an adjudicatory hearing.³ At that time, one petitioner, the San Luis Obispo Mothers for Peace, filed a request for hearing and proposed five contentions challenging the application.⁴ The Board admitted three

¹ Friends of the Earth's Notice of Appeal of LBP-15-6 (Mar. 9, 2015); Brief of Friends of the Earth in Support of Appeal of LBP-15-6 (Mar. 9, 2015) (Appeal); LBP-15-6, 81 NRC 314, 327 (2015).

² Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License Nos. DPR-80 and DPR-82 for an Additional 20-Year Period; Pacific Gas & Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2; and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation, 75 Fed. Reg. 3493, 3493 (Jan. 21, 2010).

³ *Id.*

⁴ Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010).

of them.⁵ We reversed in part and affirmed in part the Board's ruling, leaving one admitted contention pending in the proceeding.⁶ In that contention, Mothers for Peace asserted that PG&E's Environmental Report, specifically PG&E's severe accident mitigation alternatives analysis, failed to consider the Shoreline Fault, a recently discovered fault near the Diablo Canyon facility.⁷

Since the discovery of the Shoreline Fault, PG&E has undertaken a series of studies to gain a better understanding of the seismic landscape near Diablo Canyon.⁸ Among these efforts, at the request of the State of California, PG&E launched a major seismic imaging project, which culminated in a final report that PG&E provided to the NRC in September 2014.⁹ PG&E also incorporated the information it obtained from the seismic imaging project into its March 2015 response to the Staff's request for updated seismic hazard information from all licensees as part of the agency's response to the March 2011 nuclear accident at the Fukushima Dai-ichi Nuclear Power Plant in Japan.¹⁰ Over the course of

⁵ LBP-10-15, 72 NRC 257, 345-46 (2010). The Board also found that Mothers for Peace had demonstrated a *prima facie* case for waiver to support the admission of a fourth contention; the Board conditionally admitted that contention and certified the waiver petition to us for review. *Id.* at 345. We denied the waiver request and thus found the contention inadmissible. CLI-11-11, 74 NRC 427, 452 (2011).

⁶ *Id.* at 444.

⁷ *Id.* at 438; *see infra* note 10.

⁸ *See, e.g.*, Report on the Analysis of the Shoreline Fault Zone, Central Coastal California: Report to the U.S. Nuclear Regulatory Commission (Jan. 2011), at ES-1 (ADAMS Accession No. ML110140425).

⁹ *See* Central Coastal California Seismic Imaging Project (Sept. 10, 2014) (ADAMS Accession No. ML14260A106 (package)).

¹⁰ *See* Allen, Barry S., PG&E, Letter to U.S. NRC Document Control Desk (Mar. 11, 2015), at 1-2, Enclosure 1 (ADAMS Accession No. ML15071A046 (package)); *see also* Tr. at 770-71. *See generally* Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Mar. 12, 2012) (ADAMS Accession No. ML12053A340) (50.54(f) Letter); Final Determination of Licensee Seismic Probabilistic Risk Assessments Under the Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendation 2.1 "Seismic" of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Oct. 27, 2015) (ADAMS Accession No. ML15194A015). PG&E's updated seismic hazard analysis also will be considered in certain limited respects to inform the Staff's environmental review of PG&E's license renewal application, specifically with regard to the severe accident mitigation alternatives analysis and Mothers for Peace's admitted contention. *See* Lindell, Joseph A., counsel for NRC Staff, Letter to Licensing Board (July 16, 2015), at 1 (ADAMS Accession No. ML15197A195); Tr. at 784. Relatedly, PG&E sought summary disposition of Mothers for Peace's admitted contention, arguing that because PG&E has now considered the Shoreline Fault in its severe accident mitigation alternatives analysis, the contention should be dismissed. *See* Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1 (July 31, 2015) at 1-2. The Board recently granted summary disposition and has terminated the proceeding. LBP-15-29, 82 NRC 246 (2015).

this ongoing process, the Staff will review PG&E's updated seismic hazard information to determine what impacts, if any, it will have on current operations at Diablo Canyon, including whether any changes to Diablo Canyon's current licensing basis are necessary.¹¹

One month after PG&E submitted the seismic imaging project report to the NRC, Friends of the Earth filed a petition to intervene with three proposed contentions.¹² In general, Friends of the Earth asserted that the operating licenses for Diablo Canyon Units 1 and 2 may not be renewed until the agency explores, in an evidentiary hearing, the impact of the new seismic information on the safe operation of the plant.¹³ Although Friends of the Earth argued that its contentions were within the scope of the Diablo Canyon license renewal proceeding, as a precaution it also requested a waiver of three regulations in 10 C.F.R. Part 54 that pertain to the scope of the agency's license renewal review:¹⁴ 10 C.F.R. § 54.4, which defines the scope of license renewal; 10 C.F.R. § 54.21, which sets forth the contents of a license renewal application; and 10 C.F.R. § 54.29, which sets forth the findings that the agency must make for the issuance of a renewed license.¹⁵

¹¹ See Tr. at 764-65, 791-93; see also 50.54(f) Letter at 1 ("The review will enable the staff to determine whether the nuclear plant licenses . . . should be modified, suspended, or revoked.")

¹² Friends of the Earth's Request for a Hearing and Petition to Intervene (Oct. 10, 2014) at 1 (Petition); Affidavit and Curriculum Vitae of Dr. Gerhard Jentzsch (Oct. 8, 2014); Gundersen Affidavit Supporting Friends of the Earth's Petition to Intervene (Oct. 10, 2014). Friends of the Earth filed a separate hearing request, a portion of which we referred to the Atomic Safety and Licensing Board to determine whether, as Friends of the Earth asserts, there is an ongoing de facto license amendment proceeding involving PG&E's updated seismic hazard evaluation, for which the NRC is required to provide an opportunity to request a hearing under the Atomic Energy Act of 1954, as amended (AEA). See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC 729, 730, 734-35 (2015); Petition to Intervene and Request for Hearing by Friends of the Earth (Aug. 26, 2014) (Hearing Request) (ADAMS Accession No. ML14254A223 (package)); see also *infra* note 69 (discussing the referral of a portion of this hearing request to the Staff for resolution under section 2.206). The Board recently denied Friends of the Earth's request for hearing on the ground that "the NRC has neither granted PG&E greater authority than that provided by its license nor otherwise altered the terms of those licenses," and therefore, Friends of the Earth had not demonstrated the existence of a licensing action subject to hearing rights under section 189a of the Atomic Energy Act. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-27, 82 NRC 184, 186 (2015). Friends of the Earth has appealed the Board's decision. Friends of the Earth's Notice of Appeal of LBP-15-27 (Oct. 23, 2015); Brief of Friends of the Earth in Support of Appeal of LBP-15-27 (Oct. 23, 2015) (ADAMS Accession No. ML15296A550).

¹³ See Petition at 1-2, 6, 10.

¹⁴ See *id.* at 20-21, 30; Friends of the Earth's Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding (Oct. 10, 2014) (Waiver Request); Declaration of Richard Ayres, Counsel for Friends of the Earth, Regarding Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding (Oct. 10, 2014).

¹⁵ 10 C.F.R. §§ 54.4, 54.21, 54.29.

In response to questioning from the Board at oral argument, Friends of the Earth requested waiver of 10 C.F.R. § 54.30 to the extent it also precluded the litigation of Friends of the Earth's proposed contentions.¹⁶ That section states that matters relating to reasonable assurance of safety during the current license term are to be addressed under the current license and are outside the scope of a license renewal review.¹⁷ Mothers for Peace filed an answer in support of Friends of the Earth's petition to intervene and waiver request.¹⁸

PG&E and the Staff opposed Friends of the Earth's intervention on several grounds. Both PG&E and the Staff asserted that Friends of the Earth's proposed contentions were not timely filed because, in PG&E's view, Friends of the Earth could have filed them in 2011, when PG&E submitted an earlier report on the Shoreline Fault to the agency, or, in the Staff's view, no later than 2012, when the Staff completed a confirmatory analysis of that report.¹⁹ In addition, PG&E and the Staff argued that the proposed contentions were outside the scope of the proceeding because they raised current operating issues rather than the safety issues designated for review in a license renewal proceeding — specifically, those relating to the aging management of certain structures, systems, and components during the period of extended operation.²⁰ PG&E and the Staff also asserted that Friends of the Earth's waiver request should not be granted because Friends of the Earth had not demonstrated special circumstances that would prevent the challenged license renewal regulations from serving their intended purpose.²¹

The Board “decline[d] to reject [Friends of the Earth's] petition as untimely,” but ultimately found that Friends of the Earth's contentions did not meet our admissibility requirements and that its waiver request did not demonstrate a *prima*

¹⁶ Appeal at 1-2 n.3; Tr. at 740-41. Because we find that Friends of the Earth has not met the standard for a waiver of our rules, we need not address the timeliness of this additional request.

¹⁷ 10 C.F.R. § 54.30.

¹⁸ San Luis Obispo Mothers for Peace's Response to Friends of the Earth's Request for a Hearing and Petition to Intervene and Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding (Nov. 4, 2014), at 1.

¹⁹ See Pacific Gas and Electric Company's Answer Opposing the Friends of the Earth Hearing Request and Petition for Waiver (Nov. 4, 2014) at 23-25 (PG&E Answer); NRC Staff's Answer to Friends of the Earth's Request for a Hearing and Petition to Intervene and Waiver Petition (Nov. 4, 2014) at 20 (Staff Answer). See generally Report on the Analysis of the Shoreline Fault Zone, Central Coastal California (Jan. 7, 2011) (ADAMS Accession No. ML110140431 (package)); Research Information Letter 12-01, Confirmatory Analysis of Seismic Hazard at Diablo Canyon Power Plant from the Shoreline Fault Zone (Sept. 2012) (ADAMS Accession No. ML121230035). Friends of the Earth filed a reply to PG&E's and the Staff's answers. Friends of the Earth's Reply to NRC Staff's and Pacific Gas & Electric Company's Answers to Petition to Intervene and Request for Hearing (Nov. 12, 2014).

²⁰ See PG&E Answer at 13-15; Staff Answer at 25-26, 30, 37.

²¹ See PG&E Answer at 25-28; Staff Answer at 41-50.

facie case for waiver.²² The Board therefore denied both the petition to intervene and the waiver request, and Friends of the Earth filed the instant appeal.²³ Friends of the Earth's appeal qualifies as an appeal as of right under 10 C.F.R. § 2.311(c).²⁴ Our standard of review is highly deferential; we will not overturn a licensing board's ruling on threshold issues like intervention absent error of law or abuse of discretion.²⁵

II. DISCUSSION

For a successful intervention petition or request for hearing, a petitioner must, in addition to demonstrating standing, propose at least one contention that:

- (1) provides a specific statement of the issue of law or fact to be raised or controverted;
- (2) provides a brief explanation of its basis;
- (3) demonstrates that the issue raised is within the scope of the proceeding;
- (4) demonstrates that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (5) provides a concise statement of the alleged facts or expert opinions that support the 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 petitioner intends to rely to support its position on the issue; and
- (6) provides sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with 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

²²LBP-15-6, 81 NRC at 320, 325.

²³*Id.* at 327. PG&E and the Staff oppose Friends of the Earth's Appeal. *See* Pacific Gas and Electric Company's Opposition to Friends of the Earth Appeal from LBP-15-6 (Apr. 3, 2015) at 1; NRC Staff's Answer to Friends of the Earth's Appeal of Memorandum and Order LBP-15-6 (Denying Petition to Intervene and Petition for Waiver) (Apr. 2, 2015) at 2.

²⁴*See* 10 C.F.R. § 2.311(c) (providing an appeal as of right on the question whether a request for hearing or petition to intervene should have been granted).

²⁵*See, e.g.*, CLI-11-11, 74 NRC at 431.

by law, the contention must identify each failure and the supporting reasons for the petitioner's belief.²⁶

Our contention admissibility requirements are strict by design; only focused, well-supported issues will be admitted for hearing.²⁷

Our rules of practice also place limits on the types of issues a petitioner may raise. As relevant here, 10 C.F.R. § 2.335(a) prohibits challenges to an agency rule or regulation in an adjudicatory proceeding without a waiver of that rule or regulation. And because our rules were promulgated with the expectation that they will apply generically, rather than on a case-by-case basis, we set a high bar for waivers: a waiver request must demonstrate that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which . . . [it] was adopted."²⁸ To determine whether this standard has been met, we apply a four-factor test.²⁹ The petitioner must demonstrate that:

- (i) the rule's strict application would not serve the purposes for which it was adopted;
- (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;
- (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and
- (iv) waiver of the regulation is necessary to reach a significant safety or environmental problem.³⁰

Contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited by 10 C.F.R. § 2.335(a), are outside the scope of the proceeding.³¹

²⁶ 10 C.F.R. § 2.309(a), (f)(1)(i)-(vi). The Board found that Friends of the Earth had demonstrated standing through the authorized representation of members who live within 50 miles of the Diablo Canyon Nuclear Power Plant site. See LBP-15-6, 81 NRC at 317-18 & n.22. The Board's ruling on Friends of the Earth's standing is not before us on appeal.

²⁷ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

²⁸ 10 C.F.R. § 2.335(b); see also *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 206-07 (2013).

²⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

³⁰ *Id.*; *Limerick*, CLI-13-7, 78 NRC at 207-09.

³¹ See 10 C.F.R. § 2.309(f)(1)(iii). We also discussed the relationship between sections 2.335(a) and 2.309(f)(iii) earlier in this proceeding. See CLI-11-11, 74 NRC at 452.

On appeal, Friends of the Earth asks us to reverse the Board’s ruling in LBP-15-6, grant its waiver request, and admit Contentions 1 and 3 for hearing.³² In the alternative, Friends of the Earth asks us to grant the waiver request and remand the proceeding to the Board “to consider anew the admissibility of Contentions 1 and 3.”³³ We find that the Board appropriately denied Friends of the Earth’s petition to intervene and waiver request. Therefore, we decline to remand the contention admissibility issue for the Board to address a second time.

A. Friends of the Earth’s Contentions 1 and 3

In Contention 1, Friends of the Earth argued that the information in the seismic imaging report demonstrates that the potential energy from seismic activity near Diablo Canyon “is far greater than previously known.”³⁴ Friends of the Earth asserted that PG&E’s imaging study revealed that the Shoreline Fault is longer than previously known, that it may rupture with the Hosgri Fault (a nearby fault that was used in the calculation of the seismic design and licensing basis for Diablo Canyon during the initial operating license proceeding), and that the Hosgri and San Simeon faults are assumed to be connected.³⁵ Friends of the Earth asserts that this new information demonstrates “that previous seismic studies by PG&E significantly underestimated the potential seismic energy that could be released near Diablo Canyon.”³⁶

Based on its interpretation of the new information, Friends of the Earth questioned PG&E’s conclusion that the updated ground motion calculations are bounded by Diablo Canyon’s existing seismic design and licensing bases.³⁷ Friends of the Earth also questioned PG&E’s calculation methodology, arguing that the equations used in the seismic imaging report were not peer-reviewed and have not been approved by the NRC.³⁸ Ultimately, Friends of the Earth argued that the Board should not renew the operating licenses for Diablo Canyon until PG&E can demonstrate that “the plant can be safely shut down following an earthquake on one or more of [the nearby] faults.”³⁹

³² Appeal at 2. Friends of the Earth does not challenge the Board’s ruling on Contention 2, which pertained to aging management of certain switches and snubbers. *Id.* at 2 n.6; Petition at 21.

³³ Appeal at 2.

³⁴ Petition at 10.

³⁵ *Id.* at 11-12.

³⁶ *Id.* at 12.

³⁷ *See id.* at 15.

³⁸ *See id.* at 13-15.

³⁹ *Id.* at 10; *see also id.* at 8 (Contention 1: “PG&E’s operating license for Diablo Canyon should not be renewed unless and until PG&E establishes that the plant can withstand and be safely shut down following an earthquake on the Hosgri-San Simeon, Shoreline, Los Osos, or San Luis Bay Faults.”).

The Board rejected Friends of the Earth’s Contention 1 because it did not meet three of the requirements for an admissible contention.⁴⁰ The Board noted that Friends of the Earth did not dispute that safe shutdown of the plant “is a current operating issue” that is not dependent upon “whether PG&E’s licenses . . . should be renewed.”⁴¹ The Board found this concern to be outside the narrow scope of the license renewal proceeding, which, for safety-related issues, “is limited to ‘plant structures and components that will require an aging management review for the period of extended operation [under the renewed license] and the plant’s systems, structures, and components that are subject to an evaluation of time-limited aging analyses.’”⁴² Similarly, the Board found that Friends of the Earth did not raise an issue material to the findings the NRC must make to support the licensing action, which, as noted above, is narrowly focused.⁴³ Finally, the Board found that Friends of the Earth had not raised a genuine dispute with PG&E because its concerns “do not actually challenge any specific part” of PG&E’s license renewal application.⁴⁴

We agree with the Board’s finding that Contention 1 is outside the scope of this license renewal proceeding. Contention 1 asserts that, to obtain a renewed license, PG&E must adequately demonstrate that Diablo Canyon “can withstand and be safely shut down following an earthquake on the Hosgri-San Simeon, Shoreline, Los Osos, or San Luis Bay faults.”⁴⁵ As the Board properly recognized, this contention raises “a current operating issue” that “is not unique to whether PG&E’s licenses — which do not expire until nearly a decade from now — should be renewed.”⁴⁶ A central principle of our license renewal regulations is that such issues must be addressed as they arise.⁴⁷ Accordingly, our regulations rely on the

⁴⁰ LBP-15-6, 81 NRC at 321-22. All six requirements must be met for a contention to be admitted. 10 C.F.R. § 2.309(f)(1).

⁴¹ LBP-15-6, 81 NRC at 320-21.

⁴² *Id.* at 321 (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212 (2001)).

⁴³ *Id.* at 321-22.

⁴⁴ *Id.* at 322.

⁴⁵ Petition at 8.

⁴⁶ LBP-15-6, 81 NRC at 320-21.

⁴⁷ Final Rule: “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461, 22,463-64 (May 8, 1995) (License Renewal Rule) (reaffirming the regulatory philosophy that, “[g]iven the Commission’s ongoing obligation to oversee the safety and security of operating reactors, issues that are relevant to current plant operation will be addressed by the existing regulatory process within the present license term rather than deferred until the time of license renewal”); *see also Millstone*, CLI-05-24, 62 NRC at 560-61 (“[I]t makes no sense to spend the parties’ and our own valuable resources litigating allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging.” (emphasis in original)). This concept is the first principle of license renewal, which

(Continued)

regulatory processes applicable to all currently operating reactors to address most safety and security issues, limiting license renewal proceedings to consideration of only certain issues related specifically to plant aging.⁴⁸ Contention 1 does not address the particular aging-related matters within the scope of license renewal proceedings under our 10 C.F.R. Part 54 regulations. Thus, the contention is outside the scope of this license renewal proceeding.

A contention outside the scope of a proceeding is not admissible for hearing in that proceeding.⁴⁹ To remedy that deficiency, Friends of the Earth must persuade us to grant its waiver petition, in which it asks us to set aside, for purposes of this specific proceeding, the foundational regulations in 10 C.F.R. Part 54 that define the scope of our license renewal proceedings. As discussed in Part II.B, *infra*, Friends of the Earth has not demonstrated that a waiver of our basic rules governing license renewal proceedings is warranted here. Therefore, we uphold the Board's ruling that Contention 1 is inadmissible because it is outside the scope of the proceeding.⁵⁰

In Contention 3, Friends of the Earth asserted that PG&E's integrated plant assessment, under which PG&E must identify the structures, systems, and components subject to an aging management review, is faulty because it "rests on seismic data that has been shown to be obsolete and inaccurate."⁵¹ Friends of the Earth argued that PG&E must demonstrate that the structures, systems, and components identified in the integrated plant assessment can continue to perform their intended functions during the period of extended operation in light of the "newly understood seismic circumstances of the plant."⁵²

The Board likewise found this contention inadmissible, observing that Friends of the Earth "d[id] not explain how its claims . . . would affect the Staff's ability to make the findings required for license renewal."⁵³ The Board noted that Friends of

is that the "regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide[] and maintain[] an acceptable level of safety so that operation will not be inimical to public health and safety or common defense and security." License Renewal Rule, 60 Fed. Reg. at 22,464.

⁴⁸ See 10 C.F.R. §§ 54.4 (defining the scope of our license renewal regulations), 54.21 (specifying license renewal application requirements), 54.29(a) (indicating the safety findings we must make before issuing renewed licenses).

⁴⁹ 10 C.F.R. § 2.309(f)(1)(iii); see also 10 C.F.R. § 2.335(a).

⁵⁰ Because Contention 1 is outside the scope of this license renewal proceeding and inadmissible on that basis alone, we need not reach the Board's findings regarding other contention admissibility requirements.

⁵¹ Petition at 30-31 (Contention 3: "PG&E has failed to establish in its aging management plan that the effects of aging on Diablo Canyon will be adequately managed for the period of extended operation, in violation of 10 C.F.R. § 54.21(a)(3).").

⁵² *Id.* at 31.

⁵³ LBP-15-6, 81 NRC at 324.

the Earth did not cite any specific portion of the license renewal application that it found deficient, nor did Friends of the Earth explain how its generalized concerns about aging components relate to the updated seismic information in the seismic imaging report.⁵⁴ The Board thus dismissed the contention for failure to raise an issue that is material to the findings the NRC must make to support the proposed licensing action.⁵⁵ The Board also found that because Friends of the Earth did not provide any specific references to the license renewal application, Friends of the Earth had failed to demonstrate the existence of a genuine dispute with PG&E on a material issue of fact or law.⁵⁶ We agree that Friends of the Earth’s intervention petition does not identify any specific portion of the application that it seeks to challenge and therefore lacks the specificity that our contention admissibility rules require. The Board properly found Contention 3 inadmissible.⁵⁷

B. Friends of the Earth’s Waiver Request

On appeal, Friends of the Earth reasserts that it is entitled to a waiver to litigate Contentions 1 and 3.⁵⁸ The Board denied Friends of the Earth’s waiver request for failure to meet two of the four waiver factors.⁵⁹ First, the Board found that Friends of the Earth had not shown that application of the regulations in this proceeding would not serve the purposes for which they were adopted. The Board found that our license renewal regulations would serve exactly their intended purpose by focusing the proceeding on future-oriented aging issues.⁶⁰ Second, the Board found that Friends of the Earth had not shown that a waiver is necessary to reach a significant safety issue.⁶¹ Although the Board observed that “potential

⁵⁴ *Id.* at 324-25; *see also* 10 C.F.R. § 2.309(f)(1)(vi).

⁵⁵ *Id.* (citing 10 C.F.R. § 2.309(f)(1)(iv)).

⁵⁶ *Id.* at 325 (citing 10 C.F.R. § 2.309(f)(1)(vi)).

⁵⁷ The Board also found that Friends of the Earth would have needed to obtain a rule waiver in order to obtain a hearing on Contention 3. *Id.* Because we find that Contention 3 is inadmissible due to lack of specificity, we need not reach the question of whether Contention 3 is an out-of-scope contention requiring a rule waiver.

⁵⁸ Appeal at 7-8.

⁵⁹ LBP-15-6, 81 NRC at 326-27.

⁶⁰ *Id.* at 326 (citing *Millstone*, CLI-05-24, 62 NRC at 561). In its waiver request, Friends of the Earth pointed broadly to the safety-related purpose of our license renewal regulations. *See* Waiver Request at 6-7. Although it is true that our license renewal regulations are designed with safety as their goal, they were drawn specifically to ensure that current safety issues are prioritized (and are addressed as part of the NRC’s ongoing oversight activities) over those that are unique to the period of extended operation — that is, to ensure that safety issues are addressed at their appropriate time. *See* License Renewal Rule, 60 Fed. Reg. at 22,463-64; *Millstone*, CLI-05-24, 62 NRC at 560-61 (rejecting a similarly broad interpretation of the purpose of the license renewal regulations).

⁶¹ LBP-15-6, 81 NRC at 327.

seismic risks to the Diablo Canyon facility are important issues — most certainly ‘significant’ ones,” the Board concluded that Friends of the Earth could raise its concerns through other, more appropriate avenues.⁶²

Having agreed with the Board’s finding that Contention 1 is outside the scope of this license renewal proceeding and, therefore, may not be litigated absent a rule waiver,⁶³ we turn to the Board’s denial of Friends of the Earth’s waiver petition.⁶⁴ We agree with the Board that Friends of the Earth has not met the standards for a waiver of our rules, but we reach this conclusion on different grounds. We find that Friends of the Earth has not shown that special circumstances exist that were not considered, either explicitly or by necessary implication, when we adopted our license renewal regulations — the second factor in our waiver test.⁶⁵ At bottom, Friends of the Earth argues that a safety issue relating to the current operation of Diablo Canyon requires attention as part of this license renewal proceeding. But we contemplated precisely this type of circumstance when we devised the licensing structure of Part 54. We were aware, when adopting the rule, that issues “relevant to current plant operation” could arise while a license renewal application was under review, and, based on our confidence in the NRC’s regulatory process, we reaffirmed our view that those issues are best addressed as part of our regular oversight activities, outside of license renewal.⁶⁶ We see no reason to revisit that rationale in this case.

As the Board correctly observed, our rules provide other mechanisms for Friends of the Earth to raise its concerns that would not require us to redefine the scope of this proceeding.⁶⁷ In particular, Friends of the Earth “may file a request

⁶² *Id.*

⁶³ *See supra* Section II.A.

⁶⁴ As already discussed, we do not reach the question here of whether a waiver would be necessary to permit litigation of Contention 3. *See supra* note 57. Accordingly, although both Friends of the Earth’s waiver petition and the Board’s decision contemplate that a waiver would be necessary for both Contention 1 and Contention 3, our waiver analysis here assumes, without deciding, that Contention 1 is the only contention requiring a waiver.

⁶⁵ *See Millstone*, CLI-05-24, 62 NRC at 560.

⁶⁶ License Renewal Rule, 60 Fed. Reg. at 22,463-64. Friends of the Earth does argue, when addressing this second waiver-test factor, that “[t]he license renewal rule was based on the implicit assumption that a plant’s seismic design basis would be static, so that there was no need to revisit the seismic assumptions to determine whether alterations to the plant’s current licensing basis were necessary when considering a license renewal.” Appeal at 10; *see also id.* at 14-15. Yet, when issuing our license renewal regulations, we explained plant licensing bases as follows: “The [current licensing basis] represents the *evolving* set of requirements and commitments for a specific plant *that are modified as necessary over the life of a plant* to ensure continuation of an adequate level of safety.” License Renewal Rule, 60 Fed. Reg. at 22,473 (emphasis added). Modifications to a plant’s licensing basis made outside of license renewal could include, for instance, changes addressing newly discovered seismic risks.

⁶⁷ *See LBP-15-6*, 81 NRC at 327.

to institute a proceeding . . . to modify, suspend, or revoke a license, or for any other action that may be proper,” if it believes that PG&E’s seismic design and licensing basis is now invalid and that safe operation of the plant can no longer be assured.⁶⁸ Friends of the Earth also may file a petition for rulemaking to expand the scope of our license renewal regulations.⁶⁹ We decline to set aside our license renewal regulations to conduct what would be an entirely different proceeding when there are more appropriate avenues available for Friends of the Earth to seek relief.

That said, we consider seriously concerns regarding the safe operation of the current nuclear fleet. Today we conclude only that Friends of the Earth has not demonstrated that its seismic concerns are appropriately addressed as part of this license renewal adjudication, which, under our regulations, is limited in scope. Outside of this proceeding, the agency is conducting a comprehensive review of licensee seismic hazard reevaluations, including the information that PG&E provided in March of this year, which may lead to changes in the current licensing basis for Diablo Canyon, as well as for other operating plants.⁷⁰ Therefore, although we decline to permit Friends of the Earth to litigate its concerns in this proceeding, the seismic information that has given rise to these concerns is under close and active consideration by the agency.

⁶⁸ 10 C.F.R. § 2.206(a).

⁶⁹ See 10 C.F.R. § 2.802. We are not persuaded by Friends of the Earth’s arguments that neither the section 2.206 process nor the opportunity to file a petition for rulemaking would address its claims. See Appeal at 17-19. First, contrary to Friends of the Earth’s view, *see id.* at 18-19, the 2.206 process is designed for bringing just such a challenge regarding a licensee’s current operation under its existing license. By its plain terms, section 2.206 provides an opportunity for the modification, suspension, or revocation of a license, any of which actions might be appropriate as a remedy for Friends of the Earth’s concern that seismic considerations render operation of Diablo Canyon unsafe, if Friends of the Earth determines that its concerns differ from those already pending before the Staff. See *Diablo Canyon*, CLI-15-14, 81 NRC at 736 n.32 (referring a portion of a similar hearing request filed by Friends of the Earth to the Staff as a request for enforcement action under section 2.206, with instructions to the Staff to consider Friends of the Earth’s concerns regarding the safe operation of Diablo Canyon). Second, although Friends of the Earth asserts that it does not wish to challenge our regulations in Part 54 as a general matter, *see* Appeal at 17, a petition for rulemaking to expand license renewal safety reviews, if successful, could be applied to this proceeding. See 10 C.F.R. § 2.802. Third, Friends of the Earth’s insistence that its seismic concerns must be addressed “only in the course of a license renewal proceeding” because of their relation to safety *during the period of extended operation*,” Appeal at 19, does not account for the fact that the current licensing basis (including any adjustments that may have been made to it to deal with emergent safety issues) carries forward from the initial license term into the period of extended operation. Friends of the Earth’s concerns therefore appropriately could be addressed as part of the agency’s continuing oversight of Diablo Canyon irrespective of when, during the plant’s operating life, they may arise.

⁷⁰ Any amendment to an existing license as a result of this process would be subject to a hearing opportunity under the AEA. See AEA § 189a, 42 U.S.C. § 2239(a).

III. CONCLUSION

Friends of the Earth has not raised an admissible contention that is suitable for litigation in this license renewal proceeding, nor has it established that a waiver of our rules is warranted to address its concerns. We therefore *affirm* the Board's denial, in LBP-15-6, of Friends of the Earth's waiver petition and its petition to intervene.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of November 2015.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-255-LA

**ENTERGY NUCLEAR
OPERATIONS, INC.
(Palisades Nuclear Plant)**

November 9, 2015

REASONABLE ASSURANCE

When the Commission has determined that compliance with a regulation is sufficient to provide reasonable assurance of public health and safety, a licensing board cannot impose requirements that exceed those in the regulation.

REGULATIONS: INTERPRETATION (10 C.F.R. §§ 50.61 AND 50.61a)

These regulations in 10 C.F.R. §§ 50.61 and 50.61a provide alternate methods by which a licensee can demonstrate reasonable assurance of protection against pressurized thermal shock events.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.61a)

Licensees using 10 C.F.R. § 50.61a of the Commission's regulations are required to use any data that demonstrate the embrittlement trends for materials in the reactor pressure vessel.

WAIVER OF RULE

Absent a waiver granted under 10 C.F.R. § 2.335, challenges to the NRC's regulations are not permitted in adjudicatory proceedings.

MEMORANDUM AND ORDER

This proceeding stems from Entergy Nuclear Operations, Inc.'s application to amend the operating license for the Palisades Nuclear Plant to allow for the use of an alternate method provided in our regulations for evaluating the fracture toughness of certain reactor pressure vessels. In LBP-15-17, the Atomic Safety and Licensing Board denied a petition to intervene and request for hearing challenging that application from Beyond Nuclear, Don't Waste Michigan, Michigan Safe Energy Future — Shoreline Chapter, and the Nuclear Energy Information Service (collectively, Petitioners).¹ As discussed below, we affirm the Board's decision.

I. PROCEDURAL AND TECHNICAL BACKGROUND

As a general matter, Petitioners challenge the regulatory scheme that the NRC adopted to protect certain reactors from pressurized thermal shock events. Due to the highly technical nature of Entergy's license amendment request, we provide first a short summary of that regulatory scheme and the pressurized thermal shock phenomenon itself. A more detailed discussion of the technical issues and the relevant regulatory history is available in the Board's decision and in the *Federal Register* notices for our pressurized thermal shock regulations — 10 C.F.R. §§ 50.61 and 50.61a.²

The reactor pressure vessel in an operating pressurized water reactor is continuously exposed to neutron radiation from the fission reaction occurring inside the vessel, which over the life of the reactor causes embrittlement of the pressure vessel walls and decreases the vessel's fracture toughness.³ Fracture toughness, which depends on the vessel's chemical composition and its cumulative exposure to neutron radiation, is a measurement of a reactor pressure vessel's ability to withstand a pressurized thermal shock event — where “rapid cooling of the

¹ LBP-15-17, 81 NRC 753 (2015).

² See *id.* at 761-68; Final Rule: “Analysis of Potential Pressurized Thermal Shock Events,” 50 Fed. Reg. 29,937 (July 23, 1985) (1985 PTS Rule); Final Rule: “Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events,” 75 Fed. Reg. 13 (Jan. 4, 2010) (2010 PTS Rule).

³ 1985 PTS Rule, 50 Fed. Reg. at 29,938.

reactor vessel internal surface causes . . . thermal stress on the reactor vessel,” potentially leading to a breach of the reactor vessel wall.⁴

Recognizing the need to monitor fracture toughness, the NRC adopted regulatory requirements for pressurized water reactor licensees to implement programs to monitor the embrittlement of reactor pressure vessels.⁵ These “surveillance programs” provided material property data necessary to implement a regulatory scheme to protect reactor pressure vessels from failure due to pressurized thermal shock. In doing so, the NRC established values — called screening criteria — for fracture toughness. For materials with values above these screening criteria, licensees prepare fracture-toughness calculations to determine whether additional “detailed plant-specific evaluations and possibly modifications to existing equipment, systems, and procedures” are necessary.⁶ For materials with values below these screening criteria, no further analysis is required.

The screening criteria set temperature limits that measure the temperature range at which the reactor pressure vessel’s transition from a crack-resistant to brittle state occurs.⁷ Our regulations use a temperature value — known as the “reference temperature,” which is defined as “[t]he point at which steel transitions from the high-temperature, fracture-resistant state, to the low-temperature, brittle state.”⁸ The reference temperature provides a quantitative assessment of the toughness of the reactor pressure vessel — a higher reference temperature reflects “a higher degree of brittleness.”⁹ As the reactor experiences greater cumulative exposure to neutron radiation over its operating life, the reactor pressure vessel will become brittle at higher temperatures, thus increasing the likelihood that the vessel could fracture during a pressurized thermal shock event.¹⁰

Since the promulgation of these screening criteria in 1985, the state of science and engineering knowledge in this area has increased dramatically; as a result, the NRC has determined that “the risk of through-wall cracking due to a [pressurized

⁴ *Id.*

⁵ See Final Rule: “Fracture Toughness and Surveillance Program Requirements,” 38 Fed. Reg. 19,012 (July 17, 1973) (establishing the program to monitor reactor pressure vessels in 10 C.F.R. Part 50, App. H, “Reactor Vessel Material Surveillance Program Requirements”).

⁶ 1985 PTS Rule, 50 Fed. Reg. at 29,938.

⁷ See *id.*

⁸ LBP-15-17, 81 NRC at 762 (citing John B. Giessner, Division of Reactor Projects, Summary of the March 19, 2013, Public Meeting Webinar Regarding Palisades Nuclear Plant (Apr. 18, 2013), Encl. 2 at 4 (ADAMS Accession No. ML13108A336)) (internal citations omitted); *id.* at 762-63 (citing Division of Fuel, Engineering and Radiological Research, Office of Nuclear Regulatory Research, Technical Basis for Revision of the Pressurized Thermal Shock (PTS) Screening Limit in the PTS Rule (10 CFR 50.61) Summary Report, NUREG-1806 (Aug. 2007), at xxxiv (ADAMS Accession No. ML072830074 (package)) (quotation marks omitted) (Technical Basis)).

⁹ *Id.* at 762.

¹⁰ *Id.* at 763.

thermal shock] event is much lower than previously estimated.”¹¹ Due in part to this improved understanding of the risk associated with such an event, the NRC issued a new rule, 10 C.F.R. § 50.61a.¹² The new rule employs an updated embrittlement model “to predict future reference temperatures across the [reactor pressure vessel], which is then verified by existing surveillance data.”¹³ In adopting the new rule, the NRC determined that, compared to the requirements of 10 C.F.R. § 50.61, the updated “estimation procedures provide a better . . . method for estimating the fracture toughness of reactor vessel materials over the lifetime of the plant.”¹⁴ Moreover, the NRC concluded that the final rule “provides reasonable assurance that licensees operating below the screening criteria could endure a [pressurized thermal shock] event without fracture of vessel materials, thus assuring integrity of the reactor pressure vessel.”¹⁵

Licensees seeking to use the updated methodology in 10 C.F.R. § 50.61a must submit a license amendment request under 10 C.F.R. § 50.90.¹⁶ The request must provide information that includes: (1) calculations of the values of the material properties that characterize the reactor vessel’s resistance to fracture; (2) an examination and assessment of flaws discovered by American Society of Mechanical Engineers Code inspections; and (3) a comparison of the material property reference temperature values against the applicable screening criteria.¹⁷ To verify the calculations used to support the license amendment request, licensees must compare their calculations to “heat-specific surveillance data” — this verification is called the “consistency check.”¹⁸ The surveillance data used in the consistency check need not come from the same reactor pressure vessel that is the subject of the license amendment request.¹⁹ When it is available, licensees are required to use data from other reactors, called “sister-plant data,” provided the data are from material samples of the same “heat”²⁰ as the material in the vessel for the reactor that is the subject of the license amendment request.²¹

¹¹ 2010 PTS Rule, 75 Fed. Reg. at 13. “[T]he screening criteria in [10 C.F.R.] § 50.61 are unnecessarily conservative and may impose unnecessary burden on some licensees.” *Id.*

¹² *Id.*

¹³ LBP-15-17, 81 NRC at 765.

¹⁴ 2010 PTS Rule, 75 Fed. Reg. at 18.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 18.

¹⁷ *Id.*; see 10 C.F.R. § 50.61a(a)(2)-(6).

¹⁸ LBP-15-17, 81 NRC at 766-67 (citing 10 C.F.R. § 50.61a(f)(6)(i) and 2010 PTS Rule, 75 Fed. Reg. at 16).

¹⁹ See 10 C.F.R. §§ 50.61a(a)(10) and (f)(6)(i) (defining *Surveillance data* to include data from other plants and requiring licensees to consider these data under certain circumstances).

²⁰ Here, the “heat” of a sample pertains to its material composition.

²¹ See *id.*; see also 2010 PTS Rule, 75 Fed. Reg. at 16.

In accordance with this rule, Entergy submitted a license amendment application for Palisades that provided the information requested in 10 C.F.R. § 50.61a.²² Petitioners thereafter requested a hearing challenging the application.²³

In their hearing request, Petitioners expressed general concerns about the licensing framework that establishes the requirements to address pressurized thermal shock events. Petitioners asserted particularly that the implementation of the “new” requirements in 10 C.F.R. § 50.61a at Palisades will introduce “further non-conservative analytical assumptions into the troubled forty-three . . . year operational history of Palisades.”²⁴ In reviewing Petitioners’ contention, the Board evaluated three bases provided by Petitioners to support their contention.²⁵ Specifically, the Board evaluated Petitioners’ claims that the licensee cannot: (1) provide reasonable assurance under 10 C.F.R. § 50.61a “without obtaining or using additional data” from the Palisades reactor pressure vessel; (2) consider, under 10 C.F.R. § 50.61a(f)(6), sister-plant data in addition to Palisades’ surveillance data; and (3) “account for spatial variability in fluence across a reactor,” given the current surveillance data available.²⁶ The Board considered each of these claims as a separate contention.²⁷ In each instance, the Board found that Petitioners either did not satisfy our contention admissibility standards or had impermissibly challenged our regulations.²⁸ The Board therefore denied Petitioners’ request for hearing.²⁹ Petitioners appealed.³⁰ Entergy and the Staff oppose Petitioners’ appeal.³¹

²² License Amendment Request to Implement 10 C.F.R. § 50.61a, “Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events” (July 29, 2014) (ADAMS Accession No. ML14211A524) (License Amendment Request). The Staff has yet to reach a decision on the license amendment request.

²³ Amended Petition to Intervene and for a Public Adjudication Hearing of Entergy License Amendment Request for Authorization to Implement 10 CFR § 50.61a “Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events” (Dec. 8, 2014).

²⁴ Intervenor’s 10 C.F.R. § 2.311(c) Notice of Appeal of Atomic Safety and Licensing Board’s Denial of Petition to Intervene and Request for a Hearing on Entergy License Amendment Request for Authorization to Implement 10 CFR § 50.61a and Brief in Support (June 2, 2015) at 3 (Appeal).

²⁵ LBP-15-17, 81 NRC at 779.

²⁶ *Id.*

²⁷ *Id.* at 780.

²⁸ *See id.* at 783-84, 789.

²⁹ *See id.* at 792.

³⁰ *See* Appeal.

³¹ Entergy’s Answer Opposing Petitioners’ Appeal of LBP-15-17 (June 29, 2015); NRC Staff Answer to Appeal of LBP-15-17 by Beyond Nuclear, Don’t Waste Michigan, Michigan Safe Energy Future — Shoreline Chapter, and the Nuclear Energy Information Service (June 29, 2015) (Staff Answer).

II. DISCUSSION

Petitioners have appealed the Board's decision under 10 C.F.R. § 2.311(c), which provides for an appeal as of right on the question whether a request for hearing or petition to intervene should have been granted. Their appeal falls squarely within this rule. Our decision today assesses whether the Board erred in denying the petition to intervene and request for hearing for failure to proffer an admissible contention.³² In ruling on Petitioners' appeal, we will defer to the Board's rulings on contention admissibility absent an error of law or abuse of discretion.³³ As discussed below, we find no Board error and affirm the Board's decision.

Our "strict by design" contention admissibility standards focus our hearing process on "disputes that can be resolved in . . . adjudication."³⁴ The Board provided an extensive discussion of the contention admissibility requirements that we do not repeat here.³⁵

On appeal, Petitioners present three arguments challenging the Board's contention admissibility decision, any of which they contend is sufficient to overturn the Board's denial. First, Petitioners argue that the Board did not consider the discretionary authority of the NRC Staff, specifically, the Director of the Office of Nuclear Reactor Regulation, "over whether to allow a particular applicant to invoke 10 C.F.R. § 50.61a."³⁶ Second, Petitioners challenge the NRC's regulatory approach to the fracture toughness of reactor pressure vessels, arguing that the NRC cannot reasonably maintain two regulations that address the same topic when the requirements of one regulation are assertedly "weaker" than the other.³⁷ And third, Petitioners challenge the Board's determination regarding the portion of their contention related to the licensee's use of sister-plant data to satisfy the requirements of 10 C.F.R. § 50.61a.³⁸

Petitioners' first two points are related. Before the Board, Petitioners argued that 10 C.F.R. § 50.61a "clearly contemplates a discretionary determination by the Director of [the Office of Nuclear Reactor Regulation]" wherein the Staff has

³²The Board found that Petitioners had demonstrated standing. LBP-15-17, 81 NRC at 769-76. We do not address that ruling here.

³³See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

³⁴*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008) (citations omitted).

³⁵LBP-15-17, 81 NRC at 777-78.

³⁶Appeal at 18.

³⁷*Id.* at 20.

³⁸See *id.* at 22-23.

“some power to say no” to the license amendment request.³⁹ Similarly, Petitioners argued that the Board has the authority to direct the licensee to follow 10 C.F.R. § 50.61 instead of § 50.61a.⁴⁰ In essence, Petitioners requested that the Board impose additional requirements on licensees by imposing new restrictions on the use of 10 C.F.R. § 50.61a that go beyond the requirements in the regulation.⁴¹ The Board rejected this argument, finding that 10 C.F.R. § 2.335 prohibits the Board from considering “such a contention except under specific conditions not present here.”⁴² On appeal, Petitioners rephrase their challenge to 10 C.F.R. § 50.61a and claim that the Board found that “if the paperwork is properly completed,” then the licensee is “automatically allowed” to invoke 10 C.F.R. § 50.61a.⁴³ At bottom, however, Petitioners have not raised a genuine dispute with the application because they have not challenged the license amendment request itself.

A license amendment request must provide sufficient documentation and analysis to show that the licensee has complied with the relevant requirements, thereby demonstrating that the amended license will continue to provide reasonable assurance of adequate protection of public health and safety.⁴⁴ As we stated when we adopted the 2010 PTS Rule, licensees would only be allowed to implement section 50.61a upon NRC approval — mere submission of a license amendment request is not sufficient to take advantage of the new regulation.⁴⁵

Petitioners argue that the NRC should consider whether rejecting the license amendment request would provide “a superior ‘reasonable assurance’ of protec-

³⁹ Petitioners’ Combined Reply in Support of Amended Petition to Intervene and for a Public Adjudication Hearing of Entergy License Amendment Request for Authorization to Implement 10 CFR § 50.61a, “Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events” (Jan. 20, 2015) at 3-4; Tr. at 132.

⁴⁰ Tr. at 18.

⁴¹ See, e.g., *id.* at 34-35 (where Petitioners note that “the problem . . . is that . . . there isn’t a threshold, there isn’t a limbo stick over which Entergy must leap to qualify to use [10 C.F.R. 50.61a].”).

⁴² See LBP-15-17, 81 NRC at 779-80 (“Petitioners apparently want the Board to preclude Entergy from relying on section 50.61a to avoid meeting the requirements of section 50.61, but it is just such a ‘deviation’ that section 50.61a authorizes.”).

⁴³ Appeal at 18.

⁴⁴ See, e.g., *Duke Energy Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-32, 60 NRC 713, 720-21 (2004). “The legal standards that apply in this proceeding are found in various NRC regulations. First, under 10 C.F.R. § 50.90, whenever a holder of a license wishes to amend the license, including technical specifications in the license, an application for amendment must be filed, fully describing the changes desired. Under 10 C.F.R. § 50.92(a), determinations on whether to grant an applied-for license amendment are to be guided by the considerations that govern the issuance of initial licenses or construction permits to the extent applicable and appropriate. Both the common standards for licenses and construction permits in 10 C.F.R. § 50.40(a), and those specifically for issuance of operating licenses in 10 C.F.R. § 50.57(a)(3), provide that there must be ‘reasonable assurance’ that the activities at issue will not endanger the health and safety of the public.” *Id.*

⁴⁵ 2010 PTS Rule, 75 Fed. Reg. at 18.

tion of public health and safety.”⁴⁶ In making this request, Petitioners do not demonstrate an error of law or abuse of discretion on the part of the Board. Rather, they would have the NRC impose a standard that goes beyond what our regulations require. Petitioners do not refute the Board’s observation — with which we agree — that “[w]hen the Commission has determined that compliance with a regulation is sufficient to provide for reasonable assurance of public health and safety, a licensing board cannot impose requirements that exceed those in the regulation.”⁴⁷

In license amendment matters such as this, to approve the amendment the Staff must verify that reasonable assurance has been demonstrated by evaluating the licensee’s technical documentation to ensure that the requested amendment complies with our regulations — in this case, principally 10 C.F.R. § 50.61a. If the Staff determines that the licensee has satisfied our regulatory requirements, it then issues the requested license amendment. It is true that the Staff will apply engineering judgment as one consideration among many in determining whether the applicable regulatory requirements are satisfied. But once the Staff is satisfied that all such requirements are met, it is obliged to approve the request. And as we have noted in the past, regardless of whether a hearing request is granted, the NRC Staff performs a full safety review of every license amendment request — including the one at issue here — and no request is approved “until all necessary public health and safety findings have been made.”⁴⁸

Petitioners claim that the standard in 10 C.F.R. § 50.61 is “stronger” than the standard in section 50.61a and that therefore it is “legally anomalous” for the NRC to conclude that both provide reasonable assurance.⁴⁹ Here again, Petitioners neither articulate Board error nor raise a genuine dispute with the license amendment request. The existence of two regulations that provide alternative methods to demonstrate reasonable assurance is not, in and of itself, an anomaly. Petitioners did not provide a basis for their contention that two regulations cannot adequately address the same technical issue. The regulations at issue here, 10 C.F.R. §§ 50.61 and 50.61a, prescribe *alternate* methods by which a licensee can demonstrate reasonable assurance of protection against pressurized thermal shock events. Through our rulemaking process, we have found that compliance with either regulation is sufficient to demonstrate reasonable assurance with respect to the fracture toughness of a reactor pressure vessel.⁵⁰ At the time the NRC adopted the 2010 PTS Rule, we stated that after the promulgation of 10 C.F.R. § 50.61a the rule at 10 C.F.R. § 50.61 would remain in place. Section 50.61a “would not

⁴⁶ Appeal at 18-19.

⁴⁷ LBP-15-17, 81 NRC at 789.

⁴⁸ *Millstone*, CLI-08-17, 68 NRC at 234.

⁴⁹ Appeal at 20-21.

⁵⁰ *Compare* 1985 PTS Rule, 50 Fed. Reg. at 29,937 with 2010 PTS Rule, 75 Fed. Reg. at 13.

be required, but could be used by current . . . licensees at their option.”⁵¹ Thus, contrary to Petitioners’ claim, the NRC expressly put both regulations in place because compliance with either 10 C.F.R. § 50.61 or 10 C.F.R. § 50.61a provides reasonable assurance of a reactor pressure vessel’s ability to endure a pressurized thermal shock event.

Petitioners also argued before the Board that the licensee should be required to test metal coupons from inside the Palisades reactor pressure vessel.⁵² The Board found that in asking for testing of additional samples, Petitioners “are asking the Board to demand more than [10 C.F.R. § 50.61a] requires.”⁵³ The Board correctly found that 10 C.F.R. § 50.61a does not require a licensee to collect additional surveillance data from the subject plant; it requires the licensee to use “any data that demonstrates the embrittlement trends for the . . . materials, including . . . surveillance programs at other plants with or without a surveillance program integrated under 10 C.F.R. Part 50, Appendix H.”⁵⁴ Petitioners’ argument that additional testing should be required to demonstrate compliance with 10 C.F.R. § 50.61a is therefore an impermissible challenge to 10 C.F.R. § 50.61a.⁵⁵

These claims fundamentally challenge the regulatory scheme that allows for the submission, NRC review, and, if appropriate, approval of the license amendment request. Challenges to our regulatory scheme are not permitted in adjudicatory proceedings absent a waiver.⁵⁶ Petitioners have neither submitted a waiver request nor addressed the waiver criteria in 10 C.F.R. § 2.335.⁵⁷ Moreover, the information in Petitioners’ pleadings does not support the granting of a waiver here.

Next, Petitioners claim that the Board erred in not admitting the portion of their contention challenging the use of sister-plant data in the license amendment request.⁵⁸ The requirements in 10 C.F.R. § 50.61a require material samples used in a licensee’s consistency check to be from the same “heat”; there is no requirement that the sample come from the reactor pressure vessel subject to the license amendment request.⁵⁹ Petitioners argue that the license amendment request lacked “proof that the metals from the various [reactor pressure vessels]

⁵¹ 2010 PTS Rule, 75 Fed. Reg. at 22.

⁵² See, e.g., Petition at 11-12, 14-15.

⁵³ LBP-15-17, 81 NRC at 783.

⁵⁴ 10 C.F.R. § 50.61a(a)(10); see also LBP-15-17, 81 NRC at 782-83.

⁵⁵ Petitioners raised a similar issue related to the frequency of surveillance testing at Palisades in a separate challenge to a different license amendment request. See *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), LBP-15-20, 81 NRC 829 (granting a hearing), *rev’d*, CLI-15-23, 82 NRC 321 (2015).

⁵⁶ 10 C.F.R. § 2.335.

⁵⁷ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

⁵⁸ Appeal at 22-23.

⁵⁹ 10 C.F.R. § 50.61a(f)(6)(i)(A); see also LBP-15-17, 81 NRC at 788.

match.”⁶⁰ The Board found that “[Petitioners’ expert] admits that the sister[-]plant data and Palisades samples are similar. . . . [T]heir argument is without support and contradicts the statement of their expert.”⁶¹ Petitioners do not challenge the Board’s conclusion that there is “no reason to doubt that the sister[-]plant material samples are the same ‘heat’ or composition compared to the materials in the Palisades” reactor pressure vessel.⁶² Petitioners here repackage their argument before the Board without asserting Board error, and we find none. This portion of the contention is inadmissible for the reasons given by the Board.

Finally, Petitioners raise a variation of their argument below that NRC guidance supports a 20% deviation limit between data obtained from sister plants and Palisades, which would be “mathematically implausible” to satisfy, given a flux variation between sister plants that “varies by 300%.”⁶³ The Board found that Petitioners’ argument lacked support because Petitioners had relied on a limit described in an NRC regulatory guide — the guidance in question — that pertains to fluence modeling within a single reactor, rather than to a comparison of data between a particular reactor and sister plants.⁶⁴ Thus, the Board found that the regulatory guide did not support Petitioners’ claims, and Petitioners therefore did not submit an admissible contention.⁶⁵

Moreover, in considering this issue, the Board found that “the use of a material sample in the consistency check is not dependent on its location inside [a reactor pressure vessel], or which [reactor pressure vessel] it comes from. . . . From the standpoint of the consistency check, a material sample of the same fluence and material type is no different whether obtained from the Palisades [reactor

⁶⁰ Appeal at 22-23.

⁶¹ LBP-15-17, 81 NRC at 791-92. Moreover, the Board noted, and we agree, that Petitioners inappropriately first raised this argument in their reply. *Id.*; see *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

⁶² LBP-15-17, 81 NRC at 792.

⁶³ Appeal at 23 (internal citations and quotation marks omitted).

⁶⁴ LBP-15-17, 81 NRC at 789; see Office of Nuclear Regulatory Research, *Calculational and Dosimetry Methods for Determining Pressure Vessel Neutron Fluence*, Regulatory Guide 1.190 (Mar. 2001), at 3, 31 (ADAMS Accession No. ML010890301) (explaining that the uncertainty of the fluence in the reactor pressure vessel must be “20% (1 σ) or less” for calculating various reference temperatures for the purposes of complying with 10 C.F.R. § 50.61.).

⁶⁵ LBP-15-17, 81 NRC at 789; 10 C.F.R. § 2.309(f)(1)(v). Further, Petitioners’ focus on the variation in flux between sister plants is immaterial. With respect to this point, the Board correctly noted that “[a]ny variation in flux . . . is captured in the material’s fluence measurement, because fluence is the integral of flux over time. Under [10 C.F.R. § 50.61(a)(f)(6)(i)], when the fluence of a material sample is known it must be used in the consistency check if it is of the appropriate chemical composition. The regulation’s consistency check does not rely on information that is unique to a particular [reactor pressure vessel], but instead on the chemical properties and fluence of the material samples.” LBP-15-17, 81 NRC at 788 (citing 10 C.F.R. § 50.61a, equations 5-7); see also Staff Answer at 16 n.74 (explaining that “differences in fluence are accounted for in the analysis.”).

pressure vessel] or a sister[-]plant [reactor pressure vessel].”⁶⁶ In other words, the Board found that Petitioners’ claims constituted an improper challenge to the requirements in 10 C.F.R. § 50.61a, which is prohibited by 10 C.F.R. § 2.335.⁶⁷ Nothing in Petitioners’ appeal challenges these findings. The Board appropriately reviewed the support provided for the contention and determined that it did not apply to the circumstances presented here.⁶⁸

In sum, Petitioners fundamentally challenge 10 C.F.R. § 50.61a, which is not permissible in this license amendment proceeding. In addition, Petitioners have not identified an adequately supported, genuine dispute with the license amendment application. For these reasons, we find that the Board appropriately denied Petitioners’ hearing request.

III. CONCLUSION

Petitioners have identified no error of law or abuse of discretion on the part of the Board in LBP-15-17. For the foregoing reasons and for the reasons given by the Board, we *affirm* the Board’s decision in LBP-15-17.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of November 2015.

⁶⁶ LBP-15-17, 81 NRC at 788.

⁶⁷ *Id.*

⁶⁸ *See, e.g., USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)* (licensing boards are expected “to examine cited materials to verify that they do, in fact, support a contention.”) (citations omitted).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-255-LA-2

**ENTERGY NUCLEAR
OPERATIONS, INC.
(Palisades Nuclear Plant)**

November 9, 2015

CONTENTIONS, ADMISSIBILITY

Proponents of contentions must satisfy the Commission's contention admissibility criteria in 10 C.F.R. § 2.309(f). Contentions must, among other things, demonstrate a genuine dispute with the application and provide a basis for the contention.

LICENSING BOARD, AUTHORITY

Licensing Boards may not formulate contentions or provide bases to admit contentions that are not provided by petitioners.

WITNESSES, EXPERT

An expert opinion must provide a reasoned basis or explanation to support the expert's conclusion; merely stating a conclusion without support is insufficient.

MEMORANDUM AND ORDER

This proceeding stems from Entergy Nuclear Operations, Inc.’s license amendment request seeking agency approval of its “equivalent margins analysis” for the Palisades Nuclear Plant reactor pressure vessel. In LBP-15-20, the Atomic Safety and Licensing Board granted a petition to intervene and request for hearing filed by Beyond Nuclear, Don’t Waste Michigan, Michigan Safe Energy Future — Shoreline Chapter, and the Nuclear Energy Information Service (collectively, Petitioners) that challenged the license amendment request.¹ Entergy has appealed.² As discussed below, we reverse the Board’s decision.

I. PROCEDURAL AND TECHNICAL BACKGROUND

Petitioners challenge Entergy’s license amendment request on the ground that Entergy’s equivalent margins analysis “does not provide adequate assurance of margins of safety against fracture or rupture.”³ We provide first a short summary of the technical issue and license amendment request. A more detailed discussion of these issues is available in the Board’s decision.⁴

Pressure vessels in operating pressurized water reactors must meet certain requirements to demonstrate their fracture toughness (that is, their resistance to failure under certain conditions). Under normal plant conditions the materials at the “beltline” of the reactor pressure vessel must maintain “Charpy upper-shelf energy” of no less than 50 foot-pounds (ft-lb) (68 joules (J)).⁵ Charpy upper-shelf energy “is a measurement of the amount of energy the material can absorb at high temperatures before it fractures and fails.”⁶

As a reactor pressure vessel ages, it is exposed to increasing amounts of neutron radiation from the fission reaction occurring inside the reactor pressure vessel, which over time decreases the ductility (and fracture toughness) of the ferritic materials making up the vessel, thus reducing their Charpy upper-shelf energy. When a licensee determines that the Charpy upper-shelf energy of these materials will fall below 50 ft-lb, it must submit an analysis, known as an equivalent margins analysis. This analysis must demonstrate that the calculated energy will

¹ LBP-15-20, 81 NRC 829 (2015).

² Entergy’s Notice of Appeal of LBP-15-20 (July 13, 2015) (Appeal).

³ Petition to Intervene and for a Public Adjudication Hearing of Entergy License Amendment Request for Approval of 10 CFR Part 50 Appendix G Equivalent Margins Analysis (Mar. 9, 2015) at 2 (Petition).

⁴ LBP-15-20, 81 NRC at 832-35.

⁵ 10 C.F.R. Part 50, App. G, § IV.A.1.a.

⁶ LBP-15-20, 81 NRC at 833.

nevertheless “provide margins of safety against fracture [that are] equivalent to those required by Appendix G of Section XI of the ASME Code.”⁷

Fulfilling a commitment made in the license renewal application for Palisades, Entergy performed an equivalent margins analysis for the plant in early 2013.⁸ The results of that analysis demonstrated that certain materials in the Palisades reactor pressure vessel would fall below the 50 ft-lb Charpy upper-shelf energy level. Accordingly, Entergy submitted its equivalent margins analysis to the NRC in October 2013, followed by a corresponding license amendment request in November 2014.⁹ The NRC Staff published in the *Federal Register* a notice of the proposed amendment shortly thereafter, notifying the public of an opportunity to request a hearing.¹⁰ In response, Petitioners filed their hearing request. Entergy and the NRC Staff opposed the request; Petitioners replied.¹¹

In LBP-15-20, the Board granted Petitioners’ request for hearing, finding that Petitioners had demonstrated standing and proffered one admissible contention. Specifically, Petitioners’ contention (as admitted) states:

The methods of prediction used by Entergy concerning whether steel plate and weld materials within the reactor pressure vessel (“RPV”) at the Palisades Nuclear Power Plant possess Charpy upper shelf energy (“USE”) values of less than 50 ft.-lbs. of ductility stress do not provide adequate assurance of margins of safety against fracture or rupture which are equivalent to those required by Appendix G of Section

⁷ 10 C.F.R. Part 50, App. G, § IV.A.1.a.

⁸ Westinghouse WCAP-17651-NP, Rev. 0, Palisades Nuclear Power Plant Reactor Vessel Equivalent Margins Analysis (Feb. 2013) (ADAMS Accession No. ML14316A208) (Equivalent Margins Analysis). In the Palisades license renewal application, Nuclear Management Company (the licensee at the time) committed to submit an equivalent margins analysis for materials where the Charpy upper-shelf energy would fall below 50 ft-lbs “at least three years prior to the date” this would occur. Appeal at 4-5 (citing Palisades Nuclear Plant Application for Renewed Operating License (Mar. 22, 2005) at 4-12 (ADAMS Accession No. ML050940446)).

⁹ Letter from Anthony J. Vitale, Site Vice President, Palisades Nuclear Plant, to Document Control Desk, NRC (Oct. 21, 2013) (ADAMS Accession No. ML13295A448); Letter from Anthony J. Vitale, Site Vice President, Palisades Nuclear Plant, to Document Control Desk, NRC (Nov. 12, 2014) (ADAMS Accession No. ML14316A190). The license amendment request and all attachments are available at ADAMS Accession No. ML14316A370.

¹⁰ Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 520, 523-24 (Jan. 6, 2015).

¹¹ Entergy’s Answer Opposing Petition to Intervene and Request for Hearing (Apr. 3, 2015); NRC Staff’s Answer to Petition to Intervene and Hearing Request Filed by Beyond Nuclear, Don’t Waste Michigan, Michigan Safe Energy Future — Shoreline Chapter, and the Nuclear Energy Information Service (Apr. 3, 2015); Petitioners’ Reply in Support of Petition to Intervene on Entergy License Amendment Request for Approval of 10 CFR Part 50 Appendix G Equivalent Margins Analysis (Apr. 10, 2015).

XI of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code.¹²

Petitioners focus on Entergy's decision not to test physical samples — called coupons or capsules — as part of its equivalent margins analysis.¹³

In evaluating the contention, a Board majority found that Petitioners had provided sufficient factual support to demonstrate a genuine dispute with the license amendment request.¹⁴ Judge Arnold dissented; in his view, “the information provided by Petitioners . . . [was] inadequate to establish a material dispute with the application.”¹⁵ Entergy's appeal of the Board's decision followed.¹⁶

II. DISCUSSION

Entergy seeks review under 10 C.F.R. § 2.311(d), which allows for an appeal of a licensing board order granting a request for hearing on the question whether the request should have been wholly denied. Our decision today assesses whether the Board erred in granting Petitioners' request for hearing by finding their proffered contention admissible.¹⁷ In ruling on Entergy's appeal, we will defer to the Board's rulings on contention admissibility absent an error of law or abuse

¹² Petition at 2; *see also* LBP-15-20, 81 NRC at 838.

¹³ *See, e.g.*, Petition at 2; LBP-15-20, 81 NRC at 838.

¹⁴ The Board rejected several arguments proffered by Entergy and the Staff that are not challenged on appeal (e.g., whether Petitioners' contention is barred as a challenge to 10 C.F.R. Part 50, App. G under 10 C.F.R. § 2.335). *See* LBP-15-20, 81 NRC at 848-49. Therefore we need not address them further.

¹⁵ LBP-15-20, 81 NRC at 864 (Arnold, J., dissenting).

¹⁶ Petitioners oppose the appeal. Petitioners' Brief in Opposition to Entergy Appeal of LBP-15-20 (Aug. 7, 2015). Additionally, the Sierra Club filed a motion for leave to file a brief *amicus curiae* opposing the appeal. Motion by Sierra Club for Permission to File Amicus Brief (Aug. 7, 2015); Amicus Curiae Brief by Sierra Club in Support of Atomic Safety and Licensing Board Decision (Aug. 7, 2015). Entergy opposed the Sierra Club's motion. Entergy's Answer Opposing the Sierra Club's Motion for Permission to File Amicus Curiae Brief (Aug. 17, 2015). The Sierra Club replied; Entergy opposed that reply. Sierra Club's Reply to Entergy's Answer to Motion to File Amicus Brief (Aug. 20, 2015); Entergy's Answer Opposing the Sierra Club's Unauthorized Reply (Aug. 20, 2015). Our rule governing *amicus curiae* participation does not contemplate a brief under the current circumstances. *See* 10 C.F.R. § 2.315(d) (providing the opportunity to file amicus briefs for matters taken up at our discretion under 10 C.F.R. § 2.341 or *sua sponte*). Nonetheless, we have considered the Sierra Club's views as a matter of discretion. *See, e.g., Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 333 n.19 (2015) (citing *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013)).

¹⁷ The Board found that Petitioners had demonstrated standing. LBP-15-20, 81 NRC at 836-37. We do not address that ruling here.

of discretion.¹⁸ *As discussed below, we find that the Board erred in admitting Petitioners' contention.*

A. Contention Admissibility Standards

Our strict-by-design contention admissibility standards focus our hearing process on “disputes that can be resolved in . . . adjudication.”¹⁹ To obtain a hearing, Petitioners must demonstrate standing and proffer an admissible contention.²⁰ To satisfy our contention admissibility standards, a petitioner 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 that support the . . . 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 . . . petitioner intends to rely to support its position on the issue; and
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact.²¹

The proponent of a contention is responsible for formulating the contention and providing the necessary support to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). When raising a genuine material dispute

¹⁸ See, e.g., *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 379-80 (2012); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

¹⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008).

²⁰ 10 C.F.R. § 2.309(b), (d), and (f).

²¹ 10 C.F.R. § 2.309(f)(1)(i)-(vi). In this vein, Entergy argues that the Board erred in relying on an outdated contention-admissibility standard that was discussed in an unreviewed licensing board decision. Appeal at 20 (citing LBP-15-20, 82 NRC at 847-48, 855 (quoting, in turn, *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982) (“[a] contention about a matter not covered by a specific rule need only allege that it poses a significant safety problem”))). The contention admissibility rules in place at the time permitted less-detailed notice pleading. See 10 C.F.R. § 2.714(b) (1982) (requiring petitioners to file “a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity”). To the extent that the Board relied on *Catawba* in making its contention admissibility determination, we agree that the Board erred.

with an application, we expect the petitioner to present “well-defined issues,” not issues based on “little more than guesswork.”²² Finally, the petitioner must review the relevant documents, in this case the license amendment request and the equivalent margins analysis, and provide sufficient discussion of these documents and its concerns to demonstrate the existence of a genuine material dispute with the licensee on a material issue of law or fact.²³

B. Petitioners Have Not Satisfied Our Contention Admissibility Standards

On appeal, Entergy argues that the Board erred when it found (1) that the contention raises a genuine material dispute and (2) that Petitioners provided adequate support for their contention.²⁴ Our contention admissibility rules require petitioners to proffer contentions that demonstrate a genuine dispute with the application.²⁵ Here, the Board found that Petitioners’ single reference to the equivalent margins analysis, along with the general discussion in Petitioners’ supporting documents, was sufficient to provide the requisite specificity to satisfy our regulations.²⁶ We disagree.

As Entergy notes, Petitioners provide only one specific reference to the equivalent margins analysis — an excerpt from the analysis that discusses the sulfur and nickel content in the Palisades reactor pressure vessel materials.²⁷

²² *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009) (citations omitted).

²³ *See, e.g., Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

²⁴ Appeal at 2-3. Entergy also argues that the Board erred when it found that Petitioners’ challenge to the equivalent margins analysis did not constitute an unauthorized challenge to the coupon removal schedule that the NRC approved under 10 C.F.R. Part 50, Appendix H. Appeal at 11-13, 13 n.74; LBP-15-20, 81 NRC at 841-45. Here, we agree with the Board — Petitioners have not challenged the coupon-removal schedule in Appendix H; rather, they have challenged Entergy’s Appendix G equivalent margins analysis — arguing that additional physical data must be obtained to support the analysis. *See, e.g.,* Petition at 11; LBP-15-20, 81 NRC at 842. As the Board correctly stated, were Petitioners “to prevail on the merits, Entergy would need to test one or more capsules sooner than 2019 to provide adequate support” for the equivalent margins analysis. LBP-15-20, 81 NRC at 842. Thus, our regulations do not prohibit the additional testing requested by Petitioners. *See* 10 C.F.R. Part 50, App. H, § III.c.3 (specifying that “no reduction in the amount of testing” is allowed without NRC approval). But the absence of a prohibition is not sufficient justification to admit a contention — Petitioners must still satisfy our contention admissibility criteria.

²⁵ 10 C.F.R. § 2.309(f)(1)(vi); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 307 (2012) (citations and quotation marks omitted).

²⁶ LBP-15-20, 81 NRC at 861-62.

²⁷ Appeal at 3; *see also* Petition at 19-20 (citing Equivalent Margins Analysis at 24-25). One
(Continued)

Petitioners claim that this discussion shows that “the higher sulfur content of the plates means lower fracture toughness.”²⁸ But Petitioners provide no basis for their statement regarding the sulfur content, nor does their expert address this claimed relationship between sulfur content and fracture toughness. We find, therefore, that the Board erred in finding that Petitioners provided sufficient specific references to the application to satisfy our contention admissibility criteria.²⁹

Petitioners attached two documents to the Petition to support their contention: a declaration by Mr. Arnold Gundersen, an engineer and Petitioners’ expert in this matter, and a report by Greenpeace on “microcracking” in reactor pressure vessels.³⁰ The Board found that the Gundersen Declaration and Greenpeace Report provided sufficient support for Petitioners’ contention.³¹ We hold that the Board erred in making this determination. We address each document in turn below.

1. Gundersen Declaration

In finding that the Gundersen Declaration supports Petitioners’ contention, the Board noted that Mr. Gundersen “has pointed to an alleged deficiency in the analysis (lack of recent capsule data) and he has provided a foundation for his opinion with a discussion of the characteristics of the Palisades reactor vessel that allegedly make these data significant.”³² In particular, the Board points to paragraphs 8-11 and 45-48 of the Gundersen Declaration. Paragraph 8 contains an unsupported claim that “[t]he current analysis cannot be substantiated because physical data is lacking to support any mathematical analysis.”³³ Paragraphs 9-11 contain factual statements regarding reactor pressure vessels in general (e.g., that they are made of “thick steel plates”) and the Palisades reactor pressure vessel in particular (e.g., its date of construction), together with an unsupported statement that the weld materials at Palisades contain “metallic components . . . that are

of Petitioners’ supporting documents, Declaration of Arnold Gundersen (Dec. 1, 2014) (Gundersen Declaration), discussed further *infra*, likewise includes one general reference to the equivalent margins analysis. Gundersen Declaration ¶ 45.5.

²⁸ Petition at 19-20.

²⁹ With respect to the nickel content of the Palisades reactor pressure vessel, the Board found that Petitioners did not provide adequate support for their claim that the nickel content “will weaken the materials in the Palisades reactor” and that Petitioners’ support for this assertion “does not explain how high nickel content results in ‘nickel impurities’ or otherwise leads to any undue risk to the Palisades [reactor pressure vessel].” LBP-15-20, 81 NRC at 862-63. We find no error in this determination.

³⁰ See Petition at 16-19, 21-22 (referencing the Gundersen Declaration and Nuclear Reactor Pressure Vessel Crisis: Greenpeace Briefing (Feb. 15, 2015) (Greenpeace Report)).

³¹ LBP-15-20, 81 NRC at 851.

³² *Id.* at 852 (citations omitted).

³³ Gundersen Declaration ¶ 8.

now considered unacceptable due to impurities.”³⁴ Paragraphs 45-48 generally criticize the instant license amendment request and a separate request that is not at issue here.³⁵ In reviewing these paragraphs, the Board found that the Declaration “offers enough factual support and explanation to dispute the adequacy of the inputs used in Entergy’s [equivalent margin analysis].”³⁶ Further, the Board found that these paragraphs also identify an “alleged deficiency” in the equivalent margins analysis — the “lack of recent capsule data.”³⁷

We disagree. Although Petitioners and the Gundersen Declaration challenge the adequacy of the equivalent margins analysis (i.e., stating that the analysis is inadequate without additional testing of metal coupons),³⁸ the Gundersen Declaration does not cite — or otherwise discuss — the specific portions of Entergy’s analysis that Petitioners and Mr. Gundersen believe to be insufficient. Nor do Petitioners or Mr. Gundersen, as noted by Judge Arnold, “provide a description of new information that could be provided by coupon removal that is not already available” from the analysis of earlier coupons that were removed from the reactor.³⁹ As we have previously held, “an expert opinion that merely states a conclusion . . . 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.”⁴⁰ Here, Mr. Gundersen provides no explanation for his claim that additional physical testing is necessary to support the equivalent margins analysis. Further, Petitioners and Mr. Gundersen neither “explain how additional testing would improve knowledge of the vessel embrittlement” at Palisades, nor “relate this concern to their contention in any way.”⁴¹

To proffer an admissible contention, Petitioners must “explain the basis for the contention and read the relevant parts of the license application and show where the application is lacking”; an assertion that additional analysis is necessary, without further support (e.g., a basis to support the need for additional physical

³⁴ *Id.* ¶¶ 9-11.

³⁵ *Id.* ¶¶ 45-48. That license amendment application pertains to Entergy’s request to use alternate fracture toughness requirements at Palisades. In a separate decision issued today, we affirmed the Board’s ruling denying Petitioners’ request for a hearing in that matter. *See* LBP-15-17, 81 NRC 753, *aff’d*, CLI-15-22, 82 NRC 310 (2015).

³⁶ LBP-15-20, 81 NRC at 852.

³⁷ *Id.*

³⁸ *See, e.g.*, Petition at 11; LBP-15-20, 81 NRC at 851-55.

³⁹ *Id.* at 864 (Arnold, J., dissenting).

⁴⁰ *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (citations and quotation marks omitted).

⁴¹ LBP-15-20, 81 NRC at 867 (Arnold, J., dissenting).

testing), is not sufficient.⁴² Based on our review of the record and the Board's decision, we find that the Board erred in finding that Mr. Gundersen's Declaration provided "concrete and specific" support for Petitioners' contention.⁴³

2. *Greenpeace Report*

Petitioners cite the Greenpeace Report as evidence that "world-recognized nuclear engineers have advised close attention to [the microcracking] phenomenon in older reactor [pressure vessels]."⁴⁴ Petitioners only cite the Report to call for additional examination of the microcracking phenomenon at Palisades, not to support their challenge to the equivalent margins analysis.⁴⁵

The Board, however, found more support in the Greenpeace Report than is reflected in the Petition and relied heavily on the Report in admitting Petitioners' contention.⁴⁶ In its decision, the Board provides a lengthy analysis of the Report and documents cited therein. In particular, the Board stated that "[t]hese microcracking allegations imply that the Palisades [reactor pressure vessel] materials may be of lower fracture toughness than described by Entergy, and thus that Entergy's [equivalent margins analysis] fails to show that the Palisades reactor vessel demonstrates equivalent margins of safety under 10 C.F.R. Part 50, Appendix G."⁴⁷ However, it is Petitioners' responsibility, not the Board's, to formulate contentions and to provide "the necessary information to satisfy the basis requirement" for admission.⁴⁸ At the contention admissibility stage, the Board should view Petitioners' support for their contention "in a light that is favorable" to Petitioners, but the Board "cannot do so by ignoring the requirements set forth in [10 C.F.R. § 2.309(f)(1)]."⁴⁹ We agree with Judge Arnold that

⁴² *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991).

⁴³ The Board further cites to Mr. Gundersen's statements regarding the need for "physical data . . . to determine the actual toughness of the reactor vessel." LBP-15-20, 81 NRC at 852 (citing Gundersen Declaration ¶ 51). But the discussion cited by the Board here appears to be a reference to a separate license amendment request not at issue here. Paragraph 51 is the only numbered paragraph in a section that discusses Entergy's pending request to implement at Palisades the alternate fracture toughness requirements in 10 C.F.R. § 50.61a, a matter the NRC is addressing separately. Gundersen Declaration § IX (unnumbered paragraph preceding ¶ 51). *See generally* CLI-15-22, 82 NRC 310. Even if paragraph 51 can be read as discussing the license amendment request at issue here, it does not provide sufficient support for Petitioners' contention.

⁴⁴ Petition at 21-22.

⁴⁵ *See id.* at 22.

⁴⁶ Compare LBP-15-20, 81 NRC at 856-61 with Petition at 21-22.

⁴⁷ LBP-15-20, 81 NRC at 857.

⁴⁸ *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22.

⁴⁹ *Palo Verde*, CLI-91-12, 34 NRC at 155.

the “vague speculation” in the Greenpeace Report “that this type of flaw may exist in other reactor vessels [than the two Belgian reactor vessels discussed in the Greenpeace Report] is not sufficient to establish a material challenge” to the license amendment request.⁵⁰

III. CONCLUSION

As discussed above, we find that the Board erred in finding that Petitioners had satisfied our contention admissibility criteria. Therefore, we *reverse* the Board’s decision in LBP-15-20 and *direct* the Licensing Board to terminate this proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of November 2015.

⁵⁰LBP-15-20, 81 NRC at 866-67 (Arnold, J., dissenting).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

**Docket Nos. 50-247-LR
50-286-LR**

**ENTERGY NUCLEAR
OPERATIONS, INC.
(Indian Point, Units 2 and 3)**

November 9, 2015

INTERLOCUTORY REVIEW

The Commission disfavors interlocutory review, and is particularly disinclined to interfere with a Board's case management decisions. Such rulings can be reviewed, if necessary, at the end of the case. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-12-18, 76 NRC 371, 374 (2012) (declining to take interlocutory review of Board's decision to allow cross-examination); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008) (declining to take interlocutory review of Board's decision to cancel oral argument).

INTERLOCUTORY REVIEW

Interlocutory Commission review of a Board's statements concerning the probative value of a particular document was not warranted. The petitioner was not threatened with irreparable harm to its ability to present its case and will be able, following a final decision, to object to the weight afforded to that particular document.

INTERLOCUTORY REVIEW

Board's decision to allow a third party to argue in favor of protecting its own document as proprietary did not affect the basic structure of the proceeding in a pervasive and unusual manner nor did it pose a serious, irreparable harm to petitioner.

INTERLOCUTORY REVIEW

Board's decision not to withdraw the proprietary designation of certain documents may be reviewed following the Board's initial decision, and did not call for immediate Commission review.

MEMORANDUM AND ORDER

The State of New York seeks review of the Atomic Safety and Licensing Board's recent order denying New York's motion to withdraw a proprietary designation from certain documents produced by Entergy Nuclear Operations, Inc. in this license renewal proceeding.¹ As discussed below, we find that New York has not met the standards for interlocutory review and we therefore deny review at this time.

I. BACKGROUND

New York has been a party to this license renewal proceeding since its inception.² In August 2009, the parties negotiated a Protective Order that they jointly submitted to the Board for approval.³ The Board issued the Protective Order shortly thereafter; that Protective Order governs the disclosure and use in this proceeding of documents that Entergy (or any other participant) claims contain proprietary trade secrets and/or proprietary commercial or financial information.⁴

As part of its mandatory disclosures, Entergy identified and disclosed the existence of the five documents here at issue, which it designated as proprietary

¹ Order (Denying New York Motion to Withdraw Proprietary Designation) (July 20, 2015) (unpublished) (July 20 Order); *see* State of New York Petition Pursuant to 10 C.F.R. § 2.341 for Commission Interlocutory Review of the July 20, 2015 Atomic Safety and Licensing Board Order Denying New York Motion to Withdraw Proprietary Designation (Aug. 14, 2015) (Petition) (nonpublic).

² *See generally* LBP-08-13, 68 NRC 43 (2008) (ruling on standing and contention admissibility).

³ *See* Joint Motion for Entry of a Protective Order (Aug. 14, 2009).

⁴ Protective Order (Sept. 4, 2009) (unpublished).

information.⁵ Following requests for disclosure, Entergy produced the documents, unredacted, to New York under the Protective Order. Four of these documents are Calculation Notes concerning environmentally assisted fatigue prepared by Westinghouse Electric Company, LLC (Westinghouse).⁶ The fifth document is an internal memorandum prepared by the Pressurized Water Reactor Owners' Group (PWROG) addressing technical and regulatory issues related to the resolution of NRC Staff Branch Technical Position 5-3.⁷

Earlier this year, New York filed a motion seeking to remove the proprietary designation of those documents, which would allow their public disclosure.⁸ Westinghouse sought leave to "appear specially" before the Board to contest New York's motion.⁹ New York opposed Westinghouse's motion, arguing among other things that Westinghouse had not cited authority allowing such participation.¹⁰

⁵ See Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations (Apr. 20, 2015) at 3 n.11 (listing disclosure updates).

⁶ New York has identified the Calculation Notes as evidentiary exhibits for the upcoming hearing on "Track 2" contentions. See Pre-filed Ex. NYS000366, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation, CN-PAFM-09-77 (2010) (ADAMS Accession No. ML11356A371) (nonpublic); Pre-filed Ex. NYS000510, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations, CN-PAFM-12-35 (2012) (ADAMS Accession No. ML15160A339) (nonpublic); Pre-filed Ex. NYS000511, Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations, CN-PAFM-13-32 (2013) (ADAMS Accession No. ML15160A340) (nonpublic); Pre-filed Ex. NYS000512, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations, CN-PAFM-13-40 (2013) (ADAMS Accession No. ML15160A341) (nonpublic).

⁷ New York has also identified the PWROG Memorandum as a hearing exhibit. Pre-filed Ex. NYS000519, BTP 5-9 Industry Issue Executive Review (Oct. 28, 2014) (ADAMS Accession No. ML15160A342) (nonpublic) (PWROG Memorandum); see also Declaration of W. Anthony Nowinowski (May 29, 2015) (Attachment 2 to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents (June 4, 2015, refiled June 17, 2015)) ¶4 (nonpublic) (Joint Brief); NUREG-0800, Rev. 2, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, LWR Edition, Branch Technical Position 5-3, "Fracture Toughness Requirements" (Mar. 2007) (ADAMS Accession No. ML070850035).

⁸ State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (Apr. 9, 2015). Entergy opposed New York's motion; the Staff took no position. Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations (Apr. 20, 2015); NRC Staff's Answer to "State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" (Apr. 20, 2015, corrected Apr. 21, 2015).

⁹ Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents (May 5, 2015) (Westinghouse Motion).

¹⁰ State of New York Answer Opposing Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with the State's Motion to Withdraw Proprietary Designations of Westinghouse and PWROG Documents (May 6, 2015).

The Board held a telephonic oral argument on the motion and permitted Westinghouse's representative to participate therein on behalf of Westinghouse and the PWROG.¹¹ Following oral argument, in response to Westinghouse's request, the Board allowed Westinghouse to brief the issue of the proprietary designations jointly with Entergy.¹²

In July, the Board denied New York's motion. The Board found that the four Calculation Notes contained confidential commercial information, which is entitled to protection under 10 C.F.R. § 2.390(a)(4).¹³ Specifically, the Board found that the Calculation Notes had been "maintained in confidence" by Westinghouse and that their release "likely would lead to substantial competitive harm" to Westinghouse.¹⁴

Regarding the PWROG Memorandum, the Board held that the case for "competitive harm" from disclosure was "marginal at best" but that further briefing on the question would not be a "useful expenditure of resources" because, in the Board's view, the memorandum itself lacked probative value and would not be received in evidence.¹⁵ The Board observed that New York's experts could, however, provide their views on the document to the Board; "the probative evidence would be [New York's] experts' opinion supported by their qualifications and reasoning."¹⁶

New York's petition for review followed. The Staff and Entergy oppose interlocutory review.¹⁷

¹¹ See Transcript of May 14, 2015, Teleconference at 4639-716 (nonpublic) (Tr.).

¹² See Tr. at 4709-10; Joint Brief.

¹³ July 20 Order at 6; see 10 C.F.R. § 2.390(a)(4).

¹⁴ July 20 Order at 7.

¹⁵ *Id.* at 6. The Board likewise concluded that release of the memorandum would not benefit the public. *Id.*

¹⁶ *Id.*

¹⁷ NRC Staff's Answer in Opposition to State of New York's Petition for Interlocutory Review of the Atomic Safety and Licensing Board's Order (Denying New York Motion to Withdraw Proprietary Designation) (Sept. 8, 2015) (Staff Answer); Entergy's Answer Opposing New York State's Petition for Interlocutory Review of July 20, 2015 Licensing Board Order (Sept. 8, 2015); see also State of New York Combined Reply in Support of Petition for Interlocutory Review (Sept. 18, 2015).

Westinghouse seeks leave to file an amicus curiae brief opposing the petition for review. Amicus Curiae Brief of Westinghouse Electric Company Opposing New York Petition for Interlocutory Review (Sept. 8, 2015) (Westinghouse Amicus Brief); Westinghouse Electric Company Motion for Leave to File Amicus Curiae Brief (Sept. 8, 2015). Our rules contemplate amicus briefs only after we grant a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review. 10 C.F.R. § 2.315(d) (permitting the filing of amicus briefs "if a matter is taken up by the Commission under § 2.341 or *sua sponte*"); see also *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-03-9, 58 NRC 39, 44 n.21 (2003). Nonetheless, as a matter of discretion, we have considered Westinghouse's filing here.

II. DISCUSSION

A. Standard of Review

As a rule, we disfavor interlocutory review and grant requests for such review only under “extraordinary circumstances.”¹⁸ We are particularly disinclined to interfere with respect to case management decisions.¹⁹ Without more, the possibility that a Board may have made an incorrect legal ruling does not warrant interlocutory review. Such rulings can be reviewed, if necessary, on appeal from a partial initial decision or other final appealable order.²⁰ Our regulations provide for interlocutory review where the requesting party shows that the Board’s ruling:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer’s final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.²¹

Applying these standards to New York’s petition, we find that immediate review is not warranted.

B. New York Has Not Shown That Interlocutory Review Is Warranted

New York argues that the Board’s order irreparably and adversely affects its ability to put forward its case in the upcoming evidentiary hearing and identifies three specific issues that it claims warrant interlocutory review.²² First, New York

¹⁸ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009) (declining interlocutory review of a Board decision that denied reconsideration of a contention admissibility determination in this case); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

¹⁹ Indeed, we have declined interlocutory review on case management matters throughout this proceeding. See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-12-18, 76 NRC 371, 374 (2012) (declining to take interlocutory review of Board’s decision to allow cross-examination); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008) (declining to take interlocutory review of Board’s decision to cancel oral argument). Further, “[P]rocedural rulings involving discovery . . . rarely meet the standard for interlocutory review.” *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998) (citing, *inter alia*, *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 86 (1981)).

²⁰ *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 209-10 (2011); see also *Private Fuel Storage*, CLI-01-1, 53 NRC at 5; *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

²¹ 10 C.F.R. § 2.341(f)(2).

²² Petition at 1.

argues that the Board “reached beyond the scope of [New York’s motion] to issue a *sua sponte* ruling on the admissibility” of the PWROG Memorandum.²³ With respect to this issue, New York claims that the Board “issued a preemptive, *sua sponte* ruling that the PWROG Memorandum is inadmissible hearsay with ‘no probative value.’”²⁴ New York argues that this ruling effectively prevents New York from using the PWROG Memorandum as evidence in the upcoming hearing.²⁵ Second, New York argues that the Board “improperly shift[ed] the burden to [New York]” to show that the documents were not proprietary and otherwise failed to address certain of its arguments.²⁶ Among these, New York argues that the Board neglected to address its argument that, even if the documents are proprietary, the public interest in disclosure outweighs the need to protect a company’s competitive position.²⁷ Third, New York argues that the Board erred in allowing Westinghouse to participate in the proceeding “without explaining the nature or extent of its rights or obligations.”²⁸ New York claims that the Board’s ruling leaves Westinghouse’s role in the proceeding “unclear,” which in turn both threatens New York with immediate and serious irreparable impact and affects the basic structure of the proceeding.²⁹ As discussed below, these arguments do not demonstrate the need for interlocutory review.

First, we find that the Board’s statements concerning the probative value of the PWROG Memorandum have not caused New York irreparable injury.³⁰ Whether the Board erred in its treatment of the PWROG Memorandum is a matter that can be addressed following an initial decision.³¹ In the meantime, the Board’s ruling does not impair New York’s ability to present its case. Notwithstanding its views on the memorandum, the Board provided a path forward for New York to address the same or similar information through its experts.³² New York has the five unredacted documents in its possession and is not constrained from using any

²³ *Id.* at 1, 17-20.

²⁴ *Id.* at 17 (citing July 20 Order at 6).

²⁵ Petition at 20.

²⁶ *Id.* at 1, 20-25.

²⁷ *Id.* at 23-24.

²⁸ Petition at 1, 14-17.

²⁹ *Id.* at 16-17.

³⁰ See *Hydro Resources*, CLI-98-8, 47 NRC at 324.

³¹ Cf. *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977) (“[D]uring the course of lengthy proceedings licensing boards must make numerous interlocutory rulings, many of which deal with the reception of evidence and the procedural framework under which it will be admitted. It simply is not our role to monitor these matters on a day-to-day basis; were we to do so, ‘we would have little time for anything else.’”) (quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99 (1976)).

³² July 20 Order at 6.

or all of them in support of its case. And New York will have the opportunity at the end of this proceeding to raise an objection to the weight ultimately accorded by the Board to the PWROG Memorandum. At that time, New York may also renew its claim that “the Board shifted to [New York] the burden to show that the PWROG Memo was admissible evidence.”³³ In sum, the Board’s decision to withhold the documents from public disclosure at this time does not prevent New York from fully litigating its claims in this proceeding.

Nor does New York’s claim that the Board’s order imposes a “significant administrative burden”³⁴ on the state present a prejudicial procedural error warranting immediate review. Filing nonpublic versions and redacted, public versions of certain documents is part of the ordinary administrative burden involved in participating in litigation and does not merit interlocutory review.³⁵ As the Staff points out, New York must file nonpublic versions of other documents and therefore a portion of the evidentiary hearing will be held *in camera* in any event.³⁶

Further, we decline to provide immediate review of the Board’s actions with respect to Westinghouse’s participation. New York has not demonstrated that Westinghouse’s participation in the case has posed serious irreparable impact or affected the basic structure of this proceeding. In particular, the adjudicatory record does not bear out New York’s claim that it must prepare for the upcoming hearing “without knowing whether or how Westinghouse will participate.” The record to date reflects that Westinghouse’s participation has been limited to the protection of its interests with respect to the proprietary designation of the five identified documents, and New York has taken the opportunities available to respond to Westinghouse’s arguments and develop the adjudicatory record.³⁷ New York has therefore not demonstrated that interlocutory review is warranted.

³³ Petition at 21.

³⁴ *Id.* at 24.

³⁵ See, e.g., *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251, 256 (2011) (expansion of issues for litigation from the board’s denial of motion for summary disposition had neither a “pervasive and unusual effect” on the litigation nor a “serious and irreparable impact” to the moving party); *Indian Point*, CLI-09-6, 69 NRC at 133-36 (expense is not irreparable harm), 136-38 (increased litigation burden did not have a pervasive effect on the basic structure of the proceeding).

³⁶ See Staff Answer at 9.

³⁷ See Westinghouse Amicus Brief at 6-10; Westinghouse Motion at 1-3 (unnumbered). New York has filed a second motion for disclosure of additional documents authored by Westinghouse. State of New York Motion for Public Disclosure of Various Westinghouse Documents (Oct. 19, 2015) (nonpublic). The record reflects that Westinghouse has sought to participate in activities before the Board associated with this motion — as it has done so far — for the limited purpose of addressing Westinghouse’s proprietary designations for the documents at issue in that motion. See Order (Granting Westinghouse Electric Company’s Motion for Leave to Appear Specially Regarding

(Continued)

Finally, New York's concerns regarding release of information to the public do not warrant interlocutory review. As discussed above, the Board's decision does not affect New York's ability to pursue its case — New York retains full access to all five documents and has offered all five as evidentiary exhibits for the upcoming hearing.³⁸ Our rules of practice, supplemented in this proceeding by the Protective Order, provide mechanisms to accommodate litigation where nonpublic information may be discussed. In particular, the rules expressly provide for *in camera* hearing sessions where information sought to be withheld from public disclosure is offered into evidence.³⁹ New York will have the opportunity to renew its objections to the proprietary designations at the conclusion of the Board's proceeding. If at that time we determine that information withheld under the Protective Order should have been publicly disclosed, we will direct that such information and the transcript of the related *in camera* session will be made publicly available.⁴⁰

III. CONCLUSION

For the foregoing reasons, we *deny* New York's petition for interlocutory review of the Board's July 20, 2015 Order, without prejudice to its ability to renew its appeal following a partial or final initial decision in this matter.

IT IS SO ORDERED.⁴¹

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of November 2015.

Additional Proprietary Documents) (Nov. 3, 2015) (unpublished). As the case goes forward, we expect that New York (like any other party) will have the opportunity, as provided by our rules, to fully respond to Westinghouse's arguments.

³⁸ See *supra* notes 6 & 7.

³⁹ 10 C.F.R. § 2.390(b)(6) ("*In camera* sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence."); Protective Order ¶L.

⁴⁰ 10 C.F.R. § 2.390(b)(6); see *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160 (2005) (ruling on the disclosure and redaction of various kinds of information in the adjudicatory record and in several Board and Commission decisions issued over the course of the proceeding).

⁴¹ Chairman Burns did not participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

Docket No. 72-10-ISFSI-2
(ASLBP No. 12-922-01-ISFSI-MLR-BD01)

**NORTHERN STATES POWER
COMPANY**
**(Prairie Island Nuclear Generating
Plant Independent Spent Fuel
Storage Installation)**

November 4, 2015

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(SETTLEMENT APPROVAL PROCESS)**

NRC regulations permit licensing boards broad powers necessary 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.” Under this authority and the provisions of 10 C.F.R. § 2.338, boards are empowered to approve settlements proposed by the parties.

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(SETTLEMENT APPROVAL PROCESS)**

In the Board’s estimation, it is not necessary for a notice of hearing to be issued before the Board can approve this settlement. The Commission’s regulations, viewed in context, contemplate presiding officer approval of proposed settlements in proceedings with admitted contentions.

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(SETTLEMENT APPROVAL PROCESS)**

Before 2004, the settlement provision for Subpart L proceedings was found in 10 C.F.R. § 2.1241, and stated explicitly that “[a] settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding.” While this provision was replaced by the more general one governing settlements found in 10 C.F.R. § 2.338, the Commission explicitly noted that this change was made to consolidate regulatory text and provide guidance on the use of alternative dispute resolution; it was not adopted to effect any material alteration in the process for accepting settlements.

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(SETTLEMENT APPROVAL PROCESS)**

That the Commission still requires presiding officer approval for settlements in contested proceedings with admitted contentions is evidenced from other provisions of section 2.338.

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
(SETTLEMENT APPROVAL PROCESS)**

Of the three provisions that were combined in the 2004 rulemaking, only 10 C.F.R. § 2.203 (2003), which was itself limited to enforcement proceedings, referred to a notice of hearing as part of the settlement procedure. It is the Board’s estimation that the regulatory language in no way limits the Board’s responsibility to approve settlements to instances only where a notice of hearing, a procedural document, has previously been issued.

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED CASES
 (“PUBLIC INTEREST” INQUIRY)**

Licensing boards are to approve settlements when they are fair and reasonable and comport with the public interest. The parties appear in agreement that Northern States’ revisions to its license and Aging Management Program satisfy the Prairie Island Indian Community’s concerns, and the Prairie Island Indian Community has consented in its Settlement Agreement to the dismissal of Contention 6. The Board finds dismissal of this contention, in accordance with the terms of the parties’ Settlement Agreement, to be in the public interest and consistent with the Commission’s policy to encourage fair and reasonable settlement and resolution of issues proposed for litigation.

ORDER
(Approving Settlement, Eliminating Disclosures, and Terminating Proceeding)

On October 16, 2015, the Northern States Power Company (“Northern States”), the Prairie Island Indian Community (“PIIC”), and the NRC Staff jointly moved to settle and dismiss the sole remaining admitted contention in this proceeding, which concerns the storage of high-burnup spent nuclear fuel:¹

Contention 6: [Northern States’] License Renewal Application Is Deficient Because It Did Not Adequately Address the Potential Degradation of High Burnup Fuel Due to Aging During Storage, Subsequent Handling, and Transportation. 10 CFR § 72.122 Requires Confinement Barriers and Systems to Protect Degradation of Fuel and to Not Pose Operational Safety Problems.²

As discussed below, the Board *grants* the joint motion and *terminates* the proceeding.³

I. PROCEDURAL BACKGROUND

This proceeding arises from Northern States’ application for a 40-year extension of its license to operate the Prairie Island Independent Spent Fuel Storage Installation (“ISFSI”). On December 20, 2012, the Board granted PIIC’s petition to intervene, admitted three of PIIC’s seven proffered contentions,⁴ and held in abeyance certain other contentions related to “waste confidence,” i.e., the long-term storage of spent nuclear fuel.⁵ On November 19, 2013, the NRC published a Draft Environmental Assessment, as well as a Draft Finding of No Significant Impact, regarding the extension of Northern States’ ISFSI license.⁶ PIIC subsequently moved to admit several renewed and/or amended contentions,

¹ See Joint Motion for Approval of Settlement and Dismissal of PIIC Contention 6 and Termination of Proceeding (Oct. 16, 2015) [hereinafter “Settlement Motion”].

² See LBP-12-24, 76 NRC 503, 526 (2012).

³ On October 23, 2015, the parties jointly moved to suspend disclosure obligations while the Board considered the Settlement Motion. Joint Motion to Suspend Disclosure Obligations Pending Settlement at 1-2 (Oct. 23, 2015). Since the parties’ Settlement Motion is being granted, this October 23 motion is now *moot*.

⁴ See LBP-12-24, 76 NRC at 511-23, 527-28, 530 (admitting Contentions 2 and 4 in part, and Contention 6 in whole).

⁵ *Id.* at 530 (holding in abeyance all of Contention 1 and a portion of Contentions 2 and 4).

⁶ 78 Fed. Reg. 69,460 (Nov. 19, 2013).

and the Board admitted an additional contention and amended others.⁷ After all the waste confidence contentions were dismissed following completion of the so-called Continued Storage Rule,⁸ three environmental contentions and one safety contention remained.⁹

The parties thereafter engaged in settlement discussions regarding the admitted contentions, and on March 10, 2015, the Board approved the parties' joint motion to settle and dismiss the three environmental contentions in the proceeding.¹⁰ On March 27, 2015, Northern States sought summary disposition of Contention 6, the remaining safety contention in the proceeding.¹¹ On April 27, 2015, PIIC answered and filed a cross-motion for partial summary disposition.¹² The parties then entered into settlement discussions regarding Contention 6, and the Board agreed to defer temporarily the deadline for further pleadings, as well as any ruling on the dispositive cross-motions, while those settlement discussions proceeded.¹³ On October 16, 2015, the parties filed the instant Settlement Motion.

II. SETTLEMENT PROPOSAL

The parties state that, as part of the settlement, Northern States has "agreed to several revisions" of its Aging Management Program ("AMP") regarding high burnup fuel, "and to a revised license condition requiring submission of

⁷ LBP-14-6, 79 NRC 404, 433 (2014) (admitting renewed, amended Contention 3 and amending Contention 2). The Board continued to hold in abeyance certain contentions or portions of contentions addressing waste confidence issues. *Id.* (holding in abeyance amended Contention 1 and a portion of amended Contention 2).

⁸ See Licensing Board Order (Dismissing Waste Confidence-Based Contentions in Accordance with CLI-14-08) at 5 (Oct. 2, 2014) (unpublished).

⁹ PIIC also moved to admit an additional contention relating to the Continued Storage Rule and the trust responsibility due Indian Tribes, but its motion was denied. LBP-14-16, 80 NRC 183 (2014). LBP-14-16 also provides a thorough background discussion of the proceeding prior to 2015. *Id.* at 186-90.

¹⁰ Licensing Board Order (Approving Settlement and Dismissal of Contentions 2 Through 4) (Mar. 10, 2015) (unpublished).

¹¹ Northern State Power Company's Motion for Summary Disposition of the Prairie Island Indian Community's Contention 6 (High Burnup Fuel) (Mar. 27, 2015) [hereinafter "Northern States' Summary Disposition Motion"].

¹² PIIC's Answer to [Northern States'] Motion for Summary Disposition of PIIC's Contention 6 (High Burnup Fuel) & Cross Motion for Partial Summary Disposition of PIIC's Contention 6 (High Burnup Fuel) (Apr. 27, 2015).

¹³ Licensing Board Order (Approving Deferral of Answers & Ruling on Contention 6 Summary Disposition Motions) at 2 (May 11, 2015) (unpublished).

certain [evaluations] related to the continued storage of [high burnup fuel].”¹⁴ As initially proposed, the license would have allowed for compliance with the high-burnup fuel AMP in one of two ways. The AMP required Northern States to evaluate data arising from a U.S. Department of Energy pilot project on dry cask storage of high-burnup fuel (“DOE Project”) at certain formal points in time, called “Tollgate[s],” to confirm that the high-burnup fuel assemblies at the Prairie Island ISFSI are operating within their licensing basis.¹⁵ However, insofar as the DOE Project results were either unavailable or unreliable, Northern States could satisfy the requirements of the AMP with an alternative program meeting the requirements of NRC Interim Staff Guidance-24.¹⁶ But, under the Settlement Agreement, mere compliance with NRC Interim Staff Guidance-24 no longer will be an available option to Northern States unless it obtains a license amendment authorizing the use of such an alternative program.¹⁷ Accordingly, Northern States has agreed to revise its AMP to require the evaluation of data from the DOE Project as the sole method to confirm that the high-burnup fuel assemblies meet their intended function while in the ISFSI.¹⁸

To implement this agreement, the amended AMP will require Northern States to simultaneously provide the NRC and PIIC with ISFSI performance evaluation data to be gathered in 2038 at the second of multiple Tollgate evaluations.¹⁹ If the Tollgate 2 evaluation in 2038 indicates that the high-burnup fuel cladding “will not meet its intended function” when stored in the ISFSI, then Northern States must seek a license amendment to identify “proposed actions for addressing the

¹⁴ Settlement Motion at 3. The proposed settlement agreement is provided as Attachment 1 to the Settlement Motion. *See id.*, Attach. 1, Settlement Agreement Between the Prairie Island Indian Community and Northern States Power Company (Oct. 8, 2015) [hereinafter “Settlement Agreement”].

¹⁵ Settlement Motion at 3; Northern States’ Summary Disposition Motion at 3. Northern States would use the data from the DOE Project “to determine (1) whether degradation is occurring, and (2) the actions required to manage fuel and cladding performance.” *See* Northern States’ Summary Disposition Motion at 10.

¹⁶ Settlement Motion at 3.

¹⁷ *Id.* at 4 (“This change removes [Northern States]’s ability to rely on an alternative program meeting [Interim Staff Guidance]-24 to gather confirmatory data unless the new program is approved by the NRC through a license amendment request.”).

¹⁸ *See id.* It is worth stressing that the data from the DOE Project would not be used to the exclusion of other information. Under the revised AMP, Northern States at all times must also “monitor, evaluate, and trend the information via its Operating Experience Program and/or the Corrective Action Program” to evaluate the performance of the high burnup fuel assemblies in its ISFSI. Settlement Agreement, Attach. A, Revision to High Burnup Fuel AMP § A3.5.

¹⁹ Settlement Motion at 4; Settlement Agreement ¶ 1; Settlement Agreement, Attach. A, Revision to High Burnup Fuel AMP § A3.5. A license condition will be added to ensure that Northern States provides the results from both the first and second Tollgate evaluations to the NRC. Settlement Motion at 4.

issues identified by the Tollgate 2 evaluation.”²⁰ In addition, if by January 1, 2033 — which is roughly 5 years before the Tollgate 2 evaluation — “it becomes evident that the DOE Project will not be completed in time to support the Tollgate 2 evaluation,” Northern States must submit a license amendment to use another method, such as Interim Staff Guidance-24, to confirm that its high-burnup fuel assemblies are still meeting the requirements of the high-burnup fuel AMP.²¹ Moreover, PIIC retains the right to participate in any license amendment proceeding concerning the issues addressed in the Settlement Agreement.²² The parties also have agreed to meet every 6 months to discuss “the status of the high burnup fuel AMP, the DOE Cask Demonstration Project and other spent fuel storage issues.”²³

NRC regulations permit licensing boards broad powers necessary 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.”²⁴ Under this authority and the provisions of 10 C.F.R. § 2.338, boards are empowered to approve settlements proposed by the parties.²⁵ Licensing boards

²⁰ Settlement Motion at 4; Settlement Agreement ¶ 1.

²¹ Settlement Motion at 4; Settlement Agreement ¶ 1.

²² See Settlement Agreement ¶ 3.

²³ *Id.* ¶ 2; see also Settlement Motion at 4.

²⁴ 10 C.F.R. § 2.319.

²⁵ The parties bring this settlement request “[p]ursuant to 10 C.F.R. § 2.338(i).” Settlement Motion at 1. The first sentence of 10 C.F.R. § 2.338(i) states: “*Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding*” (emphasis added). Here, however, no notice of hearing has been issued. Nevertheless, in the Board’s estimation, it is not necessary for a notice of hearing to be issued before the Board can approve this settlement. The Commission’s regulations, viewed in context, contemplate presiding officer approval of proposed settlements in proceedings with admitted contentions.

Before 2004, the settlement provision for Subpart L proceedings was found in 10 C.F.R. § 2.1241, and stated explicitly that “[a] settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding.” *Id.* § 2.1241 (2003). While this provision was replaced by the more general one governing settlements found in 10 C.F.R. § 2.338, the Commission explicitly noted that this change was made to consolidate regulatory text and provide guidance on the use of alternative dispute resolution; it was not adopted to effect any material alteration in the process for accepting settlements. See Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004) (“Section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement (10 CFR 2.203, 2.759, 2.1241). . . . The Commission intends no change in the bases for accepting a settlement under the new rule.”). That the Commission still requires presiding officer approval for settlements in contested proceedings with admitted contentions is evidenced from other provisions of section 2.338. See 10 C.F.R. § 2.338(g) (“A settlement 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.”).

Of the three provisions that were combined in the 2004 rulemaking, only 10 C.F.R. § 2.203 (2003),
(Continued)

are to approve settlements when they are “fair and reasonable and comport[] with the public interest.”²⁶ The parties appear in agreement that Northern States’ revisions to its license and AMP satisfy PIIC’s concerns,²⁷ and PIIC has consented in its Settlement Agreement to the dismissal of Contention 6.²⁸ The Board finds dismissal of this contention, in accordance with the terms of the parties’ Settlement Agreement, to be in the public interest and consistent with the Commission’s policy to encourage “fair and reasonable settlement and resolution of issues proposed for litigation.”²⁹ We therefore *grant* the Settlement Motion. A copy of the Settlement Agreement is provided as Attachment 1 to this Order.

III. CONCLUSION

As there are no remaining contentions in this proceeding, this proceeding is hereby *terminated*.³⁰ Concomitantly, the cross-motions for summary disposition filed by Northern States and PIIC are dismissed as *moot*.

which was itself limited to enforcement proceedings, referred to a notice of hearing as part of the settlement procedure. *See id.* § 2.203 (2003) (“At any time after the issuance of an order designating the time and place of hearing . . . the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty.”). This language has been present since 1962. *See* Final Rule: “Revision of Rules,” 27 Fed. Reg. 377, 380 (Jan. 13, 1962). Consequently, it is the Board’s estimation that this language in no way limits the Board’s responsibility to approve settlements to instances only where a notice of hearing, a procedural document, has previously been issued; rather, this language requires presiding officer approval of settlements after contentions have been admitted and “set for hearing.” *See* Final Rule: “Civil Penalties,” 36 Fed. Reg. 16,894, 16,895 (Aug. 26, 1971).

²⁶ *See, e.g., Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-01-27, 54 NRC 219, 219 (2001), *review declined*, SECY Memorandum to Board and Parties on Order Approving Settlement and Terminating Proceeding (Nov. 19, 2001) (ADAMS Accession No. ML013230492).

²⁷ Settlement Motion at 5. Although the Staff is not a signatory to the Settlement Agreement, *see* Settlement Agreement at 3, the Settlement Motion indicates that the Staff has agreed to the changes in the AMP and to the revised license condition requiring the submission of certain information related to the continued storage of high-burnup fuel. *See* Settlement Motion at 3-4.

²⁸ Settlement Agreement ¶ 4.

²⁹ 10 C.F.R. § 2.338.

³⁰ *Exelon Generation Co., LLC* (Byron Nuclear Power Station, Units 1 and 2), CLI-14-6, 79 NRC 445, 449 (2014) (“Under our practice, ‘once all contentions have been decided, the contested [adjudicatory] proceeding is terminated.’” (quoting *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699 (2012) (modification in original))).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 4, 2015

ATTACHMENT 1

SETTLEMENT AGREEMENT BETWEEN THE PRAIRIE ISLAND INDIAN COMMUNITY AND NORTHERN STATES POWER COMPANY

This Settlement Agreement is made and entered into as of October 8, 2015, by and between the Prairie Island Indian Community (“PIIC”) and Northern States Power Company, a Minnesota corporation (“NSPM”), hereinafter referred to collectively as “Parties.”

WHEREAS, NSPM has submitted a License Renewal Application, dated October 20, 2011, (“LRA”) to the U.S. Nuclear Regulatory Commission (“NRC”), seeking renewal of the Prairie Island Independent Fuel Storage Installation (“ISFSI”) site-specific license, Special Nuclear Material License No. 2506;

WHEREAS, on August 24, 2012, the PIIC filed a Request for Hearing and Petition to Intervene (“Petition”) in the NRC proceeding to renew the ISFSI license, Docket No. 72-10. Among the contentions that PIIC raised in its Petition was a contention relating to the potential degradation of high burnup fuel during the extended storage period (“Contention 6”);

WHEREAS, on November 8, 2012, the Atomic Safety and Licensing Board established to preside over the proceeding (“ASLB”) heard oral arguments regarding the Petition, including the admissibility of PIIC Contention 6;

WHEREAS, on December 20, 2012, the ASLB granted the Petition and admitted three contentions including, as limited by the ASLB, PIIC Contention 6;

WHEREAS, on July 31, 2014, NSPM responded to NRC requests for additional information (“RAI Response”) and provided a high burnup fuel aging management program (“AMP”) that relies on the Department of Energy’s High Burnup Fuel Cask Research and Development Project (“DOE Cask Demonstration Project”) to monitor the performance of high burnup fuel during storage;

WHEREAS, on February 27, 2015, NSPM provided a presentation to PIIC representatives regarding the potential degradation of high burnup fuel during storage, NSPM’s AMP and the DOE Cask Demonstration Project;

WHEREAS, in order to address the PIIC’s concerns, NSPM and PIIC agreed that NSPM’s high burnup fuel AMP would be revised and submitted to the NRC in substantially the same form as provided in Attachment A;

WHEREAS, PIIC and NSPM both desire that PIIC remain informed of activities related to NSPM’s high burnup fuel AMP and the DOE Cask Demonstration

Project results, as well as other developments associated with continued storage of fuel at the ISFSI.

NOW, THEREFORE, in consideration of the premises and mutual promises herein, PIIC and NSPM agree as follows:

1. As provided in the high burnup fuel AMP revision in Attachment A, NSPM agrees to provide the evaluation of high burnup fuel performance required by Tollgate 2 to the NRC with simultaneous copies to PIIC. NSPM further agrees that, if the Tollgate 2 evaluation indicates that the high burnup fuel will not meet its intended function, it will submit a license amendment request to the NRC with its proposed actions to address the issue indicated by the evaluation and to continue safe storage of high burnup fuel. Finally, NSPM agrees that if by January 1, 2033, it becomes evident that the DOE Cask Demonstration Project will not be completed in time to support the Tollgate 2 evaluation, NSPM will submit a license amendment request to the NRC outlining its plans to demonstrate that the fuel performance acceptance criteria specified in the high burnup fuel AMP will continue to be met. This license amendment request will be submitted no later than December 31, 2033.

2. NSPM agrees to meet in person or telephonically with PIIC representatives, its members, and/or its technical expert(s) at six-month intervals (i.e. separately or during quarterly staff meetings) to discuss and receive feedback concerning the status of the high burnup fuel AMP, the DOE Cask Demonstration Project and other spent fuel storage issues. The purpose of these interactions is to enhance open communication and PIIC involvement with and interchange of information concerning the continued storage of spent fuel at NSPM's Prairie Island ISFSI. The updates on the high burnup spent fuel issue will include, among other things: a description of significant licensee, industry, and government meetings on the high burnup spent fuel issue; a discussion of contentions and decisions from other NRC licensing proceedings involving high burnup spent fuel; and other items of interest that may have a bearing on the high burnup spent fuel issue. The meetings will also include a forecast of significant activities over the next six-month period.

3. PIIC agrees that NSPM's revised high burnup fuel AMP and the NRC's license condition requiring submittal of Tollgate 1 and 2 evaluations to the NRC address PIIC's concerns raised in PIIC Contention 6; provided, however, that PIIC reserves the right provided for in NRC regulations to participate in any license amendment proceeding to modify the Tollgate 1 and 2 evaluation requirements set forth in NSPM's revised high burnup fuel AMP or the NRC's license condition requiring submittal of Tollgate 1 and 2 evaluations to the NRC (including any license amendment proceeding initiated in accordance with paragraph 1), and to

reassert, without restriction, PIIC's concerns raised in PIIC Contention 6 in any such license amendment proceeding.

4. PIIC consents to the dismissal of PIIC Contention 6 and agrees to take such other actions as may be reasonably necessary to obtain the dismissal of Contention 6. PIIC and NSPM agree to file a joint motion seeking a Consent Order from the ASLB approving this Settlement Agreement and dismissing PIIC Contention 6.

5. NSPM and PIIC expressly waive any and all further procedural steps before the ASLB or any right to challenge or contest the validity of any order entered by that Board in accordance with this Settlement. The Parties also expressly waive all rights to seek administrative and judicial review or otherwise to contest the validity of any order entered by the ASLB approving this Settlement Agreement and the dismissal of PIIC Contention 6, so long as such order is fully consistent with each provision of this Settlement Agreement.

6. NSPM and PIIC agree that an order entered by the ASLB in accordance with this Settlement Agreement will have the same force and effect as an order entered after a full hearing.

7. NSPM and PIIC acknowledge this Settlement Agreement resolves the matters identified in this Settlement Agreement that are required to be adjudicated.

8. This Settlement Agreement shall be effective upon the last signature dated below. In the event that the ASLB disapproves this Settlement Agreement, it shall be null and void.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be signed by their respective representatives on the dates indicated below.

For NORTHERN STATES POWER COMPANY — MINNESOTA
Kevin Davison 10-6-2015
Site Vice President,
Prairie Island Nuclear Generating Plant

For the PRAIRIE ISLAND INDIAN COMMUNITY
By:
Ronald Johnson 10.8.15
Tribal Council President

ATTACHMENT*

Attachment A to Contention 6 Settlement **Revision to HBF AMP**
Prairie Island Independent Spent Fuel Storage Installation
Application for Renewed ISFSI Site-Specific License
Aging Management Program — Revision 2

These recommendations have been addressed at PINGP and are incorporated in the applicable existing PINGP maintenance procedures.

Precedent License Renewal Applications OE

A review of precedent ISFSI license renewal applications was performed to evaluate any relevant operating experience. ISFSIs included in this review were Calvert Cliffs Nuclear Power Plant, H. B. Robinson Steam Electric Station, and Surry Power Station. The results of these reviews concluded that the Prairie Island ISFSI Inspection and Monitoring Activities Program is effective in monitoring and detecting degradation and taking effective corrective actions as needed to preclude loss of intended function.

Conclusion

The OE, reviews, and monitoring described above confirm that any potential aging effects will be identified, evaluated, and managed effectively, ensuring that these structures and components remain capable of performing their intended functions.

A2.10.3 Comparison to NUREG-1927 Program Element

This PINGP program element is consistent with NUREG-1927, Element 10, Operating Experience.

A3.0 HIGH BURNUP FUEL MONITORING PROGRAM

The Prairie Island ISFSI provides for long-term dry fuel interim storage for high burnup spent fuel assemblies, i.e., fuel assemblies with discharge burnups greater than 45 GWD/MTU, until such time that the spent fuel assemblies may be shipped off-site for final disposition. The cask system presently utilized at the Prairie Island ISFSI for the storage of high burnup spent fuel is the Transnuclear TN-40HT which has a 40 fuel assembly capacity and is designed for outdoor storage.

**Editor's Note:* This attachment encompasses Pages A-19 to A-25 of Appendix A, Aging Management Program. It has been reformatted, and headers and footers omitted, to fit this publication.

The Aging Management Review of the high burnup fuel spent fuel assemblies in a dry inert environment did not identify any aging effects/mechanisms that could lead to a loss of intended function. However, it is recognized that there has been relatively little operating experience, to date, with dry storage of high burnup fuel. Reference A5.8 provides a listing of a significant amount of scientific analysis examining the long term performance of high burnup spent fuel. These analyses provide a sound foundation for the technical basis that long term storage of high burnup fuel, i.e., greater than 20 years, may be performed safely and in compliance with regulations. However, it is also recognized that scientific analysis is not a complete substitute for confirmatory operating experience. Therefore, the purpose of the High Burnup Fuel Monitoring Program is to confirm that the high burnup fuel assemblies' intended function(s) are maintained during the period of extended operations.

A description of the High Burnup Fuel Monitoring Program is provided below. Although the program is a confirmatory program, the description below uses each attribute of an effective AMP as described in NUREG-1927 for the renewal of a site-specific Part 72 license to the extent possible.

A3.1 AMP Element 1: Scope of the Program

Fuel Stored in a TN-40HT Cask is limited to an assembly average burnup of 60 GWd/MTU (note that the nominal burnup value is lower to account for uncertainties). The cladding materials for the Prairie Island high burnup fuel are Zircaloy-4 and Zirlo™, and the fuel is stored in a dry helium environment. High burnup fuel was first placed into dry storage in a TN-40 HT cask on April 4, 2013.

The High Burnup Fuel Monitoring Program relies upon the joint Electric Power Research Institute (EPRI) and Department of Energy (DOE) "High Burnup Dry Storage Cask Research and Development Project" (HDRP) (Reference A5.9) or an alternative program meeting the guidance in Interim Staff Guidance (ISG) 24, Reference A5.10, as a surrogate program to monitor the condition of high burnup spent fuel assemblies in dry storage.

The HDRP is a program designed to collect data from a spent nuclear fuel storage system containing high burnup fuel in a dry helium environment. The program entails loading and storing a TN-32 bolted lid cask (the Research Project Cask) at Dominion Virginia Power's North Anna Power Station with intact high burnup spent nuclear fuel (with nominal burnups ranging between 53 GWd/MTU and 58 GWd/MTU). The fuel assemblies to be used in the program include four different kinds of cladding

(Zircaloy-4, low-tin Zircaloy-4, Zirlo™, and M5™). The Research Project Cask is to be licensed to the temperature limits contained in ISG-11, Reference A5.7, and loaded such that the fuel cladding temperature is as close to the limit as practicable. Aging effects will be determined for material/environment combinations per ISG-24 Rev. 0 or the “High Burnup Dry Storage Cask Research and Development Project” (HDRP).

A3.2 AMP Element 2: Preventive Actions

The High Burnup Fuel Monitoring Program consists of condition monitoring to confirm there is no degradation of a high burnup fuel assembly that would result in a loss of intended function(s). Other than the initial design limits placed on loading operations, no preventive or mitigating attributes are associated with these activities.

During the initial loading operations of the TN-40HT casks, the design and ISFSI Technical Specifications (TS) require that the fuel be stored in a dry inert environment. TS 3.1.1, “Cask Cavity Vacuum Drying,” demonstrates that the cask cavity is dry by maintaining a cavity absolute pressure less than or equal to 10 mbar for a 30 minute period with the cask isolated from the vacuum pump. TS 3.1.2, “Cask Helium Backfill Pressure,” requires that the cask then be backfilled with helium. These two TS requirements ensure that the high burnup fuel is stored in an inert environment thus preventing cladding degradation due to oxidation mechanisms. TS 3.1.2 also requires that the helium environment be established within 34 hours of commencing cask draining. This time requirement ensures that the peak cladding temperature remains below 752°F (i.e., the temperature specified in ISG-11), thus mitigating degradation due to cladding creep.

A3.3 AMP Element 3: Parameters Monitored/Inspected

Either the surveillance demonstration program as described in the HDRP or an alternative program should meet the guidance of ISG-24, Rev. 0.

A3.4 AMP Element 4: Detection of Aging Effects

Either the surveillance demonstration program as described in the HDRP or an alternative program should meet the guidance of ISG-24, Rev. 0.

A3.5 AMP Element 5: Monitoring & Trending

As information/data from a fuel performance surveillance demonstration program becomes available, NSPM will monitor, evaluate, and trend the information via its Operating Experience Program and/or the Corrective

Action Program to determine what actions should be taken to manage fuel and cladding performance, if any.

Similarly, NSPM will use its Operating Experience Program and/or Corrective Action Program to determine what actions should be taken if it receives information/data from other sources than the demonstration program on fuel performance.

Formal evaluations of the aggregate feedback from the HDRP and other sources of information will be performed at the specific points in time during the period of extended operation delineated in the table below. These evaluations will include an assessment of the continued ability of the high burnup fuel assemblies to continue to perform their intended function(s) at each point.

Toll Gate	Year*	Assessment
1	2028	Evaluate information obtained from the HDRP loading and initial period of storage along with other available sources of information. If the HDRP NDE (i.e., cask gas sampling, temperature data) has not been obtained at this point and no other information is available then NSPM has to provide evidence to the NRC that no more than 1% of the HBF has failed.
2	2038	2.a— <ul style="list-style-type: none"> (i) Evaluate information obtained from the destructive (DE) and non-destructive (NDE) examination of the fuel placed into storage in the HDRP along with other available sources of information and provide the evaluation to the NRC with simultaneous copies to the Prairie Island Indian Community. (ii) If the aggregate of this information indicates that the high burnup fuel assemblies will not perform “intended function(s)” — as that term is used in NRC regulations — NSPM will submit a License Amendment Request to NRC

with its proposed actions to address the issues indicated by the evaluation and to continue safe storage of high burnup fuel.

- (iii) If the aggregate of this information confirms the ability of the high burnup fuel assemblies to continue to perform intended function(s) for the remainder of the period of extended operations, subsequent assessments may be cancelled.

2.b If by January 1, 2033 it becomes evident that the HDRP DE of the fuel will not be completed in time to support the assessment required by Toll Gate 2.a, NSPM will submit a License Amendment Request to the NRC outlining its plans to obtain evidence to demonstrate that the fuel performance acceptance criteria 1-4 in element 6 continue to be met. This License Amendment Request will be submitted to the NRC for approval no later than December 31, 2033. The evaluation using this evidence will be completed by 2038.

3	2048	Evaluate any other new information.
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*Assessments are due by April 4 of the year identified in the table

The above assessments are not, by definition, stopping points. No particular action, unless noted in this AMP, other than performing an assessment is required to continue cask operation. To proceed, an assessment of aggregated available operating experience (both domestic and international), including data from monitoring and inspection programs, NRC-generated communications, and other information will be performed. The evaluation will include an assessment of the ability of the high burnup fuel assemblies to continue to perform their intended function(s).

A3.6 AMP Element 6: Acceptance Criteria

- The HDRP or any other demonstration used to provide fuel performance data should meet the acceptance criteria guidance of ISG-24 Rev 0.

- If any of the following fuel performance criteria are exceeded in the HDRP or alternative program, a corrective action is required¹:
 1. Cladding Creep: total creep strain extrapolated to the total approved storage duration based on the best fit to the data, accounting for initial condition uncertainty shall be less than 1%
 2. Hydrogen — maximum hydrogen content of the cover gas over the approved storage period shall be extrapolated from the gas measurements to be less than 5%
 3. Drying — The moisture content in the cask, accounting for measurement uncertainty, shall indicate no greater than one liter of residual water after the drying process is complete
 4. Fuel rod breach — fission gas analysis shall not indicate more than 1% of the fuel rod cladding breaches

A3.7 AMP Element 7: Corrective Actions

The NSPM Corrective Action Program commensurate with 10 CFR 50 Appendix B will be followed.

In addition, at each of the assessments in AMP Section 5, the impact of the aggregate feedback will be assessed and actions taken when warranted. These evaluations will address any lessons learned and take appropriate corrective actions, including:

- Perform repairs or replacements
- Modify this confirmatory program in a timely manner
- Adjust age-related degradation monitoring and inspection programs (e.g., scope, frequency)
- Actions to prevent reoccurrence
- An evaluation of the DCSS to perform its safety and retrievability functions
- Evaluation of the effect of the corrective actions on this component to other safety components.

A3.8 AMP Element 8: Confirmation Process

The confirmation process is part of the NSPM Corrective Action Program and ensures that the corrective actions taken are adequate and appropriate, have been completed, and are effective. The focus of the confirmation process is on the follow-up actions that must be taken to verify effective

¹ While it is not a fuel performance criteria, the spatial distribution and time history of the temperature must be known to evaluate the relationship between the performance of the rods in the HDRP and the HBF rod behavior expected in the TN-40HT cask.

implementation of corrective actions. The measure of effectiveness is in terms of correcting the adverse condition and precluding repetition of significant conditions adverse to quality. Procedures include provisions for timely evaluation of adverse conditions and implementation of any corrective actions required, including root cause evaluations and prevention of recurrence where appropriate. These procedures provide for tracking, coordinating, monitoring, reviewing, verifying, validating, and approving corrective actions, to ensure effective corrective actions are taken.

A3.9 AMP Element 9: Administrative Controls

The NSPM Quality Assurance Program, associated formal review and approval processes, and administrative controls applicable to this program and Aging Management Activities, are implemented in accordance with the requirements of the NSPM Quality Assurance Topical Report and 10 CFR Part 50, Appendix B. The administrative controls that govern AMAs at PINGP are established in accordance with the PINGP Administrative Control Program and associated Fleet Procedures.

A3.10 AMP Element 10: Operating Experience

Surrogate surveillance demonstration programs with storage conditions and fuel types similar to those in the dry storage system that satisfies the ISG-24 acceptance criteria are a viable method to obtain operating experience. NSPM intends to rely on the information from the HDRP with similar types of HBU fuel. The HDRP is viable as a surrogate surveillance program. Additional data/research to assess fuel performance from both domestic and international sources that are relevant to the fuel in the NSPM casks will also be used.

A4.0 Summary

The review of operating experience identified a number of incidents related to dry fuel storage. Although many of these were event-driven and most were not age-related, for those that did involve credible aging effects and mechanisms, evaluations were conducted to assess potential susceptibility. These evaluations indicated that the aging effects and mechanisms that were identified at the Prairie Island ISFSI are bounded by the Aging Management Reviews that were performed for those structures and components identified as within the scope of License Renewal.

Operating experience to date has not indicated any degradation that would affect the structures or component intended function(s). Inspections, monitoring, and surveillances continue to be conducted that would identify

deficiencies. The Corrective Action Program is in place to track and correct deficiencies in a timely manner. Corrective actions have been effectively implemented when inspection and monitoring results have indicated degradation. Continued implementation of the ISFSI Inspection and Monitoring Activities Program and the High Burnup Fuel Monitoring Program provide reasonable assurance that the aging effects will be managed such that the intended functions will be maintained during the period of extended operation.

A5.0 References (Appendix A, Aging Management Program)

- A5.1 NUREG-1927, *Standard Review Plan for Renewal of Spent Fuel Dry Cask Storage System Licenses and Certificates of Compliance*, March 2011.
- A5.2 EPRI Report 1002882, *Dry Cask Storage Characterization Project, Final Report*, September 2002.
- A5.3 Letter from D.A. Christian, Virginia Electric and Power Company to D.A. Cool (NRC), *Surry Independent Spent Fuel Storage Installation License Renewal Application*, dated April 29, 2002, ADAMS Accession Number ML021290068.
- A5.4 Transnuclear Information Bulletin, April 2001.
- A5.5 Letter from G. L. Stathes, Exelon Generation Company to Director Spent Fuel Project Office (NRC), *Submittal of Independent Spent Fuel Storage Installation (ISFSI) Cask Event Report*, dated December 01, 2010, ADAMS Accession Number ML 110060275.
- A5.6 American Concrete Institute, ACI 349.3R-96, *Evaluation of Existing Nuclear Safety-Related Concrete Structures*, January 1996.
- A5.7 NRC Interim Staff Guidance 11, *Cladding Considerations for the Transportation and Storage of Spent Fuel*, Revision 3, November 17, 2003.
- A5.8 Letter from R. McCullum (NEI) to M. Lombard (NRC), dated March 22, 2013, *Industry Analysis and Confirmatory Information Gathering Program to Support the Long-Term Storage of High Burnup Fuel (HBF)*, (ADAMS Accession No. ML13084A045).
- A5.9 High Burnup Dry Storage Cask Research and Development Project Final Test Plan, February 27, 2014, DOE Contract No.: DE-NE-0000593.
- A5.10 NRC Interim Staff Guidance 24, *The Use of a Demonstration Program as a Surveillance Tool for Confirmation of Integrity for Continued Storage of High Burnup Fuel Beyond 20 Years*, Revision 0, July 11, 2014.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary S. Arnold
Dr. Thomas J. Hirons

In the Matter of

Docket No. 50-255-LA-2
(ASLBP No. 15-939-04-LA-BD01)

**ENERGY NUCLEAR
OPERATIONS, INC.**
(Palisades Nuclear Plant)

November 13, 2015

ORDER
(Terminating Proceeding)

In CLI-15-23, the Commission reversed the Board's decision admitting one contention in this license amendment proceeding for the Palisades Nuclear Plant and directed the Board to terminate this proceeding.¹ Accordingly, this adjudicatory proceeding is *terminated*.

¹ CLI-15-23, 82 NRC 321, 330 (2015).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 13, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

BOILING-WATER REACTOR
OPERATING POWER REACTORS
WITH MARK I AND MARK II
CONTAINMENT DESIGNS

November 2, 2015

The U.S. Nuclear Regulatory Commission (NRC) Staff has reviewed the petition dated July 29, 2011, filed under section 2.206, "Requests for action under this subpart," of Title 10 of the *Code of Federal Regulations* (10 C.F.R.), by the Union of Concerned Scientists. The petition requested that the NRC issue a demand for information (DFI) to a number of boiling-water reactor (BWR) licensees with Mark I and Mark II containment designs regarding compliance of the facility design for spent fuel pool (SFP) heat removal with General Design Criterion (GDC) 44, "Cooling Water," of Appendix A to 10 C.F.R. Part 50 and section 50.49, "Equipment Qualification," of 10 C.F.R. Part 50. The NRC Staff does not believe that its response to this issue needs to involve issuance of a DFI.

The NRC Staff considers GDC 61, "Fuel Storage and Handling and Radioactivity Control," applicable to the SFP heat removal function rather than GDC 44. Criterion 61 requires, in part, that the fuel storage system be designed to prevent significant reduction in coolant inventory under accident conditions and requires a residual heat removal capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal. This criterion is appropriate for the SFP heat removal function because the SFP contains a very large inventory of coolant that mitigates the effect of any temporary loss of the SFP heat removal function, which provides time to take corrective action, and the heat that the cooling system is intended to remove from the SFP only rarely approaches the design heat removal rate even with maximum SFP heat load.

The NRC Staff has determined that the heat removal design of all SFPs

provides adequate assurance of public health and safety. During the operating license review and subsequent operating license amendment reviews involving SFP cooling, the Staff accepted the SFP cooling system designs at all subject facilities because, in part, these designs provide a reliable decay heat removal capability that reflects the importance to safety of decay heat removal, which is consistent with the criteria in GDC 61.

Because the design criterion applicable to SFP cooling specifies reliability of the decay heat removal function consistent with its importance to safety, the Staff determined that the probability of damage to the SFP forced cooling system, the redundancy of components, and the time available for recovery of the cooling function are appropriate considerations in assessing the consequences of design-basis events. With those considerations, the NRC Staff found that the existing designs of the SFP forced cooling systems adequately protect against a sustained loss of the cooling function. Consequently, electrical equipment important to safety is not required to be qualified for the environmental effects of sustained SFP boiling under 10 C.F.R. § 50.49, because that state has not been included within the design bases of the subject facilities.

After the earthquake and tsunami at the Fukushima Dai-ichi Nuclear Power Plant in March 2011, the NRC Staff issued Order EA-12-049, on March 12, 2012 (ADAMS Accession No. ML12056A045), which imposed additional requirements to ensure that strategies to maintain or restore core cooling, containment, and SFP cooling are available for a range of external initiating events. Guidance for implementation of these capabilities includes measures to manage the environmental effects created by an SFP at saturation conditions. While this NRC order required licensees to have enhanced mitigation strategies for beyond-design-basis external events, it is reasonable to assume that these mitigation capabilities would also be available for plant operators to use following design-basis events.

The NRC denies the petition because the NRC Staff has reasonable assurance that the design and operation of SFP cooling systems for BWRs with Mark I and Mark II containment designs satisfy the current design and licensing basis. The NRC Staff has found that existing structures, systems, or components related to the storage of irradiated fuel provide adequate protection for public health and safety. Information supporting this conclusion is readily available in the licensees' safety analysis reports. However, this petition was considered in the development of the implementing guidance for strategies addressing beyond-design-basis events, and the guidance includes measures to manage environmental conditions that could result from SFPs at saturation conditions.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated July 29, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11213A030), Mr. David Lochbaum, on behalf of the Union of Concerned Scientists (the Petitioner), filed a petition in accordance with Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Request for action under this subpart." The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) issue a demand for information (DFI) to a number of boiling-water reactor (BWR) licensees with Mark I and Mark II containment designs. The Petitioner requested that the DFI compel the licensees to describe how their individual facilities comply with 10 C.F.R. Part 50, Appendix A, General Design Criterion (GDC) 44, "Cooling water," and with 10 C.F.R. § 50.49, "Environmental qualification of electric equipment important to safety for nuclear power plants."

As the basis for the request, the Petitioner stated, in part, the following:

The spent fuel pool in BWRs with Mark I and II containments is located within the reactor building, also called the secondary containment. The reactor building is a structure important to safety — it houses the emergency core cooling system pumps, as well as the control rod drive system pumps and the reactor core isolation cooling system pump, which are also capable of supplying makeup water to the reactor vessel. Following a design and licensing bases event, decay heat from irradiated fuel stored in the spent fuel pool is among the "combined heat load" within the reactor building that must be transferred to the ultimate heat sink to satisfy GDC 44. When system(s) prevent the spent fuel pool from boiling, the heat from piping losses, motor operation, etc., falls among the "combined heat loads." When system(s) cannot prevent the spent fuel pool from boiling following a design and licensing bases event, the heat emitted from the boiling pool falls among the "combined heat loads." One way or another, GDC 44 requires that the heat load from irradiated fuel stored in the spent fuel pools inside the reactor building at BWR Mark I and II plants be transferred to the ultimate heat sink. If GDC 44 is not satisfied, the plant's response to design and licensing bases events may be impaired or degraded. The licensees' responses to the DFI we seek would describe how they satisfy this GDC requirement, or not.

[W]hen a spent fuel pool is prevented from boiling following a design and licensing bases event, the heat losses from piping and equipment used to achieve that outcome must be included or accounted for within the environmental qualification (EQ) programs mandated by 10 CFR 50.49. When a spent fuel pool cannot be prevented from boiling following a design and licensing bases event, the temperature, humidity and submergence conditions created by the boiling pool must be included or accounted for within the EQ programs. If 10 CFR 50.49 is not satisfied, the plant's

response to design and licensing bases events may be impaired or degraded. The licensees' responses to the DFI we seek would describe how they satisfy this 10 CFR 50.49 requirement, or not.

The Petitioner requested that the NRC issue a DFI requiring the subject licensees to provide specific information about compliance with GDC 44 and 10 C.F.R. § 50.49. The administrative action of issuing a DFI is described in 10 C.F.R. § 2.204, "Demand for information," as described, in part, as follows:

(a) The Commission may issue to a licensee or other person subject to the jurisdiction of the Commission a demand for information for the purpose of determining whether an order under § 2.202 should be issued, or whether other action should be taken, which demand will:

(1) Allege the violations with which the licensee or other person is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for issuing the demand; and

(2) Provide that the licensee must, or the other person may, file a written answer to the demand for information under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the demand for information.

II. DISCUSSION

The petition requests that the NRC issue a DFI to BWR licensees who use Mark I and Mark II containment designs to seek information on compliance with GDC 44 and 10 C.F.R. § 50.49. Criterion 44 of the GDC requires, in part, that a system be provided to transfer heat from structures, systems, and components (SSCs) important to safety to an ultimate heat sink under normal operating and accident conditions, and that this system be able to perform this safety function with either onsite or offsite power, assuming a single component failure. The regulations in 10 C.F.R. § 50.49 require licensees to establish an environmental qualification program for electrical equipment important to safety that would be exposed to harsh environmental conditions expected to develop as a result of design-basis accidents. In the following subsections, the Staff discusses the applicability of these regulations to BWR spent fuel pools (SFPs).

A. Conformance with General Design Criterion 44

1. *Regulatory Framework for the General Design Criteria*

The licensees for BWRs within the scope of this petition (or their predecessors) received construction permits for these reactors between 1964 and 1974. Reviews

of construction permits issued during that time period evolved from case-by-case evaluations without standard design criteria to reviews against the standard design criteria that are applicable to light water reactors. The licensing basis documents for all reactor licensees contain a description of the degree of conformance of the plant design with certain design criteria.

The Atomic Energy Commission (AEC), the forerunner of the NRC, initiated rulemaking to enhance the rigor of the construction permit reviews. The AEC issued a draft set of design criteria for comment on November 22, 1965. This set of design criteria was significantly expanded based on the ongoing reviews and comments, and the AEC published a revised set of design criteria in the *Federal Register* (32 Fed. Reg. 10,213) as part of a proposed rule on July 11, 1967. Under the provisions of paragraph (a)(3)(i) of 10 C.F.R. § 50.34, “Contents of applications; technical information,” which became effective on January 16, 1969, an applicant for a construction permit must include the principal design criteria (PDC) for a proposed facility and the relationship of the design bases to the PDC as part of the preliminary safety analysis report (SAR). For construction permits issued on or after May 21, 1971, the GDC in 10 C.F.R. Part 50, “Domestic Licensing of Production and Utilization Facilities,” Appendix A, “General Design Criteria for Nuclear Power Plants,” established the minimum requirements for the PDC for water-cooled nuclear power plants.

When the licensees applied for operating licenses, they transferred these PDC and the facility design bases from the preliminary SAR into the final SAR supporting plant operation. The licensees that were not required to include the PDC in the construction permit application have since completed evaluations demonstrating that the plant design was consistent with the intent of the GDC and included information in the final SAR describing the extent of this evaluation.

The regulations in 10 C.F.R. § 50.34(b) required each applicant for an operating license to present the design bases of the facility and safety analyses of the facility as a whole in the final SAR. For each plant, the NRC Staff reviewed and accepted the design bases of the facility and the associated safety analyses in the course of the operating license review.

The reactors within the scope of this petition began commercial operation between 1969 and 1990. Although some reactors began commercial operation under provisional operating licenses, all reactors within the scope of this petition were issued full operating licenses between 1971 and 1991. Therefore, the NRC Staff has considered and accepted the design capabilities of the facility with respect to the applicable design criteria. Furthermore, the NRC has established regulations in 10 C.F.R. § 50.71(e) requiring licensees to update the final SAR periodically throughout the licensed period of a plant’s operation.

The NRC Staff considers GDC 61, “Fuel Storage and Handling and Radioactivity Control,” applicable to the SFP heat removal function. Criterion 61 requires, in part, that the fuel storage system be designed to prevent significant reduction

in coolant inventory under accident conditions and with a residual heat removal (RHR) capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal. This criterion is appropriate for the SFP heat removal function because the SFP contains a very large inventory of coolant that mitigates the effect of any temporary loss of the SFP heat removal function, and the heat that the cooling system is intended to remove from the SFP almost never approaches the design heat removal rate.

The NRC Staff considers GDC 44, "Cooling Water," applicable to the heat removal function for normal operation of reactor support systems, for reactor decay heat removal under normal operating conditions, and for containment heat removal under reactor accident conditions. Criterion 44 of the GDC requires, in part, the provision of a system that transfers heat from SSCs that are important to safety to an ultimate heat sink under normal operating and accident conditions. That system must also be able to perform this safety function with either onsite or offsite power, assuming a single component failure. These requirements provide greater assurance of reliability, which is important, because the reactor and essential support systems have a high likelihood, if called upon for service, to be required to remove heat at or near the design rate to support essential safety functions.

The NRC Standard Review Plan (SRP) regarding the review of the SARs for nuclear power plants provides guidance for NRC Staff review of the complete SAR included in license applications, as well as changes to the SAR associated with license amendment requests. The NRC SRP guidance includes acceptance criteria derived from applicable GDC and other NRC regulations and a method acceptable to the Staff to demonstrate compliance with those acceptance criteria. In Revision 2 to SRP § 9.1.3, "Spent Fuel Pool Cooling and Cleanup System," the NRC Staff based the acceptance criteria for coolant inventory control and SFP decay heat removal capability on GDC 61. Previous versions of SRP § 9.1.3 included GDC 44 among the acceptance criteria for SFP decay heat removal. The NRC Staff removed the reference to GDC 44 from the review acceptance criteria in Revision 2 of SRP § 9.1.3, because the cooling system criterion of GDC 61 was consistent with the accepted SFP cooling system designs and provided reasonable assurance of adequate protection of public health and safety. Therefore, the licensees for the subject facilities have not linked the SFP decay heat removal function to GDC 44 in the final SARs.

2. Typical Spent Fuel Pool Forced Cooling Systems at BWRs

Accepted SFP cooling system designs at BWRs typically consist of a normal forced cooling system and the capability to align the RHR system or a comparable system to provide backup or supplementary SFP cooling. The normal SFP cooling systems all have redundant pumps. The availability of redundant pumps supports

the prompt restoration of cooling after identification of a failure of the operating pump. The safety-related residual heat removal system, or another comparable system, generally can be aligned to provide backup or supplemental SFP cooling.

The qualifications of the cooling system designs vary. The normal cooling systems often consist of standard industrial systems without enhanced quality measures. However, several facilities have safety-related normal SFP cooling systems. Supplementary cooling systems typically have enhanced quality measures because the safety-related RHR system often performs this function. However, the Staff identified the following configuration issues at some facilities that may limit the availability of the supplementary cooling systems:

- The supplementary cooling capability provided by the decay heat removal would be available at some facilities only during refueling when the reactor vessel is open and connected to the SFP through a flooded refueling cavity and open gates.
- The use of the decay heat removal as supplemental SFP cooling at some facilities requires installation of short piping segments.
- The flow path connecting the decay heat removal to the SFP at some facilities does not have the same level of qualification as the residual heat removal system itself.

Nevertheless, these conditions allow use of the supplemental cooling capability for its design function, which is to provide additional cooling during infrequent refueling operations that involve transfer of all fuel assemblies from the reactor vessel to the spent fuel pool. For some facilities, the supplementary cooling capability supports continued cooling of the SFP under conditions where the normal SFP cooling system may not be available. However, for all facilities, the substantial heat capacity of the SFP coolant inventory and the availability of multiple pumps to provide forced cooling of the SFP support restoration of cooling before significant environmental effects would develop.

3. Facility Design Basis and Applicability of Principal Design Criteria to Spent Fuel Pool Cooling

As discussed below, the NRC Staff has determined that the heat removal design of all SFPs provides adequate assurance of public health and safety. During the operating license review and subsequent operating license amendment reviews involving SFP cooling, the Staff accepted the SFP cooling system designs at all subject facilities because, in part, these designs provide a reliable decay heat removal capability that reflects the importance to safety of decay and residual heat removal, which is consistent with the criteria in GDC 61. As described previously, these designs generally do not ensure a continuous capability to transfer heat from

the SFP to an ultimate heat sink because that capability is not necessary. The heat capacity of the SFP, combined with a low decay heat generation rate of the stored fuel, ensures a slow response of SFP temperature to loss of forced cooling events. Furthermore, the necessary heat removal decreases rapidly throughout the course of the operating cycle. Accordingly, the NRC Staff has accepted operator action to realign systems and components necessary to restore forced cooling of the SFP.

The SARs for BWR facilities within the scope of the petition describe conformance to the facility PDC in a consistent manner. The SARs that include a comparison of the facility design with the GDC of 10 C.F.R. Part 50, Appendix A, provide a comparison of the design of the forced SFP cooling capability with GDC 61. Similarly, SARs that include a comparison of the facility against plant-specific PDC provide a comparison of the design of the forced SFP cooling capability with the PDC that are specific to spent fuel and radioactive waste storage. Comparisons with GDC 44 or similar PDC for cooling water address the design of the cooling water systems essential for accident mitigation system operation and removal of reactor decay heat, but not the SFP cooling system.

Therefore, the design of the forced SFP cooling system is consistent with the PDC used for each facility. The PDC for forced SFP cooling (i.e., GDC 61 or a plant-specific criterion) reflect consideration of the low-decay heat rate and high-thermal capacity of the SFP. The greater capability specified by GDC 44 appropriately reflects the design basis for cooling of the reactor accident mitigation and the immediacy of the cooling water flow requirement for those events. Accordingly, GDC 44, or similar plant-specific PDC, have not been applied to the design of the forced SFP cooling systems and, therefore, compliance of the SFP cooling system design with GDC 44 is not required.

B. Conformance with the Environmental Qualification Regulation

1. Regulatory Framework for Environmental Qualification

The regulations in 10 C.F.R. § 50.49 require licensees to establish an environmental qualification program for electrical equipment important to safety that would be exposed to harsh environmental conditions expected to develop as a result of design-basis accidents. As stated in 10 C.F.R. § 50.49(c), these requirements do not apply to equipment in a mild environment, which is an environment that would, at no time, be significantly more severe than the environment that would occur during normal plant operation, including anticipated operational occurrences. The considered environmental conditions include temperature and pressure; humidity; submergence (if the equipment could be subject to submergence) that could result from a design-basis accident; chemical effects; aging; synergistic effects; and margins.

As defined in 10 C.F.R. § 50.2, “Definitions,” “Design bases” refers to information that identifies the specific functions to be performed by an SSC of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design. Design-basis events are defined in 10 C.F.R. § 50.49 as conditions of normal operation, including anticipated operational occurrences, design-basis accidents, external events, and natural phenomena for which the plant must be designed to ensure the integrity of the reactor coolant pressure boundary; the capability to shut down the reactor and maintain it in a safe shutdown condition; and the capability to prevent or mitigate the consequences of accidents that could potentially result in significant offsite exposures.

2. Application of 10 C.F.R. § 50.49

In the licensing of the operating reactor fleet, the NRC Staff has considered design-basis high-energy line breaks, such as reactor loss-of-coolant accidents (LOCAs) and steam-line break accidents, as causes of harsh environments. These events cause an immediate change in the environmental conditions and may result in harsh environments in areas housing equipment essential to the mitigation of these design-basis events. Furthermore, conditions assumed to develop during the mitigation of these accidents, such as high radiological dose rates and pump seal leakage, could lead to harsh environments affecting mitigation equipment in areas of the plant not directly affected by the high-energy line break. Under the requirements of 10 C.F.R. § 50.49(d), licensees have identified, and the NRC has accepted, lists of equipment important to safety subject to environmental qualification (EQ). These lists and supporting documents identify the equipment, as well as the performance specifications, electrical characteristics, and environmental conditions for which the equipment was qualified. Under the requirements of 10 C.F.R. § 50.49(e), the EQ program must include and be based on temperature and pressure; humidity; submergence (if the equipment could be subject to submergence) that could result from a design-basis accident; chemical effects; aging; synergistic effects; and margins.

Conversely, a sustained loss of SFP forced cooling (i.e., heating of the SFP to the extent that the reactor building environment would be substantially changed) has not been considered among the design-basis events that creates a harsh environment for the purposes of EQ of equipment. Because the SFP forced cooling systems at several facilities have not been qualified to withstand the effects of the site design-basis earthquake, a design-basis earthquake with its attendant loss of offsite power could be postulated to result in a sustained loss of forced cooling. The NRC Staff has not identified another design-basis event that would directly result in a sustained loss of forced cooling. Further, a sustained loss of SFP forced cooling would be unlikely to affect equipment essential to safely shutting down the reactor following a design-basis seismic event. The

low decay heat rate within the SFP would require substantial time to heat the SFP coolant inventory to near saturation conditions, and restoration of the forced cooling function has a high probability of success during that time. Although the SFP forced cooling system equipment at many facilities have not been designed to withstand the effects of the design-basis seismic event, the NRC Staff has found that mechanical and electrical equipment designed and installed to satisfy general industrial standards would remain capable of performing its function after the design-basis earthquake (NUREG-0933, "Resolution of Generic Safety Issues," specifically, Task Action Plan Items A-40, "Seismic Design Criteria," and A-46, "Seismic Qualification of Equipment in Operating Plants"). This finding was based on performance of equipment used at nonnuclear facilities during and after seismic events, and is supported by the experience at nuclear facilities during recent earthquakes at nuclear facilities in Japan and the United States (see reports at ADAMS Accession Nos. ML11347A454, ML12103A092, and ML11308B406). Therefore, the NRC Staff does not expect a design-basis seismic event to result in a sustained loss of SFP forced cooling.

Because the design criterion applicable to SFP cooling specifies reliability of the decay heat removal function consistent with its importance to safety, the Staff determined that the probability of damage to the SFP forced cooling system, the redundancy of components, and the time available for recovery of the cooling function are appropriate considerations in assessing the consequences of design-basis events. With those considerations, the Staff found that the existing designs of the SFP forced cooling systems adequately protect against a sustained loss of the cooling function. Consequently, electrical equipment important to safety is not required to be qualified for the environmental effects of sustained SFP boiling under 10 C.F.R. § 50.49, because that state has not been included within the design bases of the subject facilities.

C. Safety Significance of a Sustained Loss of Forced Cooling

1. Effects of a Sustained Loss of Forced Spent Fuel Pool Cooling

A sustained loss of SFP forced cooling would allow the pool temperature to increase, but the stored fuel would remain adequately cooled, as long as an adequate SFP coolant inventory is maintained and the fuel is submerged. Without forced cooling, coolant temperature at the pool surface is limited by evaporative cooling from the free surface of the pool to a value no higher than the boiling temperature (100 degrees Celsius (°C) (212 degrees Fahrenheit (°F))). The design of the pool storage racks ensures that natural circulation of the coolant will maintain the fuel cool. With the coolant at its normal level, the rack design provides for adequate natural circulation of coolant to prevent nucleate boiling on the fuel cladding surface because the cladding temperature remains below the

saturation temperature at the depth of the fuel (about 116°C (241°F)). Therefore, forced cooling is not required to protect the fuel cladding integrity when adequate water level is maintained and makeup is supplied to compensate for coolant inventory loss.

As the pool surface temperature approaches 100°C (212°F), the water vapor leaving the pool surface can add a significant amount of latent heat and water vapor to the atmosphere of the building surrounding the SFP. Depending on the ventilation system design and capability, the added heat and water vapor may not be adequately removed from the building atmosphere. If not removed, the added heat and vapor could increase the building temperature and result in condensation on the cooler surfaces in the building.

The configuration of the reactor building in BWRs with Mark I and II containments limits the effect of the heat and condensation on systems important to reactor safety. These reactor buildings have very large free volumes over the SFP and limited openings for flow to lower-level volumes that contain the systems important to reactor safety. The water vapor leaving from the SFP surface will heat the air as it mixes. Without operating ventilation, this mixture (i.e., water vapor and heated air) would remain in the upper level of the reactor building, because it is less dense than the air elsewhere in the reactor building secondary containment volume.

For the BWR reactor building secondary containment structures enclosing a single reactor and its associated SFP, the rate of production of water vapor would be relatively low when the reactor was fully fueled and, with the reactor fully fueled and in operation, systems located within the reactor building would be important to reactor safety. These conditions exist only after reactor refueling is complete; the spent fuel has been discharged to the SFP; and the SFP has been isolated from the refueling cavity. Under these conditions, the fuel pool would not reach the temperatures necessary for substantial vapor production for days, because the decay heat rate of the fuel would be low as a result of the small amount of fuel discharged during each refueling and the time necessary to return to operation.

Once substantial water vapor generation begins, the vapor would either be vented through an operating ventilation system or would collect in the upper reactor building above the refueling floor. The safety-related standby gas treatment systems in BWRs with Mark I or Mark II containments would generally be capable of venting much of the vapor for hours or days, depending on the decay heat rate.

Remaining vapor collecting in the upper portion of the reactor building would condense at a rate likely to prevent pressurization of the upper elevations of the reactor building, thereby preventing the heat and water vapor from being forced into the lower elevations of the reactor building. The NRC Staff expects a small part of this condensation to return to the SFP or be held in other cavities

on the refueling floor, and the remainder to flow through floor drains to the reactor building sumps. The sumps contain level alarms to notify operators of increasing water level and pumps to transfer water to the radioactive waste system for treatment. The flow of condensed water to the sump would not exceed the capacity of the sump pumps. Therefore, the NRC Staff concludes that sustained loss of forced cooling in BWRs with single-unit Mark I and II containment designs would be unlikely to produce a harsh environment that adversely affects the equipment important to reactor safety.

For BWR secondary containment structures enclosing more than one reactor and its associated SFP, the decay heat rate, and consequently, the water vapor generation rate, could be much higher when systems within the reactor building would be important to reactor safety. This condition exists because the entire core could be transferred to one SFP, while an adjacent reactor operates at power. Systems within the reactor building are important to reactor safety when the systems perform essential safe shutdown or accident mitigation functions, such as reactor decay heat removal, when fuel is located within the reactor vessel. This secondary containment configuration exists at the following BWRs with Mark I or Mark II containments: Browns Ferry Nuclear Power Plant (Browns Ferry), Units 1, 2, and 3; Dresden Nuclear Power Station (DNPS), Units 2 and 3; Edwin I. Hatch Nuclear Plant (Hatch), Unit 1 (the Hatch, Unit 2 reactor is in a secondary containment zone, separate from the zone containing the SFPs); LaSalle County Station (LaSalle), Units 1 and 2; Quad Cities Nuclear Power Station (QCNPS), Units 1 and 2; and Susquehanna Steam Electric Station (Susquehanna), Units 1 and 2. However, based on current operating practices, placement of the full core fuel inventory in the SFP is an infrequent condition. (Based on sampling of recent operating reports, the NRC Staff estimates the full core is present in BWR SFPs less than 3 days per reactor year, on average.) At three of these sites (i.e., Hatch, LaSalle, and Susquehanna), the RHR system has been qualified to provide at least one train of RHR dedicated to SFP cooling, following a design-basis seismic event and, therefore, adequate forced cooling of the SFP would be reasonably assured when the full core is in the SFP. To gain a better understanding of the plant-specific licensing basis at the remaining three facilities, the Staff requested additional information.

2. Responses to Requests for Additional Information

Based on the above discussion, the NRC Staff requested additional information about the reliability of the SFP forced cooling function and the safety significance of its loss at BWR facilities with shared secondary containments, where safety analysis report (SAR) information showed limited backup capability for forced cooling of the SFP. By letter dated November 25, 2013 (ADAMS Accession No. ML13269A287), the NRC requested Exelon Generation Company (Exelon) to

address the reliability of SFP cooling at DNPS and at the QCNPS. Exelon responded by letter dated March 5, 2014 (ADAMS Accession No. ML14064A526). Subsequently, the NRC Staff also requested information from the Tennessee Valley Authority (TVA) regarding the reliability of SFP forced cooling at Browns Ferry, Units 1, 2, and 3, by letter dated March 24, 2014 (ADAMS Accession No. ML14055A295). By letter dated June 30, 2014 (ADAMS Accession No. ML14182A695), TVA requested additional time to evaluate the NRC Staff's information request. TVA provided its complete response by letter dated September 3, 2014 (ADAMS Accession No. ML14248A681), and TVA revised a portion of that response by letter dated December 31, 2014 (ADAMS Accession No. ML14365A183).

Exelon described that the design bases for DNPS and QCNPS include only structures and equipment whose failure could directly result in a significant release of radioactivity within design Class I, which applies to structures and equipment designed to function during and following the design-basis seismic event. Each DNPS and QCNPS unit has a dedicated SFP cooled by a normal SFP cooling system, which consists of two circulating pumps, two heat exchangers, and additional equipment. These heat exchangers reject heat to the reactor building closed cooling water (RBCCW) system. Exelon described that the SFP structures at both DNPS and QCNPS are Class I structures, but the normal SFP cooling and RBCCW systems are not Class I systems. However, both the SFP cooling and RBCCW system pumps are powered from Class I electrical supplies. In addition, the DNPS shutdown cooling system, which is powered from Class I electrical supplies, could be aligned to provide supplemental SFP cooling at DNPS, and the Class I RHR system could be aligned to provide SFP cooling at QCNPS. As noted previously, the NRC Staff has evaluated a limited scope of the seismic qualifications at older licensed facilities, such as DNPS and QCNPS, and determined that the existing classification provided an acceptable assurance of safety. Although the normal SFP cooling systems are not designated as Class I systems at DNPS and QCNPS, Exelon stated that the facilities have sufficient diversity of equipment powered from Class I electrical buses, with emergency diesel generator backup, that a sustained loss of SFP forced cooling would not be expected. Based on its evaluation, the NRC Staff agrees with the licensee's position.

TVA provided a similar description of the capability to provide SFP forced cooling at Browns Ferry. The three reactors at Browns Ferry each have dedicated SFPs, within a shared secondary containment structure. Each SFP is normally cooled by the design Class II fuel pool cooling system. SSCs designated as design Class II have not been qualified to remain functional during and following a design-basis earthquake. However, the portion of the fuel pool cooling system used for SFP makeup from the Class I RHR system has been qualified to design Class I. Other portions of the fuel pool cooling system, used in combination with

the RHR system for the SFP cooling assist mode, have been qualified as seismic design Class II to retain pressure boundary integrity following a design-basis earthquake. TVA stated that this other section of piping, which supplies water from the SFP to the suction of the RHR system pumps, has been evaluated to seismic Class I design requirements for the Unit 2 SFP, and the configuration of this piping section for the Unit 1 and Unit 3 SFPs is similar. Therefore, there is reasonable assurance that this piping would remain functional following a design-basis earthquake and, therefore, the fuel pool cooling assist mode of the RHR system would function to cool the Browns Ferry SFPs. However, TVA described technical and administrative limitations on the availability of the SFP cooling assist mode of the RHR system. When the reactor is in the cold shutdown operating mode or in the refueling operating mode with the reactor vessel hydraulically disconnected from the SFP, the facility technical specifications require the RHR system to be in the shutdown cooling mode of operation. In this mode of RHR system operation, shared suction piping precludes simultaneous cooling of the associated SFP. Therefore, the RHR system would be available to provide forced SFP cooling under refueling conditions with the highest decay heat load (i.e., during transfer of irradiated fuel between the reactor and the SFP and when all irradiated fuel has been transferred from the reactor vessel to the SFP), but it may not be available when decay heat loads in the SFP are lower. Similar to the single-unit BWRs without a shared secondary containment, the large coolant inventory and low decay heat load would allow substantial time for recovery of the normal SFP forced cooling system when the RHR SFP cooling assist mode was unavailable.

TVA also described the expected conditions that would develop within the secondary containment envelope if forced cooling of the SFP was not restored. TVA determined that the minimum time for the SFP to reach saturation conditions would exceed 12 hours, and that the minimum time to boil would occur with the SFP isolated from the refueling cavity at the conclusion of refueling (i.e., the water volume was small and the decay heat was higher than other times with the reactor operating). Similar to the NRC Staff expectations described above, TVA concluded that the environment on the refueling floor would be most affected by the sustained loss of forced cooling. TVA determined that the essential equipment required to respond to a design-basis earthquake with an associated loss of offsite power would not be challenged by the temperature or humidity conditions created by a sustained loss of SFP cooling, in part, because the equipment is qualified for higher temperatures and relative humidity associated with high-energy line breaks. In order to evaluate protection against flooding, TVA evaluated the expected elevation of accumulated condensate assuming all condensate was directed to a single equipment zone and no water was removed. With these conservative assumptions, TVA determined that the accumulated condensate would not threaten operation of safety-related equipment in that equipment zone

for at least 36 hours following the loss of forced SFP cooling. Using a more realistic distribution of condensate, TVA estimated that several days would be available to mitigate the condensate accumulation. In addition, TVA determined that the standby gas treatment system could be aligned to draw on the refueling zone and that the system function would not be challenged because it is designed for high-energy line-break conditions that bound the conditions resulting from a sustained loss of SFP forced cooling. Accordingly, TVA concluded that there is a reasonable expectation that all equipment relied upon for safe shutdown would remain operable following a sustained loss of forced SFP cooling. Based on its evaluation, the NRC Staff agrees with the licensee's position.

3. Additional Measures to Improve Spent Fuel Pool Safety

The NRC Staff has imposed additional requirements to maintain the safety of the reactor and stored spent fuel since the completion of the Spent Fuel Storage Action Plan. In accordance with 10 C.F.R. § 50.54 (hh)(2), licensees have been required to develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and SFP cooling capabilities under the circumstances associated with the loss of large areas of the plant caused by explosions or fire. This strategy for SFP cooling typically involves the capability to replace water lost from the SFP or the capability to spray water into the SFP, not the ability to provide forced cooling of the SFP water.

After the earthquake and tsunami at the Fukushima Dai-ichi Nuclear Power Plant in March 2011, the NRC established a senior-level task force — referred to as the Near-Term Task Force (NTTF). The NTTF conducted a systematic and methodical review of the NRC regulations and processes to determine whether the agency should make safety improvements in light of the events in Japan. Because of this review, the NTTF issued SECY-11-0093, “Near-Term Report and Recommendations for Agency Actions Following the Events in Japan” (ADAMS Accession No. ML11186A950). Subsequently, SECY 11-0124, “Recommended Actions to Be Taken Without Delay from the Near-Term Task Force Report” (ADAMS Accession No. ML112911571), and SECY-11-0137, “Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned” (ADAMS Accession No. ML11272A111) were issued to establish the NRC Staff's prioritization of the recommendations. NTTF Recommendation 7.1 concerning reliable SFP instrumentation was determined to be a high-priority action. The NRC Staff issued Order Enforcement Action (EA)-12-051, “Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately),” dated March 12, 2012, to address SFP instrumentation (ADAMS Accession No. ML12054A679). Order EA-12-049, “Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design Basis External Events,” issued on March 12, 2012 (ADAMS

Accession No. ML12056A045), imposed additional requirements to ensure that strategies to maintain or restore core cooling, containment, and SFP cooling are available for a range of external initiating events. While compliance with existing regulations and guidance presumptively provides reasonable assurance of safe storage of spent fuel, the NRC's assessment of new insights from the events of Fukushima Dai-ichi leads the Staff to conclude that additional requirements must be imposed on licensees to increase the capability of nuclear power plants to mitigate beyond-design-basis external natural events. These new requirements enhance the capability of plant operators to maintain plant safety, consistent with the overall defense-in-depth philosophy, and therefore provide greater assurance that challenges posed by beyond-design-basis external events do not pose an undue risk to public health and safety.

The NRC Staff issued guidance for developing, implementing, and maintaining the requirements of Order EA-12-049 in JLD-ISG-2012-01, "Compliance with Order EA-12-049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events," Revision 0 (ADAMS Accession No. ML12229A174). In the attachment to JLD-ISG-2012-01, the NRC Staff endorsed Nuclear Energy Institute 12-06, "Diverse and Flexible Coping Strategies (FLEX) Implementation Guide," Revision 0 (ADAMS Accession No. ML12242A378), as an acceptable method to develop strategies and guidance for SFP cooling. This document addresses the potential for environmental effects resulting from loss of SFP forced cooling. Specifically, Table C-3, "Summary of Performance Attributes for BWR SFP Cooling Function," and Table D-3, "Summary of Performance Attributes for PWR [Pressurized Water Reactor] SFP Cooling Functions," in Appendices C and D, respectively, identify the ability to vent steam and condensate from the SFP as a baseline capability of the SFP cooling strategy. The identified purpose of this capability is to avoid access and equipment problems that could result from accumulation and subsequent condensation of steam from a boiling SFP.

III. CONCLUSION

The NRC denies the petition because the NRC Staff has reasonable assurance that the design and operation of SFP cooling systems for BWRs with Mark I and Mark II containment designs satisfy the current design and licensing basis. The NRC Staff has found that existing SSCs related to the storage of irradiated fuel provide adequate protection for public health and safety. Plant-specific information supporting this conclusion is readily available in the licensees' SARs. Additionally, the requirements imposed by the NRC on licensees, per NRC Orders EA-12-049 and EA-12-051, provide enhanced mitigation capabilities to ensure that core cooling, containment, and SFP cooling can be maintained or restored

after beyond-design-basis external events. Guidance for implementation of these capabilities includes measures to manage the environmental effects created by an SFP at saturation conditions. While these NRC orders required licensees to have enhanced mitigation strategies for beyond-design-basis external events, it is reasonable to assume that these mitigation capabilities would also be available for plant operators to use, following design-basis events.

In compliance with the GDC, the SFP cooling systems provide reliable decay heat removal (DHR) capability, consistent with the importance to safety of SFP DHR. This capability is consistent with the criteria included in GDC 61, which specifically apply to fuel storage. Although the capability for continuous DHR from the SFP provided by a system satisfying the criteria of GDC 44 would result in a more robust system, this capability is unnecessary because of the very large heat capacity of the pool and the low decay heat rate of the stored fuel. Systems, to which the criteria of GDC 44 specifically apply (e.g., systems removing heat from emergency diesel generators and post-accident containment heat removal systems), require the essentially continuous heat removal capability specified by GDC 44, because of a much lower heat capacity, relative to the design-basis heat generation rate. Thus, the subject facilities comply with an appropriate design criterion for SFP forced cooling systems.

The NRC Staff determined that the EQ requirements of 10 C.F.R. § 50.49 would not apply to a sustained pool boiling event because that event is outside the spectrum of events considered within the SAR. The final SARs of some of the facilities within the scope of this petition discuss the potential for the pool to reach saturation, but the effects of continued boiling have not been evaluated. Other facilities have the capability to maintain SFP forced cooling with no more than short interruptions after design-basis events. The NRC Staff found that redundant pumps in the SFP forced cooling systems at all facilities would support early restoration of cooling and, regardless of cooling restoration, pool boiling was unlikely to create a harsh environment in the vicinity of electric equipment within the scope of the regulation because of the low decay heat rate and the configuration of the reactor building.

The NRC Staff concludes that the safety significance of the design changes proposed by the Petitioner would not warrant enhancements to either the design of the SFP forced cooling systems or the qualification of equipment in the reactor buildings of BWR Mark I and Mark II containments. The conditions, in which a sustained loss of SFP cooling and subsequent pool boiling could substantially affect the systems necessary to shut down the reactor safely and maintain safe shutdown conditions, are limited to those sites with a shared structure enclosing more than one operating reactor and associated SFPs, when all fuel assemblies have been transferred from one reactor vessel to the SFP. At these sites, the NRC Staff determined that the probability of a sustained loss of cooling was sufficiently small and that no additional forced cooling capability was necessary. Under other

conditions, the NRC Staff expects that the rate of vapor generation, resulting from decay heat from the fuel stored in the pool, would be too low to substantially affect the systems necessary to maintain the safe shutdown conditions.

As provided in 10 C.F.R. § 2.206(c), a copy of this DD will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

William M. Dean, Director,
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 2d day of November 2015.

ATTACHMENT

COMMENTS RECEIVED FROM THE PETITIONER ON THE PROPOSED DIRECTOR'S DECISION DATED APRIL 17, 2015

By letter dated April 17, 2015 (Agencywide Documents Access and Management System (ADAMS) Package Accession No. ML12215A276), the U.S. Nuclear Regulatory Commission (NRC) Staff issued the proposed director's decision (DD) for comments to David Lochbaum of the Union of Concerned Scientists (UCS). By letter dated May 8, 2015 (ADAMS Accession No. ML15128A388), Mr. Lochbaum of the UCS provided comments on the proposed DD. It is noted that each of the Petitioner's comments is quoted in its entirety below. The NRC's response to the comments received is provided below.

UCS Comment No. 1

The proposed DD states that the NRC considers General Design Criterion (GDC) 61 to be applicable to the spent fuel pool (SFP) heat removal function and that the SFP cooling system need not comply with General Design Criterion 44.

UCS Comment: It is clear and unequivocal that nuclear power reactors licensed by the NRC must comply with all applicable regulatory requirements, including GDC 44 and GDC 61.

UCS agrees with the NRC staff that SFPs and their cooling and makeup systems must comply with GDC 61.

UCS also agrees with the NRC staff that containments and their cooling systems must comply with GDC 44.

Because the SFPs at boiling water reactors with Mark I and II containment designs, the subjects of our petition, are located inside containment, compliance with GDC 44 inherently includes handling the heat released from the SFPs and the cooling/makeup equipment operating to support them. In other words, one cannot pretend that these heat loads do not exist and still be in compliance with GDC 44. There is an overlap between GDC 61 and GDC 44 forced by the location of the SFPs and support equipment within containment.

Similar overlaps exist between GDC 33, "Reactor Coolant Makeup," and GDC 44, as well as between GDC 35 and GDC 44; the NRC requires compliance with GDC 33 and GDC 35, "Emergency Core Cooling," as well as with GDC 44. The NRC must treat GDC 44 and GDC 61 the same way.

GDC 33 requires a system to provide makeup to the reactor vessel in the event of small breaks in the reactor coolant system. The High Pressure Coolant Injection (HPCI) system at most boiling-water reactors (BWRs) fulfills this requirement. Because the HPCI steam turbine, pump, and piping are located within secondary containment, GDC 44 calculations and evaluations must account for the heat loads from HPCI operation during an accident. If the heat loads from HPCI operation

during an accident had been excluded from GDC calculations, it would be immaterial with respect to GDC 44 compliance as to whether the HPCI design complied with GDC 33. Both GDC must be met.

GDC 35 requires a system to provide “abundant emergency core cooling” in the event of larger breaks in the reactor coolant system. The Core Spray and Residual Heat Removal Systems at most BWRs fulfill this requirement. Because the pumps, electric motors, and piping for these systems are located within secondary containment, GDC 44 calculations and evaluations must account for heat loads from their operation during an accident. If the heat loads from core spray or residual heat removal (RHR) operation during an accident had been excluded from GDC calculations, it would be immaterial with respect to GDC 44 compliance whether the design complied with GDC 35. Both GDC must be met.

The underlying foundation for our petition is our contention that the heat loads from SFPs and their support equipment have not been accounted for within GDC 44 calculations and evaluations. Thus, while GDC 61 is being met for the SFPs inside containment, GDC 44 might not be met. Both GDC must be met.

Our petition sought demands for information (DFIs) on how the applicable reactors complied with GDC 44. We assume and accept that the reactors comply with GDC 61. By whatever means are used to comply with GDC 61 (e.g., cooling by safety-related system, cooling by non-safety-related system, non-cooled with makeup to boiling pool, etc.), heat is released into secondary containment. GDC 44 cannot be met unless that heat load, along with the heat loads from all other sources, can be removed to maintain the design-basis conditions within secondary containment.

The heat loads from the SFP that may be unaccounted for are not insignificant. The matter first came to my attention while working on the power uprate project for Susquehanna in the early 1990s. The GDC 44 calculation for post-accident conditions within secondary containment assumed a total heat load of around 4.5 million British Thermal Units per hour (MBTU/hr). This calculation accounted for heat loads from HPCI, core spray, and RHR pump operation, heat losses from piping filled with warm water, and even from the heat emitted by lighting within the reactor building. But, it assumed that the SFP essentially disappeared during an accident. It considered neither the latent heat from the spent fuel nor any heat released from equipment operating inside secondary containment to cool the pool's water or provide makeup to a boiling pool. The design-basis heat load in each SFP at Susquehanna was 12.6 MBTU/hr, while the design-basis emergency heat load from a full core offload was 32.6 MBTU/hr. Thus, the GDC 44 calculation neglected heat loads 2.8 to 7.2 times greater than the total heat load considered. The results from the non-conservative GDC 44 calculation did not show abundant temperature profile margins in most reactor building areas.

The DFIs are still needed, and still requested, to answer the vital questions of how reactors with SFPs inside secondary containment comply with GDC 44.

NRC Response to UCS Comment No. 1

As discussed in the draft DD, GDC 44 applies specifically to cooling water systems. Cooling water systems designed to GDC 44 provide normal and post-accident cooling of the primary containment through various modes, heat removal from emergency systems through component cooling and room cooling, removal of decay and residual heat from the reactor vessel, and, sometimes, the SFP (consistent with the GDC 61 criterion of the “residual heat removal capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal”). When the SFP cooling system heat exchangers are cooled by a cooling water system designed to GDC 44, the heat rejection is considered in the design of the cooling water system and the ultimate heat sink. However, some plant configurations have other cooling water systems and heat sinks providing cooling to the SFP.

The SFP is located within the secondary containment envelope, and is outside the primary containment. The primary heat removal path from the secondary containment is through the normal ventilation system and, following accidents and abnormal events, through the standby gas treatment system. This heat removal includes a portion of the decay heat from stored fuel that supports evaporation of water from the pool surface. If the SFP experienced a sustained loss of forced cooling, the decay heat of the fuel would raise the pool temperature until the heat transferred to the secondary containment by evaporation or boiling matched the decay heat. This heat would increase the temperature of the upper secondary containment and increase the heat removed by ventilation system operation and by transfer to the environment through conduction/convection mechanisms. These heat transfer paths are independent of the systems designed and licensed to the criteria of GDC 44.

The facility SARs consider the reliability of forced SFP cooling. For many facilities, these analyses recognize both the limits of the forced cooling systems and the large passive heat sink provided by the pool coolant inventory. Therefore, the Staff accepted the existing cooling system designs, although they may lack the capability to provide nearly continuous forced cooling, provided by systems designed to the criteria of GDC 44.

UCS Comment No. 2

The proposed DD states, “The NRC staff has not identified another design-basis event [other than design bases earthquake] that would directly result in a sustained loss of forced [spent fuel pool] cooling.”

UCS Comment: The NRC staff failed to identify other design-basis events that result in a sustained loss of forced SFP cooling.

Among the many examples we could cite is an example contained within the licensee event report (LER) dated March 21, 2012 (ADAMS Accession No.

ML12083A194) for an oil leak from an emergency diesel generator (EDG) at Browns Ferry Unit 1. The small oil leak was reported because it “did not meet the 7-day mission time of the Unit 1/2 C EDG.” Hence, the design basis for this NRC-licensed facility includes offsite power being unavailable for 7 days, a sustained period.

The RHR system at Browns Ferry is designed to provide forced cooling of the SFP (see letter dated December 31, 2014, ADAMS Accession No. ML14365A183) in fuel pool cooling assist mode. The RHR pumps can be powered from the electrical buses connected to the EDGs and thus would be available even when offsite power was not.

But, not all boiling water reactors have the RHR fuel pool cooling assist mode option. Even those reactors equipped with this option may be unable to use it when necessary. The Updated Final Safety Analysis Reports (FSARs) typically do not describe a loss of normal SFP cooling as a design-basis accident or transient. Consequently, the valves that must be operated to establish the RHR fuel pool cooling assist mode are not guaranteed to be included within the periodic testing and inspection programs that provide reasonable assurance that the safety function can be performed.

If RHR fuel pool cooling assist is being relied upon to mitigate design-basis events, then all structures, systems, and components necessary to establish that alignment and sustain its operation must be included within appropriate testing and inspection programs. The responses to the DFIs sought by the petitioners would have identified what equipment was being relied upon, enabling determinations whether this equipment was adequately covered by testing and inspection programs.

The NRC should issue the DFIs to ensure that whatever means are being used to remove heat from secondary containments are likely to perform that safety function when needed.

NRC Response to UCS Comment No. 2

The NRC Staff agrees that a loss of offsite power is a design-basis accident and that the design basis for many fuel oil storage systems specifies a 7-day capacity. However, because the large passive heat sink provided by the pool coolant prevents substantial environmental effects for a period of several hours or more, SFP cooling systems, including those facilities where the system is non-safety-related, would be placed in operation using the emergency diesel generators as a power source. This electrical load is included among the loads used in determining required diesel fuel inventory that have a 7-day capacity as the licensing basis.

The NRC Staff also agrees that testing of the SFP cooling mode of the RHR system is not required because this function is not safety-related. Similar to the electric power supply issue, reasonable time is available to correct equipment failures that may affect this mode of RHR system operation.

Operating experience related to loss of offsite power events, similar to those considered as design-basis events, have resulted in a loss of one or more offsite

power sources for periods as long as several days. However, these events have not resulted in increased pool temperatures that substantially affected the environment of the building housing the pool. This operating experience supports the continued acceptability of non-safety-related SFP cooling systems and operator action to restore cooling systems for the SFP.

UCS Comment No. 3

The proposed DD states, “The low decay heat rate within the SFP would require substantial time to heat the SFP coolant inventory to near saturation conditions, and restoration of the forced cooling function has a high probability of success during that time.”

UCS Comment: What does the NRC staff mean by “substantial time” — a day, a week, or a month? If it involves less than 30 days, it deviates from longstanding industry and NRC practice.

As stated in the LER dated December 31, 2012 (ADAMS Accession No. ML13002A391), for Pilgrim, “The mission time for the secondary containment system is 30 days.”

As stated in the LER dated September 29, 2004 (ADAMS Accession No. ML042810116), for Pilgrim, “The SGTS [standby gas treatment system] air accumulators (accumulator bank) function [is] to store sufficient pneumatic energy for operation of the SGTS for the 30-day mission time.”

As stated in the LER dated June 17, 2011 (ADAMS Accession No. ML11174-A039), for Quad Cities Unit 1, the Residual Heat Removal Service Water System (RHRSW) has a “mission time of 30 days.”

As stated in the LER dated August 15, 2007 (ADAMS Accession No. ML-072400342), for Susquehanna, “The design basis mission time for ESW [emergency service water] and RHRSW is defined in the FSAR as 30 days.”

As stated in the LER dated April 18, 2008 (ADAMS Accession No. ML-081120106), for Hatch Unit 2, the reported problem “could have prevented the RHRSW system from meeting its 30-day mission time.”

The 30-day mission times for secondary containment, SGTS, RHRSW, and ESW all directly relate to GDC 44. In other words, one cannot comply with GDC for a “substantial time” that is less than 30 days.

The NRC has taken enforcement action in recent years because the 30-day mission time might not have been met:

By inspection report dated February 9, 2011 (ADAMS Accession No. ML-110400431), the NRC issued a Green finding for a problem at Browns Ferry for an RHR pump motor problem that “would have prevented the pump from performing its intended safety functions during the system’s required mission time.” According to this NRC letter, “The mission time of the 1C RHR pump to perform its intended safety functions was 30 days.”

The NRC has not allowed BWR owners to only show adequate Net Positive Suction Head for emergency pumps during a “substantial time” of the accident. In Enclosure 1 to SECY-11-0014, dated January 31, 2011 (ADAMS Accession No.

ML102110167), the NRC informed its Commissioners that, “The necessary time for a pump using containment accident pressure should include not only the duration of the accident when NPSH margin may be limited, but any additional time needed for operation of the pump . . . This additional time is usually taken as 30 days.”

The NRC also applied the 30-day mission time when evaluating the potential for post-accident debris to impair emergency pump operation: NUREG/CR-7011, “Evaluation of Treatment of Effects of Debris in Coolant on ECCS and CSS Performance in Pressurized Water Reactors and Boiling Water Reactors,” dated May 2010 (ADAMS Accession No. ML100960388) explicitly stated the NRC expectation that licensees would evaluate the postulated design basis event assuming, “All ECCE and CSS pumps are in operation for an extended period (up to the maximum mission time). . . .”

The NRC rejected an industry comment seeking to neglect potential damage to emergency pumps from cavitation because it would likely occur after a substantial time: The nuclear industry commented on Draft Regulatory Guide DG-1234 that cavitation was a long-term degradation effect that should be excluded from post-accident assessments of emergency core cooling system (ECCS) pump performance. Its evaluation of public comments (ADAMS Accession No. ML111330292) stated, “The NRC staff disagrees with the comment. Cavitation over the post-LOCA mission time could affect pump performance.”

Section 6.2.3, Secondary Containment Functional Design, of NUREG-0800, “Standard Review Plan” (ADAMS Accession No. ML063600406) Acceptance Criterion 1.G states, “Heat loads generated within the secondary containment (e.g., equipment heat loads) should be considered.” There is no qualifier allowing heat loads to be ignored as long as GDC 61 is met. Hence, heat generated by the irradiated fuel in the SFPs and by equipment operated in support of the SFPs must be considered.

Section 9.2.5, Ultimate Heat Sink, of NUREG-0800, Standard Review Plan (ADAMS Accession No. ML070550048) Acceptance Criterion 3.A indicates that GDC 44 is met if the design provides, “The capability to transfer heat loads from safety-related SSCs to the heat sink under both normal and accident conditions.” Secondary containment is a safety-related structure. The last paragraph on page 9.2.5-5 directs the NRC reviewers to evaluate “the UHS design, including assumptions for heat loads. . . .”

Compliance with GDC 44 requires a showing that heat loads within containment can be adequately removed over the entire 30-day mission time, not for a shorter period whether deemed substantial or not. As Abraham Lincoln might have observed, it is not sufficient to remove all the heat loads for some of the time, or to remove some of the heat loads all the time, but only to remove all the heat loads for the entire mission time.

The DFIs are still needed, and requested, to indicate how licensees are complying with this regulatory requirement.

NRC Response to UCS Comment No. 3

For certain safety analyses, the NRC Staff has indicated that a 30-day evaluation period would be acceptable to the Staff. In particular, Regulatory Guide 1.27, "Ultimate Heat Sink for Nuclear Power Plants," specifies evaluation of ultimate heat sink capacity for a 30-day evaluation period, unless the capability to replenish water to maintain continuous functionality within a shorter period is justified, considering postulated accident conditions. This evaluation considers the heat rejection from necessary equipment operation, residual heat associated with post-accident cooldown, and reactor decay heat. When the SFP rejects heat to this heat sink, the spent fuel decay heat would also be included in the evaluation. However, the 30-day evaluation period is not specified in any NRC regulation. A 30-day mission time is neither a requirement nor a common assumption for other accident analyses. Therefore, the NRC Staff disagrees that a 30-day evaluation of SFP cooling is required.

UCS Comment No. 4

The proposed DD states, "A sustained loss of SFP forced cooling (i.e., the heating of the SFP to the extent that the reactor building environment would be substantially changed) has not been considered among the design basis events that create a harsh environment."

UCS Comment: In the second full paragraph on page 9 of the Proposed Director's Decision, the NRC staff states, "The NRC staff has considered design-basis high-energy line breaks, such as reactor loss-of-coolant accidents (LOCA) and steam-line break accidents, as causes of harsh environments," for the EQ requirements of 10 CFR 50.49.

UCS agrees with these NRC statements, in fact, they form the basis for the request in our petition for DFI on how the applicable reactors comply with 10 CFR 50.49 for design-basis events.

As noted above, the mission time for many design basis accidents such as LOCA is 30 days. It is an undeniable fact that heat will be emitted from the SFP inside secondary containment throughout the mission time. Heat will also be released from equipment operating inside secondary containment to provide forced cooling of the SFP water or to provide makeup to the pool.

It is UCS's contention that the calculations and evaluations that establish the temperature profiles for rooms and areas within secondary containment may not account for the heat released from the SFP and any associated equipment operation. As a result of these omissions, the EQ of electrical equipment within secondary containment may not ensure safety functions performed by this equipment are performed throughout their entire mission times.

Similar omissions of actual heat loads inside secondary containment have compromised EQ compliance in the past. For example, the LER dated June 29, 1998 (ADAMS Legacy Library Accession No. 9807070371) informed the NRC that the

post-LOCA temperatures calculated in the secondary containments for DNPS, Unit 2 and 3, were incorrect. The calculations had established 104°F as the post-LOCA temperature. But, those calculations had assumed the post-LOCA heat loads were the same as the heat loads during normal operation. The error was in “ignoring the slow build-up of temperatures in the reactor building due to the combined effect of loss of ventilation due to the post-LOCA isolation of the secondary containment and heat load generated in the reactor building due to operating equipment and lighting.” When the calculations were redone to correct these omissions, the resulting temperatures in secondary containment ranged from 121°F to 152°F. Electrical equipment was replaced at DNPS to restore compliance with 10 CFR 50.49.

The DFIs are still needed, and requested, to show how licensees comply with 10 CFR 50.49. When EQ calculations and evaluations properly include the post-accident heat loads from the SFP and any supporting equipment operation, their responses should be quite simple and straightforward. But, if the SFP and/or supporting equipment heat loads have been ignored in these calculations, the secondary containment temperatures will likely be non-conservative as they had been at DNPS.

NRC Response to UCS Comment No. 4

The NRC Staff has found that the heat released from the SFP has been adequately considered in the evaluation of reactor building temperatures. The SFP forced cooling systems are reliable and provide reasonable assurance that forced cooling would be restored before substantial environmental effects could develop. Furthermore, the design-basis events that would initially result in a loss of SFP forced cooling, such as loss of offsite power events, would not challenge the environmental qualification of the equipment relied on to perform essential safety functions. Therefore, electrical equipment within the reactor building would be capable of performing its safety functions throughout the event.

**COMMENTS RECEIVED FROM EXELON
ON THE PROPOSED DIRECTOR'S DECISION
DATED APRIL 17, 2015**

Exelon provided comments by e-mail dated May 15, 2015 (ADAMS Accession No. ML15138A323).

Exelon Comment No. 1

Section B, "Conformance with the Environmental Qualification Regulation," describes the considered environmental conditions required by 10 CFR 50.49 in two places, but does not appear to include radiation.

NRC Staff Response to Exelon Comment No. 1

Radiation is not a relevant environmental factor for events involving a loss of forced SFP cooling, because the provision of makeup water would maintain acceptable shielding throughout the course of the event.

Exelon Comment No. 2

Under the subsection, "Application of 10 CFR 50.49," the NRC indicates licensees have identified lists of equipment important to safety subject to environmental qualification and states the following: ". . . These lists identify the equipment, as well as the performance specifications, electrical characteristics, and environmental conditions for which the equipment was qualified. . . ." Exelon believes that these lists alone may not contain all of the stated information; therefore, Exelon recommends that the NRC consider adding the phrase "and supporting documents" after "These lists" in the quoted excerpt above.

NRC Staff Response to Exelon Comment No. 2

The NRC Staff agrees with the comment and will make the requested change.

Exelon Comment No. 3

Under the subsection, "Application of 10 CFR 50.49," the NRC makes the statement, "Under the requirements of 10 CFR 50.49(e), the electric EQ program must include. . . ." Exelon believes that word "electric" in the statement is unnecessary and would recommend that the word be deleted.

NRC Staff Response to Exelon Comment No. 3

The NRC Staff agrees with the comment and will make the requested change.

Exelon Comment No. 4

In Section C, Safety Significance of a Sustained Loss of Forced Cooling, in the seventh paragraph under subsection “Effects of a Sustained Loss of Forced Spent Fuel Pool Cooling” (page 13), the NRC states: “For BWR secondary containment structures enclosing more than one reactor and its associated SFP, the decay heat rate and, consequently, the water vapor generation rate could be much higher when systems within the reactor building would be important to reactor safety.” Exelon recommends further clarification as to the connection between systems important to safety being in the reactor building and higher water vapor generation.

NRC Staff Response to Exelon Comment No. 4

The NRC Staff agrees with the need for further clarification. The Staff will add the following sentence: “Systems within the reactor building are important to reactor safety when the systems perform essential safe-shutdown or accident mitigation functions, such as reactor decay heat removal, when fuel is located within the reactor vessel.”

Exelon Comment No. 5

Under the subsection, “Responses to Requests for Additional Information,” the discussion does contain a factual description of the DNPS fuel pool storage structure and cooling system. However, Exelon believes that it may be helpful to indicate that the shutdown cooling pumps are also powered from Class 1 electrical supplies.

NRC Staff Response to Exelon Comment No. 5

The NRC Staff agrees with the comment and will modify the subsection to state, “In addition, the DNPS shutdown cooling system, which is powered from Class I electrical supplies, could be aligned to provide supplemental SFP cooling at DNPS, and the Class I RHR system could be aligned to provide SFP cooling at QCNPS.”

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

**Docket Nos. 50-250-LA
50-251-LA**

**FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)**

December 17, 2015

***PRO SE* LITIGANTS**

The Commission does not hold *pro se* petitioners to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere.

STANDARD OF REVIEW

The Commission's standard of review of a licensing board's determination on standing is deferential: the decision will be upheld absent a clear misapplication of facts or law.

STANDARD OF REVIEW

We defer to a Board's contention admissibility rulings unless the appeal points to an error of law or abuse of discretion.

STANDING TO INTERVENE

The Commission applies contemporaneous judicial concepts of standing. Petitioners must claim an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.

LICENSING BOARDS, AUTHORITY

We expect our licensing boards to reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding.

MEMORANDUM AND ORDER

The NRC Staff and Florida Power & Light Company (FPL) have appealed the Atomic Safety and Licensing Board's decision granting a hearing to Citizens Allied for Safe Energy, Inc. (CASE) in this license amendment matter.¹ CASE has challenged FPL's request to allow an increase in the ultimate heat sink temperature at Turkey Point Nuclear Generating Units 3 and 4.² As discussed below, we affirm the Board's decision.

I. BACKGROUND

The license amendment application at issue here involves an increase to the ultimate heat sink temperature limit reflected in the Technical Specifications for both Turkey Point units from 100°F to 104°F. To provide context for the issues raised in this proceeding, we first provide a short description of the cooling canal system at Turkey Point and recent plant licensing history relevant to this proceeding.

Turkey Point Units 3 and 4 are pressurized water reactors located approximately 25 miles (40 km) south of Miami and bordering Biscayne Bay. The two nuclear units are cooled by a 6100-acre (2500-ha) "closed-loop" cooling canal system.³ Heated water from the plants discharges into the system at one end, flows

¹ NRC Staff's Notice of Appeal of LBP-15-13 (Apr. 17, 2015); Florida Power & Light Company's Notice of Appeal of LBP-15-13 (Apr. 17, 2015); LBP-15-13, 81 NRC 456 (2015).

² Citizens Allied for Safe Energy, Inc. Petition to Intervene and Request for a Hearing (Oct. 14, 2014) (CASE Intervention Petition).

³ Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4; Environmental Assessment and Final Finding of No Significant Impact, 79 Fed. Reg. 44,464, 44,465 (July 31, 2014) (Environmental Assessment).

through the canals where it cools, and is withdrawn from the other end for reuse as plant cooling water.⁴ The cooling canal system serves as the ultimate heat sink for the safety-related intake cooling water system.⁵

At Turkey Point, the water in the cooling canal system is hypersaline; in 2014, salinity levels in the canals ranged from approximately 60 to 90 parts per thousand (ppt) — compared to approximately 34 ppt in nearby Biscayne Bay.⁶ The cooling canal system includes 168 miles (270 km) of earthen canals with an average depth of 2.8 feet (0.8 m) and contains approximately 4 billion gallons (15 billion L) of water.⁷ Water in the system travels 13.2 miles (21.2 km) from plant discharge back to plant intake.⁸ Rainfall, stormwater runoff, and groundwater exchange naturally replenish evaporative losses.⁹

In 2012, the NRC granted FPL’s request for an extended power uprate of both units; the uprate increased the maximum allowable power level from 2300 megawatts thermal (MWt) to 2644 MWt for each unit.¹⁰ The NRC did not identify any significant environmental impacts associated with the extended power uprate.¹¹

As part of its review of the extended power uprate, the Florida Department of Environmental Protection (FDEP) imposed “Conditions of Certification” that require FPL to monitor and assess potential harm to the State’s waters.¹² The FDEP

⁴ See “Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Turkey Point Units 3 and 4 — Final Report.” NUREG-1437, Supp. 5 (Jan. 2002), at 1-8 (ADAMS Accession No. ML020280236) (Turkey Point License Renewal SEIS).

⁵ Environmental Assessment, 79 Fed. Reg. at 44,465.

⁶ *Id.* at 44,468; FPL’s Answer to Citizens Allied for Safe Energy, Inc.’s Petition to Intervene and Request for a Hearing (Nov. 10, 2014) (FPL Answer), Ex. 1, South Florida Water Management District Emergency Final Order Issued to Florida Power and Light for the Purpose of Authorizing Temporary Pump Installation and Water Withdrawal Along and from the L-31 E Canal System; Miami-Dade County, Florida (Aug. 28, 2014), at 9 (August 2014 Emergency Final Order).

⁷ Environmental Assessment, 79 Fed. Reg. at 44,466.

⁸ *Id.*

⁹ Brief in Support of Florida Power & Light Company’s Appeal of LBP-15-13 (Apr. 17, 2015) at 2 (FPL Brief) (citing Environmental Assessment, 79 Fed. Reg. at 44,466); see also Turkey Point License Renewal SEIS at 2-7 (“The canal system does not discharge directly to fresh or marine surface waters. However, an exchange of water between the canal system and groundwater is likely because the canals are unlined.”).

¹⁰ License Amendment to Increase the Maximum Reactor Power Level, Final Environmental Assessment and Finding of No Significant Impact; Florida Power & Light Company, Turkey Point, Units 3 and 4, 77 Fed. Reg. 20,059, 20,060 (Apr. 3, 2012) (Environmental Assessment for Extended Power Uprate). The change, a 15% increase over the prior licensed power level, was considered an “extended power uprate” that involved extensive modifications to the plant’s secondary side. *Id.*

¹¹ *Id.* at 20,059.

¹² NRC Staff’s Brief in Support of Its Appeal of LBP-15-13 (Apr. 17, 2015) at 4-5 (Staff Brief) (citing Conditions of Certification PA 03-45D at 22).

issued an administrative order in December 2014 that required FPL to propose a salinity management plan.¹³ The plan would reduce salinity in the cooling canal system to 34 ppt (comparable to the salinity in Biscayne Bay) within 4 years by adding water that is less saline than that currently in the cooling canal system.¹⁴ These additions could also help moderate water temperatures.¹⁵

During the summer of 2014, the ultimate heat sink temperature approached the limit provided in the plant's Technical Specifications at the time — 100°F. In response, FPL submitted the license amendment request at issue here to increase the ultimate heat sink temperature limit in Technical Specification 3.7.4 from 100°F to 104°F, to add a surveillance requirement to monitor the ultimate heat sink water temperature once per hour whenever the temperature exceeds 100°F, and to increase the frequency of a component-cooling-water heat-exchanger performance test.¹⁶ FPL later asked for the license amendment request to be processed on an emergency basis to avoid a dual unit shutdown that would affect grid reliability.¹⁷

The NRC Staff published the Environmental Assessment and Finding of No Significant Impact for this license amendment in the *Federal Register* on July 31, 2014.¹⁸ The Environmental Assessment noted that higher temperatures would increase water evaporation rates in the canals and result in higher salinity levels but that this effect would be temporary because salinity would decrease upon natural freshwater recharge of the system.¹⁹ The Environmental Assessment also anticipated that FPL would adopt a salinity management plan similar to that imposed by the FDEP in the December 2014 Administrative Order.²⁰

¹³ FPL Brief at 4 (citing *In re Florida Power & Light Company*, Administrative Order (Dec. 23, 2014) (ADAMS Accession No. ML15035A227) (December 2014 Administrative Order)).

¹⁴ *Id.* at 4, 12 n.18 (citing December 2014 Administrative Order at 5-6).

¹⁵ Staff Brief at 10 (citing Environmental Assessment, 79 Fed. Reg. at 44,468). Elevated salinity levels contribute to higher temperatures in the cooling canals. FPL Answer, Ex. 1, August 2014 Emergency Final Order at 8.

¹⁶ FPL Brief at 1 (citing Letter from Michael Kiley, FPL, to Document Control Desk, NRC (July 10, 2014) (ADAMS Accession No. ML14196A006)).

¹⁷ Letter from Michael Kiley, FPL, to Document Control Desk, NRC (July 17, 2014), at 1 (ADAMS Accession No. ML14202A392).

¹⁸ Environmental Assessment, 79 Fed. Reg. 44,464. The Staff determined that the proposed action will not have a significant effect on the quality of the human environment and that therefore the Staff would not prepare an environmental impact statement for the proposed action. *Id.* at 44,469; *see also* 10 C.F.R. § 51.32(a). CASE filed a motion to invalidate the Environmental Assessment and Final Finding of No Significant Impact on a procedural ground. Citizens Allied for Safe Energy Motion to Invalidate Nuclear Regulatory Commission Environmental Assessment of [July] 31, 2014 (Aug. 25, 2015). The Board denied CASE's motion. Order (Denying Motion to Invalidate Environmental Assessment) (Sept. 11, 2015) (unpublished).

¹⁹ Environmental Assessment, 79 Fed. Reg. at 44,466-67.

²⁰ *Id.* at 44,468.

The Staff determined that the amendments involved no significant hazards considerations and that exigent circumstances existed and therefore issued the amendments on August 8, 2014.²¹ As approved by the Staff, the license amendments revise the ultimate heat sink water-temperature limit in the Turkey Point Units 3 and 4 Technical Specifications from 100°F to 104°F and revise surveillance requirements for monitoring the ultimate heat sink temperature and component cooling water heat exchangers.²²

In response to the notice of the issuance of the license amendments, CASE requested a hearing. FPL and the Staff opposed CASE's hearing request.²³ Following a prehearing conference in Homestead, Florida, the Board found that CASE had demonstrated standing and had submitted an admissible contention.²⁴ FPL's and the Staff's appeals followed.

II. DISCUSSION

Our rules of practice provide for an automatic right to appeal a Board decision on the question whether a petition to intervene should have been wholly denied.²⁵ On appeal, both the Staff and FPL contend that the Board erred in finding that CASE had demonstrated standing and had submitted an admissible contention.²⁶

²¹ Letter from Audrey L. Klett, NRC, to Mano Nazar, NextEra Energy (Aug. 8, 2014) (ADAMS Accession No. ML14199A107) (Letter Noting Issuance of License Amendments). The Staff initially issued a proposed no significant hazards consideration determination and notice of opportunity to request a hearing on July 30, 2014. Florida Power & Light Co.; Turkey Point Nuclear Generating Units 3 and 4; License Amendment Application; Opportunity to Comment, Request a Hearing, and Petition for Leave to Intervene, 79 Fed. Reg. 44,214 (July 30, 2014). Shortly after issuance of the license amendments, the Staff extended the deadline to request a hearing. Florida Power & Light Company; Turkey Point Nuclear Generating Units 3 and 4; License Amendment; Issuance, Opportunity to Request a Hearing, and Petition for Leave to Intervene, 79 Fed. Reg. 47,689, 47,690 (Aug. 14, 2014) (Second Hearing Notice); *see also* 10 C.F.R. § 50.91(a)(6) ("Where the Commission finds that exigent circumstances exist, in that a licensee and the Commission must act quickly and that time does not permit the Commission to publish a *Federal Register* notice allowing 30 days for prior public comment, and it also determines that the amendment involves no significant hazards considerations, it" will (among other things) "provide a hearing after issuance, if one has been requested by a person who satisfies the provisions for intervention specified in § 2.309 of this chapter.").

²² Letter Noting Issuance of License Amendments at 1.

²³ FPL Answer; NRC Staff's Answer to Citizens Allied for Safe Energy, Inc.'s Petition for Leave to Intervene and Request for Hearing (Nov. 10, 2014).

²⁴ FPL has sought dismissal of the admitted contention before the Board. Florida Power & Light Company's Motion to Dismiss CASE Contention 1 or, in the Alternative, for Summary Disposition (Dec. 3, 2015).

²⁵ *See* 10 C.F.R. § 2.311(d)(1).

²⁶ *See* Staff Brief at 1-2; FPL Brief at 7-8.

A. Standing

For CASE to be admitted as a party to this proceeding, it must demonstrate that it has an interest that may be affected by the proceeding. A petitioner must “‘allege[] such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists [that] will sharpen the presentation of issues.”²⁷ In evaluating standing claims, we apply contemporaneous judicial concepts of standing.²⁸ Accordingly, a petitioner must (1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.²⁹ With respect to the second element, the cause of the injury need not flow directly from the challenged action, but the chain of causation must be plausible.³⁰

In making standing determinations, our licensing boards “construe the [intervention] petition in favor of the petitioner.”³¹ Our standard of review of a board’s determination on standing is deferential: we will uphold the decision “absent a ‘clear misapplication of facts or law.’”³² While we generally place “[t]he burden of setting forth a clear and coherent argument for standing”³³ on the petitioner, we do not hold CASE, a *pro se* petitioner, to the same “standards of clarity and precision to which a lawyer might reasonably be expected to adhere.”³⁴

²⁷ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

²⁸ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (citations omitted); *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71.

²⁹ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted)).

³⁰ *Id.* at 75 (citing *National Wildlife Federation v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1992)).

³¹ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

³² *See, e.g., Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009) (quoting *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001)); *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994) (“In the absence of a clear misapplication of the facts or misunderstanding of law, the Licensing Board’s judgment at the pleading stage that a party has crossed the standing threshold is entitled to substantial deference. We are not inclined to disturb a Licensing Board’s conclusion that the requisite affected interest . . . has been established unless it appears that that conclusion is irrational.” (internal quotations omitted)).

³³ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999) (internal quotations omitted).

³⁴ LBP-15-13, 81 NRC at 468 & n.65 (quoting *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), LBP-15-5, 81 NRC 249, 286 (2015) and *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 3), ALAB-136, 6 AEC 487, 489 (1973)); *see also Entergy Nuclear*

(Continued)

In its intervention petition, CASE argued that FPL's use of water from the Biscayne and Floridan aquifers threatens the interests of CASE's members who live, work, and recreate in the area and use freshwater for purposes such as agriculture, mining, fishing, and drinking.³⁵ CASE claimed that drawing water from these aquifers exacerbates saltwater intrusion in the region.³⁶ In evaluating CASE's standing claims, the Board found that CASE "alleged a sufficient injury related to the use of freshwater aquifer resources and any resulting potential for increased saltwater intrusion."³⁷ Neither FPL nor the Staff challenges this finding of the Board on appeal.

In addition, to show standing, CASE must demonstrate that the asserted injury is plausibly linked to the challenged action.³⁸ Without the amendments, Turkey Point would have been forced to either shut down or reduce power to maintain a cooling canal system intake temperature below 100°F, thus potentially eliminating or reducing the need for more extensive aquifer withdrawals.³⁹ FPL and the Staff both argue that CASE failed to connect water withdrawals to the license amendments and that the amendments actually decrease water withdrawals.⁴⁰ But the hearing request observed that since the license amendments were granted, FPL has continued operating and requested State permission to withdraw additional water.⁴¹ Therefore, the Board's conclusion (related to its standing determination) that plant operation with the increased ultimate heat sink temperature limit could result in increased water withdrawals was not a clear error or abuse of discretion.⁴²

Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 45 n.246 (2010) (citing *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001)).

³⁵ CASE Intervention Petition at 1, 4-5.

³⁶ *Id.* at 4-5, 18-19.

³⁷ LBP-15-13, 81 NRC at 466.

³⁸ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

³⁹ See LBP-15-13, 81 NRC at 466.

⁴⁰ FPL Brief at 9; Staff Brief at 18-19.

⁴¹ CASE Intervention Petition at 15-16; see LBP-15-13, 81 NRC at 474; FPL Brief at 18 & n.26. The parties also dispute whether to characterize the water in the Biscayne and Floridan aquifers as fresh, salt, or brackish and whether it is potable. See LBP-15-13, 81 NRC at 465; FPL Brief at 9 (FPL asserting that the Biscayne Aquifer is not freshwater); FPL Answer at 11-12 (FPL claiming that the Biscayne Aquifer is saltwater, the Floridan Aquifer is brackish, and neither is potable); Tr. at 56-57 (Staff asserting that FPL withdraws saltwater, not freshwater); Tr. at 32-35 (CASE arguing that FPL uses fresh, but not potable, water from the Biscayne Aquifer); CASE Intervention Petition at 16 (CASE claiming that FPL withdraws freshwater). We agree with the Board that, for purposes of the standing determination here, resolution of these disputes is not necessary — CASE has articulated a sufficient injury for the reasons described above and in the Board's decision. See LBP-15-13, 81 NRC at 465-67.

⁴² See LBP-15-13, 81 NRC at 466.

Moreover, CASE has claimed, without objection from FPL or the Staff, that its members use water in the Turkey Point area for a variety of purposes.⁴³ FPL concedes that the higher cooling canal system temperatures (resulting from these amendments) could lead to increased salinity levels.⁴⁴ The parties also acknowledge that the cooling canal system consists of unlined, earthen canals — groundwater exchange occurs with the water in the canals; therefore, it is not truly a “closed” system.⁴⁵ As such, we find no error of law or abuse of discretion in the Board’s conclusion that plant operation with increased temperatures in the cooling canals may cause water of higher salinity to interact with the groundwater in the area, which could contribute to degradation of area water quality, thereby causing injury to CASE’s members.

Finally, CASE argues that its injury can be redressed because the NRC has the power to shut down, reduce the operation of, or condition the operation of one or both Turkey Point units.⁴⁶ As recognized by FPL and the Staff, without the license amendments, FPL would have shut down or reduced power operations at the units during periods of hotter weather.⁴⁷ Either of those conditions would be expected to result in less heat discharged to the canals because the plants would be operating less than if the amendments were granted, thus reducing the volume of water that would need to be injected into the canals to mitigate high temperatures.⁴⁸

⁴³ CASE Intervention Petition at 2.

⁴⁴ FPL Answer at 22; Tr. at 126-27; *see also* Environmental Assessment, 79 Fed. Reg. at 44,466-67 (“Temperature increases would also increase [the cooling canal system’s] water evaporation rates and result in higher salinity levels.”).

⁴⁵ Environmental Assessment, 79 Fed. Reg. at 44,466-67; FPL Answer at 3; Citizens Allied for Safe Energy, Inc.’s Reply to FPL and to NRC Staff Answers to Its Petition to Intervene and Request for a Hearing (Nov. 17, 2014) at 8 (CASE Reply); Tr. at 91-92.

⁴⁶ *See* CASE Intervention Petition at 4. CASE also seeks remedies that are beyond what the National Environmental Policy Act (NEPA) requires. For example, CASE requests studies and corrective actions to be taken regarding the conditions in the cooling canal system. *See* CASE Intervention Petition at 9, 19, 22; CASE Reply at 15; Citizens Allied for Safe Energy Notice of Filing a Brief in Opposition to FPL and NRC Staff Appeals of LBP-15-13 (May 12, 2015) at 15-16 (CASE Answering Brief). However NEPA does not require the NRC to create information that does not currently exist or impose mitigation measures. Rather, NEPA imposes upon the NRC a disclosure obligation — that the NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-53 (1989); *Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 11-13 (1st Cir. 2008); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1244 (10th Cir. 2004).

⁴⁷ *See* Second Hearing Notice, 79 Fed. Reg. at 47,690 (“The licensee requested a timely review of its application to avoid a dual unit shutdown that could affect grid reliability.”).

⁴⁸ FPL notes that it injects water into the canals to reduce salinity levels pursuant to its State-required salinity management plan. FPL Brief at 12-13. But since salinity and temperature are correlated, reducing the heat discharged to the canals might also mitigate salinity levels in the canals. Therefore, operation of the plants as permitted by the license amendments could result in additional injection of water into the canals to meet the salinity targets set forth in FPL’s salinity management plan.

Therefore, we find reasonable the Board's conclusion that CASE's claimed injury could be redressed.

In sum, we find that the Board did not err when it determined that CASE articulated sufficient detail as to how the proposed action would affect its members. Once the Board made that determination, it would not be appropriate for the Board to weigh the evidence to determine whether the harm to CASE's members is certain.⁴⁹ Viewing the disputed facts in a light favorable to CASE, the Board concluded that CASE asserted a sufficient injury related to the use of aquifer resources and any resulting potential for increased saltwater intrusion that could be brought about by the plant's operation with a higher temperature in the canals.⁵⁰ We defer to the Board's judgment on CASE's standing.

B. Contention Admissibility

We defer to a Board's contention admissibility rulings "unless the appeal points to an error of law or abuse of discretion."⁵¹ On appeal, FPL and the Staff argue that the Board erred in admitting Contention 1. We find the question to be a close call, but as discussed below, we defer to the Board and affirm its decision.⁵² We agree with the Board that CASE's petition was not a "model of clarity or organization," but we do not hold CASE, a *pro se* petitioner, to the same standards as parties represented by counsel.⁵³

CASE's intervention petition included four proposed contentions.⁵⁴ Contention 1 related to increases in salinity, temperature, tritium, and chloride in the cooling canal system since the extended power uprate.⁵⁵ Contention 2 challenged the

⁴⁹ *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 613 (2012) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 74) ("[W]e have held that petitioners are not required to demonstrate their asserted injury with 'certainty' at this stage of the proceeding.").

⁵⁰ LBP-15-13, 81 NRC at 466.

⁵¹ *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014); *Crow Butte North Trend*, CLI-09-12, 69 NRC at 543.

⁵² See, e.g., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 326-27 (2012) ("Although we consider . . . that support for this contention is weak, because the Board is the appropriate arbiter of such fact-specific questions of contention admissibility, we will not second-guess the Board's evaluation of factual support for the contention, absent an error of law or abuse of discretion.") (citation omitted).

⁵³ LBP-15-13, 81 NRC at 468 & n.65. To be sure, although we afford some leniency to *pro se* petitioners, we caution all parties to bear in mind, as this case goes forward, that we expect parties to our proceedings to fulfill the obligations imposed by our rules. See, e.g., *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

⁵⁴ LBP-15-13, 81 NRC at 461.

⁵⁵ CASE Intervention Petition at 5.

need to issue the license amendments on an exigent basis.⁵⁶ Contention 3 claimed that FPL's mitigating measures to control conditions in the cooling canal system are "extraordinarily invasive, environmentally usurious, and some untested."⁵⁷ Finally, Contention 4 essentially challenged the current design and function of the cooling canal system and questioned whether FPL limited its options due to decisions it made for Turkey Point Units 1 and 2.⁵⁸ The Board admitted a narrowed version of Contention 1, rejected Contention 3 as duplicative, and rejected Contentions 2 and 4 as beyond the scope of the proceeding and immaterial to the NRC's required findings.⁵⁹

On appeal, FPL and the Staff challenge the admission of Contention 1. As reformulated and admitted by the Board, Contention 1 states:

The NRC's environmental assessment, in support of its finding of no significant impact related to the 2014 Turkey Point Units 3 and 4 license amendments, does not adequately address the impact of increased temperature and salinity in the [cooling canal system] on saltwater intrusion arising from (1) migration out of the [cooling canal system]; and (2) the withdrawal of fresh water from surrounding aquifers to mitigate conditions within the [cooling canal system].⁶⁰

The Board narrowed the contention to eliminate an area where CASE asserted the omission of information that is, in fact, discussed in the Staff's Environmental Assessment.⁶¹

FPL and the Staff make a number of similar arguments on appeal regarding standing and contention admissibility. Below we treat similar issues together and discuss FPL's and the Staff's major arguments in turn, in the context of the Board's contention admissibility determination.

1. Contention 1 Must Be Within the Scope of This Proceeding

To satisfy our contention admissibility requirements, CASE must, among other things, demonstrate that the issue raised in its contention is within the scope of the proceeding.⁶² FPL and the Staff argue that the Board abused its discretion by reformulating Contention 1 from a challenge to the 2012 extended power uprate to

⁵⁶ See *id.* at 10.

⁵⁷ *Id.* at 14.

⁵⁸ See *id.* at 22-23.

⁵⁹ LBP-15-13, 81 NRC at 468.

⁶⁰ *Id.* at 476.

⁶¹ *Id.* at 476, 478 (excluding claims related to the potential environmental impacts associated with the use of copper sulfate and other chemicals in the cooling canals).

⁶² 10 C.F.R. § 2.309(f)(1)(iii).

a challenge to the Environmental Assessment for the instant license amendments.⁶³ In its intervention petition, CASE discussed the extended power uprate and its asserted impacts, but CASE maintains that Contention 1 challenged the instant Environmental Assessment.⁶⁴ And at the prehearing conference, CASE's representative stated: "[O]ur position is, we're not challenging the [uprate]. What we're saying is, you must look at the consequences and what it's causing, what's happening."⁶⁵ CASE and the Board characterized CASE's discussion of the extended power uprate as providing context for the current environmental conditions at Turkey Point.⁶⁶ We understand CASE's concern to be that the extended power uprate caused significant increases in salinity and temperature in the cooling canal system that must now be addressed in the context of baseline conditions discussed in the Environmental Assessment for the license amendment at issue here.⁶⁷ Considering CASE's intervention petition and its statements at the prehearing conference, we find that the Board did not err when it construed Contention 1 as a challenge to the *instant* Environmental Assessment and within the scope of the proceeding.⁶⁸

In admitting and revising Contention 1, the Board interpreted CASE's position to be that the Environmental Assessment cannot import the previous environmental analyses without consideration of subsequent developments at the site.⁶⁹ The Board reasoned that "[t]o hold otherwise would render meaningless NEPA's requirement to supplement an [environmental impact statement] or [environmental assessment]."⁷⁰ To be clear, 10 C.F.R. § 51.92(a)(2) does not apply to the question whether the Environmental Assessment adequately describes the current

⁶³ FPL Brief at 20-22; Staff Brief at 8-9, 11.

⁶⁴ See, e.g., CASE Intervention Petition at 9; Tr. at 120-21 (CASE acknowledging that the notice of hearing related only to the Environmental Assessment for the instant license amendments).

⁶⁵ Tr. at 120-21. Similarly, in response to FPL's assertion that "[t]he EPU licensing actions are simply not at issue here," CASE agreed and explained: "True, CASE is not challenging the licensing per se. But the reason that the NRC posted a request for comments in [the *Federal Register*] . . . is the result of the operation of the units." CASE Reply at 14 (citing FPL Answer at 21).

⁶⁶ See LBP-15-13, 81 NRC at 470-71; CASE Intervention Petition at 9; Tr. at 120-21. To the extent CASE asks us to revisit the extended power uprate, its request is indeed beyond the scope of this license amendment proceeding. CASE may file at any time a request for action pursuant to 10 C.F.R. § 2.206 if it wishes to challenge ongoing operations at Turkey Point.

⁶⁷ Cf. CASE Intervention Petition at 5 (extended power uprate has been concurrent with alarming increases in salinity and temperature in the cooling canal system); *id.* at 6 (Environmental Assessment does not discuss the impacts of salinity in the cooling canal system or saltwater intrusion); *id.* at 23 (extended power uprate was the main cause of problems in the cooling canal system).

⁶⁸ LBP-15-13, 81 NRC at 472.

⁶⁹ See *id.* at 471.

⁷⁰ *Id.* at 471 n.89 (citing 40 C.F.R. § 1502.9(c)(1)(ii); 10 C.F.R. § 51.92 (a)(2); *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 n.19 (10th Cir. 2002), *rev'd on other grounds*, 542 U.S. 55 (2004)).

environment; section 51.92(a) applies when considering whether to supplement an environmental analysis for the period between issuance of the final document and before the agency has taken the proposed action. We are not revisiting the issuance of previous environmental analyses for Turkey Point (including the environmental assessment for the extended power uprate); the final agency action was taken 3 years ago.

But CASE argued that conditions in the cooling canal system have changed since the extended power uprate.⁷¹ The Environmental Assessment characterizes the previous environmental analyses as continuing to accurately describe the current environment.⁷² Therefore, we find no error in the Board's interpretation of Contention 1 as challenging the adequacy of the Environmental Assessment's discussion of current and reasonably foreseeable environmental conditions.⁷³

2. Contention 1 Must Include a Brief Explanation of Its Bases

In addition to demonstrating that its contention is within the scope of the proceeding, CASE must also provide a brief explanation of the basis for its contention.⁷⁴ On appeal, the Staff argues that CASE in Contention 1 essentially challenged the 2012 extended power uprate, and as such, the contention's bases all relate to the extended power uprate.⁷⁵ Therefore, according to the Staff, when the Board combined portions of Contentions 1 and 3, it improperly expanded the scope of Contention 1 and added supporting bases to Contention 1 that CASE did not raise.⁷⁶ To support this claim, the Staff argues that CASE cited the Environmental Assessment only once in its stated bases for Contention 1.⁷⁷ But the Staff does not explain why a single reference is insufficient. CASE argues that the Environmental Assessment does not discuss the negative impacts of increased temperature and salinity in the cooling canal system; for such an argument, multiple citations to the Environmental Assessment are unnecessary. Moreover,

⁷¹ CASE Intervention Petition at 7, 15-17, & Ex. 4, Letter from Brian Carlstrom, National Park Service, to Blake Guillory, South Florida Water Management District (Aug. 29, 2014), at 2 (National Park Service Letter) (discussing, among other things, increases in salinity from 50 practical salinity units (psu) to 97 psu between 2012 and 2014, increases in cooling canal temperatures between 2012 and 2014, and increases in algae since the extended power uprate).

⁷² Environmental Assessment, 79 Fed. Reg. at 44,465.

⁷³ See LBP-15-13, 81 NRC at 471.

⁷⁴ 10 C.F.R. § 2.309(f)(1)(ii).

⁷⁵ See Staff Brief at 11-12.

⁷⁶ *Id.*

⁷⁷ *Id.* at 9; see Tr. at 51-52 (FPL counsel observing that CASE cites the Environmental Assessment only once).

as the Board noted, CASE's petition refers to the Environmental Assessment several times, just in different terms.⁷⁸

As discussed above, the Board reasonably interpreted Contention 1 as challenging the instant Environmental Assessment. Under these circumstances, we find no error in the Board's combination of similar issues submitted by CASE in support of two separate contentions. Indeed, we expect our licensing boards to "reformulate contentions to 'eliminate extraneous issues or to consolidate issues for a more efficient proceeding.'"⁷⁹ We find that the Board did so here. Accordingly, the Staff's argument that the Board improperly combined the bases of Contention 1 and Contention 3 is without merit.⁸⁰

For its part, FPL argues that the Board improperly supplied a basis for Contention 1 by hypothesizing that increased cooling canal system temperature causes saltwater intrusion when CASE did not expressly link saltwater intrusion to increased temperature.⁸¹ Based on CASE's unopposed assertions that water migrates out of the canals, coupled with its reference to the National Park Service's concerns related to the proposed withdrawals' impacts on Biscayne National Park, we find the Board did not supply its own basis for the contention but reasonably reformulated it to clarify the issue for hearing.⁸² Moreover, CASE contends (as the Board captured in the reformulated contention) that the Environmental Assessment fails to address the impacts of increased temperature *and salinity*. The parties acknowledge that the cooling canal system contains hypersaline water and neither the Staff nor FPL challenges the assertion that water migrating out of the canals can exacerbate saltwater intrusion.⁸³ Further, neither FPL nor the Staff contests the assertion that the license amendments would result in higher

⁷⁸ LBP-15-13, 81 NRC at 472.

⁷⁹ See *Crow Butte North Trend*, CLI-09-12, 69 NRC at 552-53 (quoting *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008) (emphasis omitted)).

⁸⁰ See Staff Brief at 12.

⁸¹ FPL Brief at 21-23.

⁸² FPL acknowledges that it may be reasonable to assume that water could migrate out of the cooling canal system and significantly impact surrounding ground and surface water since the canals are unlined and exchange water with the surrounding aquifer, but it argues that CASE did not make such a claim in its intervention petition. FPL Brief at 23. But, in its conclusions regarding Contention 1, CASE states "Let the science and not economics determine the cause and the solution to the salinity, algae bloom, tritium and chloride problems to stop the dangerous withdrawals of water from the aquifer, *the migrations of canal water in the area* and the use of chemicals harmful to wildlife." CASE Intervention Petition at 9 (emphasis added). Further, in support of Contention 3, CASE argued that "the [cooling canal system] is unlined, just dirt. There is nothing to stop [toxins leaching out of the canals and into the aquifer]." CASE Intervention Petition at 14-15. CASE also cites statements from the Superintendent of Biscayne National Park to support its claim that reduction in freshwater due to aquifer withdrawal exacerbates saltwater intrusion. CASE Intervention Petition at 16-17 & Ex. 4, National Park Service Letter.

⁸³ See FPL Answer at 4; FPL Brief at 4, 12, 23; Staff Brief at 19; Tr. at 28-30.

temperatures *and* salinity levels in the canals (at least during certain times in the summer).⁸⁴ Therefore, we find no error or abuse of discretion in the Board's reformulation of Contention 1.

3. *Contention 1 Must Demonstrate That the Issue Raised Is Material to the Findings the NRC Must Make to Support the Action Involved in the Proceeding*

CASE must also show that its contention is material to the findings the NRC must make to support the issuance of the license amendments.⁸⁵ On appeal, FPL argues that the Board erred because CASE has not demonstrated that the claimed inadequacies in the Environmental Assessment are material to the findings the NRC must make.⁸⁶ Specifically, FPL claims that “there is no suggestion that this potential temporary increase in [cooling canal system] salinity attributable to the amendment[s] would . . . potentially lead to the abandonment of the NRC’s finding of no significant impact.”⁸⁷ But CASE asserts that the impacts of saltwater intrusion would be significant — thereby implicitly challenging the Staff’s Finding of No Significant Impact with respect to the license amendments.⁸⁸ Moreover, the Board found that CASE raised a material issue related to the Staff’s “NEPA obligation to undertake a full evaluation of the environmental impacts associated with a proposed federal action.”⁸⁹ Based upon our review of the record, we find no error of law or abuse of discretion in the Board’s finding the contention satisfied the materiality prong of our contention admissibility standards.

⁸⁴ See FPL Answer at 22 (noting that the higher temperature limit could temporarily result in higher salinity levels); Tr. at 126-27 (FPL counsel stating that the potential increased salinity levels due to the increased temperature limit would only be temporary); see also Environmental Assessment, 79 Fed. Reg. at 44,466-67.

⁸⁵ 10 C.F.R. § 2.309(f)(1)(iv).

⁸⁶ FPL Brief at 26-29. The Staff argues that CASE’s claimed omission is not material because the discussion in the Environmental Assessment of beneficial environmental impacts demonstrates that the topic was not, in fact, omitted. Staff Brief at 14.

⁸⁷ FPL Brief at 27.

⁸⁸ See, e.g., CASE Intervention Petition at 9 (“the data show[] that major changes occurred in the canals and in the surrounding area” between 2012 and 2014); *id.* (advocating the termination of “dangerous withdrawals of water from the aquifer”); *id.* at 18-19 (“[S]alt water intrusion is a major threat to the viability of the Floridan Aquifer. . . . [U]sing large amounts of water from the Floridan aquifer for power generation puts the water supply at risk.”).

⁸⁹ LBP-15-13, 81 NRC at 472.

4. *Contention 1 Must Provide Sufficient Information to Show That a Genuine Dispute Exists on a Material Issue of Law or Fact*

Finally, CASE must provide sufficient information to show that a genuine dispute exists with the Environmental Assessment on a material issue of law or fact.⁹⁰ As originally presented, Contention 1 challenged the Environmental Assessment's asserted failure to discuss the impacts of salinity in the cooling canal system or saltwater intrusion into the aquifers.⁹¹ As admitted, Contention 1 disputes the adequacy of the Environmental Assessment's discussion of environmental impacts related to the saltwater intrusion issue only.⁹² On appeal, FPL argues that CASE did not address the Staff's conclusions in the Environmental Assessment that there would be no impact on waters other than the cooling canal system and no impact on groundwater resources.⁹³ Similarly, the Staff argues that the Environmental Assessment addressed saltwater intrusion into the aquifers.⁹⁴ The Board acknowledged that the Environmental Assessment mentioned these issues, but it treated the contention as disputing the adequacy of the Environmental Assessment rather than claiming a complete omission of the discussion.⁹⁵

The Staff also argues that the Board erred in not acknowledging that the NRC has already found the environmental impact of groundwater quality degradation resulting from water withdrawals to be small in the Turkey Point License Renewal supplemental EIS.⁹⁶ The Environmental Assessment also references other

⁹⁰ 10 C.F.R. § 2.309(f)(1)(vi).

⁹¹ CASE Intervention Petition at 6; Tr. at 101-03.

⁹² LBP-15-13, 81 NRC at 475-76.

⁹³ FPL Brief at 24-26.

⁹⁴ Staff Brief at 9-11.

⁹⁵ The Board observed that the Environmental Assessment considered the addition of water into the cooling canal system to have either beneficial effects or no significant impact because the cooling canal system is a man-made closed-cycle cooling system. LBP-15-13, 81 NRC at 474 (citation omitted); Tr. at 56 (Counsel for the Staff confirming Judge Kennedy's statement that the Environmental Assessment "credited the aquifer withdrawals as a positive impact on the cooling canal and having no negative impact on groundwater or surficial water resources."). The Board did not err in treating Contention 1 as a challenge to the adequacy of the Environmental Assessment's discussion of impacts rather than a true contention of omission. Contentions of omission are appropriate when an issue that by law should be discussed is not, whereas contentions of adequacy are those that assert the existing discussion of an issue is incomplete. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

⁹⁶ Staff Brief at 12-13 (citing Turkey Point License Renewal SEIS at 4-31 (citations omitted)). The Environmental Assessment referenced the Turkey Point License Renewal SEIS and noted that the license amendments would not result in any impacts beyond those characterized in that SEIS or the Environmental Assessment associated with the 2012 extended power uprate. 79 Fed. Reg. at 44,466. The Staff also notes that the Commission reexamined saltwater intrusion in its recently updated

(Continued)

previous environmental reviews of Turkey Point, including the Atomic Energy Commission's July 1972 Final Environmental Statement (prepared at the operating license stage) and the NRC's 2012 Environmental Assessment for the extended power uprate, and concludes that those descriptions "continue to accurately depict the Turkey Point site and environs."⁹⁷ The Staff argues that neither the Board nor CASE explained why these existing analyses must be revisited in this Environmental Assessment.⁹⁸

We agree with the Staff that the prior environmental analyses are not appropriately revisited in the context of this licensing action. But CASE argues that environmental conditions have changed since the extended power uprate and that the instant license amendments will cause environmental harm to the plant environs. In this vein, CASE has presented evidence — sufficient for purposes of contention admissibility — of changes in recent environmental conditions that it contends were not considered in the Environmental Assessment or the prior environmental analyses upon which it relies.⁹⁹ The Board therefore did not abuse its discretion in interpreting CASE's claims to include a challenge to the adequacy of the Environmental Assessment's discussion of the current description of the environment.

One recent change in environmental conditions relates to FPL's use of water from a canal close to Turkey Point's cooling canal system, the L-31 E canal.¹⁰⁰ As the Board noted, the Environmental Assessment did not consider FPL's temporary authorization to withdraw up to 100 million gallons per day from the L-31 E canal or FPL's request for permanent authorization to draw that amount from the L-31 E canal to mitigate temperature and salinity levels in the cooling canal system.¹⁰¹ We

generic environmental impact statement and rule associated with power plant license renewal and found the impact to be small. Staff Brief at 13 (citing Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,300-01 (June 20, 2013)).

⁹⁷ Environmental Assessment, 79 Fed. Reg. at 44,465.

⁹⁸ Staff Brief at 13-14 (citing *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 136 (3d Cir. 2009)).

⁹⁹ CASE Intervention Petition at 7, 16-17, & Ex. 4, National Park Service Letter. Some of these changed conditions, CASE argues, prompted FPL to request the license amendments in the first instance. *Id.* at 7-9.

¹⁰⁰ The L-31 E canal lies less than one-quarter mile (0.4 km) to the west of the cooling canal system. Turkey Point License Renewal SEIS at 4-49. "The L-31 E canal is a borrow canal and levee system that stretches north-south both intercepting water as it flows eastward to tide and providing storm surge protection." FPL Answer, Ex. 1, August 2014 Emergency Final Order at 3-4. The canal is part of a canal network and coastal levee system that (among other things) reduces the potential for flood and storm surge damage and limits saltwater intrusion. *Id.* at 4. Water from the canal "is discharged to Biscayne Bay at several coastal structures." *Id.* CASE asserts that the canal contains freshwater. CASE Answering Brief at 9.

¹⁰¹ The Environmental Assessment addressed the withdrawals known or expected at the time of
(Continued)

agree that CASE has asserted a genuine dispute that additional water withdrawals are likely, and that these withdrawals might result in environmental impacts that were not considered in the Environmental Assessment. CASE supported this position by citing a letter from the Superintendent of Biscayne National Park expressing concern that the temporary withdrawals from the L-31 E canal will “negatively affect the [Biscayne National] Park in the short term, and set a precedent for future freshwater requests.”¹⁰² The Board “is the appropriate arbiter of such fact-specific questions of contention admissibility,” and we defer to the Board’s decision,¹⁰³ particularly in view of the letter discussed above, whose provenance is a federal agency with expertise on the matter.

FPL and the Staff further argue that the Board abused its discretion when it speculated that additional aquifer withdrawals would be needed if the license amendments were granted.¹⁰⁴ FPL and the Staff emphasized that the withdrawals were authorized by the State of Florida, not the NRC.¹⁰⁵ They also claim that there is no reasonably close causal relationship between the license amendments and the actions taken by FPL in response to the State’s requirements to maintain certain salinity levels in the cooling canal system.¹⁰⁶

While we agree with FPL and the Staff that the NRC has no regulatory authority over FPL’s withdrawals from local aquifers, we find that the Board did not err when it found that there is a reasonably close causal relationship between the NRC’s authorization to allow an increase in the ultimate heat sink temperature and the volume of water withdrawn by FPL pursuant to State processes to support admission of the contention in this matter. With the approval of the license amendments, rather than shutting down and thereby ceasing their contribution to increases in water temperature, Turkey Point Units 3 and 4 may continue at full power. Full-power operation in turn will increase the temperature and salinity

publication; these temporary withdrawals were approved shortly thereafter — August 28, 2014. LBP-15-13, 81 NRC at 474 & n.110 (citing Environmental Assessment, 79 Fed. Reg. at 44,468). FPL requested that the State permanently authorize this withdrawal on February 18, 2015. *Id.* at 474 (citing Jenny Staletovich, *Florida Power & Light Spars with National Park Over Water Needs for Nuclear Plant*, Miami Herald, Feb. 19, 2015, <http://www.miamiherald.com/news/local/environment/article/10655732.html>); *see also* LBP-15-13, 81 NRC at 474 & n.114 (citing 10 C.F.R. § 2.340(a)(2)(ii)) (where the Staff takes action pursuant to a determination of no significant hazards consideration and issues a license amendment prior to a presiding officer’s initial decision, the Staff will thereafter take appropriate action (if necessary) in accordance with the presiding officer’s decision).

¹⁰² CASE Intervention Petition at 16-17 & Ex. 4, National Park Service Letter at 2 (emphasis added).

¹⁰³ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 409 (2012).

¹⁰⁴ FPL Brief at 11-14; Staff Brief at 15. FPL made this argument in the context of standing, whereas the Staff framed it as a NEPA issue.

¹⁰⁵ FPL Brief at 11-13; Staff Brief at 15.

¹⁰⁶ FPL Brief at 10-11; Staff Brief at 15.

in the canals during periods of warmer weather, thereby making it possible that FPL will withdraw additional water to inject into the cooling canal system to maintain the salinity of the system at the desired levels.¹⁰⁷ Therefore, we find no error in the Board's determination that CASE has raised a genuine dispute with the Environmental Assessment — the adequacy of the impacts discussion in this area.

In a similar vein, the Staff argues that the energy output of the reactors remains the same with the license amendments and thus no reasonably close causal relationship exists between the license amendment request and the aquifer withdrawals.¹⁰⁸ Because Contention 1 challenges whether the Environmental Assessment adequately describes the existing environmental conditions and reasonably foreseeable environmental impacts, at the contention admissibility stage, we need not determine precisely how the change in allowable cooling canal system temperatures might affect the volume of future withdrawals. It is sufficient, at this stage, that the license amendments allow Turkey Point Units 3 and 4 to operate during conditions where the licensee previously might have had to shut down or reduce power.

In sum, the Board did not abuse its discretion when it admitted for hearing the issue whether the Environmental Assessment contains a sufficient discussion of the current baseline environmental conditions and the reasonably foreseeable environmental impacts of increased temperature and salinity in the cooling canal system on saltwater intrusion arising from migration out of the system and the withdrawal of freshwater from surrounding aquifers to mitigate conditions within the system, and, with respect to this issue, the “reasons why the proposed action will not have a significant effect on the quality of the human environment.”¹⁰⁹ We find no error in the Board's holding that CASE has articulated a genuine dispute with regard to the Environmental Assessment on this question.¹¹⁰

¹⁰⁷ See, e.g., FPL Answer, Ex. 1, August 2014 Emergency Final Order at 8, 9 (identifying elevated salinity as a factor contributing to higher than usual temperatures in the cooling canal system and discussing relationship between algae bloom, temperature, and salinity); Extended Power Uprate Environmental Assessment, 77 Fed. Reg. at 20,062; FPL Answer at 3-4 (noting that the State, in approving the extended power uprate, required FPL to have an “ongoing program” to monitor the temperature and salinity in the cooling canal system to help prevent saltwater intrusion).

¹⁰⁸ Staff Brief at 17.

¹⁰⁹ LBP-15-13, 81 NRC at 471 (citing 10 C.F.R. § 51.32(a)(3)).

¹¹⁰ The Staff notes that the Board itself raised a challenge as to whether the Staff consulted the correct state official when preparing its Environmental Assessment. Staff Brief at 14 n.70 (citing LBP-15-13, 81 NRC at 475; Tr. at 195-206). To avoid any confusion going forward, we agree that this issue was not raised by CASE and is not properly encompassed within Contention 1 as admitted. Thus, the Staff's selection of an official for consultation purposes is not within the scope of the proceeding, and the Board overstepped its authority in this instance by inserting this issue into CASE's filing.

III. CONCLUSION

For the reasons set forth above, we *affirm* the Board's decision in LBP-15-13, in which the Board held that CASE has demonstrated standing to intervene in this proceeding and admitted Contention 1, as limited.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of December 2015.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-228-LT

AEROTEST OPERATIONS, INC.
(Aerotest Radiography and
Research Reactor)

December 23, 2015

MEMORANDUM AND ORDER

Today we consider the 2012 application of Aerotest Operations, Inc. and Nuclear Labyrinth, LLC (together, the Companies) for an indirect transfer of Facility Operating License No. R-98 for the 250-kW Aerotest Radiography and Research Reactor (ARRR) to Nuclear Labyrinth, LLC.¹ In 2013, the NRC Staff denied the application on the ground that the Companies had failed to satisfy the Commission's financial qualifications requirements.² The Companies have requested that we overturn the Staff's determination.³ At our direction, a Presiding Officer conducted a hearing and compiled an adjudicatory record.⁴ Based on our

¹Ex. NRC-008P, "Application for Consent to Indirect Transfer of Control of Licenses" (May 30, 2012) (ADAMS Accession No. ML14229A047) (nonpublic) (Application).

²Ex. NRC-028, Letter from Eric J. Leeds, NRC, to Michael Anderson, Aerotest (July 24, 2013) (ADAMS Accession No. ML14229A088) (Denial Letter) (denying the application for the license transfer).

³Joint Demand for Hearing on Denial of License Renewal and Indirect License Transfer Regarding Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2013).

⁴CLI-14-5, 79 NRC 254, 255 (2014).

review of that record, we remand the license transfer application to the NRC Staff, without prejudice, for further consideration as discussed herein.

I. BACKGROUND

This is one of three interrelated proceedings, which separately address this license transfer application, a 2005 license renewal application, and an associated 2013 Staff enforcement action.⁵ The event giving rise to all three proceedings is the May 2000 purchase of Aerotest, which owns and operates the ARRR, by Autoliv ASP, Inc. (Autoliv), a wholly owned subsidiary of Autoliv, Inc., which is headquartered in Sweden.⁶ At the time, Aerotest did not seek Commission approval for the transfer to Autoliv.⁷ Aerotest did, however, notify the NRC of the purchase, state that Aerotest “would remain under the direct control of U.S. Citizens,” and commit to keeping the Commission informed of “any significant changes inimical to the safety and security of the ARRR.”⁸ The following year, Aerotest began seeking buyers for the ARRR — an effort that it would continue for the next decade and that has culminated in the proposed sale to Nuclear Labyrinth.⁹

In May 2012, Aerotest, joined by Nuclear Labyrinth, submitted its current application for an indirect license transfer.¹⁰ Nuclear Labyrinth proposed to operate the ARRR following the transfer to provide neutron radiography services along with nuclear science and engineering research and training.¹¹ As part of the

⁵ Ex. NRC-028, Denial Letter; *see also* Order Prohibiting Operation of Aerotest Radiography and Research Reactor, 78 Fed. Reg. 46,618 (Aug. 1, 2013) (Order Prohibiting Operation).

⁶ *See* CLI-14-5, 79 NRC at 254-55; Ex. NRC-027P, “Safety Evaluation by the Office of Nuclear Reactor Regulation; Indirect License Transfer of Aerotest Radiography and Research Reactor Due to the Proposed Acquisition of Aerotest Operations, Inc. by Nuclear Labyrinth, LLC; Facility Operating License No. R-98; Docket No. 50-228” (July 24, 2013), at 2 (ADAMS Accession No. ML14229A049) (nonpublic) (SER); Ex. NRC-008P, Application, at 5-6.

⁷ *See* Ex. AOI-112, memorandum from David B. Matthews, NRR, to John W. Craig, EDO, “Transfer of Ownership at Research Reactor” (Oct. 17, 2000), at 1 (ADAMS Accession No. ML14229A054) (nonpublic). The Staff undertook several actions to assess the acceptability of the transfer. *Id.* at 1-2 & Att., “Action Plan.”

⁸ Ex. NRC-012, Letter from Sandra L. Warren, Aerotest, to Director of the Office of Nuclear Reactor Regulation, NRC (Apr. 14, 2000), at 1 (ADAMS Accession No. ML14229A076).

⁹ In the interim, Aerotest sought to transfer its license to another entity. That transfer, although approved by the NRC, did not take place. *See* Ex. AOI 119, Order Approving Indirect Transfer of Facility Operating License and Conforming Amendment (July 6, 2010), at 4 (ADAMS Accession No. ML14229A027) (nonpublic) (establishing deadline of September 13, 2010, to complete the transfer).

¹⁰ Ex. NRC-008P, Application.

¹¹ *Id.* at 5, 10-11.

application, the Companies submitted 5 years of financial revenue-and-expense estimates, as required by 10 C.F.R. § 50.33(f)(2).¹²

Under the proposed transfer, Autoliv would sell its 100% interest in Aerotest to Nuclear Labyrinth and, upon the closing of the sale, would provide Nuclear Labyrinth with enough funds to operate the facility for approximately 12 months.¹³ Autoliv also agreed to fully fund a decommissioning trust, and to provide funds for spent fuel disposal and the purchase of fuel element storage canisters for the ARRR's existing damaged fuel.¹⁴

On July 24, 2013, the Staff denied the license transfer application on the ground that the Companies had not provided sufficient assurance that they had, or would have, funds to perform the activities authorized by the license.¹⁵ Specifically, the Staff concluded that the Companies had not shown that (i) they “possess or have reasonable assurance of obtaining the funds necessary to cover estimated operating costs for the period of the license” or (ii) there would be “sufficient funds to cover the annual cost of fuel storage until the DOE accepts the fuel, which is expected to occur in 2055 or later.”¹⁶ The Staff denied the license renewal application on the ground that Aerotest is owned, controlled, or dominated by a foreign company.¹⁷ At the same time, the Staff issued an order prohibiting operation of the already-shutdown ARRR because of the denials.¹⁸

The Companies sought hearings on all three actions. We granted the hearing request in the license transfer proceeding and held in abeyance the requests for hearings on the license renewal application and the enforcement order.¹⁹ We instructed the Chief Judge of the Atomic Safety and Licensing Board Panel to assign the license transfer case to a Presiding Officer, who would conduct an evidentiary hearing and then certify the record to us, consistent with our regulations governing license transfer proceedings.²⁰ Chief Judge Hawkens conducted the hearing, including oral argument and the examination of five witnesses. Shortly thereafter, he certified the record to us for our decision.²¹

¹² See, e.g., *id.*, Att. 7, “5 Year Projected Income Statement for Aerotest Operations, Inc.” (May 30, 2012), at 48.

¹³ See *id.* at 4, 11.

¹⁴ See *id.* at 5, 6, 12. In addition, Nuclear Labyrinth agreed to maintain a letter of credit for use in the event of a shortfall in the decommissioning fund. See, e.g., Ex. NRC-027P, SER, at 14.

¹⁵ Ex. NRC-028, Denial Letter, at 2.

¹⁶ Ex. NRC-027P, SER, at 9, 11, respectively.

¹⁷ Ex. NRC-028, Denial Letter, at 2.

¹⁸ See *id.*; see also Order Prohibiting Operation, 78 Fed. Reg. 46,618.

¹⁹ CLI-14-5, 79 NRC at 263.

²⁰ *Id.* at 263-64; see 10 C.F.R. § 2.1319(a).

²¹ LBP-14-10, 80 NRC 85 (2014).

II. DISCUSSION

The Atomic Energy Act of 1954, as amended, requires a licensee to obtain the NRC's written consent prior to transferring an NRC license.²² To gain such approval, the licensee must demonstrate that the proposed transferee is qualified to hold the license.²³ To qualify, the proposed transferee for an operating license must, among other things, satisfy the same financial qualification requirements that apply to an applicant for an initial operating license.²⁴ An applicant is required to show that the proposed transferee has the financial qualifications "to carry out . . . the activities for which the . . . license is sought."²⁵ For the ARRR, these activities include both the operation of the facility and the subsequent onsite storage of spent fuel. Consequently, the Companies must demonstrate financial qualifications by showing that they will have sufficient funds to pay both the facility's expenses during the ARRR's operation and the spent fuel storage expenses following the ARRR's shutdown.

The adjudicatory record in this case reflects a fundamental dispute about the evidence on the Companies' financial qualifications. The evidence has come to the agency in two phases — during the Staff's review of the license transfer application and later during the hearing to compile the adjudicatory record. The Staff asserts that the information submitted by the Companies after the Staff's denial — that is, during the hearing — goes beyond the information provided to the Staff at the time of the denial.²⁶ Therefore, the Staff argues, we should consider only the evidence that was before the Staff during its review of the license transfer application. On the other hand, the Companies assert that we should consider all of the evidence they have provided, regardless of when it was submitted.

Both parties argue that we should look to our *Honeywell* decision to determine the admissibility of the evidence submitted by the Companies after the Staff's denial.²⁷ The Staff argues that, in applying *Honeywell*, we should consider only the information that the Companies submitted during the Staff's review of the application and that, at least in this proceeding, all subsequently submitted new

²² Atomic Energy Act of 1954, § 184, 42 U.S.C. § 2234; *see* 10 C.F.R. § 50.80(a).

²³ 10 C.F.R. § 50.80(c)(1).

²⁴ *Id.* § 50.80(b)(1)(i).

²⁵ *Id.* § 50.33(f).

²⁶ *See, e.g.*, NRC Staff Post-Hearing Statement of Position Regarding Denial of the Indirect License Transfer of the Aerotest Radiography and Research Reactor (Aug. 29, 2014), at 4, 24-28 (nonpublic) (Staff Post-Hearing Statement).

²⁷ *Cf. Honeywell International, Inc.* (Metropolitan Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 29 n.158 (2013) (referring to "the *de novo* standard applicable to [a review of] a Staff decision on a license amendment application"); *see also id.* at 31-32.

information is inadmissible.²⁸ According to the Staff, the new evidence that the Companies ask us to consider is “information that the Staff was neither aware of nor could have known at the time of its decision.”²⁹ To the extent the Companies possessed new information prior to issuance of the Staff’s July 24, 2013 denial but failed to provide that information to the Staff, the Staff requests that we not consider it.³⁰

By contrast, the Companies argue that the disputed evidence “was available for the Staff’s review,” was mostly “identified within the application and responses to RAIs or could reasonably be determined to be available from information in the [a]pplication or RAI” responses, and “shed[s] additional light on the facts that existed and events that occurred during the relevant time period.”³¹ The Companies therefore argue that we should consider all of the information they submitted — including the disputed information submitted for the first time at the hearing — in reaching a decision on the license transfer application.

As a practical matter, the Staff evaluated much of the evidence now before us to reach its decision to deny the application. The Companies, however, submitted potentially significant additional information at the hearing. Further, we are cognizant of the length of time that has passed since the Staff’s denial and of the changing economic conditions that could have affected the Companies’ revenue projections related to the ARRR since the Staff completed its review in 2013. In view of these considerations, we decline to reach the admissibility question.

Rather, we find that judicial economy is best served by remanding the license transfer application to the Staff for further consideration.³² On remand, we direct the Staff to (1) consider the additional information submitted by the Companies at the hearing and (2) afford the Companies an opportunity to supplement the application and submit any additional relevant information within a time frame established by the Staff.³³

²⁸ See, e.g., Tr. at 59, 65, 208-09. The Staff clarifies that an “expla[nation of] something that was already in Aerotest’s application or [responses to requests for additional information] . . . would be acceptable.” *Id.* at 67.

²⁹ Staff Post-Hearing Statement at 23.

³⁰ *Id.* at 31-32.

³¹ Aerotest Operations, Inc. and Nuclear Labyrinth, LLC Post-Hearing Statement of Position on the Denial of Indirect License Transfer Application (Aug. 29, 2014) at 50 (nonpublic) (internal quotations omitted).

³² Neither party should interpret our decision today as prejudging the outcome of the Staff’s review. We expect the Staff to fully consider all information now on the record, along with any additional information submitted by the Companies consistent with this decision, in reaching a final decision on the application.

³³ Our decision today does not foreclose the Staff’s ability to request additional information on any part of the license transfer application. See 10 C.F.R. §§ 2.102(a), 50.33(f)(5).

Pending our resolution of the current license transfer application, we have held in abeyance the Companies' requests for hearings on the license renewal application and the Staff's related enforcement order.³⁴ We will continue to hold these two requests in abeyance, pending the resolution of this license transfer matter.

III. CONCLUSION

For the reasons set forth above, we *remand* the license transfer application to the Staff, without prejudice, for further consideration of all evidence submitted by the Companies at the evidentiary hearing. We further *direct* the Staff to provide the Companies with an opportunity to submit any additional relevant information, should they wish to do so, within a time frame established by the Staff.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of December 2015.

³⁴ CLI-14-5, 79 NRC at 263.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

Docket No. 50-341-LR

DTE ELECTRIC COMPANY
(Fermi Nuclear Power Plant,
Unit 2)

December 23, 2015

MEMORANDUM AND ORDER

Beyond Nuclear moves to reopen the record of this proceeding to admit a new contention challenging the adequacy of the draft supplemental environmental impact statement (SEIS) prepared in connection with the subject license renewal application. Beyond Nuclear seeks to lodge a “placeholder” contention that challenges the NRC’s reliance, in the draft SEIS, on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage.¹ As Beyond Nuclear acknowledges, its request is substantively identical to several motions that we have rejected in other reactor licensing proceedings.²

¹ See Beyond Nuclear’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Fermi Unit 2 Nuclear Power Plant (Dec. 4, 2015); Beyond Nuclear’s Motion to Reopen the Record of License Renewal Proceeding for Fermi Unit 2 Nuclear Power Plant (Dec. 4, 2015) (Motion). The Staff and DTE oppose Beyond Nuclear’s request. See NRC Staff Answer to Beyond Nuclear’s Hearing Request and Petition to Intervene and Motion to Reopen the Record in the License Renewal Proceeding for Fermi Unit 2 Nuclear Power Plant (Dec. 11, 2015); DTE Electric Company Answer Opposing Petition to Intervene and Motion to Reopen (Dec. 21, 2015).

² Motion at 2; see *Union Electric Co.* (Callaway Plant, Unit 1), CLI-15-11, 81 NRC 546 (2015);
(Continued)

For the reasons articulated in those decisions, we likewise *deny* Beyond Nuclear's motion.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of December 2015.

DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC 551 (2015); *see also Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), CLI-15-15, 81 NRC 803 (2015).

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- Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army*, 398 F.3d 1235, 1240 (1st Cir. 2005)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 269 (2009)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 922-23 (2009)
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- Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)
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- Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1123 (D.C. Cir. 1971)
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- Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1123, 1124 (D.C. Cir. 1971)
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- City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1152 (9th Cir. 1997)
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996)
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986)
unless a schedule is so onerous or unfair that it deprives a party of procedural due process, scheduling is a matter of licensing board discretion; LBP-15-29, 82 NRC 254 (2015)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)
burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 394 (2015)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 94-98 (2000)
Congress intentionally limited the opportunity for a hearing to certain designated agency actions which do not include exemptions; LBP-15-24, 82 NRC 76 n.38 (2015)
exemption did not modify the license because the ability to request an exemption is part of the license itself; LBP-15-24, 82 NRC 103 n.227 (2015)
- 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), CLI-01-25, 54 NRC 368, 374 (2001)
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- Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982)
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- Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974)
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- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350-51 (2009)
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whether and how NRC Staff fulfills its consultation obligations are issues that could form the basis for a new contention that might appropriately be made in a timely fashion after Staff issues its draft environmental impact statement; CLI-15-18, 82 NRC 147 n.56 (2015)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 353-54 (2009)
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- Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014)
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009)
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 548-49, 568-70 (2009)
for any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier; CLI-15-18, 82 NRC 147 n.56 (2015)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009)
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009)
boards have some discretion to reformulate or narrow contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding, but this authority is not without limit; CLI-15-18, 82 NRC 141 (2015)
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53, 565-66 (2009)
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 565-71 (2009)
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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 568 (2009)
petitioner may respond to the legal or logical arguments presented in the answers to its hearing request, but may not use its reply to raise new issues for the first time; CLI-15-18, 82 NRC 146 (2015)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 568-69 (2009)
new claim would not have met the timeliness standards because petitioner could have raised its environmental justice concerns when it filed its initial petition; CLI-15-18, 82 NRC 147 n.59 (2015)
original contention did not point to any specific grievance with the environmental justice discussion provided in applicant's environmental report and so the board should have applied the standards in 10 C.F.R. 2.309(c) to determine whether petitioner had demonstrated good cause for its late filing; CLI-15-18, 82 NRC 147 (2015)

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- Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 470-71 (2012)
contention migrates when a licensing board construes a contention challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without petitioner amending the contention; CLI-15-17, 82 NRC 42 n.58 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)
contentions cannot be based on speculation but must have some reasonably specific factual or legal basis; CLI-15-20, 82 NRC 221 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008)
NRC's "strict by design" contention admissibility standards focus the hearing process on disputes that can be resolved in adjudication; CLI-15-22, 82 NRC 315 (2016); CLI-15-23, 82 NRC 325 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008)
regardless of whether a hearing request is granted, NRC Staff performs a full safety review of every license amendment request and no request is approved until all necessary public health and safety findings have been made; CLI-15-22, 82 NRC 317 (2016)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 121-22 (2009)
adjudicatory proceeding on license amendment is not terminated by issuance of the amendment; CLI-15-17, 82 NRC 40 n.47 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)
contention admissibility requirements are strict by design, and only focused, well-supported issues will be admitted for hearing; CLI-15-21, 82 NRC 302 (2015); LBP-15-23, 82 NRC 59 (2015); LBP-15-26, 82 NRC 174 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 363 (2001)
conclusory statements do not amount to a challenge to a severe accident mitigation alternatives analysis; CLI-15-18, 82 NRC 142 n.39 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)
four-factor test is applied to rule waiver requests; CLI-15-21, 82 NRC 302 (2015)
rule waiver petitions must address the criteria in 10 C.F.R. 2.335; CLI-15-22, 82 NRC 318 (2016)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005)
rule waiver requires that special circumstances exist that were not considered, either explicitly or by necessary implication, when NRC adopted its license renewal regulations; CLI-15-21, 82 NRC 307 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560-61 (2005)
it makes no sense to spend valuable resources litigating allegations of current deficiencies in a proceeding that is directed to future-oriented issues of aging; CLI-15-21, 82 NRC 304 n.47 (2015)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 561 (2005)
license renewal regulations serve exactly their intended purpose by focusing the proceeding on future-oriented aging issues; CLI-15-21, 82 NRC 306 (2015)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 146 (2015)
reply brief cannot introduce new issues or expand the scope of arguments advanced in the original petition, but rather must focus on actual or logical arguments presented in the original petition or raised in answers to it; LBP-15-26, 82 NRC 182 (2015)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), LBP-15-5, 81 NRC 249, 286 (2015)
burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 394 (2015)

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- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC 221, 241-42 (2015)
petitions to suspend final reactor licensing decisions pending a waste confidence safety finding were denied; DD-15-9, 82 NRC 286 (2015)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC 535, 564 n.46 (2015)
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- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC 551 (2015)
placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage are inadmissible; CLI-15-27, 82 NRC 414-15 (2015)
- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), CLI-15-15, 81 NRC 803 (2015)
placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage are inadmissible; CLI-15-27, 82 NRC 414-15 (2015)
- Duke Energy Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-32, 60 NRC 713, 720-21 (2004)
license amendment request must provide sufficient documentation and analysis to show that licensee has complied with relevant requirements, thereby demonstrating that the amended license will continue to provide reasonable assurance of adequate protection of public health and safety; CLI-15-22, 82 NRC 316 (2016)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212 (2001)
scope of the license renewal proceeding on safety-related issues is limited to plant structures and components that will require an aging management review for the period of extended operation under the renewed license and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; CLI-15-21, 82 NRC 304 (2015)
- 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)
conclusory statements do not amount to a challenge to a severe accident mitigation alternatives analysis; CLI-15-18, 82 NRC 142 n.39 (2015)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)
contentions of omission are appropriate when an issue that by law should be discussed is not, whereas contentions of adequacy are those that assert the existing discussion of an issue is incomplete; CLI-15-25, 82 NRC 403 n.95 (2015)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003)
contention pleading standards require petitioners to plead specific grievances, not simply to provide general notice pleadings; CLI-15-18, 82 NRC 147 n.58 (2015)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999)
although boards may appropriately view petitioner's support for its contention in a light favorable to petitioner, they cannot do so by ignoring the contention admissibility requirements; CLI-15-18, 82 NRC 145-46 & n.53 (2015)
- Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978)
intervention petitioner must allege such a personal stake in the outcome of the controversy as to demonstrate that a concrete adverseness exists that will sharpen the presentation of issues; CLI-15-25, 82 NRC 394 (2015)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982)
contention about a matter not covered by a specific rule need only allege that it poses a significant safety problem; CLI-15-23, 82 NRC 325 n.21 (2015)
- Eastern Testing & Inspection, Inc.*, LBP-96-11, 43 NRC 279, 282 n.1 (1996)
board authority under section 2.338(i) is to approve or reject a settlement agreement, and so it cannot amend the agreement without consent of the parties; LBP-15-21, 82 NRC 18 n.23 (2015)

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- concerns about how some aspect of a settlement agreement is being implemented or enforced can be brought to the attention of the Commission, which retains supervisory authority over the parties' agreement; LBP-15-21, 82 NRC 17 n.21 (2015)
- Energy Fuels Nuclear, Inc.*, LBP-95-20, 42 NRC 197, 198-99 (1995)
- dismissal of license amendment request is conditioned on requirement that licensee provide notice to petitioner of submission of a similar LAR so that petitioner has a fair opportunity to relitigate issues previously found admissible; LBP-15-28, 82 NRC 243 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33-35 (2008)
- expansion of issues for litigation that results from admission of a contention or denial of motion for summary disposition does not have a pervasive and unusual effect on the litigation; CLI-15-17, 82 NRC 37 n.25 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008)
- board's contention admissibility rulings do not affect the basic structure of the proceeding in a pervasive and unusual manner such that immediate review is appropriate; CLI-15-17, 82 NRC 44, 47 (2015)
- broadening of issues for hearing caused by the board's admission of a contention that applicant opposes does not constitute a 'pervasive and unusual effect on the litigation meriting interlocutory review; CLI-15-17, 82 NRC 37 n.23 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009)
- relevant issue is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-15-29, 82 NRC 250-51 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 290-91 (2010), *reconsideration denied*, CLI-10-15, 71 NRC 479 (2010)
- purpose of SAMA analyses is to identify safety enhancements that would be cost-beneficial to adopt; LBP-15-29, 82 NRC 250 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39 (2012)
- severe accident mitigation alternatives analyses in NRC license renewal proceedings are discussed; CLI-15-18, 82 NRC 139 n.16 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 706-07 (2012)
- although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA's rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 250 n.22 (2015)
- severe accident mitigation alternatives analysis is a quantitative cost-benefit analysis, assessing whether the cost of implementing a specific enhancement outweighs its benefit; CLI-15-18, 82 NRC 142-43 & n.40 (2015)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012)
- it will always be possible to envision and propose some alternative approach to severe accident mitigation alternatives analysis, some additional detail to include, or some refinement; LBP-15-29, 82 NRC 250 (2015)
- NRC regulations place an intentionally heavy burden on parties seeking to reopen the record; CLI-15-19, 82 NRC 155 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008)
- Commission has declined to take interlocutory review with respect to case management decisions; CLI-15-24, 82 NRC 335 n.19 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009)
- interlocutory review is generally disfavored and requests for such review are granted only under extraordinary circumstances; CLI-15-24, 82 NRC 335 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133-36 (2009)
- expense is not irreparable harm; CLI-15-24, 82 NRC 337 n.35 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 136-38 (2009)
- increased litigation burden did not have a pervasive effect on the basic structure of the proceeding; CLI-15-24, 82 NRC 337 n.35 (2015)

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- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009)
broadening of issues for hearing caused by the board's admission of a contention that applicant opposes does not constitute a pervasive and unusual effect on the litigation meriting interlocutory review; CLI-15-17, 82 NRC 37 n.23 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 811-12 (2011)
Commission generally disfavors interlocutory review; CLI-15-17, 82 NRC 36 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-12-18, 76 NRC 371, 374 (2012)
Commission has declined to take interlocutory review with respect to case management decisions; CLI-15-24, 82 NRC 335 n.19 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 369, 371 (2015)
original contention did not point to any specific grievance with the environmental justice discussion provided in applicant's environmental report and so the board should have applied the standards in 10 C.F.R. 2.309(c) to determine whether petitioner had demonstrated good cause for its late filing; CLI-15-18, 82 NRC 147 n.58 (2015)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246, 475-76 (2013)
petitioner asserted that applicant underestimated the population projections used in the SAMA analysis in part through failure to consider certain U.S. Census estimates and nonresident populations (tourists and commuters); CLI-15-18, 82 NRC 148 n.68 (2015)
- Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), LBP-15-20, 81 NRC 829, *rev'd*, CLI-15-23, 82 NRC 321 (2015)
petitioners' argument that additional testing should be required to demonstrate compliance with 10 C.F.R. 50.61a is an impermissible challenge to that regulation; CLI-15-22, 82 NRC 318 n.55 (2016)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 236-38 (2006)
issuance of power uprate license amendment in advance of hearing did not deprive intervenor of hearing rights because the license amendment may be revoked or conditioned after hearing; CLI-15-17, 82 NRC 40 n.47 (2015)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 45 n.246 (2010)
burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 394-95 (2015)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337-38 (2011)
reopening the record for any reason is considered to be an extraordinary action; CLI-15-19, 82 NRC 156 (2015)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-15-18, 81 NRC 793, 799 (2015)
exemption requests ordinarily do not trigger hearing rights when an already-licensed facility is asking for relief from performing a duty imposed by NRC regulations; LBP-15-24, 82 NRC 94 n.163 (2015)
state challenged the adequacy of licensee's decommissioning fund exemption request and associated analyses; LBP-15-24, 82 NRC 81 n.74 (2015)
- Exelon Generation Co., LLC* (Byron Nuclear Power Station, Units 1 and 2), CLI-14-6, 79 NRC 445, 449 (2014)
once all contentions have been decided, the contested adjudicatory proceeding is terminated; LBP-15-30, 82 NRC 345 n.30 (2015)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 207-08 (2007)
regulatory approach, of relying on licensees to submit complete and accurate information, and auditing that information as appropriate, is considered to be entirely consistent with sound regulatory practice; LBP-15-24, 82 NRC 79 n.66 (2015)

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- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 379-80 (2012)
on appeal, Commission defers to board's rulings on contention admissibility absent an error of law or abuse of discretion; CLI-15-23, 82 NRC 324-25 (2015)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 385-88 (2012)
no rule or regulation of the Commission, or any provision thereof, is subject to attack in any adjudicatory proceeding subject to 10 C.F.R. Part 2 except as provided by the waiver provision of 10 C.F.R. 2.335(b); LBP-15-24, 82 NRC 76 n.37 (2015)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 206-07 (2013)
rule waiver requests must demonstrate that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which it was adopted; CLI-15-21, 82 NRC 302 (2015)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 207-09 (2013)
four-factor test is applied to rule waiver requests; CLI-15-21, 82 NRC 302 (2015)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395-96 (2012)
in a license amendment proceeding, an admissible contention must meet the six requirements of 10 C.F.R. 2.309(f)(1); LBP-15-24, 82 NRC 75-76 (2015)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 397 (2012)
Commission generally defers to board decisions on contention admissibility unless it finds an error of law or abuse of discretion; CLI-15-20, 82 NRC 222 (2015)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 406 (2012)
proper question is not whether there are plausible alternative choices for use in the SAMA analysis, but whether the analysis that was done is reasonable under NEPA; LBP-15-29, 82 NRC 250 (2015)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 407 (2012)
unless petitioner sets forth a supported contention pointing to an apparent error or deficiency that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing; LBP-15-29, 82 NRC 250 (2015)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 409 (2012)
board is the appropriate arbiter of fact-specific questions of contention admissibility, and the Commission defers to the board's decision; CLI-15-25, 82 NRC 405 (2015)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 173 (2014)
licensee cannot amend the terms of its license unilaterally; LBP-15-27, 82 NRC 197 (2015)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 174 (2014)
NRC's inspection process is separate from its licensing process; LBP-15-27, 82 NRC 196-97 (2015)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 175 (2014)
if a hearing could be invoked each time NRC engaged in oversight over or inquiry into plant conditions, NRC's administrative process could be brought to a virtual standstill; LBP-15-27, 82 NRC 194 (2015)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 178 & n.53 (2014)
licensing boards may not assume that a licensee intends to contravene NRC regulations; LBP-15-24, 82 NRC 83 n.91 (2015)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 179 (2014)
section 2.206 provides a process for stakeholders to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted; CLI-15-20, 82 NRC 230 (2015)

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- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 283-84 (2008)
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- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 291 (2008)
state's claim that license amendment request contains incomplete and incorrect statements concerning its use of the trust fund is within the scope of the license amendment proceeding as defined in the notice of opportunity to request a hearing; LBP-15-24, 82 NRC 79 (2015)
- Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982)
purpose of NEPA's requirement that an EIS be prepared is to obviate the need for speculation by ensuring that available data are gathered and analyzed prior to the implementation of the proposed action; LBP-15-23, 82 NRC 63 (2015)
- Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996)
NEPA does not require circulation of a draft environmental assessment in all cases; CLI-15-17, 82 NRC 41 n.53 (2015)
- GE-Hitachi Global Laser Enrichment LLC* (GLE Commercial Facility), LBP-12-21, 76 NRC 218, 240 (2012)
in a limited number of appropriate circumstances, NRC Staff may exempt an applicant from regulatory requirements; LBP-15-24, 82 NRC 74 n.22 (2015)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
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- Gilmore v. Lujan*, 947 F.2d 1409, 1412 (9th Cir. 1991)
those dealing with their government must turn square corners; LBP-15-24, 82 NRC 101 (2015)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)
absent documentary support, NRC has declined to assume that licensees will contravene its regulations; LBP-15-24, 82 NRC 82-83 & n.86, 87, 91 (2015)
- Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004)
Clean Water Act section 404 permit process is discussed; LBP-15-23, 82 NRC 61 (2015)
- Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1273-74 (10th Cir. 2004)
while the Clean Water Act imposes substantive restrictions on agency action, NEPA imposes procedural requirements aimed at integrating environmental concerns into the very process of agency decision-making; LBP-15-23, 82 NRC 62 (2015)
- Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994)
standard of review of a board's determination on standing is deferential and the Commission will uphold the decision absent a clear misapplication of facts or law; CLI-15-25, 82 NRC 394 n.32 (2015)
- Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)
pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, but it is not the proper function of the court to assume the role of advocate for the litigant; CLI-15-18, 82 NRC 146 n.53 (2015)
- Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 6 (2013)
claimed deficiencies in a decommissioning plan must have health and safety significance in order to be admissible; LBP-15-24, 82 NRC 87 (2015)
- Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013)
exemption request is subject to a hearing where the plant already has a license and is seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal; LBP-15-24, 82 NRC 76 n.39 (2015)

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- when licensee requests an exemption in a related license amendment application, NRC considers the hearing rights on the amendment application to encompass the exemption request as well; LBP-15-24, 82 NRC 84 n.96 (2015)
- Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 29 n.158, 31-32 (2013)
de novo standard is applicable to review of an NRC Staff decision on a license transfer application; CLI-15-26, 82 NRC 411 n.27 (2015)
- Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 86 (1981)
procedural rulings involving discovery rarely meet the standard for interlocutory review; CLI-15-24, 82 NRC 335 n.19 (2015)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320-21 (1998)
petition is considered under interlocutory review standard because neither NRC Staff's issuance of the license nor the board's denial of a stay of the effectiveness of that license constitutes final agency action; CLI-15-17, 82 NRC 39 n.40 (2015)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 322 (1998)
claim of violation of the National Historic Preservation Act did not in itself establish irreparable harm warranting interlocutory review; CLI-15-17, 82 NRC 40 n.45 (2015)
to show imminent, irreparable harm to cultural resources, petitioner would need to describe with specificity the resources and the manner in which they are threatened; CLI-15-17, 82 NRC 42 (2015)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998)
procedural rulings involving discovery rarely meet the standard for interlocutory review; CLI-15-24, 82 NRC 335 n.19 (2015)
- In re Three Mile Island Alert, Inc.*, 771 F.2d 720, 729-30 (3d Cir. 1985)
decision lifting license suspension and authorizing restart under stipulated conditions is not a license amendment; LBP-15-27, 82 NRC 191 n.41 (2015)
- Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975)
adherence to deadlines and procedures in NRC rules is required so that other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information; CLI-15-18, 82 NRC 146 n.56 (2015)
contentions must be pled with sufficient specificity to put opposing parties on notice of which claims they will actually have to defend; CLI-15-18, 82 NRC 146 n.53 (2015)
- Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 577 (1975)
board is wrong to strain to discern the outlines of any contention in an amorphous petition; CLI-15-18, 82 NRC 143 n.43 (2015)
- Lee v. U.S. Air Force*, 354 F.3d 1229, 1244 (10th Cir. 2004)
NEPA imposes on NRC a disclosure obligation that NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action; CLI-15-25, 82 NRC 396 n.46 (2015)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74-75 (1991)
because NRC's decision to grant the exemptions is a matter of public record, the board takes notice that the exemptions have now been approved; LBP-15-24, 82 NRC 81 n.78 (2015)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004)
petitioner may respond to the legal or logical arguments presented in the answers to its hearing request, but may not use its reply to raise new issues for the first time; CLI-15-18, 82 NRC 146 (2015); CLI-15-20, 82 NRC 230 n.124 (2015)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)
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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)
allowing use of reply briefs to provide, for the first time, the necessary threshold support for contentions would effectively bypass and eviscerate rules governing timely filing; LBP-15-26, 82 NRC 182 n.36 (2015)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005)
timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted; LBP-15-24, 82 NRC 98 n.194 (2015)
- Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983)
moving party properly bears the burden of meeting the reopening standards and applicant retains the burden of proof on the question whether the license should be issued; CLI-15-19, 82 NRC 157 n.29 (2015)
- Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)
burden of satisfying the reopening requirements is a heavy one, and it rests with the party moving to reopen; CLI-15-19, 82 NRC 155-56 (2015)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
intervention petitioner must allege an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-15-25, 82 NRC 394 (2015)
- Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 391 (2012)
general and unparticularized references to health and safety significance and material deficiencies in the environmental report would not satisfy the rule that contentions be pled with specificity; CLI-15-18, 82 NRC 146 n.53 (2015)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-01-27, 54 NRC 219, 219 (2001), *review declined*, SECY Memorandum to Board and Parties on Order Approving Settlement and Terminating Proceeding (Nov. 19, 2001)
licensing boards are to approve settlements when they are fair and reasonable and comport with the public interest; LBP-15-30, 82 NRC 345 (2015)
- Massachusetts v. NRC*, 708 F.3d 63, 75 n.18 (1st Cir. 2013)
agencies are permitted to impose requirements or thresholds for parties seeking to reopen a closed record; CLI-15-19, 82 NRC 156 (2015)
- Massachusetts v. NRC*, 878 F.2d 1516, 1519, 1521 (1st Cir. 1989)
exemptions do not actually modify the regulations because the ability to request an exemption is part of the regulations themselves; LBP-15-24, 82 NRC 103 n.227 (2015)
- Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989)
NRC authorization to restart a plant following NRC Staff's review of forty-seven ordered modifications is not a license amendment; LBP-15-27, 82 NRC 191 n.41 (2015)
- Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982)
regardless of the issuance of the license, the burden at hearing remains on applicant and, with respect to NEPA compliance, on NRC Staff; CLI-15-17, 82 NRC 41 (2015)
- National Wildlife Federation v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1992)
cause of injury to intervention petitioner need not flow directly from the challenged action, but the chain of causation must be plausible; CLI-15-25, 82 NRC 394 (2015)
- Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)
mere listing of proposed mitigation measures in the draft environmental impact statement is insufficient under NEPA; LBP-15-23, 82 NRC 64 n.22 (2015)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 136 (3d Cir. 2009)
prior environmental analyses need not be revisited in the environmental assessment; CLI-15-25, 82 NRC 404 (2015)
- New Jersey Environmental Federation v. NRC*, 645 F.3d 220, 233 (3d Cir. 2011)
NRC's standard for motion to reopen has been upheld and court defers to NRC's application of its rules as long as it is reasonable; CLI-15-19, 82 NRC 156 n.21 (2015)

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- New Jersey Environmental Federation v. NRC*, 645 F.3d 220, 234 (3d Cir. 2011)
criteria for reopening a closed record may be exacting; CLI-15-19, 82 NRC 156 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 307 (2012)
absence of a prohibition is not sufficient justification to admit a contention; CLI-15-23, 82 NRC 326 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 & n.88 (2012)
contention that seeks to impose a requirement beyond those imposed by a Commission regulation is inadmissible; LBP-15-26, 82 NRC 175 n.22 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 322 (2012)
severe accident mitigation alternatives analyses are conducted for the purposes of the NRC's environmental review under NEPA and are not safety analyses; CLI-15-18, 82 NRC 139 n.16 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012)
contentions admitted for litigation must point to a deficiency in the application, and not merely suggest other ways an analysis could have been done, or other details that could have been included; CLI-15-18, 82 NRC 143 n.42 (2015)
proper question is not whether there are plausible alternative choices for use in the SAMA analysis, but whether the analysis that was done is reasonable under NEPA; LBP-15-29, 82 NRC 250 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323-24 (2012)
generalized reference to the potential human and economic costs from an accident falls short of the support necessary for a severe accident mitigation alternatives contention; CLI-15-18, 82 NRC 143 (2015)
petitioners must provide a nexus between its concerns and any deficiencies in applicant's SAMA analysis, which would be necessary to establish a genuine dispute for an admissible contention; CLI-15-18, 82 NRC 141 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 326-27 (2012)
board is the appropriate arbiter of fact-specific questions of contention admissibility, and the Commission will not second-guess the board's evaluation of factual support for the contention, absent an error of law or abuse of discretion, even if support for the contention is weak; CLI-15-25, 82 NRC 397 & n.52 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 329 (2012)
boards make threshold decisions on materiality on a case-by-case basis, given the nature of the issue and the record presented before the board; LBP-15-24, 82 NRC 85 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 348 (2012)
board may not supply its own bases for a contention; CLI-15-17, 82 NRC 46-47 (2015)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54-55 (2013)
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- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)
petitioners are not allowed to postpone filing a contention challenging publicly available information or analysis until NRC Staff issues some document that collects, summarizes, and places into context the facts supporting that contention; CLI-15-17, 82 NRC 44-45 (2015)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 938-42 (2008)
contention that applicant had inadequately described aging management plan by relying on a promise of compliance with NRC orders instead of describing the plan was admissible; LBP-15-24, 82 NRC 83 n.92 (2015)
- Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 209-10 (2011)
incorrect legal ruling typically does not warrant interlocutory review because such rulings can be reviewed on appeal from partial initial decisions or a final decision; CLI-15-17, 82 NRC 37 (2015); CLI-15-24, 82 NRC 335 (2015)

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- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)
allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims; LBP-15-26, 82 NRC 182 n.36 (2015)
argument is untimely when it is raised for the first time at oral argument; LBP-15-23, 82 NRC 63 n.21 (2015)
petitioner may respond to the legal or logical arguments presented in the answers to its hearing request, but may not use its reply to raise new issues for the first time; CLI-15-18, 82 NRC 146 (2015)
- Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 333 (2015)
board need not address the issue of standing where petitioner has failed to demonstrate the existence of a licensing action subject to AEA hearing rights; LBP-15-27, 82 NRC 189 (2015)
- Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 333 n.19 (2015)
Commission considers amicus views as a matter of discretion; CLI-15-23, 82 NRC 324 n.16 (2015)
- Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015)
NRC Staff's ongoing enforcement of regulations and license conditions does not trigger hearing rights; LBP-15-24, 82 NRC 82 (2015)
- Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 336-37 (2015)
NRC inspection reports, even those documenting violations, are not de facto license amendments; LBP-15-27, 82 NRC 197 (2015)
- Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 337 (2015)
actions taken by licensee under 10 C.F.R. 50.59 do not give rise to hearing rights under the AEA; LBP-15-27, 82 NRC 195-96 (2015)
mere possibility of a future license amendment does not trigger a hearing opportunity today; LBP-15-27, 82 NRC 198 (2015)
- Oystershell Alliance v. NRC*, 800 F.2d 1201, 1207 (D.C. Cir. 1986)
in examining petitioners' plea to reopen the record, court relied on the same court-sanctioned test applied by NRC; CLI-15-19, 82 NRC 156 n.21 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 6 n.3 (1986)
no significant hazards consideration determination is a procedural device to determine when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur; LBP-15-26, 82 NRC 172 n.14 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 913 (1981)
seismology is an evolving science; LBP-15-27, 82 NRC 186 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 344 (2002)
if petitioner can provide a sound basis to dispute compliance-related statements in a license amendment request, then the contention is within the scope of the proceeding; LBP-15-24, 82 NRC 83 n.87, 87 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 431 (2011)
Commission's standard of review is highly deferential, and it will not overturn a board's ruling on threshold issues such as intervention absent error of law or abuse of discretion; CLI-15-21, 82 NRC 301 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 452 (2011)
contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited, are outside the scope of the proceeding; CLI-15-21, 82 NRC 302 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC 729, 730, 734-35 (2015)
NRC is required to provide an opportunity to request a hearing under the Atomic Energy Act on a license amendment; CLI-15-21, 82 NRC 299 n.12 (2015)

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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC 654, 668 n.31 (2011)
incorrect information in a license amendment application is prohibited by NRC regulations; LBP-15-24, 82 NRC 99 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-27, 82 NRC 184, 186 (2015)
petitioner failed to demonstrate the existence of a licensing action subject to hearing rights under section 189a of the Atomic Energy Act; CLI-15-21, 82 NRC 299 n.12 (2015)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008)
release of NRC Staff's environmental review document may be the first opportunity for a petitioner to question the accuracy of the Staff's environmental analysis; CLI-15-17, 82 NRC 45 (2015)
- Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 81 (2010)
if the board's findings after the evidentiary hearing affect NRC Staff's conclusions in the environmental assessment, then those conclusions would have to be revisited; CLI-15-17, 82 NRC 40 n.48 (2015)
- Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 87 (2010)
within 30 days after new information becomes available is a reasonable amount of time for filing a new contention; LBP-15-24, 82 NRC 98 n.195 (2015)
- Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 87-88 (2010)
contention that relies on testimony marking the first time NRC Staff has addressed an impact at the site is timely; LBP-15-24, 82 NRC 97 n.192 (2015)
- Pa'ina Hawaii, LLC*, LBP-06-4, 63 NRC 99, 108, 112 (2006)
licensing board admitted contentions when petitioner raised a timely argument affirmatively asserting that special circumstances existed under section 51.22(b) that precluded application of the categorical exclusion; LBP-15-26, 82 NRC 182 n.37 (2015)
- Pa'ina Hawaii, LLC*, LBP-06-4, 63 NRC 99, 109 n.38 (2006)
any interested person may challenge the use of a categorical exclusion by presenting special circumstances; LBP-15-26, 82 NRC 181-82 (2015)
- Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 & n.14 (1981)
conditions set by boards on voluntary withdrawals are set on a case-by-case basis, with any conditions tailored to address the particular circumstances of that proceeding; LBP-15-28, 82 NRC 241 (2015)
- Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981)
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- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 758-59 (1983)
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- Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996)
lenient treatment generally accorded to pro se litigants has limits; CLI-15-18, 82 NRC 146 n.53 (2015)
- Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 308 n.52 (2000)
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- Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 86-88 (2013)
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- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104-07 (2007)
alleged violations of state law are outside the scope of, and not material to, an adjudicatory proceeding; LBP-15-24, 82 NRC 84 n.93 (2015)
matters within the purview of the state public service board are outside the jurisdiction of the licensing board, which is limited to considering only the license amendment request and NRC regulations; LBP-15-24, 82 NRC 84 (2015)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001)
incorrect legal ruling typically does not warrant interlocutory review because such rulings can be reviewed on appeal from partial initial decisions or a final decision; CLI-15-17, 82 NRC 37, 44 (2015); CLI-15-24, 82 NRC 335 (2015)
interlocutory review of a board decision that denied reconsideration of a contention admissibility determination was declined; CLI-15-24, 82 NRC 335 (2015)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 463 (2001)
exemption requests ordinarily do not trigger hearing rights when an already-licensed facility is asking for relief from performing a duty imposed by NRC regulations; LBP-15-24, 82 NRC 93-94 & n.163 (2015)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466-67 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 n.3 (2001)
exemption request is subject to a hearing where the plant already has a license and is seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal; LBP-15-24, 82 NRC 76 (2015)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 383-84 (2001)
even for licenses that NRC issues before completing its review of hazards like those at Fukushima, any new Fukushima-driven requirements can be imposed later, if necessary, to protect the public health and safety; CLI-15-19, 82 NRC 158 n.39 (2015)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160 (2005)
if the Commission determines on appeal that information withheld under a protective order should have been publicly disclosed, it will direct that such information and the transcript of the related *in camera* session be made publicly available; CLI-15-24, 82 NRC 338 n.40 (2015)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179, *aff'd*, CLI-98-13, 48 NRC 26 (1998)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180, *aff'd*, CLI-98-13, 48 NRC 26 (1998)
there must be some significant link between the claimed deficiency and the agency’s ultimate determination whether granting the LAR will adequately protect the health and safety of the public and the environment; LBP-15-24, 82 NRC 85 (2015)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 40-41 (2010)
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- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251, 256 (2011)
expansion of issues for litigation from the board’s denial of a motion for summary disposition had neither a pervasive and unusual effect on the litigation nor a serious and irreparable impact on movant; CLI-15-24, 82 NRC 337 n.35 (2015)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251, 256 n.24 (2011)
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- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 99-100 (2009)
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- Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977)
whether the board erred in its treatment of evidence is a matter that can be addressed following an initial decision; CLI-15-24, 82 NRC 336 (2015)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990)
burden of satisfying the reopening requirements is a heavy one, and it rests with the party moving to reopen; CLI-15-19, 82 NRC 155-56 (2015)
- Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 3), ALAB-136, 6 AEC 487, 489 (1973)
burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 394 (2015)
- Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981)
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- Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1145 (1981)
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- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)
NEPA imposes procedural requirements on an agency to consider mitigation options, but it does not mandate particular results; LBP-15-23, 82 NRC 62 (2015)

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- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 353 (1989)
NEPA does not mandate particular results and, accordingly, does not demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act; LBP-15-23, 82 NRC 64 (2015)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-53 (1989)
NEPA imposes on NRC a disclosure obligation that NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action; CLI-15-25, 82 NRC 396 n.46 (2015)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)
NEPA requires an agency's draft environmental impact statement to contain a detailed discussion of possible mitigation measures; LBP-15-23, 82 NRC 63, 64 (2015)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)
NEPA does not require the draft environmental impact statement to include a fully formulated or adopted mitigation plan, but its discussion must provide sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-15-23, 82 NRC 63 (2015)
- Rock Island, Arkansas, & Louisiana Railway Co. v. United States*, 254 U.S. 141, 143 (1920)
those dealing with their government must turn square corners; LBP-15-24, 82 NRC 101 (2015)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994)
Commission generally disfavors interlocutory review; CLI-15-17, 82 NRC 36 (2015)
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- San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), *reh'g en banc on other grounds*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986)
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- Sequoyah Fuels Corp.*, LBP-93-25, 38 NRC 304, 315 (1993), *aff'd*, CLI-95-2, 41 NRC 179 (1995)
purpose of the rule to dismiss proceedings on conditions is primarily to prevent voluntary dismissals that unfairly affect the other side, and to permit the imposition of curative conditions; LBP-15-28, 82 NRC 242 n.67 (2015)
- Sequoyah Fuels Corp.*, LBP-93-25, 38 NRC 304, 315-16 (1993)
conditions set by boards on voluntary withdrawals are set on a case-by-case basis, with any conditions tailored to address the particular circumstances of that proceeding; LBP-15-28, 82 NRC 241 (2015)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994)
possibility that a board may have made an incorrect legal ruling can be reviewed, if necessary, on appeal from a partial initial decision or other final appealable order; CLI-15-24, 82 NRC 335 (2015)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)
contemporaneous judicial concepts of standing are applied in NRC proceedings; CLI-15-25, 82 NRC 394 (2015)
intervention petitioner must allege such a personal stake in the outcome of the controversy as to demonstrate that a concrete adverseness exists that will sharpen the presentation of issues; CLI-15-25, 82 NRC 394 (2015)
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- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994)
intervention petitioner must allege an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-15-25, 82 NRC 394 (2015)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994)
petitioners are not required to demonstrate their asserted injury with certainty at the admission stage of the proceeding; CLI-15-25, 82 NRC 397 & n.49 (2015)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994)
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- to show standing, petitioner must demonstrate that the asserted injury is plausibly linked to the challenged action; CLI-15-25, 82 NRC 395 (2015)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994)
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- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 62-63 (1994)
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expansion of issues for litigation that results from admission of a contention or denial of motion for summary disposition does not have a pervasive and unusual effect on the litigation; CLI-15-17, 82 NRC 37 n.25, 44 n.71 (2015)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997)
NRC Staff's position in an enforcement proceeding is not itself dispositive of whether an enforcement agreement should be approved, but regulatory instruction to accord that position due weight is dispositive proof of the importance of Staff's views; LBP-15-21, 82 NRC 8 (2015)
presiding officer's approval of settlement is a matter that must give due consideration to the public interest; LBP-15-21, 82 NRC 8 (2015)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 209 (1997)
presiding officer's public interest inquiry for approval of settlement agreement is described; LBP-15-21, 82 NRC 8, 15 (2015)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 222-23 (1997)
public interest standard for settlement agreement review concerns whether the approval process deprives interested parties of meaningful participation; LBP-15-21, 82 NRC 17 (2015)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001)
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- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008)
licensing boards are expected to reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-15-25, 82 NRC 401 (2015)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 503-05 (2008)
contention prematurity/belatedness dilemma is discussed; LBP-15-24, 82 NRC 97-98 n.193 (2015)
- Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Facility), CLI-09-1, 69 NRC 1, 5 (2009)
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- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010)
although boards may appropriately view petitioner's support for its contention in a light favorable to petitioner, they cannot do so by ignoring the contention admissibility requirements; CLI-15-18, 82 NRC 145-46 & n.53 (2015)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 991 (1974)
licensing board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management; LBP-15-29, 82 NRC 254 (2015)
licensing boards must be vested with considerable latitude in determining the course of the proceedings that they are called upon to conduct, and the Commission will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause; LBP-15-29, 82 NRC 254 n.39 (2015)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n.10 (2012)
actions taken by licensee under 10 C.F.R. 50.59 do not give rise to hearing rights under the AEA but rather are monitored by NRC Staff's inspections and oversight, which may be challenged only by a petition for enforcement; LBP-15-27, 82 NRC 196 (2015)

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- member of the public may challenge an action taken under 10 C.F.R. 50.59 only by means of a petition under 10 C.F.R. 2.206; LBP-15-27, 82 NRC 192 n.43 (2015)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013)
- Commission considers amicus views as a matter of discretion; CLI-15-23, 82 NRC 324 n.16 (2015)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 264-65 (2007)
- keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility; LBP-15-24, 82 NRC 89 (2015)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 221 (2011)
- at the contention admissibility stage, a board evaluates whether a petitioner has provided sufficient support to justify admitting the contention for further litigation; LBP-15-24, 82 NRC 102 n.223 (2015)
- evaluation of a contention that is performed at the contention admissibility stage should not be confused with the evaluation that is later conducted at the merits stage of a proceeding; LBP-15-24, 82 NRC 102 n.223 (2015)
- facts and issues raised in a contention are not in controversy and subject to a full evidentiary hearing unless the proposed contention is admitted; LBP-15-24, 82 NRC 102 n.223 (2015)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012)
- absent a showing of irreparable injury, stay standards can only be met if movant can demonstrate a virtual certainty of success on the merits; CLI-15-17, 82 NRC 39 (2015)
- Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 n.19 (10th Cir. 2002), *rev'd on other grounds*, 542 U.S. 55 (2004)
- environmental assessment cannot import previous environmental analyses without consideration of subsequent developments at the site and to hold otherwise would render meaningless NEPA's requirement to supplement an environmental impact statement or environmental assessment; CLI-15-25, 82 NRC 399 (2015)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)
- although boards may appropriately view petitioner's support for its contention in a light favorable to petitioner, they cannot do so by ignoring the contention admissibility requirements; CLI-15-18, 82 NRC 145-46 & n.53 (2015)
- contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions; CLI-15-18, 82 NRC 146 n.53 (2015)
- intervention petitioner must review relevant documents and provide sufficient discussion of these documents and its concerns to demonstrate existence of a genuine material dispute with licensee on a material issue of law or fact; CLI-15-23, 82 NRC 326, 329 (2015)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981)
- leniency is afforded to *pro se* petitioners, but parties to NRC proceedings are expected to fulfill the obligations imposed by NRC rules; CLI-15-25, 82 NRC 397 n.53 (2015)
- Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 613 (2012)
- once the board makes its determination that petitioner has articulated sufficient detail as to how the proposed action would affect its members, it would not be appropriate for the board to weigh the evidence to determine whether the harm to petitioner's members is certain; CLI-15-25, 82 NRC 397 (2015)
- Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 NRC 31, 34-35 (2014)
- experienced litigator should have expected that NRC Staff might challenge its interpretation of an NRC regulation regarding appeals; LBP-15-28, 82 NRC 244 n.78 (2015)

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- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-03-9, 58 NRC 39, 44 n.21 (2003)
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- Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010)
NEPA does not require circulation of a draft environmental assessment in all cases; CLI-15-17, 82 NRC 41 n.53 (2015)
- Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99 (1976)
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- Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989)
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- Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 11-13 (1st Cir. 2008)
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- Union Electric Co.* (Callaway Plant, Unit 1), CLI-15-11, 81 NRC 546 (2015)
placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage are inadmissible; CLI-15-27, 82 NRC 414-15 (2015)
- Union Electric Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 NRC 14, 34 (2012)
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- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011)
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- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 161 (2011)
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- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 166 (2011)
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- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167-68 (2011)
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- U.S. Army* (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 454 n.39 (2006)
licensing boards may not assume that a licensee intends to contravene NRC regulations; LBP-15-24, 82 NRC 83 n.91 (2015)
- U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005)
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- U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009)
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- U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009)
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- U.S. Department of Energy* (High-Level Waste Repository), CLI-14-1, 79 NRC 1, 3-4 (2014)
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- U.S. Department of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 624 (2010)
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- U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001)
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- USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)
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- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)
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- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)
Commission declines to consider new arguments raised on appeal that the board did not have the opportunity to consider; CLI-15-17, 82 NRC 40 n.46 (2015)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)
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- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 476 (2006)
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- USEC Inc.* (American Centrifuge Plant), LBP-07-6, 65 NRC 429, 451 (2007)
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- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-55 (1978)
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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699 (2012)
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- Webster v. U.S. Department of Agriculture*, 685 F.3d 411, 433 (4th Cir. 2012)
NEPA is not violated when an agency issues a supplemental environmental impact statement before the Corps of Engineers completes a Clean Water Act section 404 permit review; LBP-15-23, 82 NRC 63 (2015)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101-02 (1994)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 256 (1996)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 221-22 (1999)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 n.3 (1999)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 381 (2005)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 381-82 (2005)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50 (1999)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 55 (1999)
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- 10 C.F.R. 2.102(a)
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- 10 C.F.R. 2.107(a)
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- 10 C.F.R. 2.203
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- 10 C.F.R. 2.204
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if petitioner believes that licensee's analysis is incomplete, inaccurate, or otherwise does not satisfy the section 50.54(q)(3) two-part test, petitioner can challenge the analysis through the enforcement process; CLI-15-20, 82 NRC 230 (2015)
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request that NRC suspend operations at one plant, investigate whether licensee possesses sufficient funds to cease operations and decommission another, and investigate licensee's current financial qualifications to determine whether it remains qualified to continue operating another plant is denied; DD-15-8, 82 NRC 108-34 (2015)
request that NRC take enforcement action until the Licensee completes an independent root-cause assessment for the rise in ultimate heat sink temperature is denied; DD-15-10, 82 NRC 202-10 (2015)
request that, following an earthquake that exceeded the operating basis, NRC suspend the operating licenses until completion of a set of activities described in the petition, is addressed; DD-15-9, 82 NRC 274-93 (2015)

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- 10 C.F.R. 2.206(a)
petitioner may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action that may be proper, if it believes that applicant's seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 307-08 (2015)
- 10 C.F.R. 2.206(b)
director of NRC office with responsibility for the subject matter shall either institute the requested proceeding or advise the person who made the request in writing that no proceeding will be instituted, in whole or in part, with respect to the request and the reason for the decision; DD-15-7, 82 NRC 260-61 (2015)
- 10 C.F.R. 2.306(a)
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- 10 C.F.R. 2.309(a)
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- 10 C.F.R. 2.309(b)
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- 10 C.F.R. 2.309(c)
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whether and how NRC Staff fulfills its consultation obligations are issues that could form the basis for a new contention that might appropriately be made in a timely fashion after Staff issues its draft environmental impact statement; CLI-15-18, 82 NRC 147 n.56 (2015)
- 10 C.F.R. 2.309(c)(1)
new claim would not have met the timeliness standards because petitioner could have raised its environmental justice concerns when it filed its initial petition; CLI-15-18, 82 NRC 147 n.59 (2015)
petitioner must demonstrate good cause for proffering a new contention after the initial deadline for filing; LBP-15-23, 82 NRC 59 (2015)
- 10 C.F.R. 2.309(d), (f)
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- 10 C.F.R. 2.309(f)(1)
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- 10 C.F.R. 2.309(f)(1)(i)-(ii)
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- 10 C.F.R. 2.309(f)(1)(i)-(vi)
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- intervention petitioner must, in addition to demonstrating standing, propose at least one contention that meets the criteria of this regulation; CLI-15-21, 82 NRC 301-02 (2015)
- to satisfy contention admissibility standards, petitioner must meet all six pleading requirements; CLI-15-23, 82 NRC 325 (2015)
- 10 C.F.R. 2.309(f)(1)(ii)
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- 10 C.F.R. 2.309(f)(1)(iii)
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- contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited, are outside the scope of the proceeding; CLI-15-21, 82 NRC 302 (2015)
- to satisfy contention admissibility requirements, petitioner must demonstrate that the issue raised in its contention is within the scope of the proceeding; CLI-15-25, 82 NRC 398 (2015)
- 10 C.F.R. 2.309(f)(1)(iii)-(iv)
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- 10 C.F.R. 2.309(f)(1)(iv)
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- contention is inadmissible for failing to raise a material issue; LBP-15-26, 82 NRC 177 (2015)
- petitioner must also show that its contention is material to the findings NRC must make to support issuance of the license amendments; CLI-15-25, 82 NRC 402 (2015)
- simply referencing a study without explaining the information's significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality; LBP-15-26, 82 NRC 178 (2015)
- 10 C.F.R. 2.309(f)(1)(v)
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- by pointing to the exemptions and the license amendment request, petitioner has adequately supported its statement that the LAR is legally deficient in light of the granted exemptions; LBP-15-24, 82 NRC 102 (2015)
- contention alleging deficiencies in Corp of Engineers' compensatory mitigation methods under the Clean Water Act lack alleged facts or expert opinions; LBP-15-23, 82 NRC 65 n.30 (2015)
- petitioner must state the alleged facts or expert opinions that support its position and on which it intends to rely at hearing; CLI-15-20, 82 NRC 221 (2015)
- 10 C.F.R. 2.309(f)(1)(vi)
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- 10 C.F.R. 2.309(f)(1)(vi)
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- contention alleging deficiencies in Corp of Engineers' compensatory mitigation methods under the Clean Water Act fail to articulate how the DEIS's analysis of mitigation proposals is speculative or lacks an adequate assessment of effectiveness is inadmissible; LBP-15-23, 82 NRC 66 (2015)
- contention as reformulated by the board is inadmissible; CLI-15-18, 82 NRC 149 (2015)
- contention asserting that DEIS must include the Corps of Engineers Clean Water Act section 404 permit analysis in order to satisfy NEPA fails to demonstrate a genuine dispute with the DEIS; LBP-15-23, 82 NRC 60 (2015)
- contention is inadmissible for failure to show that a genuine dispute exists with license amendment request; LBP-15-26, 82 NRC 175-76 (2015)
- contention must provide sufficient information to show a genuine dispute with applicant on a material issue of law or fact; CLI-15-20, 82 NRC 221 (2015)
- if petitioner believes that an application fails altogether to contain information required by law, petitioner must identify each failure and provide supporting reasons for petitioner's belief; CLI-15-20, 82 NRC 221-22 (2015)

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- petitioner must provide sufficient information to show that a genuine dispute exists with the environmental assessment on a material issue of law or fact; CLI-15-25, 82 NRC 403 (2015)
- petitioner must refer to specific portions of the application that it disputes, along with the supporting reasons for each dispute; CLI-15-20, 82 NRC 221 (2015)
- petitioner must show that a genuine dispute exists on a material issue of law or fact relating to the application; LBP-15-23, 82 NRC 59 (2015)
- petitioners must provide a nexus between its concerns and any deficiencies in applicant's SAMA analysis, which would be necessary to establish a genuine dispute for an admissible contention; CLI-15-18, 82 NRC 141 (2015)
- 10 C.F.R. 2.309(h)(2)
state has standing because facility is located within its boundaries and no further demonstration of standing is required; LBP-15-26, 82 NRC 173 (2015); LBP-15-24, 82 NRC 71 n.2 (2015)
- 10 C.F.R. 2.311(c)
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- 10 C.F.R. 2.311(d)
licensing board order granting a request for hearing on the question whether the request should have been wholly denied is appealable; CLI-15-23, 82 NRC 324 (2015)
- 10 C.F.R. 2.311(d)(1)
appeal as of right is allowed on the question whether a request for hearing should have been wholly denied; CLI-15-18, 82 NRC 137 n.8 (2015); CLI-15-25, 82 NRC 393 (2015)
- 10 C.F.R. 2.315(a)
limited appearance statement is not considered evidence in a proceeding; LBP-15-27, 82 NRC 188 n.26 (2015)
- 10 C.F.R. 2.315(d)
amicus briefs are allowed for matters taken up at the Commission discretion under 10 C.F.R. 2.341 or sua sponte; CLI-15-23, 82 NRC 324 n.16 (2015)
filing of amicus briefs is permitted if a matter is taken up by the Commission under section 2.341 or sua sponte; CLI-15-24, 82 NRC 334 n.17 (2015)
- 10 C.F.R. 2.319
licensing boards have broad powers 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-15-30, 82 NRC 344 (2015)
- 10 C.F.R. 2.323(c)
applicant has no right to reply and may be granted permission only in compelling circumstances, such as where movant demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply; LBP-15-28, 82 NRC 243 (2015)
movant has no right to reply except as permitted by the presiding officer and only in compelling circumstances; LBP-15-28, 82 NRC 235 n.8 (2015)
- 10 C.F.R. 2.325
moving party bears the burden of meeting reopening standards, and applicant retains the burden of proof on the question whether the license should be issued; CLI-15-19, 82 NRC 157 n.29 (2015)
regardless of the issuance of the license, the burden at hearing remains on applicant and, with respect to NEPA compliance, on NRC Staff; CLI-15-17, 82 NRC 41 (2015)
- 10 C.F.R. 2.326
importance of finality in adjudicatory proceedings is reflected in this rule; CLI-15-19, 82 NRC 155 (2015)
motions to reopen the record in NRC adjudicatory proceedings are governed by this regulation; CLI-15-19, 82 NRC 155 (2015)
- 10 C.F.R. 2.326(a)
motion to reopen will not be granted unless movant satisfies all three criteria listed in this regulation and the motion is accompanied by an affidavit that satisfies section 2.326(b); CLI-15-19, 82 NRC 156 (2015)
- 10 C.F.R. 2.332(c)
purpose of scheduling orders is to ensure proper case management, with the objective of expediting disposition of the proceeding, establishing early and continuing control so that the proceeding will not

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- be protracted because of lack of management, and discouraging wasteful prehearing activities; LBP-15-29, 82 NRC 253-54 (2015)
- 10 C.F.R. 2.332(d)
where an environmental impact statement is involved, hearings on environmental issues addressed in the EIS may not commence before issuance of the final EIS; CLI-15-17, 82 NRC 45 n.76 (2015)
- 10 C.F.R. 2.335
board is prohibited from imposing restrictions on the use of 10 C.F.R. 50.61a that go beyond the requirements in the regulation; CLI-15-22, 82 NRC 316 (2016)
challenges to NRC regulations are not permitted in adjudicatory proceedings absent a waiver; CLI-15-22, 82 NRC (2016)
contention that seeks to impose a requirement beyond those imposed by a Commission regulation is inadmissible; LBP-15-26, 82 NRC 175 n.22 (2015)
petitioner's suggestion that issuance of a license immediately upon completion of NRC Staff's review where a hearing is pending is inappropriate constitutes an attack on the regulation itself, which is not allowed in an individual adjudication in the absence of a waiver; CLI-15-17, 82 NRC 41 n.49 (2015)
rule waiver petitions must address the criteria in this regulation; CLI-15-22, 82 NRC 318 (2016)
- 10 C.F.R. 2.335(a)
absent a waiver, no rule or regulation of the Commission, or any provision thereof, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to 10 C.F.R. Part 2; CLI-15-19, 82 NRC 157 (2015); CLI-15-20, 82 NRC 218 n.40 (2015); CLI-15-21, 82 NRC 302 (2015); LBP-15-24, 82 NRC 76 n.37 (2015); LBP-15-26, 82 NRC 175 n.22 (2015)
collateral challenge to NRC emergency response data system rule is inadmissible; CLI-15-20, 82 NRC 218 (2015)
contention outside the scope of a proceeding is not admissible for hearing in that proceeding; CLI-15-21, 82 NRC 305 (2015)
contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited, are outside the scope of the proceeding; CLI-15-21, 82 NRC 302 (2015)
scope of license amendment proceedings is limited to the license amendment request; LBP-15-24, 82 NRC 76 n.37 (2015)
- 10 C.F.R. 2.335(b)
no rule or regulation of the Commission, or any provision thereof is subject to attack in any adjudicatory proceeding subject to 10 C.F.R. Part 2 except as provided by the waiver provision of this regulation; LBP-15-24, 82 NRC 76 n.37 (2015)
rule waiver requests must demonstrate that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which it was adopted; CLI-15-21, 82 NRC 302 (2015)
- 10 C.F.R. 2.338
boards are empowered to approve settlements proposed by the parties; LBP-15-30, 82 NRC 344 n.25 (2015)
fair and reasonable settlement of issues proposed for litigation is encouraged; LBP-15-21, 82 NRC 6-7 (2015); LBP-15-30, 82 NRC (2015)
strictures governing settlements are set forth; LBP-15-21, 82 NRC 7 (2015)
this section is a new provision that consolidates and amplifies the previous rules pertaining to settlement; LBP-15-30, 82 NRC 344 n.25 (2015)
- 10 C.F.R. 2.338(g)
form of settlement agreements is set forth; LBP-15-21, 82 NRC 7 (2015)
presiding officer approval for settlements in contested proceedings with admitted contentions is evidenced from other provisions of section 2.338; LBP-15-30, 82 NRC 344 n.25 (2015)
settlement 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; LBP-15-30, 82 NRC 344 n.25 (2015)
- 10 C.F.R. 2.338(h)
content of settlement agreements is set forth; LBP-15-21, 82 NRC 7-8 (2015)
- 10 C.F.R. 2.338(i)
board finds that it is not necessary for a notice of hearing to be issued before the board can approve a settlement; LBP-15-30, 82 NRC 344 n.25 (2015)

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- in an enforcement proceeding, due weight must be given to NRC Staff's position; LBP-15-21, 82 NRC 8 (2015)
- parties bring settlement requests pursuant to this regulation; LBP-15-30, 82 NRC 344 n.25 (2015)
- settlement agreement approval process is discussed; LBP-15-21, 82 NRC 7-8 (2015)
- settlements approved by a presiding officer are subject to Commission review; LBP-15-21, 82 NRC 8 (2015)
- 10 C.F.R. 2.340(a)(2)(ii)
where NRC Staff takes action pursuant to a determination of no significant hazards consideration and issues a license amendment prior to a presiding officer's initial decision, the Staff will thereafter take appropriate action (if necessary) in accordance with the presiding officer's decision; CLI-15-25, 82 NRC 405 n.101 (2015)
- 10 C.F.R. 2.341
settlements approved by a presiding officer are subject to Commission review; LBP-15-21, 82 NRC 8 (2015)
- 10 C.F.R. 2.341(b)
petition for review of order dismissing final contention and terminating proceeding must be filed within 25 days after the order is served; LBP-15-22, 82 NRC 51 (2015)
- 10 C.F.R. 2.341(b)(4)
Commission will grant a petition for review at its discretion, giving due weight to the existence of a substantial question with respect to one or more of the considerations of this regulation; CLI-15-19, 82 NRC 154 (2015)
- 10 C.F.R. 2.341(b)(5)
Commission declines to consider new arguments raised on appeal that the board did not have the opportunity to consider; CLI-15-17, 82 NRC 40 n.46 (2015)
- 10 C.F.R. 2.341(f)
Commission will consider taking discretionary interlocutory review where the requesting party shows that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-17, 82 NRC 37 (2015)
- 10 C.F.R. 2.341(f)(2)
grant of interlocutory review requires a showing that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-24, 82 NRC 335 (2015)
- 10 C.F.R. 2.341(f)(2)(i)
Commission may grant interlocutory review if the issue for which the party seeks review threatens the party adversely affected by it with immediate and serious irreparable impact which could not be alleviated through an appeal at the end of the case; CLI-15-17, 82 NRC 39 n.41 (2015)
- 10 C.F.R. 2.342(e)
four factors must be addressed when the Commission or presiding officer is asked to stay the effectiveness of a presiding officer's decision or action during the pendency of an appeal; CLI-15-17, 82 NRC 38 n.27 (2015)
- 10 C.F.R. 2.390(a)(4)
confidential commercial information, release of which likely would lead to substantial competitive harm, is entitled to protection; CLI-15-24, 82 NRC 334 (2015)
- 10 C.F.R. 2.390(b)(6)
if the Commission determines on appeal that information withheld under a protective order should have been publicly disclosed, it will direct that such information and the transcript of the related *in camera* session be made publicly available; CLI-15-24, 82 NRC 338 n.40 (2015)
- in camera* hearing sessions may be held when information sought to be withheld from public disclosure is offered into evidence; CLI-15-24, 82 NRC 338 n.39 (2015)
- 10 C.F.R. 2.714(b)
to the extent that the board relied on a precedent that allowed notice pleading under this regulation in making its contention admissibility determination, it erred; CLI-15-23, 82 NRC 325 n.21 (2015)

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- 10 C.F.R. 2.802
petitioner may file a petition for rulemaking to expand the scope of NRC license renewal regulations if it believes that applicant's seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 308 (2015)
- 10 C.F.R. 2.1202(a)
NRC Staff issuance of a license during pendency of a hearing is allowed if it provides the board and parties notice and an explanation why the public health and safety are protected and why the action is in accord with the common defense and security; CLI-15-17, 82 NRC 35 n.11, 41 (2015)
- 10 C.F.R. 2.1205
summary disposition is appropriate where alleged omission from initial renewal application is cured in updated SAMA analysis; LBP-15-29, 82 NRC 253 (2015)
- 10 C.F.R. 2.1210(c)(3)
initial decision shall include the additional Staff actions necessary if inconsistent with prior Staff action approving or denying the application; CLI-15-17, 82 NRC 40 n.47 (2015)
licenses may be altered as a result of the evidentiary hearing; CLI-15-17, 82 NRC 41 (2015)
- 10 C.F.R. 2.1213(d)
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- 10 C.F.R. 2.1213(d)(1)
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- 10 C.F.R. 2.1319(a)
record of licensing board evidentiary hearing on license transfer application must be certified to the Commission; CLI-15-26, 82 NRC 410 (2015)
- 10 C.F.R. Part 2, App. B
evidentiary hearing should begin 175 days after release of NRC Staff's environmental review document; CLI-15-17, 82 NRC 45 n.77 (2015)
- 10 C.F.R. 34.3
"radiographer's assistant," is defined; LBP-15-21, 82 NRC 10 n.7 (2015)
- 10 C.F.R. 40.42(a)
each specific license expires at the end of the day on the expiration date stated in the license unless licensee has filed an application for renewal not less than 30 days before the expiration date stated in the existing license; CLI-15-17, 82 NRC 38 n.30 (2015)
- 10 C.F.R. 50.2
"decommissioning" is defined; LBP-15-24, 82 NRC 72 n.9 (2015); LBP-15-28, 82 NRC 236 n.13 (2015)
"design bases" refers to information that identifies the specific functions to be performed by an SSC of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design; DD-15-11, 82 NRC 369 (2015)
- 10 C.F.R. 50.9(a)
applicants must provide information that is complete and accurate in all material respects; LBP-15-24, 82 NRC 79, 98 (2015)
- 10 C.F.R. 50.33(f)
electric utility applicant for an operating license is exempt from a financial qualifications review; DD-15-8, 82 NRC 110 (2015)
license transfer applicant must show that the proposed transferee has the financial qualifications to carry out activities for which the license is sought; CLI-15-26, 82 NRC 411 (2015)
- 10 C.F.R. 50.33(f)(2)
five years of financial revenue-and-expense estimates must be submitted as part of a license transfer application; CLI-15-26, 82 NRC 409-10 (2015)
operating license applicant must submit information that demonstrates that it possesses, or has reasonable assurance of obtaining, funds necessary to cover estimated operating costs for the period of the license; DD-15-8, 82 NRC 110 (2015)
- 10 C.F.R. 50.33(f)(5)
Commission decision does not foreclose NRC Staff's ability to request additional information on any part of the license transfer application; CLI-15-26, 82 NRC 412 n.33 (2015)

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- NRC has authority to request that an established or newly formed entity submit additional or more detailed information respecting its financial arrangements and status of funds; DD-15-8, 82 NRC 111 (2015)
- 10 C.F.R. 50.33(k)
licensees must submit, with each operating license application, certification specifying how financial assurance for decommissioning will be provided; DD-15-8, 82 NRC 111 (2015)
- 10 C.F.R. 50.34(a)(3)(i)
applicant for a construction permit must include the principal design criteria for a proposed facility and the relationship of the design bases to the PDC as part of the preliminary safety analysis report; DD-15-11, 82 NRC 365 (2015)
- 10 C.F.R. 50.34(b)
operating license applicant must present the design bases of the facility and safety analyses of the facility as a whole in the final SAR; DD-15-11, 82 NRC 365 (2015)
- 10 C.F.R. 50.40(a)
there must be reasonable assurance that the activities at issue will not endanger the health and safety of the public; CLI-15-22, 82 NRC 316 n.44 (2016)
- 10 C.F.R. 50.47(b)
proposed staffing changes meet emergency plan standards and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency commensurate with credible accidents in the permanently shutdown and defueled condition; CLI-15-20, 82 NRC 220 (2015)
- 10 C.F.R. 50.49
design-basis events are defined; DD-15-11, 82 NRC 369 (2015)
licensees must establish an environmental qualification program for electrical equipment important to safety that would be exposed to harsh environmental conditions expected to develop as a result of design-basis accidents; DD-15-11, 82 NRC 364, 368 (2015)
- 10 C.F.R. 50.49(c)
requirements to establish an environmental qualification program do not apply to equipment in a mild environment; DD-15-11, 82 NRC 368 (2015)
- 10 C.F.R. 50.49(d)
licensees have identified, and NRC has accepted, lists of equipment important to safety subject to environmental qualification; DD-15-11, 82 NRC 369 (2015)
- 10 C.F.R. 50.49(e)
environmental qualification program must include and be based on temperature and pressure, humidity, submergence (if the equipment could be subject to submergence) that could result from a design-basis accident, chemical effects, aging, synergistic effects, and margins; DD-15-11, 82 NRC 369 (2015)
- 10 C.F.R. 50.54(f)
NRC's post-Fukushima lessons learned and information-gathering process authorizes NRC to collect information from licensees to determine whether licenses should be modified, suspended, or revoked; LBP-15-27, 82 NRC 187 (2015)
seismic hazard reevaluations of all nuclear power reactors are not de facto license amendments because they do not amend any facility's license; LBP-15-27, 82 NRC 192 (2015)
- 10 C.F.R. 50.54(hh)(2)
licensees must develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and SFP cooling capabilities under the circumstances associated with the loss of large areas of the plant caused by explosions or fire; DD-15-11, 82 NRC 375 (2015)
- 10 C.F.R. 50.54(o)
primary reactor containments are subject to the requirements 10 C.F.R. Part 50, Appendix J; LBP-15-26, 82 NRC 168 (2015)
- 10 C.F.R. 50.54(q)(1)(iii)
reduction in emergency plan effectiveness means a reduction in licensee's capability to perform an emergency planning function in the event of a radiological emergency; CLI-15-20, 82 NRC 219 n.55 (2015)
- 10 C.F.R. 50.54(q)(1)(iv)
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- licensee changes to its emergency plan must not reduce the effectiveness of the plan; CLI-15-20, 82 NRC 219 (2015)
- 10 C.F.R. 50.54(q)(3)
licensee does not have the discretion to remove the emergency response data system without first performing and meeting the two-part screening test in this section; CLI-15-20, 82 NRC 228 (2015)
licensee may change its emergency plan without prior NRC approval if licensee completes and retains an analysis demonstrating that the revised emergency plan satisfies a two-part test; CLI-15-20, 82 NRC 219 (2015)
licensee may revise an emergency plan without prior NRC approval if the screening criteria are met; CLI-15-20, 82 NRC 228-29 (2015)
licensees whose emergency plan describes emergency response data system or its use during an emergency would need to process a change to their emergency plans; CLI-15-20, 82 NRC 219 (2015)
- 10 C.F.R. 50.55a(g)(4)
inservice visual inspection of containment system must comply with ASME Boiler and Pressure Vessel Code Section XI; LBP-15-26, 82 NRC 170-71 n.11 (2015)
- 10 C.F.R. 50.57(a)(3)
there must be reasonable assurance that the activities at issue will not endanger the health and safety of the public; CLI-15-22, 82 NRC 316 n.44 (2016)
- 10 C.F.R. 50.58(b)(5)
no significant hazards consideration determination permits NRC to make an authorized license amendment effective immediately rather than awaiting the outcome of an adjudicatory challenge; LBP-15-26, 82 NRC 172 n.14 (2015)
- 10 C.F.R. 50.58(b)(6)
apart from discretionary review by the Commission, NRC Staff's no significant hazards consideration determination under section 50.92(c) may not be contested; LBP-15-26, 82 NRC 178 & n.30, 180 (2015)
- 10 C.F.R. 50.59
actions taken by licensee under this regulation do not give rise to hearing rights under the AEA; LBP-15-27, 82 NRC 195-96 (2015)
request that NRC order licensee to submit a license amendment application for the design and installation of replacement steam generators and for additional enforcement action is moot; DD-15-7, 82 NRC 258-73 (2015)
this regulation is not a process for verifying design adequacy, and required design control measures for verifying adequacy of design are expected to be implemented before entering the section 50.59 process; DD-15-7, 82 NRC 264 (2015)
- 10 C.F.R. 50.59(d)(1)
failure to provide an appropriate basis for a determination that the change in the method of evaluation did not require a license amendment prior to implementing the change constitutes a violation; DD-15-7, 82 NRC 262 (2015)
where there was no reasonable likelihood that a change in the method of evaluation would have required a license amendment, the change was a minor violation; DD-15-7, 82 NRC 262 (2015)
- 10 C.F.R. 50.61
requirements of this rule are compared with new rule in section 50.61a to predict future reference temperatures across the reactor pressure vessel; CLI-15-22, 82 NRC 313 (2016)
- 10 C.F.R. 50.61(a)(f)(6)(i)
when fluence of a material sample is known, it must be used in the consistency check if it is of the appropriate chemical composition; CLI-15-22, 82 NRC 319 n.65 (2016)
- 10 C.F.R. 50.61a
licensee is not required to collect additional surveillance data from the subject plant, but rather licensee must use any data that demonstrate the embrittlement trends for the materials, including surveillance programs at other plants with or without a surveillance program integrated under Part 50, Appendix H; CLI-15-22, 82 NRC 318 (2016)
licensees seeking to use the updated methodology in this section must submit a license amendment request under section 50.90; CLI-15-22, 82 NRC 313 (2016)

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- material samples used in a licensee's consistency check must be from the same heat, but there is no requirement that the sample come from the reactor pressure vessel subject to the license amendment request; CLI-15-22, 82 NRC 318 (2016)
- requirements of this rule are compared with the old rule in section 50.61 to predict future reference temperatures across the reactor pressure vessel; CLI-15-22, 82 NRC 313 (2016)
- updated embrittlement model is used to predict future reference temperatures across the [reactor pressure vessel, which is then verified by existing surveillance data; CLI-15-22, 82 NRC 313 (2016)
- 10 C.F.R. 50.61a(a)(2)-(6)
information that license amendment request must contain to use updated embrittlement model is described; CLI-15-22, 82 NRC 313 (2016)
- 10 C.F.R. 50.61a(a)(10)
licensee is not required to collect additional surveillance data from the subject plant, but rather licensee must use any data that demonstrate the embrittlement trends for the materials, including surveillance programs at other plants with or without a surveillance program integrated under Part 50, Appendix H; CLI-15-22, 82 NRC 318 (2016)
- licensees must use data from other reactors (sister-plant data) when they are available, provided the data are from material samples of the same heat; CLI-15-22, 82 NRC 313 (2016)
- surveillance data include data from other plants, and licensees must consider these data under certain circumstances; CLI-15-22, 82 NRC 313 n.19 (2016)
- surveillance data used in the consistency check need not come from the same reactor pressure vessel that is the subject of the license amendment request; CLI-15-22, 82 NRC 313 (2016)
- 10 C.F.R. 50.61a(f)(6)(i)
licensees must use data from other reactors (sister-plant data) when they are available, provided the data are from material samples of the same heat; CLI-15-22, 82 NRC 313 (2016)
- surveillance data include data from other plants, and licensees must consider these data under certain circumstances; CLI-15-22, 82 NRC 313 n.19 (2016)
- surveillance data used in the consistency check need not come from the same reactor pressure vessel that is the subject of the license amendment request; CLI-15-22, 82 NRC 313 (2016)
- to verify calculations used to support the license amendment request to use updated embrittlement model, licensees must compare their calculations to heat-specific surveillance data; CLI-15-22, 82 NRC 313 (2016)
- 10 C.F.R. 50.61a(f)(6)(i)(A)
material samples used in a licensee's consistency check must be from the same heat, but there is no requirement that the sample come from the reactor pressure vessel subject to the license amendment request; CLI-15-22, 82 NRC 318 (2016)
- 10 C.F.R. 50.71(e)
although NRC Staff reviews submissions under this regulation for compliance with such administrative requirements as timeliness and content, it does not approve substantive changes, such as changes to a seismic analysis, as part of the process; LBP-15-27, 82 NRC 196 (2015)
- licensee must periodically submit an updated FSAR to NRC to report information and analyses submitted to the Commission by licensee or prepared by licensee pursuant to Commission requirement since the previous update; LBP-15-27, 82 NRC 195 (2015)
- licensees must update the final safety analysis report periodically throughout the licensed period of a plant's operation; DD-15-11, 82 NRC 365 (2015)
- submittal of updated FSAR pages does not constitute a licensing action but is only intended to provide information; LBP-15-27, 82 NRC 195 (2015)
- this regulation is only a reporting requirement; LBP-15-27, 82 NRC 195 (2015)
- 10 C.F.R. 50.71(e)(4)
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- 10 C.F.R. 50.72(a)(4)
activating the emergency response data system must be performed as soon as possible but at most within 1 hour of an emergency declaration; CLI-15-20, 82 NRC 224 n.92 (2015)
- emergency response data system activation requirements are specified; CLI-15-20, 82 NRC 214 n.8 (2015)

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- licensees must activate the emergency response data system as soon as possible but not later than 1 hour after declaring an emergency class of alert, site area emergency, or general emergency; CLI-15-20, 82 NRC 214 (2015)
- 10 C.F.R. 50.75(c) & n.1
spent fuel management is not a decommissioning activity; LBP-15-24, 82 NRC 73 (2015)
without an exemption from the NRC, licensee is prohibited from using decommissioning funds for spent fuel management because it is not an allowable decommissioning expense; LBP-15-28, 82 NRC 236 (2015)
- 10 C.F.R. 50.75(c)(2)
licensees must annually adjust the amount of decommissioning funding assurance; DD-15-8, 82 NRC 111 (2015)
- 10 C.F.R. 50.75(e)(1)
NRC monitors the status of decommissioning funds and, when necessary, requires additions to funds through parent company guarantees, cash deposits, or other methods permitted under this regulation; DD-15-8, 82 NRC 112 (2015)
- 10 C.F.R. 50.75(f)
two years before permanent cessation of operations, licensee must submit a preliminary decommissioning cost estimate that includes a plan for adjusting decommissioning funds to demonstrate that funds will be available when needed to cover decommissioning costs; DD-15-8, 82 NRC 112 (2015)
- 10 C.F.R. 50.75(f)(1)
status of decommissioning funds must be reported to NRC at least once every 2 years; DD-15-8, 82 NRC 111-12 (2015)
- 10 C.F.R. 50.75(h)
if licensee amends any license conditions related to the decommissioning trust fund, from that point forward it will have to comply with all requirements of this regulation; LBP-15-28, 82 NRC 243 n.70 (2015)
if licensee amends any of its grandfathered license conditions that were related to the decommissioning trust fund, from that point forward licensee must comply with all of the requirements of this regulation; LBP-15-24, 82 NRC 72 (2015)
- 10 C.F.R. 50.75(h)(1)-(4)
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reporting and recordkeeping rules for decommissioning trusts are government by this regulation; LBP-15-28, 82 NRC 236 (2015)
- 10 C.F.R. 50.75(h)(1)(iv)
decommissioning trust fund can be used only for decommissioning activities; LBP-15-24, 82 NRC 72 n.8 (2015)
decommissioning trust fund cannot be used for nondecommissioning expenses that are not allowed under this regulation; LBP-15-24, 82 NRC 77, 80, 81 (2015)
exemption from regulations will only be issued if the license is granted; LBP-15-24, 82 NRC 82 (2015)
if license amendment request is approved, licensee will no longer have to provide 30-day notice to the Commission once it begins decommissioning and starts making withdrawals from the decommissioning fund; LBP-15-28, 82 NRC 236 (2015)
licensee seeks regulatory exemptions to allow it to use decommissioning funds to manage spent fuel and eliminate the 30-day notice requirement that would otherwise apply to spent fuel management; LBP-15-28, 82 NRC 236 (2015)
thirty-day notice is not required for decommissioning withdrawals made under section 50.82(a)(8); LBP-15-24, 82 NRC 80, 85, 90 (2015)
- 10 C.F.R. 50.75(h)(5)
contention frames a legal dispute over the meaning of this regulation's direction that a license amendment shall be in accord with the provisions of paragraph (h) of this section; LBP-15-24, 82 NRC 101-02 (2015)
if a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section; LBP-15-24, 82 NRC 79 n.65 (2015)

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- petitioner has identified a genuine legal dispute concerning whether a license amendment can be in accordance with the provisions of paragraph (h) of 10 C.F.R. 50.75 where a plant is already exempt from two provisions of 10 C.F.R. 50.75(h)(1)(iv); LBP-15-24, 82 NRC 102 (2015)
- state has demonstrated that its contention is relevant to the findings NRC must make before approving the license amendment request because, to approve the amendment, NRC Staff must find that applicant's LAR is in accordance with this regulation; LBP-15-24, 82 NRC 84-85 (2015)
- there is no time limit on when licensee can seek an amendment to the license conditions relating to its decommissioning trust fund; LBP-15-24, 82 NRC 92-93 (2015)
- where license conditions predate issuance of this regulation, the plant was grandfathered and allowed to keep its existing license conditions; LBP-15-24, 82 NRC 72 (2015); LBP-15-28, 82 NRC 243 n.70 (2015)
- 10 C.F.R. 50.80
NRC approval is required for transfer of control of ownership and/or operating authority responsibilities within the facility operating license; DD-15-8, 82 NRC 112 (2015)
- 10 C.F.R. 50.80(a)
licensee must obtain NRC's written consent prior to transferring an NRC license; CLI-15-26, 82 NRC 411 (2015)
- 10 C.F.R. 50.80(b)(1)(i)
proposed transferee for an operating license must satisfy the same financial qualification requirements that apply to an applicant for an initial operating license; CLI-15-26, 82 NRC 411 (2015)
- 10 C.F.R. 50.80(c)(1)
license transfer applicant must demonstrate that the proposed transferee is qualified to hold the license; CLI-15-26, 82 NRC 411 (2015)
- 10 C.F.R. 50.82(a)(1)(i)
licensee must provide certifications to NRC Staff that it has permanently ceased power operations; DD-15-7, 82 NRC 261 (2015)
- 10 C.F.R. 50.82(a)(1)(ii)
licensee must provide certifications to NRC Staff that it has permanently removed fuel from its reactors; DD-15-7, 82 NRC 261 (2015)
- 10 C.F.R. 50.82(a)(2)
upon docketing of certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, license will no longer authorize operation of the reactor or emplacement or retention of fuel in the reactor vessel; CLI-15-20, 82 NRC 215 (2015)
upon docketing of certifications of permanent shutdown and fuel removal, licensee's licenses no longer authorize operation of the reactors or placement or retention of fuel into the reactor vessels and licensee is prohibited from restarting or loading fuel; DD-15-7, 82 NRC 261 (2015)
- 10 C.F.R. 50.82(a)(4)(i)
licensee must submit a post-shutdown decommissioning activities report before or within 2 years following permanent cessation of operations; DD-15-8, 82 NRC 112 (2015)
to disburse funds without prior notice, licensee must provide a description of the planned decommissioning activities along with a schedule for their accomplishment; LBP-15-24, 82 NRC 81 (2015)
- 10 C.F.R. 50.82(a)(8)
function of the procedural and administrative changes is merely to facilitate the orderly conduct of licensee's business and to ensure that information needed by NRC to perform its regulatory functions is readily available; LBP-15-24, 82 NRC 83 (2015)
given that licensee has not included discovery of unexpected levels of contaminants, and contamination in places not previously expected, in the decommissioning cost estimate, such fund withdrawals would require a 30-day notice; LBP-15-24, 82 NRC 88-89 (2015)
if license amendment request is approved, licensee will no longer have to provide 30-day notice to the Commission once it begins decommissioning and starts making withdrawals from the decommissioning fund; LBP-15-28, 82 NRC 236 (2015)
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- 10 C.F.R. 50.82(a)(8)(i)(A)
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- 10 C.F.R. 50.82(a)(8)(i)(B)
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NRC requires a contingency factor for decommissioning funds to provide for unforeseen events that may happen during operations or decommissioning that could increase the overall costs of this activity; LBP-15-24, 82 NRC 80 (2015)
potential consequences of insufficient offsite storage for spent fuel is one of the unforeseen conditions that this regulation was promulgated to address; LBP-15-24, 82 NRC 90 (2015)
- 10 C.F.R. 50.82(a)(8)(i)(B)-(C)
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- 10 C.F.R. 50.82(a)(8)(iii)-(v)
instead of providing notice before each decommissioning expense, licensee must submit a decommissioning cost estimate and timeline, called a Post Shutdown Decommissioning Activities Report, and annual reports on expenditures; LBP-15-24, 82 NRC 73 (2015)
- 10 C.F.R. 50.90
applicant must fully describe in its license amendment request the changes desired; LBP-15-24, 82 NRC 98 (2015)
FSAR updates must reflect changes that licensee has made through a license amendment request and certain changes that do not require a license amendment; LBP-15-27, 82 NRC 195 (2015)
licensee cannot be exempted from license conditions without a license amendment modifying such conditions; LBP-15-28, 82 NRC 238 n.26 (2015)
licensees seeking to use the updated methodology in 10 C.F.R. 50.61a must submit a license amendment request; CLI-15-22, 82 NRC 313 (2016)
NRC licensees require a license amendment to modify license conditions; LBP-15-24, 82 NRC 74 (2015)
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- 10 C.F.R. 50.91
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- 10 C.F.R. 50.91(a)(6)
where the Commission finds that exigent circumstances exist and it also determines that an amendment involves no significant hazards considerations, it will provide a hearing after issuance, if one has been requested by a person who satisfies the intervention requirements of 10 C.F.R. 2.309; CLI-15-25, 82 NRC 393 n.21 (2015)
- 10 C.F.R. 50.91(b)(1)
when licensee requests an amendment, it must notify the state in which its facility is located of its request by providing that state with a copy of its application; LBP-15-28, 82 NRC 243 n.72 (2015)
- 10 C.F.R. 50.92(a)
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- 10 C.F.R. 50.92(c)
eligibility conditions for a no significant hazards consideration determination on a proposed amendment are discussed; LBP-15-26, 82 NRC 172 n.14 (2015)
- 10 C.F.R. Part 50, Appendix A, GDC 44
applicability of these regulations to boiling water reactor spent fuel pools is discussed; DD-15-11, 82 NRC 364-68 (2015)
system must be provided to transfer heat from structures, systems, and components important to safety to an ultimate heat sink under normal operating and accident conditions, and must be able to perform this safety function with either onsite or offsite power, assuming a single component failure; DD-15-11, 82 NRC 366 (2015)
- 10 C.F.R. Part 50, Appendix A, GDC 61
fuel storage system must be designed to prevent significant reduction in coolant inventory under accident conditions and with a residual heat removal capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal; DD-15-11, 82 NRC 365-66 (2015)
- 10 C.F.R. Part 50, Appendix B, Criterion III
failure to verify adequacy of thermal-hydraulic and flow-induced vibration design of the replacement steam generators was determined to be of very low safety significance, because the tubes did not leak and continued to meet the required structural integrity criterion; DD-15-7, 82 NRC 263-64 (2015)
- 10 C.F.R. Part 50, Appendix E
proposed staffing changes meet emergency plan standards and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency commensurate with credible accidents in the permanently shutdown and defueled condition; CLI-15-20, 82 NRC 220 (2015)
- 10 C.F.R. Part 50, Appendix E, § VI
participation in the emergency response data system is mandatory; CLI-15-20, 82 NRC 214 (2015)
- 10 C.F.R. Part 50, Appendix E, § VI.1
when selected plant data are not available on licensee's onsite computer system, retrofitting of data points is not required; CLI-15-20, 82 NRC 214 n.10 (2015)
- 10 C.F.R. Part 50, Appendix E, § VI.2
except Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite hardware for the emergency response data system shall be provided at each unit by the licensee to interface with the NRC receiving system; CLI-15-20, 82 NRC 214 n.14 (2015)
meaning of "shut down permanently" is discussed; CLI-15-20, 82 NRC 226 (2015)
nuclear power facilities that are shut down permanently are exempt from the need to provide an emergency response data system interface with the NRC; CLI-15-20, 82 NRC 218 (2015)
- 10 C.F.R. Part 50, Appendix G, § IV.A.1.a
equivalent margins analysis must demonstrate that the calculated energy will provide margins of safety against fracture that are equivalent to those required by Appendix G of Section XI of the ASME Code; CLI-15-23, 82 NRC 322-23 (2015)
under normal plant conditions, materials at the beltline of the reactor pressure vessel must maintain Charpy upper-shelf energy of no less than 50 ft-lb (68 joules); CLI-15-23, 82 NRC 322 (2015)
- 10 C.F.R. Part 50, Appendix H
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- 10 C.F.R. Part 50, Appendix H, § III.c.3
no reduction in the amount of testing is allowed without NRC approval; CLI-15-23, 82 NRC 326 n.24 (2015)
- 10 C.F.R. Part 50, Appendix J, Option A, § II
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- required Type A containment leakage tests measures total leakage rate from all potential leakage paths, including containment liner welds, valves, fittings, and components that penetrate the containment; LBP-15-26, 82 NRC 168 n.4 (2015)
- 10 C.F.R. Part 50, Appendix J, Option B, § I
licensees must conduct periodic containment leakage tests to ensure that leakage does not exceed the allowable rates specified in the technical specifications and the containment will perform its design function following an accident up to and including the plant design-basis accident; LBP-15-26, 82 NRC 168 (2015)
- 10 C.F.R. Part 50, Appendix J, Option B, §§ II and III
contention argument is an improper attempt to graft a historical-event criterion onto the performance-criteria specified in Appendix J, Option B; LBP-15-26, 82 NRC 175 (2015)
- 10 C.F.R. Part 50, Appendix J, Option B, § III.A
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overall integrated leakage rate must not exceed allowable leakage rate with margin, as specified in the Technical Specifications; LBP-15-26, 82 NRC 170 n.9 (2015)
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- 10 C.F.R. Part 50, Appendix J, Option B, § III.B
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- 10 C.F.R. 51.22(a)
categories of actions are exempt from NEPA review where NRC has made a generic finding that the actions do not individually or cumulatively have a significant effect on the human environment; LBP-15-26, 82 NRC 180 n.33 (2015)
- 10 C.F.R. 51.22(b)
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- 10 C.F.R. 51.22(c)(10)(ii)
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- 10 C.F.R. 51.22(c)(25)
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- 10 C.F.R. 51.22(c)(9)
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- 10 C.F.R. 51.26
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- 10 C.F.R. 51.32(a)
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- 10 C.F.R. 51.33
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- 10 C.F.R. 51.45(d)
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- 10 C.F.R. 51.53(c)(3)(ii)(L)
license renewal applicants must provide a severe accident mitigation alternatives analysis in their license renewal application if NRC Staff has not previously considered SAMAs for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment; CLI-15-18, 82 NRC 139 n.16 (2015)
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- 10 C.F.R. 51.53(d)
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- 10 C.F.R. 51.92(a)(2)
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- 10 C.F.R. Part 51, Subpart A, App. B, tbl. B-1
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- 10 C.F.R. 54.21
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- 10 C.F.R. Part 100, Appendix A
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- 10 C.F.R. Part 100, Appendix A, § V(a)(2)
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- 10 C.F.R. 150.20
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- 10 C.F.R. 812.337(f)
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- 33 C.F.R. 332.1(c)(2)
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- 33 C.F.R. 332.1(f)(1)
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- 33 C.F.R. 332.3(f)(1)
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- 40 C.F.R. 1501.4(e)(2)
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- 40 C.F.R. 1502.9(c)(1)(ii)
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appeal as of right will be granted on the question whether a request for hearing or petition to intervene should have been granted; CLI-15-21, 82 NRC 295 (2015)
board is the appropriate arbiter of fact-specific questions of contention admissibility, and the Commission will not second-guess the board's evaluation of factual support for the contention, absent an error of law or abuse of discretion, even if support for the contention is weak; CLI-15-25, 82 NRC 389 (2015)
Commission considers amicus views as a matter of discretion; CLI-15-23, 82 NRC 321 (2015)
Commission has declined to take interlocutory review with respect to case management decisions; CLI-15-24, 82 NRC 331 (2015)
Commission will defer to licensing board rulings on standing and contention admissibility absent error of law or abuse of discretion; CLI-15-18, 82 NRC 135 (2015); CLI-15-20, 82 NRC 211 (2015); CLI-15-25, 82 NRC 389 (2015)
Commission will grant a petition for review at its discretion, giving due weight to the existence of a substantial question with respect to one or more of the considerations of 10 C.F.R. 2.341(b)(4); CLI-15-19, 82 NRC 151 (2015)
expansion of issues for litigation from the board's denial of a motion for summary disposition had neither a pervasive and unusual effect on the litigation nor a serious and irreparable impact on movant; CLI-15-24, 82 NRC 331 (2015)
expense is not irreparable harm; CLI-15-24, 82 NRC 331 (2015)

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- filing of amicus briefs is permitted if a matter is taken up by the Commission under section 2.341 or sua sponte; CLI-15-24, 82 NRC 331 (2015)
- four factors must be addressed when the Commission or presiding officer is asked to stay the effectiveness of a presiding officer's decision or action during pendency of an appeal; CLI-15-17, 82 NRC 33 (2015)
- grant of interlocutory review requires a showing that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-24, 82 NRC 331 (2015)
- if the Commission determines on appeal that information withheld under a protective order should have been publicly disclosed, it will direct that such information and the transcript of the related *in camera* session be made publicly available; CLI-15-24, 82 NRC 331 (2015)
- increased litigation burden did not have a pervasive effect on the basic structure of the proceeding; CLI-15-24, 82 NRC 331 (2015)
- interlocutory review is generally disfavored and requests for such review are granted only under extraordinary circumstances; CLI-15-24, 82 NRC 331 (2015)
- interlocutory review of a board decision that denied reconsideration of a contention admissibility determination was declined; CLI-15-24, 82 NRC 331 (2015)
- it is not the Commission's role to monitor rulings that deal with reception of evidence and procedural framework under which it will be admitted on a day-to-day basis; CLI-15-24, 82 NRC 331 (2015)
- licensing boards must be vested with considerable latitude in determining the course of the proceedings that they are called upon to conduct, and the Commission will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause; LBP-15-29, 82 NRC 246 (2015)
- on appeal, Commission defers to board's rulings on contention admissibility absent an error of law or abuse of discretion; CLI-15-22, 82 NRC 310 (2015); CLI-15-23, 82 NRC 321 (2015)
- possibility that a board may have made an incorrect legal ruling can be reviewed, if necessary, on appeal from a partial initial decision or other final appealable order; CLI-15-24, 82 NRC 331 (2015)
- procedural rulings involving discovery rarely meet the standard for interlocutory review; CLI-15-24, 82 NRC 331 (2015)
- settlements approved by a presiding officer are subject to Commission review; LBP-15-21, 82 NRC 1 (2015)
- standard of review of a board's determination on standing is deferential and the Commission will uphold the decision absent a clear misapplication of facts or law; CLI-15-25, 82 NRC 389 (2015)
- whether the board erred in its treatment of evidence is a matter that can be addressed following an initial decision; CLI-15-24, 82 NRC 331 (2015)
- APPLICANTS**
- regardless of issuance of the license, the burden at hearing remains on applicant and, with respect to NEPA compliance, on NRC Staff; CLI-15-17, 82 NRC 33 (2015)
- APPROVAL OF LICENSE**
- adjudicatory proceeding on license amendment is not terminated by issuance of the amendment; CLI-15-17, 82 NRC 33 (2015)
- exemption from regulations will only be issued if the license is granted; LBP-15-24, 82 NRC 68 (2015)
- NRC Staff is authorized to issue a license when it has completed its review during the pendency of a hearing as long as it provides the board and parties notice and an explanation why the public health and safety are protected and why the action is in accord with the common defense and security despite the pendency of the contested matter; CLI-15-17, 82 NRC 33 (2015)
- ASME CODE**
- inservice visual inspection of containment system must comply with ASME Boiler and Pressure Vessel Code Section XI; LBP-15-26, 82 NRC 163 (2015)
- ASSUMPTION OF COMPLIANCE**
- absent documentary support, NRC has declined to assume that licensees will contravene its regulations; LBP-15-24, 82 NRC 68 (2015)

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actions taken by licensee under 10 C.F.R. 50.59 do not give rise to hearing rights under the AEA; LBP-15-27, 82 NRC 184 (2015)

although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA's rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 246 (2015)

any amendment to an existing license as a result of NRC review of licensee seismic hazard reevaluations that leads to changes in the current licensing basis would be subject to a hearing opportunity; CLI-15-21, 82 NRC 295 (2015)

Congress intentionally limited the opportunity for a hearing to certain designated agency actions which do not include exemptions; LBP-15-24, 82 NRC 68 (2015)

license applications must specifically state information that NRC, by rule or regulation, may determine to be necessary to decide technical and financial qualifications of applicant; DD-15-8, 82 NRC 107 (2015)

licensee must obtain NRC's written consent prior to transferring an NRC license; CLI-15-26, 82 NRC 408 (2015)

NRC is required to provide an opportunity to request a hearing under the Atomic Energy Act on a license amendment; CLI-15-21, 82 NRC 295 (2015)

NRC must provide an opportunity for hearing in any proceeding under this Act, for the granting, suspending, revoking, or amending of any license; LBP-15-27, 82 NRC 184 (2015)

petitioner failed to demonstrate the existence of a licensing action subject to hearing rights under section 189a of the Atomic Energy Act; CLI-15-21, 82 NRC 295 (2015)

petitioner is not entitled to request a hearing where NRC has neither granted greater authority than that provided by its existing licenses nor otherwise altered the terms of those licenses; LBP-15-27, 82 NRC 184 (2015)

ATTORNEY CONDUCT

experienced litigator should have expected that NRC Staff might challenge its interpretation of an NRC regulation regarding appeals; LBP-15-28, 82 NRC 233 (2015)

BENEFIT-COST ANALYSIS

purpose of SAMA analyses is to identify safety enhancements that would be cost-beneficial to adopt; LBP-15-29, 82 NRC 246 (2015)

relevant issue is whether any additional SAMA should have been identified as potentially cost beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-15-29, 82 NRC 246 (2015)

severe accident mitigation alternatives analysis is a quantitative cost-benefit analysis, assessing whether the cost of implementing a specific enhancement outweighs its benefit; CLI-15-18, 82 NRC 135 (2015)

BOILING-WATER REACTORS

applicability of 10 C.F.R. Part 50, Appendix A, GDC 44 to boiling water reactor spent fuel pools is discussed; DD-15-11, 82 NRC 361 (2015)

BRIEFS, APPELLATE

Commission declines to consider new arguments raised on appeal that the board did not have the opportunity to consider; CLI-15-17, 82 NRC 33 (2015)

BURDEN OF PROOF

applicant retains the burden of proof on the question whether the license should be issued; CLI-15-17, 82 NRC 33 (2015); CLI-15-19, 82 NRC 151 (2015)

burden at hearing with respect to NEPA compliance is on NRC Staff; CLI-15-17, 82 NRC 33 (2015)

burden of satisfying the reopening requirements is a heavy one, and it rests with the party moving to reopen; CLI-15-19, 82 NRC 151 (2015)

CASE MANAGEMENT

Commission has declined to take interlocutory review with respect to case management decisions; CLI-15-24, 82 NRC 331 (2015)

licensing board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management; LBP-15-29, 82 NRC 246 (2015)

licensing boards have broad powers 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-15-30, 82 NRC 339 (2015)

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licensing boards must be vested with considerable latitude in determining the course of the proceedings that they are called upon to conduct, and the Commission will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause; LBP-15-29, 82 NRC 246 (2015)

purpose of scheduling orders is to ensure proper case management, with the objective of expediting disposition of the proceeding, establishing early and continuing control so that the proceeding will not be protracted because of lack of management, and discouraging wasteful prehearing activities; LBP-15-29, 82 NRC 246 (2015)

unless a schedule is so onerous or unfair that it deprives a party of procedural due process, scheduling is a matter of licensing board discretion; LBP-15-29, 82 NRC 246 (2015)

CATEGORICAL EXCLUSION

any interested person may challenge use of a categorical exclusion by presenting special circumstances; LBP-15-26, 82 NRC 163 (2015)

categorical exclusion is a generic finding that a category of actions do not individually or cumulatively have a significant effect on the human environment; LBP-15-26, 82 NRC 163 (2015)

categories of actions are exempt from NEPA review where NRC has made a generic finding that the actions do not individually or cumulatively have a significant effect on the human environment; LBP-15-26, 82 NRC 163 (2015)

challenge to NRC Staff's environmental analysis, which may come in the form of a categorical exclusion, may be filed as a timely motion to add a new contention once that analysis is complete; LBP-15-24, 82 NRC 68 (2015)

license amendment request is not categorically exempt from environmental review if it involves a significant hazards consideration that excludes it from the exemption pursuant to criteria in section 51.22(c)(9)(i); LBP-15-26, 82 NRC 163 (2015)

recordkeeping or administrative procedures are categorically excluded from environmental review; LBP-15-24, 82 NRC 68 (2015)

CERTIFICATION

licensee must provide certifications to NRC Staff that it has permanently ceased power operations; DD-15-7, 82 NRC 257 (2015)

licensee must provide certifications to NRC Staff that it has permanently removed fuel from its reactors; DD-15-7, 82 NRC 257 (2015)

licensees must submit, with each operating license application, certification specifying how financial assurance for decommissioning will be provided; DD-15-8, 82 NRC 107 (2015)

record of licensing board evidentiary hearing on license transfer application must be certified to the Commission; CLI-15-26, 82 NRC 408 (2015)

CLEAN WATER ACT

before being granted a section 404 permit, applicant must demonstrate to the Corps of Engineers that it has taken all appropriate and practicable steps to avoid and minimize adverse impacts; LBP-15-23, 82 NRC 55 (2015)

contention alleging deficiencies in Corp of Engineers' compensatory mitigation methods under the Clean Water Act lack alleged facts or expert opinions; LBP-15-23, 82 NRC 55 (2015)

contention asserting that draft environmental impact statement must include the Corps of Engineers 404 permit analysis in order to satisfy NEPA fails to raise a material issue; LBP-15-23, 82 NRC 55 (2015)

NEPA is not violated when an agency issues a supplemental environmental impact statement before the Corps of Engineers completes a section 404 permit review; LBP-15-23, 82 NRC 55 (2015)

section 404 permit review can be conducted after issuance of a final environmental impact statement; LBP-15-23, 82 NRC 55 (2015)

that the section 404 permit review is conducted after issuance of the final environmental impact statement does not impact an agency's duty under NEPA, but rather serves to highlight the distinction between NEPA and the CWA; LBP-15-23, 82 NRC 55 (2015)

Uniform Mitigation Assessment Method code and Wetland Assessment Technique for Environmental Review code methods reflect the Corps of Engineers' preferred approach to compensatory mitigation under the CWA; LBP-15-23, 82 NRC 55 (2015)

when a proposed project would cause discharge of dredged or fill material into wetlands, applicant must seek a permit from the Corps of Engineers; LBP-15-23, 82 NRC 55 (2015)

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when an agency otherwise complies with NEPA's requirement of a reasonably thorough mitigation analysis, there is no error in the agency's reliance on the section 404's substantive requirements as mitigation measures even though the permit review is not yet complete; LBP-15-23, 82 NRC 55 (2015) while CWA imposes substantive restrictions on agency action, NEPA imposes procedural requirements aimed at integrating environmental concerns into the very process of agency decisionmaking; LBP-15-23, 82 NRC 55 (2015)

COMPLIANCE

contention that applicant had inadequately described aging management plan by relying on a promise of compliance with NRC orders instead of describing the plan is admissible; LBP-15-24, 82 NRC 68 (2015)

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CONDITIONS

boards have authority to impose reasonable conditions on voluntary withdrawals in appropriate circumstances; LBP-15-28, 82 NRC 233 (2015)

boards set conditions on voluntary withdrawals on a case-by-case basis, with any conditions tailored to address the particular circumstances of that proceeding; LBP-15-28, 82 NRC 233 (2015)

dismissal of license amendment request is conditioned on requirement that licensee provide notice to petitioner of submission of a similar LAR so that petitioner has a fair opportunity to relitigate issues previously found admissible; LBP-15-28, 82 NRC 233 (2015)

narrowly tailored condition will afford petitioner an opportunity to dispute a specific decommissioning fund disbursement via a letter to the NRC or a petition for enforcement action; LBP-15-28, 82 NRC 233 (2015)

purpose of the rule to dismiss proceedings on conditions is primarily to prevent voluntary dismissals that unfairly affect the other side, and to permit the imposition of curative conditions; LBP-15-28, 82 NRC 233 (2015)

when the board has issued a Notice of Hearing, withdrawal of a license amendment request shall be on such terms as the presiding officer may prescribe; LBP-15-28, 82 NRC 233 (2015)

CONFIDENTIAL INFORMATION

confidential commercial information, release of which likely would lead to substantial competitive harm, is entitled to protection; CLI-15-24, 82 NRC 331 (2015)

if the Commission determines on appeal that information withheld under a protective order should have been publicly disclosed, it will direct that such information and the transcript of the related *in camera* session be made publicly available; CLI-15-24, 82 NRC 331 (2015)

in camera hearing sessions may be held when information sought to be withheld from public disclosure is offered into evidence; CLI-15-24, 82 NRC 331 (2015)

CONSIDERATION OF ALTERNATIVES

it will always be possible to envision and propose some alternative approach to severe accident mitigation alternatives analysis, some additional detail to include, or some refinement; LBP-15-29, 82 NRC 246 (2015)

proper question is not whether there are plausible alternative choices for use in the SAMA analysis, but whether the analysis that was done is reasonable under NEPA; LBP-15-29, 82 NRC 246 (2015)

CONSTRUCTION OF MEANING

meaning of "shut down permanently" is discussed; CLI-15-20, 82 NRC 211 (2015)

CONSTRUCTION PERMITS

applicant for a construction permit must include the principal design criteria for a proposed facility and the relationship of the design bases to the PDC as part of the preliminary safety analysis report; DD-15-11, 82 NRC 361 (2015)

CONTAINMENT

acceptance criteria for Type A leak rate limits embodied in the technical specification are established to ensure that, in the event of a design-basis accident, the dose received by a member of the general public will not exceed the dose limits; LBP-15-26, 82 NRC 163 (2015)

leakage rate acceptance limit is based on minimizing leakage that would occur at the calculated peak containment internal pressure related to the design-basis loss-of-coolant accident; LBP-15-26, 82 NRC 163 (2015)

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licensees must conduct periodic containment leakage tests to ensure that leakage does not exceed the allowable rates specified in the technical specifications and the containment will perform its design function following an accident up to and including the plant design-basis accident; LBP-15-26, 82 NRC 163 (2015)

primary reactor containments are subject to the requirements 10 C.F.R. Part 50, Appendix J; LBP-15-26, 82 NRC 163 (2015)

required Type A containment leakage tests measure total leakage rate from all potential leakage paths, including containment liner welds, valves, fittings, and components that penetrate the containment; LBP-15-26, 82 NRC 163 (2015)

simply referencing a study without explaining the information's significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality; LBP-15-26, 82 NRC 163 (2015)

CONTAINMENT ISOLATION VALVES

Type C pneumatic tests measure leakage rates; LBP-15-26, 82 NRC 163 (2015)

CONTAINMENT SYSTEMS

containment system is defined as the principal barrier, after the reactor coolant pressure boundary, to prevent release of quantities of radioactive material that would have a significant radiological effect on public health; LBP-15-26, 82 NRC 163 (2015)

inservice visual inspection of containment system must comply with ASME Boiler and Pressure Vessel Code Section XI; LBP-15-26, 82 NRC 163 (2015)

periodic visual inspections of the accessible interior and exterior surfaces of the containment system are required to identify structural deterioration that may affect containment integrity; LBP-15-26, 82 NRC 163 (2015)

CONTENTIONS

contentions of omission are appropriate when an issue that by law should be discussed is not, whereas contentions of adequacy are those that assert the existing discussion of an issue is incomplete; CLI-15-25, 82 NRC 389 (2015)

See Amendment of Contentions

CONTENTIONS, ADMISSIBILITY

absence of a prohibition is not sufficient justification to admit a contention; CLI-15-23, 82 NRC 321 (2015)

absent a waiver, no rule or regulation of the Commission, or any provision thereof, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to 10 C.F.R. Part 2; CLI-15-19, 82 NRC 151 (2015); LBP-15-24, 82 NRC 68 (2015); LBP-15-26, 82 NRC 163 (2015)

admissible contentions must meet the six criteria of 10 C.F.R. 2.309(f)(1); CLI-15-21, 82 NRC 295 (2015); LBP-15-29, 82 NRC 246 (2015)

admissible contentions must point to a deficiency in the application, and not merely suggest other ways an analysis could have been done or other details that could have been included; CLI-15-18, 82 NRC 135 (2015)

alleged violations of state law are outside the scope of, and not material to, an adjudicatory proceeding; LBP-15-24, 82 NRC 68 (2015)

although boards may appropriately view petitioner's support for its contention in a light favorable to petitioner, they cannot do so by ignoring the contention admissibility requirements; CLI-15-18, 82 NRC 135 (2015)

any interested person may challenge use of a categorical exclusion by presenting special circumstances; LBP-15-26, 82 NRC 163 (2015)

apart from discretionary review by the Commission, NRC Staff's no significant hazards consideration determination under section 50.92(c) may not be contested; LBP-15-26, 82 NRC 163 (2015)

argument is untimely when it is raised for the first time at oral argument; LBP-15-23, 82 NRC 55 (2015)

assertion that additional physical analysis is necessary, without a basis to support the need for additional testing, is not admissible; CLI-15-23, 82 NRC 321 (2015)

at contention admissibility stage, the board should view petitioner's support for its contention in a light favorable to petitioner, but cannot do so by ignoring the requirements set forth in 10 C.F.R. 2.309(f)(1); CLI-15-23, 82 NRC 321 (2015)

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at the admission stage, a board evaluates whether petitioner has provided sufficient support to justify admitting the contention for further litigation; LBP-15-24, 82 NRC 68 (2015)

“belief” that is not supported by alleged facts or expert opinion renders a contention inadmissible; LBP-15-26, 82 NRC 163 (2015)

board concludes that contention is not admissible because it fails to satisfy criteria of 10 C.F.R. 2.309(f)(1), and thus need not rule on its timeliness; LBP-15-29, 82 NRC 246 (2015)

board erred in reformulating contentions with arguments not originally raised by petitioners; CLI-15-18, 82 NRC 135 (2015)

board is the appropriate arbiter of fact-specific questions of contention admissibility, and the Commission will not second-guess the board’s evaluation of factual support for the contention, absent an error of law or abuse of discretion, even if support for the contention is weak; CLI-15-25, 82 NRC 389 (2015)

board is wrong to strain to discern the outlines of any contention in an amorphous petition; CLI-15-18, 82 NRC 135 (2015)

board may grant a timely filed petition to intervene if it concludes that petitioner has established standing and proffered at least one admissible contention; LBP-15-26, 82 NRC 163 (2015)

board may not supply its own bases for a contention; CLI-15-17, 82 NRC 33 (2015)

boards evaluate contentions under the six requirements of 10 C.F.R. 2.309(f)(1); LBP-15-24, 82 NRC 68 (2015)

boards have some discretion to reformulate or narrow contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding, but this authority is not without limit; CLI-15-18, 82 NRC 135 (2015)

boards may not supply information that is lacking in a contention that otherwise would be inadmissible; CLI-15-18, 82 NRC 135 (2015)

brief explanation of the rationale underlying the contention is sufficient to satisfy 10 C.F.R. 2.309(f)(1)(ii); LBP-15-24, 82 NRC 68 (2015)

broadening of issues for hearing caused by board’s admission of a contention that applicant opposes does not constitute a pervasive and unusual effect on the litigation meriting interlocutory review; CLI-15-17, 82 NRC 33 (2015)

by pointing to the exemptions and the license amendment request, petitioner has adequately supported its statement that the LAR is legally deficient in light of the granted exemptions; LBP-15-24, 82 NRC 68 (2015)

Category 1 issues are environmental issues that NRC has resolved generically and therefore does not consider in specific license renewal proceedings; CLI-15-18, 82 NRC 135 (2015)

challenge to NRC Staff’s environmental analysis, which may come in the form of a categorical exclusion, may be filed as a timely motion to add a new contention once that analysis is complete; LBP-15-24, 82 NRC 68 (2015)

challenges to agency rules or regulations without a waiver, in addition to being expressly prohibited, are outside the scope of the proceeding; CLI-15-21, 82 NRC 295 (2015)

challenges to an agency rule or regulation in an adjudicatory proceeding without a waiver of that rule or regulation are prohibited; CLI-15-21, 82 NRC 295 (2015)

claimed deficiencies in a decommissioning plan must have health and safety significance to be admissible; LBP-15-24, 82 NRC 68 (2015)

collateral challenge to NRC emergency response data system rule is inadmissible; CLI-15-20, 82 NRC 211 (2015)

Commission defers to board’s contention admissibility rulings unless the appeal points to an error of law or abuse of discretion; CLI-15-25, 82 NRC 389 (2015)

Commission generally defers to board decisions on contention admissibility unless it finds an error of law or abuse of discretion; CLI-15-20, 82 NRC 211 (2015)

conclusory statements do not amount to a challenge to a severe accident mitigation alternatives analysis; CLI-15-18, 82 NRC 135 (2015)

contention about a matter not covered by a specific rule need only allege that it poses a significant safety problem; CLI-15-23, 82 NRC 321 (2015)

contention admissibility requirements are strict by design, and only focused, well-supported issues will be admitted for hearing; CLI-15-21, 82 NRC 295 (2015)

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contention alleging deficiencies in Corp of Engineers' compensatory mitigation methods under the Clean Water Act lack alleged facts or expert opinions; LBP-15-23, 82 NRC 55 (2015)

contention argument is an improper attempt to graft a historical-event criterion onto the performance-criteria specified in Appendix J, Option B; LBP-15-26, 82 NRC 163 (2015)

contention asserting that draft environmental impact statement must include the Corps of Engineers CWA 404 permit analysis in order to satisfy NEPA fails to raise a material issue; LBP-15-23, 82 NRC 55 (2015)

contention frames a legal dispute over the meaning of regulation's direction that a license amendment shall be in accord with the provisions of 10 C.F.R. 50.75(h)(5); LBP-15-24, 82 NRC 68 (2015)

contention is inadmissible for failing to raise a material issue; LBP-15-26, 82 NRC 163 (2015)

contention is inadmissible for failure to show that a genuine dispute exists with license amendment request; LBP-15-26, 82 NRC 163 (2015)

contention migrates when a licensing board construes it as challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without petitioner amending the contention; CLI-15-17, 82 NRC 33 (2015)

contention must provide sufficient information to show a genuine dispute with applicant on a material issue of law or fact; CLI-15-20, 82 NRC 211 (2015)

contention pleading standards require petitioners to plead specific grievances, not simply to provide general notice pleadings; CLI-15-18, 82 NRC 135 (2015)

contention that applicant had inadequately described aging management plan by relying on a promise of compliance with NRC orders instead of describing the plan is admissible; LBP-15-24, 82 NRC 68 (2015)

contention that DEIS is inadequate solely because it does not include the results of the Corps of Engineers' section 404 permit review fails to raise a material issue; LBP-15-23, 82 NRC 55 (2015)

contention that relies on testimony marking the first time NRC Staff has addressed an impact at the site is timely; LBP-15-24, 82 NRC 68 (2015)

contention that seeks to impose a requirement beyond those imposed by NRC regulations is inadmissible; LBP-15-26, 82 NRC 163 (2015)

contentions cannot be based on speculation but must have some reasonably specific factual or legal basis; CLI-15-20, 82 NRC 211 (2015)

contentions must be pled with sufficient specificity to put opposing parties on notice of which claims they will actually have to defend; CLI-15-18, 82 NRC 135 (2015)

contentions must be set forth with particularity and must meet all six admissibility factors; CLI-15-18, 82 NRC 135 (2015)

contentions must satisfy the six-factor admissibility test in 10 C.F.R. 2.309(f)(1); LBP-15-23, 82 NRC 55 (2015); LBP-15-26, 82 NRC 163 (2015)

contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement; CLI-15-18, 82 NRC 135 (2015)

correctness of assurance that license conditions will be replaced by sections 50.75(h) and 50.82(a)(8) is a genuine concern relative to the appropriateness of the license amendment request; LBP-15-24, 82 NRC 68 (2015)

evaluation of a contention at the admission stage should not be confused with evaluation at the merits stage of a proceeding; LBP-15-24, 82 NRC 68 (2015)

expert opinion that merely states a conclusion without providing a reasoned basis or explanation is inadequate; LBP-15-26, 82 NRC 163 (2015)

expert witness has enough knowledge in the subject area to proffer an expert opinion for the purpose of determining contention admissibility; LBP-15-24, 82 NRC 68 (2015)

external entities are not entitled to seek revisions to a Commission direction to the NRC Staff contained in a Staff Requirements Memorandum; CLI-15-19, 82 NRC 151 (2015)

facts and issues raised in a contention are not in controversy and subject to a full evidentiary hearing unless the proposed contention is admitted; LBP-15-24, 82 NRC 68 (2015)

failure to comply with any of the requirements in section 2.309(f)(1) renders a contention inadmissible; LBP-15-23, 82 NRC 55 (2015); LBP-15-26, 82 NRC 163 (2015)

for any new arguments or new support for a contention, petitioner must explain why it could not have raised the argument or introduced the factual support earlier; CLI-15-18, 82 NRC 135 (2015)

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general and unparticularized references to health and safety significance and material deficiencies in the environmental report would not satisfy the rule that contentions be pled with specificity; CLI-15-18, 82 NRC 135 (2015)

generalized reference to the potential human and economic costs from an accident falls short of the support necessary for a severe accident mitigation alternatives contention; CLI-15-18, 82 NRC 135 (2015)

holidays and weekends are excluded from the date calculation for filing new contentions; LBP-15-24, 82 NRC 68 (2015)

if petitioner believes that an application fails altogether to contain information required by law, petitioner must identify each failure and provide supporting reasons for petitioner's belief; CLI-15-20, 82 NRC 211 (2015)

if petitioner can provide a sound basis to dispute compliance-related statements in a license amendment request, then the contention is within the scope of the proceeding; LBP-15-24, 82 NRC 68 (2015)

in a license amendment proceeding, an admissible contention must meet the six requirements of 10 C.F.R. 2.309(f)(1); LBP-15-24, 82 NRC 68 (2015)

interlocutory review of a board decision that denied reconsideration of a contention admissibility determination was declined; CLI-15-24, 82 NRC 331 (2015)

intervention petitioner must review relevant documents and provide sufficient discussion of these documents and its concerns to demonstrate existence of a genuine material dispute with licensee on a material issue of law or fact; CLI-15-23, 82 NRC 321 (2015)

it makes no sense to spend valuable resources litigating allegations of current deficiencies in a proceeding that is directed to future-oriented issues of aging; CLI-15-21, 82 NRC 295 (2015)

licensing boards are expected to examine cited materials to verify that they do, in fact, support a contention; CLI-15-22, 82 NRC 310 (2015)

licensing boards are expected to reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-15-25, 82 NRC 389 (2015)

materiality depends on whether the information is capable of influencing the decisionmaker, not on whether the decisionmaker would, in fact, have relied on it; LBP-15-24, 82 NRC 68 (2015)

"materiality" means that petitioner must show why the alleged error or omission is significant to grant or denial of a pending license application; LBP-15-24, 82 NRC 68 (2015)

matters relating to reasonable assurance of safety during the current license term are to be addressed under the current license and are outside the scope of a license renewal review; CLI-15-21, 82 NRC 295 (2015)

new arguments may not be raised for the first time in a reply brief; CLI-15-20, 82 NRC 211 (2015)

new contentions must be submitted in a timely fashion based on the availability of the information on which they are based; CLI-15-17, 82 NRC 33 (2015)

no NRC rule or regulation is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding of Part 2; CLI-15-20, 82 NRC 211 (2015)

NRC's rules are intentionally strict; CLI-15-20, 82 NRC 211 (2015)

NRC's "strict by design" contention admissibility standards focus the hearing process on disputes that can be resolved in adjudication; CLI-15-22, 82 NRC 310 (2015); CLI-15-23, 82 NRC 321 (2015)

on appeal, Commission defers to board's rulings on contention admissibility absent an error of law or abuse of discretion; CLI-15-23, 82 NRC 321 (2015)

original contention did not point to any specific grievance with the environmental justice discussion provided in applicant's environmental report and so the board should have applied the standards in 10 C.F.R. 2.309(c) to determine whether petitioner had demonstrated good cause for its late filing; CLI-15-18, 82 NRC 135 (2015)

petitioner must also show that its contention is material to the findings NRC must make to support issuance of the license amendments; CLI-15-25, 82 NRC 389 (2015)

petitioner must demonstrate good cause for proffering a new contention after the initial deadline for the filing of contentions; LBP-15-23, 82 NRC 55 (2015)

petitioner must demonstrate that the issue raised in its contention is within the scope of the proceeding; CLI-15-25, 82 NRC 389 (2015)

petitioner must demonstrate that the issue raised in the contention falls within the scope of the proceeding and is material to the findings that the NRC must make; CLI-15-20, 82 NRC 211 (2015)

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petitioner must make a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate; LBP-15-23, 82 NRC 55 (2015); LBP-15-24, 82 NRC 68 (2015)

petitioner must provide a brief explanation of the basis for its contention; CLI-15-25, 82 NRC 389 (2015)

petitioner must provide sufficient information to show that a genuine dispute exists with the environmental assessment on a material issue of law or fact; CLI-15-25, 82 NRC 389 (2015)

petitioner must refer to specific portions of the application that it disputes, along with the supporting reasons for each dispute; CLI-15-20, 82 NRC 211 (2015)

petitioner must state the alleged facts or expert opinions that support its position and on which it intends to rely at hearing; CLI-15-20, 82 NRC 211 (2015)

petitioner must state the issue of law or fact to be raised or controverted and a brief explanation of the basis for each contention; CLI-15-20, 82 NRC 211 (2015)

petitioners are not allowed to postpone filing a contention challenging publicly available information or analysis until NRC Staff issues some document that collects, summarizes, and places into context the facts supporting that contention; CLI-15-17, 82 NRC 33 (2015)

petitioners are not required to demonstrate their asserted injury with certainty at the admission stage of the proceeding; CLI-15-25, 82 NRC 389 (2015)

petitioners' argument that additional testing should be required to demonstrate compliance with 10 C.F.R. 50.61a is an impermissible challenge to that regulation; CLI-15-22, 82 NRC 310 (2015)

petitioners may not raise arguments for the first time in their reply; CLI-15-22, 82 NRC 310 (2015)

petitioners must provide a nexus between its concerns and any deficiencies in applicant's SAMA analysis; CLI-15-18, 82 NRC 135 (2015)

placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage is inadmissible; CLI-15-27, 82 NRC 414 (2015)

proponent of a contention is responsible for formulating the contention and providing the necessary support to satisfy the admissibility requirements; CLI-15-23, 82 NRC 321 (2015)

purpose of the timeliness rules is not to trap petitioners into a no-win situation where a contention is called premature if filed in the original petition and untimely if petitioners wait for a potential event to actually transpire; LBP-15-24, 82 NRC 68 (2015)

rejection of contention, where petitioner has other contentions pending for hearing does not constitute serious and irreparable harm or affect the structure of the proceeding in a pervasive or unusual manner; CLI-15-17, 82 NRC 33 (2015)

release of NRC Staff's environmental review document may be the first opportunity for a petitioner to question the accuracy of the Staff's environmental analysis; CLI-15-17, 82 NRC 33 (2015)

reply brief cannot introduce new issues or expand the scope of arguments advanced in the original petition, but rather must focus on actual or logical arguments presented in the original petition or raised in answers to it; LBP-15-26, 82 NRC 163 (2015)

requests for a generic NEPA analysis were premature where the NRC evaluation of the Fukushima Dai-ichi events was still ongoing; LBP-15-24, 82 NRC 68 (2015)

rules are strict by design; LBP-15-26, 82 NRC 163 (2015)

ruling on an appeal, the Commission defers to a board's rulings on contention admissibility absent an error of law or abuse of discretion; CLI-15-22, 82 NRC 310 (2015)

scope of license amendment proceedings is limited to the license amendment request, and petitioners typically cannot challenge a Commission regulation; LBP-15-24, 82 NRC 68 (2015)

scope of the license renewal proceeding on safety-related issues is limited to plant structures and components that will require an aging management review for the period of extended operation under the renewed license and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; CLI-15-21, 82 NRC 295 (2015)

simply referencing a study without explaining the information's significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality; LBP-15-26, 82 NRC 163 (2015)

standard is strict by design; LBP-15-23, 82 NRC 55 (2015)

state has provided sufficiently supported expert opinion to show at the contention admissibility stage why the inadvertent release of radionuclides is enough of a risk to public health and safety to warrant merits consideration as an unforeseen expense; LBP-15-24, 82 NRC 68 (2015)

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state's claim that licensee's license amendment request contains incomplete and incorrect statements concerning its use of the trust fund is within the scope of the license amendment proceeding as defined in the notice of opportunity to request a hearing; LBP-15-24, 82 NRC 68 (2015)

summary disposition is appropriate where alleged omission from initial renewal application is cured in updated SAMA analysis; LBP-15-29, 82 NRC 246 (2015)

there is a difference between asserting genuinely new arguments and alerting the tribunal to new, additional support for an existing argument; LBP-15-27, 82 NRC 184 (2015)

there must be some significant link between the claimed deficiency and the agency's ultimate determination whether granting a license amendment request will adequately protect the health and safety of the public and the environment; LBP-15-24, 82 NRC 68 (2015)

timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted; LBP-15-24, 82 NRC 68 (2015)

to satisfy contention admissibility standards, petitioner must meet all six pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi); CLI-15-23, 82 NRC 321 (2015)

to the extent that the board relied on a precedent that allowed notice pleading under 10 C.F.R. 2.714(b) in making its contention admissibility determination, it erred; CLI-15-23, 82 NRC 321 (2015)

unless petitioner sets forth a supported contention pointing to an apparent error or deficiency that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing; LBP-15-29, 82 NRC 246 (2015)

when raising a genuine material dispute with an application, petitioner must present well-defined issues, not issues based on little more than guesswork; CLI-15-23, 82 NRC 321 (2015)

where neither the Commission nor any licensing board has had the opportunity to interpret the meaning of 10 C.F.R. 50.75(h)(5), a legal issue exists for the board to address; LBP-15-24, 82 NRC 68 (2015)

whether and how NRC Staff fulfills its consultation obligations are issues that could form the basis for a new contention that might appropriately be made in a timely fashion after Staff issues its draft environmental impact statement; CLI-15-18, 82 NRC 135 (2015)

within 30 days after new information becomes available is a reasonable amount of time for filing a new contention; LBP-15-24, 82 NRC 68 (2015)

CONTENTIONS, LATE-FILED

for any new arguments or new support for a contention, petitioner must explain why it could not have raised the argument or introduced the factual support earlier; CLI-15-18, 82 NRC 135 (2015)

in addition to being timely, new contentions must satisfy the six-factor contention admissibility standard; LBP-15-23, 82 NRC 55 (2015)

new contentions must be submitted in a timely fashion based on the availability of the information on which they are based; CLI-15-17, 82 NRC 33 (2015)

petitioner must demonstrate good cause for proffering a new contention after the initial filing deadline; LBP-15-23, 82 NRC 55 (2015)

petitioners are not allowed to postpone filing a contention challenging publicly available information or analysis until NRC Staff issues some document that collects, summarizes, and places into context the facts supporting that contention; CLI-15-17, 82 NRC 33 (2015)

purpose of the timeliness rules is not to trap petitioners into a no-win situation where a contention is called premature if filed in the original petition and untimely if petitioners wait for a potential event to actually transpire; LBP-15-24, 82 NRC 68 (2015)

timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted; LBP-15-24, 82 NRC 68 (2015)

timeliness requirement does not apply if no formal proceeding has commenced; LBP-15-27, 82 NRC 184 (2015)

within 30 days after new information becomes available is a reasonable amount of time for filing a new contention; LBP-15-24, 82 NRC 68 (2015)

CONTESTED LICENSE APPLICATIONS

NRC Staff is authorized to issue a license when it has completed its review during the pendency of a hearing as long as it provides the board and parties notice and an explanation why the public health

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- and safety are protected and why the action is in accord with the common defense and security despite the pendency of the contested matter; CLI-15-17, 82 NRC 33 (2015)
- presiding officer approval for settlements in contested proceedings with admitted contentions is evidenced from provisions of section 2.338 other than paragraph (g); LBP-15-30, 82 NRC 339 (2015)
- CONTINUED STORAGE RULE**
- placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage is inadmissible; CLI-15-27, 82 NRC 414 (2015)
- COOLING SYSTEMS**
- licensees must develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and SFP cooling capabilities under the circumstances associated with the loss of large areas of the plant caused by explosions or fire; DD-15-11, 82 NRC 361 (2015)
- COSTS**
- See Decommissioning Costs
- CULTURAL RESOURCES**
- to show imminent, irreparable harm to cultural resources, petitioner must describe with specificity the resources and manner in which they are threatened; CLI-15-17, 82 NRC 33 (2015)
- CURRENT LICENSING BASIS**
- any amendment to an existing license as a result of NRC review of licensee seismic hazard reevaluations that leads to changes in the current licensing basis would be subject to a hearing opportunity; CLI-15-21, 82 NRC 295 (2015)
- petitioner may file a petition for rulemaking to expand the scope of NRC license renewal regulations if it believes that applicant's seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 295 (2015)
- petitioner may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action that may be proper, if it believes that applicant's seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 295 (2015)
- DEADLINES**
- adherence to deadlines and procedures in NRC rules is required so that other litigants are not taken by surprise and are accorded an opportunity to respond to new arguments or new information; CLI-15-18, 82 NRC 135 (2015)
- evidentiary hearing should begin 175 days after release of NRC Staff's environmental review document; CLI-15-17, 82 NRC 33 (2015)
- holidays and weekends are excluded from the date calculation for filing new contentions; LBP-15-24, 82 NRC 68 (2015)
- two years before permanent cessation of operations, licensee must submit a preliminary decommissioning cost estimate that includes a plan for adjusting decommissioning funds to demonstrate that funds will be available when needed to cover decommissioning costs; DD-15-8, 82 NRC 107 (2015)
- within 30 days after new information becomes available is a reasonable amount of time for filing a new contention; LBP-15-24, 82 NRC 68 (2015)
- DECISION ON THE MERITS**
- evaluation of a contention at the admissibility stage should not be confused with evaluation at the merits stage; LBP-15-24, 82 NRC 68 (2015)
- DECISIONS**
- See Initial Decisions; Licensing Board Decisions
- DECOMMISSIONING**
- applicant need not submit an environmental report until the final stage of decommissioning as part of its license termination plan; LBP-15-24, 82 NRC 68 (2015)
- "decommissioning" is defined in 10 C.F.R. 50.2; LBP-15-24, 82 NRC 68 (2015)
- keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility; LBP-15-24, 82 NRC 68 (2015)

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DECOMMISSIONING COSTS

- decommissioning trust funds may be used by licensees if withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in section 50.2; LBP-15-24, 82 NRC 68 (2015)
- exemptions from decommissioning fund withdrawals are categorically excluded from environmental review as administrative changes that do not increase risk of public radiation exposure; LBP-15-24, 82 NRC 68 (2015)
- given that licensee has not included discovery of unexpected levels of contaminants, and contamination in places not previously expected, in the decommissioning cost estimate, such fund withdrawals would require a 30-day notice; LBP-15-24, 82 NRC 68 (2015)
- if licensee amends any license conditions related to the decommissioning trust fund, from that point forward it will have to comply with all requirements of 10 C.F.R. 50.75(h); LBP-15-28, 82 NRC 233 (2015)
- instead of providing notice before each decommissioning expense, licensee must submit a decommissioning cost estimate and timeline, called a Post Shutdown Decommissioning Activities Report, and annual reports on expenditures; LBP-15-24, 82 NRC 68 (2015)
- license amendment request seeks to replace 30-day notice requirement and other plant-specific license conditions with the decommissioning fund requirements; LBP-15-28, 82 NRC 233 (2015)
- licensee is required to ensure that the site can be safely maintained and decommissioned, even in the face of unexpected costs; LBP-15-24, 82 NRC 68 (2015)
- licensee must provide a 30-day notice for all withdrawals other than ordinary administrative expenses to operate the decommissioning fund, but those notices are no longer required once decommissioning has begun and withdrawals are made; LBP-15-24, 82 NRC 68 (2015)
- narrowly tailored condition will afford petitioner an opportunity to dispute a specific decommissioning fund disbursement via a letter to the NRC or a petition for enforcement action; LBP-15-28, 82 NRC 233 (2015)
- reporting and recordkeeping rules for decommissioning trusts are government by 10 C.F.R. 50.75(h)(1)-(4); LBP-15-28, 82 NRC 233 (2015)
- spent fuel management is not a decommissioning activity; LBP-15-24, 82 NRC 68 (2015)
- state has provided sufficiently supported expert opinion to show at the contention admissibility stage why inadvertent release of radionuclides is enough of a risk to public health and safety to warrant merits consideration as an unforeseen expense; LBP-15-24, 82 NRC 68 (2015)
- two years before permanent cessation of operations, licensee must submit a preliminary decommissioning cost estimate that includes a plan for adjusting decommissioning funds to demonstrate that funds will be available when needed to cover decommissioning costs; DD-15-8, 82 NRC 107 (2015)
- where license conditions predate issuance of 10 C.F.R. 50.75(h)(5), the plant has been allowed to keep its existing license conditions; LBP-15-28, 82 NRC 233 (2015)

DECOMMISSIONING FUNDING

- exemption request is subject to a hearing where the plant already has a license and is seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal; LBP-15-24, 82 NRC 68 (2015)
- exemptions from decommissioning fund expenditure notification requirements are categorically excluded from environmental review as administrative changes that do not increase the risk of public radiation exposure; LBP-15-28, 82 NRC 233 (2015)
- if license amendment request is approved, licensee will no longer have to provide 30-day notice to the Commission once it begins decommissioning and starts making withdrawals from the decommissioning fund; LBP-15-28, 82 NRC 233 (2015)
- if licensee amends any of its grandfathered license conditions that were related to the decommissioning trust fund, from that point forward licensee must comply with all of the requirements of 10 C.F.R. 50.75(h); LBP-15-24, 82 NRC 68 (2015)
- licensee seeks regulatory exemptions to allow it to use decommissioning funds to manage spent fuel and eliminate the 30-day notice requirement that would otherwise apply to spent fuel management; LBP-15-28, 82 NRC 233 (2015)

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licensees cannot make decommissioning fund withdrawals that would reduce the value of the trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise; LBP-15-24, 82 NRC 68 (2015)

licensees must annually adjust the amount of decommissioning funding assurance; DD-15-8, 82 NRC 107 (2015)

licensees must submit, with each operating license application, certification specifying how financial assurance for decommissioning will be provided; DD-15-8, 82 NRC 107 (2015)

NRC monitors the status of decommissioning funds and, when necessary, requires additions to funds through parent company guarantees, cash deposits, or other methods permitted by regulations; DD-15-8, 82 NRC 107 (2015)

request that NRC investigate whether licensee possesses sufficient funds to cease operations and decommission its plant is denied; DD-15-8, 82 NRC 107 (2015)

status of decommissioning funds must be reported to NRC at least once every 2 years; DD-15-8, 82 NRC 107 (2015)

there is no time limit on when a licensee can seek an amendment to the license conditions relating to its decommissioning trust fund; LBP-15-24, 82 NRC 68 (2015)

trust fund can be used only for decommissioning activities; LBP-15-24, 82 NRC 68 (2015)

without an exemption from the NRC, licensee is prohibited from using decommissioning funds for spent fuel management because it is not an allowable decommissioning expense; LBP-15-28, 82 NRC 233 (2015)

DECOMMISSIONING FUNDING PLANS

if licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of 10 C.F.R. 50.75(h); LBP-15-24, 82 NRC 68 (2015)

NRC requires a contingency factor for decommissioning funds to provide for unforeseen events that may happen during operations or decommissioning that could increase the overall costs of this activity; LBP-15-24, 82 NRC 68 (2015)

state's claim that licensee's license amendment request contains incomplete and incorrect statements concerning its use of the trust fund is within the scope of the license amendment proceeding as defined in the notice of opportunity to request a hearing; LBP-15-24, 82 NRC 68 (2015)

two years before permanent cessation of operations, licensee must submit a preliminary decommissioning cost estimate that includes a plan for adjusting decommissioning funds; DD-15-8, 82 NRC 107 (2015)

DECOMMISSIONING PLANS

claimed deficiencies in a decommissioning plan must have health and safety significance in order to be admissible; LBP-15-24, 82 NRC 68 (2015)

DEFINITIONS

categorical exclusion is a generic finding that a category of actions do not individually or cumulatively have a significant effect on the human environment; LBP-15-26, 82 NRC 163 (2015)

containment system is defined as the principal barrier, after the reactor coolant pressure boundary, to prevent the release of quantities of radioactive material that would have a significant radiological effect on public health; LBP-15-26, 82 NRC 163 (2015)

"decommissioning" is defined in 10 C.F.R. 50.2; LBP-15-24, 82 NRC 68 (2015); LBP-15-28, 82 NRC 233 (2015)

"design bases" refers to information that identifies the specific functions to be performed by an SSC of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design; DD-15-11, 82 NRC 361 (2015)

"radiographer's assistant," is defined in 10 C.F.R. 34.3; LBP-15-21, 82 NRC 1 (2015)

scope of license renewal is defined in 10 C.F.R. 54.4; CLI-15-21, 82 NRC 295 (2015)

DEMAND FOR INFORMATION

administrative action of issuing a demand for information is described; DD-15-11, 82 NRC 361 (2015)

petitioners request that NRC issue a demand for information to compel boiling-water reactor licensees with Mark I and Mark II containment designs to describe how their individual facilities comply with 10 C.F.R. Part 50, Appendix A, GDC 44 and 10 C.F.R. 50.49; DD-15-11, 82 NRC 361 (2015)

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DESIGN

failure to verify adequacy of thermal-hydraulic and flow-induced vibration design of the replacement steam generators was determined to be of very low safety significance, because the tubes did not leak and continued to meet the required structural integrity criterion; DD-15-7, 82 NRC 257 (2015)

section 50.59 is not a process for verifying design adequacy, and required design control measures for verifying adequacy of design are expected to be implemented before entering the section 50.59 process; DD-15-7, 82 NRC 257 (2015)

DESIGN BASIS

“design bases” refers to information that identifies the specific functions to be performed by an SSC of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design; DD-15-11, 82 NRC 361 (2015)

operating license applicant must present the design bases of the facility and safety analyses of the facility as a whole in the final SAR; DD-15-11, 82 NRC 361 (2015)

DESIGN BASIS ACCIDENT

licensees must establish an environmental qualification program for electrical equipment important to safety that would be exposed to harsh environmental conditions expected to develop as a result of design-basis accidents; DD-15-11, 82 NRC 361 (2015)

DESIGN BASIS EVENTS

DBEs are defined in 10 C.F.R. 50.49; DD-15-11, 82 NRC 361 (2015)

DISCLOSURE

if the Commission determines on appeal that information withheld under a protective order should have been publicly disclosed, it will direct that such information and the transcript of the related *in camera* session be made publicly available; CLI-15-24, 82 NRC 331 (2015)

NEPA imposes on NRC a disclosure obligation that NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action; CLI-15-25, 82 NRC 389 (2015)

DISCOVERY

procedural rulings involving discovery rarely meet the standard for interlocutory review; CLI-15-24, 82 NRC 331 (2015)

request that board impose additional discovery activities as a requirement of withdrawal of license amendment request is too broad because it goes beyond the scope of the admitted contentions and discovery is peculiarly related to particular proceedings and particular contentions; LBP-15-28, 82 NRC 233 (2015)

DISMISSAL OF PROCEEDING

dismissal of license amendment request is conditioned on requirement that licensee provide notice to petitioner of submission of a similar LAR so that petitioner has a fair opportunity to relitigate issues previously found admissible; LBP-15-28, 82 NRC 233 (2015)

dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the license amendment request; LBP-15-28, 82 NRC 233 (2015)

purpose of the rule to dismiss proceedings on conditions is primarily to prevent voluntary dismissals that unfairly affect the other side, and to permit the imposition of curative conditions; LBP-15-28, 82 NRC 233 (2015)

standard for dismissal with prejudice is not met because the prospect of future litigation is not unusual, being inherent in any dismissal without prejudice; LBP-15-28, 82 NRC 233 (2015)

DOSE LIMITS

acceptance criteria for Type A leak rate limits embodied in the technical specifications ensure that, in the event of a design-basis accident, the dose received by a member of the general public will not exceed regulatory limits; LBP-15-26, 82 NRC 163 (2015)

keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility; LBP-15-24, 82 NRC 68 (2015)

DRAFT ENVIRONMENTAL IMPACT STATEMENT

contention asserting DEIS must include the Corps of Engineers Clean Water Act section 404 permit analysis in order to satisfy NEPA fails to raise a material issue; LBP-15-23, 82 NRC 55 (2015)

mere listing of proposed mitigation measures in the DEIS is insufficient under NEPA; LBP-15-23, 82 NRC 55 (2015)

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NEPA does not require the DEIS to include a fully formulated or adopted mitigation plan, but its discussion must provide sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-15-23, 82 NRC 55 (2015)

NEPA requires an agency's DEIS to contain a detailed discussion of possible mitigation measures; LBP-15-23, 82 NRC 55 (2015)

placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage is inadmissible; CLI-15-27, 82 NRC 414 (2015)

DREDGING

when a proposed project would cause discharge of dredged or fill material into wetlands, applicant must seek a permit from the Corps of Engineers; LBP-15-23, 82 NRC 55 (2015)

DUE PROCESS

unless a schedule is so onerous or unfair that it deprives a party of procedural due process, scheduling is a matter of licensing board discretion; LBP-15-29, 82 NRC 246 (2015)

EARTHQUAKES

NRC's independent technical evaluation of information submitted by licensee to demonstrate that no functional damage occurred as a result of an earthquake is described; DD-15-9, 82 NRC 274 (2015)

reactors must be shut down and remain shut down until licensee demonstrates to NRC that an earthquake exceeding its operating basis caused no functional damage to features necessary for continued operation without undue risk; DD-15-9, 82 NRC 274 (2015)

to demonstrate that no functional damage occurred as a result of the earthquake, licensee performed inspections, tests, and analyses to address the requirements of 10 C.F.R. Part 100, Appendix A; DD-15-9, 82 NRC 274 (2015)

EMBRITTLMENT

information that license amendment request must contain to use updated embrittlement model is described; CLI-15-22, 82 NRC 310 (2015)

licensee is not required to collect additional surveillance data from the subject plant, but rather licensee must use any data that demonstrate the embrittlement trends for the materials, including surveillance programs at other plants with or without a surveillance program integrated under Part 50, Appendix H; CLI-15-22, 82 NRC 310 (2015)

updated embrittlement model is used to predict future reference temperatures across the reactor pressure vessel, which is then verified by existing surveillance data; CLI-15-22, 82 NRC 310 (2015)

EMERGENCY PLANS

licensee changes to its plan must not reduce the effectiveness of the plan; CLI-15-20, 82 NRC 211 (2015)

licensee may change its emergency plan without prior NRC approval if licensee completes and retains an analysis demonstrating that the revised emergency plan satisfies a two-part test; CLI-15-20, 82 NRC 211 (2015)

licensees whose emergency plan describes emergency response data system or its use during an emergency would need to process a change to their emergency plans; CLI-15-20, 82 NRC 211 (2015)

reduction in emergency plan effectiveness means a reduction in licensee's capability to perform an emergency planning function in the event of a radiological emergency; CLI-15-20, 82 NRC 211 (2015)

revised plan must continue to meet the requirements in Part 50, Appendix E and the standards in section 50.47(b); CLI-15-20, 82 NRC 211 (2015)

EMERGENCY PREPAREDNESS

proposed staffing changes meet emergency plan standards and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency commensurate with credible accidents in the permanently shutdown and defueled condition; CLI-15-20, 82 NRC 211 (2015)

EMERGENCY RESPONSE DATA SYSTEM

activation requirements are specified in 10 C.F.R. 50.72(a)(4); CLI-15-20, 82 NRC 211 (2015)

collateral challenge to NRC emergency response data system rule is inadmissible; CLI-15-20, 82 NRC 211 (2015)

except Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite hardware for the emergency response data system shall be provided at each unit by the licensee to interface with the NRC receiving system; CLI-15-20, 82 NRC 211 (2015)

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licensees must activate the ERDS as soon as possible but not later than 1 hour after declaring an Emergency Class of alert, site area emergency, or general emergency; CLI-15-20, 82 NRC 211 (2015)
licensees whose emergency plan describes the ERDS or its use during an emergency would need to process a change to their emergency plans; CLI-15-20, 82 NRC 211 (2015)
participation in the ERDS is mandatory; CLI-15-20, 82 NRC 211 (2015)
when selected plant data are not available on licensee's onsite computer system, retrofitting of data points is not required; CLI-15-20, 82 NRC 211 (2015)

ENFORCEMENT ACTIONS

concerns about how some aspect of a settlement agreement is being implemented or enforced can be brought to the attention of the Commission, which retains supervisory authority over the parties' agreement; LBP-15-21, 82 NRC 1 (2015)
director of NRC office with responsibility for the subject matter shall either institute the requested proceeding or advise the person who made the request in writing that no proceeding will be instituted, in whole or in part, with respect to the request and the reason for the decision; DD-15-7, 82 NRC 257 (2015)
licensee is banned from engaging in NRC-licensed activities, including performing, supervising, or assisting in any industrial radiographic operations and must complete a formal radiation safety officer training course; LBP-15-21, 82 NRC 1 (2015)
section 2.206 provides a process for stakeholders to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted; CLI-15-20, 82 NRC 211 (2015)

ENFORCEMENT PROCEEDINGS

NRC Staff's position in an enforcement proceeding is not itself dispositive of whether an enforcement agreement should be approved, but regulatory instruction to accord that position due weight is dispositive proof of the importance of Staff's views; LBP-15-21, 82 NRC 1 (2015)
petitioner cannot create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis, but such claims are appropriately raised in a petition to initiate an enforcement proceeding; LBP-15-27, 82 NRC 184 (2015)

ENVIRONMENTAL ANALYSIS

challenge to NRC Staff's environmental analysis, which may come in the form of a categorical exclusion, may be filed as a timely motion to add a new contention once that analysis is complete; LBP-15-24, 82 NRC 68 (2015)
environmental assessment cannot import previous environmental analyses without considering subsequent developments at the site and to hold otherwise would render meaningless NEPA's requirement to supplement an environmental impact statement or environmental assessment; CLI-15-25, 82 NRC 389 (2015)
requests for a generic NEPA analysis were premature where the NRC evaluation of the Fukushima Dai-ichi events was still ongoing; LBP-15-24, 82 NRC 68 (2015)
section 51.92(a)(2) does not apply to the question whether the environmental assessment adequately describes the current environment, but rather applies when considering whether to supplement an environmental analysis for the period between issuance of the final document and before the agency has taken the proposed action; CLI-15-25, 82 NRC 389 (2015)

ENVIRONMENTAL ASSESSMENT

if the board's findings after the evidentiary hearing affect NRC Staff's conclusions in the EA, then those conclusions would have to be revisited; CLI-15-17, 82 NRC 33 (2015)
NEPA does not require circulation of a draft EA in all cases; CLI-15-17, 82 NRC 33 (2015)
NRC Staff cannot import previous environmental analyses without considering subsequent developments at the site and to hold otherwise would render meaningless NEPA's requirement to supplement an environmental impact statement or environmental assessment; CLI-15-25, 82 NRC 389 (2015)
petitioner must provide sufficient information to show that a genuine dispute exists with the environmental assessment on a material issue of law or fact; CLI-15-25, 82 NRC 389 (2015)
prior environmental analyses need not be revisited in the environmental assessment; CLI-15-25, 82 NRC 389 (2015)
section 51.92(a)(2) does not apply to the question whether the environmental assessment adequately describes the current environment, but rather applies when considering whether to supplement an

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- environmental analysis for the period between issuance of the final document and before the agency has taken the proposed action; CLI-15-25, 82 NRC 389 (2015)
- where an EA resulted in a finding of no significant impact, a full environmental impact statement is unnecessary; CLI-15-17, 82 NRC 33 (2015)
- ENVIRONMENTAL EFFECTS**
- immediate, irreparable harm is not presumed by a NEPA violation, even assuming such a violation has occurred; CLI-15-17, 82 NRC 33 (2015)
- ENVIRONMENTAL FUNCTIONS**
- if impacts are unavoidable, applicant shall provide mitigation measures that must be, to the extent practicable, sufficient to replace lost aquatic resource functions; LBP-15-23, 82 NRC 55 (2015)
- ENVIRONMENTAL IMPACT STATEMENT**
- contention that relies on testimony marking the first time NRC Staff has addressed an impact at the site is timely; LBP-15-24, 82 NRC 68 (2015)
- preparation of an environmental impact statement for the proposed action is unnecessary if NRC Staff determines that the proposed action will not have a significant effect on the quality of the human environment; CLI-15-25, 82 NRC 389 (2015)
- purpose of NEPA requirement that EIS be prepared is to obviate the need for speculation by ensuring that available data are gathered and analyzed prior to implementation of the proposed action; LBP-15-23, 82 NRC 55 (2015)
- where an environmental assessment resulted in a finding of no significant impact, a full EIS is unnecessary; CLI-15-17, 82 NRC 33 (2015)
- where an environmental impact statement is involved, hearings on environmental issues addressed in the EIS may not commence before issuance of the final EIS; CLI-15-17, 82 NRC 33 (2015)
- See also Draft Environmental Impact Statement; Final Environmental Impact Statement; Supplemental Environmental Impact Statement
- ENVIRONMENTAL ISSUES**
- Category 1 issues are environmental issues that NRC has resolved generically and therefore does not consider in specific license renewal proceedings; CLI-15-18, 82 NRC 135 (2015)
- contention migrates when a board construes a contention challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without petitioner amending the contention; CLI-15-17, 82 NRC 33 (2015)
- regardless of the issuance of the license, the burden at hearing remains on applicant and, with respect to NEPA compliance, on NRC Staff; CLI-15-17, 82 NRC 33 (2015)
- ENVIRONMENTAL JUSTICE**
- original contention did not point to any specific grievance with the environmental justice discussion provided in applicant's environmental report and so the board should have applied the standards in 10 C.F.R. 2.309(c) to determine whether petitioner had demonstrated good cause for its late filing; CLI-15-18, 82 NRC 135 (2015)
- ENVIRONMENTAL QUALIFICATION OF ELECTRICAL EQUIPMENT**
- environmental qualification program must include and be based on temperature and pressure, humidity, submergence (if the equipment could be subject to submergence) that could result from a design-basis accident, chemical effects, aging, synergistic effects, and margins; DD-15-11, 82 NRC 361 (2015)
- licensees have identified, and NRC has accepted, lists of equipment important to safety subject to environmental qualification; DD-15-11, 82 NRC 361 (2015)
- licensees must establish an environmental qualification program for electrical equipment important to safety that would be exposed to harsh environmental conditions expected to develop as a result of design-basis accidents; DD-15-11, 82 NRC 361 (2015)
- requirements to establish an environmental qualification program do not apply to equipment in a mild environment; DD-15-11, 82 NRC 361 (2015)
- ENVIRONMENTAL REPORT**
- applicant need not submit an ER until the final stage of decommissioning as part of its license termination plan; LBP-15-24, 82 NRC 68 (2015)
- general and unparticularized references to health and safety significance and material deficiencies in the ER would not satisfy the rule that contentions be pled with specificity; CLI-15-18, 82 NRC 135 (2015)

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information request from NRC Staff is not an approval that needs to be listed in applicant's ER under 10 C.F.R. 51.45(d); LBP-15-27, 82 NRC 184 (2015)

license renewal applicants must provide a severe accident mitigation alternatives analysis in their license renewal application if NRC Staff has not previously considered SAMAs for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment; CLI-15-18, 82 NRC 135 (2015)

ENVIRONMENTAL REVIEW

agency cannot relinquish its NEPA responsibility to evaluate environmental impacts by relying on expected compliance with the environmental standards of another agency; LBP-15-23, 82 NRC 55 (2015)

although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA's rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 246 (2015)

categories of actions are exempt from NEPA review where NRC has made a generic finding that the actions do not individually or cumulatively have a significant effect on the human environment; LBP-15-26, 82 NRC 163 (2015)

certification by agencies without overall responsibility for the particular federal action in question that its own environmental standards are satisfied attend only to one aspect of the problem without considering the broad range of environmental concerns and considerations mandated by NEPA; LBP-15-23, 82 NRC 55 (2015)

evidentiary hearing should begin 175 days after release of NRC Staff's environmental review document; CLI-15-17, 82 NRC 33 (2015)

exemptions from decommissioning fund expenditure notification requirements are categorically excluded from environmental review as administrative changes that do not increase the risk of public radiation exposure; LBP-15-28, 82 NRC 233 (2015)

exemptions from decommissioning fund withdrawals are categorically excluded from environmental review as administrative changes that do not increase the risk of public radiation exposure; LBP-15-24, 82 NRC 68 (2015)

license amendment request is not categorically exempt from environmental review if it involves a significant hazards consideration that excludes it from categorical exemption pursuant to the criteria in section 51.22(c)(9)(i); LBP-15-26, 82 NRC 163 (2015)

NEPA imposes on NRC a disclosure obligation that NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action; CLI-15-25, 82 NRC 389 (2015)

NEPA mandates a case-by-case balancing judgment by the federal agency conducting the NEPA review; LBP-15-23, 82 NRC 55 (2015)

recordkeeping or administrative procedures are categorically excluded from environmental review; LBP-15-24, 82 NRC 68 (2015)

release of NRC Staff's environmental review document may be the first opportunity for petitioner to question the accuracy of Staff's environmental analysis; CLI-15-17, 82 NRC 33 (2015)

rule that excluded certain environmental impacts from NEPA consideration and deferred totally to environmental quality standards devised and administered by other agencies violated NEPA; LBP-15-23, 82 NRC 55 (2015)

severe accident mitigation alternatives analyses are conducted for the purposes of the NRC's environmental review under NEPA and are not safety analyses; CLI-15-18, 82 NRC 135 (2015)

ERROR

board erred in reformulating contentions with arguments not originally raised by petitioners; CLI-15-18, 82 NRC 135 (2015)

board is wrong to strain to discern the outlines of any contention in an amorphous petition; CLI-15-18, 82 NRC 135 (2015)

incorrect legal ruling typically does not warrant interlocutory review because such rulings can be reviewed on appeal from partial initial decisions or a final decision; CLI-15-17, 82 NRC 33 (2015)

original contention did not point to any specific grievance with the environmental justice discussion provided in applicant's environmental report and so the board should have applied the standards in 10 C.F.R. 2.309(c) to determine whether petitioner had demonstrated good cause for its late filing; CLI-15-18, 82 NRC 135 (2015)

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possibility that a board may have made an incorrect legal ruling can be reviewed, if necessary, on appeal from a partial initial decision or other final appealable order; CLI-15-24, 82 NRC 331 (2015)
to the extent that the board relied on a precedent that allowed notice pleading under 10 C.F.R. 2.714(b) in making its contention admissibility determination, it erred; CLI-15-23, 82 NRC 321 (2015)
whether the board erred in its treatment of evidence is a matter that can be addressed following an initial decision; CLI-15-24, 82 NRC 331 (2015)

EVIDENCE

absent documentary support, NRC has declined to assume that licensees will contravene its regulations; LBP-15-24, 82 NRC 68 (2015)
in camera hearing sessions may be held when information sought to be withheld from public disclosure is offered into evidence; CLI-15-24, 82 NRC 331 (2015)
it is not the Commission's role to monitor rulings that deal with reception of evidence and procedural framework under which it will be admitted on a day-to-day basis; CLI-15-24, 82 NRC 331 (2015)
limited appearance statement is not considered evidence in a proceeding; LBP-15-27, 82 NRC 184 (2015)
whether the board erred in its treatment of evidence is a matter that can be addressed following an initial decision; CLI-15-24, 82 NRC 331 (2015)

EVIDENTIARY HEARINGS

hearing should begin 175 days after release of NRC Staff's environmental review document; CLI-15-17, 82 NRC 33 (2015)
facts and issues raised in a contention are not in controversy and subject to a full evidentiary hearing unless the proposed contention is admitted; LBP-15-24, 82 NRC 68 (2015)
licenses may be altered as a result of the evidentiary hearing; CLI-15-17, 82 NRC 33 (2015)
record of licensing board evidentiary hearing on license transfer application must be certified to the Commission; CLI-15-26, 82 NRC 408 (2015)

EXCEPTIONS

except Big Rock Point and all nuclear power facilities that are shut down permanently or indefinitely, onsite hardware for the emergency response data system shall be provided at each unit by the licensee to interface with the NRC receiving system; CLI-15-20, 82 NRC 211 (2015)

EXEMPTIONS

because NRC's decision to grant the exemptions is a matter of public record, the board takes notice that the exemptions have now been approved; LBP-15-24, 82 NRC 68 (2015)
Congress intentionally limited the opportunity for a hearing to certain designated agency actions which do not include exemptions; LBP-15-24, 82 NRC 68 (2015)
exemption cannot remove a matter germane to a licensing proceeding from consideration in a hearing; LBP-15-24, 82 NRC 68 (2015)
exemption from regulations will be issued only if the license is granted; LBP-15-24, 82 NRC 68 (2015)
exemption request is subject to a hearing where the plant already has a license and is seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal; LBP-15-24, 82 NRC 68 (2015)
exemption requests ordinarily do not trigger hearing rights when an already-licensed facility is asking for relief from performing a duty imposed by NRC regulations; LBP-15-24, 82 NRC 68 (2015)
exemptions are the sort of directly related and dependent exemption-related issues that are within the scope of a license amendment proceeding; LBP-15-24, 82 NRC 68 (2015)
exemptions do not actually modify the regulations because the ability to request an exemption is part of the regulations themselves; LBP-15-24, 82 NRC 68 (2015)
exemptions from decommissioning fund expenditure notification requirements are categorically excluded from environmental review as administrative changes that do not increase the risk of public radiation exposure; LBP-15-28, 82 NRC 233 (2015)
exemptions from decommissioning fund withdrawals are categorically excluded from environmental review as administrative changes that do not increase the risk of public radiation exposure; LBP-15-24, 82 NRC 68 (2015)
in a limited number of appropriate circumstances, NRC Staff may exempt an applicant from regulatory requirements; LBP-15-24, 82 NRC 68 (2015)
licensee cannot be exempted from license conditions without a license amendment modifying such conditions; LBP-15-28, 82 NRC 233 (2015)

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licensee seeks regulatory exemptions to allow it to use decommissioning funds to manage spent fuel and eliminate the 30-day notice requirement that would otherwise apply to spent fuel management; LBP-15-28, 82 NRC 233 (2015)

when licensee requests an exemption in a related license amendment application, NRC considers the hearing rights on the amendment application to encompass the exemption request as well; LBP-15-24, 82 NRC 68 (2015)

where license conditions predate issuance of 10 C.F.R. 50.75(h)(5), the plant was grandfathered and allowed to keep its existing license conditions; LBP-15-24, 82 NRC 68 (2015)

FAULTS

severe accident mitigation alternatives analysis is required to discuss a recently discovered fault located near the plant; LBP-15-29, 82 NRC 246 (2015)

FEDERAL WATER POLLUTION CONTROL ACT

Clean Water Act section 404 permit process is discussed; LBP-15-23, 82 NRC 61 (2015); LBP-15-23, 82 NRC 55 (2015)

FINAL ENVIRONMENTAL IMPACT STATEMENT

Clean Water Act 404 permit review can be conducted after issuance of the FEIS; LBP-15-23, 82 NRC 55 (2015)

parties agreed that additional analysis in the FEIS would be sufficient to address the only contention remaining in the proceeding; LBP-15-22, 82 NRC 49 (2015)

that the Clean Water Act section 404 permit review is conducted after issuance of the FEIS does not impact an agency's duty under NEPA, but rather serves to highlight the distinction between NEPA and the CWA; LBP-15-23, 82 NRC 55 (2015)

FINAL SAFETY ANALYSIS REPORT

FSAR updates must reflect changes that licensee has made through a license amendment request and certain changes that do not require a license amendment; LBP-15-27, 82 NRC 184 (2015)

licensee must periodically submit an updated FSAR to NRC to report information and analyses submitted to NRC by licensee or prepared by licensee pursuant to NRC requirements since the previous update; LBP-15-27, 82 NRC 184 (2015)

licensees must update the final safety analysis report periodically throughout the licensed period of a plant's operation; DD-15-11, 82 NRC 361 (2015)

licensees must update their FSARs every 2 years; LBP-15-27, 82 NRC 184 (2015)

submission of updated FSAR pages does not constitute a licensing action but is intended only to provide information; LBP-15-27, 82 NRC 184 (2015)

FINALITY

importance of finality in adjudicatory proceedings is reflected in 10 C.F.R. 2.326; CLI-15-19, 82 NRC 151 (2015)

FINANCIAL ASSURANCE

exemption request is subject to a hearing where the plant already has a license and is seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal; LBP-15-24, 82 NRC 68 (2015)

licensees cannot make decommissioning fund withdrawals that would reduce the value of the trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise; LBP-15-24, 82 NRC 68 (2015)

licensees must submit, with each operating license application, certification specifying how financial assurance for decommissioning will be provided; DD-15-8, 82 NRC 107 (2015)

NRC requires a contingency factor for decommissioning funds to provide for unforeseen events that may happen during operations or decommissioning that could increase the overall costs of this activity; LBP-15-24, 82 NRC 68 (2015)

operating license applicant must submit information that demonstrates that it possesses, or has reasonable assurance of obtaining, funds necessary to cover estimated operating costs for the period of the license; DD-15-8, 82 NRC 107 (2015)

request that NRC investigate licensee's current financial qualifications to determine whether it remains qualified to continue operating another plant is denied; DD-15-8, 82 NRC 107 (2015)

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FINANCIAL ASSURANCE PLAN

NRC has authority to request that an established or newly formed entity submit additional or more detailed information respecting its financial arrangements and status of funds; DD-15-8, 82 NRC 107 (2015)

FINANCIAL QUALIFICATIONS

five years of financial revenue-and-expense estimates must be submitted as part of a license transfer application; CLI-15-26, 82 NRC 408 (2015)

license applications must specifically state information that NRC, by rule or regulation, may determine to be necessary to decide technical and financial qualifications of applicant; DD-15-8, 82 NRC 107 (2015)
proposed transferee for an operating license must satisfy the same financial qualification requirements that apply to an applicant for an initial operating license; CLI-15-26, 82 NRC 408 (2015)

FINANCIAL QUALIFICATIONS REVIEW

electric utility applicant for an operating license is exempt from a financial qualifications review; DD-15-8, 82 NRC 107 (2015)

FINDING OF NO SIGNIFICANT IMPACT

NRC Staff may publish a draft finding of no significant impact for public comment, but it is not required to do so in all cases; CLI-15-17, 82 NRC 33 (2015)

where an environmental assessment resulted in a finding of no significant impact, a full environmental impact statement is unnecessary; CLI-15-17, 82 NRC 33 (2015)

FINDINGS OF FACT

findings that NRC must make for issuance of a renewed license are set forth in 10 C.F.R. 54.29; CLI-15-21, 82 NRC 295 (2015)

FORUM SHOPPING

quick resubmission of specific license amendment request without any change in circumstances would create the appearance of forum shopping; LBP-15-28, 82 NRC 233 (2015)

FRACTURE TOUGHNESS

equivalent margins analysis must demonstrate that the calculated energy will provide margins of safety against fracture that are equivalent to those required by Appendix G of Section XI of the ASME Code; CLI-15-23, 82 NRC 321 (2015)

no reduction in the amount of fracture toughness testing is allowed without NRC approval; CLI-15-23, 82 NRC 321 (2015)

under normal plant conditions, materials at the beltline of the reactor pressure vessel must maintain Charpy upper-shelf energy of no less than 50 ft-lb (68 joules); CLI-15-23, 82 NRC 321 (2015)

FUEL LOADING

upon docketing of certifications of permanent shutdown and fuel removal, licensee's licenses no longer authorize operation of the reactors or placement or retention of fuel into the reactor vessels and licensee is prohibited from restarting or loading fuel; DD-15-7, 82 NRC 257 (2015)

FUEL REMOVAL

licensee must provide certifications to NRC Staff that it has permanently removed fuel from its reactors; DD-15-7, 82 NRC 257 (2015)

upon docketing of certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, license will no longer authorize operation of the reactor or emplacement or retention of fuel in the reactor vessel; CLI-15-20, 82 NRC 211 (2015)

FUKUSHIMA ACCIDENT

even for licenses that NRC issues before completing its review of hazards like those at Fukushima, any new Fukushima-driven requirements can be imposed later, if necessary, to protect public health and safety; CLI-15-19, 82 NRC 151 (2015)

"imminent risk" reflects NRC's determination that, post-Fukushima, continued operation of U.S. nuclear plants and continued licensing activities pose no imminent risk to public health and safety; CLI-15-19, 82 NRC 151 (2015)

in the context of NRC's post-Fukushima activities, nothing learned to date requires immediate cessation of NRC review of license applications; CLI-15-19, 82 NRC 151 (2015)

NRC's post-Fukushima lessons learned and information-gathering process authorize NRC to collect information from licensees to determine whether licenses should be modified, suspended, or revoked; LBP-15-27, 82 NRC 184 (2015)

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- requests for a generic NEPA analysis were premature where NRC evaluation of Fukushima Dai-ichi events was still ongoing; LBP-15-24, 82 NRC 68 (2015)
- GENERAL DESIGN CRITERIA**
- applicant for a construction permit must include the principal design criteria for a proposed facility and the relationship of the design bases to the PDC as part of the preliminary safety analysis report; DD-15-11, 82 NRC 361 (2015)
- GENERIC ISSUES**
- categories of actions are exempt from NEPA review where NRC has made a generic finding that the actions do not individually or cumulatively have a significant effect on the human environment; LBP-15-26, 82 NRC 163 (2015)
- Category 1 issues are environmental issues that NRC has resolved generically and therefore does not consider in specific license renewal proceedings; CLI-15-18, 82 NRC 135 (2015)
- GRANDFATHERED CONDITIONS**
- if licensee amends any of its grandfathered license conditions that were related to the decommissioning trust fund, from that point forward licensee must comply with all of the requirements of 10 C.F.R. 50.75(h); LBP-15-24, 82 NRC 68 (2015)
- where license conditions predate issuance of 10 C.F.R. 50.75(h)(5), the plant was allowed to keep its existing license conditions; LBP-15-24, 82 NRC 68 (2015)
- HEALTH AND SAFETY**
- claimed deficiencies in a decommissioning plan must have health and safety significance in order to be admissible; LBP-15-24, 82 NRC 68 (2015)
- general and unparticularized references to health and safety significance and material deficiencies in the environmental report would not satisfy the rule that contentions be pled with specificity; CLI-15-18, 82 NRC 135 (2015)
- HEARING RIGHTS**
- actions taken by licensee under 10 C.F.R. 50.59 do not give rise to hearing rights under the AEA; LBP-15-27, 82 NRC 184 (2015)
- any amendment to an existing license as a result of NRC review of licensee seismic hazard reevaluations that leads to changes in the current licensing basis would be subject to a hearing opportunity; CLI-15-21, 82 NRC 295 (2015)
- board need not address the issue of standing where petitioner has failed to demonstrate the existence of a licensing action subject to AEA hearing rights; LBP-15-27, 82 NRC 184 (2015)
- change to a facility that is allowed under 10 C.F.R. 50.59 without prior NRC approval is not a license amendment triggering hearing rights; LBP-15-27, 82 NRC 184 (2015)
- Congress intentionally limited the opportunity for a hearing to certain designated agency actions which do not include exemptions; LBP-15-24, 82 NRC 68 (2015)
- de facto license amendment would exist, and hearing rights would be triggered, if NRC were to grant licensee greater operating authority or otherwise alter terms of the license or permit licensee to go beyond its existing license authority; LBP-15-27, 82 NRC 184 (2015)
- exemption cannot remove a matter germane to a licensing proceeding from consideration in a hearing; LBP-15-24, 82 NRC 68 (2015)
- exemption request is subject to a hearing where the plant already has a license and is seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal; LBP-15-24, 82 NRC 68 (2015)
- exemption requests ordinarily do not trigger hearing rights when an already-licensed facility is asking for relief from performing a duty imposed by NRC regulations; LBP-15-24, 82 NRC 68 (2015)
- if a hearing could be invoked each time NRC engaged in oversight over or inquiry into plant conditions, NRC's administrative process could be brought to a virtual standstill; LBP-15-27, 82 NRC 184 (2015)
- issuance of power uprate license amendment in advance of hearing did not deprive intervenor of hearing rights because the license amendment may be revoked or conditioned after hearing; CLI-15-17, 82 NRC 33 (2015)
- member of the public may challenge an action taken under 10 C.F.R. 50.59 only by means of a petition under 10 C.F.R. 2.206; LBP-15-27, 82 NRC 184 (2015)
- mere possibility of a future license amendment does not trigger a hearing opportunity today; LBP-15-27, 82 NRC 184 (2015)

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no significant hazards consideration determination is a procedural device to determine when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur; LBP-15-26, 82 NRC 163 (2015)
NRC is required to provide an opportunity to request a hearing under the Atomic Energy Act on a license amendment; CLI-15-21, 82 NRC 295 (2015)

NRC must provide an opportunity for hearing in any proceeding under the Atomic Energy Act for the granting, suspending, revoking, or amending of any license; LBP-15-27, 82 NRC 184 (2015)

NRC Staff's ongoing enforcement of regulations and license conditions does not trigger hearing rights; LBP-15-24, 82 NRC 68 (2015)

petitioner cannot create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis, but such claims are appropriately raised in a petition to initiate an enforcement proceeding; LBP-15-27, 82 NRC 184 (2015)

petitioner failed to demonstrate the existence of a licensing action subject to hearing rights under section 189a of the Atomic Energy Act; CLI-15-21, 82 NRC 295 (2015)

petitioner is not entitled to request a hearing where NRC has neither granted greater authority than that provided by its existing licenses nor otherwise altered the terms of those licenses; LBP-15-27, 82 NRC 184 (2015)

submission of updated final safety analysis report pages does not constitute a licensing action but is only intended to provide information; LBP-15-27, 82 NRC 184 (2015)

when licensee requests an exemption in a related license amendment application, NRC considers the hearing rights on the amendment application to encompass the exemption request as well; LBP-15-24, 82 NRC 68 (2015)

HEAT SINK

request that NRC take enforcement action until the licensee completes an independent root-cause assessment for the rise in ultimate heat sink temperature is denied; DD-15-10, 82 NRC 201 (2015)

system must be provided to transfer heat from structures, systems, and components important to safety to an ultimate heat sink under normal operating and accident conditions, and must be able to perform this safety function with either onsite or offsite power, assuming a single component failure; DD-15-11, 82 NRC 361 (2015)

IMMEDIATE EFFECTIVENESS

no significant hazards consideration determination permits NRC to make an authorized license amendment effective immediately rather than awaiting the outcome of an adjudicatory challenge; LBP-15-26, 82 NRC 163 (2015)

IN CAMERA PROCEEDINGS

in camera hearing sessions may be held when information sought to be withheld from public disclosure is offered into evidence; CLI-15-24, 82 NRC 331 (2015)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION

section 51.61 applies to an application for an ISFSI; LBP-15-24, 82 NRC 68 (2015)

INITIAL DECISIONS

board shall include additional NRC Staff actions necessary if inconsistent with prior Staff action approving or denying the application; CLI-15-17, 82 NRC 33 (2015)

if the board's findings after the evidentiary hearing affect NRC Staff's conclusions in the environmental assessment, then those conclusions would have to be revisited; CLI-15-17, 82 NRC 33 (2015)

INJURY IN FACT

cause of injury to intervention petitioner need not flow directly from the challenged action, but the chain of causation must be plausible; CLI-15-25, 82 NRC 389 (2015)

intervention petitioner must allege an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-15-25, 82 NRC 389 (2015)

intervention petitioner must demonstrate that the asserted injury is plausibly linked to the challenged action; CLI-15-25, 82 NRC 389 (2015)

petitioners are not required to demonstrate their asserted injury with certainty at the admission stage of the proceeding; CLI-15-25, 82 NRC 389 (2015)

INSPECTION

inservice visual inspection of containment system must comply with ASME Boiler and Pressure Vessel Code Section XI; LBP-15-26, 82 NRC 163 (2015)

NRC's inspection process is separate from its licensing process; LBP-15-27, 82 NRC 184 (2015)

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periodic visual inspections of the accessible interior and exterior surfaces of the containment system are required to identify structural deterioration that may affect containment integrity; LBP-15-26, 82 NRC 163 (2015)

INSPECTION REPORTS

NRC inspection reports, even those documenting violations, are not de facto license amendments; LBP-15-27, 82 NRC 184 (2015)

INTERVENTION

petitioner must allege such a personal stake in the outcome of the controversy as to demonstrate that a concrete adverseness exists that will sharpen the presentation of issues; CLI-15-25, 82 NRC 389 (2015)
petitioners must demonstrate standing and proffer an admissible contention; CLI-15-23, 82 NRC 321 (2015)

where the Commission finds that exigent circumstances exist and it also determines that an amendment involves no significant hazards considerations, it will provide a hearing after issuance, if one has been requested by a person who satisfies the intervention requirements of 10 C.F.R. 2.309; CLI-15-25, 82 NRC 389 (2015)

INTERVENTION PETITIONS

cause of injury to intervention petitioner need not flow directly from the challenged action, but the chain of causation must be plausible; CLI-15-25, 82 NRC 389 (2015)

hearing request must set forth with particularity the contentions petitioner seeks to litigate; CLI-15-20, 82 NRC 211 (2015)

intervention petitioner must allege an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-15-25, 82 NRC 389 (2015)

petitioner must demonstrate standing and propose at least one contention that meets the criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi) regulation; CLI-15-21, 82 NRC 295 (2015)

INTERVENTION RULINGS

automatic right exists to appeal a board decision on the question whether a petition to intervene should have been wholly denied; CLI-15-25, 82 NRC 389 (2015)

board may grant a timely filed petition to intervene if it concludes that petitioner has established standing and proffered at least one admissible contention; LBP-15-26, 82 NRC 163 (2015)

Commission will defer to licensing board rulings on standing and contention admissibility absent error of law or abuse of discretion; CLI-15-18, 82 NRC 135 (2015)

in making standing determinations, licensing boards construe the intervention petition in favor of petitioner; CLI-15-25, 82 NRC 389 (2015)

licensing board order granting a request for hearing on the question whether the request should have been wholly denied is appealable; CLI-15-23, 82 NRC 321 (2015)

once the board makes its determination that petitioner has articulated sufficient detail as to how the proposed action would affect its members, it would not be appropriate for the board to weigh the evidence to determine whether the harm to petitioner's members is certain; CLI-15-25, 82 NRC 389 (2015)

IRREPARABLE INJURY

absent a showing of irreparable injury, stay standards can only be met if movant can demonstrate a virtual certainty of success on the merits; CLI-15-17, 82 NRC 33 (2015)

claim of violation of the National Historic Preservation Act did not in itself establish irreparable harm warranting interlocutory review; CLI-15-17, 82 NRC 33 (2015)

Commission will consider taking discretionary interlocutory review where the requesting party shows that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-17, 82 NRC 33 (2015)

expense is not irreparable harm; CLI-15-24, 82 NRC 331 (2015)

immediate, irreparable harm is not presumed by a NEPA violation, even assuming such a violation has occurred; CLI-15-17, 82 NRC 33 (2015)

rejection of contention where petitioner has other contentions pending for hearing does not constitute serious and irreparable harm or affect the structure of the proceeding in a pervasive or unusual manner; CLI-15-17, 82 NRC 33 (2015)

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to show imminent, irreparable harm to cultural resources, petitioner must describe with specificity the resources and the manner in which they are threatened; CLI-15-17, 82 NRC 33 (2015)

LEAKAGE

acceptance criteria for Type A leak rate limits embodied in the technical specification are established to ensure that, in the event of a design-basis accident, the dose received by a member of the general public will not exceed the regulatory limits; LBP-15-26, 82 NRC 163 (2015)

leakage rate acceptance limit is based on minimizing leakage that would occur at the calculated peak containment internal pressure related to the design-basis loss-of-coolant accident; LBP-15-26, 82 NRC 163 (2015)

licensees must conduct periodic containment leakage tests to ensure that leakage does not exceed allowable rates; LBP-15-26, 82 NRC 163 (2015)

overall integrated leakage rate must not exceed the allowable leakage rate with margin, as specified in the Technical Specifications; LBP-15-26, 82 NRC 163 (2015)

required Type A containment leakage test measures total leakage rate from all potential leakage paths, including containment liner welds, valves, fittings, and components that penetrate the containment; LBP-15-26, 82 NRC 163 (2015)

simply referencing a study without explaining the information's significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality; LBP-15-26, 82 NRC 163 (2015)

Type B pneumatic tests detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries other than valves; LBP-15-26, 82 NRC 163 (2015)

Type C pneumatic tests measure containment isolation valve leakage rates; LBP-15-26, 82 NRC 163 (2015)

LEGAL STANDARDS

contention frames a legal dispute over the meaning of a regulation's direction that a license amendment shall be in accord with the provisions of 10 C.F.R. 50.75(h)(5); LBP-15-24, 82 NRC 68 (2015)

LICENSE APPLICATIONS

applicants must provide information that is complete and accurate in all material respects; LBP-15-24, 82 NRC 68 (2015)

license applications must specifically state information that NRC, by rule or regulation, may determine to be necessary to decide technical and financial qualifications of applicant; DD-15-8, 82 NRC 107 (2015)

See also Operating License Amendment Applications; Operating License Applications

LICENSE CONDITIONS

if licensee amends any of its grandfathered license conditions that were related to the decommissioning trust fund, from that point forward licensee must comply with all requirements of 10 C.F.R. 50.75(h); LBP-15-24, 82 NRC 68 (2015); LBP-15-28, 82 NRC 233 (2015)

if licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of 10 C.F.R. 50.75(h); LBP-15-24, 82 NRC 68 (2015)

licensee cannot be exempted from license conditions without a license amendment modifying such conditions; LBP-15-28, 82 NRC 233 (2015)

licenses may be altered as a result of the evidentiary hearing; CLI-15-17, 82 NRC 33 (2015)

NRC licensees require a license amendment to modify license conditions; LBP-15-24, 82 NRC 68 (2015)

there is no time limit on when licensee can seek an amendment to the license conditions relating to its decommissioning trust fund; LBP-15-24, 82 NRC 68 (2015)

where license conditions predate issuance of 10 C.F.R. 50.75(h)(5), the plant was grandfathered and allowed to keep its existing license conditions; LBP-15-24, 82 NRC 68 (2015)

LICENSE EXPIRATION

each specific license expires at the end of the day on the date stated in the license unless licensee has filed an application for renewal not less than 30 days before that expiration date; CLI-15-17, 82 NRC 33 (2015)

LICENSE TRANSFER APPLICATIONS

Commission decision does not foreclose NRC Staff's ability to request additional information on any part of the license transfer application; CLI-15-26, 82 NRC 408 (2015)

SUBJECT INDEX

de novo standard is applicable to review of an NRC Staff decision on a license transfer application;
CLI-15-26, 82 NRC 408 (2015)

five years of financial revenue-and-expense estimates must be submitted as part of a license transfer application; CLI-15-26, 82 NRC 408 (2015)

LICENSE TRANSFER PROCEEDINGS

record of licensing board evidentiary hearing on application must be certified to the Commission;
CLI-15-26, 82 NRC 408 (2015)

LICENSE TRANSFERS

license transfer applicant must demonstrate that the proposed transferee is qualified to hold the license;
CLI-15-26, 82 NRC 408 (2015)

licensee must obtain NRC's written consent prior to transferring an NRC license; CLI-15-26, 82 NRC 408 (2015)

proposed transferee for an operating license must satisfy the same financial qualification requirements that apply to an applicant for an initial operating license; CLI-15-26, 82 NRC 408 (2015)

LICENSEES

licensee is required to ensure that the site can be safely maintained and decommissioned, even in the face of unexpected costs; LBP-15-24, 82 NRC 68 (2015)

LICENSING BOARD DECISIONS

four factors must be addressed when the Commission or presiding officer is asked to stay effectiveness of a presiding officer's decision or action during pendency of an appeal; CLI-15-17, 82 NRC 33 (2015)
presiding officer's approval of settlement must give due consideration to public interest; LBP-15-21, 82 NRC 1 (2015)

LICENSING BOARDS, AUTHORITY

at contention admissibility stage, the board should view petitioner's support for its contention in a light favorable to petitioner, but cannot do so by ignoring the requirements set forth in 10 C.F.R. 2.309(f)(1); CLI-15-23, 82 NRC 321 (2015)

board is prohibited from imposing restrictions on the use of 10 C.F.R. 50.61a that go beyond the requirements in the regulation; CLI-15-22, 82 NRC 310 (2015)

board may not supply its own bases for a contention; CLI-15-17, 82 NRC 33 (2015)

boards are empowered to approve settlements proposed by the parties; LBP-15-30, 82 NRC 339 (2015)

boards have authority to impose reasonable conditions on voluntary withdrawals in appropriate circumstances; LBP-15-28, 82 NRC 233 (2015)

boards have some discretion to reformulate or narrow contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding, but this authority is limited; CLI-15-18, 82 NRC 135 (2015)

boards may not assume that licensee intends to contravene NRC regulations; LBP-15-24, 82 NRC 68 (2015)

boards may not supply information that is lacking in a contention that otherwise would be inadmissible; CLI-15-18, 82 NRC 135 (2015)

boards may view petitioner's support for its contention in a light favorable to petitioner but cannot do so by ignoring admissibility requirements; CLI-15-18, 82 NRC 135 (2015)

licensing board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management; LBP-15-29, 82 NRC 246 (2015)

licensing boards are expected to examine cited materials to verify that they do, in fact, support a contention; CLI-15-22, 82 NRC 310 (2015)

licensing boards are expected to reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-15-25, 82 NRC 389 (2015)

licensing boards have broad powers 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-15-30, 82 NRC 339 (2015)

licensing boards must be vested with considerable latitude in determining the course of the proceedings that they are called upon to conduct, and the Commission will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause; LBP-15-29, 82 NRC 246 (2015)

settlement agreement approval process in 10 C.F.R. 2.338(i) is discussed; LBP-15-21, 82 NRC 1 (2015)

SUBJECT INDEX

under section 2.338(i), boards may approve or reject a settlement agreement but cannot amend the agreement without consent of the parties; LBP-15-21, 82 NRC 1 (2015)
unless a schedule is so onerous or unfair that it deprives a party of procedural due process, scheduling is a matter of licensing board discretion; LBP-15-29, 82 NRC 246 (2015)

LICENSING BOARDS, JURISDICTION

board's jurisdiction terminates when there are no longer any contested matters pending before it; LBP-15-29, 82 NRC 246 (2015)
matters within the purview of the state public service board are outside the jurisdiction of the licensing board, which is limited to considering only the license amendment request and NRC regulations; LBP-15-24, 82 NRC 68 (2015)

LIMITED APPEARANCE STATEMENTS

limited appearance statement is not considered evidence in a proceeding; LBP-15-27, 82 NRC 184 (2015)

MATERIAL INFORMATION

applicants must provide information that is complete and accurate in all material respects; LBP-15-24, 82 NRC 68 (2015)
regulatory approach of relying on licensees to submit complete and accurate information and auditing that information as appropriate is consistent with sound regulatory practice; LBP-15-24, 82 NRC 68 (2015)

MATERIAL MISREPRESENTATIONS

incorrect information in a license amendment application is prohibited by NRC regulations; LBP-15-24, 82 NRC 68 (2015)

MATERIALITY

boards make threshold decisions on materiality on a case-by-case basis, given the nature of the issue and the record presented; LBP-15-24, 82 NRC 68 (2015)
contention is inadmissible for failing to raise a material issue; LBP-15-26, 82 NRC 163 (2015)
correctness of assurance that the license conditions will be replaced by sections 50.75(h) and 50.82(a)(8) is a genuine concern relative to the appropriateness of the license amendment request, and therefore the board concludes that the state has shown the materiality of its contention; LBP-15-24, 82 NRC 68 (2015)
materiality depends on whether the information is capable of influencing the decisionmaker, not on whether the decisionmaker would have relied on it; LBP-15-24, 82 NRC 68 (2015)
petitioner is required to show why the alleged error or omission is of possible significance to the grant or denial of a pending license application; LBP-15-24, 82 NRC 68 (2015)
petitioner must also show that its contention is material to the findings NRC must make to support issuance of the license amendments; CLI-15-25, 82 NRC 389 (2015)
petitioner must show that a genuine dispute exists on a material issue of law or fact relating to the application; LBP-15-23, 82 NRC 55 (2015)
simply referencing a study without explaining the information's significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality; LBP-15-26, 82 NRC 163 (2015)
unless petitioner sets forth a supported contention pointing to an apparent error or deficiency that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing; LBP-15-29, 82 NRC 246 (2015)

MIGRATION TENET

contention migrates when a licensing board construes a contention challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without petitioner amending the contention; CLI-15-17, 82 NRC 33 (2015)

MITIGATION PLANS

before being granted a Clean Water Act section 404 permit, applicant must demonstrate to the Corps of Engineers that it has taken all appropriate and practicable steps to avoid and minimize adverse impacts; LBP-15-23, 82 NRC 55 (2015)
contention alleging deficiencies in Corp of Engineers' compensatory mitigation methods under the Clean Water Act lacks alleged facts or expert opinions; LBP-15-23, 82 NRC 55 (2015)
if impacts are unavoidable, applicant shall provide mitigation measures that must be, to the extent practicable, sufficient to replace lost aquatic resource functions; LBP-15-23, 82 NRC 55 (2015)

SUBJECT INDEX

- mere listing of proposed mitigation measures in the draft environmental impact statement is insufficient under NEPA; LBP-15-23, 82 NRC 55 (2015)
- NEPA does not mandate particular results and, accordingly, does not demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act; LBP-15-23, 82 NRC 55 (2015)
- NEPA does not require the draft environmental impact statement to include a fully formulated or adopted mitigation plan, but its discussion must provide sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-15-23, 82 NRC 55 (2015)
- NEPA imposes procedural requirements on an agency to consider mitigation options but does not mandate particular results; LBP-15-23, 82 NRC 55 (2015)
- NEPA requires the draft environmental impact statement to contain a detailed discussion of possible mitigation measures; LBP-15-23, 82 NRC 55 (2015)
- Uniform Mitigation Assessment Method code and Wetland Assessment Technique for Environmental Review code methods reflect Corps of Engineers' preferred approach to compensatory mitigation under the Clean Water Act; LBP-15-23, 82 NRC 55 (2015)
- when an agency otherwise complies with NEPA's requirement of a reasonably thorough mitigation analysis, there is no error in the agency's reliance on the Clean Water Act section 404's substantive requirements as mitigation measures even though the section 404 permit review is not yet complete; LBP-15-23, 82 NRC 55 (2015)
- MOOTNESS**
- request that NRC order licensee to submit a license amendment application for the design and installation of replacement steam generators and for additional enforcement action is moot; DD-15-7, 82 NRC 257 (2015)
- MOTIONS TO REOPEN**
- burden of satisfying the reopening requirements is a heavy one and rests with movant; CLI-15-19, 82 NRC 151 (2015)
- motion to reopen will not be granted unless movant satisfies all three criteria in 10 C.F.R. 2.326(a) and the motion is accompanied by an affidavit that satisfies section 2.326(b); CLI-15-19, 82 NRC 151 (2015)
- motions to reopen the record in NRC adjudicatory proceedings are governed by 10 C.F.R. 2.326; CLI-15-19, 82 NRC 151 (2015)
- NRC's standard for motions to reopen was upheld and the court deferred to the NRC's application of its rules as long as it is reasonable; CLI-15-19, 82 NRC 151 (2015)
- MOTIONS TO WITHDRAW**
- conditions set by boards on voluntary withdrawals are set on a case-by-case basis, with any conditions tailored to address the particular circumstances of that proceeding; LBP-15-28, 82 NRC 233 (2015)
- when the board has issued a Notice of Hearing, withdrawal of a license amendment request shall be on such terms as the presiding officer may prescribe; LBP-15-28, 82 NRC 233 (2015)
- NATIONAL ENVIRONMENTAL POLICY ACT**
- agencies are afforded considerable discretion to decide the extent to which public involvement is practicable; CLI-15-17, 82 NRC 33 (2015)
- agency cannot relinquish its NEPA responsibility to evaluate environmental impacts by relying on expected compliance with environmental standards of another agency; LBP-15-23, 82 NRC 55 (2015)
- although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA's rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 246 (2015)
- case-by-case balancing judgment by the federal agency conducting the NEPA review is mandated; LBP-15-23, 82 NRC 55 (2015)
- certification by agencies without overall responsibility for the particular federal action in question that its own environmental standards are satisfied attend only to one aspect of the problem without considering the broad range of environmental concerns and considerations mandated by NEPA; LBP-15-23, 82 NRC 55 (2015)
- circulation of a draft environmental assessment is not required in all cases; CLI-15-17, 82 NRC 33 (2015)

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- Clean Water Act imposes substantive restrictions on agency action, and NEPA imposes procedural requirements aimed at integrating environmental concerns into the very process of agency decision-making; LBP-15-23, 82 NRC 55 (2015)
- conducting Clean Water Act section 404 permit review after issuance of the final environmental impact statement does not impact an agency's duty under NEPA, but rather serves to highlight the distinction between NEPA and the CWA; LBP-15-23, 82 NRC 55 (2015)
- draft environmental impact statement must contain a detailed discussion of possible mitigation measures; LBP-15-23, 82 NRC 55 (2015)
- draft environmental impact statement need not include a fully formulated or adopted mitigation plan, but its discussion must provide sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-15-23, 82 NRC 55 (2015)
- immediate, irreparable harm is not presumed by a NEPA violation, even assuming such a violation has occurred; CLI-15-17, 82 NRC 33 (2015)
- mere listing of proposed mitigation measures in the draft environmental impact statement is insufficient under NEPA; LBP-15-23, 82 NRC 55 (2015)
- NEPA imposes on NRC a disclosure obligation that NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action; CLI-15-25, 82 NRC 389 (2015)
- NEPA is not violated when an agency issues a supplemental environmental impact statement before the Corps of Engineers completes a Clean Water Act section 404 permit review; LBP-15-23, 82 NRC 55 (2015)
- particular results are not mandated and, accordingly, a fully developed mitigation plan is not demanded before an agency can act; LBP-15-23, 82 NRC 55 (2015)
- procedural requirements are imposed on an agency to consider mitigation options, but particular results are not mandated; LBP-15-23, 82 NRC 55 (2015)
- proper question is not whether there are plausible alternative choices for use in the SAMA analysis, but whether the analysis that was done is reasonable under NEPA; LBP-15-29, 82 NRC 246 (2015)
- purpose of EIS preparation is to obviate the need for speculation by ensuring that available data are gathered and analyzed prior to the implementation of the proposed action; LBP-15-23, 82 NRC 55 (2015)
- rule that excluded certain environmental impacts from NEPA consideration and deferred totally to environmental quality standards devised and administered by other agencies violated NEPA; LBP-15-23, 82 NRC 55 (2015)
- when an agency otherwise complies with NEPA's requirement of a reasonably thorough mitigation analysis, there is no error in the agency's reliance on the Clean Water Act section 404's substantive requirements as mitigation measures even though the section 404 permit review is not yet complete; LBP-15-23, 82 NRC 55 (2015)
- NATIONAL HISTORIC PRESERVATION ACT**
- claim of violation of NHPA did not in itself establish irreparable harm warranting interlocutory review; CLI-15-17, 82 NRC 33 (2015)
- NEUTRON FLUENCE**
- when fluence of a material sample is known, it must be used in the consistency check if it is of the appropriate chemical composition; CLI-15-22, 82 NRC 310 (2015)
- NO SIGNIFICANT HAZARDS DETERMINATION**
- apart from discretionary review by the Commission, NRC Staff's no significant hazards consideration determination under section 50.92(c) may not be contested; LBP-15-26, 82 NRC 163 (2015)
- determination permits NRC to make an authorized license amendment effective immediately rather than awaiting the outcome of an adjudicatory challenge; LBP-15-26, 82 NRC 163 (2015)
- eligibility conditions for a no significant hazards consideration determination on a proposed amendment are discussed; LBP-15-26, 82 NRC 163 (2015)
- license amendment request is not categorically exempt from environmental review if it involves a significant hazards consideration that excludes it from categorical exemption pursuant to the criteria in section 51.22(c)(9)(i); LBP-15-26, 82 NRC 163 (2015)
- preparation of an environmental impact statement for the proposed action is unnecessary if NRC Staff determines that the proposed action will not have a significant effect on the quality of the human environment; CLI-15-25, 82 NRC 389 (2015)

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- process for making the determination is discussed; LBP-15-26, 82 NRC 163 (2015)
- this procedural device determines when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur; LBP-15-26, 82 NRC 163 (2015)
- where NRC Staff takes action pursuant to a determination of no significant hazards consideration and issues a license amendment prior to a presiding officer's initial decision, the Staff will thereafter take appropriate action (if necessary) in accordance with the presiding officer's decision; CLI-15-25, 82 NRC 389 (2015)
- where the Commission finds that exigent circumstances exist and it also determines that an amendment involves no significant hazards considerations, it will provide a hearing after issuance, if one has been requested by a person who satisfies the intervention requirements of 10 C.F.R. 2.309; CLI-15-25, 82 NRC 389 (2015)
- NOTICE OF HEARING**
- board finds that it is not necessary for a notice of hearing to be issued before the board can approve a settlement; LBP-15-30, 82 NRC 339 (2015)
- only 10 C.F.R. 2.203 refers to a notice of hearing as part of the settlement procedure; LBP-15-30, 82 NRC 339 (2015)
- when the board has issued a Notice of Hearing, withdrawal of a license amendment request shall be on such terms as the presiding officer may prescribe; LBP-15-28, 82 NRC 233 (2015)
- NOTICE OF INTENT**
- licensee must provide a 30-day notice for all withdrawals other than ordinary administrative expenses to operate the decommissioning fund, but those notices are no longer required once decommissioning has begun and withdrawals are made; LBP-15-24, 82 NRC 68 (2015)
- where licensee has not included discovery of unexpected levels of contaminants, and contamination in places not previously expected, in the decommissioning cost estimate, such fund withdrawals would require a 30-day notice; LBP-15-24, 82 NRC 68 (2015)
- NOTICE PLEADING**
- contention pleading standards require petitioners to plead specific grievances, not simply to provide general notice pleadings; CLI-15-18, 82 NRC 135 (2015)
- to the extent that the board relied on a precedent that allowed notice pleading under 10 C.F.R. 2.714(b) in making its contention admissibility determination, it erred; CLI-15-23, 82 NRC 321 (2015)
- NOTIFICATION**
- dismissal of license amendment request is conditioned on requirement that licensee provide notice to petitioner of submission of a similar LAR so that petitioner has a fair opportunity to relitigate issues previously found admissible; LBP-15-28, 82 NRC 233 (2015)
- when licensee requests an amendment, it must notify the state in which its facility is located of its request by providing that state with a copy of its application; LBP-15-28, 82 NRC 233 (2015)
- NRC POLICY**
- Commission encourages fair and reasonable settlement and resolution of issues proposed for litigation; LBP-15-30, 82 NRC 339 (2015)
- NRC STAFF**
- due weight must be given to Staff's position in an enforcement proceeding; LBP-15-21, 82 NRC 1 (2015)
- regardless of the issuance of the license, the burden at hearing remains on applicant and, with respect to NEPA compliance, on NRC Staff; CLI-15-17, 82 NRC 33 (2015)
- Staff's position in an enforcement proceeding is not itself dispositive of whether an enforcement agreement should be approved, but regulatory instruction to accord that position due weight is dispositive proof of the importance of Staff's views; LBP-15-21, 82 NRC 1 (2015)
- NRC STAFF REVIEW**
- agency cannot relinquish its NEPA responsibility to evaluate environmental impacts by relying on expected compliance with environmental standards of another agency; LBP-15-23, 82 NRC 55 (2015)
- although Staff reviews submissions under 10 C.F.R. 50.71(e) for compliance with such administrative requirements as timeliness and content, it does not approve substantive changes, such as to a seismic analysis, as part of the process; LBP-15-27, 82 NRC 184 (2015)
- Commission directs Staff to devote sufficient resources to complete its review in a timely manner; CLI-15-17, 82 NRC 33 (2015)

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if the board's findings after the evidentiary hearing affect Staff's conclusions in the environmental assessment, then those conclusions would have to be revisited; CLI-15-17, 82 NRC 33 (2015)

NEPA imposes on NRC a disclosure obligation that NRC publicly discuss its evaluation of the reasonably foreseeable effects of a proposed action; CLI-15-25, 82 NRC 389 (2015)

NRC's independent technical evaluation of information submitted by licensee to demonstrate that no functional damage occurred as a result of an earthquake is described; DD-15-9, 82 NRC 274 (2015)

process for making the no significant hazards consideration determination is discussed; LBP-15-26, 82 NRC 163 (2015)

regardless of whether a hearing request is granted, NRC Staff performs a full safety review of every license amendment request and no request is approved until all necessary public health and safety findings have been made; CLI-15-22, 82 NRC 310 (2015)

release of Staff's environmental review document may be the first opportunity for petitioner to question accuracy of Staff's environmental analysis; CLI-15-17, 82 NRC 33 (2015)

Staff is authorized to issue a license when it has completed its review during the pendency of a hearing as long as it provides the board and parties notice and an explanation why the public health and safety are protected and why the action is in accord with the common defense and security despite the pendency of the contested matter; CLI-15-17, 82 NRC 33 (2015)

whether and how NRC Staff fulfills its consultation obligations are issues that could form the basis for a new contention that might appropriately be made in a timely fashion after Staff issues its draft environmental impact statement; CLI-15-18, 82 NRC 135 (2015)

NUCLEAR REGULATORY COMMISSION, AUTHORITY

agencies are permitted to impose requirements or thresholds for parties seeking to reopen a record; CLI-15-19, 82 NRC 151 (2015)

Commission considers amicus views as a matter of discretion; CLI-15-23, 82 NRC 321 (2015)

Commission directs NRC Staff to devote sufficient resources to complete its review in a timely manner; CLI-15-17, 82 NRC 33 (2015)

concerns about how some aspect of a settlement agreement is being implemented or enforced can be brought to Commission, which retains supervisory authority over the parties' agreement; LBP-15-21, 82 NRC 1 (2015)

NRC has authority to request that an established or newly formed entity submit additional or more detailed information respecting its financial arrangements and status of funds; DD-15-8, 82 NRC 107 (2015)

NRC's standard for motion to reopen has been upheld and court deferred to the NRC's application of its rules as long as it is reasonable; CLI-15-19, 82 NRC 151 (2015)

OFFICIAL NOTICE

because NRC's decision to grant the exemptions is a matter of public record, the board takes notice that the exemptions have now been approved; LBP-15-24, 82 NRC 68 (2015)

OPERATING BASIS EARTHQUAKE

request that, following an earthquake that exceeded the operating basis, NRC suspend the operating licenses until completion of a set of activities described in the petition, is addressed; DD-15-9, 82 NRC 274 (2015)

OPERATING LICENSE AMENDMENT APPLICATIONS

if petitioner can provide a sound basis to dispute compliance-related statements in a license amendment request, then the contention is within the scope of the proceeding; LBP-15-24, 82 NRC 68 (2015)

information that license amendment request must contain to use updated embrittlement model is described; CLI-15-22, 82 NRC 310 (2015)

license amendment request is not categorically exempt from environmental review if it involves a significant hazards consideration that excludes it from categorical exemption pursuant to the criteria in section 51.22(c)(9)(i); LBP-15-26, 82 NRC 163 (2015)

license amendment request must be complete and accurate in all material respects; LBP-15-24, 82 NRC 68 (2015)

license amendment request must provide sufficient documentation and analysis to show that licensee has complied with relevant requirements, thereby demonstrating that the amended license will continue to provide reasonable assurance of adequate protection of public health and safety; CLI-15-22, 82 NRC 310 (2015)

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- to amend a license, including technical specifications in the license, an application for amendment must be filed, fully describing the changes desired; CLI-15-22, 82 NRC 310 (2015)
- when licensee requests an exemption in a related license amendment application, NRC considers the hearing rights on the amendment application to encompass the exemption request as well; LBP-15-24, 82 NRC 68 (2015)
- when the board has issued a Notice of Hearing, withdrawal of a license amendment request shall be on such terms as the presiding officer may prescribe; LBP-15-28, 82 NRC 233 (2015)
- whether a potential future license amendment request shares those same alleged deficiencies as a previously withdrawn one would require a new analysis; LBP-15-28, 82 NRC 233 (2015)
- OPERATING LICENSE AMENDMENT PROCEEDINGS**
- admissible contention must meet the six requirements of 10 C.F.R. 2.309(f)(1); LBP-15-24, 82 NRC 68 (2015)
- contention is inadmissible for failure to show that a genuine dispute exists with license amendment request; LBP-15-26, 82 NRC 163 (2015)
- de facto license amendment proceeding is not initiated merely because licensee takes an action that requires some type of NRC approval; LBP-15-27, 82 NRC 184 (2015)
- determinations on whether to grant an applied-for license amendment are to be guided by the considerations that govern the issuance of initial licenses or construction permits to the extent applicable and appropriate; CLI-15-22, 82 NRC 310 (2015)
- dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the license amendment request; LBP-15-28, 82 NRC 233 (2015)
- exemptions are the sort of directly related and dependent exemption-related issues that are within the scope of a license amendment proceeding; LBP-15-24, 82 NRC 68 (2015)
- request that board impose additional discovery activities as a requirement of withdrawal of license amendment request is too broad because it goes beyond the scope of the admitted contentions and discovery is peculiarly related to particular proceedings and particular contentions; LBP-15-28, 82 NRC 233 (2015)
- scope of proceeding is limited to the license amendment request, and petitioners typically cannot challenge a Commission regulation; LBP-15-24, 82 NRC 68 (2015)
- state's claim that licensee's amendment request contains incomplete and incorrect statements concerning its use of the trust fund is within the scope of a license amendment proceeding as defined in the notice of opportunity to request a hearing; LBP-15-24, 82 NRC 68 (2015)
- where the Commission finds that exigent circumstances exist and it also determines that an amendment involves no significant hazards considerations, it will provide a hearing after issuance, if one has been requested by a person who satisfies the intervention requirements of 10 C.F.R. 2.309; CLI-15-25, 82 NRC 389 (2015)
- OPERATING LICENSE AMENDMENTS**
- adjudicatory proceeding on license amendment is not terminated by issuance of the amendment; CLI-15-17, 82 NRC 33 (2015)
- any amendment to an existing license as a result of NRC review of licensee seismic hazard reevaluations that leads to changes in the current licensing basis would be subject to a hearing opportunity; CLI-15-21, 82 NRC 295 (2015)
- applicant seeks to replace 30-day notice requirement and other plant-specific license conditions with the decommissioning fund requirements; LBP-15-28, 82 NRC 233 (2015)
- change to a facility that is allowed under 10 C.F.R. 50.59 without prior NRC approval is not a license amendment triggering hearing rights; LBP-15-27, 82 NRC 184 (2015)
- correctness of assurance that the license conditions will be replaced by sections 50.75(h) and 50.82(a)(8) is a genuine concern relative to the appropriateness of the license amendment request, and therefore the petitioner has shown materiality of its contention; LBP-15-24, 82 NRC 68 (2015)
- de facto license amendment would exist, and hearing rights would be triggered, if NRC were to grant licensee greater operating authority or otherwise alter terms of the license or permit licensee to go beyond its existing license authority; LBP-15-27, 82 NRC 184 (2015)
- eligibility conditions for a no significant hazards consideration determination on a proposed amendment are discussed; LBP-15-26, 82 NRC 163 (2015)

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final safety analysis report updates must reflect changes that licensee has made through a license amendment request and certain changes that do not require a license amendment; LBP-15-27, 82 NRC 184 (2015)

if license amendment request is approved, licensee will no longer have to provide 30-day notice to the Commission once it begins decommissioning and starts making withdrawals from the decommissioning fund; LBP-15-28, 82 NRC 233 (2015)

if licensee amends any license conditions related to the decommissioning trust fund, from that point forward it will have to comply with all requirements of 10 C.F.R. 50.75(h); LBP-15-28, 82 NRC 233 (2015)

if licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of 10 C.F.R. 50.75(h); LBP-15-24, 82 NRC 68 (2015)

issuance of power uprate license amendment in advance of hearing did not deprive intervenor of hearing rights because the license amendment may be revoked or conditioned after hearing; CLI-15-17, 82 NRC 33 (2015)

licensee cannot amend the terms of its license unilaterally; LBP-15-27, 82 NRC 184 (2015)

licensee cannot be exempted from license conditions without a license amendment modifying such conditions; LBP-15-28, 82 NRC 233 (2015)

licensees seeking to use the updated methodology in 10 C.F.R. 50.61a must submit a license amendment request; CLI-15-22, 82 NRC 310 (2015)

mere possibility of a future license amendment does not trigger a hearing opportunity today; LBP-15-27, 82 NRC 184 (2015)

no significant hazards consideration determination permits NRC to make an authorized license amendment effective immediately rather than awaiting the outcome of an adjudicatory challenge; LBP-15-26, 82 NRC 163 (2015)

NRC authorization to restart a plant following NRC Staff's review of forty-seven ordered modifications is not a license amendment; LBP-15-27, 82 NRC 184 (2015)

NRC inspection reports, even those documenting violations, are not de facto license amendments; LBP-15-27, 82 NRC 184 (2015)

NRC is required to provide an opportunity to request a hearing under the Atomic Energy Act on a license amendment; CLI-15-21, 82 NRC 295 (2015)

NRC licensees require a license amendment to modify license conditions; LBP-15-24, 82 NRC 68 (2015)

regardless of whether a hearing request is granted, NRC Staff performs a full safety review of every license amendment request and no request is approved until all necessary public health and safety findings have been made; CLI-15-22, 82 NRC 310 (2015)

request that NRC order licensee to submit a license amendment application for the design and installation of replacement steam generators and for additional enforcement action is moot; DD-15-7, 82 NRC 257 (2015)

there is no time limit on when a licensee can seek an amendment to the license conditions relating to its decommissioning trust fund; LBP-15-24, 82 NRC 68 (2015)

there must be reasonable assurance that the activities at issue will not endanger the health and safety of the public; CLI-15-22, 82 NRC 310 (2015)

there must be some significant link between the claimed deficiency and the agency's ultimate determination whether granting the LAR will adequately protect the health and safety of the public and the environment; LBP-15-24, 82 NRC 68 (2015)

when licensee requests an amendment, it must notify the state in which its facility is located of its request by providing that state with a copy of its application; LBP-15-28, 82 NRC 233 (2015)

where NRC approval does not permit a licensee to operate in any greater capacity than originally authorized and all relevant safety regulations and license terms remain applicable, NRC approval does not amend the license; LBP-15-27, 82 NRC 184 (2015)

where NRC Staff takes action pursuant to a determination of no significant hazards consideration and issues a license amendment prior to a presiding officer's initial decision, the Staff will thereafter take appropriate action (if necessary) in accordance with the presiding officer's decision; CLI-15-25, 82 NRC 389 (2015)

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- where there was no reasonable likelihood that a change in the method of evaluation would have required a license amendment, the change was a minor violation; DD-15-7, 82 NRC 257 (2015)
- OPERATING LICENSE APPLICATIONS**
- applicant must present the design bases of the facility and safety analyses of the facility as a whole in the final SAR; DD-15-11, 82 NRC 361 (2015)
 - applicant must submit information that demonstrates that it possesses, or has reasonable assurance of obtaining, funds necessary to cover estimated operating costs for the period of the license; DD-15-8, 82 NRC 107 (2015)
 - electric utility applicant for an operating license is exempt from financial qualifications review; DD-15-8, 82 NRC 107 (2015)
- OPERATING LICENSE RENEWAL**
- applicants must provide a severe accident mitigation alternatives analysis in their application if NRC Staff has not previously considered SAMAs for the applicant's plant in its environmental documents; CLI-15-18, 82 NRC 135 (2015)
 - contents of an application are set forth in 10 C.F.R. 54.21; CLI-15-21, 82 NRC 295 (2015)
 - findings that NRC must make for issuance of a renewed license are set forth in 10 C.F.R. 54.29; CLI-15-21, 82 NRC 295 (2015)
 - license renewal regulations serve exactly their intended purpose by focusing the proceeding on future-oriented aging issues; CLI-15-21, 82 NRC 295 (2015)
 - scope of license renewal is defined in 10 C.F.R. 54.4; CLI-15-21, 82 NRC 295 (2015)
 - severe accident mitigation alternatives analysis is required to discuss a recently discovered fault located near the plant; LBP-15-29, 82 NRC 246 (2015)
- OPERATING LICENSE RENEWAL PROCEEDINGS**
- adjudicatory proceeding is terminated following Commission reversal of board's decision admitting three contentions; LBP-15-25, 82 NRC 161 (2015)
 - Category 1 issues are environmental issues that NRC has resolved generically and therefore need not consider in specific license renewal proceedings; CLI-15-18, 82 NRC 135 (2015)
 - it makes no sense to spend valuable resources litigating allegations of current deficiencies in a proceeding that is directed to future-oriented issues of aging; CLI-15-21, 82 NRC 295 (2015)
 - matters relating to reasonable assurance of safety during the current license term are to be addressed under the current license and are outside the scope of a license renewal review; CLI-15-21, 82 NRC 295 (2015)
 - placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage is inadmissible; CLI-15-27, 82 NRC 414 (2015)
 - scope of the license renewal proceeding on safety-related issues, is limited to plant structures and components that will require an aging management review for the period of extended operation under the renewed license and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; CLI-15-21, 82 NRC 295 (2015)
- ORAL ARGUMENT**
- argument is untimely when it is raised for the first time at oral argument; LBP-15-23, 82 NRC 55 (2015)
- PERFORMANCE ASSESSMENT**
- Commission placed no historical-event restriction on reactors electing to comply with Appendix J through performance-based testing; LBP-15-26, 82 NRC 163 (2015)
- PERMITS**
- before being granted a Clean Water Act section 404 permit, applicant must demonstrate to the Corps of Engineers that it has taken all appropriate and practicable steps to avoid and minimize adverse impacts; LBP-15-23, 82 NRC 55 (2015)
 - Clean Water Act section 404 permit process is discussed; LBP-15-23, 82 NRC 61 (2015); LBP-15-23, 82 NRC 55 (2015)
 - Clean Water Act section 404 permit review can be conducted after issuance of a final environmental impact statement; LBP-15-23, 82 NRC 55 (2015)
 - contention asserting that draft environmental impact statement must include the Corps of Engineers CWA 404 permit analysis in order to satisfy NEPA fails to raise a material issue; LBP-15-23, 82 NRC 55 (2015)

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NEPA is not violated when an agency issues a supplemental environmental impact statement before the Corps of Engineers completes a Clean Water Act section 404 permit review; LBP-15-23, 82 NRC 55 (2015)

when a proposed project would cause discharge of dredged or fill material into wetlands, applicant must seek a permit from the Corps of Engineers; LBP-15-23, 82 NRC 55 (2015)

when an agency otherwise complies with NEPA's requirement of a reasonably thorough mitigation analysis, there is no error in the agency's reliance on the Clean Water Act section 404's substantive requirements as mitigation measures even though the section 404 permit review is not yet complete; LBP-15-23, 82 NRC 55 (2015)

PLEADINGS

burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 389 (2015)

leniency is afforded to *pro se* petitioners, but parties to NRC proceedings are expected to fulfill the obligations imposed by NRC rules; CLI-15-25, 82 NRC 389 (2015)

pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, but it is not the proper function of the court to assume the role of advocate for litigant; CLI-15-18, 82 NRC 135 (2015)

PREJUDICE

dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the license amendment request; LBP-15-28, 82 NRC 233 (2015)

standard for dismissal with prejudice is not met because the prospect of future litigation is not unusual, being inherent in any dismissal without prejudice; LBP-15-28, 82 NRC 233 (2015)

termination with prejudice bars relitigation of similar issues; LBP-15-21, 82 NRC 1 (2015)

when the board has issued a Notice of Hearing, withdrawal of a license amendment request shall be on such terms as the presiding officer may prescribe; LBP-15-28, 82 NRC 233 (2015)

PRESIDING OFFICER, AUTHORITY

public interest inquiry for approval of settlement agreement is described; LBP-15-21, 82 NRC 1 (2015)

PRESSURIZED THERMAL SHOCK

reactor vessel material surveillance programs provide material property data necessary to implement a regulatory scheme to protect reactor pressure vessels from failure due to withstand a pressurized thermal shock event; CLI-15-22, 82 NRC 310 (2015)

PRO SE LITIGANTS

burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 389 (2015)

leniency is afforded to *pro se* petitioners, but parties to NRC proceedings are expected to fulfill the obligations imposed by NRC rules; CLI-15-25, 82 NRC 389 (2015)

lenient treatment generally accorded to *pro se* litigants has limits; CLI-15-18, 82 NRC 135 (2015)

pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, but it is not the proper function of the court to assume the role of advocate for the litigant; CLI-15-18, 82 NRC 135 (2015)

PROTECTIVE ORDERS

confidential commercial information, release of which likely would lead to substantial competitive harm, is entitled to protection; CLI-15-24, 82 NRC 331 (2015)

if the Commission determines on appeal that information withheld under a protective order should have been publicly disclosed, it will direct that such information and the transcript of the related *in camera* session be made publicly available; CLI-15-24, 82 NRC 331 (2015)

PUBLIC COMMENTS

NEPA affords agencies considerable discretion to decide the extent to which public involvement is practicable; CLI-15-17, 82 NRC 33 (2015)

NEPA does not require circulation of a draft environmental assessment in all cases; CLI-15-17, 82 NRC 33 (2015)

NRC Staff may publish a draft finding of no significant impact for public comment, but it is not required to do in all cases; CLI-15-17, 82 NRC 33 (2015)

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PUBLIC INTEREST

- presiding officer's approval of settlement is a matter that must give due consideration to the public interest; LBP-15-21, 82 NRC 1 (2015)
- presiding officer's public interest inquiry for approval of settlement agreement is described; LBP-15-21, 82 NRC 1 (2015)
- standard for settlement agreement review concerns whether the approval process deprives interested parties of meaningful participation; LBP-15-21, 82 NRC 1 (2015)

QUALIFICATIONS

- license transfer applicant must demonstrate that the proposed transferee is qualified to hold the license; CLI-15-26, 82 NRC 408 (2015)

RADIOACTIVE EMISSIONS

- keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility; LBP-15-24, 82 NRC 68 (2015)

RADIOGRAPHER

- licensee is banned from engaging in NRC-licensed activities, including performing, supervising, or assisting in any industrial radiographic operations and must complete a formal radiation safety officer training course; LBP-15-21, 82 NRC 1 (2015)
- "radiographer's assistant," is defined in 10 C.F.R. 34.3; LBP-15-21, 82 NRC 1 (2015)

REACTOR OPERATION

- upon docketing of certifications of permanent shutdown and fuel removal, licensee's licenses no longer authorize operation of the reactors or placement or retention of fuel into the reactor vessels and licensee is prohibited from restarting or loading fuel; DD-15-7, 82 NRC 257 (2015)

REACTOR PRESSURE VESSEL

- equivalent margins analysis must demonstrate that the calculated energy will provide margins of safety against fracture that are equivalent to those required by Appendix G of Section XI of the ASME Code; CLI-15-23, 82 NRC 321 (2015)
- licensee is not required to collect additional surveillance data from the subject plant, but rather licensee must use any data that demonstrate the embrittlement trends for the materials, including surveillance programs at other plants with or without a surveillance program integrated under Part 50, Appendix H; CLI-15-22, 82 NRC 310 (2015)
- licensees seeking to use the updated methodology in 10 C.F.R. 50.61a must submit a license amendment request; CLI-15-22, 82 NRC 310 (2015)
- material surveillance programs provide material property data necessary to implement a regulatory scheme to protect reactor pressure vessels from failure due to withstand a pressurized thermal shock event; CLI-15-22, 82 NRC 310 (2015)
- requirements of 10 C.F.R. 50.61 are compared with new rule in section 50.61a to predict future reference temperatures across the reactor pressure vessel; CLI-15-22, 82 NRC 310 (2015)
- surveillance data used in the consistency check need not come from the same reactor pressure vessel that is the subject of the license amendment request; CLI-15-22, 82 NRC 310 (2015)
- temperature data from other plants are included, and licensees must consider these data under certain circumstances; CLI-15-22, 82 NRC 310 (2015)
- under normal plant conditions, materials at the bellline of the reactor pressure vessel must maintain Charpy upper-shelf energy of no less than 50 ft-lb (68 joules); CLI-15-23, 82 NRC 321 (2015)
- updated embrittlement model is used to predict future reference temperatures across the reactor pressure vessel, which is then verified by existing surveillance data; CLI-15-22, 82 NRC 310 (2015)

RECORD OF DECISION

- record of licensing board evidentiary hearing on license transfer application must be certified to the Commission; CLI-15-26, 82 NRC 408 (2015)

RECORDKEEPING

- recordkeeping or administrative procedures are categorically excluded from environmental review; LBP-15-24, 82 NRC 68 (2015)

REGULATIONS

- board is prohibited from imposing restrictions on the use of 10 C.F.R. 50.61a that go beyond the requirements in the regulation; CLI-15-22, 82 NRC 310 (2015)

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challenges to NRC rules and regulations in the context of adjudicatory proceedings is prohibited absent a rule waiver; CLI-15-19, 82 NRC 151 (2015); LBP-15-24, 82 NRC 68 (2015)
collateral challenge to NRC emergency response data system rule is inadmissible; CLI-15-20, 82 NRC 211 (2015)

petitioner's suggestion that issuance of a license immediately upon completion of NRC Staff's review where a hearing is pending is inappropriate is an attack on the regulation, which is not allowed in an individual adjudication absent of a waiver; CLI-15-17, 82 NRC 33 (2015)

rule that excluded certain environmental impacts from NEPA consideration and deferred totally to environmental quality standards devised and administered by other agencies violated NEPA; LBP-15-23, 82 NRC 55 (2015)

See also Amendment of Regulations

REGULATIONS, INTERPRETATION

applicability of 10 C.F.R. Part 50, Appendix A, GDC 44 to boiling water reactor spent fuel pools is discussed; DD-15-11, 82 NRC 361 (2015)

requirements of 10 C.F.R. 50.61 are compared with new rule in section 50.61a to predict future reference temperatures across the reactor pressure vessel; CLI-15-22, 82 NRC 310 (2015)

section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement; LBP-15-30, 82 NRC 339 (2015)

section 2.341(f)(2)(i) is compared to 10 C.F.R. 2.1213(d)(1); CLI-15-17, 82 NRC 33 (2015)

section 50.71(e) is only a reporting requirement; LBP-15-27, 82 NRC 184 (2015)

section 51.61 applies to an application for an independent spent fuel storage installation; LBP-15-24, 82 NRC 68 (2015)

section 51.92(a)(2) does not apply to the question whether the environmental assessment adequately describes the current environment, but rather applies when considering whether to supplement an environmental analysis for the period between issuance of the final document and before the agency has taken the proposed action; CLI-15-25, 82 NRC 389 (2015)

REGULATORY OVERSIGHT PROCESS

actions taken by licensee under 10 C.F.R. 50.59 do not give rise to hearing rights under the AEA, but rather are monitored by NRC Staff's inspections and oversight, which may be challenged only by a petition for enforcement; LBP-15-27, 82 NRC 184 (2015)

although NRC Staff reviews submissions under 10 C.F.R. 50.71(e) for compliance with such administrative requirements as timeliness and content, it does not approve substantive changes, such as to a seismic analysis, as part of the process; LBP-15-27, 82 NRC 184 (2015)

if a hearing could be invoked each time NRC engaged in oversight over or inquiry into plant conditions, NRC's administrative process could be brought to a virtual standstill; LBP-15-27, 82 NRC 184 (2015)

NRC monitors the status of decommissioning funds and, when necessary, requires additions to funds through parent company guarantees, cash deposits, or other methods permitted by regulation; DD-15-8, 82 NRC 107 (2015)

NRC Staff's ongoing enforcement of regulations and license conditions does not trigger hearing rights; LBP-15-24, 82 NRC 68 (2015)

NRC's inspection process is separate from its licensing process; LBP-15-27, 82 NRC 184 (2015)

regulatory approach, of relying on licensees to submit complete and accurate information, and auditing that information as appropriate, is considered to be entirely consistent with sound regulatory practice; LBP-15-24, 82 NRC 68 (2015)

REOPENING A RECORD

agencies are permitted to impose requirements or thresholds for parties seeking to reopen a closed record; CLI-15-19, 82 NRC 151 (2015)

movant properly bears the burden of meeting the reopening standards and applicant retains the burden of proof on the question whether the license should be issued; CLI-15-19, 82 NRC 151 (2015)

NRC regulations place an intentionally heavy burden on parties seeking to reopen the record; CLI-15-19, 82 NRC 151 (2015)

reopening for any reason is considered to be an extraordinary action; CLI-15-19, 82 NRC 151 (2015)

REPLY BRIEFS

allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims; LBP-15-26, 82 NRC 163 (2015)

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- new arguments may not be raised for the first time in a reply brief; CLI-15-20, 82 NRC 211 (2015); CLI-15-22, 82 NRC 310 (2015)
- petitioner cannot introduce new issues or expand the scope of arguments advanced in the original petition, but rather must focus on actual or logical arguments presented in the original petition or raised in answers to it; CLI-15-18, 82 NRC 135 (2015); LBP-15-26, 82 NRC 163 (2015)
- REPLY TO ANSWER TO MOTION
- movant has no right to reply except as permitted by the presiding officer and only in compelling circumstances; LBP-15-28, 82 NRC 233 (2015)
- REPORTING REQUIREMENTS
- exemptions from decommissioning fund expenditure notification requirements are categorically excluded from environmental review as administrative changes that do not increase the risk of public radiation exposure; LBP-15-28, 82 NRC 233 (2015)
- if license amendment request is approved, licensee will no longer have to provide 30-day notice to the Commission once it begins decommissioning and starts making withdrawals from the decommissioning fund; LBP-15-28, 82 NRC 233 (2015)
- instead of providing notice before each decommissioning expense, licensee must submit a decommissioning cost estimate and timeline, called a Post Shutdown Decommissioning Activities Report, and annual reports on expenditures; LBP-15-24, 82 NRC 68 (2015)
- license amendment request seeks to replace 30-day notice requirement and other plant-specific license conditions with the decommissioning fund requirements; LBP-15-28, 82 NRC 233 (2015)
- licensee must periodically submit an updated FSAR to NRC to report information and analyses submitted to NRC by licensee or prepared by licensee pursuant to NRC requirement since the previous update; LBP-15-27, 82 NRC 184 (2015)
- licensee must submit a post-shutdown decommissioning activities report before or within 2 years following permanent cessation of operations; DD-15-8, 82 NRC 107 (2015)
- licensee seeks regulatory exemptions to allow it to use decommissioning funds to manage spent fuel and eliminate the 30-day notice requirement that would otherwise apply to spent fuel management; LBP-15-28, 82 NRC 233 (2015)
- licensees must annually adjust the amount of decommissioning funding assurance; DD-15-8, 82 NRC 107 (2015)
- reporting and recordkeeping rules for decommissioning trusts are government by 10 C.F.R. 50.75(h)(1)-(4); LBP-15-28, 82 NRC 233 (2015)
- section 50.71(e) is only a reporting requirement; LBP-15-27, 82 NRC 184 (2015)
- REQUEST FOR ACTION
- actions taken by licensee under 10 C.F.R. 50.59 do not give rise to hearing rights under the AEA, but rather are monitored by NRC Staff's inspections and oversight, which may be challenged only by a petition for enforcement; LBP-15-27, 82 NRC 184 (2015)
- director of NRC office with responsibility for the subject matter shall either institute the requested proceeding or advise the person who made the request in writing that no proceeding will be instituted, in whole or in part, with respect to the request and the reason for the decision; DD-15-7, 82 NRC 257 (2015)
- if petitioner believes that licensee's analysis is incomplete, inaccurate, or otherwise does not satisfy the section 50.54(q)(3) two-part test, petitioner can challenge the analysis through the enforcement process; CLI-15-20, 82 NRC 211 (2015)
- petitioner may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action that may be proper, if it believes that applicant's seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 295 (2015)
- petitioner may file at any time a request for action if it wishes to challenge ongoing operations; CLI-15-25, 82 NRC 389 (2015)
- petitioners request that NRC issue a demand for information to compel boiling-water reactor licensees with Mark I and Mark II containment designs to describe how their individual facilities comply with 10 C.F.R. Part 50, Appendix A, GDC 44 and 10 C.F.R. 50.49; DD-15-11, 82 NRC 361 (2015)

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request that NRC order licensee to submit a license amendment application for the design and installation of replacement steam generators and for additional enforcement action is moot; DD-15-7, 82 NRC 257 (2015)

request that NRC suspend operations at one plant, investigate whether licensee possesses sufficient funds to cease operations and decommission another, and investigate licensee's current financial qualifications to determine whether it remains qualified to continue operating another plant is denied; DD-15-8, 82 NRC 107 (2015)

request that NRC take enforcement action until the Licensee completes an independent root-cause assessment for the rise in ultimate heat sink temperature is denied; DD-15-10, 82 NRC 201 (2015)

request that, following an earthquake that exceeded the operating basis, NRC suspend the operating licenses until completion of a set of activities described in the petition, is addressed; DD-15-9, 82 NRC 274 (2015)

REQUEST FOR ADDITIONAL INFORMATION

Commission decision does not foreclose NRC Staff's ability to request additional information on any part of the license transfer application; CLI-15-26, 82 NRC 408 (2015)

information request from NRC Staff is not an approval that needs to be listed in applicant's environmental report under 10 C.F.R. 51.45(d); LBP-15-27, 82 NRC 184 (2015)

RESTART

NRC authorization to restart a plant following NRC Staff's review of forty-seven ordered modifications is not a license amendment; LBP-15-27, 82 NRC 184 (2015)

request that, following an earthquake that exceeded the operating basis, NRC suspend the operating licenses until completion of a set of activities described in the petition, is addressed; DD-15-9, 82 NRC 274 (2015)

to demonstrate that no functional damage occurred as a result of the earthquake, licensee performed inspections, tests, and analyses to address the requirements of 10 C.F.R. Part 100, Appendix A; DD-15-9, 82 NRC 274 (2015)

upon docketing of certifications of permanent shutdown and fuel removal, licensee's licenses no longer authorize operation of the reactors or placement or retention of fuel into the reactor vessels and licensee is prohibited from restarting or loading fuel; DD-15-7, 82 NRC 257 (2015)

REVIEW

See Appellate Review; Environmental Review; Financial Qualifications Review; NRC Staff Review; Standard of Review

REVIEW, DISCRETIONARY

apart from discretionary review by the Commission, NRC Staff's no significant hazards consideration determination under section 50.92(c) may not be contested; LBP-15-26, 82 NRC 163 (2015)

Commission will grant a petition for review at its discretion, giving due weight to the existence of a substantial question with respect to one or more of the considerations of 10 C.F.R. 2.341(b)(4); CLI-15-19, 82 NRC 151 (2015)

REVIEW, INTERLOCUTORY

Commission has declined to take interlocutory review with respect to case management decisions; CLI-15-24, 82 NRC 331 (2015)

expansion of issues for litigation from the board's denial of a motion for summary disposition had neither a pervasive and unusual effect on the litigation nor a serious and irreparable impact on movant; CLI-15-24, 82 NRC 331 (2015)

expense is not irreparable harm; CLI-15-24, 82 NRC 331 (2015)

grant of interlocutory review requires a showing that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-24, 82 NRC 331 (2015)

increased litigation burden did not have a pervasive effect on the basic structure of the proceeding; CLI-15-24, 82 NRC 331 (2015)

interlocutory review is generally disfavored and requests for such review are granted only under extraordinary circumstances; CLI-15-24, 82 NRC 331 (2015)

interlocutory review of a board decision that denied reconsideration of a contention admissibility determination was declined; CLI-15-24, 82 NRC 331 (2015)

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procedural rulings involving discovery rarely meet the standard for interlocutory review; CLI-15-24, 82 NRC 331 (2015)

REVIEW, SUA SPONTE

amicus briefs are allowed for matters taken up at the Commission discretion under 10 C.F.R. 2.341 or sua sponte; CLI-15-23, 82 NRC 321 (2015); CLI-15-24, 82 NRC 331 (2015)

RISKS

“imminent risk” reflects NRC’s determination that, post-Fukushima, continued operation of U.S. nuclear plants and continued licensing activities pose no imminent risk to public health and safety; CLI-15-19, 82 NRC 151 (2015)

RULE OF REASON

although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA’s rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 246 (2015)

RULEMAKING

petitioner may file a petition for rulemaking to expand the scope of NRC license renewal regulations if it believes that applicant’s seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 295 (2015)

RULES OF PRACTICE

absence of a prohibition is not sufficient justification to admit a contention; CLI-15-23, 82 NRC 321 (2015)

absent a waiver, no rule or regulation of the Commission, or any provision thereof, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to 10 C.F.R. Part 2; LBP-15-26, 82 NRC 163 (2015)

adherence to deadlines and procedures in NRC rules is required so that other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information; CLI-15-18, 82 NRC 135 (2015)

administrative action of issuing a demand for information is described; DD-15-11, 82 NRC 361 (2015)

all six requirements of 10 C.F.R. 2.309(f)(1) must be met for a contention to be admitted; CLI-15-21, 82 NRC 295 (2015)

amicus briefs are allowed for matters taken up at the Commission discretion under 10 C.F.R. 2.341 or sua sponte; CLI-15-23, 82 NRC 321 (2015)

appeal as of right is allowed on the question whether a request for hearing should have been wholly denied; CLI-15-18, 82 NRC 135 (2015)

appeal as of right will be granted on the question whether a request for hearing or petition to intervene should have been granted; CLI-15-21, 82 NRC 295 (2015)

automatic right exists to appeal a board decision on the question whether a petition to intervene should have been wholly denied; CLI-15-25, 82 NRC 389 (2015)

“belief” that is not supported by alleged facts or expert opinion renders a contention inadmissible; LBP-15-26, 82 NRC 163 (2015)

board authority under section 2.338(i) is to approve or reject a settlement agreement, and so it cannot amend the agreement without consent of the parties; LBP-15-21, 82 NRC 1 (2015)

board may grant a timely filed petition to intervene if it concludes that petitioner has established standing and proffered at least one admissible contention; LBP-15-26, 82 NRC 163 (2015)

boards evaluate contentions under the six requirements of 10 C.F.R. 2.309(f)(1); LBP-15-24, 82 NRC 68 (2015)

brief explanation of the rationale underlying the contention is sufficient to satisfy 10 C.F.R. 2.309(f)(1)(ii); LBP-15-24, 82 NRC 68 (2015)

challenges to an agency rule or regulation in an adjudicatory proceeding without a waiver of that rule or regulation are prohibited; CLI-15-21, 82 NRC 295 (2015)

Commission will grant a petition for review at its discretion, giving due weight to the existence of a substantial question with respect to one or more of the considerations of 10 C.F.R. 2.341(b)(4); CLI-15-19, 82 NRC 151 (2015)

confidential commercial information, release of which likely would lead to substantial competitive harm, is entitled to protection; CLI-15-24, 82 NRC 331 (2015)

content of settlement agreements is set forth in 10 C.F.R. 2.338(h); LBP-15-21, 82 NRC 1 (2015)

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contention is inadmissible for failing to raise a material issue; LBP-15-26, 82 NRC 163 (2015)

contention must provide sufficient information to show a genuine dispute with applicant on a material issue of law or fact; CLI-15-20, 82 NRC 211 (2015)

contention that seeks to impose a requirement beyond those imposed by a Commission regulation is inadmissible; LBP-15-26, 82 NRC 163 (2015)

contentions must be set forth with particularity and must meet all six contention admissibility factors; CLI-15-18, 82 NRC 135 (2015); LBP-15-26, 82 NRC 163 (2015)

director of NRC office with responsibility for the subject matter shall either institute the requested proceeding or advise the person who made the request in writing that no proceeding will be instituted, in whole or in part, with respect to the request and the reason for the decision; DD-15-7, 82 NRC 257 (2015)

fair and reasonable settlement of issues proposed for litigation is encouraged; LBP-15-21, 82 NRC 1 (2015)

filing of amicus briefs is permitted if a matter is taken up by the Commission under section 2.341 or sua sponte; CLI-15-24, 82 NRC 331 (2015)

form of settlement agreements is set forth in 10 C.F.R. 2.338(g); LBP-15-21, 82 NRC 1 (2015)

four factors must be addressed when the Commission or presiding officer is asked to stay the effectiveness of a presiding officer's decision or action during the pendency of an appeal; CLI-15-17, 82 NRC 33 (2015)

grant of interlocutory review requires a showing that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-24, 82 NRC 331 (2015)

hearing request must set forth with particularity the contentions petitioner seeks to litigate; CLI-15-20, 82 NRC 211 (2015)

if petitioner believes that an application fails altogether to contain information required by law, petitioner must identify each failure and provide supporting reasons for petitioner's belief; CLI-15-20, 82 NRC 211 (2015)

importance of finality in adjudicatory proceedings is reflected in 10 C.F.R. 2.326; CLI-15-19, 82 NRC 151 (2015)

in addition to being timely, new contentions must satisfy the six-factor contention admissibility standard; LBP-15-23, 82 NRC 55 (2015)

intervention petitioner must, in addition to demonstrating standing, propose at least one contention that meets the criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi); CLI-15-21, 82 NRC 295 (2015)

intervention petitioners must demonstrate standing and proffer an admissible contention; CLI-15-23, 82 NRC 321 (2015)

licensing board order granting a request for hearing on the question whether the request should have been wholly denied is appealable; CLI-15-23, 82 NRC 321 (2015)

licensing boards have broad powers 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-15-30, 82 NRC 339 (2015)

motion to reopen will not be granted unless movant satisfies all three criteria listed in 10 C.F.R. 2.326(a) and the motion is accompanied by an affidavit that satisfies section 2.326(b); CLI-15-19, 82 NRC 151 (2015)

motions to reopen the record in NRC adjudicatory proceedings are governed by 10 C.F.R. 2.326; CLI-15-19, 82 NRC 151 (2015)

movant has no right to reply except as permitted by the presiding officer and only in compelling circumstances; LBP-15-28, 82 NRC 233 (2015)

no further demonstration of standing is required from a state that seeks to participate as a party in a proceeding pertaining to a utilization facility located within its boundaries; LBP-15-26, 82 NRC 163 (2015)

no NRC rule or regulation is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding of Part 2; CLI-15-20, 82 NRC 211 (2015)

NRC's contention admissibility rules are intentionally strict; CLI-15-20, 82 NRC 211 (2015)

SUBJECT INDEX

only 10 C.F.R. 2.203 refers to a notice of hearing as part of the settlement procedure; LBP-15-30, 82 NRC 339 (2015)

parties bring settlement requests pursuant to 10 C.F.R. 2.338(i); LBP-15-30, 82 NRC 339 (2015)

petitioner may file at any time a request for action if it wishes to challenge ongoing operations; CLI-15-25, 82 NRC 389 (2015)

petitioner must also show that its contention is material to the findings NRC must make to support issuance of the license amendments; CLI-15-25, 82 NRC 389 (2015)

petitioner must demonstrate good cause for proffering a new contention after the initial deadline for the filing of contentions; LBP-15-23, 82 NRC 55 (2015)

petitioner must demonstrate that the issue raised in its contention is within the scope of the proceeding; CLI-15-25, 82 NRC 389 (2015)

petitioner must demonstrate that the issue raised in the contention falls within the scope of the proceeding and is material to the findings that the NRC must make; CLI-15-20, 82 NRC 211 (2015)

petitioner must provide a brief explanation of the basis for its contention; CLI-15-25, 82 NRC 389 (2015)

petitioner must refer to specific portions of the application that it disputes, along with the supporting reasons for each dispute; CLI-15-20, 82 NRC 211 (2015)

petitioner must show that a genuine dispute exists on a material issue of law or fact relating to the application; LBP-15-23, 82 NRC 55 (2015)

petitioner must state the alleged facts or expert opinions that support its position and on which it intends to rely at hearing; CLI-15-20, 82 NRC 211 (2015)

petitioner must state the issue of law or fact to be raised or controverted and a brief explanation of the basis for each contention; CLI-15-20, 82 NRC 211 (2015)

presiding officer approval for settlements in contested proceedings with admitted contentions is evidenced from provisions of section 2.338 other than paragraph (g); LBP-15-30, 82 NRC 339 (2015)

proponent of a contention is responsible for formulating the contention and providing the necessary support to satisfy the admissibility requirements; CLI-15-23, 82 NRC 321 (2015)

rule waiver requests must demonstrate that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which it was adopted; CLI-15-21, 82 NRC 295 (2015)

section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement; LBP-15-30, 82 NRC 339 (2015)

section 2.341(f)(2)(i) is compared to 10 C.F.R. 2.1213(d)(1); CLI-15-17, 82 NRC 33 (2015)

settlement agreement approval process in 10 C.F.R. 2.338(i) is discussed; LBP-15-21, 82 NRC 1 (2015)

settlement agreements are contingent upon approval by a licensing board; LBP-15-21, 82 NRC 1 (2015)

settlement 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; LBP-15-30, 82 NRC 339 (2015)

settlements approved by a presiding officer are subject to Commission review; LBP-15-21, 82 NRC 1 (2015)

state has standing because facility is located within the boundaries of the state and no further demonstration of standing is required; LBP-15-24, 82 NRC 68 (2015)

strictures governing settlements are set forth in 10 C.F.R. 2.338; LBP-15-21, 82 NRC 1 (2015)

to satisfy contention admissibility standards, petitioner must meet all six pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi); CLI-15-23, 82 NRC 321 (2015)

SAFETY ANALYSIS

equivalent margins analysis must demonstrate that the calculated energy will provide margins of safety against fracture that are equivalent to those required by Appendix G of Section XI of the ASME Code; CLI-15-23, 82 NRC 321 (2015)

NRC's independent technical evaluation of information submitted by licensee to demonstrate that no functional damage occurred as a result of an earthquake is described; DD-15-9, 82 NRC 274 (2015)

severe accident mitigation alternatives analyses are conducted for the purposes of the NRC's environmental review under NEPA and are not safety analyses; CLI-15-18, 82 NRC 135 (2015)

See also Final Safety Analysis Report

SAFETY ANALYSIS REPORT

operating license applicant must present the design bases of the facility and safety analyses of the facility as a whole in the final SAR; DD-15-11, 82 NRC 361 (2015)

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SAFETY ISSUES

- although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA's rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 246 (2015)
- contention about a matter not covered by a specific rule need only allege that it poses a significant safety problem; CLI-15-23, 82 NRC 321 (2015)
- matters relating to reasonable assurance of safety during the current license term are to be addressed under the current license and are outside the scope of a license renewal review; CLI-15-21, 82 NRC 295 (2015)
- scope of the license renewal proceeding on safety-related issues is limited to plant structures and components that will require an aging management review for the period of extended operation under the renewed license and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; CLI-15-21, 82 NRC 295 (2015)
- system must be provided to transfer heat from structures, systems, and components important to safety to an ultimate heat sink under normal operating and accident conditions, and must be able to perform this safety function with either onsite or offsite power, assuming a single component failure; DD-15-11, 82 NRC 361 (2015)

SAFETY REVIEW

- regardless of whether a hearing request is granted, NRC Staff performs a full safety review of every license amendment request and no request is approved until all necessary public health and safety findings have been made; CLI-15-22, 82 NRC 310 (2015)

SANCTIONS

- dismissal with prejudice is a harsh sanction reserved for unusual situations because it is the equivalent of a decision on the merits of the license amendment request; LBP-15-28, 82 NRC 233 (2015)
- request that board impose additional discovery activities as a requirement of withdrawal of license amendment request is too broad because it goes beyond the scope of the admitted contentions and discovery is peculiarly related to particular proceedings and particular contentions; LBP-15-28, 82 NRC 233 (2015)

SCHEDULING

- licensing board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management; LBP-15-29, 82 NRC 246 (2015)
- purpose of scheduling orders is to ensure proper case management, with the objective of expediting disposition of the proceeding, establishing early and continuing control so that the proceeding will not be protracted because of lack of management, and discouraging wasteful prehearing activities; LBP-15-29, 82 NRC 246 (2015)
- unless a schedule is so onerous or unfair that it deprives a party of procedural due process, scheduling is a matter of licensing board discretion; LBP-15-29, 82 NRC 246 (2015)

SEISMIC ANALYSIS

- although NRC Staff reviews submissions under 10 C.F.R. 50.71(e) for compliance with such administrative requirements as timeliness and content, it does not approve substantive changes, such as changes to a seismic analysis, as part of the process; LBP-15-27, 82 NRC 184 (2015)
- any amendment to an existing license as a result of NRC review of licensee seismic hazard reevaluations that leads to changes in the current licensing basis would be subject to a hearing opportunity; CLI-15-21, 82 NRC 295 (2015)
- NRC's post-Fukushima lessons learned and information-gathering process authorizes NRC to collect information from licensees to determine whether licenses should be modified, suspended, or revoked; LBP-15-27, 82 NRC 184 (2015)
- seismic hazard reevaluations of all nuclear power reactors are not de facto license amendments; LBP-15-27, 82 NRC 184 (2015)

SEISMIC DESIGN

- petitioner may file a petition for rulemaking to expand the scope of NRC license renewal regulations if it believes that applicant's seismic design and licensing basis are now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 295 (2015)
- petitioner may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action that may be proper, if it believes that applicant's seismic design and licensing basis are

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now invalid and that safe operation of the plant can no longer be ensured; CLI-15-21, 82 NRC 295 (2015)

SEISMIC ISSUES

seismology is an evolving science; LBP-15-27, 82 NRC 184 (2015)

SETTLEMENT AGREEMENTS

agreements are contingent upon approval by a licensing board; LBP-15-21, 82 NRC 1 (2015)

approval process in 10 C.F.R. 2.338(i) is discussed; LBP-15-21, 82 NRC 1 (2015)

board authority under section 2.338(i) is to approve or reject a settlement agreement, and so it cannot amend the agreement without consent of the parties; LBP-15-21, 82 NRC 1 (2015)

board finds that it is not necessary for a notice of hearing to be issued before the board can approve a settlement; LBP-15-30, 82 NRC 339 (2015)

boards are empowered to approve settlements proposed by the parties; LBP-15-30, 82 NRC 339 (2015)

concerns about how some aspect of a settlement agreement is being implemented or enforced can be brought to the Commission, which retains supervisory authority over the parties' agreement; LBP-15-21, 82 NRC 1 (2015)

content requirements are set forth in 10 C.F.R. 2.338(h); LBP-15-21, 82 NRC 1 (2015)

form requirements are set forth in 10 C.F.R. 2.338(g); LBP-15-21, 82 NRC 1 (2015)

licensee is banned from engaging in NRC-licensed activities, including performing, supervising, or assisting in any industrial radiographic operations and must complete a formal radiation safety officer training course; LBP-15-21, 82 NRC 1 (2015)

licensing boards are to approve settlements when they are fair and reasonable and comport with the public interest; LBP-15-30, 82 NRC 339 (2015)

NRC Staff's position in an enforcement proceeding is not itself dispositive of whether an enforcement agreement should be approved, but regulatory instruction to accord that position due weight is dispositive proof of the importance of Staff's views; LBP-15-21, 82 NRC 1 (2015)

only 10 C.F.R. 2.203 refers to a notice of hearing as part of the settlement procedure; LBP-15-30, 82 NRC 339 (2015)

parties agreed that additional analysis in the Final Supplemental Environmental Impact Statement would be sufficient to address the only contention remaining in this proceeding; LBP-15-22, 82 NRC 49 (2015)

parties bring settlement requests pursuant to 10 C.F.R. 2.338(i); LBP-15-30, 82 NRC 339 (2015)

presiding officer approval for settlements in contested proceedings with admitted contentions is evidenced from provisions of section 2.338 other than paragraph (g); LBP-15-30, 82 NRC 339 (2015)

presiding officer's approval of settlement is a matter that must give due consideration to the public interest; LBP-15-21, 82 NRC 1 (2015)

presiding officer's public interest inquiry for approval of settlement agreement is described; LBP-15-21, 82 NRC 1 (2015)

public interest standard for settlement agreement review concerns whether the approval process deprives interested parties of meaningful participation; LBP-15-21, 82 NRC 1 (2015)

section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement; LBP-15-30, 82 NRC 339 (2015)

settlements approved by a presiding officer are subject to Commission review; LBP-15-21, 82 NRC 1 (2015)

structures governing settlements are set forth in 10 C.F.R. 2.338; LBP-15-21, 82 NRC 1 (2015)

SETTLEMENTS

fair and reasonable settlement of issues proposed for litigation is encouraged; LBP-15-21, 82 NRC 1 (2015); LBP-15-30, 82 NRC 339 (2015)

settlement 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; LBP-15-30, 82 NRC 339 (2015)

SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS

although a SAMA analysis considers safety issues, it is actually an environmental review that must be judged under NEPA's rule of reason and not under the safety requirements of the Atomic Energy Act; LBP-15-29, 82 NRC 246 (2015)

conclusory statements do not amount to a challenge to a SAMA analysis; CLI-15-18, 82 NRC 135 (2015)

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- environmental impact statement is required to discuss a recently discovered fault located near the plant; LBP-15-29, 82 NRC 246 (2015)
- generalized reference to the potential human and economic costs from an accident falls short of the support necessary for a SAMA contention; CLI-15-18, 82 NRC 135 (2015)
- it will always be possible to envision and propose some alternative approach to SAMA analysis, some additional detail to include, or some refinement; LBP-15-29, 82 NRC 246 (2015)
- license renewal applicants must provide a SAMA analysis in their application if NRC Staff has not previously considered SAMAs for the applicant's plant in environmental document; CLI-15-18, 82 NRC 135 (2015)
- petitioners must provide a nexus between its concerns and any deficiencies in applicant's SAMA analysis, which would be necessary to establish a genuine dispute for an admissible contention; CLI-15-18, 82 NRC 135 (2015)
- proper question is not whether there are plausible alternative choices for use in the SAMA analysis, but whether the analysis that was done is reasonable under NEPA; LBP-15-29, 82 NRC 246 (2015)
- purpose of SAMA analyses is to identify safety enhancements that would be cost-beneficial to adopt; LBP-15-29, 82 NRC 246 (2015)
- relevant issue is whether any additional SAMA should have been identified as potentially cost beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-15-29, 82 NRC 246 (2015)
- SAMA analyses are conducted for the purposes of the NRC's environmental review under NEPA and are not safety analyses; CLI-15-18, 82 NRC 135 (2015)
- SAMA analysis is a quantitative cost-benefit analysis, assessing whether the cost of implementing a specific enhancement outweighs its benefit; CLI-15-18, 82 NRC 135 (2015)
- SHUTDOWN**
- licensee must provide certifications to NRC Staff that it has permanently ceased power operations; DD-15-7, 82 NRC 257 (2015)
- meaning of "shut down permanently" is discussed; CLI-15-20, 82 NRC 211 (2015)
- proposed staffing changes meet emergency plan standards and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency commensurate with credible accidents in the permanently shutdown and defueled condition; CLI-15-20, 82 NRC 211 (2015)
- reactors must be shut down and remain shut down until licensee demonstrates to NRC that an earthquake exceeding its operating basis caused no functional damage to features necessary for continued operation without undue risk; DD-15-9, 82 NRC 274 (2015)
- upon docketing of certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, license will no longer authorize operation of the reactor or emplacement or retention of fuel in the reactor vessel; CLI-15-20, 82 NRC 211 (2015)
- SINGLE-FAILURE CRITERION**
- system must be provided to transfer heat from structures, systems, and components important to safety to an ultimate heat sink under normal operating and accident conditions, and must be able to perform this safety function with either onsite or offsite power, assuming a single component failure; DD-15-11, 82 NRC 361 (2015)
- SITE REMEDIATION**
- licensee is required to ensure that the site can be safely maintained and decommissioned, even in the face of unexpected costs; LBP-15-24, 82 NRC 68 (2015)
- SPECIAL CIRCUMSTANCES**
- any interested person may challenge the use of a categorical exclusion by presenting special circumstances; LBP-15-26, 82 NRC 163 (2015)
- rule waiver requests must demonstrate that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which it was adopted; CLI-15-21, 82 NRC 295 (2015)
- SPENT FUEL COOLING SYSTEM**
- fuel storage system must be designed to prevent significant reduction in coolant inventory under accident conditions and with a residual heat removal capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal; DD-15-11, 82 NRC 361 (2015)

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SPENT FUEL MANAGEMENT

license amendment request seeks to replace 30-day notice requirement and other plant-specific license conditions with the decommissioning fund requirements; LBP-15-28, 82 NRC 233 (2015)

licensee seeks regulatory exemptions to allow it to use decommissioning funds to manage spent fuel and eliminate the 30-day notice requirement that would otherwise apply to spent fuel management; LBP-15-28, 82 NRC 233 (2015)

spent fuel management is not a decommissioning activity; LBP-15-24, 82 NRC 68 (2015)

without an exemption from the NRC, licensee is prohibited from using decommissioning funds for spent fuel management because it is not an allowable decommissioning expense; LBP-15-28, 82 NRC 233 (2015)

SPENT FUEL POOLS

applicability of 10 C.F.R. Part 50, Appendix A, GDC 44 to boiling water reactor spent fuel pools is discussed; DD-15-11, 82 NRC 361 (2015)

SPENT FUEL STORAGE

placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage is inadmissible; CLI-15-27, 82 NRC 414 (2015)

potential consequences of insufficient offsite storage for spent fuel is one of the unforeseen conditions that 10 C.F.R. 50.82(a)(8)(i)(B) was promulgated to address; LBP-15-24, 82 NRC 68 (2015)

section 51.61 applies to an application for an independent spent fuel storage installation; LBP-15-24, 82 NRC 68 (2015)

STAFF REQUIREMENTS MEMORANDUM

external entities are not entitled to seek revisions to a Commission direction to NRC Staff contained in a Staff Requirements Memorandum; CLI-15-19, 82 NRC 151 (2015)

STAFFING

proposed staffing changes meet emergency plan standards and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency commensurate with credible accidents in the permanently shutdown and defueled condition; CLI-15-20, 82 NRC 211 (2015)

STANDARD OF REVIEW

appeal as of right is allowed on the question whether a request for hearing should have been wholly denied; CLI-15-18, 82 NRC 135 (2015)

appeal as of right will be granted on the question whether a request for hearing or petition to intervene should have been granted; CLI-15-21, 82 NRC 295 (2015)

board is the appropriate arbiter of fact-specific questions of contention admissibility, and the Commission will not second-guess the board's evaluation of factual support for the contention, absent an error of law or abuse of discretion, even if support for the contention is weak; CLI-15-25, 82 NRC 389 (2015)

Commission generally defers to board decisions on contention admissibility unless it finds an error of law or abuse of discretion; CLI-15-20, 82 NRC 211 (2015); CLI-15-25, 82 NRC 389 (2015)

Commission may grant interlocutory review if the issue for which the party seeks review threatens the party adversely affected by it with immediate and serious irreparable impact which could not be alleviated through an appeal at the end of the case; CLI-15-17, 82 NRC 33 (2015)

Commission will consider taking discretionary interlocutory review where the requesting party shows that the board's ruling threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-15-17, 82 NRC 33 (2015)

Commission will grant a petition for review at its discretion, giving due weight to the existence of a substantial question with respect to one or more of the considerations of 10 C.F.R. 2.341(b)(4); CLI-15-19, 82 NRC 151 (2015)

de novo standard is applicable to review of an NRC Staff decision on a license transfer application; CLI-15-26, 82 NRC 408 (2015)

interlocutory review is generally disfavored and requests for such review are granted only under extraordinary circumstances; CLI-15-24, 82 NRC 331 (2015)

licensing boards must be vested with considerable latitude in determining the course of the proceedings that they are called upon to conduct, and the Commission will enter that arena only to the extent

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- necessary to insure that no party has been denied a fair opportunity to advance its cause; LBP-15-29, 82 NRC 246 (2015)
- on appeal, Commission defers to board's rulings on contention admissibility absent an error of law or abuse of discretion; CLI-15-23, 82 NRC 321 (2015)
- petition is considered under interlocutory review standard because neither NRC Staff's issuance of the license nor the board's denial of a stay of the effectiveness of that license constitutes final agency action; CLI-15-17, 82 NRC 33 (2015)
- ruling on an appeal, the Commission defers to a board's rulings on contention admissibility absent an error of law or abuse of discretion; CLI-15-22, 82 NRC 310 (2015)
- standard of review of a board's determination on standing is deferential and the Commission will uphold the decision absent a clear misapplication of facts or law; CLI-15-25, 82 NRC 389 (2015)
- STANDING TO INTERVENE**
- board may grant a timely filed petition to intervene if it concludes that petitioner has established standing and proffered at least one admissible contention; LBP-15-26, 82 NRC 163 (2015)
- board need not address the issue of standing where petitioner has failed to demonstrate the existence of a licensing action subject to AEA hearing rights; LBP-15-27, 82 NRC 184 (2015)
- burden of setting forth a clear and coherent argument for standing is generally on petitioner, but *pro se* petitioner is not held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere; CLI-15-25, 82 NRC 389 (2015)
- contemporaneous judicial concepts of standing are applied in NRC proceedings; CLI-15-25, 82 NRC 389 (2015)
- in making standing determinations, licensing boards construe the intervention petition in favor of petitioner; CLI-15-25, 82 NRC 389 (2015)
- no further demonstration of standing is required from a state that seeks to participate as a party in a proceeding pertaining to a utilization facility located within its boundaries; LBP-15-24, 82 NRC 68 (2015); LBP-15-26, 82 NRC 163 (2015)
- once the board makes its determination that petitioner has articulated sufficient detail as to how the proposed action would affect its members, it would not be appropriate for the board to weigh the evidence to determine whether the harm to petitioner's members is certain; CLI-15-25, 82 NRC 389 (2015)
- petitioner must demonstrate that the asserted injury is plausibly linked to the challenged action; CLI-15-25, 82 NRC 389 (2015)
- standard of review of a board's determination on standing is deferential and the Commission will uphold the decision absent a clear misapplication of facts or law; CLI-15-25, 82 NRC 389 (2015)
- STATE GOVERNMENT**
- no further demonstration of standing is required from a state that seeks to participate as a party in a proceeding pertaining to a utilization facility located within its boundaries; LBP-15-24, 82 NRC 68 (2015); LBP-15-26, 82 NRC 163 (2015)
- when licensee requests an amendment, it must notify the state in which its facility is located of its request by providing that state with a copy of its application; LBP-15-28, 82 NRC 233 (2015)
- STATE REGULATORY REQUIREMENTS**
- alleged violations of state law are outside the scope of, and not material to, an adjudicatory proceeding; LBP-15-24, 82 NRC 68 (2015)
- matters within the purview of the state public service board are outside the jurisdiction of the licensing board, which is limited to considering only the license amendment request and NRC regulations; LBP-15-24, 82 NRC 68 (2015)
- STAY**
- absent a showing of irreparable injury, stay standards can only be met if movant can demonstrate a virtual certainty of success on the merits; CLI-15-17, 82 NRC 33 (2015)
- stay is an extraordinary remedy and is rarely granted in NRC practice; CLI-15-17, 82 NRC 33 (2015)
- STAY OF EFFECTIVENESS**
- four factors must be addressed when the Commission or presiding officer is asked to stay the effectiveness of a presiding officer's decision or action during the pendency of an appeal; CLI-15-17, 82 NRC 33 (2015)

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STEAM GENERATORS

failure to verify adequacy of thermal-hydraulic and flow-induced vibration design of the replacement steam generators was determined to be of very low safety significance, because the tubes did not leak and continued to meet the required structural integrity criterion; DD-15-7, 82 NRC 257 (2015)

request that NRC order licensee to submit a license amendment application for the design and installation of replacement steam generators and for additional enforcement action is moot; DD-15-7, 82 NRC 257 (2015)

STRUCTURAL INTEGRITY

failure to verify adequacy of thermal-hydraulic and flow-induced vibration design of the replacement steam generators was determined to be of very low safety significance, because the tubes did not leak and continued to meet the required structural integrity criterion; DD-15-7, 82 NRC 257 (2015)

periodic visual inspections of the accessible interior and exterior surfaces of the containment system are required to identify structural deterioration that may affect containment integrity; LBP-15-26, 82 NRC 163 (2015)

SUMMARY DISPOSITION

expansion of issues for litigation from the board's denial of a motion for summary disposition had neither a pervasive and unusual effect on the litigation nor a serious and irreparable impact on movant; CLI-15-24, 82 NRC 331 (2015)

where alleged omission from initial renewal application is cured in updated SAMA analysis, summary disposition is appropriate; LBP-15-29, 82 NRC 246 (2015)

SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

environmental assessment cannot import previous environmental analyses without considering subsequent developments at the site and to hold otherwise would render meaningless NEPA's requirement to supplement an EIS or environmental assessment; CLI-15-25, 82 NRC 389 (2015)

NEPA is not violated when an agency issues an SEIS before the Corps of Engineers completes a Clean Water Act section 404 permit review; LBP-15-23, 82 NRC 55 (2015)

parties agreed that additional analysis in the final SEIS would be sufficient to address the only contention remaining in the proceeding; LBP-15-22, 82 NRC 49 (2015)

placeholder contentions challenging NRC's reliance in the draft supplemental environmental impact statement on the 2014 Continued Storage Rule and associated Generic Environmental Impact Statement for Continued Storage is inadmissible; CLI-15-27, 82 NRC 414 (2015)

SURVEILLANCE PROGRAMS

data used in the consistency check need not come from the same reactor pressure vessel that is the subject of the license amendment request; CLI-15-22, 82 NRC 310 (2015)

information that license amendment request must contain to use updated embrittlement model is described; CLI-15-22, 82 NRC 310 (2015)

licensee is not required to collect additional surveillance data from the subject plant, but rather licensee must use any data that demonstrate the embrittlement trends for the materials, including surveillance programs at other plants with or without a surveillance program integrated under Part 50, Appendix H; CLI-15-22, 82 NRC 310 (2015)

licensees seeking to use the updated methodology in 10 C.F.R. 50.61a must submit a license amendment request; CLI-15-22, 82 NRC 310 (2015)

reactor pressure vessel temperature data from other plants are included, and licensees must consider these data under certain circumstances; CLI-15-22, 82 NRC 310 (2015)

reactor vessel material surveillance programs provide material property data necessary to implement a regulatory scheme to protect reactor pressure vessels from failure due to withstand a pressurized thermal shock event; CLI-15-22, 82 NRC 310 (2015)

updated embrittlement model is used to predict future reference temperatures across the reactor pressure vessel, which is then verified by existing surveillance data; CLI-15-22, 82 NRC 310 (2015)

SUSPENSION OF LICENSE

decision lifting license suspension and authorizing restart under stipulated conditions is not a license amendment; LBP-15-27, 82 NRC 184 (2015)

licensee is banned from engaging in NRC-licensed activities, including performing, supervising, or assisting in any industrial radiographic operations and must complete a formal radiation safety officer training course; LBP-15-21, 82 NRC 1 (2015)

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SUSPENSION OF PROCEEDING

in the context of NRC's post-Fukushima activities, nothing learned to date requires immediate cessation of NRC review of license applications; CLI-15-19, 82 NRC 151 (2015)
petitions to suspend final reactor licensing decisions pending a waste confidence safety finding were denied; DD-15-9, 82 NRC 274 (2015)
suspension of licensing proceedings is a drastic action that is not warranted absent immediate threats to public health and safety or other compelling reason; CLI-15-19, 82 NRC 151 (2015)

TECHNICAL SPECIFICATIONS

overall integrated leakage rate must not exceed the allowable leakage rate with margin, as specified in the Technical Specifications; LBP-15-26, 82 NRC 163 (2015)
to amend a license, including technical specifications in the license, an application for amendment must be filed, fully describing the changes desired; CLI-15-22, 82 NRC 310 (2015)

TEMPERATURE

reactor pressure vessel temperature data from other plants are included, and licensees must consider these data under certain circumstances; CLI-15-22, 82 NRC 310 (2015)
requirements of 10 C.F.R. 50.61 are compared with new rule in section 50.61a to predict future reference temperatures across the reactor pressure vessel; CLI-15-22, 82 NRC 310 (2015)
updated embrittlement model is used to predict future reference temperatures across the reactor pressure vessel, which is then verified by existing surveillance data; CLI-15-22, 82 NRC 310 (2015)

TEMPERATURE LIMITS

request that NRC take enforcement action until licensee completes an independent root-cause assessment for the rise in ultimate heat sink temperature is denied; DD-15-10, 82 NRC 201 (2015)

TERMINATION OF PROCEEDING

adjudicatory proceeding on license amendment is not terminated by issuance of the amendment; CLI-15-17, 82 NRC 33 (2015)
once all contentions have been decided, the contested adjudicatory proceeding is terminated; LBP-15-30, 82 NRC 339 (2015)
operating license renewal proceeding is terminated following Commission reversal of board's decision admitting three contentions; LBP-15-25, 82 NRC 161 (2015)
proceeding is terminated following Commission reversal of board decision admitting one contention; LBP-15-31, 82 NRC 358 (2015)
termination with prejudice bars relitigation of similar issues; LBP-15-21, 82 NRC 1 (2015)

TESTIMONY

expert opinion that merely states a conclusion 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; CLI-15-23, 82 NRC 321 (2015)

TESTING

acceptance criteria for Type A leak rate limits embodied in the technical specification are established to ensure that, in the event of a design-basis accident, the dose received by a member of the public will not exceed the regulatory limits; LBP-15-26, 82 NRC 163 (2015)
Commission placed no historical-event restriction on reactors electing to comply with Appendix J through performance-based testing; LBP-15-26, 82 NRC 163 (2015)
licensees must conduct periodic containment leakage tests to ensure that leakage does not exceed the allowable rates specified in the technical specifications and the containment will perform its design function following an accident up to and including the plant design-basis accident; LBP-15-26, 82 NRC 163 (2015)
no reduction in the amount of fracture toughness testing is allowed without NRC approval; CLI-15-23, 82 NRC 321 (2015)
required Type A containment leakage tests measure total leakage rate from all potential paths, including containment liner welds, valves, fittings, and components that penetrate the containment; LBP-15-26, 82 NRC 163 (2015)
simply referencing a study without explaining the information's significance relative to the potential containment leakage monitored by the testing at issue does not establish its materiality; LBP-15-26, 82 NRC 163 (2015)

SUBJECT INDEX

Type B pneumatic tests detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries other than valves; LBP-15-26, 82 NRC 163 (2015)

Type C pneumatic tests measure containment isolation valve leakage rates; LBP-15-26, 82 NRC 163 (2015)

TIME LIMITS

licensees must activate the emergency response data system as soon as possible but not later than 1 hour after declaring an Emergency Class of alert, site area emergency, or general emergency; CLI-15-20, 82 NRC 211 (2015)

there is no time limit on when a licensee can seek an amendment to the license conditions relating to its decommissioning trust fund; LBP-15-24, 82 NRC 68 (2015)

TRAINING

licensee is banned from engaging in NRC-licensed activities, including performing, supervising, or assisting in any industrial radiographic operations and must complete a formal radiation safety officer training course; LBP-15-21, 82 NRC 1 (2015)

TRANSFER OF CONTROL

NRC approval is required for transfer of control of ownership and/or operating authority responsibilities within the facility operating license; DD-15-8, 82 NRC 107 (2015)

U.S. ARMY CORPS OF ENGINEERS

contention alleging deficiencies in compensatory mitigation methods under the Clean Water Act lack alleged facts or expert opinions; LBP-15-23, 82 NRC 55 (2015)

contention asserting that draft environmental impact statement must include the CWA 404 permit analysis in order to satisfy NEPA fails to raise a material issue; LBP-15-23, 82 NRC 55 (2015)

Uniform Mitigation Assessment Method code and Wetland Assessment Technique for Environmental Review code methods reflect the Corps' preferred approach to compensatory mitigation under the Clean Water Act; LBP-15-23, 82 NRC 55 (2015)

VALVES

See Containment Isolation Valves

VERIFICATION

section 50.59 is not a process for verifying design adequacy, and required design control measures for verifying adequacy of design are expected to be implemented before entering the section 50.59 process; DD-15-7, 82 NRC 257 (2015)

surveillance data used in the consistency check need not come from the same reactor pressure vessel that is the subject of the license amendment request; CLI-15-22, 82 NRC 310 (2015)

updated embrittlement model is used to predict future reference temperatures across the reactor pressure vessel, which is then verified by existing surveillance data; CLI-15-22, 82 NRC 310 (2015)

when fluence of a material sample is known, it must be used in the consistency check if it is of the appropriate chemical composition; CLI-15-22, 82 NRC 310 (2015)

VIOLATIONS

alleged violations of state law are outside the scope of, and not material to, an adjudicatory proceeding; LBP-15-24, 82 NRC 68 (2015)

failure to provide an appropriate basis for a determination that the change in the method of evaluation did not require a license amendment prior to implementing the change constitutes a violation of 10 C.F.R. 50.59(d)(1); DD-15-7, 82 NRC 257 (2015)

rule that excluded certain environmental impacts from NEPA consideration and deferred totally to environmental quality standards devised and administered by other agencies violated NEPA; LBP-15-23, 82 NRC 55 (2015)

where there was no reasonable likelihood that a change in the method of evaluation would have required a license amendment, the change was a minor violation; DD-15-7, 82 NRC 257 (2015)

WAIVER OF RULE

absent a waiver, no rule or regulation of the Commission, or any provision thereof, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to 10 C.F.R. Part 2; CLI-15-19, 82 NRC 151 (2015); LBP-15-24, 82 NRC 68 (2015); LBP-15-26, 82 NRC 163 (2015)

challenges to an agency rule or regulation in an adjudicatory proceeding without a waiver of that rule or regulation are prohibited; CLI-15-21, 82 NRC 295 (2015)

SUBJECT INDEX

four-factor test is applied to rule waiver requests; CLI-15-21, 82 NRC 295 (2015)
rule waiver requests must demonstrate that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which it was adopted; CLI-15-21, 82 NRC 295 (2015)

WASTE DISPOSAL

petitions to suspend final reactor licensing decisions pending a waste confidence safety finding were denied; DD-15-9, 82 NRC 274 (2015)

WATER QUALITY

if impacts are unavoidable, applicant shall provide mitigation measures that must be, to the extent practicable, sufficient to replace lost aquatic resource functions; LBP-15-23, 82 NRC 55 (2015)

WETLANDS

if impacts are unavoidable, applicant shall provide mitigation measures that must be, to the extent practicable, sufficient to replace lost aquatic resource functions; LBP-15-23, 82 NRC 55 (2015)
when a proposed project would cause discharge of dredged or fill material into wetlands, applicant must seek a permit from the Corps of Engineers; LBP-15-23, 82 NRC 55 (2015)

WITHDRAWAL

request that board impose additional discovery activities as a requirement of withdrawal of license amendment request is too broad because it goes beyond the scope of the admitted contentions and discovery is peculiarly related to particular proceedings and particular contentions; LBP-15-28, 82 NRC 233 (2015)

unconditional withdrawal is generally appropriate if it would cause no prejudice to either the intervenors' or the public's interest; LBP-15-28, 82 NRC 233 (2015)

WITNESSES, EXPERT

"belief" that is not supported by alleged facts or expert opinion renders a contention inadmissible; LBP-15-26, 82 NRC 163 (2015)

expert opinion that merely states a conclusion 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; CLI-15-23, 82 NRC 321 (2015); LBP-15-26, 82 NRC 163 (2015)

expert witness has enough knowledge in the subject area to proffer an expert opinion for the purposes of determining contention admissibility; LBP-15-24, 82 NRC 68 (2015)

FACILITY INDEX

AEROTEST RADIOGRAPHY AND RESEARCH REACTOR; Docket No. 50-228-LT
LICENSE TRANSFER; December 23, 2015; MEMORANDUM AND ORDER; CLI-15-26, 82 NRC 408
(2015)

DIABLO CANYON NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 50-275, 50-323
OPERATING LICENSE AMENDMENT; September 28, 2015; MEMORANDUM AND ORDER (Denying
Petition to Intervene and Request for Hearing); LBP-15-27, 82 NRC 184 (2015)
OPERATING LICENSE RENEWAL; October 21, 2015; MEMORANDUM AND ORDER (Denying
Motion to File Amended Contention, Granting Summary Disposition, and Terminating Proceeding);
LBP-15-29, 82 NRC 246 (2015)
OPERATING LICENSE RENEWAL; November 9, 2015; MEMORANDUM AND ORDER; CLI-15-21,
82 NRC 295 (2015)

FERMI NUCLEAR POWER PLANT, Unit 2; Docket No. 50-341
OPERATING LICENSE RENEWAL; September 8, 2015; MEMORANDUM AND ORDER; CLI-15-18,
82 NRC 135 (2015)
OPERATING LICENSE RENEWAL; September 11, 2015; ORDER (Terminating Proceeding);
LBP-15-25, 82 NRC 161 (2015)
OPERATING LICENSE RENEWAL; December 23, 2015; MEMORANDUM AND ORDER; CLI-15-27,
82 NRC 414 (2015)

IN SITU LEACH FACILITY, Crawford, Nebraska; Docket No. 40-8943-OLA
MATERIALS LICENSE AMENDMENT; August 6, 2015; MEMORANDUM AND ORDER; CLI-15-17,
82 NRC 33 (2015)

INDIAN POINT, Unit 2; Docket No. 50-247-LA
OPERATING LICENSE AMENDMENT; September 25, 2015; MEMORANDUM AND ORDER (Denying
New York's Petition to Intervene); LBP-15-26, 82 NRC 163 (2015)

INDIAN POINT, Units 2 and 3; Docket Nos. 50-247-LR, 50-286-LR
OPERATING LICENSE RENEWAL; November 9, 2015; MEMORANDUM AND ORDER; CLI-15-24,
82 NRC 331 (2015)

JAMES A. FITZPATRICK NUCLEAR POWER PLANT; Docket No. 50-333
REQUEST FOR ACTION; August 27, 2015; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206;
DD-15-8, 82 NRC 107 (2015)

NORTH ANNA POWER STATION, Units 1 and 2; Docket Nos. 50-338, 50-339
REQUEST FOR ACTION; October 30, 2015; REVISED DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-15-9, 82 NRC 274 (2015)

PALISADES NUCLEAR PLANT; Docket No. 50-255
OPERATING LICENSE AMENDMENT; November 9, 2015; MEMORANDUM AND ORDER;
CLI-15-22, 82 NRC 310 (2015); CLI-15-23, 82 NRC 321 (2015)
OPERATING LICENSE AMENDMENT; November 13, 2015; ORDER (Terminating Proceeding);
LBP-15-31, 82 NRC 358 (2015)

PILGRIM NUCLEAR POWER STATION; Docket No. 50-293
REQUEST FOR ACTION; August 27, 2015; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206;
DD-15-8, 82 NRC 107 (2015)

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PRAIRIE ISLAND NUCLEAR GENERATING PLANT INDEPENDENT SPENT FUEL STORAGE
INSTALLATION; Docket No. 72-10-ISFSI-2
MATERIALS LICENSE RENEWAL; November 4, 2015; ORDER (Approving Settlement, Eliminating
Disclosures, and Terminating Proceeding); LBP-15-30, 82 NRC 339 (2015)

SAN ONOFRE NUCLEAR GENERATING STATION, Units 2 and 3; Docket Nos. 50-361, 50-362
REQUEST FOR ACTION; October 2, 2015; REVISED DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-15-7, 82 NRC 257 (2015)

SEABROOK STATION, Unit 1; Docket No. 50-443-LR
OPERATING LICENSE RENEWAL; August 5, 2015; MEMORANDUM AND ORDER (Dismissing
Contention 4D and Terminating the Proceeding); LBP-15-22, 82 NRC 49 (2015)

TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250, 50-251
OPERATING LICENSE AMENDMENT; December 17, 2015; MEMORANDUM AND ORDER;
CLI-15-25, 82 NRC 389 (2015)
REQUEST FOR ACTION; September 23, 2015; FINAL DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-15-10, 82 NRC 201 (2015)

TURKEY POINT NUCLEAR GENERATING PLANT, Units 6 and 7; Docket Nos. 52-040-COL,
52-041-COL
COMBINED LICENSE; August 21, 2015; MEMORANDUM AND ORDER (Denying Joint Intervenors'
Motion to Admit New Contention); LBP-15-23, 82 NRC 55 (2015)

VERMONT YANKEE NUCLEAR POWER STATION; Docket No. 50-271
OPERATING LICENSE AMENDMENT; August 31, 2015; MEMORANDUM AND ORDER (Granting
Petition to Intervene and Hearing Request); LBP-15-24, 82 NRC 68 (2015)
OPERATING LICENSE AMENDMENT; October 1, 2015; OPERATING LICENSE AMENDMENT;
CLI-15-20, 82 NRC 211 (2015)
OPERATING LICENSE AMENDMENT; October 15, 2015; ORDER (Granting Motion to Withdraw
LAR, Denying Motion for Leave to File Reply, and Terminating Proceeding); LBP-15-28, 82 NRC
233 (2015)
REQUEST FOR ACTION; August 27, 2015; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206;
DD-15-8, 82 NRC 107 (2015)

WATTS BAR NUCLEAR PLANT, Unit 2; Docket No. 50-391-OL
OPERATING LICENSE; September 24, 2015; MEMORANDUM AND ORDER; CLI-15-19, 82 NRC 151
(2015)